THE
JERE BEASLEY REPORT

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

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I. CAPITOL OBSERVATIONS

Consumer Outlook For The New Year

Alabama consumers are approaching the New Year with guarded optimism. Many Capitol observers believe the new Governor may be better for working men and women, retirees, and low-to-middle income citizens than the last several chief executives have been. Without a doubt, Bob Riley could do no worse than his predecessor when it comes to consumer issues. I sincerely believe that the new Governor is a good man, has the right kind of values, and is a person who recognizes that Alabama has a poor record in numerous areas of concern for consumers. I hope and pray that he will now take the steps necessary to take Alabama consumers out of the dark ages. It would be good to call consumers in our state "first-class citizens" for a change.

A Consumer Wish List For 2003

With most Alabama citizens having compiled a list of New Year's resolutions, I thought it would be appropriate to put together a wish list for Alabama consumers. The following should be high on the Riley Administration's priority list for 2003. All of these items can be accomplished at the state level.

- Appointment of a consumer advocate to serve as Insurance Commissioner would be a first step toward improving the plight of Alabama citizens who have to deal with insurance companies.
- An upgrading of the Alabama Insurance Department – giving the regulatory agency the tools necessary to do its job – must take place.
- Mandatory, binding arbitration agreements must be prohibited in insurance policies sold in Alabama.
- Legislation that will make it difficult to impose mandatory, binding arbitration in other consumer transactions should be enacted.
- Constitutional reform must occur as soon as possible.
- Tax reform is an absolute necessity and should be a top priority.
- Legislation must be passed to protect Alabama citizens from the evils of predatory lending, especially in the area of payday loans and title loans.
- The courts in Alabama must be kept open for citizens and businesses.
- Alabama nursing homes must be made safe and secure for persons who have to use them.

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- Mandatory, binding arbitration must be prohibited in nursing home admission forms to the extent possible.
- Passage of a criminal fraud act by the Legislature is long overdue and should become a reality.
- The environment in Alabama must be protected and preserved. The first step should be the reforming of ADEM and then giving the agency adequate funding and personnel.
- Campaign finance reform on the state level must be enacted.
- Additional State Troopers must be provided and put on Alabama highways.
- The Department of Forensic Sciences must be adequately funded so that law enforcement personnel and the courts can do their jobs.
- Giving Alabama a world-class system of public education would solve many of the state's economic problems.

On the federal level, the following items are essential for the good of all American citizens, including Alabamians:

- Proper regulation of the automobile industry must become a reality.
- Proper regulation and control of the powerful pharmaceutical industry is long overdue and should be a top priority.
- Closing loopholes in the federal campaign finance reform act passed by Congress should occur.
- Passing the rest of the campaign finance reform legislation package must follow to make reform complete.
- The President and Congress must take additional steps to clean up Wall Street and to make the laws —both civil and criminal— tougher on white collar criminals.
- Our nation's healthcare system must be improved. This will require control of the powerful HMOs and the insurance industry. A prescription drug benefit must be added to the Medicare program.
- The economic downturn that has largely been caused by the corporate scandals must be reversed.
- Defeat of the Bush tax cut plan that will help only the richest citizens and do nothing for average citizens is a must.

Common Sense Approach Leads To Cooperation

Governor-elect Riley has agreed to make sure the memory and accomplishments of Dr. Martin Luther King are appropriately honored during his inauguration ceremony on January 20th. A program honoring Dr. King will be held earlier that morning at Dexter Avenue King Memorial Baptist Church, where the civil rights leader was pastor during the Montgomery Bus Boycott in the 1950s. My good friend, Mrs. Johnnie Carr, a noted civil rights icon, will be allowed to make remarks during the swearing-in ceremonies. In my opinion, this is quite appropriate. Mrs. Carr is a most outstanding individual and is well respected throughout the state. She is especially loved and respected in her hometown. To include Mrs. Carr on the program speaks well for Bob Riley.

Best States For Running A Small Business

Several recent reports have given Alabama good marks on being a good place to do business. Companies looking for a place to locate a new business are finding Alabama to be most attractive, according to several recent reports. Philipp Harper, a noted business writer, did research concerning these reports and does a most interesting analysis. Some of the factors that were reviewed in the study leading to the reports include:

- Taxes of all kinds
- Electricity costs
- Workers' compensation costs
- Total crime rate
- Right to work
- Number of bureaucrats
- State minimum wage

While I agree some of these are things to be proud of, and may be appealing to business, I don't believe a low minimum wage scale is one of them. Taking everything into consideration, however, Alabama ranked 4th among all the states. Also included in the top 10 were the following southern states: Florida, Texas, Virginia, Tennessee, South Carolina, and Georgia. I am not sure how scientific or accurate these rankings are. Nevertheless, it is interesting to see that Alabama does extremely well. I wonder if the U.S. Chamber of Commerce had access to these studies prior to putting out the misleading television ads last year.

Reforms Aim At Money Side

There have been numerous articles and editorials written concerning the high cost of elections. It obviously takes money to run political campaigns. No one can deny that "money" is an inescapable part of the process. It is the amount of money given and spent, however, that is causing the problems. There are ways to make things better on the "financial side" of politics and those avenues must be looked at. Certainly, the giving and receiving of political donations must be made more open to public scrutiny, and that is a good place to start.

The new Secretary of State, Nancy Worley, and Governor-elect Bob Riley, by working together, can help make our system work much better. There are some needed reforms that have great potential for improving the election process. The most obvious is putting a ban on transfers of money among political action committees. PAC-to-PAC transfers are little more than "legal" money-laundering. We have all seen what some have described as "a giant shell game of moving funds around to hide from voters the identity of the original giver." Outgoing Secretary of State Jim Bennett believes that voters should have a clear paper trail from contributor to recipient at critical times during a campaign. When this happens, voters can then weigh that information in making their decisions.

Secretary Bennett has recommended that reports of contributions be timely filed. Notice of any contribution of $500 or more made during the final five days of a campaign should be filed in the Secretary of State's office. If that happened, contributions would be available for public inspection. Under current law, the last required pre-election campaign finance report comes too far removed from election day. Large donations that come in late – but legally – may go unreported until after the election. At that stage, the information is useless to the voters.

Penalties for failing to comply with the Fair Campaign Practices Act must be made much tougher. Secretary Bennett says we should disqualify candidates who fail to file the required disclosure forms prior to the election. These are presently required 45 days before and 5 to 10 days before the election. There's no real penalty now for missing these deadlines. The threat of disqualification would clearly be a powerful tool for encouraging compliance. This seems to be both logical and needed.

The so-called "soft money" advertising from any organization other than a candidate's campaign committee should be prohibited. Currently, special interest groups can come up with a committee with a nebulous name and run effective political advertising without telling the voters who is really paying for it. This is a powerful tool that has been widely used in recent Alabama elections and is subject to great abuse.

All of the above items are important. However, there is something else that should be done. Limits on campaign contributions in state elections should be enacted without delay. I suggest the following limits: $5,000 for political action committees; $5,000 for a corporation; and $2,500 for individuals. Campaigns in Alabama cost must too much and nobody can dispute that. Reasonable contribution limits will help restore a measure of sanity to the political process in Alabama.

Predatory Lenders Should Be Targeted

This year, our firm plans on continuing to make predatory lenders targets for lawsuits. We have been actively involved in this fight for the past several years and don't plan on stopping now. There is much yet to be done. While other states are taking action, Alabama is doing nothing. Tough new state laws have been passed in New York and Georgia that curtail abusive mortgage lending practices. Hopefully, this will prompt other states to introduce legislation that protects homeowners from the predatory lenders. However, there are many areas, other than the mortgage problem, where predatory lenders are making tremendous profits off of the backs of low-income families and retirees. The nation's $140 billion sub-prime lending market caters to borrowers with financial problems, charging them higher fees and interest rates than traditional mortgage lenders. Borrowers can easily get in over their heads and then lose their homes. Folks who don't own homes and who deal with the predatory lenders will most likely never own one. They simply won't get out of debt. The title loan companies and the payday-lending sharks are perhaps the worst of the predatory lending lot. Since there is very little federal regulation, recent action against predatory lenders has largely been left to the states. At least 15 states have passed anti-predatory lending laws during the past two years, according to the National Conference of State Legislators. Unfortunately, Alabama does not fall in those ranks.

II. LEGISLATIVE HAPPENINGS

The New Governor

It is certainly no secret that the new Governor will have his hands full dealing with all of the problems facing state government. It will take a tremendous effort to deal with the "mess" that the state operations are in. It is easy to find the problems. Unfortunately, finding permanent solutions is much more difficult. Early Cabinet appointments by Governor-elect Riley have been most encouraging, and that gives observers reason for hope. The appointment of Drayton Nabors as Finance Director was well received by most capitol observers. Mr. Nabors is an outstanding individual, who, in my opinion, will be a real asset to the Riley Administration. The Department of Transportation will be headed by Joe McInnes, who served as Vice President of Blount International for years. Joe is a most capable individual. I predict that his appointment will prove to be a very good one. The appointment of retired Russell Corporation CEO, Dwight Carlisle as Revenue Commissioner was clearly a step in the right direction. Another good move was the re-appointment of Kathy Sawyer, who has done a very good job as Commissioner of the Mental Health Department under the current Governor. I understand there have been a tremendous number of applications for other positions. Hopefully, other Cabinet choices will be of the caliber of these four. If so, things may get better very soon. However, the new Governor and his people must realize that little can happen without involving the Alabama Legislature. A working relationship between the executive and legislative branches is a must!

The Senate Battle

A battle has been waged by opposing factions in the state Senate for several weeks and continues as we go to the printer. The powers of the Lieutenant Governor, writing of the new Senate rules, and selection of the President Pro Tem are all causing a great deal of stir in and around the State House. Powerful lobbyists were reported to be very active in making sure their respective "turfs" will still be protected when the Senate is formally organized on January 14th. For those who are not familiar with how the Legislature works, the powerful fourth branch of government, made up of about 500 registered lobbyists, has no intention of losing its firm grip over legislative issues in the Senate regardless of who the Pro Tem is. In my opinion, becoming "independent" from the Governor's office is not enough. The real need for "independence" must include becoming truly "independent" from the special interests and their powerful lobbyists. Until this happens, Alabama citizens as a whole will have little say-so in what happens in Montgomery. Finally, once the "turf battle" is over and a winner officially declared, the two factions should join hands to the extent possible and work for the good of the people of Alabama.

III. COURT WATCH

Court Considers Punitive Damages Limit

The U.S. Supreme Court may finally decide whether there should be limits on how much victims of corporate or other wrongdoing can win in punitive damages from defendants found liable for intentional or wanton conduct that call for such damages. The case involves Curtis Campbell, a Utah man who sued his own insurance company, State Farm Mutual Automobile Insurance Co., because it refused to settle claims arising from a 1981 car accident that killed one driver and left another disabled. Campbell had liability insurance coverage of only $50,000. However, a jury found Campbell at fault in the accident and ordered him to pay the victims about $136,000, which was more than his insurance policy limit. Campbell and his wife then sued State Farm for punitive damages, alleging bad-faith failure to settle, fraud and emotional distress. A Utah jury awarded the Campbells $145 million in punitive damages, which was later reduced on appeal. Last year, the Utah Supreme Court reinstated the initial $145 million in punitive damages, taking into account State Farm's net worth and its wrongful business behavior in other states.

The 83-year-old Campbell died of Parkinson's Disease soon after the court's ruling. His wife remained a party to the suit. State Farm contends that the Utah court improperly upheld the punitive award in large part because it considered unrelated out-of-state evidence of misconduct. Much of this evidence dealt with State Farm's nationwide scheme devised in 1979 to meet corporate fiscal goals by capping payouts on claims. The plaintiffs' attorney argued to the High Court that the overwhelming majority of the evidence was Utah-related and the rest justifiable. The U.S. Chamber of Commerce and other business groups have filed briefs supporting State Farm. This case will give the High Court a chance for its first major ruling on punitive damages since 1996. Obviously, this is a most important case and will have a terrific impact regardless of the outcome.

A Tragic Death From Forestry Equipment: Lawsuit Settled

Kelvan Brascom was 24 years old and was excited about his new job with Eufaula Pulpwood. After only two weeks on the job, he was working with the wood crew on a Saturday doing maintenance on their equipment. One of the machines was a wood chipper manufactured by Morbark Industries of Winn, Michigan. After filing a wrongful death lawsuit, we learned that this particular machine, called a Flail Chipharvestor, was poorly engineered. The machine is designed to turn whole trees into chips. During the process, the trees are debarked by chain flails, which rotate inside the machine. This is a very large machine, set up so that a number of different people can be working on the machine at the same time. Kelvan and another employee were changing the flail chains, a job that had to be done at least once a week. Kelvan was inside the machine standing on a feed roller. The machine was not equipped with appropriate interlocks. Had these safety devices been in place, it would have kept the machine from being inadvertently started.

At the other end of the machine, a co-employee, who had been working with a welder, decided to start the engine to move the hydraulics. When the engine was started, the feed rollers started moving immediately and pulled Kelvan between two rollers, causing his death. The person that Kelvan was working with started screaming immediately upon the activation of the rollers, but by the time the engine was shut down, Kelvan had been pulled into the chains up to his chest, causing massive internal injuries. This was a slow, painful death of a worker who was simply doing his job.

The case, which was filed in Alabama, was going to be tried under Georgia law. Under Georgia law, we could prove Kelvan's pain, suffering, and fear just prior to his death. Kelvan was screaming when the machine started, clear evidence that he knew that he was about to be crushed and was powerless to help himself. During the development of the case, we learned some interesting things. Although Morbark defended the case by claiming that the machine should have been locked out and tagged out, our discovery efforts revealed that the employees of Morbark, who spent a full week with the Eufaula Pulpwood employees when the machine was delivered, did not lock out or tag out machines themselves during demonstrations. One of the Mobark employees admitted on numerous occasions that he would do exactly what Kelvan was doing without locking out or tagging out the machine. Our expert engineers contended that the machine should have been interlocked so that it could not be started when someone was inside.

The case was set for trial and was settled after mediation for a confidential amount. This was a horrible and needless tragedy. Hopefully, Morbark will redesign their machines to prevent this sort of thing from happening to someone else's loved one. We believe that if the company fails to take this action, many more innocent employees will be put at an unreasonable risk of serious injury and even death. We are convinced that had the case gone to trial, a jury would have returned a very large verdict. Greg Allen from our firm was the lead lawyer on the case. Shane Seaborn and Myron Penn, two very good young lawyers, were also involved with our firm in the handling of this case.

A Closer Look At Some Very Bad Law

We recently tried a case against Rite Aid Corp. and found out in the process that the law in our state does little to protect consumers who find themselves victims of misfilled prescriptions. Alabama law changed during the time it took our case to travel through the court system and prevented us from discovering and informing the jury of prior misfilled prescriptions at Rite Aid stores in Alabama. Under the current state of Alabama law, a party is prohibited from conducting discovery with regard to any other act or omission or from introducing evidence of any other act or omission at trial. The law applies to any case for injury or death against a "health care provider" for breach of the standard of care, whether resulting from negligence in providing health care, or the negligent hiring, training, supervision or retention of the "care giver." A "care giver" can now be a pharmacist working for a large chain store. In 2000, the Supreme Court of Alabama ruled that a pharmacist is a "health care provider" under the Alabama Medial Liability Act and later reconfirmed that ruling in a preliminary appeal in our case. In cases against a pharmacist or pharmacy for negligent filling of prescriptions, the victim is not allowed to discover or produce evidence of other previous misfilled prescriptions by the pharmacist who misfilled the prescription or other errors that the pharmacy's pharmacists have committed throughout the state.

In a wrongful death action arising out of an incorrectly filled prescription or cases of negligent supervision or training of a care giver, evidence of other prior incidents is significant in relation to both liability and also punitive damages. Prior incidents can also be a factor in the hiring process. The purpose of the Wrongful Death Act is to deter or prevent future conduct. In these cases, the defense often argues that the pharmacist who made the error made a "simple human mistake," implying this is a one-time event and attempting to invoke sympathy for the pharmacist who made the mistake. In our case, the pharmacist, whom Rite Aid claimed filled the decedent's prescription (although the pharmacist had no memory of it and it is likely that a technician filled iard of Pharmacy, and other lawsuits filed against the pharmacist who allegedly misfilled the prescription was all admissible. In that case, the Harco pharmacist incorrectly filled plaintiff's prescription for her breast cancer medication. Justice Gorman Houston wrote that evidence of prior incident reports was relevant to the plaintiff's claim that Harco failed to monitor its pharmacies. In the Harco case, the plaintiff was given a drug for heart problems instead of her cancer medication and the pharmaciard of Pharmacy, and other lawsuits filed against the pharmacist who allegedly misfilled the prescription was all admissible. In that case, the Harco pharmacist incorrectly filled plaintiff's prescription for her breast cancer medication. Justice Gorman Houston wrote that evidence of prior incident reports was relevant to the plaintiff's claim that Harco failed to monitor its pharmacies. In the Harco case, the plaintiff was given a drug for heart problems instead of her cancer medication and the pharmacist continued to refill it incorrectly two other times over a 5-month period. In that case, the jury was informed of 233 incident reports of prior prescription errors for the 3 previous years. The jury awarded a verdict including both compensatory and punitive damages in favor of the plaintiff. Interestingly, Harco was later bought out by Rite Aid Corporation.

In another case involving Wal-Mart, a pharmacist misfilled the plaintiff's thyroid prescription and misfilled it 4 more times over a period of 14 months. The Alabama Supreme Court held that punitive damages were proper. In the Wal-Mart case, the plaintiff was allowed to introduce evidence that Wal-Mart had misfilled 3 other persons' prescriptions during that 14-month period. In addition, the jury was informed that Wal-Mart had also misfilled 14 prescriptions of other customers during the same time period as plaintiff's misfills. The Court concluded that "the degree of reprehensibility" was high enough to support the punitive damages award.

There have been recent studies and surveys that document the frequency and serious nature of misfilled prescriptions in our country. According to one Associated Press report, the number of prescriptions in the United States has doubled since 1989; however, the number of pharmacists has remained the same. This report noted that pharmacists dispense 3 billion prescriptions a year, which breaks down to approximately 10,600 prescriptions by each pharmacist, often with the assistance of a technician. The Associated Press found nationwide complaints on misfilled prescriptions in all states are on the rise, with some resulting in permanent injury or death. According to a recent study, 45 million prescriptions are incorrectly filled each year. Similar studies concluded the competitive nature of the large drugstore chains, emphasis on high volume and profitability, and overworked pharmacists are reasons for the increase in prescription errors.

Last year, ABC's Primetime Live conducted a first time study. With hidden cameras, ABC took 100 prescriptions (easily recognized drugs) to randomly selected drugstores (both large and small) in New York, New Jersey, and Florida. The results were shocking, revealing potentially deadly pharmacy mistakes, including incorrect dosages, dangerous instructions and wrong pills. According to the Primetime survey, 5 out of 100 prescriptions were incorrectly filled, suggesting 274,000 misfilled prescriptions per day in the U.S. Dr. Kenneth Barker, a recognized expert from Auburn University, designed and evaluated the study.

A few examples of the shocking mistakes that could have led to serious problems and death included: a double dose of Coumadin (a blood thinner); an underdose of an asthma medication; wrong labeling; wrong pills and double dose of an anti-seizure medication; and no warning about taking aspirin with Coumadin even though the pharmacist knew it was a deadly combination. Pharmacists who spoke to Primetime admitted that there are thousands more misfills for every one the public knows about.

In October of 1996, a South Carolina jury awarded a verdict of $16 million against Rite Aid Corp. for negligence, and wantonness in retention of the pharmacist and understaffing the pharmacy. The parents of a minor filed suit against the pharmacist and Rite Aid for brain damage the child suffered after a prescription was incorrectly filled. The jury awarded $11 Million in punitive damages against Rite-Aid on the basis that Rite Aid had negligently supervised and retained the pharmacist where the pharmacist had a long history of misfilled prescriptions, the pharmacy had no policy designed to ensure competency of its pharmacists, and there was no policy regarding storage or handling of medications or the filling and labeling of prescriptions.

In the South Carolina case, the plaintiff's attorney was allowed to inform the jury that Rite Aid stores in South Carolina had knowledge of 2,900 misfilled prescriptions in a one-year period. At the time of the misfill, the pharmacist was at the end of his 12-hour shift. He had worked these shifts for 5 days without another pharmacist present to relieve him. In affirming the award of punitive damages, the South Carolina Supreme Court stated that "Rite Aid's indifference to the life, health, and safety of others was at the center of its misconduct," and that the conduct is repetitive in nature, as demonstrated by Rite Aid's internal documentations and reports to the Board of Pharmacy. This South Carolina case and the surveys previously mentioned are examples of the rising problem of misfilled prescriptions, which occur nationwide.

An Alabama jury should be allowed to know when a drugstore has a history of misfills and to know the degree of misconduct by the defendant pharmacy. In misfilled prescription cases in Alabama, the exclusion of other prior misfills makes it difficult, if not impossible, for the jury to get a true picture of the extent of the misconduct of the pharmacist and/or pharmacy. If the pharmacy has a history of misfilled prescriptions, inadequate supervision and/or training problems, then the jury should be informed of such prior conduct in order to have all the relevant facts when determining liability and assessing of damages, especially punitive damages. It clearly appears that the taking over of the retail drug business by the large chains has greatly increased the magnitude of the misfill problems.

It should be noted that the nursing home industry, with the active help of Don Siegelman, was directly responsible for bringing about the change in the law in Alabama regarding exclusion of this crucial and relevant evidence. The intent of the legislation passed was to protect nursing homes and give them virtual immunity from punitive damages. The large chain drugstores appear to have been simply a beneficiary of the changes. The result has been a law that has affected large chain drug stores in cases involving misfilled prescriptions and protects wrongdoers, rather than the public. Any customer who receives different medication than the one prescribed by his or her doctor and is injured and damaged by taking he wrong medication, should be protected. It is hard to understand the rationale behind the current state of the law in Alabama. Who would want to trust the filling of their prescription to a large chain drug store whose pharmacists was not only over-worked with long hours, but also had a history of misfilling prescriptions?

