THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

ExxonMobil Asks Court To Overturn Judgment

Exxon Mobil Corp. has filed its brief in the Alabama Supreme Court in the State of Alabama's case against the giant oil company. Two separate juries have heard the evidence and each found Exxon guilty of a massive fraud against the State of Alabama. Not only was Exxon guilty of fraud, the evidence at trial clearly revealed that the wrongful acts took place at the highest levels of the company. The appeal is an attempt to strike down the $3.5 billion punitive damage judgment as ordered by an experienced Montgomery County circuit judge. After hearing several weeks of testimony, the jury found that ExxonMobil cheated the state out of royalties from natural gas wells drilled in state-owned waters along the Alabama coast. I would encourage any person who doubts the legitimacy of the state's case to read Judge McCooey's order, which can be found by going to our website, www.beasleyallen.com. ExxonMobil's appeal argues that it had a contract dispute with the State of Alabama over how to determine the amount of royalties. They are saying that punitive damages can't be allowed "because there was no fraud."

To refresh the memory of our readers, our firm, and Cunningham, Bounds firm from Mobile jointly presented the case on behalf of the State of Alabama. Robert Cunningham, Richard Dorman and I tried the case for the State. In November 2003, a Montgomery Circuit Court jury awarded the State of Alabama $102.8 million in compensatory damages and $11.8 billion in punitive damages. The verdict was supported by the evidence and was based on Alabama law that is well-established. The well-respected trial judge, Tracy McCooey, cut the punitive damage award to $3.5 billion. The judge left the compensatory damages untouched.

In effect, Exxon wants the Supreme Court to let them off the hook by making the case one dealing only with the contractual damages. If that ploy were to work, Exxon would simply have to pay the compensatory damages plus interest and walk away very happy. In fact, that was one way Exxon's big bosses justified taking the risk when they decided to cheat the state. This was established by the evidence at trial. In internal Exxon memos it was stated by company officials that if the State of Alabama caught Exxon—which the company believed the state was incapable of doing—Exxon would pay the royalties plus interest and penalties and go on with their business. To find for Exxon would require that a court ignore both the law and evidence in the case.

The Christian Coalition And Gambling Money

It now appears that the group known as The Christian Coalition, which is little more than a well-funded political organization, has been misleading the people of Alabama on the gambling issue. They have also been able to hide the source of their funding. We now learn that an $850,000 donation from an anti-tax organization to the Alabama Christian Coalition actually came from an Indian tribe that runs a casino in Mississippi. This shocking revelation comes from Grover Norquist, the president of the organization, whom I would consider a pretty good source. Americans for Tax Reform also gave $300,000 to an organization formed to fight the lottery in Alabama during the Siegelman Administration. Alabama Christian Coalition President John Giles has now confirmed that his organization received the donation from Americans for Tax Reform in 2000. But, John claims that he said he was not aware the money came from a Mississippi Indian tribe and was connected with the gambling issue in Alabama. I doubt seriously any group would take $850,000 and not know exactly where it came from and why it was being given, but I will give John the benefit of the doubt.

In a story that appeared in the *Boston Globe*, Norquist said he sent money to the two anti-gambling groups in Alabama because the tribe wanted to block gambling competition in the state. It's very clear that the

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money came into Alabama for one purpose and that was to benefit the gambling operations run by the Indians and to kill off competition. I have always believed it is best to admit the truth in the beginning. In fact, that should always be the rule and especially for any group that uses "Christian" in its name.

You will recall that questions about whether the Alabama Christian Coalition had received Indian gambling money were raised last year after Ralph Reed, former executive director of the Christian Coalition nationally, said he had taken money from lobbyists representing four Indian tribes with casinos, including the Mississippi Band of Choctaw Indians. Reed, who is about as "slick" as they come, is back in the news because of his ties to the Indians and their money.

The influx of gambling money into Alabama makes some of the recent antics in the state Senate more clear and understandable. Efforts in the Alabama Legislature during the recently completed session to pass legislation to require nonprofit groups to disclose the source of money used to buy advertising to influence the outcome of referendums failed. The bill passed the House, but was delayed in the Senate after a group of Republican Senators staged a four-week filibuster. As a result, the House bill never came up for a vote in the Senate. When $1.15 million can be slipped into Alabama to be used solely for political purposes, it is absolutely necessary that the source of the funds be identified. The public should demand that Giles' group make a public disclosure of the source of the millions of dollars that pass through his group. In my opinion, those who killed the **disclosure** bill in the Senate have some explaining to do. I hope the Governor will include this most important bill in his call for a special session. In fact, he should go back to the original bill, which covered much more than just referendums.

Alabama Is Good For Business

The State of Alabama has been recognized once again for its outstanding efforts in the most important area of industrial development. A national business publication, *Site Selection Magazine*, rated Alabama's industrial recruitment agency as the tops in the nation for 2004. The magazine chose the Alabama Development Office for its annual Competitiveness Award. This is quite an accomplishment for our state. It tells the world that Alabama is still very good for business. ADO director Neal Wade must be given a great deal of credit for our state's industrial development efforts. It has become widely recognized that ADO is now an effective tool for economic development. Other states in the magazine's top 10 were: Michigan, Georgia, Kentucky, Indiana, Ohio, Tennessee, North Carolina, Texas, and Iowa.

The recognition by *Site Selection* magazine followed *Southern Business and Development* magazine having named Alabama as its "State of the Year" for 2003 and 2004. In another bit of good news, *Expansion Management* magazine selected the Alabama Industrial Development Training program as the top work force training program in the nation for 2004. I must take a little credit for helping to establish this program way back in the 1970s when I was involved in state government. I vividly recall traveling to South Carolina and coming back home with the plan for a workable training program to be set up in our state. In a span of a few weeks the program was started and the Legislature appropriated funds for the first time. Since that time hundreds of thousands of Alabama citizens have received training for specific jobs in industrial plants located in our state. Persons who helped get the program going in the beginning were Dr. T.L. Faulkner, Fred Denton, Tom Eden, Jimmy Clark, George Howard, and John Mosley. Since its start, the Alabama Industrial Development Training Program has been a resounding success story.

Alabama's Job Growth Looks Good

Alabama has been projected to lead the Southeast region in job growth over the next two years. The projections made by a leading and well-respected economist was not unexpected. During the Gulf South Bank Conference held last month, Louisiana State University economist Loren Scott predicted job growth in Alabama would surpass the growth of all other states in our section of the country. It is projected that employment for Alabama will grow by 2.5% through 2006. This is good news for our state and is more evidence that Alabama is very good for business.

Montgomery Chamber Recognized For Its Efforts

The Montgomery Area Chamber of Commerce has been named one of the Top 10 Economic Development Organizations in the U.S. by *Site Selection* magazine. Each year the magazine recognizes the 10 non-state economic development agencies that excelled in their efforts to attract business expansion activity relative to other groups. Representatives from *Site Selection* made the official announcement of the selection with an award presentation at the Montgomery Chamber Boardroom on May 2nd. I am currently a member of the Chamber's Board of Directors and know firsthand how hard the group works on economic development. Mayor Bobby Bright has worked hard with the Chamber and should also get a great deal of credit for the progress being made in the capitol city.

The Top 10 groups were chosen based on four objective categories: new jobs, new jobs per 10,000 residents, new investment amount, and new investment amount per 10,000 residents. Other criteria for selection

include innovative programs, leadership, and customer service. The Top 10 list was published in the May 2005 issue of *Site Selection*. As you may know, *Site Selection* is the leading publication covering the corporate real estate management and economic development sectors, and is the official publication of the Industrial Asset Management Council.

Base Closings Affect Alabama

While Alabama escaped any major military base closing under the Pentagon's strategic review, it appears that not all of the news was real good for our state. Redstone Arsenal, Fort Rucker, and Anniston Army Depot will gain jobs, but Maxwell-Gunter Air Force Base in Montgomery is slated to lose 2,300 jobs in the realignment. The other three major bases in Alabama each gained more than 1,000 jobs, with the Army air training center at Fort Rucker gaining the most with 1,888. Eleven small Guard and Reserve centers around the state will be closed under the Base Closure and Realignment proposal, but most involve only a small number of jobs. The job losses at Maxwell-Gunter will be a major blow to the economy of Montgomery and the surrounding counties.

It is difficult to understand the government's thinking concerning the part of the realignment that affects Maxwell-Gunter. In fact—based on what I have learned—the move makes no sense at all. Frankly, it is illogical to move these jobs, regardless of where they are being sent, and especially to this location. The location in Massachusetts doesn't appear to measure up, and I am told that it is not really a cost-effective move. It would make more sense to move everything to Montgomery. Maxwell-Gunter has been a shining light in the military complex, and that is well-established. Moving Alabama jobs to Massachusetts will be hard for President Bush to justify to his many supporters in our state. I hope Governor Riley and the Republican members of Congress from Alabama will be able to stop this part of the realignment. It is certainly something that is worth fighting for.

II. LEGISLATIVE HAPPENINGS

The Regular Session Leaves Much Undone

The regular session of the Alabama Legislature ended on Monday, May 16th, and it won't be one for anybody involved to write home about. The final meeting day of the session brought about some good things, but as predicted a great deal of bad took place and a lot of good didn't. The House joined the Senate in overriding Governor Bob Riley's veto of the state education budget and 6% pay raise for school workers. The budget and pay raise are now law. It didn't appear that many Republican legislators put up much of a fight to sustain the Governor's vetoes.

In any event, the last day in the Senate was one of the weirdest in recent memory. In spite of the delaying tactics, the Senate did manage to give final approval to:

- An $80 million appropriation for expansion of State Docks in Mobile.
- A bill to require that nonprescription decongestants ephedrine and pseudoephedrine be kept behind a counter and to require customers to show identification and sign before making a purchase.
- A bill that gives limited home rule to counties over issues such as stray animals and weed abatement, which isn't exactly a move toward real home rule. But, at least it's a start in that direction.

The failure of the Senate to pass the general budget—regardless of other good things that occurred—was a black mark on the entire session. Allowing that to happen was a major mistake on the part of the **leadership** of **both** political parties. While there has been lots of finger-pointing, there will be plenty of blame to go around. There were a tremendous number of bills that in my opinion should have passed, but died. Some of the bills, other than general fund budget, that didn't pass and went down the drain are:

- A bill that would have required nonprofit organizations to disclose their source of funding for buying advertising to influence the vote on a referendum.
- A bill to ban the transfer of campaign contributions from one political action committee to another.
- The bill that would have prohibited the practice of "pass-through pork," which involves hiding money in a state agency so that it can later be used for a project in a legislator's district.
- A bill to move Alabama's presidential preference primary from June to the first Saturday after the New Hampshire primary.
- An important bill that would have required every school district in the state to levy at least a $10 million property tax for education.
- The supplement appropriation bill for the Board of Corrections, which would have appropriated $20.55 million to Alabama prisons for remainder of current fiscal year to help meet payroll.
- The bill to take the racist language out of the Alabama Constitution.
- A bill to provide $250,000 in life insurance to every member of the Alabama National Guard or reservist

from the state deployed for overseas duty.

- A bill to require convicted sex offenders to register with the sheriff within seven days of moving into a community rather than the 30 days currently required.
- A bill to adequately fund the program that furnishes defense lawyers for indigent persons in criminal cases. There are currently about 1,800 lawyers who provide this essential service to the state. Failure to pass this bill was a big mistake.

The Special Session

It is most unfortunate that the Senate failed to pass the general fund budget. In my opinion, those who killed this budget did the people of Alabama a real disservice. It appears that a handful of Republican senators—aided by at least one prominent Democrat—were directly responsible for this failure. While the last day's activities are being discussed as the culprit, I believe that the killing of the budget started a long time before that infamous final day. I have difficultly understanding the motives of these senators who killed the session. Regardless of who was really to blame, there will be a special session. The cost of the special session, which could be as much as $600,000, could have been put to good use in a number of needed areas. The public can't be too happy with what happened. The Legislature should now come to Montgomery when called, pass the budget in the minimum of five days required to pass a bill, and then go home. The real problem—the lack of money to adequately fund all of the operations of state government and public education at all levels—won't be addressed during the session, and that's a crying shame. One of these days a governor and legislature will put "politics" aside and tackle the funding problem, solve it, and put our governmental and educational funding on a solid and permanent basis. In the meanwhile, we will continue to struggle along—"patching" as we go.

Alabama Silver Haired Legislature Worked Hard

There were a number of bills of general interest to Alabama seniors that were introduced during the recently completed session of the Alabama Legislature. Reports provided by the Alabama Silver-Haired Legislature kept us posted on how seniors fared during the session, and it wasn't very good. Unfortunately, there were very few bills passed that will benefit Alabama seniors and that's a real shame. Such bills as the "Seniors Living With Dignity Act" died without even being seriously considered. The Nursing Home Association was largely responsible for killing this badly needed legislation, and seniors will suffer as a result. Hopefully, the Legislature will do a better job in the future on legislation designed to benefit seniors in our state. Maybe some of the Silver-Haired group should run for the Legislature. What do you think?

III. COURT WATCH

ExxonMobil No Stranger To The Courts

Alabama's Supreme Court isn't the only appellate court to have had ExxonMobil Corp. to appear before it in the last few years. The giant oil company has had a great deal of litigation against it, and many of the cases dealt with alleged fraudulent behavior. ExxonMobil is so politically strong and influential that its bosses believe they can run roughshod over their adversaries. The following are a few examples of what has been going on.

The Dealers' Case

The Florida class action, brought by about 10,000 Exxon service station dealers against ExxonMobil has been in the court system for several years. In 2001, a jury ruled that the oil company owed about $500,000,000 to station owners. The Eleventh Circuit Court of Appeals' original decision affirmed the trial court and upheld the verdict. ExxonMobil then asked for a rehearing, which was granted. Interestingly, the entire Eleventh Circuit heard the case en banc on rehearing and denied the giant oil company's request for a reversal. Since the court of appeals ruled, Exxon has paid only the nine dealers specifically named in the lawsuit. None of the other dealers have received a dime, but that's about to change.

The trial judge has now ordered the giant oil company to start paying the rest of the dealers. In the most recent decision, the trial judge said Exxon has attempted to make a "judicial train wreck" of the claims payment process and "wants to prolong the lawsuit, filed 13 years ago." The judge pointed out that ExxonMobil makes $238 million a year from interest on the $1.3 billion as long as it keeps the money. He ruled that if ExxonMobil further appeals individual claims that have been decided, the claimants will earn funds with an interest rate equal to the company's reported earnings on the money. That will "eliminate Exxon's ability to earn money on the money it wrongly retains as a result of its bad faith scheme," the judge wrote. This is a deserved sanction in my opinion. The fact that the judge ordered the company to start paying the dealers immediately is a major victory. However, knowing first hand how ExxonMobil operates, I expect the company to delay making the legitimate payments by appealing again.

Exxon began charging dealers a 3% processing fee on gasoline sales paid by credit cards in 1982. The company promised to offset the charge by cutting the wholesale cost of the fuel. Exxon did that for six months, reduc-

ing the wholesale price by 1.7 cents a gallon. Exxon stopped the offset in March 1983, but failed to tell the dealers, who didn't learn about what Exxon was doing for eight years. As indicated above, a final judgment was entered on May 18th against ExxonMobil. I am sure that ExxonMobil will say all of the judges who have reviewed the evidence and applied the applicable law were wrong. It is most significant that this company has now added its own dealers to a long list of victims.

The Valdez Saga

I doubt there are many folks in the U.S. who don't know about the Valdez case that has been in the court system since 1989. A $5 billion punitive damages verdict has been bouncing around for almost 16 years, and the giant oil company hasn't given up yet. In fact, the company's method of operation is to wear down its victims and keep cases in court for as long as possible. The U.S. Supreme Court had rejected an earlier appeal by Exxon Mobil Corp. over the $5 billion punitive damages verdict against it for the 1989 Exxon-Valdez accident, the nation's worst oil spill. The justices let stand a U.S. appeals court ruling that the award against the oil giant in a civil lawsuit brought by Alaskan fishermen and other plaintiffs should not be set aside.

In 1989, the Exxon Valdez tanker was grounded in Prince William Sound, spilling millions of gallons of oil off Alaska's coast. The accident polluted more than 1,000 miles of shoreline, disrupted fishing, and damaged the environment. The case is a prime example of how this powerful corporation commits a wrong that hurts a great number of people and that has no feelings whatsoever for its victims.

Source: *Reuters News*

Judge Calls ExxonMobil's Conduct Reprehensible

We wrote last month about how Exxon Mobil Corp. was ordered on appeal to pay $112 million in punitive damages and $56 million in compensatory damages in connection with a 1997 pollution lawsuit in Louisiana. The appeals court judges called Exxon's actions in the Louisiana case "reprehensible" for allowing people to continue cleaning equipment on the polluted land even though it "posed a health risk." The court found that Exxon knew about equipment that was contaminated with radioactivity and "the oil company sought to wipe its hands clean and leave ITCO (Exxon's contractor) with the mess." This is a company that obviously believes it is so powerful and politically-connected it is actually above the law.

Company Ignores Louisiana Governor

ExxonMobil has announced that it will proceed with its plans to build a liquefied natural gas terminal off the coast of Louisiana regardless of the consequences to the environment and the fishing industry. If this happens, environmentalists say that Exxon will be using a system that will ruin the fishing industry in that area. The Louisiana governor opposes the LNG terminal and has notified federal regulators to that effect. As I understand it, the "open-loop" system is the one that Exxon wants to use. That system would suck in millions of gallons of water per day to warm super-cold LNG so it can be transported by pipeline. There is a "closed-loop" system that could be used by the company but it costs more. There are also serious problems from a safety perspective that must be addressed before this terminal is approved.

GOP Seeks More Curbs On Courts

I never cease to be amazed at some of the things that happen in our nation's capitol. One of the latest happenings deals with our court system. In a shocking move, it appears that House Republican leaders will use budgetary, oversight, and disciplinary authority to assert greater control over the federal courts before next year's elections. In my opinion, this legislative challenge to the courts should not be allowed. We have a system of checks and balances in place guaranteed by our Constitution that must be preserved. House Majority Leader Tom DeLay (R-TX), has complained loudly about an "arrogant, out-of-control, unaccountable judiciary." He has friends in and out of Congress who want to see the courts made a rubber stamp for right-wing extremist politics.

The Constitution specifies that Congress will set the jurisdiction and budgets of the courts. One of the more controversial developments is a plan to create an office of inspector general for the federal judiciary, like those that now serve as watchdogs of executive-branch agencies, to take complaints, prepare reports, and audit and investigate the administration of the courts. It would appear that having such an official, who would likely have an independent office within the court system but would prepare periodic reports for Congress and answer its inquiries, would violate the separation-of-powers doctrine. If we allow our courts to be controlled by Congress so that the independence of the courts is destroyed, our Republic will suffer. We simply can't allow that to happen!

Source: *The Washington Post*

Top Court Won't Hear Rezulin Appeal

Pfizer, the world's largest drug maker, has lost a U.S. Supreme Court appeal to overturn a $10 million punitive damage award to the family of an Oklahoma man who died after taking

the company's Rezulin anti-diabetes drug. The justices refused to hear Pfizer's argument that the award was excessive and violated limits on punitive awards set in a 2003 High Court ruling. Rezulin, a drug taken by about 1.9 million diabetics to help regulate insulin, was pulled from the U.S. market in 2000 after it was linked to at least 63 deaths from liver failure. An Oklahoma jury awarded $1.55 million in actual damages and $10 million in punitive damages to relatives of a 42-year-old man who died after taking the drug for five weeks.

Pfizer's appeal had been supported in court briefs by the industry group Pharmaceutical Research and Manufacturers of America, the U.S. Chamber of Commerce, and the Business Roundtable. As you know, Rezulin was made by Pfizer's Warner-Lambert unit. The man's family sued the company was sued in 2000, claiming it sold Rezulin while concealing that tests showed the drug caused liver damage. The Oklahoma Court of Civil Appeals upheld the punitive award last July, saying it wasn't "grossly excessive" and didn't punish Pfizer for conduct that was legal in other states. The jury's decision to "make the punishment commensurate with the wrongdoer's wealth" didn't amount to punishing Pfizer for out-of-state conduct. Pfizer took a $975 million charge against earnings in the fourth quarter of 2003 to cover settlements of all known personal injury claims relating to Rezulin, covering about 35,000 individuals, according to the company's 2004 annual report.

Source: *Bloomberg News*

Settlements Reached In Cadet Abuse Suits

The parents of cadets who said they were hazed and severely assaulted at Lyman Ward Military Academy have reached settlements in their individual lawsuits against the school. The settlement details are confidential. Most parents are being compensated for their sons' tuition and medical bills received after the cadets were treated for injuries sustained at the academy. Mediation was held involving eight lawsuits alleging brutal hazing and abuse against the cadets. The separate cases of abuse were allegedly carried out by senior cadets and school officials at Lyman Ward, which teaches grades 6-12, in the 2002-2003 or 2003-2004 school years. A condition of the agreement requires the parents to drop any attempts at shutting down the century-old school located in Camp Hill, which is in east Alabama.

American Military Personnel Are Rejected

At a time when we should be supporting our military, the Bush Administration has taken a rather weird stand on a most significant case. As a result, American pilots and soldiers, who were taken prisoner and tortured by the Iraqis during the Persian Gulf War of 1991, suffered a devastating loss in the U.S. Supreme Court. The High Court turned away a final appeal by the former POWs, which means their case is over. The Bush Administration opposed the lawsuit that had resulted in a $1 billion verdict in favor of the prisoners-of-war two years ago. An appeals court had thrown the verdict out. The Supreme Court's refusal to hear the case spares the Bush Administration from having to go before the justices to argue against American POWs who were tortured. The 17 former POWs had sued Iraq and the government of Saddam Hussein under the terms of a 1996 anti-terrorism law that allowed for claims by Americans who had been injured or tortured at the hands of "state sponsors of terror." Unfortunately, few people in this country were even aware of the existence of this lawsuit. During the Persian Gulf War, POWs were beaten and were badly mistreated by Iraqi captors. Several of the men nearly starved in the weeks they were held in cold, filthy cells in Iraq.

The onetime POWs won their case in federal court in 2003. To the surprise of the former U.S. prisoners, the Bush Administration then went to court seeking to nullify the award they had won. The government's lawyers argued that Iraq, now under U.S. occupation, was no longer a state sponsor of terror. Moreover, President Bush had canceled sanctions against Iraq and moved to shield its $1.7 billion in frozen assets. The President said the money was needed to "rebuild the nation." Last year, the U.S. Court of Appeals in Washington agreed with the Bush Administration and ruled that "weighty foreign policy interests" called for dismissing the POWs' lawsuit. Bush Administration lawyers then urged the Supreme Court justices to dismiss the case. Now that has happened and these men are left with no further legal recourse. I find the stance taken by the Bush White House to be most disturbing and certainly inconsistent with its public stance on war and the military generally.

Cash Advances For Clients

There are companies in business that advance money to people who have filed lawsuits and have their personal injury lawsuits pending. This lending is designed for folks with pending cases who can't pay their bills as they wait for the suits to be resolved to get some help. These companies are part of an industry that has grown rapidly across the country in the last decade. Their very high fees are legal, primarily because the money they provide is not legally a loan in most states and thus is not covered by a state's usury laws. The advances are not deemed loans because the recipients must pay them back only if they are awarded damages. About 100 of these companies are in operation across the

country. LawCash, based in Brooklyn, is one of the largest and is active nationally. That company currently has more than $25 million in advances outstanding. The monthly fees charged are usually 2% to 6% of the amount advanced, or up to 72% on an annual basis. However, some of these companies have charged much higher fees in the past and a few may still be charging rates even higher than 72% APR.

I would never recommend that a client of our firm use one of these companies. Our firm pays all expenses of litigation as a client's case progresses through the courts. But, because of Alabama State Bar rules, we are not allowed to provide any money to clients in advance in a case. While there are rare exceptions to the Bar rule, they are very limited in application. We must abide by the rules, and sometimes that makes it difficult for our clients. Oftentimes, clients will have severe financial problems because their injuries or disability keeps them from work. The death of a breadwinner in the family also causes severe financial hardships. In such situations, there should be a way to assist clients in that type situation. I hope the bar association will take a look at the present rule. But, I really don't like to see companies taking advantage of persons who have a need and no way to get relief. There must be a better way to handle the problem.

Supreme Court Says Farmers May Sue In State Courts

The U.S. Supreme Court has ruled that farmers whose crops are damaged by federally approved pesticides or herbicides will be allowed to pursue damage claims against the manufacturers in state court. The 7-to-2 decision was one of the Court's most significant rulings on the preemptive effect of federal statutes. The High Court rejected the Bush Administration's position that lawsuits claiming manufacturers negligently designed, tested, or manufactured their products are preempted by the Federal Insecticide, Fungicide and Rodenticide Act. This act is the federal law that governs the registration and labeling of these products. The case began as a threatened lawsuit in the Texas state courts by 29 Texas peanut farmers whose crops failed five years ago after they applied a new weed killer called Strongarm. The manufacturer, Dow AgroSciences, a unit of the Dow Chemical Company, filed suit in federal district court seeking a declaration that the suit was preempted by the "uniformity" clause in the statute. This suit was filed as negotiations came to a halt and was an attempt to beat the farmers to the courthouse.

