THE JERE BEASLEY REPORT

JULY 2005

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Attorneys at Law

A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA

Helping those who need it most for over twenty-five years

www.BeasleyAllen.com

I. CAPITOL OBSERVATIONS

Plenty Of Candidates For Governor

As predicted, the 2006 race for Governor in Alabama has started up much earlier than has been the case in previous years. It has become quite apparent that there will be a number of very strong candidates running for the state's top office. For the first time, there will be contested races with significant candidates in each major party's primary. I guess that means we have really arrived as a true two-party state. In any event, if this race lives up to its billing, it will be one of the most interesting in years. Folks have already started to get on board with the candidates. In fact, some are siding with more than one of them. Some are even crossing party lines. For what it's worth, the following is my brief assessment of the major candidates' prospects at this juncture.

Bob Riley

The Riley Administration has been a most interesting one. Governor Riley has had his ups and downs, but seems to have regained a great deal of his lost ground. It's interesting to note at this juncture that incumbent governors seeking reelection have not done well in recent years. Neither Folsom, James nor Siegelman could retain the office. Many believe the reason for their inability to get reelected was that none of them really faced up to the real needs facing Alabama and continued to "patch" and "borrow from Peter to pay Paul" throughout their respective terms. The State's real problems in large part were ignored, with few long range solutions ever even considered. I am firmly convinced that most voters tend to vote "against" rather than "for" candidates and that had made it tougher for incumbents. In any event, Governor Riley has assembled a good cabinet and has worked hard at his job. The Governor is an honest man and there have been no scandals in his Administration and that's certainly good news. In an interesting development, it appears that the Governor has elected to take on the legislature late in his term. That probably is good politics and it worked well for several governors in years past. George C. Wallace and Big Jim Folsom were two of the very best at that political game.

On a more positive note, however, the state continues to do well in its industrial development efforts and that will be a major selling point in Riley's reelection bid. The Governor also has a strong asset in his wife, Patsy, who appears to be very well liked throughout the state. To win a second term, Governor Riley will have to get past the Republican primary and then contend with a very popular Lt. Governor. The Governor is a good campaigner and his campaign should be well-financed, even though Alfa and the timber groups appear to be looking elsewhere for a candidate. Some of their leaders have indicated that they might even vote for a Democrat. Can Bob Riley change the trend of incumbents losing and win a second term? A great deal depends on how the special session is handled and whether the governor can avoid major mistakes during the months prior to the primary voting day.

Roy Moore

Roy Moore is a most unusual politician by most standards and the pollsters don't seem to believe he can be elected Governor. I believe that the former Chief Justice is the hardest of all candidates to poll, and for that reason I don't put much stock in his poll numbers. While the pollsters continue to give Roy low marks, you get a difficult picture when you get out and talk to ordinary folks around the state. Personally, I believe the Etowah County native will be a very strong candidate if he elects to run. I have always believed that Roy is sincere in his beliefs, was totally honest and had a real empathy for the day-to-day problems faced by ordinary folks. In my opinion, his populist views will play well with a great number of people in our state and that's because he really believes ordinary folks should have a voice in government and should be treated fairly. My assessment of the Moore candidacy is that he can run a very strong race on less money than

IN THIS ISSUE

any other candidate. Interestingly, I find that Roy is very popular with folks who used to vote Democratic and now vote Republican—some call it the old "Wallace vote." But, can Roy win—only time will tell!

Lucy Baxley

Lucy Baxley has done something that few others have been able to do and that is to spend four years as Lt. Governor and still come out as a very strong candidate for Governor. Don Siegelman did it, but his success was due more to a weak incumbent, than anything he had done while serving as Lt. Governor. In my opinion, the Senators did Lucy a real favor when they refused to restore the powers to the office that had been taken away from Steve Windom by Siegelman. Rather than sit around and pout, Lucy turned her perceived weakness in the Senate into a huge political advantage. Anybody who doubts the current Lt. Governor's popularity hasn't been talking to many folks around the state. Lucy is smart, a very hard worker, and extremely knowledgeable about the affairs of state government. She understands people and that's something that consultants can't teach a candidate. Some say Lucy has never been really tested and that she is now stepping up into the big leagues for the first time. My assessment is that Lucy will be the Democratic nominee and will run a very strong race in the fall. Can a woman be elected Governor in Alabama—a state that is said by the political experts to be ultra conservative? Again, we will get the answer to that question next November.

Don Siegelman

Don Siegelman had an opportunity to be a great Governor and let it slip away. His performance over the four years he served as chief executive was average at best. Part of Don's problems was because he had some folks around him who should never have had control of state government. That accounts for some of the scandals that Don will have to account for. The fact that Don Siegelman, who served as Secretary of State, Attorney General, Lt. Governor and Governor, is a politician and nothing more, will more than likely put him in the Democratic primary. I really can't see him winning the primary, but Don will make Lucy work for it. However, Don may be stronger than I think he is. There is one thing for certain and that is if any Alabama politician has ever had 9 lives, it is Don Siegelman and he is on number 8 at present. For that reason, I don't guess you should count this professional politician out. Don will work hard and a few of his followers who want to get their heads back in the trough may be willing to furnish enough money for him to run. Can Don Siegelman be elected to another term as Governor? I don't think so.

Other Candidates

There will obviously be other candidates who will qualify in the party primaries. There has already been one candidate who says he will run as an Independent. Nathan Mathis, a former state legislator from the Wiregrass, announced on June 21st that he would be a candidate for Governor. Nathan, who was a hard-working and extremely effective member of the House of Representatives where he served for 12 years, made his announcement in the State House. He pledged to push a pro-gambling agenda if elected.

Tim James may decide to make another run for the top spot. Tim, a Greenville businessman, was an impressive candidate in the 2002 race but his campaign never seemed to get off the ground. Much of what he said during his race, however, made sense. Tim would again be in the Republican primary if he elects to run. I suspect he learned a great deal during his first race for public office. Tim might just be a "dark horse" with a real chance this time.

There has been speculation that Dr. David Bronner might be talked into running for Governor. While I doubt that Dr. Bronner will run, I do believe he would be an outstanding Governor. There would never be any doubt as to where he stood on any issue and that would be sort of refreshing. It will be interesting to see how Dr. Bronner reacts to the folks who would like to see a man with his intellect and ability serve as Governor of Alabama.

HealthSouth Not Due Tax Refund

HealthSouth should not be given a refund on taxes paid on exaggerated property values that was part of an accounting fraud designed to inflate the company's value. That's what an Alabama Attorney General's opinion states and I believe it was correct. The Attorney General's opinion, issued March 30th, said the refund rule was never meant to cover cases in which the taxpayer manipulated the facts for personal gain. In December 2003, HealthSouth officials asked Jefferson County for a refund, saying the company had exaggerated the values of its properties for years. Clearly, no person or corporation should be allowed to benefit as a result of its' own wrongdoing. The Attorney General was absolutely right in his opinion and the taxpayers should applaud him!

HealthSouth had asked for a refund of the property taxes paid on "fictitious assets" in 2001 and 2002—a total of $1.2 million for 2001 alone. HealthSouth dismissed its pending lawsuit after the Attorney General's opinion was issued. HealthSouth could still take the case to circuit court. As everybody knows, former HealthSouth CEO Richard Scrushy is on trial on charges related to a scheme to inflate revenue by $2.7 billion between 1996 and 2002. The jury has been deliberating his case since May 19th.

Source: *Associated Press*

RSA Settles Another Case

The Retirement Systems of Alabama has settled its claim against five investment banks, which is very good news. The state pension fund recovered most of its losses from Enron Corp. when five investment banks paid $49 million to settle litigation over the collapse of the energy trading company. The settlement represented 86% of the $57 million lost by the pension fund on Enron stocks and bonds when the company collapsed in 2001. The settlement marks the second time in less than a year that investment bankers have paid money to the RSA to settle litigation arising from a major bankruptcy.

In the Enron settlement, the five investment banks, paying up were Merrill Lynch & Co., Citigroup Inc., JP Morgan Chase & Co., Credit Suisse First Boston LLC and Bank of America Corp. In the suit, RSA alleged that the five firms, which underwrote or sold Enron stocks and bonds, should have known Enron was in trouble and should not have encouraged the public employees' pension fund to invest in the company. The case was to be tried in the federal court in Houston, Texas. At the time of the settlement, RSA was trying to get the case moved back to state court in Montgomery, where it was first filed. RSA still has litigation pending against three former Enron executives, but the pension fund can't pursue those claims until the criminal cases against some of the company's former leaders are completed.

Source: *Associated Press* and *The Birmingham News*

Louisiana Doesn't Like Bush Position On Offshore Royalties

It appears that the Bush Administration has delivered a severe blow to the effort to save Louisiana's wetlands. The Administration opposes a measure that would give five coastal states, including Alabama, a greater share of royalties from oil and natural gas offshore drilling. Louisiana has been after a greater share of offshore royalties for a good while. Louisiana Governor Kathleen Blanco has called revenue-sharing the best source of funding to fix Louisiana's coast, which has lost an area the size of Delaware since the 1930s. The state continues to lose coastal wetlands and by 2050 scientists say the state could lose 700 more square miles if nothing is done to correct the situation.

Governor Blanco called Bush's position "offensive." She said that it was unfair that states that allow drilling on their land get billions of dollars in royalties while coastal states that suffer the effects of offshore drilling don't get nearly as much. The revenue-sharing measure in the energy bill pending in Congress would authorize $500 million a year to Alabama, Alaska, Louisiana, Mississippi and Texas, which are states that allow offshore drilling. While that seems like lots of money, in the scheme of things, it is only a fraction of what the federal government is raking in by way of royalties. Of course, the real winners are the oil companies.

Source: *Associated Press*

Longevity Pay Raises For Judges May Be Dead

The restoration of longevity raises for Alabama circuit and district judges was apparently killed by Governor Riley, which came as a surprise to many capitol observers. During the regular session, the Legislature passed a resolution to reinstate the longevity raises, which were suspended a year earlier. It appeared when the resolution passed that the issue had been resolved. In fact, there is a question as to whether the Governor actually had to sign this resolution. Some legal scholars believe all that is required for restoration of the pay raises is passage of a resolution by both the House and Senate. That, according to my sources, is sufficient. In any event, however, if his signature was required, the deadline for the Governor to either sign the resolution into effect or kill it by not signing it was May 26th. Governor Riley elected not to sign it. His reason for letting the resolution die was the fact that the General Fund budget wasn't passed.

This issue may be resolved before the Legislature returns in special session. Hopefully, that will happen. If not, it will certainly come up during the session. The judges' longevity raises would have provided for a 1.25% increase each year and would cost only $340,000 annually, according to the Legislative Fiscal Office. The annual longevity raise doesn't apply to judges after they have served for 20 years. In my opinion, if the Governor actually has to give his approval, the Legislature should promptly pass another resolution in the special session. Governor Riley should then sign it. It is essential that good men and women, with ability and experience, serve as judges. While it's become popular with some folks to criticize and even attack judges, it's absolutely necessary to keep our judiciary strong. Without good judges on the bench, that won't be the case. I believe that refusing to reinstate the judges' longevity raises would be a mistake. We need to keep politics out of judicial matters and that includes funding issues.

A Bold Move Is Needed

It would be a bold move—but one that is highly unlikely—for Governor Riley to include campaign finance reform in his call for the upcoming special session. The Governor showed great courage when he tried to solve our state's money woes and pushed Amendment One through the legislature. He has now become a champion for accountability. I believe passing real campaign finance reform in Alabama would be the very best thing that could happen to our state and for the overwhelming majority of Alabama citizens. In my opinion, it would bring about real accountability. The only people who would oppose campaign finance reform are the special interest groups that virtually control state government.

Senator Myron Penn of Union Springs has called on Governor Riley and the Legislature to act on campaign Finance reform during the special session. I have read a draft of the Penn proposal and it makes sense. The Democratic Senator's bill would affect all elections for statewide office and also some parts would affect legislative races. Many believe that a great number of our state's problems are related directly to the flow of campaign dollars from the special interest groups to the politicians. I share that view. As I understand it, the Penn proposal would do the following:

- Require all spending of funds promoting a candidate to be by a candidates campaign committee;
- Limit contributions by individuals and corporations to a candidate to $1,000;
- Limit contributions by PACs to a candidate to $5,000;
- Prohibit PAC to PAC transfers in all elections;
- Prohibit PAC contributions to judicial candidates;
- Require judicial races to be non-partisan;
- Limit the amounts candidates can spend in an election cycle for any statewide race to $1,000,000;
- Prohibit any group, corporation, association or their entity from spending any money to promote the candidacy of any person running in any race for statewide office or for the legislature;
- Limit the total amount a candidate can spend in a legislative race as follows:
    - For a Senate race - $50,000
    - For a House race - $17,500
- Require campaign committee to make full disclosures as to donors and expenditures as follows:
    - 30 days prior to the date of the primary election
    - 7 days prior to the date of the primary election
    - 30 days prior to the date of the general election
    - 7 days prior to the date of the general election
- Make violations of the campaign finance law and the Alabama Corrupt Practices Act generally a felony with maximum penalties of one year in the state penal system and a fine of $50,000;

I believe Senator Penn's proposal has merit. I also realize there will be strong opposition from the powerful special interest groups. If you agree with this proposal or agree with the need for campaign finance reform, but have a better proposal, contact Governor Riley and members of the legislature in your area. If campaign finance reform were to be passed in the special session, we could quit worrying about the power of the special interest groups and get down to business of running the state's overall operations. It took courage for Senator Penn to take on this project. It will take even greater courage for Governor Riley to join in, back the proposal, and include it in the special session agenda. If that happens, it will be interesting to see who in the Senate openly opposes the measure. If the Penn proposal doesn't make the upcoming session, the issue is important enough for it to warrant a special session just for that purpose. If you agree that we need campaign finance reform in Alabama, let Governor Riley know how you feel.

II LEGISLATIVE HAPPENINGS

Special Session

The Special Session is expected to be called by Governor Riley for later this month. Some say it will be around the 18th. Hopefully, there will have been enough pre-session work and planning so that a General Fund budget can be quickly approved by the House and Senate in the minimum time required to pass a bill. However, with all of the divisions that exist in the Senate, many observers are predicting a very tough session. For the good of all concerned, I hope that assessment will prove to be wrong. It will be political suicide for the legislators to have a failed session or one filled with partisan bickering. If I were advising either camp of Senators, which I clearly am not, I would tell them to put "politics" on the shelf for this session, get down to work, pass the budget, and, unless campaign finance reform is in the call, go home. The campaign finance reform legislation would be important enough to stay in town and pass it.

People all over Alabama are sick and tired of all the partisan bickering that went on during the failed regular session and which has intensified since that session ended. Frankly, I don't believe all of the post-session finger pointing has helped either side. Governor Riley, Lt. Governor Baxley and Speaker of the House Seth Hammett should join hands, work together during the session, and make sure the legislators do their job. An agenda that includes a work schedule like that of private citizens in the work force would be a step in the right direction. I don't believe coming in at 8 in the morning for 5 days would be so bad. I am going out on a limb and predict a short, productive session.

Republicans Seek To Create New Legislative Districts

On June 16th, a lawsuit was filed that seeks to create new legislative districts and change control of the House and Senate from Democrats to Republicans. The legislatures in Alabama and all other states had to redesign districts after the 2000 census to reflect shifts in population. The suit, filed in the U.S. District Court in Mobile, claims the current legislative districts violate the principle of one-person, one-vote because of population differences between the districts, and it contends there are no legitimate reasons for the population differences. The suit seeks new districts that are more equal in population. I would question the validity of the litigation because Alabama's legislative districts were approved by the U.S. Justice Department. In fact, these districts survived a previous federal court challenge.

III. COURT WATCH

Lawsuits Haven't Caused The Increase In Insurance Premiums

A new study by Dartmouth College researchers reveals what I already knew and that is that jury awards and financial settlements for injured patients have not caused the extreme increase in doctors' insurance premiums. The researchers said a more likely explanation for the escalation is that malpractice insurance companies have raised doctors' premiums to compensate for falling investment returns. The Dartmouth economists studied actual payments made to patients between 1991 and 2003, the results of which were recently published in the journal Health Affairs. Some previous studies have examined jury awards with most of the objective studies coming up with similar results. Researchers found that payments grew an average of 4% annually during the years covered by the study, or 52% overall since 1991, but only 1.6% a year since 2000. The study indicates that the increases are roughly equivalent to the overall rise in healthcare costs. The increases in jury verdicts and settlements in medical malpractice cases reflects the higher costs associated with the injuries received, which have to be treated.

Meanwhile, malpractice insurance premiums for doctors in some states have skyrocketed in recent years. Dr. Amitabh Chandra, lead author for the study says: "It's not payments that's causing this. The simple explanation that comes to mind is the underwriting cycle. If they're making less money from the investment side of things, it's going to cause [insurance companies] to raise rates." Dartmouth researchers drew their data from the National Practitioner Data Bank, to which insurers are required to report payments made on the behalf of physicians. The Physician Insurers Association as well as the federal government have criticized the data bank because payments to hospitals are not reported—unless a payment also was made to a doctor in the case. Because of this, Dr. Chandra acknowledged, his study could have slightly underestimated payments.

Source: *Boston Globe*

Restricting Patients' Legal Rights Has Little Relation To Physician Supply

There have been a number of academic studies on medical malpractice, medical liability law and doctors' reaction to the perceived threat of being sued. Public Citizen has made an initial appraisal of these studies from the consumer and patient perspective. I agree with Public Citizen that ultimately, what's most important in the debate over medical malpractice is encouraging the best outcomes for patients, while at the same time preserving victims' rights to seek full compensation for injuries suffered. In examining medical liability, it is the belief of Public Citizen that these studies generally do not address patient care, the impact on patients or their families of restricting the ability to recover damages, or the effect the legal system can have in serving to deter bad outcomes. In Alabama, it is extremely difficult to sue a doctor regardless of how bad the conduct may have been. Alabama is blessed to have very good doctors as a general rule, but there are a few who may not measure up all the time. The Alabama Legislature has taken very good care of the medical community. As a result, there are very few medical negligence cases filed and only a small percentage of those won by the plaintiff. Nevertheless, the insurance companies continue to raise premiums—even for the good doctors—and are making a financial killing in the process.

I have a tremendous respect for Public Citizen President Joan Claybrook, who in my opinion is the strongest consumer advocate in the country today. In assessing the current situation concerning lawsuits and liability insurance costs, Joan had this to say:

> *These reports once again underscore the fact that lawsuits are not responsible for rising medical malpractice insurance costs and are not driving doctors away from any state. Like all Americans, doctors choose to live in a particular place because of such things as the quality of life, level of taxation and the quality of educational opportunities for themselves and their families. Caps punish the most severely injured patients and do nothing to reduce insurance rates.*

Source: Public Citizen News Release

H&R Block Settlement Blocked

A federal judge has blocked a proposed $360 million settlement of the lawsuit against H&R Block Inc. over loans given in anticipation of tax refunds. The so-called Carnegie settlement was terminated as a result of the judge's action which means the parties to the litigation will be returned to their status as if the agreement was never made. As reported last month, H&R Block and co-defendant HSBC Taxpayer Financial Services Inc., a unit of U.K.-based banking conglomerate HSBC Holdings, agreed to pay $360 million to settle a 1998 class action suit filed in Chicago. The settlement was to cover all refund anticipation loans funded by various lenders through H&R Block, and lenders with which HSBC had agreements through other tax preparers from 1987 to 2005. Refund anticipation loans are short-term cash advances against a customer's expected income tax refund. We see advertising during the tax season promoting these loans as a quick way to get your money. These loans can speed up the refund process, but carry very high interest rates. The settlement was to cover more than 28 million customers and in excess of 55 million individual loan transactions.

Source: *Reuters News Service*

Court Overturns Arthur Andersen Conviction

On May 31st, the U.S. Supreme Court overturned the conviction of the Arthur Andersen accounting firm for destroying Enron Corporation-related documents. In a unanimous opinion, Justices said the former Big Five accounting firm's June 2002 obstruction-of-justice conviction was improper. The decision said jury instructions at trial were too vague and broad for jurors to determine correctly whether Andersen obstructed justice. "The jury instructions here were flawed in important respects," Chief Justice William H. Rehnquist wrote for the Court. After Enron's 2001 collapse, the Justice Department went after Andersen and properly so, in my opinion. The case was the first of that sort brought by the government. Enron crashed in December 2001, putting more than 5,000 employees out of work, just six weeks after the energy company revealed massive losses and writedowns. The document destruction came about prior to Enron's collapse.

As the Securities and Exchange Commission began looking into Enron's convoluted finances, Andersen put in practice a policy calling for the destruction of unneeded documentation. The government's attorneys argued that Andersen should be held responsible for instructing its employees to "undertake an unprecedented campaign of document destruction." In his opinion, Chief Justice Rehnquist noted that jurors were instructed to convict Andersen if the accounting firm had an "improper purpose," such as an intent to impede or subvert fact-finding in an "official proceeding." The Chief Justice said jurors were instructed to convict, even if Andersen mistakenly thought it was acting legally.

At trial, Andersen argued that employees who shredded tons of documents followed the policy and there was no intent to hurt or hinder the SEC investigation. The probe into Andersen led to one guilty plea that coming from the firm's former top Enron auditor, David Duncan. The conviction of Anderson forced it to surrender its accounting license and stop conducting public audits. It will be interesting to see what happens to white collar prosecutions after this decision. There has been a great deal of speculation as to what effect the ruling will have on the prosecution of companies such as Anderson and other white collar prosecutions generally. Hopefully, it won't result in Corporate America reverting to its old ways and getting away with it. Neither should this decision deter federal prosecutors from doing their job. As I read the Court's opinion, I believe the lower courts will give it a very limited application. However, it does give hope to those who would like to see the government back off from its investigations in Corporate America.

Source: *Associated Press*

Kentucky Diocese Settles For $120 Million

The Roman Catholic Diocese of Covington agreed last month to set up a $120 million fund to compensate hundreds of victims of child-molesting priests and other employees. If approved by a Kentucky judge, it will be the nation's largest settlement in the massive scandal. The settlement would bring to a close a class action lawsuit filed on behalf of victims abused over a 50-year period. The Diocese was accused of a cover-up of sexual abuse by priests and others during that time. This settlement should serve to bring some measure of peace and healing to victims and their families.

Victims will be grouped into four categories based on the severity of abuse, and compensation will range from $5,000 to $450,000 per person before attorneys' fees are deducted. A portion of the settlement funds will be set aside to provide counseling. Any money not used for claims or other expenses will be returned to the Diocese. Under the statement, the class of victims "encompasses all persons, known and unknown, who were abused during the 50-year class period." Frankly, I don't believe the magnitude of the sex abuse problem in the U.S. Roman Catholic Church has really sunk in with the public. Sexual abuse by Catholic priests has already cost the church more than one billion dollars and there have been thousands of victims. It has also hurt the church's image. The following are some of the largest known payouts to victims in the past three years:

- January 29, 2002 – Diocese of Tucson, Arizona, pays an estimated $15 million to settle 11 lawsuits. Declares bankruptcy two years later in the face of more claims.
- September 9, 2002 – Diocese of Providence, Rhode Island, pays $13.5 million to settle 36 claims.
- September 19, 2002 – Boston Archdiocese settles with 86 victims of former priest John Geoghan for $10 million.
- May 22, 2003 – Diocese of Manchester, New Hampshire, settles with 61 people for $6.5 million.
- June 10, 2003 – Archdiocese of Louisville, Kentucky, pays $25.7 million to 243 victims.
- September 9, 2003 – Boston Archdiocese reaches $85 million settlement with 552 people.
- November 20, 2003 – Cincinnati Archdiocese, in an agreement with prosecutors, creates a $3 million fund to compensate victims.
- December 2, 2004 – Diocese of Orange, California, settles 90 abuse claims for an amount revealed a month later to be $100 million.
- June 3, 2005 – Diocese of Covington, Kentucky, agrees to create a $120 million fund to compensate victims.

I don't know how many priests were actually involved, but regardless of the number, those who were have caused a great deal of trouble for the church and hurt a tremendous number of young people. It is most unfortunate that cover-up of the bad acts appears to have occurred in many of the cases. That is extremely difficult to understand. It will take a strong effort by the good priests and the leadership of the church throughout the country to make sure this sort of thing never happens again. My prayer is that we have seen the end to a sad period in church history.

Source: *Associated Press*

Judge Upholds Jury Verdict Against DuPont

A federal court in New Orleans has rejected the efforts of E.I. DuPont de Nemours & Co. to overturn jury verdict returned in 2004 that found the company liable for maliciously and intentionally discriminating against an employee with a disability. The court ordered Dupont, the Delaware-based science and chemical giant, to pay $591,000 to a former employee who was fired due to her disability - including $300,000 in punitive damages, the maximum allowed under the law. The U.S. Equal Employment Opportunity Commission's (EEOC) lawsuit against DuPont, filed in June 2003, charged the company with violating the Americans with Disabilities Act (ADA) when it terminated the employment of Laura Barrios, who has severe physical impairments, due to her alleged inability to walk well enough to evacuate the premises in an emergency.