The verdict in our case raised much media attention and public awareness to the increasing problem of misfilled prescriptions. During and after the trial, our office received numerous phone calls, including a concerned citizen discussing her own experience from a misfill; a psychiatrist commending us for getting the story out because she treats many pharmacists who are required to work extremely long shifts without any breaks; a family reported being offered

$5,000 by a drugstore if they would return the wrongly filled prescription bottle; several pharmacists complaining about how the chains were using non-professional clerks to fill prescriptions; and many other related calls concerning this misfill problem. We will see many more of these type cases. Juries will continue to get the attention of the large drugstores. Clearly, we can't tolerate incorrect prescriptions in our state. Lawyers representing injured people must continue to battle the large drugstores in these cases, which now fall under the Alabama Medical Liability Act with all of the requirements, restrictions, and evidentiary exclusions of a medical malpractice case. As lawyers, we owe our clients the commitment to keep up the fight and work to change a bad law.

The U.S. Supreme Court Refuses To Overturn A $250 Million Jury Award

The U.S. Supreme Court has refused to overturn a $250 million jury verdict in a securities fraud case. An appeal was taken after several persons and corporations were found guilty by a federal jury of fraud, embezzlement and diverting the assets of two public companies. The original lawsuit was filed in 1998 by Kinray, the owner of a large New York-based pharmaceutical distributor. The defendants had allegedly created "an elaborate illusion" that a company called Continental Investment Corp. was a viable business that would generate revenues from a granite quarry in Georgia. As a result, the plaintiff claimed to have lost millions of dollars in investments directed by the defendants. The case, tried in a Dallas federal court over 2 years ago, resulted in a jury finding the defendants liable for $250 million.

Free Speech Debate

The U.S. Supreme Court has declined to jump into another free-speech dispute. The case involved advertising restrictions the State of Florida put on dentists who want to promote their specialties. The divided Court found Justices Clarence Thomas and Ruth Bader Ginsburg saying they were troubled by Florida's law. These two Justices felt the Court should clarify how far states can go in limiting ads of lawyers, doctors and other professionals. Significantly, none of the other justices joined them. Under the Court's rules, at least four Justices must agree before the Court will hear a case. This case involved ads being used by a dentist in St. Petersburg, Florida. The dentist had attended 400 hours of classes on implant dentistry, had passed multiple exams, and was certified by the American Academy of Implant Dentistry. Under a three-year-old Florida law, any ad listing the dentist's certification had to say in capital or bold letters that the Academy is not a "bona fide" organization according to the Florida Dental Board. The Academy is an association of about 2,200 dentists. The law applies to several dental specialties, including cosmetic dentistry, with professional associations that are not accredited by the American Dental Association. It is difficult to fully assess the impact of this case on advertising by professionals such as doctors, dentists, and lawyers.

GM Verdict Affirmed

On December 18th, an appellate court affirmed a $60 million verdict against General Motors. The case arose out of a post-collision fire involving a 1983 Oldsmobile Cutlass Cruiser station wagon. The court increased General Motors' liability from 55% of the award to 100% and held that General Motors had waived its claim of privilege to certain documents that went into evidence for failing to file a privilege log. The damaging "Ivy memo," which had been mentioned in a previous report, was one of the documents introduced. This memo is extremely damaging to General Motors.

The Alabama Supreme Court On Lead Paint

The Alabama Supreme Court recently answered a question whether lead paint is a pollutant. The Court's search for an answer on a most important issue was prompted by a certified question from a federal court judge in a lead-paint poisoning case filed by the mother of two whose daughters are allegedly mentally retarded because of exposure to ambient lead-paint chips and dust in a public housing project. There was no previous Alabama case on point, so our Supreme Court had to review cases from around the country. An insurance-coverage dispute before the federal court had promoted the inquiry. In its response, the Alabama Supreme Court concluded that lead paint is a pollutant.

The municipal housing authority's insurance carrier had sought to enforce an absolute pollution exclusion clause contained in a liability policy and to deny coverage on the underlying claim. The mother had sued the Montgomery Housing Authority after it became apparent that her daughters had become developmentally disabled from lead poisoning. There were three additional defendants, which in 1991 had contracted with the authority to remove lead paint from the public housing where the family lives. The underlying case was settled for $1.6 million. The sum of $640,000 has been used to purchase an annuity that will fund a special needs trust for the girls. The remaining $1 million was expected to come from Audubon Indemnity, the housing authority's insurance carrier. Relying on the exclusionary language contained in the policy, the insurance carrier rejected the claim. It is significant that Audubon had honored two previous lead-paint claims arising under the same policy. Those claims were filed by residents of the same housing complex.

The question from the federal court was: "Does the pollution exclusion clause contained in Audubon's comprehensive general liability policy preclude coverage to its insured for liability for injuries allegedly caused by the ingestion of lead contained in paint, blinds, water, pipes and soil on the premises operated by the insured?" The Alabama Supreme Court relied primarily on two decisions – one from Pennsylvania and the second from New York. Alabama's highest court determined that lead is a pollutant, but that the clause was only intended to exclude claims arising from the "discharge, dispersal, release or escape" of pollutants. The Court stated that "these terms do not ordinarily encompass the type of movement associated with lead paint poisoning" and that "lead paint poisoning results from inhalation and ingestion of paint that has flaked over time." The state court stopped short of finding that Audubon was liable for the $1 million claim, leaving that issue to be tried before the federal court later this year.

A Loss To Companies Trying To Block Asbestos Class-Action Lawsuits

The U.S. Supreme Court has refused a request to stop a trial in Virginia against Hopeman Brothers and other companies that were sued by over a thousand plaintiffs. The High Court had earlier declined to get involved in a dispute over a giant asbestos trial in West Virginia, involving claims of 8,000 people. Hopeman Brothers, a marine company based in Waynesboro, Virginia, claimed it was unconstitutional to consolidate a large number of different claims. These developments will allow the plaintiffs to continue pursing their legal remedies in a single trial, rather than receiving thousands of individual trials.

Halliburton To Pay $4 Billion To Settle Asbestos Claims

Halliburton Co., the industrial giant once led by Vice President Dick Cheney, has agreed to pay about $4 billion in cash and stock to settle hundreds of thousands of asbestos claims. The settlement will cover about 300,000 current and future asbestos cases. Most of the claimants are people across the country who were exposed to asbestos while working at plants that produced the material or in places where asbestos was used, such as steel mills. A good number of the claims against Halliburton came from Dresser Industries Inc. when it was bought for $7.7 billion. The settlement would consist of $2.8 billion in cash and 59.5 million shares currently worth about $1.2 billion. The amount paid to individual claimants and their families would vary according to the injuries suffered. As we all know, asbestos is used for fireproofing and insulation. Inhaling asbestos fibers can cause lung cancer and other deadly respiratory ailments. These conditions are manifested sometimes decades later. Prior to this global settlement, Halliburton had been settling cases on an individual basis. There had been verdicts in Texas, Mississippi, and Maryland totaled $152 million, which apparently prompted a global settlement of all claims. The Dresser acquisition was overseen by Cheney before he left in 2000 to become President Bush's running mate. Halliburton has claimed that Harbison-Walker Refractories, which had been a part of Dresser, promised to bear the liability for any asbestos claims filed against it after 1992 and did so for several years until 2001, when it said it would no longer pay claims. Halliburton is suing Harbison-Walker over the liability issue. Harbison-Walker made construction products containing asbestos for many years. Harbison-Walker was a defendant in a Baltimore trial in which a jury awarded five people who claimed asbestos exposure $40 million. The proposed agreement would cover all present and future asbestos claims.

Settlements Will Earmark $970 Million For Asbestos Claims

Lawyers representing asbestos claimants recently approved another settlement that involved the Sealed Air Corp. As a result, nearly more than $850 million will be designated to cover the packaging company's asbestos-related liabilities. Sealed Air, the maker of Bubble Wrap, announced its decision to settle the claims in late November, only a week before the case was scheduled to go to court. Sealed Air will turn over $855 million in cash and stock to a trust fund under the control of the federal court in Delaware which is overseeing bankruptcy reorganization by W.R. Grace, the chemical giant. Fresenius Medical Care, a German firm, also made a similar settlement, designating $15 million in cash to the trust and another $100 million gained in a tax liability waiver issued by W.R. Grace in connection with the sale of its kidney dialysis unit to Fresenius in 1996. The total amount collected in both settlements has a current value of about $970 million.

These agreements result in more money being available to asbestos claimants. When Grace filed for Chapter 11 bankruptcy in 2001, the company claimed that it didn't have sufficient assets to cover all asbestos liabilities associated with its mining operations. Many of the claimants reside in the Libby, Montana, area. W.R. Grace mined vermiculite near Libby for about 30 years. Tremolite asbestos, identified by researchers as the most fatal type of asbestos fiber if inhaled by humans, was a natural byproduct of the vermiculite ore. As previously reported, W.R. Grace has been blamed for the deaths of more than 200 miners and their family members. In addition, another 900 Libby residents have been diagnosed with an asbestos-related disease. Even with this settlement, W.R. Grace still faces a significant amount of litigation. While the fraudulent transfer issues were settled, other claims weren't affected by the settlement. Property-damage and personal-injury claimants will proceed with their claims. It should be noted that asbestos-related diseases can have a latency period of some 20 to 40 years, according to the federal Agency for Toxic Substances and Diseases Registry. This has made it difficult for persons who have been exposed but don't have active symptoms to recover for claims based on that exposure.

IV. THE NATIONAL SCENE

Corporate America

The Year 2002 will forever be remembered as the year for corporate crime. Even the Bush White House has embraced the notion of corporate responsibility. You can even find a mention of corporate scandal and corporate responsibility on the White House web page. However, the Bush advisors have pushed the prospect of war to the front and have pretty much bumped the issue of corporate responsibility off of the front pages of the nation's newspapers. Clearly, as most Americans know all too well, the cascade of corporate financial and accounting scandals continues.

All Americans should be concerned with the federal government, which enjoyed a budget surplus as recently as two years ago, now has a shortfall of $157 billion this year. Unfortunately, that deficit is expected to have a larger number in 2003. Congress raised the government's debt limit in July of last year by $450 billion. This makes our debt limit now $6.4 trillion. The Bush White House has predicted that they will need to raise the limit again at sometime this year. This is why it makes absolutely no sense for Congress to pass the most recent Bush proposal concerning the economy.

A Recognized Consumer Protector

Alabama is most fortunate to have my good friend Richard Shelby in the U.S. Senate. Senator Shelby's elevation to Chairman of the Senate Banking Committee comes at a most opportune time. He was a member of that committee for 16 years and now will be in a position to act as a protector of consumers throughout the country in financial transactions. He succeeds retired Senator Phil Gramm (R-TX), who was no friend of consumers, and in fact was the finance industry's biggest defender and perhaps the biggest obstacle in the Senate to any real consumer protection. Senator Shelby, speaking at a meeting of the Consumer Federation of America Conference recently, stated that restoring and ensuring the integrity and credibility of our capital markets and dealing with the issue of privacy will be two of his top priorities this year. Hopefully, he will include predatory lending practices and arbitration on his priority list for

2003. Senator Shelby is now one of the most powerful political figures in the country. He has been good for Alabama. Hopefully, he will serve for many more years.

Justice Department Wants Tougher Sentences For Smaller Frauds

Apparently, the Justice Department has gotten the message that American citizens expect corporate criminals to be prosecuted and then "locked up." A plan aimed at toughening penalties against corporate criminals would produce "little or no change" in sentencing policies and would send the message to concerned investors that white-collar crimes "are not taken seriously" in the courts, a new Justice Department report concludes. Imposing longer prison sentences for white-collar crimes was a central goal of the overhaul of business laws that Congress approved last summer. However, Justice Department officials don't believe that the set of proposals devised by the U.S. Sentencing Commission to comply with the federal Sarbanes-Oxley Act of 2002 would deal adequately with smaller-scale cases of fraud. The Justice Department wants the proposed penalty increases to apply across the board and not just to the billion-dollar cases that have dominated the news headlines in recent months. The Department wants the tough sentencing to apply to the so-called "lower loss" criminal fraud cases. Obviously, those cases make up the bulk of federal prosecutions around the country.

It appears that there has been some rather heated debate between the Justice Department and the Sentencing Commission. The Sentencing Commission will vote this month on sentencing guidelines and has been seeking public comment on the plan. The Bush Administration has been criticized by some Democrats for going easy on corporate criminals because of its close political ties to Corporate America and to Wall Street companies. Justice Department officials plan to broaden their corporate investigations to focus more intensely on the professional "gatekeepers" — lawyers, accountants and others — who may have facilitated frauds. It also appears that the Justice Department will insist on these white-collar criminals spending their sentences in prisons.

The Justice Department wants the Sentencing Commission to amend the proposed guidelines for putting in place the Sarbanes-Oxley Act, which overhauled laws on corporate fraud, accounting and securities. The Sentencing Commission has the responsibility to develop the blueprint for enacting the new penalties. The Commission's plan will go back to Congress. If Congress does nothing, the Commission's plan becomes permanent.

White House Identifies Regulations That May Change

The Bush Administration released a list of more than 300 federal regulations last month that it may modify or rescind this year primarily at the request of industries. The proposed changes to a broad range of regulations—covering issues from the environment to public health and labor —were solicited by the Bush White House and proposed by 1,700 groups or individuals. While businesses portrayed the effort as a useful way to avoid expensive requirements that may have little practical value, environmental groups portrayed it as a way for polluting industries and Republican donors to rewrite regulations to suit themselves.

John Graham, Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, said that the Bush Administration wanted to ease the burdens on small business, streamline the regulatory process and evaluate the costs and benefits of proposals. I am concerned that this latest move is an attempt to get "cover" for changes that will further weaken regulation by the federal government. We have already experienced the tragic results of weak regulation in the corporate scandals, in the environmental problems caused by polluting industries, and also in unsafe products manufactured by the auto industry.

Bush Administration Ordered To Produce Documents

On December 24th, a federal court ordered the Bush Administration to make public documents revealing U.S. and foreign government positions in trade negotiations with potential impacts on domestic public health, labor, and environmental laws. The court ordered the Office of U.S. Trade Representative to release the documents no later than January 17, 2003. The court's order was the result of a lawsuit filed by Earthjustice on behalf of the Center for International Environmental Law, Friends of the Earth, and Public Citizen. These groups were concerned that the new international trade rules could weaken environmental and health standards.

Insurers Settle Suit Over Enron

Liberty Mutual Group and eleven other insurance companies have agreed to pay J.P. Morgan Chase & Co. more than $500 million to settle a dispute over contract guarantees related to the Enron Corp. J.P. Morgan had sued the insurers in an attempt to recoup $1 billion to compensate the company for Enron deals gone bad. The insurance companies had refused to honor energy trades they maintained were fraudulent. The proposed settlement, if consummated, will give J.P. Morgan approximately $570 million if the majority of the insurance companies also elect to let J.P. Morgan take over their claims against Enron in bankruptcy proceedings.

The dispute stemmed from what are known as ''surety bonds." These bonds are sold by insurance companies to guarantee contracts. Companies buy surety bonds from insurers as a way to guarantee they will fulfill a contractual obligation. If one or both of the partners doesn't keep its end of the bargain, the insurer steps in and makes the other side of the contract whole. Enron reportedly had contracts with at least 14 insurance companies. The Texas energy company took payments up front for natural gas orders, then used surety bonds to guarantee it would make the deliveries on time. In November 2001, when Enron went bankrupt, it left an estimated $2.5 billion worth of energy orders unfilled. Buyers that had prepaid for energy then looked to the insurance companies looking for payments. Not surprisingly, the insurers balked, arguing that the surety bonds were nullified since Enron was merely swapping gas futures and never intended to provide actual energy. Other insurance companies involved in the settlement were Hartford Financial Services Group, Travelers Property Casualty, Safeco Corp., Fireman's Fund, CNA, and St. Paul Cos.

Immunity For Pharmaceutical Companies

In earlier reports, we have discussed pending legislation before Congress that would limit citizens' rights to pursue claims against large pharmaceutical companies whose products injure them. HR 4600, a massive federal "tort reform" bill, was passed by the U.S. House of Representatives in the fall of 2002, but never passed the Senate. Now that the Republicans are in control of the Senate, the Bush Administration will certainly try to have this legislation passed and signed by the President as quickly as possible. Pharmaceutical companies have become a huge source of cash for the Republican Party. It appears that the Republicans will try to "pay them back" by limiting citizens' rights to sue the industry. We encourage the readers of this report to contact their U.S. Senators to oppose this anti-consumer legislation.

Our concerns about HR 4600 have recently been confirmed – as reported last month – by a last minute attachment to the homeland security bill. Congress passed the homeland security bill to establish a Department of Homeland Security to protect against terrorism. Buried in this 500-page bill, and apparently placed there by some unknown Republican operative, was a provision that will protect big pharmaceutical companies from lawsuits involving a drug called Thimerosal. It has been learned that placing this provision in the bill may lead to the dismissal of over 200 previously filed lawsuits.

As was pointed out last month, Thimerosal is a preservative that contains mercury and was for many years an additive in some children's vaccines. In the summer of 1999 the American Academy of Pediatrics and Public Health Service urged vaccine manufacturers to stop using Thimerosal because it contained mercury and may be linked to neurological damage to children, including autism. Lawsuits have been filed by parents across the country who are convinced that their children suffered severe neurological damage from the mercury contained in the childhood vaccines. Clearly, these children's conditions and the parents' rights to pursue their children's claims in court have nothing to do with homeland security. The addition of a provision in the Homeland Security Act that prevents these parents from pursuing these lawsuits, had to have come at the request of the drug companies. Whether the millions of dollars donated to the Republican Party and their candidates had anything to do with this is certainly worthy of discussion. Republican Senator John McCain of Arizona characterized the immunity provisions as "among the most inappropriate" in the homeland security legislation. This is just another example of how our government is being manipulated for the benefit of large corporations. When you see our government extinguishing the rights of its children in the name of profit, it makes you wonder whether we will ever be able to retake control of our governmental process that should be by the people and for the people.

Boston Archdiocese Raises Estimate Of Insurance Coverage

It now appears that the Boston Archdiocese has at least $90 million in insurance coverage to pay the claims of sex abuse victims of priests. This revelation bolsters the arguments by lawyers for the alleged victims numbering around 500 that the Archdiocese could pay all claims without resorting to bankruptcy protection. The $90 million figure was reported in a Boston Globe story published last month, citing attorneys and others involved in determining the amount of coverage available. The Archdiocese's lawyers had previously estimated that only $25 million to $45 million would be available to pay claims. Kemper and Travelers, the Archdiocese's two insurers during the years most of the abuse took place, have refused to pay the claims. The insurers claim that the Archdiocese broke its contracts by recklessly moving dangerous priests into new assignments. The Archdiocese has been trying to force Kemper and Travelers to honor the policies.

It has been estimated that the alleged victims have claims against the Archdiocese totaling about $100 million. Because of the uncertainty whether it could count on the insurance money, the Archdiocese has tossed the idea around of a Chapter 11 bankruptcy filing. Hopefully, the revelation that insurance funds are now available will put the idea of seeking bankruptcy protection to rest. Bishop Richard G. Lennon, newly appointed Apostolic Administrator for the Archdiocese after Law's resignation, is trying to find out exactly how bad the financial crisis he inherited actually is. The ever-increasing amount of evidence of abuse of children by priests has shocked the nation. The fact that known information concerning the massive number of children and priests involved was hidden from the public is indefensible. This sad chapter should be put to rest as soon as possible and safeguards put into effect to assure that nothing like this ever happens again.

AOL Wins Porn Spam Case

AOL, the giant Internet company, has won $7 million in damages after it claimed its punters had been bombarded with porn spam. After the court ruling, AOL warned spammers that it will use the full force of the law to hit at anyone who targets its users with unsolicited email. AOL brought the case against CN Productions, alleging CN had sent unwanted emails advertising adult Web sites. In 1999, AOL won an injunction barring CN Productions from spamming its users. Last year AOL went back to court claiming CN Productions had "violated" the court's injunction by continuing to send more than a billion unwanted porn emails. AOL alleged that CN Productions had accounted for a quarter of all junk email complaints about adult Web sites and had generated as much as $8 million in "illegal gains."

A federal court in Virginia agreed with AOL and awarded statutory damages totaling almost $7 million. AOL believes their verdict is an important legal victory in the fight against spam, sending a clear, distinct message to spammers that AOL is prepared to use all of the legal and technological tools available to shut down spammers who inundate the mailboxes of AOL members with unwanted and often offensive junk e-mail. I hope that AOL's assessment of this court ruling is correct. Certainly, the adult Websites are a clear and present danger to the well-being of our country. Hopefully, other companies will follow AOL's lead and fight the spread of pornography.

Yahoo's Role In Online Pornography

Yahoo!, the nation's most popular Internet portal, has been a major player in the industry that facilitates the distribution of obscene materials. Especially disturbing is the fact that Yahoo! has become a big time provider of pornography, including child pornography and obscenity. The American Family Association reported in a recent edition of its Journal that Yahoo! is believed to be the nation's largest distributor of Internet child pornography and obscenity. Presently, a person can download a software application advertised on Yahoo! that contains more than 19,000 links to Yahoo! groups with pornographic and obscene materials. According to AFA Executive Assistant Buddy Smith, "these groups are often communities of sexual deviants who swap pornographic images dealing with adult-child sex, rape, incest, bestiality, sadomasochism, and homosexuality." It is well known that Yahoo! makes tremendous profit from this type activity. Thus far, there has been no federal action by the Attorney General. Hopefully, he will get involved and help out with a growing and most serious problem.

V. CORPORATE

Ten Worst Corporations

Multinational Monitor, the Washington, D.C.-based monthly magazine that tracks the activities of multinational corporations, has named its annual list of ten worst corporations of 2002. The publication could have listed dozens of companies embroiled in the financial scandals that have plagued the nation's economy for months. Instead, according to the Editor, Robert Weissman, they decided against that course. In this regard, Mr. Weissman stated: "As extraordinary as financial misconduct has been, we didn't want to contribute to the perception that corporate wrongdoing in 2002 was limited to the financial misdeeds arena." Appearing in alphabetical order, the 10 worst corporations, according to Multinational Monitor, are:
Arthur Andersen; British American Tobacco ("BAT"); Caterpillar; Citigroup; DynCorp, M & M / Mars; Procter & Gamble, Schering Plough; Shell Oil; and Wyeth. Obviously, companies such as Enron, WorldCom, Adelphia, Tyco, and a number of others involved in the corporate scandals are representative of a "rotten system of corporate dominance," according to Weissman. I agree that these companies are "indicative of a fundamentally corrupt financial system."

