

THE JERE BEASLEY REPORT

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MARCH 2003

I. CAPITOL OBSERVATIONS

State Will Need Extra \$500 Million

Few Alabama citizens fully understand what bad shape our state government is in. For example, state government will need about \$500 million more than it's forecast to have next year to maintain its current spending for agencies and education and pay rising pension and health care costs for employees. From all accounts, this amount of funding will be required just to maintain the status quo. Joyce Bigbee, Director of the Legislative Fiscal Office, told legislative budget hearings that the state is "looking at about \$500 million to just pay the current level of expenditures and the benefits cost and nothing else." The 2004 budget year starts on October 1st, and things look grim for the new Administration. Reports indicate this will be the worst budget situation any Governor and Legislature has ever experienced. In my opinion, a combination of tax increases and spending cuts will have to occur in order to meet the shortfall. The fiscal picture is even more shocking when you consider that the current needs do not include funds to correct the problems facing our prison system, Medicaid, and other

critical needs. There is one thing for certain, and that is, a Governor with the required courage and willingness to fix the problem on a permanent basis is needed. I firmly believe that Bob Riley will meet the challenge. However, it will take some acts that won't be real popular in some circles. Hopefully, the legislative leadership will give the Governor their full support.

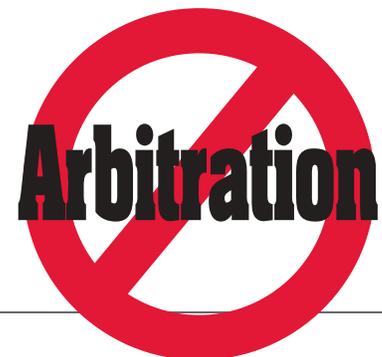
Constitutional Reform Panel Meets

I firmly believe that the time has come for reforming our 1901 Constitution. The Constitutional Reform Commission, appointed by Governor Bob Riley to work on one of the state's major problem areas, will have a real challenge. The Commission met for the first time in Montgomery last month. Governor Riley told the participants their work "could make as much difference in the next generation" as what he and the Legislature might do. The 34-member Commission will deliver its report to the Governor by March 28th if things go smoothly. Proposed constitutional amendments will be presented to the Legislature in April. The creation of the Alabama Citizens' Constitution Commission keeps a campaign pledge by the new Governor. In fact, it was created by his first executive order.

The Alabama Citizens Commission on Constitutional Reform, an

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earlier group, submitted its report on January 16th. The report was the work product resulting from six months of study and deliberations on the Commission's part. While the Citizens Commission made recommendations under five major headings, it was apparently felt by the Governor that to tackle the entire reform effort at once would be too much for the legislature. The Citizens Commission recommendations were in the following categories:

- local democracy
- debt and taxation
- government organization
- education
- economic development

However, the new Commission was asked by the Governor to remain focused only on three main areas:

- granting limited home rule for county governments
- reducing the amount of money in the state budget that is set aside for specific purposes
- giving the governor line item veto authority over budgets.

The Governor's Commission will study proposed amendments that would require a three-fifths majority in the Legislature to levy new taxes. This is the first legitimate effort at constitutional reform since Governor Albert Brewer proposed reform way back in 1969. As some may recall, the powerful special interests were able to derail that effort with little difficulty. The new Commission, which was divided into committees to tackle the 5 issues, includes a variety of business, legal, educational, constitutional and governmental leaders. Hopefully, consumer interests and the interests of ordinary citizens will be both represented and protected as the Commission does its

work. It is most significant that former Secretary of State Jim Bennett, a Republican, is chairman with Birmingham attorney Lenora Pate, a Democrat, serving as vice chairman. While I much prefer a constitutional convention to come up with a new constitution, rather than the current approach, I defer to folks who hopefully know what is best for Alabama. In any event, reforming our present constitution is critical to our state and its people. However, if total tax reform is not addressed soon, the reform won't be worth nearly as much.

Siegelman's Last-Minute Executive Orders Don't Last Long

Outgoing Governor Don Siegelman's last-minute executive orders, affecting everything from binding arbitration to second jobs for state workers, were struck down by incoming Governor Bob Riley. The new Governor issued new executive orders shortly after taking office that rescinded the six signed by Siegelman on January 16th. Riley's legal adviser, Troy King, said Siegelman's executive orders contained new policies that were major departures from long-established state practices. He stated that things of this magnitude should have been undertaken only after serious deliberation and discussion, and that the process and timing of these executive orders were flawed. Mac McArthur, Executive Director of the Alabama State Employees Association (ASEA), had requested that Governor Riley leave the executive orders in effect. While the actions by the lame duck Governor in the final days of his Administration may have had merit, they came during a transition between administrations.

The timing clearly was not good and perhaps suspect. Things of this sort simply don't meet the "smell test."

Alabama consumers certainly had an interest in one of Siegelman's executive orders. That one directed the State Insurance Department to ban mandatory, binding arbitration provisions in insurance policies. There is absolutely no doubt in my mind that arbitration of a predispute nature that is both mandatory and binding is clearly wrong and can't be justified. I also know that the State of Alabama has the legal right to ban arbitration in insurance policies. The Riley Administration believes that the arbitration issue is one that should be decided by the Legislature, not by a governor's executive order. A Siegelman spokesman said the former governor issued the executive order because he "believes mandatory arbitration is wrong, illegal and against public policy. Governor Siegelman believes every citizen is entitled to his constitutional right of trial by jury." If he really believes that, I question why he, as Governor, refused to act on the issue for 4 long years. He actually had another 4 years while serving as Lieutenant Governor and did absolutely nothing on the arbitration fight. However, I must point out that the Insurance Commissioner can, by the stroke of his pen, revoke the arbitration guidelines. That is all that it would take to stop arbitration in insurance policies in Alabama. Hopefully, Governor Riley will see fit, after reasonable time for study, to make a needed request to his Insurance Commissioner. I believe that he should do this and get arbitration out of insurance policies and soon, for the good of consumers in our state.

State Tax System Criticized

Another national publication has reported that our state's tax system is broken. Governing Magazine made headlines four years ago when it gave Alabama the nation's lowest grade on government management. The publication now has reported on the fairness, adequacy and management of tax systems in all 50 states. States received scores of one to four stars in each category. Alabama received one star for tax adequacy, one for fairness and two for management. The report confirms what all Alabama citizens know all too well. Alabama has a broken tax system. The tax system is so enveloped in the state constitution that it is incredibly difficult to do anything about it. The report reveals that Alabama unfairly taxes the poorest among us. It was encouraging to read the response by Governor Riley. It appears that Alabama finally has a champion for real tax reform in the state's high office.

Alabama has the nation's lowest property taxes. That leads to a heavy reliance on sales taxes. Combined state and local rates are as high as 11 percent. Food and groceries are also taxed and that makes matters worse. The report found that state tax systems, in general, are outdated and ineffective. Only Nevada received a lower overall rating than Alabama in the three categories combined. Governor Riley has reportedly told legislators not to be intimidated by the financial crisis facing Alabama. The Governor says he believes the public would support tax reform if it's done right. I tend to agree with Governor Riley's assessment, when he stated: "If we produce a tax program that takes the burden

off those who can least afford to pay, I think the people will support it."

Air Around Anniston Site Tainted With PCBs

A study by the Agency for Toxic Substances and Disease Registry has confirmed what our firm has learned from being involved with litigation over the past year. The study found that PCB levels at the Solutia factory in west Anniston are many times higher than in larger cities such as Baltimore, Maryland, and New Brunswick, New Jersey. The air around the site of the old PCBs factory is laced with unhealthy levels of the hazardous chemical. For decades, Monsanto manufactured polychlorinated biphenyls (PCBs) at the plant. It is now owned by Solutia, based in St. Louis, and makes other products. Before finally being banned, PCBs were used as insulators and lubricants. As has been widely reported, PCBs have been linked to a range of health problems. These range from learning disorders to cancer. PCBs were discharged into the air as well as buried in company landfills and washed from the plant into ditches, creeks and yards, eventually entering people's bodies. This deadly menace has been the focus of litigation brought by thousands in the Anniston area and with good reason. I don't believe there are many cases in Alabama where so many innocent victims were adversely affected and where the wrongdoers worked as hard to cover up their actions. A community activist criticized the agency for putting out a report without evaluating health risks. "Once again, ATSDR has come in and not gathered sufficient data to make

an assessment of the health risks to the community," said Mrs. Shirley Baker, Health Director for Community Against Pollution. Mrs. Baker has worked long and hard to help bring about justice to the people affected by this sordid mess and is certainly due a great deal of credit for her efforts. As expected, a Solutia official claims the PCB levels found in the report were not unusual for an industrial city like Anniston. Past experience with Monsanto and Solutia and their history of misleading the public offer no reason to put much stock in public pronouncements by these corporate entities. No right-thinking person with knowledge of the problems caused in Anniston by Monsanto will accept Solutia's spin on the PCB issue.

The EPA said air contamination would be reviewed under the proposed agreement between EPA and Solutia to clean up the area around the plant. The agreement awaits approval by a federal judge. Hopefully, that won't happen. We firmly believe that this agreement is clearly not in the best interest of the people in the Anniston area. We attended the federal court hearing where EPA and Solutia attempted to convince the judge that he should approve the agreement. Based on what we heard there, I don't believe the federal judge who has the case will give his approval. This highly-respected and experienced jurist asked a key EPA official a very tough question, and one that still demands an answer: "Why has it taken the EPA 40 years to address the problem?" The people in the Anniston area are entitled to an answer to that basic question. In the meanwhile, we are working hard getting our federal court cases ready for trial.

Top Officials Warn Against Incinerator's Start

Senator Richard Shelby has worked long and hard to protect citizens in the Anniston area from the dangers created by the chemical weapons incinerator. In my opinion, the Senator's concerns were well founded. He made valid objections to the incinerator to Secretary of the Army Thomas White, and hopefully the Secretary listened. Until the "obvious safety shortfalls" are fixed, Senator Shelby remains "opposed to any chemical weapons being burned in the incinerator's furnaces." Governor Bob Riley also joined Senator Shelby's opposition, which should help out greatly. The new Governor said he would take legal action, if necessary, to prevent the incinerator from firing up. This is most encouraging. The incinerator at the Anniston Army Depot was built to destroy the 2,254 tons of outdated chemical agents and munitions stockpiled there. Construction is supposed to be complete. However, training and all of the necessary warnings and safety precautions must be firmly in place before the start-up actually begins. The first burns will involve deadly nerve agents. I am concerned that Alabama was even chosen as the site for the incinerator. However, since that decision can't be reversed, we must be sure that every possible precaution is taken to avoid putting Alabama citizens at risk of injury.

Law Enforcement Must Be A Top Priority

Alabama political leaders have a long history of talking tough on law enforcement issues. However, on most occasions, the strong talk

about law and order has not been followed up with strong action when it came to approving funding for programs. The Department of Public Safety is a prime example of what can happen when action doesn't follow the talk. In my opinion, the Alabama State Troopers do a tremendous job under extremely difficult circumstances caused by a lack of financial support. In recent years, clearly the State has not adequately funded the Department of Public Safety. As a result, we have put state troopers on the road under some extremely difficult situations. There is no way that being underfunded and short-handed on personnel can be conducive to good law enforcement.

The Alabama State Trooper Association is hard at work on behalf of the troopers who work to keep our communities and our state as safe as reasonably possible. Most Alabamians feel strongly about the need for strong and effective law enforcement and I believe are willing to support it. A state that really believes in law and order is one that will do the right thing for its citizens in most instances. Putting more well trained and equipped troopers on the highways is badly needed. I strongly recommend that our readers support the Alabama State Troopers. The Association is currently working on these programs, which I believe are good for the people of Alabama:

- Legislation to improve law enforcement generally
- Programs designed to improve the general welfare of law enforcement personnel
- Putting an adequate number of Troopers, properly equipped, on the highways
- Adequate death insurance for all State Troopers
- The Trooper Teddy Bear

program, which enables teddy bears to be given to traumatized children at accident scenes and in hospitals

- The providing of scholarships for dependents and spouses of Association members

I encourage all of our readers to contact the Governor, Lieutenant Governor, Speaker of the House, and all members of the Legislature and ask each of them to support an effort to upgrade law enforcement in our state. We must have sufficient personnel in law enforcement who are well paid and adequately equipped to do a very tough job. We must insist that all needed improvements be made at every level of law enforcement in Alabama. If you would like to make a donation to the Alabama State Trooper Association, you can do so by sending your check to the Contributions Center, PMB 286, 4354 Old Shell Road, Suite A, Mobile, Alabama 36608-2011. You can get additional information concerning the work of this Association by calling toll free (866) 391-6761.

Agency Finds Problems At Jim Walter Coal Mine

The nation's mine safety agency has reported it found "significant deficiencies" in its oversight of an Alabama coal mine where the 13 workers died in the worst U.S. mining accident since 1984. However, the internal review concluded that problems within the federal Mine Safety and Health Administration did not cause the 2001 disaster. The agency again blamed actions by Jim Walter Resources Inc., which operates the Blue Creek No. 5 mine at Brookwood. As we have previously reported, Jim Walter has denied any wrongdoing.

The agency released its final report on the accident two days after the United Mine Workers of America cited poor government oversight as one of the factors leading to a pair of deadly explosions at the mine. MSHA said its inspectors missed safety hazards in the mine and sometimes issued citations for minor violations when more serious action was warranted. In one case, the report said, inspectors failed to notice when the company made a major change in 2001 to the mine's ventilation system that is key to preventing the kinds of buildup of coal dust and gas cited as causes for the explosions. Two top managers have been transferred out of the MSHA regional office in Birmingham, and the head of MSHA said the agency was making other changes to increase accountability and fix problems cited in the report. However, the report said negligence by the company, not MSHA's failures, was responsible for the deaths.

It came as no surprise that Jim Walter Resources disagrees with MSHA on the results of their investigation. The government in December blamed the deaths on negligence by the company, which was cited for numerous safety violations. MSHA did not previously address its own actions at the mine, which was the topic of the internal investigation. There are still lots of unanswered questions concerning this disaster. Hopefully, these answers will be provided.

Department Of Youth Services – A Sad State Of Affairs

Our firm is currently involved in cases where female juveniles, who were under the care and custody of the Department of Youth Services

and assigned to the Chalkville Campus in Birmingham, Alabama, were victimized. Chalkville is a minimum-security campus. While in the State's custody, as part of their treatment plan, the girls were to receive classroom schooling and other types of structured programs. An investigation by several state agencies revealed that from May of 1999 through May of 2001, guards at the Chalkville Campus had systematically preyed on the girls. The young females allege they were sexually assaulted by guards in return for various types of favors. As a result of the investigations, DYS fired or recommended the termination of at least fifteen employees at the Chalkville Campus. Between 1992 and 1997, DYS was under the federal court supervision for failing to adequately provide services to children in their custody. In June of 2001, Governor Don Siegelman released \$13.7 million to DYS to aid the agency in providing services for the children within the system.