A federal district court and the United States Court of Appeals for the Fifth Circuit, in a 2003 ruling, agreed that the company was correct and the suit was barred. Interestingly, the federal government had long taken the position that the federal act did not preempt damage suits in state courts. But the Bush Administration reversed that position and urged the Supreme Court to deny the farmers' appeal. The justices agreed to hear the case, and that turned out to be good news for farmers. A finding of preemption would have meant that consumers would have no opportunity to sue manufacturers. This decision is very important for farmers and consumers generally.

A result of the Court's opinion is that each statute must be interpreted in its own context, according not only to the statutory language but to the history of litigation involving the regulated product. In this instance, state court suits against pesticide manufacturers had previously been common. The farmers' claims for "defective design, defective manufacture, negligent testing and breach of express warranty" are not preempted. The Supreme Court did order the Fifth Circuit to give further consideration to whether the claims for fraud and "failure to warn" could go forward or were preempted.

Source: *New York Times*

Veteran Supreme Court Justice To Retire

In a move that came as a surprise to Alabama citizens who keep up with judicial politics, Justice Robert Bernard Harwood, Jr. announced that he wouldn't seek reelection to the Supreme Court. The veteran Tuscaloosa jurist is well respected by Alabama lawyers and has been an outstanding judge throughout his career. Having served as a circuit judge in Tuscaloosa County for several terms, Bernie Harwood brought a wealth of knowledge and experience to the Alabama Supreme Court when he was elected. He is known as a man who has consistently followed the law and has been fair and impartial in all of his rulings. The departure of Justice Harwood will be a real loss for the court. He will be missed.

IV. THE NATIONAL SCENE

War Costs Now Over $300 Billion

I really don't believe the extremely high cost of the war in Iraq has really sunk in with the American public. That has been somewhat of a surprise considering that the total war cost is now over $300 billion. Last month, the President signed into law an $82 billion measure for the Iraq and Afghanistan wars and reconstruction. There appears to be no end in sight for the spending. Most of the current money — $75.9 billion — is slated for military operations. Actually, lawmakers provided more money this time than the president had requested to protect troops in combat zones. It has become pretty clear that the total cost of the Iraq war—both in human life and money—is finally beginning to have an effect on how folks in this country view the war.

There will eventually be some tough

questions asked by the public of our nation's politicians. The first and toughest question will simply be: why was it necessary to wage war in Iraq? The next will be: what exactly have we accomplished, other than kicking out a very bad and corrupt leader, considering the vast cost in human life and taxpayers' money? Finally it is now time to ask: what does the future hold for our troops in Iraq? These will be tough questions for anybody who is currently in office in Washington, and their answers had best have real substance and not more political rhetoric. If anybody believes that the situation in Iraq is under control, they haven't talked to anybody who has actually had been there. Personally, I fully support our military, always have and always will. But, I can't justify the decision-making process that led us into this war. Nevertheless, as long as we have forces in Iraq, we must support them to the fullest extent possible. But, the time has come for some honest answers to some tough questions!

Source: *Associated Press*

Our Government Can't Account For $100 Million Spent In Iraq

If the American people really knew how badly the federal government has mismanaged assets in Iraq, I suspect they would be appalled. The reporting of a lack of proper documentation on nearly $100 million in cash is a prime example. Millions of dollars worth of equipment designed for use in Iraq is also unaccounted for. As you may recall, billions of dollars in cash became available after the U.S. invasion over two years ago. Unfortunately, there were few controls over how that money was spent and accounted for. From the $8.8 billion provided to Iraq's interim government—to millions provided to U.S. contractors, investigations have laid out a system that was ripe for abuse. The latest indication of that came when investigators released a report last month saying $96.6 million in cash could not be properly accounted for. The total included more than $7 million that was simply gone, according to the report from the Special Inspector General for Iraq Reconstruction.

It is mind boggling to even consider that **cash** would be used to pay for the rebuilding of Iraq or for any other purpose. Examples have been exposed of how millions of dollars in cash were given to "division level agents" responsible for distributing the money for reconstruction programs in a certain area. Those agents were supposed to keep detailed, signed receipts and other documentation for the money they spent, but usually did not, according to media reports. Regardless of how people feel about the need for the war, no person can justify not being accountable for funds being spent in Iraq.

Halliburton Lands $72 Million In Bonuses

The U.S. Army said has announced that it has awarded $72 million in bonuses to Halliburton Co. for logistics work in Iraq. Fortunately, for taxpayers the government hasn't decided whether to give the Texas company bonuses for disputed dining services to troops. Army Field Support Command in Rock Island, Illinois, gave Halliburton unit Kellogg Brown & Root ratings from "excellent" to "very good" for six task orders for work supporting U.S. troops in Iraq. The Army said its Award Fee Board in Iraq had met in March and had agreed to pay KBR bonuses for work it did in support of U.S. forces there. But it said dining facility costs questioned by auditors from the Defense Contract Audit Agency had not yet been considered by the military's Award Fee Board. Much of Halliburton's work for the U.S. military, ranging from building bases to delivering mail, is on a **cost-plus basis**, which means the company can earn up to 2% extra depending on its performance.

I understand that bonuses are awarded based on, among other factors, how efficient and responsible the company is to requests from the Army. It's also said to be an indicator of how the Army views KBR's performance in the field. KBR's logistics deal with the U.S. military has been in the spotlight from the outset in Iraq. Apparently, all of the allegations by auditors that the politically-connected company overcharged for work, including dining services, have gone largely unheeded. Investigators are still looking into whether the Texas-based firm charged too much to supply fuel to Iraqi civilians. As expected, the firm says those claims are not justified. Halliburton, which was run by Vice-President Dick Cheney before he joined the Bush ticket in the 2000 race for the White House, has earned more than $7 billion under its 2001 logistics contract with the U.S. military. I am sure that having a **voice** in Washington has played no part in Halliburton's successes.

Source: *Reuters News*

Corruption In Government Contracting Must Be Stopped

Seven "good government" groups are urging U.S. senators to allow states to enact so-called "pay-to-play" laws designed to stem corruption in state highway contracting. The groups are urging senators to adopt a measure sponsored by U.S. Senator Jon Corzine (D-NJ) that would explicitly give states the right to limit the amount a state contractor can contribute to political campaigns. The measure, to be added to the Safe-TEA Act (S. 732), would prevent the Federal Highway Administration (FHWA) from withholding federal funds from states that restrict government contractors from making campaign contributions to state elected officials who are ultimately responsible for approving the contracts. These con-

tributions have traditionally gone to governors and state legislators. The U.S. House of Representatives already has approved a similar amendment to its version of the highway authorization bill (H.R. 3). The measure is necessary, the groups said in recent letters to the Senate, because the FHWA pulled funding from New Jersey after it enacted a pay-to-play law in 2005. Faced with the threat of losing $1 billion in highway funds, New Jersey suspended the portion of its law that applies to highway contracts. That state is challenging the federal government's intervention in court.

The coalition of groups have sent to the Senate three separate letters supporting the pay-to-play amendment. These groups include Public Citizen, Public Campaign, Common Cause, Democracy 21, Campaign Legal Center, the Center for Civic Responsibility, and the Brennan Center for Justice at the New York University School of Law. Joan Claybrook, Public Citizen's president, urged that action be taken. She stated:

> *It is ludicrous that the federal government should try to stop states from taking steps to prevent corruption in contracting. It's well known that contractors try to influence officials by contributing large amounts of cash to campaigns. This has taken a serious toll on public confidence in state and local governments across the nation. States should be applauded for trying to stop it.*

In addition to New Jersey, Kentucky, Ohio, South Carolina, and West Virginia have enacted pay-to-play laws, as have local jurisdictions in California, Illinois, and New Jersey. Connecticut, whose former governor is on his way to prison for pay-to-play corruption, is writing a similar law. The Securities and Exchange Commission, led by former SEC chair Arthur Levitt, has also adopted a pay-to-play restriction for bond traders involved in the municipal bonds market, known as Rule G-37. This Rule has been upheld by the courts and serves as a useful model for states attempting to curtail corruption in state government contracting procedures.

"Pay-to-play restrictions are far from draconian measures," the groups wrote in the letter to senators. "They are a narrow remedy that focuses exclusively on a specific problem"—to ensure that government contracts are awarded on merit rather than favoritism. Corzine's amendment, which the groups urged senators to support, contains this language:

> *Nothing in this section prohibits a State from enacting a law or issuing an order that limits the amount that an individual that is a party to a contract with a State agency under this section may contribute to a political campaign.*

In blocking New Jersey's pay-to-play law, the FHWA claimed that it reduced the pool of competitive bidders for government contracts. The agency maintains that merely disclosing lobbying and political contributions is sufficient to deter corruption, even though several states have concluded that disclosure alone is not enough to end pay-to-play corruption. Federal intervention is unjustified and counterproductive. Congress should give states the right to ensure that their contracting procedures conform to the highest ethical standards. When that finally occurs, the winners will be the American taxpayers.

Source: Public Citizen

Government Contractor Settles Fraud Suit

One of the Pentagon's largest contractors has agreed to pay the federal government $2.5 million to settle accusations that it illegally overcharged the Air Force for environmental clean-up work in Texas. The agreement between the Justice Department and the Science Applications International Corporation, based in San Diego, was announced by the Justice Department. Contractor fraud in government contracts is so widespread, it no loner makes news for a corporation to be caught. The battle isn't being won because the companies committing the fraud continue to bid on contracts. The company in this case was accused, in a whistle-blower lawsuit joined by the government, of intentionally padding its estimated expenses during negotiations, then taking illegally high profits when it completed the work more cheaply. Experts in contract law say that such techniques are used in varying degrees by many federal contractors and that a government victory in the case will send an important signal to corporations. The fraud suit involved work that the company performed at Kelly Air Force Base in San Antonio. The contracts, awarded without competitive bidding, paid the company a negotiated price of $24 million. But the company reaped profits of 30%, the Justice Department asserted, when it was legally entitled to profits of 10%.

In a suit filed in 2002 under the False Claims Act, a former project manager for the company described a systematic pattern of exaggerating costs. In joining the case in 2004, the Justice Department said the company had violated one law that requires federal contractors to provide accurate data during pricing negotiations and to reduce fees if costs prove lower than projected, and another law requiring them to explain their estimating methods fully. In one example cited by the Justice Department, S.A.I.C., while negotiating a $2 million hazardous-waste project, described to the Air Force a pattern of expenses giving it a profit of 10%. Yet internal company documents at the time put the "actual profitability" at 23%. Company documents also showed that four months into the one-year project, the profit had risen to

29%. By the end of 2000, when the work was completed, the company found—and did not disclose to the Air Force—that its profit had jumped to 54%. The Air Force told contract officers last December to give special scrutiny to the company's cost estimates. At that time, S.A.I.C. had $513 million in contracts with the Air Force. It continues to be of concern that corporations doing business with the federal government cheat. It is even more troubling that these companies are allowed to obtain government contracts after they are caught cheating and pay a fine. Cheaters should be banned once they are identified and not allowed to continue to do business with the government.

Source: *New York Times*

Marines Recall Body Armor

We have read and heard about too many abuses in conducting the war in Iraq and with the rebuilding effort that is far from over. However, when those abuses put human life at risk, we should stop and take a real close look at what is going on. The Marine Corps issued to nearly 10,000 troops body armor that Army ballistic experts urged the Marines to reject after tests revealed life-threatening flaws in the vests. This was reported after an eight-month investigation by the *Marine Corps Times* was completed. Some disturbing matters were discovered. In all, the Marines bought about 19,000 Interceptor outer tactical vests from Point Blank Body Armor that failed government tests due to "multiple complete penetrations" of 9mm pistol rounds and other ballistic or quality-assurance tests. After being questioned about the safety flaws, the Marines ordered the recall of 5,277 Interceptor vests on May 3rd. The Corps has not said what it intends to do with more than 4,000 vests still in use. Army ballistics expert James MacKiewicz, in a memorandum rejecting two lots of vests on July 19, 2004, said his office "has little confidence in the performance" of the body armor.

MacKiewicz, who works at the Army Soldier Systems Center in Natick, Massachusetts, is responsible for verifying that the vests meets protective requirements and other quality standards. The Marine program manager for the vests, Lt. Col. Gabriel Patricio, and Point Blank's chief operating officer, Sandra Hatfield, apparently ignored the warnings. Instead, they signed waivers that allowed the Marines to buy and distribute the vests that failed to meet standards. The Marines questioned the accuracy of the initial tests. It pulled samples from some of the challenged lots and had them tested at a private lab. Col. Patricio, who recently retired from the Marines, said the second tests show that the vests meet safety standards and do not put Marines at increased risk of injury. If Marines were put at greater risk by the purchase of vests that were defective, somebody needs to explain how this could happen. Apparently, the Marine's Corps wouldn't have recalled the vests had not the media coverage occurred. That is difficult to believe.

Source: *USA Today*

Hillary Is A Target

I have never really understood why most Republicans dislike Hillary Clinton so strongly. Nevertheless, many of them do and with a passion. Now a veteran GOP operative has launched an anti-Hillary Rodham Clinton website, complete with an unflattering photo and a warning that she and her husband are trying to "pull the wool over America's eyes once again." It appears Hillary has become "the Republicans' number one target in 2006."

Hillary is seeking re-election next year to the New York Senate seat she won in 2000. *The Associated Press* was told that the "Stop Her Now" effort was trying to raise $10 million this year. "All of America has a tremendous stake in this effort, especially our courageous soldiers overseas," the website said. The man who put all of this together has long been a top adviser to Republican politicians. I haven't agreed with Hillary on all of her positions, but I do believe she is highly intelligent and politically astute. She seems to have a passion for people and has been an advocate for consumers. For those reasons, I have to admit she can't be too bad.

Source: *Associated Press*

Congress Should Get Tough With The Broadcast Industry

The Broadcast Decency Enforcement Act—if passed by Congress—will raise the maximum fine for indecent broadcasts to $500,000 per violation and will require the Federal Communications Commission to respond to indecency complaints within six months. The legislation also makes it clear that indecent broadcasts could jeopardize a broadcaster's license. Once passed, this legislation will ensure that indecency is no longer an affordable cost of doing business for the mega-conglomerate broadcasters. The bill will also provide families with a serious recourse when they encounter programming that is counter to their community standards. If you agree that we need to come down hard on radio and television industries, please contact your U.S. Senators and U.S. House members and ask them to support this legislation. We must protect our children from the filth they are exposed to on a daily basis, and the way to do it is to hit the industry with large fines. This Act would be a step in the right direction.

The Attack On Social Security

I can't figure for the life of me why President Bush is trying to destroy Social Security. The advisors who pushed the president into the Social Security fight gave him some very bad

advice. Those advisors should have checked to see what other Republican presidents have had to say about Social Security.

> *Should any political party attempt to abolish social security, unemployment insurance, and eliminate labor laws and farm programs, you would not hear of that party again in our political history. There is a tiny splinter group, of course, that believes that you can do these things. Among them are a few Texas oil millionaires, and an occasional politician or businessman from other areas. Their number is negligible and they are stupid.*
>
> *President Dwight D. Eisenhower, 1952*

There may be a few changes needed in the Social Security system, but playing **politics** with the system isn't the answer. Without a doubt, the plan for private accounts will go down in history as one of the worst proposals of all time. We must guarantee that the Social Security program remains strong and readily available for future generations. Democrats and Republicans in Congress have a duty to make this a reality. A bipartisan approach to problem solving in Washington, however, appears to be a thing of the past.

V. THE CORPORATE WORLD

Petroleum Industry Funds Challenge To Benzene Study

The American Petroleum Institute collected more than $27 million from oil companies to challenge a National Cancer Institute study that suggests occupational exposure to benzene is more dangerous than previously believed. The industry effort, according to documents found in boxes of evidence in an unrelated lawsuit, was undertaken to give the industry leverage against any consequences of the study, such as tighter regulations or lawsuits from cancer patients. Benzene, long known to be carcinogenic, is a chemical used throughout the petrochemical industry. It is a widespread contaminant in the air and groundwater and comes from industrial sources, cigarette smoke, gasoline and automobile emissions. It is generally accepted that benzene causes leukemia. But, there is a difference of opinion in the scientific community about the level of risk at low exposures as well as the other blood-related diseases that could be contracted from benzene.

The U.S. Occupational Health and Safety Administration has a permissible exposure limit for people who work with benzene of 1 part per million in an 8-hour workday. The documents obtained by the *Associated Press* were found in boxes of evidence that Marathon Oil Co. provided in a case against Dow Chemical Co. filed by a worker who now has leukemia. The deposition of Dr. Gerhard Raabe, who led the Petroleum Institute's Health and Products Stewardship Committee, has been taken. Dr. Raabe was trying to raise money from oil companies for the industry study. He shouldn't have a real big problem with this task.

The 1997 National Cancer Institute study of workers in Shanghai, China, where benzene exposure is far higher than in the United States, concluded that workers with 10 or more years of benzene exposure had a risk of developing non-Hodgkins' lymphoma more than four times that of the general population. Another NCI study of benzene on Chinese workers, released in December, concluded that "these data provide evidence that benzene causes hematologic effects (diseases of the blood) at or below 1 ppm, particularly among susceptible subpopulations." Acceptable levels of benzene exposure have been debated since the late 1940s, but for almost 20 years, 1 ppm has been considered the acceptable exposure for workers.

OSHA spokesman Albert Belsky said the agency and the National Cancer Institute agreed that the changes in white blood cell counts among Chinese workers exposed to 1 ppm or less need to be studied further before OSHA would consider changing the standard. The first NCI study prompted the American Petroleum Institute to compile a "consortium" of petrochemical companies to pay more than $27 million to "establish and fund a research program on the lymphohematopoietic health risks from occupational exposure to benzene" in Shanghai, according to the agreement signed by the industry study participants. The study began in 2001 and is expected to be completed in 2007.

The companies funding the study were BP, ChevronTexaco, ConocoPhillips, ExxonMobil, and Shell Chemical. The oil companies will do most anything to protect themselves and their profits. The API's involvement in these benzene studies raises the same concerns of the fox in the henhouse as we've seen with the tobacco and pharmaceutical industries. Studies of the sort financed by the oil companies have to be more than a little suspect.

Source: *Ft. Worth Star Telegram*

Drug Makers Reap Benefits Of Tax Break

Corporate America enjoys far too many tax breaks under our current tax code. While working men and women are struggling to make ends meet, big corporations are able to avoid paying their fair share of taxes. A new tax break for corporations is allowing the biggest American drug makers to return as much as $75 billion in profits from international havens to the United States while paying a fraction of the normal tax rate. The break was created

by the American Jobs Creation Act, signed into law by President Bush in October. It allows companies a one-year window to return foreign profits to the United States at a 5.25% tax rate, compared with the standard 35% rate. While any company with profits in other countries can take advantage of the law, drug makers have been the biggest beneficiaries.

Many corporations have used legal loopholes in the tax law to aggressively shelter their profits from United States taxes for years. The drug makers have told the Internal Revenue Service for years that their profits come mainly from international sales. Considering that the prices of medicines are far higher in the United States and almost 60% of their sales take place in America, I find that hard to swallow. *The Wall Street Journal* reported that "financial analysts and tax lawyers say that the drug makers' claim defies reality and that their profits come mostly from sales in the United States." Unfortunately, the IRS lacks the resources to challenge the companies effectively. As a result, the six major companies—Pfizer, Johnson & Johnson, Merck, Bristol-Myers Squibb, Wyeth, and Lilly—collectively pay a federal tax rate of less than 15% on their worldwide profits, with some companies paying much less, according to the *Wall Street Journal* report.

David Moskowitz, an analyst at Friedman, Billings, Ramsey, estimated that at least 60% of the drug industry's worldwide profits come from the United States. Higher American drug prices more than make up for higher marketing costs here, he said. Other analysts estimate that as much as 75% of the industry's worldwide profits are generated in the United States. Martin A. Sullivan, contributing editor of Tax Notes, a nonprofit journal that examines tax issues, says companies can hide those profits from the IRS by moving their drug manufacturing overseas. Companies transfer drug patents to their own foreign subsidiaries and that allows them to avoid paying their share of taxes here. The subsidiary then helps pay for research on the drug. If the medicine is approved for sale in the United States, the subsidiary manufactures the drug for a few cents a pill. The pills are then shipped to the United States, where they are sold to a pharmacy or a wholesale company for several dollars each. But the parent company claims that almost all the profit should go to the subsidiary, not to the parent in the United States. The law will encourage drug makers to become even more aggressive about shifting American profits overseas because the companies will assume that they can lobby Congress for another tax holiday in a few years.

Source: *The Wall Street Journal*

Swiss Biotech Company Indicted

Last month, a federal grand jury indicted four former top executives in sales and marketing for Serono Laboratories, Inc. The indictments were in connection with a conspiracy to offer and pay kickbacks to doctors in the form of an all-expense-paid trip for the doctors and their guests to attend a medical conference in France. It is alleged that this was in return for the doctors writing prescriptions of a drug manufactured and sold by the company. The biotech giant said that it has set aside $725 million to settle federal investigations including its AID's drug, Serostim. It was reported that the biotech giant was falling short of its marketing and sales goals and needed to "dig their way out" of the company's fiscal crisis. Federal officials allege that the indicted executives ordered regional directors of the company to target select doctors to induce them to write more prescriptions related to a sales plan. The plan called the "$6m-6 Day Plan," required each regional director to identity the highest prescribing positions or "thought leaders" in their regions. Those doctors were to be targeted with financial incentives in order to get the required number of prescriptions to achieve the sales goal of $6 million in 6 days. For obvious reasons drug companies sending doctors to France and paying all of their expenses doesn't meet the "smell test."

Source: *Forbes News*

Tenet Notified Of Possible SEC Civil Action

Tenet Healthcare Corp., in Dallas, Texas, was notified recently by the Securities and Exchange Commission (SEC) that SEC investigators will recommend that a civil enforcement action be filed against the company, former Chief Executive Officer Jeffrey Barbakow, and five other former executives. The SEC has been investigating the adequacy of Tenet's financial disclosures regarding its Medicare outlier payments and managed-care stop-loss reimbursements for at least two years. Tenet disclosed the investigation in April 2003. Tenet, Barbakow, and the other executives each received what the SEC calls a "Wells notice." All of the former executives had been high-ranking officers with Tenet.

Source: *Modern Healthcare*

VI. CAMPAIGN FINANCE REFORM

Major Lobbying Campaign Pays Off

Under the guise of providing aid to victims of asbestos-related illnesses, a small group of companies has lobbied for and won relief from their liability worth tens of billions of dollars in the Senate's asbestos trust fund bill, according to a new Public Citizen report. Unfortunately, the companies' success in protecting their corporate interests will sharply reduce the funds under the legislation that will be avail-

able to asbestos victims, the report finds. Meanwhile, some of the nation's largest financial investment firms have spent millions of dollars in lobbying and campaign contributions to position themselves to score big rewards should the legislation pass. Joan Claybrook, president of Public Citizen observed:

> *The Senate legislation that began as a good-faith effort to help the thousands of victims of asbestos has turned into a carnival of greed by some of America's biggest corporate interests.*

It is extremely difficult to understand how the victims in this legislative battle have been short changed and the wrongdoers protected. There appears to be no support by the public for what is being proposed in the Senate. This is a prime example of who runs the Congress and it surely isn't consumer groups.

The big winners in the legislation (S. 852) include a handful of Fortune 500 companies—Dow Chemical, Ford, General Electric, General Motors, Honeywell, Pfizer, and Viacom—and at least 10 asbestos makers that have filed for bankruptcy. An intense Capitol Hill lobbying campaign on behalf of the Fortune 500 companies to win the financial concession has been spearheaded by a relatively unknown entity called the Asbestos Study Group (ASG), which refuses to make its full membership list public, Public Citizen found.

Sponsored by Senators Arlen Specter (R-PA) and Patrick Leahy (D-VT), S. 852 would create a privately-funded, publicly-run $140 billion trust fund that would operate for 30 years to compensate hundreds of thousands of American workers or their families who have suffered serious injury or death from asbestos-related illnesses. Under the bill, asbestos companies with large existing liabilities that are in Chapter 11 bankruptcy would have those liabilities erased, in favor of contributions to the proposed national asbestos trust fund. But the value of contributions to the trust fund would be substantially less than the existing liabilities, providing significant windfalls to the companies involved. The Public Citizen report found that:

- The total contributions on behalf of asbestos victims that would be paid by 10 large asbestos firms were they to complete their bankruptcy proceedings under current law will drop from an estimated $25.9 billion to $5.6 billion should S. 852 become law. This represents a savings of $20.3 billion, or 78.5% expressed in today's dollars. On an individual basis, asbestos companies would effectively see their total payments over the life of the fund on behalf of asbestos victims decline by margins ranging from 40.5% to 100%.

- At least eight Fortune 500 companies are huge winners under S. 852 because their annual asbestos payments to the trust fund will be capped at $27.5 million per year for 30 years no matter how large their revenues or how many asbestos cases they have pending against them. In current dollars this means that their maximum liability is $378.5 million. By comparison, Dow Chemical otherwise projects its future liability at between $1.6 billion and $2.2 billion over the next 15 years from 2004 to 2019. Similarly, Honeywell estimates its future liability at $2.75 billion from 2004 through 2018. But the company would pay only 13.8% of that amount—$378.5 million—over the next 30 years.

- To get the best bill possible, the Fortune 500 companies created the Asbestos Study Group, a relatively unknown coalition. Public Citizen estimates that the ASG, six Tier 1 bankrupt asbestos companies, and seven Tier 2 Fortune 500 companies spent a combined $144.5 million lobbying Congress from 2003 through 2004, the latest figures available. The amount spent by ASG and the Tier 1 companies from 2003 to 2004—$27.9 million—was probably almost exclusively to pass asbestos bailout legislation.