Justice Department Recoveries

Recoveries in suits and investigations of fraud against the federal government for the fiscal year ending September 30, 2002 exceeded a billion dollars for the third year in a row. False Claims Act recoveries since the law was substantially amended in 1986 have now topped $10 billion. Of this amount, $6 billion was recovered under the whistleblowers provisions of the Act. Not surprisingly, heath care fraud accounted for the overwhelming majority of recoveries – totaling more than $980 million. How our Republican White House can continue to protect wrongdoers when Corporate America continues to cheat and literally steal from taxpayers is beyond my comprehension.

Time Magazine Honors Whistleblowers

Time Magazine has named three "whistleblowers" as Persons of the Year for 2002. The magazine named Coleen Rowley (The FBI), Sherron Watkins (Enron), and Cynthia Cooper (WorldCom) as their recipients. Time managing editor Jim Kelly made this statement: "In a year that saw our trust in American institutions tested so severely, what better way to capture that news than to profile three ordinary people who in extraordinary ways tried to restore confidence in business and government?" Hopefully, this recognition will cause other persons to become whistleblowers if they observe serious criminal wrongdoing at their workplace. There are safeguards in place that would keep frivolous matters from being reported under the federal law.

Another HCA Settlement

When we think we have heard the last of HCA's wrongdoing, another chapter unfolds. Last month, HCA, the nation's largest for-profit hospital chain, announced a $631 million settlement with the U.S. Justice Department to resolve civil health care fraud allegations. The settlement was the result of a five-year investigation into HCA operations. Previously, two former executives had been convicted and HCA had pleaded guilty to defrauding government health care programs. HCA had also agreed to pay $840 million to settle federal criminal and civil charges. The latest settlement involves cost reports and physician relations, the remaining two civil issues.

Whistle-blowers alleged that HCA filed false claims and paid kickbacks to doctors so the doctors would refer Medicare and Medicaid patients to HCA's facilities. Under the latest settlement, HCA will pay the Justice Department $631 million plus interest. In July of this year, the Justice Department closed its criminal investigation of HCA executives, clearing them to testify in the civil Medicare and Medicaid fraud cases. In addition, HCA will also be obligated by law to pay legal fees of the whistle-blowers' attorneys. Under a previously announced deal, HCA was required to pay $250 million to resolve outstanding Medicare expense claims.

State Of Alabama's Involvement

In addition to the federal government's case, HCA also reached an agreement with attorneys representing states. The states' claims against HCA were similar to those of the federal government. Under the states' agreement, HCA will pay $17.5 million to state Medicaid agencies to resolve the claims. At present, it is unclear how many persons are entitled to refunds in Alabama. In any event, as I understand it, these settlements will not affect individual claims by private citizens against HCA.

States Settle With Pfizer Over Antibiotic Ads

Pfizer Inc. has reached a $6 million settlement with 19 states concerning Zithromax®, its best-selling antibiotic. Under the agreement, the drug maker will be required to change how it promotes Zithromax®. The states had accused Pfizer of misrepresenting the performance of the drug, which is used primarily to treat ear infections in children and respiratory ailments in adults. Zithromax® works in fewer doses and fewer days, but that doesn't make it superior to other antibiotics. Pfizer failed to disclose that physicians weigh other factors when prescribing treatment for ear infections. Interestingly, the medicine's labeling is approved by the U.S. Food and Drug Administration. Pfizer will pay $2 million toward public service announcements through March 2005 and promised to inform customers about factors physicians consider when prescribing antibiotics. The company will also provide $4 million to cover the cost of the states' investigations. In addition to New York, other states pursuing the settlement were Arizona, Arkansas, California, Connecticut, Florida, Kansas, Maryland, Massachusetts, New Mexico, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Vermont and Wisconsin. I understand that in this country physicians have written 41 million prescriptions for Zithromax®.

More Problems For Charter

Charter Communications Inc., the nation's third-largest cable TV operator, has announced plans to eliminate a "significant" number of jobs in a management restructuring designed to reverse heavy subscriber losses and a crisis of confidence on Wall Street. This development comes on the heels of a federal probe of the company's accounting practices. Federal investigators are examining how Charter, which is controlled by billionaire Paul Allen, the co-founder of Microsoft Corp., accounts for capital expenditures and subscribers. Among other things, it is alleged that Charter kept nonpaying customers on its books to inflate the subscriber counts that Wall Street uses to value cable companies. The FBI has contacted several program suppliers to determine whether cable company improperly sought rebates from networks such as ESPN and Discovery for nonpaying subscribers on its rolls in 2001. The rebates totaled $15 million. The company claims those problems have been resolved. Charter, which now operates in 40 states, is expected to lose about 280,000 of its 6.7 million subscribers this year. Our firm is engaged in substantial litigation against Charter at this time.

Tyco Sues Two Former Executives

Tyco International has sued two former executives, accusing them of making more than $40 million in "short swing" stock trades. The lawsuit, filed in a New York federal court, accuses two top-ranking officers of making dozens of such trades, beginning in August 2000. Under Securities and Exchange Commission rules, a company is allowed to seize any "short swing" profits made by corporate insiders who buy and then sell shares of a company within a six-month period. The lawsuit seeks the return of those profits, plus unspecified fees and costs associated with the case. The two former officials are on bail while awaiting trial, having been accused of stealing some $600 million from Tyco. If convicted on charges of enterprise corruption and grand larceny, they face up to 25 years in prison. Tyco, a conglomerate that makes a variety of products, is based in Bermuda, but is actually run from Exeter, New Hampshire.

Another Lawsuit For Prozac®

Eli Lilly & Co. has been sued in a defamation lawsuit brought by 3 former employees. The lawsuit was filed against the drug maker claiming the employees were fired and made scapegoats in a campaign to revive Prozac® sales through unsolicited mailings that were actually backed by management. Lilly disciplined 8 workers, including the 3 fired employees. In July, after investigating unsolicited mailings of the anti-depressant drug to people in south Florida, the actions were taken by the company against the employees. The Florida Attorney General's office says in the lawsuit that subpoenas turned up evidence of "a corporate-wide, extraordinarily aggressive push" related to Prozac®. The mailings were intended to boost sales by getting Prozac® users to switch from a daily pill that lost its patent last year to a weekly-patented form. The fired employees claimed they were "scapegoats" for the bad publicity generated by the campaign. The suit claims that the drug company encouraged and applauded the so-called conversion program during its development and rollout. The company apologized for the mailings and claimed that it did not sponsor the program. The lawsuit claims the program had corporate support and that at least three earlier mailings were made without complaint or publicity. The suit, filed in Broward County, Florida, Circuit Court, seeks money damages.

Bristol-Myers Settles Antitrust Suits

Bristol-Myers Squibb has agreed to pay $670 million to settle antitrust lawsuits filed against the company. These suits arose from tactics Bristol-Myers used to keep generic versions of two of its best-selling drugs off the market. In late December 2001, 29 states and Puerto Rico sued Bristol-Myers Squibb for allegedly using illegal tactics to keep a generic version of anti-anxiety drug BuSpar® off the market. Later, a different group of 29 states accused the company of illegally blocking a generic version of its cancer-fighting drug Taxol®. Numerous consumer groups, drug store chains and generic drug companies also sued the company and are included in the settlement. Details of the settlement were being finalized when we went to print. Consumer advocates were upset when Bristol-Myers listed additional patents on BuSpar® the day before generics were entering the market in late 2000.

There was a feeble attempt last year to stop drug companies' use of loopholes in the patent laws to maintain their monopolies. Legislation passed the U.S. Senate that would have revised the rules for bringing generic drugs to market. However, the bill was stopped in the House by the Republican leadership. President Bush has now proposed new regulations that resemble parts of the Senate bill. It should be noted that Bristol-Myers is now the subject of two government investigations and the company is preparing to restate its earnings for 2001 and 2002. In addition, it has had to write off more than $1 billion on its investment in ImClone Systems after the Food and Drug Administration refused to accept the application for the biotech company's star cancer drug.

Former CEO Sentenced To Ten Years In Car Battery Fraud Case

During the 1990s, Exide Technologies committed a massive fraud that at the time seemed to go pretty much unnoticed. However, the former chief executive of what was once the nation's largest car-battery maker was recently sentenced to 10 years in prison for his part in the scheme to sell defective batteries to Sears. Arthur M. Hawkins was fined $1 million. An accomplice, former Exide Technologies President, Douglas N. Pearson, was also involved in the scam and is awaiting sentencing. The two men were convicted of fraud in June for allegedly bribing a Sears merchandise buyer to purchase batteries they knew had defects. Thousands of the bad batteries were sold under the DieHard brand in the mid-1990s. Sears broke off relations with Exide in 1997. In 2001, an Exide subsidiary, Exide Illinois, was ordered to pay $27.5 million after pleading guilty to consumer fraud. In April of last year, Exide Technologies filed for Chapter 11 bankruptcy. A Sears subsidiary was charged with consumer fraud last year for misrepresenting the batteries and agreed to cooperate with investigators. The company was required to pay $62 million.

Boston Jury Returns $9 Million Verdict Against Merrill Lynch

A trial court jury in Boston has returned a $9 million compensatory verdict against Merrill Lynch and a Connecticut financial-services firm whose principals were accused of taking escrow funds for real-estate transactions and losing them through bad stock-option investments with Merrill. After a nearly four-week trial, the jury found Merrill Lynch brokers liable for "aiding and abetting" the misuse of the funds by two top executives at Benistar Property Exchange Trust Co. of Simsbury, Connecticut. This case may well break some legal ground in determining the extent to which brokerage houses can be held responsible for allowing funds from improper sources to be invested with them. The two executives took in funds to replace money they were charged with holding in escrow that they lost in failed stock-option investments over two years prior to January 2001. The five plaintiffs had put up $9 million with Benistar as escrow funds related to property transactions intended to be shielded from taxes. When the time came to close the deals, the money was gone. Benistar maintains offices in Simsbury and Stamford, Conn., and provides employee benefit plan services and tax-avoidance strategies for small and medium-size companies, including 2,000 US clients with employee stock ownership plans. There will be a subsequent proceeding to determine if punitive damages are to be awarded.

Medco Settles ERISA Lawsuit

Medco Health Solutions Inc., one of the largest PMOs in the country, will pay $42.5 million to settle five class-action lawsuits that alleged the pharmacy benefit manager failed to pass on rebates from drug makers to its employer clients. Several groups of employers alleged that the company's actions violated its fiduciary obligations under the Employee Retirement Income Security Act. The settlement does not resolve one other class-action suit pending against the company, nor does it include any plaintiff who chooses not to participate. Medco has also agreed to alter its business practices to adequately inform clients of the wholesale price of drugs, the amount of discounts and rebates it receives, changes to drug formularies, and availability of lower-cost generic drugs. This case is most significant and will likely give rise to additional litigation.

Cigna Pays To Settle Medicare Charges

Cigna Corp., one of the nation's largest health insurers, has paid the federal government $24.5 million to settle allegations that its hospital in New Mexico submitted a decade's worth of false cost reports to increase Medicare reimbursements. An Orange County man filed the whistle-blower lawsuit against Cigna's Lovelace Health Systems, a health plan and the 225-bed hospital in Albuquerque that led to the settlement. While there have been numerous Medicare fraud settlements with the Justice Department, this was the largest settlement paid by a hospital involving allegations of Medicare cost-reporting fraud. The lawsuit was filed against Lovelace in 1998 in federal district court in Los Angeles. The whistleblower was then an employee of Healthcare Financial Advisors, a Medicare reimbursement consultant in Newport Beach that advised Lovelace in the handling of certain cost reports. Lovelace Health improperly received millions of dollars in Medicare reimbursements by shifting certain costs to higher forms of payments and by concealing overpayments. The false reports covered Medicare claims from 1988 to 1998. If this was an isolated case of fraud by corporations doing business with the government, it would be bad and certainly noteworthy. Unfortunately, this is but one of many such cases. Taxpayers throughout the United States should be pretty mad – they are the real victims of this massive fraud.

Another Corporate Boss Faces Fraud Charges

Another corporate CEO is facing criminal charges. This one has received a great deal of attention due to its connection to related SEC problems. C. Gregory Earls, the Chairman and CEO of U.S. Technologies, has been charged with securities fraud stemming from a corporate scandal that caused former FBI director William Webster to resign as head of a special government oversight board. Earls was charged with securities fraud, wire fraud, and mail fraud for allegedly misleading the public while he appropriated at least $13.8 million from USV Partners, a company that was investing in U.S. Technologies. Apparently some of the money was redirected to an educational trust for Earls' children and his ex-wife. The accounting problems at U.S. Technologies caused Webster to resign in November as head of a special accounting oversight board created by Congress to restore investor confidence. The dispute over Webster's appointment subsequently led to the resignation of Securities and Exchange Commission Chairman Harvey Pitt. The controversy over Webster's role at U.S. Technologies developed when it was learned he fired the firm's outside auditors last year when he headed the board of directors' auditing committee.

SEC Begins Formal Investigation Of Halliburton's Accounting

The Securities and Exchange Commission has begun a formal investigation into the Halliburton Company's disclosure and accounting of cost overruns on engineering and construction jobs. From all accounts, Halliburton, the world's No. 2 oil field services company, appears to be cooperating with the SEC. In May, the Houston-based company reported that the SEC had started a preliminary inquiry into whether the company improperly accelerated the booking of revenue from construction work, a practice that began when Vice

President Dick Cheney was the company's chief executive. Much of Halliburton's business comes from big construction projects, such as natural gas processing plants. Not too surprising is the "revelation" that these projects run over budget on occasion. Neither is it surprising for these overruns to be hotly contested.

According to reports, in the fourth quarter of 1998, Halliburton began to book revenue on the assumption that its customers would pay at least part of the cost overruns, although the overruns remained in dispute. Previously, Halliburton had been more conservative, reporting revenue from overruns only after settling with its customers. According to company financial reports, cost overruns still in dispute represented 50 percent of Halliburton's operating profit in the fourth quarter of 1998. Last year, Halliburton further loosened its policies on revenue recognition, according to its annual report for 2001, which was filed in March. Halliburton now says it will keep claims for cost overruns on its books indefinitely, as long as it believes that they will be paid. The company had previously said it believed that it would collect most of the claims within a year. Under the policies adopted last year, Halliburton reported that it was carrying $234 million in disputed claims on its books as of Dec. 31, up from $113 million a year earlier.

More Companies Urge Workers To Blow The Whistle

Corporate America is hard at work trying to heal the wounds inflicted by all of the scandals that literally destroyed our economy. They are also attempting to clean up its public image. After all of the recent corporate scandals, a number of companies are setting up toll-free ethics hotlines and encouraging whistle-blowers to come forward. While some of the hotlines have been around for years, many of the companies are now calling them to their employees' attention. Other companies are setting up new toll-free numbers or Web sites where workers can anonymously report problems and wrongdoing. Corporate ethics have been largely ignored for years. Now, because of the massive corporate scandals, they are becoming a major issue for company leaders. Regardless of the motivation, however, the hotlines will have a good effect. The Sarbanes-Oxley Act, passed this past year by Congress, requires publicly held companies to have a mechanism in place for employees to raise anonymous questions about securities fraud. This may be the real reason for the increase in hotlines. Nevertheless, since its passage, private firms are also setting up such programs.

Whistleblower Sues Medical Society

The former second in command at the Medical Society of New Jersey has sued the physician's group, claiming he was fired for calling attention to conflicts of interest by directors who also are directors and investors in a medical malpractice insurance carrier. The former Deputy Executive Director of the Society charges that four of the seven Executive Committee members own substantial stock in the medical insurance interexchange, creating a conflict between their duty to the Society and the public on the one hand and to company stockholders and themselves on the other. After the former official recommended a ban on dual memberships to eliminate potential conflict, he was fired. The suit seeks money damages and reinstatement. The defendants say that the plaintiff is merely a disgruntled employee who was incompetent, and that he was fired for that reason.

Dynegy Settles For $5 Million

Dynegy Inc. has agreed to pay federal regulators $5 million to settle allegations that it conspired with one of its joint partnerships to manipulate natural-gas price indexes during a two-year span that covered the California energy crisis. The Commodities Futures Trading Commission said Houston-based Dynegy and West Coast Power LLC "specifically intended to report false or misleading or knowingly inaccurate market information" in an attempt to manipulate the price of gas in interstate commerce, for Dynegy's financial benefit. The allegations are also being investigated by the U.S. Attorney's office in Houston, which just two weeks ago indicted a gas trader from the El Paso Corp. on wire fraud charges for similar activity. The trader, who pleaded not guilty, resigned from El Paso. Dynegy, which paid the full amount of the fine, has fired seven employees who were involved with the misrepresentations and allegedly disciplined six others. West Coast Power is an equal joint venture between Dynegy and NRG Energy Inc. of Minneapolis. The partnership owns and operates three San Diego and Los Angeles-area power plants with a total capacity of

2,800 megawatts. NRG manages the plants and Dynegy markets the power that is produced by them.

NRG has attempted to put all the blame on Dynegy and says it was unaware of the bad conduct as well as the settlement talks between Dynegy and the regulators. Gas price indexes are important because they are used by gas futures traders as a price barometer. Natural gas is a key component of power generation. When companies have to pay more for natural gas, it follows that the price of electricity will increase. The settlement, which says the scheme lasted from January 2000 to June 2002, provides still more confirmation that power companies worked hard to falsely inflate power prices during the California energy crisis. There is a growing body of evidence revealing that these companies used various methods to manipulate the market.

We are now fully familiar with the trading tactics employed by Enron Corp. that involved submitting false information to state grid regulators. There is also evidence that the Williams Cos. Inc. of Tulsa, Oklahoma, and AES Corp. of Arlington, Virginia, conspired to hold back power from the market and thus prolong power outages. Price and volume information at gas trading hubs that service California, as well as the Henry Hub in Louisiana—the nation's main gas trading hub, were misrepresented. I am afraid that we have just seen the tip of the iceberg when it comes to corporate fraud, manipulation, mismanagement, and corruption. It concerns me that the Bush White House appears prone to protecting wrongdoers such as these at the expenses of their victims.

VI. ARBITRATION UPDATE

The Alabama Supreme Court

We continue to see a tremendous number of arbitration cases coming out of our Supreme Court. I still have hope for this Court on this issue. Certainly, there has been progress. There are members of the Court who have shown a willingness to slow down the "arbitration train" when a good record from the trial court is sent up. Eventually, there will be a greater willingness to recognize the importance of the constitutional guaranty of a jury trial. I still believe strongly that no person should be forced or coerced into giving up a constitutional right.

Health Group Fights Arbitration

The California Consumer Health Care Council has filed a lawsuit against Kaiser Permanente Medical Group over mandatory arbitration provisions included in the group's contracts. The council alleges that the arbitration requirements have forced millions of health care consumers to give up their Seventh Amendment rights by having to forego a civil trial in contract disputes.

Corporate America Watching

A case will be heard before the Wisconsin Supreme Court this month that has received very little attention. However, the eyes and ears of Corporate America are focused on the case. This is because the outcome could have enormous impact on whether longstanding consumer protection laws will continue to assist individuals who have complaints or other problems with large companies. The dispute centers on a binding arbitration clause in a home equity loan setting. The arbitration clause is typical of the complicated fine print that large companies are now frequently inserting into purchase agreements, telephone calling plans, and credit card agreements. As we all well know, under the process, an arbitrator has complete authority to enter an order settling a dispute with the order being not subject to an appeal.

The Wisconsin case involves Conseco Finance Servicing Corporation and a home equity loan in the amount of $7,352.16 for home improvement and debt consolidation. Conseco had charged excessive fees for both recording and document preparation, among other charges. A class action was filed on behalf of all Wisconsin consumers who found themselves in the same boat. The Wisconsin Consumer Act should protect the borrowers in this case. However, Conseco called into play a binding arbitration clause found in the loan agreement. The trial judge declared that the arbitration clause was too one-sided and "unconscionable" under Wisconsin law. Conseco appealed to the Wisconsin Supreme Court, arguing that the Federal Arbitration Act preempts Wisconsin law. The Wisconsin Consumer Act has a provision, however, that says the right to bring a class action cannot be waived. We are watching this case with great interest and will keep you posted on any decision.

EEOC Sets Back Wall Street's Forced Arbitration Of Bias Claims

It now appears that the Equal Employment Opportunity Commission will go to court to fight mandatory arbitration policies, at least in some instances. Recent events indicate that such will be the case. The EEOC took its strongest stand yet against mandatory arbitration of discrimination claims in the securities industry in a case involving Smith Barney. The finding that the practice is illegal in the case has received a great deal of attention. The EEOC, charged with enforcing federal anti-discrimination laws, has been a vocal opponent of mandatory arbitration. It also went to court in at least one case to prevent an employer from firing people who refused to sign arbitration agreements. Individual commissioners have been especially critical of securities-industry arbitration. While the U.S. Supreme Court has approved of mandatory arbitration, lower federal courts have been widely split on many issues that a 1991 High Court decision left unresolved. The EEOC, as a matter of policy, doesn't condone mandatory arbitration as a condition of employment. That is certainly the correct position, and one I hope the EEOC will support in other cases. No person should be forced to give up a constitutional right in order to either obtain a job or to keep one.

The finding involves a former broker in Smith Barney's Paramus, N.J., office. The broker filed an arbitration complaint with the National Association of Securities Dealer, alleging sexual harassment against the brokerage house and several brokers in 1993. The NASD handles most arbitration cases for the securities industry, which requires employees to arbitrate discrimination complaints rather than take them to court. Over the broker's objections, a panel of three male arbitrators hearing the case required her to undergo psychological and medical exams in order to seek damages for emotional distress. A lawsuit was brought against Smith Barney by 22 women, alleging that the arbitration process itself is illegal because, among other things, it provided the employees with fewer legal rights than they would have had in court. The suit was filed in federal court in New York and alleges a widespread pattern of sex discrimination at Smith Barney. A separate charge with the EEOC was filed by the former broker prompting an investigation and resulting in a rare EEOC finding of probable cause to believe Smith Barney had in fact committed sexual discrimination.