In November of 2002, there were reports that girls were absent without leave (AWOL) from the campus because they had been sexually exploited by DYS employees. Apparently, even though DYS has been under the federal court's supervision for five years, and had been the subject of an investigation into the sexual abuse allegations, there was no deterrent effect. The release of millions of dollars to DYS to provide services to children in its custody has failed to do the job. There is still a lack of supervision and training of its employees who have the day-to-day care and custody of these young girls. It is a sad state of affairs when the State agency charged with the responsibility for the care and custody of minor children allows sexual pred-

ators to intimidate and take advantage of young females in their custody. There can be no excuse for allowing such activities to go on at DYS.

New Secretary Of State Takes Some Needed Action

I have always been impressed with Nancy Worley, going back to her AEA days, and was most pleased with her election to the important office of Secretary of State. When Nancy took office, she found something she didn't like. After learning that buttons on some office phones were being used to allow an employee to switch a phone to a busy signal when it really wasn't busy, she took immediate action. The "Make Busy" buttons – and similar "Not Ready" buttons – got disconnected shortly after Nancy took office in the Corporations Division. Apparently, based on media reports, the buttons may not be unique to the Secretary of State's Corporations Division. Hopefully, this is not a common practice in other state offices. However, I am told the "Make Busy" and "Not Ready" buttons are used on phone systems in some state offices that receive lots of calls from the public. The phone systems are set up to rotate calls among employees who are not on a phone call. These buttons are designed to allow employees to take a break from their desks or to complete paperwork from a previous call without being disturbed by a new call. Persons who deal with the Corporations Division began to call Nancy complaining about getting a constant busy signal, and this prompted an inquiry. The Corporations Division is where new corporations go to record their organization and where mergers

are recorded. Anyone trying to locate a corporation in Alabama can phone the office. According to media reports, state phone records revealed that the Corporations Division was getting 11,000 to 12,000 calls per month. Reportedly, more than half the callers were not getting through and were getting busy signals.

Revisions have now been made to the phone system so that a caller either gets an employee or voice mail. There may be rare circumstances when every phone line into the office is actually busy. I also understand the new system will save money. While it is more important that people will be served properly, saving money is also critically important. While this may seem like a small and perhaps isolated problem, it is one that was promptly corrected. I have a good number of friends who work for the State and I have personally supported ASEA for years. However, this type thing should not be tolerated and I applaud Nancy for her action. I believe ASEA and state employees generally will do the same.

Candidates In 2002 Spent At Record Pace

Campaign spending in Alabama set all-time records last year. Candidates in elections for state offices spent \$57.4 million, more than half being spent in the race for governor. The eight candidates for governor in the spring primaries and general election spent a total of \$29.9 million, making this the most expensive governor's race in Alabama history. Based on reports, \$24.5 million of the total was spent by Democrat Don Siegelman and Republican Bob Riley. Political action committees spent at least

\$55.4 million last year, with only a portion of that going directly to candidates. The \$57.4 million doesn't include in-kind services of \$1.3 million that groups donated but weren't required to be reported as a campaign contribution. In-kind services include anything donated to a campaign other than cash, such as office furniture, transportation, or food for fund-raising receptions.

Clearly, the time has come for complete and meaningful campaign finance reform in Alabama. No person can justify the wild and uncontrolled spending that we have seen in recent years, culminating in a record amount spent last year. We have seen political action committees being used by political donors more than ever in recent elections. Politicians like them because it helps them hide the source of their funding. The special interest groups like them for a number of reasons. I suspect the main reason is that the candidates want PAC involvement to help disguise the real source of certain funds.

We Should Work To Preserve The Past

I believe that we should work hard to preserve as much of our state's storied history as possible. Unfortunately, we have already lost some important buildings in Alabama, carrying away a part of our state's past. I have always been interested in Alabama history and wish I had studied harder during my school years. Over the years, I have also developed an interest in preserving the past in Alabama. Preservationists, who are passionate about saving Alabama's historic buildings, are being asked to help make some things happen in our

state. Year after year, we continue to lose historic Alabama buildings through neglect and demolition. Obviously, once gone they are gone forever, and with the buildings their historical significance. The Alabama Preservation Alliance is launching a new program to begin saving these buildings. The concept is to provide alternatives to neglect and demolition of significant properties. The Alabama Preservation Alliance is currently raising funds for a Revolving Fund to be used in the effort. As soon as \$50,000 is raised, the Alabama Historical Commission will provide a grant of \$125,000 for the intervention fund. This means that every dollar raised will average almost \$2.50 additional dollars. One of the projects will require passage by the Legislature of the Alabama Historic Preservation Tax Credit. This will authorize an income tax credit for the rehabilitation and preservation of historic buildings. If you are interested in saving some of our past, I suggest that you give them your support, including making a donation to this group. Their mailing address is: Post Office Box 2228, Montgomery, Alabama 36102. You can contact Chip DeShields, Executive Director, at 334-834-2727. I am sure he will be happy to forward additional information concerning the work of the APA to you.

II. LEGISLATIVE HAPPENINGS

The State Of Alabama Must Avoid Financial Doom

The Legislature will be in session by the time you receive the March

Report. Some of the new legislators may wonder why they ran when the vastness and depth of the problems are fully explained and understood. The veteran members will have to concede that never before have things been so bad. We have dodged the real fiscal problems facing state government for years, and now things are so bad that the familiar band-aid approach can no longer be used. Real solutions for real problems must be found and soon. The new Governor, during a recent speech to the annual meeting of the Public Affairs Research Council, gave a brief outline of some things he wants to accomplish. The first two things the Riley Administration wants the Legislature to accomplish are the elimination of most of the earmarking of state revenue, and the granting to local governments more authority to deal with their problems. The new Governor believes that "excessive earmarking" doesn't allow government to set spending priorities. As a result, he feels that this doesn't allow "the assessment of needs." Governor Riley also promised to support "home rule" to give local governments more authority to make their own decisions. Counties and cities in Alabama have to go to the Legislature to deal with local issues such as zoning and annexation and that makes no sense. The Governor has expressed a desire to give authority back to the people who need it most. As stated above, the state needs \$500 million and soon to keep the state's operations going. Our leaders have no choice but to either raise taxes or drastically cut essential services. It will be interesting to see which route is taken. Personally, I believe it will take a fairly good bit of both. It will also be extremely interesting to see

which special interest groups fall in with Governor Riley and the legislative leaders who have the responsibility of tackling the severe fiscal problems facing the state. It will be equally interesting to see which openly oppose them.

A Former Governor Speaks Out

Former Governor Albert Brewer has told Alabama legislators they would have to find "significant amounts" of new tax revenue to solve some of the many problems that now face the state. Brewer, who served as governor from 1968 to 1971, told lawmakers not to be afraid of adverse public reaction if they were to pass tax increases. The former Governor is chairman of the board of directors of PARCA, a public policy advocacy group that has been vocal in support of reforming the state's tax system and the 1901 constitution. "The people realize there is going to have to be new revenue and that they are going to have to pay more," Brewer said. "They will respond if they know your plan is fair and equitable." Brewer told legislators they will need \$500 million in additional revenue in the next two years just to address emergencies currently facing the state. They include overcrowded prisons, inadequate money to fund Medicaid, a shortage of state troopers on state highways, and the funding crisis facing education, and the list goes on. Albert Brewer is one of the most knowledgeable persons concerning state government on the Alabama scene today. He is totally honest, most intelligent, widely respected, and is admired by folks all across the state. I hope those currently in government will listen to him and follow his advice. I believe that Governor Riley is

smart enough to take advantage of this available talent. The two men - while from different political parties - share a common commitment, and that is to make Alabama a better place for all our citizens.

More Immunity For Nursing Homes

Reportedly, the powerful nursing home industry, in an attempt to gain even more protection from lawsuits, will push more tort reform proposals during the current session of the Legislature. This is an industry that is poorly regulated by both the State of Alabama and the federal government. Nursing homes in Alabama have been placed under the Alabama Medical Liability Act, which gives them significant advantages when sued for their wrongdoings. As has been widely reported, it is extremely difficult to win a lawsuit under this Act. In addition, special laws have been enacted that allow nursing home owners and operators to hire unqualified and even incompetent staff with no fear of being sued when residents are abused, mistreated, or receive poor and substandard care. The nursing homes are also using mandatory, binding arbitration as a condition for admission to a facility. Obviously, this is the strongest form of tort reform since it closes the courthouse door to victims. When you consider reports and studies of the industry, one has to wonder what the nursing homes really want. In any event, Joe Perkins, who is said to be the chief architect of the nursing home tort reform package, will have some highly paid lobbyists, including former Siegelman aide Paul Hamrick, working for him and under his direction.

This is a battle that will affect elderly and disabled citizens in Alabama who deserve to be protected. It is not a battle over lawsuits. Instead, it is a struggle between the nursing home industry and their own insurance carriers. The insurance companies are arbitrarily increasing insurance premiums on the good and bad nursing homes alike with no underwriting basis for their actions. Hopefully, the Legislature will demand some answers to some serious questions before passing any legislation affecting nursing homes. What we need in Alabama is "insurance reform" rather than more tort reform. To date, nobody in government has looked at the place where this type reform should start and that is in the Alabama Insurance Department. This agency has the sole responsibility of regulating the insurance industry, including carriers insuring nursing homes. The Department's ability to regulate must be upgraded. This means adding needed personnel with the required qualifications to do a most important and badly needed job.

III. CONGRESSIONAL

Early Action On So-Called Reform Promised

With our nation on the brink of war and with people across the country greatly concerned over the prospects of more terrorist attacks at home, the Bush White House is hard at work trying to protect corporate wrongdoers. This is similar to what happened after the terrorist attacks on September 11th, when some in Corporate America

took advantage of the fears and apprehension that gripped our nation and enacted tort reform measures while the nation was still in shock. This makes absolutely no sense and can't be justified. What have we learned from all of the corporate scandals? Who needs protection now? The President and his advisors should be taking steps to make sure the scandals in Corporate America are stopped, never to occur again, and that should be a top priority. Instead, Washington lawmakers are preparing to tackle two of the civil justice issues that the Bush White House is pushing. These are so-called reforms that involve class action lawsuits and medical malpractice liability insurance costs.

Three Senators introduced the "Class Action Fairness Act of 2003" on February 5th. The measure would, among other things, allow the removal of a class action lawsuit to federal court from state court if the total damages sought by the class exceed \$2 million and the parties involved are from more than one state. This will further burden a federal judiciary that is already overloaded, primarily because of increases in federal criminal cases. The measure would also require judicial review of "noncash settlements" to purportedly make sure that they are fair to class members.

The medical insurance legislation is also in the works. The White House-backed medical malpractice reform legislation has been reintroduced and is being widely discussed. More will be said on that in the National Section of this Report. Senator Orin Hatch (R-Utah), who chairs the Senate Judiciary Committee, announced early last month that his Committee and the Health, Education, Labor and Pensions Committee would hold joint hear-

ings on the Medical Malpractice Liability Act.

New Study On So-Called Medical Malpractice Insurance Crisis

The real reform needed in Washington, as it relates to the so-called "medical malpractice crisis," should start with the insurance industry. There has been lots of false information put out by the tort reformers relating to this alleged crisis. New insurance industry data and analysis, released last month, shows that the average medical malpractice insurance payout, or closed claim, has been only \$28,524 over the last decade. Payouts in 2001 follow the same low pattern. This figure includes all jury verdicts, settlements and other costs used by insurers to fight claims in court. Moreover, medical malpractice insurers are paying nothing in 77 percent of all claims filed; in the 23 percent of cases where insurers pay anything, the average claim is only \$107,587. According to the Harvard Medical Practice Study, only one in eight malpractice victims ever files a claim for compensation. In Alabama, lawsuits against doctors, hospitals, and nurses are few in number, and of those filed, few are won.

The analysis, conducted for Americans for Insurance Reform (AIR) by J. Robert Hunter, Director of Insurance for the Consumer Federation of America, examined insurance data through 2001, the most recent year available from the National Association of Insurance Commissioners and A.M. Best and Co. Hunter, the former Texas Insurance Commissioner and Federal Insurance Administrator, concludes that, "despite the hype about 'exploding' jury awards coming

from the insurance and medical lobbies, when one looks at the data and sees exactly what insurers are paying out in claims, the average is under \$30,000. There has been absolutely no upward trend in medical malpractice payouts at any time over the last decade." Available data indicate that less than one in four who file claims get any compensation. This shows that insurers are certainly not settling most claims. In cases that do go to trial, juries are cautious in awarding benefits to people injured or killed by medical errors. This has traditionally been the case.

Joanne Doroshow, Executive Director of the Center for Justice & Democracy, has been a "beacon of light" on this issue. She stated in a recent news release, a copy of which was sent to our office: "These data are another astonishing refutation of insurance company assertions that medical malpractice verdicts are 'exploding' and forcing dramatic rates increases. Insurance companies are blaming judges and juries for the decision to make insurance unaffordable for doctors. Medical and insurance lobbyists are telling lawmakers that doctors' insurance rates are rising due to increasing claims by patients and rising jury verdicts. This data shows that such assertions are completely erroneous." I do not believe that Congress will pass legislation that is not in the best interest of the American people. Several recent events involving "mistakes" by the medical community with awful consequences have certainly gotten a great deal of attention. I will not go into these cases at this time except to say that they point out why more tort reform, including caps, is the wrong thing to do.

Republican Lawmaker Calls for Tougher False Claims Act Enforcement

Many observers, including lawyers in our office, believe that the Department of Justice and the HHS Office of Inspector General haven't cracked down hard enough on alleged fraud and abuse in federal health care programs. Now, Senator Charles Grassley (R-IA), who was the architect of the 1986 amendments that strengthened the False Claims Act, believes that the DOJ and the OIG have been lax in the anti-fraud crusade. Many have felt for years that the federal agencies are much too cozy with the health-care providers. Many corporations that deal with the federal government on healthcare programs have never believed that there was much to fear if they cheated the government. If they were caught, little was done. The corporations would pay fines with no prosecution of the wrongdoers. Senator Grassley has criticized the DOJ for "an institutional distaste for whistleblowers and their representatives that is corroding the working partnership between government and the whistleblower." The Senator has questioned several recent settlements. Citing efforts to "see the math" underlying the recent \$631 million proposed fraud settlement between hospital chain HCA Inc. and the Justice Department, Grassley claims he was "turned away" by DOJ officials and told to "trust them." Obviously, their response did not sit too well with the Finance Committee Chairman.

Senator Grassley now plans to introduce legislation that would allow Congress "an explicit right to review the facts and figures behind any proposed False Claims Act settlement before it is approved and

forwarded to the court for closure." The Republican Senator also raised concerns about the OIG. He has expressed concern about the morale of the agency and believes that the watchdog agency's decision making "has been and continues to be subject to outside influences." Senator Grassley will call for, among other things, a return to "stricter, more rigorous corporate integrity agreements."

Senate Bill Would Set Asbestos Claims Criteria

Senator Don Nickles (R-Okla.), the Chairman of the Senate Budget Committee, has introduced a bill that would set medical criteria for people seeking to sue for asbestos-related diseases. The Asbestos Claims Criteria and Compensation Act of 2003, if passed, would unduly restrict rights of citizens. Claimants who do not meet detailed medical criteria would not be able to sue for compensation. The Nickles bill would also affect claimants whose illnesses did not manifest themselves for years after exposure. It is unclear whether those persons would still be able to pursue claims at a later date. Since they are behind his bill, the Senator drew immediate praise from several business and insurance groups. It is too early to determine exactly what this bill does for the persons who have been victimized by these corporations that profited for years and now want immunity for their wrongful actions. It is very clear, however, that the legislation is just another attempt to protect Corporate America in situations where corporate bosses acted irresponsibly, even though they had actual knowledge of the hazards created, knew the medical and health risks to persons affected, and then covered up their actions.