- Goldman Sachs, a leading Wall Street investment banking firm, has been providing critical advice to the ASG and the Senate Judiciary Committee since at least 2003 regarding two crucial matters: the feasibility of financing the proposed trust fund to compensate victims and at what level it should be funded. The firm's role appears to be highly unusual—if not inappropriate—for an investment company with a big stake in the legislation's outcome via significant holdings in Fortune 500 firms whose stock prices should appreciate considerably under S. 852.

- ASG and the 13 companies employed 168 individual lobbyists during 2003 and 2004 to work on asbestos legislation. Of the 168, Public Citizen counts 94—or 57.7%—who walked through the revolving door from government service to the private sector, including eight former members of Congress.

Public Citizen has done an outstanding job of alerting the American people on what is going on. Frank Clemente, director of Public Citizen's Congress Watch, stated:

> *The stakes for getting the compensation they need and deserve could not be higher for the hundreds of thousands of American workers and their families who have been stricken by diseases caused by asbestos. The Senate should not allow this legislation to become a feeding frenzy for companies that from all indications care more about their bottom lines than for the lives of the Americans their products harmed and for whom this legislation was intended.*

Source: Public Citizen

On The State Level

The Alabama Legislature has failed miserably to strengthen the very weak campaign finance laws in our state. All attempts have largely been stalled and ultimately killed by a small group of Senators. The revelations exposing the Christian Coalition may prompt the Governor, Lt. Governor and key Legislative leaders to make campaign finance reform and the control of the powerful special interest lobby groups a priority. If that were to happen, many of our state's problems—that require legislation—could be solved. A good time to start would be the up-coming special session. If you agree contact Governor Bob Riley and urge him to include reform in his call.

VII. CONGRESSIONAL UPDATE

Federal Legislation Update

The Bush Administration, aided by an army of Big-Business lobbyists, continues to push its pro-business and anti-consumer agenda in Congress. So far, they have been able to successfully pass two pieces of legislation that will adversely affect consumers nationwide. The class action bill and the bankruptcy bill both passed earlier this year. Neither of these two bills does anything to benefit or assist consumers, and each is heavily weighted in favor of the President's pro-business supporters. I seriously doubt if we really know what all was contained in these two measures, but what we do know isn't good for ordinary folks. There are currently three additional bills in Congress that bear watching at this time.

The Asbestos Bill

The first bill is the Asbestos Bill, which is unique even for Washington-style politics. Many consumer-friendly organizations are in agreement with the insurance industry and many of the companies currently being sued for asbestos liability that this bill is not good for anyone. On the surface, it would appear that it would help solve the asbestos litigation problem. But many of the critics point out that the bill fails to address some critical issues. For example, who would fund the money to be set aside to pay claims? What would happen if the available funds weren't enough? How are pending claims to be addressed?

Energy Bill

Another bill that is currently being considered in the U.S. Senate is the so-called Energy Bill. This legislation is most troubling because it provides immunity for MTBE litigation. As many of you know, MTBE litigation stems from the leakage of the fuel additive Methyl Tertiary Butyl Ether (MTBE) from industrial underground storage tanks that affects the groundwater supplies in more than 1,800 communities and in at least 29 states. Recent reports published by two national environmental organizations, the Sierra Club and the Environmental Working Group, make this information available to the public and to members of Congress. According to the Sierra Club report, the Federal Government registered 130,000 leaking underground storage tanks, nationwide that may affect drinking water.

Environmental advocacy groups have claimed that the liability protection afforded in the Energy Bill is another blatant handout that allows large gas corporations to escape MTBE clean-up costs. The total cost for clean-up is estimated to reach approximately $29 billion dollars. This immunity provision is obviously an attempt on the part of the Bush Administration to repay buddies in the oil and gas industry who have helped President Bush get elected twice. There is currently a great deal of bipartisan opposition to this proposed immunity provision. It is clear that this portion of the Energy Bill would be very detrimental to the environment. When the public realizes that this granting of immunity to the responsible companies will shift the costs to the taxpayers, there will be lots of political explaining to do.

The Highway Transportation Bill

Another bill in Congress, the Highway Transportation Bill, seeks to provide yet more immunity to big businesses. A little-known part of this bill would give rental car businesses immunity from lawsuits for leasing vehicles to people who are not fit to drive an automobile. In fact, this proposed immunity could give total immunity to a rental car service that leased a car to a driver who did not have a valid driver's license or a valid insurance policy. Clearly, this bill would benefit the rental car industry and would hurt persons who are involved in a motor vehicle accident with an unsafe driver who would be uninsured in a rental vehicle.

Congress Needs To Get To Work For People And Not Special Interests

It has been said by many observers that Congress spends more time providing immunity from lawsuits to the businesses that financially support their elections, than working on such problems as the Iraq situation and the economic woes that continue to plague our country. I believe the three bills listed above are clear examples of the Bush Administration not being focused on the thing that really affect hard-working Americans. Unfortunately, this Administration has done very little for consumers and actually has done much to hurt them. I have been accused of being too harsh in my criticism of President Bush's programs. My answer to that is simply this: when he starts worrying about "little folks" and quits pro-

tecting "big folks" at every turn, I won't have much to criticize.

The Drug Companies Use Their Political Clout

A recent article in the *USA Today* by Jim Drinkard should have gotten the attention of American citizens who are having a hard time paying for their prescription drugs or who find themselves in any type conflict with a drug company. The article started with a revelation of how Senator Bill Frist used a Gulfstream corporate jet owned by Schering-Plough in a number of political stops last November. The powerful Senate leader used the jet for a "victory tour" after the 2004 elections with stops in Florida, Georgia, North Carolina, and South Carolina. The article made this astute observation:

> *The drug company's friendly gesture toward the Senate's most powerful member illustrates the political clout of the pharmaceutical industry. It will be needed in the months ahead as the industry faces the threat of increased federal regulation, brought on by mounting concerns about the safety of the nation's drug supply.*

According to the *USA Today*, the drug companies' corporate jets have been made available to other powerful lawmakers, including the Speaker of the House of Representatives. House Speaker Dennis Hastert (R-IL) took at least four trips to GOP fundraising events in the past two years aboard Pfizer's Gulfstream. Drug companies and their officials contributed at least $17 million to federal candidates in last year's elections.

Since 1998, drug companies have spent $758 million on lobbying activities in our nation's capital –more than any other industry. The industry has 1,274 lobbyists in Washington—more than two for every member of Congress. At least 18 members of Congress received more than $100,000 apiece. The industry also liberally funds think tanks and patient-advocacy groups that don't bear its name but often take its side. An example is the National Patient Advocate Foundation, which receives financial support from at least 10 drug companies. Dr. David Graham can tell us about how the industry plays hardball. Dr. Graham, a Federal Food and Drug Administration scientist, got on the industry's bad side when he exposed how truly bad the industry is. The industry is so powerful and influential it believes drug companies are above the law.

Our firm knows from experience that the pharmaceutical industry is extremely powerful and tries to run over folks who get in their way. They have pretty much had their way in Congress and with the FDA. A recent Gallup poll indicated that 81% of the American people believe that the pharmaceutical companies have too much influence on government and politics. Until Congress puts limitations on campaign spending, restricts lobbying activities, and beefs up the FDA, the American people will continue to be victimized by the drug industry.

Source: *USA Today*

Federal Legislation Would Help Curb Corruption In Congress

Our firm routinely runs into expert witnesses for defendants in product liability cases that we handle against the automobile and pharmaceutical industries who in their past lives worked for a federal regulatory agency. It is significant that these "experts" just months before facing us in court had the duty to regulate the very companies they now are "helping" to avoid liability in product liability trials. In these cases, they are defending products that we contend are defective and unreasonably dangerous. A bill has been introduced in Congress that if passed would promote legislation that would slow the revolving door between federal officials serving the public and serving special interests. Passage would also bring much-needed sunshine to the influence-peddling business and prevent lobbyists from secretly funding congressional junkets. The legislation, introduced by Representatives Marty Meehan (D-MA) and Rahm Emanuel (D-IL), would help significantly curb corruption in Congress.

The "Lobbying and Ethics Reform Act of 2005" proposes mainstream "good-government" reforms that close many of the gaping loopholes in the nation's current ethics rules and lobbying disclosure system. These reforms are not the property of any one party—just as the problems they address are not particular to any one party. In fact, both parties have engaged in these unsavory activities. Whoever is the majority seems to stake their own claim. The real fault lies in lax ethics rules, monitored by an even weaker disclosure and enforcement system. If enacted into law, this desperately needed legislation would, among other things:

- **Strengthen the revolving door restriction** so members of Congress could not make direct lobbying contacts for two years after leaving office, rather than the current one-year cooling off period.
- **Enhance the disclosure system for lobbyists' activities** so that lobbyists have to reveal their contacts with senior government officials and the amount they spend on grassroots lobbying, and so that the public has full and timely access to lobbying information on the Internet.
- **Ensure that congressional travel junkets are not organized or paid for by clients of lobbyists**, are subject to reasonable spending limits, and are fully disclosed to the public.

The members of Congress should establish an independent ethics agency. Congress needs to move beyond the

bipartisan bickering and partisan posturing over ethics issues. It is abundantly clear that self-policing too often results in self-preservation. An independent ethics agency would remove the conflicts of interest that riddle the current system and would reassure the public that the highest ethical standards are being upheld. I believe that most American citizens badly want to see all of the partisan political posturing put on the back burner. They expect public officials to be honest and hard-working and to play by the rules. There appear to be some in Washington who really need a good "dose of ethics!"

Source: Public Citizen

VIII. PRODUCT LIABILITY UPDATE

NHTSA's Crash Test Program Is Out Of Date

A Government Accountability Office (GAO) report underscores what many of us already knew—he government's innovative crash test program is out of date and needs to be revamped and updated. The New Car Assessment Program (NCAP) is run by the National Highway Traffic Safety Administration (NHTSA) and was created 25 years ago. In the 1980s the program was considered a huge advance in highway safety. As highlighted in the report, the tests now fall short in the following ways:

- They don't consider the propensity of vehicle roofs to crush during rollover crashes or test vehicle compatibility.
- The tests use only male crash test dummies, omitting women and children from test results.
- They don't test how vehicles respond when hitting pedestrians or when the corner of a vehicle is involved in a crash.
- They don't take into account the huge increase in SUVs on the highways.

By using a higher and heavier barrier for crash tests, rather than one that is the height of a compact vehicle, the test could accomplish its goals. In some cases, the four- and five-star test ratings mislead consumers. This is crucial, considering that preliminary figures released last week showed that SUV fatalities increased 4.9% between 2003 and 2004. Other countries are more thorough in analyzing how vehicles perform in crash tests, taking into account not only measured test results, but also deadly vehicle intrusion. There is no reason we can't do the same things in the U.S. Another problem is that the NCAP ratings are not available to consumers on a timely basis. By the time the information for a particular model year is made available by the DOT, millions of the tested vehicles have been sold and are in use.

One way to improve the program would be to beef up the tests and require the auto industry to conduct and certify them before any new vehicle is sold. Manufacturers already conduct these tests, but keep the results secret. NHTSA should then check the results through random testing. And this information should be available to consumers on the window sticker at the point of sale. That is something that should be mandated by Congress. Finally, the star system could be more meaningful to consumers using letters "A" through "F." In any event, the crash test program must be brought up to date without delay. It is most important for everyone who travels on highways in the U.S.

Source: Public Citizen

Beware Of Seat Belt Danger

For many years car companies have known that two-point seat belts, also known as "lap belts," may be dangerous in certain types of crashes. The original seat belt designs for automobiles included nothing but a lap seat belt. As automobiles advanced, the three-point belt, or lap/shoulder belt, became the seat belt of choice. For years, however, car manufacturers retained the lap belt only in the rear seats of passenger cars and in the front center seat position of certain vehicles. Even today, some vehicles are manufactured with lap belts in the center seat positions. If not properly designed, lap belts may cause serious or even fatal injuries in frontal crashes.

In a frontal crash, the person in a lap belt may "jackknife" over the lap belt. The lap belt may ride up over the pelvic bone. This is called "submarining". When this happens, the belt may squeeze through the soft intestinal tissue of the abdomen, exerting a sudden force on the spine. As a result, the occupant is exposed to the potential of serious spinal and intestinal injury. In addition, the upper torso, including the head and neck, is exposed to a danger as the body jackknives over the lap belt. Rear center seated occupants sometimes strike their heads on the center console or on the rear of the front seatback, causing neck fractures and/or brain damage. Lap belts are responsible for many paralyzing injuries, instances of brain damage, and deaths in crashes that would not be considered serious for persons using three-point belts.

The knowledge of this danger goes back for decades. Car companies originally resisted putting lap/shoulder belts in the rear seats, even though numerous studies showed that lap belt injuries were occurring frequently. Finally, the National Highway Traffic Safety Administration (NHTSA) passed a rule on December 11, 1989, mandating lap/shoulder belts in the rear seats of vehicles. But the rule exempted the center seat position. Car manufacturers have justified not placing a lap/shoulder belt in the center seat position by arguing that the center seat is seldom used. The primary motivation is cost,

but it is hard to justify to someone who is facing a lifetime in a wheelchair that the car company needed to save a few dollars. The technology for putting lap/shoulder belts in the center seat position has been available for many years, even in cars that have fold-down rear seats. There is simply no economic justification for not having lap/shoulder harnesses in every seating position in every vehicle.

In 1984 the National Transportation Safety Board (NTSB) performed a study on frontal crashes. The NTSB made several conclusions, including the following:

- In frontal collisions, persons using lap-only belts may not be adequately protected against injury and may sustain additional injuries, induced by the lap belt itself.
- Lap belts may induce injury, ranging in severity from minor to fatal, to the head; spine; abdomen; intra-abdominal viscera, connecting tissue, and blood vessels; and intra-thoracic viscera, connecting tissue, and blood vessels. Such injuries may occur singly or in combination.
- The relative inadequacy of lap belts to provide crash protection, and their ability to induce serious injury, have been known for many years to researchers, some parts of the medical profession, and to others concerned with occupant crash protection.
- Lap/shoulder belts provide superior crash protection to that of lap belts alone, and present a significantly lesser risk of induced injury; such systems appear to work even for children, and they can be used with child safety seats and booster seats.

In another report issued by the National Highway Traffic Safety Administration in March of 1987, the federal agency estimated that if 70% of all rear seat occupants wore their safety belts in passenger cars, lap/shoulder belts could prevent 76 fatalities and 2,430 moderate to critical injuries annually. A 70% usage rate in light trucks and MPVs would prevent 8 fatalities and 280 moderate to critical injuries annually. In that same report, the NHTSA estimated that as of 1987, installing lap/shoulder belts in the rear outboard seats of passenger cars would increase the per vehicle cost by $12.00. Installing lap/shoulder belts in the center seating position would increase the cost by an additional $20.00.

There are also ways of making a lap belt safer, but some manufacturers have ignored the existing technology. As examples, vehicles can be designed with "anti-submarining" seat pans, which will lessen the likelihood of the hips submarining under the belt in a frontal crash. It has also been known for years that if a lap belt is placed at a particular angle, it is less likely to ride up over the pelvis and cause visceral injuries. Retractors are available to assure adequate belt tension while in use. These designs are used in some, but not all, current designs. The average consumer has no way of knowing whether the lap belt is the best design available. Persons who may be using a lap belt need to be informed of the need for keeping the belt low on the hips and sufficiently snug. The best advice is to use the lap/shoulder harness unless there are no other options available. Hopefully, car manufacturers will one day be forced by the federal government to require lap/shoulder harnesses in all seated positions in every vehicle.

Ford And Volvo In Conflict Over Roof Design

The National Highway Traffic Safety Administration (NHTSA) has taken the unusual step of removing documents on vehicle roof design from a government website at the request of Ford Motor Co. The material includes internal reports from Ford and its Volvo subsidiary that suggest the Swedish automaker views sturdy roofs as an important safety feature, a stance at odds with that of its parent company. NHTSA removed the documents from a website of public comments on proposed changes in the federal standard for roof strength in passenger vehicles. Ford requested the material be removed, saying that a court order in a wrongful death case in Florida barred their release and that the disclosure would cause "irreparable" harm by revealing trade secrets. In a significant move, the trial judge in the Florida case entered an order on May 17th sealing the documents, which will keep the public from seeing these important documents. Another hearing was set on the "sealing" issue for later this month.

NHTSA had said it would review Ford's confidentiality claim and decide what to do with the papers. The federal regulatory agency is engaged in an effort to craft a tougher vehicle roof strength standard. Ford and other major automakers are opposing any changes, claiming that roof strength has little effect on occupant injuries in rollover accidents. This makes the timing of NHTSA's actions suspect. The episode highlights a sensitive issue for Ford—difference in design approach between Ford and the Swedish automaker that Ford acquired in 1999.

It is said that roof collapse in vehicle rollovers may cause or contribute to as many as 6,900 serious to fatal injuries per year. Safety advocates believe the current roof crush standard, adopted in 1971, was too weak then and is grossly inadequate now given the popularity of top-heavy pickups and SUVs. NHTSA recently sent a draft of a proposed new roof standard to the Office of Management and Budget, which reviews major federal regulations. To date the proposal has not been made public. The Ford and Volvo documents had been posted for about 24 hours on the NHTSA site when Ford requested their removal. I suspect now that the documents have been sealed, NHTSA

will follow that lead and do as requested by Ford.

The documents submitted to NHTSA came from a lawsuit in Duval County, Florida, where they were exhibits in a wrongful death case involving a Ford Explorer. A Jacksonville jury on March 18 ordered Ford to pay damages of $10.2 million to the husband of Claire Duncan, 26, who died after her 2000 Ford Explorer rolled and the roof collapsed. The Duncan family sought to prove with the documents that Ford skimped on safety and that its public position on roof strength was inconsistent with and thereby undercut by Volvo's. Ford had produced the documents under a protective order that barred them from publicly releasing the documents. After the trial the papers were stored in court files. Ford filed a motion on April 22nd to enforce the protective order. Court clerks had made copies of the documents for the Detroit News, which publicized some of the documents in an article in late March. The documents include test data suggesting that roofs on Ford Explorers were made progressively weaker during the 1990s to the point where they were barely more robust than required by the federal standard. A Ford engineer had indicated in an e-mail in October 1999 that the Explorer roofs have a "less than desirable safety margin. The Volvo documents reflect its concern about increasing roof strength for the new Volvo XC90 SUV, along with improving seat belts to hold passengers firmly in place in a rollover. The documents discussed the development of more advanced tests to see how roofs actually perform in rollovers. "Improvements in this area will increase the passengers' rollover protection," one Volvo report said.

The roof of the Volvo SUV is more than twice as strong as required by the federal standard, the Swedish company has previously said. Ford told NHTSA in a letter that the documents could expose trade secrets, such as "the strategies by which new technological advancements are introduced." Volvo's safety philosophy, which is entirely contrary to its parent (Ford), is a problem for Ford. Automakers have long contended that roof strength is of little consequence, because vehicle occupants typically strike the roof when a vehicle flips over. According to this argument, an injury will result from the force of a body pressing down on the head and neck, whether or not the vehicle's roof holds up. Safety advocates dispute that claim, and it's very clear that the automakers' claim won't stand up. This incident is a prime example of why protective orders on safety issues should be banned by legislation or by court rules. Hopefully, the Ford documents will eventually be released from the protective order by the Florida court. The full light of day needs to shine on these documents.

Source: *Los Angeles Times*

More Fords Have Suspect Switch

In March, the National Highway Traffic Safety Administration (NHTSA) began investigating 3.7 million Ford (F) pickups and SUVs because the cruise-control switch was linked to engine fires. Now we learn that these switches are on at least 6 million additional Ford vehicles. There are seven additional models, including the 1997-2002 Explorer and the 2001-02 Escape, that have these switches. Currently, NHTSA is monitoring reports of fires in those vehicles. Clearly, the agency should expand its investigation to include the additional models. Models in addition to the Explorer and Escape, are: the 1997-2002 Mercury Mountaineer, Ford Ranger, Econoline, Windstar, and Explorer Sport Trac. The NHTSA inquiry is focused on a cruise-control deactivation switch that can overheat. That switch has been linked to engine fires on Ford F-150 pickups and Ford Expedition and Lincoln Navigator SUVs. NHTSA has been investigating at least 218 reports of fires in 3.7 million 1995-99 and 2001-02 F-150s and 1997-99 and 2001-02 Expeditions and Navigators. Interestingly, all of these fires occurred while the vehicles were parked. Thus far, no injuries or deaths have been reported by Ford. But there have been reports of homes, garages, and sheds catching fire, with the origin being a vehicle fire.

Ford recalled 750,000 2000 model-year F-150s, Expeditions, and Navigators in January. The cruise-control switch, made by Texas Instruments, was discontinued midway through the 2002 model year. Ford reports that it was replaced with one made by Hi-Stat. Texas Instruments denies that there is a safety defect. A Ford spokesperson told the *USA Today* that the change was made before Ford received reports of increased incidences of fires in the pickups and SUVs. But NHTSA records reveal that the company had already received complaints of engine compartment fires in 1992-97 Lincoln Town Cars, Ford Crown Victorias, and Mercury Grand Marquis models that had an almost identical switch. Ford recalled the 1992 and 1993 models in 1999. Some vehicles with the switch seem more prone to catching fire. Reportedly, Ford is looking into "dozens of factors," including whether the risk of fire varies depending on the switch's location in a particular vehicle and its proximity to such components as the master cylinder. With all their resources, Ford should be able to come up with the cause and then remedy it. In any event, NHTSA should expand its current investigation.

Source: *USA Today*

Landmark Gun Safety Settlement With Smith & Wesson

Trial Lawyers for Public Justice has reached a landmark settlement of a case against Smith & Wesson for defectively designing and failing to child-proof a nine-millimeter semiautomatic

pistol. This is the first time ever a gun maker has paid to settle a claim for failing to childproof a gun. An 8-year-old child was accidentally shot in the face by another boy. The children were playing with what they believed to be an "unloaded gun."

The suit was filed in a Pennsylvania state court in Philadelphia, seeking damages for the injured child. The child suffered serious injuries including significant brain damage, speech and hearing loss, and left-side facial paralysis. The terms of the settlement are confidential. The suit charged that the shooting would never have taken place if the gun, a Smith & Wesson Model 915, had been properly designed. Among other things, the suit alleged—and the evidence at trial showed—that the Model 915 had a faulty safety device, lacked an indicator that would have shown it was loaded, wasn't childproofed in any way, and came without instructions warning parents of this model's specific dangers for children.

The settlement demonstrates that gun manufacturers—like the manufacturers of all potentially dangerous products—can and should be held accountable if they don't act responsibly. Smith & Wesson knew that accidental shootings like this one were taking place all across America. But the company neglected to make the simple, inexpensive design fixes that would have prevented the child's injuries—and that, if adopted by others, could spare the lives of thousands of injury victims nationwide. According to a U.S. General Accounting Office report, about one in every three accidental shooting deaths in the U.S. could be prevented with simple childproofing devices.

Source: *Trial Lawyers For Public Justice*

Electronic Stability Control Saves Lives

For the last 50 years auto safety advocates have concentrated most of their efforts on making auto accidents more survivable for vehicle occupants. As a result, we have such safety advances as airbags, auto body "crush zones," and the greatest safety advance of the era, the simple seat belt. While no one can doubt the efficacy of these advances, there is another area of research and development that promises equally startling advances to the cause of safety, and it revolves around vehicle systems that help keep accidents from occurring in the first place. Auto engineers call it "active safety," while referring to things like airbags as "passive safety systems." The ultimate active safety system would be an accident-avoidance system—technology that now seems like something from a Jules Verne science fiction novel. Actually, though, this type system is coming closer and closer to reality. Such a system would have the ability to take total control of the vehicle from the driver in critically dangerous conditions, slowing the engine, applying the brakes, and even steering the vehicle out of danger.

We're not there yet, but current technology includes a system that comes close. Today's Electronic Stability Control (or ESC) doesn't take over steering control from the driver, but it does enhance the driver's ability to stay in control of his or her car and steer it out of danger. By combining the technologies of anti-lock brakes, traction control, and enhanced lateral stability, ESC detects when a driver is about to lose control of a vehicle and automatically intervenes to provide stability and help the driver stay on course. In a recent study, ESC was shown to increase a driver's control over his or her vehicle by 34%, making the technology a milestone on the path to safer cars. Available in many new cars, this technology helps drivers maintain control of their vehicle during extreme steering maneuvers by keeping the vehicle headed in the driver's intended direction, even when the vehicle nears or exceeds the limits of road traction. When drivers attempt an extreme maneuver (for example, to avoid a crash or because a curve's severity has been misjudged), they may experience unfamiliar vehicle handling characteristics as the vehicle nears the limits of road traction. The result is a loss of control. This loss of control usually results in either the rear of the vehicle "spinning out," or the front of the vehicle "plowing out."

A professional driver, with sufficient road traction, could maintain control in an extreme maneuver by using various techniques, such as countersteering (momentarily turning away from the intended direction). It would be unlikely, however, for an average driver to properly apply countersteering techniques in a panic situation to regain vehicle control. ESC uses automatic braking of individual wheels to prevent the heading from changing too quickly (spinning out) or not quickly enough (plowing out). ESC cannot increase the available traction, but does maximize the possibility of keeping the vehicle under control and on the road during extreme maneuvers by using the driver's natural reaction of steering in the intended direction. ESC happens so quickly that drivers do not perceive the need for steering corrections. If drivers do brake because the curve is more or less sharp than anticipated, the system is still capable of generating uneven braking if necessary to correct the heading.