Last year, the EEOC issued such findings in only 2.2% of the 78,000 charges filed. Smith Barney, a unit of Travelers Group, is trying to wrap up a settlement in the larger case. Merrill Lynch & Co., the nation's biggest brokerage firm, is trying to settle a separate sex-discrimination suit, with the help of the same mediator that is involved in the Smith Barney case. It wasn't clear whether the EEOC finding would have any effect on settlement talks in the larger Smith Barney suit. That suit attracted heavy nationwide publicity for its allegations of brokers' mistreatment of female co-workers and, in one branch, engaging in fraternity-house antics in a basement clubhouse known as the "boom-boom room." It is significant that because of widespread criticism of mandatory arbitration, the NASD has recently proposed that its rules be changed to no longer require that all licensed brokerage employees arbitrate discrimination disputes. The new policy, however, would allow brokerage firms to require arbitration on their own.

The Dean Witter Reynolds Case

The U.S. Supreme Court has decided a case that may have a tremendous impact in arbitration cases. Dean Witter Reynolds, Inc.'s standard client agreement requires clients to arbitrate disputes with the company before the National Association of Securities Dealers (NASD). NASD's Code of Arbitration Procedure Section 10304 states that no dispute "shall be eligible for submission ... where six (6) years have elapsed from the occurrence or event giving rise to the dispute." A client filed for arbitration in her dispute with Smith Barney. Dean Witter then filed a suit, asking the federal district court to declare the dispute ineligible for arbitration because it was more than six years old and time-barred. Smith Barney also sought an injunction to prohibit the plaintiff, Howsam, from proceeding in arbitration. The court dismissed the action, stating that the NASD arbitrator should interpret and apply the NASD rule.

The case was appealed and ultimately came to the U.S. Supreme Court. The High Court found that the rule's application presented a question of the underlying dispute's "arbitrability." The presumption is that a court, rather than the arbitrator, will ordinarily decide an arbitrability question. The Court stated, however, that an NASD arbitrator should apply the time limit rule to the underlying dispute. The Court stated that: "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." The Court then held that the question whether parties have submitted a particular dispute to arbitration, i.e., the "question of arbitrability," is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." It is significant that Dean Witter had asked that a court – rather than an arbitrator- interpret the terms of an arbitration agreement. However, the Court disagreed stating: "NASD arbitrators, comparatively more expert about their own rule's meaning, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding."

VII. PRODUCT LIABILITY UPDATE

A Settlement Against Ford

Our firm settled a most important case against Ford and Firestone earlier this month. The case was a rollover case that took the life of NAACP civil rights leader Earl Shinhoster in June of 2000. We represented Ms. Samimah Aziz, a rear seat passenger in the Explorer. Ms. Aziz, one of the tour guides for Mr. Shinhoster, served as the First Lady of Liberia. The 1997 Ford Explorer was being driven by Mr. Ademah Hackshaw. The Explorer was traveling along an Interstate highway (I-85) heading toward Montgomery with a number of other cars led by a state trooper escort. There were two state trooper cars in front and one trooper car in the rear. The Explorer was traveling just ahead of the last trooper car. As the motorcade traveled south on the Interstate, the left rear tire made by Firestone detreaded. The driver lost control due to the oversteer defect of the Explorer vehicle. When the vehicle went out of control, it rolled over on the pavement and then continued to roll off to the side of the road striking a tree. Mr. Shinhoster died and Ms. Aziz was seriously injured and permanently disabled. Fortunately, Mr. Hackshaw suffered only a minor knee injury.

There were claims against Firestone for the defective tire which resulted in a detread. Defendants argued that the Seiberling II was not part of the Firestone recall. We claimed, however, that the tire design was essentially the same as the Firestone ATX, which was recalled. Claims against Ford included the Explorer's defective vehicle dynamics, including its potential for oversteer and instability. If the case had not settled, we would have proved and shown to the jury clips from the prior testimony of John Lampe, the Chief Executive Officer of Firestone. Mr. Lampe had reported to the National Highway Traffic Safety Administration the oversteer defect of the Explorer. Since that time, however, Ford and Firestone have started doing business again. As a result, they are no longer blaming each other. It is amazing what "money" can make some top corporate officials do when it comes to "safety."

It is significant that Firestone had independent testing done by Dennis Guenther, an expert, which demonstrated a significant oversteer defect in the Explorer. When a rear tire detreads on an Explorer, the vehicle is virtually uncontrollable by an average driver. This causes the vehicle to start sliding on pavement. The vehicle is so top-heavy that it will roll over as a result of friction forces between the tires and the pavement. We also have Ford's internal testing, as well as independent testing, that proves the stability defects of the Ford Explorer. We have known for years that the Explorer had serious defects and was unreasonably dangerous. This case is just another example of what can happen to innocent victims. It is much worse when you add to the equation a defective tire.

Ford had $500 million invested in the Explorer program and refused to make significant design changes that were badly needed, even though engineers inside Ford recommended that the changes be made. The recommended changes would have made the vehicle more stable. Since making the changes would have delayed the production of the vehicle, thus delaying the return on Ford's significant investment in the Explorer project, nothing was done.

Defendants Ford and Firestone settled on the first day of trial with Ms. Aziz, our client, and with Mr. Hackshaw for confidential amounts. William Gill of Montgomery and Jock Smith of Tuskegee were involved with us in this case. William had been hired originally and was good enough to get us in the case. Greg Allen was the lead lawyer in the case, assisted by Graham Esdale from our firm. The death case was handled by a Texas firm, Bobby Segall of Montgomery, and Linda Henderson of Tuskegee and settled several days later – but before opening statements were made. This settlement amount was also confidential.

Honda Confidentially Settles ATV Design Defect

Diane and McCoy Carroll lost their son, Jody, on May 30, 1999, when a 1992 "all-terrain vehicle" (ATV) Honda TRX 300FW Fourtrax 300 4x4 flipped rear-over-front on a downhill descent. As the ATV flipped over on top of him, the rear rack of the ATV crushed the back of his skull and neck killing him instantly.

Our law firm filed suit on behalf of the Carroll family for the wrongful death, claiming that the unexpected front-wheel "lock-up" was caused from the defendant's defectively designed, unreasonably dangerous braking system. The brake design would not allow the application of rear brakes without also involving the front wheels. Honda's owner's manual instructs operators to avoid applying front-wheel brakes when going downhill. We contend the problem is that Honda's brake design on the four-wheel-drive ATV did not permit main engagement of only the rear brakes for safe downhill operation.

Expert witnesses for the Carrolls were able to produce an inexpensive alternative design that eliminated the braking hazard, allowing only rear-wheel braking on descent of a hill. The new design employed a sprag clutch, which served to disengage the braking effect on the front wheels upon rear-wheel braking on downhill descent. Plaintiffs' experts testified that the design did not adversely affect the utility of the four-wheel-drive operation and that this alternative design would have prevented the accident and death of Jody Carroll. The manufacturer initially defended the case on the basis of contributory negligence and operator error. The case was scheduled to go to trial on January 8th. Honda settled the case with the plaintiffs on a confidential basis before trial. Steve Drinkard and Cole Portis of our firm, along with Ralph Chapman, a very good lawyer from Mississippi, represented the Carroll family.

$225 Million Jury Verdict

A Duval County, Texas, jury returned a $225 million verdict in favor of two families. Two men died in July 2001 after two doors of a 2000 Ford F-150 opened during a rollover accident, ejecting them from the pickup. During the accident on a "farm-to-market road," the truck rolled over three times, and both driver-side doors opened. Two other passengers were seated on the passenger side and were able to walk away from the accident. The passenger-side doors did not open. The families alleged that the Ford F-150 four-door crew cab's driver-side doors malfunctioned. The lawsuit was filed against Ford Motor Company in August 2001. One of the victims was the 34-year-old assistant head football coach at Freer High School. The other victim graduated from Freer High School and attended Texas A&M University-Kingsville. After two weeks of testimony from the families and witnesses, the jury awarded the families of the two victims one of the largest amounts in actual damages in a personal injury case in the history of the State of Texas.

Evidence at trial proved that the truck was not designed with a center pillar. After the truck rolled over, the center of the cab's roof crushed in. This caused the door latches on the driver's side to malfunction. At trial, a rollover test performed by Ford Motor Co. that showed the driver-side doors open after the roof was crushed was key evidence. Rollover tests and poor safety ratings from the Insurance Institute of Highway Safety that compared the Ford truck to other trucks in its class were also key factors considered by the jury.

The Absence Of Brake-Shift Interlock In Chrysler Minivans Raises Serious Safety Issues

Over the years, there have been a number of product liability lawsuits involving park-to-reverse problems. The brake shift interlock is a device that prevents a vehicle with an automatic transmission from being moved out of "park," keeping the transmission from being engaged until the driver depresses the brake pedal. The object is for the device to make sure that the vehicles are not inadvertently moved into reverse or drive, whether by a driver or a passenger. Many of the cases involve children who play with the transmission lever while playing in a vehicle. The interlock is especially important for minivans, which are designed for families and provide passengers easy access between the front and back seats. When installed in a minivan, the brake shift interlock is a device separate from any other system. Without the brake shift interlock, minivans are likely to unexpectedly, or with inadvertent touching of the transmission lever, shift from "park" to "reverse" or "drive," causing the vehicle to begin moving even when there is no person seated in the driver's seat or otherwise where no individual has ready access to the brakes. The lack of this important safety feature has caused collisions resulting in serious injury or death. The risk of a rollaway – when the vehicle starts moving as a result of an inadvertent shift – is most significant. Since it is extremely common for individuals to be either in front or behind the car, the potential for serious injury is extremely high. Such occurrences as getting children in and out of the vehicle, or loading and unloading groceries, are prime times for mishaps.

The use of the brake shift interlock has been an industry standard since the early 1990s in almost all vehicles. The Ford Windstar, as well as other minivans that compete with Chrysler's minivans, uses this device. Significantly, one of the companies that made the brake shift interlock standard in its vehicles was Daimler Benz. This company subsequently merged with Chrysler Corporation to form Daimler Chrysler. Daimler Benz had been installing the brake shift interlock as standard equipment on virtually all its vehicles since as early as 1985. In 1994, Chrysler's own inhouse NS-Body Safety Leadership Team expressly recommended that the brake shift interlock be placed in the Chrysler minivans and other vehicles it manufactured. It is most unfortunate that Chrysler elected not to follow that recommendation.

Chrysler's decision was in contrast to virtually all other automobile manufacturers, which equipped minivans and other vehicles with the brake shift interlock. We have learned that it would have cost about $10 per vehicle to install the brake shift interlock. Chrysler's decision has resulted in a number of accidents with injuries and even deaths. Chrysler's deliberate failure to include a brake shift interlock in its minivans is a prime example of a corporations putting profits over the welfare of consumers and disregarding safety. Chrysler has claimed in advertisements that it makes the "safest minivan in the world." The marketing folks even claim that Chrysler goes beyond government requirements to make sure that the best available safety devices are used to protect its customers. Certainly, Chrysler knows full well that a very large percentage of its consumers are families with children. The company also has to know that these families place a high priority on safety for their children. Chrysler intentionally failed to disclose to consumers the material fact that Chrysler minivans, vans, pickup trucks, and SUVs did not contain the brake shift interlock. This is inexcusable!

Ford To Pay $51.5 Million Over Ads For SUVs

All 50 states sued Ford Motor Co. claiming the automaker's advertisements for Explorers and other sport utilities didn't adequately warn consumers about rollover dangers. Ford has agreed to pay $51.5 million to settle these lawsuits. The settlement will include a promise by Ford to share safety technology with the federal government and add stronger language to SUV commercials. Future Ford SUV commercials depicting high-risk driving will include a disclaimer that reads: "Professional driver. Closed course. Do not attempt." Only the "Do not attempt" portion is new. The commercials will not warn of possible rollovers, which in my opinion should have been required by the states' lawyers.

The settlement funds will be shared by the 50 states, Washington D.C., Virgin Islands and Puerto Rico. I agree with Clarence Ditlow of the Center for Auto Safety, who stated, "Unfortunately, this settlement does little for consumers. The Explorer is still subject to rollover and roof crush. Warnings haven't worked." The agreement comes a year after Bridgestone Corp.'s Firestone unit agreed to pay $51 million to settle allegations by the states that defective tires contributed to Explorer accidents. The Florida Attorney General's Office spearheaded the case against Ford.

The settlement between Ford and the states should open the door to claims against other automakers that make SUVs, such as General Motors Corp., Daimler-Chrysler AG and Toyota Motor Corp. Because of their higher centers of gravity, SUVs are generally more prone to tipping over than passenger cars. The claims against Ford by the 50 states were filed in the wake of the Firestone tire controversy. At least 271 deaths have been linked to Firestone tires, mostly mounted on Ford Explorers. Firestone has recalled millions of ATX, ATX II and Wilderness AT tires over the past two years because they are prone to losing their tread. Our experience in cases indicates that the Ford Explorer is just as bad as the defective Firestone tires.

In February, the National Highway Traffic Safety Administration announced that its investigation determined the Explorer was no more rollover prone than comparable SUVs. It is difficult to reconcile this conclusion with the facts. While Ford and Firestone have spent tens of millions dollars to settle hundreds of personal injury lawsuits related to the accidents, a great number of cases are still pending. We are involved in a number of cases involving Explorer rollover. Ford will be required to share with the federal government and any other automakers information about its patented Belt-Minder safety system. The system reminds drivers to buckle up with intermittent beeping. I have to wonder why this technology wasn't already known to NHTSA and other automobile manufacturers.

One source close to the deal hammered out with state attorneys general after lengthy negotiations said the $51 million provided by Ford would be used to help finance U.S. consumer information campaigns and public safety announcements. Our firm has handled a number of individual Explorer rollover and wrongful death lawsuits. Our lawyers don't believe the small amounts allocated to each state will do much good. Consumer information is always good. However, all the information in the world is not going to make a defective vehicle safe, and that's a fact. The settlement with the states will have no material impact on the many individual rollover lawsuits still pending against Ford and Firestone.

Bungee Cords - More Than Meets The Eye

Bungee cords are common, everyday devices, inexpensive and easy to use. They may come packaged alone or attached to equipment, luggage or luggage carts. Bungee cords are made of elastic material, and are usually equipped with metal or plastic J-shaped or S-shaped hooks on each end. They are used to tie down or secure equipment, restrain cargo, and hold items in place in businesses, homes, and leisure activities. However, they possess an inherent danger that has caused injury and permanent vision loss. This seemingly harmless device has all the potential to cause lasting damage in the blink of an eye. One of the characteristics of a bungee cord is its stored energy, which can be released suddenly. The heavy elastic cords from which bungees are made contain tremendous force when they recoil. This sudden release of stored energy results in a high speed flailing hazard when:

- the hook pulls out of the user's hand as it's being stretched into place
- the hook disengages from the attachment point
- the attachment structure fails
- the hook straightens out
- the cord breaks
- the hook detaches from the cord

In each of these situations, the free end of the bungee cord can recoil at extreme speeds and produce significant injury or damage upon impact. The American Medical Association has called for warning labels to be placed on bungee cords. The warnings should include information about the deterioration of the cords, which can cause them to snap unexpectedly. The majority of bungee cord accidents involves injuries to the eyes. These accidents are becoming an increasingly common cause of severe and penetrating eye injuries.

Our office currently represents a young man who lost the vision in one eye when a bungee cord attached to a luggage cart unexpectedly released and struck him in the face. Sadly, the overwhelming number of similar occurrences proves that his injury is not an isolated incident. The U.S. Consumer Product Safety Commission has documented numerous eye injuries caused by bungee cords, and a recent hospital study noted that more than half the patients seen in the emergency room for bungee cord-sustained eye injuries required hospitalization for treatment of their injury. Injuries included bleeding within the eye, lacerations to the eye, traumatic cataracts, and tearing or detachment of the retina from the back of the eye. Most victims suffered a mild-to-serious loss of vision, some had no useful vision, and some had injuries that were so severe that their eye had to be surgically removed. The usefulness of bungee cords may be well known, but their potential for injury clearly is not.

Dallas To Sue Ford Over Police Car Safety

The city of Dallas is suing Ford Motor Co. seeking information on the Crown Victoria police cruiser. This action follows a deadly fuel-tank fire that killed a Dallas police officer. The suit against Ford will seek to gain access to Ford engineers and receive information from the company's testing on gas-tank technologies that are supposed to minimize the dangers of an explosion. Earlier, Ford had refused the City's request for sworn testimony on the tests, claiming the information was confidential. At least 14 police officers have been killed and 11 others hurt in fires triggered by fuel tanks that ruptured in rear or side collisions in the past 10 years, safety advocates said. In October, a police officer was killed when his Crown Victoria burst into flames after it was rear-ended at high speed by a drunk driver. A Dallas city investigation showed that the accident caused the car's gas tank to be punctured in four places. Ford claims that no car could have survived the accident because the driver who slammed into the police car was traveling at 80 miles per hour. In the most-recent incident involving a Crown Victoria, a New York State Trooper was killed just a few weeks ago when a sport utility vehicle rammed his vehicle, causing the police cruiser to burst into flames.

Ford is facing several lawsuits over the safety of its police version of the Crown Victoria. In October, the U.S. National Highway Traffic Safety Administration said, after a 10-month investigation, the agency could not find a defect with the Crown Victoria police cruiser. Dallas officials said Ford is paying to retrofit the some 1,000 Crown Victorias used by the city's police force with a shield that is aimed at protecting the gas tank. It defies logic for Ford to take this action if there isn't a problem with its design.

VIII. NURSING HOME UPDATE

False Documentation In Nursing Home Charts

Why is nursing home documentation important? Accurate documentation provides the nursing home staff with critical information vital to the quality care of residents. However, false documentation is commonplace in some nursing homes. Activities of daily living (such as feeding, bathing, turning, hygiene, etc.) are done by Certified Nursing Assistants or "CNAs." CNAs are supposed to chart when these activities are done to ensure that nursing home residents are receiving appropriate care. Unfortunately, due to heavy workloads and/or understaffing, CNAs don't chart accurately.

Often, documents produced by the nursing home have been altered intentionally before or after litigation has ensued. Pre-suit litigation document falsification occurs for several reasons. One, CNAs are usually overworked and underpaid. Often responsible for more residents that any one person can handle, CNAs don't have the time to complete their daily tasks and complete paperwork too. They may rush through paperwork at the end of the day and record something inaccurately. Second, due to understaffing, there is not enough time to provide the requisite care to each resident and fill out the chart. So, rather than face discipline from supervisors for not completing all tasks, staff will fudge the record and chart that care was given when, in fact, it was not. Third, staff may fill out the chart at the beginning of their shift so that they don't have to bother with it at the end of the day. Fourth, at the month's end, staff will effortlessly fill in blanks in order to make a chart look complete.

For the reasons stated above, it is important to compare dates on the documents to the time of the resident's admission. For example, are there entries in the chart after the resident was discharged or after the resident died? As unbelievable as it sounds, in several of our cases, we found evidence that the nursing home continued to chart days after our client was dead or on days that our client was out of the facility. Usually, when asked to explain such blatantly false documentation, the nursing home employees have no logical explanation. The family of a nursing home resident can use false charting to challenge the credibility of a nursing home chart. False charting can show that a nursing home relied on false information to design or carry out a plan of care for the resident. The falseness of the chart can provide that the nursing home's actions are based upon inaccurate data, thus resulting in substandard, impersonalized care for the resident. Ultimately, the nursing home can be proven incapable of providing proper care or at least not doing it as required and necessary.

Using The Nursing Home Chart And Hospital Records To Establish Nursing Home Liability

Nursing home litigation can be intimidating for many reasons. One of the most challenging aspects is obtaining and deciphering the medical records and nursing home chart. During the investigation of a nursing home case, one should request the resident's file from the facility. Federal regulations provide that a resident be granted access to his or her chart upon 24 hours notice. The facility must provide a copy of the record to the resident within two days of the request. 42 CFR § 483.10 (b) (2) (ii). If the facility fails to do so, notify the state regulatory agency of this failure and inform the facility of this notification. This gives plaintiff the opportunity at trial to establish the defendant's cover up and noncompliance from the outset of litigation. Upon notice of the facility's failure to provide access to the records, the state may perform a surprise inspection of the facility. If so, the impromptu inspection will most likely reveal deficiencies, which may prove useful to plaintiff's case. Keep a separate file of what is produced by the facility before suit is filed so that it can be compared to discovery produced after the suit is filed. Differences between the two can be used to establish cover-up or falsification.

Color copies are a must. Not only are they easier to read, but often there is much to be learned by the differences in ink and highlighting, which are not distinguishable on black and white copies. Once discovery has been served with the complaint, monitor it closely. Follow up routinely. Keep the focus on what was requested. Do not get sidetracked by voluminous documents or fooled into thinking everything has been produced or that all that was produced is responsive. Review every document and confirm that it is indeed responsive to the request. Be prepared to fight over everything requested. Be well versed in discovery case law and stay on top of recent decisions because a motion to compel will be necessary. Keep a file of compel orders from judges within and around the circuit. Provide the court with examples from other cases in which the information requested was not a fishing expedition, but rather a valid exercise of discovery, which revealed discoverable and admissible information. When the documents arrive, have them organized and reviewed by someone knowledgeable in the field of long term care. Nursing home records are different from medical records in other personal injury cases. The medical consultant who reviews other personal injury cases may not be familiar with the nursing home regulations or the documentation required of long-term care facilities. Much of a nursing home's liability stems from the failure to comply with nursing home regulations. The person reviewing the chart must be able to recognize noncompliance with the relevant regulations.

Elderly residents often have numerous hospital admissions, which makes it crucial that the documents are not only chronologically arranged, but also arranged by medical provider. For instance, an individual who has had numerous hospital admissions may have developed a fatal infection during a hospital admission rather than at the nursing home. If the records are incomplete or unorganized, the wrong entity may be sued or a necessary party could be overlooked. One must be able to track the resident's condition from day to day and from facility to facility in order to determine when conditions developed and how the resident responded to the treatment provided. Also, the nursing home may claim that it did all that could be done for the resident, considering the resident's medical history. Very often a hospital successfully treats the resident at the hospital, and then the patient's health declines at the nursing home. Use the hospital's records to show that the resident was not the hopeless case as purported by the nursing home. Thus, the previously existing condition defense fails.