The jury originally ordered DuPont to pay $1.29 million to the former employee for illegally firing her with malicious intent. The award included $1,000,000 in punitive damages, $91,000 in lost past wages, and $200,000 in lost future wages. On January 31, 2005, pursuant to legal limits imposed by the ADA, the court reduced the punitive damage award to the highest possible amount of $300,000 (the statutory cap for one individual). In her 60-page opinion dated June 6, 2005, Judge Sarah Vance of the United States District Court for the Eastern District of Louisiana found sufficient evidence to uphold all aspects of the jury's verdict. In reference to the punitive damage award, Judge Vance stated:

> *The jury may have concluded from this evidence that DuPont wished to force out an individual with a disability whether she could work or not - a reprehensible view with respect to individuals with disabilities... Ultimately, there is ample evidence from which the jury could have concluded that DuPont discriminated against Barrios with both malice and reckless indifference to her rights under the ADA...there was sufficient evidence for the jury to conclude that DuPont engaged in a pattern of intentionally discriminatory and malicious conduct.*

The bottom line is simply this—employers must make sure that their employees don't suffer discrimination based on disability. In fact, discrimination of any kind has no place in the workplace.

Source: *Claims Guides*

Judge Cuts Damages Against Carmaker

A judge in Tennessee has reduced the punitive damages award against DaimlerChrysler in connection with an infant's death after a June 2001 minivan accident. You will recall that the jury returned a $98 million verdict. The verdict was cut to $20 million. The jury had found the carmaker to have designed a faulty seat on a 1998 Dodge Caravan. The 8-month-old infant died of head injuries during a crash on June 30, 2001, when a driver in a pick-up truck rear-ended the boy's grandparents' minivan. DaimlerChrysler was accused of knowing that the seats in its vans were prone to collapse during rear-impact accidents. The car company argued that a reckless driver traveling at twice the speed limit caused Joshua's death and said the company's seats were designed with safety in mind. A jury later found the carmaker 50% responsible for the infant's injuries.

The judge ruled that DaimlerChrysler had acted **recklessly** by ignoring evidence that its front seats **could collapse backward** into the spot where an infant might be buckled in a car seat in certain collisions. But the judge said a $98 million punitive damage award was excessive when compared with the amount of other damages due in the case. The jury had awarded $5 million for the wrongful death and an additional $2.5 million for the emotional distress suffered by the child's mother, who witnessed the death of her young son. This would have made the total compensatory damages $7.5 million. The trial judge obviously felt that $20 million in punitive damages met constitutional muster.

IV. THE NATIONAL SCENE

The President's Job Approval Falls To New Low

We should have figured that President Bush was not doing very well in the public opinion polls when the very popular first lady, Laura Bush, was sent out as her husband's chief spokesperson a few weeks ago. In my opinion, that was a good public relations move. Now we learn that, in fact, the President's approval rating about the time of Mrs. Bush's entry had fallen to 43%. This revelation came from an Associated Press-Ipsos poll and was the lowest level yet for the President. Charles Jones, a presidential scholar and senior fellow at the Brookings Institution, observed: "There's a bad mood in the country, people are out of sorts. Iraq news is daily bad news." I didn't need a poll to know that the President's popularity was dropping. The ill-advised attack on social security was a major mistake and has cost the President. There also are other factors involving the President's performances that are not at all popular with the American people. Poll results are very revealing along those lines.

The public is showing concerns about the direction of the country as the war in Iraq drags on. Only about one-third of adults, 35%, said they thought the country was headed in the right direction. Forty-one percent said they supported the President's handling of the war in Iraq, which was a low-water mark. The financial cost of the war in Iraq and the heavy death toll since the war started are troubling for the President. Pentagon officials acknowledge the level of violence is about the same as a year ago, when they were forced to scrap a plan to substantially reduce the U.S. troop presence in Iraq. While Bush has gotten generally low scores for his handling of domestic issues for many months, Americans have been more supportive of his foreign policy. That seems to be changing. The poll conducted for Associated Press by Ipsos found 45% support Bush's foreign policy, down from 52% in March. I believe there is a big difference in supporting the military and in supporting the reasons for the war in Iraq and the fact that no exit strategy appears to exist.

Bush's popularity was close to 80% when Ipsos started tracking attitudes about the President at the start of 2002, and was just over 50% when the Associated Press-Ipsos poll was started in December 2003. The fact that approval for Congress has dipped from the 40s early this year into the low 30s does make Bush look a little better in comparison. A majority of Republicans and Democrats in the United States say they don't approve of Congress. That really was no surprise, even though some of the members are very popular in their own area. A prime example is Senator Richard Shelby, who is extremely popular in Alabama.

As mentioned above, the attack on social security has hurt the President greatly. Only 37% support Bush's handling of Social Security, while 59% disapprove. Those numbers haven't budged after more than four months of the president traveling the country to sell his plan to create private accounts in Social Security. Support for his handling of the economy was at 43% and that is real bad news for the Rove-directed White House. The Associated Press-Ipsos poll was taken June 6th—8th and has a margin of sampling error of plus or minus 3 percentage points.

Source: *Associated Press*

Approval Of CAFTA Would Be Another Major Mistake

In my opinion, the Bush Administration is making a big mistake in pushing the Central American Free Trade Agreement. Our political leaders should be doing all within their power to save American jobs and protect our economy. CAFTA—if approved—will hurt our nation's economy in my opinion and will cost jobs. In our state of Alabama, this trade pact would hurt Alabama farmers and also further damage our industrial and agricultural base. There can be little doubt that the North American Free Trade Agreement has been a dismal failure. Foreign outsourcing and our foreign competitors have clearly been the real beneficiaries under NAFTA. It was estimated by a Washington based think tank that NAFTA has caused a loss of 29,000 Alabama jobs, while creating only 14,000 in our state. It is believed that over 760,000 U.S. jobs were lost as a result of NAFTA. We don't need to see any more plants shut down in this country or any more American jobs lost. I believe CAFTA is just as bad. I strongly oppose CAFTA. The following gives us a pretty good and I hope objective assessment of the arguments against CAFTA:

- Small-scale farmers in the region would be unable to compete against duty-free American imports, forcing farmers off the land and, in some cases, to migrate to the United States.

- The U.S. sugar industry says the increase in Central American imports, to reach 1.7% of U.S. production after 15 years, could drive down prices in the oversupplied market and open the way for other sugar exporters to undercut U.S. producers in future trade deals.
- CAFTA would require countries to enforce their own labor and environmental laws. Critics say this is inadequate to protect worker rights and the environment in countries with a history of abuses in these areas.
- Critics say CAFTA would extend rules that limit generic drug competition to the benefit of the U.S. pharmaceutical industry.
- CAFTA is patterned after NAFTA, which has caused U.S. job losses, rising trade deficits and lower wages in Mexico.
- CAFTA will prohibit a Buy America policy by states.
- States won't be able to require contractors to pay fair wages or to treat their workers fairly.

I am totally against CAFTA and believe its approval will prove to be a bad thing for U.S. citizens and for our country. Our government's goal should be to protect U.S. jobs first and foremost. So far, that hasn't been the case. Our economic policies at present seem to be off the mark and we had best get things straightened out. CAFTA is the wrong path to take in my opinion.

SEC May Take The Wrong Turn

President Bush has named Christopher Cox, a pro-business member of Congress, to lead the Securities and Exchange Commission. Representative Cox will succeed William Donaldson, who stepped down after 28 months on the job. Bush called Cox "a champion of the free enterprise system in Congress," which is code for **anti-consumer** in the Bush White House. Cox, 52, a member of the House Republican leadership, has represented California in Congress for 16 years. Before that, he was a corporate finance lawyer in private practice and served as a senior counsel in the Reagan White House.

Donaldson, a former Wall Street official whom the president picked to restore investor confidence after a wave of corporate scandals, has done a very good job. However, it became apparent that he was too "fair" on consumer issues for the Rove-mentality that drives the Bush political engine. Donaldson's aggressive regulation had antagonized big business' leaders and their allies in the Administration and on Capitol Hill. Clearly, Donaldson was considered too much of a maverick on consumer issues to suit the Rove agenda. The SEC, under Donaldson's lead, had worked to restore faith in the integrity of corporate practices so that we could believe the information being put out from the board rooms.

The SEC's five commissioners have been deeply divided on the general direction of appropriate policy. By law, no more than three commissioners can be from one political party. Many key decisions were taken by a 3-2 vote, with Donaldson voting with the two Democratic commissioners. Clearly, the SEC responds to political pressures. That's why it's structured so as to prevent sharp policy divergences after changes in political control of either Congress or the Presidency. Most of the close 3-2 votes affect areas where rules have yet to be implemented. It's most important that these decisions don't get reversed. We must watch closely for changes in the enforcement climate.

The U.S. Supreme Court's decision in the **Arthur Andersen** case could be relevant. The case, overturning the criminal conviction for the firm for destroying Enron documents, is discussed in another section of this issue. The decision could give prosecutors less leeway in future corporate fraud cases. Cox's chairmanship will definitely push the SEC in a more business-friendly direction, but hopefully, it won't result in the reopening of many previously settled areas. Nevertheless, the American people must pay very close attention to the future direction of the SEC. We can't afford to go backward!

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

U.S. Should Take Action On Climate Concerns

I agree with British Prime Minister Tony Blair who believes it is vital that the United States become involved in international dialogue on climate change. Blair told the House of Commons, after returning to London from talks in Washington with President Bush that he made no progress on the global warming issue. Blair stated:

> *Climate change is, in my view, long-term, the single biggest issue that we face. The brutal truth is, without America in a process of dialogue and action in the international community, we are not going to make progress on it.*

It is evident that significant global warming is occurring, causing increases in sea levels, retreats of glaciers and changes in many biological systems. Tackling this problem is a priority for Britain's presidency of the Group of Eight industrialized nations. Apparently, Blair was unable to reach any agreement with the United States on global warming. In fact, President Bush questions scientists' view that man-made pollutants are responsible for increasing temperatures. The President refuses to back the Kyoto Protocol on global warming, which is a big mistake. Bush claims that America is at the forefront of climate research and the development of technology to reduce emissions. However, there is little evidence that claim is an accurate assessment of the current situation.

It was reported in *The New York Times* that Phillip A. Cooney, who served as chief of staff to President Bush's environmental policy council, who incidentally came from the oil industry, has taken steps to play down links between greenhouse gases and global warming. This is a man with no scientific background or knowledge. There can be no question about where the Bush Administration stands on global warming and it is on the wrong side of the issue. The effects of global warming are already extremely harmful to the environment and if things continue it will be much worse in future years.

It is shocking to learn that Cooney is now going to work for ExxonMobil. Remember, this is the White House staff member who repeatedly revised government scientific reports on global warming. He was in a key spot to do good, but did just the opposite. *The New York Times* reported that Cooney edited reports in ways that cast doubt on the link between greenhouse-gas emissions and rising temperatures. A former lawyer and lobbyist with the American Petroleum Institute, the main lobbying group for the oil industry, Cooney should never have been given any opportunity to help the powerful oil industry while serving in government.

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

Japan Bans 'Grand Theft Auto' Sales

A state in Japan has decided to ban a U.S. video game from being sold or rented to minors. This came after officials deemed it harmful and capable of inciting violence. "Grand Theft Auto III," produced by Rockstar Games Inc., was introduced in Japan in September 2003 and has sold about 350,000 copies. It depicts random killing sprees in public places, cars being blown up and other acts of violence. The Japanese officials were concerned that teens might try to mimic what they were exposed to. The game will receive a "harmful" product label in Kanagawa prefecture (state), where retailers will be barred from selling or renting the game to anyone under age 18. The game also will have to be displayed separately from other titles.

While other products have faced similar restrictions due to explicit sexual content, it is the first time Japan has placed such measures on game software because of violence. Osaka-based Capcom Co. Ltd. distributes the game in Japan. I understand that Kanagawa prefecture is located just south of Tokyo. It includes major cities like Yokohama and Kawasaki. I commend the officials who made this decision. I am convinced that the young people in the U.S. should be protected from video games that promote violence of the kind seen in "Grand Theft Auto III." I have to wonder what it will take to wake up responsible adults in our country!

Source: *Associated Press*

John Edwards Stays Busy These Days

For a man not officially running for anything, my friend John Edwards has been keeping a campaign-like schedule. In one week in late May, John met with the British prime minister, spoke at the London School of Economics and lobbied members of the Albuquerque, New Mexico City Council to pass a higher minimum wage. In early June, he was named to co-chair a Council on Foreign Relations task force on Russia. John's latest book will soon be on the market. He is actively helping Democratic legislators across the country. John also has his day job and that's running the University of North Carolina's new Center on Poverty, Work and Opportunity.

John, who is a young 51, has visited at least 15 states since January. He'll visit a good number of states in the coming months. His whirlwind schedule does little to dampen speculation that John is looking toward a 2008 campaign for the White House. In my opinion, John Edwards would have been a much better candidate in 2004 than the one put up by the Democrats. In fact, many believe John could have been elected President had he been the nominee. There is one thing for certain—he would have run much better than Kerry.

On a more personal note, John's wife, Elizabeth, has had her last radiation treatment for breast cancer. John says Elizabeth's doing well and that's very good news. The Edwards family has moved back to North Carolina from Washington and will live in Raleigh until their new home is finished in Orange County, North Carolina. At this juncture, I believe John should be considered a front runner for the Democratic nomination in 2008, but lots can change over the next two years.

V. THE CORPORATE WORLD

Kozlowski And Swartz Are Guilty

Former Tyco International Ltd. top executives L. Dennis Kozlowski and Mark H. Swartz were convicted last month of multiple charges that they systematically looted millions of dollars from the company. The jury, which deliberated for 11 days, found the two executives guilty of grand larceny, conspiracy, securities fraud and eight of nine counts of falsifying business records. In addition, Kozlowski was convicted of one count of grand larceny related to his purchase of artwork with company funds. Swartz also was convicted of one count of grand larceny related to a deposit he put down on a set of luxury hotel units near Central Park and was later reimbursed for by Tyco.

These two corporate crooks were on trial in New York State Supreme Court on charges they stole more than $150 million from the Bermuda conglomerate by granting themselves giant bonuses and improperly using company loan programs, as well as gaining $405 million combined by inflating the company's stock price. These men were treating the company like it was their own and they obviously had no regard for either shareholders or employees. They each face up to 15 years to 30 years in prison. I believe each should get the maximum sentence so that others in Corporate America will get the message—crime—including corporate crime doesn't pay!

Citigroup And J.P. Morgan Pay Billions

Former Enron Corp. investors had some real good news over the past few weeks. Some $4.2 billion in settlements from Citigroup Inc. and J.P. Morgan Chase & Co. were announced as those banks settled lawsuits over their roles in aiding Enron's fraudulent financial dealings. The first company to step to the plate was Citigroup Inc., the nation's largest financial services company, which will pay $2 billion to settle a class action lawsuit over its role in helping Enron Corp. orchestrate the massive accounting fraud that led to the energy trader's collapse. Enron investors, who claim they were cheated out of billions of dollars when the energy company went bankrupt in 2001, are finally getting what they deserve.

J.P. Morgan then announced the largest Enron settlement to date, $2.2 billion, in a lawsuit led by the University of California. About 50,000 Enron stock and bond holders filed claims as part of the suit. The agreement is the largest settlement deal in lawsuits against banks, advisers, and Enron executives connected to the energy trader's 2001 bankruptcy. The suit alleges that a number of banks and brokerages helped Houston-based Enron continue to operate and raise money even as the company was imploding.

Those settlements are the latest in the long-running Enron debacle, with some $491.5 million in settlements having being made previously with Lehman Brothers Holdings Inc., Bank of America Corp., Andersen Worldwide, Enron's outside directors and Enron's former vice chairman, Ken Harrison. The reason why J.P. Morgan is paying $200 million more than Citigroup is because the University of California offered incentives for those that strike settlements "sooner rather than later." Interestingly, The University of California lost $144.7 million when Enron declared bankruptcy.

All the settlements still must be approved by a federal judge in Texas, who will determine a formula under which claimants would be paid. No date for a hearing has been set. Seven other banks are defendants in similar lawsuits. Class action suits are pending against Barclays PLC, Credit Suisse First Boston, Merrill Lynch & Co., Toronto Dominion Bank, Royal Bank of Canada, Deutsche Bank AG and the Royal Bank of Scotland.

Source: *Associated Press*

The Amount Of Citigroup Settlements Is Shocking

Now that Citigroup has settled its Enron case, I thought it might be interesting to see how truly bad this company's conduct has been. Citigroup has now agreed to pay almost $6 billion since late 2002 to settle lawsuits and regulators' complaints about its questionable business practices. Many of the settlements were largely overlooked by the media and as a result by the public. Here is how Citigroup's settlements add up:

- $5 million: September 23, 2002—Salomon Smith Barney, now Citigroup Global Markets, pays fine to NASD for publishing misleading research by telecom analyst Jack Grubman.
- $400 million: December 20, 2002 – Its share of nine Wall Street firms' settlement with state and federal regulators who alleged the firms published misleading stock research or otherwise harmed investors.
- $101 million: July 28, 2003 – For Enron-related allegations of misconduct by SEC and Manhattan District Attorney. Also paid: $12.5 million each to New York state and city.
- $1 million: October 29, 2003 – New York Stock Exchange alleges WorldCom employees got bad advice about their stock holdings.
- $2.65 million: May 10, 2004 – Settles WorldCom investors' lawsuit.
- $70 million: May 27, 2004 – Federal Reserve Board alleges improper lending practices by a Citigroup subsidiary in 2000 and 2001.
- $486,000: July 28, 2004 – NASD alleges excessive markups and markdowns in trading of high-yield corporate bonds.
- $75 million: March 23, 2005 – Settles SEC and NASD charges that mutual fund representatives did not give certain customers discounts and did not disclose Citigroup's business ties to funds it sold.
- $208.1 million: May 31, 2005 – Settles SEC charges, including fraud, that two subsidiaries hid conflicts of interest concerning a service contract from boards overseeing Smith Barney's mutual funds.
- $2 billion: June 10, 2005 – Settles lawsuit by Enron investors.

More Bad News For Citigroup

Coming on the heals of all its prior legal problems, the shocking news that Citigroup lost the account data of 3.9 million of its customers is more bad news for the company. However, that doesn't seem to have caused the uproar that I would have expected. In any event, the fact that the financial services giant experienced a data breach involving 3.9 million accounts in its CitiFinancial consumer lending operations is alarming. The company has called itself a leader in **data security**. Citigroup has been promoting its identity theft solutions as a leading feature of its retail banking services that it says put it ahead of its competitors. In its literature for CitiFinancial mortgage customers, it says that identity theft is one of the fastest-growing crimes, but that its dedicated specialists can help victims of the crime get their lives back "quickly and painlessly."

Citi blames a courier service, **United Parcel Service**, for misplacing tapes containing the account data, including Social Security numbers, account numbers and payment history of 3.9 million of its customers. It was sending the tapes to a credit bureau, which is a routine shipment. Citi says its lost data is limited to accounts of CitiFinancial branch customers. It claims that the loss does not include auto, mortgage or other businesses. Accounts of customers in Puerto Rico or Canada are also said not to be included. So far the company says it has not received any reports of unauthorized activity. Hopefully, that is correct. Citi customers were told that they have been signed up for its free "Identity Theft Solutions" package, available to all customers. They were also offered additional protection: enrollment in a free credit monitoring service for 90 days.

Source: *Forbes News*

Cheating The Government Shouldn't Pay

Hardly a day passes that we do not get a report that some large corporation has been caught cheating the federal government. It is so common now days that the news media no longer considers cheating the government front page news. The following are just a few examples and there are hundreds more.

- **Oracle Corporation** - $8 million to settle allegations that it fraudulently billed the federal government for software training services. Federal officials in Boston allege that from 1997–2003 Oracle, one of the worlds largest enterprise software companies, submitted false claims for payment of computer training to a variety of government agencies.
- **Staten Island University Hospital** will pay $76.5 million to settle allegations that the hospital fraudulently over billed the Medicaid program for services provided at 21 clinics. It was also alleged that the University Hospital caused the State of New York to pay a wrongfully inflated reimbursement rate for patients visits are more than 500 clinics over a three-year period. It was also alleged that the hospital and CHAPS Community Health Services Inc., fraudulently billed for services at 21 part-time clinics.
- **Honeywell Technology Solutions Inc.**, a unit of Honeywell International Inc. will pay $2.75 million to settle federal charges that it fraudulently stated in a contract proposal to the United States Air Force that it had fully compliant cost management system when it in fact it did not have even one. HTSI subsequently was awarded the contract and then it improperly charged the Air Force for putting a compliant system in place.
- **The Mayo Foundation**, parent organization of the Mayo Clinic, has paid the United States $6.5 million to resolve allegations that it charged the government under federal grants for research costs unrelated to the research projects sponsored by those grants. The settlement resolves allegations that Mayo wrongfully charged the government by including on under spent grants research costs incurred on overspent grants and internal Mayo costs centers. The government says that it paid Mayo more under the grants than Mayo was entitled to receive.

I believe that the American public is fed up with all of the fraudulent conduct that has become all too prevalent in Corporate America. For this reason, I don't believe that the public will tolerate any slow down by the federal government in the prosecuting of corporate criminals. Corporate CEOs, who make an average of $200 million annually, and who can afford the best criminal lawyers available, shouldn't be given a "free pass" from jail when they break the law. The common thieves can't afford those kind of lawyers and, as a result, they generally find their experience in the courts quite different than that of the CEOs.

University Of Miami Pays $3.8 Million To Settle False Claims Act

The University of Miami will pay $3.8 million to settle a False Claims Act lawsuit alleging that it defrauded Florida's Medicaid program. The whistleblower in the case, a former State of Florida Medicaid employee, alleged that the University double-billed and overcharged Medicaid through several of its outpatient clinics. University of Miami and its outpatient clinics allegedly billed Medicaid under their respective provider numbers for the same covered services provided to the same recipients on the same date.

Federal Government Does The Right Thing In Caremark Case

The U.S. Justice Department and four states—Texas, Tennessee, Florida and Arkansas—have intervened in a federal False Claims Act case against pharmacy benefits manager Caremark, Inc. of Nashville, Tennessee. The lawsuit, pending in a federal court in San Antonio, Texas, alleges the company engaged in an unlawful scheme over many years to avoid reimbursing Medicaid for payments of prescription drugs for individuals who were insured by one of its health plans. Although the individuals and families covered by the plans Caremark designs and administers were also eligible for Medicaid assistance, Medicaid is always the payer of last resort by law if individuals are already covered by a health plan or pharmacy benefit manager. The lawsuits by the states seek to recover dollars Caremark bilked from the state Medicaid programs. Texas Attorney General Greg Abbott stated:

> *We intend to send Caremark a past-due bill for its conduct. This company schemed to avoid responsibility for its health care obligations to members who were paying premiums. Instead it opted to let the Medicaid program—and Texas taxpayers—cover expenditures it should have covered on behalf of those already insured under its plan. I intend to get those dollars back for Texas.*

I find that most folks still don't know what a pharmacy benefit manager (PBM) really is. A PBM administers prescription drug benefit plans for insurance companies, employers, managed care organizations and other entities. In doing so, the PBM are obligated to keep costs low for these clients, but to do so lawfully. You will find that the PBMs are paid extremely well for this fork. This lawsuit tracks a systematic effort by Caremark to allow Medicaid to pick up the tab for medications acquired by families who were dually covered by both Caremark and Medicaid. State and federal law require health benefit plans to reimburse Medicaid when a claim covered by insurance is paid for by Medicaid. The practices were brought to light in a 1999 sealed whistleblower lawsuit filed by an employee of Caremark, whose job involved the review of claims processing. The employee complained to the company that legitimate government requests for reimbursement for these unlawful practices were being rejected, but company officials ignored her. She then filed suit on behalf of the state of Texas and the federal government in a civil action known as a qui tam action, but more commonly referred to a "whistleblower" lawsuit.

False Claims Act Cases Pending

The more we learn about how the giant pharmaceutical industry has operated, the worst things appear to be. As we have learned, the False Claims Act is very important in today's world when it comes to controlling corporate behavior. There are currently pending 125 False Claims Act cases against pharmaceutical companies in the federal courts. There are 500 drugs implicated in those cases. According to reliable sources, the Justice Department will only settle three or four of these cases each year. That means a log jam in the system has to be the result. Currently, the Civil Division of the Justice Department has only a small unit of lawyers in charge of handling these cases. When you consider that the cases under the False Claims Act have the potential of returning hundreds of millions of dollars each year for the federal government, it is incomprehensible that the government won't adequately fund the Justice Department and demand a better performance of prosecuting the wrongdoers in both the civil and criminal courts. The False Claims Act is an important part of the overall system and we can't afford to let the cases filed under the Act die on the vine.

Hundreds Of Cases Of Drug Pricing Fraud

State and federal prosecutors are investigating 150 cases of alleged pricing fraud by some of the world's largest drug makers, according to a published report in *The Wall Street Journal*. It was reported recently that the investigations could produce more than $1 billion in criminal and civil penalties this year. The *Journal* said the probes are looking at allegations that drug companies cheat state and federal health-care programs by inflating prices and offer undisclosed rebates to distributors. They are also looking into charges the drug makers market drugs for unapproved uses. Earlier probes have already produced fines of nearly $1.5 billion against five of the world's largest drug makers, according to the paper. The current investigations could hit Swiss biotech Serono, Inc., U.S. drug maker Abbott Laboratories, Inc., and generic and name-brand drug maker King Pharmaceuticals, Inc.