ESC systems exist under many trade names, including Vehicle Stability Control (VSC), Vehicle Dynamic Control (VDC), Electronic Stability Program (ESP), and Vehicle Stability Enhancement (VSE). While loss of control can lead to various types of crashes, rollovers are among the deadliest. Rollovers are dangerous incidents and have a higher fatality rate than other kinds of crashes. Of the nearly 11 million passenger car, SUV, pickup, and van crashes in 2002, only 3% involved a rollover. However, rollovers accounted for nearly 33% of all deaths from passenger vehicle crashes. In

2002 alone, more than 10,000 people died in rollover crashes. SUVs are much more likely to experience an "on-road" rollover as a result of an emergency avoidance maneuver than are passenger cars.

It's no wonder that results of a National Highway Traffic Safety Administration study released in September show that cars with ESC were involved in 30% fewer fatal single-vehicle crashes than those without. Astonishingly, SUVs with ESC were involved in 63% fewer fatal single-vehicle crashes. An Insurance Institute for Highway Safety (IIHS) study released in October 2004 found that cars and SUVs with ESC were involved in 56% fewer fatal single-vehicle crashes than comparable models without ESC. The IIHS estimates that ESC could save some 7,000 lives annually if all vehicles on U.S. roads had the feature.

Early ESC introductions were limited to luxury and sport cars. BMW, Mercedes, and Toyota all introduced cars with ESC systems in 1995. In overseas markets, Toyota installed ESC on sedans in 1995. Mitsubishi followed in 1996, and Nissan and Honda in 1997. Daihatsu, Subaru, Mazda, Hyundai, and Suzuki all added ESC in 1998 and 1999 models. One has to wonder why ESC was not added to high risk SUVs first. This question will haunt vehicle manufacturers as they face litigation related to loss of control and rollover crashes involving SUVs and trucks. The automakers want us to believe ESC is a new scientific break-through. However, today's ESC technology varies little from the systems first introduced in 1995 by BMW, Mercedes, and Toyota. The automakers have no excuse for not having made ESC standard equipment on all SUVs when ESC was first introduced in the mid-1990s. If ESC is available on vehicles you're considering, order it. If you're considering two otherwise closely matched vehicles—especially SUVs—opt for the one with ESC. Don't let a salesperson talk you out of ESC. If necessary, special order it.

Survival Odds Improve In Car-SUV Crashes

A new study by the Insurance Institute for Highway Safety (IIHS), which is the research arm of auto insurers, appears to indicate that cars are doing a better job of protecting occupants in crashes with sport-utility vehicles and pickup trucks. In cars that collided with midweight SUVs, the death rate fell 39%—to 42 deaths per million registered SUVs in 2000 to 2003, compared with 69 deaths per million registered SUVs a decade earlier. The death rate fell even more in collisions involving heavier SUVs—to 49 deaths per million registered SUVs from 86 a decade earlier. IIHS specifically looked at the differences in height and weight of vehicles and how that mismatch affects death rates in crashes. The Institute found that, while incompatibility is still an issue, it's less of a problem than it was a decade ago. Incompatibility—the concept that people in cars are more at risk in collisions with SUVs and trucks because those vehicles are bigger—has been a focus of recent efforts to make vehicles safer. That includes the million-plus dollars the Institute has put into a crash-test program that mimics an SUV slamming into the sides of other vehicles. The federal government says this is a top auto-safety priority. I hope that is true, because of the terrific numbers of SUVs now in use and the affection the driving public has for these vehicles.

Automakers have agreed to make voluntary changes to vehicles to address the mismatch issue. My experience with voluntary compliance on safety issues by the auto industry, however, is that it simply doesn't work. The Institute points to some basic safety measures to explain the improvement over the past decade: better vehicle designs; improved seatbelt use; and half of all registered cars now equipped with driver airbags, compared with 3% in 1990. SUVs have also changed during that time period, going from heavier, more aggressive truck underbodies to SUVs built on car frames that inflict less harm in a crash. While cars have gotten safer in crashes with SUVs, the safety of the SUVs has changed very little, if at all, over the same time period. In crashes with cars, the death rates for people in both SUVs and pickup trucks generally improved only slightly in most weight categories. The death rates were slightly worse for the lightest and heaviest SUVs. Still, the death rates for SUV occupants are substantially lower than for car occupants when the two vehicles collide. As the SUVs get heavier, they get safer for their own occupants, but deadlier for the cars involved in the crash. It should be noted that this study looked at only two-vehicle crashes. Thus the increased rollover risk of SUVs wouldn't be included, and nothing contained here should give anybody the idea that SUVs are safe. The rollover situation is a totally different safety risk and one that is still a major problem.

Death rates are 59% higher for car occupants than SUV occupants in crashes involving the lightest SUVS. But in the heaviest SUVs, the car death rates are nine times as high as those of SUV occupants. Death rates were 50% higher for occupants of a car that collided with an SUV, than for occupants of the same car when it collided with a four-door car of the same weight as the SUV. The study looked at deaths in 2000 to 2003 in model year 1999 to 2002 vehicles compared with 1990 to 1993 deaths in 1989-1992 model-year vehicles. SUVs clearly present a major problem for car occupants in collisions between any size SUV and a passenger car. In any event, Institute President Brian O'Neill says that he is encouraged by the improvements referred to above.

Source: *The Wall Street Journal*

IX. MASS TORTS UPDATE

Our Clay County Case Continued

Our Vioxx case, scheduled to be tried in Clay County, Alabama, last month, was continued and will be rescheduled for a trial at a later date. Both sides agreed to the postponement, which was subsequently ordered by Judge John Rochester. While it would have been good to be the first lawyers to try a Vioxx case, we felt it was in our client's interest to try the case at a later date. We fully intend to try this case and believe it will result in a substantial verdict against Merck for the widow of Brad Rogers. However, the additional time will allow us to complete expert discovery and go through about 2 million new documents that Merck is being ordered to turn over to us. Previously, we had reviewed over 5 million Merck documents and during that lengthy process found a number of documents that are extremely bad news for Merck. Much of what we have in our possession is subject to protective order, however, and can't be shown to the public. I hope the court will remove the protective order at an early date so that folks can see how truly bad Merck has been. We expect the Rogers case to be rescheduled for a trial date very soon and hope to try the case around the first of next year.

Tens Of Thousands Of Cases Seen Over Vioxx

U.S. District Court Judge Eldon Fallon, the federal judge who has control over the federal Vioxx cases, told lawyers who attended a monthly status conference there could ultimately be up to 100,000 cases filed against Merck & Co. So far, there have been over 2,000 cases filed against the drug maker. Analysts have estimated that Merck's potential liability could reach $18 billion. As previously reported, all of the pretrial issues for federal cases are being handled by Judge Fallon. Lawyers from both sides were in court in New Orleans on May 23rd for the status conference. I have been impressed with how organized Judge Fallon and his staff are, and that will assist greatly as this phase of the Vioxx litigation progresses. There is a great deal of work to do and both sides have recognized that to be the case. Our firm is currently evaluating over 10,000 potential cases and will likely file a good number of them. We are being contacted by clients and referral lawyers on a daily basis.

Source: *Associated Press*

Merck Shareholders Criticize Executives And The Aftermath

Merck shareholders don't appear to be very happy with the performance of the giant drug company's bosses. A call for new top management at the company was expressed at Merck's most recent annual meeting. About 900 shareholders gathered for that meeting, which featured some lively debate, leaving no doubt that Merck is facing a rocky road. Not surprising was the strong criticism over the company's handling of the Vioxx problems. In fact, the more we learn about Merck, the worse things look for the company. When the shareholders get the complete picture, they will really be upset. In any event, the company's stockholders seem to be greatly concerned with what they have learned so far. It is apparent that the bosses at Merck have lots of answering to do both to their stockholders and to the consuming public.

Shortly after the annual meeting, Merck shocked the nation when its big boss stepped down. Richard Clark replaced CEO Raymond Gilmartin, who had been under the gun, as the new boss at Merck. Interestingly, the company chose an insider without a background in medicine at a time when observers believe that the company desperately needs to focus on developing new drugs. Based on what I have learned about the new CEO, Clark is certainly no master of drug research or product development. Instead, he has spent his 33 years at Merck concentrating on such areas as manufacturing and information technology. The fact that Gilmartin cut and ran with the company in turmoil couldn't be good news for Merck. It could be just a coincidence that Gilmartin, who made $38 million last year, resigned unexpectedly as the congressional hearings got underway concerning the questionable marketing tactics of Vioxx. On the other hand, however, it could be that some of the matters discussed at the hearings played a role in the departure.

The public has started to question how companies manage to gain regulatory approval of drugs like Vioxx and then turn them into wildly profitable blockbusters in such a short span. People are also finding out about the industry's incredible influence over drug development, approval, and even consumption. Part of the problem is that we have a system of regulation that allows the drug companies:

- to design the drug trials;
- select the subjects for the study;
- maintain and interpret the data from the trials;
- select which parts of the studies get published;
- choose who will become the reviewers in the prestigious medical journals; and
- pick "key opinion leaders," whom they pay big bucks to promote the drugs.

How many industries have such a great arrangement—with so little regulation? The public is finally beginning

to question how the drug companies and FDA operate. What they are learning can't be very reassuring about the safety of prescription drugs.

The recent congressional committee hearings revealed to the public information that we have had access to for months. It is now becoming known that Merck had gone to great lengths to promote a drug it knew would cause heart attacks and strokes. Merck misled the FDA, withheld known safety risks from the medical community, and actually deliberately lied to the public about Vioxx's safety. Merck used project code-names such as "Offense" and "XXceleration" to train its sales representatives on how to deflect doctors' questions about the safety of Vioxx. A 2001 Merck memo stated, "Do not initiate discussions" on a study that raised cardiovascular safety concerns of Vioxx. Other training materials for Merck's sales representatives termed addressing physicians' safety concerns as "obstacle handling." It is quite clear based on our discovery efforts that Merck lied to the FDA, the medical community, and the public about the safety concerns over the drug. Representative Henry Waxman (D-CA) was right on track when he observed:

> *When it comes to the one thing doctors most needed to know about Vioxx—its health risks—Merck's answer seems to be disinformation and censorship.*

During the hearings, Representative Waxman focused on training and activities of the sales representatives, arguing, "the goal was sales, not education." Dr. Michael Wilkes, vice dean for medical education at the University of California-Davis, agreed and made this disturbing comment: "Doctors don't read the medical literature, they often rely on the salesman they meet in their office." We have known for months that Merck was guilty of misleading the medical community. We simply didn't realize how easy the task was to accomplish. When doctors asked about Vioxx safety concerns associated with the heart, Merck sales representatives were told to provide a "cardiovascular card" with data suggesting that Vioxx could be eight to eleven times safer than other anti-inflammatory drugs. FDA officials have said that comparison was clearly inappropriate. In fact, the statement was totally false and Merck had to know it. In fact, there is even stronger evidence that will eventually come out about how Merck deliberately misled doctors and the FDA and how the public softened as a result.

Clearly, Merck withheld information from doctors and misled them about the health risks of Vioxx after research linked the pain reliever to increased heart attack risks over five years ago. The committee hearing provided an inside look at how Merck trained its 3,000-person sales force to persuade doctors to prescribe Vioxx and other Merck products. When concerns about Vioxx's safety arose, Merck used this highly trained force to present a misleading picture to physicians about the drug's cardiovascular risks. The report prepared for the committee said the documents show Merck instructed its sale force not to address negative research findings in dealings with doctors, but to "emphasize outdated and misleading data that indicated Vioxx was safer than alternatives." As pointed out above, Merck's own documents are extremely damaging on the Vioxx issue.

Representative Tom Davis (R-VA), the chairman of the committee, said the inquiry raises serious questions about Merck's conduct and candor regarding Vioxx. All drug companies have an obligation to convey truthful information that is up to date concerning drugs put on the market. Documents in our possession paint a grim picture for Merck concerning its marketing tactics. This company has to be greatly concerned since both Congress and the FDA have to be hearing from people on this issue.

Without a doubt, Merck knew that there were serious "cardiovascular obstacles" relating to Vioxx sales. The committee staff report said that after each negative development regarding Vioxx, Merck sent bulletins or special messages to its salespersons "directing them to use highly questionable information to assuage any physician concerns." The committee said the documents show:

- After a company study in March 2000, known as VIGOR, reported increased heart attack risks, Merck directed its sales force to show physicians a "cardiovascular card" that made it appear Vioxx could be eight to 11 times safer than other anti-inflammatory drugs. The card omitted any reference to VIGOR and was based on data the FDA considered to be inappropriate for a safety analysis.

- After an FDA advisory committee agreed in a 2001 vote that physicians should be informed of the risks found in the VIGOR study, Merck sent a bulletin to its sales force that advised: "Do not initiate discussions of the FDA Arthritis Committee ... or the results of the ... VIGOR study." If physicians asked about the study, Merck representatives were told to respond, "I cannot discuss the study with you."

- After the New York Times reported on the cardiovascular danger of Vioxx in May 2001, Merck instructed its field staff to tell physicians that patients on other anti- inflammatory medications were eight times more likely to die from cardiovascular causes than patients on Vioxx.

- After extensive negotiations with the FDA, Merck agreed to a label change for Vioxx in April 2002 that mentioned the cardiovascular risks found in the VIGOR study, but it included a statement that the significance of the findings was "unknown." The com-

mittee said Merck then instructed its sales force to emphasize the uncertainty of the VIGOR study to counter physician's concerns.

Merck also issued news releases to the media that contained false statements relating to the safety of Vioxx.

The public has now had a close look—for the first time—at the shocking world of drug marketing. Sales representatives for Merck were offered $2,000 bonuses for meeting sales goals. They worked in campaigns with codenames to try to boost sales even as regulators were about to increase warnings on the drug's label. "Don't bring up the heart risks," warns a February 9, 2001, internal Merck memo. And when doctors asked about those risks, the Merck sales force was instructed to actually lie to the doctors concerning the safety of Vioxx. Merck had a $2.5 billion market for Vioxx by 2003 and that really gives the reason for Merck's actions. At that time the company knew about the problems with heart attacks and strokes. Unfortunately, the bosses at Merck ignored the bad information and kept Vioxx on the market.

Source: *Wall Street Journal*, *USA Today* and *Associated Press*

Other Countries Do A Better Job of Regulation

Other countries are tougher on the drug companies than is the U.S. government. For example, government officials, particularly in the U.K., have stepped up their scrutiny of the industry. During a recent in-depth study, U.K. leaders uncovered a great deal that troubled them. For starters, they found that drug companies can specifically design clinical trials to deliver favorable—but possibly misleading—outcomes. Richard Nicholson, editor of the *Bulletin of Medical Ethics*, cited a Merck trial of Vioxx as a prime example. Drug companies often run numerous trials in an attempt to yield some favorable results that they can publicize. But the companies then share only their positive findings and classify the rest of the trials, rather than the drugs themselves, as failures. So far, they have gotten away with his sort of thing in this country. That hasn't been the case in foreign countries where the drugs are not only cheaper, but safer for the consuming public. Bad drugs are pulled from the market much more often and much quicker.

Italians File Lawsuits Against Merck

A group of Italians have filed a class action lawsuit in the United States, seeking damages after suffering heart attacks and strokes they say were caused by the Vioxx painkiller. In the lawsuit, filed in Louisiana, 18 Italians are seeking damages from Merck & Co. The Italian complaint was submitted to U.S. District Judge Eldon E. Fallon, the New Orleans judge, who is overseeing all the federal Vioxx cases in the U.S. The complaint will have to be certified as a class action before it can proceed. One of the group of Italians, a 68-year-old cardiologist Giovanni Scibilia, told reporters in Rome that he took Vioxx for almost a month and suffered two heart attacks. He stated: "The reason I link the attacks to Vioxx is the timing. I used to jog and swim before I was prescribed the drug, and after four days of treatment I had the first heart attack."

If certified as a class action, the lawsuit will allow other Italians who claim to have suffered illness after taking Vioxx to join the case without having to file separate lawsuits. Vioxx was first introduced in the Italian market during the summer of 2000. You will recall it was approved by the FDA in May of 1999.

Source: *Associated Press*

Black-Box Warnings May Not Be Enough

We are told that when the Food and Drug Administration (FDA) wants to get its message across about a prescription drug's risk, it tells the manufacture to add a "black-box warning" to the label. As you will recall, several high-profile drugs have been given new black-box warnings in recent months. For the uninformed, a black box warning is simply a rectangle that surrounds the bold face text of a message, which is placed in the warning section of the drug's label. There are several drugs that currently have a black-box warning. The following are a few that have had these warnings added recently by the FDA:

- **Anti-depressants** – warns of the possible link to suicidal behavior.
- **Prescription Non-Steroidal Anti-Depressant Anti-Inflammatory drugs (NSAIDs)** – the group of pain relievers that includes Ibuprofen and naproxen. This warning is due to the increased risk of heart attack, stokes and bleeding of the digestive track.
- **Lotronex** – the drug prescribed for irritable bowel syndrome. You will recall that manufacturers stopped selling this drug, but the FDA later allowed it back on the market with a black-box warning and a risk-management program to increase doctor awareness.

As we went to the printer with this issue, the FDA was working on a black-box warning for Celebrex (the Cox2 inhibitor) and for Elidel and Protopic (the two eczema creams linked to cancer in animals). The effectiveness of the black-box warning approach has been debated and for good reason. Many consumer groups believe that these warnings aren't that effective. Interestingly, even some FDA officials have questioned the effectiveness. When you consider the fact that the manufacturers of prescription drugs advertise their products heavily and studies reveal that consumers respond to the ads, I doubt seriously that many people really pay much attention to the product labels. But a strong black-box warning is superior to the weak warn-

ings currently used with many drugs now on the market.

PPA Litigation Update

In a victory for PPA plaintiffs, Middlesex County, New Jersey, Superior Court Judge Bryan Garruto found the 2004 epidemiological study by the Korean Pharmaceutical Manufacturers Association linking PPA with hemorrhagic strokes to be reliable. The study found an association between PPA use and hemorrhagic stroke. The defendants had moved to preclude the study based upon numerous perceived weaknesses in the study design, including a lack of "clear, pre-specified aims" and the lack of an independent panel to review cases. Judge Garruto ruled that the study flaws "do not outweigh the Korean Study's many strengths."

Adding to the growing list of victories for the defendants, a Utah jury found in favor of Bayer in a February trial involving a 65-year-old woman who suffered a hemorrhagic stroke from PPA-containing Alka Seltzer Plus. Since the FDA pulled PPA from the market in November 2000, there has been only one jury verdict in favor of a plaintiff. A state court jury in El Paso, Texas, awarded $ 400,000. in compensatory damages to a 25 year old who suffered a hemorrhagic stroke hours after ingesting PPA-containing Alka Seltzer Plus.

We still have several PPA cases pending in state courts in New Jersey, Pennsylvania, as well as a number of federal cases in the MDL court. Because of the growing number of defense verdicts in the PPA litigation, it is not surprising that the defendants are reluctant to discuss resolution of any case where a plaintiff's medical history reveals risk factors for stroke. Based upon this history of defense verdicts, we feel fortunate for our clients to have resolved numerous PPA injury cases, including two of the largest PPA case settlements in late 2003.

Drug Companies Learned Well

Several years ago, the drug companies learned how to get the consuming public to "take their drugs," and they haven't slowed down since. Direct-to-consumer (DTC) advertising soared after the U.S. Food and Drug Administration FDA allowed drug promotions on television for the first time in 1997. Supreme Court rulings protecting commercial speech have aided the drug companies, but their best ally has been the FDA. The ads are regulated by the FDA's Division of Drug Marketing, Advertising and Communications, an office with less than three dozen employees. These employees have to review 30,000 to 40,000 ads a year. Obviously, that is an impossible task. Since 1997, the drug companies have intensified their efforts and that has been paid off beyond any expectations.

A recent study has now confirmed what the pharmaceutical industry has known for a good while, and that is, physicians are more likely to prescribe a particular drug if a patient asks for it by name. According to a new study published in the *Journal of the American Medical Association*, patients asking for a specific brand name drug are far more likely to get that drug **regardless of the severity of their condition**. The study, which was not the normal kind, was carried out by Dr. Richard L. Kravitz, director of the Center for Health Services Research in Primary Care at the University of California.

Actors trained by Dr. Davis went to 152 doctors in three cities. These actors exhibited symptoms associated with clinical depression (for whom antidepressant drugs are appropriate) or posed as patients with job loss and depressed mood (whom antidepressant drugs are unlikely to help). Some of the actor-patients requested Paxil (an antidepressant drug), that is a heavily advertised brand name drug. Others either asked in general terms whether antidepressant drugs might help them or they made no request at all. The study found that patients with minor symptoms were more likely to get a questionable prescription if they asked for a brand name drug.

Things really changed relating to mass media advertising for prescription drugs in 1997. The big break for pharmaceutical companies came in a 1997 decision by the FDA to relax the rules governing this type of advertising. This 1997 ruling has had a significant effect on the way drugs are distributed in this country. Pharmaceutical companies now spend $3.2 billion per year on direct-to-consumer advertising of pharmaceutical drugs in an effort to convince consumers that they have the answer to their problems. Slick advertising campaigns have really paid off. I have had Alabama pharmacists tell me that people came into their store with a prescription for "Drug A" and try to get it changed to "Drug B." Those persons got their information from TV ads and were convinced "Drug B" was exactly what they needed to solve their medical problem.

Drug manufacturers realize that their financial success depends heavily upon their ability to persuade physicians to prescribe their drugs instead of their competitor's. Accordingly, pharmaceutical sales representatives are paid hundreds of millions of dollars per year to convince doctors to prescribe their companies' drugs. They also spent another hundred million dollars of industry money in their efforts to promote the drugs for their companies. When patients make requests for specific prescription drugs, that is proof that the ads are working. When you combine the sales efforts by the sales representatives with the massive DTC advertising, it gives the industry a big one-two punch. Survey data suggest that over 8.5 million consumers annually, prompted by DTC advertising, request and receive an advertised drug. A comparison between Canada, which prohibits DTC advertising, and the United States, which does not, found

that patients in the United States were twice as likely to request advertised drugs and that those who requested DTC advertised drugs were nearly 17 times as likely to receive a new prescription.

If you aren't convinced, take a look at the recent debacle involving Vioxx, Bextra, and Celebrex. Vioxx was the most heavily advertised drug to consumers in 2000 ($160 million), and retail sales quadrupled from 1999 to 2000. In 2003, Pfizer spent $87.6 million on ads for Celebrex. As a result, the number of COX-2 prescriptions skyrocketed. But when reports of serious safety issues with the drugs began to surface, Merck and Pfizer pulled back on DTC advertising for these medications.

To its credit, even though it's just a drop in the bucket, the FDA has moved against scores of ads that it found to be inaccurate or misleading. In 2001, it warned Merck and Co. that its ads for the arthritis drug Vioxx were misleading and did not adequately warn viewers of cardiovascular risks. After Merck took Vioxx off the market last September, Pfizer Inc. aggressively increased advertising for its competing painkiller, Celebrex. Subsequently, that company got a warning from the FDA.

Experts say it's unlikely that the federal government will further restrict DTC advertising anytime soon. This is true even though opponents say the FDA should prohibit pharmaceutical drug companies from advertising their products directly to consumers. If New Zealand passes a ban on DTC advertising in 2005, which is anticipated, the United States will be the only industrialized country in the world that permits the practice. In my opinion, there is no way to justify DTC advertising by the drug industry. I hope there will be enough members of Congress who will do the right thing and ban DTC ads.

Source: *JAMA* and *Dow Jones Newswire*

Lipitor Class Certification Denied

A Philadelphia judge has declined to certify as a nationwide class those Rite Aid customers who purchased what may have been counterfeit Lipitor in 2003. The proposed class would have included as many as 330,000 people, in every state except Louisiana, who in 2003 received recall notices from Rite Aid informing them that a portion of the cholesterol-reducer the pharmacy giant purchased from H.D. Smith Wholesale Drug Co. in spring 2003 might have been counterfeit. According to the court's opinion, no more than 20% of the 10-milligram Lipitor tablets and no more than 6% of the 20-milligram tablets Rite Aid purchased from H.D. Smith between April 22, 2003, and May 23, 2003, were in fact counterfeit. The plaintiff, a Michigan resident, had purchased a 20-milligram Lipitor tablet from Rite Aid in late April 2003. The court noted that no Rite Aid customers who purchased Lipitor in 2003 suffered any known related ailments. The bottom line was that the court found the "Plaintiff has created a class which is detrimentally over-inclusive. As a result, neither plaintiff nor the court can ever determine class identity or size." I really believe this decision was a good one.

Judge Reverses $1.4 Million Fen-phen Verdict

A Philadelphia judge has reversed a verdict against Wyeth, in which the drug maker had been ordered to pay three Utah women a total of almost $1.4 million for alleged harm from one of the company's recalled "fen-phen" diet drugs. Judge Mark Bernstein of the Court of Common Pleas ruled that the sole expert witness for the women had systematically provided "questionable" or "illogical" scientific testimony. Judge Bernstein ordered a new trial in the cases for the three women, who won their favorable verdict last November. You will recall that the judge had overturned a verdict in favor of a fourth female Utah plaintiff in the same trial who had been awarded $780,000 in compensatory damages. All four plaintiffs alleged they suffered heart valve damage as a result of taking Pondimin, one of the drugs commonly used in the fen-phen slimming cocktail.

