



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

BILL PRYOR SHOULD BE APPROVED

I don't know a great deal about most of the candidates that George Bush has nominated for federal judgeships around the country. But, I do know a great deal about Bill Pryor. The former Attorney General has been put up again by the President for a slot on the U.S. Court of Appeals for the Eleventh Circuit. Bill is currently serving on that court, but not in a permanent position. He will leave the court at year's end if not confirmed by the U.S. Senate. In my opinion, the Senate should confirm Bill and allow him to serve on the court. I have certainly not agreed with everything that the Mobile native has done in his legal career. In fact, I never voted for him for political office. But, I do know that Bill is extremely well qualified to serve on the bench. I hope that our Democratic friends in the Senate will put politics aside and confirm this nomination. Bill Pryor—if allowed to serve—will be a fair and impartial judge and will do an outstanding job on a most important court. In my opinion, it will be a big mistake for the Senate not to confirm this nominee.

JOE BORG NAMED AS MEMBER OF UNITED NATIONS PANEL

Joseph P. Borg, Director of the Alabama Securities Commission, participated in an intergovernmental panel as part of the United Nations Eleventh Congress on Crime Prevention and Criminal Justice. The U.S. delegation approved Joe to attend the Congress. He participated in a study sponsored by the United Nations Office on Drugs and Crime in conjunction with the United Nations Commission on International Trade Law. Joe and other attendees convened as an Intergovernmental Expert Group to prepare a

study on International Fraud and the Criminal Misuse and Falsification of Identity in Vienna. This is quite an honor for Joe and a tribute to his standing in his field of work. He is extremely well respected by his peers. It is also quite good for Alabama for Joe Borg to receive this recognition.

TERRY BUTTS TO RUN FOR LIEUTENANT GOVERNOR

Former Supreme Court Justice Terry Butts, who has represented Judge Roy Moore, says that he will run for Lieutenant Governor next year. Interestingly, Terry says other persons **associated** with Judge Moore will also be on the Republican ticket. But, Terry told the *Associated Press* he didn't believe that Justice Moore will have an announced slate. According to Terry, every statewide office on the ballot next year—including 11 seats on the state appellate courts—will be contested in the Republican primary. That had been the "hot" rumor around the state over the past few weeks.

I am sort of surprised that the race for Lt. Governor is getting this much attention. Now it appears there will most likely be others—both Republican and Democrat—who will seek the post. Mo Brooks, a Madison County commissioner and former state legislator, has already announced his candidacy. The talk around the State House in Montgomery is that Perry Hooper, Jr. is a likely candidate. Several other Republicans and Democrats have said they are considering seeking the office because Lucy Baxley is definitely running for governor.

For those who don't know Terry, he began his political career as a Democrat, and was most successful. He served several years as a circuit judge and then as a state Supreme Court justice. Terry resigned from the Supreme Court in 1998 to run for attorney general. As you may recall, Terry lost a very close race to Republican Bill Pryor. After that, the Crenshaw County native returned to private law practice. Terry represented

Governor Riley in the post-election dispute after the 2002 general election. Then in 2003, he represented Judge Moore when the Court of the Judiciary removed the chief justice from office. The **Moore factor** will make the Republican primary a most interesting event next year. It appears that Terry is on the Moore team!

STATE OF MISSISSIPPI MAKES CLAIM AGAINST WORLDCOM AND KPMG

Our firm has been employed to help the State of Mississippi in litigation that

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hopefully will help that state's treasury. As you know, in June 2002, news that WorldCom had improperly booked \$3.8 billion dollars over the past five quarters led the Mississippi-based company to file one of the largest bankruptcies in U.S. history. A report by the Securities and Exchange Commission revealed that WorldCom had committed "accounting improprieties of unprecedented magnitude." Clearly, stockholders took a real beating as the company's stock took a nosedive. Several top-level WorldCom executives have already pleaded guilty to criminal fraud and conspiracy charges. But, the big news was the guilty verdict in New York of Bernie Ebbers on all counts. This, in my opinion, was justified. It will be a strong message to other CEOs who betray the trust of their company. Employees and stockholders suffered because of the greed that corrupted what could have been a great company had it been run by honest folks.

The State of Mississippi has now filed a \$1 billion dollar tax claim against WorldCom in the bankruptcy case, which is pending in New York. Mississippi Attorney General Jim Hood investigated his state's claim for approximately one year and has built a very strong case. To assist in the investigation and potential prosecution of the claim, the Attorney General retained The Langston Law Firm of Booneville, Mississippi and the Lundy & Davis Law Firm of Lake Charles, Louisiana and Jackson, Mississippi. Our law firm was then asked to work on the case and we will be part of the litigation team. Andy Birchfield, Frank Woodson, and I will work with the other firms on this most interesting case.

Sixteen other states have filed claims against Worldcom for unpaid taxes. In addition, all of the states, including Mississippi, are making claims against KPMG, a giant accounting and auditing firm, for its part in what the states contend to be a large tax avoidance scheme. The state of Mississippi contends that WorldCom's accounting scheme mischaracterized various pay-

ments made to WorldCom's holding company by various subsidiaries, reducing the tax liabilities of both. One basis for the Mississippi claim is the "Examiner's Report" from the Bankruptcy Court. The court-appointed examiner prepared an audit of WorldCom and his conclusions fully support the Mississippi claims. The Examiner's Report is critical of the "royalty program" whereby certain intangibles (something the KPMG accountants refer to as "management foresight") were transferred to the WorldCom Holding Company and then licensed to various WorldCom subsidiaries. This scheme generated roughly \$20 billion dollars in royalty payments since 1998. The subsidiaries deducted royalty payments from subsidiary income, reducing their taxable income to the states in which they are located. On the other hand, WorldCom's royalty income was not fully recognized because of certain tax rules in Mississippi related to royalty payments that were in effect at that time. Clearly, these payments weren't royalties and both WorldCom and the accounting firm knew it.

This is a most significant claim, which is critically important to the citizens of the State of Mississippi. Corporate citizens have a duty and responsibility to pay their fair share of taxes. And, they can't be allowed to devise schemes to avoid their legitimate tax obligations. Unfortunately, it appears that many in Corporate America believe that there is really nothing wrong with cheating governments. I suspect they really believe they can get away with fraud with little chance of ever being caught. In any event, it is good to see public officials who will go after the corporate cheaters. We look forward to assisting Attorney General Hood and the other lawyers in prosecuting this claim on behalf of the State of Mississippi and its citizens.

WE CAN'T ALLOW ALABAMA PUBLIC SCHOOL STUDENTS TO REMAIN IN POVERTY

Education should be any state's top priority, but in reality that has never been the case in Alabama. We are now paying for our past failures. A recent report verifies the bad news. The percentage of Alabama public school students living in poverty has crossed the 50% mark for the first time in our state's history, according to state education officials. The Alabama State Department of Education released more than 1,200 "report cards" rating the state's 1,529 public schools. The reports show that 50.7% of Alabama's students live in poverty, which is inexcusable. The majority of children in 71 of the state's 129 school districts are from poor families.

In many parts of our state—including Montgomery County—we have built a very good private school system. In fact, some of the campuses look like colleges. In most of those counties the public schools have suffered. If we would simply wake up and really make education our state's top priority, which means providing adequate funding—as well as accountability—for public education, there is no telling what our state could accomplish. It goes without saying that our vast potential has largely gone untapped. It's high time we got serious about educating our children. It's not too late to put education on the right track, but the time clock is running down. The current session of the Legislature is a great place to start. In fact, the bill passed by the House of Representatives on the property tax measure for education was a step in the right direction. I am hopeful the Senate will pass this legislation, which is a constitutional amendment. I believe the people will approve it in the referendum to be voted on statewide.

Source: Associated Press

COMMISSIONER SPARKS IS DOING HIS JOB WELL

Ron Sparks is doing an outstanding job as Commissioner of Agriculture & Industries. The Commissioner has kept all of his “campaign promises” and that is indeed rare. He has announced a pilot program for Country of Origin Labeling in Alabama grocery stores in cooperation with the Alabama Grocers Association. The Department and the Association have been working closely in the last few months to implement a project to test the feasibility of labeling produce in grocery stores. The testing will be conducted in eight grocery stores for up to 90 days in the Birmingham area. The participants include Associated Grocery Stores, Bruno’s Stores, Piggly Wiggly, and Western Supermarkets. All of the participating stores have voluntarily agreed to apply country of origin labeling on all loose produce in an effort to give consumers a choice. Commissioner Sparks, in announcing the project, stated:

Alabama raises some of the safest and most economical food in the world and farmers in other countries may not have the same high standards as we do here at home. I want to do anything I can to protect our families and our food supply. I commend these businesses for volunteering to be a part of this test program.

I applaud the Commissioner for taking the lead in this project. We need to do everything possible to promote the well-being of Alabama farm families and Ron Sparks is working hard for them. He should be commended for his efforts. For more information on the participants in the country of origin labeling pilot program, please contact Jim Smotherman at the Alabama Grocers Association or Christy Rhodes in the Commissioner’s office at (334) 240-7103.

II. LEGISLATIVE HAPPENINGS

AN OVERALL ASSESSMENT

The Alabama Legislature is at the halfway mark of the regular session with 15-legislative days left. As predicted, very little of real significance has happened so far. Also, as predicted, most everything being done is pointed toward the 2006 election year. There is one thing for certain, however, the state needs additional revenues to operate all of the functions of government adequately and to properly fund our public schools at all levels. Unfortunately, it is even more clear that there will be no new taxes passed by the Legislature for the general fund this year. The only hope for any additional educational funding—and that is limited—will be discussed below. The best we can hope for is just another series of patches being put on an old tire that is wearing very thin. In my opinion, that’s not the right way to go, but it appears to be the route we will once again take.

GOVERNOR SIGNS OPEN MEETINGS BILL INTO LAW

The Legislature should be commended for passing one piece of good legislation. Governor Bob Riley signed the badly needed open meetings legislation into law on March 15th. This will replace a 90-year-old law that had far too many “loopholes.” The new law will take effect on October 1st. Senator Zeb Little (D-Cullman) and Rep. Blaine Galliher (R-Gadsden) pushed the bill through the Legislature without a dissenting vote, which was quite an accomplishment.

Alabama’s old open meetings law, enacted in 1915, was not working well and it badly needed replacing. The new law spells out when meetings of government bodies must be open and

how they must notify the public of upcoming meetings. In my opinion, the changes in the new law will greatly benefit the people of Alabama and will actually improve the performance of our political leaders. Clearly, the public will be the real beneficiary of the new law. The Governor, Attorney General, the legislative leadership in both Houses, and the Alabama Press Association should be commended for working hard to get this bill passed. Chief Deputy Attorney General Keith Miller will help local governments and school boards with the changes. In my opinion, passage of this bill will be a highlight of the session.

Source: Associated Press

PROPERTY TAX BILL FOR SCHOOLS HEADS TO SENATE

Before the members took off for the annual spring break, the Alabama House passed a proposed constitutional amendment that would require residents of 30 school districts to pay higher property taxes. The legislation, which passed the House by a 71-19 vote, would require all city and county systems to have at least 10 mills of property tax dedicated to public schools. Those without 10 mills would have to raise their taxes or risk losing much of the state funding for their public schools. The bill now goes to the Senate. If passed there, the amendment will then have to be approved in a statewide referendum. Rep. Richard Lindsey (D-Centre), who was the bill’s sponsor, says the change would raise about \$17.8 million a year for education in the state. I am hopeful the Senate will pass this bill and put the issue to the voters.

THE CAMPAIGN FUND DISCLOSURE BILL

The Campaign Fund Disclosure Bill is now before the full Senate. I am hopeful that this badly needed bill will pass and become law. If the Legislature can accomplish this to go along with the

open meetings law, I will consider this session to have been a good one. We badly need to reform our election laws, and the passage of the funding bill would be a step in the right direction.

THE REST OF THE SESSION

Frankly, I don't see much else of any real importance passing during the rest of the session. There are a number of important bills that should be passed. A prime example is Senator Penn's bill that would require associate justices on the Alabama Supreme Court to run in districts. However, if reasonably good budgets can be passed, that will be about all we can reasonably expect. But, those budgets—without adequate funding—won't be anything to write home about!

III. COURT WATCH

THE PRESIDENT'S TORT REFORM CLAIMS ARE UNFOUNDED

I won't spend a great deal of time this month discussing the ongoing efforts in Congress to pass more tort reform legislation. It's very clear that the President has been "using" doctors to sell his so-called medical malpractice reform in Congress. It doesn't seem to matter that the actual history of medical malpractice litigation doesn't bolster the President's claims. Simply put, there is no evidence of a lawsuit crisis in the U.S. involving medical doctors. The *New York Times* had an excellent editorial on the reform issue. It clearly repudiates and undercuts the basis for the President's claims and is worth reading in my opinion. For that reason, we are setting out the *Times*' editorial in its entirety for your edification.

FALSE DIAGNOSIS

Medical malpractice litigation reform is a high priority for President Bush, who contends that juries are running amok, multimillion-dollar settlements are on the rise and greedy trial lawyers are filing frivolous suits. The results, Mr. Bush and others argue, include skyrocketing insurance prices, abandoned medical practices, defensive medicine and a crisis of access to care. Their proposed solution: caps on jury awards to patients and on lawyers' contingent fees. No one disputes that insurance premiums have risen significantly. The question is whether a crisis in states' tort systems accounts for the increase. Consider Mr. Bush's home state of Texas, America's second most populous state and the third largest in terms of total health care spending. After studying a database maintained by the Texas Department of Insurance that contains all insured malpractice claims resolved between 1988 and 2002, we saw no evidence of a tort crisis. Adjusting for inflation and rising population, we arrived at the following findings:

- *Large claims (with payouts of at least \$25,000 in 1988 dollars) were roughly constant in frequency.*
- *The percentage of claims with payments of more than \$1 million remained steady at about 6% of all large claims.*
- *The number of total paid claims per 100 practicing physicians per year fell to fewer than five in 2002 from greater than six in 1990-92.*
- *Mean and median payouts per large paid claim were roughly constant.*
- *Jury verdicts in favor of plaintiffs showed no trend over time.*

- *The total cost of large malpractice claims was both stable and a small fraction (less than 1%) of total health care expenditures in Texas.*

In short, as far as medical malpractice cases are concerned, for 15 years the Texas tort system has been remarkably stable. Texas's situation is not unique. One study of Florida's experience from 1990 to 2003 also found declines in paid claims per 100 practicing physicians as well as per 100,000 population. Over the same period in Missouri, the total number of malpractice claims fell by about 40% and the number of paid claims dropped almost by half. Malpractice premiums have risen sharply in Texas and many other states. But, at least in Texas, the sharp spikes in insurance prices reflect forces operating outside the tort system. The medical malpractice system has many problems, but a crisis in claims, payouts and jury verdicts is not among them. Thus, the federal "solution" that Mr. Bush proposes is both overbroad and directed at the wrong problem.

If you check the bills proposed by the White House, you will find the real beneficiaries are the insurance companies, pharmaceutical companies, and the manufacturers of medical products. There is nothing in any of the bills for "victims." I have to wonder why the President has shown no interest in insurance reform or upgrading consumer protection in Congress. If he really wanted to do the right thing, President Bush could start his reform efforts by reforming the insurance industry. Of course, that would mean going after some of his largest campaign contributors.

Source: *The New York Times*

VERDICT AGAINST METABOLIFE THROWN OUT

An appeals court panel has overturned the \$4.1 million jury verdict against Metabolife International Inc. You will recall this case involved claims that four Alabama plaintiffs suffered health problems after taking the company's herbal weight-loss supplement. The U.S. Court of Appeals for the Eleventh Circuit ruled the plaintiffs' expert testimony should not have been allowed at the trial because it did not pass scientific muster. The appeals court stated: "The admission of their testimony on medical causation in this toxic tort case substantially prejudiced Metabolife and authorizes reversal of the judgment." The case in Birmingham's federal court was the first to go to trial against Metabolife. Jurors returned a verdict in favor of the plaintiffs, finding that Metabolife International sold the product Metabolife 356 in a defective condition, unreasonably dangerous to the consumers, and that the plaintiffs were injured as a result.

U.S. SUPREME COURT CAN CLARIFY WHEN SUITS SHOULD GO FEDERAL

The tort reform groups have successfully sold their story that federal courts are much better for Big Business than are the state courts. This has caused many trial lawyers to avoid the federal courts for their clients' claims. Frankly, I think that is a mistake. However, it should be very clear what cases are to be filed in the federal courts. A Florida renters' lawsuit claiming personal injury from toxic mold in apartments could give the U.S. Supreme Court an opportunity to clarify—to some extent at least—when plaintiffs can sue in federal court as opposed to state court. The question has clearly become a political issue largely as a result of the tort reform efforts. Under current federal rules, a defendant has a right to "remove" a case that is originally filed in a state court to federal court when the two parties are citizens of different states and the claimed damages exceed \$75,000. That

has been the accepted rule for years. While the present case before the High Court doesn't involve a class action, it would clarify what determines a corporation's "citizenship" in both individual and class action suits when a company has subsidiaries in multiple states. The issue before the Court is whether Virginia renters can sue their landlord in Virginia state court over exposure to toxic mold in their apartment. The landlord is a Texas-based company with a subsidiary in Virginia.

The Richmond-based U.S. Court of Appeals for the Fourth Circuit held that the suit in state court was permitted. It found that the landlord was a "citizen" of Virginia because its subsidiary conducted business in the state and as a result had significant ties there. The landlord's appeal of the lower court's ruling is supported by a good number of big business groups. They all argue that the Fourth Circuit's ruling would **unfairly** expose them to litigation in state court. In recent months justices have sought to clarify the scope of federal jurisdiction, including whether lawsuits that allege harm of less than \$75,000 may be heard in federal court if the basic facts they allege are similar enough to be tacked onto other lawsuits that do meet the minimum requirement. That would really take a most liberal interpretation of the present rules of court to reach such a ruling. It should be noted that the new class action legislation would allow class action suits seeking \$5 million or more to be heard in state court only if the primary defendant and more than one-third of the plaintiffs are from the same state. It will be interesting to see how the Supreme Court rules in the pending case. It is also noteworthy to mention that the federal courts were already significantly overloaded with cases long before the class action bill became law. Now, the wheels of justice will really wind to a "crawl."

Sources: *The Wall Street Journal* and *Associated Press*

CELL PHONE COMPANIES SUED FOR 'UNSAFE LEVELS OF RADIATION'

There have been reports over the past few years concerning cell phone use and radiation dangers. Thus far, these reports haven't been able to sufficiently link the phone use to cancer. However, a divided federal appeals court has reinstated five lawsuits claiming that the cell phone industry has failed to protect consumers from unsafe levels of radiation. The class action lawsuits are attempting to force cell phone manufacturers to provide headsets for users. The suits allege that the headsets would reduce risks of brain tumors. The lawsuits, which also seek punitive damages, originally were filed in state courts in Maryland, Pennsylvania, New York, Georgia and Louisiana, but were consolidated and transferred to a federal court in Baltimore. A federal district court judge dismissed the lawsuits last March, ruling that federal standards regulating wireless phones—including uniform national limits on radiation emissions—preempt the state law claims. A panel of the U.S. Court of Appeals for the Fourth Circuit, however, reversed that ruling in a 2-1 decision on March 17th. Four of the cases were returned to state courts and one to the federal district court for further proceedings.

It should be noted that several studies have found no adverse health effects from cell phones. The appeals court, in its majority opinion, stated: "We have thoroughly examined the claims... and one thing is clear: the elements of each of the claims depend only on the resolution of questions of state law." The dissenting opinion stated that the claims require the courts to explore the adequacy of the Federal Communications Commission's radiation emission standards and that "It is well-settled that a suit to invalidate a federal regulation arises under federal law.... This thinly disguised attack on the validity of the FCC standards raises a substantial federal question." It will be most interesting to see how these cases develop.

Source: *Associated Press*

IV. THE NATIONAL SCENE

KICKING THE AARP MAY HAVE BEEN A BIG MISTAKE

The Bush White House has declared war on the AARP and it is using some of the same tactics that it has used in the past in destroying political opponents. This attack comes because of the AARP's refusal to go along with President Bush on Social Security. An organization stirring controversy in the debate over Social Security's future, known as USA Next, is applying techniques learned through years of fundraising for conservative causes. The group has been around for a while under the name United Seniors Association. USA Next claims it is "the conservative alternative to AARP," according to a report in the USA Today. Taking on the AARP, however, may prove to be a little tougher than John Kerry or even John McCain. In my opinion, the AARP, which has a tremendous number of members nationwide, will be a tough nut to crack. I have always had tremendous respect for the AARP and really hate to see the organization being defamed by the Rove political machine.

The group USA Next has been closely aligned with the President in other battles. Direct-mail tactics and Internet-based fundraising were used by the group to push President Bush's Medicare prescription-drug program. Interestingly, USA Next used millions of dollars received from the pharmaceutical industry to fund that campaign. According to the USA Today report, the group plans an initial \$10 million campaign accusing AARP of a "shameful record of liberal activism," including backing gay marriage. Its first step was an Internet ad in late February that specifically claimed AARP supports "gay marriage." It included a picture of two men kissing at what appeared to be their wedding over the words, "The

real AARP agenda." I have to wonder who came up with that agenda.

In style and tactics, the USA Next campaign appears to be modeled on some of Karl Rove's past work. Many of those involved in the USA Next campaign are some of the same folks who ran the misleading television ad campaign against Senator Kerry. To my knowledge AARP has taken no position on gay marriage. In fact, the group is made up of folks who have always been considered as being very conservative. I suspect most of the AARP members have traditionally voted Republican. Financial support for USA Next comes from the food industry, pharmaceuticals, health care, energy, and other industry groups and trade associations. I really believe this is a case where a single person with tremendous power—Karl Rove—has gotten to the point where he believes he can do anything to get anybody always and get with it. Rove has consistently used the "gay marriage" and "patriotism" issues—regardless of the factual situation—to his advantage. If you oppose the president, you will likely be labeled as being immoral and unpatriotic, regardless of the issue involved. It will be most interesting to see whether Rove and his troops can intimidate the AARP.

Source: USA Today

THE COUNTRY MAY BE READY FOR A WOMAN PRESIDENT

A recent poll says that we are ready for a female to be elected president in the United States. It is most significant that more than six in 10 voters believe a female can now be elected president. The poll, conducted by the Siena College Research Institute and sponsored by Hearst Newspapers, found that 81% of people surveyed would vote for a woman for president. Interestingly, 53% of the people believe New York Senator Hillary Rodham Clinton should make the race. On the Republican side, 42% of voters said Secretary of State Condoleezza Rice

should run for the White House, while 33% named North Carolina Senator Elizabeth Dole.

The pollsters found about 60% of voters said they expect a woman to be the Democrats' nominee for president in 2008. In contrast, they found only 18% expected the Republican ticket to be headed by a woman. About 67% of those polled said a female president would be better than a male on domestic issues, but only 24% said a woman president would do better on foreign policy issues. Personally, I would have no problem voting for a woman to lead our nation as president. However, there are some potential female candidates who simply won't get my vote—not because of their gender, but because of their positions on consumer issues. Come to think of it, there are several males who might be running in 2006 who fall in that category and who I could never vote for. Nevertheless, it is encouraging to see that the America public has reached the point that a female would be accepted as a candidate for President.

Source: USA Today

TAX AVOIDANCE SAVES BIG COMPANIES BILLIONS

Abusive tax shelters have been most prominent in the news recently. What may not have been as well publicized, however, is the extent to which Fortune 500 companies have taken advantage of these tax shelters. The Government Accountability Office (GAO) has reported that Fortune 500 companies avoided \$1.8 billion in federal taxes alone from 1988 through 2003. During that same time period, the GAO has reported that sixty-one Fortune 500 companies avoided a total of \$3.5 billion in taxes through auditor-inspired tax schemes. Sometimes these auditors would provide tax advice to top executives of the companies. Senator Carl Levin of Michigan says the GAO report highlights the need for stronger auditor-independence rules. I am in total agreement with the senator

on that point. The obvious conflict that arises when a firm is both consultant and auditor has caused a great deal of problems for companies and their shareholders.

