

THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

A Better Day For Alabama

Governor Bob Riley has undertaken what many believe to be an impossible task and that is to solve our state's multitude of most serious problems. I sincerely believe that he will do his very best. Most observers were quite impressed with his inaugural speech - I certainly was. Lucy Baxley, the first female Lieutenant Governor in our state's history, has been most impressive in her first days in office. The Lieutenant Governor is not only smart and talented, she is extremely well liked by Alabama citizens. While the top two officials come from different parties, I predict they will work well together. I pray that this is the beginning of a better day for our state and all of our citizens.

A Good Beginning

On his first day in office, Governor Riley and his cabinet met and did something that should make all of us feel pretty good. Each of the Riley Cabinet members signed a strong Code of Ethics. The Governor also signed the pledge. The Attorney General and Director of the Ethics Commission then spent two hours briefing the group on

Alabama ethics laws and opinions. This is most refreshing and I believe an indication of how this Administration will operate. The Governor should now push strong ethics reform. I hope he will add campaign finance reform to his agenda. I am sold on this Governor and while we don't agree on all issues, he has my full support.

The Legislative Battles

There were no surprises in either the House or Senate. As expected, Lowell Barron was elected President Pro Tem of the Senate. The Speaker of the House will again be Seth Hammett. Insiders say that Lowell Barron will control what happens in the Senate, and everything will pretty much pass in the House. I disagree on both counts. There are too many intelligent, qualified, and talented members of the Senate to let any person or group control the Senate and run roughshod over the body. In the House, I believe this is the best group assembled in that body in years. Accordingly, I believe the "pass all bills" and "dump" all of the problems in the Senate approach is over. The money problems will take center stage in this Legislature, and that's when the "cheese will get binding" as they used to say back home. If anybody believes this first year will be dull and uneventful, they are sadly mistaken. All legislative

IN THIS ISSUE

I. Capitol Observations	1
II. The Evils of Predatory Lending	2
III. The National Scene	6
IV. Court Watch	10
V. Corporate Crime	12
VI. Congressional Update	13
VII. Consumer Corner	13
VIII. Product Liability Update	15
IX. Mass Torts Update	21
X. Business Litigation	24
XI. Nursing Home Update	27
XII. Premises Liability	30
XIII. Hazards in the Workplace	30
XIV. Tobacco Update	31
XV. Arbitration Update	32
XVI. Insurance Update	33
XVII. Healthcare Issues	35
XVIII. Environmental Concerns	37
XIX. Recalls Update	39
XX. Firm Activities	41
XXI. Closing Remarks	42

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observers should “fasten their seatbelts” and get ready for a rough but hopefully productive “ride.”

Alabama’s Tax Structure Is Unfair

Anybody who lives in Alabama has to know that our state has a terrible tax structure. To say the system favors the rich and powerful and is unfair to low-income citizens is a gross understatement. Another recently completed study confirms that view. The study, prepared by the Washington, D.C.-based Institute on Taxation and Economic Policy, ranked Alabama’s tax system the 10th most regressive in the country. Tax burdens on a range of incomes for non-elderly tax-paying families in all 50 states were examined in the study. In Alabama, the less money a person earns, the greater the percentage that person will likely pay in state and local taxes compared to persons earning more. Alabama Arise, an advocacy group for the poor, has been working hard to right the wrongs that have existed for all too long. Hopefully, their lonely fight has picked up a number of allies. It is quite shocking to read that the poorest 20% of Alabama residents pay 10.3% of their wages to taxes, including income, sales and property taxes. The middle 60% of Alabama’s population pay 9.6% of their wages in taxes as a group. In contrast, the wealthiest one percent of Alabama’s wage earners pay only 4.9% in taxes. Sadly, Alabama is among the 10 worst states with the most regressive tax systems: the others are Washington, Florida, Tennessee, South Dakota, Texas, Illinois, Michigan, Pennsylvania, and Nevada. It should be noted that the study did not include federal taxes.

The State of Alabama must have complete tax reform without further delay and it must be done fairly. Rumors are floating around the capitol complex that a deal of sorts has been worked out between the tax reform group on the one hand and Alfa and the Timberland trade group on the other. Hopefully, this is just that - an unfounded rumor. Any real tax reform has to include two things. The first is a marked increase in property taxes. The next is a closing of the many loopholes that have been extended to special interests over the years. That’s where reform has to start.

Better Late Than Never

On his last Friday as Governor, Don Siegelman finally did what he should have done in the early part of his Administration, and that is to order the outlawing of mandatory, binding arbitration in Alabama insurance policies. The outgoing Governor, appearing in front of the ASEA office, signed an Executive Order directing his Insurance Commissioner to put a stop to arbitration in Alabama insurance policies. While I have to question his motives and timing, at least Don did what most Alabama citizens believe should be done. Insurance companies are difficult to deal with when it comes to getting claims paid. When you allow the companies to add arbitration to their policies, it makes them virtually invincible. The vast power of a large insurance company contrasted to that of an individual policyholder is the primary reason arbitration has no place in an insurance policy. When a dispute over a claim arises, the courts must remain open so that the playing field is even for both parties.

Recently, I had a conversation with the owner of a major insurance brokerage house who has a multi-million dollar dispute with an out-of-state insurance company. The Alabama company has had to submit its claims to binding arbitration with all proceedings held in Connecticut. The expense and delays have cost the Alabama company greatly. This man, who is both well-known and certainly well-respected, says arbitration is the worst thing that his company has ever encountered. At his request, because of what he does for a living, and his political party affiliation, I won’t divulge the name or location of this unhappy businessman. As to the arbitration executive order, it took the outgoing Governor 4 years to recognize the evils of arbitration. I hope the new Governor will now allow Don’s belated action to stand.

II. THE EVILS OF PREDATORY LENDING

The Evil Empire

The predatory lenders have been called the “Evil Empire” and for good reason. Predatory lenders have been robbing the poor in our society for thousands of years. In Ezekiel 18:13, the prophet Ezekiel stated: “lending at usury and taking excessive interest is a detestable thing”. In Nehemiah 5:10 the prophet Nehemiah stated “let the exacting of usury stop”. In John 2:14, Jesus Christ himself became angry with the moneychangers in the Temple because they were gouging the poor with exorbitant and usurious interest rates. He

upset their operations and rightly so. From biblical times until the 1900's, predatory lending was carried out by small time operators such as street-corner loan sharks. During the 1980's, however, after President Reagan's de-regulation of the banking industry, many large Wall Street Banks entered the predatory lending market. It is no longer a small street-corner business. Instead, it is now a multi-billion dollar industry run by Wall Street's largest banks. However, these large banks handle predatory lending through their subsidiaries, as if they are ashamed of their own practices. If a low-income consumer enters the door of a major bank, that customer will be steered to its subsidiary to get a loan. It appears there is one door for certain people with influence, money, and power, and another door for the others.

Predatory lenders make loans in what is called the sub-prime market, which is a market for consumers who are not considered creditworthy by traditional banks. Predatory lenders prey on the most vulnerable people in our society and typically target minorities, the working poor, and the elderly with their high-priced loans. Because of this, these groups pay much more for loans than do others in our society. They pay a "poverty tax" and some have called it a "skin tax." These consumers are easy prey for predatory lenders simply because they cannot get loans elsewhere and must agree to take the loans on any terms required by the lender. When the borrowers enter into these loans, they become enslaved to these lenders for life.

Presently, the four largest predatory lenders in the country are Citigroup, AIG, Wells Fargo, and

Household Finance Corporation. Citigroup does its predatory lending through its subsidiary, City Financial. While City Financial makes predatory loans itself, it also owns Associates, Transouth, Commercial Credit and Kentucky Finance. Each of these companies engages in predatory lending. AIG does its predatory lending through its subsidiary American General Finance. Wells Fargo makes its predatory lending loans through its subsidiary Wells Fargo Financial. Household Finance Corporation does its predatory lending through subsidiaries, including Beneficial. Since the major banks entered the sub-prime market, predatory lending has grown substantially, from \$18.7 billion to over \$60 billion per year. Most folks in our country think in small number when they consider loan shark activity. They are shocked when the vastness of the industry and its profitability come to their attention.

Predatory lenders have devised many schemes that literally "strangle" their victims economically and keep them "poor." These schemes include credit insurance packing ("packing"), forced refinancing ("flipping"), equity stripping ("stripping"), balloon payments ("ballooning"), high prepayment penalties, and negative amortization. We can now add arbitration to the evil arsenal of the predatory lenders. All of these schemes are designed to keep minorities, the working poor, and the elderly in debt forever while allowing large and totally unjust profits to the lenders. In some of the schemes, the predatory lenders actually charge effective interest rates of well over 300%. We have seen some with an APR of 1,200%. Let's take a look at some

of the schemes.

Insurance packing involves the lender selling worthless insurance to the consumers at the time of the loan and financing the premiums. The insurance policies are underwritten by the lender's subsidiary. The Consumer Federation of America calls credit insurance a \$2.5 billion a year rip-off and states that it is more prevalent in the loans of minorities and the unsophisticated. Critics have called credit insurance the "tail that wags the dog," because lenders make loans more for high insurance premiums than for the interest they charge on the loans.

There are many types of credit insurance, which is life insurance designed to pay off a loan in the event the credit customer dies. Credit disability insurance is designed to make the loan payments in the event the customer becomes disabled. Credit property insurance is designed to reimburse the lender if the collateral is lost. This insurance is particularly bad because lenders force consumers to use bogus collateral such as cane fishing poles, clock radios, ladders or blankets solely to be able to charge insurance on these items - even though they don't exist. Lenders also push involuntary unemployment insurance, which is designed to make the loan payments if the borrower is laid off from work. All of these insurance products are sold through subsidiaries of the lender at exorbitant prices and the lender also charges interest on these premiums. Unfortunately, the policies rarely pay the consumer anything. Many times the consumers don't even know they have these insurance products. This assures that few, if any, claims are ever filed in the event of a loss. If a claim is

made at a local branch of the lender, the claim is on occasion never turned in to the home office or to the insurance carrier.

Another way that predatory lenders strangle their victims involves forced refinancing or flipping. When a consumer is almost through paying for a loan, the payments are made up of mostly principal, which obviously is not profitable for the lender. Accordingly, the lender must get this loan off the books by refinancing it into a new loan. The lender entices the victim back to the branch by offering him a very small pre-approved loan. When the victim arrives, instead of receiving a new and separate loan in a small amount and keeping his old loan, the lender requires the borrower to refinance the old loan in order to get the new money. Thus, the consumer no longer has an old large loan and a new small loan as promised. Instead, the borrower now has one large new loan, carrying with it all new insurance and other charges. This practice is very common in the predatory lending market. Most predatory lenders flip the average consumer three times.

A favorite predatory lending trick is equity stripping ("stripping"), which is also known as equity theft. Stripping is where the lender makes the loan based on the asset and not on the customer's ability to repay. In other words, the lender targets a person who owns his or her own home with no outstanding debt on it. Stripping usually involves the elderly and minorities. The lender knows that the loan can never be repaid based on the borrower's income and ability to pay. The victim defaults on the loan, the lender then takes the house, evicts the victim, and sells and finances the house for another person.

Many predatory lending victims are steered into high-priced loans that involve balloon payments ("ballooning"). The victim gets to the end of the loan and thinks the loan is paid off. Instead, there is this huge balloon payment waiting to be paid at the end. The victim cannot afford to pay the balloon payment and is then forced to refinance the loan. The victim is forced to do this over and over again to keep from losing the home that is collateral for the loan. Predatory lenders also put high pre-payment penalties in the loans in an effort to keep its victims in debt. If consumers ever want to refinance or pay off the loan in order to get a lower priced loan, he or she cannot do so because of the high pre-payment penalties. Predatory lenders also use negative amortization. This involves making the payment so low that the consumer is not even covering the interest each month. As a result, the balance is going up every month instead of coming down. At the end of the loan, the victim is forced to refinance.

In addition to other unconscionable practices, predatory lenders now use mandatory, binding arbitration agreements in their loan documents. Many borrowers don't even know an arbitration clause is in their papers. Whenever victims need to take the predatory lenders to court because of some kind of wrongdoing, they cannot do so. Borrowers are then forced into arbitration where an arbitrator decides whether or not the claim is to be paid. The arbitration filing fees are very high and there is no appeal from the arbitrator's decision. Consumers almost never win in arbitration, which shouldn't come as a surprise, since the arbitrators are generally picked by the

predatory lenders. The use of arbitration literally shuts the courthouse door and keeps the predatory lenders from being held accountable for their wrongful actions. No borrower from a predatory lender can afford to go through the arbitration process because of the very high cost and expenses involved.

While the predatory lending schemes mentioned above are the most common, it seems the industry is constantly devising new ways to "con" their victims and take unfair advantage of them. Regulators such as the Federal Trade Commission and some of the States' Attorneys General have tried for years to stop predatory lending. In fact, in 2002, Citigroup was fined by the Federal Trade Commission \$215 Million for its predatory lending practices. Likewise, in 2002, Household Financial Corporation was fined \$484 million in an action by the States' Attorneys General for the company's predatory lending practices. Other Regulators, including the FDIC, and HUD, have also condemned predatory lenders. The FDIC has indicated that high cost predatory home loans are running rampant in this country. Likewise, HUD's Predatory Lending Task Force has made the curbing of predatory home mortgage lending a high priority. According to HUD, we need to improve consumer literacy and disclosures, prohibit harmful sales practices, restrict abusive terms and conditions on high-cost loans, and improve the market structure. Another regulator, FREDDIE MAC, has also taken a strong stance against predatory lending and is committed to a mission designed to combat predatory lending practices.

In 1994, the U.S. Congress tried to stop predatory lending by

passing The Home Loan Protection Act. The Federal Reserve Board has now proposed new rules that would broaden the scope of the Act to prohibit “flipping” and “stripping”. The Fed specifically stated that homeowners in certain communities, particularly the elderly and minorities, are targeted with offers of high-cost credit with homes put up for security. Even Federal Reserve Chairman Alan Greenspan stated that “enough was enough” on the excesses of predatory lending. The federal and state regulators have repeatedly tried to end or at least control predatory lending, but because of the industry’s tremendous power have been unable to do so.

Alabama is not the only state with predatory lending problems. Originally, the southern states were targeted and hit the hardest by these loan sharks. We now see that the practice has spread into all states on a very large scale. For example, predatory lending practices were largely responsible for 25,000 families in Ohio losing their homes to foreclosures in 2001. North Carolina has also seen predatory lending on the rise. According to Responsible Lending, over 50,000 consumers in North Carolina have been victimized by abusive lenders, losing their homes or a large portion of the limited wealth they spent a lifetime to build. Even Habitat For Humanity borrowers end up being flipped approximately 10% of the time by the predatory lenders. In Senator Trent Lott’s Mississippi, where predatory lending is as bad as anywhere in the country, the industry showed its power by passing legislation that gave predatory lenders virtual immunity from lawsuits. The immunity granted in Mississippi applies even when a predatory

lender targets certain people and intentionally cheats them out of their life savings or their homes.

Most cities and states continue to search for ways to stop the evils of predatory lending. However, the devastating power of the industry is highlighted by what happened in Mississippi. According to Consumers Union, publisher of Consumer Reports Magazine, the most vulnerable areas for predatory lending were lower income, high minority neighborhoods with a higher than average share of elderly residents. It also stated that President Bush’s State of Texas is one of the worst places for predatory lending in the country. It specifically stated that Houston, San Antonio, and Austin, rank in the top ten cities in the nation for predatory lending amongst African-American borrowers. Consumer Reports has urged government agencies both at the federal and state levels to do something to stop these unsavory practices.

The AARP has this to say about predatory lending: “[t]here are a growing number of aggressive, dishonest lenders who advertise their services to people in financial need – people who may have fallen behind on property taxes, or need money for medical bills, or face costly home repairs. Instead of offering a fair loan, these lenders use smooth-talking salespersons, high interest rates, outrageous fees, and unaffordable repayment terms. Homeowners can be tricked into taking out loans that they cannot afford to repay. Some homeowners may lose their homes to foreclosure.” The AARP has been fighting predatory lending for years and hopefully will continue to do so.

The Association of Community Organizations for Reform Now (ACORN) issued a paper in Novem-

ber 2002, entitled “Separate but Unequal,” that is well worth reading. It stated that sub-prime lending is disproportionately concentrated among minority, low-income, and elderly homeowners. It also stated that minorities are 4.4 times more likely to receive a sub-prime loan when re-financing than whites. It also stated that while the face of predatory lenders may appear to be those of small-time crooks, the kingpins behind predatory lending can be found among some of the world’s largest and most powerful financial institutions. Investment firms bankroll predators by scrutinizing their mortgages and selling them to investors. The Social Investment Forum Foundation, Co-op America, and the National Consumer Law center are organizations that also seek to end predatory lending and have warned consumers to become aware of predatory lending practices such as flipping, packing, stripping, and ballooning.

The Federal Trade Commission, in seeking to stop these predatory lending practices, stated that these lenders target homeowners who are elderly and who have low incomes or credit problems and then try to take advantage of them by using deceptive practices. The FTC cautions all homeowners to be on the lookout for the deceitful practices of predatory lenders. Many other consumer groups are trying to stop predatory lending, but thus far have not made much progress because of the power, wealth, and vast influence of the industry. The hurt and long lasting damage done to their victims by the predatory lenders is just about as bad as it gets. The shocking news is that the Karl Rove-run White House wants to protect the “Evil Empire” as a part of Rove’s efforts to protect Corporate America.

III.

THE NATIONAL SCENE

A Supreme Court Justice Complains About Church-State Court Rulings

Supreme Court Justice Antonin Scalia is stating what a majority of American citizens believe when it comes to “religious matters.” This well-respected and high-placed jurist believes courts have gone too far to keep religion out of public schools and other forums. Although the Constitution says the government cannot “establish” or promote religion, the Framers did not intend for God to be stripped from public life, according to Justice Scalia. He contended that the Constitution has been “misinterpreted” both by the Supreme Court and lower courts. The High Court Justice pointed to a federal appeals court ruling in California barring students from reciting the Pledge of Allegiance with the phrase “one nation under God.” Does this position sound familiar? I only hope that a majority of the court agrees with Justice Scalia.

Justice Scalia was the main speaker at an event for Religious Freedom Day. He said past rulings by the Supreme Court gave the federal judges in the pledge case “some plausible support” to reach that conclusion. However, the Justice went on to say that decisions of this sort should be made legislatively and not by courts. I share his opinion that the Constitution is being liberally interpreted. It is most encouraging to know that Justice Scalia is on the U.S. Supreme Court and in a position to bring some common sense and

logical legal reasoning into the First Amendment fight concerning religion. I would hope that this judicial thinking would carry over into the arbitration fight. Clearly, the U.S. Constitution has a strong guaranty of a right to trial by jury. I don’t believe the Framers of the Constitution could have ever envisioned this right being lost by any means.

Protecting The Wrongdoers

President Bush is proving to be no friend to American citizens who are victims of corporate wrongdoing and have been severely damaged as a result. The President - directed by his chief strategist and mentor Karl Rove - is now attempting to take away the constitutional right of these victims to go to court. When one considers how Corporate America has virtually destroyed the nation’s economy, and hurt so many folks along the way, as the result of the worst corporate scandals in our country’s history, it is inconceivable that the President is now pushing massive tort reform efforts in Congress. It would appear that his efforts would be directed to punishing the bad guys, and making sure their wrongdoing never happens again, rather than hurting their victims further.

