THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

West Anniston Medical Clinic Ribbon-Cutting

The Honorable U. W. Clemon, Chief Judge of the United States District Court for the Northern District of Alabama, has approved the West Anniston Medical Clinic Project. A ribbon-cutting ceremony was held by the Court on February 14th to commemorate this historic event that came out of the federal court settlement. The Project will be run by two established medical clinics in the Anniston Community. Quality of Life Health Services, Inc. will treat adult claimants. Dr. Angela Martin's pediatric clinic will treat children claimants. A comprehensive medical clinic, not only providing medical services and prescription drugs to claimants, but health education and scientific research, is planned. Pfizer, Inc. will provide a $2 million grant to enhance the infrastructure of the two clinics, and the Defendants in the Tolbert case will provide $2.5 million per year for ten years to help fund clinic services. Neither of these funding sources for a medical clinic would have been available but for the settlement. Medical clinic services will be provided to claimants by the Anniston Quality Health Care facility at 1316 Noble Street in Anniston, Alabama, and Dr. Martin's clinic, located at 222 East 10th Street.

Quality of Life has been in the Anniston area since 2001, operating as a primary care center. Quality of Life was founded in 1977 with one health care facility, the Roberta A. Watts Neighborhood Health Clinic, in Gadsden. Currently, the company has twelve health care facilities within a ten county radius. The company has considerable experience with financially challenged and diverse patients. It has a school-based clinic, public housing-based clinics, and a clinic that caters to non-English speaking patients. Since 1994, Dr. Martin has provided preventative medical care to infants, children and adolescents to age twenty-one in Anniston. She currently admits to Northeast Alabama Regional Medical Center, and does both high risk and routine deliveries. Dr. Martin, who was the first African-American female to enter into solo pediatric practice in the Anniston community, also runs the Martin Foundation, which awards scholarships in the areas of medicine, education and environmental sciences.

The Quality of Life facility will have the capacity to provide some diagnostic testing. There will also be a pharmacy on site for both children and adults to ensure that patients receive their medications in a timely fashion. Quality of Life Health and Dr. Martin are looking forward to working together on this most worthwhile project, and welcome the opportunity to help improve the lives of Tolbert claimants. Presently, the medical clinic is only endowed for ten years. But, the goal of Quality of Life, Dr. Martin, the parties to the lawsuit and the court is to seek additional funding in an effort to make the medical clinic permanent. The medical clinic will be a most important, long lasting and beneficial aspect of the federal court settlement. In my opinion, this was a most important part of the settlement that came out of the federal court lawsuit. David and Shirley Baker, who has been involved in this fight for a long time, worked especially hard for the establishment of a medical clinic and are due a great deal of credit for this becoming a reality. It is gratifying to know that the clinic will be available to help the people in West Anniston.

Democrats Stand Pat And Republicans Shift Gears

It appears that Redding Pitt has weathered the storm and will remain as chairman of the Alabama Democratic Party. You will recall that Lt. Governor Lucy Baxley, State Agriculture Commissioner Ron Sparks, House Speaker Seth Hammett, and 16 Democratic state senators had called for Pitts' replacement. Redding was elected party chairman in March 2001, with the support of then-Governor Don Siegelman, and was re-elected to a four-year term in January 2003.

IN THIS ISSUE

On the other side of the political fence, the state Republican Party has made a significant change at the top. Twinkle Andress Cavanaugh—the first woman to hold the title in either major Alabama party—was selected to head up the party in Alabama. She replaces Marty Conners, who will be a tough act to follow. I seldom agreed with Marty, but I must say that he did an outstanding job as party chairman. The Republican Party made significant progress during his tenure and that's simply a fact of political life. After taking over, Twinkle immediately set a goal of taking control of the Alabama Legislature from the Democratic Party. It appears that my friend Dr. Paul Hubbert was her first target. Twinkle, who served as deputy chief of staff to Governor Riley, won the chairmanship without opposition. I suspect the Hubbert fight will be a little tougher.

Democrats currently hold a 61-41 majority in the Alabama House of Representatives and have a 25-10 margin in the state Senate. There won't be a presidential race or a U.S. Senate race on the ballot in 2006, and that will make Twinkle's job much more difficult. The governor's race will highlight the ballot and, while it should prove to be very interesting, it won't have the appeal for Republicans that the Bush-Kerry race had in 2004. In Alabama, Democrats traditionally have run stronger in gubernatorial election years than in presidential election years. But, the Republicans have more money than they can spend and that may level the playing field somewhat. In any event, 2006 will be a most interesting political year.

More On Channel One

The State Board of Education took some needed action on February 10th that I believe will eventually prove to be good for children in our public schools. I appeared before the Board and was one of those who spoke in opposition to Channel One being allowed in Alabama public schools. As you already know, I am totally opposed to Channel One and am firmly convinced that it has no place in the public schools of our State. I have grandchildren in the public schools, and I don't want them exposed to what I have seen coming from Channel One. In my opinion, those who run our schools should get Channel One out of every school system in Alabama. I have seen the content of Channel One and I don't like what I have seen. Unfortunately, most folks in Alabama don't even know that Channel One exists. This commercial advertising channel in our schools fosters sexual activity, extreme violence, and gross conduct of all sorts. It also pushes junk foods, which are bad for children. Students, beginning with sixth graders, have access to Channel One and are compelled to watch it virtually every school day. The history of Channel One gives me little reason to believe that things will get any better. In fact, unless checked by our political leaders, I predict they will get even worse.

We should take every precaution to protect our children. While this responsibility starts at home, it also extends to those who are in charge of our public schools. I am told that the overwhelming majority of secondary schools in this country don't allow Channel One. In fact, I understand that New York State—Channel One's home base—has banned Channel One from all public school classrooms in that state. That should tell us something about the suitability of Channel One for students and especially for young children.

The members of the Alabama State Board of Education were asked to take action that would help us get Channel One out of our schools. The Board voted for us on a proposed amendment, and that was the right thing to do. The amendment that the members of the State Board of Education adopted reads as follows:

> *The State Board of Education recommends that Channel One refrain from advertising high-sugar, high-fat, or low nutritional value food or drink products, over-the-counter medicines, or movies and television shows that receive a MPAA rating for sexual, violent, or drug content. The Channel One website and any recommended links on the Channel One website are included. Monitoring shall be the responsibility of local school personnel, parents, and Channel One.*

I consider this to be a step in the right direction. The following members voted for the amendment: Betty Peters, Stephanie Bell, Randy McKinney, David Byers, and Dr. Mary Jane Caylor. Voting against it was Sandra Ray.

Now that the State Board has taken action, the pressure should be on the local school boards to go further and take the steps necessary to get Channel One totally out of all Alabama schools. It should be noted that the company that owns Channel One has had three paid lobbyists working for it in Alabama. The last one hired was none other than former Lt. Governor Steve Windom. Why would Channel One even need lobbyists? If you want to learn more about Channel One, go to www.obligation.org. If you agree that Channel One should be banned in Alabama, contact your local school board members and let them know how you feel. I suggest you also contact the governor, lt. governor, and your local legislators and ask for their help.

Dirty Tricks Shouldn't Pay

A recent race for a vacant House seat has brought to the public's attention a need for some real election reform in

Alabama. I understand that the Alabama Republican Legislative Committee mailed a flyer in the special election campaign for the vacant House seat in District 65, which is located in southwest Alabama. I know Gloria Dolbare, the Democratic candidate who lost, very well. She ran to fill the vacancy created when her husband, who held the seat, died of cancer. The tactic used by the Republicans against Gloria was shameful and was "gutter" politics of the worst sort. That kind of thing should not be allowed in politics at any level. Any person who had anything to do with the smear tactics employed in this race should hang their collective heads in shame. The Birmingham News put everything pretty much in context recently in an excellent editorial. The editorial writer framed the issue as follows: "Republican lawmakers should be ashamed of the tactics they used to win a Legislative race in southwestern Alabama." The following is the News editorial:

Winning At All Cost

Is this really how Republican lawmakers want to increase their numbers in the Legislature? By demonizing Democratic opponents with questionable information from a discredited special-interest group that refuses to disclose where it gets its money?

Here's the story: The Alabama Republican Legislative Committee mailed a flier late in the special election campaign between Democrat Gloria Dolbare and Republican Nick Williams to fill the vacant House seat in District 65 in southwest Alabama. Williams won the race on January 25th.

The first page of the flier shows a classical painting of Adam and Eve with the words "God made Adam and Eve but Gloria Dolbare wants you to meet..." And on the second page, "Adam and Steve! Shocking but true, Gloria Dolbare has failed to sign the Alabama Christian Coalition's Marriage Protection Pledge," the copy reads, alongside a picture of two smiling men, one of them kneeling before the other and holding the man's left hand with his own.

"Defend Alabama. Defend your marriage. Defend your family. Reject Gloria Dolbare!" the flier says next to her picture with "Reject" stamped in red across her mouth.

First, how does the Republican Legislative Committee or the Christian Coalition know without doubt that Dolbare saw the pledge, much less what her position is on same-sex marriage? It's wrong to assume what her stance is without any evidence. Dolbare, a special education teacher running for the seat her husband held until his death from cancer last year, said she never saw the pledge during the campaign but probably set it aside with other mail.

Then there's the Christian Coalition's role in this. The group is demanding that legislators and legislative candidates disclose their position on same-sex marriage, while it refuses to disclose what groups and people pay it to influence elections. Remember, last year we learned that the Christian Coalition had funded its battles against gambling in Alabama with money from out-of-state Indian tribes that run casinos.

If the Christian Coalition can demand disclosure from legislators and legislative candidates, the Legislature can demand that the Christian Coalition and every group like it must let the public know what people and groups fund their efforts.

Republican lawmakers ought to be ashamed at using the Christian Coalition's flimsy "evidence" against Dolbare to run such a noxious campaign.

What the Republicans did to Gloria Dolbare shouldn't be allowed to happen in future political races in Alabama. We should make the election laws so tough—with strong penalties for offenders—that dirty tricks in Alabama politics will become a thing of the past. The leadership of both political parties should jointly ask the Alabama Legislature to enact some meaningful changes in our election laws during the current session to prohibit dirty tricks in future campaigns.

Lucy Baxley Leading The Latest Poll

According to a recent poll, Lt. Governor Lucy Baxley is the front-runner in a lineup of 2006 gubernatorial hopefuls. The Mobile Register-University of South Alabama poll found Lucy leading both Governor Bob Riley and Judge Roy Moore in separate head-to-head matchups. The results certainly indicate that Lucy will be her party's strongest candidate in the 2006 general election. I don't believe Don Siegelman, the other known Democratic prospect thus far, will be a factor. He trailed both Republicans in hypothetical pairings in the poll.

The poll also found that 44% of respondents believe Alabama is on the wrong track. Only forty percent believe the state is headed in the right direction, and that is disturbing. Of those surveyed, 39% said they are Republicans when it comes to state politics, 37% said they are Democrats, and 19% said they are independents or back

another party. Persons polled were asked how they would vote in hypothetical general election pairings. In the poll, Lucy drew 39% to Governor Riley's 35%. She also led Judge Moore 44% to 38%. While this poll has to be encouraging for the obviously popular lt. governor, it is a long time before the campaign for governor really heats up. Fortunes in politics can change like the wind!

A Change Of Pace

I have had the pleasure of representing Coach Tommy Tuberville and helped negotiate his new long-term contract with Auburn University. The contract, which was signed on February 16th, is a very good one for both parties. Coach Tuberville is a good man who runs a clean program, which I believe are two things in his favor. Importantly, he also is an outstanding football coach. He and his family love Auburn and hopefully this contract will assure Auburn of having Tommy Tuberville as head football coach for a long time. Negotiating this contract was quite interesting. It was a contrast to what I normally do, which is trying lawsuits. This was quite a change of pace for me and I must say I enjoyed it.

I was most impressed with the manner in which Dr. Ed Richardson and Director of Athletics Jay Jacobs handled the negotiations. Lee Armstrong, a very good lawyer, who is legal counsel for Auburn, also did an excellent job of protecting the University's interest. Being an Auburn graduate, I must confess that it feels good to know that I helped work things out on this contract. Auburn University's football program will be in good hands for a long time and that's a fact! Cole Portis from our firm and Kyle Johnson, who is a very good tax lawyer from Montgomery, assisted on working out the details of the contract.

Montgomery Ranks As A Best Place For Thriving Economy

We hear so much talk about lawsuits and tort reform these days that good news is often ignored by the media. In the December issue of Business Development OUTLOOK magazine, the City of Montgomery ranked 27th on the list of Best Places in the nation for a Thriving Economy. Criteria for inclusion on the list included such things as average unemployment rate and growth of the job market. Economic progress is always good news. Because I live and work in Montgomery, I really wasn't surprised to learn that Montgomery did well in this report. In any event, this is good news for Montgomery. It tells a story that the tort reformers hate to hear, and that is, Alabama is still good for business.

II. LEGISLATIVE HAPPENINGS

The Newest Member Of The Alabama Senate

Bobby D. Singleton was sworn in on February 16th as the newest member of the Alabama Senate, after winning election in the 24th Senatorial District, and it didn't take long for him to get down to work. In my opinion, the new senator will be a real asset to the Senate and will represent the folks in District 24 extremely well. Bobby is highly intelligent, a hard worker, and a very good person. I predict that Senator Singleton will be an outstanding member of the Senate and will bring credit to that body. I wish him the very best.

A Change Is needed In The Election Of Supreme Court Justices

A most important bill has been filed in the current session by Senator Myron Penn of Union Springs. Senate Bill 64, which is called the Judicial Selection Bill, is an extremely fair way to handle the selection of associate justices to the Alabama Supreme Court. Currently, under existing law, the chief justice and the eight associate justices, are elected statewide by popular vote in what have become very partisan and sometimes ugly elections. Senator Penn's bill, which would require amending the Constitution of Alabama, provides for the long needed non-partisan election of the 8 associate judges from 8 separate geographical districts. The chief justice would still be elected on a statewide basis. If the bill is passed and the people approve it in a referendum, the election of justices in districts would begin in the 2006 election cycle.

Most folks that I have talked to believe that the fairest way to elect judges is on a non-partisan basis. That method of selecting judges in judicial races is already being used in the vast majority of the states throughout the country. In fact, Alabama is one of the few states that still allows the partisan election of judges. Many experts, as well as most judges, believe that politics should be taken out of the judicial election process. The Penn bill would be a step in the right direction and would bring about a needed change. Specifically, under the Penn bill, the 8 associate justices would be elected by districts based on the districts currently utilized to elect the state Board of Education. The chief justice would be elected in 2006 and the terms of the 8 associate justices would be staggered to effectuate a smooth transition to the new system.

Personally, I commend Senator Penn for proposing this needed legislation. In my opinion, this bill could help eliminate the bitter partisan elections that have taken place in our state over the past several years. It would also reduce the costs of judicial elections,

which have become far too expensive. In fact, big money in judicial races effectively takes ordinary folks out of the mix and virtually reduces their influence to almost nothing. I also believe passage of this bill could go a long way toward adding both racial and gender diversity to our state's highest court, effectively mirroring the state's population, and that would be good for Alabama. It is impossible to justify not having a singe black citizen of Alabama on our Supreme Court. In fact, there is not a single black person currently serving on any of our appellate courts. That is not something that Alabama politicians should be proud of. I would strongly urge all fair-minded legislators to seriously consider Senator Penn's bill. I believe its passage would be a step in the right direction and would prove to be extremely beneficial to our great state.

The Child Passenger Safety Bill

I understand that the Child Passenger Safety Bill will be considered by the Alabama Legislature during the current session. This bill fills a large safety gap that currently puts elementary school aged children at great risk. Current state law requires newborns to leave the hospital in an infant seat and requires toddlers and children up to age 3 to ride in a car seat. The proposed legislation supported by Voices for Alabama's Children puts in place what auto safety experts are now recommending, and that is that children 4 and older who weigh less than 80 pounds must be buckled in appropriate restraints or booster seats. Children who weigh less than 80 pounds are not protected by adult safety belts during auto crashes. It is also important to check out the booster seat that you purchase with safety groups. Just because a manufacturer says their seat complies with federal safety standards, doesn't mean it is safe for use. The federal standard that applies is antiquated and very much out-of-date. It is obviously a very week standard. To get in touch with Voices, call 800-444-KIDS (5437). I urge you to contact your local legislators and ask them to support this legislation.

III. COURT WATCH

A Look At The Class Action Reform

The vote on final passage of the business-backed class action bill really came as no surprise to me. Because all pro-consumer amendments that were proposed were defeated, the outcome on final passage was a foregone conclusion. In fact, I never thought there was ever a chance of defeating the bill, and it turns out I was correct. The important votes were on two key amendments that were intended to mitigate the harmful effects of the bill. One would have exempted employment and civil rights lawsuits from the reach of the bill. That amendment was defeated on a 59-40 vote that was largely split along party lines. The second amendment would have enabled federal judges to certify multi-state class actions. It was also defeated, on a 61-38 vote.

Passage of the so-called Class Action Fairness Act of 2005, without the incorporation of such a procedural mechanism for federal courts to certify multi-state classes, will effectively lock the courthouse doors to many consumers. Disproportionately it will hurt citizens of less populous states where class actions are not financially viable because of the relatively small number of plaintiffs. Our firm handles relatively few class actions and our clients will not be unduly affected by the passage of this bill. There are hundreds of thousands of victims, however, who have been hurt by wrongful actions by large corporations and whose cases will be effectively damaged by this so-called reform litigation. The pharmaceutical, tobacco, chemical, insurance, finance, and other powerful industries won this battle, and consumers are the losers. Only time will tell how bad this bill really is. The simple fact that the groups that pushed this bill through Congress spent more than $100 million on their anti-consumer campaign is reason enough for me to believe it will prove to be worse than most of us thought it would be. The new act will limit corporate accountability at a time of rampant corporate scandals and corruption. That is truly sad news for ordinary citizens in this country. Unfortunately, few people even realize at this stage what this Act has done to them.

Reform Of The Judicial System

The American civil justice system has long been the best line of defense for the average citizen against the abuse of corporate power. In fact, it is usually the only line of defense that ordinary folks have when Corporate America is on the other side of an issue. It has also been a counter to a government that too often fails to protect its own citizens. It has been proved that "tort litigation" has had to deal with the failure of the federal government to do its job of regulating big business in this country. Prime examples of the failures are: the FDA and the drug industry, the Firestone tire debacle, the Enron scandal, and countless more. Had the government done its job of regulation, none of those would have ever occurred. Now the Bush White House and their friends in Congress want to close courthouse doors to all lawsuits. To hear them tell it, every lawsuit should be considered a "frivolous" one.

Clearly, "tort reform" legislation is on a fast track. First up was the push to abolish class actions. There is a place for class action lawsuits and the state

courts have traditionally done a very good job in this area. It wasn't until 1966 that class actions were formalized in the Federal Rules of Civil Procedure. Where a widespread pattern of discrimination, systemic abuse, or other unlawful conduct has occurred, class actions allow a few persons to represent all the injured class members, streamlining the legal process and providing plaintiffs with strength in numbers.

The so-called reform—pushed by conservatives, who otherwise tout states' rights—has now "federalized" most class actions, taking them away from local courts and juries. Already overburdened, federal courts will now be required to resolve complex issues of state law and adjudicate factual disputes—resulting, at best, in slow justice. Many real victims can now forget about justice and adequate compensation. It is no coincidence that trade groups representing chemical companies, the pharmaceutical industry, the insurance industry, and manufacturers' associations were behind the reform and pushed it through both houses of Congress in record time. These are members of the corporate community that are frequently subject to successful class actions in the state courts.

When you consider the current climate involving all of the major problems in Corporate America, it is difficult to see how the American people could let tort reform take center stage in Congress. The attack on a citizen's day in court is occurring against a backdrop of kickback scandals in the insurance industry, unsafe drugs like Vioxx slipping through government oversight, and corporate-power abuses unmatched since the scandals of the 1920s. Instead of cleaning up the abuses—after dismantling much of the regulatory regime—the Bush Administration wants to further let big business loose through tort reform. For the average American, tort "reform" will simply mean more unsafe products, dangerous drugs that continue to be on the market, unfair markets, and unchecked monopolies. To put it in simple terms, the "rich" will get richer and the "poor" will get poorer.

None of us know when we will need the protection of the civil justice system. Teenagers, whose parents may consider themselves immune from needing the courts, are driving unsafe SUVs. Many citizens—Republicans, Democrats, and Independents—are taking prescription drugs such as Celebrex, Bextra, and Crestor that could cause them to have serious health problems. Consider the folks who took Baycol, Vioxx, or any of the other dangerous drugs that the FDA allowed to be put on the market and now have been pulled. The federal courts are also loaded down with litigation. I don't believe any federal judge wanted this added burden on their system. An example of what can happen in the federal courts is the Exxon case in Alaska. The fishermen of Valdez, Alaska have yet to receive a penny through federal class action litigation against Exxon brought 16 long years ago. Remember, this was the greatest environmental disaster in U.S. history. Yet the case is still bogged down in the federal system, and Exxon has been the winner so far because it still has money-earning dividends.

Class action lawsuits are not perfect. Some large corporations use them to wipe out enormous liabilities to large number of people. Abuses like "forum shopping"—filing suits in what are considered plaintiff-friendly courts—and excessive legal fees do occur—but rarely. It should be noted, however, that remedies for these problems are already available through established court rules and procedures. In fact, no other type of lawsuit is subject to as much judicial oversight and control as the class action. In Alabama, our Supreme Court has been extremely tough on class actions, and many lawyers who handle class actions prefer the federal courts. Anybody who claims there have been frivolous class actions in our state courts simply doesn't know what they are talking about or are intentionally misleading their advice.

I know from experience that laws don't enforce themselves—somebody has to take the initiative and file a civil lawsuit in many instances. Even criminal prosecutions don't just happen, typically coming as a result of private citizen involvement in some form. Civil lawsuits provide a critical backstop to government oversight, and that shouldn't be subject to serious debate. Presently, we have a situation on the federal level where government regulators don't do a very good of regulation, Congress is largely asleep at the proverbial switch on most consumer issues, and the federal courts are overloaded with cases. We should all watch closely to see how our representatives in Washington vote on the next round of tort reform. In my opinion, the vote on the class action bill wasn't a good indicator. The real test will come on the next round. Their votes then will signal whether they represent the public interest or whether they are controlled by corporate power that is unparallel in modern times.

Tort Reformers Have Intentionally Deceived The Public

We have know for some time that the big and powerful corporations pushing "tort reform" would mislead consumers and even lie about the legal system when they felt it was necessary. I have written about tort reform on numerous occasions and have been amazed how some people still buy the tort reform myth. Most of you are probably aware that tort reform is a well-funded campaign to protect big companies and limit damages against

them. The tort-reform bosses subscribe to the principle that says "if you continue to tell a lie over a period of time—pretty soon it takes on the look of truth." There is a growing collection of "legal mythology" that now appears regularly in the national media that has had its intended effect. I was talking to a young lady recently, who told me about a case that she said had "actually happened," and she was upset. She was totally convinced that it was a "real case." The case the lady described, however, was one that had never happened. She was shocked to learn that there had never been such a case and that it was just another "tort reform lie." The following are a few of the lawsuit stories that many folks like my friend actually believed were real cases:

- A story spread around the country about the man who injured himself while using his lawnmower as a hedge clipper and then won $500,000 in a lawsuit against the lawnmower company. There was no such case and the whole thing was completely untrue.
- There was also a "case" involving the woman who threw a soft drink at her boyfriend, slipped on the wet floor, and then won $100,000 in a lawsuit against the restaurant? Again, this was a total falsehood.
- We hear that an Austin, Texas lady received $780,000 from a jury after she tripped over her own son in a furniture story. There was no such case.
- A 19-year-old Los Angeles man was awarded more than $74,000 when his hand was run over by a neighbor. The neighbor did not see him because he was stealing his hubcaps. This was a good story, but it just happened to be false—It never happened.
- A Bristol, Pennsylvania man was given $500,000 after he was inadvertently trapped in the garage of a house that he was burglarizing. Another false story that made its way around the U.S.
- A man won more than $1.7 million dollars and a new Winnebago after he put his new motor home on cruise control at 70 mph and then went in the back to fix himself some coffee, only to crash on the highway. This too was totally false, but it has been repeated constantly.

There are many more stories concerning lawsuits that would be considered "frivolous," but which never happened, that are being discussed by folks who don't know any better. What big corporations have learned is that they can use their money and clout to influence public opinion by spreading false horror stories about the court system. These tactics have been very effective. In today's world, unfortunately, image is everything. Horror stories offered by industry group's play to a weakness in the media for this "you are not going to believe this" type story. Of course, even when the stories are made up about lawsuits that never happened, the effect is still there, and that is a sad commentary on our times. Many of the stories the "tort reformers" provide to the media simply are not true and they know they have no factual basis.

The hedge-clipper story mentioned above has appeared in newspapers, on TV programs, on radio talk shows, and certainly in political speeches. In fact, it has even been repeated in law school classrooms. A number of national political figures have referred to this case as a good reason for reforming the legal system. You might be interested to know where this story originated. It was part of an ad campaign put together by Crum & Forster, an insurance firm. The company has now admitted that it knew of no such case and had made up the story. I learned a long time ago that some big corporations don't let facts stand in the way of a good story if it suits their purpose. Their motive is clear when it come to their "lawsuit myths," and that's to turn voters and jurors against lawyers and lawsuits. These "lawsuit lies" fit the stereotype that Big Business wants you to believe. They have sold the "**frivolous lawsuit**" story using these tactics. To them, the truth or falsity of the stories actually become secondary.

Folks should be aware of the danger that these "stories" promote. Corporate America wants to take away your legal rights to trial by jury. They will stop at nothing to accomplish their goal. It does not seem so important when you are talking about someone else's right to bring a case when they have been injured or wronged. But when it does happen to a person or one of their family members, their views on tort reform—all of a sudden—change dramatically. Only then does the fact that our court system is the only place in the world where an individual can truly be on a level playing field with a large corporation, really sink in. Oftentimes it takes a personal tragedy happening for this to come home to a family.

Source: *USA Today*

More Than 100 Families Settle Asbestos Case

More than 100 northwest families reached a $30 million settlement recently in an asbestos lawsuit involving a subsidiary of Houston-based Halliburton Co. The settlement was part of a $4.3 billion global settlement encompassing Halliburton's past, present, and future asbestos liabilities. More than 200,000 injured workers nationwide were affected. Many were exposed to asbestos while serving on U.S. Navy vessels contaminated with asbestos. Others were exposed from shipyards, paper mills, or industrial plants. Dresser Industries, a subsidiary of Hal-

liburton acquired when Vice-President Dick Cheney was chairman of the company, distributed asbestos products to shipyards, power plants, and industrial facilities. This was at a time when the company had to know how dangerous asbestos was.