An example of the need for stronger auditor-independence rules can be seen in Ernst & Young's work for Sprint and its top executives in 2000. That year, the accounting firm earned \$65 million dollars in audit and consulting fees from Sprint. Part of this was earned for lobbying the Securities & Exchange Commission (SEC) to permit seven company executives to rescind their exercise of company stock options after a steep drop in the stock price left them with tens of millions of dollars in tax liabilities. Under accounting rules, a company is entitled to a tax benefit on the difference between the shares option and exercise price, even if the profit is short-lived. Ultimately, Sprint dropped the proposal for another reason—it would have to account for the rescission as added compensation, dragging down its earnings. At the same time, however, Sprint told the Federal Communications Commission (FCC) that it wanted to rescind the executive stock awards because their personal tax liabilities had become a “distraction” that could “adversely affect the company.”

This sounds questionable if Ernst & Young was acting solely as Sprint's auditor. Interestingly, the giant accounting firm also worked on the executives' personal tax strategies, leading to their participation in one of the firm's now-discredited tax shelters that the Internal Revenue Service (IRS) is currently investigating. The Public Company Accounting Oversight Board is proposing to prohibit audit firms from providing tax services to company officers in financial oversight roles as part of tougher auditor-independence rules. This makes sense and should be implemented.

Source: *USA Today*

REPORT SAYS AVIATION SYSTEM VULNERABLE TO ATTACKS

A recent confidential report by the Homeland Security Department and the FBI shouldn't make us feel real good about where we are in this country in our “war against terror.” We now learn from this report that the nation's aviation system remains vulnerable to attacks by al-Qaida and other terrorists who may be targeting noncommercial aircraft and helicopters. The government's report concludes that commercial airlines also remain susceptible to attack. Members of al-Qaida are believed to be examining and testing U.S. security systems for weaknesses. The **confidential report**, dated February 25th, reveals that terrorists will likely target the areas that have been put on a lower priority by the government.

The report was first revealed by *The New York Times* on its Internet site and was then picked up by Associated Press. More than \$12 billion has been spent on explosive detectors, armored cockpit doors, screeners, air marshals, and other aviation security systems since the attacks on September 11th. Clearly, some progress has been made. President Bush has proposed giving the Transportation Security Administration (TSA) \$5.6 billion in 2006—\$2 billion of which is for airline passenger screening and \$1.45 billion for airline baggage screening. But a report by congressional investigators in December found that TSA “has primarily focused on strengthening the security of commercial aviation.” That report noted that TSA doesn't understand the risks posed by small private planes, fails to issue meaningful threat information to general aviation airports, and can't make sure charter airlines and flight schools comply with security regulations. If that is true—which certainly appears to be the case—we had best start looking at those areas immediately.

The thousands of general aviation airports—which host recreational planes, business jets, helicopters, and

other kinds of noncommercial aircraft—must all have security measures that are equivalent to TSA mandates at commercial airports, according to government officials. The Aircraft Owners and Pilots Association, which represents general aviation pilots, said that current TSA regulations allow grass airstrips in rural areas and large private airports near a city to adopt security measures that fit their individual needs. We don't need to wait for another terrorist attack and then respond to some obvious needs. We must take the necessary steps to make our nation as safe as reasonably possible from terrorist attacks. I hope the release of this confidential report will result in a broadening of our government's planning to include all phases of aviation. To ignore this problem area any longer is asking for trouble!

Sources: *The New York Times* and *Associated Press*

MORE ON OUR RECORD TRADE DEFICIT

The United States is rapidly becoming heavily indebted to the rest of the world, and that should be alarming to our most conservative readers. Our country's trade deficit was reported by the Commerce Department at an all-time record high of \$665.9 billion in 2004. In my opinion, the soaring trade deficit can't be good for the future well-being of our nation. Many private economists are extremely worried that the huge level of resources being transferred into the hands of foreigners will eventually result in lower living standards in this country. I worry about even more serious consequences.

Many knowledgeable persons are also greatly concerned over the decline in the value of the U.S. dollar. We know that the dollar—against other currencies—has been declining for the past 3 years. Fortunately, it has been—at least so far—an orderly decline. But, it is extremely dangerous for foreigners to have control over our economy. For example, if foreigners suddenly decide to diversify into other currencies and

began cashing in their holdings of U.S. stocks, bonds, and treasury securities, it would have a drastic effect on the value of our dollar. Such a development could send stock prices in this country plunging and interest rates soaring, according to some economists. That would be a disaster in the making. Investor Warren Buffet had this to say:

The United States could become a "shareholder society" by the continued transfer of U.S. assets into foreign hands.

Buffet estimates that the country's debt to foreigners could surge to \$11 trillion by 2015. Unless we take the steps necessary to bring the trade deficit into balance, I fear we are in for some tough economic times. I have to wonder why nobody in Washington seems overly concerned. Can anybody explain the White House's lack of interest?

V. THE CORPORATE WORLD

CORPORATE FRAUD IS ON THE INCREASE

We all know that corporate fraud is a tremendous problem in the United States, affecting millions of people, and there doesn't appear to be any slowdown. Currently, the Federal Bureau of Investigation (FBI) is pursuing 334 corporate fraud cases throughout the country. This represents more than a 100% increase over last year. Eighteen of those cases involve losses to the public that exceed \$1 billion. The FBI is currently opening 3-6 new cases each month, with each case averaging a loss exceeding \$100 million. Interestingly, Robert S. Mueller, III, the director of the FBI, is making corporate and securities fraud only 10th on a list of 15 priorities for his bureau. Obviously, tops on the priority list is counterterrorism and counterintelligence, which is

understandable. But, it is difficult to understand why corporate fraud is so low on the list, considering its effect on our economy. The following points, given by Director Mueller to the Senate Intelligence Committee recently, give us an idea of the magnitude of the problem:

- Since the initiation of the FBI Corporate Fraud Task Force in December 2001, there have been 480 indictments and 305 convictions of corporate executives and their associates.
- The FBI's efforts have also resulted in over \$2 billion in restitutions, recoveries and fines. This is in addition to over \$30 million in seizures and forfeitures.
- In the Enron, HealthSouth, Cendant Corporation, Credit Suisse First Boston, Computer Associates International, Worldcom, Imclone, Royal Ahold, Perigrine Systems, and America On Line cases the FBI obtained 119 indictments or informations and 79 convictions.
- Several high profile trials are anticipated in the near future, including the trial of Ken Lay.
- During fiscal year 2004, the FBI had 2,468 pending health care fraud investigations. The Bureau obtained 693 indictments and informations, and 564 convictions or pretrial diversions. They also received \$1.05 billion in restitution, \$543 million in fines, \$28.8 million in seizures, and \$19.05 million in forfeitures, and disrupted 186 and dismantled 105 criminal organizations.

Director Mueller made this observation: "Corporate fraud can cost Americans their jobs and rob them of hard-earned savings. It shakes the public's confidence in corporate America to its foundation." I believe that the public will support making the fight on corporate fraud a high priority. Recent polls checked the pulse of the American people on this issue and

found that confidence in the chief executive officers who run the major corporations in the U.S. was at an all time low. This is attributed to the massive fraud that has been reported over the past few years. Folks simply don't trust the corporate bosses now and with good reason. A major crack down on corporate fraud is certainly in order. The criminal conviction of Bernie Ebbers, in my opinion, will have a very good effect on corporate fraud. This conviction—unlike that of Martha Stewart—sends a strong message to the corporate world!

Source: *The Corporate Crime Reporter*

DEMAND FOR FRAUD EXAMINERS INCREASES

With all of the reports of fraudulent conduct being uncovered in Corporate America, I am not surprised to learn that more fraud examiners are needed to keep track of all the cheating that is going on. The Association of Certified Fraud Examiners announced recently that its membership had grown to a record level. There are now 32,000 members, representing an increase of 4,000 members in the past year. This reflects a growing demand for trained anti-fraud professionals to address continuing concerns about fraud in business and government. ACFE President Toby J. F. Bishop stated:

Implementing Sarbanes-Oxley 404 has demonstrated both the challenge and the opportunity to reduce the risk and cost of fraud. Leading audit committees, boards of directors, CEOs and CFOs are realizing that fighting fraud effectively is not a one-time activity. It requires ongoing effort within their companies.

Bishop says that he believes the demand for Certified Fraud Examiners is rising as organizations strengthen their anti-fraud capabilities. Demand for Certified Fraud Examiners, which is currently exceeding the supply, is likely to grow even stronger simply

because fraud is still on the increase. Had the politicians mandated strong regulation, and even stronger enforcement, things would be much better today. Instead, they have pushed tort reform, which protects the **cheaters** and further penalizes their **victims!**

SETTLEMENTS TOTALED \$5.4 BILLION FOR SECURITIES CLASS ACTIONS IN 2004

Corporations paid a record \$5.4 billion to settle securities class actions in 2004 and probably will pay more in coming years as the very large number of fraud claims works its way through the legal system. The study was done by Cornerstone Research, a consulting firm based in Boston. The 118 claims settled last year also was a record. This was up from 96 settlements in 2003. While 80% of settlements last year were for less than \$25 million, there were seven settlements in excess of \$100 million, the most in any year since the study began in 1997.

Last year, 212 suits were filed against companies alleging securities-law violations, up from 181 in 2003, according to a previous study by Cornerstone. Many of those big losses are tied to claims of fraud at mutual-fund companies and pharmaceutical firms that recalled key drugs. As in past years, cases involving allegations of accounting fraud, restatements, and regulatory enforcement actions resulted in shareholders receiving a higher percentage of estimated damages compared with cases that didn't include those factors. Institutional investors' claims were involved in 35% of cases. The study reveals that defendants paid more in those cases.

Source: *The Wall Street Journal*

WORLD COM CLASS ACTION SETTLED

Two major players, along with some lesser lights, have settled class action securities litigation involving WorldCom. Bank of America got the ball rolling by agreeing to pay \$460.5 million to settle its part of the claim.

Then J.P. Morgan agreed to pay \$2 billion to settle. The case is pending in the United States District Court for the Southern District of New York. A scheduled trial date had been reached when J.P. Morgan elected to settle. Under the terms of the settlement agreement, which is subject to court approval, subsidiaries of Bank of America Corporation, which are named as defendants in the litigation, will also make payments to the settlement class. The four investment banking firms that participated as underwriters in WorldCom's May 2000 bond offering will pay a total of \$100.3 million to settle the claims asserted against them. These defendants with the amounts paid by each are: Lehman Brothers Inc. (\$62,713,582); Credit Suisse First Boston, LP (\$12,542,716); Goldman, Sachs & Co. (\$12,542,716); and UBS Warburg LLC (\$12,542,716).

A total of 16 banks involved in the underwriting or sale of WorldCom bonds have now agreed to pay a total of \$6 billion. At press time, settlement negotiations with 11 former WorldCom directors reportedly had also been successful. If that is accurate, it will add another \$55.2 million to the total settlement. The only defendants left in the litigation are now one former board member and Arthur Andersen. If they don't settle, the case will go to trial against them.

Source: *The Insurance Journal*

HIH LIQUIDATOR WARNS BERKSHIRE

The liquidator of HIH Insurance Ltd, an Australian insurer, has warned subsidiaries of Warren Buffet's investment company, Berkshire Hathaway Inc., they could face claims of deceptive conduct leading to the Australian insurer's collapse. HIH became Australia's biggest-ever corporate failure in 2001. The demise of HIH was partly attributed to its 1998 takeover of FAI Insurance Ltd, a heavily overvalued rival. The company suffered massive losses totaling about \$5.3 billion. The Australian liquidator, Tony McGrath, of

McGrath Nicol & Partners, is attempting to recover HIH's lost \$5.3 billion for creditors. Berkshire Hathaway Inc's annual report states that the liquidator had been in touch with two subsidiaries of its General Reinsurance company—General Reinsurance Australia (GRA) and Kolnische Ruckversicherungs-Gesellschaft (KR).

The Berkshire 2004 annual report reveals the following: "The liquidator contends, among other things, that GRA and KR engaged in deceptive conduct that assisted FAI in improperly accounting for such transactions as reinsurance, and that such deception was a causal factor that led to the insolvency of HIH." The Australian Securities and Investments Commission is pursuing breaches of the Corporations Act on behalf of the Australian public. Several top officials at HIH have pleaded guilty to criminal charges arising from breaches of corporations law.

Source: Yahoo Finance

FLORIDA ATTORNEY GENERAL GOES AFTER TENET HOSPITAL

Over the past year, state Attorneys General have been very active in pursuing corporations that have been cheating state governments. Recently, Florida Attorney General Charlie Crist filed a lawsuit in Miami federal court alleging that the Tenet Hospital chain inflated its Medicare charges and improperly took more than \$1 billion that could have been used by public hospitals. The complaint charges that Tenet hospitals nationwide engaged in a racketeering scheme that removed funds from the Outlier Pool that public hospitals could have used. General Crist said in a Miami press conference: "The long and short of it is they lied, they cheated, and they stole from the people." Among the plaintiffs in the lawsuit are the North and South Broward County hospital districts and the Public Health Trust, which represents the Jackson Memorial Hospital system in Miami.

Source: *The Insurance Journal*

TENET ANNOUNCES SETTLEMENT IN PRICING CASES

On another front, Tenet Healthcare Corp. has agreed to settle some class action lawsuits over prices that uninsured and underinsured patients were charged at hospitals owned by the chain's subsidiaries. Originally filed in December 2002, the lawsuit claimed that patients not covered by insurance plans were charged excessive prices at 114 hospitals owned and operated by Tenet subsidiaries in 16 different states. The lawsuit claimed that as a result of a scheme to boost its Medicare outlier payments, Tenet increased its "gross charge." The gross charge is that charged only to uninsured or underinsured patients who do not have the economic leverage to negotiate lower rates. The lawsuit charged that this increase in gross charges violated California's consumer protection and unfair competition laws. The settlement, announced on March 10th, is subject to court approval and is not expected to become final for several months. The Dallas-based operator of acute-care hospitals said it has established a reserve of \$30 million that will cover settlement expenses. Class action lawsuits are pending against Tenet hospitals in Alabama, California, Florida, Louisiana, Missouri, Pennsylvania, South Carolina, Tennessee and Texas. If a nationwide settlement is approved by the California court, it will most likely cause a dismissal of those cases.

The settlement class includes any uninsured patient who received medically necessary services at any of its hospitals between June 15, 1999 and December 31, 2004, and paid for services based on the hospital's gross charges. Under the terms of the proposed settlement, Tenet will refund amounts paid in excess of certain thresholds. During the class period, Tenet reportedly collected approximately \$400 million from uninsured patients. The specific percentage of reimbursement varies depending on the year the patient was treated. Tenet

must reimburse uninsured patients who received medically necessary services at any of its hospitals between June 15, 1999, and December 31, 2004, who were paid more than a certain percentage of the hospital's gross charges. Tenet will make a \$4 million contribution to a health care-related charity chosen by the plaintiffs' lawyers.

The settlement will not only provide restitution to those who need it, but in the future it guarantees that uninsured patients will receive significant discounts. The settlement was designed to provide uninsured patients with a degree of market power that will allow them to obtain the same rates insurance companies are able to obtain. Under the proposed settlement, Tenet has agreed to do the following for a period of four years:

- Provide financial counseling to all uninsured patients, including help in understanding and applying for governmental financial assistance and charity care programs. Subject to applicable legal requirements, Tenet will also post information on the availability of such financial assistance on hospital websites and at certain locations in its hospitals.
- Treat uninsured patients fairly and with respect during and after treatment, and regardless of their ability to pay for the treatment they receive.
- Offer uninsured patients reasonable payments and payment schedules, with no interest for the first 120 days after a patient is discharged. If a patient has applied for financial assistance, Tenet will not attempt to collect fees from the patient while an eligibility determination on the patient's completed application is pending.
- Follow a uniform credit and collection policy, including, among other things, a commitment not to pursue legal action for nonpayment of bills against any patient who is unemployed or without other significant

assets or to place a lien on a patient's home.

- Disclose to uninsured patients the estimated charges for anticipated treatment, subject to applicable legal requirements.
- Offer uninsured patients discounted pricing at rates comparable to the hospital's current managed care rates.

Sources: *Associated Press* and *The Insurance Journal*

PUTNAM TO PAY \$83 MILLION MORE IN RESTITUTION

Putnam Investments will pay \$108.5 million in restitution to customers because of improper share trading. The amount was determined by an independent consultant appointed as part of a settlement of "market timing" charges leveled against Putnam by the Massachusetts Securities Division and the Securities and Exchange Commission. Under the settlement, first announced last April, the company had agreed to pay \$110 million in penalties, including as much as \$25 million in restitution. But Putnam, the seventh-largest mutual fund company, a unit of Marsh & McLennan Cos., also agreed to pay more if the consultant determined the damages to be larger. With the final report, whose preliminary findings were previously reported, Putnam will now pay an additional \$83.5 million to current and former shareholders. The total sum that Putnam will pay in fines and restitution is now at \$193.5 million.

Putnam was the first fund company to face civil fraud charges in the trading scandals that began in the fall of 2003. Numerous companies have since agreed to pay penalties totaling about \$3 billion. Regulators and Putnam now will have to decide how to distribute the money to affected shareholders. Unfortunately, many of the restitution checks will be fairly small. Actually many investors were unaffected, and those will receive nothing or very little from the settlement. Larger investors in

the funds hardest hit by trading will receive only payments in the \$100 to \$200 range. William Galvin, Massachusetts Secretary of the Commonwealth, who oversees the state's securities division stated: "This was the story of a little money stolen from a lot of people." However, the consultant, Peter Tufano, a Harvard Business School professor, reported that customers lost a total of \$4.4 million, including interest, because of improper trading by portfolio managers and other Putnam employees. Customers lost a further \$48.5 million in transaction costs related to billions of dollars of withdrawals by customers after disclosures about excessive trading. Clients lost another \$55.6 million because Putnam failed to stop excessive trading by customers in retirement accounts. More than 90% of the losses were generated by 56 retirement plans, less than 2% of the number administered by the company.

We had reported in prior issues that "market timing" had become a major problem. The improper trading at Putnam involved rapid in-and-out exchanges from funds that took advantage of out-of-date prices of securities portfolios. On occasion these contained foreign stocks trading on exchanges that close earlier than in the U.S. Such trading skims profits from long-term investors and raises transaction costs. Trading was concentrated largely in five international funds. Hopefully Wall Street has cleaned up its act!

Source: *Wall Street Journal*

MORE BROKERAGE HOUSES FINED FOR IPO PRACTICES

The Securities and Exchange Commission (SEC) has ordered Wall Street firms that worked to increase the prices of new-stock offerings during the time frame of 1999 and 2000 to pay \$80 million dollars to settle civil allegations that they improperly induced customers to bid up stock prices in exchange for hot allocations of new technology company shares. Goldman

Sachs and Morgan Stanley will pay \$40 million dollars each under the terms of the settlement. Orders will be entered barring these companies from future violations of stock underwriting rules. In my opinion, the companies came out pretty well since they most certainly will have paid less in fines than they made from the initial public offerings (IPOs). They also don't have to admit any wrongdoing under the settlement. As previously reported, these initial offerings often produced hundreds of millions of dollars in fees for these Wall Street firms. Sadly, many of the companies that were introduced in the public offerings no longer exist. Many investors were left holding the bag after suffering tremendous losses.

The companies were involved in practices that have come to be known as "laddering." That's where customers are induced to help drive IPO share prices up by buying at increasingly higher rungs. It is very interesting to note that Goldman and Morgan initially made the argument that they were merely doing due diligence on IPOs they were overseeing by checking what the market would be for the shares. They also claim it was to discourage the quick selling or "flipping" of the shares for short-term profit. While the SEC stopped short of accusing Morgan and Goldman of actually manipulating the market, it said that any conduct that has a chance of artificially stimulating higher prices is illegal.

The SEC cited Morgan documents that said the firm deliberately sought to "create perception of scarcity" with an IPO, and marketed itself as consistently having "oversubscribed" interest from investors. Once Morgan created interest in a deal, the SEC alleged the firm would then ask investors whether they planned to buy more stock after the IPO began trading. Morgan allegedly kept detailed files of customers' stated commitments and tracked whether they followed through with them. You may recall from earlier reports that J.P. Morgan Chase & Company agreed in late 2003 to pay \$25 million dollars to

resolve similar allegations. Also, the Credit Suisse First Boston Unit of Credit Suisse Group in 2002 paid \$100 million dollars to settle civil regulatory charges over a variety of IPO allocation practices. As usual, none of these firms ever admit any wrongdoing. In fact, they consistently deny that anything illegal or wrong ever occurred. They just pay their fines and keep right on trucking in many cases.

Source: *Wall Street Journal*

CHEATING DIDN'T SEEM TO HURT TITAN

Titan, the San Diego, California-based defense contractor, has won the right to do business with the U.S. government despite the company's conviction on bribery charges. Titan, a military intelligence and communications company, pleaded guilty to making illegal payments to a presidential election campaign in Benin, hoping to boost fees for a project there. The company agreed to pay \$28.5 million to settle those and related charges. In addition, Titan allegedly violated federal tax laws by claiming the "bribes" as deductible expenses. As you may recall, Titan has lucrative contracts related to homeland security and the war on terrorism.

It is difficult to comprehend how the U.S. government could continue to do business with a company that is an admitted **cheater** and **defrauder!** Maybe this simply confirms my belief that some in Corporate America don't believe it is really "cheating" when their victim is the government. But, it does concern me that these "cheaters" can continue to do business with our government. Cheating, paying a fine, and never missing a beat on the government contract circuit just seems to be a way of life for some large corporations doing business with the government. If these corporations were banned from bidding on government contracts after a guilty verdict or plea, I suspect the cheating would grind to a halt.

TIME WARNER SETTLES SEC FRAUD CHARGES

Time Warner Inc., the world's largest media company, will pay \$300 million to settle fraud charges by the Securities and Exchange Commission for overstating online advertising revenues and the number of its Internet subscribers. As part of the agreement, Time Warner has restated its financial results to reduce the amount of online advertising revenues it reported by about \$500 million from the fourth quarter of 2000 through 2002. The company also has agreed to appoint an independent examiner who will further review the company's accounting for several previous transactions. There could be further restatements depending on how the report comes out.

Source: *Associated Press*

VI. CAMPAIGN FINANCE REFORM

ON THE NATIONAL SCENE

There isn't much to report from Washington on the campaign finance reform front. The leadership of both the House and Senate are too closely tied to Corporate America and the tort reformers for anything of consequence to get through Congress this year. It will take a change in that leadership for Congress to ever clean up the financial mess that has plagued our national elections for years. Hopefully, the American people can let their collective voices be heard in the national elections next year. All candidates for both the U.S. House and Senate—and especially incumbents—should be asked what they intend to do on reforming all election laws and bringing about tough campaign finance reform. Until the public demands it, our politicians aren't going to do anything of consequence. All national polls on the subject reveal that the

public is heavily in favor of reform. I suspect the consultants who run the political campaigns are reading the poll results. I hope things will eventually change for the better.

THE STATE OF ALABAMA

In Alabama, the House of Representatives has passed and sent to the Senate a bill that deals with political action committee (PACs). A Senate committee amended the House bill and made it much stronger. The bill was reported out of committee and was put on the special order calendar for the Senate on March 17th. I believe it will be the pending order of business for the senators when they return to Montgomery. I am hopeful this bill will be voted on in the Senate and will pass in its amended form. If given the chance, I believe the House would accept the Senate changes and send the bill to the governor. In my opinion, this legislation is badly needed in Alabama and is long overdue. It will be most interesting to see where the opposition to the bill comes from when the legislators return to work on March 29th.

VII. CONGRESSIONAL UPDATE

WHITE HOUSE PUSHES HARD FOR PRO-BUSINESS REGULATION

The Bush Administration is working hard to bring about more business-friendly regulation in Washington. Such things as streamlined and more flexible pollution standards, chemical handling rules, and workers' medical leave protections are on the horizon. It should be remembered that U.S. manufacturing was hammered by recession and overseas competition during much of President Bush's first term. Gary Bass, executive director of OMB Watch, a pro-consumer group that monitors the White House Office of Management

and Budget (OMB), calls the latest efforts a new assault on anticompetitive rules that amounts to rewarding the President's political supporters in the business world. OMB is leading the effort through its Office of Information and Regulatory Affairs. The project is being coordinated by a former Harvard professor, John Graham, who has turned OMB's regulatory arm into a voice for the Administration's pro-business views on regulation.