In this country, we have witnessed the consequences of weak and ineffective regulation by federal regulatory agencies such as the Securities and Exchange Commission, the National Highway Traffic Safety Administration, and the Food and Drug Administration over the years. The corporate scandals, the Ford Explorer-Firestone tire problems, the large number of bad drugs put on the market with disastrous results are still on the minds of all American citizens. In

my opinion, this is why the President is now diverting attention away from the country’s real problems by setting up the medical malpractice insurance “straw man.” President Bush’s White House has orchestrated a so-called crisis with strikes by medical doctors in several states. The President followed up the strikes by launching his attacks on American juries under the mantle of reform.

I don’t believe the American people will approve of medical doctors going out on strike and leaving innocent patients high and dry. I seem to recall that an oath of some sort requires a doctor to treat patients. Hopefully, a vast majority of doctors wouldn’t take the strike route. I don’t believe they will. In Alabama, there is absolutely no reason for them to do so.

The Bush Administration’s Malpractice Misdiagnosis

We are witnessing the opening shots of the tort reform movement sponsored by scandal-ridden Corporate America and the powerful insurance industry. In an effort to keep the nation’s attention away from the corporate scandals and the failing economy, President Bush has endorsed a plan devised by his mentor and strategist, Karl Rove, for addressing the so-called “medical liability crisis.” The Bush Administration claims of a crisis can’t be supported once the true facts are revealed. The insurance industry and many of the corporate wrongdoers such as Enron, World-Com, and Arthur Andersen are seeking virtual immunity from lawsuits. Medical doctors are being used much like the “Trojan Horse” was hundreds of years ago. Once the dust settles and the “occupants” of the present day horse are

revealed, we will see exactly who the real beneficiaries of this scheme are. In any event, the written outline released by the White House on January 16th was very general in nature. In his speech, the President endorsed legislation from the last Congress, H.R. 4600. The "Rove Plan" espoused by the President, which is essentially the once-defeated House bill, would do the following:

- A cap would be imposed on "non-economic" damages. Awards for "non-economic" loss compensate for the human suffering and emotional distress caused by negligence and defective products. It should be undisputed that these damages will always greatly exceed \$250,000 in cases involving permanent significant injuries and disability. In reality, the Rove Plan targets victims of injuries of wrongdoing such as deafness, blindness, loss of limb or organ, paraplegia, quadriplegia, or severe brain damage. The unfairness of a cap is most apparent in cases involving permanent injury and disability to children. Consider a young child, who is paralyzed from the neck down by a negligent act, and who would expect to live a long life in that condition. To limit damages for pain, mental suffering, emotional distress, and the loss of enjoyment of life for each day of the rest of that child's life is cruel, heartless, and indefensible. I have to wonder whether the creator of this plan has small children and how he would feel if he faced such a cap.
- Punitive damages, which are rarely awarded in medical malpractice cases, would also be limited. The threat of punitive damages is extremely important to deterring reckless disregard

for patient safety by doctors, hospitals, HMOs, nursing homes, and drug and medical device manufacturers. There are cases where punitive damages are clearly justified, but only in those cases where the conduct is wanton or intentional and the act or omission is proved by clear and convincing evidence.

- Collateral source benefits to plaintiffs would be denied. Those are benefits paid by the plaintiff's health or disability insurance and programs such as Social Security Disability that are funded by payroll taxes. The Rove Plan would strip these benefits from a worker and give an unfair benefit to the defendant.
- Payouts for future damages would be controlled by the defendants. By instituting a "periodic payment rule" for future damages, the Rove Plan would allow defendants and insurance companies to string out payments for future damages over the life expectancy of the victim, rather than make them pay up front. The defendants' insurance companies would be able to invest and earn interest on the vast majority of a victim's damage award. Those victims would be left to cope with unexpected needs or changing medical costs and increased transportation and housing costs. This would greatly decrease the value of a jury's verdict to a person who would have to be disabled and impaired in order to receive future damages.
- The statute of limitations would be reduced to one year after discovery of the injury. This is much too narrow a window and can't be justified.
- The Rove Plan would abolish the long-recognized doctrine of joint

and several liability. That rule of law says that when two defendants are both found liable for negligence, a plaintiff may collect the entire award from either of them when it becomes necessary. Mr. Rove's plan would change this rule and leave patients with no recovery for the share of damages assigned to an uninsured, underinsured, or bankrupt defendant.

- The Rove proposal also would protect special interests other than doctors. These special interests include hospitals, HMOs, nursing homes, and drug and medical device manufacturers. Their inclusion in the bill is clearly wrong. In fact, it is that category of potential wrongdoers, along with the powerful insurance industry, which is really behind the Rove plan. When his troops come out of the present day "Trojan Horse," each of those groups will be well represented. It is interesting that Rove was able to put doctors out in front of his horse requiring them to do the dirty work for the other special interests. If this bill passed, it would make it much easier for the Enrons and WorldComs of the world to then set out to accomplish their goals. Obviously, these corporate wrongdoers couldn't have been the "advance guard."

A Message To President Bush From Public Citizen

A few weeks ago, Public Citizen asked the White House to explain why it stopped a national health warning about extremely carcinogenic insulation present in millions of American homes. The Bush Administration refused to allow the warning to be issued. In a letter

sent to Mitchell E. Daniels Jr., Director of the Office of Management and Budget (OMB), Public Citizen questioned the Bush Administration's motives and its authority to block the U.S. Environmental Protection Agency's decision to declare a public health emergency in Libby, Montana, in April 2002. The agency had planned to issue a nationwide warning regarding the severe danger presented by Zonolite insulation, which contains asbestos fibers that are 10 to 100 times more dangerous than "typical" asbestos and is estimated to be in 15 to 35 million American homes. I have to wonder how anybody could fail to recognize this extreme danger to tremendous numbers of American citizens.

Instrumental in killing the warning was none other than John Graham, Administrator of the Office of Information and Regulatory Affairs (OIRA), which is part of OMB. You may recall as we have reported, Public Citizen in a 2001 report outlined Graham's ties to big industry when he ran the Harvard Center for Risk Analysis. Public Citizen warned then that Graham would be an advocate for industry interests if he got his high-powered job in the nation's capitol. Public Citizen President Joan Claybrook warned the country what to expect from Mr. Graham. Ms. Claybrook said months ago:

"This is a clear-cut example of how the Bush Administration is not just willing, but eager, to put the interests of industry over public safety and bully federal agencies into toeing the line, even if it clashes with their statutory mission. We cannot overlook the public health danger the White House is presenting by quashing this warning."

The situation was brought to

light in a St. Louis Post-Dispatch article, "White House Office Blocked EPA's Asbestos Cleanup Plan," by Pulitzer Prize-winning reporter Andrew Schneider. The article explained the government's investigation and related the internal debate leading up to the EPA's decision to declare a public health emergency and issue a nationwide warning. The article also detailed the White House's interference with that decision and the EPA's ultimate capitulation and sudden about-face. According to the article, EPA Administrator Christine Todd Whitman was poised to declare a public health emergency and issue a national public health warning when "the White House budget office's Office of Information and Regulatory Affairs...derailed the Libby declaration."

Thus far, the White House has made no effort to explain its motivations. No basis for their actions was ever given to Mr. Schneider or to Public Citizen. The letter from Public Citizen poses questions to Daniels, including:

- Under what authority did OMB/OIRA intervene?
- Upon what scientific evidence did OMB/OIRA decide to quash the notification?
- Did OMB/OIRA meet with W.R. Grace or other insulation officials in contemplation of the notification?
- Did the Administration's support of legislation to limit asbestos manufacturers' liability play a role in this decision?

There clearly are questions that demand White House answers. A serious cancer problem that poses a risk to millions of American families cannot be ignored or swept under the rug. Graham's secret role in this decision is the antithesis of transparent, accountable, responsi-

ble government, which he claims to support, according to Public Citizen. The Administration was asked not to hide behind closed doors on this matter. If the first two years of the Bush Administration are a forecast of what is to come, we in America are in store for some real problems. Corporate America is already running roughshod over the rights of ordinary people on a daily basis. There appears to be little regard for safety or for the environment.

Share Of Breast Implant Settlement Requested By U.S. Government

The U.S. government has decided it wants a part of the class action settlement made about 9 years ago. Class action plaintiffs settled their claims with makers of silicone breast implants for \$1 billion. Lawyers with the U.S. Department of Justice have argued since the settlement was announced in 1994 that taxpayers should be reimbursed for Medicare payments made on behalf of women who claimed implants caused them to get sick. Lower courts have disagreed. However, a three-judge panel of the 11th U.S. Circuit Court of Appeals has heard oral arguments on the matter. Exactly how much is at stake is unclear. Because of the intimate nature of the breast implants, the settlement kept the names of the plaintiffs confidential. Obviously, this made it hard for the government to figure out which members of the class received the Medicare benefits it wants reimbursed. Lawyers for the implant makers claim the Justice Department failed to ask for the information in a timely or systematic way. At issue is whether federal law allows the government to collect

insurance reimbursements from defendants. I don't believe that the government has this right under the act in question. A federal judge in the Northern District of Alabama, where the class case was based, agreed with the defendants and dismissed the government's suit in 2001 because the government could not identify the women who got Medicare money.

In 1994, hundreds of thousands of women settled their claims with implant makers Baxter Healthcare Corp., Bristol-Myers Squibb Co., Minnesota Mining and Manufacturing Co. and Union Carbide Chemical & Plastics Co. Thus far, at least \$1 billion has been paid out to claimants. My friend Ralph I. Knowles Jr., a great lawyer from Atlanta, chairs the Plaintiffs' Steering Committee. Last year, Dow Corning, another implant maker, settled with the government for \$9.8 million as part of its Chapter 11 bankruptcy reorganization. To date, however, the other implant makers have refused to negotiate. This led to the argument before the 11th Circuit judges. At issue are federal statutes called the Medicare Secondary Payer provisions, which were designed to save money by requiring Medicare recipients to exhaust all available insurance coverage before resorting to Medicare coverage. The provisions hold that Medicare should be reimbursed when a payment could have been made under a liability insurance plan. This was the basis for the government suing Baxter, Bristol-Myers Squibb, 3M and Union Carbide, as well as the escrow agent for the settlement fund. This is a most interesting case and involves some most interesting concepts.

Big Four Top Accounting Watchdog's List

The new Public Company Accounting Oversight Board plans to launch inspections of the Big Four accounting firms in its first year as the industry's independent watchdog. Some believe tackling the Big Four is going to be a "Herculean task" for the Board. Certainly, aggressive action would set a needed tone of overseeing the approximately 700 firms that audit publicly traded U.S. companies. At its first formal public meeting the Board set an estimated budget of \$36.6 million for 2003. Its annual budget after it reaches full staffing probably will be about \$50 million.

Even if the Board does nothing more than issue news releases, it has made sure that its members will be very well paid. The Board's salaries will be \$560,000 for the chairman and \$452,000 for the four other members—amounts that deliberately were made equal to the salaries of members of the Financial Accounting Standards Board, the independent body that establishes specific bookkeeping rules for accountants. The mission of the five-member PCAOB is to "audit the auditors." The auditor-inspection arm of the American Institute of Certified Public Accountants, the industry trade group, has clearly failed to do the job. They have been severely criticized for lax oversight. It is sort of like the "fox guarding the hen house." Apparently, the first step for the new Board will be to inspect the Big Four, which will be a major undertaking.

The nation's largest accounting firms are Deloitte & Touche, Ernst & Young, KPMG and PricewaterhouseCoopers. The Big Four handle the overwhelming bulk of auditing

of large public companies. Arthur Andersen, once a major player and a part of the then-Big Five, collapsed amid allegations of criminal wrongdoing in its role as auditor of scandal-ridden Enron Corp. and other firms. The PCAOB, which will eventually have as many as 300 employees, will open offices in New York and in other cities. Hopefully, the Board will do the job that is necessary to help right a sinking ship. If they fail, our nation's economy will suffer greatly.

\$226 Million Tax Refund Overturned

A federal appeals court has overturned a \$226 million tax refund to Wyeth, the giant pharmaceutical company. It appears the company relied on an unlawful tax shelter. The U.S. Court of Appeals for the District of Columbia said Wyeth created an overseas partnership that lacked any business justification other than to reduce its U.S. taxes. The appellate court reversed a lower court ruling that had ordered the Internal Revenue Service to refund the \$226 million plus interest to Wyeth. This is the latest in a series of cases invalidating tax-avoidance plans that the Merrill Lynch & Co. created for several of its Fortune 500 clients. I suspect that these clients may look to Merrill Lynch for more than an explanation for what may well have been bad advice. It is not a good time to take any risky chances with the IRS, in my opinion. If anybody should know better, Merrill Lynch certainly should.

Homeowners Receive \$14 Million Settlement

A city government and three developers have agreed to pay a

settlement of \$14 million to residents in a Carson City, Nevada, subdivision. The residents claimed faulty construction led to drainage problems and mold-related illnesses. Residents filed a class-action lawsuit, alleging they should have been warned of groundwater problems that resulted in damage to their homes. The homes were built in phases between 1992 and 1998. Under the settlement, 369 residents will receive \$10,000 for miscellaneous repairs to their homes. Fifty-seven residents will receive an additional \$10,000 for health problems caused by mold. Reportedly, subdivision developers and contractors generally are concerned over the outcome of this case, even though it was a settlement rather than an actual trial.

IV. COURT WATCH

Ford Motor Company Sanctioned

A federal court judge has ordered Ford Motor Co. to turn over safety data on its 15-passenger vans. It should be shocking to most folks who don't deal with product liability lawsuits on a regular basis that this is information Ford has but claimed it didn't exist. The court also fined the carmaker for concealing test result data. Ford is accused of hiding the evidence in a case involving the deaths of 2 passengers in one of the large vans when it flipped over on a Kentucky highway. There were 13 persons riding in the van, which is certainly not unusual. This ruling against Ford will have implications in other cases against the carmaker involving the unsafe vans. As we have previously reported, these vans have

come under increased government scrutiny because of the tremendous number of rollover accidents and the tragic consequences. The safety tests were conducted several years ago. Clearly, it is important to know what Ford knew about the vans' stability before they were sold. This is something that the public should know about as well as judges and jurors in cases involving the vans.

The National Highway Traffic Safety Administration has said that 15-passenger vans have a dramatically higher risk of rollovers when fully loaded, and should be operated only by experienced drivers. Last year, the National Transportation Safety Board called on Ford and General Motors Corp. to improve the safety performance of their 15-passenger vans. Some 500,000 15-passenger vans are in use on U.S. highways. According to NHTSA, 424 people have died in passenger van accidents in the United States since 1990. Ford claimed the tests were done on a rudimentary model, not a production version of the 15-passenger van, and do not apply to the vehicle involved in the accident.

A Victory For Ford / Firestone In The U.S. Supreme Court

The U.S. Supreme Court has refused to disturb a ruling that threw out nationwide class-action status for product liability claims by millions of owners of Ford Motor Co. Explorers and tires made by Bridgestone Corp.'s Firestone unit. Some consider this a victory for Ford and Firestone since the Court refused to review the ruling by a U.S. appeals court in Chicago that a single trial would be unmanageable. The effect of the appeals court ruling is that more than 3 million

owners of the Explorers made between 1991 and 2001 and of approximately 60 million Firestone tires will have to pursue individual cases instead of a single class-action lawsuit. As we now know very well, federal regulators have linked rollover accidents involving Explorer sport utility vehicles and Firestone tires to 271 deaths and more than 800 injuries. It should be noted, however, that the claims at issue don't involve any injuries or deaths. These cases seek compensation for the "diminished resale value" of the vehicles. Lawyers for the plaintiffs alleged that both companies knew the tires and vehicles were defective, causing "enormous economic loss to purchasers."

As background, a federal judge in Indianapolis had initially allowed two different classes to proceed. One was for owners of the Explorers, with the other being for buyers of the Firestone tires. The appeals court said a class-action lawsuit would be unmanageable because a number of differing state laws applied. Also, the court felt the case involved too many products sold over a long period, with various circumstances involved. By refusing to hear the case, the U.S. Supreme Court has made it difficult for persons who have "minor damages" as a result of corporate wrongdoing to pursue claims, even when that wrongdoing affects thousands or even millions of consumers. The tremendous costs and expenses incurred in prosecuting the cases of individual plaintiffs will prohibit these claims from being filed. In this regard, it is a major victory for these two corporations.

Exxon Case Reversed

In an unexpected turn of events, the Alabama Supreme Court

reversed the State of Alabama's fraud verdict against Exxon-Mobil. The case is currently in the Supreme Court awaiting a decision on an application for a rehearing. It is expected that the application will be denied and the case returned to the trial court in Montgomery for a retrial. This had to be a major victory for Exxon-Mobil.

Consumer Arbitration Fight In U.S. Supreme Court

The U.S. Supreme Court has agreed to hear arguments from a unit of Conesco Inc. that says a South Carolina court shouldn't have let two borrower arbitration cases proceed as class actions. A \$27 million consumer-lending dispute is now before the Court. The High Court will consider whether to strengthen the rights of companies that require their customers to arbitrate all disputes. Conesco claims its agreements with the customers permit only individual arbitration cases. It is interesting that corporations conceded that many state courts around the country refuse to enforce the terms of arbitration agreements. They want the courts to treat them like any other contracts regardless of the bargaining power of the parties to the contract. A number of special interest lobby groups and trade groups are backing Conesco. Both sides of the argument would have to agree that there had clearly been a "judicial hostility" to arbitration up until a few years ago. This was evidenced by numerous court decisions. In addition, as in Alabama, arbitration was against public policy. The American Bankers Association and two other trade groups are urging the court to rule with Conesco. The two customer complaints accuse

the company's Conesco Finance unit of ignoring a South Carolina requirement that lenders advise consumers of their right to have their own attorneys and insurance agents. One case involves a home-improvement loan by Green Tree Financial, as the Conesco unit was previously known. The other case involves three new-home purchasers who say they were lied to by the company.

In each case now before the High Court, the customers signed an arbitration agreement as part of their loan packages. However, the arbitration clauses didn't mention the possibility of class-action cases. The South Carolina Supreme Court allowed both disputes to proceed in arbitration as class actions. Interestingly, the arbitrators awarded a total of \$27 million in penalties, attorney's fees, and costs. The U.S. Supreme Court was urged by the customers not to take the case for review. The consumers said the \$27 million award was justified to address Conesco's "pervasive and knowing violation" of South Carolina law. This is the second arbitration case on the Supreme Court's current calendar, which runs through June. In addition to the South Carolina case, the Justices also are reviewing a case that asks whether companies can enforce arbitration agreements that don't authorize the level of damages that would be available in court. These cases present significant consumer issues and will be watched closely.

Court Reduces Award In Mold Case

Recently, a Texas Court of Appeals reduced a damage award in a lawsuit over a toxic mold infestation from water damage at a home, its health effects and alleged bad-

faith actions by an insurer. The appellate court cut the award in the case from \$32 million to \$4 million. In addition, all claims for punitive and mental-anguish damages were dismissed by the court. The defendant was a Farmers Insurance affiliate. This had been the largest mold-related verdict in the nation and had received a great deal of attention. There have been a good number of mold claims over the past two years around the country, with Texas and California being leaders in the mold litigation.