Dresser officials had to know their products were harmful to workers in the 1930s, but continued to distribute them through the mid-1970s. Thousands of American workers were lost as a result of asbestos disease because the companies manufacturing asbestos products concealed the truth from the public. It was a sad chapter in our country's history. The conclusion to this tragic mess will eventually come from congressional action. Unfortunately, that may not be good for the asbestos victims. The Bush Administration—as has come to be expected—is more interested in protecting Corporate America than it is in taking care of their victims. I hope Congress won't be pushed into passing a bad "asbestos bill."

Source: *Associated Press*

Securities Class action Settlement Sums Reach A Record

Securities class action settlements reached a record level in 2004 as corporations paid shareholders for losses in the stock market. A study released last month by NERA, a consulting group, contains some very interesting information. The average shareholder settlement rose 33%, to $27.1 million, from $20.3 million in 2003, the study concluded. The median settlement fell 4%, to $5.3 million, from $5.5 million. The study also concluded that Sarbanes-Oxley, the corporate reform law passed in 2002, has had no significant effect on settlement amounts or new federal filings, but might have been responsible for integrating corporate governance reforms into settlements.

The main factor behind the record high settlements, the study concluded, was high investor losses, which are calculated by estimating how much a particular stock rose or fell when compared to the Standard & Poor's 500-stock index. Investor losses in a lawsuit rose to an average of $2.5 billion in 2003, compared with $140 million in the average suit settled in 1996. In 2004, investor losses in the typical suit decreased to $1.7 billion. The median loss for investors in 2004 was five times that of 1996. A feature of some settlements is the inclusion of corporate governance reforms, sometimes secured instead of higher cash payments. Since the passage of Sarbanes-Oxley, at least nine settlements have incorporated reforms, including cases involving HCA Inc. and Sprint.

Source: *The New York Times*

Alabama Lawyers Need Help On Indigent Fees

There are a good number of lawyers in Alabama who represent poor people and abused children in the courts. Obviously, these lawyers perform a valuable service for our state. The State of Alabama clearly has a responsibility to provide services for lawyers who are appointed in criminal cases to represent indigent defendants and who do work in the family courts for low-income people. Instead, the State has cut funding for indigent defense and family court lawyers. Since February 1st, the state comptroller's office has stopped all payments to these lawyers, who provide a most valuable service. I understand the State's long-standing practice of paying indigent defense attorneys for office overhead has been stopped. Lawyers who represent indigent clients earn $60 an hour in court and $40 an hour out-of-court. The State also paid an additional amount for office overhead. Many rely on those payments to maintain their law practice.

As all lawyers know, it has become extremely expensive to operate a law firm. If the State doesn't change its position, fewer lawyers will be able to take on indigent criminal cases. The State's actions also affects lawyers who represent abused and neglected children in Family Court cases. I understand that many of the lawyers affected haven't been paid for almost two months. The legislature should pass a law during the current session that would require the State of Alabama to reimburse lawyers for office overhead. The shifting of $14 million in indigent defense funds by the governor to help tackle the State's Medicaid funding crisis is just another example of "robbing Peter to pay Paul."

IV. THE NATIONAL SCENE

Most Americans Have Lost Trust In Our Leaders

Folks in American are losing trust in their leaders and in some institutions and for good reason. A recently released nationwide poll found more than 61% of Americans feel this way. This should not be too surprising because of the vast number of corporate scandals, as well as other events that have caused many folks to have grave concern. The current drug problems relating to the federal Food and Drug Administration are a prime example of why people feel as they do. All of the corporate scandals came about because of greed and a failure of government agencies to do their job of regulating. Leading newswire service Reuters partnered with a consulting firm, DecisionQuest, to research how trust has been affected and how national skepticism might impact juror attitudes. Dr. Philip Anthony, DecisionQuest CEO, made this comment:

The common theme found throughout so many major events in recent years is a perceived abuse of power, from news of church abuse cover-ups to Martha Stewart. Americans are more suspicious of authority now than they were four years ago. This distrust is going to have consequences in our justice system, where witnesses or defendants are expecting the benefit of the doubt.

All elected officials generally received mediocre trust scores in the survey. Even President Bush had serious problems on the issue of trustworthiness. The poll revealed that President Bush, television reporters, and corporate executives have lost the most ground over the last four years. Findings from the poll include:

- Corporate executives, lawyers, and entertainment celebrities are the least trusted groups in America. Conversely, family members and firefighters are ranked among the most trusted in a list of 20 different categories.
- The war in Iraq is the biggest factor reported to cause decrease in trust. The 2000 election controversy in Florida is second place. White-collar crime is third and terrorism is fourth.
- In various case types, people who report their trust has declined over recent years are about 10-15% more likely to find for a plaintiff in a court case.
- Respondents ranked British and Canadian corporate executives to be the most trustworthy witnesses in a courtroom case over Americans. French corporate executives were ranked next to last, followed only by Middle Easterners.
- Approximately 60% of Americans would side with the prisoners over the prison guards in the Iraq prison abuse case, which is most likely the result of a perceived cover-up.

Unless the present trends are reversed, I suspect we will see folks getting more and more distrustful of our political readers and of those who run things in Corporate America. President Bush's answer to the problems facing consumers has been to protect the wrongdoers who have caused the scandals and to ignore their victims. This, in my opinion, is largely responsible for the President's decline in trust. I hope the President will see the error of his ways and start showing concern for ordinary citizens—that would indeed be a welcome change.

Source: *Reuters News*

President Bush Promotes Anti-Consumer Agenda In State Of The Union

I watched the President's State of the Union address and really wasn't surprised at its content. While it was the best "delivery" by President Bush thus far, what he actually said should be really scary for most people in the U.S. President Bush's address provided the nation another opportunity to examine and understand a radical domestic agenda that, if enacted, will curtail consumer, civil rights and environmental protections; take away the legal rights of citizens defrauded or harmed by corporations and medical providers; and further erode democratic principles. Public Citizen President Joan Claybrook, who is a strong voice for American citizens, had this to say concerning the address:

President Bush's heartless agenda is a blueprint for stomping out a century of reforms that have made this nation more prosperous and brought cleaner air and water, less poverty and more basic fairness for the people who do the everyday hard work to keep our country running. Bush cynically views government as an agent for the very rich, particularly his campaign contributors. Born to great wealth and prominence and helped along every step of the way by wealthy benefactors, he remains sorely out of touch with the concerns and problems that Americans encounter in their daily lives—and sadly, his actions indicate he just doesn't care.

The staff at Public Citizen has done a thorough analysis of what the President proposed. I appreciate the group giving us access to this information. Here are the responses by the consumer advocacy group to several specific issues:

- **Bush's Assault on the Legal Rights of Citizens**

Bush falsely claims there is a "crisis" in the civil justice system and is pushing Congress to enact sweeping changes that would dramatically curtail the rights of citizens to seek redress in court when they are defrauded or otherwise harmed by corporations or injured by doctors.

Specifically, Bush backed S. 5, the business class action bill, which was recently adopted by both houses of Congress and signed into law by President Bush. This law will move most class action lawsuits of any significance out of state courts—which have traditionally heard these suits—to the already-overburdened federal courts. Because federal courts rarely certify nationwide class actions based on state consumer-protection laws (and there are no comparable federal laws that can be enforced by citizen lawsuits), most class actions involving market abuses—such as overcharges by insurers, selling defective products, predatory lending scams targeting seniors and the poor—will be blocked.

"This bill, unless amended, creates a classic Catch-22 for consumers," Claybrook said before its passage. "Con-

gress says, 'You must go to federal court.' But the federal courts will lock consumers out. It's the perfect scenario for businesses seeking to avoid accountability, and the most likely outcome is that we will see a surge in corporate misbehavior."

Also on Bush's agenda is legislation to place a nationwide $250,000 cap on non-economic damages that juries can award to patients who are injured by negligent or incompetent doctors, drug companies, HMOs, nursing homes, hospitals and other health care providers. Such limits would apply to even the most horribly disfigured, crippled, or brain-damaged victims.

Bush claims that "frivolous lawsuits" are out of control and that such lawsuits are making malpractice premiums for doctors unaffordable. But, there is scant evidence to support Bush's dubious contentions. Malpractice premiums are driven by economic cycles that affect insurance industry investments (and profitability), not payouts to malpractice victims. In fact, just 5% of doctors nationwide are responsible for about half of all malpractice payouts—but Bush is offering nothing to weed out these repeat-offender doctors.

"Once again, as he did with weapons of mass destruction in Iraq and as he is now doing with Social Security, Bush has created a bogus crisis so that he can rally support for a special interest agenda that is bad for America," said Frank Clemente, director of Public Citizen's Congress Watch division.

- **Bush's Corporate Welfare for Energy Corporations**

Bush likely will call for energy legislation that will reward energy companies and investment bankers that now own power plants and natural gas pipelines. Despite the lessons learned from the massive fraud and market abuse by Enron and other energy companies in recent years, Bush advocates further deregulation of the energy sector. This includes the repeal of the Public Utility Holding Company Act, a staple of consumer protection enacted to stem the type of abuses that helped cause the Great Depression. This law protects utility customers from unjustified rate hikes and service disruptions by limiting the ability of executives to use ratepayer profits to embark on risky business ventures unrelated to their core utility business.

The Administration also wants to deliver billions in taxpayer dollars to energy companies in the form of subsidies and tax breaks, a clear reward for the more than $8.5 million contributed to his re-election campaign by the energy and investment sectors, not to mention the $3.7 million donated to his second inauguration and the additional $7 million to the Republican National Committee.

In addition, Bush advocates nuclear power as a promising and "renewable' energy source, while ignoring the massive nuclear waste problem and urging taxpayer subsidies to fund the next generation of nuclear reactors. Tax dollars already are subsidizing half the cost—estimated to be as much as $87 million each—of the new U.S. Nuclear Regulatory Commission "early site permit" application process in Illinois, Mississippi, and Virginia, as well as combined operating and construction licenses for several huge consortia.

"Bush's energy policy does nothing to help consumers, stem global warming or help clean up the environment," said Wenonah Hauter, director of Public Citizen's Critical Mass Energy and Environment Program. "It utterly fails to set a course that will sustain our country over the next century. It is the exact opposite of visionary."

- **Bush's Stubborn Insistence on Expanding Failed Trade Policy**

Bush wants to expand the corporate globalization model—as embodied by the North American Free Trade Agreement (NAFTA)—to six more countries through the proposed Central America Free Trade Agreement, known as CAFTA. This model of trade relations has led to the largest U.S. trade deficit in history—a projected $600 billion by year's end. The trade deficit, which is 5.5% of national income, is also the largest as a share of our national economy in the post-World War II period. Trade agreements have contributed to growing income inequality in the United States and stagnant economic performance in less-developed countries.

"The Bush Administration insistence on pushing to extend the colossal failures of the NAFTA model to the poor countries of Central America, which have suffered for decades from the fallout of civil war, economic stagnation, and natural disasters, is morally unconscionable," said Lori Wallach, director of Public Citizen's Global Trade Watch. "We join with the major U.S. and Latino civil rights and immigrant rights groups in opposing this offensive push.

"It is increasingly clear that no one is safe from the negative effects of these trade liberalization policies, which are leading to increased off-shoring of high-paying professional jobs and more risks to hard-won consumer protections and social programs. Bush's plan to experiment with the privatization of Social Security, for example, could put the nation's most popular social program at the mercy of World Trade Organization rules, which might make the experiment more difficult to reverse when it predictably fails to generate promised benefits."

Source: Public Citizen

The Bush Budget Fails To Protect Consumers

Not only was the President's State of the Union message a preview of what

is in store for ordinary citizens, the budget presented actually contains even worse news for most folks. American citizens should really be alarmed at the anti-consumer agenda that President Bush has proposed. But, few folks even know what the budget contains. If they did, I suspect they wouldn't be too happy. In my opinion, this President is the most controlled of any occupant of the White House in my lifetime, and that is reflected in his budget. His agenda has been largely put together by Corporate America with little—If any—input from consumer groups. A careful look at the Bush budget reveals how "people" are left out and virtually ignored insofar as anything really good for them is concerned. I agree with Public Citizen's belief that President Bush's budget proposal will do little to protect the health and safety of consumers in three critical areas: energy, food and water. These are essential resources that every citizen must be able to afford, have access to, and most importantly, know are clean and protected. Let's take a look at each of these important areas.

Energy

In the fiscal year 2006 budget released by the White House, Bush requested $651 million for Yucca Mountain, which is $74 million more than the program received last year. This is indefensible given the myriad problems of the nuclear waste dump project. Further, Bush is asking that nuclear power user fees be reclassified as "offset collections." (Since 1982, nuclear power utility consumers have paid fees to the Nuclear Waste Fund to pay for the establishment of a national high-level nuclear waste repository.) Reclassifying the fund is simply a budgetary gimmick that obscures the fund's impact on the country's massive budget deficit. In addition to Yucca funding, Bush is asking taxpayers to further subsidize nuclear power—a failed technology for consumers and the environment. The Administration is seeking $56 million for the Nuclear Power 2010 program, in which taxpayers pay half the cost of applying for licenses to site and build new nuclear reactors. Last year, Bush requested $10 million, but thanks to Senator Pete Domenici (R-N.M.), the program received $50 million. Similarly, Bush is requesting $45 million for Generation IV, a U.S. Department of Energy program to develop new "inherently safe" reactor designs; last year, he requested $30.5 million, but again thanks to Domenici, the program received $40 million.

Bush's budget will also seek to raise the inexpensive electricity rates charged by the federally owned and operated Power Marketing Administration—a sop to more expensive corporate-owned power and a first step to privatizing these public resources. These federal power agencies supply large parts of the country with inexpensive electricity generated mostly from hydroelectric dams. It is no secret that corporate owned utilities, which nationally charge prices more than 8% higher than publicly owned or cooperative power, seek to control these cheap sources of power. The result is usually higher rates for consumers and bigger profits for the companies.

Food

The proposed budget for the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS) calls for $139 million of the funding for meat inspection to come from "user fees" paid by the meat industry at plants operating more than eight hours a day. Allowing the industry to fund the regulators who oversee them sets a dangerous precedent and sets the stage for conditions that could compromise the effectiveness of inspectors. In fact, the USDA has "de-listed" plants in other countries from being eligible to export to the United States because the industry funds their government meat inspection programs. It is senseless to implement a policy in this country that we oppose elsewhere. Unfortunately, the proposed budget leaves very little wiggle room for the agency to avoid accepting industry user fees. Congress should reject these fees and instead appropriate adequate funding for FSIS operations. In addition to the proposed user fees, the budget eliminates the 63 FSIS personnel dedicated to humane slaughter regulations and assigns them to general inspection duties.

Water

With crumbling infrastructures nationwide, there is a desperate need of funding to maintain and improve the safety and accessibility of our public water supply. There is a very real funding gap for water and wastewater systems in the United States. By some estimates, it will cost $20 billion annually for the next 20 years to build, repair and maintain systems in this country. But the Bush budget allocates only $730 million for the Clean Water State Revolving Funds, which is $360 million less than Congress appropriated in FY05. Further, Bush requested $850 million—slightly less than was appropriated last year—for the Safe Drinking Water State Revolving Fund, which provides grants to states to help improve drinking water systems and infrastructure.

It is abundantly clear that those who control the federal government can accomplish their anti-consumer goals by what's put in the budgets by the White House operations. This budget is no exception. It is one of the worst in years for American consumers and ordinary citizens generally. I hope members of Congress will stand up for the American people and change the Bush budget where needed. If that doesn't happen, and the Bush budget passes, the American people will be headed for some dark days in a number of critical areas.

Source: Public Citizen

The American Public Should Be Alarmed Over Bush's Deficit

In addition to the consumer concerns stated above, there is a great deal more not to like about this budget. The President's budget will drive America deeper into debt while making cuts that will hurt veterans, farmers, and other working Americans. It is most significant that Bush's budget leaves out the tremendous cost of the wars in Iraq and Afghanistan, currently running in excess of $5 billion per month. It also leaves out the cost of his Social Security privatization scheme. The Bush budget does nothing to decrease the deficit, and that's a big time problem. Despite the President's failure to rein in the deficit, his budget still includes cuts to some important programs that will hurt folks in this country who need the most help. The Bush budget has proposed cuts for the following programs:

- Medicaid;
- Veterans' health benefits, which will force veterans to pay more for health care;
- College loans;
- Education programs that help poor children;
- Farm subsidies; and
- Community development grants.

It is significant that many Republicans in Congress, who have been strong Bush allies, have expressed their opposition to many of the cuts in his budget. The numbers put out by the Bush White House are "not credible," according to a number of economists, but of course, that's nothing new. I have yet to hear a good explanation from any of my Republican friends on how a "real conservative" person can justify the record federal deficit being run up by President Bush. That is mind-boggling—to say the least!

Rove Gets Bigger Role At White House

It was reported last month that President Bush's senior adviser, Karl Rove, has taken on a wider role in developing and coordinating policy in President Bush's second term. That really shouldn't have come as a big surprise. Rove, as we all know, was Bush's top political strategist during his 2000 and 2004 presidential campaigns and is commonly known as the man who runs the show at the White House. He now has become a deputy White House chief of staff in charge of coordinating policy between the White House Domestic Policy Council, the National Economic Council, the National Security Council, and the Homeland Security Council. This sounds like some pretty big and important stuff. I suspect it's more semantics than substance, because Rove was already running the show. Needless to say, Rove will continue to oversee White House strategy and will work tirelessly to advance Bush's agenda.

Clearly, Karl Rove is the most powerful man in Washington and is also the most dangerous. His strategy has been to destroy anybody who gets in his way. Rove carefully devised the plan to gain the support of the Christian community nationwide for President Bush and the Republican Party. It became pretty well accepted in the last presidential race that no Christian possibly could vote for a Democrat and especially not one from Massachusetts. It will now be most interesting to see where Rove places real Christian values on his congressional agenda. Rove is good at the use of "code words," but now we'll see how serious he is about getting something done in Congress on issues that Christians are really interested in.

The President Fills Long-Standing Vacancy At FDA

President Bush has nominated Dr. Lester M. Crawford to be Commissioner of the Food and Drug Administration. This position has been vacant for nearly a year—which I have never really understood, considering the rising concerns about the safety of drugs on the market. Dr. Crawford, an Auburn University graduate, has been acting commissioner since March 2004. He earned a degree as a veterinarian from Auburn and later received a Ph.D. in pharmacology from the University of Georgia. I hope Dr. Crawford will provide the needed leadership to turn the ineffective FDA around and make it the protector of people that it is supposed to be. The FDA has been a failure, in my opinion, giving Dr. Crawford a tremendous opportunity to turn things around. He will have to be tough and willing to take on the powerful pharmaceutical industry in order to change things at the FDA. I hope and pray that Dr. Crawford will be successful.

The FDA is under great pressure to make drugs safer and more affordable. Critics say the FDA does not monitor the side-effects of drugs, especially in combination, after they are approved. Watchdog groups have criticized Dr. Crawford's ties to the food industry.

Actually, his record as acting commissioner provides another target. Opponents say, for example, that the FDA reacted too slowly under his watch when drugs it had approved started to show indications of being dangerous for users. Janell Mayo Duncan, counsel for Consumers Union, which publishes Consumer Reports had this to say:

> *Under Dr. Crawford's watch, the FDA has failed to protect the public from dangerous prescription drugs, dietary supplements, and contaminated animal feed that could carry mad cow disease. As many of these controversies arose while Dr. Crawford was acting commissioner, it will be important for him to lay out to Congress and the American public his specific plans to ensure the safety of our prescription drugs.*

I am going to give Dr. Crawford the benefit of all doubt and watch to see how he performs now that the "acting" designation has been taken away from his job title. Certainly, American consumers are counting on the new boss at the FDA to do the job. I hope and pray that he is up to the challenge.

John Edwards To Head UNC Poverty Center

My friend John Edwards will head a University of North Carolina center that will study ways to lift people in this country out of poverty. The former U.S. senator will be director of the Center on Poverty, Work and Opportunity. John will hold a part-time, two-year faculty position, funded by private gifts to the university. As you know, John served one term in the Senate and pursued a presidential run last year before having the misfortune of being picked as John Kerry's running mate. I am convinced that John would be President today if he had headed up the ticket. While in the Senate, John pushed for raising the minimum wage, expanding the earned income tax credit, and creating matching savings accounts for poor families. I don't know what the future holds for my friend from North Carolina. I do know, however, that whatever John Edwards does, he will work hard at it and will do an outstanding job.

In an unrelated note, I would ask all of our readers to pray for the full recovery of John's wife, Elizabeth, who was diagnosed with breast cancer in November. She is now undergoing surgery and treatment. John is doing his part by helping to take care of their children. Elizabeth will do her part and fight this unwelcomed visitor to the Edward's family. She will, with God's help, beat this problem.

Tom Donohue Appears To Have A Personal Interest In Tort Reform

I really thought Tom Donohue, the president of the U.S. Chamber of Commerce was simply a hired gun who had just been hired to do a job on the "tort reform" front. Now it appears that Mr. Donohue really has a vested interest in the national campaign to limit corporate accountability. You might be surprised to learn that he sits on the boards of two scandal-ridden corporations. A recently released Public Citizen report gives us some insight into what is motivating this man. Although Donohue has proclaimed the importance of board members serving as **watchdogs** for the corporations they manage, he sits on the boards of two publicly traded companies—Qwest Communications International Inc. and Union Pacific Corp.—whose **reputations** have been marred by **serious misdeeds** that have prompted the very type of civil lawsuits that Donohue is now trying to limit. The two companies have engaged in a monumental deception of investors, violated federal and state regulations on a massive scale, jeopardized public safety, and perverted the American judicial system through alteration and destruction of evidence, according to Public Citizen.

Under Donohue's leadership, the U.S. Chamber has been one of the most outspoken supporters of the tort law changes sought by big business. It has supported anti-consumer class action legislation and spent many millions of dollars in state political races to defeat judicial and attorney general candidates who they deemed to be sympathetic to consumer and investor rights. Donohue is now calling for a massive overhaul of the tort system and reduced regulatory oversight by government agencies—the same authorities that have **held** Qwest and Union Pacific **accountable** for a long string of **corporate misdeeds**.

Public Citizen President Joan Claybrook had this to say: "Using tens of millions in corporate money, Tom Donohue is systematically trying to disarm the public institutions that hold corporate violators accountable—the liability system, the courts, state attorneys general and regulatory agencies. He sits on boards of two companies that serve as vivid examples of why we need strong law enforcement for crime in the corporate suites." The following are among Public Citizen's findings:

- Qwest has paid $250 million to settle fraud charges brought by the Securities and Exchange Commission (SEC) for overstating earnings, has paid $25 million to settle five lawsuits concerning alleged insider trading, and still faces billions of dollars in potential civil litigation liabilities.
- Since Donohue joined Qwest's board, the company has been assessed more than $114 million in fines by 10 states and the Federal Communications Commission for defrauding consumers and for failing to disclose secret business dealings.
- Instead of punishing Qwest's corpo-

rate executives, Donohue and his fellow board members rewarded them with higher pay packages. Qwest's board of directors has received dismal ratings from two independent research organizations for furnishing executives with exorbitant pay packages despite poor corporate performance. Donohue sits on the board's compensation committee.

Public Citizen reports that since Donohue joined the Union Pacific board in 1998, the company has repeatedly been found liable in accidents resulting from poor training or unsatisfactory upkeep of tracks, has pressured workers not to report accidents, and has been deemed responsible by courts for manipulating or destroying evidence:

- The Arkansas Supreme Court said in a 2004 decision involving a fatal accident, "the record in this case reflects the development of a corporate policy at Union Pacific that put company profits before public safety."
- A federal judge in Arkansas fined Union Pacific $168,000 in 2001 for destroying evidence in a case stemming from another railway crossing crash that left a motorist dead.
- In Washington state, a federal judge sanctioned Union Pacific in February 2002 after it was revealed that a manager secretly fixed a faulty railway crossing after a motorist was killed there. The judge labeled the actions "egregious" and said "severe sanctions are appropriate" since the manager's "actions were not that of a rogue underling." Union Pacific had sought compensation from the estate of the driver in this case, claiming the crash had left one of its locomotives damaged.

Again, Donohue and fellow board members appear to have rewarded Union Pacific executives with ever higher pay. An independent research organization last year recommended against retaining Donohue as a board member because of his role on the compensation committee in boosting executives' pay. Donohue has repeatedly acknowledged the responsibility of board members to make sure companies behave responsibly. In 2000, he was quoted as calling for board members to perform "due diligence" and be active in understanding the company so they can provide the best possible advice. This is what Donohue—the present day "tort-reformer"—was saying to them: "Save me from a bunch of people on a board who are going to tell me what I want to hear." Frank Clemente, director of Public Citizen's Congress Watch division observed:

> *The hypocrisy hits you like a train. Donohue has called for board members to exercise proper oversight of companies, yet he has responded to wrongdoing in companies he oversees by hiking executive pay. Donohue's crusade to limit the ability of consumers to hold companies accountable for wrongdoing takes on a new light when you look at his activity on these corporate boards.*

Public Citizen's report also draws attention to the Chamber president's opposition to the SEC's proposed shareholder access rule, which would allow shareholders holding a significant portion of a company's shares to place nominees for the corporate board on the official company ballot. Currently there is no practical way for shareholders to elect directors not nominated by the incumbent board. Donohue has a vested interest in keeping things as they are, because his continued tenure on Qwest's board has been challenged and some shareholders indicate they are likely to challenge it again in the near future. (Public Citizen's complete report, "Tom Donohue: U.S. Chamber of Commerce President Oversees Renegade Corporations While Pushing for Limits to Corporate Accountability," can be found at http://www.citizen.org/documents/021805DonohueForPdf.pdf.)

Source: Public Citizen

V. THE CORPORATE WORLD

Ten Worst Corporations Listed

Each year the *Multinational Monitor* magazine puts out a list of the Ten Worst Corruptions in the U.S. The February issue of the *Monitor* listed the ten worst corporations of 2004. These corporations, according to the survey, are:

- Abbott Labs
- American International Group
- Coca-Cola
- Dow Chemical
- GlaxoSmithKline
- Hardee's
- Merck
- McWane
- Riggs Bank
- Wal-Mart

Robert Weissman, editor of *The Monitor*, says that it's becoming increasingly difficult to choose the ten worst corporations. *The Monitor* has a rule that they do not name companies to the list if they appeared on the previous year's list. I guess that would explain a number of really bad companies missed the list this year. Our readers may agree or disagree with this listing of bad corporations. In fact, I

can think of a few more companies that could be added to any such list. *The Monitor* gave good reasons why each of the ten companies they chose made the list for 2004.