Clearly, Big Business interests have made headway in Washington on several fronts, including passage in Congress of the so-called class action reform. Passage of new consumer bankruptcy laws also points to the power and influence of Big Business in Bush II. The White House is now putting forward a new priority list of regulations for agencies. Some changes can be made administratively, with little or no input from Congress, which sets a very dangerous precedent. It appears that consumers will have almost no voice in what comes out of the White House over the next 3 years. I hope and pray that the President, who claims to be a **compassionate conservative**, will develop a feeling and concern for **little people** who are really hurting today!

Source: *Wall Street Journal*

VIII. PRODUCT LIABILITY UPDATE

MANY SMALL CARS GET 'POOR' SIDE CRASH RATINGS

The vast majority of small cars sold in this country were rated "poor" in recent side-impact tests conducted by the Insurance Institute for Highway Safety. Statistics reveal that side-impact crashes are the second most common type of fatal crash. Only the Chevrolet Cobalt and Toyota Corolla, both equipped with optional side airbags with head protection, performed well

enough to earn an “acceptable” rating, which is the institute’s second-highest rating. Without the optional airbags, both cars dropped to “poor.” Other small cars earning “poor” ratings were the Ford Focus, Hyundai Elantra, Kia Spectra, Mazda Three, Mitsubishi Lancer, Nissan Sentra, Saturn ION, Suzuki Forenza, Suzuki Aerio and the Volkswagen New Beetle. Those results are certainly cause for concern.

The Dodge Neon was the worst performer. The Institute called it “a disaster,” noting that because of a poor structure, the crash test dummies’ heads were hit by the barrier during the crash test. In previous testing, the Cobalt also earned “good” ratings in front and rear tests. The Corolla reached “good” in front, but was called “poor” for rear-crash protection. The testing group noted that although small cars are affordable and efficient, they don’t do a good job of protecting people. The Institute’s ratings differ from government crash tests, which simulates a car hitting the side of a car. In the IIHS test, the barrier is the height of the front end of an SUV. Three more small cars will be tested in side impacts later this year. Those are the modified Mini Cooper and Subaru Impreza, and the completely redesigned Honda Civic. Institute research shows that side airbags with head protection are reducing deaths by about 45% among drivers of cars struck on the driver side.

Source: *Associated Press*

NHTSA ANNOUNCES RATING ON MINIVANS

Two General Motors vehicles, the Chevrolet Astro and the GMC Safari, fared the worst in government crash tests of minivans, according to results released by the National Highway Traffic Safety Administration (NHTSA) last month. In rollover tests, the Ford E-150 van received the worst rating and was the only vehicle among 13 models tested to tip over. The Astro and Safari received three out of five stars for driver’s frontal crash tests. Three stars

means there is a 21% to 35% chance of serious injury in a similar real-world crash. As you may already know, NHTSA conducts the front-impact test at 35 mph.

Five models earned the top rating of five stars in both frontal and side-impact tests: Chrysler Town & Country, Dodge Grand Caravan, Kia Sedona, Mazda MPV and Nissan Quest. According to the NHTSA scale, five stars mean there is a 10% chance or less of serious injury. None of the models studied scored less than four stars in side-impact tests, which are conducted at 38.5 mph. Four stars translate to an 11% to 20% chance of serious injury.

For rollover tests, NHTSA found the Ford E-150 had a 29.5% chance of rollover. This was much worse than other vehicles tested in the same category. Among side-impact tests, the Honda Odyssey received five stars, but the government noted that the driver’s door became unlatched during the side crash test, increasing the likelihood of occupant ejection. NHTSA released crash test results for 32 minivans and rollover ratings for 13 minivans. New 2005 frontal impact tests were released for the Buick Terraza, Chevrolet Uplander, Chrysler Town & Country, Dodge Caravan, Dodge Grand Caravan, Ford Freestar, Honda Odyssey, Pontiac Montana SV6, Saturn Relay and Toyota Sienna. The agency chooses vehicles to test based on popularity and other factors. You can get more information on the test results by going to the NHTSA website: www.NHTSA.gov or www.safercar.gov.

THE BLAZER RANKED AS THE DEADLIEST VEHICLE IN COUNTRY

The Insurance Institute for Highway Safety had some bad news for General Motors recently. The two-door Chevrolet Blazer from GM has the highest driver death rate of any passenger vehicle on U.S. roadways, according to the Insurance Institute for Highway Safety. An extensive study of passenger vehicles from the 1999-2002 model

years focused on the rate of driver deaths in various types of crashes, including both single- and multiple-vehicle accidents. The overall driver death rate, for 199 models studied during the 2000-2003 calendar years, was 87 per million registered vehicles annually. Weighing in at more than three times the overall rate, the Insurance Institute reports that the two-door, two-wheel-drive Blazer—a mid-sized SUV—had an average of 308 driver deaths per million. The Blazer also had the highest rate of driver deaths in rollover accidents at 251 per million.

Highlighting a long-standing trend, the Insurance Institute says that “large cars and minivans dominate among vehicle models with very low death rates.” Models with the highest rates are “mostly small cars and small and mid-sized SUVs.” However, the Insurance Institute said the small-sized Toyota RAV4 SUV from Toyota Motor Corp. ranked among vehicles with the lowest average driver death rate. Vehicles with the lowest overall rate of driver deaths were led by the large Mercedes E-Class luxury sedan from DaimlerChrysler AG, at 10 per million, according to the Insurance Institute. That was followed by the Toyota 4Runner mid-sized SUV, with an overall driver death rate of 12, the four-door mid-sized Passat from Volkswagen, with 16 deaths, Toyota’s Lexus RX 300 mid-sized SUV, at 17, and RAV4 with 18. Following Blazer, vehicles with the highest driver death rates were the Mitsubishi Mirage, a two-door, small-sized car from Mitsubishi Motors Corp., at 209; GM’s Pontiac Firebird sports car at 205; the subcompact Kia Rio from Kia Motors Corp. at 200; and the two-wheel-drive Kia Sportage compact SUV at 197. GM has already halted full-scale production of the two-door Blazer. The vehicle is due to be phased out later this month.

JURY FINDS AGAINST DAIMLERCHRYSLER

A jury in Shelby County, Tennessee, has awarded the family of a woman killed in a minivan crash \$48 million dollars in punitive damages. The verdict against DaimlerChrysler came in the second phase of a lawsuit by the family against the carmaker. Two persons, a daughter and her mother, were killed in a three vehicle crash that happened in Arkansas back in July 2002. In the first phase, the jurors had awarded compensatory damages of nearly \$3.5 million on behalf of the daughter and more than one million dollars on behalf of the mother. Jurors attributed the mother's death to a defective seat belt. The daughter's death was found to have been caused by the minivan's lack of crashworthiness. The Dodge Caravan has scored low in the Insurance Institute for Highway Safety offset testing. The 17-year-old driver died as a result of passenger compartment intrusion. The second phase, which considered punitive damages, was held because jurors found DaimlerChrysler guilty of intentional and/or reckless conduct.

\$27 MILLION VERDICT AGAINST FORD MOTOR CO. AND MAZDA

After a three-week trial, a jury in Cook County, Illinois, returned a \$27 million verdict against Ford Motor Co. and Mazda Motor Corporation. The jury allocated 40% fault against the two companies, which were the co-designers of the Ford Escort. Sixty percent fault was allocated against the other driver. The case involved a seatback failure in a 1996 Ford Escort when the driver of a 1994 Cadillac rear-ended the Escort at 55-60 mph. The belted driver's seat bent back more than 60 degrees from vertical, resulting in a fatal head injury from the driver's head striking the rear seat seatback or header. The decedent's daughter was seated in the rear right seat and did not sustain significant injuries even though the point of impact was directly behind her.

ANOTHER TENNESSEE VERDICT

In February of this year, another Tennessee jury returned a \$10 million verdict against Ford Motor Co. involving the defective seatback design of the Ford Escort. As we have pointed out, the Ford Escort was designed and tested by Mazda Motor Corporation, with Ford's active involvement. The detailed seat design work was performed by Toyo, a Japanese company. Most consumers in this country aren't aware of the involvement of Mazda or Toyo. The front bucket seats for the Escort were inadequately designed, allowing the seatbacks to collapse during a rear impact, which results in the occupant "ramping" up the seat and striking interior components of the vehicle. This causes severe injuries and even death.

ANOTHER JURY FINDS AGAINST FORD

A jury in Jacksonville, Florida, returned a \$10.2 million verdict against Ford Motor Co., finding defects in the and seat belt systems. After the four-week trial, the jury said the death of a Jacksonville woman could have been prevented if the roof had not collapsed. To my knowledge, the verdict is the first in the nation where a jury has found the Explorer's roof to be defective. Clair S. Duncan was traveling on Interstate 95 in Virginia to watch her brother graduate from the Naval Academy in Annapolis, Md., when the 2000 Explorer she was driving swerved to miss a Winnebago. The Explorer then tipped and rolled five times. The SUV's roof collapsed resulting in Ms. Duncan's death. Her husband and sister, who were in the vehicle, had minor orthopedic injuries. All of the occupants were wearing their seat belts. Internal Ford documents showing Explorer to have the weakest roof of any SUV on the market were put in evidence. The company's engineers had actually recommended that its roof be strengthened, which we mentioned in the last issue.

Ford's lawyers said the SUV met federal regulations and that Ms. Duncan could not have survived the accident in any car. Obviously, the jurors didn't buy that claim. Ford should make stronger roofs for the Explorer together with a seat belt system that will better hold occupants in place. It is accepted by all safety engineers that it is hazardous for occupants to be thrown around in a vehicle that is rolling over. It is also accepted that roofs should be of adequate strength to avoid crush.

FORD'S SEAT DESIGN IS TOTALLY INADEQUATE

Ford has taken the position for many years that it designs seats to "yield" during a rear impact to lessen the potential for neck injuries in low speed rear impacts. The problem with Ford's design concept is that in higher speed rear impacts, seatbacks **collapse** and allow belted front seat occupants to **ramp** up the seat and **impact** rear occupants or rear vehicle components, resulting in catastrophic injuries. Ford has been aware of this design problem for many years. Unfortunately, Ford has taken the position that stronger seats would increase the number of whiplash type neck injuries in lower speed accidents. But, testing shown to the jury in at least one of the above-referenced cases revealed that Ford now includes much stronger seats in some vehicles. There has been no increased likelihood of neck injuries in those vehicles.

Unfortunately, Ford does not inform consumers of the likelihood of severe injury in the event of a rear impact. Other manufacturers have designed seats that absorb occupant energy during a rear impact, but also are designed to retain the occupants in the front seat. Also, a number of manufacturers have included seats with integrated seat belts that retain an occupant in the event of a seatback collapse. Ford has not seen fit to change the design of its poorly designed seats, and that is most unfor-

fortunate. The design flaw in the driver's seat was exposed by CBS' "60 Minutes" TV show more than a decade ago. Still no major changes have been made in its design. While most front seats in vehicles are weak, the industry has been exceptionally slow to deal with this defect.

ANOTHER JURY VERDICT AGAINST FORD

A fatal rollover accident that occurred two years ago has resulted in a \$31 million verdict against Ford Motor Company. The jury found Ford primarily responsible for the wreck, in which all four occupants of a Ford Explorer were ejected from the vehicle. Two of the occupants died and two others were injured. During trial, the plaintiffs' lawyers contended that had Ford used a stronger type of laminated side window glass, the deaths would have been averted. Ford claimed that the deaths came from the occupants' failure to wear seat belts. However, the jury found Ford 90% responsible, and by its verdict said that the company must pay \$28 million. The driver of the Explorer, who was a co-defendant, was found to be 10% responsible and thus bound to pay the remaining \$3 million of the jury verdict. Ford says it will appeal the result.

DEFECTIVE OVENS REVISITED

In the November 2001 issue of this Report, we discussed a pending case in Mississippi against a manufacturer of a defective range. Our client in that case was an elderly female whose oven tipped over on her. The weight of the oven held her down and suffocated her. We eventually settled the case against the oven manufacturer and the apartment complex in January of 2003. Within the last month, our firm has been put on notice of two other incidents of range tipping. A female in south Alabama was killed when her oven tipped over on top of her, and a minor child in the Midwest was also killed in the same manner. As we

reported back in 2001, these types of incidents are common occurrences. But, the public is largely unaware of the problem and the risk involved. Minors and the elderly are most susceptible to oven-tipping injuries. Although ovens can tip over with relatively little weight placed on an open door, they are quite heavy once tipped. Because of their physical conditions, minors and the elderly often times are not strong enough to extricate themselves from under a tipped oven. Small children will commonly use an open oven door as a step to reach up on the stove. Many people use an open oven door as a temporary place to rest food before placing it into the oven. Either scenario can result in the oven tipping over. The injuries associated with tipping ovens are burns caused by the oven itself, boiling food on top of the oven, and death (usually from suffocation).

Oven manufacturers have known about the hazard of oven tipping since the early 1970s. Even with this knowledge, the industry has done very little to reduce or eliminate this solvable problem. Numerous alternative designs are available. One alternative design is a breakaway door. When too much weight is applied, the oven door will simply fall to the ground preventing a tip over. Another alternative design is the side-opening or slide oven door. A side-opening or slide oven door would eliminate the most common tipping mechanism, an open oven door. The most simple and commonly used mechanism to prevent oven tipping, however, is an anti-tipping device. An anti-tipping device is a small metal mechanism attached to the wall behind the oven. If used, it prevents the range from tipping over even if enough weight to cause the oven to tip is placed on an open oven door. Anti-tipping devices are inexpensive and effective. But, they can only prevent tip-overs if they are installed properly. All too often, anti-tip devices are either not installed or are not properly installed.

Oven tipping is a serious hazard

because virtually every home in the U.S. has an oven. Consumers should verify whether the risk of oven tipping exists in their homes. A simple test can verify whether the hazard exists. Simply open your oven door and place your foot on the door. If the oven tips up, an anti-tip device is either not installed or is not properly installed. As demonstrated above, a tipping oven is dangerous to household members and could lead to serious injury or even death. With the risk of injury and even death being great, eliminating the risk is very easy and relatively inexpensive.

MORE NEWS ON TASER STUN GUNS

As most folks who keep up with the daily news already know, there is a great deal of attention being paid to the use of Taser stun guns by law enforcement personnel. Recently, a lawsuit was filed involving the September death of a 21-year-old man who was allegedly shocked with a stun gun. In that case, the manufacturer, Taser International, is accused of knowingly marketing a dangerously defective weapon as being "safe and non-lethal." The product liability lawsuit, which was filed on behalf of the decedent's infant son, adds to the growing controversy about Taser stun guns. According to Amnesty International, 94 people have died in the United States and Canada after being shocked with stun guns. Amnesty is calling for a moratorium on Taser use until independent medical research resolves safety concerns.

Tasers fire twin metal barbs that emit a 50,000-volt charge into a suspect, causing him or her to collapse from loss of muscular control. The manufacturer has maintained that the stun gun does not generate enough electrical current to disrupt the heart. These guns have proved to be very popular with law enforcement personnel and appear to be very effective in dealing with the criminal population in this country. Nevertheless, the controversy over the safety factor relating to Tasers continues.

SUIT OVER MICHIGAN-MADE SAFETY VESTS HEADED TO ARKANSAS COURT

A federal judge has ruled that Arkansas' lawsuit against the manufacturer of a material used in Michigan-made bulletproof vests will be heard in an Arkansas state court. U.S. District Judge J. Leon Holmes ruled that, although the Central Lake, Michigan, company that made the vests is reorganizing its debt in federal bankruptcy court, Arkansas' claims against Toyobo of America and Toyobo Corp., can continue and should be heard in a state court. Second Chance Body Armor produces body armor primarily for use by law enforcement agencies. Toyobo makes Zylon, a lightweight, ballistic-resistant fiber. Tests showed that Zylon could deteriorate after exposure to natural elements. Second Chance discontinued a line of products used with the material and offered a warranty program.

Arkansas Attorney General Mike Beebe sued Second Chance and Toyobo in state court in 2003, alleging the companies violated the state Deceptive Trade Practices Act. Second Chance filed for bankruptcy protection last year. This stopped all court action against the company. Toyobo petitioned to have the Arkansas case transferred to the federal court for western Michigan. General Beebe filed a motion seeking to have the case kept in Arkansas but said if the case were to be sent to federal court, the state would not object to having the case transferred to Michigan. Toyobo said the decision should be left to the Michigan bankruptcy court. But Judge Holmes said in his ruling that Toyobo cannot make a claim under bankruptcy law because it did not file for bankruptcy. While Second Chance's bankruptcy might be related, the claims that the state of Arkansas made against Toyobo are solely state court claims.

Judge Holmes also said he was bound under the law to send the case back to Pulaski County, Arkansas because Toyobo's action did not arise

in or under the bankruptcy case, and because the state court could address the case relatively quickly. Toyobo acknowledged that tests show Zylon loses 10% to 20% of its durability within two years of manufacture. But the company insisted the fiber works well in body armor that is properly constructed. Lawsuits have also been filed in Arizona, Connecticut, Georgia, Illinois, Massachusetts, Minnesota, Pennsylvania, and Texas.

Source: *Associated Press*

IX. MASS TORTS UPDATE

MASS TORTS SECTION

Our Mass Torts Section, headed by Andy Birchfield, has been extremely busy over the past several months and it doesn't appear that things will slow down in the foreseeable future. The Section continues to manage a large number of cases that are coming in as a result of the Vioxx withdrawal and the bad news regarding Celebrex. The Section's lawyers and support staff are also handling other claims involving a number of well-known defective medical products or pharmaceuticals. The following will give our readers an overview on some of the things that the Section is currently doing:

- **Baycol:** This medication was prescribed to treat high cholesterol. Baycol was removed from the market in August of 2001 due to reported toxic, and sometimes fatal, adverse events relating to muscle deterioration, cell breakdown, and kidney failure. We are currently investigating, litigating, and/or settling claims involving serious injury or death.
- **Bextra:** Bextra is one of many drugs known as non-steroidal anti-inflammatory drugs (NSAIDs). Bextra, Celebrex, and Vioxx are all classified as

COX-2 inhibitors. COX-2 inhibitors, like older NSAID drugs such as ibuprofen and naproxen, work to decrease swelling in affected joints. Bextra has been linked to the same problems as Celebrex and Vioxx—serious thrombotic cardiovascular adverse events, in addition to SJS, a condition described below. As with Celebrex and Vioxx, we are currently investigating claims involving serious injury or death.

- **Celebrex:** Celebrex, like Bextra and Vioxx, is another popular and heavily advertised and prescribed arthritis drug. Based on an analysis of data from previous clinical trials, physicians/researchers from the Cleveland Clinic identified an increase in the risk of what the study refers to as "serious thrombotic cardiovascular adverse events," including heart attack, stroke and sudden and unexplained death related to Celebrex and other NSAIDs. The Cleveland Clinic physicians that conducted the study state that they have tried unsuccessfully to have the manufacturers of these drugs look into these concerns further. Despite this alarming data, an FDA panel recently voted to allow Celebrex to remain on the market. Meanwhile consumers remain at risk of heart attack and stroke. Our firm is currently investigating and litigating claims involving serious injury or death.
- **Crestor:** Crestor is a member of a class of drugs commonly referred to as "statins" and is used to lower cholesterol. AstraZeneca originally filed its application with the Food and Drug Administration (FDA) in June of 2001. This application was delayed because of safety concerns revealed during clinical trials, which included reports of kidney damage and rhabdomyolysis, a potentially life-threatening condition that causes muscle cells to breakdown. We are investigating cases involving these injuries.

- **Ephedra:** Based upon mounting evidence of its relationship to heart attack, heart arrhythmias, strokes, and death, the FDA recently ordered the removal of ephedra-containing products from the market. We welcome the opportunity to investigate and pursue claims for people who have suffered serious injury or death as a result of taking products containing ephedra.
- **Guidant Ancure Endograft System:** This device was manufactured and introduced by EndoVascular Technologies (EVT), a subsidiary of the Guidant Corporation, and was used to repair abdominal aortic aneurysms. EVT received approval from the FDA for Ancure® in September 1999 and first recalled the product in March 2001, several months after seven anonymous employees reported the failures and problems with the Ancure® system to the FDA. After pleading guilty to 10 felony counts and paying more than \$90 million in federal penalties surrounding their failure to report more than 2,600 incidents of problems with the device, including deaths and serious injuries, EVT reported last year that they would no longer be manufacturing the device. We are currently investigating and litigating these cases.
- **Hormone Therapy (HT):** For years, women have taken hormone therapy (HT) to reduce the symptoms of menopause. Studies now show that HT medications such as Prempro can increase the risk of breast cancer, ovarian cancer, stroke, and heart disease. We are currently investigating and litigating these types of cases against the manufacturers of HT medications.
- **Phenylpropanolamine (PPA):** PPA is an active ingredient that was found in many over-the-counter cold, cough, allergy, and diet aids. It was removed from the market on November 6, 2000, after an industry-funded study performed at the Yale University Medical School demonstrated that products containing PPA increased the users' risk of suffering hemorrhagic strokes. Earlier research supports claims of non-hemorrhagic strokes being related to this active ingredient as well. We are currently investigating, litigating, and/or settling claims involving serious injury or death.
- **Serzone:** Serzone is an anti-depression drug. While this product still remains on the market, the FDA recently instructed the manufacturer to include a black box warning on its label because of the side effects involving the liver. A black box is the strongest warning available to consumers short of removing the product from the market. We are currently investigating and litigating claims involving liver injury or death.
- **Smith & Nephew Knee Replacements:** In September 2003, Smith & Nephew announced a voluntary recall of two of their knee replacements products. The products included in the recall are the cement less versions of the Oxinium Genesis II and Profix II. The complications stem from the products not bonding properly. We are investigating claims involving these particular devices.
- **Stevens-Johnson Syndrome (SJS):** SJS is an immune complex reaction that can be caused from an infection or immune response to pharmaceuticals. It is a severe expression of a simple rash known as erythema multiforme. It affects all ages and genders. The most severe form of SJS is toxic epidermal necrolysis (TENS). We are currently investigating and settling claims of SJS or TENS.
- **Vioxx:** While the recent withdrawal of Vioxx from the market may make it seem like new litigation, our firm has been working on these cases for over three years. In fact, we filed our first Vioxx case in November 2001 and, since then, have filed nearly sixty cases. Furthermore, we are currently preparing to file hundreds more. Discovery efforts in our lawsuits have allowed us to review hundreds of thousands of documents and take approximately 30 depositions. Moreover, we have retained world-renowned experts and are set for the first Vioxx trial in the country in May of this year. We are interested in investigating and litigating claims involving heart attack or stroke.
- **Welding Rods:** Not long ago, a medical journal study noted a possible link between exposure to welding fumes and Parkinsonism. We welcome the opportunity to investigate and pursue claims of people who have been exposed to welding fumes and have tremors, trouble walking, loss of balance, slurred speech, or stiff or weak muscles, or have been diagnosed with Parkinson's Disease.
- **Zyprexa:** This is an atypical anti-psychotic drug used for the treatment of schizophrenia and bipolar mania. In September of 2003, the FDA instructed all manufactures of this type of drug to add a warning to the product label due to a link between usage and the serious side effects of diabetes mellitus and blood sugar disorders such as hyperglycemia, diabetic ketoacidosis and pancreatitis. We are currently investigating claims involving serious injury or death.

We are working with a number of law firms in the litigation areas mentioned above. We have established some excellent working relationships with a number of very good law firms around the country and look forward to working with many others in the coming months. For additional information on any of these specific areas of litigation and others the firm is currently working on, please visit our website at www.beasleyallen.com. Lots of good information can be found there, all of which we believe can be helpful.