Supreme Court Says No To Carmakers In Asbestos Fight

In another significant case from the U.S. Supreme Court, an appeal by Ford Motor Co., General Motors and DaimlerChrysler, seeking to limit their exposure to lawsuits filed by people who say asbestos in car brakes made them sick, was rejected. The powerful carmakers were trying to make it easier to transfer lawsuits from state courts into federal bankruptcy court. Lawyers for the defendants want all of the asbestos suits combined in one court. The industry has been sued by about 15,000 auto mechanics and factory workers who worked around brake parts that had asbestos fibers. With good reason, the victims' lawyers argued against consolidating the cases. Their contention was that each suit is different and should be considered by itself. Federal-Mogul Global Inc., an auto parts manufacturer, had filed for bankruptcy to avoid asbestos lawsuits. Carmakers wanted to be named "related parties" in the company's bankruptcy and be "pulled" into that case. The Supreme Court obviously didn't buy that request and rejected the appeal.

V. CORPORATE CRIME

U.S. Files Suit Against Tenet Over Medicare Billing

The U.S. Justice Department has filed a lawsuit seeking \$323 million in damages against Tenet Healthcare. Tenet was accused of submitting fraudulent claims to Medicare. Government officials contend that Tenet, one of the nation's largest commercial hospital chains, over-billed Medicare through much of the 1990's by submitting inappropriate diagnosis codes for illnesses such as pneumonia and septicemia, according to the federal court lawsuit. To increase how much it was paid by Medicare, Tenet assigned codes "without regard to whether such codes were supported by the patients' medical condition and the physician documentation of the diagnoses in the medical records."

Tenet has been the subject of numerous regulatory inquiries regarding its more recent billing practices. According to the government, much of the overbilling took place while Tenet was still operating under an agreement with the government in which Tenet promised to review its billing practices and report any violations. I suppose that is either supreme arrogance or major stupidity. In either case, it was not a recommended course of action. The government also says that Tenet was "dilatatory in addressing such coding and billing abuses" and "failed to take corrective action until after it learned of the government investigation into the coding practices of hospitals." Tenet had

yet to reimburse the government for claims the company itself had identified as inaccurate.

This lawsuit is the latest in a series of serious problems at California-based Tenet. Questions have surfaced over the amount of special Medicare payments some of the Tenet hospitals have received for especially costly cases. Federal regulators are now auditing those payments. The Justice Department has issued a subpoena seeking more information from the company and 19 of its hospitals. Federal officials have also raised other questions about Tenet's operations. The Securities and Exchange Commission is also conducting an informal inquiry into the company's activities. The lawsuit filed by the Justice Department, given the amount of uncertainty surrounding Tenet, "is a significant exposure," according to knowledgeable observers. This is just another example of how a great number of corporations believe it is somehow all-right to cheat the U.S. government.

Caremark To Pay U.S. \$7.5 Million Settlement

Caremark Rx Inc., formerly MedPartners Inc., has agreed to pay the U.S. Government \$7.5 million to settle allegations that false claims were submitted to Medicare. U.S. Attorney Alice H. Martin, based in Birmingham, reported that the settlement stems from a voluntary disclosure Caremark made under a self-disclosure program. Caremark, then MedPartners, apparently realized that its subsidiary may have been submitting false claims to Medicare. MedPartners acquired the subsidiary AmCare in 1997. In July 1999, MedPartners alerted the Health

and Human Services Inspector General that it had discovered inappropriate Medicare billings by the Florida-based AmCare for home healthcare services.

MedPartners stopped AmCare's business and reported the potential fraud to the government. MedPartners reported to the government that it believed AmCare may have submitted about \$5 million in claims that could not be supported. An internal investigation by the company apparently uncovered several potentially inappropriate practices by certain AmCare managers. Some of these resulted in overpayments from federal programs. The report said the managers were fired and AmCare operations stopped. As the owner of AmCare, Caremark was liable for the billings even though it appears they did not participate in the wrongdoing. The settlement was entered with the Department of Justice and the Department of Health and Human Services.

Some Good Results From A Good Law

Under the False Claims Act law, the government can recover triple damages and penalties against anyone submitting false claims to the government, including Medicare claims payment. The self-disclosure program, however, allows Medicare providers to limit their liability by reporting potential fraud. I have to wonder how much corporate fraud would go undetected were it not for the False Claims Act which encourages "whistleblowers." There is no telling how many billions of dollars have been taken illegally from the U.S. government by government contractors. Apparently, some in Corporate America don't

believe criminal fraud is wrong, so long as the government is the victim. What they forget is that taxpayers are the real victims. Ultimately, those who depend on the involved federal programs are also victimized. The U.S. government should be as tough as possible on corporate criminals. It makes no sense to put individuals in jail for long periods of time for stealing and to let corporate criminals off with just a fine.

VI. CONGRESSIONAL UPDATE

Corporate America On The Attack

Over the past several years we have seen a well planned and efficiently carried out movement designed to destroy the jury system in America. The movement has spent a tremendous amount of money to spin its trumped-up story that our court system is broken and that Corporate America is being hurt in the process. The truth is that we have experienced some of the worst examples of corporate wrongdoing in our nation's history. Corporations such as Enron, World-Com, Ford Motor Company, and Bridgestone/Firestone to name a few have inflicted an amount of "hurt" on American citizens that is so vast it is difficult to fathom. Now at the direction of the "brains" behind the movement, Karl Rove, the Bush White House is making the strangest push ever to protect the corporate scoundrels and to punish their victims.

VII. THE CONSUMER CORNER

ID Theft Worst Fraud In Record Year

According to the Federal Trade Commission, identity theft tops the government's list of most frequent consumer fraud complaints for the third year in a row. The number of total fraud complaints jumped from 220,000 in 2001 to 380,000 in 2002. The dollar losses consumers said they suffered because of fraud grew from \$160 million to \$343 million. Identity theft accounted for 43% of the total number of complaints. In Alabama, consumer frauds cost Alabama citizens \$1.8 million. In our state, there were 1,276 victims of identity theft. At least, that many complaints were filed. I suspect that is a conservative number since many incidents are never reported.

The FTC's "Consumer Sentinel" program now includes data from the FBI's Internet Fraud Complaint Center, the Social Security Administration's Office of Inspector General, the National Consumers League's National Fraud Information Center and Better Business Bureaus around the country. The Internet is fast replacing more traditional methods of scamming, including the phone and mail. Of about 220,000 complaints that weren't related to ID theft, half had some connection with the Internet. Consumers were contacted online, responded to Web ads or made a questionable transaction entirely on the Internet. Of the consumers who complained about fraud, only 23% were contacted by phone. Howard Beales, Director of the FTC's Consumer Protection

Bureau, says there are several ways to protect yourself from frauds of all kinds. As the old saying goes, "like any offer, if it sounds too good to be true, it probably is." There are some ways that will help you to avoid becoming a victim:

- Don't leave credit card receipts lying around.
- Don't give a bank account number or Social Security number to any person or company you have doubts about. A company that has only a Web site or mailbox drop should raise suspicions. Nearly 20% of suspected frauds were done through bank debits, the FTC says.
- Ask any business you are dealing with to put promises in writing. Go over them carefully before paying money or signing contracts.
- Don't pay up front for a loan or credit. Legitimate lenders won't guarantee loans or credit before you apply, especially if you have bad credit or a bankruptcy.
- Get a copy of your credit report periodically to catch unauthorized credit activity early.

Complaints of fraud can be filed at www.ftc.gov. You can also call 877-FTC-HELP for fraud problems 877-ID-THEFT for identity theft reports. Additionally, you can also contact the Division of Consumer Fraud at your state's Attorney General's office. In Alabama, the phone number is: 334-242-7334.

Predatory Mortgage Lending

This will expound on one segment of the predatory lending crisis that was mentioned in a previous section of the Report. Homeownership represents the best possible opportunity for families to

build wealth and economic security. Accumulating equity in their homes is a primary way most families earn the wealth to send their children to college, pay for emergencies and pass wealth on to future generations. With the tremendous increase in low income and moderate-income homeownership, there has come an increase in the number of homeowners with little financial experience and lacking education about the danger of using their home as collateral. Also, there has been an increase in elderly homeowners, living on a fixed income, with limited resources available to maintain their home. Homeowners who have limited income and who are less experienced and less sophisticated about mortgage debt have created an environment ripe for abuse. Sub-prime lenders have aggressively targeted selling sub-prime loans to the most vulnerable homeowners.

The sub-prime mortgage industry, being fully aware of these vulnerabilities, has consistently targeted these homeowners through direct mail solicitations and other aggressive practices. The elderly, unsophisticated and poor homeowners are being devastated by sub-prime lenders' abusive lending practices. These abusive practices include excessive interest rates; excessive closing costs and fees; financing the sale of unnecessary and over-inflated credit insurance; flipping borrowers into repeated fee-loaded refinancing; prepayment penalties; broker kickbacks; loans the homeowners cannot afford to repay; paying off low interest rate loans with high interest rate loans; refinancing unsecured debt; and the outright fraud in solicitation or origination of loans. Sub-prime loans are conclusively associated with high default and foreclosure rates.

Sub-prime lending can be a helpful way to provide mortgage credit to people with some credit problems, and can be done in a non-predatory fashion. However, there is a distinction between "productive credit," which can be defined as "wealth-building," and "destructive credit," which results in a loss of equity and wealth, often built over a lifetime. A majority of predatory loans start out with small consumer finance loans that are systematically refinanced into large first liens. These predatory mortgages usually involve consolidating consumer debts, thereby shifting the consumer debt onto the home, putting the home at risk. Elderly, unsophisticated and poor borrowers who do not have access to mainstream credit seem to be particularly vulnerable to sophisticated and highly manipulative marketing tactics by predatory lenders. We must start addressing the problems of predatory lending.

Recently, Associates First Capital Corporation and Associates Corporation of North America (The Associates), acquired by Citigroup in November 2000, agreed to pay \$240 million dollars in redress to consumers to resolve Federal Trade Commission charges and class action lawsuits alleging that The Associates engaged in systematic and widespread deceptive and abusive lending practices. As a result of the settlement, as many as two million consumers will receive monetary relief in the form of cash refund or reduced loan balances. The complaints allege that through deceptive marketing practices, The Associates induced consumers to refinance existing debts into home loans with high interest rates and fees, and to purchase high cost credit insurance. The settlement will provide \$215 million in redress to consumers who bought credit

insurance in connection with loans made by The Associates between December 1, 1995 and November 30, 2000. Additionally, the settlement will provide \$25 million to consumers whose Associates mortgage loans were refinanced by The Associates during the same time period. Consumers who want to exclude themselves from the settlement and pursue their legal rights in individual lawsuits must file a Request for Exclusion by February 7, 2003. This is the largest consumer protection settlement in the history of the Federal Trade Commission.

Homeowners have been victimized by abusive lenders, losing their homes or a large portion of their wealth they spent a lifetime building. In order to protect these homeowners, Congress should address the weakness in federal law and pass a federal statute that would address these predatory lending practices. While strengthening the law is important to protect homeowners from abuse, community education, litigation and media advocacy are also effective measures in battling predatory lenders. In fact, the courts and the media have had to take the lead because of legislative inaction.

Cell Phone Problems

In previous issues, we have discussed the safety hazards caused by cell phone use while driving a vehicle. There is another problem, and that is lots of folks have good reason to believe that cellular telephone service is pretty bad. This also can cause some risks of danger. A recent study by Consumers Union confirms their belief. Nearly a third of the customers surveyed by Consumers Union are seriously considering switching companies. However, there is no easy way to figure out which plans

are best, According to Consumer Reports magazine. "Deciphering one plan is hard enough, but comparing plans from various carriers is nearly impossible," said Jim Guest, President of Consumers Union, which publishes the magazine. In addition, he said companies make it difficult to switch by refusing to let customers keep their phones or phone numbers when they move to another company. Early termination penalties of up to \$175 are being charged in many instances. A Federal Communications Commission regulation that would let customers keep their phone numbers when they switch was scheduled to go into effect in November.

Mr. Guest described the current state of the cell phone industry as a "cell hell" for consumers. "The cell phone industry has made great strides in offering consumers sleek cell phones with the latest gee-whiz gadgets and gizmos, color screens, games, individualized rings and Internet access. But the cell phone industry is not providing the nuts and bolts - the basic services consumers depend on." The most essential of those basic services, according to Mr. Guest, is the ability to make a 911 call. The magazine found that emergency cell phone calls often failed because they were limited to one company's signal, even if a rival's signal was stronger in the area. The magazine said a survey of 21,944 subscribers found numerous complaints of dead zones, busy signals and dropped calls. Service was compared in six cities - New York, Washington, D.C., Chicago, Dallas, Los Angeles and San Francisco. Many people, especially females and elderly citizens, consider a cell phone as a safety feature. Certainly, customers should expect a phone that "works" when it is

needed in an emergency. Consumer Reports suggested that customers do some homework before signing on with any carrier, including:

- Seek recommendations from neighbors and business associates to find out which company's service is best where the customer will be using it.
- Decide on a plan before deciding on a phone.
- Take advantage of the usual two-week trial period.
- Review the bill carefully each month.

Consumers Union is an independent nonprofit organization whose mission since 1936 has been to test products, inform the public and protect consumers. In my opinion, Consumers Union provides a most valuable service for American citizens. The group's income comes from sales of Consumer Reports and other services and noncommercial contributions and grants. This allows them to remain independent of the influence of Corporate America.

Reports Of Gas Leaks In Some Volvos

Ford Motor Co.'s Volvo 850 Series sedans and wagons are being investigated by U.S. regulators because of reports of gasoline leaks. The inquiry may affect 198,000 of the 1993 to 1996 models. The National Highway Traffic Safety Administration began its inquiry last month. Thus far, it has received 15 complaints of leaks from fuel tanks. NHTSA says no accidents, injuries or fires have been reported.

Horses Killed By Toxic Mold In Corn

A toxic mold in corn apparently killed at least three horses recently

in Louisiana. Officials there say it is possible that even more were killed. Several horses that died were tested for West Nile but did not actually have the virus. Veterinarians in Louisiana are being told by the State Agriculture Department about the symptoms of poisoning from the mold, which is called fumonisin. They are also being told how to test for it. According to Louisiana officials, the corn tainted with fumonisin is known to have caused at least three deaths. It should be noted that while most farm animals can tolerate the mold, even 5 parts per million can kill horses. This poses a significant risk. Recent tests on corn feed in Louisiana were positive for the mold. The three horses which died in Louisiana turned out to be eating corn with 90 parts per million of the mold. Fumonisin and aflatoxin, another toxin found in corn, thrive on wet weather. If a horse is showing abnormal neurological signs, the owner should pull the feed and have the animal checked for fumonisin. Anybody owning or housing horses should be aware of this potential problem. While large animal veterinarians are probably already aware of the problem, you should check with your vet to make sure.

VIII. PRODUCT LIABILITY UPDATE

Top Regulator Criticizes SUVs On Safety Front

When I heard that the nation's top auto safety regulator had joined the growing number of sport-utility vehicle critics, I almost fell out of my chair. Dr. Jeffrey Runge, Adminis-

trator of the National Highway Traffic Safety Administration, said he wouldn't drive the SUVs that scored lowest in government rollover ratings "if they were the last vehicles on earth." Speaking at an auto industry conference, Dr. Runge hit automakers pretty hard for not making SUVs as safe as passenger cars. He noted that the popular SUVs, which are really nothing but fancy trucks, are much more likely to roll over in a single-vehicle accident. Dr. Runge also called for more work on designs and technologies that will keep the vehicles from tipping. NHTSA will propose guidelines this year for side air bags, which are becoming more common, especially in SUVs.

These surprising comments represent Dr. Runge's most direct criticism of the auto industry since he took over the agency in August 2001. Up to this point, most of his public comments have focused on increasing safety belt usage and decreasing drunken driving. As reported by the *Wall Street Journal*, Dr. Runge warned automakers that if they don't make SUVs safer, the government could step in and require safety improvements. Hopefully, NHTSA's "bite" will be as strong as Dr. Runge's "bark." If so, it will result in safer vehicles on our highways. While automakers market these vehicles as safe for families, the companies have known for over 15 years that SUVs are particularly dangerous, both to SUV occupants and to occupants of other vehicles. Since most automakers have failed to act, the government must step in and mandate changes that if implemented will save thousands of lives and prevent great numbers of crippling injuries. This is NHTSA's duty!

It should be noted that approximately one-third of the 2002 SUVs

tested by the federal regulatory agency earned just one or two stars in NHTSA's five-star rollover rating. It is most significant that the low performers included the top-selling SUV, Ford Explorer, and other popular models such as Chevrolet Tahoe, Toyota 4Runner, Nissan Xterra, and Mitsubishi Montero. Automakers don't like NHTSA's rollover ratings, derived from a mathematical equation based on wheel width and center of gravity.

NHTSA is also developing a test for rollover tendency based on driving maneuvers done on a track. A final standard for that test is expected this year. NHTSA believes the current rating method "accurately predicts rollover behavior of SUVs in real-world driving," according to an official spokesman. SUVs have been under attack by an increasing number of citizens who dislike their size and gas guzzling. The opponents include some religious groups and environmentalists. However, my objection to the SUVs involves much more than the fact they are gas-guzzlers. I am greatly concerned over their lack of highway safety because of the known stability and handling problems. SUVs roll over because of their higher center of gravity, and SUV occupants are three times more likely to die in a rollover crash than occupants of passenger cars. NHTSA is currently developing standards, mandated by Congress in 2000 following the Ford/Firestone debacle, that will provide consumers with information, by make and model, about the propensity of SUVs to roll over. This is a good start, but more is needed. NHTSA should issue a minimum rollover prevention standard.

NHTSA should also require safety changes to improve crashworthiness and protect occupants when

these vehicles do roll over. The federal regulatory agency is considering a new standard to prevent deaths and injuries due to flimsy roofs that are crushed in rollovers. Hopefully, NHTSA will live up to Dr. Runge's strong words and issue this rule. Other measures mentioned by Dr. Runge include side air bags designed to protect the head, which Detroit automakers promised to install voluntarily. However, the industry has pulled back from doing so and has broken their promise.

Dr. Runge also spoke of reducing the danger to other motorists by making SUVs more compatible with passenger cars and less aggressive. Because of their rigid frame and high bumper, SUVs are like urban tanks. Occupants of other vehicles, who are unlucky enough to be broadsided by an SUV, will always come out on the short end of the stick. Implementing these measures without delay is essential. This SUV safety overhaul should include weight reduction and technologies to vastly improve fuel economy. The automobile companies have repeatedly shown, by resisting virtually every new safety innovation, that they will not design safe SUVs without tough minimum government standards. In the auto industry, voluntary safety moves are the exception rather than the rule. While not all deaths and serious injuries can be prevented in real-world accidents, a great number of them can be. While Dr. Runge's words are encouraging, it is time for NHTSA to act and for Congress to give the agency the funding necessary to do its job.