A comparison of hospital records to nursing home records can also be used to rebut other common defenses. For example, if a resident is transferred from a hospital to a nursing home, comparing the hospital discharge summary and physician orders to the nursing home admission record may provide evidence of nursing home failures. The nursing home may claim that it was not aware of the resident's condition, which later deteriorated and resulted in injury. The home claims that had it known of the particular condition, it would have implemented the necessary precautions. However, neither the family nor the resident informed the facility that the condition existed, therefore, claims the nursing home, it had no reason to implement certain precautions.

For example, the hospital identifies a patient as a fall risk. Every fall cannot be prevented, but upon notice of a fall risk, the nursing home is obligated to exercise the necessary standard of care to reduce the risk for falls. Upon admission to the nursing home, the fall risk assessment provided to the nursing home by the hospital is not included in the resident's care plan. As a result, no fall precautions are implemented. The resident suffers a serious fall and resultant injuries at the facility. When questioned by the family as to why fall precautions were not implemented, the facility argues that the resident never exhibited signs of fall risks and therefore, such precautions were not deemed necessary. The hospital discharge summary however clearly shows that while at the hospital and upon discharge, the resident was a known fall risk. Information contained in the hospital discharge summary, which is reviewed by the nursing home prior to or upon admission to the nursing home, shows that the nursing home was aware of the resident's condition. Thus, the lack of notice defense fails. If previously existing conditions create needs in a resident that the facility cannot meet, the nursing home is obligated to deny admission into its facility. Once the documents are accounted for, organized and reviewed by a knowledgeable medical advisor, case theories can then be further developed and the specific documents probative of the theory can be identified.

Supreme Court Reformulates Expert Testimony Rule

In a recent decision, the Alabama Supreme Court made it much easier for plaintiffs to pursue claims against healthcare providers such as doctors, hospitals and nursing homes. In Ex Parte HealthSouth Corporation, 2002 WL 31663618 (Ala. Nov. 27, 2002), the Court held that in medical malpractice cases filed against healthcare providers, expert testimony is not needed where the breach of the applicable standard of care (the alleged negligence of the healthcare provider) can be ascertained by common knowledge and experience.

In this particular case, plaintiff Sharon Heath was admitted to the HealthSouth Medical Center for back surgery. After the surgery was performed, Mrs. Heath was transferred to the rehabilitation section of the facility. She was given Valium, morphine and percodan before she was transferred and was given an additional dosage of percodan upon her arrival in the rehabilitation section. Only two of the four side rails were raised on Mrs. Heath's bed. While in the rehabilitation section, Mrs. Heath needed to use the bathroom and rang the nurses' buzzer to summon a nurse. She contended that she waited "thirty minutes to an hour" for the nurses to come. When they never arrived, Mrs. Heath climbed out of bed by herself and fell and broke her hip. Mrs. Heath and her husband sued HealthSouth.

Alabama law requires that lawsuits filed against healthcare providers must be filed in accordance with the Alabama Medical Liability Act. The Act has several different provisions that provide protection to healthcare providers and often make it difficult to proceed with and prove claims against them. One of the provisions of the Act requires that the plaintiff must submit expert testimony to prove that the defendant healthcare provider breached the particular standard of care, which the plaintiff contends caused the plaintiff's injuries. In other words, a plaintiff must employ an expert witness and present testimony from that expert that the defendant healthcare providers' alleged negligence was the cause of the plaintiff's injury.

In Ex Parte HealthSouth, the plaintiff did not present expert testimony to establish that HealthSouth breached its duty of care with respect to the plaintiff's allegation that HealthSouth's nursing staff failed to respond to her calls for assistance in walking to the bathroom and that, as a consequence of that failure, the plaintiff attempted to walk to the bathroom by herself, fell and was injured. Consequently, HealthSouth filed a motion for summary judgment, asking the court to dismiss the case due to plaintiff's lack of expert testimony. The trial court granted the motion for summary judgment, dismissed the case and plaintiff appealed. The plaintiff first appealed to the Alabama Court of Civil Appeals, which held that expert testimony was not required in this situation. HealthSouth then appealed the case to the Alabama Supreme Court, which affirmed the Court of Civil Appeals' opinion, reversing the summary judgment entered by the trial court in favor of HealthSouth and sending the case back to the trial court for further proceedings.

In prior decisions, the Alabama Supreme Court had held that as a general rule, in a medical malpractice action, the plaintiff is required to produce expert medical testimony to establish the applicable standard of care and a breach of that standard of care in order to satisfy the plaintiff's burden of proof. However, the Supreme Court also recognized an exception to the rule in cases where "want of skill or lack of care is so apparent as to be understood by a layman and requires only common knowledge and experience to understand it." Within that exception, the Alabama Supreme Court had recognized the following situations: 1) where a foreign instrument is found in the plaintiff's body following surgery; 2) where the injury complained of is in no way connected to the condition for which the plaintiff sought treatment; 3) where the plaintiff employs a recognized standard or authoritative medical text or treatise to prove what is or is not proper practice; and 4) where the plaintiff is himself or herself a medical expert qualified to evaluate the doctor's allegedly negligent conduct.

HealthSouth maintained that as a result of its prior decisions, the Alabama Supreme Court had carved out four narrow categories of exceptions to the general rule and expert testimony was therefore required in all other medical malpractice scenarios. Consequently, because the issue in HealthSouth's case, i.e., whether the nurses' failure to respond to a routine, custodial call from a patient was negligent, did not fall under one of the aforementioned exceptions, expert testimony was necessary to prove HealthSouth was negligent according to HealthSouth.

The Alabama Supreme Court disagreed, however, and stated that to adhere to the logic proposed by HealthSouth would impose an impermissible and restrictive standard. It further stated that it would offend "common sense" to require the Heaths to use an expert witness to aid the jury in determining whether the nurses breached the standard of care by completely ignoring for thirty minutes to an hour a call for assistance by a patient who had just returned from the surgical ward following back surgery and who was under doctor's orders not to get out of bed. Accordingly, the Alabama Supreme Court reformulated the exception to the rule requiring expert medical testimony in medical malpractice cases by recognizing first, a class of cases where "want of skill or lack of care is so apparent as to be understood by a layman and requires only common knowledge and experience to understand it." Such cases falling under this particular exception would include those in which a sponge is left in the patient or where, for example, the wrong leg is operated on or, as in the instant case, where a call for assistance is completely ignored for an unreasonable period of time. The court also recognized a second exception to the rule requiring expert testimony which is when a plaintiff relies on a recognized standard or authoritative medical text or treatise to prove the alleged breach or is himself or herself a qualified medical expert. The court then added that to the extent any prior decisions were in conflict with its ruling, the prior decisions were overruled.

In essence, the Alabama Supreme Court opened the door a bit more for persons claiming injuries due to the negligence of healthcare providers. The court broadened the spectrum of cases in which the use of expert testimony is unnecessary to prove a plaintiff's claim against a healthcare provider. In particular, those cases in which custodial care (rather than medical care) is at issue no longer require a plaintiff to employ an expert witness to prove that the defendant hospital, doctor or nursing home was negligent. Certainly, a distinction can be made between medical care and routine or custodial care. If a patient requires professional medical care by a healthcare provider, then expert testimony is still necessary to prove that the medical care was inappropriate. It does not follow, however, that all care and attention rendered to patients by a doctor, a hospital or a nursing home should require proof by expert testimony. To require the use of experts in practically every case filed against a healthcare provider allows the healthcare provider to possibly escape liability through the protections of the Alabama Medical Liability Act. It also makes it more difficult for a plaintiff to proceed with his or her case against the defendant healthcare provider because of the additional expenses that are incurred in employing an expert witness. Further, it insults the intelligence of the jury by saying to them that they cannot make a determination, through their common knowledge and common sense, as to whether the defendant healthcare provider was negligent in certain situations. Although the Alabama Supreme Court in Ex Parte HealthSouth Corporation did not remove the need for expert witnesses in medical malpractice cases, it did clarify and broaden those instances in which expert testimony is not required.

My Thoughts On Medical Cases

Our firm made a decision years ago not to sue Alabama doctors or nurses. We have stuck to that rule and don't regret it. I firmly believe that the overwhelming majority of these medical professionals in Alabama are good, hard-working, competent, and dedicated persons. Of course, there are a few who simply shouldn't be in the medical profession. Fortunately, they are a very few. On occasion, however, even the best make honest mistakes. In such cases, lawsuits can become necessary if there is a serious injury or death. It should be pointed out, however, that punitive damages are never recoverable in any case under Alabama law, except in the case of death, for simple negligence. In medical cases in Alabama, the awarding of punitive damages is as rare as "hen's teeth." This is why I have to wonder why insurance companies that insure doctors and nurses in Alabama charge such "high premiums." I have asked several of my friends in the medical community that very question. Thus far, I haven't gotten a very good response. In fact, several indicated they would make some inquiries with their own carrier, Mutual Assurance.

IX. MASS TORTS UPDATE

Federal Government Takes Action Against Weight Loss Drug Company

The Federal Trade Commission has filed suit against Mark Nutritionals, Inc., maker of a weight-loss product known as "Body Solutions Evening Weight-Loss Formula." According to the FTC complaint, which was filed in U. S. District Court in San Antonio, Texas, there is no scientific proof that any of the ingredients in the product actually promote weight loss. Mark Nutritionals used radio disc jockeys on more than 650 radio stations in 110 cities to sell its Body Solutions product. The FTC says that the false claims included statements that the product would "cause substantial weight loss even if users eat substantial amounts of high-calorie foods, such as pizza, beer, tacos, nachos, cheese, grits, and doughnuts." The product has also been sold by leading retail stores such as Wal-Mart, Eckerd, K-Mart, and Walgreens. Although the company filed for bankruptcy protection in September of this year, it has taken in more than 190 million dollars since 1999 through sales of the Body Solutions products. According to the FTC, the company still sells the weight-loss products on its Website. The FTC is seeking preliminary and permanent injunctions against the company to stop any deceptive claims in radio and television ads. The agency is also seeking refunds for consumers.

An Ephedra Update

Over the course of the last year we have reported on the growing concern over weight loss products containing Ephedra or Ma Huang. Over the past year Ephedra has gained increasing notoriety among trial lawyers, authors of medical literature, consumer groups, and the federal Food and Drug Administration. Interestingly, the dietary supplement industry, which is largely driven by manufacturers of Ephedra-containing products, is not regulated by the Food and Drug Administration. However, the changing landscape surrounding Ephedra may be bringing that to an end. Ephedra is an herbal substance that in many ways is very similar to Phenylpropanolamine (PPA), formerly an active ingredient in cold medicine that was withdrawn by the FDA on November 6, 2000. Prior to that action, the FDA had ordered manufacturers of PPA-containing weight loss products to cease the manufacture, sale, and distribution of PPA-containing weight loss products that combined PPA with caffeine. Ephedra-containing weight loss products contain the herbal equivalent of PPA (Ephedra) and Caffeine (Guarana seed), and do so in varying degrees that are neither regulated nor subject to quality control standards. In essence, the products do herbally that which is illegal to do pharmaceutically.

Recent events concerning Ephedra have caused the U.S. Armed Forces to ban Ephedra products from commissaries and military exchanges worldwide. This action was taken after more than 30 deaths of service personnel had been documented while taking Ephedra products. The recent scrutiny surrounding Ephedra has caused two major Ephedra product producers to announce that they will be phasing out all of their Ephedra-containing product lines. Herbalife and TwinLabs, two large players in the industry, recently announced that they would be phasing out all Ephedra products and instead will substitute Citrus Auranthim as an active ingredient. While on the surface this appears to be a step in the right direction, the jury is still out on whether this is actually a safe alternative. Citrus Auranthim's active substance, Synephrine, is chemically similar to Ephedra and may create the same risks for individuals using these products. Leading medical researchers in the Ephedra area have suggested that the change from Ephedra to Citrus Auranthim may in effect do little to put aside the concerns of the consuming public. Instead, this does little more than place us in the same position we were with Ephedra some four years ago. We will continue to monitor this ever-changing industry in the coming months. Until the federal government gets a handle on the diet supplement industry, the public will remain at tremendous risk.

The Alternatives Will Surely Come

Clearly, since the controversy over Ephedra is creating a demand for alternatives, manufacturers will be quick to roll them out. Some experts foresee similar problems with the alternatives. For example, when the wildly popular drug combo phen-fen was pulled from the market in 1997, people were forced to look elsewhere for weight-loss help. That's when the mysterious Chinese herb known as Ma Huang came on the scene. The natural supplement, which we now know as Ephedra, seemed less risky than the prescription medicines, which had been medically linked to heart valve problems. Consumers are again searching for a safe alternative. Although supporters still contend that Ephedra is safe, some major sellers already are scaling back or abandoning sales of products containing the herb.

Big Dollars Create Big Motivation for Drug Companies

With the Republican victories in last November's elections, we can anticipate the attack on trial lawyers by Big Business will continue. This attack will undoubtedly be felt by the trial lawyers who litigate against the powerful pharmaceutical industry. Few industries in this country have amassed greater wealth with resulting political clout than the pharmaceutical industry. There are now more pharmaceutical lobbyists in Washington, D.C. than the entire number of legislators in both the U.S. Senate and House of Representatives. Unfortunately for consumers, the industry's sway extends to the state level as well. Being the target of Big Business' slings and arrows is nothing new to trial lawyers. It is something we will all live with so long as we choose to stand up against the powerful interests of Corporate America. When the rhetoric begins and the industry resorts to defending itself on the high cost of research and development, at the same time blaming trial lawyers for trying to enrich themselves with no regard for their clients, please keep in mind the following information.

Families USA, a non-profit watchdog organization in Washington, D.C., recently compiled information documenting that the nine largest American-based pharmaceutical companies which sell the top fifty drugs for seniors spent, on average, over twice as much of the companies' revenue on marketing, advertising and administration than they did on research and development. Without dispute, the members of the pharmaceutical industry are not shy when it comes to heavily compensating their executives. Total compensation packages, without even taking into account unexercised stock options, can easily reach into the tens of millions of dollars annually for some pharmaceutical executives. In addition, those unexercised stock options can exceed one hundred to two hundred million dollars for some of their executives. As a simple review of the year-end financial reports of any of the pharmaceutical companies that manufacture the top fifty prescribed drugs will reveal, the industry's claim that exorbitant pricing is necessary to fund proper research and development simply does not hold water. The companies are focusing their resources on marketing their products extravagantly. At the same time, they are heaping wealth upon their highest executives. When you ponder these statistics, consider also that this is the fifth consecutive year in which the rising cost of prescription medication accounted for the largest part of the increase in overall health costs in this country.

The attacks on trial lawyers for pursuing legitimate claims for clients against what has commonly been referred to as "Big Pharma" will certainly come. That is why it is necessary for persons to find out exactly what motivates the drug companies. The industry has placed making unprecedented profits over the safety and well being of persons buying and using its drugs and medicines. Without the court system and trial lawyers, consumers would be at the mercy of "Big Pharma."

X. BUSINESS LITIGATION

New Hampshire Medical Society Joins Suit Against Insurers

The New Hampshire Medical Society has joined a class action lawsuit that charges nine of the nation's largest medical insurers with conspiring against doctors. The suit accuses the insurers of forcing doctors into unfair contracts with reduced payments, withholding payments for medical procedures and failing to provide fee schedules when contracts are negotiated. The insurers have apparently had the upper hand in their dealings with doctors in New Hampshire. The doctors have had great difficulty working under these health plans, according to knowledgeable persons. It is significant that the New Hampshire Medical Association issued a statement saying: "We hope this sends a strong message that physicians are concerned about their ability to provide good patient care."

The two largest insurers in the state, Cigna HealthCare and Anthem Blue Cross and Blue Shield, are named in the suit with seven other large managed care companies, including Aetna, United HealthCare and Humana. New Hampshire now joins 18 other state medical associations in the federal suit, which is filed in Miami. The suit claims insurers violated the federal Racketeer Influenced and Corrupt Organization Act (RICO) by conspiring against the medical industry. The RICO act was designed to break the influence of organized crime. While the suit does not allege any connection between insurers and organized crime, it does accuse insurers of "colluding" to keep payments artificially low.

This is the first time the RICO act had been invoked to prosecute the health care industry. Other state medical associations in the lawsuit include those in Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Louisiana, Maine, Nebraska, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas and Washington. These groups represent over 600,000 doctors. This lawsuit points out how the powerful insurance industry uses its power and influence to run over even doctors and other medical professionals. The bargaining power between the insurers and their "clients" is extremely unbalanced. When you consider that even medical doctors can't stand up to the insurance industry in the bargaining process, it is easy to see why low and middle income citizens don't have a fighting chance in their dealings with the industry.

Walt Disney Goes To Court

Walt Disney Co. has sued Blockbuster Inc. for $120 million. The basis for the suit is a video-supply agreement that Walt Disney claims Blockbuster has violated. The suit was filed in federal court in Los Angeles. Disney claims that Blockbuster has "consistently and deliberately breached its promises" under the agreement. In a statement, a spokesman for Disney said the studio had tried to resolve their dispute but had no alternative other than "to go court."

Cigna To Appeal Order Halting Settlement

Cigna has appealed a federal judge's order that put on hold a preliminary settlement, which the managed care company hoped would rid it of class-action lawsuits by the nation's doctors. Cigna is among several industry leaders targeted with lawsuits claiming the companies routinely underpay doctors on their reimbursement claims. Cigna filed a settlement in East St. Louis, Ill., in a similar case last month. It announced plans to take a $50 million settlement charge, and suggested the agreement would extend to and terminate the Florida litigation. Lawyers for doctors in the Miami case protested. Subsequently, U.S. District Judge Federico Moreno put a stop to the settlement. Cigna filed its notice of appeal, which will be heard by the 11th U.S. Circuit Court of Appeals in Atlanta.

XI. INSURANCE UPDATE

Why Are Liability Insurance Rates Soaring Again?

The insurance industry – aided and abetted by its highly placed political friends – is doing a masterful job of selling the myth that insurance premiums are being increased because of trial lawyers and juries. However, the real truth is quite different. The following "truths" point out how misleading the public relations campaign by the insurance industry has been:

- The amounts paid out in claims haven't really been rising, even though a few outlandish cases make it seem otherwise.
- What drives insurance rates has little to do with claims — and has everything to do with the profitability of the real business that insurers are in: investing in stocks, bonds and real estate.

Those are the conclusions of studies directed by J. Robert Hunter of the Consumer Federation of America. Hunter is an actuary who was insurance commissioner for the state of Texas and federal insurance administrator under President Gerald Ford. The story of insurance rates that emerges from the studies is a stunning departure from the tale that we've long been told.

As persons knowledgeable in finance have conceded, insurance companies are essentially huge investment pools. The real reason insurers sell coverage is to raise money from premiums to invest. The companies don't live or die fiscally from premium dollars received. When interest rates are high and the bond and stock markets are returning good profits, insurance companies seek out as much money as they can get their hands on. In the process, they cut their premiums in order to sell more insurance, offer marginal lines of coverage, and relax underwriting standards. This is true even if that means taking on risks that turn out to be imprudent. The companies need to keep their money invested. As a result, they really don't like to pay claims. When interest rates fall – as they have now – and the profitability of investments plunge, insurers pull back from insuring. Rates are increased to unaffordable levels. Lines of insurance with unappealing claims histories are dropped. When the investments by insurance companies go south, the companies then start crying wolf and seeking tort reform.

The industry's legislative allies in Washington and in the states are preparing for a new round of assaults on the courts in an effort to explain the sudden unaffordability of insurance. While the specific lawsuit limits take various forms, their objective is to deter plaintiffs by making suits harder to bring, harder to win, and less likely to yield enough money to make them worthwhile. It is in the public interest to have a court system that gives access to ordinary people so they can be compensated in a way that juries believe is fitting. Justice denied always has a cost. The insurance industry has been active in politics for years, and has intensified their efforts and campaign giving in recent years. As a result, politicians have been obligated and oftentimes respond when their actions hurt folks back home. When lawmakers restrict a person's right to file a lawsuit, the insurance industry profits greatly. Most recently, in Mississippi and now in West Virginia, we have seen the insurance industry use doctors to force or try to force tort reform on people in those states.

Insurance Rate Hike Put On Hold As California Consumer Group Receives Public Hearing

You may recall that in 1988, California passed a strong insurance regulatory law. It now appears that the law is resulting in lower premiums. An example is the fact that a 15.6 percent rate hike request made by California's second-largest medical malpractice insurer has been put on hold. The action comes as Americans for Insurance Reform (AIR) member, California-based Foundation for Taxpayer and Consumer Rights (FTCR), was granted a public hearing on the request made by SCPIE Holdings and its related subsidiaries. Under Proposition 103, California's insurance reform law that passed by voter initiative in 1988, the state's insurance department must hold public hearings on any rate hike if requested by the public. Other states should enact this kind of stringent rate regulation in order to protect consumers from unwarranted rate increases.

According to AIR spokesperson J. Robert Hunter, "just as the Prop. 103 miracle has dropped automobile insurance rates from among the highest in the nation to below average, medical malpractice rates are also being controlled by this powerful combination of maximizing both competition and regulation." Hunter, an actuary, is Director of Insurance for the Consumer Federation of America, former Texas Insurance Commissioner and former Federal Insurance Administrator under Presidents Carter and Ford. Passed by California voters in 1988 despite a record $80 million campaign against it by the insurance industry, Proposition 103 gives state regulators and the public powerful tools to investigate and limit the insurance industry's rates and practices. Studies have shown that premiums in California began to drop only after the passage of Proposition 103.

Proposition 103 allows consumers to challenge rate increases. Under that law, the California Insurance Department must grant a hearing for a challenge to any increase above 15% for commercial lines of insurance and 7.5% for personal. The nation's doctors, who have accepted the insurers' propaganda and joined with these companies in an assault on their own patients' rights, should check into this situation. Doctors should examine the insurance industry and its propaganda more carefully before backing the industry's attack on patients' rights. The insurance industry increases premiums on doctors, limits payments to injured patients and walks away with the profit. By forcing insurers to open their books, doctors will find that their real battle is with the insurance companies, not the legal system. Our state is a prime example of insurers that write coverage for Alabama doctors, taking advantage of a myth. It is virtually impossible for any person to win a medical malpractice lawsuit against a doctor in Alabama. Yet, the insurance companies continue to "cry wolf."