VIOXX MDL—LIAISON COUNSEL NAMED

As previously reported, the Vioxx multi-district litigation (MDL) preceding will be located in the U.S. District Court for the Eastern District of Louisiana in New Orleans. U.S. District Court Judge Eldon Fallon will preside over all the Vioxx cases filed in federal courts across the country. Judge Fallon requested plaintiffs' attorneys to recommend liaison counsel, and four names were submitted to the court for consideration. From that list, Judge Fallon appointed Russ Herman, an outstanding New Orleans lawyer, to serve as liaison counsel. Russ is a senior partner with Herman, Herman, Katz & Cotlar, L.L.P. He is also Chairman of the Board of Directors of Herman, Mathis, Casey, Kitchens & Gerel, L.L.P., a national firm with offices in Atlanta, Georgia. Russ was chosen "Outstanding Trial Lawyer" in 1977 by the Louisiana Trial Lawyer's Association. He served as President of ATLA from 1989 to 1990. Russ has received a number of national awards and is extremely well-respected by his peers. His many accomplishments and vast experience will certainly be assets to the Court and to all of the parties involved in this most important litigation. I believe that the court's appointment of liaison counsel is a good one. We look forward to working with Russ in this litigation.

FIRST VIOXX HEARINGS IN NEW ORLEANS

The first hearing was held in the MDL, which will involve all of the federal court cases, on March 18th in New Orleans. It was the first real hearing before Judge Fallon and was mainly a planning session. All of the pretrial motions and discovery in federal liability cases involving Vioxx will be before Judge Fallon. More than a thousand lawsuits have been filed so far. The plaintiffs' steering committee will be appointed and will work with the judge and Merck to facilitate the handling of the cases. Things such as the taking of depositions and gathering

of documents for evidence will be coordinated by this committee in the MDL. We expect more than 100 lawyers to apply for selection on the committee. Judge Fallon is expected to select between 8 and 14 attorneys. Judges customarily select lawyers with extensive experience in product liability, who represent a number of plaintiffs in the case, and whose firms have the financial ability to fund their participation in a complex case of this sort. It is expected that two lawyers will be appointed as co-lead counsel by the court in the near future.

There were 1,357 product liability lawsuits filed against Merck as of March 9, 2005, according to papers the company filed with the court. Of those, 127 have been moved to Judge Fallon and more than 400 others are expected to follow and wind up in his court. After all the pretrial activities, the federal cases will be returned to their original jurisdictions for trial. Our firm wanted all of the cases to be placed under one judge for pretrial motions and the handling of complex discovery issues. With cases of this magnitude and complexity, it just makes good sense to go that route. It is expected that the federal case will take longer to get to trial because of the number of cases and lawyers involved. Two state cases are slated to begin trial in May. We have a May 23rd court date in Ashland, Alabama, and a case scheduled to begin May 31st in Angleton, Texas, involving a 59-year old man who died of a cardiac arrhythmia while taking Vioxx.

FIRST VIOXX CASE TO BE TRIED IN ALABAMA

Our firm is scheduled to try the first Vioxx case in the United States. This wrongful death case will be tried in Clay County, Alabama, starting on May 23rd, before Judge John Rochester, a veteran circuit court judge. The case involves the death of a 43-year-old married man, with no known health problems, who died from a massive

heart attack after taking Vioxx for a relatively short period of time. We are looking forward to this trial. The judge, who has the reputation of running a very "tight ship," has told both sides to get ready and that the case won't be continued. We are working hard and will be ready to go.

CONGRESS MUST CLEAN UP THE DRUG INDUSTRY

In my opinion, Congress must act promptly to clean up the drug industry. To accomplish all that needs to be done, a major reform of the Food and Drug Administration (FDA) must also take place. The FDA has operated for years more as an extension of the powerful drug industry than it has as a strong regulator of the drug companies and a defender of public safety. That must be changed. Finally—because of intense public pressure—the agency is taking some steps. Some of the things done so far—even though late in coming—seem to be fairly good. For example, to help get information to the public more quickly when safety questions arise for a new drug, the FDA is now developing plans for a Drug Watch webpage. Side effects and problems will be communicated directly to the public and to doctors, bypassing the kinds of negotiation delays that occurred with Merck over Vioxx. This may be more spin than substance, but at least it shows that the FDA is feeling the heat from the public.

Clearly, the FDA must change the methods it uses to approve new drugs and oversee their safety. The public is aware that the pharmaceutical industry has been beset by a series of most serious safety questions. They range from heart problems linked to the COX-2 inhibitors, to the use of antidepressants by adolescents. In fact, the reality of the problems actually reads more like fiction. Unfortunately, the problems and shortcomings are very real, with tragic consequences. Few folks had any idea things were so bad.

Congress is currently exploring a

range of legislation to address safety. A bill introduced by Senators Chuck Grassley (R-IA) and Christopher Dodd (D-CR), would force drug companies to make information from their clinical trials public, including negative results they often don't want to publicize. The FDA must be given authority to order additional clinical trials if safety questions come to light once a drug is on the market. The congressional hearings held recently on the Cox-2 inhibitors has really helped focus attention on how weak and ineffective the FDA really is.

Part of the FDA's problems are caused by inadequate funding. The agency has asked for \$33.4 million—a \$6.5 million increase—in the budget for its office of drug safety for next year. Sufficient funds must be appropriated so that the FDA can fully carry out plans to improve drug safety monitoring. The American people are demanding that the drug industry be cleaned up. This will require major reforms at the FDA. Failure to take action in Congress may cost some politicians at the polls next year.

Source: *USA Today*

FDA'S WHISTLE-BLOWER CRITICIZES NEW DRUG SAFETY OVERSIGHT BOARD

You will recall that the U.S. Food and Drug Administration (FDA) announced in February that it would create a new independent Drug Safety Oversight Board. According to the FDA, the new Board will oversee "the management of drug safety issues and provide emerging information to health providers and patients about the risks and benefits of medicines." The creation of the Board came about in response to numerous charges that the FDA has repeatedly failed to protect the public from dangerous drugs and their side effects. The announcement came on the eve of the three-day meeting that discussed the safety of Vioxx and several other painkillers.

The members, who will come from the FDA along with medical experts

from other HHS agencies and government departments, will be appointed by the FDA Commissioner. The Board is expected to consult with other medical experts and representatives of patient and consumer groups.

The jury is also out on how effective this new Board will be. Based on our experience with the FDA and the drug industry, the lawyers in our Mass Torts Section are skeptical about this new "independent" Oversight Board. Our firm is not alone in this skepticism. Dr. Bruce M. Psaty, a professor of medicine at the University of Washington, said "the FDA lacks authority once a drug is approved and on the market to do some basic things that are necessary to protect the public health." Dr. Psaty co-authored an editorial about drug safety that was posted online by *The New England Journal of Medicine* the same day the FDA announced the new Oversight Board. The editorial calls for Congress to give the FDA authority to require drug manufacturers to complete post-marketing studies that are agreed upon at the time of approval. The editorial further states that "the FDA currently engages in protracted negotiations with manufacturers rather than mandating" that the companies take certain actions after approval. The editorial writer concludes by saying that "provisional approval and regular repeated review would provide opportunities to reevaluate risk and benefit." Dr. Psaty claims that the Board "is potentially a part of a solution, but it isn't a solution." I totally agree with that assessment.

Other detractors are even harsher and with good reason. Dr. Sidney Wolfe, director of Public Citizen Health Research Group, stated that the drug safety board "is doomed to fail." Dr. Wolfe believes the problem is with the FDA's Office of Drug Safety, which monitors drugs after they are on the market. He believes that office must work too closely with the Office of New Drugs, which puts the drugs on the market. Also, Dr. David Graham, the FDA whistle-blower who really

brought the issue of unsafe drugs and the problems with the FDA to the forefront of public opinion, doesn't believe that the board will do much good. Dr. Graham observed:

It's an important admission at the highest levels that the FDA hasn't handled drug safety up to now, but it won't address the root causes of the problem. Until drug safety becomes as important as approving drugs quickly, the fundamental problem will remain and unsafe drugs will continue to be approved and will stay on the market.

Hopefully, creation of this Board will prove to be a step in the right direction. At least, it will give the FDA the opportunity to break its ties with the pharmaceutical industry and have a true independent panel monitoring drugs once they are placed on the market. However, given the current mentality and make-up of the FDA with former pharmaceutical company insiders, this happening is highly unlikely. For example, Dr. Lester M. Crawford, the acting FDA commissioner, stated that the agency now "understands that the public expects better and more prompt information." While I respect Dr. Crawford, the FDA should have understood this simple fact long before now. The FDA has an obligation to the public on drug safety and it has largely failed to meet and live up to its responsibilities. I firmly believe that it's time for major changes in the structure and funding of this most important agency.

FDA SEEKS DRUG-WARNING-LABEL AUTHORITY

Prior to all of the recent revelations concerning the drug industry, I suspect that most folks in this country believed that the Food and Drug Administration (FDA) had the legal authority to decide what warnings are to be put on drug labels. But, the FDA has no such authority and that is absolutely impos-

sible to justify. This should come as a shock to anybody who is taking prescription medications. This simply points out how weak and ineffective the government's sole regulatory agency over drugs has been. Finally, at long last, the government is asking Congress for **authority** to dictate label changes for drugs. Heretofore, the FDA had to **bargain** with pharmaceutical companies over the labeling for a drug. This includes both "wording" and "placement." In a tragic case in point, this type of haggling **delayed** warnings to Vioxx users about potential heart problems. Dr. Sandra L. Kweder, FDA's deputy director for new drugs, told the Senate Committee on Health, Education, Labor, and Pensions recently that the ability of the FDA to require changes in labels "would be helpful."

It was disclosed that after the dangerous side effects of Vioxx were known, **negotiations** between the FDA and its manufacturer, Merck & Co., over what a warning should say, **delayed** getting the information out to doctors and the public. Dr. Kweder admitted to the Senate panel: "The lapse from my perspective was the delay that it took to get that information into the labeling. We had to negotiate with the company how the specific language should be worded." If this doesn't shock folks who read this admission by a top FDA official, I will be greatly surprised. It is very hard to believe that Congress has never given the FDA the authority to dictate what **warnings** should be placed on drugs sold in the U.S. It is even more shocking to learn that the FDA has never even asked Congress to give it that authority. Nevertheless, there can be no excuse for Congress allowing this situation to exist. Congress is now considering legislation to tighten rules on how the government keeps track of the safety of drugs after the FDA approves them. It should also give the FDA authority to adequately regulate the drug industry and to do this Congress must give them all of the tools necessary for the agency to do their job. The Bush Administration's

announcement in February that it was setting up an independent Drug Safety Oversight Board to monitor FDA-approved medicines once they're on the market and update physicians and patients with emerging information on risks and benefits was helpful. Unfortunately, not only was this very late in coming, it was also not nearly enough. The President should do the right thing and make reforming the FDA a top priority in his congressional agenda. This will require disappointing his big donors from the pharmaceutical industry that may prove to be a major problem.

The authority to dictate the labeling language is badly needed by the FDA, and Congress should act immediately to cure this deficiency. The public is now well aware of the serious problems Vioxx and the other Cox-2 inhibitors—Bextra and Celebrex—have caused. It is inconceivable that the Food and Drug Administration, after claiming for months that it did nothing wrong in its oversight of Vioxx, can now admit "lapses" in the agency's actions. Most witnesses testifying before the panel, the Senate Committee on Health, Education, Labor and Pensions, said that the FDA should have the authority to force label changes and make companies conduct tests if safety issues arose after a drug was approved. Dr. Steven Galson, the director of the new drug center, admitted after the Senate hearing that the FDA had never requested new authority over labels. Clearly, the agency took too long to get information about Vioxx's heart risks into the prescribing label that is provided to doctors. Not only did Merck misled consumers, it also misled medical doctors who trusted the company and also believed the FDA was doing its job.

We have clients whose loved ones **died** during the year while the FDA and Merck were **negotiating** behind closed doors. Millions of people took Vioxx in the years after its risks to the heart became apparent to both the manufacturer and the FDA. As a result,

as many as 55,000 patients have died from heart attacks and strokes induced by the drug. In fact, I predict the number of deaths attributed to Vioxx will be much greater once all of the information is in. I also predict that Dr. Kweder's admission will cause great difficulties for Merck in litigation against the company. To date, thousands of patients have filed suits against Merck.

FDA WARNING ON CRESTOR

Crestor (the cholesterol drug) is being **relabeled** to add a **caution** that starter doses should be reduced in Asian-Americans and some other patients. The Food and Drug Administration announced that Crestor, like other statins, can have a rare side effect of serious muscle damage. A clinical trial found that levels of Crestor in Asian patients were double those of Caucasians taking the same dose, increasing the chance of muscle damage. The new label urges medical doctors to start Asian patients, persons with severe kidney disease, and patients taking cyclosporine at the lowest dose level. The lowest available dose would be 5 milligrams, compared with a maximum dose of 40 milligrams. To date, there have been more than 4.3 million Crestor prescriptions for patients, according to manufacturer AstraZeneca.

The FDA's stated intent is to notify the public of "potentially significant emerging safety data so that they can make more informed choices about their medical care." As previously reported, Crestor has drawn strong criticism for the reported muscle damage. Overall, the FDA said it believes the benefits of statin drugs, when used as recommended, outweigh their potential risks. Based on the knowledge we have acquired in handling actual cases and the opinions of well-respected experts in the field, we believe that the FDA is on shaky grounds in making this decision.

DR. WOLFE ON CRESTOR

The FDA's announcement of the revised label of Crestor does very little for folks who trust the FDA and who need help with cholesterol problems. While at first blush, the label changes appear to be a step in the right direction, many consumer groups felt they fell short and weren't enough. For example, Dr. Sidney M. Wolfe, Director of the Health Research Group at Public Citizen, wasn't overly impressed. The following is Dr. Wolfe's statement on the subject in its entirety, which I believe makes the case against Crestor and the FDA very well:

Today's announcement by the U.S. Food and Drug Administration (FDA) concerning revised labeling of the cholesterol-lowering drug Crestor is yet another example of the agency's dangerous cowardice in failing to adequately protect people in this country from uniquely dangerous prescription drugs. Like statements from AstraZeneca, the FDA's statement is replete with false and misleading information. Rather than responding in a public health-positive manner to our March 2004 petition and banning this drug, the FDA has done exactly what AstraZeneca wanted with minimal labeling changes and surely has pleased one of the drug companies contributing to the \$150 million in drug industry funding that the FDA is receiving this year for drug review.

Since the last supplement to our petition to ban Crestor (submitted in October 2004), which was based on adverse reaction reports through August 26 of last year, there have been an additional 52 U.S. cases of life-threatening muscle damage (rhabdomyolysis) reported to the FDA and an additional 12 U.S. cases of kidney failure or impairment in people not having rhabdomyolysis reported to the agency

up to the end of January of this year. The total of such U.S. cases reported since the drug was first marketed in September 2003 is now 117 cases of rhabdomyolysis and 41 cases of kidney failure, both higher than seen with the other currently marketed statins. Because of concerns about the safety of Crestor, several countries, including Germany, Norway and Spain, have not approved the drug.

Although the increased rate of rhabdomyolysis is not as high as that of the now-banned Baycol, the FDA is well aware that the rate is higher than that of the other statins, a fact it covers up by saying the rate is "similar." The FDA statement also includes other "facts" that are extremely misleading if not false:

- **FDA Statement:** "Data available to date from controlled trials, as well as post-marketing safety information, indicate that the risk of serious muscle damage is similar with Crestor compared to other marketed statins."

Response: Crestor was the only statin that caused rhabdomyolysis at any dose in clinical trials prior to approval. (The cases occurred at 80 mg, a dosage not approved, but most of the post-marketing cases are occurring at 10 or 20 mg.)

- **FDA Statement:** "Mild, transient proteinuria (or protein in the urine, usually from the tubules), with and without microscopic hematuria (minute amounts of blood in the urine), occurred with Crestor, as it has with other statins, in Crestor's pre-approval trials."

Response: Although the FDA admits that with Crestor, "The frequency of occurrence of proteinuria appeared dose-related," it fails to mention that this dose-related increase in proteinuria and hematuria (blood in the

urine) was seen only with Crestor and not with any other statin.

- **FDA Statement:** "In clinical trials with doses from 5 to 40 mg daily, this effect was not associated with renal impairment or renal failure (i.e., damage to the kidneys)."

Response: (from FDA medical officer during the July 2003 FDA hearing on Crestor approval): "These three cases of renal insufficiency of unknown etiology are of concern because they present with a clinical pattern, which is similar to the renal disease seen with rosuvastatin in these clinical trials.... Proteinuria and hematuria could be potentially managed with regular urinalysis screening. However, if they are the signals for the potential progression to renal failure in a small number of patients, this may represent an unacceptable risk since currently approved statins do not have similar renal effects." (emphasis added)

Rather than being a "Public Health Advisory," as the announcement is titled, this FDA statement is more like an AstraZeneca Health Advisory. In its inability to serve two masters, the FDA has sided once again with its funders in the drug industry.

Of course, the labeling issue mentioned above shouldn't even be on the table for discussion. With all of the available information, the FDA should have already banned Crestor. But, as stated above, the federal agency has rejected Public Citizen's petition to remove Crestor from the market, even though Dr. Wolfe had petitioned the agency to remove the drug from sale. He made a strong case citing reports of muscle toxicity and kidney damage. Obviously, the FDA doesn't believe that Crestor poses any greater risk of muscle damage than other cholesterol drugs, called statins, now on the market. Neither is the agency too worried about the kidney problem area. Refusing to ban Crestor will prove to have been a

major mistake, in my opinion.

Sources: *Associated Press* and *Public Citizen*

WYETH PREMPRO USERS CAN SUE AS A GROUP

A Florida state court trial judge says that as many as 300,000 women can sue **Wyeth** as a group over claims that they were injured by Wyeth's Prempro hormone replacement therapy. Judge Lawrence Schwartz, based in Miami, ruled that the women may join together in the lawsuit that seeks to receive court-supervised medical monitoring for future injuries due to the drug. In 2002, researchers linked the drug to increased risks of heart disease and stroke. This was one of the first filed after the 2002 release of Women's Health Initiative Study. It was also the first lawsuit nationally to get class action clearance. There are at least 20 competing class action lawsuits pending that haven't been certified. Wyeth wasted no time in appealing the consolidation order.

Source: *Bloomberg News*

BIAGEN AND ELAN SUSPEND MARKETING OF MS DRUG

Biogen Idec Inc. and Elan Corp. have voluntarily withdrawn Tysabri, a drug used to treat multiple sclerosis, from the market. This came after one patient died and another developed a serious disease of the central nervous system after taking the drug in combination with another drug. The companies said in a news release that they have suspended supplying and marketing the drug. They also advised doctors to suspend prescribing the medication and stopped using the drug in clinical trials. In total, about 3,000 patients have been treated with Tysabri in clinical trials of multiple sclerosis, Crohn's disease, and rheumatoid arthritis.

Sources: *Wall Street Journal* and *Los Angeles Times*

FDA VOWS TOUGH TREATMENT FOR DRUG ADS

A Food and Drug Administration official who reviews prescription drug ads for accuracy has told a marketing group conference that the industry has "gone too far" on its advertising. While that is good to hear, I have to wonder why the FDA doesn't actually do something about it. Currently, the FDA is currently reviewing some 40,000 promotional pieces a year. The official said the FDA was concerned about the direction consumer advertising seems to be taking." These comments were made at the drug marketing industry's DTC National annual conference in Boston. I hope the FDA will now take a tougher stance on drug advertising. Dr. Lester Crawford, the new administrator, has promised closer scrutiny of **claims** in drug ads. Only time will tell how Dr. Crawford defines "tough" and how he will follow up on his comments.

FDA officials have announced that the agency will draw up a new set of voluntary guidelines to help manufacturers strike a "fair balance" between promotion of benefits and explanation of risk. The new position by the FDA follows years of criticism that the agency has not done enough to protect the public from misleading marketing campaigns about powerful medications with sometimes life-threatening side effects. This new position—even though pretty weak—does represent a stronger regulatory stance from a year ago. At that time, a thorough review of drug advertising resulted in no change to the status quo.

Because of the legal requirements, the drug company advertisements do the minimum required—within a few seconds they explain every possible risk under the sun—and when it's all over no one understands a thing about the risks. Frankly, I can see no justification for allowing a drug company to aggressively promote a drug with a massive television ad campaign. Clearly, the risks associated with a drug should be communicated to the ultimate user. The

companies should educate doctors and pharmacists as to the benefits and risks associated with the drugs. This is done using written advisories and communications by detail persons.

Source: *The Boston Globe*

X. BUSINESS LITIGATION

MICROSOFT FINALLY WINS ITS CASE

A U.S. federal appeals court has overturned a \$521 million patent infringement ruling against Microsoft and ordered a retrial. The ruling is a second blow to private firm Eolas Technologies and the University of California, which maintain that Microsoft's Internet Explorer Web browser infringed on technology they developed. As you will recall, last year Microsoft won a ruling by the U.S. Patent and Trademark Office that threw out a similar claim by the plaintiffs. The latest decision says two of Microsoft's key arguments had been ignored by the court in the original trial.

CITIGROUP SETTLES LAWSUIT

Citigroup, the world's largest financial-services company, is paying \$75 million to settle a lawsuit brought by investors over its role in the collapse of telecom network-provider Global Crossing. Citigroup, which was one of Global Crossing's bankers, was accused of issuing inflated research reports and failing to disclose conflicts of interest. Citigroup denied any wrongdoing, but will pay out \$75 million in the settlement. Last year, the company agreed to pay \$2.58 billion to settle a similar class action lawsuit involving WorldCom.

AMAZON PAYS \$27.5 MILLION TO SETTLE SECURITIES SUIT

Amazon.com Inc. has agreed to pay \$27.5 million to settle an investor

lawsuit alleging securities violations by its officers and directors. According to its annual report filed with the Securities and Exchange Commission, the Seattle-based Internet retailer said it reached a settlement with plaintiffs' lawyers in March. It appears that most, if not all, of the settlement will be funded by the company's liability insurers. The lawsuit filed by stock and bond holders in August 2003, alleges, among other things, that Amazon officers and directors made false or misleading statements from October 29, 1998 through October 23, 2001, about the company's business, financial condition and future prospects. The settlement must be approved by the court. It should be noted that the settlement, which must be approved by the court, does not resolve complaints filed in 2001 by Amazon investors alleging the company made false or misleading statements in connection with a February 2000 offering of convertible bonds. The company says it hasn't done anything wrong and denies all allegations made against it.

Source: *The Wall Street Journal*

XI. INSURANCE AND FINANCE UPDATE

FLORIDA LAWSUIT ACCUSES CHUBB AND PRUDENTIAL OF BID-RIGGING AND PRICE-FIXING

Two dozen insurance companies or insurance brokers that do business in Florida have filed suit against several insurance companies, including the Chubb Corp. and Prudential Financial Inc., accusing them of price-fixing and bid-rigging. The suit alleges that the insurers paid independent agents a second commission, or "contingent commission," to lock up more business. As I understand it, independent agents are supposed to work strictly for their clients and are bound to sell the insurance policy that best fits their

client's specific needs. The suit alleges that this second commission causes agents to push the insurance line that pays them what amounts to a "kick-back." It accuses the insurers and brokers of racketeering, bid rigging and anti-competitive behavior.

The suit alleges further that, as a consequence of the wrongful conduct, customers—all of them businesses—have been cheated out of "hundreds of millions, if not billions, of dollars" since 1994. These are the same allegations that New York Attorney General Eliot Spitzer made four months ago, when he launched his investigation. As you know, the New York Attorney General's office has won guilty pleas from nine insurance company or insurance brokerage executives, including those associated with two of the companies named in the Florida suit. Shortly after General Spitzer announced his investigation, Florida Attorney General Charlie Crist began one of his own. The Florida Attorneys General office has issued subpoenas to nearly two-dozen insurance companies and brokers. The Florida suit was filed in state court by Palm Tree Computer Systems Inc., (a small Oviedo, Florida company that sells and services computers and provides Web page design and hosting) and Delta Research Institute Inc., (a Longwood, Florida financial-research company).

Source: *Insurance Journal*

CONSECO POLICYHOLDERS HALT NON-OPT OUT CLASS ACTION

Last October, a state District Court in Cameron County, Texas, preliminarily approved a class action settlement on behalf of approximately 28,000 Consec Life Insurance Company policyholders. This was in the class action lawsuit against Consec Life Insurance Company and Consec Services, LLC. The original complaint in the case alleged that Consec fraudulently exchanged older policies for a new Consec product, which Consec claimed, was a "better deal" for the pol-

icyholders. But, the class alleged that the policy exchange forced policyholders to lose policy values and benefits. The class action included all United States residents who formerly owned Massachusetts General Life Insurance Company or Philadelphia Life Insurance Company flexible premium adjustable life insurance policies and whose policies were exchanged in Consec Life's exchange program for a Consec Life flexible premium adjustment life insurance policy.