Another Wrongful Death Suit Filed

Our firm recently filed a wrongful death lawsuit against the Ameri-

can Motors Corporation and the Daimler/Chrysler Corporation. In October of last year, 33-year-old Cynthia S. Berkley, 5-year old Rebekah Nicole Berkley, and 6-year old Samantha Beck were riding in a 1983 AMC Jeep Wagoneer in Houston County, Alabama. The Wagoneer collided with a truck. The fuel system of the Jeep Wagoneer failed in the collision, resulting in gasoline and gasoline vapors being forced from the fuel system. The released gasoline and vapors quickly ignited. The ensuing fire engulfed the Jeep Wagoneer, severely burning the occupants. As a result of their burns, Cynthia and Rebekah were killed. Samantha was severely burned and is permanently impaired. Clearly, a person who survives the forces of an automobile crash should not die in a post-collision fire caused by a fuel system defect. Greg Allen and Michael Andrews from our firm will handle this tragic case. Greg, who is recognized around the country for his work in product liability cases, has successfully handled other cases of this nature.

Three Deaths In Highway Crash

We are filing a wrongful death lawsuit in Lowndes County in a case where 3 members of a family were killed. A wrecker was parked at night partially on I-65, a busy interstate highway, with no lights according to reports. The rollback on the bed of the Nissan wrecker extended several feet to the rear of the vehicle with no underride protection. Our vehicle was traveling at a normal speed on the highway and struck the back of the wrecker, killing the 3 occupants on the right side of the vehicle. Nissan had sold a package deal to a wrecker company in Alabama with a

wrecker bed and rollback to be installed by a related company in North Carolina as a part of the deal. The vehicle was sold with no underride protection with full knowledge as to the use to which the vehicle would be put. Greg Allen, LaBarron Boone, and I will be handling this case.

General Motors Worker Sues GM Under Michigan's Whistleblower Law

It appears that General Motors Corporation is in deep trouble again. This time, one of its own employees has sued GM claiming he was blackballed by the company after he threatened to report that he found safety problems in the fuel line systems of some vehicles. Courtland Kelly was a manager of the internal auditing program at General Motors. This program tested vehicles for safety. Kelly found that the fuel line problems caused fuel to spill out in some accidents, which could result in a fire. Obviously, this would create a most hazardous situation. According to the lawsuit, Kelly repeatedly notified higher management at GM of the problem, but was ignored. When he threatened to contact a federal agency about the defects he found, Kelly was demoted and his auditing program was discontinued. He is still employed at GM, but does not have a title or a permanent assignment. He claims to have been denied access to internal computer files, such as the ones he helped create that describe the safety problems.

This is just the latest chapter in what is now a well-documented history of problems GM has had with the fuel systems on its vehicles. Instead of solving the known problems, GM has spent the last 27

years concealing what it knows about its fuel system's dangers. It is estimated that 20,600 passenger cars catch fire in crashes each year, killing 1,100 persons and injuring 3,200 seriously. GM estimates that between 300 and 500 people a year are killed in fires that erupted in vehicles when they crash. That estimate dates from 1973 when it was the first assumption in the now infamous "Ivey Memo." Ed Ivey, a mechanical engineer in GM's Oldsmobile Division in 1973, prepared his two-page memo to help managers "figure out how much Olds could spend on fuel systems" safety. Ivey assigned a "value" of \$200,000 to each of the up to 500 people who burned to death annually in GM cars, concluding that the deaths costs \$2.40 per car on the road. If GM could install a safer fuel tank for \$2.40 per car or less, it still could save money. Instead, GM decided it was cheaper to pay for the deaths than to save lives. GM calculated it would cost \$8.59 per car to protect fuel tanks in crashes - a net safety (cost) of \$6.19 per car to save lives. Ivey's report was distributed to senior management. In later litigation, it was revealed that Ivey had lied in previous trials about GM's knowledge of fuel tank hazards and the corporation's use of 1973 cost analysis. GM has repeatedly tried - and continues to try - to quash motions requesting the evidence and to seek protective orders based on claims that the documents are protected by the attorney/client privilege.

The bottom line is that engineers have known for decades how to protect fuel systems from leaking in most crashes. The gas tanks should be located away from the "crash zone," behind the rear axle. The tanks should be situated over the car's rear axle and within the

vehicle's protective frame; they should be kept away from protruding objects that could puncture them. The tank should have shields on them to protect them from such objects. Further, GM should configure and construct tank filler necks that won't rupture or break away from the tank in a crash. GM should install safety "check valves" that prevent gasoline from siphoning out of the fuel tanks after a crash. While this latest revelation by Mr. Kelly that GM has problems with its fuel line systems is nothing new, it again puts the spotlight on GM to fix the problem it has been trying to cover up for years.

Settlement Reached In Lawsuit Against Ford And Firestone

Over the past year or so, there have been a number of settlements in cases involving Ford and Bridgestone/Firestone. The latest involves a settlement reached in a lawsuit by the family of a woman who was injured when a faulty tire caused her Ford Explorer to roll over. The agreement to settle came as the trial against Ford and Bridgestone/Firestone was about to begin in a Los Angeles court. The woman's family had sued the two companies after she suffered a broken neck and brain damage in a 1999 accident. The crash occurred when the tread separated from a defective Firestone tire. Ford and Firestone have previously settled a number of similar claims before verdicts could be reached. It is shocking that more than 250 people have been killed and hundreds more injured in accidents around the country involving Bridgestone/Firestone tires. I suspect these numbers are actually conservative because of the veil of secrecy that these corporations insist on when

settling cases. Most of the accidents involved the rollover-prone Ford Explorers and Firestone tires losing their tread. This tragic chapter in our nation's history should be forcing the federal government to do a better job of regulation. Instead, our President and his team want to protect the corporate wrongdoers and punish their victims. I wonder how long Dr. Runge will last after his public comments on how dangerous the SUVs are.

Power Window Safety

It is very easy for a small child in an automobile equipped with power windows to accidentally hit the power window switch. Most folks are totally unaware that this hazard even exists and that there have been resulting fatalities. A recent event reported in the *Los Angeles Times* involved such an occurrence. Two-year-old Zoie Beth Gates of Anthony, Kansas, was supposed to be taking a nap in the back seat of her father's Ford pickup truck when a friendly dog wandered over and grabbed her attention. The child stood up and stuck her head out the window to reach the dog. Unfortunately, her knee accidentally hit the power window switch. The window went up and trapped her neck, killing her almost instantly.

"My husband was only about 20 feet away from the truck when it happened. Many parents don't realize the danger of power windows," said Britt Gates, Zoie's mother. It is disturbing that no government agency has kept track of how many children die in power window accidents, and few standards exist to help prevent the deaths. Kids 'N Cars, a San Francisco-based nonprofit organization

that promotes highway safety programs for children, says it has identified 42 child deaths and thousands of injuries from power window accidents since the devices became widely available in the 1960s. Janette E. Fennell, executive director of the group, places much of the blame for the problem on U.S. auto manufacturers. Each death the group has identified has involved vehicles made by General Motors Corp., Ford Motor Co. and Chrysler Group. The Big Three use a type of rocker switch that can activate a power window motor with a slight push of a button if a child leans on it with a foot or knee. Automakers will always attempt to blame accidents involving power windows on parents who leave children alone in vehicles. Zoie Gates' parents sued Ford for the death of their daughter. The lawsuit recently was settled for an undisclosed amount, according to Oklahoma City attorney David Little, who represented the family.

The family's lawyer plans on filing a petition with the National Highway Traffic Safety Administration calling for the agency to require automakers to use safer power windows. Safety groups believe a power window that requires a passenger to put a finger in the lever to activate it would be safer. They also recommend using a power system with a sensor to stop a window from moving if there is an obstacle in its path. This will prevent a child from becoming trapped. Federal regulators issued a rule in 1996 that required power windows to include an automatic reverse system similar to the safety triggers on garage door openers. But the rule applies only to power window systems with an express up or down feature, and critics allege that it has other loopholes.

Delphi Corp., the largest supplier of auto parts and systems, has a power window system that optically senses obstructions and prevents the window from closing. The technology was developed by Prospects Corp. and licensed to Delphi in October. Christopher O'Connor, Chief Executive of Prospects, said a European automaker has agreed to use the system in its 2005 models, but so far no domestic company has such plans.

More On The Problem – Children And Cars

Accidents with power windows are just one of the dangers faced by children left unattended in vehicles, a safety issue Kids 'N Cars has identified. The group said four children died last year from power window accidents, and more than 40 deaths involved children who died as a result of heat inside closed cars. About 58 children were killed when drivers backed over them, the group said. The federal government has shown little interest in regulations or programs addressing these types of deaths, particularly when accidents do not involve a moving vehicle. NHTSA has suggested that the area is the responsibility of the Consumer Product Safety Commission. According to Ms. Fennell, "both agencies have disclaimed responsibility."

Safety Tips For Parents

Safety systems can certainly help prevent deaths of children left unattended in vehicles. However, parents also have to help out. Parents or others in charge of children should never leave a child alone in a car for any reason. However, we know that adults will

be involved in many types of activities such as paying for gas, dropping off items, checking for a flat tire, or any other activity that involves being more than a few steps from their vehicle. A good rule is to never leave the keys in a car with a child inside. A better job should be done of warning parents and others about the dangers involving children and power windows. Few adults ever think of a power window posing a safety hazard. Ms. Fennell has drafted legislation that she hopes will be introduced in Congress this year requiring NHTSA to collect statistics on deaths involving stationary vehicles and study technological solutions to avoid such fatalities. We should all support this organization and this legislation.

Lack Of Safety Rules For Bath Seats

Many parents are totally unaware of the dangers to small babies who are placed in bath seats. The Consumer Product Safety Commission voted in May 2001 to develop a mandatory safety standard for their seats. Manufacturer Safety 1st came out with a prototype of a safer seat in November 2001. Now CPSC says safety standards won't be considered for several months. Safety 1st says its improved version won't be on the market until in the fall of this year. The seats, used to prop infants up in a tub, have been linked to more than 80 infant deaths in the past 20 years. It is indefensible that there have been at least 10 infants who have died in baby bath seats during the nearly two years while federal regulators and the lone maker of the seats were "working" to make them safer. That cannot be justified. Safety 1st sells about 500,000 a year of the

currently available seat, which has suction cups on the bottom that don't adhere to the skid-proof tubs in most homes today. This means the seat can tip and drop the baby into the water. Infants also can slip through the large leg openings in the seat.

Bath seats have become a divisive product safety issue. Many consumer and safety groups believe the seats should be banned. Proponents of a ban say the current design of the seats is defective and that the seat encourages parents to take risks. Believing the seats to be a safe-haven for her baby, a mother could leave the bathroom to answer a ringing phone. This is perhaps a common occurrence. It only takes seconds for a baby to drown in a tub. There are many distractions for a busy mother with small children. Companies know this and must take precaution to preserve human life.

Safety 1st says they put a warning on the box the seat comes in that parents not to use it in a skid-proof tub and not to leave a baby alone. In my opinion, that warning is totally inadequate. Many mothers believe the seat to be a safety device, when actually it is only a convenience device. The prototype seat put forward months ago had an arm that hooked onto the side of the tub, eliminating suction cups, and smaller leg openings. Former CPSC chairman Ann Brown, who once backed a ban of the seats, showed off the Safety 1st prototype on her last day with the agency in November 2001 and cited the seat's redesign as one of her main accomplishments. Now the head of product-safety foundation SAFE, Ms. Brown says it's inexcusable CPSC hasn't acted. I totally agree. Hal Stratton, CPSC's new chief, says bath-seat safety is impor-

tant, but claims it will take more time to address the problem. He notes that CPSC is working with ASTM, the standard-setting group, on a “voluntary” industry standard for the seats, which the agency must do under law before setting a mandatory standard. It would appear that a more aggressive approach is badly needed. Unless the seats can be made much safer, I believe they should be banned and recalled.

Heavy Truck Crashworthiness

Are heavy-duty trucks designed to protect occupants during foreseeable accidents? In most cases, heavy-duty trucks or 18-wheelers are not designed with sufficient safety features to protect the occupants in a foreseeable accident, but rather are designed to allow freight companies to haul more cargo to generate higher profits. Unlike passenger cars, which are regulated by the Federal Motor Vehicle Safety Standards (FMVSS), heavy-duty trucks have very little regulation when it comes to safety, design, and crashworthiness. For many years, the Federal Motor Vehicle Safety Standards have provided minimum safety standards for design and production of passenger cars. The minimum safety standards for passenger cars include, but are not limited to, steering wheel designs, door latch designs, seat belt designs, and fuel system designs. However, very few of the FMVSS standards apply to the design and production of heavy-duty trucks. As a result, heavy-duty trucks have, for the most part, lagged behind passenger cars when it comes to occupant safety and crashworthiness. Many of these trucks are built of fiberglass and aluminum, which provide very

little protection to occupants who are involved in foreseeable accidents.

In fact, only a few manufacturers produce heavy-duty trucks made of high-strength steel and incorporate state-of-the-art interior components, which are designed to help reduce occupant injuries.

Over the last 20 years, NHTSA and the Society of Automotive Engineers (SAE) have conducted numerous studies of typical high-way accidents involving heavy-duty trucks. These studies have revealed that a large number of the deaths and/or serious injuries associated with heavy-duty truck accidents are the result of entrapment of the occupants with interior parts of the vehicle due to excessive cab crush. One of the ways to limit the number of deaths or serious injuries in heavy truck accidents is to limit the number of entrapments through the use of an energy management steering system. The FMVSS has required energy-absorbing steering systems in passenger cars for years. However, this regulation does not apply to the design and manufacture of heavy-duty trucks. As a result, very few heavy truck manufacturers have incorporated this safety design into their vehicles, despite the thorough research performed on the issue by organizations like the SAE. In fact, the SAE has promulgated testing procedures and standards to determine if a vehicle’s steering system is likely to cause severe injuries during foreseeable accidents. However, these standards are voluntary and not mandatory.

Unfortunately, instead of focusing on occupant safety, most heavy-duty truck manufacturers have focused their energies on designing the lightest trucks possi-

ble. The maximum weight an 18-wheeler can carry is restricted by law. Therefore, if companies can reduce the weight of their trucks, they can increase the freight being hauled. As a result, many heavy truck manufacturers have chosen to design vehicles capable of increasing profits, not occupant safety. Interestingly, many of the safer heavy truck designs come from European truck manufacturers. In fact, in many instances, European standards provide much more stringent safety requirements for heavy-duty truck design than do American standards. In fact, in many instances, there are no American standards related to safety issues that are covered by European standards. Rather than producing light vehicles that increase freight company profits, American heavy truck manufacturers should become the leaders in occupant protection safety.

Rear Seat Passengers And Safety

Many of us have heard growing up that the safest place to be in a vehicle while traveling is the back seat. However, this is not true for most small passenger cars. Most auto manufacturers do not perform any rear seat impact collision testing with an occupant (dummy) in the rear seat. Thus, the automobile manufacturers have no clue if these small passenger vehicles will protect rear seat occupants in a rear impact collision. The consuming public becomes guinea pigs for the automotive manufacturers as it relates to occupant safety in a rear impact. A statistical study performed by General Motors revealed that 23.3% of all injuries occurred in rear impact collisions. However,

rear impact collisions make up only a small percentage of the total accidents that occur on the road. Accordingly, one can conclude that an occupant is at the greatest risk of injury if they are in the rear seat in a rear collision. With this knowledge, you would think that the automobile manufacturers would conduct rear safety testing with test dummies in the rear of their vehicles.

Statistics prove that the potential for serious injuries drastically increases for the rear seat occupants of a vehicle during a rear impact collision. Most small passenger vehicles, such as the Geo Metro, are death traps for rear seat occupants in a rear collision because these vehicles have not been adequately tested. In fact, most manufacturers have not performed impact testing with rear seat occupants (dummies) in its vehicle. Manufacturers routinely conduct the following crash tests: 30 mph frontal impact; 30 mph frontal offset testing; impact testing at 30 degrees right of center; and 30 degrees left of center. These tests are run to determine the survivability of a front seat occupant in a frontal collision. No such testing is conducted for the rear seat occupant - the second-class citizen - in a rear collision.

Most manufacturers have specifications that require a certain amount of survival space for front seat occupants. Occupant survivable space is a specification that sets a limit on the maximum amount of intrusion allowed into the front occupant compartment. There is no such requirement for the rear occupant compartment. An ex-automotive engineer once said, "From a safety standpoint,

rear seat occupants are considered second class citizens by the automobile manufacturers." As a result, needless deaths occur across this country because manufacturers such as GM have not adequately tested their vehicles to see if the vehicle will protect the rear occupant in a rear impact collision.

A Case In Point

Our firm recently filed a case in an Alabama court where a young man was killed while traveling in a 2-door Geo Metro. A Chevrolet Tahoe struck the Geo Metro in the rear, which should have resulted in a survivable event for all occupants. The front seat passenger of our vehicle walked away with no serious injuries. However, the child in the rear seat was killed. If adequate testing had been performed, and corrective action taken, everyone should have walked away from this collision. GM has never tested a Geo Metro with a rear seat occupant (dummy) in the vehicle in a rear impact collision test. Unfortunately, our client became the test subject for GM. Had the Geo Metro been adequately tested, Ahmar Allen would be alive today. The rear of the Geo Metro collapsed in, with the rear structure nearly touching the back of the front seat. There was no chance for Ahmar Allen to survive the collision. The tragedy is that there are thousands of these vehicles on the road and others will inevitably be killed in rear impact collisions, which are clearly survivable.

IX. MASS TORTS UPDATE

Bayer Says Lawsuits Over Anti-Cholesterol Drug Rise To More Than 7,000

German drug maker Bayer has announced it now faces 7,000 lawsuits worldwide over an anti-cholesterol drug withdrawn from the market in 2001 after it was linked to dozens of patient deaths. The number of lawsuits brought by patients claiming they suffered severe side effects from Lipobay, marketed as Baycol in the United States, has grown steadily. A Bayer spokesman reported that 7,400 suits have been filed. This is up from 2,000 last August and 5,700 in November. To date, about 400 cases have been settled. Bayer says it will seek further out-of-court settlements on a case-by-case basis. As we all know by now, the drug was associated with rhabdomyolysis, a muscle-wasting syndrome. While Bayer continues to settle lawsuits, it claims the lawsuits against it are groundless. Bayer has announced that its product-liability insurance will most likely cover all claims against the company. Bayer, which makes Aspirin and anthrax treatment Cipro, said last year it was prepared to merge its drugs business with a larger rival. Our firm currently has over 20,000 clients who have Baycol claims against Bayer. We know first hand that the claims in our office are not "groundless." The amount of damages in the cases will vary depending on the degree of injury and losses sustained by each client. I believe that Bayer will ulti-

mately have to agree with our assessment.

U.S. Government Report Released On Direct-To-Consumer Advertising

It is undisputed that the pharmaceutical industry is one of the most profitable industries in the world. They promote their products directly to consumers via television, print and other media. Studies show overwhelmingly that when a patient requests a particular medication, the doctor complies. A primary way to increase that type of demand is through direct-to-consumer advertising. Federal regulations on prescription drug advertising were loosened in 1997. Since that time, the number of direct-to-consumer advertisements has increased significantly. Pharmaceutical companies are required to submit ads to the FDA as soon as they are disseminated to the public. It is the responsibility of the FDA to regulate the advertisements to ensure that they present accurate information and fairly represent the risks and benefits of the drug. When the FDA identifies a misleading advertisement, it sends a regulatory letter to the company asking the company to stop disseminating the advertisement. Many companies continue to run misleading ads even after the FDA has tried to stop them.