Another Insurance Scam

Academy Life, an insurance company based in Pennsylvania, has settled a major insurance fraud case. The company sold life insurance to approximately 93,000 soldiers and sailors between 1991 and 1998. The settlement calls for Academy Life to pay $160 million to settle the accusations that its sales personnel posed as recruiters for the Non-Commissioned Officers Association (NCOA) and paid kickbacks to use the name of the Association. As many of you already know, all U.S. military personnel get low-cost life insurance policies from the government when they enlist. Academy Life apparently struck a secret agreement with the NCOA in the early 1990s in which it agreed to pay the group $700,000 each year, plus 1 percent of all premiums. In exchange, the NCOA would assist in getting access to military bases, normally off limits to all insurance agents.

Academy Life agents would pose as NCOA "membership developers." These agents would visit military personnel claiming to be recruiting for the NCOA, which incidentally is the nation's largest military association. The sole mission and task of the agents was to sell insurance and had nothing to do with recruitment of members. The military banned Academy Life from defense department installations in 1998. The government investigation revealed that NCOA leaders were aware of the problem. However, no action will be taken against the group for some reason. I understand that the NCOA leaders claim that Academy Life had "tricked" them also. The NCOA has approximately 65,000 members and is chartered by Congress to advance the interests of service members.

Conseco Files Third Largest Bankruptcy In U.S. History

Insurance and finance company Conseco, deep in debt and facing a federal investigation of its accounting practices, has filed for Chapter 11 protection. This will be the third-largest bankruptcy ever in U.S. history. It should be pointed out that the filing does not include Conseco's insurance operations, which the company and insurance regulators say remain financially sound. Conseco Finance is insolvent after failing to make a $4.7 million payment due Dec. 4. The unit grew out of the parent company's acquisition of Green Tree Financial in 1998 at a cost of $6 billion. That unit, specializing in high-risk mobile home loans, became a burden as loan default rates rose. In 2000, Conseco's board ousted Chairman and Chief Executive Stephen Hilbert — a one-time encyclopedia salesman who co-founded the company and parlayed his wealth into horse racing and philanthropy, including securing naming rights to the Indiana Pacers' Conseco Fieldhouse. The firing came after Hilbert piled up $8.2 billion in debt.

XII. ENVIRONMENTAL CONCERNS

Abandoned Army Chemical Weapon School Still Plagues Alabama Community

Fifty-six years ago, Steele, Alabama, was home to Camp Sibert, the country's largest chemical weapons school during World War II. From 1942 to 1945, Camp Sibert trained approximately 5,000 troops with chemical agents such as mustard gas and Lewisite. Both chemicals cause severe blistering and can be fatal if inhaled. Nearly a decade ago, the Army sold the 38,000 acres of land that the camp was situated on for a few dollars per acre. The Army claims to have removed tons of debris prior to the sales, but it is now clear that a number of hazards still remain. Unexploded artillery shells are believed to be the biggest threat on the land. Studies have also found that area groundwater may be highly contaminated with mercury, lead and a variety of chemicals. The Army Corps of Engineers estimates that cleaning up the old Camp Sibert property would cost nearly 70 million dollars. Only $8.1 million were spent on clean-up before the sale of the property to area residents. Many residents report finding unexploded shells and large tracts of dead vegetation. The Army Corps of Engineers estimates that as much as 20 billion dollars is needed nationally to remove hazards from nearly 9,200 formerly used defense sites ranging from old U.S.O. halls to areas like Camp Sibert. Until Congress appropriates the money to conduct these cleanups, communities like Steele, Alabama will face terrible environmental problems on a daily basis.

Mercury Pollution Uncertain Decades After Anniston Plant Closed

It seems that Anniston residents will never see the end of their health problems caused by Corporate America. For nearly 20 years, a chemical company discharged unknown amounts of mercury into the Anniston area. For more than 30 years after the mercury facility closed, the situation was overlooked. Now, nearly a year and a half after an *Anniston Star* investigation revealed that mercury was released from Monsanto's – now Solutia's – chemical plant in the 1950s and 1960s, the full extent of local mercury pollution still is not known. There may be some good and bad news concerning this problem. The good news is that the Environmental Protection Agency claims it has not found "worrisome levels" of mercury in residential areas around the plant. The bad news is that the source of this statement is the EPA. The Alabama Department of Public Health says mercury levels in local fish are low, though the fish are much too contaminated with PCBs to eat. The company's own data shows mercury levels that are up to four times normal around Choccolocco Creek. There has been no new testing for mercury since The *Anniston Star's* investigation in July 2001. ADEM said nothing has indicated that mercury is an urgent problem here, but mainly it has not required new testing because it is hampered by limited resources, and the agency is focusing on PCB work.

Most people recognize mercury as the liquid metal in traditional glass thermometers. It's also in amalgam dental fillings and batteries. It can be very harmful if swallowed or inhaled. Once that kind of mercury – elemental mercury – gets into the environment, bacteria changes it into a more worrisome type called methyl mercury. Methyl mercury accumulates in animals – especially in fish – and is extremely dangerous for children and pregnant women. It can cause problems ranging from developmental delays to mental retardation, deafness and blindness. From 1952 to 1969, the Monsanto plant used elemental mercury to make chlorine, a component of the polychlorinated biphenyls, or PCBs, that have contaminated the Anniston area. According to the Star investigation, as much as 50 tons of mercury were lost in the process and discharged from the plant.

The former Monsanto plant is located on a public highway in western Anniston. Significantly, it is in a residential area. Wastewater from the plant goes through nearby neighborhoods, by way of ditches that flow into Snow Creek, then south to Oxford into Choccolocco Creek, then west into the Coosa River and Lake Logan Martin. Clearly, PCBs and contamination on the plant site have to be the top priority for ADEM. Unfortunately, ADEM has just one staffer on the Anniston problem. As a result, the agency has not yet been able to look closely at the Choccolocco floodplain data from 2000. Nor has ADEM figured out where additional work needs to be done.

Company Ordered To Pay $3 Million For Polluting

Koppers Industries Inc., based in Pittsburgh, admitted to breaking air and water pollution regulations at a former plant outside Birmingham and has been ordered to pay $3 million in fines and restitution. U.S. District Court Judge Lynwood Smith ordered the coal production company to pay a $2.1 million fine and $900,000 in restitution to the Black Warrior-Cahaba Rivers Land Trust. The fine and restitution were for pollution violations that occurred in 1997. Koppers also received three years' probation and was ordered to implement an environmental compliance program at each of its U.S. facilities. Earlier, the company had entered guilty pleas to three counts of environmental violations. The company admitted to discharging wastewater with an amount of ammonia that was above the 35 parts per million limit allowed under a water pollution control permit for the plant. The company also admitted discharging a concentration of about 50 parts per million after a Koppers' employee falsely stated the amount as 28.5 parts per million on a wastewater discharge report. The violation of the Clean Air Act came when the company admitted that in 1997 employees improperly used environmental protection equipment, resulting in emissions. Koppers produced coke and coal byproducts at the plant until it was closed in 1998.

How Much Is Too Much?

A lawsuit filed in New Jersey brings into focus an environmental problem that few American citizens fully understand. A couple living on the banks of the American River near a missile factory never realized that they or any of their family were being exposed to dangerous conditions. Thirteen years after the family moved into their home, the husband and two of his daughters developed numerous health problems, including cancerous and benign tumors as well as thyroid-related problems. Five years ago, the family learned that the home they bought in 1970 lies on the edge of a plume of underground water polluted with waste from the nearby missile factory. Among the chemicals found in the local drinking water is perchlorate. This chemical is the main ingredient of solid rocket fuel. For decades, millions of Americans have been unknowingly exposed to perchlorate through their local water supplies. The chemical is known to be toxic. However, the level at which it becomes dangerous in drinking water is the subject of a fierce debate between the EPA and the Pentagon and its defense-industry allies. The U.S. government has never established a nationally enforced standard. Until it does so, the poisonous chemical is known to be in the environment in amounts that could be causing the slow spread of serious diseases on a large scale.

XIII. PREMISES LIABILITY UPDATE

Jury Award In Apartment Pool Drowning

A Kansas jury awarded nearly $7.2 million in damages to a Kansas City woman whose teen-aged son drowned in an apartment complex's swimming pool. The wrongful-death lawsuit was filed after the 17-year-old drowned in 1999. The drowning occurred in 8 feet of water after the victim's shirt became entangled in a broken pool drain cover. Water in the pool was so cloudy that the victim was not found until another swimmer tripped over his body. A maintenance worker testified at trial that he told a manager days before the accident that the drain cover needed to be fixed and that nothing was done. Jurors returned a verdict of about $2.2 million in actual damages against a realty company, the apartment owners. Jurors later awarded $5 million in punitive damages, for a total of $7.2 million.

XIV. WORKPLACE HAZARDS

An Unsafe Workplace

Our firm represented Bruce and Vickie Cochran in a personal injury case against Dothan-based Covenant Steel Warehouse, Inc. filed in Houston County, Alabama. Mr. Cochran was employed by Airgas-South, Inc. and sold welding supplies and other products to Covenant Steel. One day while Mr. Cochran was walking through the Covenant Steel plant with the plant manager in a place where he was expected to be, an employee of Covenant Steel dropped a 1,500 pound steel beam from a crane onto Mr. Cochran's leg. During discovery, we learned that the company had failed to properly train and supervise the crane operator. We also learned that the crane operator had improperly rigged the steel beam. As a result of the accident, Mr. Cochran had his left leg amputated below the knee. Our client will never be able to perform the same type of work that he was doing before his injury. He subsequently lost his job. Other restrictions will limit his employment opportunities and have adversely affected his future earning capacity. During discovery, we found that the company had no formal training and safety programs in place. Many of the crane operators were simply not well trained and were not competent to operate a crane in a workplace. The crane operator in our case failed to give any warning that he was about to move a beam near people in the plant. When the inexperienced crane operator saw the two men in his path, he panicked, and lost the beam. The improper rigging also contributed to the beam falling. The case settled for a confidential amount after a jury was selected. Alan Livingston of Dothan, who is a good friend and an excellent lawyer, worked with Julie Beasley from our firm on this case.

Jim Walter Blamed For Deaths

I attended a briefing in Tuscaloosa last month held by the U.S. Mine Safety Administration for families who had suffered the loss of loved ones. Federal officials blamed Jim Walter Industries for safety violations that contributed to the 2001 accident that killed 13 miners. This has been called the worst mine accident in this country since 1984. After the briefing for the families and their lawyers, Dave Lauriski, head of the U.S. Mine Safety and Health Administration, held a separate news conference in Tuscaloosa, which I attended. Lauriski reported that Jim Walter Resources was being cited for 27 violations, eight of which contributed to the accident and deaths.

A key violation was failure to start evacuating the mine after four men were injured in an initial underground explosion. We felt, based on our own investigation, that the roof problems were a major factor in causing the 13 deaths. These problems were caused by a number of contributing factors. Jim Walter was not the only culprit. Others will share blame for what happened on that fateful day. Instead of sending the men in, all miners in the mine should have been evacuated. The second, larger explosion in the deep-shaft mine should never have occurred. Jim Walter Resources has denied that any safety flaws played a role in the explosion, which is absolutely shocking.

The accident happened at Blue Creek No. 5, located in Brookwood about 50 miles southwest of Birmingham. At 2,140 feet, the mine is the deepest vertical shaft coal mine in this country. On September 23, 2001, part of the mine roof collapsed and falling rock hit a battery charger, causing sparks that ignited methane gas. A subsequent, larger explosion fatally injured the 13 miners. Violations cited by the agency included, among others, a failure to properly support mine roofs and inadequate "dusting," a procedure aimed at keeping down coal dust. While there were a number of very serious violations, the dusting problem was a critical factor in the severity of the second explosion. Clearly, the 13 deaths should never have occurred. In my opinion, this mine should have been shut down until such time as some extremely serious safety problems that had existed prior to September 23rd were corrected. The maintenance crews that were sent into the mine on Sunday should never have been sent in by Jim Walter. However, there will be a number of companies and other entities that will share responsibility for this disaster. You can read MSHA's complete report by going to: www.msha.gov.

UMWA Critical Of Report

The United Mine Workers of America International has criticized the federal government's investigation into the mining accident. The mineworkers union calls the review too limited in scope. Its own probe of the accident found the same problems identified by the Mine Safety and Health Administration as well as several others. The union's review has not been released. It is pretty obvious that the union believes MSHA enforcement actions played a role in the accident at the mine. The union has repeatedly accused the government of lax oversight that contributed to conditions that led to the accident. Jim Walter has contended that the deaths resulted from an unavoidable accident. It is significant that the mine had been cited for 31 safety violations that occurred before the explosions in September of 2001. Government records show no indication that the problems were fixed. However, the company claims they were in fact corrected.

Jury Awards Ex-Miner $1.5 Million

A Jefferson County jury has awarded $1.5 million to a former mine worker in a wrongful termination case related to the deadly September 2001 mine explosion in Brookwood. After a two-week trial, the jury ruled against Jim Walter Resources, awarding the former miner $1 million in compensatory and $500,000 in punitive damages. The veteran miner, who had worked at mines for 27 years, was in Blue Creek Mine No. 5 when 13 miners were killed. He was about 800 feet away when the explosion occurred that killed the other miners. The plaintiff was diagnosed with severe posttraumatic stress syndrome and could not return to underground mining. He was off work for about 12 weeks. Upon returning to work, he was given a job assignment above ground. A workers' compensation claim was then filed by the plaintiff against Jim Walter. Shortly after filing the claim, Jim Walter told the plaintiff "to get back underground, or they had no job for him." The jury found that Jim Walter had forced out the plaintiff in retaliation over his filing the workers' compensation claim. Doctors had stated that the plaintiff was not fit to return to the mines underground. Jim Walter contended during trial that it had not terminated the plaintiff.

XV. TRANSPORTATION

Alcohol-Related Crash Results

The National Highway Traffic Safety Administration engaged in a study that tracked the locations of fatal alcohol-related accidents throughout the country. This was actually broken down to the county level in each state. The results reveal that while the death toll is higher in the most populated counties, the state-by-state death rates show that gains in the fight against drunken driving have not been uniform around the country. Nationally, the rate of deaths in alcohol-related crashes dropped by more than half since 1982. NHTSA compiled state-by-state statistics to encourage states at the bottom of the rankings to get tougher on drivers who drink. It will be interesting to see how effective the crackdown on drunken and drugged drivers turns out. NHTSA and law enforcement agencies nationwide were engaged in a crackdown with sobriety checkpoints and increased patrols from December 20th through January 5th. NHTSA defines a fatal alcohol-related accident as one that occurred where a driver, pedestrian, or cyclist had alcohol detected in their blood. In most states, it is legal to drive with less than 0.08 percent blood alcohol content.

While there was a marked improvement in the death rate involving alcohol use starting in the early 1980s, there has been a shift in direction. Deaths linked to alcohol use fell nearly every year in the 1980s and 1990s, finally reaching a low of 16,572 in 1999. However, the number of people killed in alcohol-related crashes has risen slightly. Last year, 17,448 persons were killed, accounting for 41 percent of all U.S. traffic deaths. Many highway safety advocates believe that Americans have become complacent about the dangers of drunken driving. When you are still having over 17,000 people killed each year as a result of drinking and driving, there is still a most serious problem. The President of MADD blames high death rates in some states on the lack of political leadership. Clearly, drivers need to be held responsible when they choose to drink and drive. It is up to those with political power and influence to keep up the fight against drunken drivers. To get a county-by-county breakdown, go to the NHTSA county-by-county maps at: www.nhtsa.dot.gov.

$27 Million Verdict Awarded In Kentucky

A Kentucky jury awarded $27 million to a young lady who was 17 years old at the time of her motor vehicle accident that resulted in serious and permanent personal injuries. A garbage truck, operated by Monarch Environmental Inc. of Bowling Green, Kentucky, had stopped on the wrong side of the road at the bottom of a hill. The award is one of the largest in a personal injury case in Kentucky history. The 17 year old, who will need a tremendous amount to meet her needs, has a life expectancy of 61.6 more years. The trial lasted for six weeks. The jury found that the truck and its operator were 100 percent responsible for the accident, which left the victim in a coma for 57 days. The teenaged victim was disfigured, walks with a limp, has double vision and lost her short-term memory, among other injuries. The jury awarded more than $1.34 million for current and future loss of income; almost $11.2 million for pain, suffering and mental anguish; nearly $500,000 for medical expenses to date; and more than $14 million for future medical care.

Evidence at trial indicated there had been many complaints from local residents about garbage trucks parking in the wrong lane while loading, resulting in several near misses. One witness testified that he would have hit the garbage truck if he hadn't swerved, and that was just five minutes before the Houchin crash. The company's own training tapes said drivers should not go left of the centerline. Doctors who testified described the victim as "among the top two or three most brain-damaged people they had ever seen." A number of expert witnesses testified in the case, including neuropsychiatrists and neuropsychologists, rehabilitation experts, vocational and medical economists, a life-care planner and an accident reconstructionist.

American Airlines Settles *"Economy-Class Syndrome"* Suit

The first settlement of a lawsuit claiming that sitting in a cramped seat on a long flight caused the development of potentially deadly blood clots in a passenger's legs has occurred. American Airlines has agreed to the settlement. The settlement of the U.S. lawsuit could affect a potentially precedent-setting British case against 27 international carriers. Those carriers are accused of not warning passengers that sitting through long flights in coach seats can cause Deep Vein Thrombosis (DVT). The malady has been labeled "economy-class syndrome." The case reportedly involved a woman flying from Paris to the USA. The British case, which involves more than 50 plaintiffs, is pending in a London court. Plaintiffs' attorneys have attributed at least one death to DVT developed during a long flight. It is also contended that the low level of oxygen in the cabin air aboard jetliners contributes to DVT.

XVI. HEALTHCARE ISSUES

A Nationwide Movement

The Congress of California Seniors is part of the Prescription Access Litigation project, a Boston-based coalition of nonprofit organizations that has been organizing lawsuits against drug companies to end practices that it contends raise prices. Off-label promotion has become an issue lately. The U.S. Attorney's office in Boston, 47 states, and the District of Columbia are investigating whether Warner-Lambert illegally promoted off-label uses for Neurontin, an epilepsy medication. Warner-Lambert is now owned by Pfizer Inc. This group is working to reduce wholesale drug prices, which will reduce the retail cost of drugs to consumers. Clearly, something must be done to reduce the cost of drugs. The pharmaceutical industry is making record profits and consumers are hurting. That is a bad combination and can't be tolerated. A balance must be reached and if it takes lawsuits to do it, so be it.

FDA Cracks Whip On Misleading Drug Ads

The new boss at the Food and Drug Administration is apparently taking his job seriously. FDA Commissioner Mark McClellan, the new chief, is making an effort to halt misleading drug ads. McClellan, a physician-economist and longtime adviser to President Bush on health policy, has promised quick action to stop drug advertisements that mislead patients into thinking a medication is better or safer than it really is. Dietary supplement manufacturers should tread carefully, too, since the FDA plans to take more aggressive action against them if they make unproven health claims.

It is real hard to justify the expensive ad campaigns by the drug companies, even if they are completely true and accurate. However, misleading ads certainly have no place. To date, the FDA's chief counsel hasn't blocked any attempt to stop a misleading ad. However, the new Commissioner says the FDA will enforce the law in this area and will go to court if necessary. The FDA is responsible for making sure the $2.7 billion worth of drug ads splashed across the television, newspaper, and radio drug ads each year are fair and accurate. It should be noted, however, that the FDA warning letters to the offending manufacturers have dropped by almost two-thirds in the last year alone. "The bottom line is they're not doing enforcement," Dr. Sidney Wolfe of Public Citizen said of the FDA's attempts to stop false drug ads. Misleading advertising "can make the difference between someone getting the right drug and the wrong drug." Dr. Wolfe believes it is a health and safety issue. Critics argue that drug ads too often make the pills seem a panacea while downplaying side effects. Congressional investigators pointed out that misleading ads often are off the air by the time the FDA gets around to doing something about it with their makers.

A Bush Administration policy change this year required the FDA's chief counsel to review every warning letter before they are mailed to drug companies. So far this year, the FDA has issued only 27 letters ordering drug companies to stop a misleading ad, down from 73 such warnings last year and a high of 157 in 1998, according to a report by Public Citizen. The policy change "had a chilling effect" on an already weakening regulatory process, Dr. Wolfe said. Another problem is repeat offenders. The FDA can't fine drug companies over ads, and that is part of the problem. For repeat offenders, "issuing warning letters is not enough," according to Commissioner McClellan. The FDA says it won't be afraid to go further in cases of recurrent patterns of abuse. Truthful advertising is just one part of what McClellan called a top priority for his tenure at the FDA: getting more information to consumers to help them understand the health consequences, good or bad, of the products they choose.

The new Commissioner's other priorities are improving patient safety and anti-terrorism work that includes strengthening the security of the food supply and working to bring antidotes for biological, chemical or radiation attacks to market. And it's not just manufacturers of heart or cholesterol pills that should be wary of the new regulator in town, based on his initial statements. Makers of dietary supplements — which sell with little federal oversight to ensure they're safe or work — also make scientifically unproven claims about their products' benefits. Apparently, the FDA will take more aggressive steps to stop that sort of thing. Time will tell whether their words are backed up by auction.

U.S. Lists Hormone Therapy As Carcinogen

Estrogen replacement therapy has joined the official U.S. government list of cancer-causing agents, along with wood dust and ultraviolet light. A big study published in July showed that hormone replacement therapy increases the risk of several kinds of cancer, including breast cancer, although it seems to lower the risk of colon cancer. It also raises the risk of heart disease. The report also lists wood dust as a "known human carcinogen." The report, part of the National Toxicology Program's biennial report on cancer-causing agents, says unprotected workers in sawmills, furniture factories and similar places have a higher risk of cancers of the nasal cavities and sinuses. The report lists broad-spectrum ultraviolet light, both naturally produced by the sun and the light made by tanning beds and lamps, as a known cause of cancer in people. The various separate kinds of UV light, such as UVA, UVB and UVC, are listed as probable carcinogens because it is not clear whether each one on its own alone could cause cancer. According to the Department of Health and Human Services, the total of substances 'known' or 'reasonably anticipated' to pose a cancer risk, has now risen to 228.