While class counsel for the Plaintiffs and Defendants did reach a tentative settlement, the agreement included a provision that precluded class action members from "opting out" of the settlement. Typically, a nationwide class action involving damages from insurance fraud contains a provision that allows class members, on their own initiative, to exclude themselves from the class action and pursue their own individual case. In most circumstances, due process requires that class members be given the right to opt out. But here, the preliminary settlement did not give Consec class action members this right. Over eighty members of the class action contacted our firm and expressed dissatisfaction with the inability to exclude themselves from the settlement. Accordingly, our firm objected to the class action on behalf of these policyholders. As a result of these objections, the Court entered a subsequent Order on January 31, 2005, which included a provision allowing class members to opt-out and pursue their own individual cases if they chose to do so. This was a hard-fought battle and resulted in a very significant victory for our clients.

AON SETTLES CORRUPTION INVESTIGATION

New York Attorney General Eliot Spitzer and Acting New York State Insurance Superintendent Howard Mills, together with Connecticut Attorney General Richard Blumenthal, Illinois Attorney General Lisa Madigan, and Illinois Acting Director of Insur-

ance, Deirdre Manna, reached an agreement with the nation's second largest insurance brokerage to resolve allegations of fraud and anti-competitive practices. Under the agreement, the Chicago-based Aon Corporation is providing \$190 million over a 30-month period for restitution to policyholders and is adopting a new business model designed to avoid conflicts of interest. In addition, Aon's Chairman and CEO, Patrick G. Ryan, will issue a public statement apologizing for Aon's improper conduct, according to the statement issued by Spitzer's office. General Spitzer, in announcing the settlement, stated:

The underlying complaint in this case shows that improper conduct was pervasive at Aon. To its credit, however, the company has acknowledged the problems, has agreed to compensate policyholders, and has adopted reforms that will provide greater accountability in the future.

The agreement with Aon was modeled after an earlier agreement reached on January 31st with Marsh & McLennan Companies, the nation's largest insurance broker, for \$850 million. The Aon complaint cites the involvement of Ryan in efforts to increase placements with an insurance company in exchange for that company's use of an Aon subsidiary (Aon Re) for reinsurance brokering. The complaint also alleges that Michael O'Halleran, Ryan's second-in-command, personally negotiated "claw-back" arrangements in which Aon Re would provide insurers with discounts or rebates on its reinsurance commissions on the condition that Aon could recover or "claw back" these discounts through retail placements made with the same insurers. Among the reforms adopted by Aon is a new policy in which the company will accept one payment only for an insurance contract at the time of placement, and that its payments will be fully disclosed to and approved by Aon's customers.

The civil complaint filed last month

in State Supreme Court in Manhattan and the citation issued by the New York Insurance Department allege that for years Aon received special payments from insurance companies that were above and beyond normal sales commissions. These payments—known as "contingent commissions"—were characterized as compensation for "services to underwriters" but were, in fact, rewards for the business that Aon steered and allocated to the insurance companies. Spitzer's office and the Insurance Department have said they have uncovered evidence showing that the "practice distorts and corrupts the insurance marketplace and cheats insurance customers." In addition to promising to send business to its insurance company partners in exchange for cash payments, Aon also promised to place business with insurers in exchange for the insurers' agreement use Aon's reinsurance brokerage services, according to the charges by the state Attorney General. General Spitzer's complaint against the company cites internal communications in which top executives openly discussed these efforts to maximize Aon's revenue and insurance companies' revenues—without regard to Aon's clients' interests. Aon will—under the terms of this settlement—bring greater transparency to the insurance marketplace by providing significant disclosure to clients and instituting substantive corporate governance reforms. It appears that consumers will be the winners in this settlement. Persons buying insurance need assurances that they are receiving appropriate insurance products at the best price. In connection with the settlement, Connecticut Attorney General Blumenthal said:

This hidden "pay to play" scheme severely bit both public and private purses, including ordinary consumers, towns and cities, taxpayers, and major educational institutions. Aon demanded kickbacks from insurers in exchange for business, even as it was paid by customers.

The scheme inflated prices and stifled competition. Today's action compels Aon to cease this illegal, unethical practice immediately and pay restitution.

The investigation revealed that Aon Corporation accepted secret payments from insurers for steering them business. Aon's acceptance of these secret payments was a direct conflict of interest that harmed Aon's clients. Aon's acceptance of kickbacks was not only unethical, but also illegal. This settlement will guard against future conflicts of interest and help to return integrity to this industry. General Spitzer's office and the New York State Department of Insurance are continuing a broad investigation of the insurance industry. As this issue went to the printer, 10 executives from four companies had pleaded guilty to criminal charges stemming from the probe. I don't believe Elliot Spitzer will be invited to many insurance company Christmas parties this year.

Source: *Insurance Journal*

SOME INTERESTING DEVELOPMENTS RELATING TO ROA

Our firm is hard at work on the case pending in federal court that arose out of the Reciprocal of America (ROA) demise. You will recall that our firm filed a civil lawsuit in the U.S. District Court in Memphis, Tennessee on behalf of insurance regulators in Tennessee and Maryland. We allege in the case that General Reinsurance Corporation, a wholly owned subsidiary of General Re Corporation (Gen Re), was one of four "principal leaders" of a conspiracy that ultimately resulted in the collapse of ROA. There have been some interesting developments that should certainly affect our case in a positive manner. We understand that federal prosecutors are now investigating whether General Reinsurance Corporation, which also is an indirect subsidiary of Berkshire Hathaway Inc., played a lead role in helping ROA hide

details of its deteriorating financial situation. As you will recall, General Reinsurance Corporation provided various reinsurance coverage to ROA from the late 1970s through 2002.

Criminal investigators are probing whether General Reinsurance Corporation, for more than a decade, helped executives of the now-defunct ROA disguise loans as reinsurance. As we have previously reported, insurers use reinsurance to spread out their own risk. Investigators want to know whether General Reinsurance Corporation aided an alleged program to deceive state regulators and ROA policyholders with transactions dating to the early 1990s. Until now, the Justice Department was concentrating on the actions of the executives of ROA, which collapsed in 2003. As previously reported, plea bargains with two former ROA executives tied to the alleged fraud were reached in Virginia.

Berkshire Hathaway, the holding company of Warren Buffett, said in a securities filing that Berkshire and Gen Re were cooperating "with the U.S. Attorney's investigation of Reciprocal of America." Berkshire added in the filing that General Reinsurance Corporation and four of its current and former employees, "including its former president," had received subpoenas in October 2003 in the matter. The filing also noted that the U.S. Attorney and Justice Department in Washington in December and "on several occasions since then" had sought information concerning ROA as well as information related to General Reinsurance Corporation's transactions with "other insurers." In the filing, it was said that General Reinsurance Corporation "cannot at this time predict the outcome of this investigation, or if that outcome may have a material adverse effect on the Corporation's financial statements." I am told that the Justice Department is now investigating a much broader relationship between all of the parties related to ROA.

It should also be noted that this matter also is part of an industry-wide

investigation by the SEC and New York Attorney General Eliot Spitzer's office into certain types of nontraditional insurance. Our lawsuit is in the early stages, but we are accumulating a tremendous amount of information relating to the scheme to defraud the regulators and the doctors, lawyers, hospitals, and others who were insured by ROA. This case has the potential for a tremendously large recovery. If we are successful, it will benefit a tremendously large number of victims.

Sources: *Wall Street Journal* and *USA Today*

PENNSYLVANIA SETTLES WITH FORMER RELIANCE INSURANCE DIRECTORS

The Pennsylvania Insurance Department has finalized the negotiation of an \$85 million settlement with the former directors and officers of the Reliance Insurance Group. The Pennsylvania Insurance Commissioner, as statutory liquidator for Reliance Insurance Company, made the announcement. The goal of the settlement was to maximize the recovery for Reliance policyholders. The Insurance Department set out to protect and recover the assets of the company for the benefit of all policyholders and to hold responsible parties accountable for their actions. To accomplish that required taking action against Reliance's former officers and directors. Of the \$85 million settlement, \$34 million will benefit the creditors of Reliance parent companies, Reliance Group Holdings Inc. and Reliance Financial Services Corporation. The remaining settlement proceeds of more than \$51 million will go to policyholders. This \$51 million, when combined with the \$45 million previously recovered from Reliance's parent companies, results in a recovery of nearly \$100 million for Reliance's policyholders from litigation brought by the Insurance Department.

In addition to a substantial monetary recovery, the settlement provides non-economic benefits, which were negotiated by the department for the benefit of Pennsylvania policyholders and to

deter future misconduct by insurance company executives. These include agreements from defendants Saul P. Steinberg and Robert M. Steinberg not to serve as officers or directors, or to hold a controlling interest, in any insurance company domiciled, licensed or conducting insurance business in the Commonwealth of Pennsylvania for the next 15 years.

Reliance Insurance Company, which is a Pennsylvania-based insurance company, was licensed to write insurance business in all 50 states. It stopped writing most new or renewal business in June 2000. The states with the largest number of policyholders included California, New York, Florida, Pennsylvania, Illinois, and Texas. Reliance Insurance Company's insurance business consisted primarily of workers' compensation, commercial auto, commercial liability and personal auto coverage. The Pennsylvania Insurance Department took statutory control of the company on May 29, 2001, under an Order of Rehabilitation, followed by an Order of Liquidation in early October of that same year. The Department filed a civil action, which resulted in this settlement, against the former officers and directors of Reliance on June 24, 2002, in the Commonwealth Court of Pennsylvania. Among other things, the complaint alleged claims for breach of fiduciary duties, professional negligence, and the recovery of preferential transfers.

This settlement closed a large chapter in the story of the liquidation of the Reliance Insurance Company. A copy of the settlement agreement can be found at the Reliance Documents website, www.reliancedocuments.com. Policyholders with questions concerning the Reliance liquidation estate should call 215-864-4500.

Source: *The Insurance Journal*

LLOYD'S SETTLES WITH CENTRAL FUND INSURERS FOR \$ 292 MILLION

Lloyd's of London has reached a settlement agreement with the insurers

involved in the arbitration proceedings relating to an insurance policy supporting its New Central Fund. The settlement amount is £152 million (\$292.4 million), which includes amounts previously paid. In 1999, Lloyd's negotiated a five-year policy to protect the Central Fund with six companies: Swiss Re; St Paul; Hannover Re; XL Re; Federal Insurance Company; and Employers Re. The policy was to reimburse the fund for cash calls by members that exceeded £100 million (\$192.4 million) in any one year up to £385 million (\$740 million), with an upper limit of £500 million (\$962 million). The policy expired at the end of December 2003. Following the September 11th attacks, Lloyd's made several cash calls and eventually filed claims for reimbursement of £477 million (\$918 million). The insurers, led by Swiss Re, claimed they weren't obligated under the terms of the policy to pay. Arbitration proceedings, as provided for in the policy, started in April of 2003. Except as disclosed in the news release issued by Lloyd's, "the terms of the settlement agreement will remain confidential between the parties."

This is a prime example of when arbitration is proper and should be used by parties engaged in a dispute. All of the parties to this dispute were relatively equal in economic bargaining power. This is the type dispute that arbitration was originally intended for.

Source: *The Insurance Journal*

XII. PREDATORY LENDING UPDATE

AMERIQUEST REACHES SETTLEMENT IN FRAUD SUIT

We wrote last month on some of the "questionable" activities of Ameriquest Capitol Corp that have hurt lots of folks around the country. Since that time, home loan lender Ameriquest Mortgage Co., a subsidiary, has agreed to

settle a class action lawsuit that alleges it cheated thousands of borrowers in four states. The case is pending in a California state court. The Orange County, California-based company has also been questioned by attorneys general and regulators in 25 states about its lending practices. These inquirers include how loan terms are verbally described to borrowers. Ameriquest, which is one of the worst of the predatory lenders, has lawsuits pending in at least 20 states that accuse the company of fraud and falsification of documents.

The settlement stems from a lawsuit that accuses Ameriquest employees of surprising borrowers with fees and interest rates that often were significantly higher than quotes in good-faith estimates of loan costs. A hearing has been scheduled for June 24th for final approval of the settlement. Under the terms, Ameriquest would pay at least \$15 million, but no more than \$50 million, in settlement. It would give refunds to some California borrowers who received loans from 1996 through February 2004. Customers in Texas, Alabama and Alaska who took out loans from 1998 through February 2004 would also get refunds. To qualify, closing loan rates must have been more than .9 percentage points higher than the rate in good-faith estimates. Class members also could be entitled to a 50% refund of prepayment penalties if preliminary disclosures did not indicate that the loan was subject to such a penalty. Reportedly, there are 1,671 such customers.

Ameriquest first disclosed it had been questioned by attorneys general and regulators in a February 23rd Securities and Exchange Commission (SEC) filing (a prospectus for potential buyers of interest-paying bonds). Connecticut Attorney General Richard Blumenthal said his state was concerned about the lender's excessive fees to refinance loans for existing customers. In addition, he said Connecticut has received dozens of complaints about the company's lending practices since the

state closed an Ameriquest investigation last year with a settlement agreement. General Blumenthal says that: "Ameriquest has violated not only the letter of our law ... but also the spirit of our agreement that gave them a second chance." The company, which has requested a hearing in its SEC filing to defend itself against Connecticut banking regulators, blamed a computer glitch for the alleged violations. As stated above, Ameriquest Mortgage, is a unit of privately held Ameriquest Capital Corp. I am not sure how good this settlement will turn out to be for the victims of this very powerful and well-connected corporation.

Sources: *Los Angeles Times* and *Associated Press*

XIII. WORKPLACE HAZARDS

OSHA IDENTIFIES 14,000 WORKPLACES WITH HIGH INJURY AND ILLNESS RATES

Approximately 14,000 employers have been notified by the Occupational Safety and Health Administration (OSHA) that injury and illness rates at their worksites are higher than average and that assistance is available to help them fix safety and health hazards. OSHA has explained to these employers that the notification was a proactive step to encourage employers to take steps now to reduce those rates and improve the safety and health environment in their workplaces. The identification process by OSHA is meant to raise awareness that injuries and illnesses are high at these facilities. OSHA says its goal is to identify workplaces where injury and illness rates are high, and then to offer assistance to employers so they can address the hazards and reduce occupational injuries and illnesses. Establishments with the nation's high workplace injury and illness rates were identified by OSHA through employer-reported data from a 2004 survey of 80,000 worksites.

The survey consisted of data from calendar year 2003.

Employers receiving the letters were also provided copies of their injury and illness data, along with a list of the most frequently violated OSHA standard for their specific industry. The 14,000 sites are listed alphabetically, by state, on OSHA's website at: www.osha.gov. The list does not designate those earmarked for any future inspections. An announcement of targeted inspections will be made by OSHA later this year. The sites listed are establishments in states covered by federal OSHA. The list doesn't include employers in the 21 states and one territory (Puerto Rico) that operate OSHA-approved state plans covering the private sector. OSHA's data collection initiative is conducted each year to provide the agency with a clearer picture of those establishments with higher-than-average injury and illness rates.

Source: *The Insurance Journal*

OSHA CITES OKLAHOMA FACILITY FOLLOWING CHEMICAL SPILL

OSHA has issued citations to Valmont Coatings-Oklahoma Galvanizing, which is located in Claremore, Oklahoma. Penalties were proposed totaling \$126,000 for safety and health violations. Eighteen employees were sent to the hospital. Valmont Coatings-Oklahoma Galvanizing, a hot-dip galvanizing business, is owned by Valmont Industries Inc., headquartered in Omaha, Nebraska. The company employs more than 3000 workers, with about 100 being located in Claremore. Following an inspection that began August 31st, OSHA cited the company for one alleged willful and eight alleged serious violations for exposing employees to sulfuric acid during a clean-up spill from the rupture of a storage tank. The alleged willful violation was issued for failing to provide personal protective equipment to employees who responded to the acid spill. A willful citation is issued by OSHA when an employer either knew

that a condition constituted a violation or was aware that a hazardous condition existed and made no reasonable effort to correct it. The alleged serious citations included:

- Failing to ensure that the premises were free from hazardous conditions such as exposure to concentrated sulfuric acid or being struck by debris caused by the leakage and/or rupture of a storage tank operating under pressure;
- Failing to develop and implement an emergency response plan;
- Failing to ensure the senior emergency response official took charge of the situation at the site when the spill occurred; and
- Failing to train employees in emergency response operations.

OSHA defines a serious violation as one in which there is a substantial probability that death or serious physical harm could result from a hazard about which the employer knew or should have known. Valmont Industries has reportedly had numerous inspections in past years. One of these inspections resulted in proposed penalties of \$20,000 when an employee died in Valley, Nebraska, after being crushed by a stamper machine in July 1996. Violations involved machine guarding and control of hazardous energy.

Source: *The Insurance Journal*

WAL-MART SETTLES CIVIL CASE AND AVOIDS CRIMINAL CHARGES

Wal-Mart Stores Inc., has agreed to pay \$11 million to settle the pending civil immigration case against the retail giant. Wal-Mart escaped criminal charges and put an end to the federal probe into its use of illegal immigrants in 21 states. A dozen contractors, who hired the laborers for work inside the stores, have agreed to plead guilty to criminal immigration charges and will pay an additional \$4 million in fines. The civil immigration settlement is said

to be a record dollar amount for such cases. The settlement agreement requires Wal-Mart to create an internal program to make sure it complies with immigration laws. I suspect Wal-Mart made money on this settlement.

JURY RETURNS A \$7.5 MILLION JURY VERDICT AGAINST WAL-MART

In another matter, a New York jury has ordered Wal-Mart to pay \$7.5 million in damages to a disabled former employee in a class action lawsuit. It was claimed that the retailer unfairly reassigned the worker to garbage duty even though he was hired to work in the pharmacy department. The 21-year-old plaintiff, who suffers from cerebral palsy, had applied for a position in the pharmacy unit of a Wal-Mart store in Centereach, New York, and was hired in the summer of 2002. But the plaintiff, who worked for just four days before quitting, claimed that after being hired he was soon reassigned to other responsibilities that included collecting garbage and shopping carts in the Wal-Mart parking lot. The jury's verdict includes \$5 million in punitive damages. Wal-Mart claimed it was not guilty of discrimination of any kind, but the jury didn't buy that argument.

Source: *CNN*

LOWE'S EMPLOYEE WINS DEFAMATION LAWSUIT

Worker's compensation benefits—when due to an employee who has suffered an injury on the job—should always be paid by the employer or its insurance carrier. It now appears that Lowe's, a national home improvement chain, fired one of its employees for seeking compensation for work-related injuries. Last month, a jury in the United States District Court of the Western District of Texas awarded a former assistant store manager at Lowe's \$4.3 million for defamation and punitive damages. The employee won an additional \$312,000 for lost pay and benefits. The lawyer

who represented this employee says that Lowe's has "a pattern and practice of discriminating against anyone filing a worker's compensation claim."

As the employee was closing the Lowe's Home Center store back in 2003, she fell and injured her knee. The employee filed a worker's compensation claim and worked through the pain until her surgery in June of that year. When she returned to work a few months later, the employee was fired. She was also accused of improperly buying a \$4,000 tractor from the store, which was proved to be "a completely false and manufactured allegation." The company claimed that the employee bought the tractor at a discount, damaged it and then returned it. The store's upper management told other employees the employee had been fired for theft. Friends of the employee who called the store looking for her were given the same story. Lowe's has a history of pressuring recovering employees to quit by placing them in cashier's positions instead of on light duty in their normal managerial roles. I understand that three other Lowe's employees at the same store were fired after making worker's compensation claims.

Source: *Gazette News Services*

SILICA LITIGATION SETBACK

There have been a series of setbacks for persons with Silica cases pending in the multi-district litigation in Texas. U.S. District Judge Janice Graham Jack presides over the multi-district litigation, which is pending in the Southern District of Texas. In February, plaintiffs' lawyers and their experts appeared for Daubert hearings and in-court depositions in these cases. It appears that neither the hearings nor the depositions went well for the plaintiffs. In fact, defense lawyers filed a motion seeking over a million dollars in sanctions from the plaintiffs' lawyers for "knowingly submitting and advocating bogus diagnoses." These are obviously

extremely serious charges to be made against a lawyer. The sanction hearing was set for March 14th. At press time, we had not heard the results. Regardless of how that hearing comes out, it appears that Judge Jack is inclined to remand all of the cases back to the state courts. In that regard, the judge has told the lawyers in very clear terms that she will write a lengthy analysis of her findings, which will be sent to the state court judges.

Silicosis, while apparently on the decline, is a most serious medical condition for those who actually have it. Our firm was not involved in the multi-district litigation and hasn't handled any silica cases at this point. But, it appears that a good number of reputable law firms were involved for the plaintiffs in the Texas court. It will be interesting to see how all of this pans out. If nothing else, it points out the necessity for having good experts who are highly qualified in cases that require expert testimony.

XIV. TRANSPORTATION

SURVEY SHOWS THAT TRUCKERS ARE WORKING LONGER HOURS

Our firm handles a very large number of wrongful death cases each year and many of them involve 18-wheeler accidents. A new Insurance Institute for Highway Safety survey indicates that drivers of interstate trucks now spend more time behind the wheel under a federal work rule that went into effect in 2004. This new rule lengthens the mandatory rest period by two hours, but lets drivers stay on the road an extra hour every day. A work-week restart provision of the rule increases allowable driving hours in a 7-day period from 60 to 77 hours. A quarter of drivers who were surveyed said they drive more than the new daily limit of 11 hours. Eight of 10 drivers said they're taking advantage of

the restart provision that allows them to drive 25% more in a week.

While the drivers said their sleep time has increased under the new rule, they reported slightly more instances than the previous year (when the old work rule was in effect) of driving drowsy or falling asleep at the wheel. When drivers were asked about dozing at the wheel at least once in the past month, the reported percentage increased from 13% under the old rule to 15% under the new rule. Anne McCartt, Institute vice-president for research, stated:

Studies show that fatigue is a significant factor in truck crashes. The new rule was supposed to improve safety, but our survey shows the opposite. Truckers are using the restart provision to squeeze even more driving hours into the week.

A number of the wrongful death cases we have handled over the years are where drivers of 18-wheelers dozed off and literally ran over passenger cars on interstate highways. Those cases seem to be on the increase. Several of our cases involved drivers who were over the hours time limit. Enforcement of work hours has reportedly long been a problem because written logbooks are easily falsified and companies push their drivers very hard. The Institute's survey shows that none of this has changed. About a third of drivers said they either "sometimes" or "often" omit hours worked from their logbooks. A proposal to include electronic onboard recorders, which are tamper-resistant devices that can monitor driving hours, was dropped before the new rule went into effect. Without electronic recorders the rule can't be enforced effectively. The 2004 rule should be amended to require these recorders.

Source: *The Insurance Journal*

STUDY SHOWS RURAL ROADS ARE MOST DEADLY

A recent study reveals that the death rate for motorists on rural roads was more than 2½ times the rate for driving on all other roads in 2003. Corresponding to that statistic, safety improvements on rural, non-interstate routes have also lagged behind. An analysis of federal highway data by The Road Information Program (TRIP) is the basis for the comparison. William Wilkins, executive director of the Washington-based highway information research organization, observed: "The nation's rural roads... are exposing rural residents and visitors to an unacceptable level of risk. We know how to make rural roads safer. What is missing is adequate funding for road safety projects that will save numerous lives." The following are some of the study's findings:

- 52% of the 42,301 average annual traffic deaths from 1999 through 2003 occurred on rural, non-interstate routes, although travel on those roads represents 28% of miles driven.
- The death rate on rural roads in 2003 was 2.72 per 100 million miles driven, compared with 0.99 on all other roads.
- From 1990 through 2003, the death rate on all routes excluding rural roads decreased 32%. The death rate on rural roads declined by 21% during the same period.
- Many rural areas, particularly in the West and South, are gaining population, but roads in those areas are more likely than urban roads to have features that make driving hazardous. They include narrow lanes, limited shoulders, sharp curves, steep slopes and pavement drop-offs.