The United States General Accounting Office recently released a report detailing limitations of the FDA's oversight of direct-to-consumer advertising. According to the report, the FDA's oversight is limited because it cannot verify that it receives all newly disseminated advertisements from pharmaceutical companies and because of a procedural

change implemented by the Department of Health and Human Services. In January 2002, the Department of Health and Human Services, which oversees the FDA, changed the procedures for reviewing draft regulatory letters. The change in procedure has reduced the FDA's effectiveness in issuing regulatory letters because no violation letter can be issued until the FDA's Office of Chief Counsel reviews it for "legal sufficiency and consistency with agency policy." This change has negatively affected the FDA's oversight of the advertisements because it has created a delay between the FDA's discovery of a deceptive ad and notice to the pharmaceutical company. The Office of Chief Counsel set a goal to review the regulatory letters within forty-five days. Because the life cycle of most ad campaigns is less than two months, many ads have completely run before notice is given to the company. Therefore, the misleading information may be completely disseminated before the manufacturer receives the FDA letter, thus leaving consumers exposed to inaccurate and/or incomplete information. The GAO report recommends that the agency expedite the review of regulatory letters so that misleading ads can be revised or withdrawn in a timely manner. The Department of Health and Human Services commented on the report and stated that it has established a goal of issuing letters within fifteen working days of review at the Office of Chief Counsel.

Does Big Pharma Now Rule D.C. With An Iron Fist?

As you know, U.S. Senator Bill Frist (R-TN) is the successor to

Trent Lott as the Senate Majority Leader. Senator Frist, a former surgeon, first ran for the Senate in 1994. In an interview with National Public Radio just days before he first took office, Senator Frist stated "In my first meeting, as I looked around the room, I started saying, 'You know, I think I'm the only outsider here.' Seven [of the new 11 Senators] are from Congress and one a governor and two have worked in Washington as high-level aides, and then there's me. And I think there's a real advantage in that, and that is what I ran on, the whole concept of citizen legislator, not coming here forever, but coming with a mission to accomplish and then leaving. And I think I do represent that." However, there have been questions raised regarding Senator Frist's ties to the healthcare and pharmaceutical industries. I will give the Senator the benefit of the doubt and watch his actions over the next few weeks. I hope he will not blindly follow the Karl Rove agenda and be an enemy of consumers in this country.

Frist Ties To The Healthcare Industry

Senator Frist's father and brother founded HCA, Inc. (Hospital Corporation of America), the largest for-profit hospital chain in the United States. This corporation has been under investigation for almost ten years by the federal government. The charges are that HCA defrauded Medicaid, Medicare and Tricare (the U.S. military healthcare provider). Forbes magazine reported "the company increased Medicare billings by exaggerating the seriousness of the illnesses they were treating. It also granted doctors partnerships in a company hospital as a kickback for the

doctors' referring patients to HCA. In addition, it gave doctors 'loans' that were never expected to be paid back, free rent, free office furniture - and free drugs from hospital pharmacies." Deputy Assistant FBI Director Thomas Kubic called its investigation into HCA "one of the FBI's highest-priority white-collar crime investigations." While Senator Frist made his ascension to the extremely important position of Senate Majority Leader, the Bush Justice Department suddenly ended the investigation against HCA. This may well be another coincidence. According to Reuters, HCA has agreed to pay more than \$880 million to settle government accusations of healthcare fraud and has agreed to pay a total of more than \$1.7 billion in penalties, the largest figure ever assessed in a healthcare fraud case. HCA will still be able to participate in Medicare and no criminal charges will be brought against any top HCA executives. Those who will escape criminal prosecution include Thomas Frist (Senator Frist's brother), the former HCA CEO and now its current director. Senator Frist and his wife currently hold \$26 million in HCA company stock in a blind trust.

In a *Los Angeles Weekly* article, Jamie Court, from the Foundation for Taxpayer and Consumer Rights and co-author of the book, "Making a Killing: HMOs and the Threat to Your Health," stated that "In the Senate, Frist has used his influence to further HCA's cause by stopping a strong patients' bill of rights, gridlocking a mandatory Medicare prescription-drug benefit, and promoting caps on damages for victims who sue negligent hospitals like HCA's". The Executive Director of Public Campaign, Nick Nyhart, said that "Frist isn't the senator from Tennessee - he's the senator from the state of Health-

care Industry Influence - he's gotten more than \$2 million from the health-care sector, giving him the dubious distinction of raising more cash from health-care interests than 98% of his colleagues."

Frist Ties To The Pharmaceutical Industry

According to *The San Diego Union Tribune*, Senator Frist was the sponsor of legislation limiting the legal liability for vaccine manufacturers that used a mercury-based preservative, thimerosal. Thimerosal has been linked to autism in children. This was passed as a provision of the Homeland Security legislation and would stop pending and future lawsuits against these vaccine makers. Eli Lilly is seen as the primary beneficiary of this legislation, as they are the creators of thimerosal. Because of the controversy surrounding this issue, Senator Frist announced that this provision would be repealed but promised to revisit the issue within six months when he will attempt to pass similar legislation that would end all thimerosal-related litigation, as well as make wholesale changes to the Vaccine Injury Compensation Program.

LA Weekly reported that "[t]he pharmaceutical industry was the largest single contributor to the National Republican Senatorial Campaign Committee that Frist chaired, ladling out some \$4 million - and Lilly was the single biggest contributor to the GOP from that industry, having given \$1.6 million in the last election cycle, 79% of it to Republicans." The Gannett News Service reported that Eli Lilly purchased 5,000 copies of Senator Frist's post 9-11 book, "When Every Moment Counts: What You Need to Know

About Bioterrorism from the Senate's Only Doctor" and is distributing them to physicians around the United States. Gannett also reports, "As the head of the political committee to elect Republican senators, Frist was heavily involved in fund raising and Lilly has been a top Republican donor. Of the at least \$1.68 million the company and its employees gave in federal campaign contributions for this year's elections, \$226,250 went to the National Republican Senatorial Campaign (NRSC) Committee that Frist had led. That's about \$100,000 more than Eli Lilly contributed to the Democratic counterpart group." Jamie Court warns that, "As Senate majority leader, Frist will have the power to schedule or not schedule votes on legislation, determine committee assignments and control all debate, absent a supermajority against him." If the trail of money is any indication, Big Pharma may now have all the power needed in the White House and Congress to pass sweeping tort reform granting them virtual immunity. We will soon see what Senator Frist means by "...the whole concept of citizen legislator."

Alabama Attorney General Announces Bristol-Myers Squibb Agreement

Recently, Attorney General Bill Pryor announced that Alabama and other states have reached agreement regarding the financial terms that will facilitate the settlement of two major antitrust cases brought against Bristol-Myers Squibb Co. The states participating in this litigation expect to receive in excess of \$155 million when these cases are ultimately settled. How this money will be allocated and when it will be

available is not known at this time. The two drugs at issue are BuSpar®, an anti-anxiety medication, and Taxol®, a cancer-fighting drug.

Bristol-Myers Squibb's agreement is part of ongoing negotiations to resolve lawsuits in which the state of Alabama, along with numerous other states and private parties, sought compensation for drug overcharges and injunctive relief to prevent Bristol-Myers Squibb from repeating its conduct in the future. The financial agreement announced by the Attorney General is contingent on the parties' reaching agreement on other settlement terms, including injunctive relief. With the assistance of a federal magistrate judge assigned by the court to oversee settlement talks, the parties are continuing to negotiate other terms to determine whether the case can be settled by agreement without further litigation. I agree with General Pryor that pharmaceutical companies are entitled to the legitimate benefits they earn by providing valuable goods and services. I also agree that we must not allow these corporations to profit illegally at the expense of patients.

In the BuSpar® case, Alabama and thirty-four other states, along with Puerto Rico and the District of Columbia, contended that Bristol-Myers knowingly made false statements to the U.S. Food and Drug Administration about the scope of a new patent for BuSpar®. It was claimed by the state's attorneys that this prevented generic drug manufacturers from marketing a generic, cheaper form of BuSpar®. Watson Pharma Inc. and Danbury Pharmaceutical Inc. are also defendants in this case. The parties have reached a tentative agreement on the financial element of the settlement

under which the companies would pay \$100 million in settlement of the states' claims for damages, penalties, and individual consumer redress. The main thing remaining to be worked out is the needed injunctive relief. The settlement is contingent on the parties' reaching total agreement on all settlement terms.

Alabama, thirty-seven other states, the District of Columbia and three other territories also filed a suit against Bristol-Myers outlining violations in the way the company manipulated the market to maximize its profits from the sale of Taxol®, while keeping a generic version of the drug off the market. This conduct ultimately resulted in the forced payment of significantly higher prices for this cancer treatment. The parties have reached a tentative agreement on the financial element of the settlement under which Bristol-Myers would pay \$55 million on the states' claims for damages, penalties, and individual consumer redress. Again, the resolution of the cases is contingent on the parties' reaching total agreement on other settlement terms, including needed injunctive relief.

Our Firm's Activity

Our Mass Torts Division has been extremely active since the first of the year. Since it appears that the Bush Administration will pressure the federal Food and Drug Administration into backing away from good, aggressive regulation of the pharmaceutical industry, our workload will most likely increase. Unfortunately for consumers, more bad drugs will be placed on the market without adequate trials and testing. This will result in injuries and deaths, based

on the past history of the FDA and the drug industry. Rather than the government and the law protecting the Americans who must by necessity take prescription drugs by really regulating the drug companies, we are now seeing the drug companies being protected by more tort reform on the federal level. We would have to go back a long, long time to find a White House that is more controlled by Corporate America and more specifically by the powerful drug industry.

X. BUSINESS LITIGATION

Stockholder Lawsuits

The sorry record left by Corporate America from last year's scandals hasn't seemed to bother the Bush White House a great deal. As a result, we have seen the most shareholder fraud lawsuits ever filed in one year. According to a report by Stanford Law School, 260 shareholder fraud lawsuits were filed last year. This was a 54% increase over 2001, during which year there were 169 shareholder suits. Most of those cases were settled with the average settlement being for \$16 million. During 2001, there were also 224 corporate financial restatements. In the first half of last year, there were 125 restatements. This record insofar as the number of lawsuits is impressive because the 1995 Private Securities Litigation Reform Act made it more difficult for financial fraud victims to file suits. I wonder if President Bush and Karl Rove consider the losses suffered by American investors—many of them Republicans—to be insignificant.

Surely, they don't believe the 260 lawsuits to be of a frivolous nature. Another observation is that we don't see any of the corporate CEO's out on strike, although some of them appear to be headed for jail.

Many National Companies Are Violating The Fair Labor Standards Act

Over the last several years, the working people of this country have seen the amount of time they spend at work increase, while the amount of time they have available to spend with their families decreases. Many companies are now requiring longer workdays for their employees and increased workloads, coupled with an increase in lay-offs and assignment of multiple job tasks. This "tightening of the belt" process that so many companies try to justify is never at the expense of the corporate executives, but invariably falls on those workers trying hard to earn a decent wage. The downsizing of the work force of some corporations, combined with the increased workload, not only endangers the health of the employees, but often leads companies to cut corners in ways that violate the law.

Our firm is involved in several lawsuits where employees are routinely required to work 40 hours or more a week and are not paid overtime. Many of our clients have been intentionally mislabeled as managers, administrators, and/or executives, so that the company can avoid paying them overtime. Misclassifying an employee is often a direct violation of a federal law known as the Fair Labor Standards Act ("FLSA"). Under the FLSA, an employee generally qualifies for one of the exemptions, and is not owed overtime, if they 1) have a

unique skill or profession or 2) supervise more than 2 employees, have a certain amount of discretion in the day-to-day decision making process of their job, and spend a majority of their time doing management or administrative work. Many companies claim to give their employees wide amounts of discretion, but in reality, require prior approval from someone else before a decision can be put into action.

Violations of the FLSA are not specific to any one industry. Presently, our firm has requested that several courts certify nationwide "collective actions" against various large retail corporations, national restaurant chains, automotive store chains, insurance companies, manufacturers and food processing companies. Many companies who have cheated their employees out of proper wages have been sued and been forced to pay tremendous amounts of money. Often, the court requires the employers to pay double back wages to the employees, plus all of the attorneys' fees.

Microsoft Settles In California

Microsoft has reached a \$1.1 billion settlement with California consumers who accused the software giant of violating the state's antitrust and unfair competition laws. The settlement has been labeled by critics as a "sellout" and one that is extremely favorable to Microsoft. Under the agreement, proceeds of the settlement will be distributed in the form of "vouchers" redeemable for computers and software products. The settlement stems from a class-action lawsuit filed in 1999 on behalf of California consumers and businesses and covers those who bought Microsoft's operating system, pro-

ductivity suite, spreadsheet or word processing software between February 1995 and December 2001. Before becoming final, the agreement must be approved by the court having jurisdiction of the case. If approved, the settlement is supposed to benefit more than 13 million consumers and 3 million children in 4,700 schools. Details about how consumers can take advantage of the voucher offers will be made available if and when a judge approves the agreement.

Similar antitrust class-action lawsuits have been filed in 16 other states and are still pending. California represented the largest number of remaining lawsuits with the largest number of consumers affected. The private antitrust lawsuits are separate from a case Microsoft settled last year with the Justice Department and several states. The final cost of the settlement will depend on the number of California consumers who submit claims during a four-month submission period later this year. Two-thirds of any unclaimed portion of the settlement amount will go to California's poorest schools in the form of software, hardware and money for technology programs, under the terms of the agreement. As stated above, there are critics of the settlement who claim it is pretty much a "sweetheart" deal for Microsoft. Hopefully, this is not correct. In any event, it appears that Microsoft's problems are winding down.

\$33 Million Settlement For Fleet

FleetBoston Financial Corp. has agreed to pay \$33 million to settle federal charges that Robertson Stephens, its defunct San Francisco investment arm, parceled out

shares in “hot” initial public offerings to investors in exchange for kickbacks. The defendant is also accused of erasing some of its e-mail and failing to supervise a research analyst who violated conflict-of-interest rules. In a related action, the Securities and Exchange Commission has filed suit against the analyst for allegedly abusing the system for his own personal gains. This latest action by the federal government is another sad chapter in the rise and fall of Robertson Stephens, the “investment boutique” that became one of the largest underwriters of technology firms during the recent dot-com boom. The Internet bubble burst, and predictably the company collapsed. Fleet, which acquired Robertson Stephens in 1998 as part of its merger with Bank Boston, closed down the unit. The shut-down came only after most of its business dried up, resulting in several quarters of losses. The primary reason that the U.S. government has had to clamp down on investment firms is simply that Congress and regulators ignored widespread and serious conflicts on Wall Street over the years. It sure looks like somebody dropped the ball. The barrage of corporate scandals that resulted has hurt lots of folks who trusted the investment firms and believed what they said. Most persons who invest have to depend on the companies they deal with for good, honest, and reliable advice, counsel, and service.

Many folks haven’t really comprehended how serious the problem has become. In recent weeks, the SEC struck a \$1.4 billion settlement with 10 securities firms and a \$32.5 million settlement with US Bancorp Piper Jaffray to settle charges they misled investors with inflated stock ratings. A year ago,

Credit Suisse First Boston agreed to pay a \$100 million fine to settle allegations that it improperly doled out IPO shares to investors in exchange for a share of the profit. Events occurring during the dot-com boom ultimately caused a great deal of financial misery. During that time, IPOs often doubled or more in their first day of trading. This would allow a handful of investors with access to stocks at the initial offering price to turn a quick and handsome profit. In this case, the SEC said Robertson Stephens distributed IPO shares in 1999 and 2000 to more than 100 investors who didn’t normally qualify for the limited offerings. In exchange, the investors agreed to pay inflated commissions, in some cases more than 4,000% higher than the standard rates on other trades made around the time of the IPO. Obviously, greedy people were dealing with other greedy people. According to the SEC, there was “no economic purpose” for the trades other than to generate money for Robertson Stephens.

FleetBoston agreed to pay \$28 million to the SEC and the National Association of Securities Dealers to settle that portion of the complaint. FleetBoston also agreed to pay an additional \$5 million fine to settle accusations that it failed to preserve all its e-mail for three years and didn’t supervise its analyst closely enough. Robertson Stephens had issued the typical “boilerplate disclaimers” which said generally that its analysts might have had “an interest in the securities” described in the report. However, the company didn’t specifically disclose the holdings. To give you an example of how bad the wrongdoings were, consider this: an analyst profited secretly to

the tune of over \$6.5 million by investing personally in merger deals he pushed publicly. The SEC has reported that analysts were recommending that others buy stocks when privately the same analysts were telling associates the stocks were bad buys and even worse. Whenever analysts undertake to speak to the financial community, they have a duty to speak fully, truthfully, completely, and to disclose all material facts. This duty can never be ignored or compromised. This is indeed a sad commentary on what once was a trusted industry.

Couple Reaches Settlement In Strange Case

The DuPont Co. has settled a multimillion-dollar lawsuit involving the fungicide Benlate. However, settlement terms are confidential. The settlement was announced after a jury heard opening statements in the case, but before a single witness testified. The owners of a plant nursery claimed that DuPont offered money to their attorneys when the couple sued it over Benlate damage to their plants. After their attorneys entered into a “secret agreement” with DuPont, the nursery owners claimed they were fraudulently persuaded to settle their case in 1996. In opening statements, a DuPont attorney painted the plaintiffs as greedy people who were “working the legal system for more money.” The plaintiffs had previously settled with the company for about \$3 million and signed a contract releasing the company from additional claims. However, the plaintiffs claimed that DuPont forced their former attorneys to “abandon them” by offering those lawyers \$6.4 million. The plaintiffs and

others claimants then settled their lawsuits in 1996 for a combined \$59 million. DuPont ordered a halt to Benlate production last April after 32 years. Currently, the company has paid more than \$1 billion in settlements and legal fees on Benlate damage claims. This case is unusual to say the least, and it's too bad that it settled. Now, no one, other than the parties and their lawyers, will ever know what really happened. However, the charges by the plaintiffs were most serious and DuPont did settle - on a "confidential" basis. I guess that is a pretty good indication that the settlement was significant. Otherwise, why would the payers seek confidentiality?

Corporation Pays Well

Lucent Technologies, Inc. is a company that has had a good number of internal problems over the past 2 years. The company is the subject of a tremendous number of lawsuits, including several class actions and stockholder suits. In early 2002, the company finally adopted a policy that prohibits use of their independent auditors for any new consulting services. PricewaterhouseCoopers, LLP is currently serving as the corporation's audit firm. For the fiscal year 2002, PricewaterhouseCoopers was paid a total of close to \$20 million in fees by Lucent in the aggregate for professional services rendered. If this is any indication, it is fairly easy to see that the now Big Four is doing well.

XI. NURSING HOME UPDATE

Beverly Enterprises Requires Arbitration

Beverly Enterprises, Inc., which currently operates 450 nursing homes around the country, is now requiring arbitration agreements in their admissions process. According to the company, up to 80% of new admissions are "voluntarily" signing the arbitration agreements. The fact that Beverly, one of the giants in the nursing home industry, is taking advantage of families who have to place their loved ones in nursing homes is shocking, but not unexpected. It should be noted that Beverly is heavily involved in lobbying for federal and state tort reform. Rather than correcting staffing shortages and upgrading quality control at its facilities, Beverly is protecting itself from responsibility for neglect, abuse, and poor medical care that injures residents. I really believe people around the country will react unfavorably to a nursing home that requires the surrender of a constitutional right by a person in order to gain a bed in their facility. We have talked to a number of persons who had to place a family member in a nursing home in Alabama and who were shocked to learn that an arbitration agreement had been signed at the time of admission. After a problem arose at the nursing home and legal help was needed, for the first time many learned a mandatory, binding arbitration agreement had been signed. This means that an arbitrator would then decide their claim with no right to go to court or even to appeal the ruling.