Pondimin and another Wyeth appetite suppressant, Redux, were recalled in 1997 after being linked to heart valve problems and a highly fatal lung condition called primary pulmonary hypertension. Wyeth has taken charges of over $21 billion since the recall to satisfy claims from former users of the medicines, but still faces about 60,000 lawsuits in the United States. An estimated 6 million Americans took Wyeth's two drugs before they were recalled.

Source: R*euters News*

Crestor Side Effects Are Made Worse Than Previously Reported

A recent study can't be good news for the maker of Crestor, the cholesterol-lowering drug. Contrary to government claims, side effects happen more often with Crestor than with other statins. Consumer advocates have been trying to get Crestor off the market for months. The study was published online on May 23rd by the American Heart Association's journal Circulation. Researchers had analyzed reports of side effects sent to the FDA for Crestor and compared them to the rates during the same time period for Lipitor, Zocor and Pravachol, three other statin drugs. The latest research challenges a decision by FDA related to the drug's safety. In March, the FDA had contended Crestor's risks were no greater than its competitors. The agency rejected consumer efforts to have the drug, made by AstraZeneca PLC, pulled from the market.

Instead of pulling the drug, the FDA ordered a warning on the label, saying Crestor could cause serious muscle problems and kidney damage, espe-

cially among Asians. Dr. Sidney Wolfe, medical director of Public Citizen, had this comment after the study results were released: "This will be further reason to take the drug off the market." It is good to know that Public Citizen will try again to get Crestor off the market. An estimated 20 million Americans are believed to be taking statins. Researchers say these drugs are still the best drugs for lowering high cholesterol and reducing the risk of heart disease and stroke. In my opinion, the jury is still out on Crestor. The black-box warning is a pretty good indication that a considerable risk exists if you take Crestor. Anybody taking any statin, including Crestor, should consult with their personal doctor and weigh the risks and the benefits. Crestor clearly appears to be the worst of the lot. There will certainly be more written on this drug as time passes. We are evulating a good number of potential claims and already have pending litigation. We anticipate filing a number of cases in the near future.

Source: *Associated Press*

Drug Firms Fail To Disclose All They Know

The editor-in-chief of the *New England Journal of Medicine* has accused three of the largest drug companies of "making a mockery" of efforts to create transparency in clinical trials. Dr. Jeffrey M. Drazen, the editor, said that Pfizer Inc., GlaxoSmithKline PLC, and Merck & Co. are not providing enough useful information on clinical trials they register with the government. Interestingly, Dr. Drazen says that some important medical publications might not publish the companies' studies in the future and that is most significant. It is pretty obvious that the journals will require more information from pharmaceutical companies before accepting articles for publication.

A review of the information from 10 drug companies was posted on www.clinicaltrials.gov., which is run by the U.S. National Institutes of Health. The review was conducted by Dr. Deborah Zarin of the NIH at the request of the Internal Committee of Medical Journal Editors. I believe that requiring drug companies to disclose all they know about a drug—good and bad—is something that will benefit all citizens. It will help medical doctors make good decisions relating to medicine and will allow them to believe what they read as complete and accurate.

Defibrillator Maker Didn't Reveal Problem

The maker of an internal heart defibrillator has now admitted it waited three years before telling some 24,000 patients and their doctors about an electrical problem that caused some of the implanted devices in use to short-circuit. The admission by Indianapolis-based Guidant Corp., first reported on May 24th by *The New York Times*, came about after a Minnesota college student died on a spring break bicycling trip in March. The death of the 21-year-old student, who had a genetic heart disease, is the only fatality known thus far. Guidant disclosed the flaw in its Ventak Prizm 2 Model 1861 to the student's doctors and told them about 25 other cases in which the defibrillator had malfunctioned, the *Times* reported. Interestingly, the company did not issue an alert to physicians until it learned the *Times* was preparing a story on the defibrillator.

Electrical malfunctions involving the model occurred in units produced during a two-year period before mid-2002, when the company fixed the problem, the *Times* reported. Apparently, the problem has not happened in any devices made since. In February, Medtronic Inc. told doctors that the battery used in one of its defibrillators was draining too fast. No deaths or injuries have been associated with the Medtronic model. Implanted defibrillators shock the heart back into a normal rhythm when it starts beating irregularly.

In my opinion, Guidant had a duty to disclose the problem to doctors and patients as soon as the information was available to the company. There can be no justifiable excuse for any delay – especially one of three years—when a defective medical device is involved. Had the *Times* not gotten involved, we may not have known about the problems, even at this writing. Guidant is one of the largest makers of medical devices, with $3.8 billion in sales last year, almost half coming from implantable defibrillators.

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

X. BUSINESS LITIGATION

Verdict In Perelman Case Against Morgan Stanley

The suit filed by Ronald Perelman, the 1980s corporate raider, against Morgan Stanley has resulted in a massive verdict against the investment bank. The suit, claiming fraudulent conduct by the investment banks, was tried and resulted in a most interesting verdict. In 1998, Mr. Perelman decided to sell his stake in Coleman, Inc., the camping gear maker, to Sunbeam. He claimed that in 1997, Morgan Stanley suggested he do the deal with Sunbeam. Perelman contended that he saw the firm's stamp of approval on the appliance maker as being very significant. In trial, the wealthy plaintiff testified that the Morgan Stanley firm prided itself on being of the highest integrity, quality, and character. Perelman said he never expected Morgan Stanley to lie to him and said further that Morgan Stanley hid from him and other investors Sunbeam's accounting problems in pursuit of big investment-banking fees. Not long after Mr. Perel-

man sold his stake in Coleman for approximately $1.5 billion dollars, including $680,000 in stock, Sunbeam became engulfed in an accounting scandal, driving down the value of his stock.

On May 16th the jury returned a verdict in Perelman's favor in the amount of $604.3 million in compensatory damages. The jury then considered whether to award punitive damages and in a subsequent verdict awarded $850,000 in punitive damages.

The claim by Mr. Perelman involved a critical issue on Wall Street today: what is the responsibility of an investment banker in identifying problems at a client, and to whom is the underwriter responsible? This case will be appealed and perhaps a more clear picture will emerge. Based on what I have learned, the jury's verdict appears to be a good one. We must continue to hope that one day average investors can have access to a jury trial when they are mistreated rather than being restricted to arbitration. An interesting development in the Perelman suit involved a default judgment entered by the trial judge on liability. There had been an abuse of the discovery process and the defendant paid for it big time. As a result, the jury only had to determine whether the wrongdoing "caused" Perelman to lose money, and if so, how much. The jury obviously, did just that—returning a verdict for both compensatory and punitive damages. We will watch the appeal in this case with interest.

What I find most interesting—in addition to the judge's ruling and the amounts awarded—is that when a person who is a billionaire has a problem with an investment bank, such as Morgan Stanley, he is able to take his case to a jury to have the differences with his banker resolved. When an average investor buys a stock or is misled by a broker, however, that investor must go through an expensive arbitration procedure that is in part financed by the brokerage industry. That person can't get a trial before a jury of his peers. For some reason, that just doesn't seem right.

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

Doctors Settle Their Claims For $80 Million

Health Net Inc. and Prudential Insurance Co. of America have agreed to pay more than $80 million to settle claims that they routinely skimped on payments to more than 700,000 doctors. Health Net will contribute $60 million to pay claims from doctors and for legal fees. The company will also create a better definition of "medical necessity" for procedures that doctors perform and a streamlined system for physician complaints and payments as a part of the settlement. Prudential will contribute $22.2 million to pay for efforts to monitor and improve compliance by health maintenance organizations.

The doctors allege in their lawsuit that the HMOs conspired from 1990 to 2002 to program their computers to systematically underpay doctors for their services. Health Net and Prudential were two of eight original defendants. Aetna and Cigna have already settled. The doctors will continue to pursue their claims against Anthem, Coventry, United Health and Wellpoint, the companies that haven't settled so far, and are very likely to prevail.

Source: *Associated Press* and *Forbes News*

WorldCom Litigation Update

The total WorldCom class action settlement has now reached approximately $6.1 billion. The remaining defendant Arthur Andersen, WorldCom's former accounting firm, settled recently for $65 million during trial. According to court documents, the settlement funds from each defendant will be allocated based upon liability to each class of investor. The vast majority of settlement funds appear to be earmarked for investors in the May 2000 and May 2001 bond offerings. Despite the record size of the settlement, shareholders of the roughly 3 billion shares of WorldCom will recoup little of the money they lost.

At press time, the Securities and Exchange Commission was preparing to disburse its WorldCom Victim Trust Fund to investors who bought WorldCom after April 29, 1999 and still held it as of June 25, 2002. The fund, consisting of $500 million in cash and 10 million shares of common stock of reorganized MCI, Inc, was obtained by the SEC as a result of its enforcement action against WorldCom. It should be noted that the deadline for investors to file Proof of Claims Forms to the SEC is the 25th of this month. Investors can obtain the forms at one of these websites: www.worldcomvictimtrust.com, www.mci.com or www.sec.gov.

Anderson has been involved in a series of accounting scandals including WorldCom, Enron Corp. and Global Crossing Ltd. Andersen, based in Chicago, is now a shell of its former self. The firm had 24,000 employees before the Enron scandal broke and now has only about 200. The fate of Anderson is a good example of what can happen to an audit firm when it allows greed to cloud its vision. There is no way for an accounting firm to be a real auditor and a highly paid consultant for the company being audited at the same time. The conflict is obvious.

Adelphia To Pay $715 Million In Fraud Probe

Bankrupt Adelphia Communications Corp. has agreed to pay the government $715 million to settle a federal fraud investigation. Adelphia will deposit the money in a fund that the government will use to compensate investors hurt by the fraud, making the settlement one of the largest of its kind. As part of the settlement, members of the Rigas family, the company's

founders, have agreed to forfeit more than 95% of their assets. Adelphia, the nation's fifth-largest cable television provider, filed for bankruptcy after founder John W. Rigas and others were accused of using the company as their "private piggy bank" and cheating investors out of billions of dollars. Rigas and other officers were convicted of conspiracy, bank fraud, and securities fraud last year. Adelphia is seeking $3.2 billion from the Rigas family. The Justice Department had been seeking $2.5 billion in damages from the family. Time Warner Inc. and Comcast Corp., the two largest cable TV companies in the country reached an agreement to buy Adelphia's assets, a deal valued at $17.6 billion in cash and stock.

Source: *Associated Press*

Dynegy To Pay $468 Million To Settle Shareholder Lawsuit

Dynegy Inc. has agreed to pay $468 million in cash and stock to settle a shareholder lawsuit that accused it of misrepresenting its financial results and violating securities laws through a secret 2001 transaction. The company also agreed to let the lead plaintiff in the class action litigation, the University of California regents, pick two new directors for Dynegy's board. The settlement caps a three-year effort by Dynegy to settle claims stemming from a group of transactions called "Project Alpha," which involved a $300 million loan from a syndicate led by Citigroup Inc. that was disguised as a five-year natural-gas contract. The transaction artificially boosted cash flow at Dynegy and created nearly $79 million in tax breaks that flowed to the bottom line as profits.

Dynegy's stock was trading for around $28 a share in April 2002, before details about Project Alpha were published in *The Wall Street Journal*. By late July 2002, the shares were selling for less than a dollar. This issue to be decided by a jury would be to determine what part of the share loss stemmed from company actions and what portion was caused by larger market forces. Dynegy continues to operate a power-generation business and a natural gas business, but has shed other enterprises, including an electric utility, an energy trading business, and a telecommunications business. An article in *The Wall Street Journal* had raised questions about the company's performance in view of a gap between its cash flow and its earnings. Liability insurance carriers for Dynegy will cover $150 million of the University of California settlement. Dynegy will pay $250 million in cash, and the remaining $68 million will be in the form of Dynegy's Class A common stock issuance. The company will take a $155 million after-tax charge in the first quarter. In September 2002, Dynegy paid $3 million to the federal government to settle civil charges brought by the Securities and Exchange Commission that focused on Project Alpha, whose profit Dynegy was forced to reverse.

Source: *The Wall Street Journal*

Steel Companies Sue Suppliers

Two steel companies have filed suit against their raw-material suppliers in separate suits, alleging the suppliers jacked up prices and refused shipments on hundreds of thousands of tons of critical steel making ingredients to take advantage of the commodity boom. One of the companies, Wheeling-Pittsburgh Steel Corporation, filed suit in West Virginia against a subsidiary of Massey Energy Company, a Richmond, Virginia coal company, alleging that the company breached a long-term metallurgical-coal supply agreement by not shipping contracted amounts and forcing the company to buy the product on the spot market at higher prices. Wheeling-Pittsburgh Steel says it sustained millions in dollars of damages to its business and dramatically increased the cost of their coke-oven repair program.

Separately, Mittal Steel Company's International Steel Group filed suit in Pennsylvania against coke supplier Shenco Limited. The International Steel Group has claimed that Shenco breached a coke supply contract valued at more than $100 million for 730 tons of coke that were supposed to be supplied during 2004 and 2005 to its steel plant in Cleveland. There is a dispute over whether a contract was ever entered into. International Steel Group claims that a legally binding agreement was formed between ISG and Shenco in 2003, when it signed and faxed an e-mail offer from Shenco to sell coke for $138 per ton. However, Shenco claims it did not pick up a copy of the fax until after it got a better offer from A. K. Steel Holding Corp. for $145 per ton. As a result, Shenco sold the material to A. K. Steel instead. ISG claims it was forced to buy coke on the spot market at higher prices, leading to damages between $5 million and $20 million dollars.

Source: *Wall Street Journal*

Farmers Insurance Ordered To Pay $52.5 Million In Suit

A federal judge has told Farmers Insurance Group Inc., the third-largest U.S. home and auto insurer, to pay $52.5 million to claims adjusters who say they were denied overtime pay. U.S. District Judge Robert E. Jones in Portland, Ore., ruled that Farmers, a unit of **Zurich Financial Services** of Zurich, Switzerland, must pay damages averaging about $50,000 to each of the 1,039 adjusters in seven states. This case arose out of a California lawsuit in which Farmers agreed in September to pay about $200 million to settle claims that it denied overtime to more than 2,000 workers. After success in that case, workers filed similar suits in various states, which were consolidated in the Portland court. Farmers contended that the adjusters were exempt from overtime laws on the

basis that they were administrative employees, and the adjusters claimed they were white-collar production workers.

Farmers says the damages phase of the case was a "cooperative effort between the parties" to calculate the amount of overtime due. The company is going to appeal Judge Jones' determination last year that Farmers was legally responsible. After trial, Judge Jones ruled that under federal and state laws, insurance adjusters who handle real estate and auto damages must be paid overtime, while adjusters who process personal injury claims are exempt from overtime pay. The ruling, which covers unpaid overtime from 1999 to July 2004, involves adjusters in Colorado, Illinois, Washington, Michigan, Minnesota, New Mexico and Oregon.

Source: *Bloomberg News*

AT&T And Comcast To Settle At Home Corp. Claims

AT&T Corp. and Comcast Corp. will jointly pay $340 million to settle claims related to the bankruptcy of At Home Corp., an Internet access company previously controlled by AT&T. The agreement calls for $340 million to be paid to a bondholders liquidating trust that was pursuing claims on behalf of the At Home estate. Comcast, as part of the terms of its 2002 purchase of AT&T's broadband assets, will pay $170 million of the settlement. In addition, both companies will relinquish claims to about $60 million held in reserve by the At Home estate, bringing bondholders a total of $400 million.

AT&T bought a controlling stake in At Home Corp., or Excite@home, in 2000, before the high-flying Internet company crumbled under a cash crunch. Holders of At Home bonds filed the lawsuit against AT&T in 2002, alleging the phone company breached its fiduciary duties related to its designees to the At Home board, At Home's bankruptcy claims, and AT&T's attempt to dispose of some of At Home's assets. The bondholders also filed a patent infringement claim relating to AT&T's broadband distribution and high-speed Internet backbone networks and equipment. The settlement, subject to bankruptcy court approval, clears AT&T of all claims filed on behalf of the trust, the patent infringement case, and other claims filed against AT&T and AT&T Broadband in the bankruptcy court. The At Home bondholders still have claims outstanding against Comcast and **Cox Communications Inc.**, which also held a stake in the company.

Source: *Dow Jones Newswire*

Morgan Stanley Allegedly Failed To Disclose Key Documents

The Perelman case, referred to above, seems to have had another effect that relates to Morgan Stanley. A class action lawsuit has been filed in Florida against the investment bank seeking damages for the firm's failing to provide clients who brought claims against them with evidence that may have been relevant in hundreds of past arbitration cases. The suit comes in the wake of Morgan Stanley's recent acknowledgement that it has found electronic tapes that potentially could contain documents that would have been of interest to plaintiffs who claim they received faulty stock research and investment advice from Morgan Stanley. The suit also seeks to reopen cases that the New York Stock Exchange and NASD arbitration panels have ruled on regarding the investment bank since 1999. Morgan Stanley has said it recently discovered the potential evidence as it reviewed its e-mail retention policies as part of the Perelman fraud suit.

Many lawyers who represent investors have long suspected that Morgan Stanley was not being forthcoming with disclosures. It is alleged by the plaintiffs in this lawsuit that "Morgan Stanley's actions demonstrate a history of discovery abuse preventing plaintiffs from obtaining a full and fair hearing." The arbitration process makes it very easy for a corporate defendant to hide documents that would be easily accessible in a civil lawsuit filed in either a state or federal court. Frankly, I am not surprised that Morgan Stanley had to turn their internal documents over in the Perelman suit. But, it took a judge to get all of it, as pointed out above. That would never have happened in an arbitration proceeding.

H&R Block Settles Suit Targeting Loan Program

H&R Block Inc. has reached a tentative settlement in a class action lawsuit over its tax-refund loans. The nation's largest tax preparer and its banking partner, HSBC Taxpayer Financial Services Inc., were accused of illegally gouging customers by providing "refund anticipation loans" at interest rates frequently exceeding 100%. The lawsuit was over a license fee paid to H&R Block for facilitating the loans. The license fee should have been disclosed, but the company and the bank didn't disclose it. They claimed it was because it did not affect the cost of the loan or the cost of the tax-preparation service. The fee was disclosed beginning in 1997 and was discontinued in 2003. The proposed settlement was filed in an action pending in the U.S. District Court for the Northern District of Illinois. It would cover more than 28 million customers involving more than 55 million transactions.

The settlement, consisting of $110 million cash and $250 million in coupons, would go to class members who provide a "timely proof of claim." The settlement, if approved, would end all class action lawsuits related to the loans that were filed against the company. The coupons, worth $6 each, could be used for various H&R

Block tax preparation services over the next three years. Class members will also receive a cash settlement after plaintiffs' attorney fees are awarded by the judge, with the amount dependent on how many class members file a claim. H&R Block would record an after-tax charge of about $38 million. The proposed settlement must be approved by a federal district judge in Chicago. Interestingly, this same judge rejected an earlier proposed settlement by H&R Block in 2003.

Under the refund anticipation loan program, customers owed a tax refund could receive most of the money in two to three business days by paying a fee to file the return electronically and a loan-processing fee. The loans victimize low-income households, immigrants, and financially unsophisticated taxpayers who aren't adequately informed about the high interest rates. The settlement provides for "disclosure guidelines" to help customers understand tax-refund options. It will be interesting to see whether the judge approves this settlement.

Source: *Associated Press*

Insurance Companies Sue Paxil Maker GlaxoSmithKline Over Generics

Blue Cross and Blue Shield of Minnesota and 18 other insurers in Minnesota are suing GlaxoSmithKline, alleging manipulation of the federal patent system to keep cheaper generic alternatives to its anti-depressant Paxil off the market. The lawsuit, filed last month in U.S. District Court in Minneapolis, alleges that GlaxoSmithKline violated federal and state antitrust laws and fraud laws and engaged in deceptive trade practices. I understand that each insurer will review its claims data to determine how much money they are due from GlaxoSmithKline. Blue Cross did note that a generic equivalent to Paxil came onto the marketplace in late 2003 and a month's supply sold for $63. The insurer said a month's supply of Paxil at that time was $93. The lawsuit claims that generics could have been available as early as 1998 if GlaxoSmithKline hadn't taken illegal actions that allowed it to maintain a monopoly for Paxil.

According to the lawsuit, GlaxoSmithKline claimed to hold patents on scientific procedures that already were in the public domain and listed invalid patents with the Food and Drug Administration that kept other pharmaceutical manufacturers from making generic equivalents. It is also alleged that GlaxoSmithKline "harassed" other manufacturers by filing frivolous lawsuits. Those lawsuits prevented manufacturers from marketing a generic to Paxil and caused a federal law to be invoked that gave GlaxoSmithKline an automatic 30-month extension on its patents.

Source: *Associated Press*

Utility's Damage Award In Fraud Case Limited

A federal court jury in Decatur, Alabama, returned a $33.5 million verdict in a case brought by Huntsville utilities against ProLiance Energy Corp. However, U.S. District Judge Virginia E. Hopkins turned down Huntsville Utilities' request to triple the $8.2 million award for compensatory damages against the Indiana-based natural gas provider. The verdict included $25 million in punitive damages against ProLiance in the fraud case. The city-owned utility had sued ProLiance in Madison County Circuit Court in May 2002, accusing it of breach of contract, negligence and making false representations about cheap gas to win the utility's business. Huntsville Utilities sought to recover about $10 million in overbillings and lost gas reserves. The case was removed to federal court by the defendant. After the removal, Huntsville Utilities amended its complaint, claiming ProLiance violated the federal Racketeer Influenced and Corrupt Organizations Act (RICO). Under RICO, the utility argued, it should be entitled to triple damages. Judge Hopkins denied the utility's claim for triple damages because a portion of the $8.2 million verdict includes damages that were not sustained under RICO. Those damages arose out of the utility's claim of intentional interference with contractual or business relations. The judge ruled that the court had no authority to triple the damages since they weren't related to the RICO violation.

There were other defendants in this case. The ProLiance salesman, who was a central figure in the case, was ordered to pay Huntsville Utilities $35,000 in compensatory damages and $165,0000 in punitive damages. The jury also ordered a ProLiance lawyer to pay $25,000 in compensatory damages and $10,000 in punitive damages. Judge Hopkins did order the salesman to pay triple his compensatory damages, because all of the allegations against him did arise under RICO. Since the lawyer wasn't named in the RICO action, he was not ordered to pay triple damages. My lawschool classmate, Gary Huckaby, was one of the lawyers representing the plaintiff in this case and obviously did a good job.

Source: *The Huntsville Times*

XI. INSURANCE AND FINANCE UPDATE

Report By State Department Of Insurance

I have contended for years that the funding and staffing for the Alabama Insurance Department should be significantly increased. If that ever happens, it would allow the Department to do a better job of regulating the insurance companies that do business in Alabama. There are some very good, dedicated employees in the Insurance Department who do an outstanding

job. They could do even better with additional staffing and funds. These folks simply need help.

On April 18th Commissioner Walter A. Bell filed the department's quarterly report with the Alabama Legislature. This gives us an indication of what the Department has been doing. During the months of January 2005 through March 2005 the Alabama Department of Insurance had the following activity:

- The Department investigated 2,874 consumer complaints
- There were 1,893 consumer inquiries to the Department concerning companies doing business in Alabama
- Disciplinary actions taken against insurance agents were as follows:
    - Orders placing agents on probation – 43;
    - Continuing education orders for agents – 49; and
    - Cease and desist orders issued – 4.
- The following actions were taken against companies:
    - Orders to show cause – 20;
    - Orders of suspension – 9; and
    - Other agent and company orders – 23.

FBI Probe Of Insurance Firms May Be Expanded

We have learned that the Federal Bureau of Investigation's wide-ranging inquiry into the insurance industry may now be extended to banking and other financial sectors. This probe was prompted by the accounting scandal at American International Group Inc., which has shaken the entire insurance industry. The FBI has assigned between 50 and 75 agents to the probe within its Financial Crimes Section. It is pretty evident that the vast number of problems at AIG has caused the FBI to widen its net and get involved in a much larger scope. As we know, AIG is under investigation by the New York attorney general, the Securities and Exchange Commission (SEC), the Justice Department and the New York Insurance Department. The inquiry is examining whether the AIG used complex insurance products and offshore affiliates, thus artificially enhancing its financial results, to mislead investors.

I don't expect this new development to end quickly. It will likely be a long and drawn-out affair. The FBI has been heavily involved in the corporate fraud crackdown, working with the SEC and other federal and state agencies, and the public has been shocked at how widespread the corporate fraud actually is. Currently, the FBI Financial Crimes Section has 405 corporate fraud cases open. It is unknown how many of those relate to the insurance industry. Interestingly, the 405 cases represent a doubling of the number of pending cases at the end of fiscal year 2003. In recent years, the SEC, which has civil authority, has begun referring more cases to criminal prosecutors in recent years as part of a broader effort to crack down on corporate fraud and levy stiffer penalties. The American public is demanding that corporate criminals be treated like all other criminals. When those running the show in Corporate America come to realize that "crime doesn't pay," and that "corporate crime" is still a crime, it will be good news for our nation's economic future.