With all of the budget problems—both in Congress and in state governments—I fear that funds for rural highways won't be a high priority when transportation funds are allocated. Tools to improve safety include

rumble strips, better signs, lane markings and lighting, guardrails, and removal of obstacles along roadsides. A transportation spending bill pending in Congress could increase funding for rural road improvements. But substantial improvements will actually depend more on state and local funding, which represent about three-quarters of U.S. spending on roads and highways, according to Frank Moretti, director of policy and research for TRIP. It is important to note that TRIP is a non-profit group supported by insurance companies, labor unions and businesses involved in highway construction and engineering.

Source: *USA Today*

ALCOHOL-RELATED DEATHS

More than 17,000 persons are going to be killed in the United States by drunk drivers in 2005, according to projections by law enforcement agencies. They also project that another 500,000 will be injured in motor vehicle accidents involving drunk drivers. It is quite obvious that alcohol-related traffic deaths continue to be a major problem in this country. When you consider that about 3 in every 10 American citizens will be involved in an alcohol-related crash at some time in their lives, it points out the magnitude of this problem. That staggering statistic certainly should get our attention, especially those of us who have young children or grandchildren. It is critically important that each of us support strong law enforcement in this area of concern. We can also support groups such as MADD who fight the battle on a daily basis, with our financial support. I have been a supporter of MADD for years and know firsthand how hard the group works.

RAILROAD TO PAY OVER VIOLATIONS AT CROSSINGS

CSX Transportation Inc. has agreed to pay one million dollars to settle state

charges in New York that it violated safety laws by failing to report and promptly fix hundreds of warning-signal malfunctions at grade crossings across the state of New York. As part of the settlement, which is described as one of the largest enforcement actions against a railroad, CSX also agreed to improve the way it reports, inspects, and repairs broken warning signals. CSX will also set aside up to \$500,000 to pay for sending local police officers to direct traffic at crossings with broken signals. It should be noted that the settlement resulted from action taken by the New York Attorney General's office. The Federal Railroad Administration is the nation's primary overseer of rail safety. It is highly unusual for a state government to take such sweeping action against a railroad. The New York Attorney General, who is one of the most aggressive state prosecutors in modern times, was motivated to begin a state inquiry of CSX after the death of an elderly couple last year at a Rochester-area crossing with a broken signal. General Spitzer says federal regulation of the railroad industry is "an abject failure." Having dealt with the federal government on crossing cases for a number of years, I agree with his assessment.

The New York Times reported last year that CSX had repeatedly failed to properly report grade crossing accidents, that federal regulators were closely entwined with the rail industry, and that warning-signal malfunctions were more common than federal regulators had acknowledged. In recent weeks, signal problems have continued at CSX. On February 11th, a woman was killed when a CSX train struck her car in Fonda, New York. In that case, a CSX employee had manually raised the gates in error. And more recently, a 37-year-old man died instantly when his truck was hit by an Amtrak train at a CSX crossing in Pompano Beach, Florida.

A bipartisan bill in Washington is pending in the U.S. Senate, introduced by Senators Charles E. Schumer (D-NY) and Lindsey Graham (R-SC). This bill

would require for the first time that the federal rail agency investigate each fatal grade-crossing accident. It would also raise fines and increase the number of federal regulators assigned specifically to grade crossings. Congress needs to make a number of changes in the laws that deal with railroad safety and specifically with grade crossings.

Source: *The New York Times*

A LOOK AT THE SAFETY OF SKY AMBULANCES

Most American citizens probably don't consider medical helicopters as presenting any more of a safety problem than any other helicopters. I would surmise that they also believe that pilots who fly the helicopters are all well-trained and experienced. You may be surprised to learn that medical helicopters are involved in a great number of accidents each year and oftentimes pilot error is a cause. In less than two months this year, four people have died in four separate accidents involving medical helicopters. Last year was a particularly deadly one for flight crews and patients—with 18 people killed in 11 accidents—and that is enough to get the attention of safety advocates. That was the highest number of deaths in a single year in more than a decade, according to federal regulators. The increase in crashes has put a spotlight on a little-regulated, but fast-growing sector of health care, and that is the medical helicopter industry. An excellent article on this little known problem appeared recently in the *New York Times*. According to the *Times*, there are an estimated 700 medical helicopters operating nationally, which is about double the number flying a decade ago.

The *Times* article points out that at one time nearly all medical helicopters were affiliated with hospitals. As a result of more generous federal reimbursements and changes in payment methods, more operators, including publicly traded corporations and smaller companies, have entered this

field. In some cases, the companies set up outposts and market their services to rural emergency units and even to homeowners. It is undisputed that emergency medical helicopters do save lives by getting some patients to hospitals far faster than a ground ambulance could and by reaching remote areas. But the industry's rapid, competitive growth may also be exacting a toll. Federal regulators are concerned that the pool of skilled helicopter pilots has become largely drained and that some of those now flying are making poor decisions. In addition, some companies are flying older helicopters that lack the instruments needed to help pilots navigate safely. According to the *Times*, of the 27 fatal medical helicopter accidents that occurred between 1998 and 2004, 21 were at night and bad weather contributed to the crashes in some cases.

In February of this year, the Federal Aviation Administration (FAA) proposed steps to improve flight safety. The proposals included helping pilots assess risks and providing them with up-to-date electronic equipment. Separately, the National Transportation Safety Board has been examining medical helicopter safety and plans to issue recommendations to the FAA. Reportedly, initial reviews by the aviation agency and the safety board indicate that pilot error was to blame in many of the recent accidents. A report in 1988 by the Board found that medical helicopters were crashing at a rate three times higher than that of other helicopters. At that time, the safety board made a number of recommendations adopted by the aviation agency, including better pilot training, particularly for flying in bad weather.

There is a growing concern about medical helicopter safety among safety experts. Because the number of accidents is increasing, there is a real need to be able to understand more about the causes. According to the *Times* article, there is a long-running debate over whether many of the flights are even medically necessary. There are

about 350,000 medical helicopter flights annually, with about 30% involving calls to accidents or other emergencies, according to the Association of Air Medical Services, a trade group in Alexandria, Virginia. Most other flights involve the transfer of patients between hospitals.

Having an adequate supply of trained and experienced pilots is a necessity. Clearly, the industry's rapid growth may be outpacing the pool of experienced pilots and that is a most serious problem. The FAA, citing the industry's rapid growth and an "unacceptable" number of accidents, suggested recently that operators increase the use of technical aids like radar altimeters, night-vision goggles, and terrain awareness warning systems, among other things. In addition, the FAA recommended that companies emphasize a "safety culture" and also improve systems that will give pilots better information about changing weather conditions while they are in flight. Company officials told the *Times* that they were working with regulators to find solutions. I hope the FAA will stay on top of this growing problem and make sure that emergency flights on medical helicopters are as safe as reasonably possible.

Source: *New York Times*

LEAKING RAIL CAR NOT DESIGNED TO HANDLE CONTENTS

A railroad tank car that leaked toxic fumes, forcing thousands of folks in Utah from their homes, was apparently not designed to hold the mixture of highly corrosive acids with which it had been filled. Some 6,000 people were allowed to return home and highways were reopened after crews pumped the hazardous waste out of the tank car. Tests showed the tank car had been filled with a mixture of acetic, hydrofluoric, phosphoric and sulfuric acids, which easily corroded the car's lining. The car was supposed to be used only for hauling sulfuric acid. Kennecott Utah Copper of Magna, Utah, a copper

mining company owned the car. Philip Services, a hazardous waste handler, had leased it and was using the car to haul waste belonging to its customers. The load was said to comply with federal Transportation Department guidelines on the shipment of hazardous materials. About 6,000 gallons of liquid were pumped out of the car. It is believed about 6,500 gallons more had leaked and soaked into the ground. Contaminated soil will have to be neutralized with lime and removed. The leak could lead to a criminal investigation, according to officials investigating the incident.

Source: CNN

XV. ARBITRATION UPDATE

CAR DEALERS DON'T LIKE ARBITRATION IN THEIR OWN CONTRACTS

Over the past several years, the use of arbitration in consumer transactions has spread across the land like kudzu. It has been abundantly clear that consumers have little—if any—chance of prevailing when they take on large corporations in arbitration. More and more media outlets are beginning to pay more attention to the evils of mandatory, binding arbitration clauses in consumer transactions. Over the past several months there have been several excellent stories and reports on the subject. For example, ABC News did an excellent series on consumer arbitration. *The Wall Street Journal* has also had articles—as has USA Today—discussing the use of arbitration in consumer transactions. Automobile dealers in Alabama have been using arbitration when it is in their interest for several years. In fact, it is virtually impossible to buy a car or truck in Alabama without having to first sign an arbitration agreement.

But, there are times when the automobile dealers don't like arbitration at

all. We reported back in 2000 that the National Automobile Dealers Association was pushing a bill in Congress would protect the dealers from the Federal Arbitration Act in their dealings with automobile manufacturers. H. Thomas Green, chief operating officer of the NADA, stated the position of the automobile dealers at that time in connection with the pending legislation. The bill pushed by the NADA had some interesting language concerning the **unfairness** of “allowing one party to dictate and condition binding mandatory arbitration as the sole dispute resolution mechanism.” Mr. Green stated at that time that:

The NADA does not support or encourage the use of mandatory and binding arbitration in any contract of adhesion whether a motor vehicle franchise contract between a manufacturer and dealer or a consumer contract. In fact, the NADA Board of Directors adopted a resolution in 1999 stating that NADA would not oppose other federal legislative efforts to preclude mandatory and binding arbitration as the sole dispute resolution mechanism in any contract of adhesion.

The NADA's contention that a contract between an automobile dealer and an automobile manufacturer containing a predispute arbitration agreement would be unfair to the dealer is certainly hypocritical. When you consider that almost every automobile dealer in Alabama uses arbitration in its dealings with customers, it is impossible to justify NADA's position in Washington. The NADA said back then that the economic power of the automobile manufacturers was so great that the dealers couldn't get a fair shake in arbitration against the manufacturers. Assuming that to be an accurate appraisal, how can an ordinary citizen who buys a car or truck on credit be forced to sign an arbitration agreement in order to have the right to buy the vehicle? Of course, NADA was able to

get their bill passed and arbitration can't be used against the dealers by the manufacturers. The old adage, “what's sauce for the goose is sauce for the gander” should certainly apply to consumer contracts and arbitration in my opinion!

ARBITRATION LEFT ID THEFT VICTIM WITH \$27,000 BILL

The tort reformers, who tout arbitration as being more efficient and cheaper, should check with Beth Plowman, a Damascus international public health adviser. Ms. Plowman was shocked when she discovered that a \$27,240 arbitration judgment had been levied against her for credit card charges incurred by an identity thief who bought sporting goods all across Europe. Ms. Plowman had been in the United States at the time and had no knowledge of the charges. Someone claiming to be her sister had called the credit card company and asked that all bills be sent to an address in England. When she found out about the charges, Ms. Plowman attempted to get them dismissed through the collection agency. She didn't realize her appearance was needed at the arbitration hearing after the charges were illegally made on her card by an identity theft. She lost the arbitration and had to hire a lawyer to persuade the collection agency pursuing her for the debt to drop its claim. Ms. Plowman, who doesn't even have a sister, told the *Washington Post*: “The fact that people are being held to pay these debts through an arbitration process is just frightening.”

While Ms. Plowman's experience may be unusual, consumer advocates say this unfortunate lady is a classic example of what can go wrong when mandatory arbitration clauses are written into credit card agreements. Mandatory arbitration is being used as an “offensive weapon” by credit card companies seeking speedy resolution to disputes—sometimes without a consumer's full knowledge. The arbitration

process may result in a consumer being left with debts that they didn't even have anything to do with. They will also be hit with substantial arbitration costs, including the credit card company's legal fees. The National Consumer Law Center has issued a paper on the arbitration problem, citing four consumer cases including the Plowman arbitration. It shouldn't come as a surprise to learn that businesses are more likely to bring cases to arbitration than individuals. As we have repeatedly reported, over the past decade mandatory arbitration clauses have been appearing in the fine print of many consumer agreements, including those for credit cards, telephone service, car sales, exterminator services, and just about every consumer transaction. As American consumers have come to know—all too well—these clauses require consumers to agree in advance to waive their rights to a court hearing and refer all disputes to so-called independent, third-party arbitrators who serve as judge and jury.

Businesses say arbitration is faster, more efficient and cheaper than litigation. But, we know better. Mandatory arbitration protects large corporations, and the deck is stacked against individual consumers. Consumer groups will continue to fight arbitration in consumer contracts of all kinds. Paul Bland, staff attorney for Trial Lawyers for Public Justice, says it is unclear how many consumers may have unknowingly had arbitration decisions issued against them seeking repayment of debt. Paul stated that: "in the last six months, we (TLPJ) have received scores of phone calls from consumers who want us to represent them challenging collection activities."

Ms. Plowman says she may be one of the luckier consumers. She declined to participate in the arbitration proceeding because she had been contacted by a debt collection agency and believed the problem would be corrected once the credit agency realized she was an identity theft victim. However, in August 2003, the arbitrator

issued a \$27,240 award against her. Ms. Plowman subsequently hired an attorney, who ultimately convinced the collection agency that the charges were not hers. The agency dropped its claim, but only after Ms. Plowman paid \$2,200 in legal fees. I guess things could have been worse, but when you consider that the lady had done absolutely nothing, was an identity theft victim, and had to hire a lawyer to get help—that tells us something about the credit card company involved, as well as the arbitrator.

Source: *Washington Post*

JAMS REVERSES CLASS ACTION POLICY

The arbitration service JAMS has reversed its policy of refusing to enforce contract clauses that prohibit consumer and employee class actions. This comes after nearly four months of intense pressure by representatives from Corporate America. The arbitration firm, as I understand it, still believes that the clauses may be unfair to workers and consumers. I am told these are the feelings of JAMS' General Counsel John "Jay" Welsh. Nevertheless, the service changed its policy to counter the perception that JAMS was favoring the plaintiff bar. In fairness, I will say that to its credit JAMS had been the only ADR provider to refuse to enforce exclusion clauses. It should be noted that at least one large client, Citibank, wrote JAMS out of its contracts because of the policy. Other companies, including Discover Card, also wrote out JAMS, effectively taking them out-of-the-loop for business, so to speak.

Class action arbitrations are a relatively new issue and have only received substantial debate over the past two years. The whole idea of a class action arbitration is pretty foreign. A U.S. Supreme Court decision, *Green Tree Financial v Bazzle*, 539 U.S. 444 (2003), gave arbitrators authority to decide whether class actions were allowed under particular contracts.

Since then, the debate over exclusion clauses has been "very difficult and very divisive." Lawyers on all sides of the arbitration debate say that more definitive court rulings are needed to address whether it's legal for a contract to rule out class actions. Until the debate is resolved, I understand that JAMS will allow such clauses in jurisdictions where they're legal.

I really had thought there was at least one alternative dispute resolution company that would be fair to consumers and not yield to economic pressure from Corporate America. Unfortunately, I was wrong! A company that's not capable of withstanding the pressure and doing what they think is right, shouldn't be doing arbitrations. To my way of thinking, that's pretty basic!

XVI. NURSING HOME UPDATE

PENNSYLVANIA LATEST BATTLEGROUND OVER NURSING HOME ARBITRATION

The use of arbitration by nursing homes has become very a hot issue in Pennsylvania. That state has become the latest legal battleground over whether the elderly should be forced to agree to arbitration, signing away their legal rights to a jury trial. The AARP and the National Senior Citizens Law Center have joined a 78-year-old woman in a legal challenge of a growing trend in Pennsylvania nursing homes of requiring would-be residents to agree to binding arbitration for any disputes. It should be noted that Pennsylvania has the highest number of nursing home residents outside of Florida. Dorothy Siemon, an attorney for AARP in Washington, D.C., told the *Pittsburgh Tribune-Review*:

Our position is consistent. We oppose arbitration agreements for nursing home residents. But it's happening more and more. We're

bearing about nursing homes trying to impose these agreements all the time to avoid potential liability if they do anything wrong.

In the Pennsylvania case, a 78-year-old lady filed suit against Beverly Healthcare Center in Oakmont, claiming she was injured by a worker at the nursing home, where she was recovering from hip replacement surgery. Her lawsuit was dismissed in January by a state court judge because she had signed a contract stating that any complaints against the nursing home had to go through an arbitrator. The lady said she didn't remember ever signing an arbitration agreement. The case is now on appeal to the state Superior Court. The lawyer representing the resident says:

You can't find a more vulnerable group of people, other than maybe children, than nursing home patients. They are asked to sign these documents, and we really have no idea about how many people have been affected by the agreements.

Beverly has 372 nursing homes in 24 states. The company claims that about half of Beverly Healthcare's residents sign arbitration agreements. I suspect the percentage is much greater. There is no way that any right-thinking person can justify forcing persons to sign arbitration agreements in order to gain admission to a nursing home. If anybody says the level of care at nursing homes requiring arbitration won't go down in a hurry, I suspect they might either have an interest in a nursing home or are totally uninformed on the subject.

LITIGATION HAS A GOOD EFFECT ON NURSING HOMES

A recent article in the National Underwriter, an insurance industry publication, seems to suggest that **litigation** against nursing homes is getting the desired results in better staffing and care. In some situations, sprinklers in

nursing homes are also the result of lawsuits after a fire. The article, titled "Insurers Returning to Nursing Home Market" indicates that jury verdicts sent much of the nursing home industry to alternative risk-transfer approaches several years ago. One insurer undertook a major re-underwriting effort three years ago that required more favorable nurse-patient staffing ratios and the installment of sprinkler systems in the homes. Significant jury verdicts against nursing homes sent a message to the industry that something had to change, according to industry observers.

According to the article, with the nursing home industry tightening policies and procedures, the average nursing home is better off today than before. In addition to tightening policies and procedures guidelines in the facilities, more extensive background checks of new hires have been added. The president of one large health care insurer indicated that certain carriers today would not take on the risk of nursing homes unless staffing ratios are increased and meet certain desired targets. The article also indicates that insurers are now doing a closer review of the circumstances underlying incidents that occur in nursing homes, such as falls, and they are putting much more credence in the deficiency reports received from state surveyors.

Source: *National Underwriter*

ADVERSE DRUG EFFECTS IN NURSING HOME ARE MORE COMMON

Drug-related injuries in nursing homes are more common than previously documented and largely preventable, according to the findings of a study published in the *American Journal of Medicine*. A team of physicians reviewed records of two large academic long-term care facilities that had a combined total of 1229 beds. Over an eight to nine-month period the researchers identified 815 adverse drug events that caused injury to a patient. The events were typically caused by errors in drug prescribing and monitor-

ing, including wrong dosages of medication, drug interactions, and failing to monitor drug side effects. The researchers concluded that 42% of all the adverse drug events were preventable. These rates of adverse events at these facilities associated with academic institutions is a great cause of concern to the researchers because, as the researchers stated, the facilities "are exceptional...strongly committed to improving patient care and safety, and with many more resources than community nursing homes." The researchers felt that because there was a high rate of problems at these facilities, drug problems were likely occurring at a much higher rate at most nursing homes in the United States. The researchers felt that engagement of family members in care of their older relatives was extremely important. Families should be aware of the drugs that are being prescribed for their relatives, the reasons for the use of the drugs, and potential side effects, and they should report any changes they notice in their relative's condition immediately.

STATE REPORT SHOWS INACTION AT KNOXVILLE NURSING HOME

State investigators in Tennessee reported that staff, department heads, and administrators knew of the allegations of sexual abuse at Hillcrest Healthcare North in Knoxville, Tennessee, but did nothing to remedy the situation. According to a report from the state, Hillcrest has more than 260 residents. Earlier in February, four female residents reported multiple cases of sexual abuse to employees. The report says that one of the women, who had no serious mental problems, told at least four nursing assistants that she had been the victim of sexual abuse on more than one occasion. According to the state's investigation, two other women made similar allegations.

An administrator and two assistant directors of nursing at Hillcrest were terminated and the director of nursing

at the facility resigned. As a result of the violations, the nursing home was required to pay more than \$23,000 in fines. As a result of the investigation, the facility has implemented some new policies. Hillcrest North says now when a resident reports abuse, law agencies will be called in to investigate. Also, employees will go through additional training. The State of Tennessee has done a follow-up inspection of the facility and found that Hillcrest North is now in compliance.

JURY VERDICT FOR FAMILY IN ANT-BITE DEATH

The wife and children of a retired postal worker who died from hundreds of fire ant bites in a Florida nursing home nearly four years ago will receive almost \$2 million for their loss. Mariner Health Care, the nation's third largest long-term health care company, will pay the wife and children of the decedent \$1.875 million. Nursing homes have a duty to follow federal law requiring them to keep their facilities free of pests, including ants. This is the second time in recent years a nursing home company has settled a wrongful death case stemming from a fatal ant attack. In the other case, Quality Health Care settled with the family of a female resident for an undisclosed amount. The poor lady died after she was bitten 1,625 times by fire ants in a North Port, Florida, nursing home. There have been numerous accounts of nursing home residents severely injured or killed as result of fire ant bites.

The resident in the latest Florida case, who was 73 years old, had been recuperating from surgery at the Melbourne, Florida, facility for exactly a month when ants swarmed his bed and bit him in the early hours of July 26, 2001. The surgery had left the Rockledge, Florida, man partially paralyzed, unable to roll over or get out of bed on his own. Forty hours later, the resident died of shock from the amount of ant poison in his body, according to the

medical examiner's report. His back, arms, chest, neck, head, and shoulders were covered in ant bites. The family sued Mariner Health Care in 2002. Records and sworn depositions showed that the 120-bed Atlantic Shores facility had a history of fire ant infestation for years. The pest control company came out weekly to spray for fire ants in patient rooms. During lawsuit negotiations, Mariner Health care sold Atlantic Shores to Sovereign Healthcare in 2003, which replaced the management.

Richard deShazo, a professor with the University of Mississippi Medical Center, who specializes in allergic reactions to insect bites, says that fire ants like medical facilities because there's always food around. Dr. deShazo has been an expert witness in 10 ant bite cases, with most of them involving health care facilities. Dr. deShazo stated:

Many of us feel they (ants) see humans as food sources, because we've seen them go for areas of the body that are high in protein. Others feel that food products in the rooms attract them. The people who have died are old people who are debilitated or demented and not alert enough to withdraw when they get covered.

In another case, a 90-year-old woman who survived a 2002 fire ant attack at a Bradenton nursing home, won a \$1.2 million verdict last year. But the company that owned the home had gone broke and had no insurance. It is unlikely that this unfortunate lady will ever collect.

Nursing homes should be made to follow federal law requiring the facilities to keep their facilities free of pests, and that certainly includes ants. Patients' care and security and protection must be placed ahead of profits and making money. When you hear of cases like those mentioned above, it makes you wonder whether things in our nursing homes will ever get any better. Since the industry is now requir-

ing arbitration agreements as a shield to liability, I don't guess it ever will.

XVII. HEALTHCARE ISSUES

REPORT SAYS MEDICAID OVERPAYS FOR DRUGS

A report released last month by Congressional investigators should be shocking to taxpaying citizens. Federal health officials are not enforcing a law that requires drug companies to cut their prices on drugs bought for poor people under Medicaid, according to the report. The Government Accountability Office (GAO) investigators said the federal Medicaid agency rarely verified the accuracy of price data reported by drug manufacturers and used to compute the discounts required by law. As a result, Medicaid, the nation's largest health insurance program, with more than 50 million beneficiaries, is paying too much for prescription drugs. The report says that even when federal officials detect errors and problems in the data, they do not require drug companies to make corrections. The accountability office, an investigative arm of Congress, said the Medicaid agency provided "minimal oversight" of the program.