Source: *The Corporate Crime Reporter*

W. R. Grace Indicted Over Asbestos

The federal indictments in Montana involving W. R. Grace & Company are good news for people and bad news for the officials who ran this company. The company and seven of its executives are said to have known a mine was releasing cancer-causing asbestos into the air and effectively hid the danger from workers and towns people. You may recall that a newspaper study linked nearly 200 deaths to asbestos from the vermiculite mine in the small town of Libby, Montana, which is located near the Canadian border. More than 1,200 people became ill over the thirty years that Grace, a global supplier of chemicals and building materials, operated the mine.

The federal grand jury handing down the indictment said top Grace executives and managers kept secret numerous studies spelling out the risks the asbestos posed to its customers, its employees, and the residents of Libby. According to the indictment, Grace, while it knew the risks, put folks in the area of the plant at great risk. For example, the company actually sold or leased some of its contaminated properties for homes and businesses, baseball fields, and even city use. The indictment, which was recently unsealed, also accuses Grace and its former manager of trying to obstruct efforts by the Environmental Protection Agency to investigate the extent of the asbestos contamination beginning in 1999. The reason the 1999 date is significant is because a study by the Seattle Post-Intelligencer linked the nearly 200 deaths and hundreds of illnesses to the mine. The EPA, which has never disputed the findings in that study, has since declared the area a Superfund site and has spent more than $55 million dollars on cleanup. Bill Mercer, U.S. Attorney for Montana stated: "A human and environmental tragedy has occurred in Libby. The prosecution seeks to hold Grace and some of its executives responsible for the misconduct alleged in this indictment." Lori Hanson, a special agent with the Environmental Protection Agency, called the allegations against Grace and its executives "one of the most significant environmental indictments in our history."

The Libby mine is now closed. Grace filed for bankruptcy protection in April 2001. The company had been overwhelmed by asbestos-related injury lawsuits. As pointed out above, asbestos contamination in Libby came to light in 1999 after national news reports first linked the pollution from a nearby vermiculite mine to the deaths and illnesses of area residents. The vermiculite ore was used in a number of household products, most notably a common home insulation. The ore, however, contained naturally occurring tremolite asbestos, a carcinogen. The EPA began its investigation shortly after news of the asbestos-related deaths became public. The company could face a fine of up to $280 million, twice the amount of after-tax profits the government alleges W.R. Grace realized from the Libby mine, according to the Justice Department.

The government alleged the defendants kept secret the health dangers posed by the vermiculite mined at Libby. They hampered federal government efforts to protect the public from such risks. The result was a national tragedy. As early as 1976, the company knew of lung health problems among its employees at the mine, according to the indictment. Grace executives had reports or studies warning of the dangers of asbestos vermiculite exposure in 1977, 1980, 1981, and 1982. At one point, a Grace executive responded to one of the studies by writing in a memo: "Our major problem is death from respiratory cancer. This is no surprise." Despite having the information referred to in the memo, Grace officials told the EPA in 1983 that there was no indication their products posed a substantial threat to human health. When the EPA arrived in 1999, company officials lied about providing vermiculite insulation to local residents for their homes and businesses, and failed to reveal that vermiculite was used on the school's running track. As late as April 2002, in response to the EPA declaring a public health emergency in Libby, the company still insisted its vermiculite was not a risk to the environment and human health.

Former Mercury Finance CEO Is Indicted On Fraud Charges

Several years ago our law firm tried a civil fraud case in Alabama against Mercury Finance Co., which at that time was very big in the secondary auto loan business. We were successful in this case. Our jury, after hearing the evidence, returned a $50 million verdict against the company. Many tort reformers said at that time, we had "tricked" the jury and had taken unfair advantage of a good company. We knew better. Now federal prosecutors have indicted the former chairman and chief executive of Mercury Finance Co. on charges of accounting fraud. John Brincat Sr. was named in a 15-count indictment charging wire fraud, lying to financial institutions, and conspiracy, according to the U.S. Attorney's office in Chicago. The indictment claims that Mercury Finance, which had 290 offices in the U.S. and whose stock traded on the New York Stock Exchange, fraudulently obtained nearly $1.5 billion in loan commitments and lines of credit.

Prosecutors said Mr. Brincat and three other Mercury Finance executives manipulated earnings reports and failed to account for bad loans in an effort to deceive shareholders and investors. The indictment seeks forfeiture of $17 million. Three other Mercury executives have been named in the alleged scheme. One of them, former Chief Financial Officer James Doyle, is deceased. Lawrence Borowiak, former accounting manager, pleaded guilty to charges in 2002. Bradley Vallem, former treasurer, received a sentence of 20 months in prison after pleading guilty. Borowiak and Vallem agreed to cooperate in the probe. Mercury, once a major player in the so-called subprime-lending business, disclosed in January 1997 that it had vastly overstated profits for previous years. The company filed for bankruptcy protection in 1998 and reorganized, as MFN Financial Corp. The new company was later sold to Consumer Portfolio Services Inc. of Irvine, California.

The case we tried against Mercury Finance revealed at the time how bad the company and its bosses were. For example, the company was taking advantage of low-income purchasers of used automobiles on a nationwide basis. At the time the company was charging a hidden $1,000 charge on each auto loan, it sold several types of insurance to the borrowers with high premiums and little coverage, interest rates were over 25%, and the list goes on. The so-called property damage insurance policy on our 19 year old client's car was most interesting—for a premium of about $750 annually, the car was covered by insurance only if it was "repossessed" by Mercury Finance. The sticker price on the car had been $3,000, which means it could have been purchased for that amount. The initial loan wound up being over $6,500 for a car that was listed at $3,000 with interest charged on that amount. Later, the car was virtually destroyed by fire—that's when our client found out his car wasn't covered by his policy. Mercury Finance arranged for the car to be repaired, and refinanced the loan by adding the repair cost to the loan balance. Again, all sorts of fees were added to the new loan amount.

Our client, who was working at a local hospital, was then paying 60% of his monthly salary each month on the loan to Mercury Finance. When he became unable to pay the payments, he turned the car in to save his credit and was assured by Mercury Finance that his debt was satisfied totally and that nothing further was owed. A few weeks later, however, our client got a letter saying he owed over $10,000 to Mercury Finance. The company, after it repossessed the car, sold it to a well-connected company for $500. After looking into what had happened, we then sued Mercury Finance for fraud. After the verdict, we settled that plaintiff's case and about 100 others on a confidential basis. All of them were factually similar. One thing that we learned during pretrial discovery sticks out in my mind about Mercury Finance. We got a memo from the home office to all branches that said: "once we get them in debt—keep them in debt—don't let them out." That philosophy tells us lots about the mentality of the folks who ran this company.

Another Point Of View

I have been accused by some folks of being too much of a consumer advocate in this report. Some even say that I never present "the other side" of an issue. While I don't apologize for being strong for consumers and their rights, I thought this might be a good time to present another point of view.

The recent settlement in which Enron directors agreed to use personal funds to compensate shareholders for their losses, and a similar one by WorldCom directors that was later overturned, represent significant events in the newly complex world of regulatory compliance. They come at a time when companies are struggling with the high cost of complying with new laws and regulations, such as the US Sarbanes-Oxley act. They also come amid growing fears that legal and financial exposure will deter competent individuals from joining public company boards. American companies estimate that Sarbanes-Oxley compliance costs alone could run into hundreds of millions of dollars. Are these onerous and unnecessary expenditures or a worthwhile investment? In the end, will they really benefit investors? Corporate opposition to increased regulation has met with some success. Deadlines for enacting the Sarbanes-Oxley requirements for certifying internal financial controls were extended. The Securities and Exchange Commission is also looking at ways to make it easier for US-listed European companies to meet Sarbanes-Oxley requirements or delist. But it would be a mistake to conclude that the overwhelming response of companies to these new regulations is obstruction, delay and then grudging compliance.

This was written for a national publication by Samuel DiPiazza, who incidentally is from Alabama. While I don't disagree with much of what he writes, I still believe that most of the scandals involving Corporate America could have been avoided had the federal government done its job of regulating. This is especially true of corporations regulated by the SEC. Instead of worrying about the corporations, I believe our first priority is to worry about and

protect both their shareholders and others who trust the companies to do the right thing.

Judge Gives Enron Settlement Preliminary Approval

A proposed $168 million shareholder lawsuit settlement with 18 former Enron Corp. directors who oversaw the company ahead of its 2001 flameout has received preliminary approval from a Texas judge. As you may recall, there had been two other settlements that had been reached previously with banks. The agreement with plaintiffs in the conglomerate of lawsuits in Houston, led by the University of California, involves $155 million in insurance proceeds and $13 million paid from the pockets of 10 of the former directors who sold stock inflated by hidden debt and accounting tricks. The other settlements given preliminary approval by the court were $69 million with the Bank of America Corp. and $222.5 million with Lehman Brothers Inc. The judge will consider whether to give final approval to the settlement in April.

There is an interesting aspect of the Enron scandal that has gone pretty much unnoticed by the media. The former directors paying unspecified portions of the $13 million included **Wendy Gramm**, the wife of **former Senator Phil Gramm**, R-Texas, and that takes on a special significance. All of us have probably heard of Senator Gramm, who was a very powerful man, but few folks would have even recognized the name "Wendy Gramm." Interestingly, Mrs. Gramm chaired the Commodity Futures Trading Commission, a federal agency, before joining Enron's board in 1993. That Commission directly affected Enron's operations in a most significant way and gave them certain distinct advantages by their rulings. Mrs. Gramm was in charge of audits with Enron and acquired a good bit of stock in the company. Her roles in government and with Enron are certainly worth looking into. One might ask when she sold her Enron stock, when she got it, and how much she sold it for. The timing of her stock sales could be most interesting and revealing.

The directors' settlement is the fourth reached since the main lawsuit was filed in October 2001, a few weeks before Enron imploded amid revelations of hidden debt, inflated profits and fraudulent accounting. It is the first involving individuals. Last year the university announced the settlements with the Bank of America and Lehman Brothers. Former Enron auditor Arthur Andersen LLP's former international umbrella organization, Andersen Worldwide SC, reached a $40 million settlement in July 2002—a month after Andersen was convicted of altering and shredding Enron-related documents as regulators began investigating the energy company's finances. Unfortunately, the victims of the Enron scandal are still the "losers" in this sad affair.

VI. CAMPAIGN FINANCE REFORM

Judge Combines Campaign Finance Cases

A federal judge has combined separate lawsuits filed by President Bush's campaign and sponsors of a 2002 campaign finance law into one case. The consolidated cases are seeking a federal crackdown on groups that spent big donations in last year's elections. U.S. District Judge Emmet Sullivan announced on February 18th that the issues raised by the Bush campaign and Representatives Christopher Shays (R-Conn.), and Marty Meehan (D-Mass.), against the Federal Election Commission were virtually identical. The two lawsuits had been filed against the FEC last year after it declined to restrict partisan interest groups spending tens of millions of dollars in the elections. As you most likely recall, both Bush and Kerry were targets of this money.

The Bush campaign and lawmakers, who contend the groups' activities were illegal, want Judge Sullivan to order the Commission to curb the raising and spending of six- and seven-figure donations and require groups spending in federal elections to register with the FEC. The Commission contends the Bush campaign and the congressmen have no legal standing to sue it over the issue. Judge Sullivan has scheduled a September 13th hearing on the case. Lawyers will file written briefs setting out their legal arguments, starting in late April. I hope these consolidated cases will help to curb the wild spending by groups such as the 527 committees and others. But, that may be wishful thinking.

Source: Associated Press

The Urgent Need For Reform

I could have titled this portion of this issue as "The Buying of the Government," but felt that that might be going a little too far. But, after reading some of the numbers below, you may disagree. Nobody can argue successfully that the large corporations aren't being taken care of in our nation's capitol. The economic agenda coming out of the Bush White House is a prime example. That agenda includes privatizing Social Security, shifting taxation from corporations and the wealthy to ordinary consumers, preventing folks from exercising their rights to sue large corporations that harm them, and unleashing the energy companies to do whatever they see fit with little restriction. In my opinion, this does not project an agenda that the public really wants or has been hollering for. In fact, all of the polls run indicate just the opposite. To give you an example of how Corporate America has spent their

political money, consider the following, which shows the amounts spent in 2004.

- Merrill Lynch $1,900,326
- Pfizer $1,465,317
- MBNA Corp. $1,453,497
- Southern Company $1,041,021
- Wachovia Corp. $998,997
- GlaxoSmithKline $822,210
- Eli Lilly & Co. $623,852
- Merck & Co. $508,131
- Abbott Laboratories $420,225

The numbers listed above include PAC contributions and contributions by way of executives to either Republican candidates for federal office or to the Republican National Committee. This is by no means all the political money that can be attributed indirectly to the corporations that winds up buying influence. For example, the so-called "527 Committees" don't have to reveal their sources or the amounts given by those sources. I suspect Corporate America spent billions over the last few years that passed through these committees.

VII. CONGRESSIONAL UPDATE

The Bush Agenda

The Bush congressional agenda appears to be one carefully designed to weaken the middle class and to make the upper class in this country stronger than ever. I sincerely believe that this will prove to be a mistake. Destroying the middle class makes no sense and can't be justified. I hope there are enough members of Congress who will stand up to the pressures put on them by Corporate America and the Bush White House and who will say no to the President's programs that are not good for American citizens. In my opinion, what happens during the first year of the President's second term will determine the future of the already shrinking middle class in this country. Personally, I believe we must fight to **save** the middle-class—I hope you agree!

The FDA Needs Prompt Attention

Congress must reform the federal Food and Drug Administration, which is badly in need of repair, and without further delay. The regulatory agency, which should be protecting the consuming public, is controlled by the pharmaceutical industry and incapable of protecting American consumers as the agency is currently set up. Drastic changes must be made immediately by Congress so that the FDA can be made capable of doing its job. I am hopeful members of Congress will hear from people back home who I believe will demand that drugs on the market be safe to use. If the FDA approves a drug, the public should be entitled to rely on the agency's approval as an assurance that the drug has been thoroughly tested and is safe. I don't believe that can be said today. Simply put, the FDA is **broken** and it must be **fixed**!

The So-called Medical Malpractice Legislation

President Bush is working hard to pass the so-called Medical Malpractice legislation in Congress. The President and the powerful industries pushing "tort reform" are using medical doctors in an attempt to pass legislation that does much more than "reform" pure medical malpractice litigation. The President's legislation will apply to medical products, nursing homes, and health insurance claims. This will make the bill in effect a product liability measure. It is designed to protect the pharmaceutical industry, the medial device manufacturers, nursing homes, HMO's, and insurance companies. It will also give virtual immunity to all who are covered by the legislation. The medical community should be strongly in opposition to what this bill attempts to do to the American public. The pharmaceutical industry and the HMOs are much more of an enemy to doctors than trial lawyers are. The public needs protection from the groups referred to above rather than the reverse being true.

VIII. PRODUCT LIABILITY UPDATE

GM's Roof Crush Scandal

Unprotected internal General Motors' documents reveal just how far GM went to weaken the federal safety standards on the strength needed for vehicles' roofs. The federal standard applicable to roof strength is FMVSS 216. In 1970, when it first proposed a roof intrusion protection standard, the federal government was going to require testing on both front corners of a vehicle's roof. Specifically, the test was to be a static roof crush test using a device measuring 12 in. by 12 in. This rigid test device was to be oriented 10 degrees horizontally and 25 degrees laterally. At these angles, the test device gradually applied a force concentrated on the upper surface of the roof at the A-pillar until it reached a force of one-and-a-half times the empty weight of the tested vehicle or 5,000 lbs, whichever is less. Then the test was to be repeated on the other side of the vehicle's roof. The intent of the proposed rule was to insure that the roofs of vehicles were strong

enough to prevent serious injuries and deaths in rollover accidents.

When the federal government issued its notice of the proposed rule, GM immediately began testing its cars to see whether the cars could meet the proposed federal standard. GM's internal documents showed that out of seven vehicles tested, six of them could not meet the proposed roof intrusion requirement. GM then hid this testing from the government. In 1971, when it came time for GM to respond to the proposed testing standard, the automaker told the government that testing both sides of the roof was unnecessary. GM also recommended that the government change the size of the test device to a device as large as 30 inches by 72 inches and to change the horizontal orientation to 5 degrees. All of GM's proposed changes to the federal test procedure weakened the federal roof crush standard and insured that GM's current 1970-71 production vehicles could pass the test without having to strengthen the roofs. In 1971, the government issued the roof crush standard in accordance to GM's recommendations. GM got its way and pulled the roof strength standard down to the level of GM's 1970 vehicles. That test procedure has not changed in 32 years. If the standard had remained as it was proposed by the government in 1971, roofs would now be 200% stronger. Since 1971, it has been estimated that 100,000 deaths and 160,000 catastrophic injuries caused by the crushing of the roof could have been prevented.

For the most part, GM takes the position that injuries and deaths in rollover accidents do not occur because of the roof crush. Instead, GM argues that the occupant "dives" into the roof, resulting in the injury before the roof ever crushes in a rollover accident. According to GM's theory, even a belted occupant "dives" into the roof and incurs injury or death, before the roof crushes. In support of this theory, GM points to a series of rollover tests conducted on Malibu cars. The Malibu paper compared the results of rollover tests involving production vehicles and vehicles equipped with a roll cage. GM claimed that the results showed that serious injury can occur in either vehicles. Thus, according to GM, roof crush doesn't make a difference. But, the data were manipulated by setting the threshold for serious injury at a very low and unrealistic level. In reality, the level of force generally required to cause serious injury is more than 3-4 times the level set by these Malibu tests. At the more accurate level of force necessary to cause serious injury, the Malibu tests prove that none of the dummies in the rolled cage roof suffered serious injuries.

Further, confidential data from the Malibu tests that were never published, but were discovered in litigation against GM, debunk GM's "diving into the roof" theory. These confidential data from the Malibu tests demonstrate that the forces on the dummies' neck occurred after the vehicle's roof started to crush. In fact, Gary Bahling, one of the authors of the second Malibu paper, admitted the roof was crushing and deforming before the head or neck injury occurred. GM has used the Malibu tests for years to defend not increasing the strength of its roofs, concluding that a stronger roof would not give added protection to passengers in rollover accidents. Clearly, GM's own internal data does not support that conclusion.

Roof crush does matter. In fact, it's a most serious problem. About 17,000 occupants are seriously injured and more than 10,000 are fatally injured each year in rollover accidents. Approximately 6,900 of these non-ejected serious or fatal injuries are known to have received their injuries from roof contact. GM knows its roofs are weak. Actually, GM relies on the windshield glass in its vehicles to support its roofs. In 1990, GM ran a series of roof crush tests on its S/T model vehicle. GM tested the strength of the roofs on the vehicles with the windshield glass and without the glass. What the test revealed was the roof of the vehicles without the glass was 36% weaker than those roofs with the glass. This is a frightening discovery because GM knows that most rollover accidents involve multiple occupant hits on the roof of the vehicle. In these accidents, the windshield glass is typically lost on the first contact with the roof. Thus, on the next contact on the roof, the roof has lost 36% of its strength and no longer has enough roof strength remaining to protect its occupants.

General Motors recognizes the dangers of its weak roofs. The company's own internal safety guidelines for its test drivers reveal the automaker's knowledge of the danger of its weak roofs. GM's safety guidelines require that its test drivers must use a helmet and seat belt for a driving maneuver as simple as lane changes from 0-55 mph if its static stability factor (SSF) is less than 1.10 It is significant that this would include the popular Blazer and Jimmy vehicles. Further, GM's safety guidelines require the installation of a roll bar or roll cage in the same vehicles under these same simple driving maneuvers in order to protect the occupants from roof crush. It is inconceivable, but GM continues to deny that roof crush causes injuries. Yet, it puts roll cages on its trucks for its own employees to protect them from roof crush. The sad reality is that—for 32 years, GM has known that the roofs on its vehicles were weak and not capable of withstanding forces in real world rollover accidents. But, during those 32 years, instead of strengthening its roofs to prevent deaths and serious injuries, GM has continued to deceive the government and the motoring public by saying that

roof crush does not matter. The truth is that roof crush kills and seriously injures thousands each year. It does matter to consumers and it certainly should to General Motors and NHTSA, which has the authority to make GM strengthen its roofs and save lives.

Ford Engineers Warned Of Death Risk From SUVs

It has become very clear, as the result of information obtained mostly through discovery in lawsuits, that Ford Motor Co. has consistently ignored its own engineers' design advice on the Ford Explorer. Their engineers told Ford bosses that the Explorer needed design revisions to prevent rollover accidents and fatal injuries. This has been documented. Bloomberg News put out an excellent story on Ford and the Explorer, which all consumers should read carefully. It points out how the automaker put profits over safety, or at least that's the way I view it. This news outlet obviously did a great deal of work on this project and did an excellent job. Let's take a look at what Bloomberg found out about Ford and the Explorer.

Company records show that in 1993, Ford engineers James Cheng and Jessy Li advised the company to reinforce Explorer roof supports to prevent collapses in rollovers. Ford didn't make changes because NHTSA didn't require any, according to Ford engineering supervisor Christopher Brewer in a 2003 deposition. In 1999, Ford engineers in Venezuela warned that Explorers were rolling over and had caused a number of deaths because of flaws in the suspension. Three years earlier, Ford engineers had said in writing that the deficiency could be solved by moving the shock absorbers toward the wheels. But, Ford didn't make the change. Ford has consistently put an emphasis on profit before safety.

We all know that the Explorer has been a big ticket item for Ford and is very popular with young people. The company sold 339,333 Explorers in the U.S. in 2004. We also know there have been a number of lawsuits filed against Ford, claiming design defects in the Explorer. In 2004, Ford lost two Explorer cases with verdicts totaling about $375 million. Ford claims the Explorer doesn't roll over more often than any other vehicle in its class. Ford tries to use statistical data in all of the trials that really has no place in individual cases. It says the fatality rate in rollovers was lower for Explorer than for the Chevrolet Blazer, the Jeep Grand Cherokee and Kia Sportage, according to the National Highway Traffic Safety Administration's Fatality Analysis Reporting System data from 1994 to 2001. Of course, even if that's true, it doesn't mean the Explorer is a safe vehicle.

Ford didn't perform proper Explorer rollover tests before selling the SUV. Ford's truck engineering director, Thomas Baughman, admitted in a December 2000 deposition that Ford stopped live testing of Explorer rollover resistance in the mid-1990s because of an accident during a test drive of a Ranger pickup truck. As you may recall, the evolution of the Explorer included the Ranger, which became the Bronco II, which became the first generation of the Explorer. In a November 2004 deposition, William Ballard, a Ford design engineer, testified that Ford never intentionally rolled Ford Explorers to see how the seat-belt systems operated in crash conditions. In his deposition, Ballard said: "We don't do rollover testing as part of a development program." In reality, Ford actually used their customers as "crash-test dummies," instead of doing the necessary testing.

We have learned that all of the automobile companies are using computer simulations for much of this testing and will only do the testing they're actually required to do. I am convinced that simulations are not adequate for SUV rollovers. Ford runs a type of rollover resistance maneuver known as the J-turn, abruptly turning the vehicle in the shape of the letter "J." Ford documents with graphs comparing results of J-turn testing correlated with computer models are available. But, it is most interesting that Ford has been unable to locate copies of the actual J-turn results without the computer modeling.

Ford has limited some other tests of Explorers involving actual driving conditions, according to a report on a July 1999 test at the Dearborn Proving Grounds. After a test driver in Dearborn rolled a 1999 Explorer while turning on a gravel road, Ford instituted new rules, the report says. The report reveals that testing on gravel roads for the Explorer and other SUVs are limited to "straightaway section only" at speeds not exceeding 35 miles per hour. It is significant that Ford's test drivers must wear helmets. In 1989, Ford engineers recommended the company widen the vehicle by 2 inches to improve its stability. Ford didn't redesign the Explorer because the work would have delayed both the marketing of the vehicle and the company's return on a $500 million investment in the model. This is according to a November 2000 deposition by Roger Simpson, Ford's program manager for the vehicle.

Ford widened the 4-door Explorer in the 2002 model year, Ford's Baughman testified in his deposition. But, the company didn't widen the 2-door version. A California state court judge wrote in upholding $75 million in punitive damages of a $369 million award against Ford last year in San Diego: "There is evidence Ford knew of potentially fatal defects during the development and manufacture of the vehicle not addressed by the safety standards and chose not to remedy those problems." Joan Claybrook, pres-

ident of Public Citizen Inc. says:

> *The car company's decisions are similar to marketing choices made by pharmaceutical companies that sell drugs linked in clinical studies to potentially fatal side effects. There is a rush to market for many industries because of strong competitive pressures.*

Ms. Claybrook, who was head of the National Highway Traffic Safety Administration from 1977 to 1981 under Jimmy Carter, says companies are willing to face lawsuits because their profits outpace legal costs. She says that "Many companies view this as a cost of doing business." I am totally convinced that this is true. In the Explorer's first three years on the market, profit from the sport-utility vehicle exceeded that of the rest of the company. During 1990 to 1992, the company had net income of $2.5 billion on Explorer sales in the U.S. and Canada, according to a 2002 deposition by Ronald Ross Johnson, a financial analyst at Ford. From 1990 to 1997, Ford had about $13.4 billion in net income on the Explorer, according to Johnson.

Starting in 2000, the safety reputation of the Explorer was hurt by a federal investigation into at least 271 highway deaths involving tread separation by Firestone tires, mostly on Explorers. Our firm has been involved in several of these cases. Ford has settled an undisclosed number of lawsuits, with more than 100 of these tread separation cases still pending. Several of our cases are still pending.

In 2004, Ford lost two Explorer rollover cases at trial, including the $369 million verdict in San Diego in June, later reduced by the trial judge to $150 million, and a $5.3 million verdict in Fort Myers, Florida, in August. Ford appealed the San Diego verdict after the trial judge turned down the company's request for reversal. Ford settled the Fort Myers case. Many of the pending rollover lawsuits don't focus entirely on stability claims. Explorers also have suspension, roof, or seat belt defects, as well. Roof-crush claims were the key elements in the San Diego verdict. The memo by the Ford engineers, written while Ford was considering changes for the 1995 model Explorer, said an Explorer roof can buckle when the windshield breaks. It recommended improvements in roof strength. Cheng and Li, in their report written to engineering supervisor Brewer, suggested reinforcing the B-pillar and changing A-pillar material from "cold roll steel to high strength steel" to improve roof crush performance. As you probably know, the A pillar is near the windshield, holding up the roof of a vehicle. The B pillar, which also holds up the roof, is adjacent to the front seats. Brewer testified in a January 2003 deposition that Ford didn't make the changes in the 1995 Explorer because the roof met federal regulatory standards. It is very important that Brewer testified in his deposition that the modifications would have improved the safety of the Explorer. Brewer also testified in his deposition that the B pillar was bolstered in early 1996. In May 1996, Ford engineers listed "roof crush" as a safety weakness of the then-current Explorer, according to an internal Explorer "design review" document.