Source: *The Wall Street Journal*

Doctors Accuse Insurance Companies Of Fraud, Extortion and Collusion

Recently, about 2000 physicians in Kansas City, Missouri, filed several class action lawsuits charging insurance providers with extortion, fraud and collusion. In the lawsuits, doctors allege the insurance providers are conspiring together with elaborate schemes to make it difficult to care for patients, such as constantly rejecting medical claims. Among the insurance companies involved in these lawsuits are Humana and Blue Cross Blue Shield. These lawsuits were brought on in large part because of the insurance companies' denial of claims on the basis that the treatments prescribed by the physicians were not "medically necessary."

The doctors who are involved in these lawsuits say they are fed up with the insurance companies "practicing medicine." These doctors feel that physicians—not insurance companies—should determine what treatment is or is not medically necessary for their patients. I have often wondered why the medical community in every state wasn't taking a strong stand against "bean-counters" working for insurance companies being allowed to take over much of the practice of medicine.

It is most significant that in their lawsuit, the doctors allege the insurance companies "are obstructing care by putting profits above patient health." Studies show that insurance companies have doubled profits in just four years. Dr. William Soper, with Mid-America Medical Affiliates, made this interesting observation: "We have a barrier between doctors and patients, and it's the insurance companies." That is a real problem for both doctors and their patients. It is high time for the doctors to stand up and be counted on this most important issue.

Source: *The Kansas City Channel*

ERISA Statutes Used By Insurance Companies To Increase Corporate Profits

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C § 1001, et. seq., was enacted by Congress in 1974 to protect employees from improper interference with their retirement and/or employment benefit plans by their employers. The ERISA statutes are federal statutes that provide for specific penalties for any improper interference with an employee's retirement and/or benefit plans. These

statutes preempt all other penalties and/or remedies available to an employee under state law. But, the penalties and remedies available to an employee under the ERISA statutes are not punitive in nature and do not serve as a deterrent for an employer from continuing the improper conduct complained of by the employee. Over the years, the ERISA statutes' application has been broadened by federal courts and applied not only to employers' improper conduct, but also to improper conduct by outside insurance companies that related to an employer sponsored insurance benefit plan purchased by an employee. However, this broadened application by federal courts has not served as a benefit to America's employees as was intended by Congress, but has instead actually served as a detriment because of its limitations of available penalties and liabilities. Insurance companies are well aware of their limited exposure to liability under the ERISA statutes and have taken advantage of these limitations in an effort to increase corporate profits. Our firm has uncovered a scheme employed by a particular insurance company under which it has initiated efforts to have all employee insurance policies fall under the ERISA statutes so it could deny claims for benefits to save the insurance company money and increase corporate profits. The following is directly from the insurance company's internal memorandum sent to its claim management group:

A task force has recently been established to promote the identification of policies covered by ERISA and to initiate active measures to get new and existing policies covered by ERISA. The advantages of ERISA coverages in litigious situations are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact on [this insurance company] by having policies covered by ERISA could be significant. As an example, [we have] identified 12 claim situations where we settled for $7.8 million in the aggregate. If these 12 cases had been covered by ERISA, our liability would have been between zero and $0.5 million.

In order to take advantage of ERISA protection, we need to be diligent and thorough in determining whether a policy is covered. Accordingly, I have attached a rough draft of questions that should be asked in our claim investigation process. I recommend that it be used for all claims. The key for determining the applicability of ERISA is whether or not the employer 'sponsors' or 'endorses' the plan. If the employer pays the premium, the policy would usually, but not always, be considered to be governed by ERISA. Salary allotment or payroll deduction arrangements, by themselves, do not necessarily mean that a policy is subject to ERISA. While our objective is to pay all valid claims and deny all invalid claims, there are gray areas, and ERISA applicability may influence our course of action.

Another requirement needed in order to take advantage of the projection offered by ERISA, is to establish a formal appeal process for ERISA situations. When we deny a claim, we must include language in our letter that informs the claimant of the right to appeal our decision within 60 days. I have attached a copy of sample language. The appeal must be in writing and should be reviewed by a panel specifically established to review ERISA appeals. I recommend that the panel be composed of Chris Kinback, Bob Parsk, Becky Absher, Tom Timpanaro and me.

We will be modifying the salary allotment agreement used at the point of sale to include endorsement language.

I am interested in any comment or feedback you may have on this issue.

As you can see from this internal memorandum, insurance companies view ERISA as an asset and a way to increase corporate profits, not as protection for employees as Congress originally intended when it enacted this legislation back in 1974. The ERISA statutes need to either be amended to provide punitive damage liability exposure to insurance companies that wrongfully deny claims for benefits, or the courts need to more narrowly construe ERISA applicability. Insurance companies should not be allowed to use ERISA as a tool to hurt folks who were supposed to be protected when Congress enacted the legislation.

186 Insurers Still Have 57,830 Claims Open From Storms In Florida

Kevin McCarty, Florida Office of Insurance Regulation Commissioner, reported to the Florida Cabinet that 186 insurers have reported they still have 57,830 claims open. This is down from more than 140,000 open storm claims in April. To spur action on settling these claims, the Commissioner brought a rule before Governor Jeb Bush and the Cabinet requiring insurance companies to settle all outstanding claims by April 18th with a reporting deadline of April 28th. That appears to have had a good effect. The State Commission is now trying to get the 57,830 remaining claims resolved.

Florida Legislature Takes A Stand

Anybody who has kept up with the handling of insurance claims in coastal countries in Florida and Alabama knows that insurance companies

haven't done their job. The Florida Legislature passed SB 1486, which will make major changes in how hurricane claims will be handled, starting with the next storm. Among the key changes brought about by the legislation are the following:

- Consumers will get cash up front for their damages. Insurers will no longer be allowed to withhold part of the check until repairs are complete.
- Insurers won an exemption from paying policy limits when flooding or storm surge—normally covered under federal flood insurance—contributes to the destruction of a home. Hundreds of 2004 hurricane victims with current claims are protected from the exemption. They'll have to continue to fight for those contested payments in court, a venue that includes class action lawsuits against four of Florida's largest insurers.
- Policy content changes including large-type warnings about the flood gap, itemized lists of what's covered, policy discounts, and the dollar value of their hurricane deductible.
- A rate cap on the state-sponsored insurer of last resort, Citizens Property Insurance, was removed. So was a provision requiring insurers pay uncontested claims in 30 days.
- A checklist to explain clearly what's covered and what's not in their insurance policies.
- A low-interest loan program to help pay for retrofitting property to meet stronger building codes.
- More choices for hurricane deductibles.

Policyholders are promised they can still seek policy limits if they prove wind would have destroyed their homes even without flood. Insurers are guaranteed that when consumers do that, they don't collect more than it costs to rebuild. It also means the insurance industry will see changes to the Florida Hurricane Catastrophe Fund, from which insurance companies now buy coverage from this fund to help them pay claims after a hurricane. In the future, companies will now be able to draw from the fund for smaller storms that resulted in $1 billion or more in losses, provided the two worst storms of the season caused at least $4.5 billion apiece in damage. The new law has been criticized by the insurance industry. That probably means it will be fair to policyholders who obviously need help with storm claims.

Source: *The Insurance Journal*

Jury Finds Against Health Insurer In Louisiana

A health insurance company has been ordered to pay a Louisiana woman more than $2 million for delaying the discovery of a spinal tumor. Christaine Hymel, of Mandeville, Louisiana, had to delay an MRI for three months to raise part of the $4,000 fee on her own after Blue Cross Blue Shield of Louisiana refused to pay for the test. The delay allowed a previously undetected spinal tumor to grow to a point that left the lady debilitated and required immediate surgery. Only after extensive physical therapy will she be able to walk again, although still suffering nerve damage and irreparable numbness from the chest down.

Blue Cross will have to pay Ms. Hymel $2 million for mental anguish and loss of enjoyment of life, $50,000 for pain and suffering, $69,830 for past medical expenses, and $15,000 for future medical expenses. The company also must pay $101,600 for her legal fees. The verdict is not subject to the state's $500,000 cap on malpractice awards. During the trial, Blue Cross alleged that Ms. Hymel misrepresented her medical history, deleting references to leg and back pain in her application for coverage. Blue Cross had refused to pay on the grounds that back pain and numbness that Ms. Hymel suffered was a pre-existing condition. Ms. Hymel said she did not go to court for the money, stating: "It's more about doing it for the next set of people that are going to be coming through and fighting the insurance company, just to show them that what they did was wrong."

Source: *Insurance Journal*

Jury Reaches Partial Verdict In Executive Life

Last month, a federal judge reported that a jury has voted on seven of eight verdict forms in a case against a group of French investors in connection with the illegal takeover of failed insurer Executive Life. In 1999, the California Department of Insurance sued the French investors, claiming they had conspired all along to effectively give Credit Lyonnais, then owned by the French government, control over all of Executive Life's assets, thereby violating California law at the time prohibiting foreign governments from owning insurers in the state. The lawsuit also accused French billionaire Francois Pinault and his holding company, Artemis SA, of later buying Executive Life's insurance business and some of the bonds as part of a scheme to help Credit Lyonnais and the other investors shield themselves from an investigation by U.S. authorities.

Most of the original parties named as defendants, including Credit Lyonnais, reached a $600 million out of court settlement in February. MAAF Assurances declined to offer a defense in the case. Pinault and his company were the remaining defendants. Policyholders of the former Executive Life Insurance Company have to be pleased with the result so far. According to reports, the jury "found that Artemis, Credit Lyonnais and others engaged in a conspiracy to fraudulently obtain assets from the Executive Life estate." To date, lawyers representing the California Department of Insurance have recov-

ered $715 million in settlements with Credit Lyonnais, CDR Enterprises, Aurora, and others. The French investors who bought Executive Life and its assets did so illegally by hiding the true controlling ownership of their group. No company should be allowed to profit from fraud regardless of who they are or where they are located.

Source: *The Insurance Journal*

XII. PREDATORY LENDING UPDATE

Payday Loans Are A Public Menace

Payday loans are among the fastest growing financial services in America. This is now a $40 billion-a-year industry. Ten years ago payday loans didn't exist, but today there are more payday stores in America than there are McDonald's restaurants. Payday lenders make millions of loans each year, but for most all customers, the fees end up costing more than the actual loan. I have great difficulty in comprehending how our political lenders allow the payday lenders, who are the worst of the predatory lenders, to operate as they do.

The FDIC, the federal agency that regulates the banking industry, recently tightened its guidelines to warn banks that essentially they shouldn't give a consumer more than six payday loans a year. A few states have even tried to close the payday stores down, but the lenders have managed to stay open and operate full bore. North Carolina, for example, has a consumer protection law limiting interest on small loans to 36%, but payday stores there still manage to charge annual fees of 400% without breaking the law. Alabama's laws on payday lenders are so weak that new payday loan outlets are popping up all over the place. At one time, Florida lenders were moving over the state line to get the benefit of Alabama law. I believe the payday lenders are a public menace and should be subject to strong controls.

XIII. PREMISES LIABILITY UPDATE

Lawsuit Claims Plant Was Poorly Staffed

A lawsuit has been filed arising out of the deadly blast at the BP Texas City refinery. It is alleged that the disaster was caused partly by understaffing in a critical control room. It is also claimed that other workers on duty in the area that exploded were either inexperienced, undertrained, or not adequately doing their jobs. The supervisor of the refinery's isomerization unit, which was being restarted at the time of the blast, wasn't even at the unit "during a critical time period" during the start-up, the lawsuit alleges. It also claims that a qualified substitute was not left in charge, other key operators were allowed to leave the refinery at the time, and only one board operator was assigned to the control room.

The U.S. Chemical Safety and Hazard Investigation Board (CSB) is looking closely at staffing issues. The start-up of a unit is considered one of the most dangerous times in refinery operations. Fifteen people died and more than 100 were injured in the March 23rd explosion. There appears to have been a systematic breakdown in communications, operator training, and management supervision of the start-up procedures.

Dozens of injured workers and relatives of those killed are suing the refinery operator in a Texas state court. Workers had just finished eating lunch and were getting back to work when several noticed a flammable liquid and vapors spewing from a vent stack on the isomerization unit's raffinate splitter. The splitter makes products used to boost the octane of gasoline. Witnesses said the liquid and vapors gathered on the ground and were ignited by a vehicle or other source, causing a series of blasts heard and felt up to five miles away. CSB officials have said one of the blasts happened underneath a doublewide construction trailer located within 150 feet of the isomerization unit. Most of those killed were attending a meeting or working in the trailer.

The employees didn't know the start-up was taking place and heard no alarms as the liquid was accumulating. They have questioned why the trailer was placed so close to the isomerization unit, as well as why they and other non-essential workers were allowed to be at the site during the start-up. In addition, industry experts and others have questioned why the vent stack was not equipped with a flare system, which likely would have safely burned away the materials before they overflowed. Such flare systems are common in the industry, and the CSB has said repeatedly that the vent stack is a major focus of its investigation.

Source: Houston Chronicle

IX. WORKPLACE HAZARDS

Jury Awards $6 Million To Woman Allegedly Raped By Pastor

A Missouri jury has awarded a $6 million judgment to a former choir director who claimed the Methodist Church didn't protect her from a pastor who allegedly raped her seven years ago. The jury heard two weeks of testimony before returning their verdict, awarding $4 million in punitive damages. The jury, which already had awarded $2 million in compensatory damages to the lady, ruled that the West Missouri Conference of the United Methodist Church should pay punitive damages for its wrongdoing.

Several people from a United Methodist Church in Springfield had filed complaints about the pastor, who served the church from 1995 to 1998. The victim testified that she was raped on March 25, 1998. The alleged attack by the pastor took place at the church in the choir director's office. Witnesses testified that as early as 1996 they brought complaints against the pastor about inappropriate comments and sexual innuendoes to the Bishop and to a former District Superintendent, each of whom was named in the suit. The conference did not follow through with plans in March 1998 to monitor the pastor and have him undergo training regarding sexual misconduct, according to testimony. A civil lawsuit has also been filed against the pastor, who accepted a three-year suspension, then left the Methodist Church. Interestingly, this man is now a pastor of a Baptist Church in Kansas.

OSHA Fines Alabama Foundry For Safety Violations

The U.S. Labor Department's Occupational Safety and Health Administration has cited United States Pipe and Foundry Company and proposed penalties totaling $71,000 following inspections at the company's Bessemer, Alabama plant in response to a fatal accident last fall. In October, dislodged crane cables struck and killed a foundry employee. Although the company is a molten metal industry health "partner" with OSHA, the agency began a fatality investigation October 28th, and initiated plant-wide safety and health inspections on November 4th. Partnerships, in general, have proven to be an effective tool in reducing worker fatalities, injuries and illnesses. OSHA says the company focused on reducing employee exposure to noise, silica, and lead, but failed to address other serious hazards not specified in the partnership agreement. The company received two serious citations directly related to the fatality, with proposed penalties of $9,500, for failing to have a safety latch on a gantry crane hook and failing to ensure that employees used personal protective equipment, such as hard hats.

OSHA also issued 20 additional serious citations, with proposed penalties of $61,500, alleging other deficiencies:

- in gantry and overhead cranes;
- inadequate personal protective equipment and eye wash stations for employees working with corrosive materials;
- improper labeling and storage of hazardous chemicals;
- failing to provide employees with safety and health training;
- lack of fall protection; failing to protect workers from electrical hazards;
- exposing employees to injuries from unguarded machinery; and,
- not properly locking and tagging machinery to prevent start-up during maintenance or repair.

OSHA Cites 5 Companies In Fatal Accident At University Of Mississippi

The federal Occupational Safety and Health Administration has cited five contractors for a November 2004 construction accident that killed two roofers and injured two others at the University of Mississippi. OSHA has proposed penalties totaling more than $152,000 for Harvey C. Green Construction Co.; B&G Electrical Contractors Inc.; Tri-Star Mechanical Inc.; Mississippi Sheet Metal Inc.; and Steven Patrick Nance, a roofing contractor. Clyde Payne, OSHA's Jackson area director, said the companies have 15 days to contest the citations and proposed penalties before the independent Occupational Safety and Health Review Commission. The accident occurred November 11, 2004, as workers were installing a roof on Scruggs Hall. They were riding in a lift crane that toppled about 35 feet at the renovation site. The two employees who were killed died as a result of massive head trauma.

Source: *Associated Press*

Jury Verdict In Trench Cave In Case

Two men were awarded $6.2 million for injuries from a construction accident that occurred seven years ago. The men sued Konover Construction Corp., the general contractor on the project, claiming that the company failed to adopt safe procedures as the general contractor for a B.J.'s Wholesale Club located in a shopping center. The two men were injured when a trench caved in on them on October 30, 1998. A Connecticut jury awarded the two men verdicts of $3.4 million and $2.8 million respectively. One of the men was excavating a water line when a trench caved in, burying another worker. The two men who later sued jumped in to save their friend, and the trench caved in a second time, burying them. All three of the men were rescued, but the two men who tried to rescue their friend suffered permanent injuries.

Electrolux Settles Wrongful-Death Case

The family of a man who blamed his cancer on years of working at a central Illinois vacuum maker has reached a $3.25 million settlement in a wrongful-death case. The agreement ended a civil trial in the case of John Maxwell, who spent about 25 years working for The Eureka Co., which is now known as Electrolux Home Products. Mr. Maxwell died in 2001, after suffering from laryngeal cancer and leukemia that his family attributed to chemical exposure. The lawsuit claimed Eureka concealed dangerous working conditions, and chemical makers and suppli-

ers failed to adequately warn workers about health risks. The company attorneys contended that the man got cancer from smoking. I have to wonder if they really believed that considering the amount of the settlement. Eureka, which changed its name to Electrolux in 2004, produced vacuum cleaners and other products in central Illinois for more than 50 years before closing its Normal, Illinois, plant in 2000. While its company headquarters remain in Bloomington, manufacturing jobs went to Texas and Mexico.

Source: Associated Press

Smith Barney Sued For Discriminating Against Women

Four financial consultants have sued Citigroup's Smith Barney division alleging gender discrimination. Specifically, the suit alleges that Smith Barney systematically discriminates against its female employees by distributing accounts and business opportunities disproportionately to men regardless of qualifications. The plaintiffs also allege in their lawsuit that women brokers are often deprived of new business opportunities because women brokers are rarely allowed to partner with other brokers. While this case is in the early stages, it has to be considered a major problem for not only the defendant, but others in the industry.

The lawsuit, which seeks class action status, asks for injunctive relief to end gender discrimination, back pay, and an undisclosed amount of related damages. As you may know, the current litigation is not the first high profile accusation against Smith Barney in cases of this sort. The financial consulting firm was sued in 1996 by hundreds of women who alleged sex discrimination in the workplace. That suit, which included lurid and wild details of basement parties on Smith Barney's premises, was settled in 1998. I wouldn't be surprised to see Smith Barney try to resolve this case at an early date.

XV. TRANSPORTATION

Dangerous Roads Killing Folks

Every year, about 5,000 pedestrians die in traffic accidents, 17,000 people die in alcohol-related traffic accidents and 13,000 people die in speeding-related traffic accidents. More than half of the nation's accidents, are on two-lane, rural roads. According to reports, undivided rural two-lane roads—those with no median—account for two out of every five fatal accidents. This database, sorted by state, county, and road, is a summary from 1999-2003 of:

- Fatal accidents in which at least one pedestrian died. The list includes pedestrians, bicyclists, someone in a wheelchair, and others not in motor vehicles who were killed in accidents with motor vehicles.
- Drinking drivers who were involved in fatal crashes.
- Speeding drivers who were involved in fatal crashes. The list includes drivers that investigators reported as exceeding the posted speed limit, were ticketed for excess speed or racing, and also cases in which investigators noted that excess speeding was a contributing factor to a fatal accident.
- Accidents on two-lane, undivided roads.

Note that roads may be listed under different names, depending on how police reported the incidents. Also, studies caution that local investigators tend to underreport alcohol-related crashes. The U.S. Department of Transportation's National Highway Traffic Safety Administration asks the states to report each traffic fatality. Those reports are compiled into a database, the Fatality Analysis Reporting System (FARS), which is the source for these fatalities. You can learn more about FARS by going to their website at http://www-fars.nhtsa.dot.gov/.

Source: *NBC News*

The Alabama Highway Death Report

The number of deaths on Alabama highways rose 15% last year over 2003, according to preliminary reports from the state Department of Public Safety. There were 1,007 highway deaths in 2003, and reports indicate there were 1,155 fatalities on Alabama highways in 2004. State troopers report there were 362 speed-related crashes and 255 DUI-related fatalities in 2004. According to the Department of Public Safety, speed is gaining each year as a cause of highway deaths. The number of deaths caused by DUI is holding steady. Unfortunately, each year the number of speed-related deaths has increased. At one time during the 1980s, more than half the highway deaths were DUI related. According to preliminary statistics, most 2004 highway deaths in Alabama did not occur on interstates. Thirty-one percent happened on county roads, 22% on state highways, 22% on U.S. highways, and 12% on interstates. This pretty well follows the pattern in other states. The remaining victims were killed on bicycles or all-terrain vehicles. DPS officials blame the increase in highway deaths on the lack of state troopers. Clearly, that has led to excess speed being the rule rather than the exception on Alabama highways.

Source: *Associated Press*

Federal Rule On Truck And Bus Driver Training Is Very Weak

A federal rule establishing training requirements for truck and bus drivers is grossly inadequate because it doesn't require that entry-level drivers receive any training in how to operate a commercial motor vehicle. Public Citizen filed a brief on behalf of Advocates for Highway and Auto Safety in the U.S.

Court of Appeals for the District of Columbia. Public Citizen is asking the court to overturn a rule issued in May 2004 by the Federal Motor Carrier Safety Administration (FMCSA). The rule was supposed to set minimum training requirements for commercial vehicle operators, including drivers of trucks and buses. Instead of requiring that drivers have on-the-road training in such things as backing, driving in severe weather, controlling skids and passing other vehicles, the rule merely requires training in driver wellness, driver qualifications, hours of service, and whistleblower protection. Judith Lee Stone, president of Advocates for Highway and Auto Safety, stated:

> *The federal government just released preliminary highway fatality data for 2004 showing an alarming increase in truck crash deaths. More than 5,100 people died in truck crashes last year. We are suing FMCSA because it issued a driver training rule for new truck drivers that did not require any on-the-road or behind-the-wheel training. It is inconceivable that this agency would allow someone to start driving an 18-wheeler for long distances at high speeds without adequate behind-the-wheel training. The agency is playing Russian roulette with the safety of truck drivers and American families on our highways.*

Concerned about the number of truck crashes caused by inadequately trained drivers, Congress in 1991 directed the Secretary of Transportation to begin a formal process investigating the need for minimum training requirements for entry-level truck and bus drivers. The agency was to issue a rule by December 1993 or submit a report to Congress explaining why a rule was not necessary. The Federal Highway Administration's Office of Motor Carriers (now FMCSA) had previously published a model curriculum for tractor-trailer drivers requiring at least 320 hours of instruction. In another study published in 1995, the Highway Administration called the model curriculum a starting point and found that commercial vehicle drivers were not being adequately trained. In fact, it found that only 8.1% of heavy truck carriers and 18.5% of bus operators provided entry-level drivers with adequate training—statistics that indicate a need for minimum training requirements. The agency held a public hearing in 1996 on the issue, but then did nothing for seven years. In November 2002, Public Citizen, Citizens for Reliable and Safe Highways, Parents Against Tired Truckers, and Teamsters for a Democratic Union filed a petition in court seeking an order directing the government to fulfill Congress' mandate and issue a rule. As part of a settlement, the U.S. Department of Transportation agreed to issue a rule by May 31, 2004.

But, when FMCSA produced the rule on May 21, 2004, it appeared to give no consideration to the reams of information it had gathered documenting the inadequacies of driver training and the need for on-the-road training for entry-level commercial drivers. Its final rule calls for just 10 hours of training, none of it on the road. Adina Rosenbaum, the Public Citizen attorney working on the case, stated:

> *The agency seems to have ignored all the data it collected showing the great need for minimum training standards for truck and bus drivers. It is absurd that after 14 years, the rule doesn't require drivers to get behind the wheel of a truck or bus as part of their training.*

In the brief, Advocates for Highway and Auto Safety's petition was consolidated with petitions filed by the Owner-Operator Independent Drivers Association and the United Motorcoach Association. The organizations are asking the court to declare FMCSA's rule arbitrary and capricious and to order the agency to rewrite it to ensure that entry-level drivers receive the training they need to operate a large truck or bus.

Source: Public Citizen

Back-Over Deaths Are A Major Problem

Nearly 100 children under age 4 were hit and killed while walking or riding bikes on U.S. roadways last year. Almost the same number died in parking lots and driveways when relatives or family friends accidentally backed over them, but those deaths went uncounted by federal regulators. The government agency that ensures traffic safety doesn't track victims of back-over accidents, usually small children run over by family members who don't see them behind minivans and SUVs with limited rear visibility. The number of such deaths nationwide has averaged at least two a week for the past couple of years, according to a children's safety group that compiles numbers from media coverage. An unexplained spike in the incidents took place last month, according to Janette Fennell, founder of the advocacy group Kids and Cars. Fennell has registered 14 back-over deaths in the past three weeks, most involving very young children who died from their injuries: a 17-month-old Wisconsin boy backed over by his uncle during a family birthday party, a 14-month-old Texas girl backed over by her grandmother in the driveway, a 2-year-old South Carolina girl backed over by her father.