The Most Common Types of Nursing Home Abuse and the Causes

Elder abuse occurs in several different forms. The three primary forms are physical abuse, sexual abuse, and neglect. Physical abuse includes situations in which a resident is kicked, beaten or otherwise physically mistreated. Sexual abuse most often occurs when a resident is fondled, subjected to other sexual contact, or raped. Neglect is the most prevalent type of elder mistreatment. Several types of injuries are commonly associated with progressive nursing home neglect. Pressure sores, or bedsores, can result from a lack of turning and repositioning, and improper nutrition. Pressure sores usually develop on bony prominences of the body, including the heels and buttocks. Starting out as slightly reddened patches of skin, pressure sores can eventually become deep, infected wounds that may lead to amputation or septicemia, a deadly blood infection.

Malnutrition and dehydration are also injuries commonly associated with nursing home neglect. Malnutrition and dehydration result from the failure of nursing staff to provide adequate nutrients and water to residents. Residents who suffer from malnutrition and dehydration are typically residents who are unable to adequately feed themselves because they are either physically disabled or suffer from dementia, a declining mental state, and therefore must constantly be encouraged to eat and drink. Two of the leading causes of death of nursing home residents (other than natural causes) are dehydration and malnutrition. Falls and fractures are other injuries commonly linked to nursing home neglect. Falls often

result from the failure of nursing home staff to adequately assess a resident as a fall risk and implement preventative measures. Residents typically either fall from bed while trying to climb out, or fall from a wheelchair. Common preventative measures include close supervision by nursing staff, fall alarms (which detect movement), and the placement of protective padding around a resident's bed or wheelchair. Residents typically die from the head injuries that they receive as a result of a fall.

Aspiration pneumonia is also an injury that occurs as a result of nursing home neglect. Aspiration pneumonia occurs in residents who have difficulty swallowing or chewing, usually as the result of a stroke. Instead of passing into the stomach, food and liquid are deposited in the resident's lungs, causing death. Residents who have difficulty swallowing or chewing should be evaluated by a nursing facility's speech therapist. The speech therapist should then recommend precautions to prevent aspiration pneumonia, including elevating a resident's bed and monitoring feeding. If a resident has a percutaneous endogastrostomy tube (PEG tube), additional precautions must be taken to prevent aspiration pneumonia.

One of the most common injuries associated with neglect among female nursing home residents is the development of septicemia from a urinary tract infection. This injury usually occurs in residents who are immobile, and lay in urine or feces for long periods of time. Fecal contaminants can therefore easily invade the urinary tract, causing a urinary tract infection, and that infection can sometimes enter the bloodstream, causing death. Nursing

homes can usually prevent severe urinary tract infection by keeping residents clean, dry and properly hydrated.

Contractures are another injury that results from nursing home neglect. Contractures occur in residents who are immobilized in a wheelchair or bed for an extended period of time and can no longer flex their joints. Nursing home residents who are at risk of developing contractures should be evaluated by a physical therapist and provided range-of-motion therapy. Other examples of neglect include the development of gangrene, injury from physical or chemical restraint, and injuries to a resident who "wandered off" resulting from exposure to the elements and lack of food and water.

Insufficient staffing and inadequate training are the most significant causes of nursing home abuse and neglect. In order to cut costs and make more money, nursing homes may hire marginal, insufficient numbers of staff that are physically incapable of providing sufficient care and supervision for residents. Federal regulations mandate that nursing facilities participating in the Medicare and Medicaid programs have "sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care." *Requirements for Long Term Care Facilities*, 42 C.F.R. § 483.30. Thus, when the number of nursing staff working on a particular shift are unable to adequately provide all the care necessary to residents, the regulations are clearly violated. In their quest to maximize profits nursing homes may also opt to

spend little or no money for training, resulting in unqualified employees. With an inadequate work force, accidents, injuries, and deaths may occur that should otherwise be prevented.

Medical Malpractice Tort Reform: Who Really Benefits?

The question of who benefits from the recent surge of medical malpractice tort reform that has spread nationwide, requires a look at all interested parties involved. On one side of the equation, there are the insurance industry, healthcare facilities and physicians, who are generally strong advocates of tort reform. Their main concern is medical malpractice lawsuits and jury awards, which they claim produce high insurance premiums. The other side encompasses any person who has the potential of developing health problems that will result in medical intervention (ironically, this would also include people within the insurance industry, officers and employees of healthcare facilities and physicians). The main concern for anyone, opposition or otherwise, should be the possibility of injury or death from negligent conduct. This concern should demand protection of the public as an important state interest, where any limitation placed on the system must be balanced with the need to fairly compensate injured individuals.

Medical malpractice tort reform began in the 1970's, when numerous state legislatures were persuaded by insurance and other special interests that a statutory limitation or "cap" on medical malpractice damages was an effective mechanism for ensuring future affordability and availability of medical malpractice insurance for

healthcare providers. However, the perceived threat of an economic crisis in medical malpractice insurance rates and availability in the 1970's did not support the existing insurance statistics at that time. For instance, one study found that the average hospital spent approximately only 1% of its annual revenues on malpractice insurance during the period immediately before and after most states imposed a cap on medical malpractice damages. By 1985, the American Medical Association (AMA) estimated that the average physician spent only 4% of his or her income on malpractice insurance. Furthermore, the overall probability of a serious medical malpractice mistake resulting in damages exceeding one million dollars was estimated at roughly one in 100,000 in hospitals, with even lower injury probability occurring within a physician's private office. Despite these statistics, state legislatures quickly passed statutory caps on total damages recoverable in medical malpractice actions in an attempt to deal with the perceived "crisis" in the malpractice insurance industry.

Although many states are now following a trend of instituting caps on damages resulting from jury awards, other states have found serious problems with these limitations. Various state supreme courts have held statutory caps on total and non-economic damages constituted "special legislation" that violated the state constitution; that caps operated as a "legislative remittitur" in practice and therefore violated the state's doctrine of separation of powers; that statutory caps violated the right to a jury trial and the guarantee to remedy by due course of law; and that comprehensive limitation on

recovery and medical malpractice actions violated state's constitutional due process provisions, based on the absence of any conclusive evidence indicating a rational connection between the statutory cap and the effect on malpractice insurance rates.

The "corrective justice" goal of compensatory damages is to make the injured plaintiff whole, or in other words, to place him in the same position in which he was before the injury. In light of this most basic doctrine, the medical malpractice cap stands in stark opposition to the fundamentals of tort law. Nonetheless, various state legislatures are enacting special provisions and protections that favor the healthcare industry. Medical malpractice tort reform, in essence, gives a "quasi-immunity" type of protection to the healthcare industry and its insurers. This treats their negligence significantly less harshly than the negligence of the average wrongdoer. One could easily conclude that there is no benefit under this legislation that would positively affect any person who has a health problem that would require medical treatment.

Nursing Homes Must Post Nursing Staff Levels

As of January 1, 2003, all nursing homes nationwide that participate in the Medicaid and Medicare programs are required to begin posting the number of nursing staff on duty for each shift in the nursing home. The staffing levels must be posted "in a clearly visible place". The personnel who must be included in the posting are registered nurses, licensed practical nurses and nurse assistants "directly responsible for resident

care". This requirement is contained in Congress' 2002 Benefits Improvement and Protection Act (BIPA).

In an effort to ensure that the requirements of the posting provision would be enforced, Senators Chuck Grassley (R-IA) and John Breaux (D-LA) wrote a letter to Administrator Thomas Sculley of the Centers for Medicare and Medicaid Services in August of 2002. The letter encouraged the department to establish guidelines for the posting of the information in a "uniform manner" as required by the Act. Senators Grassley and Breaux, who are tireless advocates on behalf of nursing home residents, stressed the significant role that this information will play in providing information to families and the public about the quality conditions in particular nursing homes. The Senators noted the significance of this requirement in light of the second phase of the federal study concerning the nursing staff levels in nursing homes and the increased public and congressional attention to the problem of understaffing.

I would strongly encourage anyone who has a family member in a nursing home to closely review the nursing home's postings concerning staffing levels. If the nursing home does not post the staffing levels as required by law, I would demand that the information be posted in a clearly visible location in the nursing home. If the nursing home fails to post the information, I would encourage you to write Senators Grassley and Breaux and your Congressman concerning the nursing home's failure to comply with this law. Any specific complaints may be addressed with your state ombudsman or your

state's Department of Health.

These postings should shed some light on the "actual" staffing levels in particular nursing homes. In several of our cases, the nursing homes have contended that they have been properly staffed. However, evaluations of state surveys, time cards and work schedules often tell a different story. Numerous studies have established the correlation between staffing levels and quality of care in long term-care settings. The posting of staffing levels will provide family members with information that can be a key indicator of the quality of care provided to nursing home residents.

XII. PREMISES LIABILITY

The Mitchell Jail Fire Lawsuit

Our firm, in association with several North Carolina firms, was able to settle a tragic case in North Carolina. A Superior Court judge in Mitchell County, North Carolina, approved the settlement that will pay about \$1.9 million to families of the victims of the jail fire. Each of the 17 claimants - the estates of the eight inmates killed in the fire and nine survivors - will receive \$50,000. An additional \$1.1 million will be divided among the 17 by a three-person arbitration panel. Mitchell County's liability insurance carrier will pay the amount of the settlement. The policy has a limit of \$2 million. Under state law in North Carolina, local governments are protected by sovereign immunity when they are acting for the public good unless they buy liability insurance. In those cases, where insurance is purchased, gov-

ernments are liable for the limits of their insurance. In this case, the county had already paid \$60,000 for victims' funerals. Eight men were killed in the fire at the four-cell, two-story jail. State Bureau of Investigation officials found that the fire most likely started when a heater, located in a storage room attached to the jail, caused a stack of cardboard boxes to catch fire.

We will now file a claim against the State of North Carolina for being negligent in its jail inspections. A report by the North Carolina Department of Labor revealed that state and county inspectors failed to detect "serious safety deficiencies" in the jail. It also found the North Carolina Department of Health and Human Services, which inspects jails twice a year, failed to detect the violations before the fire. Mitchell County relied on an unqualified inspector for its jail examination. The Labor Department's own inspectors missed violations in 1998 that directly contributed to the fire. Pursuing a claim against the state allows us to subpoena witnesses and take depositions. The families we represented want to find out more about what happened to cause the tragedy. Settling with the county was the best way to keep from diminishing the settlement amount. To litigate 17 different lawsuits would exhaust a great deal of that money. Although the settlement releases the county from further liability, it is interesting that the county paid the maximum amount without fighting any claims. Ben Baker handled this case for our firm and, working with the North Carolina firms, did an outstanding job. We were faced with a situation where limited funds were available to cover a tragic event resulting in multiple deaths and injuries. The case also

pointed out how unfair sovereign immunity can be to victims of wrongdoing where the state or a covered governmental entity is the wrongdoer.

XIII. HAZARDS IN THE WORKPLACE

Foundry Accused Of Safety Violations

An employee of Tyler Pipe lost both of his legs in an accident on the plant premises. A truck was backing up and ran over the worker. Both the victim and the driver of the truck that hit him blame the accident on safety violations. The workers said plant managers at the foundry ignored the dangers of poor lighting, inadequate safety training and shoddy maintenance of the truck. The driver was backing up to a metal bin when he struck the worker. Managers at the foundry had been warned that lights were not working where the accident occurred. Tyler Pipe is owned by Birmingham, Ala.-based McWane Inc., one of the world's largest manufacturers of cast iron water and sewer pipes.

Since 1995, McWane has recorded more than 4,600 injuries and accumulated more than 400 safety violations, four times the total of its major competitors combined, according to a report in the *New York Times*. The accident occurred the same day that inspectors from the federal Occupational Safety and Health Administration were in the plant. OSHA was monitoring the plant's progress in correcting old problems. The *Times* reported that McWane is one of the most dangerous businesses in this

country. It has had, for 3 of the last 4 years, the highest injury rate in the nation. In addition, McWane reportedly has an extensive record of environmental violations.

Oklahoma Supreme Court Refuses To Recognize Bad Faith Claim In Workers' Comp Case

In December of last year, the Oklahoma Supreme Court in a 5-4 decision refused to recognize a tort of bad faith against a self-insured employer for post-award conduct in a workers' compensation case. The plaintiff sued Gulfstream Aerospace Technologies after it refused to pay an award in a workers' compensation case. The worker had filed a claim in Workers' Compensation Court to reopen a prior court order for a change of condition. He alleged that his neck condition had worsened. The Workers' Compensation Court entered an order for permanent partial disability, which was upheld on appeal. The court's order required Gulfstream, a self-insured employer, to continue paying for prescription medication issued by the employee's doctor. Prescription receipts were sent to Gulfstream for payment in January of 2001. When Gulfstream refused to pay the full balance of the prescription costs, the employee sued the company for bad faith. The trial court dismissed the action and an appellate court reversed. Gulfstream then petitioned the State Supreme Court. The higher court refused to recognize a bad faith tort against a self-insured employer for post-award conduct, finding that the Legislature has provided a statutory remedy in the Workers' Compensation Act. Given that Gulfstream obviously was not deterred from its misconduct by

the Workers' Compensation Act, it is unfortunate that the court failed to acknowledge that a tort claim is necessary to provide some "teeth" in the law. I hope the Oklahoma legislature acts to fill this "hole" promptly.

OSHA Cites U.S. Steel

The Occupational Safety and Health Administration has cited U.S. Steel's Fairfield works for 18 safety violations. A worker lost both feet in an accident at U.S. Steel on August 3, 2002. OSHA inspected the plant 3 times after the accident and came down with the violations to a very "small" fine. U.S. Steel had been cited after another inspection for repeated failures to protect workers from electrical hazards. The accident in question occurred when an employee was standing on a coiled metal strip, helping to lower the top of a dryer tank, when an operator activated a mechanism that pulled the strip and the worker's feet into the machine rollers. Obviously, the worker is permanently disabled and his earning capacity greatly impaired.

XIV. TOBACCO UPDATE

A Loss By Smokeless Tobacco On Appeal

United States Tobacco Co., the nation's top snuff manufacturer, has lost an appeal to the U.S. Supreme Court. As a result, the company must pay \$1.05 billion for stifling competition. The justices refused to disturb a 2000 decision by a Kentucky jury against the company. U.S. Tobacco makes Skoal and Copenhagen, two popular sellers. The

company had been sued by Conwood Co., a rival, and accused of breaking antitrust laws. U.S. Tobacco salesmen were accused of having removed Conwood display racks from stores and hiding competitors' products. Conwood's snuff brands include Kodiak and Cougar. The Kentucky jury verdict followed a month long trial that included evidence that Conwood's sales were hurt by U.S. Tobacco tactics. A jury ordered U.S. Tobacco to pay \$350 million to Conwood. Under federal antitrust laws, the award was tripled. A federal appeals court upheld the jury verdict last May. The case was then appealed by U.S. Tobacco to the U.S. Supreme Court.

Suit Seeks Refunds On Light Cigarettes

As this issue was going to the printer, a class-action trial was set to begin in Edwardsville, Illinois. In that case, Philip Morris Cos. is being accused of violating state consumer protection laws by deceiving people about the dangers of its light cigarettes. The world's largest tobacco company is being asked to refund billions of dollars to Illinois smokers who bought such cigarettes going back more than 30 years. The case is the first of its kind nationally to come to trial in that it involves claims of economic loss rather than personal injury. The trial is being closely watched as a barometer for other class-action claims involving light cigarettes. Philip Morris faces similar allegations in at least 10 other states. R.J. Reynolds Tobacco Holdings Inc. and British American Tobacco PLC's Brown & Williamson also have been sued. Philip Morris contends the case does not deserve class-action status, arguing that the allegations

in each case are too different to be treated collectively.

Philip Morris lost a light-cigarette case last year in which the family of a deceased smoker who used the low-tar products sued for wrongful death. An Oregon jury ordered the company to pay damages of \$150 million, later reduced by a judge to \$100 million. Philip Morris first introduced light cigarettes in 1971. By continuing to market these cigarettes as “light,” the tobacco industry deceived consumers, according to allegations in the current suit. To the average consumer, “light” means “healthy,” according to the lawyer who represents the smokers. I don’t believe there is any doubt the smokers buying “light” brands thought they were getting a “safer” cigarette. The National Cancer Institute reported in November of 2001 that low-tar or light cigarettes did not reduce the chances of getting smoking-related diseases. Afterwards, Philip Morris admitted that the lights were not safer than full-strength brands. However, that is exactly the impression it had created with its marketing campaign.

New Trial Ordered In Secondhand Smoke Case

A Florida judge has ordered a new trial for the former American Airlines flight attendant who lost her lawsuit against the tobacco industry. She had claimed that secondhand cigarette smoke over a period of time caused her sinus disease. The judge agreed with the lawyers for the plaintiff that testimony by an expert witness for cigarette makers was unfairly prejudicial and did not follow state rules. The court’s ruling also had harsh words for the tobacco

lawyers. The judge said they argued a position they should have known was wrong. The jury agreed last September that the plaintiff suffered from sinusitis, rhinitis, allergies and other ear, nose and throat problems. However, the jurors concluded that her on-the-job exposure to secondhand smoke was not the cause of her health problems. At trial, the tobacco expert rejected secondhand smoke as a cause of sinusitis, despite evidence presented by the plaintiff that it does. The trial grew out of a 1997 class-action settlement between four leading cigarette makers and non-smoking flight attendants. That settlement set up a \$300 million foundation to study smoke-related illnesses and paved the way for a series of as many as 3,000 compensatory damage trials for individual attendants. Punitive damages are not allowed. Three earlier trials on attendants’ claims ended with a \$5.5-million verdict, a decision favoring tobacco, and a mistrial, respectively.

XV. ARBITRATION UPDATE

Class Actions Not Barred by Pre-Dispute Contracts

An appellate court in California has ruled that pre-dispute arbitration contracts that bar class action claims are “unconscionable” under both California and Nevada law. The decision is a blow to corporations, which have sought to shield themselves from class action suits by requiring customers to sign arbitration contracts that forbid joint claims. The California court in a 2002 opinion had previously

deemed class action arbitration restrictions unconscionable. The latest opinion broadens the ruling in that case, by finding that the same analysis applies under Nevada law. The case involved a California woman suing her credit card issuer, the Household Bank (Nevada), National Association, as part of a multimillion-dollar class action. Under the terms of the credit card contract, any disputes were to be governed by Nevada law and subject to binding arbitration. The contract’s arbitration clause prohibited class action claims without the written consent of the plaintiff and defendant. The court held that requiring the defendant’s consent is tantamount to a complete prohibition on class arbitration. In this regard, the court stated: “A party may not be forced to abide by contract terms that were obtained as a result of unfair bargaining power and are so one-sided and oppressive as to shock the conscience.” The fact that Nevada law governs the contract does not mean the contract can’t be judged unfair since Nevada law mirrors California law in its analysis of unconscionability.