The A pillar was never bolstered. When the Explorer was first planned, company engineers warned in 1987 that federal standards were insufficient and rollovers would require greater roof strength. Ford's engineers in July 1987, in a document titled "Light Truck Safety Design Guideline Strategy, wrote: "Fatalities in rollover accidents, which may or may not be accompanied by roof crush or occupant ejections, are more prevalent in light trucks than cars." Remember, the Explorer is designated a light truck. In a 2003 deposition, Brewer was asked if Ford should have considered making the changes recommended by Cheng and Li. To this, he responded: "We chose, based on the test results that we had, to recommend that we should do some kind of reinforcement like this between a 1995 and 1998 time frame." He was then asked: "Why wait?" Brewer's response was: "Every change that we make takes some amount of time to do, some amount of testing to do, and costs some amount of money, right?" It should be noted that while the roof of the Ford Explorer complies with federal standards, that is no assurance of safety.

There are also defects in the Explorer seat belt, which can spool out during a rollover, leaving an accident victim hanging out of the vehicle while the belt is still buckled. The seat belt can also release as the vehicle rolls. In 1996 and 1997, the Society of Automotive Engineers published two papers on seat-belt failures in rollovers, along with proposed solutions. One paper cited a spool-out in an Explorer rollover. Ford has argued in lawsuits over roof crush that the occupants, even those wearing seat belts, hit the roof during the rollover before the roof collapses. Of course, this is good evidence of a failure of the seat belts to restrain occupants. A device attached to the retractor, where the belt's webbing feeds through, can lock the belt for 10 seconds and prevent it from unwinding. Pretensioners, devices using sensors to detect rapid decelerations, can "fire milliseconds before impact and pin you into the seat." The devices were provided on the Ford Mondeo in Europe in 1993, according to a November 2004 deposition of Ford's Ballard. However, they weren't offered on Ford vehicles in North America until 1997. Pretensioners with sensors to detect potential rollovers were offered as optional equipment as part of the side curtain airbag system in all 4-door Explorers in March 2002.

Unfortunately, Ford doesn't make such equipment standard on its vehicles. Most purchasers wouldn't really see the need for this option, unless they were informed of the need.

There is another problem with the Explorer. The vehicle's suspension allows the back end of the vehicle to "skate" sideways when there is a vibration in the rear. This can be caused by a rough road, a tread separation, or by the wheels going over rumble strips used on highways to slow down cars or to alert drivers. When this occurs, the likelihood of rollover is great.

In August of last year, the first of the suspension cases went to trial, with a Fort Myers jury finding against Ford in a claim brought by the family of Bob Miller, who was killed in an Explorer rollover. Miller, who was 57 years old at the time, was the safety director for a construction company. He was traveling on Interstate 75 outside Fort Myers when he lost control of the Explorer after a non-Firestone tire blew. The jury awarded $5.3 million in compensatory damages and was considering the family's request for $48 million in punitive damages when Ford settled the lawsuit for a confidential amount. During the trial, documents from a 1999 study by Ford's Venezuela unit were put in evidence. It concluded that the Explorer's shock absorber design was "too soft" and the vehicle's high center of gravity made it more susceptible "to rollover during hard shift," or on rough roads.

A July 1998 Ford engineer's evaluation of an Explorer that had experienced "slippage/loss of control during rough road/off road" was also used during the trial. The Ford evaluator said: "This is typical 'skate.' Suspension design changes would be required." Previously, in 1996, three Ford engineers had warned that the shock absorbers should be moved to prevent skate. In an article published by the Society of Automotive Engineers, Kenneth Kramer, William Janitor, and Lawrence Bradley, wrote about the suspension used on Ford light trucks, including the F-150 series, the Ranger and the Explorer. The Ford engineers said that "skate" occurred most often when "vehicles are driven aggressively on rough, winding roads." They added that "skate" could also occur "with single wheel events or potholes." The engineers advised that shock absorbers should be moved outward toward the wheels. Ford says extreme speeds in skate-related accidents "is an exception." The driver in the Florida case was traveling the speed limit, 65 mph, before the Explorer rolled following a tread separation.

Ford solved the skate problem in the 2002 4-door Explorer by changing to an independent rear suspension. But, Ford didn't change the suspension in the 2002 2-door, Baughman said in his deposition. Ford says the 2-door Explorer was discontinued after the 2003 model year. The second trial involving the skate problem is scheduled for April in Miami. It involves the death of Lance Hall, 18, who was a passenger in a 1996 Explorer. Hall's family says the Explorer went into skate after driving over a rumble strip.

Ford said in November of last year that it would add a rollover protection system to the 2005 Explorers. Ford made changes in the 2002 4-door Explorer that made it "inherently less prone to rollover," Ford's Baughman testified in 2000. Unfortunately, the changes in design won't stop the accidents because several million of the older vehicles remain on the road. People buy Explorers for their children and young drivers tend to drive faster, so the accident statistics will keep going up.

Without a doubt, Ford has done a tremendous job of "marketing" the Explorer, making this SUV extremely popular with the driving public. The public's acceptance of the Explorer—in spite of its design defects—has made litigation against Ford in Explorer cases extremely difficult. But, the more we learn about what Ford's engineers were telling the automaker, and what Ford refused to do after getting the advice, the better the victims' chances at trial will be. Of course Ford vigorously defends the Explorer, which was to be expected.

Source: *Bloomberg News*

Ford Explorer Class To Proceed

A state court in California certified a class action last month in a lawsuit pending against Ford Motor Co. The automaker is charged with knowing of a rollover defect in its Explorer SUVs and concealing the information from consumers. The class certified by the court includes persons who purchased or leased Ford Explorers in California during the period from 1990 to August 2000.

A Full Trunk Can Be Trouble

Most folks haul lots of "stuff" in the trunk of their family passenger cars and don't realize that this cargo can create a hazard. They probably don't think much about the safety factor when they load their vehicle. Golf clubs, suitcases, even a case of Coca Cola, are all common things we put in the trunk of our cars. Unfortunately, during an accident, these items can become deadly and can actually crash through the back seat of a car. We have handled cases where back seat passengers were killed in such cases. In each case, the car met all U.S. government safety standards. There was one case where a back seat passenger was killed in a collision. The rear seat, which is considered the safest part of a vehicle, was not adequate to protect her. Out of six people in the car, the unfortunate lady was the only one who was killed. The

thing that killed the lady surprised not just her family, but also the police officers who investigated the accident. The object that killed her was a small toolbox. During the crash, the toolbox in the trunk went flying. It broke the back seat, slamming it forward. The lady was crushed against her seat belt. An auto safety expert said the lady would have survived if that seat had stayed in place.

Cargo crashing through back seats is a most serious problem. In a crash test, for example, it is easily seen how a small suitcase breaks through the back seat of a car. One can only imagine what would have happened to the passengers sitting in the back seat. A 25-pound suitcase is enough to go crashing through that back seat and is enough to kill a passenger. It's not just suitcases in the trunk that can pose a risk. Any heavy, solid object can be dangerous. Even a spare tire, if it's not properly secured, can be a weapon.

The problem concerns the way rear seats are made. They aren't always strong enough to hold back cargo in a crash. When most lawyers—even those who handle product liability cases—look at how the seats are made, they are usually shocked. I suspect our non-lawyer readers would be too. Actually, there is little support built into the seats. Often times a thin wire is attached to a sheet metal clip and that's the only thing that holds the top of the seat in. In the United States, car manufacturers are not required to test their back seats to make sure they protect passengers against cargo. The truth of the matter is we badly need stronger regulations, like those in Europe, where every car sold must pass a stringent cargo test. The European standard calls for two 40-pound suitcases to be placed back toward the side of the car in the trunk. They run a 30-mile-an-hour crash test, and the suitcases are not allowed to intrude into the back seat significantly.

European automakers tell us that every model they sell in the United States meets this standard. Regardless of what kind of car you have, there are things a person can do to reduce their risk. The first thing to do is never put more in the trunk than you absolutely need. Don't carry things around all the time. It just increases your probability of injury. But if you are going to carry heavy things, push them as close as you can to the seat, and try to distribute the load so that it's even. And if you can, try to wedge them in. In a crash, this will reduce the force of the cargo against the seatback. It also helps to tie down any heavy items or to restrain them in a cargo net. Of course, NHTSA and the auto industry should require and design stronger seats. It takes a tragic accident for a family to find out just how dangerous cargo in the trunk could be. The domestic automakers already know—but most of them won't do anything about it.

Hyundai Pays Judgment

Hyundai Motor Corp. has paid a $10,000,000 judgment in a New York case. The case in New York state court involved a front passenger who was killed in a 1993 Hyundai, while wearing only the motorized portion of her 2-piece belt system. The victim's lawyers challenged not only Hyundai's choice of belt systems, but also the implementation of the system it selected. This included the location of the knee bolster and the lack of adjustability of the shoulder belt, especially for short people. The middle level appellate court in New York had affirmed the verdict unanimously. The NY Court of Appeals, the highest state court in New York, then refused to hear the case. After that, Hyundai paid the required amount to the victim's family.

Not Everybody Likes The SUV Ad Campaign

Last month I reported on the nationwide SUV safety education campaign that was launched by state attorneys general. SUV Owners of America is applauding the efforts to educate drivers about the different handling characteristics of SUVs as compared to other vehicle types. But, they are concerned that media coverage of this advertising campaign has been inaccurate. I suspect that the manufacturers of SUVs would rather the public not see these ads at all. At the same time, many safety groups believe that the campaign fails to address the real problem, and that's the bad design of SUVs generally. The ads do appear to be primarily telling folks who drive SUVs to be more careful. It seems to tell us that being careful will keep an SUV from rolling over in an emergency avoidance maneuver. The emphasis on the driver may be a little much in the scheme of things. Actually, it is really the design that causes the hazard, thereby creating the dangerous condition.

Jury Verdict In Wrongful Death Lawsuit

A Hidalgo County, Texas, jury awarded $14 million last month to the family of a boy who was killed in a fire allegedly started by a Whirlpool Corp. clothes dryer. The 15-year-old died 2 years ago, when his family's mobile home in Mercedes, Texas burned down. His parents filed a wrongful death suit against Whirlpool, claiming a defective dryer started the fire. During the trial, jurors saw photos of the family's fire-wrecked mobile home and heard testimony from experts who pointed to the dryer as the source of the fire. According to the U.S. Consumer Product Safety Commission, clothes dryers are to blame for 15,500 fires, 10 deaths, 310 injuries, and more than $84.4 million in property damage

each year. The jury's verdict will be appealed by Whirlpool.

Ford Defect Suspected As Cause Of Fire

Officials are looking into whether a faulty cruise-control switch on a recalled Ford Expedition caused a fire that destroyed two vehicles and damaged a home in Texas. Officials have determined that the fire last month started in a Ford Expedition, which was parked under a carport. Ford Motor Co. had recalled about 800,000 Expeditions and other models after fires started under the hoods of parked cars. Besides 2000 model Expeditions, the automaker recalled 2000 Ford F-150 trucks, 2000 Lincoln Navigators, and 2001 F-Series Supercrew trucks manufactured in the same period as the 2000-model year vehicles. Texas officials are looking at the cruise switch as the possible cause of the fire. In the Texas case, as is oftentimes the case, the problem is most of the evidence is gone. It was consumed in the fire. That makes it difficult to pinpoint the exact ignition point. Early reports are that the fire started in the engine compartment.

The family was sleeping when the fire occurred, but fortunately they escaped the blaze unharmed. However, they did not know that Ford had issued a recall on the sport utility vehicle they had bought four months before the date of the fire. Ford had issued the safety recall on January 27th to address fires under the hood related to the speed-control switch. The company began mailing notices to owners of affected vehicles. The Expedition in this case was bought used. The new owners had not received a notice from Ford. Reportedly, Ford would notify owners to have the electrical connector from the speed control disconnected until the company could acquire replacement parts. Once replacements are available, Ford says it will issue a second owner notification to have the switch replaced and the speed control reconnected.

An Update On Back-Up Sensors

Last month we wrote on the availability of back-up sensors on certain makes of vehicles. Lamar Wagner, who is with Liberty Dodge in Prattville, Alabama, brought to my attention that the Chrysler group now has back-up sensors on Chrysler, Jeep and Dodge products. Lamar points out that the back-up sensors are a good addition to the number of safety products available for vehicles. He also says the cost as a separate item is only $255. I appreciate the fact that Lamar would take the time to bring this oversight to our attention.

Deaths Prompt Reviews On Use Of Stun Guns

Obviously, stun guns, or Tasers, have proved to be a valuable tool for law enforcement personnel. The use of stun guns by law enforcement officers has been in the news lately. It was reported by *USA Today* last month that the largest association of police chiefs are asking police departments around the U.S. to review the use of stun guns because of reports that the weapons may be related to numerous deaths. The International Association of Chiefs of Police and the Justice Department will study more than 80 deaths, to assess the risks in using the weapons. Civil rights groups and some police agencies have questioned the use of stun guns, or Tasers, which emit electrical charges to temporarily incapacitate suspects. I understand that more than 80 deaths have been reported since 1999 after victims were shocked with stun guns. This comes from reviews by *The Arizona Republic* and the Southern Christian Leadership Conference as reported (SCLC) in the *USA Today*.

The SCLC also asked U.S. Attorney General Alberto Gonzales to declare a moratorium on the weapon. Despite recent questions about safety, the stun gun still has broad support among law enforcement officers. Tasers became popular in recent years as an alternative to using guns to stop suspects. I have talked to a number of my friends in law enforcement who swear by the Tasers and say they have helped them greatly in dealing with difficult situations. I hope any problems that exist can be corrected. The Tasers have been helpful to law enforcement personnel. Of course, they must be reasonably safe to use.

Source: *USA Today*

Jury Finds General Motors Responsible In Lawsuit

A Wise County, Texas, jury has found General Motors partially responsible for the injuries suffered by a woman, who sustained severe brain damage as a result of a January 2003 accident. The jurors awarded $18.7 million in damages. The two-vehicle accident involved a 2001 Chevrolet Suburban and an 18-wheeler. The jury found that the failure of a side impact airbag to deploy in the Suburban during the crash caused the woman's injuries. The jury awarded $38.2 million in damages, but they found the plaintiffs mother, the driver of the vehicle, 51% responsible for the injuries and GM 49% responsible. That means GM was only responsible to pay for 49% of the damages. The GM side airbags don't always deploy, according to trial testimony. The woman hit her head on the area between the front and back doors—an area where the airbag should have been, had it deployed. GM could have fixed the problem for $8 per vehicle, but elected not to do so. The medical bills incurred by the plaintiff and her family were very high, totaling millions of dollars. GM claimed

that the accident and the injuries were caused by the driver of the Suburban. They Suburban crossed the center line while exiting from an Interstate roadway in front of the 18-wheeler. A collision resulted. I believe this is the first case in the nation involving GM and the side airbag issue that has actually gone to trial. There are a number of similar cases pending around the country.

IX. MASS TORTS UPDATE

Federal Panel Consolidates Vioxx Suits

All of the lawsuits filed in federal courts against Merck that blame Vioxx for deaths and injuries, will now be consolidated in a federal court in New Orleans. The consolidation order that sent the cases to Judge Eldon E. Fallon was issued on February 16th by a seven-member administrative body of federal judges that rules on motions to centralize nationwide litigation in the federal courts. Andy Birchfield from our firm was one of the lawyers for Vioxx victims, presenting arguments to the seven-judge multiple district litigation panel. Both sides agreed in principle that the growing number of cases made consolidation the best route to take.

Merck had asked that the cases be consolidated in a federal court in Illinois, Indiana or Maryland, but the court in Louisiana was selected. The administrative panel said in its order it was assigning the cases to Judge Fallon because he had the time and experience to handle the Vioxx litigation. We agree with that assessment. The Louisiana judge is overseeing a proposed settlement reached in his court last year for all federal injury claims related to Propulsid, a heartburn drug made by a Johnson & Johnson subsidiary, and has done a very good job. Judge Fallon is known to be a fair and impartial jurist who is capable of handling complex cases.

Analysts have estimated that Merck's total liabilities in federal and state cases could run as high as $30 billion. So far, the company has set aside $675 million in reserves to cover its potential Vioxx liabilities. I was told that this number was primarily for defense costs. After the panel issued its order, Merck issued a statement that reiterated its intention to "defend itself vigorously."

We expect these cases to be put on a fast track by Judge Fallon. Hundreds of thousands of people have been badly hurt and many died as a result of taking Vioxx. Handling these cases will require a tremendous outlay of funds and a great deal of manpower. We are looking forward to the challenge. I don't believe that the FDA advisory panel action mentioned below will have a negative effect on the lawsuits against Merck. In fact, I predict it will be just the opposite.

FDA Panel Votes To Let Vioxx Sales Resume

A Food and Drug Administration advisory panel voted on February 18th to recommend that Merck & Co. be allowed to resume sales of Vioxx. This has to be one of the most shocking developments to date relating to the Vioxx story. The decision, which surprised most analysts, came the same day that the panel voted to recommend that both Celebrex and Bextra be allowed to remain on the market. The FDA panel's actions came during a three-day meeting called to discuss the safety of pain relievers. Analysts had anticipated that studies linking Celebrex to greater risk of heart attack and stroke would lead the panel to recommend a so-called black box warning, the highest level of warning at the FDA, for the Pfizer drug. Bextra already has a black box warning. How Pfizer escaped on Celebrex is a real mystery. But the real mystery is how 17 of the 32 panel members, with all of the bad information now available to them, could say it's fine to sell any of the three drugs at all. Certainly, for the FDA panel to say that Vioxx could be sold again is the biggest shock of all.

In my opinion, Vioxx, Celebrex and Bextra should be banned by the FDA and not allowed to be sold. When Merck voluntarily recalled Vioxx in September 2004, it was the only one in the group that showed cardiovascular risks. Since then, studies have linked both Celebrex and Bextra to the very same risks. It is extremely difficult to understand the panel's actions. The final word on the painkillers will come from the Food and Drug Administration itself, which typically follows the recommendations of its advisory panels. I don't believe there are many—if any—doctors located anywhere in the country who will prescribe Vioxx to a patient. Neither do I believe any patient who has access to the information that was available to the FDA panel would take Vioxx. Here's a brief look at some of the information the FDA panel had access to. I'll let our readers decide whether the panel did the right thing.

Prominent cardiologist Dr. Garrett FitzGerald reiterated his long-standing assertion that the entire class of drugs increases the risk for cardiovascular problems. He made his point strongly to the panel. FDA whistle-blower Dr. David Graham went even further, asserting that "there doesn't appear to be a need for Cox-2 (inhibitors)." The information supplied by Dr. Graham alone should have been enough to keep Vioxx off the market. There was much more information—just as strong—that this panel heard during the three days it met.

Several studies have shown a direct

link between Vioxx and increased cardiovascular risk. According to an internal study conducted by FDA scientist Dr. David Graham, up to 140,000 people may have suffered heart attacks as a direct result of taking Vioxx. And millions of people may have been exposed unnecessarily to the risk of heart attack by taking Cox-2 inhibitor drugs, including Vioxx. The vote on Vioxx by the panel, which incidentally was 17-15, illustrates the weakness of the current drug control policy and reinforces the need for immediate FDA reform. Most folks who took Vioxx—I suspect—were influenced in their decision by the $60 million ad campaign put out by Merck. They were convinced that Vioxx was a strong pain killer, when the same relief would come from taking two Advils, I am told.

Another bit of information that the FDA panel had access to gives us further reason to question the recent action. The editor of a leading medical journal had questioned whether patients should continue using the Cox-2 drugs. Dr. Jeffrey M. Drazen, editor of the *New England Journal of Medicine*, made this comment: "Because there are well-established options for treatment of all the approved indications for these drugs, it is reasonable to ask whether the use of the drugs can now be justified." His comments were in an editorial published on February 15th. The FDA's Center for Drug Evaluation and Research has noted that many consumers and scientists have asked whether any Cox-2 drugs should be allowed to remain on sale. Dr. David Graham told the FDA panel on February 17th that the use of Vioxx poses the risk of hundreds to thousands of additional heart attacks in older men. Dr. Graham said studies indicate a range of increased heart attack risk, which translates to as few as 400 or as many as 10,800 additional heart attacks in men aged 65 to 74 at low doses of the drug. How the panel could have ignored all of the information it had access to is impossible to understand!

We believe that Merck should do the right thing and leave Vioxx off the market. We have been watching the situation concerning this drug unfold over the past 4 years. Even though they were late in doing so, Merck finally did the right thing in September when it withdrew Vioxx from the market. To reintroduce the drug now would most certainly result in further cardiovascular injuries, including deaths, for thousands of people. The fact that Merck is even considering putting Vioxx back on the market clearly shows their motives are to put profits above the safety of their drugs. For the FDA to allow this to happen—considering all they now know about Vioxx—is incomprehensible.

Members On Panel Had Industry Ties

Ten of the 32 members of the panel referred to above who endorsed continued marketing of Celebrex, Bextra and Vioxx have apparently consulted in recent years for the makers of these drugs' makers. *The New York Times* disclosed that ten members of the panel have worked in some capacity in recent years for Merck and Pfizer. The Times learned this from disclosures in medical journals and other public records. Consider this: If the 10 advisers had not cast their votes, the committee would have voted 12 to 8 that Bextra should be withdrawn and 14 to 8 that Vioxx should not return to the market. The 10 advisers with company ties voted 9 to 1 to keep Bextra on the market and 9 to 1 for Vioxx's return. The votes of the 10 did not substantially influence the committee's decision on Celebrex because only one committee member voted that Celebrex should be withdrawn. As we have learned over the past several years, researchers with ties to industry commonly serve on Food and Drug Administration advisory panels. In my opinion, this is not good for consumers and has the look of potential—if not actual—conflicts of interest.

The Center for Science in the Public Interest, an advocacy group in Washington that maintains a large database of scientists' industry ties gotten from disclosures in medical journals and other public documents, analyzed the panel members' affiliations at the request of *The New York Times*. It should be noted that the center has been a frequent critic of the FDA and of the pharmaceutical industry and for good reason. The center's analysis may understate the industry ties of the panel participants because some ties may not have been previously disclosed publicly. I certainly can't say with certainly that any of the panel members allowed their ties to the drug company's to influence their vote. However, I can say that in a issue as serious and volatile as this one, it sure doesn't look good. As they used to say back in Barbour County—"It just doesn't meet the smell test!"

Source: *The New York Times*

Shareholder Suits Consolidated

A federal panel has granted motions by several parties, including Merck, to consolidate all Vioxx shareholder suits pending in federal courts nationwide. The shareholder cases were transferred to the U.S. District Court for New Jersey and will be heard by District Judge Stanley Chesler. This is separate and apart from the individual injury cases that were sent to District Judge Fallon in Louisiana. Our firm isn't involved in the shareholder suits.

Bad News For Drug Safety

I have to wonder just what it would have taken to get the FDA panel's

attention. *The New England Journal of Medicine* has released new details from studies indicating that the Pfizer painkillers Celebrex and Bextra may cause the same sorts of heart problems that led to the recall of Vioxx last fall. The top-line results of the studies were announced last fall, but the *Journal's* release was the first publication of the full details. In one study of Bextra and its injected cousin parecoxib, heart bypass patients treated for as little as ten days with the drugs had nearly quadruple the risk of having a heart attack or other cardiovascular adverse events in the next month. In another National Cancer Institute study of 2,000 people at high risk for colon cancer, patients who took very high doses of Celebrex for three years had more than triple the risk of serious heart problems compared with those who got a placebo. Also in the same issue, the Journal is publishing results of the colon cancer prevention study that led Merck to withdraw Vioxx last fall.

It sure does appear that these results support the theory that all so-called COX-2 inhibitors are quite likely to boost the risk of heart problems if used for long-enough periods of time or at high-enough doses. *New England Journal of Medicine* Editor Jeffrey Drazen stated in a blunt editorial accompanying the three studies: "It appears that this is a class effect. Since there are plenty of other painkillers, it is reasonable to ask whether the use of these drugs can now be justified." Drazen also takes Merck and Pfizer to task for not conducting studies of Celebrex and Vioxx specifically designed to examine the safety of the drugs in high-risk patients, rather than just examining heart safety data from trials conducted for other purposes. He stated: "Had trials designed to test the question of cardiovascular toxicity directly been launched in 1999 and executed with urgency...perhaps a substantial number of deaths could have been prevented." In a separate New England Journal editorial, University of Washington epidemiologist Bruce Psaty and Wake Forest University's Curt Furberg were harshly critical of Pfizer for not publicizing until just a few weeks ago details of another study that found hints of cardiovascular problems with Celebrex in 2000. They wrote: "Failure to publish the findings of these studies not only violates the [trial participants' trust], but also misrepresents the evidence about risks and benefits for physicians."

Study Links Pain Killers To Heart Risk

Another new study has linked Vioxx, Celebrex, and Bextra to increased cardiovascular risk, reinforcing findings of the other trials that had already caused great concern over the safety of a Cox-2 inhibitors. Vioxx and Celebrex increased patients' risk of heart attack and stroke by about 20% while Bextra increased the risk by 50%, according to a study by WellPoint Inc., the nation's largest provider of health benefits, which is based in Indianapolis, Indiana. Dr. Sam Nussbaum, WellPoint's executive vice-president and chief medical officer, stated on February 14th that the study is further evidence of an "increasingly compelling trend" of data that show the drugs elevate patients' risk of heart attack and stroke. WellPoint studied the records of 7,232 patients over the age of 40 taking one of the three drugs and compared them with records of 629,245 people older than the age of 40 who were not taking any of the drugs. WellPoint shared the data with researchers at Indiana University's medical school, who adjusted the information for heart attack and stroke risk factors, such as age. WellPoint, which began the study after Vioxx was removed from the market, examined patient records from January 2001 through June 30, 2004. All the patients were on the drugs for at least 18 months. As you know, Merck officials still insist the problems with Vioxx didn't become apparent until patients were taking the drug for at least that long. WellPoint has shared the data with the FDA and with Pfizer. There have been at least three studies linking Bextra to increased risk of heart attack and strokes while two separate trials indicated Celebrex elevates the likelihood of cardiovascular problems.

Source: *Associated Press*

FDA Seeks Shelter From Drug Storm

In an attempt to restore some confidence in the agency, the U.S. Food and Drug Administration has created an independent drug safety board. Interestingly, the announcement came just hours before the FDA started the unusual three-day meeting by the panel discussed above to review the safety of painkillers including Vioxx, Celebrex and Bextra, resulting in the rather bizarre action that it took. You will recall that last November, Dr. David Graham, the FDA researcher, told Congress that the agency was incapable of defending the public against another drug disaster. Even though the FDA has an Office of Drug Safety it hasn't worked very well. The office has been criticized for a lack of independence. The recent action by the panel on Vioxx, Celebrex, and Bextra should tell the American people how powerful the drug industry really is and how ineffective the FDA has been.