ABA Asbestos Lawsuit Limits

The American Bar Association, the nation's largest lawyers' group, has moved into the asbestos lawsuits debate. In a most unusual move, the ABA has endorsed efforts by the corporations that have caused the problems to limit who can sue. The organization is now on record as being on the same side as big business groups, which is probably not too much of a surprise, considering who runs the ABA. President-elect Dennis Archer said massive asbestos lawsuits have become a problem and the association could not remain on the sidelines. The ABA plan would restrict lawsuits to those with asbestos-related pulmonary disease and defines what the medical standard is. As we all know, there are a good number of asbestos-related lawsuits in courts around the country. It appears that under the ABA proposal, 90 percent of those cases would be barred. It would be a "tragic mistake" for the ABA to limit access to courts for people who otherwise would have a jury determine if they were ill and deserved compensation.

The ABA Report calls upon Congress to pass legislation blocking access to the courts for hundreds of thousands of victims who suffer from asbestos-related disease. Under the Commission's recommendation, unless individuals can meet extremely arbitrary and restrictive medical criteria and satisfy various other rigorous procedural requirements, their claims are to be summarily dismissed. If adopted by Congress, the recommendation in the Commission's Report would eviscerate the rights of every asbestos victim who suffers from serious but non-malignant asbestos related disease.

Presently, the claims of these victims are valid under the law of all fifty states. The American people and their representatives in Congress should demand that the greedy companies that caused the asbestos epidemic be held responsible for the destruction they caused. I would hope that the ABA would get involved in consumer issues on the side of consumers for a change. I have been a member of the ABA for several years and have attempted to get them involved in issues such as "defective products," "predatory lending abuses," and "the failure of the FDA to protect the public." So far, I have seen little interest from the ABA in helping "little folks" when "big folks" may be called to task.

IV. COURT WATCH

Courts Should Not Be Subjected To Another Shutdown

It appears that the Governor and Legislature will be called upon once again to bail out the Alabama court system. The Legislative Budget Committee was told that jury trials may be shut down and court employees laid off if the judicial system does not receive additional money to finish the current fiscal year. Unfortunately, this is just one of the many fiscal problems facing state government. It is quite clear that approximately \$8 million is needed to finish the current fiscal year, which ends September 30th. An additional \$18.5 million is needed by the courts for next year. The Director of the Administrative Office of Courts says that the courts are under severe budget restraints because they have not been adequately

funded for almost 20 years. I know from experience that this is absolutely correct. Regardless of who is to blame, it is essential that the courts remain open for Alabama citizens. A shutdown would result in a denial of justice, both in the civil and criminal sides of the court, and that would not serve the citizens of our state well. It would actually cost more money in the long run because of the start-up problems that would come down the road. I have stated on numerous occasions that the judicial system should never be put in the position of being subordinate and subservient to either the Executive or the Legislative Branches of Government. Under our Constitution, that simply is not permissible. The Judicial Branch is a co-equal with the other two branches of government and must be kept totally independent. Hopefully, the problems concerning court funding will be solved early in the legislative session.

History Proves Caps Don't Work

There will be a strong push for more tort reform, both in Washington and in many states, in the nature of caps on damages that a jury can award. People were told in previous tort reform campaigns that by putting limitations on damages in the form of caps, insurance premiums would be reduced. However, it simply hasn't worked that way. Insurance premiums have not been reduced in a single state where caps were imposed. In fact, the very opposite is true - rates have gone up drastically in every state. This points out that what we really need is "insurance reform!" The insurance companies are the beneficiaries of caps and

tort reform generally. We should not penalize victims of corporate wrongdoing and benefit insurance companies because of a string of bad investments by the companies. Historical data and actual experience prove that caps don't work. Government must take steps, however, to put a halt to the increases in insurance premiums.

A Workable Approach

There is a method that has worked to reduce insurance premiums, and that is what is referred to as a "roll-back" of insurance rates. The State of California adopted Proposition 103 several years ago. This came after an unsuccessful attempt at using caps to solve the problem. In 1988, the State of California passed the Insurance Rate Reduction Reform Act, better known as "Proposition 103." Voters finally took matters into their own hands and passed a ballot measure that imposed the toughest regulations of insurance rates and practices in the nation. Under Proposition 103, premiums were frozen for nearly four years. Each insurance company had to roll back rates by 20% based on the premiums in effect on November 8, 1987. Insurance companies were forced to refund over \$1.2 billion to California citizens, including over \$75 million to doctors, and the insurance companies continued to do well. This is a concept that should be used in Alabama and in all other states where rates are out of control.

Future Rate Hikes

Only after Proposition 103 passed did medical malpractice insurance premiums go down and stabilize. Thus, we have a state

where government tried to solve a problem in two different ways. The caps on damages that passed in the mid-1970s had no effect on insurance premiums, which continued to rise even though a cap of \$250,000 was placed on damages for pain and suffering, along with the imposition of other tort reform measures. When another approach - rolling back rates and making the insurance companies justify their actions - was utilized, premiums went down and stayed down. I have to wonder what would happen if our Governor and legislative leaders elected to take this approach in Alabama. Maybe they will and soon.

Should Judges Be Allowed To Serve Past 70?

A bill authorizing a constitutional amendment will be introduced in the current legislative session to repeal a restriction on anyone 70 or older being appointed or elected to serve as a judge in Alabama. That limitation has already forced many jurists - including Perry Hooper, the last former Chief Justice of the Alabama Supreme Court - into retirement. Many believe the current law expels qualified judges from office, while limiting voters' options. Clearly, we have a number of judges, who are in their late 60's, who are quite capable and are still doing a very good job. In my opinion, whether a judge is competent to serve really should be decided by the voters at the ballot box. While lots of able men and women can serve well in the workforce beyond 70 years of age, others may have a hard time at 30.

I have a difficult time justifying this age limit. The Judicial Inquiry Commission and Court of the Judi-

ciary - statewide panels of judges appointed to police their peers - are already able to remove incompetent jurists. The bill's supporters will have a difficult road in the Alabama Legislature, where similar measures have died many times before. Personally, I would trust the voters on this issue since they would have the ultimate say. I am told that 21 of Alabama's 243 circuit and district court judges will turn 70 during their current terms. Based on my personal experience in the courts, many of those judges are competent jurists. Voters adopted the age restriction in 1973 as part of a state constitutional amendment that restructured the Alabama court system. Interestingly, the law is the only age limit for any elected office. I hope legislators will allow this measure to pass and go to a vote of the people.

Lawyers Appeal \$5.35 Million Jury Award

You may recall when a Madison County jury found some extremely bad conditions in an assisted-living facility, awarding \$5.35 million to an Alzheimer's patient who was attacked by fire ants while she slept. Lawyers are now appealing the verdict against a Huntsville assisted-living center and a pest exterminator. It is difficult to understand how fire ants could ever get in an assisted-living facility. It is even more shocking that no staff personnel detected their presence. Attorneys representing 84-year-old victim argued that Huntsville Health Service and Terminix International employees should have prevented the insect attack. The daughter of the unfortunate lady had sued the health center and exterminator in 1999 after she discovered

fire ant bites on her mother's body. The lady was a patient at Greystone Assisted Retirement Community and Assisted Living Center, operated by Huntsville Care Services. Greystone and Terminix filed their notices of appeal last month. The appeal will be heard by the Alabama Supreme Court. Circuit Judge Jim Smith, a well-respected and experienced trial judge, had upheld the jury's award, denying bids for a new trial from Greystone and Terminix. This was a most significant ruling by the trial judge who heard the evidence during the trial.

Nation's Highest Verdicts

While our firm's verdict in the Jernigan case against General Motors has received a great deal of attention from the tort reform community, there was another verdict in Alabama that also made the list. A lawsuit brought by United Investors, a Birmingham-based insurance company, resulted in a jury verdict of \$50 million. This was litigation involving two corporations, and for some reason there has been no cry of "outrage" from the tort reformers over this verdict. In our case, however, General Motors believed the Jernigan case had merit before we went to trial and offers were made. In fact, General Motors even tried to settle the case for \$10 million during the trial. During closing arguments, one of the lawyers for General Motors suggested a verdict range of between \$12 and \$18 million. However, once the jury returned a larger verdict, all of a sudden, GM began to tell the media that the case suddenly had no merit. In our case, our client, a young man with a promising future, saw that future taken away because of General

Motors' greed and disregard for safety. In the design process, by taking away safety features to save money and increase profits, General Motors made hundreds of millions of dollars. Our client just happened to be one of the company's victims.

V. NURSING HOME UPDATE

The Nursing Home Industry Misleads The Public

The nursing home industry is claiming poverty and asking for more tort reform. Many in this industry have already defrauded taxpayers out of hundreds of millions of dollars. There have been a number of cases where the government had to go after the nursing home industry because of fraudulent conduct. The following is a partial list of some of the wrongdoing:

- Beverly Enterprises - the federal government claimed it was defrauded out of more than \$460 million by this nursing home chain.
- Vencor Inc. (Kindred Healthcare) - hit with a \$1.3 billion claim for "intentionally defrauding the government."
- National Healthcare Corporation - this company agreed to pay \$27 million to settle allegations of fraud.

The Alabama Nursing Home Association is also misleading the public and the Legislature when they claim to be providing a high level of care and attention to residents. The comparative data they are using to show the quality of Alabama nursing homes are self-reported and unaudited. The infor-

mation furnished by the Association was found by the United States General Accounting Office to be:

- Lacking precision.
- Inaccurate in many aspects.
- Inappropriate for state-to state comparison, which is exactly what the industry has done and is exactly what the GAO warned against because it is not an appropriate use of these data.

There are many other matters that should be considered when looking at the performance of the nursing home industry:

- March 1999: The U.S. Department of Health and Human Services Inspector General found that 13 of 25 "quality of care" deficiencies have increased in recent years and Ombudsman complaints have been steadily increasing since 1989.
- March 1999: According to the U.S. General Accounting Office, state surveys identified deficiencies that harmed residents or placed them at risk of death or serious injury in more than 25% of nursing homes nationwide.
- August 2000: The Centers for Medicare and Medicaid Services, formerly the Health Care Financing Agency, issued the findings of an 8-year study examining the association between staffing levels in nursing homes and quality of care. They found that 54% of the nursing homes in America are dangerously understaffed.
- July 2001: The U.S. House Committee on Government Reform investigated the incidence of physical, sexual, and verbal abuse in nursing homes in the United States. It found that more than 30% of U.S.

nursing homes were caught abusing residents during a two-year period; and the percentage of nursing homes with abuse violations is increasing.

Arbitration In Nursing Homes

As mentioned previously in this report, nursing homes all over the state of Alabama are now including arbitration clauses in their admission contracts. Recently, Beverly Enterprises Inc., the largest nursing home chain in the country, began including arbitration in their admission contracts. This deprivation of rights “agreement” in nursing home admission contracts is particularly disturbing when you consider the emotional circumstances that surround the placement of a loved one in a nursing home. The federal Centers for Medicare and Medicaid Services (CMS) could have taken care of this situation in one fell swoop by determining that an arbitration agreement in a nursing home admission contract violates the regulations with which nursing homes must comply in order to retain their licensure. Instead, in a January 9, 2003 memo issued by Steven Pelovitz for CMS, they chose to side-step the issue. CMS takes the position that if a nursing home discharges a resident or retaliates due to an existing resident’s failure to sign or comply with a binding arbitration agreement, then an action for violation of the licensure regulations may be initiated. The memo is not clear as to whether arbitration agreements are permitted between new residents and the nursing home.

Unfortunately, CMS failed to mention in the memorandum the Federal regulation that states that not only is the act of requiring a

new resident, or their family, to sign an arbitration agreement a violation of the regulations, a facility may not even accept an arbitration agreement under the federal license regulations. 42 CFR § 483.12 (d) (3) says that a facility “must not charge, solicit, accept, or receive, in addition to (Medicaid money) any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility.” I am fairly certain that giving up your right to jury trial – a right guaranteed to us by the Founding Fathers – constitutes “consideration.” By virtue of our Medicaid system, nursing homes are virtually guaranteed to have their beds filled and to be paid for the services they provide. They should not be allowed to extract any other form of payment, or any concession of rights, from families who need long term care placement for their loved ones. CMS should enforce this regulation as written.

Woman Locked In Freezer

When maggots were found in a West Alabama nursing home, I thought I had seen it all. However, another case has cropped up that proves me wrong. An elderly woman, who was wheelchair-bound, was found locked in a freezer at a Calhoun County nursing home. The family of the lady justifiably wants an investigation so they can find out how their loved one, a patient at Beverly Health Care, ended up in a freezer and in sub-freezing temperatures. The family was called about their mother being in a freezer, and she was carried to a hospital for treatment. The 83-year-old Alzheimer’s patient was treated at Regional

Medical Center in Anniston for frostbite. As you may know, the temperature inside walk-in freezers is usually zero degrees. The Executive Director of Beverly Health Care confirmed to the Anniston Star that staff members found the wheelchair-bound resident in the freezer. It is not clear how long the poor lady may have been in the freezer because Beverly officials have refused to say. However, the State Health Department is currently looking into the matter. Employees at the nursing home started looking for the resident on a Saturday night when it was determined she was missing during a bed check.

This nationwide chain is now requiring families and residents to sign mandatory, binding arbitration agreements as a condition to admission to their nursing homes. The fact that a resident could be found locked in a freezer is a good example of why this corporation and others in the nursing home industry are using arbitration, and it may also explain why they are looking to cap damages that can be awarded. Fortunately, this lady survived her ordeal. However, the extent of the damage done to her system won’t be known for weeks. In the meanwhile, the nursing home is hard at work pushing for more tort reform in Alabama.

The Truth About Nursing Home Financing

Bad care and grim incidents of death and neglect have long been staples in many of America’s 17,000 nursing homes. We know that abuse, neglect, and poor medical treatment have occurred, and we have good information on why these conditions exist in nursing homes. However, much less is

known about the “financial magic” that goes on behind the scenes. Although public funding has effectively made nursing home care a full-blown government program, the money comes with no guarantees of quality. About 3.5 million people will live in a nursing home over the course of a year, meaning an estimated 15 percent of all U.S. families will have a relative in a home. State and federal financing of this system reached \$58 billion last year. Nursing home residents and their families contributed an additional \$34 billion. The magazine U.S. News recently conducted a home-by-home examination of the industry’s finances. The magazine analyzed hundreds of thousands of pages of nursing home financial statements and shared the results with current and former regulators, patient advocates, congressional staffers, and others knowledgeable about the industry.