Bill To Bar Arbitration Clauses In Farm Contracts

Last month, a bipartisan coalition of Midwestern Senators introduced a bill in the U.S. Senate that would amend the Federal Arbitration Act to bar the use of mandatory pre-dispute arbitration clauses in livestock contracts. This actually revives a provision that was deleted from the farm bill signed into law last year by President Bush. Senate Bill 91, introduced by Senator Chuck Grassley (R-IA) and co-sponsored by Senators Russell Feingold (D-WI) and Tom Harkin

(D-IA), would add new language to the FAA requiring that any agreement to use binding arbitration to resolve poultry or livestock contract disputes would have to be made after a dispute has arisen, in a writing that is signed by both parties. The bill also would require that arbitrators provide the parties with a written award explaining the factual and legal basis for the award. The senators want the bill brought up immediately in the new Congress. I understand no substantive changes were made to the bill since its introduction as Senate Bill 2943 in the last congressional session. Senate Bill 2943 was introduced in September 2002 and was referred to the Senate Judiciary Committee. The session ended before any further action was taken on the bill. However, sponsors of the measure succeeded in getting similar language in the broader farm bill, though that provision would simply have limited pre-dispute arbitration agreements in livestock contracts without amending the FAA. That approach proved successful for car dealers who won similar relief last year without amending the FAA. Unfortunately, the language was dropped from the farm bill by the Senate Agriculture Committee before the bill was sent to the White House. The bill, if passed, will ensure that the small operators' options are not unfairly limited when it comes to resolving disputes with larger companies. It will make an unlevel playing field—with tremendous advantages to one party—more level and fair.

Discover Card Gives Right To Reject Arbitration

The "Arbitration of Disputes Section" in Discover Card agreements currently provides, among

other things, that the cardholder may elect to resolve any claim or dispute with the company by arbitration. Interestingly, Discover Cards now give the cardholder the right to reject resolving any claim or dispute through arbitration. To reject arbitration, the cardholder has to provide Discover a notice (a "Rejection Notice") by March 25, 2003 in writing by the cardholder. The Rejection Notice must include name, address, telephone number, account number, and must be signed. It must not be sent with any other correspondence. Calling to indicate rejection of arbitration is insufficient. Sending a Rejection Notice in a manner or format that does not comply with all applicable requirements is also deemed insufficient notice. It is encouraging to see a major credit card company back up - to this extent - on the arbitration problem. This is due, in my opinion, to the overwhelming opposition to arbitration by consumers. While Discover Card's approach is much better than other major credit card companies are doing on arbitration, there is a better method. There is nothing wrong with binding arbitration where it is not of a pre-dispute nature and is agreed to by both parties after a dispute occurs. Nevertheless, Discover Card is to be commended for its actions.

XVI. INSURANCE UPDATE

UnumProvident Memo

There can be little doubt that UnumProvident Corp. intended to use a law designed to protect workers' retirement savings to help the company save money on

claims. A memo written in 1995 says Provident Corp., which merged with Unum Corp. in 1999, had formed a "task force" to identify policies covered by the Employment Retirement Income Security Act of 1974. The contents of this memo are extremely damaging to UnumProvident. The Chattanooga, Tennessee-based company's claims-handling procedures are being scrutinized by state insurance regulators in Georgia and California. The memo, written by an Assistant Vice President in the Claims Department, discovered the fact that under ERISA that there are no jury trials and there can be no compensatory or punitive damages. The memo also reveals that UnumProvident used the ERISA law in connection with their denial of claims. The memo says a Provident Manager had previously identified 12 separate claims settled for \$7.8 million. If governed by ERISA, however, Provident's liability would have been between zero and \$500,000. Congress never intended that ERISA be used to hurt persons who had problems with their insurance companies. In fact, the intent of ERISA was to help employees and not hurt them. Any insurance company that can hide behind ERISA and deny valid claims with no fear of being taken to court, will likely do so.

Jury Verdict Against UnumProvident Corp.

A medical doctor in California won a most important case against UnumProvident Corp. recently. The jury awarded \$31.7 million to the eye surgeon finding that the insurance company had acted with fraud and malice when it denied the doctor's disability payments. This is typical of the claims against the company. The

company says it will appeal the verdict.

Metropolitan Life Insurance Settles Race-Base Life Insurance Class Action

Recently a federal judge in New York preliminarily approved a settlement between Metropolitan Life Insurance Corporation and class representatives in the amount of \$160 million dollars. The class action is based upon allegations that Met Life charged African-Americans a higher rate for life insurance than similarly situated Caucasians. The proposed settlement must receive final approval from the United States District Court for the Southern District of New York. The "fairness hearing" is set for February 7, 2003. If in fact the court accepts the proposed settlement, it will conclude the class action filed against Met Life on behalf of purchasers of low valued life insurance policies commonly known as "industrial" or "burial" policies. While these policies have relatively low premiums, the policyholder routinely ends up paying more in premiums on the policy than the policy is actually worth. It would appear from documents produced in this case that Met Life actively marketed these "substandard" life insurance plans to African-American citizens in this country until 1973.

Our firm is actively representing approximately 1,000 clients who decided to "opt-out" of the class action. As I have stated in previous reports, we find it egregious that certain insurance companies have a history of treating African-American policyholders in such a shameful manner. Although Congress enacted specific civil rights acts that would have prohibited

such conduct years ago, many of these insurance companies, including Met Life, continued to charge and collect additional premiums from the African-American community. Some industry experts referred to this over-charge as a "skin tax" simply because African-Americans were being charged additional premiums based upon the color of their skin. The Met Life class action settlement follows suits against several other companies including American General and Life of Georgia that have recently settled class actions alleging overt, racial discrimination in the marketing of life insurance policies.

Attempts To Intervene In Farmers Settlement Move Forward

A judge's ruling last month keeps alive the efforts by policyholders of Farmers Group Inc. to intervene in a proposed class action settlement that would end the State of Texas' suit against the insurer. The ruling also allows the policyholders to question the people who negotiated the deal. A Texas judge denied Farmers' motion to strike the intervention and also denied motions by the insurance company and the State of Texas to quash subpoenas for the State Insurance Commissioner, Farmers' state director in Texas, staff members at the Texas Department of Insurance, and personnel at the Office of the State Attorney General. A settlement valued at \$100 million was reached in the suit brought by the Office of the Attorney General against the insurer last August. Farmers announced in September that it would pull out of the Texas market.

In its original suit against Farmers, the State of Texas alleged

deceptive trade and discriminatory practices in the company's insurance for homeowners in Texas. On Dec. 18, 2002, the office of the attorney general filed an amended petition alleging deceptive, misleading and discriminatory practices in Farmers' automobile insurance as well. Five auto insurers were added to the list of defendants. According to reports, the Office of the Attorney General is seeking the settlement as a class action so as to make sure all the people affected by the settlement will have an opportunity to say if they don't like it. There is a dispute on whether the settlement will receive more scrutiny as a class action or as a deceptive trade practices action. The question is which would provide policyholders the most protection. Policyholders will receive notice of the terms of the settlement and can opt out of the agreement if they don't like it. As I understand it, the state can terminate the settlement if 2% of the policyholders object to it.

In its suit, the state alleged that Farmers discriminated by using credit histories as a significant factor in setting premiums without adequately disclosing to policyholders the adverse impact of that practice. It also alleged that Farmers' practice of basing discounts on the age of policyholders' homes was discrimination because the company's own loss analyses often showed that higher discounts were warranted. The management fee arrangements Farmers had with certain subsidiaries were also challenged. Although the state alleged in the suit that Farmers' failure to adequately disclose the management fees to policyholders constituted a misleading and deceptive act, the fees aren't addressed in the settlement.

Employee Health Plan Problems

Our firm has filed an interesting case in the Circuit Court of Houston County, Alabama. We represent an employee-leasing company that employs several hundred people in Alabama and Florida. The business filed suit against North American Indemnity, American Heartland Health Association, Al Cariglino, and George Werner. These defendants marketed and sold a health insurance plan to the business for its employees. The plan was to operate like traditional health insurance coverage, but in fact was a type of self-funded arrangement. The arrangement was very volatile and was not protected by the Alabama Department of Insurance. None of this information was revealed to the business when the plan was established by the defendants. Our clients believed they were purchasing a form of insurance protection. North American Indemnity (NAI) is a re-insurer. NAI was supposed to insure that all health insurance claims would be paid through the insurance plan. American Heartland Health Association (AHHA) is a third-party administrator, whose role was to administer and handle the claims process for our client's employees. NAI and AHHA contracted with each other to operate the plan. Cariglino and Werner acted as the point men and representatives of the other defendants in establishing the health insurance plan.

After the plan was established, many of our client's employees had their health insurance claims go unpaid. To date, many of these claims are still not paid or processed by the defendants. NAI and AHHA blame each other and have actually sued each other. The

employees did their part in paying the required premiums for the health insurance coverage and ended up with nothing more than unpaid medical bills because of the defendants' failure to meet their obligations. Our client decided to protect its employees by filing suit against the defendants. About the time we filed the lawsuit, the Alabama Department of Insurance and Florida Department of Insurance issued "cease and desist orders" against NAI and AHHA, directing them to stop all insurance sales and operations in both states. The Alabama and Florida Insurance Departments have held that both NAI and AHHA are selling insurance without a license. This is a direct violation of both insurance departments' regulations and against the law in each state. Hopefully, we will be able to protect our client and its employees.

World Trade Center Lease Holder Sues Over Insurance

Larry Silverstein, the property developer who leased the World Trade Center two months before it was destroyed, has filed another major lawsuit against his insurers. This case is over who will pay costs of defending legal claims arising from the September 11, 2001 attack. Mr. Silverstein is already battling more than 20 insurers over the property insurance of the complex, trying to recoup up to \$7 billion in losses. He is now suing his insurers for a payout on his liability coverage to pay for defending himself in the lawsuits. The insurers counter-sued to block his request. The developer and the Port Authority of New York and New Jersey (which owns the complex) have been sued for damages by representatives of those who died in the Twin Towers.

Also included in the suits are the airlines that operated the hijacked airplanes used in the attack along with security firms working at the complex on that fateful day. The developer wants a New York federal court to rule that the Port Authority is also covered by his \$1 billion in liability insurance, and further that coverage can be claimed to pay for defending the suits.

Mr. Silverstein wants the court to clarify the maximum liability he and his affiliates face. The insurer leading Silverstein's liability coverage has denied his claims. One issue to be decided is whose insurance is tapped first, if at all, to cover claims against the owner and leaseholder of the complex. The Port Authority has \$650 million in separate liability coverage. Zurich American Insurance Co., a unit of Zurich Financial Services (ZURZn.VX), counter-sued, asking the court to issue an opinion on which parties are covered by the policy. The court is also being asked to rule that Zurich is not liable to pay Silverstein's legal costs. Interestingly, the insurer wants the matter to go to mediation and not arbitration. Mediation, of course, is not binding and allows the court to ultimately decide the issues if not settled.

XVII. HEALTHCARE ISSUES

\$111 Million Asbestos Verdict In New York

In a verdict recently unsealed by a state trial judge, a New York jury in an asbestos personal injury trial awarded \$111,609,098 to nine plaintiffs who had contracted

mesothelioma from their exposure to asbestos. The plaintiffs alleged they had been exposed to asbestos products while working in a variety of occupations, including sheet metal work, carpentry, school maintenance, pipe design, boiler and brake mechanic repairs, welding and electrical work. The jury delivered the verdict in June of 2001 in Phase I of a trial to determine causation and damages against several defendants.

Mesothelioma is a highly aggressive and rare form of cancer that usually appears in the lining of the lung. Mesothelioma can also occur in the lining of the heart and abdominal cavity. The only known cause of mesothelioma is exposure to asbestos. The onset of mesothelioma after exposure to asbestos can take anywhere from 15 to 45 years. The first symptom is usually a constant pain in the chest and is accompanied by shortness of breath, or pain or swelling in the abdomen. Other symptoms include persistent coughing, coughing blood, fatigue and significant weight loss. A person's life span is typically 12 to 24 months after diagnosis, but it depends on the size of the cancer, where it is, how far it has spread, how it responds to treatment, and the health of the patient, among other things.

Companies that make and sell asbestos products have known for years that asbestos is harmful. Even so, they made and sold their products without warning the public or their customers of those hazards. The human cost in suffering, medical expense and loss of life as a result of these calculated corporate decisions to put profits over people has been staggering. Our firm is currently investigating and accepting claims of persons who have been stricken with mesothe-

lioma. We will continue to try to hold accountable the corporate merchants of death who are responsible for inflicting such harm on the working men and women of our state and nation.

HealthSouth Shareholder Suits To Proceed

A judge has ruled that HealthSouth Corp. must face investors' lawsuits claiming that executives used inside information to sell \$106.7 million of the hospital company's shares. A Delaware Chancery Court judge rejected the company's request to put the suits on hold while a special committee investigates stock sales by Chief Executive Richard Scrushy and other board members. The judge questioned the impartiality of the panel, whose head cleared Scrushy of wrongdoing, saying it has a "troubling" composition.

Healthcare Reforms Face High Court Test

Congress will again debate health-care reform this year. Regardless of what happens in Congress, the U.S. Supreme Court is set to decide two crucial issues. The first is whether drug makers can be forced to give lower prices to those persons who are uninsured. The second is whether HMOs can be forced to allow patients to use their "favorite" doctors. Some states have already enacted such pro-consumer measures. Unfortunately, the debate in Washington has come to a halt. Industry wants the High Court to block the new state reforms. They claim that federal law doesn't allow the states to lead the way on health-care reform. A case from Maine will test whether states can

force discounts on prescription drugs. A second case from Kentucky will test whether states can allow patients to see doctors outside their health maintenance organizations.

Last year, in a 5-4 decision, the High Court upheld state laws that give patients a right to a second opinion by an outside doctor if their HMO refuses to pay for a medical treatment or drug benefit. All 50 states now have such "independent review" laws. The reason that industry is so concerned with the two new cases is clear. If Maine and Kentucky win in the Supreme Court, other states are sure to follow their lead. Skyrocketing prescription drug costs are driving the efforts to change the system. Spending on prescription drugs rose 17% each year from 1997 to 2001, according to a recent national study. Drug costs are projected to rise faster than other medical expenses over the next decade. It should be noted that about 70 million Americans do not have insurance that covers prescription drugs. Of these, 18 million are senior citizens. These people find themselves at a double disadvantage when it comes time to fill a drug prescription. Not only do they have no insurance, they must also pay the highest prices.

Not surprisingly, the Bush Administration is squarely on the side of drug makers. U.S. Solicitor General Ted Olson says the Maine law violates Medicaid because it is open to every resident, not just the poor. However, he does concede that a state may be able to extend price discounts to a "narrowly defined class of persons who have a low income," but are above the poverty level. The Bush Administration has not granted a waiver that would allow Maine to target people

whose incomes are less than three times the poverty rate. In December, a U.S. Court of Appeals in Washington said Maine cannot go ahead without the federal waiver. Health-care reformers say the Maine RX program will spread nationwide if the Supreme Court upholds it. The Kentucky case involves so-called "any-willing-provider" laws, which allow patients to use doctors and hospitals that were not part of their managed care networks. Kentucky is one of 25 states with such a law.

Celebrex's Ulcer Link Questioned

It is being claimed that Celebrex, the arthritis drug, doesn't protect the stomach from dangerous bleeding ulcers as well as thought. Celebrex and two similar new anti-inflammatory drugs are heavily advertised as being safer for arthritis patients based on earlier research that found they caused fewer ulcers and other gastrointestinal complications than older anti-inflammatory medicines. The three new drugs collectively have annual sales exceeding \$6 billion. Recently, their safety has been called into question. The new study, which focused on arthritis patients at high risk of recurrent ulcers, revealed that nearly 10% each year would develop another bleeding ulcer. The study found the same thing for Prilosec, an older anti-inflammatory drug combined with ulcer medicine, which doctors often give arthritis patients to protect their stomachs. In addition, neither treatment protected as many patients from dangerous kidney complications as past studies showed, according to the researchers. The

results of the study, while showing the treatments work the same, indicate more study is needed on preventing bleeding stomach ulcers in vulnerable older people who for years ease joint pain with nonsteroidal anti-inflammatory drugs.

The study was reported in the *New England Journal of Medicine*. It included 287 patients who had a previous bleeding ulcer and so were at very high risk of developing another, potentially life-threatening ulcer. Complications from taking older anti-inflammatory drugs hospitalize about 107,000 Americans, and ulcer complications kill an estimated 16,500 each year. Frankly, I was surprised that the numbers were this high. Celebrex has been marketed aggressively and is a very large source of money as a result. I really have a hard time understanding how aggressive marketing of a drug to the public can be justified. The drug companies spend a very large percentage of their budgets for marketing purposes. Perhaps that is a major reason prescriptions cost so much in this country.

Drug Firms Settle

An antitrust lawsuit filed by New York Attorney General Eliot Spitzer against two drug companies has been settled. States and consumers will share in the \$80 million settlement with the companies accused of conspiring to keep a less expensive, generic version of a blood pressure medication off the market. Aventis Pharmaceuticals Inc. and Andrx Corp. will pay the states, insurance companies and consumers nationwide to settle charges that consumers paid too much for the drugs Cardizem CD and its generic

equivalents because the companies conspired to delay the marketing of cheaper competitors. Aventis makes Cardizem CD. Observers say this may well be the first of more similar settlements in the drug industry. The fact that consumers are paying too much for prescription medicines, and that the culprits are the drug manufacturers, should be getting more attention in the White House and Congress. Instead, Mr. Rove and his surrogates are giving the companies legal immunity from lawsuits.

XVIII. ENVIRONMENTAL CONCERNS

Why Is Alabama A Dumping Ground For PCB-Tainted Equipment?

Last month, tons of old U.S. military equipment tainted with PCBs came into Alabama from the Pacific for disposal in our state. The equipment, which had been stored in Japan and on Wake Island, was delivered into Maxwell Air Force Base in Montgomery and then trucked to Trans-Cycle Industries in Pell City. While Senator Richard Shelby was able to slow down the delivery for a few days, it finally came into the state. TCI has destroyed hazardous PCBs, or polychlorinated biphenyls, for the military since 1999. As our readers - especially those in Calhoun County - know all too well, PCBs were once manufactured in Anniston as an electrical insulator. PCBs have been identified as a cause of cancer and have also been linked to other health problems, including liver disorders, skin irritations, and learning disabilities. It is shocking that local officials were apparently unaware

the shipment of old electrical transformers, capacitors and other items was headed to Alabama until they were contacted by an Anniston newspaper. Hopefully, this dropping of PCBs into our state won't turn out to be another "environment and health problem" for Alabama. I believe more precautions should have been taken, more notice given, and better cooperation obtained between all levels of government required before dumping more PCBs in our state. I commend the Anniston Star for its work.

Solutia Causes New Toxic Waste Disposal Concerns

According to a recent Associated Press report, Solutia, Inc., has been injecting toxic waste into disposal wells located in the western portion of the Florida panhandle for 40 years. Some scientists have voiced concerns that it is just a matter of time before these underground disposal wells taint the region's drinking water. Most of their fears are centered around a dozen abandoned toxic waste wells that are located within 15 miles of the Missouri based company's nylon plant, which is just north of Pensacola. Some of Solutia's toxic waste wells are more than 1,400 feet deep and contain such toxic wastes as nitrates, formic acid, and PCBs.