I will concede that the Bush Administration's new drug safety board—if it is given the necessary power and tools to do their job—could play an important role in policing the safety of drugs after they are approved and on the market. But if the board is intended to be the Administration's primary solution for the glaring weaknesses that have been revealed in the FDA's ability to protect patients from adverse effects that show up only after a drug is widely used, it

will fall woefully short. The panel will be composed of government specialists, mostly from the drug agency, with a few coming from other agencies. It will be charged with monitoring information that emerges about serious side-effects and helping to resolve disputes over safety issues. The FDA pledges to make information about possible dangers public promptly, even if the evidence is not yet conclusive. That should go a long way toward breaking the inertia that typically paralyzes the agency while it waits to accumulate conclusive evidence.

Source: *Forbes News*

AARP Speaks Out On The Drug Problem

I have always believed that the AARP would fight to protect consumers and especially seniors, and recent events have confirmed my belief. They are now involved in the fight to make prescription drugs safe for use. An excellent article appeared in the February 2005 issue of the AARP Bulletin that addressed the most serious drug safety dilemma that American citizens are now facing. This excellent article, which contained an interview with Dr. David Graham and was written by Merrill Goozner, can be read in its entirety by going to www.aarp.org/bulletin. You can also receive a reprint of the article by calling 800-635-7181, ext. 8158. With AARP's permission, we are including the article, entitled "What Went Wrong?" for your consideration.

What Went Wrong?
By Merrill Goozner

Last September Merck took the painkiller Vioxx off the market after a clinical trial showed it increased the risk of heart attack. Soon after, Pfizer pulled its ads for Celebrex, a prescription drug similar to Vioxx, when a government-funded cancer study showed that in high doses it, too, multiplied heart problems. The U.S. Senate Finance Committee held a hearing in November on why the pharmaceutical companies downplayed early warning signals of heart risk and what role the U.S. Food and Drug Administration played. A key witness was physician David Graham, associate director for science in the FDA's Office of Drug Safety and a 20-year veteran of the agency, who gave his assessment of FDA safety procedures. He also testified that the FDA managers last summer suppressed his studies showing the link between Vioxx and heart attacks. In January the FDA granted Graham permission to publish his findings in the journal Lancet. In a statement, the agency said it would not comment on specific personnel issues, but "as with any institution, sometimes an individual within FDA may ultimately disagree with a consensus scientific judgment for a variety of reasons. Nevertheless, FDA is required to base its decisions on the best available, verifiable science. In the end, we must weigh all the evidence and decide on behalf of our citizens whether the products should be available." The FDA is sponsoring a review of its drug safety system by the quasi-governmental Institute of Medicine. Graham talked about the pain pill dilemma in an AARP Bulletin interview with writer Merrill Goozner.

Q. How serious are the heart risk problems with newer pain relievers like Vioxx, which is now off the market, Celebrex and Bextra?

Any individual patient's absolute risk for developing a heart attack might be small, but if you have millions of people taking the drug, many thousands of people will get heart attacks. A recent clinical trial showed an almost fourfold increase in heart attack risk with high doses of Vioxx. We estimate 100,000 people had heart attacks due to Vioxx, with 30,000 to 40,000 dying. And the ones who didn't die had their life expectancy shortened because they've had a first heart attack. This is a major safety problem.

Q. Why weren't physicians and consumers more cautious about prescribing and taking these new drugs?

The direct-to-consumer advertising magnified the risk [by encouraging consumers to ask doctors for the drugs]. It is difficult for people to comprehend what these [risk-factor] statistics mean. If a person has diabetes, is a smoker or has high cholesterol or blood pressure, the risk is even higher. It is also difficult for the physicians, who rely on the drug companies for most of the information they get about the drugs. You would expect that people should be able to rely on the FDA for information about drugs. But in the case of Vioxx, the FDA let the American people down.

Q. Why wasn't the scope of the problem identified before the FDA approved the drugs?

Before those drugs were marketed, there were theoretical concerns that they may cause heart problems in some cases. But these concerns were not properly evaluated. This is typical. Before a drug is brought on the market, the tests are usually small and focused on whether the drug works: does it cure arthritis pain? But they weren't large enough to quantify how often serious problems occur— in Vioxx's case, heart attack. Part of this has

to do with how the FDA makes its decisions. They are responsible for determining if drugs are safe and effective. The effective part is fairly well done. They ask for 95% certainty that it will have the effect they think it will. But they don't require the same 95% certainty on safety. They assume the drug is safe and require studies to show it is not safe. Yet they don't require big enough studies to show that.

Q. Do these problems extend beyond these pain relievers? You mentioned five other drugs at the hearing.

This is a systemic problem at the FDA [because] the FDA has an inherent conflict of interest. They approved the drug, so why on earth would they turn around and say, "We made a mistake" and pull it off the market? Obtaining [safety] evidence is almost impossible once a drug is on the market because it is not in the company's interest to do the studies that might show safety problems. And they're the only ones with the wherewithal to do it. The FDA doesn't have the money for these large studies. The agency has focused on reviewing and approving drugs as quickly as possible to the detriment of safety. The approval process is driving the bus while safety is at the back of the bus.

Q. People are confused when conflicting studies come out. Despite the revelations about some pain relievers, can consumers generally be confident about the drugs they take?

There's no deliberate attempt to confuse people. What we're seeing is that there are insufficient studies to determine safety. For most drugs, consumers can be reasonably confident that they work and that they're safe. Most drugs have been on the market for many years and have been very well studied. But with newer drugs, we don't generally have good safety information. They usually haven't been studied in the many thousands of patients you need to adequately show the safety profile. If there is a drug on the market that has been taking care of a problem for 10 years, stick with it. If that isn't working for you, and your doctor thinks there is a new drug on the market that might be worthwhile, then follow your doctor's advice, realizing that we probably have a lot less information about the safety of the newer drug.

Q. What could the FDA do to help patients and doctors sort this out?

The FDA does not compare one drug with another to determine which is better, although this might be the most valuable information to have. If there are five or seven cholesterol-lowering drugs out there, it would be very valuable to know that they all work the same or that two or three work better than the others. If you can get the generic version, and you knew it worked every bit as well as the name brand, why spend $3 a tablet for the name brand that is on your television screen when you can get a generic that might cost 50 cents a tablet to do the same thing?

Q. Did you have problems bringing these issues to the forefront at the FDA?

When I presented the Vioxx data to my managers at the FDA, they wanted to change my conclusions. When [Republican Senator Chuck] Grassley's office began to investigate what the FDA knew before Vioxx came off the market, these same FDA managers accused me of scientific misconduct; they tried to block the publication of my paper in the Lancet, a prestigious medical journal; and they called the Government Accountability Project to convince them not to represent me as a whistleblower. There is a Whistleblower Protection Act, but that doesn't necessarily protect government employees. The only people who know when the government isn't doing its job well are the people within government. But if they can't protect themselves when they go public, then it is going to be impossible for them to protect the consumer.

Q. What led you to speak out?

It was conscience more than courage. I would have to live with the knowledge that many people had been hurt or killed because I didn't act. Where does my conscience come from? For me, it has to do with my Christian beliefs and trying to live those Gospel principles. My faith is a part of my life. It is interwoven into everything that I do. I'm acting based on the science, but I feel I have a moral responsibility.

Source: *AARP Bulletin* — printed with permission.

A Closer Look At Celebrex

Because of the recent action by the FDA panel, I believe a special look at Celebrex is in order. The maker of this drug recently admitted that its 1999 clinical trial found that elderly patients taking the pain killer were far more likely to have heart problems than compared to patients taking a placebo (inactive substance). This 1999 clinical trial was an Alzheimer's study, which found that 22 out of 285 patients taking Celebrex suffered heart attacks, strokes, and other heart problems com-

pared to only 3 out of 140 patients taking a placebo. Even taking into consideration the difference in sizes of the two groups, Celebrex users were almost four times as likely to suffer heart problems, according to this clinical study.

When Pfizer acknowledged this unpublished 1999 clinical trial, the company attempted to marginalize the study's significance by saying it was flawed. But, the results of this study contradicts earlier public statements by Pfizer about the safety of Celebrex regarding any association with heart attacks and strokes. On October 1, 2004, after Merck's decision to withdraw Vioxx, Pfizer said that no completed study had ever shown any increased heart risks related to Celebrex. At that time, Pfizer stated in a news release, "The evidence distinguishing the cardiovascular safety of Celebrex has accumulated over years in multiple completed studies, none of which has shown any increased cardiovascular risks for Celebrex." But, in December 2004, when a colon cancer prevention study done by the company indicated that Celebrex was in fact, associated with heart attacks and strokes, Pfizer claimed that the results were unexpected.

It is interesting to note that the 1999 Alzheimer's clinical trial was never published and not submitted to the Food and Drug Administration until June 2001, months after the FDA conducted a major review of the safety of Vioxx and Celebrex. Two doctors who participated in that review said they had not known about the 1999 study until the end of January 2005. One of them, Dr. Kenneth Brandt, a professor of medicine at Indiana School of Medicine, said that if the safety panel had known about the study, it might have recommended that both the Vioxx and Celebrex be taken with greater caution. The panel decided to recommend that Vioxx, but not Celebrex, carry a warning about its cardiovascular risks. That difference is one of the main reasons Celebrex enjoyed greater sales than Vioxx.

Dr. Sidney Wolfe of Public Citizen stated recently that the 1999 clinical trial is further evidence that Celebrex is dangerous. Dr. Wolfe publicized the 1999 clinical trial in January of this year after finding the study in a new website where Pfizer and other drug companies have begun to post some clinical trial results. Dr. Wolfe said that the results from the 1999 study had not been on the site a few weeks earlier. He stated: "It's a clear signal that I would have loved to have known about four years ago." Public Citizen, as you know, has asked the FDA to ban Celebrex.

Proposed Settlement In Serzone MDL

The United States District Court for the Southern District of West Virginia has entered an order conditionally approving a temporary settlement class and settlement in the Serzone litigation. Pursuant to the court's order, the proposed settlement agreement establishes four settlement funds totaling $70 million. Fund A will initially contain $30 million and will be used to satisfy the claims of the most seriously injured Settlement Class Members. Fund B will contain $30 million and will be used to satisfy claims of those individuals less seriously injured. Funds C and D will have $5 million each: Fund C will satisfy claims of individuals with no serious injuries and Fund D will satisfy claims of individuals not making claims under Funds A, B, or C. A Schedule of Payments, attached as an exhibit to the settlement agreement, will be used to categorize different levels of injuries and place values on individual claims.

Potential members of the class action settlement have already received or will be receiving a notice from the court advising them of the terms of the class action settlement. Individuals who do not wish to participate in the class action settlement must sign a written request to be excluded from the settlement by April 8, 2005. Individuals who wish to participate must submit an Inventory Form by May 13, 2005, with all supporting documentation to be submitted within 90 days thereafter. We have real concerns about the proposed settlement. After reviewing the settlement agreement and the schedule of payments, we are convinced that certain claims are severely undervalued. Factors used to assign values are subject to interpretation, with certain factors or conditions summarily excluded, which gives rise to our concern. The amount of time allowed for Bristol-Myers Squibb to review and make final payment on claims, assuming an appeal is not required, is another concern. Until we receive assurances from Bristol-Myers Squibb regarding all of our concerns, we cannot recommend to any of the folks who have contacted us that they participate in the proposed settlement.

X. BUSINESS LITIGATION

American Honda Finance Corporation And Banks Settle Discrimination Lawsuits

In late January 2005, American Honda Finance Corporation, the lender for Honda Motor Company, and three banks, Bank One, Bank of America Corp. and U.S. Bancorp, settled class action lawsuits brought by African American and Latino customers for racial bias in the companies' automobile lending policies. According to the lawsuits, American Honda and the banks charged African Americans a finance charge markup, an increase in the interest rate of the loan, which was

greater than the finance charge markup charged to non-minority customers. Although interest rates typically vary depending upon creditworthiness, the troubling factor in this case was that African Americans with credit scores similar to non-minorities were charged higher markups than their non-minority counterparts, without explanation. The markups in some cases amounted to $500 or $1,000 more than the amount non-minorities pay on a single loan.

Markups are excess costs added to a consumer's auto loan in order to generate a greater profit. Generally, when a consumer applies for in-house financing for an automobile, the dealer submits the consumer's credit application to the lender. Lenders affiliated with the automakers then approve an interest rate for the car loan based on the person's income and credit history. Some lenders also allow dealers to add percentage points to that rate without informing the consumer. The amount of the finance charge markup is often shared by the dealer and lender. Because consumers are unaware of the markup, this practice can be deceptive and discriminatory.

Three studies by Professor Mark Cohen at Vanderbilt University suggest that race is a key factor in auto-loan markups. In a January 2004 report on the racial impact of Ford Motor Credit Company's ("FMCC") finance charge markup policy, Professor Cohen found that 48.5% of African Americans who financed their cars through FMCC were charged a markup, compared to only 30.9% of non-minority borrowers. According to the study, African-American borrowers who receive a subjective markup are charged on average $1,412, compared to only $1,090 for non-minorities. Professor Cohen found similar results in studies of General Motors Acceptance Corporation and Nissan Motor American Corporation customers.

Although some states have predatory lending laws that cap interest rates with markups, these laws provide little protection against the arbitrary nature of the markups. Thus, many consumers have sought judicial intervention in order to put an end to these discriminatory practices. Under its settlement agreement, American Honda Finance Corporation, Bank One, Bank of America, and U.S. Bancorp agreed to cap markups at 2.5% on loans up to 60 months, 2% on loans between 61 and 71 months and 1.75% on loans of 72 months or more. The financing companies will also offer car loans without any markups to up to 2.4 million minority consumers. Bank One agreed to offer 875,000 preapproved loans without markups to African Americans and other minorities, Bank of America will offer 600,000 such loans, and U.S. Bancorp will offer 300,000. American Honda agreed to offer 625,000 preapproved loans without markups to minorities. Additionally, the settlement agreement would require Honda to institute a broad refinancing program, reducing rates charged to current African-American and Latino customers whose loans were marked up by 1% or more. Although the parties have agreed to the settlement, the terms of the agreement must be approved by the court before it becomes final.

Supreme Court Leaves Managed Care Class Action Intact

Lawsuits that question the way HMOs pay physicians will go forward as a class action that includes more than 900,000 working and retired doctors nationwide. As reported, the question was resolved for good in January of this year when the U.S. Supreme Court said it wouldn't hear an appeal of a lower court ruling upholding the massive litigation's class action status. This denial of further review clearly is a great turn of events for the physicians and medical associations that filed the lawsuits. The HMOs now must either try these cases or settle them. Health Net, Humana, PacifiCare Health Systems, Prudential Insurance Co. of America, UnitedHealthcare, and WellPoint Health Networks remain defendants in the lawsuits. Aetna and CIGNA have already settled the lawsuits they faced. The trial is scheduled for September 6th in U.S. District Court in the Southern District of Florida. The doctors allege, among other things, that the HMOs conspired to systematically underpay physicians by doing things such as using computer programs to automatically downcode or bundle claims.

Some Good News For Investors

A recently proposed change in investor-arbitration rules could allow courts to get more involved in investor disputes. The National Association of Security Dealers has proposed a new rule that would force arbitrators to provide written decisions if asked. As it currently stands, the arbitrators do not have to issue a written report, and they rarely do. This leaves many investors confused and in the dark as to why they lost their case, or did not receive the amount that they requested.

If this rule is adopted, it will make it easier for federal courts to see what arbitrators have actually done in cases that are appealed to them. I do not think there is any question that having a written decision will make it easier for those investors who do not succeed before an arbitration panel to take their claim to a federal court. I think this will help investors, as they essentially have no choice in whether to arbitrate their case or go to court. Most brokerage contracts require that complaints be handled by arbitration.

Source: *Wall Street Journal*

Riggs Bank Sues PNC For Cutting Bid And Then Completes Deal

Riggs National Corp., the parent of Riggs Bank, filed a civil suit against PNC Financial Services Group Inc., and three days later made a pretty good deal with the very defendant it had sued. The lawsuit came after PNC cut its takeover offer to Riggs by 20%, citing legal uncertainties surrounding Riggs' recent guilty plea over a law aimed at stopping money laundering. Pittsburgh, Pennsylvania-based PNC had agreed in July to pay $24.25 a share (a total of about $779 million in cash and stock) for Riggs, an old-line Washington institution that had a near-monopoly on business with the capital's diplomatic community. Riggs National said its board had unanimously rejected a reduced offer of $19.32 per share from PNC. Riggs pleaded guilty on January 27th to failing to report suspicious transactions in the accounts of foreigners, including former Chilean dictator Augusto Pinochet. The bank agreed to pay a $16 million fine—the largest criminal penalty ever imposed on a bank of Riggs's size, according to federal prosecutors. This was in addition to a record $25 million civil fine levied on the bank by a Treasury Department agency last May.

In the lawsuit, Riggs claimed damages for financial injury to its reputation in the business world. The parent of Riggs Bank said it had sued PNC because Riggs "had been damaged by PNC's decision not to proceed with the merger after Riggs had devoted the last six months preparing for the merger and taking various actions at PNC's insistence." One thing that Riggs said it was seeking was an order that would compel PNC to proceed with the merger under the original terms agreed upon last summer. It is most interesting that just three days after it sued PNC, Riggs agreed to a $645 million buyout. Not surprisingly, Riggs then agreed to drop its lawsuits. It does seem like maybe the courts were being used by Riggs in this deal. Maybe this is one of the **frivolous** lawsuits the President has been telling folks about.

Source: *Associated Press*

Dealers File Antitrust Suits Against DaimlerChrysler Unit

A pair of class action antitrust suits were filed against Detroit Diesel Corp., a leading manufacturer of truck engines, in U.S. District Court in Philadelphia, Pennsylvania. The actions were brought by truck dealers who claim the company orchestrated an illegal group boycott and price-fixing scheme after it became a subsidiary of DaimlerChrysler. The suits were filed on behalf of classes that consist of hundreds of International and Volvo truck dealers. In addition to Detroit Diesel, the suits name 17 of its distributors as defendants. According to the complaints, Detroit Diesel and its independent distributors engaged in a group boycott of truck dealers not affiliated with DaimlerChrysler by terminating those dealers' rights to perform major warranty repairs on Detroit Diesel engines in trucks that they had sold. At the same time, the suits allege, Detroit Diesel and its distributors also agreed to an across-the-board increase on the prices the terminated dealers paid for Detroit Diesel parts.

Source: *The Legal Intelligencer*

Executive Life Settlement

Policyholders of Executive Life have reached a settlement with French bank Credit Lyonnais (CL) and the Consortium de Réalisation (CDR), a government sponsored group, which took over CL's debts in 1995. The settlement calls for a $525 million payment to conclude the civil suit. The agreement brings to a close a protracted lawsuit that has put further strains on already fragile Franco-American relations. The case began following the takeover of Executive Life, once the largest life insurance company in California, in 1991. As part of the rehabilitation of Executive Life, both its insurance business and its junk bond portfolio were put up for sale. CL, through its investment banking subsidiary Altus, reportedly orchestrated a scheme in which it obtained Executive Life's bond portfolio, and used secret "parking" agreements—referred to in French as portage agreements—to illegally gain control of Aurora National Life Assurance Company, a newly formed California life insurance company that acquired the restructured Executive Life's insurance business.

The transaction ultimately wound up in the criminal courts as criminal charges were brought against the companies and individuals involved. At the time of the deal, the federal Glass-Steagall Act was still in force, which prohibited banks from owning or controlling insurance companies. CL and the others were also charged with violating a California law that barred foreign governments from controlling insurance companies. It should be noted that CL was effectively owned by the French government at the time. The criminal charges were settled in December 2003, with the agreement that CL, the CDR, and other defendants, along with Artemis S.A., a holding company controlled by French businessman Francois Pinault, would pay a total of $771 million in fines, penalties, and victim compensation.

But, there was no settlement of the civil cases at that time. The agreed on settlement of those cases has to receive the approval of the court. The case was due to start with jury selection on February 16th. The original claims totaled $3.7 billion dollars. In addition, the

plaintiffs sought punitive damages based on the alleged misconduct. The CID had reached an $80 million settlement with another Aurora Life Company. Pinault and his holding company, Artemis S.A., are now the only major defendants who have failed to settle the matter.

Source: *The Insurance Journal*

Lawsuit Over Software Secrets

A Birmingham, Alabama, jury has awarded a software company $27.5 million after finding that an Arizona competitor and one of its employees stole trade secrets. Group 8760 LLC, located in Homewood, Alabama, sued Systrends Inc. of Tempe, Arizona. Group 8760 claimed Systrends hired Group 8760's fired co-founder, who helped his new employer recreate the Alabama company's software for utility firms. Systrends hired Richard Brooks two weeks after he left Group 8760. The plaintiffs contended at trial that Brooks violated his Group 8760 employment contract, which called for him to wait a year before going to work for a competitor and not to share trade secrets. The jury concluded that Brooks helped his new company take business away from Group 8760, which suffered millions of dollars in damages.

Group 8760, founded in 1996 by Brooks and two other men, according to trial evidence, would be worth $10 million today had it not been for Brooks' breach of his agreement. The company is now worth only $1 million. The verdict requires Systrends to pay $19.5 million, including $12.6 million in punitive damages. Brooks will have to pay over $7 million, including $5.4 million in punitive damages. Jurors saw internal Systrends documents that showed Brooks and Systrends conspired to steal trade secrets from the Alabama company.

Title Insurance Company Reaches Settlement

First American Title Insurance Co., a title insurance company, has agreed to refund about $24 million to consumers nationwide after state insurance investigators claimed the company gave kickbacks to homebuilders, lenders, and real estate agents. The company agreed to give back the money to consumers across the country. The kickbacks cost consumers millions of dollars and involved other major title insurers in a complex financial scheme that began in 1997, according to information supplied to the Associated Press by Colorado Governor Bill Owens. The arrangement kept the cost of title insurance artificially high and may have violated state and federal laws, according to Governor Owens. The parent company of First American Title is First American Corp. of Santa Ana, California. Governor Owens says that, in return for the alleged kickbacks, homebuilders, lenders, and real estate agents referred title insurance business to a specific company.

It was reported that an average homebuyer would pay about $1,000 for title insurance. Of that, $325 would be funneled back to the homebuilders, lenders, and real estate agents in the form of premiums paid to title insurance companies established by those businesses. Most states have laws that bar title insurance companies from paying for business referrals in most states. I don't believe that Alabama law specifically addresses the issue. We contacted the State Department of Insurance and they were not aware of any law or regulation covering that issue. We will check further to see if anything was missed. The State of Colorado contended these are illegal kickbacks because there is no necessity for these arrangements. First American Title and other subsidiaries provide title insurance or title abstracts in every state and the District of Columbia, as well as services in Australia, the Bahamas, Canada, Guam, Hong Kong, Ireland, Mexico, New Zealand, Puerto Rico, South Korea, the United Kingdom, the U.S. Virgin Islands, and other nations.

Source: *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

Illusory Insurance Trusts

Insurance trust agreements are widespread in the insurance industry. But, our firm, along with Tim Ryles, Ph.D., an ex-insurance commissioner for the state of Georgia, recently uncovered a deceptive marketing scheme used by the world's largest disability insurer to sell disability insurance to thousands of schoolteachers around the state of Alabama. The scheme involved the use of an insurance trust agreement with an out-of-state bank acting as trustee for the schoolteachers as beneficiaries. But, the out-of-state bank's only expressed duty under the trust agreement was to "hold" the master policy that was issued to the trust. The insurer retained all administrative and discretionary duties under the agreement. The insurer in reality issued the master policy to itself, which gave it the ability to change the terms of the teachers' coverage at will. And that is exactly what happened. While the trust was in existence and the teachers were paying their premiums, the insurer changed the terms of the coverage numerous times without notifying the teachers. This illusory trust agreement also allowed the insurer to avoid Alabama insurance regulations that are in place to protect the citizens of Alabama. I hope the Alabama Insurance Department will begin to look more closely at these types of arrangements.

Alabama Caps Mold Damage Claims

The Alabama Insurance Commissioner has agreed to place a $10,000 cap on mold damage claims on homeowner's insurance policies. The Alabama cap amount is below the average mold claim of $17,000 in Texas, where a much smaller cap had been requested. I understand that the Alabama Insurance Service Office, Inc., a rating organization that represents several hundred insurance companies, requested the cap on mold damage claims, which harms most those who suffer the greatest damage and otherwise expected their insurance to cover their losses. *Alabama Business Review* also reported that other companies, including State Farm, are seeking state permission to change the language on mold coverage. So far Wisconsin and Alabama are the only states to have put limits on mold claims. The Texas Department of Insurance considered a $5,000 cap and instead approved a plan to offer varying levels of coverage. Many homeowners are now facing sharply higher rates for the same levels of coverage they had last year. It has been reported that there has been an increase in mold illness symptoms associated with flooding in the southern part of Alabama. Portions of our state were declared disaster areas by the president on 35 occasions from 1969 to 1997. The entire state was declared a disaster area on two occasions.

In our adjoining state of Florida, mold was also a hot topic at a public forum held last month in Pensacola, which is located in the Panhandle section of the state. The Florida Department of Insurance sponsored the forum to obtain public input concerning mold coverage. Insurance companies in Florida have reported a spike in mold claims the last couple of years. Such claims easily can reach tens of thousands of dollars and sometimes the full value of a home, according to the Pensacola *News Journal*. Fearing a rash of lawsuits, Florida insurance companies are looking for protection, the newspaper reported. More than 400 companies have asked the Florida Department of Insurance to limit, and in some cases even eliminate, their responsibility to cover mold claims. The Department is expected to make a decision on the issue by the end of October. Currently, homeowners' policies in Florida cover mold damage if it's caused by an accident or an act that is covered in a specific policy. Several Florida insurance companies are asking the state to allow them to offer the mold coverage as an add-on option to a standard policy.

Source: *The Insurance Journal*

Florida Companies Fined

The Florida Insurance Commission has issued fines against 91 insurance companies that reportedly didn't file affidavits in a timely fashion showing compliance with state law requiring them to quickly settle hurricane claims. Under Florida law, Florida property insurance companies are required to prove they have evaluated property damage, made a reasonable effort to settle claims, gotten negotiations going in dispute situations, and advanced living expenses to customers forced from their homes. The claim deadline was November 22nd for Hurricanes Charley and Frances and Tropical Storm Bonnie. It was December 8th for Hurricanes Ivan and Jeanne. Companies that received claims from any of the storms after those deadlines were supposed to file affidavits with the information by January 3rd. "These companies were given an appropriate time period to submit the required affidavits based on these devastating hurricanes and failed to do so," according to Florida Insurance Commissioner Kevin McCarty. The fines are generally $2,500 for each day the affidavit has not been received. An insurance industry group said that it believes most companies have complied and those that haven't had a good excuse. They claim that reporting requirements were "confusing and unclear."