The investigations come months before a new Medicare prescription drug program will dramatically escalate government spending on drugs. The program will cost an estimated $720 billion in its first 10 years. Those costs have prompted Senate Finance Committee Chairman Charles Grassley to press the Justice Department to step up fraud enforcement, according to the report. The federal government has got to bring the pharmaceutical industry under control. We have seen too much evidence of the "tail wagging the dog" in the governments regulatory efforts. It's time for a drastic change!

Source: *The Wall Street Journal*

HealthSouth Settles SEC Civil Fraud Charges For $100 Million

HealthSouth Corp. has reached a settlement with the Securities and Exchange Commission and will pay $100 million over two years to settle charges brought by the government. All of this arose out of the corporate fraud at the medical services chain which was exposed in March 2003. The SEC's civil action accused both HealthSouth and fired CEO Richard Scrushy of overstating earnings by $1.4 billion since 1999. After further investigation, that number grew to $2.7 billion over seven years, beginning in 1996. The settlement, which applies only to the Birmingham-based company, is to be paid in five installments over two years beginning in the fourth quarter of 2005.

As part of the settlement, HealthSouth also agreed to hire consultants to monitor governance, internal control and accounting practices and policies, and to train certain officers. In a separate SEC filing, the company said it will create an Inspector General position. The company—which brought in new management to lead the post-Scrushy effort to avoid bankruptcy—also agreed to continue cooperating with the SEC and Department of Justice. HealthSouth reached a $325 million settlement over three years with the Justice Department in January to resolve issues associated with various Medicare billing practices. Company officials have spent much of 2005 restructuring HealthSouth's debt to help manage the fraud-related issues. HealthSouth has gotten a $315 million term loan, a $250 million revolving credit line and $150 million in letter of credit facilities.

Sources: *Associated Press* and *The Birmingham News*

Bristol-Myers To Pay $300 Million To Settle Probe

Bristol-Myers Squibb Co. will pay $300 million to settle a criminal investigation by the Justice Department into its alleged accounting manipulations from several years ago. As part of the settlement, longtime board member James D. Robinson III will become chairman. Current Chairman and Chief Executive Peter R. Dolan will have to step down, but he will retain the CEO title. Two executives were indicted. The settlement will include a deferred prosecution, which will enable the company to avoid criminal indictment. As part of the settlement, Bristol-Myers will incorporate several governance changes.

Source: *The Wall Street Journal*

Sihpol Case A Setback For Spitzer

In a rare defeat, New York State Attorney General Eliot Spitzer has finally lost a state court case. A jury found former **Bank of America** broker **Theodore Sihpol** not guilty on 29 counts of larceny and securities fraud. Sihpol had been accused of helping a hedge fund do improper late trades in the bank's Nations Funds. The judge declared a mistrial on four remaining counts, on which it was reported the jurors voted 11 to 1 to acquit. This loss was loudly applauded in corporate board rooms all over the country. You would have thought they had won the Super Bowl or World Series. Some believe the pendulum is swinging away from powerful regulators and back toward Corporate America. Since unveiling his investigation into the mutual fund industry in September 2003, Spitzer has been able to get over $3 billion in penalties, fee reductions and restitution from a dozen or so mutual funds. His investigations have led to the ouster or resignations of several top fund executives.

Interestingly, that's more than Spitzer's conflict-of-interest investigation into the investment banking community, which resulted in a global settlement of $1.4 billion. As in the Wall Street investigation, Spitzer used the Martin Act, an almost forgotten New York state law, to aggressively pursue companies and individuals. The Martin Act, a 1921 law designed to eradicate fraudulent stock sales, is so broadly written it gives Spitzer unusually strong powers to subpoena records and other materials before he has to file a complaint. Hopefully, the New York Attorney General won't be discouraged by this one setback. In my opinion, what he has done has been good for America and he should keep it up. In any event, Sihpol, who still faces civil charges in an SEC proceeding, might not be so fortunate in that forum since the burden of proof is difficult.

Sources: *Forbes News* and *The Wall Street Journal*

Boeing May Have Knowingly Used Many Faulty Plane Parts

Three senior Boeing Co. employees have sued the aircraft manufacturer, claiming that it ignored defects in numerous airplane parts. The three employees of Boeing's commercial-aircraft division in Wichita sued in March on behalf of the U.S. Government, saying Boeing knew of nearly 2,000 defective parts from Ducommun Inc., a manufacturer of parts for numerous aircraft based in Carson, California, that were used in 32 airplanes. The lawsuit became public recently after the U.S. Justice Department completed its investigation. A federal-court filing said the defective parts ended up on $1.5 billion worth of planes delivered to the Air Force and Navy and foreign militaries, including those of Japan, Italy, Turkey and Australia.

The lawsuit says the parts didn't pass minimum Federal Aviation Administration safety requirements and were used on 737s, 747s, 757s and 767s made in Wichita and delivered for sale from March 1998 through November 2004. According to the lawsuit, in 1999 Boeing found that Ducommun's documents for making the parts did not conform to FAA requirements. A Boeing field representative wrote a computer report to suspend Ducommun's delivery of parts to the Wichita plant, the lawsuit says, but the report was deleted the next day.

Source: *Associated Press*

Supplier For Osprey Aircraft Charged

A military supplier and two of the company's workers have been charged with falsely certifying material for the V-22 Osprey aircraft. Anco-Tech Inc., located in Dearborn Heights, Michigan, manufactured titanium tubing for use in the tilt-rotor aircraft. The company certified that the tubing met the military's standards, even though it was never tested or incompletely tested, according to federal prosecutors. The prosecutors say:

> *Tests were skipped, protocols were ignored, inspection procedures were not followed, documentation was either incomplete or falsified. All of this was not only tolerated but sanctioned and condoned by the company.*

The Osprey program has been threatened since 23 Marines died in a pair of crashes during testing in 2000. A December 2000 crash in North Carolina, which killed four Marines, was caused by a titanium hydraulic line that ruptured. Anco-Tech's titanium tubing was used in the hydraulic system in the aircraft that crashed, but an independent expert hired by the Justice Department didn't find any flaws or defects in the tubing that would have caused the rupture, prosecutors said. The rupture was most likely due to external forces unrelated to the condition of the tubing, prosecutors said.

The Osprey tilt-rotor aircraft can land and take off like a helicopter and fly like an airplane. Commanders say the Osprey can haul more troops and equipment farther than existing helicopters. It was designed to replace the aging helicopters in the Marine Corps fleet. A joint venture of Boeing Co. and Textron Inc.'s Bell Helicopter unit builds the aircraft in Texas and Pennsylvania. The Marine Corps grounded the Osprey fleet in March 2003 to remove Anco-Tech tubing from any critical parts of the hydraulic systems, at a cost of more than $4 million, prosecutors said. Anco-Tech went out of business in 2002. A number of Marines have been killed in Osprey crashes. An August 2000 crash in Arizona killed 19 Marines.

Our firm handled a wrongful death case that resulted from the Osprey crash in North Carolina. We learned during our handling of that case that this aircraft is not nearly as safe as some in government would have us believe. In fact, I am convinced that the Osprey is unreasonably dangerous and that blaming the deaths that have occurred on pilot error can't be justified.

VI. CONGRESSIONAL UPDATE

Asbestos Trust Fund Legislation Called A "Corporate Bailout"

The Asbestos Disease Awareness Organization (ADAO), an organization which is said to serve as the voice of asbestos victims, has announced its extreme disappointment regarding the passage of the asbestos trust fund bill (S. 852) sponsored by Senator Arlen Specter (R-PA). ADAO President Alan Reinstein made this observation:

> *We are sorely disappointed that S. 852 has been voted out of the Judiciary Committee. It is clear that the victims and their families were not considered stakeholders. This legislation does not adequately protect the rights of present and future victims and we hope the Senate does the right thing by voting 'no' on this corporate bailout bill.*

ADAO, which represents thousands of asbestos victims, with the numbers growing daily, has continually voiced opposition to the bill, which does not adequately represent the rights of those affected by asbestos. The following points out the weaknesses of the legislation:

- ADAO's Science Advisory Board strongly objects to the outdated and incorrect medical criteria in S. 852 describing the symptoms, diagnosis and severity of asbestos related diseases. ADAO recommends that any piece of legislation should follow the established American Thoracic Society guidelines to diagnose and treat asbestos related diseases.
- The bill contains inordinate compensation delays and ineligibility for the victims.
- The bill has inadequate funding for not only research, but education, prevention and outreach.
- The trust fund faces insolvency long before all present and future victims can access it.

Earlier this year, ADAO Co-founder and Executive Director Linda Reinstein explained in a statement to the Senate Judiciary Committee why the bill is so bad. She stated:

> *Asbestos diseases can take twice as long to appear as the fund is designed to last. That leaves millions of Americans exposed to asbestos with a fund that is destined to become insolvent…Once again, sick and dying victims will be at the mercy of bureaucracy and receive more aggravation than compensation… We are not principally opposed to a trust fund. But it makes good business sense to design a fair and balanced fund that provides speedy compensation and adequate funding for research, education and outreach. Give the victims the right to choose the fund or a trial. Citizens need to make certain before they give up*

their right to a trial, that a national trust fund has sufficient funding for the future.

Asbestos Disease Awareness Organization was founded by asbestos victims and their families. ADAO seeks to give asbestos victims and concerned citizens a united voice to help ensure that their rights are fairly represented and protected, while raising public awareness about the dangers of asbestos exposure and often deadly asbestos related diseases. ADAO is an independent organization funded through voluntary contributions and staffed by volunteers. If you want more information about this legislation, you can visit http://www.asbestosdisease awareness.org.

VII. PRODUCT LIABILITY UPDATE

NEW RULE REQUIRING TIRE PRESSURE MONITORING SYSTEMS IS INADEQUATE

A new rule requiring auto manufacturers to install tire pressure monitoring systems in new vehicles is flawed, does not meet the requirements set by Congress and would allow for motorists to ride on dangerously underinflated tires, according to a federal court lawsuit. The suit was filed in the U.S. Court of Appeals for the District of Columbia by Public Citizen, the Goodyear Tire & Rubber Company, Bridgestone Firestone North American Tire, Cooper Tire & Rubber Co., Pirelli and the Tire Industry Association. The rule, issued in April, doesn't require tire pressure monitoring systems to operate with replacement tires - a dangerous omission given that an estimated 61% of passenger and 54% of light truck mileage occurs on replacement tires. Under the rule, a malfunction light will come on to alert motorists that the system is not working with the replacement tires. Not only would this undermine public confidence in the systems, but it would likely lead to consumers ignoring the warning light or having it disabled. Public Citizen President Joan Claybrook says:

Congress ordered the National Highway Traffic Safety Administration (NHTSA) to write a rule that would improve highway safety by helping ensure that motorists are alerted to dangerously underinflated tires. This rule falls far short.

Under the rule, systems need not measure tire pressure until a motorist has been driving between 30 and 60 miles per hour continuously for 20 minutes. This means that the system would be useless for someone who does a lot of city driving with attendant stops and starts. Clearly, there are systems that would provide more accurate information to motorists faster. The systems are to alert motorists if any tire falls 25% below the recommended inflation pressure. However, a key problem is that under the rule, the baseline by which the 25% will be measured will be dictated by the recommended tire pressure set by automakers. Because this recommendation is usually a range, and because the rule allows for a fudge factor of 2 pounds per square inch in the systems, this could allow some tires to be on the road at 30% underinflation or more before an alert is provided. With the passage of the TREAD Act in the fall of 2000, Congress required NHTSA to set guidelines for tire pressure monitoring systems within a year. The agency in the spring of 2002 issued a weak rule allowing for a system that wouldn't function when two tires on the same side of the vehicle were underinflated. The system had other weaknesses and would have been of little help to motorists.

The revised regulation takes effect this fall and is a part of the safety changes ordered by Congress in the aftermath of the Firestone tire debacle when nearly 300 people were killed in U.S. crashes caused by blowouts and tread separations of Firestone tires. As you will recall, most of the Firestone crashes were rollover accidents involving Ford Explorer sport-utility vehicles. Firestone recalled millions of tires and Congress enacted a series of laws designed to boost vehicle and tire safety. In the new monitoring standard, a dashboard light will warn motorists if tires are under-inflated by more than 25%. But tire makers and Public Citizen oppose a single standard because tires vary in size and thickness. They argue that a 25% drop in recommended pressure may leave some tires so underinflated they cannot safely support a fully loaded vehicle. Under-inflated tires can expose rubber and other materials to hot roads and friction, resulting in premature wear at the edges and sides of a tire.

Public Citizen, the New York Public Interest Research Group and the Center for Auto Safety filed suit in June 2002 to force the agency to revise the rule to ensure that motorists would be adequately alerted when their tire pressure dropped to dangerous levels. In 2003, a three-judge panel of the United States Court of Appeals for the Second Circuit ordered the government to strengthen the rule to cover each tire on the vehicle. Still, the agency dragged its feet for nearly a year, and the safety groups returned to the court in July 2004, asking it to order the recalcitrant agency to act. On April 7th, NHTSA issued a rule requiring automakers to install systems in all new passenger cars and trucks by the 2008 model year, beginning a phase-in with 2006 model year vehicles. A copy is available at http://www.citizen.org/documents/Petition_for_Review.pdf.

Source: Public Citizen

NHTSA Hesitant To Alter Roof Test

With a long-anticipated revision in roof-strength regulations nearing completion, officials from the National Highway Traffic Safety Administration indicated last month that they were unlikely to pursue a key change to the agency's longtime test. As previously reported, safety advocates have been pushing for a stronger roof-strength test, one that more closely resembles what actually happens in a rollover. The comments from NHTSA, delivered during an international safety conference in Washington, are the latest indication that the agency is not too interested in updating its roof-strength requirements. The roof-strength test is the main requirement automakers must meet to lessen the likelihood of injury in a rollover crash. Currently, the agency applies force to an angled steel plate to the roof of a stationary vehicle. The roof must be able to bear 1.5 times the vehicle's unloaded weight to pass. That will be explained in more detail below.

In their presentation, NHTSA researchers said their initial examination of different angles showed little difference in the damage patterns on the vehicles they tested. In subsequent phases of research, the agency dropped the idea of changing the test angles. "The differences produced from the two load plate angle configurations were small, so it could be concluded that both configurations produce equally realistic roof damage," according to a technical report released by NHTSA. It was reported that research discussed at the safety conference formed the underpinnings of the revised roof-strength regulation. NHTSA says the regulation was subject to change. The agency sent its proposal to the White House in late April, where it is under review by the Office of Management and Budget (OMB). Nothing will be final until the regulation comes back from the OMB.

Previously, NHTSA has indicated that only a tiny fraction of the more than 10,000 rollover deaths in the United States each year would be prevented by stronger roofs. NHTSA is hoping to save additional lives by combining its revised roof-strength requirements with new regulations to make safety belts more effective in keeping passengers in seats during a rollover. NHTSA is also researching the effectiveness of side airbags in preventing ejections, another leading cause of deaths in rollover crashes. But consumer and safety advocates charge that the agency is fiddling around at the edges of an outdated rule and missing an opportunity to significantly reduce the number of rollover deaths. They want NHTSA to adopt a full-scale rollover crash test, like the one the agency conducts for frontal crashes that helped spur the development of airbags. NHTSA's latest findings on the roof-strength test angles were challenged by Carl Nash, a former high-ranking NHTSA official. Nash said his own study of 273 in-depth crash investigations showed that the agency's test angles did not match with real-world rollover crashes.

The roof-strength test, known as Safety Standard 216, involves applying force of up to 1.5 times a vehicle's weight to a steel plate on the corner of the roof. The plate is angled at 5 degrees from front to back, known as "pitch," and 25 degrees from side to side, known as "roll." Nash said his review of real-life crashes showed a substantial number contained damage that indicated a pitch angle of 10 degrees or more. The former NHTSA employee says the 5 degree angle used by NHTSA is an easier test for manufacturers to pass, since it puts less force on the front pillars and more on the middle pillars. Front pillars, known as "A" pillars, often collapse in crashes. Nash is an adjunct professor at George Washington University and a partner in Xprts LLC, a California research firm.

Automakers have consistently argued that roof strength is a minor factor in rollover injuries. A series of company-financed studies published over the past two decades suggest rollover injuries are due to occupants' flying out of their seats into the roof in the split seconds before a roof collapses during a crash. The automakers' argument totally ignores the weak roof structures. In any event, NHTSA has ruled out full-scale crash tests. Agency officials claim full-scale rollover crash tests don't meet a legal standard known as "repeatability," meaning the tests result in the same kind of damage every time they are conducted.

Protecting occupants in rollover crashes was a hot topic at the safety conference, known as the 19th International Technical Conference on the Enhanced Safety of Vehicles. A team of German researchers studying 434 rollovers in Hanover concluded that "stiffer interior structures" to prevent roof collapses of 30 centimeters or more was an important component in preventing injuries in a rollover crash. Another German team conducted an in-depth analysis of how a new kind of airbag, deployed from the roof, could prevent serious injuries.

The Office of Management and Budget is expected to finish its review of NHTSA's roof-strength proposal by the 28th of this month. OMB doesn't comment on the regulation until the agency's review is complete.

Source: *Detroit News*

Ford Warns Drivers About Danger Of Older Tires

Tires with a great deal of age—even when virtually unused—can be a safety concern. Ford Motor Co. has warned its customers that they should replace older tires, even if their treads are not worn out, and that's a good thing. Ford officials said the move comes in response to a growing body of research that suggests tires deteriorate as they age and can experience tread separations and other failures, even if they look good. Ford's new tire warning is posted on the company's website, http://www.ford.com/. It will be printed in owner's manuals beginning with 2006 model year vehicles. Similar warnings have appeared in Europe, but this is the first time a U.S. automaker has cautioned U.S. customers. It's not too surprising to hear that the tire manufacturers weren't very happy about Ford's position. Ford's warning reads:

> *Tires degrade over time, even when they are not being used. It is recommended that tires generally be replaced after 6 years of normal service. Heat caused by hot climates or frequent high loading conditions can accelerate the aging process.*

Foreign makers including Volkswagen AG, BMW AG, Toyota Motor Corp. and DaimlerChrysler AG have alerted customers in Europe and the United States about aging tires. General Motors Corp.'s European brands, Vauxhall and Opel, also have carried similar warnings. This is not unusual for foreign counties to be far ahead of the U.S. when it comes to safety issues.

Sean Kane, the president of SRS Inc., a Massachusetts auto safety research firm, has petitioned NHTSA for an easy-to-read tire age label. SRS has documented 73 crashes related to older tires that have resulted in 50 deaths since 1999. Kane believes the safety agency should issue a consumer advisory based on the latest research, an approach NHTSA has followed before when it has stopped short of regulation. It would appear that a consumer advisory would be in order. It would go a long way toward preventing the crashes that we've seen in the real world. However, NHTSA is not expected to issue any kind of consumer advisory, which is "par for the course" for the federal safety regulator.

NHTSA is still weighing Kane's petition to put an expiration date on the side of all tires. Manufacturers are already required to print the tire's manufacturing date in a Department of Transportation identification code on the inside sidewall. The last four digits indicate the week and year the tire was made, information consumers can use to determine tire age. In the meantime, NHTSA says it is trying to come up with a test that will simulate the effects of aging. Congress asked for the test as part of legislation that followed the Firestone tire recall. A proposal is expected to be amended next year. The tire industry says it is also conducting research into tire aging.

Obviously, the tire industry has known about the risk of tire aging for a long time, but so far hasn't seemed fit to warn customers. There is clearly a need for warnings concerning tire aging. NHTSA should act promptly as should the tire manufacturers. Ford should be commended for joining in with the foreign auto makers and warning folks in the U.S. Hopefully, other car makers in the U.S. will follow Ford's lead. There can be no justification for the tire manufacturers failing to join in and issue its own warnings.

Source: *The Insurance Journal*

Car Crash Test And Rollover Ratings For 2005 Passenger Cars

The National Highway Traffic Safety Administration has announced the completion of crash test and rollover ratings for passenger cars for the 2005 model year. The newly-tested Mitsubishi Galant, Toyota Avalon and the Volvo V70—all with side airbags—earned the top rating of 5-stars for all seating positions in frontal and side impact crash tests. NHTSA's consumer information program uses a one to five star rating system, with five being the highest. Star ratings reflect a vehicle's ability to protect the driver and passenger in a crash.

In this latest group of rollover testing, all newly tested passenger cars received 4-stars for rollover. NHTSA uses a five star scale, as well as a percent chance of rollover, to rate a vehicle on its likelihood of rollover in a single-vehicle crash. New 2005 ratings for frontal impact are available for the Buick Lacrosse four-door, Chevrolet Cobalt four-door, Chevrolet Malibu four-door, Ford Mustang two-door, Nissan Maxima four-door, Suzuki Verona four-door, Toyota Avalon four-door, Toyota Camry four-door, and the Volkswagen new Jetta four-door. New 2005 ratings for side impact are available for the Buick Lacrosse four-door, Chevrolet Cobalt four-door, Chevrolet Malibu four-door, Ford Mustang two-door, Honda Accord two-door, Honda Accord four-door, Honda Accord Hybrid four-door, Mitsubishi Galant four-door, Pontiac G6 four-door, Saturn Ion four-door, Suzuki Verona four-door, Toyota Avalon four-door, Volkswagen new Jetta four-door and the Volvo V70 four-door. New rollover ratings for 2005 passenger cars include the Buick Lacrosse four-door, Chevrolet Cobalt four-door, Honda Accord Hybrid four-door, Saturn Ion four-door, Scion tC two-door, Subaru Forester four-door, Suzuki Verona four-door, Toyota Avalon four-door, Volkswagen new Jetta four-door, Volvo V70 four-door and the Volvo XC70 four-door.

All results, including previously tested model year 2005 vehicles, are available at the agency's website: www.safercar.gov. Complete comparative lists of passenger cars, including carryover vehicles, by weight class (heavy, medium, compact, light and mini) are available on the website. First, select "Passenger Cars" and "2005," using search Option 1, and then submit "View 2005 PCs." Then scroll to the bottom of the list and use the "Select a class" dropdown box to select a weight class of passenger cars. You will find this information most helpful.

Source: *The Insurance Journal*

Eight Cars Get Top Ratings In Crash Tests

Five large family passenger cars and three large luxury models have earned top ratings in frontal crash tests conducted by the Insurance Institute for Highway Safety. The highest ratings went to 2005 family vehicles such as the Buick LaCrosse, Chrysler 300, Ford Five Hundred, Kia Amanti, Toyota Avalon and three luxury passenger cars — Acura RL, Cadillac STS and Lexus GS. In the front crash test, vehicles strike a barrier on the driver side at 40 mph.

Source: *Associated Press*

Insurance Institute For Highway Safety Names Side Impact 'Best Picks'

The Insurance Institute for Highway Safety (IIHS) named the 2005 model midsize sedans, the Audi A4 with standard side airbags and the Chevrolet Malibu equipped with optional side airbags as "best picks" with good ratings in side impact crash tests. The Volvo S60 earned the second highest rating of acceptable, and the Suzuki Verona and Nissan Maxima were marginal in the side impact tests. No vehicle in this group was rated poor. The A4, which also is a "best pick" in the Institute's frontal offset crash test, becomes only the second car to earn this designation in both tests. Along with the Saab 9-3, it's a "double best pick." Adrian Lund, IIHS chief operating officer, says:

> *The Institute's side impact test is severe, reflecting what happens when vehicles are hit in the side by a pickup or SUV. These latest test results show that more and more manufacturers are improving their vehicles to better protect occupants in side impact crashes.*

The Institute now rates nine midsize car designs good for side impact protection. Five more midsize models will be tested in side impacts later this year. The Acura TSX, BMW 3 series, and Infiniti G35 will have new design features added to improve side impact protection. The completely redesigned Lexus IS 300 and Volkswagen Passat will be introduced later in 2005. The institute test is more challenging than federal test: In the Institute's side impact test, a moving deformable barrier strikes the driver side of a passenger vehicle at 31 mph. The barrier weighs 3,300 pounds and has a front end that is shaped to simulate the front end of a typical pickup or SUV.

In each side-struck vehicle are two instrumented crash test dummies the size of a small (5th percentile) woman, one positioned in the driver seat and one in the rear seat behind the driver. The federal government uses a barrier that represents the front end of a car. This barrier was developed in the early 1980s when cars represented most of the vehicles on the road. The height of the barrier's front end is below the heads of the dummies that measure injury risks in side-struck vehicles. These federal tests don't assess the risks of head injury from impacts with vehicles like SUVs and pickups. Real world conditions are not measured by the NHTSA test and there lies the problem.

The IIHS's barrier is 12 inches taller and rides 4 inches higher off the ground. The top of it is at the same level as the heads of the dummies in the cars that are being tested. This is the scenario in real-world side impact crashes where occupants' heads often are struck by the intruding hood of a striking SUV or pickup truck. Based on the IIHS's front, side, and rear impact tests, the Malibu with optional side airbags and Volkswagen's new Jetta with standard side airbags are the two highest rated moderately priced midsize cars overall. The 2005 Malibu—without the optional airbags—is rated poor in the side impact test. Volvo is acceptable; the S60's performance was not as good as the A4's or Malibu's. With the standard curtain airbags, head protection was good. But forces on the driver dummy's pelvis were high. Even though the S60 has standard torso airbags for front-seat occupants along with the curtains, a fractured pelvis for the driver would be likely in a real-world crash like this, according to the test. The Institute believes Volvo still has some work to do to improve the S60's performance.