The nursing home industry is profitable and growing, with operators spinning a far brighter tale for Wall Street than for Capitol Hill. Many nursing homes are earning exceptionally healthy profit margins, often 20 and 30 percent. There is no strong evidence, as the industry claims, that inadequate federal payments for care of the elderly poor are dragging down profits. Likewise, there is no evidence that patients are markedly sicker today. Even as they report tough financial times in their official government filings, many nursing home operators steer big chunks of their revenues to themselves or related businesses before they calculate the bottom line. The government funding cuts, described by the nursing home industry as catastrophic, actually amount to about 1 percent of current revenue.

Thomas Scully, Administrator of the federal Centers for Medicare and Medicaid Services (formerly the Health Care Financing Administration), in commenting on the U.S. News’ findings, agreed that the industry’s finances are not nearly as dire as many industry executives say. He has indicated that many of the nursing homes are doing fine. Nancy-Ann DeParle, the agency’s Administrator from 1997 to 2000, reviewed the findings and concurred with that assessment. Moreover, the industry’s claim of ever-worsening resident sickness doesn’t hold up. One measure of “acuity,” as it’s called in the trade, is patients’ ability to handle the daily activities of life, such as whether they can eat or use the toilet without help, whether they have behavioral problems, or whether their joints are so racked with pain or swelling that they can’t move their hands, arms, or legs.

Based on these factors, a U.S. News examination of millions of patient evaluations from the past three years found that acuity levels have been essentially flat. For instance, the percentage of patients who are bedridden held steady at about 5 percent. The percentage with pressure sores (which can become life-threatening wounds, exposing bone and organs) was level at just under 10 percent. The portion of patients with incontinence hovered just under 60 percent. Those with infections remained steady at around 17 percent. Largely the same picture emerges from a recent national study by researchers at the University of California-San Francisco. Other evidence that acuity is not soaring comes from a recent study by the General Accounting Office, the investigative arm of Congress. The agency’s investigators studied how patients’ care needs were ini-

tially classified. They found that for the single biggest group of Medicare patients (those in rehabilitation therapy, who account for three quarters of Medicare-covered stays), markedly fewer patients were being assigned to the highest acuity categories. Instead, many more are being assigned to medium severity groups. Investigators believe this is done because the facilities have concluded that the middle groups yield the best profit margin.

A more detailed examination of the industry’s fascination with “profit margins” leads us to probably the least understood piece of the industry’s financial puzzle. At the epicenter of this financial puzzle are transactions that regularly occur between individual nursing homes and related entities. These can include dealings with operators’ family members and business affiliates. U.S. News identified \$3.4 billion worth of these transactions in 2000, which is the most recent year for which records were available. Such “related party” transactions are a classic financial warning sign. For example, the American Corporate Counsel Association lists related party transactions among its top “accounting issues to watch.” Related party transactions can be hidden from the public and from regulators. Self-dealing, which figured prominently in the Enron Corp. debacle and other corporate scandals in the past year, has given the public good reason to be skeptical of all in Corporate America, and that obviously includes the nursing home industry.

In the case of nursing homes, these arrangements typically involve at least one of three things: exporting profits from a local nursing home to a corporate parent; dividing up some of the parent company’s costs among its

local homes; or the local home's purchase of goods and services from a related party. There is a legitimate place for these transactions, so long as there is no abuse and such dealings are disclosed. Related party transactions raise the question of whether the arrangements are designed to siphon money from a home, depriving residents of benefits. Self-dealing appears to be widespread in the nursing home industry. U.S. News found that about 7 of every 10 homes engage in these kinds of transactions. Two common practices documented by U.S. News are rental of facilities from related companies and payment of management or consulting fees to related parties.

Nursing homes are supposed to report the amount of all related-party transactions, then flag those costs that regulators may deem excessive. But in thousands of cases, U.S. News found, the calculations provided by nursing homes were incorrect or the amount of related-party dealing reported was inconsistent. Asked about the errors, industry executives say the Centers for Medicare and Medicaid Services, which collect the information from individual homes, must have corrupted the records. CMS says it doesn't have enough staff time to unravel the issue.

Based on the reports referred to above, it is clear that nursing homes spend billions yearly on deals with related individuals and companies. The major categories include such things as home office, management, administration fees, property rental, therapy, and pharmacy. It should be clear that the industry's claims of poverty are both false and self-induced. It appears to be easy for the corporations that run the individual homes

to move money from the homes into sister or subsidiary corporations and then claim to be not doing well financially. I believe that the nursing home industry must be better regulated and its accounting practices looked at more carefully in the future. Some observers have compared some of the accounting practices and fiscal policies to those used by Enron, Tyco, and WorldCom. Hopefully, that won't prove to be true.

A Coalition Formed To Protect Our Families

Alabama Watch, a consumer advocacy group, is leading the fight for Alabama consumers in a number of areas of concern. It is most significant that a coalition of concerned citizens has finally been formed, consisting of members of community groups, union folks, senior citizens advocates, advocates for low-income people, and consumer groups. According to Barbara Evans, Executive Director of Alabama Watch, this coalition will be active on "consumer issues." These groups have come together for that reason and with a shared objective because all are consumers and all are concerned over what has happened to erode consumer rights in Alabama. I suspect that the most vulnerable consumers in Alabama, however, are nursing home residents. While the coalition has joined forces to protect the rights and make things better for all consumers, they are especially concerned for nursing home residents.

We all recognize that some of the nursing homes in this state are better than others. We also know there are some that are simply bad. Even "good" nursing homes have staffing and other problems that

adversely affect the residents. Even the "good" ones make mistakes. Unfortunately, there are a significant number of nursing homes, however, that are not performing well on an all-too-frequent basis. During the past year, many of the nursing homes have begun to require residents or their families to give up their day in court by signing arbitration agreements. They are also making residents and their families give up the right to have video cameras in the rooms of the residents. This does nothing but help the bad nursing homes and may turn the good ones in the wrong direction. These measures certainly do nothing for the needed improving of conditions in the facilities.

There are lots of questions that must be answered concerning the economic condition of Alabama nursing homes. Reports published in US News and World Reports and with the US General Accounting Office Report are a good place to start. The GAO report indicates that the accounting procedures of the nursing home industry may be less than forthright and that the facilities are doing just fine financially.

The nursing homes are saying their insurance premiums have risen, and that probably is true. However, litigation has not been the culprit. Government has failed to regulate the insurance industry and hold it accountable. According to Ms. Evans, accountability of the insurance industry has been a priority of Alabama Watch for the past year. However, she concedes there is still much work to do. We all know it is wrong to take away the rights from the nursing home residents because of an insurance problem. Instead, government must deal with and correct the insurance problem. We don't

remove protections put in place by our Founding Fathers (and mothers) simply because the insurance industry and the tort reformers want that to happen. You don't take away the right of the residents and their families to their day in court just because some nursing homes have been sued. Instead, the problem that caused the lawsuit must be corrected. In Alabama, there are laws against filing false or frivolous lawsuits. However, we never hear of anybody using these laws.

The following is a statement by Barbara Evans, Director of Alabama Watch, that is worth reading. She hits the nail right on the head and looks at the problems as a consumer and not as a lawyer. I am including it for your consideration.

"Maybe that's because people with loved ones in nursing homes, people like me, think long and hard before filing a lawsuit, (could we remember that it is consumers who hire lawyers) and it is only under the worst of conditions. I didn't sue when my mother died needlessly in a nursing home, I was too upset, and when I thought about it, people made me feel bad about hiring a lawyer. So I didn't sue, leaving that nursing home free to continue the bad practices that cost my mother her life. And I am so sorry. We need to protect our residents.

"Most of the residents are our elderly. As our country approaches the brink of war, we must be reminded of what the elderly of this state mean to our country. They have been called the Greatest Generation and for good reason. And how do we reward them? We ask them to sign away their legal protections when they enter a nursing home. The Protect Our Families Coalition is asking Alabama Legislators to draw a line

in the sand as the rich and powerful Alabama Nursing Home Association begins their move to reduce the accountability of nursing homes. We want legislation that stops arbitration in human services and in insurance. We want Governor Riley to support us in this effort. I hope and pray that our new chief executive will remember the sacrifices that our elderly have already endured on our behalf. I would ask him to allow our seniors to have their day in court and a jury of their peers. I would ask for more funding for our ombudsman programs and senior services.

"Finally, we must get a handle on insurance reform. We need an independent office of public insurance counsel to represent consumers on a consistent basis within the Alabama Department of Insurance. We need laws to stop the insurance companies from using our credit ratings when pricing or issuing insurance. We want protections from an insurance company dropping consumers after one or two claims, and we want accountability in the insurance industry. I said in the beginning this press conference is about accountability. About 15 years ago I was in North Carolina when a chicken plant burned and 25 workers died inside because the owner had locked them inside. I was one of the people who worked on the campaign to bring criminal charges against the owner, and he finally went to jail, the first boss in the country to get jail time for killing employees.

"Maybe we ought to look at criminal charges for corporate criminals who lie, cheat and steal and use hanky panky in accounting procedures, who, in the name of profit, allow our elderly and our kids to be hurt, maimed or even killed. Ladies

and Gentlemen: do not despair. It's true that the big boys have the money, but we have the people, and Alabama Watch and the Protect Our Families Coalition are willing to work with responsible nursing homes and businesses and insurance companies to solve the problems. Ultimately, however, in this debate there is no easy way out, no compromise or middle ground. We either stand up for the elderly and disabled consumers and allow them the legal protections they have fought for and earned, or we don't. You can call the Alabama Watch Office at 334-263-3022 to get on our mailing and e mail lists, to tell us about your concerns, and check out our Website: www.alabamawatch.org."

The Current Regulatory Climate In Alabama

When you take a close look at how poorly we have regulated nursing homes in Alabama, it is not surprising that we have serious problems. For example, we find a backlog of 1200 complaints; a system that is the third worst in the nation for short staffing; and a system that leads the nation with the worst record of deficiencies in the area of activities of daily living. All of this is most disturbing. In many cases, we find staff that is terribly overworked and grossly underpaid. Add to this a huge turnover of employees in these facilities. Taking all of this into account, it is then pretty easy to see why we have problems in the nursing home industry in our state. It follows that residents need to be protected and not ignored. Certainly, more tort reform is the last thing that any person with a relative or friend in a nursing home should want.

I would hope and pray that the new Governor and Legislature will remember the hard work and sacrifices by our elderly citizens over the years. We have benefited greatly from their efforts. Our seniors are entitled to protection, and in cases of abuse, bad care or treatment, or other wrongful acts such as assaults, they are entitled to have their day in court with a jury made up of Alabama citizens to hear their cases. In the debate over nursing home care and treatment of residents, there can be no compromises. We can either stand up for the elderly and the disabled and allow them to enjoy the legal protections they deserve, or we can simply forget them and ignore their plight. The choices are very clear. If we fail to protect our seniors, they have absolutely no chance for justice.

Bed Side-Rails In Nursing Homes: Yes or No?

Most people view bed rails as a needed safety device in nursing homes, keeping residents who tend to move around in the bed or get out of bed, from falling out of bed and onto the floor and possibly injuring themselves. However, most experts agree that they are often used as an improper physical restraint and, more importantly, they can be a potential danger. Studies have shown that bed rails are not suitable for and will not restrain individuals who are active or ambulatory, no matter the mental status. Bed rails can indirectly cause injury in that most falls from beds in elderly individuals occur when they attempt to climb over the rails. Moreover, on occasion, bed rails can cause death directly by entrapment.

The majority of such cases where

accidents and deaths occur as a result of the use of bed rails involve nursing homes, where the patients are elderly and tend to have cognitive and physical disabilities. In Michigan, for example, in the last two years, at least six nursing home residents have been killed and hundreds have been injured when they tried to climb over or through bed side-rails or became trapped in the bed rails or between the mattress and the rails. Hundreds of bed rail related deaths have been reported nationally, and the federal Food and Drug Administration, the federal Health Care Financing Administration and the Michigan Department of Consumer and Industry Services have all issued safety alerts regarding the hazards of bed side-rails. Recently, in the Journal of American Geriatrics Society, the results of a study of deaths attributed solely to bed rails illustrated their danger and the misconception that they function as safety devices. In 70% of the cases, the resident was entrapped between the mattress and the bed rail, which resulted in the resident's face being pressed against the mattress. 18% of the deaths were caused by entrapment of the resident's neck within the rails, and 9% of the 74 patients died when they slid partially off the bed. This resulted in their being suspended by either their heads or pelvises with, in the latter circumstance, the necks of the residents being hyper-flexed or hyper-extended by contact with the floor.

In the state of Michigan, in an effort to combat the misuse of potentially hazardous bed side-rails in nursing homes, a new law was enacted that requires nursing homes to offer the option of using bed side-rails to existing residents and new residents upon admission. The law requires nursing homes to

inform residents or their representatives who choose to have bed side-rails of the alternatives to and the risks of side-rails. It further mandates that nursing homes may only provide side-rails if the resident or his or her representative gives consent and if there is a written order from the resident's attending physician that includes the medical justification for the side-rails.

Because of the public misconception about the use and effectiveness of bed side-rails, this legislation in Michigan is significant in that it requires nursing homes to educate their residents and representatives of the risks involved in using bed side-rails. Experts agree that safer alternatives to bed rails do, in fact, exist. These include moving beds closer to the floor, using soft padding to cover the floor, using contoured mattresses and providing better supervision of confused or vulnerable residents. Using these options as well as educational programs to inform residents of the proper use of bed rails, many facilities have significantly reduced residents' risks of injuries from falls without sacrificing safety concerns.

In our representation of victims of nursing home neglect and abuse and their families, we see instances where bed side-rails are improperly used and, as a result, residents suffer falls and resulting injuries. There have also been reports of instances where nursing homes have made efforts to conceal the deaths of residents caused by bed rails. These instances have involved placing the individual back in bed after the fatal injury has occurred and notifying the attending physician that the patient died naturally. While bed rails are appropriate in some circumstances, they are

subject to frequent misuse by nursing home employees, often resulting in injuries to residents. Accordingly, family members or sponsors of nursing home residents should be aware of any nursing home rules pertaining to the use of bed side-rails. You should ask questions of the nursing staff and the treating physician to determine whether a decision has been made to use the side bed-rails, the reasons for the decision and how that decision will be implemented. The safety and well being of nursing home residents is paramount. The proper use of bed rails under the right circumstances can facilitate and enhance the efforts of the nursing home staff to provide a better quality of life for its residents. The improper use of side bed rails, on the other hand, can lead to tragic circumstances that should have been avoided.

Nursing Home Administrator Liability

When one thinks of those responsible for nursing home abuse and neglect, the obvious culpable parties are the nursing and medical staff charged with providing care and treatment to the residents. Although the nursing home administrator does not provide hands-on care, the administrator is nonetheless responsible for the care and treatment provided by the nursing staff. In order to participate in Medicare and/or Medicaid, nursing homes must adhere to the minimum standards of care as prescribed by the federal regulations. It is the duty of the nursing home administrator to make sure that his or her facility is in compliance with the federal requirements. Despite these regulations, some would argue that it is the director of

nursing who is responsible for supervising the nursing staff and assuring that quality care is provided. After all, most administrators have no medical or nursing training. Therefore, they rely heavily if not completely upon the director of nursing to monitor the health and progress of the residents. However, all allegations of abuse and neglect must be reported to the administrator. 42 CFR § 483.13. Also, when deficiencies are cited by state inspectors, it is the administrator, not the director of nursing, who must submit a plan of correction to the appropriate state agency defining actions taken to correct the deficiencies. Thus, it is clear that the administrator has a duty to not only monitor the care provided, but also to correct deficiencies in care as they occur. This responsibility is established by both state and federal regulations.