Safety advocates say there are relatively simple and inexpensive ways to solve the problem, including placing small cameras on rear bumpers. Legislation before Congress would require the government to study the issue and the auto industry to take steps to address it. Sally Greenberg of Consumers Union, which publishes *Consumer Reports* magazine, said: "This is

fixable. Every year, year in and year out, we're going to see many, many children backed over and killed unless we do something." Cases such as that of Adrianna Clemens, a 2-year-old Texas girl run over in October by her father as he backed his SUV out of the garage. Her mother, Rachel Clemens, has started a campaign to push for legislation requiring rear visibility standards in the auto industry. "We have got to save the lives of these children. It has become an epidemic and it has to be stopped," she says. A *Consumer Reports* study last year found that some vehicles have rear blind spots as deep as 50 feet, with larger trucks and vans generally worse than cars. Automakers say they are constantly working to minimize blind spots and gradually introducing technology such as sensors and rear-viewing cameras to give drivers more information, but they oppose legislation to make such steps mandatory.

Nearly 900,000 new vehicles sold in the United States last year, out of almost 17 million total, included some kind of "parking sensor" that beeps to warn of obstacles to the rear, according to Ward's Communications, an automotive statistics clearinghouse. A few 2005 models, including some by Lexus, Acura, Infiniti, Toyota and Honda, offer rear-viewing cameras with displays on the dashboard, often as standard equipment, according to Edmunds.com. As optional equipment, such cameras can cost $1,000 to $2,000. The National Highway Traffic Safety Administration (NHTSA), which compiles statistics about traffic fatalities, doesn't really know how wide the scope of the back-over problem is because there is no central repository of information about the incidents. Nevertheless, it clearly is a major problem.

A recent NHTSA study of 1998 death certificates from selected states estimated that 120 people die annually from accidental back-overs, mostly young children or the very elderly. NHTSA is preparing a regulation that would set back-up safety standards for large, commercial-sized trucks. However, NHTSA isn't prepared to require changes from the auto industry. I believe that the government should address this problem. Too many lives are at stake for further delay. If NHTSA fails to act, Congress should legislate in this area of concern.

Source: *The Washington Post*

Jury Verdict In Death Of Soldier

A Texas jury awarded $17.5 million to the family of a soldier killed in a March 2002 accident near Texarkana. Jurors learned, during the trial, that a trucker repaired a leak in an air brake hose with a toothpick and electrical tape. About 100 miles after the toothpick repair, the hose failed and the brakes locked, bringing the truck to an abrupt stop. A car driven by Lt. Matthew Giuliano slammed into the rear of the truck. The soldier later died from injuries suffered in the accident. Lt. Giuliano, 23, of Ellington, Conn., had been driving from Fort Knox, Kentucky, where he had just graduated from officer training school, to Fort Hood for his first posting as an officer. As part of a settlement to avoid an appeal of the verdict, Giuliano's family agreed to accept $1.25 million. The family accepted the smaller amount because of caps placed on jury verdicts in Texas. Celadon Trucking Services, the company that owned the truck, would have only had to pay $200,000 of the $15.5 million in punitive damages. With conduct of the sort exhibited in this case, a $200,000 cap on punitive damages is absurd. Wrongdoers should be punished, and a pat on the hand doesn't do the job. The family of a Lt. Giuliano deserve better! The jury had also awarded $2 million in compensatory damages.

Charter Airline Must Pay $27 Million

A jury has ordered a charter airline company to pay $27 million to a woman for failing to keep her ex-husband from taking her children out of the country. A Massachusetts woman sued Cincinnati-based Executive Jet Management after her ex-husband paid the company $160,000 to fly him and the couple's two children to Egypt on short notice. The plaintiff alleged that Executive Jet Management failed to maintain adequate safeguards against abductions, such as asking both parents to sign consent forms before flying children abroad. The case was heard in Connecticut because the flight took off from Bradley International Airport in August 2001. The plaintiff and her children were reunited in June 2003. Executive Jet Management will appeal the judgment. Jurors awarded $10 million for negligence and aiding custodial interference and $17 million for the 22 months the plaintiffs spent apart from her children.

The lawsuit also named the ex-husband as a defendant, but that case will be heard separately. The couple was entangled in a custody battle when the ex-husband took the children to Egypt. He later demanded millions of dollars from his ex-wife in exchange for the children's safe return. The plaintiff hired a private investigator and learned the children and their father were living on a yacht off Havana. Cuban authorities arrested the ex-husband and returned the children to their mother. This was a very interesting case and will be followed closely on appeal.

Source: *Associated Press*

Interstate Highway Crash

The parents of a 17-year-old girl killed in a motor vehicle accident in 2004 have sued the Utah Department of Transportation (UDOT), alleging its negligence caused their daughter's death.

The teenager died instantly when her car slammed into a concrete post on an Interstate highway. The parents allege in their complaint that the freeway was "in a defective, unsafe, and dangerous condition." They also claim that UDOT and its employees were negligent in the manner in which they maintained the highway in the area of the accident, permitting water to accumulate. A storm had just passed through the area before the accident, leaving standing water on the roadway, according to the Utah Highway Patrol. The decedent, who was traveling below the posted speed limit, at a speed appropriate for the conditions, drove into the standing water. This caused her to lose control of the vehicle and strike the concrete barrier in the median. In most highway construction projects, specific responsibilities are placed on private contractors. In this case the state department had that duty. However, maintenance of an area of roadway is generally the contractor's responsibility. It is extremely important to have proper drainage at highway construction sites, and in this case the responsibility to maintain the site is an issue to be determined.

Source: *Salt Lake Tribune*

Calls For Seat Belts On School Buses

I have contended for years that school buses should be required to have seat belts for children. There have been a number of recent accidents that have caused a renewed call to put seat belts on the nation's 585,000 school buses. School buses are the safest way to travel to school. Nonetheless, an average of 20 students are killed every year—five while riding the bus and 15 run over by buses while getting on or off them. The following are some of the recent bus accidents:

- Twenty-three students were injured in Montana last month.
- Two students were killed April 28th in Arlington, Virginia, when a school bus collided with a garbage truck.
- A school bus equipped with seat belts in New York City flipped April 26th. The 44 sixth-graders on board suffered minor injuries.
- A 16-year-old high school sophomore died March 29th in Ripley, Oklahoma, when a bus struck a flatbed truck. The driver of the truck also died. The bus driver faces charges of negligent homicide.

Alan Ross, president of the National Coalition for School Bus Safety told the *USA Today*: "School buses are old-fashioned, out-dated and don't give children the benefit of current safety techniques." Ross told *USA Today* that school buses should have seat belts and be redesigned so they are not so top-heavy and prone to rolling over. New York, New Jersey and Florida require new buses to have seat belts, but only New Jersey, and Florida require students to use them, which is rather difficult to understand. I believe that all states should require seat belts for school buses and require all passengers to wear them.

Source: *USA Today*

XVI. ARBITRATION UPDATE

Things You Can Do To Protect Your Legal Rights

It is now well documented that consumers don't like mandatory, binding arbitration. However, folks throughout the country are being forced to deal with this anti-consumer tool, which is used against them on a regular basis, and the results aren't good. Until the courts or legislative bodies see fit to give consumers some badly needed relief, there are some things folks can do that will give them some protection against the evils of arbitration:

- **Be aware** – Without even knowing it, you have already signed dozens of these arbitration clauses. They are everywhere….car contracts, credit card contracts, leases, loans, mortgages, nursing home admittances, building contracts, and many more.
- **Read the fine print & cross it out**– Be sure to carefully read all the provisions in a contract or service agreement. You should look for words like "dispute resolution" or "settling claims." You have the power to nullify mandatory arbitration clauses simply by crossing them out before you sign the agreements or by opting out under set procedures. In most cases, the company you are dealing will require you to agree to mandatory arbitration in order to receive services. With any luck there will be other service providers in the area that may fit your needs.
- **Shop around** – Some service providers do not require mandatory arbitration. When comparing prices and services, be sure to check their arbitration policies. Shop for consumer-friendly companies that refuse to be involved in mandatory arbitration. Don't be afraid to challenge any company that demands that you sign an arbitration agreement.
- **Read mail stuffers** – You should read thoroughly any paper that comes with your monthly statements to be sure they don't include new provisions to your contracts, including mandatory arbitration clauses.
- **Join a credit union** – Many credit unions don't put mandatory arbitration clauses in their loan or credit card contracts. Some credit unions do have mandatory arbitration clauses for other services, however, so you should read the fine print to be sure.
- **Always Ask** – When you are asked to sign any type agreement or sign for repairs or the receipt of any type

goods or services, always ask if the document contains an arbitration agreement.

- **Modify Arbitration Clauses** – Some folks have taken some interesting steps in an attempt to avoid arbitration. For example, in one case, it was typed in on the back of the consumer's check: "By endorsing and cashing this check, the payee agrees to avoid any arbitration agreement involving the payor." After the check was endorsed and cashed, there was no more arbitration agreement. In another case, the consumer wrote the company and said "we didn't agree to an arbitration agreement when we signed our loan documents and are not bound by the enclosed arbitration clause. We are hereby rescinding the arbitration agreement, but no other part of the agreement."

NASD Trying To Level Playing Field

The National Association of Securities Dealers is planning to change the way it defines a public arbitrator, making it more difficult for people with ties to Wall Street to fill that role. The NASD proposal is a rule that will exclude employees who work at companies that control or are controlled by securities firms from serving as public arbitrators. Spouses and immediate family members of these individuals also would be prohibited from serving as public arbitrators. The rule is aimed in large part at prohibiting employees of asset-management firms that are not registered with the NASD, but are controlled by a registered firm, from wearing the hat of a public arbitrator. This rule would require approval by the Securities and Exchange Commission. It has been reported in the media, and specifically in the *Wall Street Journal*, that a number of public arbitrators have long ties to Wall Street. In one instance, a public arbitrator worked for a Prudential Financial, Inc. money-management unit. This change certainly would appear to be a step in the right direction. The proposed rule change, which may not make it through the SEC, is long overdue in my opinion. It is tough enough for investors to have a panel, one-third of which is made up of a Wall Street regular. The other two certainly do not need to be controlled by brokerage firms as well.

Source: *Wall Street Journal*

XVII. NURSING HOME UPDATE

Nursing Home Shut Down After Violations Found

More than 40 residents of a Cleveland County, Oklahoma, nursing home are being relocated after numerous violations prompted regulators to shut down the facility. Among the violations at the Noble Residential Care Home were rodent droppings, urine on kitchen plates and bowls, and cockroaches "too numerous to count" crawling on a resident's clothes and beds. Noble Residential Care Home had beds for 34 residents. A separate, unlicensed building housed eight additional residents. The home was cited for numerous health and safety violations that threatened residents' welfare.

Health Department inspectors found sinks with faucet handles that didn't work; cold water in showers and bathtubs; uninvestigated allegations of a resident's personal property stolen by a staff member; and an employee who had been convicted of a misdemeanor assault-and-battery charge. One employee didn't have required criminal background checks conducted on him for two years. Because one toilet regularly clogged, residents were told not to flush toilet paper. Because of that, inspectors found a bathroom wastebasket "filled with toilet paper smeared with feces." In one bathroom, the windowsill "was covered with dust, dead bugs and empty bottles," according to a Health Department inspection. In the home's kitchen, rodent droppings and dead weevils were found on storage shelves containing open cereal boxes, sugar, pancake mix, cookies, and beans. Chew marks from rodents were found on a bag of instant gelatin. Besides cockroaches, spider webs with live spiders were observed over the hanger rack in one resident's closet.

Source: *Associated Press*

Non-Profit Nursing Homes May Provide Better Care

A University of Toronto study suggests that non-profit nursing homes in the United States generally provide better care than for-profit homes. The study examined about forty cases in which non-profit nursing homes were compared to for-profit homes during the time period of 1993 to 2002. In those comparisons it was found that non-profit homes generally had better results in the areas of use of restraints and pressure ulcers. The study indicated that residents living in for-profit nursing homes had higher rates of development of pressure ulcers, were subjected to a greater use of psychoactive medications, and were more frequently placed in physical restraints. The lead author of the study, Michael Hillmer, said "We really don't know what it is about non-profit homes that allows them to perform better…it could be as simple as them being required to put any profits back into the homes." I would caution readers, however, that there are many nursing homes out there that call themselves "non-profits," but in some cases that couldn't be farther from the truth. Many of the "non-profit" nursing homes we run into pay out huge sums of money to individuals with an ownership interest in the homes.

Sex Offenders Living In Florida Nursing Homes

There have been numerous reports of sex offenders living in nursing homes around the country. We have learned that there are currently at least nineteen registered sex offenders in Florida who are living in nursing homes. It is difficult to comprehend how convicted sex offenders could be allowed to live in facilities where a most vulnerable group, the elderly, are living. There have been numerous incidents in nursing homes in which elderly residents were raped. Some of the victims of the sex offenders who are in the Florida facilities were children.

Arkansas "Granny Cam" Bill

We have learned that the "Granny Cam" bill in the Arkansas Legislature has failed to pass. Had the bill passed, it would have made Arkansas only the third state to pass such legislation. After the Arkansas bill was introduced several changes were made, prompted by the nursing-home industry, that caused several groups to withdraw their support for the bill, including the Arkansas Advocates for Nursing Home Residents and the Arkansas AARP.

XVIII. HEALTHCARE ISSUES

Hospital Services Performed Overseas

There is a current trend affecting our economy that should be of concern to all American citizens. We are sending all sorts of jobs and services to foreign countries, and the number is increasing by leaps and bounds. This has now found its way into the medical community. I really didn't know that medical services were being sent oversees. However, hospital services are now being out-sourced to foreign countries, which probably are not widely known in this country. For example, having radiologists read images from such U.S. hospitals in such places as Hawaii, India, Australia, Switzerland, Israel and Brazil is not uncommon. The companies, and the doctors and hospitals using them, say the trend is improving care by guaranteeing that well-rested radiologists are always available, even in the middle of the night, even for the smallest hospitals and in the most rural areas. Skeptics, however, say the practice raises a host of concerns. The obvious question is: Are the radiologists qualified? There are others: Is communication as good when the radiologists are so far away? Can an overseas doctor be held accountable when something goes wrong? Is anyone ensuring that properly trained and licensed radiologists are actually doing the work? Is patient privacy being protected?

Both sides see the trend as the leading edge of a movement toward greater use of telemedicine, which is widening the spectrum of care doctors can provide from afar and enabling more outsourcing of medical services overseas. Some say teleradiology is really just the beginning and that other things such as pathology are also being outsourced. The trend has sparked a flurry of regulatory initiatives, including proposed state and federal legislation designed to ensure that doctors performing the work are properly trained and licensed, and that patients are notified whenever information about them is transmitted elsewhere, especially overseas.

Representative Edward J. Markey (D-MA) and Senator Hillary Rodham Clinton (D-NY) recently introduced legislation that would require patient consent in advance. Representative Markey says: "Patients have the right to know, and the right to say no, before their X-rays or other private health information is offshored to countries that lack strong privacy safeguards." The advent of remote radiology services was prompted by various factors, including a shortage of radiologists and rapid advances in imaging technology, which has caused a sharp increase in the number of tests. As a result, many hospital radiologists have a hard time keeping up with the demand, especially at night. In response, St. Mary's and hundreds of other hospitals and radiology practices have begun outsourcing, allowing their staff radiologists to come to work fresh each morning. But skeptics worry that remote radiology operations may be staffed with one or two U.S.-certified radiologists who approve reports prepared by less-qualified technicians, a practice known as "ghosting." "Because of the ease of moving this stuff around, the problem of being able to authenticate who is doing the work is an issue," said Robert Wise of the Joint Commission on Accreditation of Health Care Organizations, which is upgrading its standards for accrediting hospitals in response to the trend.

Source: *Washington Post*

Study Urges More Care For Lead Exposure

A recent study confirmed what our firm has known for a good while. Children who are poor often don't get the medical follow-up they need for lead exposure. Unfortunately, those at highest risk for lead poisoning are the least likely to get additional testing, a study in Michigan found. The study involved 3,682 children in the Medicaid program whose blood tests showed levels of lead that could harm mental function. Only about half the children—54%—had follow-up testing within six months, the researchers said. Follow-up screening to see whether initial blood-lead levels have changed is a key step in monitoring cases, according to lead author Dr. Alex Kemper, an assistant pediatrics professor at the University of Michigan. Treat-

ment typically follows such testing. Although the research focused on Michigan children, similar results likely would be found elsewhere. The children in the study generally live in homes built before lead-based paint was outlawed, or they live in areas near factories and other sources of lead. This puts them at risk for lead poisoning. Obviously, children who live in the suburbs or in new homes aren't at risk as a general rule.

Medicaid children with other risk factors for lead exposure—minorities and those in urban areas—were the most likely in the study not to receive follow-up testing. These children fall through the cracks for several reasons:

- Parents might not always be notified when their children have higher lead levels or they may not know they should seek additional screening.
- Some doctors might not pursue follow-up testing for low-income patients, figuring that remedies, including paint removal, might be impossible for patients with few resources.

Dr. Bruce Lanphear, a researcher at Cincinnati Children's Hospital, who wrote an editorial accompanying the study in the *Journal of the American Medical Association* last month, stated: "There's probably enough blame to go around." Lead can interfere with development of the central nervous system and severe lead poisoning can cause seizures and even death. Lead-linked declines in mental functioning may be permanent. We should treat lead-poisoning as the serious threat that it is and get to work solving the problem. Lead abatement has been delayed for a number of reasons. Even in more affluent areas, public health officials lack resources or legal muscle for lead abatement.

Source: *Associated Press*

XIX. ENVIRONMENTAL CONCERNS

Lead Cleanup In Anniston Area Could Cost Up To $100 Million

The Environmental Protection Agency has sent a proposed settlement agreement to 11 companies responsible for lead contamination in the Anniston area, including parts of Oxford and Hobson City. Franklin Hill, deputy director of the waste management division for EPA Region IV, estimated the agreement could address more than 14,000 properties and cost the companies up to $100 million over a span of at least three years. The EPA has already spent $11 million on lead cleanup in Anniston, a portion of which would be recovered by the agreement. The companies involved either own or formerly owned one of 23 industrial operations in Anniston. The parties identified have been asked to commit to the cleanup as a group instead of singling out liabilities. The companies, which will decide amongst themselves how to divide the costs and manage the cleanup, have formed the Foothills Community Partnership to streamline the process. I expect a number of civil lawsuits to be filed, primarily for property damages. There is presently pending a class action lawsuit seeking damages for property damages. There will likely be individual cases filed for claims based on damages to property. Personal injury lawsuits will be much more difficult, as was the case in the PCB cases.

Source: *Associated Press*

A Hot Spot For Mercury Pollution

An **internal** Environmental Protection Agency report estimates the southeastern area of the country alone could reap up to $2 billion a year in benefits from reducing mercury pollution—40 times more than the $50 million in benefits the agency projected **publicly** for the entire nation. The report shows the Bush Administration sought to minimize the benefits of reducing mercury pollution in order to justify not requiring power plant owners to buy the most effective technology for lowering mercury emissions. A separate EPA-commissioned study released in February by the Harvard Center for Risk Analysis estimated there could be $5 billion a year in public health benefits from a 62.5% cut in the mercury released by power plants. That study too was excluded from consideration in the new rule EPA released in March. The report on Southeast benefits, a copy of which was obtained by the *Associated Press*, looked at reducing mercury concentrations in marine fish and shellfish. While it didn't estimate the cost of achieving this reduction, it did say that reducing national mercury emissions by 30% to 100% would produce benefits to the southeast of between $600 million to more than $2 billion.

This report also found mercury "hot spot" deposits of the toxic metal stretching across 50,000 square miles in the South Atlantic from North Carolina to South Florida. The existence of such a large mercury concentration makes extremely suspect assertions by EPA officials that their new rule would prevent such hot spots. Mercury concentrations accumulate in fish and go up the food chain, posing the greatest risk of nerve damage to pregnant women, women of childbearing ages, and young children. EPA officials also had said mercury-contaminated fish from abroad posed the biggest threat. But, the unreleased EPA report "paints a different picture—that in certain parts of the country you have a lot of Americans eating fish caught locally." Do you wonder why it is hard to believe that the EPA is really a protector of the environment and public health?

The EPA commissioned the study two years ago. Interestingly, a "final" version is dated January 2004, 14

months before EPA released its mercury rule for power plants. Agency officials said that report is still being "internally peer reviewed," which is why it wasn't considered for EPA's rule. The March rule ordered steps it estimated would cut mercury pollution from power plants in half by 2020, from 48 tons a year now to 24.3 tons. Environmental and health groups said EPA could achieve quicker cleanups and fewer hot spots if it ordered the nation's 600 coal-burning power plants to install new pollution controls, and imposed a firm deadline. It comes down to a question of the costs versus benefits of a nationwide cleanup program, and one of power and influence. Forty percent of all U.S. mercury pollution comes from coal-fired power plants, and those releases have never before been regulated. The utilities are politically well-connected and very powerful.

In sort of a stop-gap fashion, the Food and Drug Administration and the EPA have come up with these guidelines for fish eaters:

- Do not eat shark, swordfish, king mackerel, or tilefish because they contain high levels of mercury.
- Eat up to 12 ounces (2 average meals) a week of fish and shellfish that are lower in mercury, such as canned light tuna, salmon, pollock, and catfish. Only 6 ounces of Albacore ("white") tuna is advised because it has more mercury than canned light tuna.
- Check local fish advisories for mercury and other pollution alerts. A national database is online at epa.gov/waterscience/fish/states.htm.

Source: *Associated Press*

XX. TOBACCO LITIGATION UPDATE

Jury Rejects Flight Attendant Smoke Claims

A jury has rejected claims by a former flight attendant that her health problems were caused by exposure to second-hand cigarette smoke aboard airliners. The Miami-Dade Circuit Court jury rejected claims by Lorraine Swaty that her chronic sinusitis was caused by smoke during her 20 years as an attendant for US Airways Group Inc. The lawsuit was filed as part of 1997 class action settlement allowing individual flight attendants to claim compensatory damages against cigarette companies for health problems they say are related to smoke exposure aboard aircraft. About 2,800 such lawsuits have been filed. The verdict marked the sixth time in seven such cases that have gone to a jury since 2001 in which cigarette companies have prevailed. Another case ended in a mistrial in May 2002 and was later dismissed.

Source: *Forbes News*

XXI. THE CONSUMER CORNER

Children Are More Safe In Car Back Seat

Studies have shown that children are safer in car crashes when they sit in the back seat. They are also less likely to be injured when safety seats and seat belts are used. A recent study was sponsored by The Children's Hospital of Philadelphia, the American Academy of Pediatrics, and the world's largest insurer, State Farm Insurance Co., which confirms that children should ride in the back seat. "The single most important lifesaving decision parents can make for their child is to use the rear seat and age- and size-appropriate restraints during every car ride, every time," said Dr. Flaura Winston, a pediatrician and chief investigator of the study, which was released last month. The findings are based on information from more than 370,000 State Farm policyholders involved in car crashes. Researchers say the combination of sitting in the back seat and using safety restraints would have prevented more than 1,000 of the 3,665 serious injuries to children under 16 in the crashes. The study also notes that almost a third of the nearly 1,800 children who died in car crashes in 2003 were riding in the front seat, and more than half weren't restrained.

The study found children were 40% safer in the back seat than the front in car crashes. The risk of injury dropped to less than 2% when safety seats and seat belts were used. Dr. Winston said too many parents give in to children who have grown out of safety seats and want to ride up front. There are more things in the front compartment that can cause injury to children, such as dashboards, windshields and airbags. There can be no negotiations when it comes to safety and children. Adults have to make safety decisions for children. The report also concluded that minivans and large cars and sport-utility vehicles were the safest for children, while smaller vehicles had higher injury rates. Safety improvements and increased safety seat and seat belt use have reduced child fatality rates to 1.5 per 100 million miles driven in 2003 from 2.3 per 100 million miles in 1988, according to the study.

Source: *Associated Press*

Settlement In RICO Suits Involving Lupron

A pair of settlements totaling $150 million received final court approval last month. The settlements were reached in

RICO suits brought by consumers and insurance companies over allegedly illegal sales tactics that drove up the price of Lupron, the prostate cancer drug. U.S. District Judge Richard G. Stearns of the District of Massachusetts rejected all objections to the settlement, but put off deciding whether to approve a request for legal fees. The judge wrote a 50-page opinion explaining the basis for his approval of the settlement.

The civil suit stemmed from a criminal case in which TAP Pharmaceutical Products Inc.—a joint venture of Abbott Laboratories of Illinois and Takeda Pharmaceuticals Co. of Japan—pleaded guilty to charges that it had encouraged doctors to fraudulently bill the Medicare program for free samples of Lupron as part of a "'brand loyalty'" scheme. Prosecutors had argued that the intent of the scheme was to provide incentives to doctors to prescribe Lupron instead of cheaper, similarly effective drugs, such as Zoladex, manufactured by AstraZeneca. At the heart of the scheme was TAP's overt or tacit encouragement of doctors to bill Medicare for Lupron at an imaginary **average wholesale price** (AWP) provided by TAP to the "Red Book," an industry publication used by Medicare and other third-party payors, to establish payment schedules for reimbursable prescription drugs. Prosecutors argued that TAP knew it could "raise" the AWP of Lupron at any time by simply forwarding to the Red Book a new and higher average wholesale price. This allowed TAP to control the maximum Medicare reimbursement paid to a doctor for prescribing Lupron.