Side airbags are important, but so is good structure. The results for the Verona and Maxima show that vehicles with weak side structures are unlikely to provide effective protection in serious side crashes, even if they're equipped with head-protecting airbags. Both of these cars earned good ratings for driver head protection because of the standard side airbags, but the marginal performances of their structures contributed to high forces elsewhere on the driver dummies in both cars and on the rear dummy in the Verona. Although the Verona is rated marginal overall, its performance is an improvement compared with the 2004 model. Side airbags weren't available in 2004, and the car's performance was poor in large part because the driver dummy's head was struck by the intruding barrier, which produced high head accelerations. For the 2005 model year, Suzuki added standard combination head/torso airbags that deploy from the side of the front seats. This time head protection for the driver was good, and forces on the driver dummy's torso were reduced. Suzuki received accolades for making side airbags standard in this relatively inexpensive car. A summary of results for all midsize moderately priced cars and midsize luxury/near luxury cars tested by IIHS can be viewed on the organization's website, http://www.iihs.org/.

Source: Public Citizen

When The Insurance Institute For Highway Safety Speaks—The Auto Industry Listens

It is interesting to note that as Volkswagen prepared to launch its redesigned 2005 Jetta sedan, the automaker asked the Insurance Institute for Highway Safety to run two of the cars through some very tough crash tests. In order to get the tests early, Volkswagen paid for the tests—about $60,000—including the cost of the two cars tested at the Institute's test center. The car manufacture wanted to include the crash tests in new ads that were launched in June. The Jetta got top marks, which apparently Volkswagen officials expected, and the ads tell that story. The sedan was engineered with the Institute's front- and side-impact crash tests in mind. It is said by some auto safety groups that the Institute forces the auto industry into improving the safety of its cars and trucks by going public with its tests. The chief weapons of the Institute, a nonprofit organization funded by auto insurers, are its reputation for solid scientific research and its graphic crash tests. Media outlets regularly publicize the Institute's research findings, test results and recommendations. Consumers have become accustomed to watching the Institute's crash tests on television news shows.

I am convinced that safety advocates—such as Public Citizen, Consumer Reports magazine, Center for Auto Safety, as well as the Insurance Institute for Highway Safety, have played a significant role in the nation's automotive safety agenda. In fact, I believe that the groups have a much greater influence on safety than does NHTSA. For example, this year the Institute has a $13-million budget funded by auto insurance companies, that allow it to do its job. Additionally, when automakers request special tests, as Volkswagen did with the Jetta, the Institute requires them to pay the costs. Otherwise, the Institute buys the cars it crashes. The Institute has budgeted almost $2 million for 70 cars and trucks for crash tests this year in the institute's ongoing campaign to praise automakers that improve their vehicles and slam those that don't. This approach by the Institute—with its very good budget and tremendous media contacts—has been most effective.

Clearly, the Institute's test results have influenced many design changes. For instance, the Mitsubishi Galant sedan failed the Institute's frontal crash test in 1995 when the passenger compartment collapsed. The test dummy's head and left shoulder hit the window frame, and the dummy's left foot and lower leg became twisted and deformed. After getting the bad reviews, the Mitsubishi engineering staff went back to the drawing board and the new Galant, which debuted in 2004, passed the next Institute test with flying colors. That is the objective and desired goal of testing and that is also why NHTSA needs to do a better job.

Consumer Reports magazine and the Government Accountability Office (GAO), Congress' watchdog agency, favor Institute tests over the federal agency's. The GAO recently said the federal regulatory agency needed to update its crash test standards and held up the institute's side-impact test as an example of a better way to do it. In May, *Consumer Reports* revised its safety criteria so that only vehicles that receive the Institute's highest rating of "good" on both front- and side-impact tests can receive the magazine's top recommendation. The federal government has the duty to regulate the auto industry and that includes performing the necessary testing to find out what's going on in the industry. Only the government has the power to force the auto industry to improve auto safety. If NHTSA did its job, we wouldn't need groups such as the Institute and the others mentioned above having to fill the breech. Neither would there be such a critical need to keep the court system open for victims.

Source: *Los Angeles Times*

Safety Chief Considers Tougher ATV Regulation

There has been a significant number of injuries and deaths of children riding all-terrain vehicles and the numbers are increasing at an alarming rate. It is significant that Consumer Product Safety Commission Chairman Hal Stratton has ordered his staff to consider whether a tougher government approach is needed to boost safety and sent a memo to his staff ordering a review. The chairman previously had expressed opposition to more federal regulation, instead supporting voluntary industry standards and more rider education. Citing the increase in injuries and deaths, the top regulator now wants his staff to study whether those voluntary standards are adequate. A CPSC spokesman said:

> *This memo orders a full top-to-bottom review of any and all regulations that could be done to really make a difference in reducing the number of injuries and deaths. Everything is on the table.*

The commission is currently weighing a 2002 petition filed by doctors and consumer groups to ban sales of adult-size ATVs intended for children under 16. Stratton previously has said a ban would not mean fewer accidents, noting that most accidents are due to improper behavior such as riding on paved roads or not wearing protective gear. Among the areas Stratton ordered reviewed are:

- whether pre-purchase training and certification should be required
- if manufacturers should develop an ATV model suitable for 14-year-olds
- whether ATV sales outlets should provide child injury data at the time of purchase

I believe that the Commission should ban the sale of adult-size ATVs when children under 16 are the intended users. The current voluntary approach simply hasn't worked well. Several studies reveal that many dealers don't comply. It is estimated that only 70% of dealers follow the voluntary guidelines. Some 5,791 ATV-related deaths occurred between 1982 and 2003. Nearly a third of the victims were under 16 and 13% under 12 years of age.

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

Breast-Implant Company Allegedly Made Defective Parts

Two former employees of Mentor Corporation, a breast-implant manufacturer, have leveled charges of cover-ups and defective parts against the company. The allegations were made in a 2003 lawsuit brought against the company by a woman who claimed health problems caused by the implants. The lawsuit was dismissed, but sworn depositions by the two ex-employees were recently reported in The New York Times. One former employee alleged that some senior company officials told him to destroy reports detailing high rupture rates. He said packaging for the implants was sometimes infested with fleas. The former employer also said that workers on the factory floor would stash defective parts above ceiling tiles. Mentor recently won a recommendation from federal scientific advisers that the government let the company resume widespread sales of its devices under certain conditions.

Source: *The New York Times*

Ford's Request For A New Trial In Texas Case Denied

Ford Motor Co. is trying to get the $28 million verdict against the company thrown out of court. A Texas state judge discounted Ford Motor Co.'s claims of jury misconduct and denied the automaker's request for a new trial. The verdict was in an Explorer rollover accident that killed two teenagers. Ford alleged misconduct by a member of the jury that returned the verdict. The trial judge rejected Ford's claims, finding that Ford failed to prove that its right to a fair trial was compromised by jury misconduct and denied the motion. Ford is appealing. Mikal Watts of the Watts Law Firm in Corpus Christi, Texas, called Ford's claims "outrageous." He accused the automaker of "trying to smear the names of the jurors with no factual basis whatsoever." Hopefully, that will prove to be the case. Jury misconduct—regardless of which side of a case it favors—can't be tolerated. For that reason, this case will be watched closely with great interest.

Ford Wins Trooper Death Case

After a multi-week trial, a jury found that Ford Motor Co. wasn't liable in the 2003 death of a Missouri State Highway Patrol trooper whose Crown Victoria was struck from behind and caught fire. Jurors found the guilty parties to be the driver whose pickup truck slammed into Michael Newton's patrol car and the driver's employer, Trade Winds Distributing Inc. The jury awarded $8.5 million in damages to the trooper's family and a passenger in the patrol car who was severely burned. The victims' families actually will get about $500,000 each, since a pretrial agreement capped Trade Winds' liability at near $1 million. The plaintiffs' lawyers contended that the design of the Crown Victoria, with the fuel tank located between the rear bumper and the rear axle, partly contributed to the explosion. The jurors had to recognize that this is a very bad design, but obviously disagreed that it caused the accident because of the excessive speed of the "bullet car."

Source: *Associated Press*

Government Investigates Toyota Hybrid

The Toyota Prius, the gas-electric hybrid sedan, is the subject of a government investigation into reports that the engine can stall without warning. The National Highway Traffic Safety Administration announced last month that its preliminary investigation will involve about 75,000 of the passenger cars from the 2004-2005 model years. Toyota Motor Sales USA, Inc., an arm of Toyota Motor Co. of Japan, said in a statement it was ''an early-stage inquiry to determine if further analysis is warranted, not a recall.'' The company is cooperating with NHTSA and told *The New York Times* it will provide the agency with complete results of its own internal investigation. On occasion, NHTSA investigations eventually lead to vehicle recalls.

Hybrid vehicles deliver better mileage and less pollution by switching between a gasoline engine and an electric motor. The vehicles have become increasingly popular with the rise of gas prices. The Prius has been very popular in the U.S. and Motor Trend magazine named it the 2004 car of the year. It was recently named the top performer among compact cars by J.D. Power and Associates.

NHTSA said it has received 33 complaints alleging engine stalling. The majority of the complaints involved reports of the engine stalling at speeds of 35 mph and 65 mph. Some complaints indicated the vehicle was in electric mode for some period after the gas engine stalled. All the reports said the engine shut down without warning. About half of the complaints said the vehicle wouldn't restart after it stalled. Toyota says that there have been no reported cases of deaths or injuries from the engine problems. However, an engine stalling without warning while a vehicle is being operated on a public highway is clearly a safety hazard.

Source: *The New York Times*

Airbags Endanger Young Teens In Front Seat

A new study suggests teens are better off staying out of the front seat of airbag-equipped cars until they're almost old enough to get behind the wheel. While current federally mandated warning labels in cars flag a risk for airbag injuries for children 12 and under, researchers at Oregon Health Sciences University found that the injury risk from passenger airbags remains high through age 14. Dr. Craig Newgard, an assistant professor of emergency medicine at the University's Center for Policy and Research in Emergency Medicine and the author of the new study, stated:

> *Eight years ago, when the National Highway Traffic Safety Administration issued its recommendations, they were based on the best information (about airbag safety) available at the time. Those warnings worked in reducing injuries to children, but as a parent and emergency physician, I felt it was time to study whether more children could be at risk and assess whether age or body size were good measurement guidelines.*

Motor-vehicle crashes overall remain the leading cause of death for Americans aged 3 to 33, but research on restraint systems and safety for older children has been limited. In research published in the June issue of Pediatrics, Dr. Newgard looked at what happened to 3,790 children aged 1 month to 18 years who were seated in the right front seat of a vehicle and involved in a crash. The information came from a nationally representative database of police reports on crashes over an eight-year period maintained by the NHTSA. The agency reports that more than 150 children through age 11 have died from airbag injuries as of mid-2004. It should be noted that information on teens has been very limited. The study found that children 14 and younger were at high risk for serious injury from airbags when they sat in the front passenger seat during car crashes. In contrast, airbags had a protective effect for teens aged 15-18.

The study also showed that age may be a better indicator of risk from airbag injury than height or weight. Newgard and co-author Dr. Roger Lewis, an emergency-medicine researcher at the University of California-Los Angeles, said several body changes that take place during puberty, including muscle mass, bone density and bone-mineral content, may help explain why body size alone isn't a good measurement of risk to children from the airbags. The conclusions from the report should be made available to parents. This information can be assessed on NHTSA's website. In fact, anyone who drives needs have access to this information, according to Dr. Newgard.

Guidant Defibrillators Will Be Recalled By FDA

The U.S. Food and Drug Administration will recall as many as 50,000 faulty cardiac defibrillators manufactured by Guidant Corp. because of potential malfunctions in the devices. The faulty devices have been implanted into patients. Indianapolis-based Guidant said it was voluntarily advising physicians about the safety of several defibrillator models and that regulators had indicated the move would be classified as a recall. The devices have failed at least 45 times and have caused at least two deaths as recently as May 30th, according to the company.

You will recall that Guidant came under fire this spring after it was learned that Guidant had failed to alert doctors about potential problems with the Ventak Prizm 2 DR model defibrillator. Implanted defibrillators shock the heart back into a normal rhythm when it starts beating irregularly. This recall includes the Prizm 2 DR; the Contak Renewal and Contak Renewal 2; the Ventak Prizm AVT; Vitality AVT; Renewal 3 AVT; and Renewal 4 AVT ICDs. We mentioned the problems related to heart defibrillators made by the Guidant Corporation in the June issue. When the company told doctors that the popular implantable heart defibrillator had failed in a small number of cases because of an electrical flaw, it wasn't totally truthful. The company also said that it had fixed the flaw in devices produced after mid-2002. Unfortunately, data provided by Guidant to a Minnesota hospital now suggests that the company continued to sell the potentially flawed devices for months after it changed the way it made the device and had begun selling the new ones. The Guidant data, which the company provided to doctors at Abbott Northwestern Hospital in Minneapolis, indicates that from May to September 2002, nine patients there received implants of defibrillators that were made before April 2002. It was during that month that the company first changed its manufacturing process to eliminate the risk of short-circuiting.

Interestingly, Guidant urged physicians not to replace the units because it said the risks of doing so outweighed any dangers the device may pose. However, the apparent fact that Guidant sold older devices with the potential flaw when improved ones were available could pose a new round of problems for the company. The Food and Drug Administration needs to do its job and call Guidant officials on the carpet over the handling of problems with the device. Guidant is one of the nation's largest makers of medical devices, with $3.8 billion in sales last year, about half of them from implantable defibrillators. In December, Johnson & Johnson announced it planned to buy Guidant in a deal worth $25.4 billion. Based on media reports, Johnson & Johnson apparently is still committed to the deal.

For each Model 1861 unit, the list

gives the date of implant as well as a "use before" date, or the date beyond which the device can no longer be implanted because it has remained in inventory too long. According to the FDA, the shelf life or "use before" date of the Guidant Model 1861 is 12 months after its battery is connected. Typically, that point marks a device's date of manufacture, and the unit goes into inventory a few weeks later, industry officials told *The New York Times*. Based on that timeline, the Guidant implant data provided suggests that nine devices with manufacturing dates before April 1, 2002, were implanted in patients at the hospital (Abbott Northwestern) after that time. This latest recall will add fuel to an already hot fire for the company.

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

NHTSA Restates Rollover Warning For Users Of 15-Passenger Vans

The National Highway Traffic Safety Administration recently announced new research that reinforces its concerns about 15-passenger vans. As a result, NHTSA reissued its consumer advisory for users of 15-passenger vans for the third time in the past four years. In a new research report related to improper tire maintenance on 15-passenger vans, the NHTSA study found that 74% of all 15-passenger vans had significantly mis-inflated tires. By contrast, 39% of passenger cars were found with significant inflation problems. NHTSA research has consistently shown that improperly inflated tires can change handling characteristics, increasing the prospect of a rollover crash in 15-passenger vans. However, these vans are dangerous even when tires are properly inflated.

To reduce the risks associated with 15-passenger vans, NHTSA's safety advisory recommends that drivers insist all occupants wear safety belts at all times; drivers of 15-passenger are trained and experienced; tires are checked at least once a week, using the manufacturer's recommended pressure levels; and no loads are placed on the roof of the vehicle. Prior NHTSA research has shown that 15-passenger vans have a rollover risk that increases dramatically as the number of occupants increases from fewer than five to more than ten. In fact, 15-passenger vans (with 10 or more occupants) had a rollover rate in single vehicle crashes that is nearly three times the rate of those that were lightly loaded (with fewer than five occupants). Nearly 80% of those who died in 15-passenger van rollovers nationwide between 1990 and 2003 were not buckled up.

While Federal law prohibits the sale of 15-passenger vans for the school-related transport of high school age and younger students, no such prohibition exists for vehicles to transport college students or other passengers. I believe all 15-passenger vans should be taken off the highway, as soon as possible. Without a doubt, they are unreasonably dangerous and constitute a hazard on our roadways. These vans are intended to be used for transportating large numbers of people and their baggage. With all of the available information, how can NHTSA justify leaving them in use?

An interpretation of this Federal law can be found at http://www.nhtsa.dot.gov/cars/rules/interps/files/17730.drn.htm. A copy of the NHTSA study on tire maintenance can be found at: http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/RNotes/2005/809846.pdf under "Research Notes". NHTSA is reissuing this advisory to specifically alert summertime users of 15-passenger vans. The agency also has prepared a flyer on 15-passenger van safety that is available on the 15-Passenger Van Advisory page. http://nhtsa.gov/cars/problems/studies/15PassVans/15PassCustomerAdvisory.htm.

Bullet-Proof Vest Warning Issued

The nation's largest supplier of bullet-resistant vests to law enforcement agencies is urging its customers to replace vests containing the fiber Zylon, saying they may not be safe. Second Chance Body Armor announced last month it had sent notices to police agencies nationwide. The warning affects about 58,000 Tri-Flex vests and an additional 40,000 Ultima and Ultimax vests with Performance Pacs, the company said in a statement. New research shows that vests made even partially with Zylon "may fail to perform and result in serious injury or death," according to the company. Second Chance, based in Central Lake, Michigan, is undergoing reorganization in federal bankruptcy court. The company will ask the court to devise a procedure for vest owners to make claims arising from the latest warnings. Second Chance says it hasn't received any reports of field failures of the products in question. The company was wise to report these new research findings immediately.

Source: *CBS News*

VIII. MASS TORTS UPDATE

Lawsuit Filed Against Wyeth And Qualitest Pharmaceuticals In Breast Cancer Case

Our firm has filed a lawsuit on behalf of an Alabama resident against New Jersey-based Wyeth Pharmaceuticals and Alabama-based Qualitest for distributing a drug that causes breast cancer. The lawsuit was filed in the Circuit Court of Bullock County, Alabama. Our client was prescribed and used hormone therapy drugs Premarin, Prempro and Medroxyprogesterone (MPA). Wyeth and Qualitest, their managers and sales representatives, "encouraged the use of these drugs to improper customers and misrepresented their products as to their safety, efficacy, and harmful side effects" to increase sales. There was a motive for improper long-term usage and dangerous high dosage. This is yet another case of profits over public safety and duping doctors as well as consumers. Consequently, there are a tremendous number of women who have suffered with breast cancer.

The lawsuit details that Wyeth has promoted and marketed its menopausal hormone therapy products since 1942, emphasizing long-term use of these medications. Through an expensive and expansive decades-long marketing and advertising campaign, Wyeth convinced doctors and the public that menopause is a disease requiring drug treatment rather than the natural process of aging. Wyeth and Qualitest knew of the significant risks associated with menopausal hormone therapy, but failed to warn consumers of such risks. These risks include breast cancer, ovarian cancer, heart attacks, strokes, deep vein thromboembolisms, pulmonary embolisms, gallbladder cancer and non-Hodgkins lymphoma, among other side effects. We believe this is the first case of this sort filed in Alabama. Most of the cases thus far have been filed in the home state of the drug company. Melissa Prickett, Ted Meadows and I will handle the case for our firm. Shane Seaborn and Myron Penn are the local lawyers who will be working actively on this case with us. We look forward to trying this case in an Alabama court.

Journal Editor Blasts Drug Makers

The New England Journal of Medicine is one of the most respected medical journals in the world. Jeffrey Drazen, the editor of *NEJM*, has accused three of the largest drug companies of "making a mockery" of efforts to create transparency in clinical trials. He believes this could lead some important medical publications to avoid publishing their studies. The editor names Pfizer, GlaxoSmithKlein and Merck as the pharmaceutical drug manufacturers who are not providing enough useful information on clinical trials they register with the government.

In September 2004, the members of the International Committee of Medical Journal Editors said they will not publish any studies that are not registered in a public database as they are launched. This international committee is asking for twenty disclosures, including what each study is designed to evaluate and how many patients will be studied in a public database before they will agree to publish the results of the studies in their journals. Drazen's comments were based on a review of the information ten drug companies posted on www.clinicaltrials.gov. This website is run by the United States National Institute of Health. Drazen recently said in an interview:

> *They (the three companies) are giving nonsense details. They are written in a way that they are trying to hide what they are doing.*

Last year, the New York State Attorney General sued GlaxoSmithKlein for suppressing unfavorable studies of its antidepressants. In lawsuits filed against Merck involving the pain reliever Vioxx, Merck is accused of hiding evidence about the safety of Vioxx. Drug companies are legally required to register trials dealing with serious or life threatening diseases on the NIH site. But since the controversy over trials, the drug companies have been listing various types of studies on the site.

Source: *New Jersey Star Ledger*

Drug Safety Panel Is Criticized

The new drug safety board established by the Food and Drug Administration is under a great deal of criticism in our nation's capitol. The board, formed to restore confidence in the nation's drug supply, will actually set back efforts to improve the safety of the medications Americans take and will not make it any easier to take dangerous drugs off the market, an FDA whistle-blower and a key senator said recently. FDA safety officer David Graham said that, after reviewing the makeup and structure of the Drug Safety Oversight Board, he concluded that the panel is "severely biased in favor of industry" and that "the FDA cannot be trusted to protect the public or reform itself." That's pretty strong, especially considering the position Dr. Graham holds with the FDA. Dr. Graham told *The Washington Post*: "Ironically, drug safety in the U.S. is worse off today than it was in November." That was when Dr. Graham, a longtime FDA safety reviewer, sharply criticized his agency's record during a Senate Finance Committee hearing relating to Vioxx.

Senator Charles E. Grassley (R-IA), whose Committee has done an excellent job, plans to issue his own critique of the board. In a letter to acting Commissioner Lester M. Crawford, the Senator said that the makeup of the safety oversight panel led him to conclude that "what we have here is nothing more than the status quo." The criticisms by Senator Grassley and Dr. Graham indicate that Congress may not be satisfied with the FDA's performance and may press for action on pending legislation to create a more independent drug safety office. In my opinion, that is the only way to get the job done.

The FDA announced the 15-member board last fall in part to identify and review emerging drug safety issues that Dr. Graham and others said were not being treated seriously enough. For some reason, it was finally formally established last month. The board consists largely of FDA managers, with some input from officials of the National Institutes of Health and of the

Department of Veterans Affairs. The attacks on the panel come as a steady flow of bad news about safety problems with popular drugs is causing great concern by the public. As a result, this has given rise to competing initiatives designed to reassure the public. The congressionally chartered Institute of Medicine held a public meeting last month to begin a study of the FDA's safety procedures. Congress is considering bills that would more aggressively address drug safety and that's good.

One thing that is badly needed is a way for the FDA to get information relating to drug reactions. Medicare Administrator Mark B. McClellan has a plan to use billing and health care information collected from Medicare beneficiaries to create a more effective surveillance system for prescription drugs on the market. The current voluntary system for reporting serious drug reactions is believed to capture only 10% of actual cases. FDA officials said the initiative looks promising and that they are working with Medicare on it.

I had hoped that creating the safety oversight board would prove to be a good move. Now it appears that the obvious problem with the safety oversight board is its makeup. In his letter, Senator Grassley said 11 of the 15 voting positions on the board are filled by senior managers of the FDA's Center for Drug Evaluation and Research. This is the very same office responsible for reviewing and approving new drugs. One of the main selling points for the safety board was that it would make the safety review process more independent of the new drug review process. That makes sense because officials who approve a drug for sale could well be hesitant to see it taken off the market. This is because they tend to be more focused on the potential benefits new drugs can bring. In my opinion, an independent safety review is essential if the system is to work properly.

Senator Grassley and Dr. Graham also criticized FDA's decision to keep most of the board's safety deliberations private, especially "at a time when the agency should be making every effort to improve transparency and accountability," Senator Grassley said. Dr. Graham noted that before he testified in November, he turned down an invitation from Dr. Crawford to play a central role in reorganizing the drug safety program. Dr. Graham believed and rightfully so, that it would constrain his ability to criticize the agency. A posting on the FDA website confirmed that most of the board's members will come from the center that evaluates new drugs. Rather than having an independent executive director, that position will be appointed by the center's director. Any office can refer a drug safety issue to the board's director, who, in consultation with the center's deputy director, will decide whether and when the board should address it. That doesn't say much for independence.

The operating procedures of the board require at least a two-thirds vote by its members to recommend that the FDA take action. Senator Grassley and Senator Christopher J. Dodd (D-CT) have introduced a bill that would give drug safety oversight responsibility to a board that would have considerably more independence from the FDA. Opponents of the proposal, including the trade association for the drug industry, say that they are concerned that an independent board will focus exclusively on a drug's risks and disregard its potential benefits. I suspect they are more concerned over the drug industry's loss of control over the process.

Source: *The Washington Post*

A Top FDA Official Says The Drug Safety System Is Broken

In a shocking admission, a top federal drug official told the medical advisory board on June 8th that the nation's drug safety system had "pretty much broken down" and that there was room for "a lot of improvement" in the government's approach to uncovering dangers in drugs already on the market. The official, Dr. Janet Woodcock, deputy commissioner of operations at the Food and Drug Administration, made her remarks before a committee of experts at the Institute of Medicine. What she had to say should alarm all American citizens. In her testimony, Dr. Woodcock said:

> *The keystone of the current system is the prescriber, and that person is the one who decides if the benefits of a drug outweigh the risks for that patient. This system has obviously broken down to some extent, as far as the fully informed provider and the fully informed patient.*

According to Dr. Woodcock, the drug agency has known for a long time that it needed to improve systems for learning about problems with drugs on the market. One way to do that, she said, is to take advantage of electronic health records from managed-care organizations. The agency proposed such a system several years ago, but Congress refused to pay for it. Dr. Woodcock also said the agency hoped to change the way drugs were developed by the industry so that rare side effects might be identified before a drug is marketed widely. It is most significant according to Dr. Woodcock that the agency could do only so much to curb problems with drugs already on the market. She stated: "The bottom line is that a lot of drug safety problems are actually preventable," because "most adverse events are from known side effects."