The federal regulations provide that each nursing home must have an administrator. The administrator must be licensed when so required by the state in which it operates. Pursuant to federal regulations, the nursing home administrator is “responsible for the management of the facility.” 42 CFR § 483.75. A nursing home must be “administered” in a manner that uses its resources effectively to maintain the highest practical level of physical, mental and psychosocial well-being of each resident. 42 CFR § 483.75. Thus, it is clear that the federal regulations impose upon nursing home administrators a personal obligation to the residents to make sure that the facility is operated in a manner that meets the needs of the residents.

In order to participate in Medicare and/or Medicaid, nursing homes must also adhere to state laws. Each facility must be licensed

pursuant to applicable state laws and must adhere to state statutes and codes, which prescribe the accepted professional standards. Consistent with the federal regulations, nursing home administrators in Alabama must be licensed by the State of Alabama and are responsible for the overall management of the facility. Also, in Alabama administrators “shall be responsible for the implementation and maintenance of personnel policies and procedures that support sound resident care and personnel practices.” Rules of Alabama State Board of Health § 420-5-10-03. Thus, Alabama regulations also impose upon the administrator a personal obligation to manage the facility and supervise the staff in a manner that meets the needs of each resident.

It is the failure of nursing home administrators to adhere to these federal and state regulations that forms the basis of typical claims alleged against nursing home administrators: negligent hiring, negligent retention, negligent training, negligent supervision and failure to implement and/or follow policies and procedures. Although ample information is available to administrators to monitor resident health and progress, unfortunately, many fail to use this information as a tool for maintaining resident health. As a result, resident care suffers, and thus the administrator is also to blame.

Many, if not the majority, of neglect and abuse cases, are a direct result of insufficient staffing. Although the nursing and medical personnel provide the care and treatment, ultimately it is the administrator’s responsibility to ensure that there are enough nurses on staff to provide the care needed by the residents. Although

some states require a specific, daily nursing quota, neither the federal nor Alabama regulations require that a specific number of nurses be on duty at any particular time. The regulations do require, however, that there be a sufficient number of nursing staff on duty to meet the needs of each resident twenty-four hours a day, seven days a week. 42 CFR §483.30. The number of nurses needed to meet the needs of each resident depends upon the resident census and resident acuity level. Resident census reports identify the number of residents in the facility, and acuity reports identify the level of care required by each resident. By using payroll reports and labor distribution reports, administrators can monitor the number of Registered Nurses, Licensed Practical Nurses and Certified Nursing Assistants employed at the facility. Administrators can also monitor the number of nurses working on each hall, floor or wing of the facility. This information is monitored by most nursing home administrators, by some on a daily basis. The comparison of the labor reports to resident census and acuity reports is a powerful tool available to most administrators, which can be used to determine whether the number of staff on duty is sufficient to meet the needs of each resident. Unfortunately, although this information is available, it is not used for purposes of resident care. Instead, many nursing home administrators use census reports, acuity reports and labor reports exclusively for determination of budget compliance. When the administration is budget-driven, resident care suffers. When abuse and neglect result, the administrator who failed to use this information wisely shares the blame.

A Correction

In the December 2002 issue of the Report, I made a mistake. Chapter 9, Protection of Aged or Disabled Adults, §38-9-2 - 38-9-8, Code of Alabama, has been changed. The amendment relieves the Department of Human Resources of the responsibility of receiving and investigating reports of abuse, neglect, or misappropriation of property of nursing home residents when the alleged perpetrator is an employee of the facility. Reports of this nature are to be made to and investigated by the Department of Public Health. I appreciate very much Doris S. Ball, Acting Director of the Adult Protective Services Partnership, bringing this to my attention. I am most happy to make this needed correction, and apologize for putting out "bad" information.

VI. THE NATIONAL SCENE

Tort Reform Moving At Full Speed

I mentioned above in the Congressional Section that the tort reform movement is on the fast track and moving very rapidly in Washington. The insurance industry and their allies wasted little time getting their radical proposal to limit patient rights re-introduced in the newly convened 108th Congress. The groundwork was being laid months ago. I wondered then what the Chamber of Commerce television ads were all about. Now we know. On February 5th, Representative James Greenwood (R-Pa.), together with 68 co-sponsors, intro-

duced H.R.5, which is entitled "Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act." This bill is substantially the same as the one this Representative introduced in the last Congress. This bill contains the most extreme health care liability limits ever proposed in Congress. Among other things, it would impose a \$250,000 cap or limit on non-economic damages in medical malpractice cases and in product liability cases against the makers and sellers of defective drugs and medical devices. It would also apply in cases alleging nursing home wrongdoing and HMO misconduct. In all of these cases, the bill would preempt state law and, among other things would:

- Cap non-economic damages such as pain and suffering, disfigurement, emotional distress, and the loss of enjoyment of life, at \$250,000;
- Get rid of what is referred to as joint and several liability for non-economic and economic damages, leaving victims unable to collect damages for any portion of liability attributed to a judgment-proof or financially weakened defendant, even where another guilty defendant is viable;
- Establish a most restrictive Statute of Limitations. In fact, it will be virtually a Statute of Repose;
- Cap punitive damages at \$250,000 or two times economic damages;
- Prohibit punitive damages altogether in cases alleging harm caused by a drug or device approved by the Federal Drug Administration; and
- Require periodic payments of future damages above

\$50,000, enabling an insurance company to hold their money and earn income on it for years.

If this bill passes, the American people will have suffered a loss like few have ever experienced in past years. The only winners will be the powerful insurance industry and their tort reform buddies in Big Business. The losers will include doctors, patients, nursing home residents and their families, the user of any product used in the medical or rehabilitation field, and persons who must use prescription drugs, to name only a few. Our firm represents victims who have suffered losses of a significant nature. Our firm doesn't sue doctors, nurses, or hospitals in our state. However, we do represent clients whose rights would be severely restricted and whose claims would be covered by this legislation. Examples would be claims against the large chain drug stores for misfilling prescriptions with disastrous consequences; claims by persons who have been injured and damaged by bad drugs; claims by persons damaged or killed by defective medical products; and claims by residents and their families against nursing homes for abuse, assault, neglect, or bad treatment. In my view, this extreme loss of rights and the ability to hold corporate wrongdoers accountable cannot be justified.

Should Doctors Be Allowed To Strike?

It has been suggested by several observers that doctors going out on strike isn't "selling" to mainstream America. I tend to agree. Public Citizen has taken a slightly different approach to the strikes than simply saying doctors shouldn't strike. For example, the consumer

group believes that the doctors' strike in New Jersey orchestrated by the Medical Society of New Jersey violates federal and state antitrust laws and should be investigated. Letters were sent by Public Citizen to the Federal Trade Commission and New Jersey Attorney General David Samson. "Antitrust laws do not countenance individuals or organizations from collectively refusing to serve their clients (here, their patients) in order to gain leverage with the legislature," Public Citizen said in the letter. It is believed that the Medical Society of New Jersey has engaged in collective activities the express purpose of which is to cause doctors throughout New Jersey to deny medical services to their patients as a means of pressuring the New Jersey legislature to enact laws that will increase the economic well-being of doctors. If this is true, it is the unlawful nature of the means, not the legislative ends, that gives rise to the violation of law.

Section 5 of the Federal Trade Commission Act outlaws unfair methods of competition. The New Jersey doctors' walkout is almost identical to a similar action taken more than a decade ago by lawyers who refused to serve indigent clients. In that case, the U.S. Supreme Court determined that the lawyers had violated antitrust law. The letters from Public Citizen ask the Commission and the Attorney General to investigate the conduct of the medical society and make a public announcement that the walkout violates the law. If the society is found to have broken the law, a court could order it to cease its activity. To verify the medical society's involvement, the letters cite documents posted on the society's Web site in which the society pledges its full support -

legal, communications and public relations - to carry out the strike. The letters were signed by Alan Morrison, Director of the Public Citizen Litigation Group, Dr. Sidney Wolfe, Director of Public Citizen's Health Research Group, and Frank Clemente, Director of Public Citizen's Congress Watch. You can read the contents of the letters at: www.citizen.org. I don't believe Alabama doctors would go out on strike and literally abandon their patients. I am of the opinion that our medical community wouldn't allow such activity and that there would be no reason in Alabama for a strike.

Medical Malpractice Insurance Premium On Increase In Texas

As we all know, Texas is supposed to be the model for what "tort reform" was supposed to do for businesses. Public Citizen released a report on February 10th that I hope all of our readers will take the time to review. The report exposes some of the myths propounded by the tort reformers. This deals with Texas, where massive tort reform with low caps was pushed through the legislature and forced folks by then-Governor Bush. The medical malpractice insurance premium increases in Texas are not caused by the legal system, but by cyclical economics of the insurance industry, according to the report. In fact, the most significant long-term malpractice "crisis" facing Texans is the unreliable quality of medical care being delivered, which is a result of frequent medical mistakes and a lack of doctor oversight by the state medical board. Government data show that "repeat offender" doctors are responsible for the bulk of malpractice payments. Between September 1990 and

September 2002, 6.5 percent of Texas' doctors made two or more malpractice payouts worth a total of more than \$1 billion. These represented 51.3 percent of all payments, according to information obtained from the federal government's National Practitioner Data Bank. Only 2.2 percent of the doctors made three or more settlement or verdict payments, representing about a quarter of all payouts.

Dr. Sidney Wolfe, Director of Public Citizen's Health Research Group, released a letter from Public Citizen to the Texas State Board of Medical Examiners, asking the board to investigate 272 doctors who have lost or settled four or more medical malpractice cases, but who had not been disciplined in the past 12 years. The letter also lists 45 physicians who have lost or settled six or more malpractice suits. Public Citizen released the report as lawmakers debate limiting non-economic damages to victims of doctor errors to \$250,000. The Texas Medical Association has hired a team of top-gun lobbyists, including the state's former Health and Human Services Commissioner, the former Insurance Commissioner, and the former Texas Secretary of State. Capping damages, as proposed by President Bush, will only hurt those who have been most severely injured by medical errors.

According to Public Citizen's report, Medical Misdiagnosis in Texas: Challenging the Medical Malpractice Claims of the Doctors' Lobby, medical errors cause 3,260 to 7,261 preventable deaths in Texas each year. These errors cost families and communities \$1.3 billion to \$2.2 billion annually in lost wages, lost productivity and

increased health care costs. In contrast, medical malpractice insurance costs Texas's doctors less than \$421.2 million annually. As the report notes, "The short-term insurance rate increases have nothing to do with the civil justice system and everything to do with insurance industry economics." Financial management problems at major insurers compounded Texas' malpractice woes. The number of malpractice insurers in Texas dropped from 17 to 4 during 2001 and 2002. In at least three cases, the departing companies had severe cash-flow problems that went beyond their medical liability businesses. The number of doctors has been increasing steadily - not dropping, as the medical and insurance lobbies claim. Between 1997 and 2002, the number of physicians and osteopaths practicing in Texas increased from 31,459 to 37,188, an 18.2 percent increase. This is not the story that the tort reformers constantly put out to the media.

Solutions to the problem lie in reducing medical errors. In addition to effective doctor discipline, all states should require hospitals and other health care providers to institute meaningful risk prevention programs. Hospitals should implement measures to curb errors, such as using computers to order and track prescriptions. If this is done, it can cut errors by 55 percent. Requiring proper hand-washing to reduce infections, addressing the nursing shortage, and reducing the long hours of medical residents will definitely pay dividends. Also, insurance risk should be spread, reducing the number of classifications of doctor specialties. Risk pools for some are too small and thus overly influ-

enced by either a few losses or the concentration in a few specialties of doctors handling the highest risk patients. Dr. Wolfe stated: "If the state medical board remains unwilling or unable to seriously discipline doctors with multiple malpractice payouts, then the terrible human and financial costs will continue to cause preventable deaths and injuries." What Public Citizen finds in Texas is equally applicable to other states. However, we are witnessing a well-planned and carefully orchestrated campaign to pass massive tort reform in all states and on the federal level. We included this information from Public Citizen as proof-positive that tort reform and specifically caps has not worked in Texas. So, why does the President feel that the nation should suffer too?

Medical Malpractice Victims In Georgia Call for Increased Patient Safety

We do a pretty good bit of trial work on behalf of victims in the State of Georgia and have become most familiar with the tort reform climate there. Georgians who have been injured or lost loved ones as a result of medical negligence held a news conference at the State Capitol in Atlanta recently and laid out the serious nature and consequences of the tort reform efforts. Elected officials in Georgia were asked to make patient safety and improving quality of care their top legislative priority. A number of injured patients and family members from across the State of Georgia spoke out against so-called "tort reform" legislation that will shield insurance companies and negligent medical professionals from accountability for medical

malpractice—and restrict Georgians' access to the courts—but do nothing to reduce medical errors or insurance premiums. The news conference was a part of an effort by Georgia Watch, the statewide consumer research and advocacy organization, to ensure that patient safety is made a priority in the debate over medical malpractice in Georgia. When “real” people talk about “real mistakes” and “real consequences,” people in government don't listen. A poll was run by the Atlanta Journal-Constitution that showed that over 68 percent of the people responding did not favor caps on damages.

Tighten Up On Insurers

On February 12th, USA Today carried an excellent statement by consumer advocate Joanne Doroshow. This was a response to a pro “tort reform” opinion carried by USA Today. It is a good presentation and one with which I totally agree. Joanne works long and hard on causes that help protect consumers and victims of corporate wrongdoing around the country. She is a real “warrior!” The following is the text of her statement:

Tuesday, 50 survivors of medical errors will travel to Washington, D.C., to speak to lawmakers about misguided proposals to solve doctors' insurance problems on the backs of injured patients. These are the forgotten faces in the debate over how best to reduce skyrocketing insurance rates for some doctors. Insurers and the medical lobbies propose one solution: limiting compensation to patients injured by medical malpractice. It would be one thing if capping jury awards would do anything at all to help doctors who are being price-gouged. But it won't. In the 1990s, medical malpractice insurance pre-

miums rose far less than medical inflation. No matter how low they kept rates in order to gain market share, insurers made tremendous profits from investing premium dollars, mostly in bonds.

Bond interest rates are key in determining investment income for medical malpractice insurers. Now that interest rates and investment income have plummeted, many insurers are trying to recoup by raising rates 100% or more. This “cyclical” price gouging is nothing new. The exact same scenarios occurred in the mid-1970s and mid-1980s, precipitated by dropping interest rates. At the same time, actual payouts to victims by insurers remained modest — today and for the last decade, only \$28,524 per claim. Insurance companies typically try to cover up past pricing errors by blaming jurors and patients for insurance price jumps. This, in turn, leads to frenetic calls for legislative limits on patients' rights to sue. Indeed, during the past two crises, most states enacted restrictions on patients' rights to file legal claims, listening only to insurance companies and organized medicine for guidance. Many of these states, like Missouri, are in crisis again today. These “solutions” don't work. It's time for a second opinion. Consumer advocates have long known that the only way to stop periodic insurance crises is to get better control over the business and accounting practices of the insurance industry. That involves stricter rate regulation, public oversight and repeal of the industry's extraordinary exemption from antitrust laws. Until we do that, nothing will change. And patients always will be unjustly blamed for an insurance problem they did not cause.