Moreover, the report said the Medicaid agency does little to "ensure the accuracy of reported prices" and "discounts" provided by drug makers. As you know, Medicaid is financed jointly by the federal government and the states. Under a 1990 law, intended to help control costs, Medicaid pays for prescription medicines only if the manufacturer agrees to give certain discounts, in the form of rebates to the states. In buying brand-name drugs, Medicaid is entitled to the "best price" charged to any buyer, with some exceptions. The accountability office found that manufacturers sometimes concealed the best prices. This was

done so they would not have to give the same discounts to Medicaid. Drug spending has grown rapidly and now accounts for more than 10% of all Medicaid spending, or about \$37 billion of \$300 billion in spending this year. Rebates and discounts total at least \$6 billion a year. The GAO said it couldn't determine the amount of federal overpayments. In general, it said the federal Medicaid agency has allowed drug companies to use any "reasonable assumptions" they wanted in computing discounts. In the case of one manufacturer, congressional auditors found that proper accounting would have increased savings to Medicaid by 16%.

The emergence of pharmacy benefit managers (PBMs) has also had a bad effect. The PBMs act as middlemen for employer-sponsored health plans and other health insurers. PBMs, such as Medco and Express Scripts, often secure large discounts for their clients. But the report said the Bush Administration hadn't given drug companies any guidance on how to account for such concessions in calculating the discounts for Medicaid. The federal government may face similar challenges in trying to audit drug spending under the new Medicare drug benefit, which becomes available to the elderly and disabled next year. In his budget request to Congress last month, President Bush proposed to cut Medicaid payments to pharmacies. Governors of both parties have asked the president to extract savings from drug companies as well as pharmacists.

The accountability office's report was requested by Senator Charles E. Grassley (R-IA) and Representative Henry A. Waxman (D-CA) in a bipartisan move. Senator Grassley, the chairman of the Senate Finance Committee, which has authority over Medicaid, said:

The drug program has been badly mismanaged. The Centers for Medicare and Medicaid Services, which administers the program, has been negligent. For 15 years, drug companies have been profit-

ing from a system that costs taxpayers untold hundreds of millions, if not billions, of dollars annually.

Drug companies told investigators that they had never received clear guidance from the government on how to define or calculate "best price." In a written response to the report, federal Medicaid officials agreed that it would be helpful for them to provide "clear guidance" on how to perform such calculations. Predictably, the Bush Administration denied that it was providing "inadequate oversight." The Bush White House suggested that the government lacked the resources to verify data used for hundreds of drugs. Clearly, huge amounts of money are at stake. In one case, Schering-Plough agreed last year to pay \$345 million to the federal government and 50 state Medicaid programs to resolve civil and criminal charges of fraud in the pricing of Claritin, the popular allergy drug. The government said Schering had concealed its best price. As a result, Medicaid had paid far more than two managed care companies. The government learned of the case through a complaint filed by three former Schering employees.

Source: *The New York Times*

PUBLIC CITIZEN SAYS IRESSA SHOULD BE REMOVED FROM MARKET

Public Citizen believes that Iressa, a drug approved to treat non-small cell lung cancer, should be pulled from the market because it does not improve survival rates and has been linked to deaths in Japan and the United States. Public Citizen has filed a petition with the U.S. Food and Drug Administration (FDA) to have the drug pulled from the market. In testimony delivered to the FDA's Advisory Committee on Oncologic Drugs, Public Citizen said that Iressa should be reclassified as an experimental drug.

Iressa was approved in May 2003 under an accelerated approval program. Because it had been demon-

strated only to reduce tumor size, its approval was conditioned on the manufacturer, AstraZeneca, studying the drug further to determine whether it prolonged survival. That study has been done and it shows that patients taking Iressa didn't live any longer than patients taking a placebo. The FDA has the authority to pull the drug under the accelerated approval process. Instead, the agency merely advised patients to consider taking one of two other drugs that—unlike Iressa—have been proven effective in prolonging survival.

Even more significant is the fact that Iressa has been linked to deaths. In January, Japanese scientists linked Iressa to a total of 1,473 adverse events and 588 deaths in that country. In addition, according to a Public Citizen analysis of the FDA's adverse event reactions database, there have been 144 reports of acute interstitial pneumonia in patients taking Iressa between May 2003 and September 2004, including 87 deaths for which the drug was suspected to be the cause. Dr. Peter Lurie, deputy director of Public Citizen's Health Research Group, said:

The continued use of Iressa puts all patients at risk for a serious and potentially fatal lung disease that is occurring with a relatively high incidence. Leaving Iressa on the market increases the likelihood that patients will be diverted from an effective therapy to an ineffective therapy, endangering their lives. Keeping a drug on the market while effectively telling people to avoid taking it is not an adequate public health response.

Considering the excellent and most impressive track record of Public Citizen when it comes to protecting the public from unsafe drugs, I believe that the FDA should take a long look at Iressa. In fact, the public would be much better off if Dr. Wolfe (director of Public Citizen's Health Research Group) had been the boss at the FDA for the last 10 years. In any event, I

believe that the sale of the drug should at least be suspended—if not banned—by the FDA until such time as further studies are concluded.

Source: Public Citizen

FDA CAUTIONS DOCTORS ON ECZEMA TREATMENT

The Food and Drug Administration (FDA) has issued an advisory to doctors urging caution in prescribing two drugs for eczema because they may cause cancer. The drugs Elidel and Protopic will receive new “black box” warnings pointing out that an increased risk of cancer may be associated with their use. Elidel and Protopic are applied to the skin to control eczema by suppressing the immune system. It is reported that animal tests have shown an increase in cancer associated with the drugs. Additionally, a small number of cancers have been reported in children and adults treated with the drugs, according to the FDA. The manufacturers of the products have agreed to do further tests to determine the actual risk. But, both companies contend strongly that their products have not been tied to cancer. The FDA is developing a medication guide for patients, and urges physicians considering prescribing the drugs to consider the following:

- Elidel and Protopic are approved only for short-term and intermittent treatment of eczema in patients who don't respond to or cannot tolerate other treatments.
- These drugs are not approved for use in children younger than 2 years old because the long-term effect on the developing immune system is not known. In clinical trials, infants and children younger than 2 years of age treated with Elidel had a higher rate of upper respiratory infections than those treated with placebo cream.
- These drugs should not be used continuously. The long-term safety of these products is unknown.

- Children and adults with a weakened or compromised immune system should not use Elidel or Protopic.
- Use the minimum amount needed to control symptoms. The animal data suggest that the risk of cancer increases with increased exposure.

As you know, the black box warning requirement is most significant. A black box is the strictest warning the FDA can require a company to place on its label. The FDA will now begin negotiating the exact wording of the box with Novartis and Fujisawa. Both companies said they would work with the FDA. Novartis and Fujisawa have been required to report on any cancers seen among Elidel and Protopic users. There have been 29 reports of cancer, including about a dozen of skin cancer and lymphoma. But, the FDA said it would take 10 or more years of human studies to determine whether there really is a link between use of the products and cancer, and noted that both companies have agreed to conduct such research. Novartis said the number of cancers in question was below the number normally seen in the general population.

Sources: *USA Today*, *Associated Press* and *The Wall Street Journal*

NEW RULES WILL COST DOCTORS AND OTHER EMPLOYEES AT NIH

A group of senior government scientists have announced their opposition to new and restrictive conflict-of-interest rules at the National Institutes of Health. These scientists complained that the agency's mission was in danger of being irreparably compromised. They said the new rules, which ban NIH employees from accepting consulting fees or stock options from biomedical companies, would victimize even food handlers and elevator operators. However, I doubt if many of the NIH employees in those two job descriptions have been receiving much “financial help” from biomedical companies or the pharmaceutical industry. Interestingly, according to a report in

the *Los Angeles Times*, six of the 18-member executive committee leading the dissidents have accepted consulting fees or stock options from biomedical companies in recent years. The fees totaled more than \$400,000. One committee member received stock options for 500,000 shares as compensation from a company. The committee was elected by colleagues to “address” the current “situation” and “the new rules,” according to the Internet site of the protesting NIH employees, named the Assembly of Scientists.

Scientists at the NIH also are being ordered to divest ownership of stock in any pharmaceutical, biotechnology or related company. Other NIH employees must divest holdings exceeding \$15,000 in value in any individual company in the biomedical field. The tighter restrictions were scheduled to take effect on March 5th. Allowing NIH staff scientists to receive consulting fees from drug companies clearly undermines confidence in the agency's research. Reports published in the *Times* that became the focus of four congressional hearings last fall are said to have caused NIH to act. Citing interviews and agency and company records, the *Times* reported that senior NIH researchers and laboratory chiefs who helped design or oversee clinical trials had accepted industry compensation. The directors of two major NIH institutes—whose duties included overseeing clinical trials—accepted hundreds of thousands of dollars in fees or stock options, according to the *Times*.

At least 530 agency scientists accepted fees, stock or stock options from the biomedical companies between 1999 and 2003, according to the NIH and company documents. Other records, submitted to Congress last year by 20 biomedical companies have identified about 50 NIH scientists who accepted industry payments but either failed to get required approvals from the agency or did not report the income internally. The compensation from the companies to the scientists was allowed because many restrictions

were lifted in November 1995 by Dr. Harold E. Varmus, a former NIH director. The statement issued by the group of NIH scientists was the latest sign of resistance to tighter ethics rules among some staff members at the agency. If anything, the ethics rules governing potential conflicts of interest should be made tougher.

Source: *Los Angeles Times*

ANTIDEPRESSANT LABELS START THIS MONTH

“Black box” labels warning that antidepressants can increase suicidal behavior in children were to have been on the drugs most widely prescribed to children by mid-March. This is five months after the Food and Drug Administration (FDA) ordered that the warnings be on the drugs. Joel Gurin, executive vice president of Consumers Union, a consumer advocacy group, stated: “It’s unfortunate that it’s taken this long. It was really important for parents to have had this information. Getting it out quickly was important for transparency and trust.” The FDA sent letters telling the 14 companies that make antidepressants to add the boxes and produce “medication guides” about proven risks and benefits. The guides will be given to everyone picking up antidepressant prescriptions. The companies then had to submit applications for the label changes. The FDA approved the changes and set a 30-day deadline for action.

Approval letters went out in mid-February to the makers of Prozac, Zoloft and Celexa. The same letter had gone out to GlaxoSmithKline, maker of Paxil and Wellbutrin, in January. These five antidepressants are the most widely prescribed to children, according to IMS Health, which tracks prescription drugs. The warnings say that about 2 in 100 children taking antidepressants are more likely to think about or try suicide because they’re on the pills. There were no suicides among the more than 4,400 children involved in the studies reviewed by the FDA. Only Prozac has

been approved to treat childhood depression, but the other drugs can be prescribed legally as an **off-label use**. But, even Prozac causes a 50% higher risk of suicidal behavior in children, according to an FDA analysis released last fall. The October decision by the FDA to order black boxes, which is the strongest possible warning now available, and medication guides came only after eight months of mounting pressure by Congress. Dozens of parents testified at two FDA hearings that antidepressants had caused their children’s suicides and this added to the pressure on the FDA. An FDA scientific advisory panel recommended the black boxes, which are reserved for the most dangerous drugs, after a hearing in September. I hope the strong warnings will be enough to curb the prescribing of antidepressants for children.

Source: *USA Today*

EPA CRACKS DOWN ON LEAD IN DRINKING WATER

As our readers already know, lead is a highly toxic metal that was used for years in many household products. It has become widely accepted that lead can cause kidney and brain damage and, in some cases, death. Pregnant women and infants are the most vulnerable to lead. Even at low levels, it can cause behavioral problems and learning disabilities in children, who are most at risk at ages six and under when the brain is developing. Since 1991, the Environmental Protection Agency has required drinking water utilities to reduce contamination if lead concentrations exceed 15 parts per billion in more than 10% of taps sampled. There are about 54,000 community water systems supplying 268 million Americans, or about 90% of the U.S. population, according to The American Water Works Association, a trade group. The EPA said its review shows the current regulations are adequately protecting more than 96% of water systems that serve 3,300 people or more. The agency told the Associ-

ated Press that in the past three years there have been only four large water systems (Washington, D.C.; St. Paul, Minnesota; Port St. Lucie, Florida; and Ridgewood, New Jersey) that had unsafe lead levels.

The EPA plan is designed to “increase the accuracy and consistency of monitoring and reporting.” Their aim is to deal with lead problems “quickly and properly.” Notification of persons in the area to be affected is critically important. The chief concern of the EPA is said to be “protection of public health.” EPA’s regulations, which affect both lead and copper in drinking water, also are intended to improve management of lead service lines and customer awareness of any problems. President Bush has proposed cutting EPA spending by nearly a half-billion dollars next year, most of that from clean water programs. The President wants to reduce by one-third the low-interest loans to states for water quality protection and decrease by 83% spending on replacing aging water treatment facilities and pipes. In a rather inconsistent statement, President Bush said that one of the chief tasks facing the next EPA chief would be to “lead federal efforts to ensure the safety of our drinking water supply,” which would also play “an important role in the war on terror.” Cutting the EPA’s budget doesn’t make much sense, and really can’t be justified. I hope the cuts to the EPA’s budget will be replaced as the budget goes through the Congressional process.

Source: *Associated Press*

AUTISM LINK TO MERCURY POLLUTION FOUND

Mercury released primarily from coal-fired power plants may be contributing to an increase in the number of cases of autism, according to Texas researchers. A study released on March 17th in the journal “Health and Place” found that autism increased in Texas counties as mercury emissions rose. The study was done at the University of Texas Health Science Center in San Antonio. “The

main finding is that for every thousand pounds of environmentally released mercury, we saw a 17% increase in autism rates,” according to Dr. Claudia Miller, who participated in the study. About 48 tons of mercury are released into the air annually in the United States from hundreds of coal-burning plants. The study looked at Texas county-by-county levels of mercury emissions recorded by the government and compared them to the rates of autism and special education services in 1,200 Texas school districts. One of the researchers involved in the study says the study shows that there may be “a very important connection between environmental exposure to mercury and the development of autism.” The U.S. Centers for Disease Control has said it does not know how many cases of autism there are in the country or whether the number has increased, but that the issue is under study.

Some experts estimate there are 1.5 million people in the United States with autism, most of them children, and say the number of cases has risen rapidly in recent years. Autism has increased dramatically over the last decade or so. Thus far, the reasons for that increase have really stumped the medical community. It is now believed that the rising exposures in pollutants like mercury may be at the root of some of these cases. Dr. Raymond Palmer, an autism expert, states: “This research has implications for toxic substance regulation and prevention policies. Policies regarding toxic release of mercury and the incidence of developmental disorders should be investigated.” If in fact mercury and other pollutants are causes of autism, our elected officials and the regulatory agencies in government must do all within their power to curb the polluters.

Source: Reuters News

XVIII. ENVIRONMENTAL CONCERNS

THE CHEMICAL INDUSTRY PLAYS HARD BALL

Around the first of the year, twenty of the largest chemical companies in the United States launched a very quiet, but effective campaign to attack the credibility of two historians who have studied the industry’s efforts to conceal links between their products and cancer. For the first time that anyone can remember, lawyers for Dow, Monsanto, Goodrich, Goodyear, Union Carbide, and several others subpoenaed and deposed five academics who recommended that the University of California Press publish a book titled *Deceit and Denial: The Deadly Politics of Industrial Pollution*. Also, in what seems to be a growing trend among some in Corporate America today, their “own” historian contends that the authors of this book have engaged in unethical conduct. The authors, Gerald Markowitz and David Rosner, are Professor of History at the CUNY Grad Center and Professor of History and Public Health at Columbia University, and Director of the Center for the History and Ethics of Public Health at Columbia’s School of Public Health, respectively.

It does not take very long to figure out why these companies are taking this punitive action. They face potential liability on a very large scale if cancer is linked to their products. One of the best ways to stop both publishers and authors is to charge them with **ethical** violations and then subpoena their publishers and manuscript readers. This is of the utmost concern for the public at large, because the center of this dispute is access to information about cancer-causing chemicals in consumer products.

The scheme contrived by these companies is fairly simple. Dr. Markowitz is a key expert witness for the plaintiffs in a case that claims chemical companies

are liable for liver cancer through exposure to vinyl chloride monomer on the job. These corporate defendants are trying every method possible to discredit these witnesses. In court filings, they have told federal judges that the research done by Markowitz and Rosner is “not valid,” and that the publisher’s review process was “subverted.” They have even stated that Rosner and Markowitz have “frequently and flagrantly violated” the American Historical Association’s Code of Ethics. Obviously, these are extremely serious charges.

Who would have the motivation to discredit these men? It doesn’t take a “Philadelphia lawyer” to figure that out. The rebuttal to the opinions Rosner and Markowitz are stating is coming directly from chemical companies. Phillip Scranton of Rutgers University wrote a 41-page critique of the book, *Deceit and Denial*, and of the ethics of the historians who wrote it. Scranton teaches business history at Rutgers-Camden where he is University Board of Governors Professor of the History of Industry and Technology. He also works at the Hagley Museum, a museum of early-American business history at the ancestral home of none other than the Dupont family. Scranton also finds time to testify for the asbestos companies in their liability litigation. It is interesting to note that, although Scranton is serving in the vinyl chloride cases as an expert witness for chemical companies, he is not an expert on cancer-causing chemicals. In the case, he doesn’t claim to be an expert on the post-war chemical industry; instead, he offers himself as an expert on Markowitz’ ethics. Markowitz, in contrast, is a legitimate expert on the central issue in the case: the question of what the chemical companies knew, and when they knew it.

Fifteen or sixteen lawyers deposed Markowitz for five and a half days. Obviously, Markowitz and Rosner are part of a larger trend in which historians are appearing in court more often as expert witnesses. One reason is the growing number of cases in which companies are being accused of wrong-

doing based on evidence that workers and consumers are suffering illness and disability because they were exposed to asbestos, lead, silica, or other chemicals. In every case, the exposure began decades ago, and thus in every case, a central legal question is a historical one: When did the companies first learn of the health dangers posed by their products? At what point in the past can they be held responsible? Because the governmental regulatory agencies have largely failed to act, more and more lawsuits have had to be filed to protect the health of workers and the public. Clearly, the Occupational Safety and Health Administration, as well as the Environmental Protection Agency have, over the years, increasingly become much more industry-dominated. As trial lawyers, it is our job to continue to bring cases such as the one mentioned in this article to a jury so that the truth can be exposed. Apparently, big chemical companies will continue to do anything and everything to keep all of the historical facts from being brought to light. It should make one wonder what they have to hide.

Source: *The Nation*

EPA CONSIDERING AIR POLLUTION CUTS FOR COAL-FIRED POWER PLANTS

Coal-fired power plants in Alabama and 12 other eastern and southern states may be forced to reduce unhealthy air pollution at their plants because of a proposed settlement between the EPA and the state of North Carolina. In a filing by North Carolina's Attorney General Roy Cooper in March of last year, the state asked the EPA to find that pollution coming from coal-fired power plants outside of North Carolina was preventing the state from meeting federal health-based standards for smog and soot in metropolitan areas. The state of North Carolina also contends that pollution from these out-of-state plants is harming people's health, damaging farmers' crops, and detracting from mountain resort views.

The proposed settlement with EPA

was filed last month in U. S. District Court in Raleigh, North Carolina. If the Court approves the proposed timetable under the settlement, the EPA would have to make specific decisions on an overall plan to reduce air pollution emissions from these coal-burning power plants within a three-year period. A federal appeals court has twice upheld the EPA's authority to clean up pollution from power plants under the "good neighbor" provisions of the Clean Air Act. But, EPA spokeswoman Cynthia Bergman has said that, "It's an absolute certainty" that the case will drag on for years because some power plants will inevitably challenge the EPA's decision. Still, Michael Shore, a senior policy expert for the Environmental Defense Fund in Asheville, North Carolina, said that the settlement would put pressure on the EPA to fulfill its promise to achieve many of the suit's goals. He says that the "EPA would have to repudiate all of its...analysis to find anything but that the sources in upwind states are contributing to air pollution in North Carolina." I predict that if the court approves this settlement, North Carolina can expect several coal-fired power plant operators in Alabama to strenuously object to any EPA plan involving air pollution reductions.

THE IMPACT OF AIR-POLLUTION DESIGNATIONS ON BUSINESS GROWTH

Approximately 509 counties nationwide have been cited over the last year as "non-attainment zones" by the Environmental Protection Agency. The federal Clean Air Act requires states to develop a plan for reducing air pollution in those areas. A growing number of businesses are refusing to expand or open new plants in areas cited by the federal government as having too much smog-causing ozone or very fine particles in the air. Businesses that do go forward with plans to expand or open new plants in non-attainment zones usually face a number of permitting challenges and additional costs to

operate in those places that have not achieved acceptable pollution levels.

In Alabama, automotive companies such as Mercedes in Vance, Honda in Lincoln, and Hyundai in Montgomery opted to put their plants in those locations because the cities had already complied with air-pollution standards. Other cities in Alabama, such as Birmingham, have a very difficult time attracting new industry because of Jefferson County's designation as a non-attainment zone. The conflict between jobs and clean air has gained attention as lawmakers consider President Bush's air pollution plan, which has failed to pass Congress for three years. The Senate Environment and Public Works Committee is currently trying to advance the White House plan, despite opposition by senators from both parties.

Under President Bush's plan, manufacturers would reduce emissions of sulfur dioxide, nitrogen oxide and mercury by 70% by the year 2018. The Bush proposal claims that it would bring non-attainment regions into compliance through a trading plan in which companies with emissions under the federal limit could sell credits to companies over the limit. A number of critics have noted, however, that actual emission levels are not lowered by this exchange at all. Democrats and environmental groups argue that Congress instead should pass a stronger bill that also would regulate carbon dioxide, the chief "greenhouse" gas blamed for global warming, and require faster emission reductions. In my opinion, the Bush plan does not even come close to addressing the serious air-pollution problems we face in this country. If we move aggressively to clean up the air, not only will people in these non-attainment cities, like Birmingham, have clean air, but also businesses will be in a better position to locate there and provide new jobs to the community. It makes sense to get serious about air pollution and start attacking the problem. We can't afford to let the polluters call the shots any longer.

SETTLEMENT OF DUPONT CLASS ACTION APPROVED

A West Virginia state trial judge has approved the settlement of the class action lawsuit involving DuPont Co.'s Teflon. It was alleged a chemical used in making the nonstick substance Teflon contaminated water supplies near DuPont's Washington Works plant in West Virginia. The settlement—in which DuPont agreed to pay at least \$107.6 million—was approved by the judge. He called the company's proposal an "unprecedented action by a huge corporate defendant." The court noted that the settlement was finalized without any evidence that perfluorooctanoic acid, also known as PFOA or C8, caused any disease. The lawsuit was filed in August 2001 on behalf of residents living near the plant, located on the Ohio River about 7 miles southwest of Parkersburg, West Virginia, who said their drinking supply was contaminated by PFOA.

DuPont gave the usual corporate spin to the settlement. The company denied any wrongdoing and said it decided to enter into the agreement because of the time and expense of litigation. That is usually the reason given for a settlement by a corporate defendant, although DuPont clearly was not facing \$108 million or more in "expense of litigation" alone. Under the agreement, blood tests will be conducted on tens of thousands of current customers of six area water districts, former customers of those suppliers, and residents with private wells. The agreement also calls for DuPont, based in Wilmington, Delaware, to provide the six drinking water utilities with new treatment equipment to reduce PFOA in water supplies at an estimated cost of \$10 million. The company will also fund a \$5 million **independent** study to determine whether PFOA makes people sick. If PFOA is found to probably be linked to adverse health effects, ultimately DuPont could be forced to spend another \$235 million on a program to monitor the health of resi-

dents who were exposed to the chemical, according to the agreement. Participation in the lawsuit does not rule out future personal injury litigation against DuPont. I suspect the make-up of the scientific panel, whose members were selected by agreement of both sides, will determine whether it finds C8 harmful. There are certainly strong indications that the chemical is harmful and I would have to believe that DuPont knows it.

Source: *Associated Press*

EPA ISSUES RULES CUTTING MERCURY POLLUTION

Last month the Environmental Protection Agency (EPA) ordered a nearly 50% cut in mercury pollution from power plants over the next 15 years, adopting a market-based strategy that would raise electricity prices, but help protect fetuses and young children from nerve damage. Jeffrey Holmstead, the EPA's top air pollution official, told the *Associated Press*: "The United States is the first nation to take a leadership role in addressing the problem of mercury from power plants." The EPA estimates the current 48 tons a year of mercury pollution from the nation's 600 coal-burning power plants will decrease to 31.3 tons in 2010, 27.9 tons in 2015 and 24.3 tons in 2020. Not everybody is happy with the EPA's regulations. The new rules faced immediate political and legal opposition from senators, environmentalists and public health advocates. Opponents said EPA's approach, favored by the utility industry, fails to do all the Clean Air Act requires by not making deeper cuts nationwide in harmful mercury emitted by coal-burning power plants. While the new rules are an improvement in the current situation, it appears that they still are not enough. I hope there will be enough pressures on the White House to bring about some needed changes in the rules.