The NTP, part of the National Institute of Environmental Health Sciences, one of the National Institutes of Health, updates its list of known and suspected cancer-causing agents after lengthy study and scientific reviews by three expert panels of government and non-government scientists. Also new to the list are nickel compounds and beryllium and its compounds commonly used in industry. Beryllium was previously listed as "reasonably anticipated to be a human carcinogen." About 800,000 workers are exposed via inhalation of beryllium dust or dermal contact with products containing beryllium, according to the Department. Workers with the highest potential for exposure include beryllium miners, beryllium alloy makers and fabricators, ceramics workers, missile technicians, nuclear reactor workers, electric and electronic equipment workers, and jewelers. Joining the list of reasonable cancer suspects is IQ, or 2-amino-3-methylimidazo(4,5-f)quinoline, which is formed during direct cooking with high heat of foods such as meat and eggs and which is also found in cigarette smoke. The full report can be found on the Internet at http://ntp-server.niehs.nih.gov.

Study Shows Pacing Defibrillators May Damage Hearts

The common practice of "pacing" the heartbeat in patients may damage their hearts, according to a report last month on a study of heart devices that was terminated early because too many patients died. The Cleveland Clinic cardiologist who led the study concluded that physicians should switch off the pacemaker function on dual-chamber implantable defibrillators, the type implanted last year in Vice President Dick Cheney. The reason was it may knock the heart out of rhythm and hasten heart failure. The pacemaker uses a mild electrical impulse to continuously control the heartbeat. Defibrillators are implanted in about 100,000 people annually to control an irregular heartbeat, which is often a precursor of a heart attack. A defibrillator is designed to deliver a powerful shock to the heart if it falls out of rhythm or speeds up too much.

Many of the battery-powered defibrillators currently in use can deliver electric shocks to both chambers in the heart's right side, which pumps blood to the lungs. The left side of the heart pumps re-oxygenated blood returning from the lungs back into the body. The advantage of delivering electric impulses to both the heart's right atrial and right ventricle chambers is that it helps coordinate the signal to the heart and is useful for diagnostic purposes. In a majority of patients with the implanted dual-chamber defibrillator, the device's pacemaking function is also activated. But activating the pacemaker function in the right side of a patient's heart may be throwing off synchronization with the left side, causing the heart to lose efficiency and deteriorate, said the report published in the Journal of the American Medical Association.

"It's easily conceivable that, with the number of defibrillators going in, if three-quarters are being programmed the wrong way, we could be hurting patients," study author Dr. Bruce Wilkoff said in an interview with Reuters. Out of 506 patients implanted with defibrillators in the study, half were programmed to pace their heart at 70 beats per minute as well as to shock both right-side chambers in the event of an arrhythmia. The other half were programmed to shock the right ventricle in the case of an arrhythmia but only to activate the pacemaker function if the heartbeat fell below 40 beats per minute. A normal heartbeat ranges roughly between 50 and 75 beats a minute. In the study group whose pacemaker function was activated, and who were expected to be healthier, 23 died and 43 became ill enough to require hospitalization. In the other group, 15 died and 30 were hospitalized.

The committee overseeing the study had seen enough and called a halt a few months early before any more patients were enrolled. Medtronic Inc., which makes defibrillators and pacemakers, said the study was flawed because the patients who participated did not need their hearts paced for them. “Physicians know when the patient should have pacing and when they shouldn’t,” Medtronic spokesman Scott Papillon said. Cheney, who has suffered four heart attacks since 1978 and was diagnosed as being at risk of an irregular heartbeat, was implanted with Medtronic’s dual-chamber defibrillator last year. The devices used in the 506-patient study were made by St. Jude Medical, which provided funding. Dr. Wilkoff said that pacemakers, which have been around for half a century, still have an important use for patients with ailments that dangerously slow down their heartbeats. Patients with defibrillators who do not need the pacemaking function should probably not use it, Wilkoff said. According to the doctor, the problem is that many patients who have the devices also take medications that slow their heartbeats, making them sluggish and making them candidates for the pacemaking function. The next generation of heart devices delivers impulses to both sides of the heart to ensure synchronization, Dr. Wilkoff said, though implanting electric leads on the left side was more difficult.

Group Sues Pharmacia Over Drug Promotion

The Congress of California Seniors, a consumer group, has sued Pharmacia Corp. over its promotion of Bextra®, the pain drug. The claim is that the pharmaceutical company is circumventing federal marketing regulations. The suit was filed in state court in Los Angeles, alleging that Pharmacia is illegally promoting the off-label use of Bextra®. While doctors may prescribe drugs in any way they see fit, drug companies can only market their products for indications approved by the U.S. Food and Drug Administration. Drug companies can share research and journal articles with doctors that discuss unapproved uses. However, they can’t actively suggest the doctors incorporate those uses in their practices. The lawsuit says that Pharmacia hired Scirex, a clinical testing firm owned in part by Omnicom, a large advertising conglomerate, to study Bextra® for use in cases of acute pain caused by impacted molars. Bextra® is not approved for acute pain but is approved for chronic pain associated with arthritis, osteoporosis, and menstrual cramps, according to the suit. The results of the study were published in the Journal of the American Dental Association. According to the lawsuit, the drug’s sales were increased. The lawsuit alleges that Pharmacia orchestrated the study, and violated the law, when the FDA specifically refused the company’s request for an indication for acute pain.

A Shadow Case On Drug’s Promotion

Prior to its acquisition by Pfizer, top executives at Warner-Lambert approved a detailed plan by subordinates to market Neurontin for unapproved uses. This is according to internal company memoranda unsealed in a whistle-blower case. Under federal law, doctors can prescribe drugs in whatever way they believe is best for their patients. However, it is illegal for pharmaceutical companies to market their products for uses that have not been approved by the Food and Drug Administration. The memoranda, dated in 1995 and 1996, say that executives on Warner-Lambert’s “new products committee” agreed that the company should not conduct the large clinical trials needed to gain government approval of the use of Neurontin for migraines, social phobia, and other conditions. Instead, the company planned to promote Neurontin for those unapproved uses by performing small studies and having the results published in medical journals, according to the memoranda.

The executives on that committee in 1996, according to documents, included the top officials of Warner-Lambert. Other memoranda allegedly explain how Warner-Lambert spread the word about those small clinical studies by inviting doctors to continuing-education classes, lectures at hospitals, dinners and weekend retreats. The company also hired advertising agencies to help write the medical journal articles. The company is alleged to have hired doctors to speak to their peers about Neurontin. These doctors were expected to present positive messages about the drug and were paid fees of $500 to $2,000 a speech. According to reports, all of this is documented by memoranda and invoices from advertising agencies that organized the events.

The United States attorney's office in Boston is conducting criminal and civil inquiries into Warner-Lambert's marketing of Neurontin. In addition, 47 states are jointly pursuing their own criminal and civil investigations of the matter. The whistle-blower, who filed the original suit, said that he had resigned after finding that the company was involved in a nationwide marketing campaign that he believed was illegal and was endangering patients. At issue in the case are tens of millions of dollars that taxpayers paid for Neurontin when doctors prescribed it for Medicaid patients for unapproved uses. The whistle-blower worked for Warner-Lambert in 1996.

Pfizer acquired Warner-Lambert in 2000 and says that the lawsuit related to activities that took place years before the acquisition and that Pfizer employees did not promote drugs for unapproved uses. Pfizer has also said it is not aware of any credible evidence showing that Warner-Lambert employees made false claims about the drug. Pfizer still sells Neurontin exclusively. In one memorandum in which Warner-Lambert agrees to promote Neurontin for migraines, executives detail the results of an initial study the company performed in Europe that concluded the drug was not effective for that problem. The memorandum says that the results of coming studies would be published only if they conclude that Neurontin worked for migraines. This is a tactic often used by drug companies that can distort doctors' impressions about medicines. These documents, if authentic, show a conscious decision by upper-level management to circumvent the FDA approval process.

According to reports, the Warner-Lambert marketing plan worked. A memorandum in 1995 reveals that 25 percent of Neurontin's prescriptions were written for unapproved uses. Neurontin's sales this year are expected to be $2 billion, with more than 80 percent of its prescriptions written for conditions other than epilepsy. Reports reveal that one of the more interesting tactics used by Warner-Lambert and the advertising agencies it hired to promote Neurontin concerned a 1996 dinner at the California Culinary Academy in San Francisco. In a draft of a letter written to a doctor by an advertising agency, marketers offered the doctor $200 to memorize questions about Neurontin that they wanted him to drop casually into the dinner conversation.

Magazine Says Chickens Contain Harmful, Drug-Resistant Bacteria

Consumer Reports, a well-respected consumer magazine, says it found harmful, drug-resistant bacteria in nearly half the chickens it bought from stores nationwide. The bacterium campylobacter, which can cause food poisoning, was found in 42 percent of 484 fresh broiler chickens tested for a survey in the January issue of Consumer Reports. The magazine said that 12 percent of the chickens had salmonella, another bacterium. Both bugs can cause diarrhea, fever, abdominal pain and sometimes even death. The report said people sickened by the bacteria would stay sick longer, and treatment would be more difficult for doctors to treat, because 90 percent of the campylobacter samples and 34 percent of the salmonella resisted treatment by commonly used antibiotics such as tetracycline. "That's a very uncomfortable starting point, and it goes to reinforce the growing concern about the use of antibiotics in livestock production," said David Pittle, vice president for technical policy at the magazine's publisher, Consumers Union. The Sierra Club and the International Agricultural Trade Association had similar results from a smaller-scale survey also released to the public. The tests involved 200 whole chickens and 200 packages of ground turkey.

Bacteria can become stronger if they survive drug treatment. Many have blamed the increasing prevalence of such bacteria on doctors' over-prescribing antibiotics and patients' misusing them. Other groups now argue that farmers who use antibiotics in barnyard animals to prevent illness and speed growth are compounding the problem. They want Congress and the president to enact a law restricting use of the drugs in animals. Pharmaceutical companies and producers have fought back and claim that the drugs make food safer and protect animals. The Food and Drug Administration regulates animal pharmaceuticals. It proposed guidelines in September for drug makers to rely on when determining whether new animal drugs would increase the problem of drug-resistant bacteria. The agency also banned a poultry antibiotic two years ago because of evidence it makes people more vulnerable to becoming ill sick from drug-resistant campylobacter. But the drug, Baytril, is still on the market. Bayer, its manufacturer, is actively fighting the ban, arguing most illnesses aren't caused by tainted grocery-store chicken. Consumers Union wants Bayer to withdraw the drug. The Agriculture Department is working on setting up a program to test for campylobacter at the request of Consumers Union.

Red Cross Under Fire

CBS News has reported on some serious problems involving the Red Cross. According to a news special report, FDA inspectors found more than 200 safety violations by the Red Cross. Many of the violations were offenses the Red Cross has repeatedly been ordered to fix. The Red Cross shipped infected blood, failed to screen out risky donors – even some who admitted having HIV – and lost track of more than a thousand units, including small amounts infected with HIV or hepatitis C. And, some Red Cross employees were told to skip safety steps or falsify records to allow infected blood to be released. Despite years of violations, the Red Cross has insisted things can't be that bad because not many people are getting sick from transfusions. But the new FDA report finds the Red Cross failed to adequately investigate infections to even determine if bad blood was to blame.

Red Cross workers reportedly told FDA inspectors there's a "culture to hide problems," meaning they'd been instructed to "falsify documents," and to "hide mistakes," and said they "feared retaliation" if they reported problems. In response to the latest FDA findings, the Red Cross says it "understands more work needs to be done to further strengthen our processes" and they're committed to working with the FDA "to enhance our systems." The Red Cross has also just beefed up its work force on quality, and promises to improve employee training. But some critics say the charity has broken repeated promises to fix the blood supply, and argue it's time for a radical change. The FDA needs to take action to resolve what appears to be a most serious problem. A re-design of the blood system appears to be in order. It has been speculated that the Red Cross is counting on the fact that, even if it's not managing the blood supply the way it should be, nobody else wants the job.

Florida Patients Face Crisis In Medical Errors

Public Citizen has taken another strong stand for consumers. Doctors, insurers and their political allies have mounted a massive disinformation campaign in Florida and elsewhere, attempting to convince lawmakers and the public that the way to address rising medical malpractice insurance rates is to drastically curtail victims' rights in lawsuits, rather than reduce medical errors and reform the pricing practices of the insurance industry, according to Public Citizen President Joan Claybrook's strong testimony before members of Florida Governor Jeb Bush's task force on medical malpractice. Their solution would do nothing to address the causes of the crisis: bottom-line business decisions by insurance companies and an alarming number of preventable medical errors, many of them committed by a small percentage of practicing doctors. Claybrook's testimony noted that based on federal Institute of Medicine (IOM) data, medical malpractice results in 2,400 - 5,400 deaths in Florida each year and $935 million to $1.6 billion in costs resulting from disability, health care and lost income. At the same time, the annual cost of Florida physicians' medical malpractice premiums is only about $500 million, according to data from the insurance industry. Rather than placing draconian restrictions on the rights of victims of medical errors, the State of Florida should implement vital patient safety measures that would significantly reduce the number of medical errors - and consequently malpractice claims. Florida should also address the root cause of the premium increases: rate manipulations by insurance companies to compensate for poor investment returns when the stock market slowed after the 1990s boom. "Rising insurance rates have nothing to do with lawsuits but everything to do with the economics of the insurance industry," according to Ms. Claybrook. Patients severely injured by doctor malpractice should not be made to suffer even more harm by the relatively small number of bad doctors who commit most malpractice and the bottom-line business practices of insurers. Neither should the good doctors suffer due to the bad acts of a few of their colleagues.

Public Citizen offered these compelling statistics:

- The number of medical errors reported by Florida hospitals exceeds the number of medical malpractice claims filed each year by 6 to 1. (Note: It is probably fair to assume many more medical errors occur than the hospitals report.)
- Only 6 percent of Florida doctors are responsible for half the malpractice claims.

A 1999 report by the IOM presented a blueprint for reducing medical errors and improving the quality of care in hospitals. The plan includes:

- Eliminating errors caused by treatment of the wrong body part or the wrong patient, and performing the wrong procedure: In 2001, the Florida health care agency reported nine incidents of surgery performed on the wrong patient, 16 incidents in which the wrong procedure was performed and 54 incidents in which surgery was performed on the wrong site. Simply mandating that surgeons mark the correct site for surgery on a patient with a permanent marker could prevent many such accidents.
- Addressing the shortage of nurses: Recent studies have shown that patients in hospitals where nurses have heavy workloads have a higher risk of dying. The Florida Hospital Association estimates that the state will need 34,000 more nurses by 2006. Gov. Bush has signed legislation to simplify the process for out-of-state nurses to begin working in Florida and to increase funding for nursing education, but more must be done.

Ms. Claybrook told the task force that Florida's medical board has been falling short of its responsibility to police doctors' performance in the state. For example, there are 24 Florida doctors in the National Practitioner Data Bank who have paid 10 or more medical malpractice judgments, but 12 of those doctors have never been disciplined by the board. In fact, only 36 percent of Florida's disciplinary actions in 2001 were serious - that is, involving license revocation, suspension, surrender or probation. When compared with the rest of the country, only two states were worse in that regard, Wisconsin and North Carolina. "It would be a travesty of justice for this task force to take away patients' legal rights in the name of protecting insurance company profits and doctors' income," Ms. Claybrook said in her statement. She added: "The fact is that the legal system is all Floridians have to ensure just compensation for injury and to force improvements in patient safety, as the regulatory system is not doing the job here or in most places across the country. Limiting legal rights will not solve the problem, because they are not the cause."

XVII. TOBACCO UPDATE

Alabama Fails In Tobacco Prevention Programs

The American Lung Association gave Alabama failing grades in the fight against tobacco use. The organization graded the states and awarded Alabama nothing but "Fs" on its efforts. The following areas were graded: state cigarette taxes; laws to protect people from secondhand smoke; measures to stop children from smoking; and spending on anti-tobacco programs. The study echoed a report released in April by the Centers for Disease Control and Prevention, which ranked Alabama third lowest in the nation on anti-smoking funding. Even Dr. Don Williamson, Alabama's state health officer, acknowledged some failures. Also receiving straight Fs were Georgia, Kentucky, Montana, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee and West Virginia. Vermont scored the highest grades. Alabama is the only state lacking an indoor clean-air bill, which Dr. Williamson labels a "major deficiency." Currently, more than 100 city and county laws restrict smoking in public places in Alabama.

Smoker Accepts $28 Million In Tobacco Suit But Will Appeal Cut

A woman with lung cancer has agreed to accept a reduced $28 million punitive damage judgment against Philip Morris. However, in a most unusual move, she will appeal a judge's decision to slash the jury's original $28 billion award. By appealing, the 64-year-old woman will contend that the judge failed to properly state his reason for settling on the $28 million figure. Apparently in California, there is no conflict in accepting the judgment and appealing the reduction. Philip Morris will appeal the jury verdict. The judge had upheld the jury's decision that the tobacco company was at least partially responsible for the plaintiff's cancer, but found the $28 billion punitive award excessive. The judge termed $28 million "a reasonable sum to be awarded against Philip Morris in these circumstances." I totally agree with that assessment. The jury's verdict sent a strong message, which was most likely their goal. The punitive damages in the case are in addition to $750,000 in economic damages and $100,000 for pain and suffering. In his ruling, the judge wrote that "the court finds that the jury's award is legally excessive because it produced an excessive punitive to compensatory ratio." The court then said: "Here, the punitive damages awarded by this jury was 33,000 times the amount of the compensatory award. Hence, after balancing all relevant considerations, the court, exercising its independent judgment, determines from all the evidence that an award of $28 million is a reasonable sum to be awarded against Philip Morris in these circumstances." Again, I have to agree with that conclusion.

Jury Verdict Upheld

The 9th U.S. Circuit Court of Appeals has affirmed a $1.4 million judgment awarded to a woman whose husband died from exposure to secondhand smoke. The incident occurred during a transatlantic flight involving Olympic Airways. The court said the district trial judge did not commit error when ruling that the man's death by asphyxiation was caused – in part – by Olympic Airways' failure to honor his request for a new seat. It was alleged and obviously proved that the smoke was affecting the man's health.

Louisiana Lawsuit

A lawsuit filed 7 years ago in Louisiana is finally heading to trial. The case is asking the tobacco companies to pay for programs designed to help smokers quit. Additionally, the suit asks for programs to monitor the health of current and former smokers. The issues to be tried in the first phase of the trial include, among other things, marketing cigarettes to children and manipulation of nicotine levels. Hopefully, this case will proceed without interruption. The tobacco companies have thus far avoided having to try their defenses.

XVIII. RECALLS UPDATE

Milwaukee Tool Has Recalled Electric Grinders

Electric Tool Corp. has recalled about 24,000 electric grinders. The grinder's switch can stick in the "on" position, which could pose an injury hazard to consumers. CPSC and Milwaukee Electric Tool have received 12 reports of grinder switches sticking in the "on" position. The recall includes the 15 Amp grinders that have a seven or nine inch disc. The following catalog and serial numbers can be found on a nameplate on the top of the grinder and are set out below:

- 6086-20 Serial Prefix 991A and 991B only
- 6088-20 Serial Prefix 994A and 994B only
- 6089-20 Serial Prefix 992A

The grinders were manufactured in the United States. Home centers, hardware stores and industrial distributors sold these grinders nationwide from June 2001 through November 2002 for between $165 and $175.

Makita USA Has Recalled Circular Saws

Makita USA, Inc. has recalled about 180,000 circular saws. The lower blade guard of the saw can become jammed, which can result in the consumer coming in contact with the blade and suffering a serious injury. This recall is being conducted to prevent the possibility of injuries. The recall involves 7 1/4-inch circular saws with the model number 5740NB. The model number is located on the silver nameplate next to the name "Makita." The saw's housing is blue-green and the name "Makita" appears on the metal blade guard and silver nameplate on the motor housing. The recalled saws were manufactured in China. Home centers, hardware stores and industrial suppliers nationwide sold the circular saws from April 1998 to November 2002 for between $99 and $119. Consumers should stop using the circular saws immediately and return them to the nearest Makita factory service center for a free repair. For more information on how to return the saw or to locate the nearest Makita factory service center, consumers should contact Makita U.S.A. Inc. at 800-462-5482.

Montrose Wholesale Candies & Sundries Has Recalled Illegally Imported Cigarette Lighters

Montrose Wholesale Candies & Sundries has recalled about

247,000 disposable cigarette lighters. The lighters do not have child-resistant mechanisms, as required by federal law. Young children could ignite the lighters, presenting fire and burn hazards. These "BIC" brand lighters were illegally imported into the United States by Montrose Wholesale Candies & Sundries, Inc., a Chicago importer. This recall does not involve lighters sold in the U.S. by BIC. In the United States, BIC sells only lighters with a child resistant mechanism. BIC notified CPSC of these illegally imported lighters. The non-child-resistant lighters were found by the CPSC in several stores in the Chicago area. All disposable lighters imported and sold in the U.S. are required by law to be child-resistant.

This recall is being conducted to prevent the possibility of injuries. The disposable cigarette lighters being recalled are oval-tube-shaped "BIC" and mini- "BIC" brand lighters. The lighters have a green, red, blue, black or yellow body and a metal top. "BIC" and "Made in France" are imprinted into the metal top of the lighter. A label on the lighter reads, "WARNING KEEP AWAY FROM CHILDREN." The recalled lighters are not equipped with a metal shield over the spark wheel. The child-resistant lighters have that shield. The recalled standard size lighters have the UPC number "3 086120 600020" and the mini-lighters have the UPC number "3 086120 600051." Convenience, gas, and grocery stores in the central U.S. sold these disposable cigarette lighters from September 2002 through December 2002 for about $1. Consumers should stop using these lighters immediately and return them to the store where purchased for a refund. For more information, call CPSC's Hotline at 800-638-2772.

McNeil Consumer & Specialty Pharmaceuticals Has Recalled Children's Tylenol

Children's Tylenol has been recalled by McNeil Consumer & Specialty Pharmaceuticals. The firm initiated recall is ongoing. It involves a defective container. The product is packaged with incorrect dosing cups marked with metric measurements rather than with U.S. standard measurements. There are 116,172 bottles involved with a nationwide distribution.