Source: *The Insurance Journal*

Three Plead Guilty In Insurance Probe

A former senior executive at Marsh & McLennan and two employees at American International Group (AIG) have pleaded guilty in the state's probe of bid-rigging and price-fixing in the insurance industry. The highest-ranking executive pleading guilty was Joshua Bewlay, a former senior vice-president at Marsh who worked in the broker's excess casualty group in New York. He admitted guilt to one felony count of scheming to defraud and faces up to four years in prison. John Mohs, a former manager at AIG's American Home Assurance unit, also entered a guilty plea to the same charge. Carlos Coello, an AIG underwriter, pleaded guilty to a misdemeanor, second degree scheming to defraud. Mohs had reported to former AIG executives Karen Radke and Jean-Baptist Tateossian, who last October were the first to plead guilty to fraud charges arising from the Spitzer probe. To date, nine executives from AIG, Marsh, ACE, and Zurich Financial Services have pleaded guilty to charges filed by the New York Attorney General.

Source: *USA Today*

These Insurance Companies Like The Courts

Five insurance companies will recover 2.3 million euros ($3 million) and Air France will collect 850,000 euros ($1.1 million) from the French government. This is the result of a court ruling in Marseille, France stemming from the near crash of an Airbus A320

in 1998. A report from Agence France Presse (AFP) described the incident as involving a "dead hedgehog" and a "flock of hungry seagulls," attracted by the dead animal. Unfortunately, the "feast" took place at the end of the runway of the Marseille airport, which incidentally was also being used by the A320. The pilot had to abort his takeoff at the last minute when a number of the seagulls were sucked into the plane's right engine, destroying it. The insurers had already paid the claims involved, but the court ruled that the French government, which runs the country's airports, was responsible for keeping the runways clear. The court felt that the officials in charge should have noticed "such a large group of birds" in the path of the jet.

Source: *The Insurance Journal*

Insurance companies Should Pay Valid Claims

Citizens Property Insurance Co. is refusing to pay property losses, even after losing a south Florida appeals court decision that came about from a major storm. Hurricane Irene brought both wind and water when it totally destroyed the Fort Lauderdale house of Zennon Mierzwa in 1999. Though Mierzwa's home was insured for $281,000 with the Florida Windstorm Underwriting Association, the state agency offered to pay only $68,000, in part because Mierzwa also was collecting $54,000 from his flood policy. A south Florida appeals court ruled in favor of Mierzwa and ordered the FWUA, now a part of Citizens, to pay the policy limit. Despite the ruling, which came down last summer, Citizens is refusing to pay policy limits to 2004 hurricane victims caught in similar multi-peril situations. The insurer contends that it shouldn't have to pay for any share of damage caused by something excluded in its policy—flood. Citizens, which is the State of Florida's insurer of last resort, has refused to pay anything to their policyholders thus far. The company contends that the damage to the houses was caused entirely by water and not by wind. Policyholders are asking how a house on a barrier island can get no wind damage during a hurricane. Wind perils are clearly covered by hurricane policies. Storm surge is the domain of federal flood insurance. In order to rebuild, after a storm loss, owners need to collect their policy limits.

A good number of lawsuits have been filed. More than a dozen cases were filed against Citizens in Escambia and Santa Rosa Counties recently. There were also lawsuits filed against other insurers. Allstate Floridian, USAA, Florida Select, Vanguard, Universal Property and Casualty, and Southern Family Insurance are some of the companies that have been sued. The obvious question is "When a house is destroyed, how are you going to determine how much was caused by wind and how much by flood?" It is estimated that some 15,000 policyholders could have claims against Citizens. Many of these policyholders will have substantial losses. According to reports, Citizens has told Florida officials more than 2,400 claims from Hurricane Ivan remain open. Citizens takes the position that some of these claimants won't be paid because they ostensibly had no wind damage.

A Florida legislative committee has recommended "clarifying" state law to require insurers to pay only a portion of policy limits, based on the perils covered. Insurance settlement delays, coupled with contractor shortages, can confound the recovery of an entire community. A Florida state legislator has asked for an audit of Citizens. We know from experience that many insurance companies were extremely hard to deal with in both Florida and Alabama on the recent storm damage claims. We have had to file suits against a number of the insurers.

Source: *The Insurance Journal*

Britney Spears Sues Eight Insurance Companies

Britney Spears has sued eight insurance companies for damages. I wouldn't have thought the well-known recording artist would have had time to file a lawsuit given all of her "activities." These companies refused to pay the $9.8 million claim the popular singer filed after she injured her knee during a video shoot and had to cancel her 2004 summer tour. Spears and her company, Britney Touring Inc., paid the firms more than $1.3 million in premiums to insure her tour through the United States, Canada and Europe. On June 8th, while the policies were in effect, Spears hurt her left knee while performing dance steps for a video of one of her songs in New York. She required surgery, according to the complaint, and subsequently canceled the rest of the 2004 tour. Seven British insurance companies that refused to pay the recording artist said the recording artist failed to tell them about a pre-existing left knee injury and surgery she underwent less than five years earlier. Thus far, the eighth company, a French firm, hasn't responded to the claim.

According to Ms. Spears, she had "minor orthopedic surgery" on her left knee in March 1999, four years and 11 months before she took out the insurance policies. She contends in her complaint that this surgery should not have affected the insurers' decision in the 2004 injury. It appears that not only the middle and low-income policyholders have problems getting some insurance companies to pay claims. An interesting side note on this case is that the policyholder probably has more money than the insurance companies.

XII. PREMISES LIABILITY UPDATE

Dillard's To Pay $15 Million To Girl Hurt By Escalator

Dillard's department stores has agreed to pay $15 million to a little girl who lost three fingers when her hand got jammed in an escalator as she tried to free her stuck shoe. The child and her family settled their lawsuit against Dillard's Inc. just hours after a Florida circuit court jury ordered the company to pay $9.4 million for medical expenses, pain and suffering. The jury was about to begin hearing evidence in the punitive damages portion of the trial when the settlement was reached. The jury was told during the trial that Dillard's managers knew the escalator was dangerous and had set up a sham company to make it appear to state regulators that the escalators were being maintained when they were not. Based on the law and evidence presented, it is very probable that the jury would have awarded punitive damages in the case. Dillard had set out to circumvent the safety laws that apply to escalators. The jury's award will deter this kind of behavior in the future, and the settlement will assure the family of receiving the funds now.

The little girl was 5 when she lost the fingers during a shopping trip with her mother and two siblings. Dillard's lawyers acknowledged some fault for the escalator, which had a history of trapping shopper's shoes, but contend the accident happened because the girl's mother was not supervising her properly. The jury assigned 15% of the blame to the girl's mother and the remaining fault to the Little Rock, Arkansas-based retailer.

Jurors were told how Dillard's had known the escalator was dangerous, but had spun a tale of corporate deceit to avoid state regulators or fixing the faulty machine. The jury was also told Dillard's had used unlicensed workers to save money on escalator repairs, set up a fake service company to avoid state inspections, failed to report dozens of accidents to state regulators, and had ample evidence that someone eventually would get seriously hurt on its escalator. More than 80 people had gotten shoes or clothing caught in the down escalator at the store involved in the case since 1998. More than a dozen people had entire shoes ripped from their feet and ingested by the machine. It is significant that Dillard's could have replaced the escalator for about $60,000, but it would have meant closing the escalator for up to 12 weeks and possibly shutting down the store. Instead of replacing the escalator or hiring an expert company to maintain it, Dillard's attempted to train employees to do escalator maintenance so it could save the extra $30,000 it would have cost to hire an outside firm. Dillard's then attempted to get around a state requirement for yearly inspections by creating a company called Dillard's Elevator and Escalator Co., which suggested Dillard's had an independent company inspecting its equipment. Interestingly, the escalator company had no employees. Dillard's has 328 stores in 29 states with annual revenues exceeding $7.8 billion. This case was a prime example of putting profits over safety.

Alleged Hazing At Lyman Ward Gives Rise To Lawsuits

There have been several lawsuits filed against Lyman Ward Military Academy that are certainly worth mentioning. The lawsuits filed by parents allege that cadets—some as young as 10 years old—have been subjected to physical, mental or verbal abuse by older classmates and adults during hazing at the school. At least eight suits have been filed in state court in Tallapoosa County against the academy, an all-male boarding school for grades 6-12, located in Camp Hill, which is a small town in southeast Alabama. The alleged incidents are said to have occurred in 2002. It is alleged that the adults either condoned the abuse or failed to stop it. The Academy's lawyer says that the suits are unfounded and that any abuse that might have occurred would have simply been "the typical schoolyard brawls involving boys of that age." The plaintiffs in the cases are being represented by Tripp Walton, an Auburn lawyer, and the Academy's lawyer is Tom Radney from Alexander City. Each of these men is a good lawyer and each happens to be a good friend of mine. This should be a most interesting case to watch as it progresses through the system.

Source: *The Opelika-Auburn News*

XIII. WORKPLACE HAZARDS

Welders Show Elevated Rate Of Parkinson Symptoms

A new study tells us that welders may have a higher-than-average rate of Parkinson's disease symptoms. Researchers found that among more than 1,400 welders from Alabama, the prevalence of Parkinson-like symptoms, including tremor, muscle rigidity, and slowed movement, was 7 to 10 times higher than the norm for the general population. The findings, based on a group of mostly male welders between the ages of 40 and 69 years, are published in the journal Neurology.

In an earlier study of 15 career welders, the same investigators found that the men started suffering Parkinson's symptoms at an atypically early

age—at age 46 on average, versus age 63 in a comparison group of non-welders. It was suspected at that time by the researchers that an as-yet-unknown toxin in welding fumes might speed the onset of Parkinson's disease in people who would likely have developed the disease at an older age. That study was published in 2001.

Parkinson's disease is a progressive neurological condition typically marked by four types of symptoms: tremors, muscle rigidity, slowed movement, and problems with balance and coordination. The disease occurs when certain brain cells that produce the movement-regulating chemical dopamine are damaged or destroyed. No one is absolutely certain what triggers this brain damage, but scientists believe that a number of factors, genetic and environmental, play a role. On-the-job exposures to certain chemicals, including pesticides and herbicides, have been linked to Parkinson's disease, and overexposure to the mineral manganese can lead to Parkinson's-like symptoms. The welding process creates fumes that contain manganese. There are many potential toxins in welding fumes, although manganese is the one best recognized as being damaging to nerve cells. Our firm is currently handling a tremendous number of cases involving welders who suffer from advanced Parkinson's disease.

Source: *Reuters News*

OSHA Slow To Act On Beryllium Exposure

It is shocking that for years the Occupational Safety and Health Administration failed to test its inspectors for exposure to beryllium fumes or dust. Inspectors were at risk for contracting chronic beryllium disease, which can be fatal. The agency didn't begin testing until last year. It has been reported that at least three OSHA inspectors tested positive for blood abnormalities that indicate they could be susceptible to the disease. Beryllium, an extremely lightweight metal that is a carcinogen, is used in making microprocessors, golf clubs, and dental alloys, and in the military and nuclear industry. Inhaling even minute amounts of beryllium dust or fumes can be dangerous, although not everyone exposed gets sick. Studies cited by OSHA show that an average of 2% to a high of 15% of workers who manufacture beryllium products get the disease.

The permissible exposure level for beryllium is 2 micrograms per cubic meter of air for an eight-hour period. That limit was set in 1971 and was based on a 1949 standard set by the Atomic Energy Commission. OSHA began work on setting a new standard in 1975, but it was never completed. Peter Lurie, a physician and the deputy director of Public Citizen's Health Research Group stated: "The agency is in some kind of grand denial of the problem that extends to its own workers. Because they have not protected workers, they have put their own employees at risk." In 1999, the Department of Energy cut the standard for beryllium exposure for workers at its plants to 0.2 micrograms per cubic meter of air, and started a prevention and testing program for current and former workers. Medical and scientific staff members at OSHA tried to persuade their agency to do the same. At the time, Adam M. Finkel was a director of health standards for the entire agency. He later became a regional administrator in Denver. Clearly Finkel was a top man at OSHA and was in a position to know what was going on.

Finkel, who became a whistleblower in 2002, based his concerns on data that showed possible exposure levels for up to 500 inspectors. Workers who show a sensitivity to the metal should not be further exposed, Finkel said. OSHA has a database of workplaces with high levels of beryllium and which inspector did the testing. The agency says that its records show that since 1984, it has conducted 4,000 inspections where beryllium was present and collected 13,000 samples. Of those, 147 samples, or 1.1%, were above the agency's safe exposure limit. The beryllium industry and some of its users maintain that working with the substance is safe when proper precautions are taken. Brush Wellman Inc., a large producer, has supported extensive research on the effects of beryllium. That company contends that there is no definitive link to cancer or that beryllium should be listed as a carcinogen. Wellman also thinks that inspectors don't need a special testing program and that the test being used is inappropriate for screening.

Instead of tightening the beryllium standard, OSHA has issued periodic hazard information bulletins saying the standard may not be adequate. Public Citizen and a labor union petitioned the agency in 2001, asking that the federal standard be lowered to 0.2 micrograms per cubic meter of air and that surveillance of workers be required. In late 2002, OSHA issued a "request for information," which is a preliminary step to rulemaking. OSHA does not yet have a proposal, but is querying the small-business community on the likely effects of changing the standard. The Bush Administration took up the issue of testing inspectors in April 2002. It is reported that OSHA's administrator at the time, John L. Henshaw, pronounced in a meeting that retired inspectors would not be tested and that any testing in the future might be part of regular physical exams. Defying orders to keep those discussions confidential, Finkel reported the agency's decision to the media. Almost immediately, Henshaw told Finkel he was being transferred to Washington to work on the agenda for an upcoming health and safety

meeting.

That prompted Finkel to file whistleblower complaints. Pressure on OSHA increased when Finkel took his case public in October 2003, accusing the agency of failing to disclose "a substantial danger to public health" and claiming his bosses were retaliating against him. OSHA Deputy Assistant Secretary R. Davis Layne sent a memo to employees saying that Finkel's allegations were "completely false" and the agency was expanding medical monitoring procedures for beryllium. The testing began in April. Finkel settled with OSHA in late 2003 and remains on the government payroll through this year while he teaches at Princeton University.

Source: Public Citizen

XIV. TRANSPORTATION

Cell Phone Use Ups Accident Risk

A new study shows that talking on a cell phone makes you drive like a retiree—even if you're only a teen. A report from the University of Utah says when motorists between 18 and 25 talk on cell phones, they drive like elderly people—moving and reacting more slowly and increasing their risk of accidents. David Strayer, a University of Utah psychology professor and principal author of the study, told the Associated Press: "If you put a 20-year-old driver behind the wheel with a cell phone, his reaction times are the same as a 70-year-old driver. It's like instant aging." Apparently, according to the study, it doesn't matter whether the phone is hand-held or hands-free. Any activity requiring a driver to "actively be part of a conversation" likely will impair driving abilities.

It is said that motorists who talk on cell phones are more impaired than drunken drivers with blood-alcohol levels exceeding 0.08. Strayer and colleague Frank Drews, an assistant psychology professor, found this to be true during research conducted in 2003. The results of the study appear in this winter's issue of Human Factors, the quarterly journal of the Human Factors and Ergonomics Society. When 18- to-25-year-olds were placed in a driving simulator and talked on a cellular phone, they reacted to brake lights from a car in front of them as slowly as 65- to 74-year-olds who were not using a cell phone. In the simulator, each participant drove four 10-mile freeway trips lasting about 10 minutes each, talking on a cell phone with a research assistant during half the trip and driving without talking the other half. Only hands-free phones—considered safer—were used.

The study found that drivers who talked on cell phones were 18% slower in braking and took 17% longer to regain the speed they lost when they braked. The numbers, which come down to milliseconds, might not seem like much, but it could be the difference to stopping in time to avoid hitting a child in the street, Strayer said. The new research questions the effectiveness of cell phone usage laws in states such as New York and New Jersey, which only ban the use of hand-held cell phones while driving. It's not so much the handling of a phone, Strayer said, but the fact that having a conversation is a mental process that can drain concentration. The only silver lining to the new research is that elderly drivers using a cell phone aren't any more of a hazard to themselves and others than young drivers. The study found that more experience and a tendency to take fewer risks on the part of older drivers helped negate any additional danger.

Source: *Associated Press*

New Hampshire Jury Awards $2.6 Million In Car Crash Suit

A New Hampshire jury has awarded nearly $2.6 million to the family of a man killed in a 1999 car crash. The jury found that the firm that redesigned the intersection where it happened was partly at fault. The decedent was killed when his pickup truck collided with a car driven by a 71-year-old woman who pulled into the intersection after getting frustrated by a traffic light that got stuck on red for at least five minutes. The jury agreed with the decedent's family that CLD Engineering Associates, which redesigned the intersection, was partly at fault. The jury placed 49% of the blame on the engineering company, 49% of the blame on the other driver and 2% on the state Department of Transportation.

An appeal is expected by the company. Their lawyers claim the crash was caused by the other driver, who ran a light and crossed five lanes of traffic before colliding with the pickup. The suit claimed that CLD's "defective" traffic control system caused a red light to become stuck in that position, leading the female driver to get frustrated and pull into the intersection as the decedent was approaching. CLD denied being at fault, saying its redesign is based on the directions of the Department of Transportation. It will be interesting to see what happens to this verdict on appeal.

New York Settles Guard Rail Lawsuit

The New York State Thruway Authority has agreed to pay over $5 million to a student who was paralyzed in a 1999 car crash that killed another student. The settlement, which came during a November trial in the state Court of Claims, has since been approved by the Thruway Authority board of directors. Under the settlement, the state will pay $5.15 million to

the student. The state also reached a $150,000 settlement with the family of the other student, who was killed in the crash. A guardrail installed along the Thruway was said to be defective, thereby contributing to the accident. That guardrail has since been replaced with another guardrail of a different design. The two students, both 18, were among five Rochester Institute of Technology soccer players who were returning from a concert in Toronto when their car skidded off the road during a rainstorm. Proper design of a guardrail is very important. Many of the ones in use today are not properly designed and are considered defective.

XV. ARBITRATION UPDATE

The Battles Are Still Being Fought

I wish that I could report that the battle against mandatory, binding arbitration was being won by consumers. But, that simply isn't the case. Until the courts—and ultimately Congress—say this anti-consumer weapon has no place in consumer disputes—unless both parties agree to it after a dispute arises, as Congress originally intended—the problem for consumers will continue. We are continuing our fight in this arena and don't have any intention of letting up. Fortunately, there are consumer groups involved in the fight. We will mention more on that below. Arbitration favors the powerful and is bad for consumers and that's a simple fact. There is no way that forcing arbitration on ordinary citizens can be justified.

Nationwide Effort to Stop Binding Mandatory Arbitration

More than two dozen public interest organizations have launched a nationwide effort to stop the corporate use of binding mandatory arbitration clauses in consumer transactions. Millions of U.S. consumers unwittingly waive their right to access the courts on a daily basis and many don't even realize. At a press conference held last month, the groups released a 10-point platform for action, which includes the unveiling of two educational websites, a call for state and federal legislation, and a campaign to encourage consumers to avoid doing business with companies that use BMA clauses. There is probably not a single adult in the United States who is not subject to at least one binding mandatory arbitration clause—and most are subject to many. Buried in the fine print of credit card billing inserts, health insurance plans, employee handbooks and even standard purchase contracts, the clauses require consumers to waive their right to go to court if a dispute arises with the company involved in the transaction. Cases are funneled to a costly private legal system that favors companies and operates outside the law; arbitrators are not bound to use legal precedent or even good sense in making their rulings, and an arbitrator's rulings can't be appealed.

Joan Claybrook, president of Public Citizen, said at the news conference:

We are starting a campaign to stop the use of binding mandatory arbitration clauses, which Big Business is now forcing on unknowing consumers in billions of pre-printed, take-it-or-leave-it contracts as part of its larger push to avoid oversight and accountability for fraud and deception. It is galling that corporations are systematically denying individuals their right to go to court.

Paul Bland, staff attorney with Trial Lawyers for Public Justice added these comments:

At Trial Lawyers for Public Justice, we have been repeatedly asked for help by consumers and employees who had strong legal claims, but were being forced into arbitration systems badly tilted in favor of corporate defendants. These persons find it hard to believe that something so unfair could happen to them in America, but it happens to people every day. Under our current system, the fine print of BMA provisions in corporate contracts can and does hurt people who have been ripped off by corporate wrongdoing.

Tom Greene, a resident of Enterprise, Alabama, is a former poultry farmer and a Vietnam veteran. Tom was on hand for the announcement and shared his story. In 1990, Tom built a poultry farm in which he invested heavily. When the poultry processor attempted to force binding mandatory arbitration on him, Tom refused to sign it. He was forced out of business and suffered substantial losses. Tom described these events at the press conference, noting:

Arbitration violates the fundamental liberties our Constitution extends to us as free citizens in this great republic. … As a soldier, a war veteran who has drawn blood in defense of those principles, I could not sign that contract.

The groups' 10-point platform aims to highlight the widespread use of arbitration and provide tools to empower consumers to fight the anti-consumer clauses. In it, the groups pledge to:

- Launch two new Web sites to educate consumers about BMA clauses. The first, www.givemebackmyrights.org, explains what BMAs are, where they are found and what they mean to consumers. The

second, www.callbeforeyoubuy.com, helps consumers purchase vehicles without being forced into a contract with a BMA clause.

- Conduct a campaign to let consumers know which companies don't use BMA clauses.
- Encourage consumers to close credit cards that have BMA clauses and call on credit card companies to remove BMA clauses from their contracts.
- Encourage homebuyers seeking mortgages to avoid lenders that use BMA clauses.
- Urge consumers to avoid auto dealers and auto financers that use BMA clauses.
- Call for auto dealers to remove BMA clauses from their contracts.
- Provide bill stuffers for consumers to send with their payments to repudiate BMA clauses.
- Urge large membership organizations to insist that partners providing services to their members, such as credit card and mutual fund companies, remove BMA clauses from their group contracts as a condition of offering products to their members.
- Conduct a nationwide campaign promoting the passage of model state laws limiting the use of BMA clauses.
- Call for congressional hearings on BMA clauses and for legislation prohibiting BMA.

As we have said on numerous occasions, arbitration was conceived as an informal, expedited process for resolving routine disputes between businesses. But when used against consumers, arbitration becomes a tool to block consumers from exercising their rights. There is no such thing as a level playing field when arbitration involves a corporation and a consumer. Sally Greenburg, senior counsel for Consumers Union, stated:

> *Consumers Union finds ominous the growing prevalence of fine print clauses in consumer contracts that have the effect of blocking consumers' access to the courts. These binding mandatory arbitration clauses are the stealth weapon of corporations that seek to escape being held accountable in a neutral forum—a court of law—by giving themselves the advantage of binding mandatory arbitration—often without the consumer even knowing she or he has no right to go to court.*

The use of arbitration is just another attempt to avoid corporate accountability. It must be stopped before the American marketplace is overrun with corporate fraud and abuse that make Enron and Worldcom the rule, not the exception. It is good to know that there are public interest groups, which are willing to stand up and fight for consumers.

An Important Ruling In Florida

The Supreme Court of Florida has refused to enforce a binding mandatory arbitration clause in a payday loan contract charging interest rates of up to 1,300%. The court ruled that low-income borrowers couldn't be forced to arbitrate their claims that the loans violated state usury laws. Trial Lawyers for Public Justice (TLPJ) and a team of consumer advocates representing borrowers are challenging the legality of the high interest "payday loan" rates charged by Buckeye Check Cashing—a nationwide company with over 90 locations—and successfully argued that consumers cannot be forced out of court and into arbitration.

The court's January 20, 2005, decision held that Florida courts must first decide whether a legal agreement exists before enforcing the agreement's binding mandatory arbitration clause. The 5-to1 ruling overturned the decision of Florida's Fourth District Court of Appeals, which held that Buckeye's arbitration clause should be enforced even though the plaintiffs were challenging the legality of the entire payday loan contract. TLPJ Staff Attorney F. Paul Bland, Jr., who argued the appeal, stated: "Payday lending companies like Buckeye that charge interest rates up to 1,300% should not be allowed to shield these illegal loan-sharking schemes by forcing borrowers into private arbitration. The Florida Supreme Court was completely correct that companies cannot use an illegal contract to force consumers to give up their day in court."

Plaintiffs John Cardegna, Donna Reuter, and thousands of other Florida residents borrowed money from Buckeye and received immediate payments of cash in exchange for post-dated personal checks for substantially greater sums of money. When the time came for Buckeye to cash the checks, borrowers who could not afford the greater amount due were allowed to "roll over" the loan by paying an additional "fee" equal to the difference between the amount owed and the amount borrowed, even though they did not receive any additional loan. These added "fees" on deferred payments produced interest rates between 137% and 1,317%.

Cardegna and Reuter filed suit against Buckeye on behalf of all its Florida borrowers, alleging that Buckeye's "deferred check-cashing" transactions were actually usurious consumer loans that required low-income borrowers to pay exorbitant interest rates in violation of numerous state consumer protection statutes. Buckeye responded by moving to compel arbitration, arguing that all of its borrowers should be forced out of court and into individual private arbitration proceedings pursuant to the BMA clause in its loan contracts.

Richard M. Fisher of Cleveland, Tennessee, who is co-lead counsel for the plaintiffs, stated: "Buckeye wanted to force our clients into secret arbitration proceedings so no court could ever issue a binding judgment saying that its 'check-cashing' business is an illegal scheme to commit usury. If Buckeye had pulled off this gambit, it would have been impossible for us to publicly vindicate the rights of thousands of Floridians."

The Florida trial court initially denied Buckeye's motion for arbitration, but the Fourth District Court of Appeals reversed and held that the plaintiffs' claims that Buckeye's loan contracts were illegal and void had to be resolved through arbitration. The state supreme court granted review and then reversed the appeals court, holding that "an arbitration provision in a contract which is void under Florida law cannot be separately enforced while there is a claim pending…that the contract containing the arbitration provision is itself illegal and void ab initio. Chris Casper of James, Hoyer, Newcomer & Smiljanich in Tampa, Florida, who is also co-lead counsel for the plaintiffs, stated: "We are pleased that the Supreme Court found that our clients are entitled to their day in court. Now, we have the chance to hold Buckeye accountable for its repeated violations of Florida's usury and consumer protection laws." In addition to Bland, Fisher, and Casper, E. Clayton Yates of Fort Pierce, Florida also represented the plaintiffs.