Source: *Associated Press*

A REPORT ON MERCURY PROBLEMS IN SOUTH ALABAMA

A new round of laboratory testing sponsored by the *Mobile Register* provides new evidence that contaminated materials found scattered throughout the community of Macintosh, which is located in Washington County, are likely to contain droplets of pure "elemental mercury," a potent form of the heavy metal in terms of danger to humans and the environment.

The *Register*-sponsored testing revealed high levels of total mercury in materials spread on several roads and scattered near schools, parks, and woods and around houses in the Macintosh community. It appears that the concentrations of mercury were extremely high and hazardous. According to scientists, the presence of elemental mercury multiplies the number of ways that mercury can enter the environment and become a danger to humans. Ben Raines and Bill Finch, who are staff reporters at the *Register*, did an excellent job and I would recommend that you read the entire article, which appeared in the *Register* on March 16th. You can go to the paper's website: www.al.com/mobile to get the article in its entirety.

Source: *Mobile Register*

DIESEL EXHAUST POSES A HEALTH HAZARD

It has been reported that more than 20,000 Americans die each year from breathing toxic diesel fumes. These deaths occur even though there are federal standards for new diesel engines. A report released recently found that many of the deaths could easily have been prevented by applying available technology that can cut diesel soot emissions by 90% or more from existing engines. The report, *Diesel And Health in America: The Lingering Threat*, was released by the Clean Air Task Force and the Alliance of Regional State and Local Environmental and Public Health Groups from around the country. The report esti-

mates that thousands of diesel-related deaths could be avoided each year if federal and state authorities would take aggressive action to clean up existing sources of diesel soot, including buses, trucks, ships, and construction and farm equipment. Diesel exhaust also poses a cancer risk that, on a national basis, is 350 times higher than the EPA's acceptable risk level.

The report notes that EPA's recently-issued emission standards for new diesel engines will take more than a quarter century to become fully effective. Those standards don't apply to any of the 13 million diesel engines in use today. Conrad Schneider, who serves as Clean Air Task Force's advocacy director and who was a co-author of the report, stated:

Diesel exhaust may be the single most severe air pollution threat to people's health in heavily-populated urban areas across the country. Scores of medical studies show that microscopic particles and toxins in diesel exhaust are associated with cardiovascular death and lung cancer, and they trigger asthma attacks—especially in children, the elderly and people who live and work near buses, trucks and other diesel vehicles.

XIX. TOBACCO LITIGATION UPDATE

SECONDHAND SMOKE MAY CAUSE BREAST CANCER

Scientists at an influential California agency have concluded that second-hand smoke causes breast cancer. This is a finding that could have broad impact on cancer research and hopefully will lead to even tougher anti-smoking regulations. Although recent studies have linked smoking to breast cancer, no major public health group,

including the American Cancer Society, the Centers for Disease Control and Prevention, and the National Cancer Institute, has declared it a cause of the disease that kills 40,000 women each year in the USA. The finding by scientists for the Air Resources Board—whose early efforts to regulate auto emissions were a model for the rest of the country—could fuel workplace smoking bans in more states. And it is likely to refocus the scientific debate over the link between smoking and breast cancer. Terry Pechacek, associate director for science in the CDC's office on smoking and health, told the *USA Today*: "I have to say without reservation it will stimulate continued and accelerated scientific evaluation of the smoking and breast cancer issue."

A scientific review panel approved the report and forwarded it to the Air Resources Board. This board has broad state authority to regulate air pollution. The report analyzes new data on the extent of Californians' exposure to second-hand smoke and more than 1,000 studies of health effects from second-hand smoke. The conclusion that second-hand smoke causes breast cancer, particularly in younger women, challenges conventional scientific thinking because most studies, until recently, had found no connection between female smokers and breast cancer. But California scientists based their conclusion on recent human studies that they determined had more careful assessments of long-term exposure to tobacco smoke. The report also gave more weight to toxicology evidence from animal studies than previous studies by the surgeon general and others. It's well-documented that chemicals from cigarettes cause breast cancer in lab animals.

The report says that women exposed to second-hand smoke have up to a 90% greater risk of breast cancer. According to the report, second-hand smoke kills as many as 73,400 a year in the USA. The report did not estimate the number of additional new breast cancer cases annually. Scientists didn't calculate risk levels based on doses of second-hand

smoke. Tobacco companies don't appear to think much of the report. They say it gives little weight to studies that found no breast cancer connection. A new surgeon general's report on second-hand smoke is expected this year. If it is proved conclusively that passive smoke causes breast cancer, it will have strong implications for tobacco control and breast cancer control.

Source: *USA Today*

U.S. SUPREME COURT TURNS AWAY PHILIP MORRIS

The U.S. Supreme Court has rejected an appeal by Philip Morris that was welcomed news. This means that the tobacco giant will have to pay more than \$16 million to a California woman who contracted lung cancer. It would be the largest payment ever paid to an individual smoker. It is also the first punitive damages award to actually be paid. The tobacco company had been fighting for six years to overturn the damages award to the plaintiff, who was diagnosed with lung cancer in 1998, after more than 30 years as a Marlboro smoker. In February 1999, a jury found that the company had lied about the risks and addictiveness of smoking and was responsible for the plaintiff's cancer. The jurors awarded \$51.5 million, but the award was later reduced after a series of hearings and appeals to \$10.5 million. The 58-year-old plaintiff says she will give most of the money to a foundation to teach children about the ills of smoking and treat kids with respiratory ailments and cancer.

XX. THE CONSUMER CORNER

FORD'S LENDING PRACTICES CHALLENGED IN A LAWSUIT

In a recent issue, we wrote on the class action lawsuit filed against Ford Motor Credit, the division of Ford

Motor Company that makes car loans. The complaint in that case contended that the company's lending practices allow dealers to discriminate against minorities. Through a practice known as **markups**, auto dealers charge an interest rate higher than a lending institution would offer and either pocket the difference or split it with the lender. A federal judge has now found that Ford Motor Credit has been discriminating against its minority customers. At the conclusion of a two-week bench trial in Nashville, Tennessee, U.S. District Judge Aleta Trauger told all of the lawyers that she intended to rule in favor of the African-American plaintiffs. The judge then ordered the parties to start negotiating a settlement that will resolve the plaintiffs' claims. A 30-day window for settlement negotiations was given to the parties by the judge.

Sources: *New York Times* and *The Tennessean*

BANK OF AMERICA IS MISSING TAPES WITH CARD DATA

There have been a series of incidents recently relating to identity fraud that should cause all consumers a great deal of concern. For a start, Bank of America Corp. has admitted that it lost computer backup tapes containing personal information, such as names and Social Security numbers, on about 1.2 million federal government charge cards, back in December. Apparently, Bank of America doesn't plan to close the affected accounts or issue new cards unless asked to do so by customers. The missing tapes hold information on Visa charge cards issued to employees at federal agencies. Bank of America has refused to disclose the agencies with charge card data on the tapes. But, the Defense Department told the *Wall Street Journal* that 900,000 of its workers may be affected. Bank of America and four other U.S. banks provide charge cards to federal agencies through contracts with the General Services Administration, which is the government's centralized procurement

arm. The program's current contract period ends in November. Interestingly, personal information on more than half of the 100 U.S. Senators also is on the tapes, according to the *Journal*.

This incident also could add fuel to the growing regulatory and political scrutiny of data clearinghouses and other companies with mountains of personal information on nearly every American. This is a most serious matter and I hope Bank of America has taken the steps necessary to protect all of the persons whose personal information was compromised—if that is possible. It is difficult—with all of the available technology—to understand how this breakdown occurred in the first place. I fear we haven't heard the last from this episode. The unfortunate thing, however, is the fact that this isn't the only company having problems.

Source: *Wall Street Journal*

CHOICEPOINT ALSO HAVING PROBLEMS

In another major debacle, Georgia-based ChoicePoint Inc., one of the largest sellers of private consumer data, has acknowledged that criminals used fake documentation to open fraudulent accounts, compromising 145,000 records in the company's databases. Unfortunately, this wasn't the first problem of this sort that ChoicePoint has had. In 2002, two Nigerian-born scam artists were arrested in Los Angeles in 2002 on charges of using ChoicePoint Inc. to tap into its vast database of personal information. In the 2002 incident, the two individuals gained access to at least 7,000 people and used their identities to buy at least \$1 million in merchandise, the *Los Angeles Times* reported. This scam went pretty well under the radar screen at that time. Now we are learning of other similar problems with ChoicePoint and other companies.

ChoicePoint has 19 billion public records that include motor vehicle registrations, license and deed transfers, military records, addresses, and Social

Security numbers. The company has acknowledged that thieves used previously stolen identities to create what appeared to be legitimate businesses seeking personal records. The scam artists, who operated undetected for more than a year, then opened up 50 accounts and received vast amounts of data on consumers, including their credit reports. The latest case became public as a result of a California law that requires credit agencies to notify victims of identity theft. ChoicePoint said the latest breach affected nearly 145,000 people nationwide, including more than 34,000 in California.

Consumer advocates are calling for federal oversight of the loosely-regulated data-brokering business. The Federal Trade Commission estimates that identity theft cost U.S. businesses \$50 billion in 2002 and consumers \$5 billion. The SEC and the FTC have launched investigations of ChoicePoint in the wake of the scandal. I hope our elected leaders in Washington fully understand the serious nature of identity theft and how easy it appears for criminals to steal personal information. The U.S. Senate Judiciary Committee plans to hold hearings on the ChoicePoint security breach. Senator Patrick Leahy (D-VT) told the *Wall Street Journal* that the missing Bank of America computer tapes suggest "the need for greater care and accountability on the part of the businesses that have access to Americans' personal information." If the same effort had been put forth in dealing with identity theft that we have seen from the President and Congress on tort reform, our private and personal information would be much safer and more secure.

Sources: *The Los Angeles Times*, *Wall Street Journal*, *Houston Chronicle*, and *Associated Press*

XXI. RECALLS UPDATE

DODGE DURANGO AND DODGE DAKOTA RECALL

DaimlerChrysler has been required to recall nearly 600,000 vehicles related to a potential safety defect. The automaker has recalled Dodge Dakota Sport Utility Vehicles and Dodge Dakota Pickup Trucks for model years 2000-2003. After a sixteen-month investigation into potential safety defects related to the front suspension upper ball joint assembly of the DaimlerChrysler vehicles, the National Highway Traffic Safety Administration (NHTSA) recommended a recall. NHTSA's study revealed that water buildup in the upper ball joint assembly, of these vehicles could wear down the upper ball joint assembly and if failure occurs, the front suspension could collapse and the wheels could fall off. NHTSA investigators have received nearly 800 complaints related to the upper ball joint assemblies on the Dodge Durango vehicles. In contrast, NHTSA has only received approximately 12 complaints for the Ford Explorer and approximately 11 for the Chevy Blazer.

According to NHTSA, if water or moisture leaks into the upper ball joint assembly, evacuation of the lubricant can occur and corrosion of the joint can cause excessive wear, which can result in failure of the ball joint assembly. A failure of the upper ball joint could result in separation of the tire from the suspension. There have been numerous reports of wheels falling off during operation due to faulty ball joint assemblies. Some persons have reported that a clunking sound was heard in the front suspension, indicating that the upper ball joint assembly was suffering from this safety problem. But, other persons have reported no warning signs before a front wheel fell off their vehicle. According to NHTSA, the safety improvement campaign related to the upper ball joint assembly of the Dodge Durango model years

2000-2003 began on December 21, 2004. Owners who believe they have an affected vehicle can contact DaimlerChrysler at 1-800-853-1403.

MITSUBISHI RECALL

Mitsubishi Motors Corp. is recalling 65,436 Endeavor sport utility vehicles because the parking brake may not work correctly. The recall affects Endeavors from the 2004 and 2005 model years. NHTSA reports that a nut in the braking system may not be tightened properly. As a result, the vehicle could roll if it is parked on a slope and the transmission isn't in "park." Mitsubishi will notify owners starting this month. Dealers will inspect vehicles and tighten the nut if necessary.

CHRYSLER PACIFICA RECALLED

DaimlerChrysler AG is recalling 43,180 Chrysler Pacifica SUVs equipped with halogen headlights because the headlights may stop working. The recall, announced by NHTSA, affects Pacificas from the 2005 model year. Dealers will inspect the headlights and replace them for free.

GM RECALLS

General Motors has recalled 25,766 Chevrolet Uplanders, Saturn Relays, and Pontiac Montanas. These recalls came after manufacturer side-impact testing of an earlier version of the Uplander showed the release handle of the second-row bucket seat may become unlatched, increasing the potential for injury. The company has placed a cap where the handle was located in an effort to fix the problem. Owners should be notified of the recall during this month.

YAMAHA RECALLS 190,000 MOTORCYCLES

Yamaha Motor Corp. is recalling around 190,000 motorcycles because

the passenger seat can fall off the rear fender, federal safety regulators and the company said Friday. The recall affects XV250, XVS11, and XVS65 motorcycles from the 1988-2005 model years. The mounting hardware that connects the seat to the fender can loosen when passengers shift their weight, which eventually can cause the seat to fall off. The company says it knows of two minor injuries caused by the defect. Yamaha decided to recall the vehicles after reviewing quality control reports on the motorcycles in Japan. Yamaha will notify owners about the recall this spring. Dealers will replace the seat's mounting hardware for free.

CHARMS RECALLED TO GET LEAD OUT

A New Jersey company has recalled about 2.8 million metal charms sold at Michael's stores and other arts and crafts retailers because they contain high levels of lead. The recall was prompted by reports that a 6-year-old girl from San Jose, California, apparently suffered lead poisoning in December after placing in her mouth a charm she wore as a necklace, according to the Consumer Product Safety Commission (CPSC). In February the agency set acceptable lead levels for the millions of pieces of children's metal jewelry sold at dollar stores and in vending machines. The recalled charms—sold as decorations for greeting cards and gift bags, but also used to make necklaces and bracelets—do not necessarily fall under the new policy. According to CPSC, the lead poisoning incident was enough to prompt the company, Hirschberg Schutz & Co. Inc. of Warren, New Jersey, to recall the product. Studies have found that even small amounts of lead ingested by children can cause neurological damage or behavior and learning problems.

Opponents of CPSC's lead policy on toy jewelry argue it falls short, in part because it does not require the industry to test for lead. "Until they have an enforceable policy out there, we're

concerned that kids are going to continue to be exposed to lead in jewelry, and these chaotic recalls are going to continue,” said Charles Margulis, a spokesman for the Center for Environmental Health in Oakland, California. The Center has sued more than a dozen retailers for allegedly failing to warn customers of lead in jewelry. Legislation that would ban lead in all products for young children has been introduced in Congress. The mostly silver-color charms, made in China, were sold in packages of two to 12 pieces for \$3 to \$4 at Michael’s stores from July 2002 to February 2005; at ReCollections from October 2004 to February 2005; and at Hancock Fabrics from January 2004 to January 2005. Consumers are urged to take the charms from children and contact the company at 800-873-5506 or e-mail charmsrecall@horizongroupusa.com to receive a refund.

PACIFIERS RECALLED OVER CHOKING CONCERNS

The Consumer Product Safety Commission has recalled 34,000 Soother Baby Pacifiers because of worries about their safety. The pacifiers failed safety tests and they could come apart, creating a choking hazard for infants. The pacifiers are blue, green, yellow, and pink. The name Soother Baby Pacifiers is printed on the back of the bubble packaging. For more information about this recall, go to <http://www.cpsc.gov/cpscpub/prerel/prhtml05/05125.html>.

XXII. SPECIAL PROJECTS

PARENTS TELEVISION COUNCIL

I sincerely believe that programming on commercial television has reached a new low. We are witnessing a philosophy based on “anything goes” and “how

bad and gross can we make it” taking over in this powerful industry. Both the actual programming and the commercials that accompany them are very bad most all of the time these days. When you consider that most folks spend more time watching TV than they do working in a given week, it becomes absolutely imperative that we clean up the television industry. Children in many homes spend countless hours watching TV on a daily basis. Much of that time—I fear—involves watching MTV. This channel is a prime example of what is wrong with the commercial television industry. I encourage all of our readers—and especially parents—to get a copy of “MTV Smut Peddlers: Targeting Kids with Sex, Drugs and Alcohol,” which can be obtained from the Parents Television Council. This is one of a series of special reports that I believe all parents should read. The Council is doing a good job of trying to clean up the television industry. You can go to their website: www.parentstv.org to get more information on this group’s activities.

I don’t shock easily, but I admit that MTV is much worse than I ever imagined and I am totally shocked over what I have learned. I didn’t know anything about MTV and suspect many adults are in the same boat. But I guarantee you that most children who have access to cable TV know a great deal about MTV. How bad is the content of MTV? The Parents Television Council examined 117 hours of programming from one week last year. Here are just a few highlights of what they found:

- **Sex:** They noted a staggering 1,548 sexual scenes containing 3,056 depictions of sex or various forms of nudity and 2,881 verbal sexual references.
- **Profanity:** There were 1,518 uses of unedited foul language and an additional 3,127 “bleeped” profanities on MTV—nearly three times as much profane content as adult-targeted programs on network television during prime time.

- **Violence:** There were 1,068 violent incidents during this time, with many of the incidents being extreme acts of violence.

MTV is bundled with basic cable packaging in most instances. Families are forced to subscribe to MTV in order to watch what little wholesome entertainment programming may be found on commercial cable channels. Families find themselves being victimized by the smut peddlers who distribute the harmful content that we find on MTV. If you agree that MTV is bad for children—and they are targeting the 12 to 16 age group—you should join groups such as the Parents Television Council. The only way to combat the “smut peddlers”—including MTV—is to hit them where it hurts—and that’s in the pocket book. In that regard, a successful boycott, in my opinion, would work wonders!

ALABAMA PUBLIC TELEVISION

Most folks in the United States are finding it extremely difficult to find anything good or worthwhile to watch on any of the commercial, cable, or satellite television channels. In fact, there are very few what I would consider family shows on commercial television these days. Fortunately, there is an alternative for TV viewing and one that is “family-friendly.” That alternative for folks in my state is Alabama Public Television (APT). In my opinion, APT is extremely important to people in our state. It is one of the nation’s most respected public television networks and we are blessed to have them on the air. The programming by APT is outstanding and it offers programming that the entire family can watch and enjoy. Each evening when the commercial and cable channels fill your TV screen with lots of junk, trash and pure filth, you can always turn to APT for the finest in theatre, journalism, science, and children’s programming. Two of my favorite programs are For the Record and Antiques Roadshow,

and I try not to miss them each week.

I sincerely believe that we should all support APT and keep its programs readily available for our families. As you might expect, APT is in need of financial assistance. In my opinion, a financial contribution to APT would be one of the best investments—insofar as promoting real family values is concerned—that you could make. You can get more information concerning APT by going to www.aptv.org. If you would like to make a financial donation, send it to APT, 2112 11th Avenue South, Suite 400, Birmingham, AL 35205-2884. For our out-of-state readers, I suggest that they support the public television stations in their state.

XXIII. FIRM ACTIVITIES

AUBURN UNIVERSITY'S EXECUTIVE IN RESIDENCE PROGRAM

On March 8th, I had the high honor of being selected to participate in the Executive in Residence Program at the Auburn University College of Business. We started the morning in Auburn with an early roundtable discussion with the Executive Committee from the College. I went from there to talk to an advanced accounting class. An interview for the Shareholder Magazine followed. At noon, I had lunch with Dr. Ed Richardson, Dean Paul Bobrowski, Reverend Chette Williams, and several other distinguished persons. After lunch I talked to a very large business law class, and that was followed by a student roundtable discussion. I ended the day in a late afternoon meeting with my friend Jay Jacobs, who is now Director of Athletics at Auburn University, and who I believe will do a great job in that position.

I must say that I really enjoyed my day back on the campus at Auburn. I was most impressed with my meetings with the faculty members and students. I don't know whether I contributed

very much to the learning experience of the students in the College of Business, but I certainly enjoyed myself. In fact, I learned a great deal from them. It was a most interesting experience. Perhaps the thing that impressed me the most was the knowledge and understanding of the students concerning current events. I left Auburn with the sincere belief that my alma mater is now in good hands. I am firmly convinced that Dr. Richardson now has Auburn University on the right track. I was also very much impressed with Dr. Paul Bobrowski, the new Dean of the College of Business, and with all of the faculty members I encountered.

THE RACING SEASON BEGINS

Our firm has been the primary sponsor of a racecar for the past few years and it has been quite an experience. Grant Enfinger, a native of Baldwin County, will be racing the BeasleyAllen.com Super Late Model stock car during 2005. Grant will race primarily in Montgomery, Pensacola, and Mobile. The racecar's paint and logo scheme was designed by Jayme Yaroch and his staff in our firm's Information Technology office. Lots of attention has been directed to NASCAR fans lately by political advisers who are trying to help their clients. I suspect most of these fans have been voting Republican in presidential elections over the past several years. In getting involved, we want to let the fans of the nation's most watched sport know that we support them.

The pro-Big Business, anti-consumer organizations realized years ago that this segment of the population was fertile ground for their campaigns of misinformation. As a result, those groups have been most successful in targeting the racing fans with their misleading propaganda barrage. We are determined to get the truth out to all consumers and voters and decided to actually get involved on the ground floor. We have found that our racecar

has received a tremendous response and has given us an opportunity to tell our side of the "tort reform" story. It also gives us the chance to promote something that is lots of fun and enjoyed by a tremendous number of people. Greg Allen and Bobby Mazingo, who are our "racing experts," have been our technical advisors on this project. Grant's father, Floyd Enfinger, in an old friend who keeps us all on our toes. He is our direct contact with Tom Methvin, our Managing Shareholder.

The racecar features the firm's websites—www.BeasleyAllen.com, www.vioxx-legal.com, and www.CrashSafety.com. Photo cards given out by Grant at the racetrack and in personal appearances provide information on the websites. As I have mentioned in previous issues of the Report, the CrashSafety.com website provides much needed consumer information, including vehicle safety ratings and recall notices. The vioxx-legal.com site contains the latest information on our firm's continuing fight on behalf of Vioxx victims.

As part of the sponsorship agreement, Grant and his race team are committed to making appearances with the car at civic, church or social gatherings, and fundraisers. If your firm, church, or organization are interested in scheduling Grant and the racecar, contact Bobby Mazingo at the firm. If you want photo cards of the racecar, e-mail Grant at grantenfinger@yahoo.com and he will be happy to sign and mail them. I predict that Grant and his team will move up the ladder rapidly and will one of these days—I hope soon—be racing in places like Daytona and Talladega. You can keep up with the progress of the firm's race team by going to the firm's website, www.BeasleyAllenRacing.com.

XIV. SOME PARTING WORDS

Easter Sunday, a very special day for all of us, came early this year. Our church—as did many others—had a number of special programs relating to the life, death, and resurrection of Jesus Christ during the weeks leading up to Easter. Having seen The Passion, I believe that Easter had more spiritual meaning for most Christians this year. It is a sobering reality that God loved each of us so much that He was willing to sacrifice His only Son for us. Life in

our strife-filled world could be most difficult if we didn't have the promises of God to rely on. God's plan of salvation offers us two things that are certain. The first is **peace** on this earth and the second is **eternal** life. Consider these words and I believe it will make a difference in your life:

For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life. For God did not send His Son into the world to condemn the world, but that the world through Him might be saved. He who believes in Him is not condemned; but he who does

not believe is condemned already, because he has not believed in the name of the only begotten Son of God. And this is the condemnation, that the light has come into the world, and men loved darkness rather than light, because their deeds were evil. For everyone practicing evil hates the light and does not come to the light, lest his deeds should be exposed. But he who does the truth comes to the light, that his deeds may be clearly seen, that they have been done in God.

John 3: 16-21

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