Once drugs are on the market, they are typically no longer studied, unless the FDA mandates it for the relatively few products that go through the agency's accelerated-approval system. Drug firms are required to alert the

FDA about any adverse reports they receive from doctors about possible reactions to a drug. Adverse-event reporting is voluntary from health-care professionals. The FDA receives about 400,000 adverse-event reports annually. It is said that system is good at picking up reports of problems such as liver failure or a skin condition that might be expected from a certain drug "but it's not very effective at finding increased frequency of common events like heart attacks."

Source: *The New York Times*

More Concerns Raised About Painkiller Safety

British scientists called for more research into the safety of painkillers after finding more evidence they may increase the risk of heart attacks in some patients. Dr. Julia Hippisley-Cox of the University of Nottingham in England, who conducted a study, observed: "We think more data and more research is needed to formally evaluate the safety of all these drugs." The findings from her study of more than 9,000 patients, which is reported in the British Medical Journal, suggest that non-steroidal anti-inflammatory drugs (NSAIDs), raise the odds of heart attack. Dr. Hippisley-Cox says that their findings "support existing knowledge and raise questions over additional drugs." You will recall that in April the Food and Drug Administration called for stronger warnings on NSAIDS about possible health problems. In the observational study in the *British Medical Journal*, Vioxx, Diclofenac and Ibuprofen were associated with an increased risk of heart attack.

Source: *Reuters News Service*

Merck Tries To Stop The Bleeding

Merck, which has had its problems over the past several months, has taken steps designed to regain some of its lost ground. The giant drug company describes the first campaign in its 114-year history to help repair the damaged reputation of its corporate brand rather than sell its products. The campaign, with a budget estimated at more than $20 million, will use both television and radio ads, as well as print and online advertising spots. The ads seek to counter perceptions among skeptical consumers that Merck in particular - and giant drug makers in general - are more interested in profits than in people. The intent of the campaign, which is to continue through the end of the year, is evident its slogan: "Merck. Where patients come first." It's quite obvious that the advertising blitz was in response to all of the negative publicity the company has received over its Vioxx problems.

The TV commercials are running on broadcast and cable networks. The print ads will appear in 40 magazines as well as national newspapers. The Internet ad purchase includes websites like webmd.com. Merck believes the campaign will reach more than 90% of the U.S. population by the time it concludes. This appears to be a desperate move by a company that recognizes it's in deep trouble. I don't believe folks are as easy to fool as the Merck bosses apparently believe they are.

Source: *The New York Times*

Study Shows How COX-2 Drugs Damage Heart

We have been asked by a number of our readers to explain exactly how COX-2 inhibitors cause heart attacks. Researchers at University of Pennsylvania School of Medicine believe they have uncovered another link in the chain of events that causes COX-2 inhibitors to increase the risk of heart attacks. It should be noted that until 2004, COX-2 inhibitors were some of the most heavily prescribed medications in the United States for the relief of pain and inflammation. Since Vioxx was pulled from the market, other COX-2 inhibitors have been linked to heart attack. One of them (Bextra) was subsequently removed from the market. The researchers at Penn looked at COX-2 inhibitors' effect on the muscular wall of blood vessels. They found that a COX-2-derived fatty acid called *prostacyclin* controls the blood vessel response to stressors such as high blood pressure. By inhibiting COX-2, the drugs impair the ability of blood vessels to react to high blood pressure.

Combined with earlier research, this study may help doctors understand why COX-2 inhibitors affect the heart and raise heart attack risk even among patients who were previously at low-risk. Other studies have shown that, by suppressing prostacyclin production, COX-2 inhibitors predispose people to high blood pressure, which aggravates atherosclerosis, a condition in which the arteries gradually become clogged with plaque deposits. When the additional factor of impaired blood vessel response is added, heart attacks and strokes may occur. These studies may help the medical community better understand, and therefore manage, this class of drugs. With that better understanding, the doctors will be able to do a better job with the patients. The drug companies responsible for Vioxx, Bextra and Celebrex have done very little to educate the medical community. It is high time for that sort of thing to change and it's up to Congress and the FDA to see that positive change occurs.

Source: HeartCenterOnline.com

FDA Looking Into Blindness-Viagra Link

Federal health officials are examining rare reports of blindness among some men using the impotence drugs Viagra and Cialis. This disclosure comes at a time when the drug industry can't afford any more negative publicity about another class of blockbuster medicines. While the Food and Drug Administration is investigating, there is no evidence to date that the drug is to blame. This type of blindness, called NAION, or non-arteritic anterior ischemic optic neuropathy, can occur in men who are diabetic or have heart disease. Interestingly, these are the same conditions that can cause impotence and thus lead to Viagra use. The FDA has 42 reports of the blindness, 38 among users of Viagra and four among users of Cialis. There were no cases reported among users of Levitra, the third impotence drug. While late night TV shows are said to be having lots to say about the blindness connection, the FDA is taking these claims seriously. The FDA is checking into the reported cases with the manufacturers of the three drugs.

Source: *Associated Press*

Pfizer Files For Multi-District Litigation For Both Celebrex And Bextra

While we have primary focused on the Merck manufactured drug Vioxx in past few issues, it is important to remember that developments continue to occur with the other Cox-2 inhibitor drugs Celebrex and Bextra. As pointed out above, all of these medications are members of a family of drugs that work by selectively inhibiting the body's production of the cyclooxygenase-2 isoenzymes. They are similar to, but fundamentally different in their mechanism of action, than traditional non-selective steroidal anti-inflammatory drugs such as ibuprofen, naproxen, etc.

Pfizer, the manufacture of both Celebrex and Bextra, has engaged in a nationwide publicity campaign aimed at combating all of the damaging medical literature released lately. Pfizer is also attempting to counteract the damage it suffered when the FDA required Pfizer to pull Bextra from the market as well as issue a "Black Box Warning" of cardiovascular adverse events for Celebrex. Pfizer's well-funded publicity campaign attempts to downplay the safety risks associated with both Bextra and Celebrex.

What Pfizer does not want you to know is that it has filed paperwork before the Untied States Panel on Multi-District Litigation asking that the Panel: 1) establish Multi-District Litigation (MDL) covering both Celebrex and Bextra; 2) separate the two Multi-District cases; and 3) establish both MDL's in New York. MDL's are a type of federal litigation sponge that would soak up state and federal cases involving Celebrex and/or Bextra. MDL's are intended to handle massive volumes of cases and are normally established in litigation involving both widespread and substantial litigation. It is curious that Pfizer, a company that has spent so much money of late denying any health related side effects of their drugs, would move for MDL's to be created for both Celebrex and Bextra. If their drugs were so safe and few people, if any, were truly injured, then why has Pfizer filed for dual MDL's?

There is a hearing scheduled before the U.S. MDL panel in Denver on the 28th of this month. The Panel will make the following decisions soon after that hearing:

- Should MDL's be established for both Bextra and Celebrex?
- Should the MDL's be joined or separated?
- Where will the MDL[s] be established?

Perhaps we will also hear from Pfizer about how their "safe and effective" drugs could have killed or injured so many people to warrant the establishment of one, and perhaps even two, MDL's. We will keep you up to date on developments.

Lilly To Settle On Zyprexa Label Claims

Eli Lilly & Co. has agreed to pay nearly $700 million to settle a majority of liability claims that labels on its anti-psychosis drug Zyprexa had failed to provide adequate warning that the drug could put patients more at risk for developing diabetes. The settlement, when finalized, will apparently resolve about 75% of the Zyprexa claims pending in the United States. Most of the lawsuits claimed that before September 2003, the information on Zyprexa labels regarding the risk of hyperglycemia and diabetes was not adequately displayed. Hyperglycemia is a condition in which the blood has elevated sugar levels, typical in diabetics.

In September 2003, the Food and Drug Administration required label changes for all atypical anti-psychotic drugs to warn against the risk. Lilly will take a pretax charge of at least $700 million for the fund and to cover other claims not covered in the agreement. The agreement only involves people who filed claims alleging that they developed diabetes-related conditions from using Zyprexa, which is used to treat schizophrenia and bipolar disorder.

Christopher Seeger, a Liaison Counsel of the plaintiffs' steering committee, stated: "The patient population to which this drug is given has difficult medical histories. Protracted litigation was in no one's interest." In April, worldwide sales of Zyprexa fell 5% to $1.04 billion. Sales in the United States fell 17% to $517.4 million. U.S. sales of the treatment for schizophrenia and other disorders brought in $2.4 billion for Lilly last year. The drug had worldwide sales of $4.4 billion in 2004.

Source: *Associated Press*

IX. BUSINESS LITIGATION

Insurers Lose Bid To End Suit By Doctors

UnitedHealth Group Inc., WellPoint Inc. and five other health insurers has lost a U.S. Supreme Court bid to derail a class action lawsuit that claimed they systematically underpaid 600,000 doctors. For the second time this year, the justices turned down an industry appeal in the case. The high court turned aside the latest petition without comment. Billions of dollars may be at stake in the case, which is now back in federal court in Miami. Insurers Aetna Inc. and Cigna Corp. have settled their portion of the doctors' lawsuit for a total of $310 million.

In their appeal, the insurers argued that a federal trial judge was wrong to allow some legal claims against the insurers to go to trial while other claims were subject to arbitration. The allegations that will now go to trial include conspiracy to engage in racketeering. The U.S. Court of Appeals for the Eleventh Circuit upheld the trial court ruling. The providers accuse the insurers of developing processing software that automatically "downcodes" claims submitted by doctors to reduce the reimbursement rate. The doctors intend to seek billions of dollars in damages for claims that date back to 1990. The lawsuit also names units of Humana Inc., PacifiCare Health Systems Inc., Prudential Financial Inc., Health Net Inc. and Coventry Health Care Inc.

Source: *Bloomberg News*

IBM Will Pay $314 Million To Settle Pension Claims

IBM has agreed to pay $314 million to settle claims that it shorted thousands of workers when it switched pension plans in the 1990s. Letters went to about 275,000 former and current IBM workers, informing them of the settlement and offering them a chance to object. However, the computer giant has been unable to reach an agreement on the crucial issue of the lawsuit that has drawn national attention - the formula in the company's "cash-balance" pension plan. If it loses on that issue, IBM could be liable for up to $1.7 billion to claimants.

This lawsuit will affect other companies because more than 7 million people are covered by cash-balance plans across the country. Finding fault with IBM's plan would shed "doubt" about the validity of thousands of other plans. Last year, a U.S. District Judge ruled that IBM's cash-balance plan does discriminate against older workers. That brought national scrutiny from Congress, advocates for older workers and business interests. Rather than determining a monthly payment, a cash-balance plan attempts to establish an overall account balance for each worker, often based on a complex formula. That federal court ruling will be appealed by IBM.

IBM contends its formulas are fair and that it has done nothing improper. Even so, as of January 1st, the company discontinued its pension plan for new employees. Instead, IBM is offering them what it calls an "enriched" retirement savings plan. All of the resolved issues involve internal matters with IBM's switchover from traditional to new pension plans, as allowed by Congress in the 1990s. The judge's order, approving the partial preliminary settlement, allows objectors to come forward before a final hearing on August 8th.

Source: *St. Louis Post Dispatch*

The Federal Government Backs Bank Of America In Suit Over Fees

The federal government is backing Bank of America Corp. in a lawsuit alleging the bank improperly tapped into Social Security recipients' funds. The government urged a California appeals court to block a lower court's ruling requiring the bank to pay $284.4 million to California customers who said it illegally raided their Social Security benefits to collect fees. The class action case involves allegations that the bank from 1994 to 2003 dipped into Social Security direct-deposit accounts to collect fees for overdrafts and other debts owed by the California customers. Bank of America said the award in October was contrary to federal and state law. The bank wants to avoid having to reimburse customers while it appealed.

The government, filing its brief on behalf of the Social Security Administration, the Treasury and the Comptroller of the Currency, essentially said that Bank of America's practice was common in the industry and that a decision against the bank could disrupt industry services to Social Security recipients. I find that hard to believe and believe that the government's backing of a potential wrongdoer is not good. It definitely sends the wrong message.

Medco Refuses Subpoena From Department Of Health And Human Services

In an interesting development, MEDCO Health Solutions, Inc. refused to comply with a federal subpoena from the Health and Human Services Office of the Inspector General. Simply put, MEDCO doesn't want the agency to share information with another federal agency that has sued the company, according to a news report from The Wall Street Journal. MEDCO can't afford for the Justice Department to get the documents. An on-going investigation of the company for its arrangements with drug makers seems to be the motivation. The Inspector General's office subpoenaed MEDCO in January for documents that would show whether the company committed fraud in its agreement with drug makers to favor one drug over another, the Journal reported. MEDCO informed a Justice Department attorney that it does not want the subpoenaed documents shared with a prosecutor heading up a 2003 lawsuit against MEDCO for allegedly defrauding the government.

MEDCO Health Solutions, Inc., one of the largest Pharmacy Benefits Managers (PBM) in the country, is a former subsidiary of the drug giant Merck.

Many entities, such as public and private health plans, contract with MEDCO to procure all of the prescription drugs needs of the plan's members. The Department of Justice is investigating MEDCO for several fraudulent schemes involving its operations as a PBM including, but not limited to, pill shortages and failure to pay adequate rebates to the plans. Last year, MEDCO entered into a settlement agreement with 22 states for these fraudulent practices. Additionally, the company is involved in a class action regarding private payers and ERISA plans for these practices.

Our firm currently represents the West Virginia Public Employees Insurance Agency, which contracted with MEDCO for PBM services in 2001, in a lawsuit. The complaint alleges that MEDCO failed to provide the West Virginia employees with proper rebates, and that the PBM illegally steered pharmaceutical prescriptions to its parent entity, Merck Pharmaceuticals. This case is currently pending in the Circuit Court of Kanawha County, West Virginia. Dee Miles and Clint Carter of our firm are working on this case.

Sources: *CNN Money* and *The Wall Street Journal*

National Bank Loses Case

A Pennsylvania state court jury recently awarded $70.3 million to the owners of a Pennsylvania shoe business that went bankrupt in 1997. The owners claimed that the bankruptcy was caused by the wrongdoing of CoreStates, which was its bank. The jury ordered CoreStates's successor, Wachovia Bank, to pay $10.3 million in compensatory damages and $7 million in punitive damages. The business owners claimed that CoreStates negligently misled it in liquidating its retail assets in 1996 and then used the liquidation as grounds for declaring the company in default on its loan agreement with the bank. Wachovia assumed the liabilities of CoreStates and now has the burden of either paying the verdict for a lesser amount, or appealing to a higher state court.

Jury Awards $242 Million In Failed Casino Plan

In a most interesting case, an entertainment firm and a group of investors won their civil case in a Wisconsin court. The plaintiffs were part of a failed plan to develop an American Indian casino in Wisconsin. The jury that heard the case found that three partners in Nii-Jii, an entertainment firm that bid on the project, failed to disclose one of the partner's business links to two Chicago crime figures. Nii-Jii had been created to develop the Paradise Key Casino for the Menominee Nation at the site of the Dairyland Greyhound Park racetrack in Kenosha, Wisconsin. The plan to develop the casino failed and suit was filed. The jury awarded Nii-Jii Entertainment $220.9 million and the investors were awarded $21.5 million.

Source: *Associated Press*

Bristol-Myers To Pay $89 Million To Settle Lawsuits

Bristol-Myers Squibb Co. has agreed to pay $89 million to settle four lawsuits brought by shareholders who opted out of a class action suit that was settled last year for $300 million. Both cases arise from issues surrounding its inflated accounting, wholesaler inventory matters and investment in ImClone Systems Inc. that date back several years. An undisclosed amount will be reserved by the company in the second quarter to resolve the continuing federal investigation into the accounting scandal. Bristol-Myers had increased its litigation reserves by $110 million before taxes. The increased reserve, which comes to $89 million after taxes, would cover the settlement cost of the four shareholder suits, which had been pending in the U.S. District Court in the Southern District of New York. The U.S. Attorney's Office in New Jersey is heading the investigation into the accounting matters. In March 2003, Bristol-Myers announced it had overstated revenue by $2.5 billion from 1999 to 2001 because of wholesaler incentives. Last August, the company agreed to pay the Securities and Exchange Commission $150 million to settle charges of accounting fraud related to the wholesaler issue.

Source: *The Wall Street Journal*

Federal Judge Orders $80 Million Settlement Over Drug Overpayments

A Michigan federal judge has ordered the distribution of an $80 million in a class action settlement to 76,400 consumers who overpaid for blood pressure medication. A single objection had delayed the payment for 18 months. Now, U.S. District Judge Nancy G. Edmunds has approved the distribution of the settlement checks. Attorneys General from 14 states, led by Michigan and New York, sued Aventis Pharmaceuticals and Andrx Corp. in 2001, saying the companies conspired to keep a cheaper, generic version of Cardizem CD off the market. The once-a-day prescription drug is used to treat high blood pressure and angina. Consumers paid too much for the drugs Cardizem CD and its generic equivalents because the companies conspired to delay the marketing of cheaper competitors. Under terms of the agreement, joined by attorneys general for all 50 states, consumers who bought the drug between January 1998 and January 2003 were eligible to be compensated. A Tennessee woman had filed an objection to the settlement in November 2003, which held up payment for over a year. The case eventually went to the U.S. Supreme Court, which declined to hear an appeal on May 23rd.

Source: *Associated Press*

X. INSURANCE AND FINANCE UPDATE

Lawsuit Filed Against AIG

New York Attorney General Eliot Spitzer and State Insurance Superintendent Howard Mills have filed a lawsuit against American International Group, the nation's largest business insurance company, alleging that the firm manipulated its books to deceive regulators and the investing public. The lawsuit alleges that AIG former top management, including former Chairman Maurice R. Greenberg and former Chief Financial Officer Howard I. Smith, engaged in numerous fraudulent business transactions that exaggerated the strength of the company's core underwriting business to prop up its stock price. When filing the lawsuit Spitzer said:

> *The irony of this case is that AIG was a well-run and profitable company that didn't need to cheat. And yet, the former top management routinely and persistently resorted to deception and fraud in an apparent effort to improve the company's financial results.*

I have to wonder how a company that **cheats** can ever be considered well-run. Corporations are run by people and sometimes those bosses get greedy and do bad things. When that happens, the company's stockholders and employees suffer. This is what Superintendent Mills had to say:

> *The charges against AIG and two of its former executives are serious ones and the complaint includes compelling evidence that investors and regulators were misled over an extended period of time. Having said that, however, I believe AIG is taking steps to restore the company's credibility.*

The lawsuit, filed in a New York state court, attributes the misconduct at AIG directly to Greenberg. The suit cites e-mails and other evidence showing that Greenberg was personally involved in negotiating some of the fraudulent transactions, and that he directed other AIG staffers to develop and implement the schemes underlying other misleading transactions. Specifically, it alleges that the company and top management:

- Engaged in sham transactions with a reinsurance company to create the appearance of insurance reserves where none existed. These deals were personally conceived and negotiated by Greenberg;
- Hid underwriting losses from an auto warranty unit by transferring the losses to an off-shore entity that it secretly controlled;
- Papered over losses in a Brazilian subsidiary by linking the losses to a Taiwanese subsidiary;
- Created false underwriting income derived from the purchase of life insurance policies; and
- Repeatedly deceived state regulators about AIG's ties to off-shore entities.

The lawsuit also cites a separate scheme in which AIG improperly booked worker's compensation premiums as general liability and other coverage. This misconduct reduced the company's taxes and other assessments. AIG has already admitted that many of the transactions were improper, has terminated certain implicated personnel, and has announced plans to restate its earnings. The company is said to be cooperating with authorities. In addition to common law fraud, the suit alleges violations of New York's Martin Act, Executive Law and Insurance Law. In addition to injunctive relief, the suit seeks damages and disgorgement of profits from the illegal transactions.

Following the lawsuit being filed, AIG announced that it has filed its long-awaited 2004 annual financial report Form 10-K along with adjustments for 2000 through 2003 with the Securities and Exchange Commission. The restatement shows that AIG had cut shareholders' equity by 2.7% or \$2.26 billion. The company also lowered 2004 net income by 11.9%, or \$1.32 billion, to \$9.73 billion from the \$11.05 billion previously reported on February 9th. The 10K filing comes just days following the filing of the complaint against the company and two of its former executives referred to above. Following the initial subpoenas from Spitzer, AIG commenced its own internal review of its financial reports and accounting and has issued restatements that address several of the alleged illegalities cited in the Spitzer complaint. The AIG story is far from being over—there is more to come—and it won't be good for the giant insurance company.

Source: *The Insurance Journal*

General Reinsurance Executives Plead Guilty To Fraud

As previously reported, our law firm represents Tennessee Insurance Commissioner, Paula Flowers, in her role as receiver of three Tennessee insurance companies that failed financially as a result of alleged fraudulent conduct by General Reinsurance Corporation, a defendant in a case that we are currently pursuing in federal District Court in Memphis, Tennessee. The thrust of Commissioner Flowers allegations are that Gen Re executives entered into a reinsurance agreement, known in the industry as a "treatise", and filed that treatise with the regulators for the State of Virginia and Tennessee, but later nullified Gen Re's obligations under the treatise through the use of a "secret side letter" by Gen Re executives and the executives of the parent company of the three Tennessee insurance companies. This fraudulent conduct resulted in the financial failure of the parent company, Reciprocal of America and the three

Tennessee companies known as Doctor's Insurance Reciprocal ("DIR"), insuring physicians, American National Life Insurance Reciprocal ("ANLIR"), insuring attorneys, and The Reciprocal Alliance ("TRA"), insuring hospitals.

Within the last few weeks, two Gen Re executives have pled guilty to criminal fraud charges filed by the United States Department of Justice. First, the former Chief Executive Officer of Cologne Reinsurance Company in Dublin, Ireland, a General Reinsurance subsidiary, pled guilty to conspiring with others to misstate certain financial statements for one of America's largest insurance companies, American International Group, more commonly known as AIG. Second, Gen Re Senior Vice President and Executive responsible for Gen Re's relationship with AIG, also pled guilty to the same allegations as Houldsworth, and has agreed to cooperate fully with the Securities and Exchange Commission which has filed a similar complaint in federal court in New York City.

Gen Re, which is owned by Berkshire Hathaway, of Omaha, Nebraska, a Warren Buffet Company, has now shown a pattern of sham accounting transactions that appear to be reinsurance contracts that transfer risks from Gen Re to AIG, when in reality all parties involved know that is not true. As a result of AIG's accounting treatment for these transactions, the Company's financial statements showed false increases in reserves that AIG reported in the Company's quarterly earnings releases. Without the phony loss reserves, AIG's financial results for at least two reporting quarters would have shown substantial declines in it loss reserves. These sham transactions are solely designed to inflate earnings which in turn artificially inflate the stock price of the company, in this case AIG.

Approximately one year ago, a similar course of events occurred in Australia, with Gen Re executives again being found guilty of these sham accounting transactions. All of these sham accounting transactions are related to the case we are handling for Commissioner Flowers in Memphis, Tennessee. However, in the Tennessee case, an insurance treatise was filed with regulators reflecting these reinsurance agreements, but later these agreements were nearly completely undermined by "secret side letters" that neither the regulators nor the policyholders knew existed. It was not until the complete financial failure of Reciprocal of America and the three Tennessee companies that these "secret side agreements" were discovered.

Needless to say, we are working hard to find out exactly how long Gen Re has been operating with these sham accounting transactions. Apparently, according to Richard Napier, one of the Gen Re executives who has already pled guilty, Gen Re CEO, Ronald E. Ferguson not only knew about these transactions, but helped devise the transaction involving AIG and its CEO, Maurice R. "Hank" Greenberg. If true, Gen Re and its executives owe the regulators and the policyholders mentioned above, an explanation, among other things.

Lots Of Folks Are Unhappy With Insurance Claims Service

One-fifth of Americans who have filed property or casualty claims during the past three years are not satisfied with the way their insurance companies handle their claims, according to results of a survey released by Accenture and SAP. In addition, two-thirds of respondents said they believe it's important for their insurance companies to provide the ability to check the status of claims online. It wasn't too surprising to learn that consumers' dissatisfaction regarding claims service significantly increased with the number of claims representatives they had to speak with during the course of their claims settlements. Survey respondents who spoke to three or more people at their insurance companies during the course of claims were nearly five times as likely to be dissatisfied with their claims experience as those who spoke to only one or two claims personnel—49% versus 10%. Three-fourths of respondents said they would prefer to speak to only one person from their insurance companies about their claims. Respondents with more complex claims experiences were more likely to negatively rate their claims experiences:

- Negative claims experience ratings were highest for claims that took more than 20 days to be resolved (40% compared with 20% overall);
- claims that resulted in recovery of less than half of their losses (28%); and
- claims that involved auto-related injuries (39 %).