Scientists are concerned that if the toxic waste wells are not properly plugged, the pressure created from the injected wastes could push these toxic substances into a shallow aquifer that nearby communities draw their drinking water from. "It has a potential to be a big deal," said Chris Richards, Senior Hydrologist with the Northwest Florida Water Management District. However, Bruce McLeod, a Solutia

Senior Environmental Engineer, told the Associated Press that a layer of clay 200 feet thick keeps the wastes contained in a deep salt-water aquifer and helps plug the abandoned wells. "Under the pressure it's under, that clay is plastic enough to where it will flow in and seal any breaches," McLeod said.

Gary Mahon, Chief of Hydrologic Studies for the U. S. Geological Survey in Tallahassee, does not share Solutia's optimism about their clay barrier's ability to hold up indefinitely. "What are going to be the long-term effects 100 years from now, 1,000 years from now?" he said. "That's a concern I have." Solutia's Pensacola plant is the world's largest integrated nylon processing facility. The plant produces fibers, plastics, and resins used in a variety of products including carpet, airplane tires, can linings, and an additive used in Jell-o. The Solutia plant discharges 35,000,000 pounds of toxic waste every year through deep well injection. The level of waste that the plant discharges annually exceeds the waste that is produced by industries in 17 states and is the main reason Escambia County, Florida ranks 14th nationally in total toxic releases.

Exxon Valdez Oil Still Harming Sea Life 13 Years Later

In 1989, the oil supertanker Exxon Valdez disgorged 11 million gallons of its cargo into Prince William Sound, spreading oil over 1,200 miles of Alaskan shoreline. Even though Exxon reportedly spent more than \$2 billion on the cleanup, however, small oil patches left from the Exxon Valdez spill are still releasing toxins that harm sea life, according to federal government scientists. Studies by the

National Marine Fisheries Service discovered toxins still flowing from lingering crude oil lodged in beaches well over a decade after the worst tanker spill in U.S. waters in history. As recently as last summer, sea otters and harlequin ducks in waters still suffered from high death rates and problems in reproduction. Liver enzyme tests of otters in the areas near the remaining oil patches show high levels of an enzyme connected with oil exposure, evidence of oil-related stress. The studies used data from a 2001 survey that found 28 acres of beach are still contaminated by nearly 16,000 gallons of oil. In summer of 2002, government scientists placed monitoring devices around known oil patches. They found the buried oil has failed to break down into a benign state, and remains "bioavailable" to clams, mussels, otters, ducks and other aquatic life in the area. Exxon officials claim that any residual oil pollution in Prince William Sound comes from sources other than the Exxon Valdez, such as abandoned mines, fuel spills from fishing boats, and natural oil seeps. Government scientists obviously think otherwise.

The Exxon Valdez disaster resulted from the criminal negligence of its seriously intoxicated captain and Exxon's reckless and reprehensible conduct in allowing that captain, whom Exxon knew was an alcoholic and had been drinking, to be at the helm of a supertanker in that condition. The spill caused untold environmental damage to the ecosystem and staggering economic harm to the people who lived near or made their living from the Sound. In 1991, Exxon (now ExxonMobil) paid a reported \$1.025 billion to settle state and federal government

damage claims for the environmental harm. In 1994, a federal court jury awarded \$287 million in compensatory damages to Native Americans, commercial fishermen and property owners who suffered harm to their property or to their right to fish commercially or for subsistence. The jury also ordered Exxon to pay the plaintiffs \$5 billion in punitive damages, at that time the largest punitive damage award in American history. In 2001, a federal appellate court ruled that the punitive damage award was excessive, and returned the case to the trial court to review that award. In December 2002, U.S. District Judge H. Russel Holland reduced the punitive award to \$4 billion.

If the Courts Don't Remain Open – Where Is The Protection?

Under the influence of and hand-in-hand with its big dollar donors in the polluting industries, the Bush Administration is making every effort to gut the protections of environmental laws passed over the last 3 decades, and to weaken the enforcement of or ignore those laws that remain standing. That leaves the courts, and specifically trial by jury, as the last and sometimes the only resort for persons like the Native Americans and fishermen who were harmed by the Exxon Valdez disaster to be compensated for the injuries they suffered. And, punitive damages are fast becoming the only way to punish corporate criminals who intentionally or recklessly kill or maim consumers with defectively designed products, poison residents with toxic chemicals in the land, air and water, steal their retirement or cheat them out of their savings—even though it takes a

substantial dollar amount to get the attention of the Exxons, General Motors, Enrons, WorldComs and Monsantos of the world. Now, of course, the Bush Administration, Republicans in Congress, Big Business, and corporate lobbyists in state legislatures all over the U.S. are trying to ram through bills to impose arbitrary limits on certain types of compensatory damages – no matter how much harm the defendant caused – and punitive damages – no matter how bad the misconduct. What's more, the Republican-dominated United States Supreme Court is considering at least two cases in which nearly every Big Business interest in the country is urging the Court to adopt rules that would eliminate meaningful punitive damage awards against corporate wrongdoers. Unless average Americans demand that our elected representatives preserve our fundamental right to jury trial and to full compensation for harm, and unless courts recognize the critical historical role of punitive damages in punishing and deterring misconduct, I am afraid all that stands between citizens and corporate criminals is the essential goodness of man – an idea that took a real hit in the days of Adam and Eve.

Sufferers From Foundry Dust Settle Lawsuit

A lawsuit against Union Foundry over health damages from its dust pollution has been settled in Calhoun County, Alabama, for \$2 million. The suit was filed in 1999, alleging that pipe-shop dust had damaged property and health. Union Foundry has been blamed for chronic asthma, bronchitis, and throat problems. The settlement will be shared by persons who

qualify. Union Foundry is owned by Birmingham-based McWane Inc., a privately owned company with annual revenues estimated at \$2 billion. According to government documents, the company has repeatedly been fined for health, safety and environmental violations. Residents in the suit believe plant pollution has tainted their houses, their cars, their gardens, and their lungs. A judge will hold a fairness hearing on March 18th. Since the lawsuit was filed, the Alabama Department of Environmental Management has fined the foundry \$386,000 for air, water and hazardous waste violations. A primary component of the settlement is \$8.3 million Union Foundry has spent on environmental controls since the lawsuit was filed—controls that are required by regulators. The company agrees to comply in the future with all environmental laws and regulations. Hopefully, the court and ADEM will make sure they do. There is little in this company's history to give Alabama citizens much hope of voluntary compliance.

XIX. RECALLS UPDATE

Some Chrysler Vehicles Have Faulty Seatbelt Buckles

The Center for Auto Safety has called on DaimlerChrysler to recall 14 million vehicles with Gen 3 seatbelt buckles that can inadvertently release in a crash because of a release button that protrudes too high and fails a simple safety test that other manufacturers' seatbelt buckles pass. The problem is that the release button can be hit by an elbow, a child seat or other object in a crash and release. According to

CAS Executive Director, Clarence Ditlow, the defect can be deadly and escapes detection because after the crash it looks like the occupant was not wearing a seat belt. Mr. Ditlow said: "Seat belts are your last line of defense in a crash and should never fail. Yet Chrysler's Gen 3 seatbelt buckles are like a perfect crime because dead men tell no tales. After a fatal crash, the occupant is not alive to say the buckle came apart. The Center calls on DaimlerChrysler to recall all Gen 3 seatbelt buckles and replace them with the safer Gen 4 buckle."

The Center also called on NHTSA to adopt the industry standard test using a 30 to 40 mm ball pressed against the buckle release button. No belt buckle should release when such a ball is pressed against it. The Center urged NHTSA to adopt a standard that uses the smaller 30 mm ball because it is a more rigorous test. In the late 1970's, NHTSA considered requiring an inadvertent release test but dropped it when US auto companies complained it was too burdensome. Some European companies advocated a 40 mm ball test, which was required in Europe at the time. For more information on this defect, go to www.unsafebelts.com.

900,000 Backup Power Devices Recalled

A Rhode Island company is recalling about 900,000 backup power supply devices that can overheat and cause a potential fire hazard. American Power Conversion Corp., of West Kingston, R.I., has received six reports of overheated units melting their outer casings and three reports of minor property damage, according to the Consumer Product Safety Commission.

The recalled Back-UPS CS Uninterruptible Power Supply devices, commonly used to protect computers in case of power failures, include the Back-UPS CS350 and the Back-UPS CS500 models. Retailers, computer and electrical distributors and catalogs sold the power supply devices nationwide from November 2000 through December 2002. Consumers should immediately stop using the devices by turning off power to all connected equipment, turning the Back-UPS CS off and unplugging it from the electrical outlet. Consumers can receive a free replacement unit by contacting the company at 1-866-272-7359.

General Motors Has Recalled The 1994-1995 Saturn L Series

General Motors has recalled the 1994-1995 Saturn L Series because of potential problems with the seat. There are 72,135 units affected. The dates of manufacture were from July 1993 to March 1995. On certain passenger vehicles, some front seat back recliner gear teeth may wear excessively through repeated use, which could cause the seat back to slip partially rearward when force is applied. If this happens while the vehicle is being driven, it could cause a loss of control, increasing the risk of a crash. Dealers will replace the vehicle's front seat recliner mechanisms. The manufacturer has reported that owner notification is expected to begin during January 2003. Owners should contact Saturn at 1-800-553-6000, Prompt #6.

Hyundai Motor Has Recalled The 2003 Hyundai Tiburon

Hyundai Motor has recalled the 2003 Hyundai Tiburon because the

driver seat belt buckle wiring could be damaged by interference with the driver seat cushion height adjuster mechanism. The number of units affected is 7,382. The dates of manufacture were from August 2001 through March 2002. On certain passenger vehicles, the driver seat belt buckle wiring could be damaged by interference with the driver seat cushion height adjuster mechanism. Damaged wiring could cause the seat belt warning lamp or the air bag wiring lamp to illuminate. It could also cause the air bag to open, preventing air bag deployment. Nondeployment of an air bag could increase the risk or severity of injury in a crash. Dealers will install a new driver seat belt buckle, if necessary, and will place a protective cover over the driver seat belt buckle wiring to prevent damage from occurring. The manufacturer has reported that owner notification is expected to begin during January 2003. Owners should contact Hyundai at 1-800-633-5151.

Hayes Lemmerz Has Recalled the Hayes Lemmerz Trailer Wheel

Hayes Lemmerz has recalled the Hayes Lemmerz Trailer Wheel because the trailer wheel could come off, possibly resulting in a vehicle crash. There are 40,000 units affected. The dates of manufacture were from September 2001 through February 2002. An incorrect label was placed on certain eight-spoke trailer wheels. The incorrect label advises users to torque cone nuts to 175-225 lb-ft and flange nuts to 275-325 lb-ft. The correct label advises the users to torque wheel nuts to 90-120 lb-ft. If the user torques the nuts in accordance with the incorrect label, the nuts could deform the

mounting area of the trailer wheel and allow the trailer wheel to loosen. The trailer wheel could come off, possibly resulting in a vehicle crash. Dealers will inspect these trailer wheels. If the nuts on the trailer wheels are correctly tightened, correct labels will be permanently affixed over the incorrect label. If the wheels are incorrectly tightened, new parts will be installed free of charge. Owner notification began Jan. 15, 2003. Owners should contact Hayes Lemmerz at 800-236-2804.

XIX. FIRM ACTIVITIES

Product Liability Lawyer Recognized Nationally

Greg Allen, our most experienced products liability lawyer, has been recognized in several national publications for his work on behalf of families who have suffered losses as the result of defective products. Greg has an uncanny ability to fully understand, comprehend, and analyze the details of the most complicated product liability cases. He has also been recognized nationally for his discovery efforts in a number of successful cases. Anybody who handles product liability cases knows all too well that the discovery battleground is where these cases are won or lost. The nation's lawyers are learning what I have known for a long time - Greg Allen is the "best" I have ever seen in the product liability litigation business. We are most fortunate to have him on our team and in the victims' corner.

The Montgomery County Bar Association

Cole Portis has just completed a most successful term as President of the Montgomery County Bar Association. Cole heads up our Product Liability Division and does an excellent job. Cole, who got his "education" at Auburn University, graduated from the University of Alabama Law School in 1990. Having served as a law clerk for Judge Joe Phelps, Cole had a "head start" on most lawyers coming into a litigation practice. Some of his accomplishments as Bar President included: establishing a Bench/Bar annual conference featuring judges from all courts located in Montgomery County; bringing about the financial stability of the Association; achieving a substantial increase in membership; having a great patriotic Law Day program featuring Gerry Izzo, a military officer involved in the Somalian conflict (and featured in the movie *BlackHawk Down*); on Law Day honoring Sergeant Stephen Bryson, killed in action, posthumous, with the Liberty Bell Award; securing computers for the MCBA library; excellent CLE programs; publication of the Docket on a monthly basis; creating a grievance committee that issued timely reports to the Alabama State Bar; obtaining photo ID access to the Montgomery County Courthouse so as to bypass the metal detectors; achieving greater support for the judiciary; involvement with Judge Ira DeMent's portrait unveiling; participating in the investiture of Circuit Judge Truman Hobbs, Jr.; sponsoring a hospitality room in honor of Judge Charles Price, who is the new incoming President of the Circuit Judges' Association for the State of Alabama; and beginning the

process of long range planning for the Association. We salute Cole for a job well done!

Firm Shareholder Heads Up State Lawyer Group

One of our Shareholders, LaBaron N. Boone, is now serving as President of the Alabama Lawyers Association. The Association was founded in 1972 to address the under-representation of minorities within the legal community, and is the largest minority organization for attorneys in our State. The organization's goals include enhancing the integrity in the legal profession, encouraging the continuance of legal training by practitioners in the state, improving the quality of legal services provided to the public and protecting the civil rights of the citizens of the State of Alabama. The prestigious list of Past Presidents and Founding members include the late Oscar W. Adams, a tremendous lawyer, who served with distinction on the Alabama Supreme Court; the Honorable Algernon J. Cooper, former Mayor of Prichard, Alabama, and founder of the National Black Law Students Association; the Honorable Fred Gray, a prominent civil rights lawyer who represented Martin Luther King, served as President of the National Bar Association, and is now President of the Alabama State Bar Association; and Chief Judge U.W. Clemon of the U.S. District Court for the Northern District, who is widely recognized as one of the most brilliant jurists to have ever served on the federal bench in this country. LaBarron joined our firm in 1994 and is an outstanding trial lawyer. He focuses his practice on General Consumer Fraud Litigation, Personal Injury Law, and Products Liability Law, with an emphasis on the latter.

Managing Shareholder Nationally Honored

Our Managing Shareholder, Tom Methvin, has been named a Top 10 All Star in the *2002 National Law Journal's Litigation Yearbook*. Tom was honored as one of the "Top 40 Under 40" in the *National Law Journal's July Issue*. *The National Law Journal* is a weekly legal publication delivering news and information for the legal community. The Top 40 list consisted of attorneys who have served as lead or co-lead counsel in the lawsuits in which they have been involved. Within the list of 40 leading young litigators, ten were selected for special recognition. "Each attorney on this list has had substantial success already and is expected to lead the nation's litigation bar for decades to come," said Margaret Fisk, reporter for the *National Law Journal*.

A New President of the Montgomery County Trial Lawyers Association

Dee Miles, who heads up our Consumer Fraud Division, has been elected to serve as President of the Montgomery County Trial Lawyers Association for 2003. The Montgomery County Trial Lawyers Association was founded in 1979 as a professional association of Montgomery area attorneys who work together to foster and promote the administration of justice and to defend and safeguard the advocacy system. Dee, who actively practices in the area of consumer fraud, manages the firm's entire Consumer Fraud Division. He is a frequent guest speaker at national, regional, and state seminars on consumer fraud. Dee is a sustaining member of the

Executive Committee for the Alabama Trial Lawyers Association. He has been an active member of the MCTLA for 12 years. The MCTLA has done a great job of assisting lawyers who represent victims of wrongdoing by Corporate America do a better job for their clients. The group, which meets monthly at the Sahara Restaurant (a Capitol City landmark), is a strong supporter of Father Walter's Center for Handicapped Children in Montgomery.

Shareholder Admitted to Ohio Bar

We have had lawyers admitted to practice in a number of states around the country. J. P. Sawyer, one of our Shareholders who practices in our Nursing Home Section, has been admitted to the Ohio Bar and was sworn in on November 13th before the Ohio Supreme Court in Columbus, Ohio. J.P., whose practice focuses on nursing home litigation, is a frequent speaker at nursing home litigation seminars, both locally and nationally. He is also admitted to the United States District Courts for the Northern, Middle, and Southern districts of Alabama and the Northern and Southern Districts of Mississippi. J.P. is a member of the Alabama Trial Lawyers Association, Association of Trial Lawyers of America, Alabama State Bar (Member of Committee on Bench and Bar Relations), Mississippi Bar Association, Mississippi Trial Lawyers Association, Montgomery County Trial Lawyers Association, and Montgomery County Bar Association. J.P. is working in an area where legal assistance is badly needed for victims of neglect, abuse, and poor treatment in nursing homes.

XXI. CLOSING REMARKS

As has been mentioned on numerous occasions, our state has a tremendous number of most serious problems. None of them is just cropping up for the first time. Each of the major problems has been with us for a considerable length of time. During that time, we have seen "patches" and "band-aids" used by governors and legislatures as temporary solutions for these monumental problems. This has been our approach for all too long and must be put aside for good. Permanent solutions must be found and applied for the very first time in years. Our current leaders have the knowledge and ability required and I hope and pray they will have the courage and dedication required to get the job done. I sincerely believe that they do. Even so, it will take cooperation and participation by Democrats and Republicans alike, along with a great deal of hard work on the part of all concerned, in order to get the job done. Nothing less than that will be accepted by the people of Alabama - nor should it be.

We are truly blessed in Alabama to have a number of state elected officials who share a strong belief in Almighty God. Each holds a most important role in our state government. In my opinion, this is very important and good for the people of Alabama. History has taught us that no country can survive whose people turn their backs on God, His promises, and His requirements. There will always be attacks on God-fearing men and women who hold public office. However, the attacks can

only have any real effect when those being attacked forget that God is in control and is always with them. While government has no business promoting any religion, there is absolutely no reason why those in high public office can't recognize God and openly express their dependence on a Supreme Being. I, for one, am glad to know that the top two officeholders in Alabama, along with the Chief Justice of the Alabama Supreme Court, are persons who not only know God, but also trust and obey Him on a daily basis.

Obviously, there are others of whom the same can be said. So, having said all of this, the time has come for all of us to quit complaining and to back those we have sent to Montgomery. Let's help them get the job done!

Finally, I again urge all of you to join in daily prayers for all of our elected and appointed officials. That is our moral duty regardless of whether we voted for them or even know them. We should also pray for a peaceful solution of our international problems, many of which now appear to be insur-

mountable. We appear to be heading toward a major war. That doesn't mean our government should be prohibited from the use of military might if that course of action turns out to be the only solution. We have to trust those in Washington with the most knowledge on the warfront to make the necessary military decisions. It is also most important that we keep our military personnel and their families in our thoughts and prayers. It is especially critical to support the family members left at home. May God bless our nation!

THE JERE BEASLEY REPORT

FEBRUARY 2003

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