According to the plaintiffs in the civil suit, the AWP reported by TAP for Lupron bore no resemblance to the actual prices being charged to doctors, nor did it bear any relationship to a reasonable interpretation of the terms "average" or "wholesale." Instead, the suit alleged that the AWP was inflated at the expense of consumers and insurers in order to funnel hidden profits to doctors. Under its plea agreement, TAP paid a $290 million criminal fine and nearly $560 million in restitution. The largest beneficiary was the Medicare program. Ordinarily, prescription drugs are not covered by Medicare, but Lupron, which is injected in the doctor's office, is covered as a cancer treatment. Lupron has been a major success, enjoying an 85% market share. There is a very good reason for patients wanting Lupron. Lupron is injected into the buttocks, but Zoladex is injected with a larger needle into the abdomen (a much more sensitive spot), and that has to be appealing to people. Both drugs serve as alternatives to surgery.

Prosecutors alleged that TAP had gone to extreme lengths to protect its dominant market share by routinely giving doctors free samples of Lupron if they agreed to stop using Zoladex. The company then encouraged the doctors to reap huge profits from the free samples by billing the government, according to the prosecutors. In the court's opinion, Judge Stearns outlined the terms of the settlement, which consisted of two separate agreements:

- In the first agreement, the defendants will pay $55 million to settle claims brought by a consortium of insurance companies and health plans that provide prescription drug benefits and together represent 70% of the 198 million Americans covered by insurance.
- In the second settlement, the defendants will pay $40 million to cover claims of individual consumers and $55 million to settle the claims of a class of third-party payors.

Judge Stearns noted that consumer-purchasers are entitled to recover either 30% of their total out-of-pocket payments for Lupron or $100, whichever is greater, unless the total amount of claims exceeds the amount allotted to the consumer pool. It is estimated that, after payment of expenses and lawyers' fees, $27.5 million will be available to the consumer-purchaser class. It is believed that this amount will be adequate to pay all claims in full. Judge Stearns concluded that the settlement was fair in part because the allocation of the settlement funds was "deliberately weighted to favor the consumer-purchaser class" over insurers and third-party payors. If the case had not settled, Judge Stearns stated that it would be in the courts for years. He also stated that the plaintiffs faced significant risks at every turn in establishing liability and proving damages.

Source: *The Legal Intelligencer*

Drug Chains Limit Access To Cold Medicine

Three of the nation's largest drugstore chains will move certain nonprescription cold and allergy medicines behind pharmacy counters. This comes after a string of retailers have limited access to drugs whose ingredients can be used to make the illegal drug methamphetamine. CVS Corp. and Rite Aid Corp. will move medications containing pseudoephedrine behind counters at their stores this summer. Walgreen Co. spokeswoman said the chain—the nation's largest by sales—also plans to put the drugs under a pharmacist's control, but has not yet set a timetable for the change. Pseudoephedrine, an active ingredient of Pfizer Inc.'s Sudafed and Schering-Plough Corp.'s Claritin-D, can also be used to manufacture methamphetamine, a highly addictive drug. Customers should have to ask pharmacists for the medications rather than being able to pick them off a store shelf. Walgreen and CVS only plan to restrict access "single ingredient" pseudoephedrine products, while Rite Aid said it will also pull combination products off shelves.

Target Corp., Albertson's Inc., and Wal-Mart Stores Inc. have all recently limited access to medications containing the drug. I understand that Pfizer is

in the process of reformulating its Sudafed products to remove pseudoephedrine. A number of states have imposed restrictions on the sale of pseudoephedrine products in an attempt to curb a proliferation of so-called meth labs across the country. Alabama's Legislature failed to pass a bill during the last session. Six states only allow pharmacies to sell drugs with the ingredient, and seven restrict access to pseudoephedrine products. Woonsocket, Rhode Island-based CVS said the change will take effect at its 5,400 stores by July 1st, and Rite Aid, which operates about 3,400 drugstores nationwide, set a deadline of August 1st.

More Web Threats On The Horizon

Many consumers at least are aware of the identity theft problem known as "phishing." That one uses fake emails that appear to come from banks and other businesses seeking personal data. Now there are two more scams that have damaging potential, and those are not so well known or understood. These are called "evil twins" and "pharming." Evil twins are wireless networks that pretend to offer legitimate Wi-Fi connections to the Internet. In pharming, identity thieves redirect a consumer to an imposter webpage even when the individual types the correct address into his browser. Fortunately, pharming and evil twins aren't as widespread as phishing at this point. But, they have tremendous potential for harm. Clearly, Internet security is essential for all persons who use the Internet.

Source: *Wall Street Journal*

Lawsuit Says Sweepstakes Was Scam

A lawsuit filed by the Texas Attorney General's office is aimed at a sweepstakes scam. As we have previously reported, the sale of personal information is the fastest-growing crime and consumer problem that is facing America today. The lawsuit charges that two individuals and their companies violated the Texas Deceptive Trade Practices Act by tricking thousands of Texans into providing their personal information, which was then sold without their knowledge. These defendants are being sued for $20,000 per alleged violation of the act. According to the lawsuit, displays were set up at movie theaters, malls, boat shows, and other events in and around Austin and San Antonio to encourage people to fill out sweepstakes entry forms that included contact information, marital status, and annual income.

The company would then pass along the information to the two individual defendants, according to the lawsuit. The individuals then solicited the consumers to attend sales presentations by vacation timeshare companies, which paid them for the telemarketing services. Records show that these two defendants made more than $1.5 million between 2003 and 2004 for the personal consumer information they provided to the timeshare companies. The lawsuit seeks an injunction requiring the companies to clearly disclose that the information may be used by telemarketers. According to the lawsuit, which resulted from an investigation initiated in January 2004, people who were married or widowed, were under the age of 70, and had incomes of more than $35,000 were targeted. This is just another example of how consumers are being cheated and wind up losing large sums of money. Government must do everything possible to curb this new form of criminal activity.

Source: *The American Statesman*

CDC Pushing New Mosquito Repellents

For years the federal government has promoted the chemical DEET as the best defense against West Nile-bearing mosquitoes. Now the government, for the first time, is recommending two other insect repellents as safe and effective enough for use. The Centers for Disease Control and Prevention says repellents containing the chemical picaridin or the oil of lemon eucalyptus also offer long-lasting protection against mosquito bites. It's an about-face for the federal health agency, which maintained for years that non-DEET repellents were not likely to offer the same degree of protection from mosquito bites. DEET has been the "go-to" chemical for health officials trying to control the spread of the West Nile virus in the United States.

Backyard Play Sets Can Be Hazardous

Every year, playground accidents leave thousands of children with serious, sometimes permanent injuries. Most folks school or park playgrounds are the most dangerous. Actually more than half of playground deaths occur on play sets in backyards. Falls are a common cause of injuries in backyard play sets. Strangulation is another hazard. Strangulation of children can happen when they have drawstrings in their hoods and clothing. Children can become entrapped in the stairs and other parts of backyard play sets.

These are some **safety tips** for parents and other adults who supervise children:

- Make sure the play set has space. Don't put it too close to trees, the house, the fence, or the driveway. And find a nice level spot.
- Put down mulch or wood chips or shredded rubber—about a foot deep—under the play set, to break any falls.
- Make sure the child's head and body can fit through ladder rungs so the child can't get stuck and strangle. At the top near the slide, make sure the slats or guard rails are less than 3 1/2 inches apart, so a child can't stick his or her head through and get stuck.
- Do a weekly inspection of the play set, looking for rotting wood, nails

that are sticking out, loose screws, and rough edges.

- To lessen the chance of strangulation, never hang a rope to the play set, and never tie a dog leash to the set.

Salmonella Outbreak Linked To Poultry

Nine people from New Mexico and four other states have been reported to suffer salmonella infections in the past two months. Six of those cases are linked to young poultry from a New Mexico hatchery. The state Health Department had not named the hatchery pending the completion of its investigation. The department is collaborating with the Colorado Health and Environment Departments to investigate salmonella cases that have been reported in New Mexico, Colorado, Kansas, Oklahoma, and Texas. Seven of the nine cases in March and April were in children age one year or younger.

Symptoms of salmonella, which begin 12 to 72 hours after exposure, include diarrhea, fever, and abdominal cramps that usually last four days to a week. Most people recover without medication or treatment, but young children can suffer from more severe symptoms. Human salmonella infections occur when contaminated food, hands, or other objects are placed in the mouth. Health officials recommend that young children avoid contact with poultry and that people who handle baby chicks, ducks, or other poultry thoroughly wash their hands with soup and water afterward. Poultry also should be kept outdoors in an area separate from young children or sources of food.

Source: *Associated Press*

Funeral Industry Is Hit With Casket-Pricing Suit

Consumer advocates have filed suit against three of the biggest funeral-home chains and the leading U.S. casket maker, alleging they conspired to keep prices high and shut out companies that engage in selling caskets at a discount. Some of them are the online retailers that have sprung up in recent years. The lawsuit, filed in federal court in San Francisco, charges that the companies engage in price-fixing and sell caskets for as much as six times their wholesale cost. Consumers have been complaining about high funeral costs for a long time. This lawsuit could be a significant new challenge to the industry. The suit, filed on behalf of a consumer group and six families who say they were overcharged for caskets, seeks to be certified as a class action, representing millions of casket buyers. If the court grants class action status, under current antitrust law, the companies could face huge potential damages for overcharges going back to 2001. Casket sales in the U.S. totaled about $3 billion last year. Funeral costs have been rising in recent years, and now average about $6,000.

Named in the suit are the top three chains, controlling more than 2,100 funeral homes, including industry leader Service Corporation International; Alderwoods Group Inc.; and Stewart Enterprises Inc. The suit also names as a co-conspirator Hillenbrand Industries Inc.'s Batesville Casket Co. unit, which is by far the nation's largest casket maker, with nearly half the U.S. market. The suit also charges that the funeral-home chains are able to avoid federal rules designed to protect consumers. The rules permit people to buy caskets from anyone, but funeral directors are prohibited from charging extra to customers who buy from another source. The suit alleges that funeral homes discourage the outside purchases by offering "sham discounts" for package deals that include caskets, while boosting prices for individual services, such as embalming, if a customer decides to buy a casket elsewhere. The funeral directors have formed powerful trade groups that lobby in Washington and state capitals. In the years since the Federal Trade Commission imposed rules on the industry, these lobbies have succeeded in getting some state Legislatures to limit casket sales to licensed funeral directors. These laws have repeatedly been opposed by the FTC and overturned by the courts in recent years. It will be interesting to watch this case as it travels through the system. If class action status is granted, it should be **bad news** for industry and **good news** for consumers.

Source: *The Wall Street Journal*

XXII. RECALLS UPDATE

GM Announces Recall Of More Than 2 Million Vehicles

General Motors Corp. has recalled more than 2 million vehicles to fix a variety of potential safety defects, most of them on cars and trucks sold in the United States. The largest of the safety actions included nearly 1.5 million full-size pickup trucks and sport utility vehicles from the 2003 to 2005 model years with second-row seat belts that may be difficult to properly position across passengers' hips. GM, which led the auto industry in U.S. recalls last year, said it voluntarily conducted that recall. The company claims to have had no reports that the belts caused or contributed to any injuries.

The recall includes some of GM's top-selling pickup trucks and SUVs, including the model year 2003 to 2005 Chevrolet Suburban, Chevrolet Tahoe, Hummer H2, Cadillac Escalade, GMC Yukon, GMC Yukon XL, and the crew cab versions of the Chevrolet Silverado and the GMC Sierra. The recall is one of the largest for GM since March of last year, when it recalled more than 4 million full-size pickup trucks to replace tailgate support cables that may

corrode and fracture. That led to a record year in recalls for GM, which ran counter to claims it had improved the quality of its cars and trucks.

Other GM Recalls

GM announced five separate recalls on May 3rd. They include a recall of 332,202 of the 1500 Series Chevrolet Suburban and Yukon XL SUVs from the 2000 and 2001 model years for possible overheating of fuel pump wires that could lead to engine stalling, failure to start, a possible fuel leak, and inaccurate fuel-level readings. Also recalled were 142,585 1500 Series Silverado and Sierra pickups from the 1999-2002 model years and 2500 and 3500 Series pickups from the 2001-2004 model years with manual transmissions. The parking brakes could wear out, allowing the vehicles to move unexpectedly. GM also recalled 69,037 of its 2005 model year Buick Lacrosse and Buick Allure sedans, which went on sale last year, for a potential problem with a brake part that could lead to brake loss.

Also recalled were 39,078 2004-model year Buick Rendezvous and Pontiac Aztek SUVs, which could stall or fail to start due to a faulty ignition relay. Finally, GM recalled 22,115 Saturn L Series wagons from the 2002 to 2004 model years because they were built with center and passenger-side rear seat belt anchors that fail to comply with U.S. and Canadian safety standards. GM is notifying owners of the recalled vehicles, and dealers will repair the parts for free.

Toyota Recalling More Than 750,000 Trucks And SUVs

Toyota Motor Corp., in one of its largest safety recalls ever, is recalling more than 750,000 pickup trucks and sport utility vehicles because of problems with the front suspension that could hinder steering. The company said the recall covers 774,856 vehicles in the United States, including the 2001-2004 model years of the Tacoma, the 2001-2002 versions of the 4Runner, and the 2002-2004 model years of the Tundra and Sequoia. Toyota said the surface of a ball joint that connects to the front suspension may have been scratched when it was manufactured, which could lead to wear and tear over time. Any excessive wear or looseness in the joint could force drivers to exert more effort when steering, allow the vehicle to drift, and increase the amount of noise from the suspension. Toyota says the company had confirmed six cases in which the condition existed in the suspension. Toyota plans to conduct a similar recall of the affected vehicles in Canada, Japan, Australia and other countries. This is clearly one of the largest recalls in company history.

In 1992, Toyota recalled about 550,000 Camrys from the 1987-1990 model years because of the potential for power door locks to malfunction and lock passengers out of or inside the vehicles. In 2002, the company recalled nearly 400,000 subcompact and minicar vehicles exported to the United States, Europe and Canada because of improperly designed brake fluid pipes. In this latest recall of trucks and SUVs, owners will be notified beginning in July and will be able to have the problem fixed at no cost.

Recalled Children's Chairs Blamed For Finger Amputations

A Florida company is recalling about 1.5 million children's folding chairs that can suddenly collapse and have caused fingertip amputations of four children. Seven other children suffered finger lacerations, according to the recall announced by the U.S. Consumer Product Safety Commission (CPSC) and Atico International USA Inc. of Fort Lauderdale. The CPSC said defective safety locks can cause the chairs to collapse or fold unexpectedly, trapping a child's fingers in the hinges. The recalled folding chairs are made of metal tubing with a padded seat. They were sold in red, blue, yellow and green colors either individually or as part of a set consisting of a table and four chairs. Hardware, discount department, toy, grocery and drug stores nationwide sold the chairs from September 2002 through April 2005 for about $10 individually and for about $30 for a set. Consumers should stop using the chairs and contact Atico for a full refund. Consumers can call Atico at (877) 546-4835 or visit the company's website at www.aticousa.com for more recall information.

Dollar General Recalls Metal Heart-Shaped Pendants

Dollar General recalled about 80,000 heart-shaped pendants last month because the items contain high levels of lead. Goodlettsville, Tennessee-based Dollar General agreed with the U.S. Consumer Product Safety Commission to recall the pendants, which are silver-colored, ribbed on the front, and hollow on the back, and hang on a pink suede cord with a silver-colored clasp. The pendants were sold at Dollar General stores nationwide from May 2003 through April 2005 for about $1. Consumers should take these necklaces away from children immediately and return them to Dollar General stores for a refund. The pendants pose a serious risk to children. Lead poisoning in children is associated with behavioral problems, learning disabilities, hearing problems, and retardation. Dollar General has set up a toll-free number, 800-678-9258, for consumers with questions. Information is also available at the company's website, www.dollargeneral.com.

22 Car-Seat Models Face Recall

The National Highway Traffic Safety Administration (NHTSA) announced

last month that the Dorel Juvenile Group, a child safety seat manufacturer that produces gear for several brand names, is recalling about 190,000 rear-facing seats. The recall of products includes Eddie Bauer, Safety 1st, and Cosco brand seats. Dorel has received complaints that the harnesses on seats can loosen after a child has been buckled in, according to NHTSA. The models involved in the recall are:

- **Eddie Bauer** – 22-625 AFD GB1B, 22-625 GLC GB1B, 22-625 EDG GB1B, and 22-625 MAC GB1B
- **Safety 1st** – 22-325 CMB GB1B, 22-325 VIN GB1B, 22-325 DTA GB1B, and 22-325 TST GB1B
- **Cosco** – 22-300 JOS GB1B

Only those seats manufactured between August 19, 2003, and October 20, 2004, are affected. Dorel will mail a free repair kit with two harness clips and instructions to owners who return their registration cards. Other owners can call Dorel at (800) 881-0570 Monday through Friday from 8 a.m. to 4:30 p.m. EDT or e-mail designerrecall@djgusa.com. NHTSA said that parents should get the repair kit as soon as possible. If the seats are used before being repaired, parents should check the harness after putting the child in the seat.

Wooden Push Toys Pose Choking Hazard

A California company is recalling about 7,000 Lemon Meringue Wooden Push Toys because of a potential choking hazard. Pamela Drake Inc. says small parts on the toys can break off, posing a choking hazard to young children. No injuries have been reported. The recall includes six different multi-colored, solid wooden push toys, including an airplane, tractor, dump truck, fire truck, a two-piece circus train with train cars, and a tow truck with family van. The vehicles are constructed with a bendable flap that allows the toys to "wiggle" back and forth. The dump truck, circus train with train cars, and tow truck with family van have white magnets on the front and back to hold the push toys together. All the toys have rubber rings on the tires. The recalled push toys are intended for children 12 months and older. There is no writing on the push toys. The recalled toys were sold at toy and hobby stores nationwide from February 2005 through March 2005 for between $15 and $24. Consumers should return the toys to Pamela Drake Inc., or their local retailer, for a full refund. Consumers can call Pamela Drake at (800) 966-3762 or visit the company's website at www.woodkins.com for more recall information.

XXIII. FIRM ACTIVITIES

Employee Spotlights

Dana Taunton

Dana Taunton came to work at our firm in 1998. She is a shareholder in our firm and currently works in the Personal Injury/Product Liability Section. Dana received her law degree in 1993 from the University of Alabama. She has spoken at several legal seminars on various topics related to personal injury law and has given updates on tort law on numerous occasions. Before coming to work for the firm in 1998, Dana worked for a prominent defense firm and had a brief stint with the Alabama Attorney General's Office. She also clerked for the Honorable Ira DeMent, United States District Judge for the Middle District of Alabama. Working for Judge DeMent has to be great training for any young lawyer. Since coming to work for the firm, Dana has handled complex business and commercial litigation, products liability and personal injury litigation. She is married to Derrick Taunton and they have two daughters, Betsie and Abigail. The Taunton family attends Frazier Memorial Methodist Church in Montgomery. Dana has become an excellent product liability lawyer and does an outstanding job for her clients.

Jason Minor

Jason Minor has been with us since October of 2004. In his current job, Jason is one of the employees responsible for making hand-deliveries for the firm. These include numerous courthouse runs in several counties. Jason also serves subpoenas for trial witnesses on a regular basis. Keeping up the inventory of supplies is also part of his workload. Jason also assists the lawyers and legal assistants during trials by making sure that all equipment, trial boxes and supplies are in place when the trial starts. Jason is the son of Floyd and Lynn Minor. Floyd is a prominent Montgomery lawyer and Lynn keeps things in order for the family at home. They have done a good job with Jason. Jason attends TSUM where he is majoring in business. He is doing a very good job for us and is staying very busy. We have really enjoyed having Jason with the firm.

April Worley

April Worley came to the firm as a Staff Assistant for the Rezulin Litigation in June of 2001. She now serves as a Legal Assistant for the Vioxx Litigation. Since Vioxx was taken off the market in September 2004, April's caseload has changed significantly, as we are presently evaluating more than 15,000 Vioxx cases. April's position entails drafting and filing pleadings and discovery and communicating with the lawyers in regards to screening and investigating Vioxx cases. April has also previously worked on litigation regarding Rezulin, Serzone, Vioxx and Celebrex. Because our firm has such a prominent role in the Vioxx litigation, April is extremely busy. She has a Bachelor's degree from AUM in Justice & Public Safety and a Master's from

AUM in Judicial Administration. She has also recently earned a second Master's in Public Administration from AUM. April's five-year-old son, Micah Worley, attends Green Gate School. We are fortunate to have April, who does an excellent job, as an employee of the firm.

Beth Warren

Beth Warren, who has been with the firm for over three years, currently works as a Legal Assistant to Lance Gould in our Fraud Section. Beth works mostly with mass predatory lending cases. Beth had previously worked in the Toxic Torts Section. She graduated in May of 2000 with a B.S. degree in Criminal Justice and in December 2002 with an A.S. degree in Legal Studies. Beth passed the National Association of Legal Assistants' National Certification Exam in January, 2003. She enjoys playing softball, cooking and visiting her family in Pensacola. Beth does an outstanding job for the firm and is a valuable employee.

Kimberly Vaughn

Kimberly Vaughn, who was one of our employees, had to resign recently because her husband was being moved to an assignment in another state. Kimberly worked as a legal secretary in Cole Portis' section. On her last day with the firm, Kimberly sent me a message that really made me realize how important a good place to work is for our employees. Her message said that our firm was "the only place she had ever worked" where she "looked forward to coming to work every single day." That was not only good to hear, it made me realize that we have good employees who are dedicated to the firm's mission and that a good work place is critically important for them. We will miss Kimberly and wish her well in her new location.

XXIV. SOME PERSONAL OBSERVATIONS

The Mayor's Annual Prayer Breakfast

Montgomery Mayor Bobby Bright sponsored the second annual Mayor's Prayer Breakfast, which was held on May 4th, and it was a huge success. Almost 1000 people from numerous denominations and from all walks of life gathered for this special event. Interestingly, no politicians or business leaders were featured or even introduced, and that was most refreshing. Instead, the program consisted of prayer, singing, praising God, and a very good breakfast prepared by John Sullivan and his staff. It was a moving spiritual experience for all who attended and participated. I commend Mayor Bright for having the courage to take a leadership role and for being willing to stand up for our Lord and Savior—Jesus Christ. Anybody who attended this program had to leave with a good feeling about the City of Montgomery and its leadership. It is good to know where the Mayor and his family stand on spiritual matters. The event also made many of us, who deal with difficult issues on a daily basis, put things in a much better perspective. I sincerely believe the City of Montgomery's government is in good hands.

Mickey DeBellis

Mickey DeBellis and I have been very good friends for about 36 years. Mickey has been fighting an illness over the past several months, but is now recovering well. He is back on his feet, which is good news. Mickey and his wife Sue are still residing in Greenville, where they have lived for years. Mickey served as Insurance Commissioner under two Governors (George Wallace and Fob James) and did an outstanding job. In fact, Mickey DeBellis will go down in history as a real consumer advocate and a man who worked hard to protect insurance policyholders and regulate insurance companies fairly and effectively. He was a real friend of consumers and that actually caused Mickey to retire early during Fob James' second Administration. At that time, Mickey was instructed in his capacity as Commissioner to allow insurance companies to put arbitration clauses in their policies. He knew that wasn't good and resisted. But, rather than disobey an order from his boss, Mickey elected to resign his position as Commissioner.

I commend him for that decision. After leaving the department, Mickey continued to fight for Alabama consumers. He observed at a mass meeting in Montgomery during the Siegelman Administration, attended by over 1,000 people, that "arbitration was the worst thing that could happen to a consumer." I have tremendous respect and admiration for Mickey. He has been my friend for years and I appreciate that friendship today more than ever. Mickey is a good man and I only wish we had more like him in this world. God has blessed Mickey and Sue DeBellis with a long and happy marriage. I wish for them many more years of happiness together.

The Miracle League

The Montgomery Miracle League is an organized baseball program for physically and mentally challenged children. For children facing physical and mental disabilities, playing organized sports is most difficult, and most never even get that opportunity. But, the Miracle League gives these children an opportunity of a lifetime. Baseball fields aren't designed with wheelchairs, walkers and crutches in mind. The Miracle League removes those barriers and lets players with special needs experience the joy of "America's

favorite pastime." I am told that the first Miracle League field opened in Conyers, Georgia in April 2000. Since that time, fields have opened in South Carolina, West Virginia, Chicago, California and one other in Alabama. There are some 14 completed rubberized turf fields, with another 62 fields under some phase of construction at this time. The City of Montgomery Parks and Recreations Department has converted an existing field to this specially designed need. A barrier-free facility with knowledgeable and qualified personnel in charge will provide an opportunity for lots of special children to really play baseball for the very first time. I am convinced God will bless all of those persons who have made the Miracle Leagues a reality. I hoe and pray this movement will spread like kudzu!

XXV. MY PARTING WORDS

I learned something during a recent Sunday school class taught by Mrs. Dean Albritton at St. James United Methodist Church that made a real impression on me. The Washington Monument, which towers over all other structures in our nation's capitol, has an aluminum dome at the very top. I never knew what was inscribed on that dome. I now know—thanks to Dean, who is one of the best teachers around. The words in Latin "Laus Deo," which mean "Praise be to God," are inscribed on this monument. I believe this is most significant. The inscription can only be seen from above. Most folks—like me—don't even know the words are there. Somebody had their priorities in order when those words were placed in such a prominent and compelling location in our nation's capitol. I believe that God is still looking down on our country—just as He was when our country was founded and when the Washington Monument was put in place—and He can't be too pleased over much of what He sees today. We had better straighten up and fly right as a nation—before it's too late.

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