Michael Lucarini, a partner in Accenture's Insurance practice stated: "Insurers need to continue to implement new automated claims technology to help further expedite the process and improve the customer experience. The most significant opportunities to improve claims customer satisfaction are reducing the carrier-to-customer interactions required to handle high-frequency, low-severity claims and keeping the customer more informed on longer, more-complex claims."

Peter MacPherson, Vice-President, Insurance business unit, SAP America Inc. added: "Consumers are demanding easier and more efficient methods for filing their claims. Innovative technology is crucial to help insurers meet growing customer demands for simpler claims filing processes. Insurers who leverage the Internet as a tool for consumers to manage their claims will gain a competitive advantage as well as reduce their operational expenses."

Additional survey findings:

- Respondents based their claims satisfaction levels on several elements, giving top priority to the perceived fairness of the settlement (selected as the top priority by 45% of respondents), followed by responsiveness of claim representatives (19%) and speed of the settlement (19%).
- Eighty-one percent of consumers polled said they would file claims online if it would expedite the claims settlement process.
- Nearly one in five (17%) respondents said their claims experiences would keep them from referring their insurance companies to friends.
- The two most important concerns of respondents when settling property/casualty claims were that premiums would increase because of the claims (42%) and that they would not receive the full value of the claims (26%).

Source: *Claims Guide*

Citizens Wind Policies Must Pay For Flooding

A Florida circuit court judge has ruled in a class action lawsuit in Tallahassee, Florida that Citizens Property Insurance Corp., Florida's insurer of last resort, must pay the full amount of damage homes were insured for, even if they were primarily damaged by flooding and not wind. The decision supported contentions by homeowners that state law requires insurers to pay the full amount of a policy even if an uncovered catastrophe causes a portion of the damage. Citizens' still contends it should not be paying for losses caused by flood. Citizens will appeal the court's ruling.

Hundreds of residents of the Florida Panhandle, whose homes were destroyed by 20-foot waves during Hurricane Ivan, could receive payments if the decision is upheld. Citizens maintains it is legally prohibited from paying flood claims and believes the judge's ruling essentially means it could have to pay for the full value of a house even if 99% of the damage is caused by flooding. Folks who paid their premiums on the policies deserve to get their policies paid so they can rebuild their homes and go on with their lives.

About 350 homeowners have demanded Citizens make full payment on their policies. Others who may not have contested Citizens' decision not to pay flood damage may do so now. As reported, the Florida Legislature passed a bill that would protect insurance companies from having to pay flood damage when policies only cover wind. The bill, however, isn't retroactive, so it won't affect this case. Citizens Property Insurance Corporation should pay these legitimate claims by their policyholders. Those folks shouldn't have to file lawsuits to get relief. Tom Gallagher, Florida's CFO, commented on the case:

> *Thousands of storm victims, especially in the Panhandle, have suffered for far too long without resolution of their claims. This ruling reinforces what I have said all along–the people in Pensacola, whose homes were destroyed more than eight months ago, must be made whole. I applaud Judge Davey's ruling and urge Citizens and all insurers to immediately comply with the ruling.*

Florida Court Awards $16 Million Judgment To FCCI

A Sarasota, Florida Circuit Court has awarded FCCI Insurance Company a $16,174,977 judgment in a civil action dating back to 2002. The judgment against S&H Drywall and Premier Enterprises Unlimited, two Florida companies, comes after an internal investigation conducted by FCCI's Special Investigations Unit revealed inaccurate and incomplete information was provided to FCCI when the companies were obtaining workers' compensation insurance from FCCI, a property and casualty commercial insurance provider. FCCI, which is located in Sarasota, alleged that S&H and Premier misrepresented the nature of the construction work they did understated the number of their employees and failed to disclose true payroll figures. FCCI says it was prevented from collecting the correct amount of premium.

The partial summary judgment issued by a circuit court judge included a triple premium award of nearly $4,000,000 and an additional $12,276,810 as statutory damages pertaining to the difference of premium that the companies paid FCCI compared to what they should have paid. Additionally, FCCI is to be compensated $93,888 for unreimbursed costs relating back to some of the undisclosed employees. It is interesting that the business community applauded this judgment.

Source: *The Insurance Journal*

TRG Officials Who Are Going To Jail Will Pay Their Victims $2.5 Million

Carmelo Zanfei and William Paul Crouse, accused by Florida's Department of Financial Services (DFS) of cheating more than 7,000 Floridians out of more than $2.5 million in unpaid insurance bills, have pleaded guilty to charges of racketeering and unlawful transaction of insurance. Formal sentencing of both defendants will come later before a state court judge in Orlando. According to Florida Attorney General Charlie Crist, Zandei and Crouse were apprehended when DFS determined that the firm they headed, TRG Marketing, had a self-insured plan that was under-funded and failed to pay millions of dollars in medical claims.

Source: *The Insurance Journal*

Executive Life Insurance Jury Goes Back To Work

We mentioned the legal problems relating to Executive Life Insurance Co. in a prior issue. According to The Los Angeles Times, the jury in the long-running court case will reconvene on the 12th of this month to start deliberating whether damages should be paid in connection with the failure of the insurance company. U.S. District Judge A. Howard Matz will bring the jury back following the failure of settlement talks between California Insurance Commissioner John Garamendi and French billionaire Francois Pinault. Jurors cleared Pinault of wrongdoing in May. The jurors found that Pinault's company, Paris-based Artemis, worked together with a subsidiary of French bank Credit Lyonnais and other investors to defraud California regulators. The jury said that Artemis' actions resulted in harm to Executive Life policyholders. Because of some interesting orders by Judge Matz, Artemis may only have to pay about $75 million in damages. Four months ago, Credit Lyonnais and other French defendants settled their part of the case for $600 million.

Source: *The Los Angeles Times*

XI. PREDATORY LENDING

Appeals Court Upholds Georgia's Payday Lending Law

A federal appeals court has upheld Georgia's payday lending law, a measure passed by lawmakers last year in a bid to outlaw short-term, high-interest loans often marketed to military personnel. In a 2-1 ruling, issued last month, a panel of the court held that the State of Georgia did not overstep its power in outlawing such loans. Eleven companies had sued the state to prevent enforcement of the law, claiming the statute denied a financial backstop for military personnel and the working poor who need to borrow money against their future paychecks. A federal judge upheld the law more than a year ago and this ruling came from the appeal from that ruling. The Legislature decided to outlaw payday loans largely at the urging of military commanders who said their soldiers and sailors were being victimized.

Source: *Associated Press*

Alabama Has A Problem

Pay Day Lending has quietly become a multi-billion industry. We are seeing pay day loan operations opening up all over our area and that's not good. People who have to deal with the payday loan sharks are being victimized now more than ever. In Alabama these victims simply don't have a chance. In my opinion, the Alabama Legislature should repeal the anti-consumer Pay Day Loan Law that was passed last year. It does nothing for consumers and was pushed to passage by lobbyists for the pay day lenders. Passage of this act was a big mistake and it is hurting folks who have to deal with the pay day loan outlets. We should be doing a better job of regulating these predatory lenders and protecting their victims. The first step is to repeal the current law and replace it with legislation that really regulates the industry and protects consumers.

XII. PREMISES LIABILITY UPDATE

Lack Of Safety Oversight

As we get full-swing into the summer season, there will be many persons spending time at amusement parks throughout the country. There are currently no federal safety oversight rules or regulations that govern amusement parks. To make matters worse, there are very few states that have any type regulatory activity concerning these facilities. A tremendous number of families face tragedy every year due to injuries and deaths that occur at amusement parks. Currently, seven out of ten amusement parks have no independent safety oversight. This is difficult to comprehend when you consider that total revenue for U.S. amusement parks in 2004 was $10.8 billion. Until something is done, either in Congress or on the state level, parents and adults who supervise groups of children must be made to understand that oversight of the amusement park thrill rides is virtually non-existent. Amusement park rides have been exempt from federal safety regulation since 1981.

A bill has been introduced in Congress entitled The National Amusement Park Rides Safety Act of 2005. If passed, this would restore oversight of amusement park rides by the Consumer Products Safety Commission. This is a step in the right direction. Currently, legal action in the courts is the only way to hold theme parks accountable. The death of a child at Disney World, which is discussed below, is a prime example of why a strong inspection law is needed in each state. Currently, the industry is free to do pretty much what it pleases with no real oversight or regulation.

4-year-old Dies At Disney World

A 4-year-old boy died last month after passing out while aboard Walt Disney World's "Mission: Space" attraction—a ride that has caused previous concerns because of its intensity. The child passed out while aboard the attraction, which simulates a rocket launch and trip to Mars. The little boy apparently met the minimum 44-inch height requirement for the ride which is located at the Epcot theme park, which simulates twice the normal force of gravity. It is difficult to understand how a small 4 years old could be allowed on a ride of this sort.

An autopsy is being conducted to determine cause of death. The boy, who was from Pennsylvania, was visiting Disney World with his family. He was on the ride with his mother and sister. The $100 million ride, one of Disney World's most popular, was closed after the death. It reopened a day or so later. It is significant that in 2003, Disney began placing motion sickness bags in the ride. During an eight-month period in 2003-04, six people over age 55 were taken to the hospital for chest pain and nausea after riding it. It was the most hospital visits for a single ride since Florida's major theme parks agreed in 2001 to report such problems to the state. Updated figures are not immediately available. Signs, which warn visitors about the intensity of the ride, state: "For safety you should be in good health, and free from high blood pressure, heart, back or neck problems, motion sickness or other conditions that can be aggravated by this adventure." Nothing is said on the warning sign about the effect on little children.

Source: *Associated Press*

Family Of Burned Infant Is Awarded $8.25 Million

A jury in Pontiac, Michigan, has awarded $8.25 million to a family whose child was badly burned as a premature baby when his hospital bedding caught fire. The child—a quadruplet—suffered serious burns and long-term lung damage about three months after his birth in 1997. A doctor at William Beaumont Hospital used a cauterizing tool after the birth, sparking a flash fire. The child, now 7 years old, can't talk or dress himself, cannot breathe on his own and has learning disabilities. The hospital apologized to the family for the fire, but claims that the lung damage was a birth complication.

Source: *Los Angeles Times*

Settlement Reached In Choking Lawsuit

A settlement has been reached in a tragic wrongful-death lawsuit. A trial that offered graphic descriptions of a 6th grader's frantic final moments as she choked on marshmallows was ongoing when a settlement was reached by the child's parents. The $2 million settlement was reached with Glenview Elementary School District 34 and one of its teachers. The child was 12 when she suffocated after playing "Chubby Bunny" at school, a game in which full-size marshmallows are placed in the mouth one at a time until the person can't say "chubby bunny." The child was playing the game with several friends at her school. She was rushed to a local hospital and died shortly afterward. The settlement came eight days into the trial. The teacher had left the classroom on an errand when the incident occurred. The child was left unattended while she and other children played the game.

Two teachers overseeing other games were working in adjoining classrooms separated by partitions left partially open, attorney Thomas DiCianni said. The parents say that the entire purpose of their suit was to inform and warn other parents of "the dangers of this game and all food games." Besides the settlement, which will be paid by the school district's insurance company, officials will start a memorial fund in the child's name. During the trial, another student described how she watched her best friend in distress, her face and lips turning purple as she struggled to breathe after stuffing three or four marshmallows into her mouth. The child—in distress—took few steps to a water fountain and tapped her classmate on the shoulder, signaling that she needed help. The child then collapsed as her friend ran across a hallway to find a teacher. School officials called paramedics, attempted the Heimlich maneuver and administered CPR.

After their child's death, the parents appeared on "Oprah," and school officials contacted other districts to warn them about the hazards of Chubby Bunny. Unfortunately, some youth groups continue to play it. For example, at a private college in Tennessee, members of a social club have displayed on a website photos of young men with marshmallows oozing from their mouths as they played the same game. All school officials should be made aware—if they aren't already aware—of the dangers associated with food games such as "Chubby Bunny."

Source: *The Chicago Tribune*

Parents Sue Store Over Daughter's Assault

The parents of an 11-year-old girl who was sexually assaulted at a Target store in 2003 has sued the company, alleging that inadequate security allowed the attack to happen. The lawsuit names Target Corp. and the store's head of security as defendants. The lawsuit argues that Target should have provided a highly visible and professional security force to prevent criminal assaults, according to allegations in the complaint. Video from surveillance cameras on July 12, 2003, shows a man stalking a girl in the store and then leading her down an aisle by her wrist. Prosecutors at his criminal trial said he pulled a knife and sexually assaulted her in two locations in the store. In a written statement, Target officials defended the way store officials responded.

Source: *Associated Press*

XIII. WORKPLACE HAZARDS

Ford Settles Employee Suit Alleging Bias In Testing

Ford Motor Co., has settled a discrimination lawsuit that lasted six years. The suit involved a claim that Ford denied admission to 3,400 African-Americans to its apprenticeship program. The $10 million class action settlement was presented to a federal judge who took the proposed settlement under advisement. Current and former employees of Ford's transmission plant in Sharonville see this as a victory over racial bias at Ford, one of the largest U.S. corporations. Ford told *USA Today* that it agreed the settlement will "enhance the test and opportunities for all our employees. ...It will ensure that African-Americans have opportunities for apprentice training."

The settlement covers roughly 3,400 African-American employees at Ford plants nationwide who were shut out of the company's apprenticeship program dating back to 1997. Completion of the multiyear program brings job skills, higher pay and greater job security. It was alleged that Ford excluded the employees because of their race. Hopefully, I will see the day when all men and women are treated equally in the workplace and in all other aspects of our daily lives.

Source: *USA Today*

OSHA Cites Company After Fatal Georgia Accident

The U.S. Labor Department's Occupational Safety and Health Administration (OSHA) has cited Bartow, Florida-based Atlantic Scaffolding Inc. following investigation of a fatal accident at an International Paper Company facility in Augusta, Georgia. The agency is proposing penalties totaling $78,000. The accident occurred December 12th as Atlantic Scaffolding employees were dismantling a 14-level, 100-foot high scaffold erected inside a boiler. Crew members were allegedly removing planks at the fourth level when one employee, reaching out to receive a plank from another employee, stepped into an opening and fell 21 feet to the bottom of the boiler. An OSHA representative says:

If the safety harnesses worn by these workers had been properly attached to a lifeline, this tragic accident would have been prevented. Two years ago, this company had a similar accident and knew the hazards involved in not tying off.

OSHA issued one willful citation, with a proposed maximum penalty of $70,000, for failing to provide employees with proper fall arrest systems. A willful citation is issued when an employer has shown an intentional disregard of, or plain indifference to, the requirements of the Occupational Safety and Health Act and regulations. The company received two serious citations, with proposed penalties totaling $3,000, for failing to train employees on fall protection, including recognizing and reducing scaffolding hazards, and failing to have guard rails on scaffolding stairways. Additionally, the company received a proposed penalty of $5,000 for failing to notify OSHA of a fatal accident within the required eight-hour period. The company has the right to contest the citations and proposed penalties before the Occupational Safety and Health Review Commission. A contest has to be filed within 15 working days from receipt of the citations.

Man Injured In Toilet Blast Files Suit

A Pennsylvania man, injured when a portable toilet exploded, has filed suit against a general contractor and a coal company. The man and his wife filed the lawsuit in a state circuit court. They are suing Chisler Inc., a general contractor, and Eastern Associated Coal Corp. for $10 million in damages. The explosion occurred on July 13, 2004. The man, a North West Fuels Development Inc. methane power plant operator, entered a portable toilet, sat down and then tried to light a cigarette. When he struck the lighter, "the whole thing just detonated—the whole top blew off," it was alleged. The lawsuit says the flame from the lighter ignited methane gas leaking from a pipe underneath the unit. Eastern Associated Coal Corp. owns the property where the explosion occurred. It is alleged that Chisler Inc. ran over the pipelines with heavy equipment before the incident, causing the methane gas leak. The lawsuit also says there was no sign on the portable toilet warning that smoking, matches and open flames were forbidden. The man had severe burns on his face, neck, arms, torso and legs, resulting in his being permanently disfigured, the lawsuit says. Eastern Associated Coal is a subsidiary of Peabody Energy.

Source: *Associated Press*

XIV. TRANSPORTATION

There May Be 20 Million Unsafe Drivers On U.S. Highways

Results of a recently released study suggest that millions of Americans lack basic knowledge of rules of the road and safe automobile operation. In fact, the study shows that if tested today, one in 10 drivers - nearly 20 million Americans - would fail a state drivers test. Furthermore, the study evaluated Americans' everyday driving habits, unveiling dangerous driving behaviors. The alarming results came from the first GMAC Insurance National Drivers Test, a study of almost 5,000 licensed drivers nationwide, between ages 16-65 years. The test is designed to gauge Americans' driving knowledge. Respondents were administered a 20-question written test representative of those used to award state drivers permits or licenses. Oregon drivers ranked highest on the test with an overall average score of 89%. At the other end of the scale, 70% or higher is required to pass a standard driving test.

Rhode Island ranked lowest with an overall average score of 77%.

Results suggest that many Americans find standard driving practices difficult, including merging, failure to yield when making left turns, and road-sign interpretation. In addition, many may not take such important topics as drinking and driving seriously enough. Twenty-nine percent of drivers who drink admitted they would knowingly drive while over the legal limit “if they felt okay.” This means about 57 million folks would drive even though they were **legally drunk**. The test clearly supports the need on the behalf of the driving public to stay abreast of the rules of the road. It is also essential that they put them into practice.

According to the Insurance Institute for Highway Safety (IIHS), a non-profit research organization funded by auto insurers, areas where respondents showed lack of knowledge or a propensity for unsafe practices are also common causes of auto accidents. For example, IIHS research shows that speeding increases both the likelihood of crashing and the severity of the crashes that do occur and that younger drivers speed more often than older drivers. In addition, IIHS states that alcohol-impaired driving is still a major problem. Since 1997 about a third of fatally injured passenger vehicle drivers have had a Blood Alcohol Concentration of 0.08% or above. Driving with a BAC of 0.08% or higher is illegal in every state. Susan Ferguson, PhD, senior Vice-President of research, International Institute for Highway Safety, made this observation:

> *As a nation of drivers, we’ve made little progress in the past 10 years to curb some of the most dangerous driving behaviors, including drinking and driving and speeding. This study underscores the importance of safer driving habits and more consistent law enforcement.*

While all of us have obligations to take steps necessary to make our highways safer, our elected officials have a duty to take action in government. They can learn from this research and apply what they learn. The following are some of the findings from the report:

- Drivers 18-24 years old are most likely to fail a written driving test (78% passing rate) and drivers 50-64 years are most likely to pass (85% passing rate);
- Drivers in the Northeast and Mid-Atlantic are the least knowledgeable (1 in 5 were unable to pass the written drivers test);
- Drivers in the Pacific Northwest and Great Lakes are the most knowledgeable with a failure rate of 1 to 3%;
- At least 1 out of 5 drivers do not know that a pedestrian has the right of way at a marked or unmarked crosswalk. This is of special concern considering that drivers in urban areas are among the least knowledgeable in the nation. According to IIHS in 2003, 48% of all pedestrian injuries and 21% of fatal injuries to pedestrians occur in collisions with motor vehicles at intersections;
- 1 out of 3 drivers claim to speed up to make a yellow light even when pedestrians are in the crosswalk;
- 1 out of 4 drivers would roll through a stop sign rather than come to a complete stop;
- The nation’s least knowledgeable drivers (Northeast and Mid-Atlantic drivers) are the most likely to speed;
- Nebraska’s drivers are least likely to exceed the speed limit;
- 1 out of 10 drivers regularly drives over the speed limit by 11 or more miles per hour, although 58% of drivers feel that driving 10 miles per hour over the speed limit on the interstate is dangerous;
- Younger drivers (18-24 years old) are most likely to speed with older drivers (65+) being the least likely;
- Half of Americans report that they do not know how to merge into heavy traffic;
- 60% of Americans say that they change lanes on a highway without using their blinker;
- One-third of Americans have packed their car so tightly that their vision was obstructed;
- 17% of Americans have driven without a rear view or driver’s side mirror; and
- 1 out of 5 drivers do not know that highways are the most slippery just when it starts to rain after a dry spell. Fortunately, 96% of those tested say that they know what to do when they hydroplane.

The test was administered by TNS NFO, a custom research company and a provider of social and political polling (www.tns-global.com). Drivers were given a 20-question test representative of a DMV written drivers test typically used to award a driver’s permit or license. It is interesting to find out which states have the most knowledgeable drivers in the nation. According to the test results, Alabama ranked 15th on the list. Georgia was 29th; Mississippi was 40th; Louisiana was 39th; and Florida was 40th.

Source: *The Insurance Journal*

Driver Fatigue Results In Fatal Bus Crash

Driver fatigue, especially with truck drivers, is a leading cause of accidents on our nation’s highways. We have seen a rash of cases where driver fatigue played a major role in causing the accidents. An accident that occurred in New York is an example of what can happen when drivers of large trucks and buses are too tired to drive their vehicles safely. The driver of a charter bus swerved off a highway and rammed a parked tractor-trailer, killing four people. The 24-year old driver was accused of lying about the hours he worked in the days before the January 29th wreck. The driver insisted he veered off an interstate highway in rural western New York after striking something on the road. It's not surprising that his claim is being supported by the bus company. State police disagree—they didn't recover any object—and believe driver fatigue might have contributed to the crash, which killed the truck driver and three bus passengers.

Another 19 people on the bus, which was chartered by a Canadian women's youth hockey team, were injured. After a morning game in Rochester, players, family and coaches were traveling to a ski resort when the crash occurred at dusk about 27 miles south of Rochester, New York. The driver was charged with misdemeanor violations of state transportation laws, as well as failing to stay in the proper lane moments before the crash. Authorities allege that the driver lied about the hours he worked in another job during the three days before the crash and failed to report in the driver's log book that he drove team members around Rochester in the six hours before they embarked on the ski trip. Commercial drivers are required to maintain accurate logs of their work hours and break times.

Source: *Associated Press*

States Limit Cell Use By Drivers

Cellphone use has become a real problem on our nation's highways. Lawmakers in several states are cracking down on distracted driving as research increasingly documents the perils of inattentiveness behind the wheel. So far this year, Colorado, Delaware, Maryland and Tennessee banned cellphone use by young drivers. The National Conference of State Legislatures reports that so far this year 37 states have debated new laws restricting drivers' use of cellphones. This activity is the result of research at the University of Minnesota and the University of Utah which concludes that drivers talking on cellphones or fiddling with the car radio sometimes perform as poorly as drunken drivers. The National Highway Traffic Safety Administration estimates that distracted driving is a factor in 25% of all traffic accidents reported to police. NHTSA says 8% of drivers are using cellphones at any moment during daylight. The following are some of the actions that have taken place:

- Chicago has banned all drivers from using hand-held cellphones.
- New York enacted the first such state law in 2001.
- Jersey and Washington, D.C., have similar bans.
- Nevada stiffened penalties for drivers who kill someone while using cellphones, putting on makeup or eating.
- Virginia banned pornographic videos in vehicles if they can be seen by people outside the auto.
- Several states, including Florida, Kentucky, Louisiana and Mississippi, have tried to prevent a crazy-quilt of regulations by prohibiting local governments from banning cellphones for drivers.

Another study reveals that among the many distractions faced by car drivers, cellphones and other wireless devices contributed to far and away the most crashes, near-crashes and other incidents. The new government study released recently backs up earlier tests that show basically the same results. The yearlong study, which tracked 100 cars and their drivers by the Virginia Tech Transportation Institute and NHTSA, highlights the danger of talking on cellphones. Most states, however, have had difficulty getting cellphone bans enacted. The cellphone industry and the non-profit association that represents state highway agencies question the effectiveness of such measures. In my opinion, more controls are needed.

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

XV. ARBITRATION UPDATE

Another Run At Mandatory Arbitration In Congress

During recent hearings before a pair of U.S. House of Representatives subcommittees on financial matters, there were calls for new limits on the use of mandatory arbitration agreements in the mortgage lending market. Consumer advocates were pushing for an all-out ban. The subcommittees on Financial Institutions & Consumer Credit and Housing & Community Opportunity heard from consumer representatives about the restrictions mandatory arbitration agreements put on homebuyer rights. Industry representatives argued that arbitration is a cost-saving measure and should not be subject to an outright ban in the lending market. Instead, the industry says they should only be barred in high-cost loans, industry officials said.

Two bills before the subcommittees, (HR 1182 and HR 1295), reflect those two positions with different degrees of restrictions on mandatory arbitration in the mortgage business. HR 1182 would bar its use in any home loan; HR 1295 would only prohibit it in the sub-prime loan market. The hearings came on the heels of a May 19th announcement by financial services giant CitiFinancial that it would no longer include or enforce mandatory arbitration agreements in real estate loans. That decision follows a similar action taken last year by Freddie Mac and Fannie Mae to stop buying loans containing mandatory arbitration agreements. The bills are likely to come up for a vote later this year. However, it is unclear whether both will be acted on, or whether a single compromise bill would be presented to the full Financial Services Committee. Overall, borrower representatives came out in favor of HR 1182 and its complete ban on mandatory arbitration, while industry representatives favored HR 1295 and its more limited approach to prohibiting the clauses only in high costs loans. Josh Nassar, Vice-President for Federal Affairs at the Center for Responsible Lending, said:

> *Mandatory arbitration agreements "eliminate basic rights of victims of abusive lending to save their home by having their day in court. Therefore, allowing mandatory arbitration to continue preventing people from being able to keep their most valuable asset, their home, must end… HR 1295 falls short of industry best practices by only barring [mandatory arbitration agreements] in high costs loans.*

It remains an open question whether mandatory arbitration would be prohibited, but it is an issue that could be decided during negotiations over the bills. There is no way to justify pre-dispute arbitration that is both mandatory and binding. Congress should restrict arbitration to non-consumer transactions and allow it in consumer transactions only in post-dispute settings when both parties agree to it. It will be up to people around the country to let their representatives in Washington know how they feel about arbitration. Otherwise, there will likely be nothing done on these bills.