IRS Gives A Break On Offshore Tax Offenders

In January, the Internal Revenue Service issued Revenue Procedure 2003-11, which sets forth the IRS' Offshore Voluntary Compliance Initiative (“OVCI”). Under this Initiative, qualified taxpayers who have avoided taxation through financial arrangements outside the United States may disclose their activities to the IRS and limit their exposure to some civil penalties. Taxpayers will be allowed to avoid some of the penalties arising from use of offshore payment cards (credit, debit, or charge cards) issued by banks in foreign jurisdictions or through offshore financial arrangements. The Procedure became effective on January 14, 2003. Some believe that the type information that must be provided to the IRS in order to participate in the Initiative may keep many from participating. The Financial Crimes Enforcement Network will not impose civil penalties for failure to timely file a Report of Foreign Bank and Financial Accounts on participants. Taxpayers who want to participate in the Initiative will have to make a request by April 15, 2003.

Persons desiring to participate will have to include the following concerning the taxpayer's introduction to offshore payment cards and offshore financial arrangements:

- Names, addresses, and telephone numbers of any parties who promoted or solicited the taxpayer's use of offshore payment cards or offshore financial arrangements.
- The names, addresses, and telephone numbers of any parties who advised or assisted the promoters or solicitors in marketing offshore

payment cards or offshore financial arrangements.

- All promotional materials, transactional materials, and other related correspondence and documentation that the taxpayer at any time received regarding offshore payment cards or offshore financial arrangements.

I suspect having to furnish this information may deter some of the people who have used this scheme to avoid taxes. Taxpayers who have derived income from illegal sources during the years on which they seek participation are excluded. Though drug trafficking is specifically mentioned in this connection, presumably money laundering would also preclude participation, even if the offshore accounts were not used for the money laundering. If the taxpayer used the offshore arrangements “to support or, in any way, facilitate illegal activities not related to taxes,” this will also preclude participation.

Lawsuits Coming On Tax Shelters

An excellent story in the New York Times doesn't contain good news for accounting firms that “pushed” tax shelters that are questionable to say the least. Some wealthy Americans who paid millions in fees to two of the Big Four accounting firms to set up tax shelters are suing the firms after the Internal Revenue Service denied the tax savings that they had been promised. Although only a few lawsuits have been filed, tax experts and lawyers handling these cases said they expected a flood of similar cases as the IRS stepped up its hunt for tax cheating by hundreds and perhaps thousands of executives, business owners, ath-

letes and entertainers with big incomes. Two firms being sued, Ernst & Young and KPMG, offered shelters that they said would make taxes on salaries, stock option profits and capital gains from the sale of a business either shrink to pennies on the dollar or disappear.

The fees and savings on taxes can be enormous. Ernst & Young charged some clients \$1 million just to hear a sales pitch, according to court papers. And the firms made millions from the sale of each shelter. The shelters allowed accounting firms, their clients and the law firms that blessed the deals to share money that otherwise would (and should) have gone to the government. The plaintiffs in the suits say that the accounting firms should have known that the tax shelters would be disallowed and that the firms put their own financial interests ahead of those of their clients. The accounting firms say that they gave sound advice, that they fully informed clients of the risks and that the clients acknowledged these risks in writing. The threat that one tax shelter will be demolished in an audit has already meant that the top two executives at Sprint could owe more than \$100 million in taxes. William T. Esrey, the departing Sprint chief executive, and Ronald T. LeMay, the company president, bought shelters that Ernst & Young said would let them take stock option profits immediately, but delay taxes for 30 years. Mr. Esrey disclosed Wednesday that he was being audited and could lose his entire fortune. Mr. Esrey said he was depending on Ernst & Young to defend him if the IRS disallowed his arrangement. Ernst & Young, however, said it stood by its tax advice.

Lawyers whose clients have sued Ernst & Young and KPMG in New

York, North Carolina and Florida described several common elements in the unrelated cases. In all of the cases, large fees were charged; the customers were not allowed to seek independent legal advice on the shelters or to disclose the arrangements; the deals were pitched as virtually sure things; and the sales pitch began with someone who had a long history as a trusted adviser. In two North Carolina lawsuits, the trusted adviser was a banker, but in the other cases it was the accountant who had prepared the person's tax returns before recommending the tax shelter being sold by his firm. In Asheville, N.C., three businessmen who sold a local mall at a huge profit said that William Spitz of KPMG told them that the strategy to shelter those profits was “bulletproof” and that it “used the IRS's own rules against” the agency. Mr. Spitz was also quoted in court papers as saying that Dale Earnhardt, the race car driver who died in a crash in 2001, saved \$4 million using the tax shelter in 1997.

The three businessmen, Richard L. Coleman Jr., Stewart B. Coleman and Thomas W. Coleman, said in their suit that KPMG told them to pay no attention to IRS rules requiring that tax shelters be registered. KPMG was adamant, the men said, that it was selling something different, called a “tax investment strategy.” The Colemans said the IRS later rejected the strategy as a worthless “tax shelter scam.”

Sellers of shelters are obligated to defend their clients in tax proceedings, which typically go on for years. The Florida case was brought last July by Joseph J. Jacobini, an entrepreneur, who said KPMG refused to let him obtain an independent legal review of the tax shelter. “KPMG executives told him he could not involve any other

professionals because the investment `strategy' was `confidential,' according to his suit. KPMG tried to block efforts by Mr. Jacobini to examine documents related to the shelter, conduct that drew a rebuke this week from the federal magistrate overseeing the case. "The shroud of secrecy that KPMG kept over" the two tax shelters "has been lifted," wrote David A. Baker, the federal magistrate. He noted that some of the firm's clients said KPMG was defrauding them and that the IRS investigation of the tax shelters was public record. "KPMG should recognize that its role in these transactions will be examined with no presumption of confidentiality," Magistrate Baker wrote. KPMG said it would file an objection to the magistrate's report.

In a New York Federal District Court, four Indiana men who sold their distribution business for a \$70 million gain in 1999 sued Ernst & Young, saying it sold them a tax shelter that the IRS had already declared improper. To escape \$14 million in capital gains taxes, the men paid \$3 million in fees, with \$1 million going to Ernst & Young and \$2 million to Jenkins & Gilchrist, the Dallas law firm that had conceived the shelter. The men also paid \$75,000 to Sidley Austin Brown & Wood, a major law firm, for a letter attesting to the propriety of the tax shelter. The suit said the fee was unconscionable because at least 43 other clients paid the same amount for virtually identical letters, even though the only extra cost was for printing out copies from a computer.

The suit contends that the accountants and the law firm "reaped as much as \$50 million in fees from as many as 47 other clients" that the firms "enticed into the scheme." The shelter sold to the Indiana men, called Cobra —

"currency options bring reward alternatives" — used foreign currency trades in an attempt to reduce the size of gains. The widespread sale of tax shelters is not limited to the wealthy clients of the big accounting firms. The Justice Department has filed suit in Ohio to close a tax shelter that was marketed to middle-class customers of State Farm by one of its former insurance agents. The government said it lost at least \$30 million in 1999 and 2000 from the scheme.

Enron Cheated The Government – Is Anybody Surprised?

We've known for a while that Enron managed to avoid paying taxes for four of the last five years. It wasn't until recently, when the Joint Committee on Taxation released 2,700 pages on Enron's tax evasion, however, that we were confronted with the troubling details. Enron got away with more than \$2 billion in tax cheating. Somehow, despite claiming \$2.3 billion in profit between 1996 and 1999, Enron also managed to report a \$3 billion tax loss to the IRS. Enron was able to do this mostly through hairsplitting technicalities that allowed it to report the same transaction as a loss to the IRS but not to shareholders. Included in this list of technicalities was the treatment of stock options, a tax deduction that does not show up as a loss on the financial balance sheet. Enron used options to generate about \$1.5 billion in tax deductions in 2000 without impacting its bottom line, making the company's top 200 executives very, very rich in the process.

To accomplish all this, Enron sought out the advice of a number of accountants, bankers, and lawyers, who were only too happy

to sell them expert advice on how to "trick" the federal government. For example, Enron paid \$40.2 million to Bankers Trust, \$16.3 million to Deloitte & Touche, and \$12.7 million to Chase Manhattan for tax-shelter schemes. Unfortunately, for the rest of the taxpayers, corporate tax evasion is more widespread than just Enron. In 1999, companies with \$250 million or more in assets paid taxes at a rate of 20.3%, well below the 35% rate set out in the tax code. Some paid not taxes at all. As reported by the Washington Post, "Accountants and bankers who devise tax shelters allow major corporations to avoid an estimated \$50 billion in federal taxes each year."

Chrysler Charged With Credit Redlining

In previous reports, we have discussed a practice known as redlining. A DaimlerChrysler subsidiary is being charged with the denial of financing to creditworthy black Chicago applicants based on their race and where they lived. A lawsuit filed in U.S. District Court in Chicago on behalf of six Chicago-area residents seeks class-action status. It charges that the financing subsidiary unlawfully repossessed vehicles from 70 black customers who did manage to get credit. DaimlerChrysler and its subsidiary, Chrysler Financial Company, is being charged with knowing about racist practices at its regional headquarters, which were tolerated. DaimlerChrysler Services North America, LLC, doing business as Chrysler Financial Company, LLC, a subsidiary of DaimlerChrysler, is sued as the sole defendant. The lawsuit charges that Chrysler Financial's zone manager bragged that he ran the most prof-

itable zone in the company because of his “racist policies,” and that he frequently used offensive terms for black people during meetings with other Chrysler personnel.

The six plaintiffs in the lawsuit allegedly were denied credit by the Chrysler financing unit, despite good scores on Chrysler’s own credit rating system. It is alleged that the company used an override to reject black applicants from certain neighborhoods. No matter what a person scored, if they were from an area thought to be a black area of a certain type, the applicant was bounced, according to the complaint. We have seen the practice of redlining, which is illegal in this country, becoming more widespread. Redlining is the practice of denying credit or failing to provide services to people in certain areas based on the neighborhoods’ ethnic makeup. The lawsuit, which seeks punitive damages, also charges that Chrysler offered worse terms to minority buyers than to white customers with equal credit scores. The difference between what the black plaintiffs would have paid in interest under Chrysler’s promotional financing offers and the higher rates they ended up paying in bank loans will also be an element of the damages claimed.

Is There A Bond Of Silence In The Gun Industry?

The right to bear arms under our Federal Constitution is a right that most Americans believe is most important and one that is worth fighting for. If anybody doubts that - venture into the “Gun Control” debates in Washington or in most every state in the country. I suspect gun control is one of the most volatile of all political issues

at present. In fact, Alabama’s constitution is even stronger than the federal constitution on this issue. A recent development, however, has brought a new wrinkle into the debate. A former senior firearms industry executive has revealed that gun manufacturers knew for years that some of their dealers corruptly sold guns to criminals, but pressured one another into remaining silent for fear of legal liability. This is the first time a senior official in the gun industry has broken ranks to challenge practices in the business. An affidavit by Robert A. Ricker, a former chief lobbyist and executive director of the American Shooting Sports Council, was filed in a California Superior Court in support of claims by 12 California cities and counties suing the gun makers and their wholesalers and retail dealers. The council is the main gun industry trade organization.

The cities, led by Los Angeles and San Francisco, contend that the gun industry has maintained a distribution system that allows many guns to fall into the hands of criminals and juveniles, creating a public nuisance and violating a California law on unfair business practices. A copy of Mr. Ricker’s declaration, filed under seal, was made available to The New York Times. Mr. Ricker lost his post as Executive Director of the American Shooting Sports Council in 1999. This came after he attended a White House meeting with President Bill Clinton to discuss preventing more school shootings like the one at Columbine High School in Colorado. The meeting was opposed by the National Rifle Association. Mr. Ricker claims that pressure from the NRA led the gun industry to disband his organization in favor of the more conservative National

Shooting Sports Foundation.

The gun makers have insisted they do not know what happens after the guns leave the factory, since they are sold to wholesalers and in turn to retail dealers. However, Mr. Ricker, who has been working for more than two decades in the gun industry, including a stint as a lawyer for the N.R.A., said the gun makers had long known that “the diversion of firearms from legal channels of commerce to the black market” takes place “principally at the distributor/dealer level.” He states that leaders in the industry have long known that greater industry action to prevent illegal transactions is possible. He claims that acting through a network of manufacturers’ representatives, who stay in close touch with dealers, this can be accomplished. The gun makers became sufficiently concerned about their potential liability, Mr. Ricker said, that they convened annual meetings from 1992 through 1997, which he attended. A major subject was whether it would be good to take voluntary action to better control the distribution of guns. Mr. Ricker says that the prevailing view was, if the industry took action voluntarily, it would be an “admission of responsibility for the problem.”

I certainly don’t know what will come of all of this. Clearly, the criminal element in America is extremely well armed and that’s no secret. If guns can be kept out of the hands of criminals - which I seriously doubt - it would be great. Obviously, reasonable steps should be taken to make it harder for criminals to obtain guns. However, the rights of individuals under both the Federal and State Constitutions must be protected.

VII. CORPORATE

The HealthSouth Probe

The FBI has confirmed that HealthSouth Corp., already facing several lawsuits and an investigation by the Securities and Exchange Commission, is now being investigated for possible securities law violations. HealthSouth employees have been questioned in a round of interviews conducted in the Birmingham area. Chief Executive Officer Richard Scrushy said in a news release that he does not believe that HealthSouth or anyone related with the company has done anything wrong. HealthSouth, one of the nation's largest operators of rehabilitation clinics and outpatient surgery centers, is also being investigated by the Securities and Exchange Commission. In addition, the company is the subject of several shareholder lawsuits charging insider trading by top officials. HealthSouth has confirmed the SEC is looking into the timing in August of last year of an announcement that reduced Medicare payments would cut the company's pretax profits by \$175 million a year. The SEC hasn't commented on the scope of its investigation. However, HealthSouth has acknowledged to media outlets that the documents sought by federal prosecutors are similar to ones it provided earlier to federal securities regulators. Scrushy's stock sales have become the subject of at least two dozen shareholder lawsuits filed against him and the company after the announcement.

Judge Cuts Award for Diluted Drug Patient

A judge has upheld the verdict in favor of a cancer patient who received watered down drugs from a pharmacist. However, the damages were cut from \$2.2 billion to \$330 million. This came about in the case against Robert Courtney, who was sentenced to 30 years in prison in December after pleading guilty to diluting two cancer medications. Everybody was shocked to learn that this defendant admitted in his plea agreement that he had been diluting drugs since 1992, affecting as many as 4,200 patients. The \$2.2 billion damage award, the second largest in the nation last year, the first of more than 400 lawsuits against Courtney. Lawsuits also were filed against Courtney's pharmacy and the companies that made the drugs, Eli Lilly & Co. and Bristol-Myers Squibb Co. The lawsuits alleged that Courtney committed intentional wrongdoing and that the drug companies were negligent in failing to prevent his conduct. The above lawsuit against Courtney, however, has been the only case to go to trial so far. Another case is scheduled for trial in May. The two pharmaceutical companies have settled their lawsuits.