Source: Trial Lawyers for Public Justice

XVI. NURSING HOME UPDATE

Woman Found Dead After Wandering From Nursing Home

A seventy-six year old woman was found dead in a ditch after walking out of a nursing home in Daytona Beach, Florida a few weeks ago. The elderly lady, who had been a resident at Daytona Beach Health and Rehabilitation Center, had attempted to leave the nursing home the day before she disappeared. Her body was discovered in a ditch 200 yards from the nursing home, where she had apparently drowned in six inches of rainwater runoff, according to police reports. Residents living near the nursing home were concerned that something like this might happen because of similar earlier incidents. Bryan Lee of Florida's Long-Care Ombudsmen Program said, "each [nursing-home resident] should have a customized, individual care plan that meets his or her specific needs." Lee said residents of elder-care homes have the "right to walk around the facility" but "many need supervision".

The Florida Agency for Healthcare Administration has put the 180-bed facility on a statewide nursing home watch list four times, but records indicate that the facility corrected the problems. State inspectors gave the facility a one-star rating, meaning it ranks in the bottom fourth of all nursing homes in Florida in terms of care, life, nutrition, minimizing use of restraints, prevention of bedsores, and maintaining dignity. The facility is run by Northport Health Services, Inc., a Tuscaloosa, Alabama, based company that operates approximately 40 nursing homes in four states. State officials had sanctioned the home previously in 2001 for not keeping track of patients.

Beverly Enterprises Receives Takeover Offer

Beverly Enterprises, Inc., one of the nation's largest nursing home chains, has received a $1.45 billion take-over offer from an investor group. Beverly presently operates 351 nursing homes, 18 assisted living centers, and 52 hospice and home health centers throughout the country. Based on all the talk about how financially strapped nursing homes are, you would expect Beverly to jump at this offer. But, the chairman and chief executive officer of Beverly Enterprises, William R. Floyd, responded that the acquisition of the nursing home chain would not be in the best interests of the company. Mr. Floyd stated further that the aggressive suitors would only return Beverly to the "over-leveraged, financially weak condition the company was in prior to our turnaround." Beverly Enterprises has in recent years sold off many of its underperforming nursing homes and nursing homes, which had a history of lawsuits.

Sex Offenders Found Living In Nursing Homes

It is hard to imagine sex offenders living in nursing homes but it is happening. We have learned that convicted sex offenders may be living among residents in Tennessee nursing homes. The most frail and vulnerable people in our society could be at great risk. The state is now in talks to form a list that would show the number of sex offenders that are living in Tennessee's nursing homes. At least four offenders were found living in nursing homes in the state. In my opinion, sex offenders should never be allowed to live in nursing homes. When unregistered sex offenders were rounded up in Hamilton County, Tennessee, last year, Tennessee Bureau of Investigation (TBI) agents made a startling discovery. A

TBI spokeswoman reported: "Of the 72 people we were looking for, two of them were actually in nursing homes."

State Ombudsman Adrian Wheeler reports that two more sex offenders have been found living in nursing homes in Tennessee. Wheeler can't say where those offenders were working, but he wants to know how many more are out there living among some of Tennessee's most vulnerable. He stated: "There are many residents who are bedridden. They are limited in motion and they are not able to defend themselves," said Wheeler. Just like many other seniors, some aging sex offenders have to be cared for in nursing homes. That is not against the law. But more and more states, including Minnesota, Florida and Oklahoma, report cases of sex offenders living in nursing homes assaulting other residents.

The State Ombudsman in Tennessee, who works on behalf of nursing home residents, doesn't believe sex offenders should be allowed to live in nursing homes at all. He also wonders if sex offenders should be contained to a certain area of a nursing home. Wheeler is currently in talks to get Tennessee lawmakers involved before the worst happens. The AARP is reviewing the issue and strongly believes something should be done about sex offenders living in nursing homes. Under Tennessee law, a sex offender's address has to be listed on-line only if they committed the crime after July 1, 1997. If the offender committed a sex crime before that date, they have to register with law enforcement, but that isn't listed publicly. In Alabama a sex offender's address has to be registered when they commit a notifiable crime after May 1996. If a person has committed a sexual crime prior to May 1996, served their time, and has not moved since that date, he or she would not be listed online. If they move after 1996 or commit a notifiable crime past that date, they are required to register with the local sheriff's office. Failure to notify the sheriff's office is a misdemeanor, not a felony, and that's inadequate. Should sex offenders be allowed to live in nursing homes? I suggest you write the governor in your state and express your views on this subject.

Stricter Laws Against Nursing Home Abuse Needed

More than 1,000 complaints of abuse in nursing homes reach Mississippi state investigators each year. This year, Mississippi Attorney General Jim Hood is calling for more serious punishments for those convicted of abusing senior citizens. The Attorney General is urging legislators to create a special felony category for abuse of residents living in long-term care facilities such as nursing homes and mental health institutions. General Hood states: "We believe with requiring them to provide that information, they can call our unit and we'll go out and investigate those matters, and it will give you more piece of mind." In Mississippi, you can report suspected abuse by calling (800) 829-6766.

Stronger Oversight Of Nursing Homes Sought In Oklahoma

Seeking to put an end to accounts of neglect, abuse and mismanagement at many of Oklahoma's nursing homes, the Oklahoma Legislature is considering legislation that would revamp the board responsible for overseeing the administrators of those facilities. House Bill 1453 was filed in response to growing concerns that the Oklahoma State Board of Examiners for Nursing Home Administrators may be violating federal and state guidelines, circumventing the state's Open Meeting Law, and placing Oklahoma's seniors in danger. The legislator who filed the bill, who incidentally is a Republican, stated: "Those who take advantage of our elderly and frail are vile individuals. We need to safeguard our seniors.… If Oklahoma's act and the federal act are not administered truthfully and in good faith, then they are just pieces of paper."

Under Oklahoma state law, the State Board of Examiners for Nursing Home Administrators is responsible for "developing, imposing and enforcing standards which must be met by individuals" who are licensed to operate nursing homes. News reports state that over the years, the Board has adopted questionable management practices that have obscured the actions of some injurious administrators. A recent investigation by the Tulsa World revealed that the Board routinely dismisses many cases that are referred to it for investigation or disciplinary action, according to the announcement. The paper's review found that dismissed cases included incidents in which nursing home residents "died, suffered burns or other serious injuries, or were victims of abuse or neglect." Additionally, records indicate a subcommittee of the Board has dismissed cases without the Board's approval, as required by law.

House Bill 1453 would better define the Board's purpose, its membership and its duties and would open the process to public scrutiny. The legislation would require that any nursing home administrator devote at least half their work time to "on-the-job supervision" of the facility and would change configuration of the board that oversees their management. Of the 13 appointed members of the State Board of Examiners for Nursing Home Administrators, five would be required to be licensed nursing home administrators with bachelors' degrees and three would be members of the general public. Under the bill, none of the remaining five members could have any direct or indirect financial interest in nursing homes. Under HB 1453, each investigation of a complaint

received by the Board must be completed within 180 days of receipt. Extensions could be granted with the Board's approval. HB 1453 also would require the board to establish a process for reviewing complaints, create a formal file on each complaint received, and maintain a publicly accessible registry of all complaints or referrals complaining of acts or omissions of licensed administrators.

Source: *The Insurance Journal*

XVII. HEALTHCARE ISSUES

Medicare Drug Benefit To Cost $720 Billion

President Bush didn't level with Congress or the American people when he pushed the Medicare prescription drug benefit bill through Congress last year. Now the President says **fixing** Medicare is next on the government's fix-it list. New Administration estimates, released last month, revealed that the Act will cost taxpayers $724 billion over its first full 10 years. Obviously, this is far higher than earlier estimates. This has caused the President a great deal of difficultly in Congress and with consumer groups. The new estimate exceeds earlier projections by over $300 million. The prescription benefit that the President signed into law last year doesn't take effect until next year.

The Administration now estimates the drug program's gross price tag will be $1.19 trillion. The new numbers should cause the American public to question the White House on other programs, considering how they misrepresented the cost of this one. The White House low-balled cost estimates two years ago to win votes from conservatives when Congress narrowly approved the program under intense pressure from the President and the powerful pharmaceutical industry. Congress will have to take a very close look at the program's costs and may have to pass new legislation to hold down costs and give seniors the true benefits they deserve. When Congress narrowly approved the drug legislation in 2003, the Administration told wavering lawmakers that the program would cost no more than $400 billion, including expected savings. The White House revised the estimate to $534 billion just two months later, after the law was enacted. Now we find that the drug program's gross 10-year cost will be over $1.2 trillion.

Even Republican members of Congress, including Senator Judd Gregg (R-N.H.), the new chairman of the Senate Budget Committee, are complaining. Based on the new numbers, the program's costs are estimated at roughly $100 billion annually in 2014 and 2015, or more than a third of what the Medicare bill was projected to cost in its first 10 years. Under the new program, participants will pay monthly premiums that are expected to average $35 in 2006 and the first $250 in drug costs. Medicare will pick up 75% of the next $2,000 in prescription expenses. After that, a gap is built into coverage during which participants are responsible for the entire drug bills until costs top $5,100, after which the government pays 95%. Controversy over cost has plagued the program since before its passage. Now the public has learned that you simply can't trust the White House to always tell the truth.

NIH To Ban Deals With Drug Firms

I have always believed that persons who are in a position to determine healthcare issues should not be allowed to receive money from companies in the healthcare industry. Finally, some steps have been taken to take away the appearance of conflicts of interest. Now all staff scientists at the National Institutes of Health (NIH) will be banned from accepting any consulting fees or other income from drug companies. NIH employees must also divest themselves of all industry stock holdings. This comes under a far-reaching reform that was long overdue. The new regulations—drawn up by administrators from the NIH, the Office of Government Ethics and the Department of Health and Human Services—are aimed at halting lucrative deals that have led to conflict-of-interest inquiries at the government's premier agency for medical research. While the new rules can be reassessed after one year, I hope they will be permanent. This is certainly a step in the right direction.

For the last decade, government scientists at the NIH have quietly been allowed to consult for biomedical companies. Hundreds of scientists took millions of dollars in fees and stock from industry. Unfortunately, most of the payments were hidden from public view. Obviously, this raises obvious questions about the scientists' impartiality in overseeing clinical trials and in making recommendations to doctors for treating patients. In some cases, NIH scientists worked for drug companies that directly benefited from their recommendations to doctors. In other cases, scientists appeared at public forums and commented upon or endorsed treatments or drugs without revealing that they were on the payroll of companies making the products.

The *Los Angeles Times* in 2003 and 2004 revealed the existence of the deals, along with the secret policy changes that made them possible. A blue ribbon panel was appointed last year to examine the NIH's policies. Congressional leaders, citing the *Times* articles, asked the director to provide details on all biomedical industry payments to agency scientists for a five-year period. Four congressional hearings into conflict of interest at the

NIH were convened last year. Three of these hearings took place in the House and one in the Senate. All NIH scientists will now be prohibited from accepting consulting fees, speaking fees and any other form of income from all biomedical companies, professional societies, and other outside entities. The scientists must sell or otherwise dispose of any stock or stock options they hold in individual pharmaceutical or biotechnology firms.

It should be pointed out that the government employees will be allowed to accept paid outside positions as physicians at hospitals or in other clinical settings. They also will be allowed to accept fees in some circumstances from universities for teaching or writing and editing services. The number of NIH employees required to file annual financial disclosure reports open to public inspection under the Freedom of Information Act also was to be expanded. Any potential conflict of intent should be subject to public scrutiny. In my opinion, this is not asking too much. I believe this will result in more objective work coming from the NIH employees, and that is good news for American citizens.

Source: *The New York Times*

Documents In Thimerosal Cases Continue To Come Out

As you may recall, our firm is currently involved in thimerosal cases on behalf of families whose children received vaccine shots that contained excessive doses of mercury. We contend that these shots have caused a number of problems for those children and their families, including autism. A recent discovery regarding a memo from Merck & Company shows that nearly a decade before the first public disclosure, senior executives with the company were concerned that infants were getting an elevated dose of mercury in vaccinations containing a widely used sterilizing agent. The March 1991 memo, obtained first by the news media, said that 6-month-old children who receive their shots on schedule would get a mercury dose up to 87 times higher than guidelines for the maximum daily consumption of mercury from fish. The memo, written to the president of Merck's Vaccine Division, was prepared at a time when U.S. health authorities were aggressively expanding their immunization schedule by adding five new shots for children in their first six months. Many of these shots, as well as some previously included on the vaccine schedule, contained thimerosal, an antibacterial compound that is nearly 50% ethyl mercury, a neurotoxin.

Federal health officials disclosed for the first time in 1999 that many infants were being exposed to mercury above health guidelines through routine vaccinations. The announcement followed a review by the U.S. Food and Drug Administration that was described at the time as a first effort to assess "the cumulative mercury dose." The Merck memo, however, shows that at least one major manufacturer was aware of the concern much earlier. The memo states:

> *The key issue is whether thimerosal, and the amount given with the vaccine, does or does not constitute a safety hazard. However, perception of hazard may be equally important.*

The legitimacy of thimerosal is causing major problems for Merck and other drug companies. More than 4,200 claims have been filed in a special federal tribunal, "The Vaccine Injury Compensation Program," by parents asserting that their children suffered autism or other neurodevelopmental disorders from mercury in vaccines. Similar claims, including our client's cases, are awaiting trial in civil courts. Various scientific studies we believe prove the dangers of thimerosal, including the levels found in vaccines.

Thimerosal has been largely removed from pediatric vaccines in recent years in what health officials have described as a precautionary measure. This has been accomplished as drug makers have voluntarily switched from multi-dose vials of vaccine, which require a chemical preservative like thimerosal, to single dose containers. Merck continues to claim that there is no credible evidence of harm from the amounts of mercury previously used in children's shots. At the very least, the memo obtained from Merck provides the first real hard evidence that the company knew that the children were getting significantly more mercury than the generally accepted dose. If Merck knew, it is reasonable to conclude that other companies had this same information.

I have to wonder why this damaging Merck memo was provided to the news media, but not to lawyers who are handling these cases for victims. A Washington lawyer who works with parent groups on vaccine safety issues actually provided the memo to the media. He obtained it from a whistle-blower whom he would not name. Clearly, Merck had a legal duty to provide this damaging memo during discovery in cases pending against the company. Just as clearly, the company elected not to do so. The 7-page memo states that regulators in several countries had raised concerns about thimerosal. For example, in Sweden the chemical was being removed from vaccines. The Merck memo goes on to say:

> *It appears essentially impossible, based on current information, to ascertain whether thimerosal in vaccines constitutes or does not constitute a significant addition to the normal daily input of mercury from diverse sources. It is reasonable to conclude that it should be eliminated where possible, especially where use in infants and young children is anticipated.*

The Merck memo goes on to say that unlike regulators in Sweden and some other countries, "the U.S. Food and Drug Administration…does not have this concern for thimerosal." That assessment, considering how controlled and ineffective the FDA has been, is not surprising.

Congress passed a bill in 1997 ordering an FDA review of mercury ingredients in food and drugs. That was a real turning point. Please keep in mind, however, that this was six long years after the 1991 Merck memo. The review was not completed until 1999, when it revealed the high level of mercury exposure from pediatric vaccines and raised many questions. In e-mails released subsequently at a Congressional hearing, an FDA official said health authorities could be criticized for "being asleep at the switch" for decades by allowing a potentially hazardous compound to remain in many childhood vaccines, and not forcing manufacturers to exclude it from new products. While asserting that there was no proof of harm, in July 1999, the U.S. Public Health Service called on manufacturers to go mercury-free by switching to single-dose vials. Soon thereafter, Merck introduced a mercury-free version of its Hepatitis-B vaccine, replacing the only thimerosal-containing vaccine it was still marketing at the time. It is shocking that these vaccines could have been mercury-free a long time ago, but the companies elected not to take that option. The vaccines are today and that's good, but that doesn't excuse the sins of the past. Remember, it was only in 2002 that thimerosal was eliminated or reduced to trace levels in nearly all childhood vaccines.

Source: *Los Angeles Times*

Battery Problem May Cause Certain Defibrillators To Fail

Medtronic Inc. is advising doctors about a potential battery problem that can cause certain of its implantable defibrillators to fail. Medtronic says there are no reports of patient injuries or deaths due to the problem. The Minneapolis medical-device maker said nine batteries out of 87,000 implanted devices in question have gone dead because of a shorting action, but it estimates that the failure rate might increase as high as 1.5% as the devices get older. According to the company, if the shorting happens the batteries can be depleted within a few hours or a few days, and the devices would stop working. Devices with batteries manufactured from April 2001 to December 2003 may have the problem, Medtronic reported. The potentially affected models are the Marquis VR/DR and Maximo VR/DR ICDs and the InSync I/II/III Marquis and InSync III Protect CRT-D devices. About 75% of these devices were implanted in the U.S.

Most Americans Want U.S. Price Limits On Drugs

The results of a new survey dealing with healthcare issues tells me something that I already knew. Nearly two-thirds of Americans want the government to play more of a role in the prices charged for prescription drugs, according to the survey. Most don't believe the claims from the pharmaceutical industry that the high costs of prescription drug prices are driven by **research** and **development**. Three-fourths in the poll, conducted by the Kaiser Family Foundation, say the desire for **profit** by the industry is the biggest factor in prescription drug prices. Two-thirds of respondents (65%) say they want more regulation limiting prescription drug prices and over half (51%) say they want more regulation of drug advertising. Only 18% said they trust drug company ads "most of the time," compared with 33% in 2000. Interestingly, the poll revealed that the public still generally trusts the Food and Drug Administration, although 27% said they had lost some **confidence** in the agency during the last few years. The Kaiser poll of 1,200 adults was taken during the first week of February had a margin of sampling error of plus or minus 3 percentage points. I suspect the FDA's popularity has slipped even more due to recent events. This sort of thing normally takes a few weeks—and sometimes longer—to sink in. There is one thing for certain and that is folks believe the FDA should ensure drug safety and should never put a dangerous drug on the market.

XVIII. ENVIRONMENTAL CONCERNS

Asbestos Compensation Fund Far From A Done Deal

The asbestos bill, sponsored by Sen. Arlen Specter (R-PA), continues to face serious opposition from within both parties. The bill, which would create a national trust fund to settle all asbestos-related claims, does not seem likely to emerge from the Senate Judiciary Committee anytime soon. The latest complications are coming from within Senator Specter's own Republican Party. Senate Majority Leader Bill Frist, who appears to be running for President, has placed bankruptcy reform and federal budget bills ahead of the ailing asbestos bill.

If history is any indication, the opposition for this type of legislation will continue to be fierce. The first asbestos bill was introduced in 1978. The business community, through the Asbestos Alliance and the American Insurance Association, wants assurances that $140 billion is the maximum funding and

that there is no provision for a return to the tort system should the fund be depleted. On the other hand, the Association of Trial Lawyers of America and the AFL-CIO are concerned there will not be adequate up-front funding and that subrogation against awards victims might receive would leave sick victims with little or no real compensation.

XIX. PREDATORY LENDING UPDATE

Predatory Lending In Alabama

Anybody who travels our state can tell you that Alabama is overrun with predatory lenders. Signs promising "easy money" are visible in almost every community. Currently, Alabama citizens face an overwhelming variety of credit services designed to "trap consumers" in "financial quicksand." Once they get in, it's mighty hard to get out. Nearly all states have laws against usury, which prohibits the charging of obsessive interest, and we are no exception. Alabama has the Alabama Small Loan Act, which caps the interest on small, short-term loans at 3% per month (APR of 36%). Unfortunately, the laws that regulate payday lenders, mortgage brokers, and pawn shops permit certain kinds of loans that have APRs of more than 10 times the usury limit. Owners of the predatory lending outlets are raking in tons of cash and in the process are making huge profits. The most vulnerable borrowers in our state are at the mercy of these lenders.

We have been asked on occasion to explain exactly what a predatory loan is. There are several categories of loans that fall under this classification and so far, I haven't found a single one that is consumer-friendly. Here are the ones that are most widely used:

- **Payday Loans**—borrowers use a check dated in the future as collateral for a short-term loan.
- **Title Pawns**—the pawning of an automobile's certificate of title by the owner.
- **Refund Anticipation Loans**—these are short-term loans offered by tax reparation services and secured by the taxpayer's expected refund.
- **Rent-To-Own**—these companies operate as lenders without having to comply with loan regulations.
- **Sub-prime Mortgages**—these are loans offered at higher interest to home-buyers who don't otherwise qualify for prime rates because of their credit history's.
- **Loan-flipping**—while this is not a loan in and of itself, it is a real bad practice. Flipping or renewing consumer loans is a method by which lenders exploit vulnerable borrowers. The loans are constantly renewed, with all sorts of fees and charges each time being added to the loan.

I hope the Legislature will take a close look at the predatory lending industry in Alabama and do something to get Alabama consumers out of the "quicksand" they find themselves in when dealing with this industry. I am not aware of any real movement in the current session to get something done in this area of concern.

A Good Look At Ameriquest

Our firm sees lots of cases these days involving sub-prime lending practices. Generally, those loans involve high costs along with very high interest rates. Ameriquest Capital Corp., one of the sub-prime lenders, has been held up as an industry model. It should be noted that the company agreed in 2000 to establish a fund for needy borrowers and to adhere to a list of "best practices." Ameriquest says it holds itself "to the highest standards" and does not tolerate unethical or improper behavior by its employees. The nation's largest sub-prime mortgage lender has sought to polish its image because it is moving into prime mortgage lending, which is referred to as mainstream lending. The company has also increased its political profile, donating heavily to various political campaigns. The privately held company is also being very visible in the sports world. It committed $75 million to have the Texas Rangers ballpark dubbed Ameriquest Field. This company also sponsored the halftime extravaganza at Super Bowl XXXIX. In fact, Ameriquest even sponsors one of my favorite TV programs "Antique Roadshow," which regularly appears on public TV. The company likes to say, "we never forget that our customers deserve respect, fairness and honesty." Yet the Los Angeles Times found a far different picture when it looked into the company's past history. This is what the Times discovered:

- Ameriquest customers filed more complaints with the Federal Trade Commission from 2000 through 2004 than did those of two of its biggest competitors combined—466 compared with 101 for Full Spectrum Lending (Calabasas, California-based Countrywide Financial Corp.'s sub-prime unit) and 51 for New Century Financial Corp.
- From 2000 through 2004, 134 complaints (including allegations of fraud and unfair business practices) were registered against Ameriquest with the California Department of Corporations, compared with 39 for New Century and 21 for Full Spectrum.
- Recent lawsuits filed by consumers in over 20 states allege a pattern of fraud, falsification of documents, bait-and-switch sales tactics, and

other violations. Six of these suits seek class action status to represent large groups of borrowers.

- In court documents and interviews, 32 former employees across the country say they witnessed or participated in improper practices, mostly in 2003 and 2004. This behavior included deceiving borrowers about the terms of their loans, forging documents, falsifying appraisals, and fabricating borrowers' income to qualify them for loans they couldn't afford.

- Two ex-workers at an Ameriquest office in California that focuses on retaining existing customers said people often were solicited to refinance loans that they had for less than two years. In adopting a best-practices standard in 2000, Ameriquest pledged not to resolicit its customers for two years to discourage "flipping," or pushing new loans simply to generate fees and commissions.

- Nearly one in nine mortgages made by Ameriquest last year was a refinance of an existing company loan less than 24 months old, according to an analysis of public records by DataQuick Information Systems done at the request of The Times. That was a higher rate than for any of six competitors included in the analysis.

- On January 10, 2005 the Connecticut Department of Banking said it would seek to bar Ameriquest from doing business in the state for allegedly charging excessive fees and repeatedly violating a state law aimed at preventing loan flipping. Ameriquest is challenging the action.

Bob Kirby, who is a very good lawyer from Birmingham, has handled a number of cases against Ameriquest. He tells me that the FTC terminated its ongoing investigation of Ameriquest in 2000 based largely on the lender's pronouncement of its new "Best Practices" policy. That new policy was to have a strict **prohibition** against soliciting the refinancing of their own loans within 24 months of origination. Unfortunately, Ameriquest never had any intention of following this rule and is blatantly violating it today. For example, Ameriquest charges its customers who are refinancing an existing loan with the **new loan** with the **substantial** pre-payment penalty from the **old loan**.

Consumer activists say the company, a big-time donor to both Democrats and Republicans, has also been lobbying against state legislation aimed at countering alleged abuses by subprime lenders. Incidentally, Ameriquest was the number one contributor to the 2005 Presidential Inaugural Committee, which won't hurt its chances of getting help in Washington. The company has a history of fighting predatory lending legislation, which is badly needed. Predatory lenders have a duty to treat their customers fairly and few—if any—of them do. They also have a duty not to commit fraud in connection with their lending practices.

Source: *Los Angeles Times*

A Case In Point

Tom Methvin, who is the firm's Managing Shareholder, appeared on Alabama Public Television several times last month. He appeared on a program called "Where Credit is Due." On this program, Tom primarily focused on the plight of the working poor in Alabama as it relates to predatory lenders. As a specific illustration, he related the story of Ms. Lannie Russ, one of our clients whose story should get the attention of all of us. Ms. Russ is a middle-aged African American female who lives in Montgomery. Our client can neither read nor write and only completed the 5th grade in school. Ms. Russ purchased her home in 1993 for $31,000 and the loan was soon sold to American General Finance. About seven years after she purchased the home, the house was in desperate need of repair. Ms. Russ contacted American General Finance about loaning her money to make the necessary repairs. American General informed Ms. Russ that she could get the loan, but she would save money and it would be in her best interest to refinance her existing loan. The agent also steered Mrs. Russ to a contractor to perform the repairs.

When Ms. Russ came back to complete the paperwork for the loan, her nephew came with her to read the documents to her. American General refused to allow her nephew into the room during the closing so he could read the documents to Ms. Russ, even though she told them that she couldn't read and needed her nephew to read the documents to her. After the documents were signed, the contractor began work on the house, but did not complete any of the work. Also, the work that was done was very shoddy. Therefore, Ms. Russ got very little work, but owed a whole lot of money.

In addition to this, Ms. Russ recently learned that the contractor forged her name to another loan three months after this loan. The forged loan paid off the previous loan, gave $1,800 to the contractor, and charged her $2,500 for an insurance policy that she did not know that she had. The insurance policy was written by a subsidiary of American General Finance so it received a commission from the sale of the insurance policy. Interest was also added to the amount of the premium.

On the house that Ms. Russ paid $31,000 for 11 years ago, she now owes over $45,000 on it. She is currently unemployed and has been for the past 5 years. Ms. Russ suffers from arthritis, severe headaches, and has constant nerve trouble. Before she

became unemployed, she was employed doing general labor in a chicken house.