A Good Ruling By A Mississippi Court

The Mississippi Supreme Court has issued a very good decision relating to the formation of binding mandatory arbitration agreements. The case, Union Planters Bank v. Rogers (4-28-05), involved the estate of an elderly couple who hired a woman to help take care of them. The woman then forged their signatures on several checks and stole $58,000 from them. The bank argued that the estate was bound to arbitrate its claims because of a clause included in a mailing. The clause said that "By signing a signature card and using your account you agree to the terms of this arbitration agreement," and the couple never signed the card, but did keep using the account. In its opinion, the Mississippi Court stated:

> *Submitting to arbitration means giving up the right to file a lawsuit in a court of competent jurisdiction. Waiving that right requires more than implied consent: 'Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right.'…We find absolutely no evidence that either of the Rogerses voluntarily and knowingly waived their right to access to the courts…The use of basic contract construction rules also leads us to the conclusion that the Rogerses were not bound by Union Planters' arbitration provision.…We find that the general provisions of the mail-outs and the specific provisions of the arbitration clause are in conflict…, causing ambiguity. Ambiguities in a contract are to be construed against the party who drafted the contract… we find that waiving the right to have access to the courts is something much more significant and of a different character than changing the terms and conditions of a bank account, assert for which can be obtained simply by the continued use of the account.*

Little Has Changed In Alabama

The Alabama Supreme Court continues to struggle with arbitration in consumer cases that come before the court. I am still hopeful that the court will eventually come to recognize the evils of mandatory, binding arbitration and will restrict its use in consumer transactions and nursing home cases. Maybe—as some suggest—lawyers are not sending good records from the trial court up to the court on appeals involving arbitration issues. If that is an accurate appraisal, we should remedy that in all of our cases. However, I believe the courts should take a closer look at the overall problems caused by arbitration when powerful corporations use it against individual consumers. It is difficult to see how the court fails to realize that arbitration was never intended to be used in disputes arising out of consumer transactions. The U.S. Senate Journal is very clear on that point. In any event, nobody can convince me that pre-dispute arbitration clauses should ever be forced on an unwilling consumer. I still have hope that a majority of the Alabama Supreme Court will rethink the court's position on arbitration and do the right thing.

XVI. NURSING HOME UPDATE

Louisiana Nursing Home Bill

Under a bill approved by a House committee in Louisiana, the rights of nursing home patients to sue for damages for violation of their rights would be restored. The House Civil Law Committee voted six to one in favor of the bill, although it was strongly apposed by the Louisiana Nursing Home Industry. At present, nursing home residents in Louisiana can only sue to stop violations of their patient rights by nursing homes and can't sue for money damages. Patient rights include, among others, religious liberties, the right to be treated with dignity, and the right to be free from mental and physical abuse.

The nursing home industry claimed that the rising cost of insurance, because of lawsuits, was taking money away from resident care, an argument that is making its way around the country. The industry said further that Louisiana nursing home residents already have adequate legal remedies available to them, including the state medical malpractice law. The Louisiana legislature passed a nursing home resident's bill of rights in 1985, which included the right to seek civil damages for violations of those rights. However, in 2003 the nursing home industry was successful in convincing the Louisiana legislature to limit the ability of residents to pursue violations of those rights in court.

Arkansas Court Of Appeals Affirms 1.6 Million verdict

The Arkansas Court of Appeals recently affirmed a $1.6 million compensatory damage verdict in favor of the family of a nursing home resident against the nursing home in which she was residing. Mrs. Eula Givens was 90 years old and weighed 118 pounds when she entered Rose Care in 1999. While she was not a healthy woman, few nursing home residents are. The resident was fully dependent on the nursing home staff for all of her activities of daily living, including her meals, which were to be spoon-fed to her. Mrs. Givens, within two weeks of her admission to the facility, began developing pressure sores on her hip, heel and ankle. She began to lose weight and lost approximately 16 pounds in a little over one month. Eventually, the poor lady had lost down to 76 pounds in just a few months. Her pressure sores deteriorated. She subsequently developed a urinary tract infection from which she did not recover and died in December of 2000.

The family of Mrs. Givens sued the nursing home, alleging that Rose Care understaffed its facility and allowed Mrs. Givens to become severely dehydrated, lose a great deal of weight, develop several painful pressure sores and after numerous indignities. Eventually, all of this combined to cause her death. Several former employees of the facility testified at trial. One recalled that Mrs. Givens wanted water "a lot" and that, when walking down the hall, she heard the resident's voice asking for water. Another testified that, at the start of her shift, she discovered Mrs. Givens with dried feces all over herself, her bed, and the wall. This employee said that it took more than an hour to find someone to help her clean Mrs. Givens. Another employee testified that, on three out of five mornings when she would begin working her shift, she would find Mrs. Givens saturated in urine, feces, or both. These employees related incidents when a fresh bandage on Mrs. Givens had been placed over an older bandage; when a nurse unclogged Mrs. Givens feeding tube by pouring Coca-Cola into it; when her "call light" was placed out of her reach; and when a maintenance man was "pulled onto the floor" to act as a certified nursing assistant when state inspectors came to the facility.

The jury, after having heard this compelling evidence, awarded $1.6 million dollars in compensatory damages. The trial court had granted a directed verdict on the Plaintiff's punitive damage claim, meaning that the jury was unable to decide whether punitive damages should be awarded against the nursing facility. The Arkansas Court of Appeals said that the trial court was wrong in not letting the jury decide the issue and ordered that a new trial be held on punitive damages. The facts presented in this sad case are extremely unfortunate; however, this sort of thing is not at all uncommon in nursing home cases.

XVII. HEALTHCARE ISSUES

Doctors Continue To Fight Managed Care Companies

During the mid-1990s, I am sure you remember the reputation that Columbia/HCA Healthcare Corp. developed for hard-nosed business tactics, including pressuring managed-care companies to exclude its rivals from the insurers networks and preventing doctors with staff privileges at competing hospitals from investing in for-profit ventures with the Nashville based company. Recently, a physician-owned hospital in Kansas, Heartland Spine & Specialty Hospital, filed suit alleging that HCA Midwest Division, which is a wholly owned subsidiary of the for-profit HCA, pushed a systematic conspiracy to pressure managed-care companies to boycott Heartland over the last two years and drive it out of business. It is alleged that HCA Midwest, which controls roughly one-third of all of the hospital beds in the metropolitan area, joined with other hospitals in the Kansas City metro area, to persuade a host of insurers to exclude Heartland, a the surgical hospital, from their networks.

Lawyers for Heartland Spine & Specialty Hospital say that HCA conspired with other major hospitals in an effort to put Heartland out of business. These charges, some of which are brought under the Sherman Antitrust Act, are clear evidence of the friction in the ongoing fight between specialty facilities and community hospitals. It is alleged the conspiracy by HCA, which is the largest for-profit hospital in the nation with 190 facilities, is in keeping with the chain's long-time dislike towards specialty hospitals. The lawyers filing the suit say it is consistent with the way HCA has dealt with these hospitals and the statements they have made in other markets.

This lawsuit sheds light on the battle between full-service community hospitals and specialty facilities specializing in high-margin services such as orthopedics, surgery, and cardiac care. In Idaho, four physicians filed a still-unresolved lawsuit last year charging HCA's Eastern Idaho Regional Medical Center with illegally revoking their hospital privileges after the doctors invested in a competing specialty facility. It appears that some of the next battles will be fought in Congress. An 18-month moratorium on physician self-referral to doctor-owned specialty hospitals will expire June 7, 2005. The Medicare Payment Advisory Commission has recommended extending that ban through January 1, 2007, a suggestion that most observers believe will be followed by federal lawmakers.

In the Heartland suit, it is interesting to note that the alleged conspiracy includes other local hospitals, as well as six insurance companies—three of which Blue Cross Blue Shield, Coventry Healthcare of Kansas City and United Healthcare—control more than three-fourths of the local market. The complaint alleges that after questioning from Heartland, the insurers admitted that they succumbed to the pressure of the coordinated conduct of the hospital defendants to deny Heartland in-network contracts. All of the defendants are, of course, denying the allegations—it will be interesting to see how this lawsuit progresses. It is also interesting to note that HCA is the company that Senator Bill Frist's family has a huge stake in.

Pesticide Link To Parkinson's Disease Has Strengthened

Fears that pesticides may cause Parkinson's have been strengthened by research that says the greater the exposure to these chemicals, the higher the risk of developing the disease, the New Scientist reports. Low users of pesticides such as amateur gardeners are 9% more likely than non-users to develop Parkinson's, while high users, such as farmers, are 43% more likely, the study says. The so-called Geoparkinson study, head-authored by University of Aberdeen scientist Anthony Seaton, investigated the background of 767 volunteers in Scotland, Italy, Sweden, Romania and Malta who had Parkinson's disease.

These were compared against 1,989 'controls', people who had similar backgrounds but were healthy. The study does not identify which pesticides could be to blame, and says there are other risk factors for Parkinson's that are much higher. For instance, having a family history of the disease boosts the risk by 350%; being knocked unconscious raises the risk by 32%, and those who have been knocked out several times face an increased risk of 174%. The report appeared in a recent issue of *New Scientist*, the weekly British science magazine, which says the study confirms the need for gardeners and farmers to wear protective gear when handling pesticides. Parkinson's is a currently incurable, degenerative disease of the nervous system, affecting more than 1% of people over the age of 65.

Source: *Forbes News*

Hospitals Need To Clean Up

Why are infections that have been nearly eradicated in some other countries raging through hospitals here in the United States? The major reason appears to be poor hygiene. In fact, hygiene is so inadequate in most American hospitals that one out of every 20 patients contracts an infection during a hospital stay, according to a recent story in *The New York Times*. Hospital infections kill an estimated 103,000 people in the United States a year, as many as AIDS, breast cancer and auto accidents combined. And the danger is worsening as many hospital infections can no longer be cured with common antibiotics. One of the deadliest germs is a staph bacteria called methicillin-resistant Staphylococcus aureus (M.R.S.A.), which lives harmlessly on the skin, but causes tremendous problems when it enters the body. Patients who do survive M.R.S.A. often spend months in the hospital and endure several operations to cut out infected tissue. In 1974, 2% of staph infections were from M.R.S.A. By 1995, that number had soared to 22%. Today, experts estimate that more than 60% of staph infections are M.R.S.A.

What can be done to lessen these problems? Perhaps we can do what hospitals in foreign countries such as Denmark, Finland and the Netherlands have done. Simple things such as the rigorous enforcement of rules on hand washing, the meticulous cleaning of equipment and hospital rooms, the use of gowns and disposable aprons to prevent doctors and nurses from spreading germs on clothing and the testing of incoming patients to identify and isolate those carrying the germ did the job there. Unfortunately, too few hospitals in the United States are using these precautions.

My wife Sara graduated from nursing school at Emory University and for a time taught nursing at Troy University. At Emory, Sara and all other nursing students were taught to thoroughly wash their hands before treating a patient or assisting in surgery or doing anything else that involved the use of their hands. Medical students received the same training. According to the Times article, more than half the time, doctors and other caregivers break the most fundamental rule of hygiene by failing to thoroughly clean their hands before treating a patient. We should demand that the folks who "run our hospitals" take the steps necessary to "clean up" their facilities. Some basic hygiene rules should be established and then implemented.

Source: *The New York Times*

Surgical Tools Get Hydraulic Wash

A shocking story out of North Carolina should make all of us wonder what in the world is going on in our hospitals. About 3,800 patients at two hospitals run by Duke University Health System were operated on last year with instruments that were washed in hydraulic fluid instead of detergent, hospital regulators said. Duke Health Raleigh and Durham Regional hospitals put patients in "immediate jeopardy" in November and December by not detecting the problem, despite complaints from medical staff about slick tools, according to a report by the Centers for Medicare & Medicaid Services. The hospitals failed to fix the problem for weeks, said the agency, which oversees patient care at hospitals that receive payments from federal insurance programs.

The mix-up apparently occurred when an elevator company drained hydraulic fluid into empty detergent barrels last summer. The detergent supplier later picked up the barrels and mistakenly redistributed them as washing fluid. Duke Health officials assured patients in January that the likelihood of infection from the tools was "no more than the risk normally associated" with the procedures that the patients underwent. However, dozens of patients who were exposed to the surgical instruments have reported lingering health concerns ranging from fatigue and joint pain to problems requiring hospitalization.

Source: *Associated Press*

Massive Drug Recall

Able Laboratories, a small New Jersey company, is at the center of one of the biggest drug recalls in history. Able, a growing maker of generic prescription drugs, recalled all of its products on May 23rd, saying deficiencies in its testing procedures might have resulted in "sub or super potent" drugs. It appears that millions of doses are now in the market. Able produces about 30 generic drugs, some well known, including generic versions of the painkiller Vicodin, Tylenol with codeine, blood-pressure drug Atenolol and nitroglycerin tablets for chest pain. Promethazine, an antihistamine, is its top seller, with more than 50% of the generic U.S. market. The recall's exact size won't be known for weeks or months. Able produced 1.3 billion tablets, capsules and suppositories last year. Drugs made earlier might be in the market, too, if they haven't expired.

The thing that makes this recall highly unusual is that all of the company's products were involved. The recall also points out how the FDA failed to do its job. Over the past three years, Able passed 11 separate FDA plant inspections. Not once did the FDA raise what it considered to be a serious concern about the company's manufacturing processes.

The FDA has advised consumers to keep taking the drugs until they get new medications from their doctors. A sudden stop could do more harm than taking a possibly compromised drug, they say. Since the recall, Able, which had sales of $103 million last year, has halted manufacturing. The company laid off more than half its 400 employees. Its CEO and co-founder, Jay Wadekar, has resigned. It is not known if the company will even resume production. In effect, this recall amounts to a shutdown of an entire company.

The full recall came three months after the FDA had inspected the South Plainfield, New Jersey, plant, where most of Able's production was done. The February inspection, designed to check the practices that Able later said were lacking, turned up nothing that would warrant an FDA warning letter. Able has a history of problems that was well known to the FDA. In 2004, Able was cited for failing to tell the FDA about 27 consumers who had adverse reactions after taking Able-made drugs. In 1991, the FDA charged Able with failing to comply with good manufacturing practices. As a result, the company operated under a consent decree for 10 years. Able has also had at least 12 product recalls since 1991. This is a very scary story and one whose final chapter won't be written for months.

Source*: USA Today*

XVIII. ENVIRONMENTAL CONCERNS

McWane And Three Executives Convicted In Pollution Case

A federal court in Birmingham jury convicted McWane Inc. and three of its executives last month on criminal charges involving the dumping of wastewater from McWane's Cast Iron Pipe Co. into Birmingham's Avondale Creek. The jury convicted McWane and two of the employees of conspiracy to violate the Clean Water Act by discharging plant wastewater into Avondale Creek. The company was found guilty of:

- Conspiring to violate the Clean Water Act;
- Filling a false report to the EPA; and
- Discharging pollutants into the creek.

The Clean Water Act violations carry a fine of $5,000 to $50,000 per day of violation and up to three years in prison. The three employees convicted were a former Vice-President and general manager of the cast iron pipe plant in Birmingham, the current Vice-President for environmental affairs, and a former plant manger in Birmingham. The punishment in this case needs to be as serious as the crimes.

Source: *The Birmingham News*

Eleven States Suing EPA Over New Mercury Rules

Eleven states have filed suit in Federal Court challenging a new EPA rule that allows power plants to avoid reducing their mercury emissions by buying credits from other plants. The lawsuit was filed by New Jersey Attorney General, Peter Harvey, on behalf of the States of New Jersey, Pennsylvania, California, Connecticut, Maine, Massachusetts, New Hampshire, New Mexico, New York, Vermont and Wisconsin. All eleven states participating in the case are attempting to overturn the Clean Air Mercury rule that was published on May 18th of this year in the Federal Register.

The states claim that the "Cap and Trade" program will create hot spots of mercury around plants that are allowed to purchase credits from other plants whose emissions are lower than regulations require, instead of installing emission control devices of their own. In March of this year, nine states filed a separate suit against the EPA challenging another mercury emissions rule that removed coal-fired power plants from the list of pollution sources subject to stringent controls under the Clean Air Act. The National Wildlife Federation, the Sierra Club and other environmental groups have also challenged this same rule. Both the environmental groups and the coalition of states argue that the EPA rule delays reductions in mercury emissions and violates the Clean Air Act. The petitioners want the EPA to regulate mercury under Section 112 of the Clean Air Act, which requires that "maximum achievable control technology" be used to control mercury emissions.

In 2000, the EPA informed the public that mercury was a hazardous pollutant that needed to be strictly regulated. Now it appears that the EPA is effectively reversing their earlier position. Under the proposed trading program, the EPA believes that mercury emissions will be reduced by 35% by 2010 and 50% by 2020. However, the 11 states challenging this program contend that if maximum achievable control technologies were implemented at these plants, mercury emissions at every coal-fired power plant would be reduced by 90% by the year 2008. The states are also criticizing the fact that the new EPA rules would extend the compliance deadline for these plants to the year 2018. In my opinion, the EPA's new mercury emission rules appear to have far more to do with pro-business politics than protecting the environment. For all of our sakes, I hope the eleven states that have taken a stand against these new rules are successful in their fight.

Source: *Environmental Litigation Reporter*

Mercury Problems Continue In McIntosh

Mercury continues to be a problem in the community of McIntosh, located in rural Washington County. News reports, primarily from the *Mobile Register*, indicate that mercury from McIntosh's Olin Corporation plant site is being released into streams and rivers flowing toward Mobile Bay. The concentrations of mercury reported in storm water by Olin Corporation have been thousands of times higher than levels in typical Alabama waters. Some are comparing the high numbers to some of the most mercury-contaminated sites in all of North America. Sampling, reported by the media, in one creek draining Olin storm water showed mercury concentrations in water samples more than forty times higher than the average concentrations recorded in 1999 and 2000 by University of Alabama researchers in a survey of all major rivers draining into Mobile Bay. Concentrations of methylmercury, often considered the most dangerous form of mercury, were more than 120 times higher at the Olin site. The *Mobile Register* has done an outstanding job of reporting on the mercury-related problems at the Olin site.

It is not clear how much mercury has flowed off of the Olin site since 1952 when the plant began producing chlorine using large quantities of mercury to help separate chlorine gas and caustic soda from salt brine. The mercury process was abandoned some time in the early 1980s. Currently, Olin makes chlorine and caustic soda with cleaner, better techniques. However, remains from the earlier process still stand on and around the plant site, which is on the Tombigbee River about thirty miles north of Mobile. Huge piles of the salty brine, which company documents note is laced with mercury, sit exposed to southwest Alabama's frequent and heavy rain storms. Undetermined quantities of brine have settled in ponds and wetlands near brine wells where the salt was mined. Previous reports by the *Mobile Register* have documented that salty brine contaminated with high levels of mercury has been spread over roads and driveways in the McIntosh community. The paper should be commended for staying on top of this story. Hopefully, ADEM will take a much stronger stand as a result. If not, the courts will have to again fill the breach that occurs when regulators don't do their job.

Source: *Mobile Register*

ADEM To Work On New Mercury Standard

The Olin situation mentioned above—combined with other mercury-related problems in other areas—may have gotten ADEM's attention. The agency agreed on June 17th to begin work on a new mercury standard to bring the state into line with 4-year-old recommendations from the U.S. Environmental Protection Agency. If adopted, the new standard could put many more lakes and streams on the unsafe list. The proposed change was made at a meeting of the Environmental Management Commission.

EPA classifies mercury as a highly

toxic substance with a number of adverse health effects, particularly neurological effects. Children are especially susceptible, and mercury is easily passed through the placenta to the fetus and fetal brain. The primary exposure for most people is through eating fish, although mercury also is present in some vaccines and the soil and water of polluted areas. Mercury is believed to be primarily a problem in south Alabama, Anniston and other areas with heavy industry such as chlorine manufacturing. However, it also is emitted by coal-fired power plants. Among other things, the 2001 EPA recommendations call for testing fish, which accumulate mercury. ADEM uses fish testing to determine the presence of some pollutants, such as dioxin, when the chemical does not easily show up in water tests.

Source: The Birmingham News

Grace Sued By New Jersey Over Plant Site

The State of New Jersey has filed suit against W.R. Grace & Co. and two of its former executives, alleging that the chemical maker lied about asbestos contamination at an industrial plant that processed vermiculite ore for about 47 years. In addition to seeking millions of dollars in civil damages, New Jersey officials likely will explore other legal options, including criminal charges against the company and the former executives for alleged false claims to state environmental officials. The moves could further complicate Grace's bankruptcy reorganization and cloud the prospect that proposed federal legislation to resolve millions of asbestos claims could rid the company of many of its financial liabilities. It also adds to the legal problems faced by the company and several current and former executives who are under federal indictment on charges of knowingly exposing residents of Libby, Montana, to levels of asbestos that sickened at least 1,200 of them. New Jersey Attorney General Peter C. Harvey reported: "This is part of a comprehensive investigation that's looking into potential criminal liability of the company and certain executives for willful concealment of the environmental hazard at the Hamilton [Township] facility, which has now placed in jeopardy the health of the community."

The lawsuit says Grace officials falsely told the New Jersey Department of Environmental Protection in 1995 that contamination at its Hamilton Township plant had been cleaned up, leaving trace amounts of asbestos in soil in and around the site. State and federal environmental protection officials found later that at least 15,000 tons of contaminated soil remained at the site when Grace closed the plant in the early 1990s, the suit contends. The plant processed several hundred thousand tons of vermiculite ore shipped primarily from Grace's mine in Libby beginning in 1948. The ore was used to make fire-retardant insulation, material used in lightweight concrete and fertilizer. The production process produced waste that contained a dangerous form of asbestos, which causes lung cancer and other lung diseases when inhaled. Top Grace officials, including the former environmental coordinator, made the environmental declarations. Based on their claims that the site was clean, the state required no further environmental testing at the plant.

The lawsuit seeks damages under two statutes that could push fines as high as $300,000 for each day that the company failed to correct the false statements, a period of about 10 years. New Jersey officials have asked the Environmental Protection Agency and other federal authorities investigating Grace to share information. The contamination at Hamilton wasn't discovered until 1999, when the EPA began examining 200 sites that had processed vermiculite. Among those scrutinized was a Beltsville plant that processed product from Libby until the early 1990s. Federal investigators determined in 2003 that the former Maryland plant was largely free of asbestos and didn't pose any danger. A large fine and potential criminal charges could delay Grace's bankruptcy reorganization, depending on how large the fines are and how they are characterized by the court.

Grace is among dozens of former asbestos companies operating in bankruptcy that stand to benefit from proposed federal legislation. In its current form, the bill would create a $140 billion trust fund to pay thousands of claims filed by people who say they were harmed by exposure to asbestos products. The bill is scheduled for debate in the full Senate in coming weeks but faces a great deal of opposition. If it passes, the legislation could remove a major obstacle to Grace's financial recovery by sharply reducing its asbestos liability. Bankruptcy experts point out that Grace still would face potentially huge fines and penalties related to the cases in New Jersey and Montana, as well as any other potential criminal or civil actions related to other sites under investigation.

Source: *The Baltimore Sun*

XIX. TOBACCO LITIGATION UPDATE

A Shocking Conclusion In The Federal Government's Tobacco Case

I wondered how long the Bush White House would wait before "gutting" the government's tobacco lawsuit. Well, the wait is over! Federal prosecutors, in the lawsuit against the tobacco industry, have asked the court for only a fraction of the $130 billion that the government initially said cigarette makers would have to spend on smoking cessation programs. The shocking new stance by the Justice Department, announced as lawyers were summarizing arguments in the racketeering trial, caught most everybody by surprise. Federal prosecutors are now willing to accept a penalty of only about $10 billion for a five-year program to help people kick the habit. This is a far cry from the $130 billion, for a 25-year smoking cessation program, that was initially proposed in court by a medical professor from the University of Wisconsin and backed by other government witness. While many, including the Judge, will see this "strange" move a sign of total **weakness**, I see it as being much worse. It is a total **sell-out** to the powerful tobacco industry. The word obviously came from somebody very high up in the Bush White House.

At the heart of the suit is the government's allegation that cigarette companies conspired for decades to deceive the public about the dangers of smoking. The defendants in the lawsuit are Philip Morris USA Inc. and its parent, Altria Group Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co.; British American Tobacco Ltd.; Lorillard Tobacco Co.; Liggett Group Inc.; Counsel for Tobacco Research-U.S.A.; and the Tobacco Institute. The trial had been going on for over 9 months at a tremendous cost when the government decided to surrender its case.