More Corporate Fraud

Media reports continue to reveal more and more corporate fraud and corruption. It appears that many corporations dealing with the United States government on government contracts believe that cheating the government goes with the territory. I believe that the government should use criminal prosecutions that put crooked executives in jail combined with large money penalties against their

corporations when the government is cheated. That is needed to put a stop to this type activity. Taxpayers must be protected from criminals who steal with a "pen" as well as from criminals who use a "gun" to steal. I suspect corporations have gotten away with fraud and corruption for so long it has become a habit for some top executives. The government needs to come down very hard on the corporations that continue to lie, cheat, and steal when dealing with Uncle Sam.

VIII. ARBITRATION UPDATE

A California Lawsuit

A lawsuit has been filed in California that seeks to stop HMO organizations from using arbitration clauses. According to the complaint, the clauses are unenforceable because, among other things, they violate Health and Safety Code Section 1363.1, which requires that contract language clearly describe to patients that they are waiving their right to a jury trial and that the arbitration is binding. The HMOs are not complying with disclosure requirements, according to the lawsuit. The plaintiffs accuse the HMOs of illegally forcing binding arbitration on members. In one case, it is claimed that an HMO denied a patient high-dosage chemotherapy to treat her cancer. Eventually, the patient died and the family sued. After three years of litigation, the court found that the HMO could not compel arbitration because the arbitration clause was unenforceable. The lawsuit has accused the state's major health maintenance

organizations of engaging in a “systematic fraudulent scheme” to impose allegedly unenforceable arbitration clauses on its patients.

A Consumer Victory By Long Distance Customers Of AT&T

The U.S. Court of Appeals for the Ninth Circuit ruled on February 11, 2003, that provisions in AT&T’s standard form contract for long distance customers requiring them to submit their claims to mandatory arbitration are unconscionable and unenforceable. Affirming a significant legal victory for seven million California long distance customers of AT&T, the Court struck down provisions in AT&T’s arbitration clause that (a) stripped consumers of the right to file or participate in a class action; (b) stripped consumers of various rights and shielded AT&T from damages for willful misconduct under California’s consumer protection laws; (c) required consumers to pay expensive fees for arbitration; and (d) contained a gag rule requiring consumers to keep secret any dispute they might have against AT&T. The Court said in its opinion that its holding was not directed at arbitration, “but at the manner in which it was forced upon consumers, the way in which AT&T avoided liability for willful misconduct, and the costs to consumers of vindicating their rights.”

Trial Lawyers for Public Justice (TLPJ) was actively involved in this case and did a great job. “The Court of Appeals made clear that corporations like AT&T cannot enforce abusive arbitration clauses that make it impossible for consumers to enforce their rights under consumer protection laws,” according to TLPJ Staff Attorney F. Paul Bland, Jr., who argued the

appeal. He added: “AT&T cannot evade laws that protect consumers by sneaking in an unfair and one-sided, fine-print arbitration clause that most long distance customers won’t read or can’t understand.”

The appellate court ruled that the provision of AT&T’s arbitration clause that banned class actions was unconscionable and “manifestly one-sided,” because it would make it harder for consumers to bring claims. The court found that AT&T’s arbitration clause violated state consumer protection law because it would require consumers bringing claims against AT&T to pay costs that are greater than those they would have to pay if they had brought their claims in court. It also found that if AT&T “succeeds in imposing a gag order,” such secrecy would favor AT&T because the corporation would know what happened in other arbitrations but consumers would be unable to discover that information. AT&T not only tried to force its customers to take their claims to arbitration instead of to court, the corporation attempted to rig that forum to strip its customers of all meaningful rights and remedies under California law, according to James Sturdevant, co-lead counsel for the successful plaintiffs. “The Court of Appeals made clear that courts can and must protect consumers from that kind of abuse,” he stated.

TLPJ and The Sturdevant Law Firm filed this California statewide class action lawsuit against AT&T on July 30, 2001 for attempting to impose mandatory predispute arbitration to eliminate its long distance telephone customers’ right to their day in court and shield itself from liability. The lawsuit is the first in the nation to challenge AT&T’s new mandatory arbitration

provision. It was filed and certified as a class action on behalf of all AT&T long distance telephone customers in California. The federal magistrate judge who presided at trial declared that AT&T’s mandatory arbitration and limitation of liability provisions are illegal, unconscionable, and unenforceable under California’s Consumer Legal Remedies Act and Unfair Competition Law, and permanently enjoined their enforcement in California.

AT&T, relying on the Federal Communications Act (FCA) and the Federal Arbitration Act (FAA), had argued to the Court of Appeals that it did not matter whether it complied with state contract and consumer protection laws. Their position was that the FCA and FAA preempted those state laws. The Ninth Circuit rejected the argument that the FCA preempts either state contract laws or state consumer protection laws. The Court agreed with AT&T that the FAA preempts California’s Consumer Legal Remedies Act, but held that California’s contract law was still sufficient to strike down nearly all of the terms in AT&T’s contract that were challenged in this case.

Federal communications laws do not provide long distance phone companies with any special exemption from complying with state consumer protection laws. It is apparent that long distance phone customers will benefit enormously from California law’s strong protections against deceptive and abusive practices. Key briefs and the Ninth Circuit ruling in this important case are posted on TLPJ’s web site, www.tlpj.org. All consumers nationwide owe a debt of gratitude to TLPJ for its dedication and good work. This case also points out clearly how a state, by

enacting strong consumer protection laws, can have an effect on mandatory, binding arbitration.

IX. PRODUCT LIABILITY UPDATE

SUV Safety Standards Under Scrutiny

The National Highway Traffic Safety Administration is completing a rating system that will tell consumers how likely the vehicles are to roll over in emergency maneuvers. NHTSA is exploring new safety standards to reduce injury when SUVs and pickups slam into the sides of cars. However, it is not certain that a regulation will result from this latest move. The process could take five years or more. Clearly, there is a real need to curb serious accidents involving sport utility vehicles. Some safety advocates believe that we are going to see more of what are called “crossover” designs – SUVs that are less truck-like. The Insurance Institute for Highway Safety has been a longtime critic of SUV safety flaws. Last year, consumers bought nearly 3 million traditional SUVs. The Ford Explorer remained the best-selling model of any size. While demand for bigger SUVs remained flat, sales of smaller cross-utility vehicles surged by 23 percent, to more than 1.2 million, according to www.WardsAuto.com, a leading source of industry statistics.

I had originally thought that the best thing for overall safety would be to ban all SUVs. However, statistics from the Insurance Institute show I may have been wrong in some cases. Banning the largest SUVs and pickups would save

about 160 lives a year. Significantly, outlawing the “smallest” cars would prevent about 700 deaths, according to Insurance Institute estimates. The obvious reason is because small cars have less steel and structure to protect occupants. According to Brian O’Neill, President of the Institute, if the fleet mix could be changed to improve safety, far bigger gains would occur if the smallest cars and SUVs were increased in size than if the largest SUVs were downsized. Safety experts know that SUVs are more likely to be involved in rollovers, which are extremely violent crashes. The rollover death rate for people in midsize four-wheel-drive SUVs was more than two times higher than for those in midsize sedans, according to the Institute. Studies have consistently shown that SUV drivers are not aware of the inherent rollover risk in the high-profile geometry of their vehicles. Nearly six in 10 disagree with the statement that SUVs are dangerous to occupants because of their tendency to roll over, according to the Harris polls.

Is The Auto Industry’s Voluntary Safety Program For SUVs A Ploy to Avoid Real Change?

Without dispute, the automobile manufacturers have known for almost 20 years that their SUVs are highly prone to rollover, are not protective of occupants in such crashes, and are very dangerous to occupants of automobiles in two-car crashes, particularly front-to-side-impact crashes. Occupants of other cars are nearly three times as likely to die in crashes with SUVs than with other cars due to this incompatibility. Dr. Jeffrey Runge, administrator of the National

Highway Traffic Safety Administration (NHTSA), has spoken out about his concerns with both the incompatibility and aggressiveness of light trucks and SUVs in crashes with automobiles and indicated that he would initiate regulation. He has also expressed concern about both rollover propensity and the lack of rollover protection. In an attempt to avoid the issuance of safety standards, the automobile industry has met with and written a letter to Dr. Runge indicating that the companies intend to address the issues of this lack of vehicle compatibility. The car manufacturers indicated that they would research the issue in working groups but gave no deadline for action.

Dr. Runge, who is new on the job, has welcomed this voluntary action. However, consumers and safety advocates in this country have seen this game played before. In 1999, the auto manufacturers agreed to design a test for side-impact head protection air bags. Not only did the manufacturers refuse to let consumers participate in the process, they never followed through to put side-impact head protection air bags in most of their vehicles. This is what usually happens when we depend on voluntary action. Self-regulation and voluntary action simply don’t work in the corporate world. The problems with industry promises instead of government safety standards are:

- Consumers are unable to participate in the development of the test for the standard;
- The public has no independent evaluation of the quality of the proposed tests;
- The public has no verification that a vehicle actually complies with the industry voluntary test;

- The industry is under no obligation to ensure that all of its vehicles comply with the voluntary test;
- Consumers are not informed about which vehicles do and do not comply with the voluntary test; there is no sticker on the vehicle at the dealership, for example.

Further, the industry ignores rollover propensity and crash protection even though 60 percent of the deaths in SUVs are in rollover crashes. If these vehicles are going to be substantially redesigned, they can be made much more fuel efficient, but the industry's plan makes no mention of such improvements. The reason that fuel economy and safety requirements are both housed in NHTSA is to ensure that there is coordination of these two programs. These latest industry promises give consumers no assurance that they will in fact be any safer in the future than they are today. As soon as things die down and public pressure subsides, they will go back to business as usual. They have done it many times before. Thanks to Public Citizen for furnishing us with this information.

Acceleration Case Results In \$80 Million Jury Verdict

General Motors Corp. has been ordered by a jury to pay \$80 million to a Missouri woman whose car sped out of control while backing down the driveway. This appears to be the largest verdict on record in a case over the sudden acceleration of a motor vehicle. A Missouri jury awarded a husband and wife \$30 million in compensatory damages and \$50 million in punitive damages for an accident that left the wife in a vegetative state. A defect in the car's

cruise control allegedly caused the vehicle to speed up when the driver shifted into reverse, sending the car 120 feet across the street into a tree. General Motors has said it will appeal. The jury obviously believed that the accident was the result of a design problem with the cruise control mechanism of the vehicle involved, which was a 1993 Oldsmobile Cutlass. An electrical charge in the mechanism activated the throttle and caused the car to take off down the driveway. After the vehicle hit the tree, it reversed direction on its own, came back across the street, rolled over some landscaping and ended up in the driver's front yard. There was important other similar incident testimony from other people who experienced similar failures. In fact, eight other people involved in similar sudden-acceleration accidents testified in the case.

Ford Blamed For Failing To Fix Crown Victoria Defect

The National Association of Police Organizations Inc., which represents more than 1,000 police unions around the country, has filed a lawsuit in a New York federal court claiming that Ford failed to fix a defect that can cause its Crown Victoria police cruisers to erupt in flames when hit from behind. Last month, a New York state trooper died when a sports-utility vehicle rammed into his Crown Victoria cruiser. The lawsuit cites this death and seven other similar accidents. Ford has consistently denied that the cars are dangerous. In September, Ford agreed to pay for the installation of shields around the gas tanks on police-issued Crown Victorias. Some 350,000 police cars across the country — about 80 percent of all

police cruisers — are Crown Victorias.

Another Lawsuit Filed In Texas

The parents of a police officer killed when his Crown Victoria cruiser was hit from behind by a drunken driver, causing the Ford vehicle to burst into flames, has filed a lawsuit against Ford Motor Co. The officer was working off-duty with a construction crew on an interstate highway project when he was hit. The lawsuit, filed in Dallas County, Texas, accuses Ford of negligence, aggravated assault, and malice in the death. Obviously, Ford has known of the hazards relating to these vehicles, knowing that the vehicles were vulnerable to rear-end explosion. Despite having that information, Ford has continued to design, market and sell the Crown Victorias to the police community. The Texas lawsuit cites deposition testimony from Ford officials taken recently in conjunction with class-action lawsuits. It was revealed that prior to 2001, Ford was aware that punctures in the vehicle's fuel tanks by rear suspension components were responsible for fires that caused deaths and injuries among law enforcement officers. As we already know, Ford had knowledge of how to prevent the punctures before October 2001, but withheld it until October 2002. When juries hear how Ford has put a defective vehicle on the highways to be used by police officers, I don't believe they will like what they hear.

Ford Settles Van Rollover Case

Ford Motor Co. has settled a lawsuit in Chicago over a fatal rollover of a 15-passenger van. The recent settlement in Chicago came after a Ford test-driver admitted

under oath that he had rolled one of the vans over on its side, contrary to previous testimony by Ford that the vans had never rolled over in a test. U.S. District Judge Robert W. Gettleman, who had previously threatened to impose sanctions on Ford for its prior attempts to hide data on the stability of the vans, said Ford's concealment of evidence in the case "borders on criminal." Obviously, this is a very strong statement from a federal judge.

The case arose out of a rollover wreck in Kentucky that killed two passengers in a Ford E-350 Super Club Wagon. Several other passengers were seriously injured in the incident. The settlement came prior to trial date. At the pretrial hearing, the judge indicated he was "very, very close" to finding Ford liable by default, and holding a trial only on "damages." There was never any doubt that Ford would never let this case go to trial. A settlement was subsequently reached with the amount being confidential. Richard Schettler, a Ford engineer, described an incident that occurred in 1990 when he drove one of the vans through a slalom course. As he zigzagged around a series of cones at about 40 mph, the van lifted up on two wheels and then tipped over on its side. This information was revealed by Schettler in a discovery deposition.

It is most significant that in January of this year, Ford settled another van rollover case in Georgia before a judge there could impose sanctions for similar complaints about hiding evidence. Now, it will be interesting to see how Ford handles other van cases in which Ford has made some of the same statements that the federal judge in Chicago has deemed false. Unfortunately, con-

cealing evidence of safety defects has become commonplace in the automobile industry. There are presently an estimated 500,000 of the 15-passenger vans on the road. These vans are widely used by church groups, athletic squads and vanpools. In addition to Ford, which is the top producer, General Motors Corp. and DaimlerChrysler have their own versions. Information from NHTSA reveals that from 1990 through 2001, 647 people died in rollovers of the vans. The federal government's regulatory agency has warned that with the vans' high center of gravity, their stability declines markedly with 10 or more people on board. Ford and its rivals claim the vans are safe and that deaths and injuries result from driver errors and failure to use seat belts. However, based on cases that we have handled, I know for a fact that these vans are extremely dangerous and put folks who ride in them at risk of injury or death.