Unfortunately, Ms. Russ' predicament is similar to that of thousands of working-poor families both in Alabama and throughout the southeastern part of the U.S. To add insult to injury, most predatory lenders now use arbitration agreements in their contracts. This means that if they get caught cheating folks, it's very hard to hold the predatory lenders accountable. We badly need more and stronger regulation in this area of concern. The predatory lending industry must be reined in and soon.

XX. TOBACCO LITIGATION UPDATE

A Look At The Future Of Tobacco Litigation

Many lawsuits seeking to recover the health-care costs of treating sick smokers, or seeking personal-injury damages, have either failed or been overturned on appeal. The Engle class action case in Florida is currently under review by that state's Supreme Court, following the 2003 decision by a Florida appeals court to toss out a landmark $145 billion class action judgment against the five largest U.S. cigarette makers. The jury verdict that had produced the largest damage award in U.S. history was reversed by that ruling. A decision is expected this summer. The only other major legal threats currently facing the industry are the "light" class action cases, in which smokers are bringing suit under state consumer-protection laws, based on the claim that cigarette makers falsely advertised their light cigarettes as less harmful than other brands.

In Alabama, our Supreme Court has made it virtually impossible to successfully sue a tobacco company under state law. I regret to say that suing a tobacco company has become extremely difficult in any state or federal court. Tobacco is the only product to my knowledge that when used exactly as the manufacturer tells a person to use it, will kill the user. It is extremely frustrating to see how the tobacco industry has avoided its legal responsibilities to its victims. The national settlement with the states a few years ago did nothing for victims or their families. I hope the present trends in the courts will change.

Government Loses $280 Billion Tobacco Bid

Last month, we reported that the U.S. government was really going after the tobacco industry. Unfortunately, a U.S. appeals court has rejected the federal government's bid to force cigarette makers to pay $280 billion in past profits. The court struck the toughest sanction from the racketeering case. The three-judge panel of the Court of Appeals for the District of Columbia ruled 2-1 that federal law does not allow the monetary "disgorgement" penalty the government sought in the civil case that has been on trial since September. The panel stated: "We hold that the language of (the racketeering law) and the comprehensive remedial scheme of (the racketeering law) preclude disgorgement as a possible remedy in this case." This decision strips the government of its most powerful weapon in the case and has to be considered a major blow to their case. In addition to the monetary penalty, the government is seeking to impose tougher rules on marketing, advertising and warnings on tobacco products.

The government charges cigarette makers deceived the public about the dangers of smoking as part of a 50-year industry conspiracy. The tobacco companies deny they illegally conspired to promote smoking and say the government has no grounds to pursue them after they drastically overhauled marketing practices as part of the 1998 settlement with state attorneys general. Judge David Sentelle, a Ronald Reagan appointee from the tobacco-producing state of North Carolina, wrote that the civil racketeering statute used to bring the case was aimed at putting an end to the illegal conduct going forward. The judge wrote: "Disgorgement is a very different type of remedy aimed at separating the criminal from his prior ill-gotten gains and thus may not be properly inferred from (the statute)." Judge Sentelle was joined by another Reagan appointee Judge Stephen Williams. Dissenting was Judge David Tatel, who was appointed by former President Bill Clinton, whose Administration brought the case. I doubt seriously that politics played any part in either the majority or dissenting opinions.

Federal Appeals Court Reverses Tobacco Liability Award

While a federal appeals court upheld a Kansas man's right to sue tobacco companies over a disease that cost him his legs, it took away $15 million he had received in damages. The U.S. Court of Appeals for the Tenth Circuit overturned the punitive damages awarded to the smoker, but upheld a federal jury's finding that R.J. Reynolds Tobacco Co. failed to adequately warn or test for the dangers of smoking. A three-judge panel rejected the claim that R.J. Reynolds fraudulently concealed information about the dangers of cigarette smoking. The appeals court said Kansas state courts would not recognize such claims based on the evidence.

The Kansas suit against R.J. Reynolds and the American Tobacco Co. filed in 1994, claimed the companies had

known about the potential hazards of smoking since the 1950s but failed to warn the public cigarettes were addictive and dangerous. The man, who had smoked for 43 years, quit after his legs were amputated due to peripheral vascular disease. His doctor had warned him that smoking could also cause him to lose his arms. In February 2002, a federal jury in Kansas determined R.J. Reynolds was liable for his injuries and ordered the company to pay $196,416 in compensatory damages to cover economic loss and other actual injuries. The jury also authorized the judge to award additional punitive damages, which are used to punish defendants in lawsuits. A few months later, a U.S. District Judge awarded $15 million, saying the tobacco company's concealment of how addictive cigarettes are was "particularly nefarious." The plaintiff later dropped his claim against American Tobacco, which the jury ordered to pay $1,984. Now the remaining part of his case has been taken away.

Source: *Associated Press*

Missouri Family Awarded $20 Million In Tobacco Suit

On a brighter note, a jury has awarded the family of a woman who smoked for nearly 50 years more than $20 million in a wrongful death lawsuit against the maker of Kool cigarettes. This is the largest total judgment against a tobacco company in Missouri. The jury awarded punitive damages to the family of the smoker. Brown & Williamson officials called the damages "grossly excessive" and asked the judge to set aside the verdict. The woman, who smoked Kool cigarettes for nearly 50 years, quit smoking in 1990. She died 10 years later of a heart attack at age 73. During her later years, she had heart and lung disease. Hopefully, this verdict will survive on appeal.

Source: Associated Press

XXI. THE CONSUMER CORNER

The Growing SPAM Problem

A real problem that is causing difficulty for businesses, as well as individuals who rely on e-mail and the Internet, is known as SPAM. As you probably know, SPAM e-mails are those unwanted, unsolicited, and many times obscene e-mails that we all have received in our inbox at one time or another. The SPAM crisis is growing so rapidly that anti-SPAM software developers are fighting an uphill battle on a daily basis to maintain some sort of control over the situation. Our firm has been bombarded by SPAM e-mails at the rate of nearly 10,000 per day. Although up to 90% of these undesirable messages are blocked by our internal systems before they reach the end-users inbox, a few slip through the cracks and arrive at the intended destination. Many of the SPAM e-mails are pornographic and contain really bad stuff.

There have been many commercial systems developed to combat this issue. Unfortunately, the financial resources of the SPAMers are many times greater than those of the software developers. Thus, the SPAMers are staying one step ahead of the "good guys." However, you can take a few simple steps to help reduce the amount of SPAM that is sent to your e-mail address and/or block it when it arrives. Our firm employs both proactive and reactive steps to curb SPAM. From a proactive approach, we encourage our staff to use alternate e-mail addresses when filling out forms on the Internet or signing up for newsletters. As well, they are asked to never use the "unsubscribe" feature that is found within many SPAM emails. This "unsubscribe" feature, in most cases, does not take you off their mailing list. Instead, it verifies to the SPAMer that your email address is valid and it is then resold to other SPAMers. The end result is more SPAM being sent to your inbox. Our reactive plan includes a message filtering system that uses the following techniques for catching SPAM:

- Identifies emails sent from known SPAMers,
- Looks for approximately 1,500 keywords in the subject line and body; and
- Contains a Bayesian learning system that looks at the overall email.

We also encourage folks to send and receive email in plain text and to lessen the use of preview panes in their email application.

Even though SPAM can be a huge problem for businesses, these issues can also present themselves in the home, where it can be an even greater challenge for parents. Parents should be cautious of the emails and Internet sites that your children are allowed to view. One of the most underrated problems today is the widespread misuse of the Internet by our children and teenagers. These issues span from Internet pornography, to inappropriate emails, to unsupervised chat sessions. Unlike Hollywood or television, where many times we have a greater opportunity to screen our children from potentially obscene or violent content, the Internet is even more alluring and deceptive.

The Internet can be a safe and successful tool. Unfortunately, when it is misused, it becomes a tool in the hands of Satan. Take a word of caution from the passage of scripture found in 1 Peter 5:8: "Be sober, be vigilant; because your adversary the devil walks about like a roaring lion, seeking whom he may devour." The Internet is ready made for evildoers and we must all learn more

about it so that we can protect our businesses and more importantly our homes from those who use it for evil!

U.S. Sets Acceptable Lead Level In Jewelry

The federal government has set an acceptable level for the lead found in millions of pieces of children's jewelry sold mainly at dollar stores and in vending machines. Concerns over lead resulted in the largest toy recall in U.S. history in July—150 million pieces of jewelry by four importers, which together supply nearly all vending machine jewelry. They agreed at the time to halt imports of jewelry containing lead until the Consumer Product Safety Commission determined a safe lead level. Now imports will start up. Gib Mullan, director of the CPSC's office of compliance, said, "As far as we're concerned, they (the companies) have kept their end of the bargain by waiting for our policy." Studies have found that even small amounts of lead ingested by children can cause neurological damage, or behavior and learning problems.

The agency's chairman, Hal Stratton, has estimated that about one-half of all the jewelry sold in vending machines contained unacceptable levels of lead. He said some pieces were as much as 70% lead. Under the new policy, a piece of jewelry should not have lead content of more than 0.06%, the same standard used for paint. Any piece that exceeds that level is subject to further testing to determine whether the lead is likely to leak out when, for example, children put the jewelry in their mouths. The product would then be subject to a recall. The four companies involved in last year's recall are A & A Global Industries Inc. of Cockeysville, Maryland; Brand Imports LLC of Scottsdale, Arizona; Cardinal Distributing Co. Inc. of Baltimore; and L.M. Becker & Co. Inc. of Kimberly, Wisconsin.

Source: *Associated Press*

Warning To Alabama Citizens About A Securities Investment Scam

Joseph P. Borg, Director of the Alabama Securities Commission has warned Alabama citizens to be on the alert for investment offerings from Premium Income Corp, Tri-Forex International, LTD, and suspected key associates. In issuing the warning, Director Borg stated: "The Commission is very concerned that an apparent illegal investment scam will target citizens of Alabama. Reports have been received from other states of possible scam activities." The Commission wants any citizen of Alabama who has been approached by the entities listed below to call 1-800-222-1253 and ask to speak to an Enforcement Investigator. Their information can help protect Alabamians and assist the Commission in its investigation. Alabama is working closely with its counterparts in Texas and with the Commodities Future Trading Commission (CFTC) to prevent investment loses from spreading any further.

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

Student Dies From Overdose Of Skin Cream

A North Carolina State University student died in January from an overdose of Lidocaine, a numbing cream. An autopsy, confirming the cause of her death, revealed that the student suffered heart failure and brain damage. The student spread the prescription-strength cream she purchased from Premier Body Clinics from her waist to her ankles and then wrapped her legs in plastic wrap. A pharmacy sold the compounded Lidocaine that killed her to the Premier Body Laser Clinics. It should be noted that compounded drugs by definition are never specifically tested, but Lidocaine by itself is routinely sold over-the-counter in smaller concentrations that apparently pose few problems. The fact that the student wrapped her legs in plastic, after applying the drug, most likely made the situation worse.

This is not an isolated occurrence. A woman died in Tuscan, Arizona, last fall under circumstances similar to this case. The Tucson resident died November 1st after being hooked to a respirator in her mother's house for nearly two years. On January 25, 2002, the woman had applied anesthetic cream to her legs and wrapped them in cellophane several hours before an appointment for laser hair removal. She became disoriented while driving, had seizures, and fell into a coma. She never regained consciousness and died of respiratory failure. The victim's mother sued a Tucson clinic and the clinic's physician. An out-of-court settlement with the Utah pharmacy that compounded the cream has been reached.

Source: *Associated Press*

McDonald's Settles Trans Fat Lawsuit

McDonald's Corp. will pay $7 million to the American Heart Association settling a lawsuit that accused the fast-food giant of failing to reduce fat, as promised, in the cooking oil used for its popular french fries and other foods. The settlement will require the Heart Association to use the proceeds to educate the public about trans fats in

foods. Heart-clogging trans fat is made when manufacturers add hydrogen to vegetable oil, a process called hydrogenation. BanTransFats.com sued McDonald's in California state court in 2003, alleging McDonald's did not effectively disclose to the public that it had not switched to a healthier cooking oil. In September 2002, McDonald's announced it would lower trans fat in its cooking oils and said the switch would be completed in five months. In February 2003, however, McDonald's announced a delay. The lawsuit accused the Oak Brook, Illinois-based company of failing to adequately inform consumers of that delay. McDonald's says that it has reduced the amount of trans fat in its Chicken McNuggets, Crispy Chicken and McChicken sandwiches. I hope that is factual and that the company is really working to reduce trans fat in its other fried foods.

Suit Filed Against Wal-Mart For Defective Bicycles

A class action lawsuit has been filed in California against Wal-Mart Stores Inc. and a California company for importing defective bicycles that have injured at least nine children. The suit alleges that Wal-Mart conspired with Dynacraft Industries, an importer, and investigator Carl Warren & Co. to cover up the fact that the front wheels of the bicycles can easily detach after hitting a bump, causing serious injuries. According to the suit, at least nine children sustained injuries ranging from broken teeth to head trauma. It is alleged that the deaths were reported to Wal-Mart, and Wal-Mart continues to sell the product. Dynacraft Industries imported the Next brand bicycles from China, and Carl Warren investigated complaints, according to the suit.

NHTSA Investigating Lexus SUV's Brakes

The National Highway Traffic Safety Administration is investigating complaints about the Lexus RX330's power brakes. Several owners have complained that the brakes went out while they were driving. Apparently, Lexus knew about the problem but failed to notify customers because the company did not believe that the problem was widespread. It would appear that any braking problem would be cause for concern.

XXII. RECALLS UPDATE

Ford Recalling 358,857 Focus Cars

Ford Motor Co. is recalling 358,857 Focus cars because their rear passenger doors may not latch properly, the National Highway Traffic Safety Administration announced on its website. The recall affects four- and five-door Focus cars from the 2000-2002 model years. All of the vehicles were sold or are registered in 20 eastern and midwestern states and the District of Columbia, NHTSA said. One person reported a minor wrist injury because of the defect, according to Ford. There are 33 complaints about the defect listed on NHTSA's website. The defect is caused by corrosion of the latch. The door may be difficult to open and close, and eventually may not close at all.

This is the second major recall by Ford this year. On January 27th, it was announced that the automaker was recalling about 792,000 pickup trucks, sport utility vehicles and minivans because of possible fire risks from the overheating of their cruise control switches. Ford began notifying customers about the latest recall on March 1st. Ford dealers will replace corroded latches for free or will clean and lubricate unaffected latches to prevent corrosion. The states where the affected Focus cars were sold or are registered are Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

Dodge Durango Recall

The NHTSA announced that Daimler-Chrysler AG is recalling 26,000 Dodge Durango sport utility vehicles from the 2005 model year because the fuel tank filler valve may not fully close after refueling. Fuel could leak from the vehicle if the valve isn't closed. At press time DaimlerChrysler hadn't determined when the recall will begin. Fuel leakage in the presence of an ignition source can result in a fire.

Faulty Switch Spurring Vehicle Fires

Ford truck and SUV owners across the country have had problems with fires. Ford has issued a recall for 800,000 vehicles. The problem is one tiny switch in the cruise control system and in problem trucks, it can overheat even when the engine is not running. Under Ford's recall, thousands of truck owners have had their cruise control disconnected. The recall involves the 2000 F-150, Expedition and Lincoln Navigator and certain 2001 F-series Supercrew trucks. Anybody who has had a fire can file a complaint. The NHTSA complaint line is (888) 327-4236. Ford customer assistance can be reached at (800) 392-3673.

GM Is Recalling 215,000 Vehicles

General Motors Corp. has announced three separate recalls affecting a total of about 215,000 vehicles, stemming

from a variety of potential safety defects. The moves, which continued a string of recalls reported by the world's biggest automaker in the past year, affect GM's full-size trucks, sport-utility vehicles, vans, and cars. In 2004, GM recalled about 10.7 million vehicles in the U.S. in 41 total recalls. So far this year, the company has recalled a total of about 283,548 vehicles in the U.S. in five separate recalls, according to the National Highway Traffic Safety Administration. The largest of the three latest recalls affects about 173,361 GM full-size trucks that may have a defective valve in a "Hydro-Boost accumulator," a part that helps enable braking and power steering. If not working properly, power-steering and braking capabilities could suffer and the valve could burst, potentially injuring bystanders if the hood is open, NHTSA said. GM says "There have not been any injuries or any cases of this actually happening." GM plans to begin notifying customers and making free repairs sometime during this month.

The recall covers certain Chevrolet Suburban, Silverado, Avalanche, Kodiak, and Express van models, and certain GMC Sierra pickups, Yukon XL sport-utility vehicles, Top Kick medium-duty trucks, and Savana vans. Certain Hummer H2 models are covered. The potentially affected trucks were built in February to September 2004.

In a separate announcement, GM said it is recalling 20,260 additional vehicles related to windshield urethane that may not have properly adhered to the body on 2005 models of the Chevrolet Trailblazer, the GMC Envoy, the Buick Rainier, and the Isuzu Ascender. If there were a crash, the windshield might not stay in like it's supposed to, according to GM. Thus far no injuries or incidents have been reported. I understand GM discovered the potential problem at its factory in Moraine, Ohio. The company plans to begin notifying customers and making repairs this month.

The third recall involves the accelerator pedal on GM's Cadillac XLR and SRX vehicles, and the Pontiac Grand Prix, affecting about 21,885 cars. The problem relates to the electronic throttle-control function. At low temperatures, the pedal-return springs on some of the vehicles may be broken. At press time GM hadn't determined when it will notify customers.

Toyota Is Recalling 22,228 Tacoma Pickups

Toyota Motor Co. is recalling 22,228 Tacoma pickups because the parking brake may not work. The automaker and federal safety regulators made an announcement of the recall on February 15th. Tacomas from the 2005 model year with automatic transmissions are involved in the recall. Toyota said the company recalled the vehicles after the National Highway Traffic Safety Administration received eight complaints. No injuries have been reported due to the defect. Toyota said the lock nut on the parking brake cable may not have been properly tightened and can loosen and come off. If that happens, the vehicle could roll if it's stopped on a slope and the transmission isn't in park. Toyota will notify owners of the recall this month. Dealers will tighten the lock nut for free.

BFGoodrich Recalls 20,000 Land Terrain Tires Made In Alabama

BFGoodrich is recalling 20,000 Land Terrain tires sold in the United States and Canada because they do not have the required tread wear indicators. The tires were produced between February 29th and August 19th 2004, at the company's plant in Opelika, Alabama. The size is P235/75R15, and the mold numbers are 40381 and 40382. The recalled tires have U.S. Department of Transportation tire identification numbers that begin with DOT AN HL B411 and end with the last four digits 0904 through 3304. The DOT code is on the inner sidewall of the tire just above the wheel rim. BFGoodrich is mailing notices to consumers who bought the tires and will replace them free. Consumers who believe they are affected by the recall can return to where they purchased their tires for a free inspection. Goodyear says the tires were made using two molds provided by a supplier that did not have the required tread wear indicators. The indicators, also known as wear bars, let drivers know when they need to replace their tires.

Bissell Recalls Upright Carpet Cleaners

Bissell Homecare Inc. is recalling about 750,000 upright carpet cleaners. The Grand Rapids, Mich.-based company says the carpet cleaner's metal upper handle can pose an electric shock hazard to consumers. The company says it has received six reports of consumers getting shocked. The recalled upright carpet deep cleaners have an open handgrip and a partially metal handle, and come in a variety of colors. The recalled carpet cleaners have date codes beginning with 01, 02, 03 or 04 and include the following models:

- PowerLifter Plus (model number 1620)
- PowerSteamer ClearView (model numbers 1692, 1692-1, 1692-R)
- Power Steamer (model numbers 1685, 1693, 1693-R, 1693-W, 1694, 1694-1, 1694-R)
- Power Lifter (model number 1694-3)
- Rubbermaid X-tra-Lift (model 9E00)

The date codes and model numbers are printed on a label on the bottom of the unit. The recalled carpet cleaners were sold at major discount, appliance,

and department stores nationwide from January 2001 through December 2004 for between $100 and $145. Consumers should stop using the carpet cleaners immediately and contact Bissell for the location of the nearest service center to receive a free inspection and if necessary, repair. Consumers can call Bissell at (866) 860-2392 or visit the company's website (www.bissell.com) for more recall information.

Government Recalls 2 Million Barbecue Lighters

The U.S. Consumer Product Safety Commission (CPSC) is recalling about 2 million multipurpose barbecue lighters sold under the brand name "Kitchen Works." The CPSC says the lighters lack child-resistant mechanisms required by federal safety standards. Federal standards require multipurpose lighters to have the same level of child-resistance as required in the safety standard for cigarette lighters. The lighters were distributed by Arett Sales Corp. of Cherry Hill, New Jersey. There have been no reports of incidents or injuries involving the lighters. The recalled gas-fueled lighters have an orange or red plastic body, and a silver-colored metal nozzle. Dollar stores nationwide sold the barbecue lighters from January 2001 through July 2004 for about $1. Consumers should stop using the lighters and return them to the place of purchase for a full refund. Consumers can contact Arett Sales at (800) 431-1212 for more recall information.

XXIII. SPECIAL PROJECTS

The Alabama State Bar's Leadership Forum

I participated in a leadership conference on February 18th sponsored by the Alabama State Bar and really enjoyed the experience. The one-day event was held in Montgomery and was attended by an impressive number of "young" lawyers. The leadership class was comprised of lawyers who have been practicing law between 5 and 15 years. Each participant was selected by the State Bar. The leadership program, referred to as "The Alabama State Bar Leadership Forum," is designed to produce committed and involved lawyers willing and able to take significant leadership roles in the local and state bar associations and to serve as role models in matters of ethics and professionalism. The goals of the Alabama Leadership Forum are to:

- Raise the level of awareness of lawyers as to the purpose, operation, and benefits of the Alabama State Bar
- Build a core of practicing lawyers to become leaders with respect to ethics and professionalism, resulting in raising the overall ethical and professional standards of lawyers in the community
- Form a pool of lawyers from which the Alabama State Bar, state and local governmental entities, local bar associations, and community organizations can draw upon for leadership and service.

My part on the program was to serve on a panel in a question and answer session on Friday afternoon. The other members of the panel were former Governor Albert P. Brewer, Dr. David Bronner, Birmingham lawyer William N. Clark, Dr. John Dew and me. It was an honor to be on a panel with such distinguished men. I was most impressed with the program, which I believe was most successful. Doug McElvy, who is doing an excellent job as President of the State Bar, had the responsibility of carrying out the overall program this year. In my opinion Doug's hard work will pay off. Bill Clark, who preceded Doug as President, has to be given the credit for putting this program together during his tenure. I believe that it will pay great dividends in years to come. Pat Graves and Alyce Spruell were in charge of this year's program and did an excellent job. Ed Patterson also did his usual good job in coordinating things for the event. It's good to know that our State Bar is in good hands and is working to improve things in Alabama.

XXIV. FIRM ACTIVITIES

Employee Spotlights

Davida de Gonzalez

Davida De Gonzales has been with the firm for almost five years. She currently works in the Administrative Department taking new client calls. In this position, Davida has a number of important duties. She takes the majority of the new client calls and performs duties relating to new client contacts. She assists other departments with calls as needed. Davida, who has a degree in optics and is ABO certified, is currently attending Troy University working on a degree in psychology. Davida has a 4-year-old son, Darius. She does an outstanding job for the firm.

Willie Fred Gamble

Willie Fred Gamble came to the firm last month to work primarily in our mailroom. Fred was born and raised in Montgomery and attended Lanier High School before going on to Oklahoma State. At Oklahoma State, Fred majored in Physical Education and played football for the Cowboys. He then signed on to play with the N.Y. Giants. After his time in the NFL, Fred returned to Montgomery and spent several years working for the State of Alabama. He

moved from that job to work at Henig Furs, where he worked in both sales and security. Fred has also run a lawn service for the past 18 years. He stays active in football, coaching children's teams. We are most pleased to have this new employee. I predict he will be a real asset to the firm.

XXV. SOME PARTING WORDS

For the first time in years, I watched the entire Super Bowl game this time. I suppose there are a number of reasons why people watch the Super Bowl. Apparently, some watch for football, others for the commercials, others simply because they just happen to be with friends who are watching the game. I didn't watch most of the commercials this year for several reasons—one being I can't figure out the message most of the time—so I fall in the "football group." I do watch commercials from time to time, however, and have a real problem with the content of many of the commercials that are shown on commercial TV channels as well as on cable and satellite TV channels. I have to wonder whether there is a connection between what we decide to watch and what's actually in our heart? Should a Christian's faith in Jesus Christ have anything at all to do with his or her TV choices? In a world of declining moral standards, we must think through that question. How does our Christian faith affect our TV viewing habits? I suspect if we were totally honest, sometimes our faith has very little to do with what we watch and what we allow our children and grandchildren to watch.

One secular writer, speaking about today's television programs, commented: "The notion of indecency has become obsolete." It is pretty evident that if any real standards exist, they have been largely pushed aside. If we all applied the moral standard found in biblical teaching, our families would be much better off and so would we. I don't believe anybody would argue that most TV productions are not governed by the guidelines God wants each of us to follow. The Bible has set out a pretty good rule of thumb that we could apply to our TV viewing habits:

> *Whatever things are true, whatever things are noble, whatever things are just, whatever things are pure, whatever things are lovely, whatever things are of good report, if there is any virtue and if there is anything praiseworthy—meditate on these things.*
>
> *Philippians 4:8*

It's really hard for us to do that when we're constantly being bombarded by the ungodly images presented on television every day of the week—even on Sunday—and during all hours of the day. It is pretty sad that commercials appear during the news programs at 6 o'clock on all commercial stations that young children have no business seeing. Some of the promos during the news for programs to be aired later that night are very close to being "X Rated." The same is true for lots of commercials shown during prime time sporting events. What can we do about it? I believe we should let all of our political leaders know that we want television programs, including commercials, cleaned up. We should especially call on those politicians in our nation's capitol. Today commercial channels, as well as cable and satellite television, are pretty rotten. We are finally seeing some cracking down on indecency in programming, but it's not enough. Our churches should be leading the fight to clean up the television industry—and we could add the movie industry to that effort as well—but are they?

It's easy to spot problems like those mentioned above, but doing something about them is much more difficult in today's world. With all of the troubles facing us, it is extremely important that we look for things spiritual and eternal in our daily lives. Otherwise, we could get so discouraged that life would get sort of miserable. Some of us might even quit trying to make things better for our families and for others. I encourage all of our readers to take a look at John 3:1-21. If we are like the powerful Jewish ruler mentioned in John's Gospel—who was confused and was seeking some real answers—I can't think of a better message to put things into focus for us. This has really helped me understand that having power, prestige and standing in one's community doesn't mean that we understand God's plan for **all** of us. In fact that sort of thing oftentimes blinds us to an understanding of God's plan of salvation. My prayer is that every person reading this report has been exposed to that plan and—if not already on board—that each will accept the promises available to all of us. I can assure you—there's no other way!

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