In another shocking development it has now been alleged that a top Justice Department official threatened to remove a government specialist from its witness list if he didn't water down his recommended penalties for the tobacco industry. Max Bazerman, a business professor at Harvard University, claims a career trial attorney told him senior Justice officials wanted him to change his recommendation that the court appoint a monitor to review whether it was appropriate to remove senior tobacco company officials. Bazerman says the attorney told him the change—opposed by the career lawyers on the case—had come from Justice Department attorney Frank Marine and Associate Attorney General Robert D. McCallum Jr.

The following is a little of what The Washington Post had to say in a recent editorial about these weird developments in the government's tobacco case:

> *Since taking office, the Bush Administration has spent more than $100 million suing the tobacco industry. This week it scuttled its own case just as it was approaching judgment. The episode looks like politically inspired malfeasance, and it should be investigated. Last month the government put on expert testimony that a comprehensive national smoking-cessation program would cost $130 billion over 25 years. This week, during closing arguments as the eight-month trial wound to an end, the Justice Department suddenly backed off this request—asking instead for only a $10 billion, five-year program that could be extended. The government thereby reduced by 92% the value of a key remedy for the industry's misconduct that the government's own evidence suggested was necessary.*

Judge Gladys Kessler, who had presided over the trial, ordered the parties to discuss a settlement of what is left of the government's case. If the case doesn't settle, Judge Kessler will enter a ruling. With all of their political allies working for them, the tobacco company defendants have no reason to pay much to settle this case. Some say the judge's ruling will likely come in the fall.

Sources: *Associated Press* and *The Washington Post*

XX. THE CONSUMER CORNER

40 Million Credit Card Holders May Be At Risk

Tighter security of electronic information held by companies that process credit card transactions is badly needed and that may be a gross understatement. The news of another breach of computerized personal data is becoming a nightly news event. MasterCard International reported on June 17th that 40 million card holders of all brands could be exposed to fraud. The breach involves 13.9 million MasterCard accounts, 22 million for Visa USA and an unspecified number for American Express and Discover. This is the latest in a string of mishaps and outright thefts this year involving credit cards, bank records and employee information that have affected as many as 50 million consumers. The Federal Trade Commission must be given the power to set national standards for companies handling sensitive consumer data. There are attempts in Congress to get this done. My question is why has it taken so long to recognize the magnitude of the problem.

Security experts say that Cybercrooks can sell stolen IDs in bulk on underground websites, purchase goods and secure cash advances. The banks that issue cards have tremendous liability exposure in these electronic info systems thefts. The latest batch of compromised cards could bring more than $250 million, according to Evan Hendricks, editor of Privacy Times. Privacy and credit experts suggest checking credit card statements and credit reports regularly. Checking online can catch problems early. The latest disclosure will further erode consumer trust in electronic financial transactions. Any new legislation must protect consumers and require the companies to take all necessary steps to accomplish that goal. Congress must act promptly on the pending legislation.

Source: USA Today

Alabamians Can Get Free Credit Reports

Starting June 1st, Alabamians were able to check their credit reports for free to make sure they are accurate and not dragging down their credit rating. A law enacted by Congress in 2004 to give consumers free access to their credit reports is being phased in from the West Coast to the East Coast. June 1st the implementation date for Alabama and the 10 other Southern states. Barbara Evans, executive director of the consumer education group Alabama Watch observed:

> *With the huge increase in identity theft, people need to keep a regular check on their credit reports. Sometimes it's years before people know someone has opened an account in their name.*

A credit report contains information on where a person lives, how the person pays bills, and whether the person has been bankrupt, arrested or sued. Consumer reporting companies sell the information to businesses where consumers seek credit, such as car dealers and furniture stores, as well as to insurance companies and employers. The Fair and Accurate Credit Transactions Act allows consumers to get a copy of their credit report for free once a year from the three big national credit reporting firms: Equifax, Experian, and TransUnion. The Federal Trade Commission says the reports can be requested all at once or can be staggered. There are three ways to get them:

- Click on the website hppt://www.annualcreditreport.com and fill out a request.
- Call 877-322-8228.
- Print out the annual credit report request form and mail it to Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348-5281.

Before the 2004 law, consumers could get their credit reports free only if they were denied credit, unemployed, welfare recipients, or victims of identity theft. Otherwise, they had to pay. U.S. Senator Richard Shelby, chairman of the Senate Banking Committee, helped write this important legislation and worked for 18 months to get it passed. The FTC recommends that if an error is found in a report, consumers should write the consumer reporting company to explain the situation. It makes sense for consumers to seek credit reports before making any large purchase, such as a house. Consumers should get all three reports because the companies use different methodology and different databases to compile their reports.

Source: *Associated Press*

Hot Cars Pose A Deadly Danger

At least 35 young children died of heat stroke last year after being left in a hot car. A tragic incident involving two young children in North Alabama where one of them died recently after being left in a locked SUV, sort of brings this problem home to us. While it may be hard to imagine, many deaths have occurred when over-stressed or busy parents forgot that their children were even in the back seat. *Consumer Reports* auto engineer Jennifer Stockburger, who says that tragedies like this occur more often than most folks think, observed:

> *You hear of these incidents happening and wonder how could somebody possibly leave their child in the car, but the truth is it can happen to just about anybody, particularly when they vary their normal routine. We've heard of a pastor, a veterinarian, a NASA researcher, a dentist, all leaving their children in the car on a hot day.*

Consumer Reports warns that cars heat up quickly. Even if it is only 70 degrees outside, a car can quickly heat to more than 120 degrees. Ms. Stockburger says that researchers are working on devices such as weight sensors or heartbeat monitors to detect the presence of a child in the back seat, but nothing currently exists to warn drivers that a child has been left behind. *Consumer Reports* suggests putting something like a toy on the front seat as a reminder that there is a baby in the car. Adults can also leave their purse or briefcase in the back seat next to your child. Simple things like this can save young lives. It's important to realize that cars can be dangerously hot even on a cloudy day or with a window open. So *Consumer Reports* says that it is never safe to leave a child—or a pet, for that matter—in a car, even if you expect to be right back.

Children's Tylenol Recalled Because Of Label Confusion

Johnson & Johnson is recalling several varieties of its Tylenol painkiller for children due to confusing packaging information that could lead to young patients being given overly high doses of the over-the-counter medicine. The Johnson & Johnson recall includes all lots and flavors of the following:

- Children's Tylenol Meltaways (80 milligram dose) that come in bottles and blister packs;
- Children's Tylenol SoftChews that come in 80 milligram blister packs; and
- Jr. Tylenol Meltaways that come in 160 milligram blister packs.

Blister packages allow patients to push a pill through thin packaging material and are designed to be convenient for parents who need dosing flexibility depending on the age or weight of the child, according to the company. The package design includes blister cavities that contain one tablet while other cavities contain two tablets. As a result parents may mistakenly believe that the two tablets contain the recommended 80-milligram dose of the active ingredient acetominophen, when two tablets would actually provide 160 milligrams.

Taking large amounts of Tylenol can cause liver damage. Johnson & Johnson's McNeil Consumer & Specialty Pharmaceuticals division has been working with the Food and Drug Administration on the voluntary recall since March, according to a McNeil Consumer spokeswoman. The Meltaways tablets have been available since last fall. Parents or caregivers with concerns about the tablets can call 1-877-895-3665 (English) or 1-888-466-8746 (Spanish) or visit the Tylenol website at www.tylenol.com.

EPA Sued Over Pesticides' Effects On Children

The government has failed to protect the children of farmworkers from the harmful effects of pesticides, according to a lawsuit filed last month by farmworkers, environmentalists and public health advocates. The suit alleges that the Environmental Protection Agency has ignored scientific evidence that children who grow up near farms face increased health risks from exposure to hazardous pesticides from air, soil, water, food and clothing. In the United States, more than 1 million children of farmworkers live near farms, including more than 300,000 children younger than 6 years old who are especially vulnerable to pesticide exposure, the suit says. Plaintiffs included the Pesticide Action Network, United Farm Workers of America and Natural Resources Defense Council.

The plaintiffs filed suit because the EPA allegedly failed to respond to their 1998 petition to recognize the special needs of farmworkers' children when setting pesticide tolerance levels, as required by the 1996 federal Food Quality Protection Act. Michael Wall, an attorney for the Natural Resources Defense Council says: "The EPA has turned a blind eye to this problem, which has left another generation of our children at risk." In a statement, the EPA said it believed its "decisions are protective of children's health and fully meet the toughest scientific and legal standards under the Food Quality Protection Act."

Source: *Associated Press*

Consumers Pay Large Overdraft Fees

Consumers paid $10.3 billion in overdraft fees to U.S. banks in 2004, according to a report released recently by the Center for Responsible Lending. The report found that "many people are finding themselves with overdraft loans that they never asked for, do not want, and can not afford" and that "federal regulators have failed to protect these customers." The report indicates that the banks institute a system of offering customers formal overdraft protection. As a result, banks levy hefty fees ranging from $20 to 35 a pop for customers who overdraft their accounts, according to the report. The group reported further that "the program's are designed to increase the number of overdrafts and increase institution's fee income."

Banks are extending credit by paying customers checks, debit card transactions or ATM withdrawals when customers have insufficient funds in their accounts. The banks then pay the amount of the overdraft often without the consent of the customer and charges the customer a large fee, according to the report. When the customers next deposit is made through his or her account, the institution debits the amount of the overdraft and adds a fee. As a result of the high fees and short repayment time, borrowers often pay triple—and even quadruple—digit interest rates. For example, a $22.50 fee for an $80 overdraft loan can translate into a 1,467% annual percentage rate for a loan paid back in a week. The report charges that the Federal Reserve has permitted banking institutions making overdraft loans to evade the Truth and Lending Act. A second report, released by the Consumer Federal of America, found that over 80% of the nations largest banks charge consumers high overdraft fees without their permission.

XXI. RECALLS UPDATE

Kia Recalls Sedona Minivans

Kia Motors America Inc. is recalling more than 37,000 minivans because of potential damage to a rear wheel bearing that could cause a crash. Kia says a defect may exist on 37,358 Kia Sedona minivans from the 2003-2005 model years equipped with alloy wheels. Moisture cay accumulate around the small steel cap that seals the rear hub and bearing assembly on alloy wheels, leading to damage to the wheel bearing. The damage can occur without warning and cause a crash. The company says it is unaware of any accidents caused by the defect. However, there have been four warranty claims due to the problem, according to Kia.

The majority of the vehicles, more than 26,000, were from the 2004 model year. Owners, who should have been notified in June, can take their vehicle to a Kia dealer to have the rear hub caps inspected and replaced, if necessary, at no charge. Kia Motors Corp., South Korea's second-largest automaker, is the parent company of the Irvine, California-based Kia Motors America. Kia sold 61,149 Sedonas in the United States in 2004, a 20% increase from the more than 50,000 minivans sold in 2003, according to Autodata Corp. Through April 2005, Kia had sold 17,091 Sedonas.

Ford Recalls Over 350,000 Vehicles

Ford Motor Co. has recalled about 260,000 vehicles, most of them large pickup trucks, to fix safety defects that include sudden stalling of diesel engines. The National Highway Traffic Safety Administration said the stalling problem affects F-Series Super Duty pickups from the 2004-2005 model years as well as the 2004-2005 Ford Excursion full-size sport utility vehicle and E350 and E450 vans. About 180,100 of these vehicles are equipped with 6.0 liter diesel engines and the recall stems from a potentially faulty fuel injection control module, NHTSA said.

Beyond the 260,000 vehicles that NHTSA revealed, Ford said an additional 18,000 vehicles are also being recalled in Canada and Mexico. Ford is also investigating 2003 model-year F-Series Super Duty pickup trucks equipped with the 6.0 liter diesel engines due to various engine performance issues.

Separately, Ford is recalling 78,675 Super Duty pickups and chassis cab vehicles from the 2005 model year because their fuel line may separate from the main fuel bundle. Fuel line separation can cause engine stalling or leakage, possibly resulting in a fire. NHTSA says the trucks affected by the recall are the F-250, F-350, F-450 and F-550 Super Duty pickups, equipped with 5.4 or 6.8 liter gasoline engines.

Nissan Announces Sedan Recall

Nissan has recalled 49,000 2005 Sentra sedans because of concerns over possible fuel leakage. Nissan has told NHTSA that some of the Sentras may have faulty fuel tank vapor hoses that could cause excess fuel to spill onto the ground—potentially starting a fire. The automaker says 43-thousand of the vehicles were sold in the U-S and the remainder in Canada, Guam, and Puerto Rico. Nissan will begin notifying customers about the recall in August. Dealers will inspect the fuel tank and, if necessary, replace it at no charge.

Go-Karts Recalled Because Of Rollover Danger

Carter Brothers Inc., an Alabama company, is recalling about 9,000 Fun-Kart go-karts. The company, located near Brundidge in Pike County, said the wheel could fall off of the go-kart, posing a rollover hazard. No injuries have been reported. The recall includes one-seater models 1136-3020, 1136-3021, 1136-3420, 1136-3421, 1205-3020 and two-seater models 2336-3021, 2336-3022, 2336-5019, 2575-3020, 2575-3420, 2605-3416, 2605-3515, 2606-3016, 2606-3017, 2606-3416, 2606-3417, 2636-3016, 2636-3017, 2906-3015, 2906-3016, 2906-3017, 2906-4015, 2906-4016, 2906-4017, 2909-3015, 2909-3415, 2909-4015, 2910-3015, 2910-3016, 2910-3415, 2910-4015, 2910-4016, 2910-4415, 2911-4015, 2911-4016, 2946-3015, and 2946-3016. The model number and serial number are located under the seat (on the driver's side if two-seater). The Fun-Karts were produced in several colors to include red, black, blue, purple and green. The go-karts were sold at Carter Brothers dealers nationwide from April 2003 through March 2005 for between $900 and $2,900. Consumers should stop using the recalled Fun-Karts immediately. Registered owners of the vehicles will be notified directly by Carter Brothers about the recall. Consumers can call or visit their local Carter Brothers Dealer to schedule a free repair. Consumers can also call Carter Brothers at (800) 523-5278 or visit the company's website at www.carterbro.com for more recall information.

XXII. FIRM ACTIVITIES

Employee Spotlights

Clint Carter

Clint Carter, one of the lawyers in our Consumer Fraud Division, represents individuals and business plaintiffs throughout the country. Clint is currently involved in complex business litigation cases involving pharmaceutical pricing, as well as the representation of state Medicaid agencies involving average wholesale price (AWP) litigation. He is also involved in the representation of state entities and their health and insurance plans in litigation against the pharmacy benefits management (PBM) industry. Clint has additional areas of practice in insurance fraud, consumer rights and bad faith litigation. He has been involved in several significant settlements on behalf of individual policyholders and also businesses in cases against the insurance industry. Clint has spoken at legal seminars on a wide range of topics including the trial of insurance fraud cases. He is married to the former Elizabeth K. Brannen of Frostproof, Florida, and they have two children Brannen Kay, 3 years, and Smith Pierson, one month. Elizabeth is a lawyer with Hill, Hill, Carter, Franco, Cole & Black of Montgomery. The Carter family attends church at St. John's Episcopal Church in Montgomery.

Ashley Pugh

Ashley Pugh has been with the firm for almost six years. She previously worked in our Accounting office for four years before moving to become Administrative Assistant for our Managing Shareholder, Tom Methvin, two years ago. Ashley assists Tom and his legal secretary Anna Pender Pierce with the firm's daily operations. Ashley has also been very active with the Cystic Fibrosis Foundation. This year she organized a charity ride for Cystic Fibrosis and also organized our firm's team for the annual Cystic Fibrosis Walk. Ashley is married to Patrick Pugh and they have one son, 15 month-old JP. She is a most valuable employee and does very good work.

Angela Talley

Angela Talley, who started with the firm three years ago as a receptionist, serves as a clerical assistant in our Products Liability Section. She also serves as well as Law Librarian, which includes keeping the library up to date. Angela assists all the legal assistants and legal secretaries in her section with various responsibilities. Angela has three children, Tony, Katie and Neal. She enjoys taking her children to the YMCA to swim and spending as much time with them as possible. Angela does a real good job for the firm and we are glad to have her with us.

Shanna Malone

Shanna Malone serves as the Public Relations Coordinator for the firm. She is responsible for developing and overseeing media relations, coordinating and implementing the firm's charity functions, community outreach and service programs and handling the firm brochures. Shanna deals with media outlets all over the country as a result of our national litigation presence. She also serves as the editor for the Jere Beasley Report and helps in putting this report together each month. The report currently goes to over 30,000 persons and hopefully helps to keep our readers informed on subjects of interest.

Shanna graduated from Troy State University with a Bachelor of Science in Print Journalism and Public Relations in August of 1999. She is a member of the Troy State Alumni Association, the Troy State Journalism Alumni Association, and is a member of the Montgomery Chapter of the Public Relations Council of Alabama. Shanna, who is a native of Crenshaw County, is married to Shannon Malone and they have two daughters, 3 year-old Sydney and 15 month-old Shelby. Shanna is an excellent employee and has an important role in the firm.

Shareholder Runs For National Office

Gibson Vance, who is one of our shareholders, is running for Parliamentarian at the American Trial Lawyers Association convention in Toronto, Canada, on the 27th of this month. Gibson has been a great asset to our firm since he started with the firm several years ago. Prior to coming with us, Gibson worked in a 2-person law firm for eight years. Accordingly, he knows what it's like to work in a small firm and knows the special commitment it takes. Gibson also understands how important the small firms across the country are to ATLA.

Gibson has been very involved in ATLA for quite some time. He served as a State Delegate, as the Public Affairs Committee, Leaders Forum Committee, ATLA PAC, Eagle Member, President's Club Member—and the list goes on. Gibson has been a successful advocate for ATLA in Washington, DC and has proved to be a tenacious fundraiser for ATLA. He has also been involved in the trenches in Alabama and Mississippi helping to fight tort reform for years. Gibson believes that we need to focus ATLA's attention on public relations and letting people know that we are on the right side of the tort reform fight. The annual convention of ATLA will be held in Toronto. The vote in Gibson's race is scheduled for 8:00 a.m. on July 27th. For our lawyer readers, who are members of ATLA, I hope you will vote for Gibson if you attend the convention. If elected, Gibson will do an outstanding job.

PraiseFest

Once again this year, our firm proudly sponsored PraiseFest, which was held during the Jubilee CityFest Memorial Day weekend. PraiseFest exceeded our expectations. Four years ago we agreed to sponsor PraiseFest to ensure that God was glorified. This year, PraiseFest was an amazing testimony to the holiness of God. Steven Curtis Chapman, who has been at the forefront of contemporary Christian music for many years, was the headline act. Many consider him the number one contemporary Christian artist today. In spite of his notoriety, Chapman is humbled by how God has used his ministry. He states, "the only decent art I've ever created has been out of the overflow of my heart." During his concert, Steven Curtis Chapman displayed a heart completely committed to God.

Prior to Chapman's concert, Trevor Morgan, a tremendous songwriter in his own right, wowed the crowd with the depth of his music. Ginny Owens, another well-known contemporary Christian artist, remarked that Trevor is "a true man of God and a born leader, whether he is serving people in his church family, helping take care of others on the road or standing in front of an audience sharing his heart, his God-given ability to be strong and steadfast in his faith is always evident." Other musical artists during PraiseFest were Sarah Kelly, who was picked as one of the best new artists of 2004 by ChristianityToday.com and Starfield, a band from Canada which has been nominated for two Dove awards. This is the most impressive line up of artists that PraiseFest has had to date. We were blessed to be a part of the work God did through the music of these artists'.

Jimmy Hitchcock Memorial Award

This year, Cole Portis, who heads up our Products Liability Section, served as President of the Jimmy Hitchcock Memorial Award. This award, presented to Montgomery high school seniors, honors outstanding Christian leadership in athletics, academics, church and other activities. The award is one of the highest honors that any young person can ever receive. The theme for this year's award program was to "Put on Christ." As the City of Montgomery celebrated the work of Christ in these young people, everyone was encouraged to examine their own lives to determine whether they were putting on Christ. We were reminded not to be amazed at the examples set by these young people, but to be encouraged by their desire to impact the world for the glory of God. Coach Chan Gailey of Georgia Tech, who was the main speaker, expanded on this theme of putting on Christ. He shared his personal testimony of how Christ has done a miraculous work in his life. Coach Gailey is a fine coach, but an even more outstanding man because his priorities are in the right order. It is good to see college coaches who have the courage to discuss his faith openly and with conviction.

Also, we want to congratulate Rory McKean, the male winner, and Lauren Vercelli, the female winner. Rory's grandfather, Mahlon Paulk, is an outstanding man and a good friend of mine. Obviously, Mahlon instilled strong Christian values in his children and grandchildren. Lauren Vercelli is the child of Chip Vercelli, a local attorney in Montgomery. Chip is a fine lawyer and obviously a very good father. These young people were chosen from a truly outstanding group this year. All of the nominees were very special and we are proud of each of them.

XXIII. SOME PERSONAL OBSERVATIONS

The Fight For Justice

Lawyers who represent victims of corporate wrongdoing had best fasten their seat belts because we are going to experience an assault on the civil justice system nationally and in every state like we have never seen before. Those who want to destroy the jury system and give immunity from lawsuits to corporate wrongdoers will spend whatever money it takes and do virtually anything in order to accomplish their goals. I am convinced that total destruction of the jury system is the ultimate goal of Corporate America. It would be replaced by a system of arbitration and non-jury trials.

Personally, I will never apologize for representing victims of corporate wrongdoing. Neither will I apologize for representing small business owners whose companies become victims and are wronged in their dealings with the giants of Corporate America. The tort reformers could care less about the victims of corporate wrongdoing and their unfortunate plight. All they are concerned with is protecting their profits and getting virtual immunity from the courts. I don't believe that's what people in Alabama—or America for that matter—want. Consumers and the owners of small businesses can't afford to allow the civil justice system to be destroyed.

The only way to defeat the unholy tort reform alliance is for consumers, small business owners and consumer advocacy groups to unite like never before and fight back on a daily basis. Those of us who represent individuals and small businesses when they experience wrongdoing have an obligation to stand with them in their battle. We have "truth" and "right" on our side and under normal circumstances that would be enough. However, these aren't normal times and none of us can afford to sit on the sideline in this epic battle and expect to defeat a well-financed and highly organized enemy. The overwhelming majority of American citizens depend on us to be actively involved with other consumer advocacy groups and champion their cause. This battle won't be any place for the timid, fearful, or weak of heart—it will take the strength of numbers and a dedicated effort in order to win. But, I am convinced that ultimately right will prevail and the American people will come out of all of this as the winners.

XXIV. SOME PARTING WORDS

John Gibbons, who does a tremendous job with the Fellowship of Christian Athletes in Alabama, spoke at the annual prayer breakfast at the ATLA seminar last month. The event was well-attended and everybody who heard John received a real blessing. John used a familiar passage from one of the Gospels to convey the message that we all have an obligation to help others and that it takes team work and tremendous faith in order to get the job done.

> *And again He entered Capernaum after some days, and it was heard that He was in the house. Immediately many gathered together, so that there was no longer room to receive them, not even near the door. And He preached the word to them. Then they came to Him, bringing a paralytic who was carried by four men. And when they could not come near Him because of the crowd, they uncovered the roof where He was. So when they had broken through, they let down the bed on which the*

paralytic was lying. When Jesus saw their faith, He said to the paralytic, "Son, your sins are forgiven you." And some of the scribes were sitting there and reasoning in their hearts, "Why does this Man speak blasphemies like this? Who can forgive sins but God alone?" But immediately, when Jesus perceived in His spirit that they reasoned thus within themselves, He said to them, "Why do you reason about these things in your hearts? Which is easier, to say to the paralytic, 'Your sins are forgiven you,' or to say, 'Arise, take up your bed and walk'? But that you may know that the Son of Man has power on earth to forgive sins"—He said to the paralytic, I say to you, arise, take up your bed, and go to your house." Immediately he arose, took up the bed, and went out in the presence of them all, so that all were amazed and glorified God, saying, "We never saw anything like this!"

Mark 2: 1-12

The four men described above had great faith in Jesus' healing power and they displayed that faith by helping a friend—who without their faith and dedication to the task—would never have been healed. The FCA does a great job of spreading the gospel message to thousands of young men and women in schools all over the country. Many of these young students would never hear that message but for the efforts of the FCA. The men and women who work for the FCA display the kind of faith and determination that we see exhibited in the Gospel of Mark. The results from FCA's hard work have been overwhelming. The simple fact that accepting Jesus Christ as a personal savior will give a young person hope and the promise of a new life is great news. I know the FCA in Alabama is in good hands with John Gibbons in charge and that's great news for our young people. John is very much like one of the four friends described in Mark. I wonder how many of us—who profess to be Christians—have that type faith and dedication. We have the opportunity each day to find out!

To view this publication on-line, add or change an address, or contact us about this publication, please visit our Website: www.BeasleyAllen.com

218 COMMERCE STREET (36104)
POST OFFICE BOX 4160
MONTGOMERY, ALABAMA 36103-4160
(334) 269-2343
TOLL FREE
(800) 898-2034
TELECOPIER
(334) 954-7555
WEB PAGE
www.BeasleyAllen.com

RETURN SERVICE REQUESTED

PRESORTED
STANDARD
U.S. POSTAGE
PAID
MONTGOMERY, AL
PERMIT NO. 275

Arbitration

www.BeasleyAllen.com

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.