Kmart Corp. Recalls Candy Filled Toys

Kmart Corp. has recalled about 50,000 wooden vehicles that are filled with candy. These products may be given to children as toys. The wheels on the wooden toys may break off into small parts, which may pose a choking hazard to young children. This recall is being conducted to prevent the possibility of injuries. The recalled wooden vehicles include a red wagon, truck and train and were packaged with candy. The following UPC codes are located on the bottom of the vehicles: 694405900012 (wagon), 694405900029 (truck), and 694405900036 (train). The wooden toy vehicles were made in China. Kmart stores nationwide sold these wooden vehicles from November 2002 through December 2002 for about $5. Consumers should take them away from children immediately and return them to any Kmart store for a full refund. For additional information, consumers can contact Kmart at (800) 63-KMART anytime.

Electric Fans Recalled

Brooklyn Lollipop Imports & Exports, Inc. has recalled about 22,000 electric fans. These electric fans have undersized wiring, use a power plug that is not polarized, have an improperly sized grill, and overheat, all of which could cause electrocution, electric shock, fire, and finger entrapment hazards to consumers. This recall is being conducted to prevent the possibility of injuries. The recalled electric fans, which have the brand name "Lollipop" printed on the fan blade cover, have model numbers V1185, V1186, V1865 and V1783, which can be found on the motor housing. The V1185, V1186, and V1865 models have labels that read, "Hi Velocity Lollipop Air Circular." The three-speed, four-position fans are either floor mounted or table top units. The model V1783 has a clip-on base. These fans were manufactured in China. Discount and variety stores in the metropolitan New York area sold these electric fans from May 2000 through July 2002 for between $10 and $15. Consumers should stop using these electric fans immediately and return them to the store where purchased for a full refund. Consumers also can return the fans to the firm for a full refund, by mailing the unit to: 7 Marcus Garvey Blvd., Brooklyn, New York 11206. For more information, call Brooklyn Lollipop collect at 718- 388-9526.

Propane-Powered Camping Stoves Recalled

Century Tool and Manufacturing Co. Inc. has recalled about 6,300 propane-powered camping stoves. The burner assembly in the stoves can restrict the flow of gas, which can cause a leak. The leaking gas can ignite and weaken the hose, causing it to separate from the stove and pose a fire hazard to consumers. Century Tool and Manufacturing has received eight reports of hoses separating from the stove, causing one minor injury. The recalled stoves include the Century, Hillary, and LL Bean brand names. The stoves have a drip tray, two or three burners, and a black or green base with a label identifying the brand name. The manufacturing date (050202 through 073102) and model number (4660, 4665, 4675, 4730, 4960, 72861, and 4960LLB) are printed on the inside of the stove's lid. The stoves were manufactured in the United States. Sporting goods, camping supply and mass merchandise stores nationwide sold these stoves from May 2002 through September 2002 for up to $90. Consumers should stop using the recalled stoves immediately and call Century at 800-435-4525 Monday though Friday to receive information on replacing their stove. Consumers can also write to Century Tool and Manufacturing Company, P.O. Box 188, Cherry Valley, Illinois 61016 or visit the company's Website at www.centurytoolmfg.com.

Speakers Recalled

Madrigal Audio Laboratories, Inc. has recalled about 1,300 subwoofer speakers. A screw inside of the subwoofer can cause a high voltage short, which could cause a severe injury to consumers through an electric shock. To date, Madrigal has received one report of electric shock. The recalled Revel B-15 subwoofers have an outer cabinet with a black or gray speaker grill on the front and are about 20 inches in width, height, and depth. The brand name "Revel" is printed on the bottom left of the rear panel and "PERFORMA B15 SUBWOOFER" is printed on the bottom right. The 1000W subwoofers were made in the United States. Specialty audio dealers sold the subwoofers nationwide and in Puerto Rico from January 2001 through October 2002 for about $3,000. Consumers should not touch the rear panel, use the power switch, or remove the power cord or any connections from the back of the unit until it is repaired. Consumers should immediately contact the dealer from whom the subwoofer was purchased or Madrigal at 800-424-8043 Monday through Friday to receive a free repair and new computer software.

Children's Fleece Outfits Recalled

Kohl's Department Stores Inc. has recalled about 9,600 children's fleece, two-piece pant sets. Small pieces of fabric at the end of the sleeves, along the hem and on the pockets of the tops can be torn off easily, posing a choking hazard. Kohl's Department Stores Inc. has received two reports of young children putting torn pieces of fabric in their mouths. One child reportedly began to choke on a piece of material. The recall includes the First Moments- or Second Step-brand two-piece pants set. The brand name is written on a label inside the tops of the set. The set's pink fleece top has two patch pockets and the cotton pants have a pink floral print. The set came in sizes 3 months to 24 months. The set has a cut-out floral pattern in the fabric at the end of the sleeves, along the hem of the top and along the top of each pocket. The part of the fabric subject to the cutting has been weakened and tears easily from the rest of the garment. Kohl's Department Stores sold the pant set nationwide from September 2002 through early November 2002 for about $18. Consumers should stop using the set immediately and return it to the store where purchased for a refund. For more information, call Kohl's toll-free at 800-694-2647.

Talking Dolls Recalled

Lovee Doll & Toy Co., Inc. has recalled about 160,000 talking, electronic dolls. Buttons on the dolls' outfit could detach, posing a choking hazard to young children. This recall is being conducted to prevent the possibility of injury. This recall includes the "Talking Learn n' Play" dolls with buttons. The dolls describe the functions of zippers, buttons, snaps and shoelaces. The dolls are about 13-inches tall and are dressed in pink jumpers with pink and white plaid shirts. The purple packaging reads, "Talking Learn n' Play." The dolls were made in China. Toy and discount department stores sold the dolls nationwide from June 2002 through December 2002 for between $10 and $15. Consumers should take these dolls away from children immediately and return the dolls to the store where it was purchased for a refund. For more information, consumers can contact Lovee Doll & Toy Co., Inc. at 800-307-5911.

Sparklers Recalled

Elkton Sparkler Company Inc. has recalled about 1.7 million boxes of bamboo stick sparklers. The sparklers' bamboo-stick handles can catch fire, burn and disintegrate and emit burning fragments during use. The sparklers present a fire hazard and a risk of burn injury. CPSC and Elkton Sparkler have received four reports of burns and clothing igniting. Injuries include a 6-year-old girl who received second-degree burns to her ankle and a 3-year-old boy who received a minor burn to his leg when his sweat pants caught on fire. The recalled sparklers were packaged in a red, white and blue cardboard box and sold with six sparklers per box. Three models of sparklers were sold, including model SP08 measuring 8-inches long, model SP14 measuring 14-inches long, and model SP20 measuring 20-inches long. Labels on the packaging read in part "BAMBOO GOLD SPARKLERS," "6 PIECES," and "MADE IN CHINA." Variety Stores sold these sparklers nationwide from January 2002 through May 2002 for between $2 and $5 a box. Consumers should stop using these sparklers immediately and return them to the store where purchased for a full refund. For more information, consumers can contact Elkton Sparklers at 800-322-3458 or visit the firm's web site at www.easylite.com.

Hip Hoppy Bunny Toys Recalled

Zutano Inc. has recalled about 3,000 "Hip Hoppy" stuffed bunny toys with buttons. The buttons on the front of the bunnies' jacket can detach, posing a choking hazard to young children. This recall is being conducted to prevent the possibility of injuries. The recall includes bunny toys that measure about 10-inches tall and have jackets that button up the front. Some of the jackets, pants and hats on the bunnies have a multi-colored striped or a patterned print. "Zutano" is printed on a tag attached to the bunny. "Hip Hoppy" is printed on a hang tag attached to the bunny. Only bunny toys with buttons are included in the recall. The bunnies were made in China. Department and specialty stores nationwide sold the recalled bunny toys from July 2000 through December 2002 for about $18. Consumers should take these recalled bunny toys away from young children immediately and contact Zutano Inc. to receive a replacement outfit. For more information, contact Zutano at 800- 287-5139.

GM Sedans Added To U.S. Engine-Fire Probe

The government has upgraded an investigation into more than 2 million General Motors Corp. cars with 3.8-liter engines after 44 owners complained that the engines caught fire. The investigation involves 1996 through 2000 models of the Buick Le Sabre, Park Avenue, Regal and Riviera; Oldsmobile 88, 98 and Cutlass; Pontiac Bonneville and Grand Prix; and the Chevrolet Monte Carlo. GM said it will cooperate. The National Highway Transportation Safety Administration also opened an investigation into 2001-03 models of the Acura 3.2 TL and 3.2 CL because of 35 complaints about transmission problems that can cause the cars to quickly lose speed and come to a stop. Two crashes and two injuries were reported. NHTSA estimates about 265,000 of the cars are on the road.

The Acura probe was opened after The Los Angeles Times reported in September on a growing number of automatic transmission failures in V-6 powered models. Acura, the luxury car unit of Torrance-based American Honda Motor Co., initially denied that a problem existed, then said it had replaced more than 24,000 transmissions under warranty. The company announced in late September that it would extend the power train warranties on various Acura and Honda models with the suspect transmissions to seven years or 100,000 miles.

Motion Lamps Recalled

Cracker Barrel Old Country Store® has recalled about 27,000 motion lamps. Approximately 6,400 of those lamps were sold to consumers. Wires near the light's socket can become exposed, posing a risk of electric shock or electrocution to consumers. This recall is being conducted to prevent the possibility of injury. The recall involves the Pumpkin and Snowman model motion lamps. The ceramic lamps have liquid-filled globes that become warm and the heat moves the glitter inside. The Pumpkin lamp has orange liquid in its globe, straw hair and a burlap hat. The

Snowman wears a black top hat and a red and black scarf. The Snowman's globe is filled with a clear liquid. On the bottom of each lamp is a sticker that reads, "Made in China."

Cracker Barrel Old Country Stores® sold the motion lamps nationwide from August 2002 through October 2002 for about $20. Consumers should stop using and unplug these lamps immediately and contact Cracker Barrel Old Country Store® at 888-645-6516 to receive a full refund. For more information, consumers can log on to the company's web site at www.crackerbarrel.com.

Information On Recalls

For those of you who want to keep up with product recalls that deal with drugs, dietary supplements, and medical devices, an excellent source of information is the Public Citizen Health Research Group's Health Letter. You can visit their Website at www.citizen.org/hrg. Even better, you can subscribe to the Health Letter, which costs $18 per year. If you are interested, send a check payable to Public Citizen, to Health Letter, 1600 20th Street NW, Washington, DC 20009. Recalls reflect actions taken by a firm to remove a product from the marketplace. Recalls may be conducted on the firm's own initiative, by FDA request, or by FDA order under statutory authority. There are three classes of possible recalls. A Class I recall is a situation in which there is a probability that the use of or exposure to the product will cause serious adverse health consequences or death. A Class II recall involves products that may cause temporary or medically reversible adverse health consequences. Class III situations are for products not likely to cause adverse health consequences. If you have a drug in your possession that is the subject of a recall, you should label them "DO NOT USE" and put the drug container in a secure place. If there has been no adverse reaction to use of a drug, you can return them to the place of purchase for a full refund. You can also contact the manufacturer. If you desire to report an adverse drug reaction to the FDA, you can call: 800-FDA-1088. The FDA also has a Website, www.fda.gov.

Holidays And Recalls

Due to a lack of space, we obviously can't list all recent product recalls that we are aware of. A tremendous volume of toys for children found their way into homes around the country during the holidays. Obviously, there are lots of dangerous toys on the market. Some of them have been recalled. Unfortunately, not all of them have. However, parents and other responsible for small children can't afford to be uninformed. I suggest you go to the Website of the Consumer Product Safety Commission at www.cpsc.gov for more recalls and additional information.

XIX.
THE CONSUMER CORNER

Lead Paint Trial Results In Settlement

A Cleveland woman has settled her lawsuit against her former landlords over the lead poisoning of her five daughters. The agreement was reached with the landlords just before the fourth day of trial. The woman's lawyers argued that the daughters suffered brain damage because of exposure to chips and dust from lead-based paint in a rented home. The terms of the settlement are confidential. The settlement will be paid by the landlords' insurance carrier. As has been reported, lead, a toxic metal, was once a common paint additive. It was banned from most paints in 1978 because it can cause brain damage and retardation in children. However, in many cities, such as Cleveland, with older homes coated in old paint, lead exposure is still a problem.

NYC Reaches Settlement With H&R Block Coupons

Tax preparer H&R Block Inc. will pay as much $4.2 million to settle a New York City lawsuit over high-interest loans that were given in advance of tax refunds. As part of the settlement with the New York City Department of Consumer Affairs, Block will give more than 60,000 New Yorkers $35 coupons that can be used toward tax preparation services or redeemed for cash. If all of the coupons are sent in, the coupons are worth about $2.7 million. The suit alleged that Block failed to properly distinguish high interest tax refund anticipation loans that it was marketing for a bank, from other ways for customers to get quick tax refunds. The loans were made to customers who wanted to receive their tax refund money immediately instead of waiting for the government to process their returns.

Last month, H&R Block reached a settlement with 700,000 people to settle claims in Texas involving the loans. That settlement forced Block to take an after-tax charge of $25 million. The company is waiting for an Illinois judge to approve a $25 million settlement it negotiated to settle all remaining claims involving the loans nationwide. As a result of the New York settlement, Block will also pay a fine to New York City and contribute money to support the city's drive to encourage more low-income New Yorkers to file for Earned Income Tax Credits. The credits are given by the U.S. government to taxpayers whose income falls below a certain level.

FTC Unveils Federal Telemarketing "Do Not Call" List

The Federal Trade Commission has announced final rules to create a national "Do Not Call" list to allow consumers to head off many of the 16-billion telemarketing calls now pouring into homes each year. The FTC needs approval by Congress to assess the fees on telemarketers that would finance the project. A court fight has been threatened by foes in the $1.9 trillion direct- and interactive-marketing industries. The FTC list won't cover industries regulated by other agencies, such as telecommunications, which is under the Federal Communications Commission. However, the FCC has proposed a similar list. If enacted, the two agencies could wipe out eight of 10 telemarketing calls. The FTC hopes to have the list up and running next year: Consumers can sign up free, online or by calling a toll-free number. The estimated $16 million FTC program would be paid for by fees charged telemarketers to get a required updated list of consumers every three months. It will take several months to complete the sign up.

Cell Phone Suits Now Targeting Companies

A young lawyer, who worked as an associate for a law firm, was allowed to use a cell phone and bill clients for the time she talked to them from her car. As many as 40 cell phone calls were made each day. On March 8, 2000, during a call she made at 10:36 p.m., she hit and killed a 15-year-old girl on a busy highway in Fairfax County, Virginia, just outside Washington. The girl's parents have filed a civil suit against the lawyer, who served a one-year jail term on work release after pleading guilty to leaving the scene of an accident. However, and most significantly, in seeking $30 million in damages, the parents are also suing the lawyer's former employer, a San Francisco-based law firm.

The basis of the claim against the law firm is the cell phone calls that the lawyer made when she was working. The suit alleges that the firm is legally liable for the accident because the lawyer's job involved doing business by cell phone. Such calls, the suit says, were done "with the expectation and acquiescence of the law firm and served as a direct benefit to the firm." The case is one of a growing number of lawsuits against businesses whose employees are involved in car accidents while talking on cell phones. Businesses across the nation whose productivity is tied to the hours their employees spend on mobile phones should be paying special attention to this case. There will be more of these suits and some significant verdicts in the next few years. If you can prove that an employee is using his or her cell phone for work purposes, the employer is certainly vulnerable. The risks presented by inattentive cell phone users on the highways are pretty well known.

There have already been a number of successful results in cases involving cell phone use. Smith Barney, the investment-banking firm, paid $500,000 to settle a suit brought by the family of a motorcyclist killed in an accident involving one of the firm's brokers who had been talking on a cell phone at the time. The state of Hawaii agreed to pay $1.5 million to the family of a New Jersey man who was walking across a highway when he was struck by a car driven by a public school teacher who was talking on a cell phone. An Arkansas lumber wholesaler, Dyke Industries, agreed to pay $16.2 million to a 78-year-old woman who was severely disabled in a car accident involving one of its salesmen who was talking on his cell phone.

The Current Cell Phone Problem

More than 128 million people use cell phones in the USA. A federal survey of motorists last year found that 54% have a cell phone with them when they drive. Of those, 73% said they talk while driving. While some drivers wear an earpiece attachment to the phone, which leaves both hands free to hold the steering wheel, this is only a partial solution to the problem. The focus on the call is the real problem. Phone records documenting cell phone airtime can provide proof that a driver was on the phone at the time of an accident. Once that is established, it is fairly easy to prove that the driver might have been distracted and, therefore, at fault. The 1997 *New England Journal of Medicine* study about cell phone use in cars, one of the most comprehensive examinations of cell phone use, found that the risk of accidents is four times higher when a motorist is using a cell phone. Few days pass when I don't see dozens of persons talking on their cell phones while driving a car. Many times the drivers appear to be totally connected with the call and perhaps not attentive to conditions on the highway around them.

A Significant Credit Report Lawsuit

A class action lawsuit that involves millions of consumers and damage claims in the billions is pending against Equifax. It has the potential of changing the way companies like Equifax keep track of an individual's personal finances. In the original case, the plaintiff had bankruptcy shown in a credit report – even though he had never been in the bankruptcy court. When the plaintiff tried to buy a car, he was turned down because his credit report carried a bankruptcy case notation. The 58-year-old plaintiff, who works as a mechanic, is the point man in a case that challenges the accuracy of reports issued by the three largest purveyors of credit data in the world. Defendants in the case are Experian and TransUnion, in addition to Atlanta-based Equifax. Information the companies use to compile their reports comes from banks, credit card companies, retailers and others that extend credit to consumers. Inaccurate or imprecise credit reports have long been a sore point for consumer advocacy groups. That's because credit reports carry the bill-paying histories of virtually every consumer who has ever applied for credit. These reports determine how much credit individuals are granted and at what cost.

The Fair Credit Reporting Act, which governs the credit reporting industry, requires companies to use "reasonable procedures to ensure the maximum possible accuracy" of credit reports. There are estimates that a third or more of all credit reports contain errors, although attorneys for the plaintiffs acknowledged in court documents that no reliable statistics exist. The Consumer Federation of America and the National Credit Reporting Association, a trade organization, released a study on credit report accuracy. The study covers 500,000 credit reports and reveals numerous errors.

It is very important for this case to proceed as a class action. Without class action status, individuals are on their own against larger and better-financed legal opponents. Each of the companies identified about 1.6 million to 1.7 million consumers who fall into the class action suit. Obviously, there can be some overlap because the three companies often have reports on the same people. People eligible to join the class action suit will be notified by February 17th.

XX. CLOSING REMARKS

The year 2003 promises to be one full of promise, challenges, and unfortunately lingering problems of a most serious nature. Hopefully, our political leaders – both at the national and state levels – will remember the plight of "little folks" in our nation. The rich and powerful have enjoyed unparalleled privilege and protection at the hands of government for all too long. In Alabama, the failure to enact strong consumer protection laws, our inequitable and regressive tax structure, and the granting of immunity to and otherwise protecting corporate wrongdoers are just a few of the shortcomings. The Governor-elect and the new Legislature will clearly have their work cut out for them. In short order, they will be expected to make right lots of wrongs in our state. I sincerely believe that Bob Riley is the right man for Alabama, at the right time. He doesn't appear hesitant to tackle the tough problems. I pray that he will be successful. Our state's future and well-being depends on it.

On the federal level, I predict that the Karl Rove–led White House will make the most serious and focused attack on consumer rights that American citizens have ever experienced. This will be a well-planned and carefully carried out attack. The court system and lawsuits in general will be the Rove target. We will also see a further relaxing of federal regulation of Corporate America by our Government. Frankly, I do not believe that the American people will tolerate any further erosion of both their constitutional and individual rights. Gaining control of Congress was the first step in the Rove master plan. He was successful there. For the good of our nation, I prayerfully hope that Mr. Rove fails in this next step.

We must all continue to pray for our leaders at all levels of government. I am firmly convinced that the collective prayers of people are badly needed and when offered-up are highly effective. The world has yet to come up with a better solution for dealing with the tough problems that continue to plague people. Finally, we need to pray earnestly for our military personnel who very soon may be involved in a major land war and for the families left behind.

THE JERE BEASLEY REPORT

JANUARY 2003

JERE LOCKE BEASLEY
J. GREG ALLEN
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R. GRAHAM ESDALE, JR.
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LABARRON N. BOONE
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C. GIBSON VANCE
J. P. SAWYER$^{*\,\mu}$
C. LANCE GOULD
JOSEPH H. AUGHTMAN
DANA G. TAUNTON
J. MARK ENGLEHART$^{\#}$
CLINTON C. CARTER$^{\Omega\,\dagger\,*}$
BENJAMIN E. BAKER, JR.$^{\Delta\,\Sigma\,\Theta\,\Phi}$
DAVID B. BYRNE, III
TED G. MEADOWS
GERALD B. TAYLOR, JR.$^{\nabla\,\dagger\,\#\,*}$
DAVID F. MICELI$^{\nabla\,\Delta}$
FRANK WOODSON

(OF COUNSEL)
J. PAUL SIZEMORE$^{\Delta\,\dagger}$
A. LES HAYES, III

SCARLETTE M. TULEY
KENDALL C. DUNSON$^{\Delta}$
KAREN L. MASTIN*
WILLIAM R. DAVIS
CHRISTOPHER E. SANSPREE*
ROMAN ASHLEY SHAUL$^{\Omega\,*\,\kappa}$
LARRY A. GOLSTON, JR.$^{\nabla\,\Sigma}$
D. MICHAEL ANDREWS
RONALD AUSTIN CANTY
MELISSA A. PRICKETT
W. ROGER SMITH, III$^{\dagger\,\Psi\,\varpi}$
JOHN E. TOMLINSON
KIMBERLY R. WARD
NAVAN WARD, JR.

$^{\Psi}$ ALSO ADMITTED IN ARIZONA
$^{\Omega}$ ALSO ADMITTED IN ARKANSAS
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www.beasleyallen.com

218 COMMERCE STREET (36104)
POST OFFICE BOX 4160
MONTGOMERY, ALABAMA 36103-4160
(334) 269-2343
TOLL FREE
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