Wrongful Death Suit Filed Against Manufacturers Of Isuzu Rodeo

Our firm has filed a wrongful death suit against Isuzu Motors, Ltd. Our client's husband was driving a 2002 Isuzu Rodeo, traveling along a county road, when the vehicle started to pull to one side. The driver was caused to lose control of the vehicle. The Isuzu's stability and handling defect, which was well known to Isuzu, resulted in the automobile overturning. We learned that the defendants had tried to repair the defect, to no avail, shortly after the vehicle was sold. Our client's husband was killed in the incident. As the Isuzu Rodeo overturned, the seatbelt system failed to keep the driver inside the vehicle. As a result of the

rollover, both the driver and a passenger who were each wearing their seatbelts were nevertheless thrown from the vehicle. The driver of the vehicle was killed and the passenger was injured. The case will be handled primarily by LaBarron Boone and Greg Allen. I will also be involved to help them out. Defendants, other than Isuzu Motors, Ltd., are American Isuzu Motors, Inc., Subaru-Isuzu Automotive, Inc., GMC-Isuzu, Inc., Takata Corporation, and Takata Restraint Systems, Inc.

Log Trucks Can Be Very Dangerous

Last month, I wrote about the lack of safety features and protection afforded to drivers and occupants of heavy trucks or 18-wheelers in general. One heavy truck in particular where the driver is exposed to an unreasonable risk of serious injury in the event of a foreseeable collision is the "log truck." We have all seen these trucks, a dual unit made up of a cab and log trailer, and in most instances equipped with an aluminum cab guard or headache rack. Our firm is currently handling several cases where families have lost loved ones while operating "log trucks." In each case, the driver of the log truck was involved in a frontal collision which was survivable, but for the logs shifting forward in the collision and crushing the cab guard, cab, and tragically the occupant. In each case, had the manufacturer of the truck or cab, the cab guard, or trailer used an adequate design, the driver would have survived. The liability and fault is shared equally between these manufacturers.

Manufacturers of heavy trucks, such as Mack, Freightliner, and

International, have ignored for years general accepted safe engineering practices in analyzing and developing appropriate cab strength to protect occupants from impacts from the rear of the cab caused by anticipated loads in units, such as log trucks. This is despite known testing and development of adequate rear cab strength in Europe by domestic and foreign manufacturers for years. This is also despite the manufacturers' knowledge of injury and death caused by logs or other unrestrained cargo shifting forward in frontal collisions in log trucks and other units hauling cargo. Most of the heavy truck manufacturers participated in the SAE Heavy Truck Crashworthiness Study, which showed that cargo impacting the rear of cabs during a rear-end collision with another 18-wheeler. Such a foreseeable event occurred with some frequency.

The manufacturers of log trailers are equally culpable. They completely ignore their responsibility in protecting occupants. Most of the manufacturers of log trailers provide no fixed anchor points or cargo barriers to retain logs in the event of a collision, despite the only use for these trailers - to haul or carry logs, as many as several tons of logs. Sadly, they wrongly believe that it is not their responsibility to make log trailers safe.

Finally, most manufacturers of cab guards sell cab guards that they have not designed or tested. Manufacturers, such as ProTech, Merit, and others, sell aluminum cab guards or headache racks, which they know will not protect an occupant in a frontal collision. Instead, manufacturers, such as ProTech and Merit, design and produce cab guards or headache racks with the lightest possible

products at the expense of strength and truck occupant safety. More shocking is that most of the manufacturers of aluminum headache racks do not test the racks they warrant as safety features for log trucks.

Most of the log truck units on the road today haul 30,000, 40,000, and 50,000 thousand pounds, if not more, of timber. If a driver of these trucks is unfortunate enough to be in a frontal collision, there is little chance that he or she will survive, even at a very low speed impact, because of the devastating consequences of the unsecured logs or cargo crushing the cab and occupant. Until the manufacturers of cabs, log trailers, and cab guards accept their responsibility, the occupants of log trucks will continue to be at risk, and they and their families will suffer catastrophic consequences.

X. MASS TORTS UPDATE

First Baycol Trial In Nation

The first jury trial in the country involving the cholesterol drug Baycol started up in Corpus Christi, Texas. A jury was selected on February 18th and the case is being tried as we go to press. As you will recall, Baycol is a cholesterol lowering medication that was withdrawn from the market in 2001 after it was linked to dozens of patient deaths and nine severe muscle injuries called rhabdomyolysis. Bayer® faces over 7,500 lawsuits worldwide involving this drug. Andy Birchfield, Section Leader of our law firm's Mass Torts Section, will be helping try the case in Corpus Christi. The trial could

influence the outcome of thousands of similar cases pending across the country. In the lawsuit, retired engineer Hollis Haltmon suffered contents Baycol caused his rhabdomyolysis, a breakdown of muscle tissue that can cause renal failure. The plaintiff intends to show that Bayer® was a company in dire financial straits and saw their competition sharing a \$24 billion a year statin market. At the time, Baycol was the sixth statin drug on the market. Bayer® did not provide proper warnings on the drug's side effects, omitting them in an attempt to make Baycol into a billion dollar a year drug.

The trial of the case is expected to last two to three weeks. Andy Birchfield, who is participating in the trial, says it is going very well. We hope to be able to report the outcome of the case in our next edition. Documents reveal that Bayer's senior executives knew this anti-cholesterol drug was causing injuries and deaths long before the company pulled it off the market. The company documents include e-mails, memoranda, and sworn depositions by company executives. Bayer® continued to promote the drug despite a company analysis that found patients on Baycol developed rhabdomyolysis, the rare muscle disease, much more often than patients on alternative drugs.

A Strange Development

After the jury was selected, it was discovered that Bayer® had mailed out approximately 2,200 letters to residents of Nueces County. Interestingly, this is where the trial is taking place. The Bayer® letter discussed details of the case, attempts to settle the case, and how much money Bayer® contributes in taxes to the State of Texas, among other

things. This was an obvious attempt to sway public opinion. Was it an attempt to sway the opinion of potential jurors? Some members of the jury panel received the letter. The judge presiding over the trial has provided a copy of the letter to the District Attorney. The judge advised some of the Bayer® employees they may need to seek legal counsel and that he would read them their rights. The District Attorney is currently conducting an investigation into possible jury tampering against Bayer® and the employees responsible for the letter. When you consider how the tort reformers put out information through the news media in communities around the country on a constant basis, I am not too surprised at what Bayer® did. However, Bayer's actions sure do "smell" like an attempt to influence a jury.

Public Citizen Says FDA Is Wrong

Public Citizen has filed suit against the U.S. Department of Health and Human Services (HHS) because that agency has not allowed the public to comment on new rules regarding patient information leaflets distributed with prescription drugs by pharmacists, relying instead on a faulty private sector program that does not give patients the vital drug safety information they need. This is in violation of a 1996 patient information law passed by Congress, and the court should order the agency to seek public comments, Public Citizen said in its lawsuit filed in the U.S. District Court for the District of Columbia. In 1995, the Food and Drug Administration, a part of HHS, proposed a rule requiring the distribution of scientifically

accurate and useful written information with new and refill prescriptions, such as information about adverse effects and guidance on how to best use the drugs. The FDA set the following goals: By 2000, 75 percent of patients would be receiving patient information leaflets, and 95 percent would be receiving them by 2006. In 1996, Congress passed a law adopting that timetable and requiring the private sector to design and implement the program.

Congress provided in that 1996 law that, if the private sector's program failed to meet certain quality and quantity standards by 2001, the FDA must then take public comment on alternative methods for providing accurate and useful leaflets to prescription drug consumers. Although the FDA acknowledged in June 2002 that the private sector failed to meet the 2001 goals, the agency nonetheless refuses to take comment on alternative methods of improving the leaflets, in violation of the law. Members of Congress believed that patients should be receiving this information. They set specific deadlines to ensure that the program would work. Public Citizen was forced to file this lawsuit because the FDA was unwilling to do its job.

According to the FDA's assessment of the private sector's information campaign, while 89 percent of patients were receiving information leaflets, the leaflets on average had just half the information considered essential for a patient to take a drug safely. None of the leaflets met the seven quality criteria of the proposed rule. Public Citizen has an interest in the success of the program because its members are not receiving sufficient information about their pre-

scription drugs, as Congress intended. The FDA has not established a public comment period. As a result, Public Citizen has been denied its right to participate in the process. The lawsuit asks the Court to declare unlawful the FDA's delay in opening a comment period and order the agency to immediately seek public input on initiatives that could achieve the goals laid out by the FDA rule and the 1996 law.

Since the private sector's performance up to this point is clearly not acceptable, it is necessary to look for other ways of implementing a workable program. According to Dr. Sidney Wolfe, "Educating patients about the potential dangers of the medications they are taking is imperative for lowering the number of needless deaths and injuries from unsafe drugs and drug interactions. It's inexcusable for the FDA to stand in the way of that." I commend Public Citizen for another courageous stand for American consumers. Hopefully, their lawsuit will be successful.

Young Major Leaguer Dies

A young major league pitcher for the Baltimore Orioles died last month during the first days of spring training. Steve Belcher, a 23 year old who was in the early stages of his baseball career, died from complications of heat stroke on a day with temperatures of about 80 degrees. Interestingly, he had taken ephedra, the weight-loss drug banned by many sports leagues but not major-league baseball. It has been reported by the media that the drug contributed to the heatstroke death of this young athlete. The coroner on this case confirms this conclusion. Bechler had been taking Xenadrine, an over-the-counter diet supplement.

As we know, Xenadrine contains ephedrine, which has been linked to heatstroke and heart trouble. Bechler died less than 24 hours after a routine spring training workout sent his temperature to 108. Toxicology tests to confirm whether ephedrine was in Bechler's system will not be complete for two to three weeks. Ephedra can promote heat stroke in these ways: (1) it stops metabolism and thus creates extra heat; (2) it constricts blood vessels in the skin, keeping the body from cooling; and (3) by making the user feel more energetic and thus less fatigued, it keeps the person exercising longer. If the user is dehydrated, out-of-shape, or overweight, this is more dangerous for users. Dr. Joshua Perper, the medical examiner on the case, urged baseball officials to join the National Football League (NFL), National Collegiate Athletic Association (NCAA), and the International Olympic Committee (IOC) in banning the substance. One has to wonder how a major league baseball team could allow athletes to take ephedra.

Doctors Confirm That Ephedra Use Is Unsafe

We are handling a number of cases involving ephedra, which has been proven to be unsafe even when taken in recommended doses. The most common side effects are high blood pressure, followed by irregular heart rhythms, stroke, and seizures. The use of ephedra should be restricted, according to a report by doctors. According to the study, American Poison Control Centers reported 1,178 adverse reactions to ephedra dietary supplements in 2001. This study is posted on The Annals of

Internal Medicine's Web site and will be published in the Journal. Ephedra accounted for 64 percent of all adverse reactions involving herbs, even though it is found in less than 1 percent of all herbal products sold. The study, based on data collected by the American Association of Poison Control Centers, is just the latest of several to question ephedra's safety. The Food and Drug Administration has reports of nearly 100 deaths of people who had taken ephedra. Significantly, the American Medical Association has advised people not to use ephedra. As stated above, the International Olympic Committee, the National Football League, and the National Collegiate Athletic Association are among the groups banning the use of ephedra. In June, the federal government ordered a review of ephedra's safety. How many more deaths will it take for the federal government to get involved? When you consider that ephedra is sold in health food stores, in drugstores, supermarkets, and on the Internet with annual sales of more than \$3 billion, it is easy to understand why the manufacturers are fighting so hard to keep this dangerous drug on the market. That may also explain why the federal government has refused to protect American citizens by banning ephedra.

Suits Say Cold Remedy Ingredient Causes Death

A recent lawsuit, filed in Texas against Bayer® Corp., alleges phenylpropanolamine, or PPA caused a Texas man's heart to suddenly stop beating. (The ingredient no longer found in the medicine.) The Houston resident had a simple case of bothersome allergies when he took an Alka-Seltzer Plus cold

remedy in December 2000. However, the 42-year-old, whose only health malady was diabetes, died during his sleep. This case is just another in a series of lawsuits pending around the country against a number of manufacturers of products containing PPA, including Bayer®, Bristol-Myers Squibb Co. and American Home Products. Presently, there are hundreds of cases pending that are alleging PPA caused death or serious injuries. Many of the suits have been transferred to a U.S. district court in Seattle designated to handle initial pretrial proceedings. These cases will ultimately be returned to the courts in which they were filed. The lawsuits involve drugs made prior to the Food and Drug Administration's public health alert on November 6, 2000 about PPA's harmful effects.

The FDA's alert followed numerous complaints and a report by Yale University researchers showing an association between PPA and an increased risk for hemorrhagic stroke. The FDA then acted to get drug companies to discontinue using PPA. Many companies have since voluntarily removed or reformulated the ingredient in cough and cold medications and over-the-counter weight loss products. PPA reportedly never received formal FDA approval as an over-the-counter drug. The ingredient was "grandfathered in" because it was in use prior to a 1938 law creating federal drug oversight. The ingredient relieves nasal congestion by narrowing blood vessels. This can cause a rise in blood pressure. While this is harmless to most users, it puts others at significant risk for strokes.

Conflicts Of Interest In Biomedical Research

Over the last twenty years, pharmaceutical industry support for biomedical research nearly doubled, from 32% in 1980 to 62% in 2000, while financial support from the federal government decreased. This was a finding in an article in the January 22-29, 2003 issue of the Journal of the American Medical Association, titled, Scope and Impact of Financial Conflicts of Interest in Biomedical Research. As a result of increased industry support, the relationships between academic research institutions and the pharmaceutical industry flourished. The existence of these “close ties” creates a hazardous conflict of interest, and, according to some reports, poses a “threat to scientific integrity.” According to the Scope article, financial relationships between industry and biomedical researchers are “pervasive and problematic.” The article found that industry-sponsored research tends to draw pro-industry conclusions. The “pro-industry conclusions” likely result from:

- industry support of clinical trial designs that favor positive results;
- infrequent publishing of studies having negative results; and
- industry refusal to publish negative studies.

Furthermore, the study found about one in four medical investigators at academic institutions receive industry funding, and one in three “lead” authors hold relevant financial interests. The pharmaceutical industry, in effect, has converted academic research centers into arms of the companies. While patient safety issues once prevailed as the primary

concern in all biomedical research, financial considerations now triumph. These competing interests will continue to taint the integrity of scientific research and development unless procedures are implemented to ensure research neutrality. The authors of the Scope article suggest, at a minimum, that all researchers disclose the nature and extent of all of their relationships with the pharmaceutical and biomedical industry, and that all results be made available in a publicly accessible registry. Unfortunately, until such procedures are implemented, the integrity of biomedical research will be compromised.

XI. BUSINESS LITIGATION

Two Phone Giants Fight Turkish Family

Two of the world’s largest phone equipment companies, Motorola and Nokia, claim they are the victims of a huge fraud by a secretive Turkish family. The case went to trial in a federal court in New York last month. The two phone giants are trying to recover as much as possible of the \$2.8 billion they lent Telsim, a Turkish cellular start-up controlled by the Uzan family, to buy equipment and enter the fast-growing Turkish market. The battle has been waged on multiple fronts, including courts in Britain and Turkey, as well as in Washington. Interestingly, Motorola has sought the support of the Bush Administration.

Motorola and several of its top executives are now facing a growing number of shareholder

lawsuits complaining that the company inflated its stock price in 2000 and 2001 by announcing the sale of more than \$1.5 billion in equipment to Telsim without disclosing that it had provided even more than that in loans to finance the sales. Motorola says those suits are without merit. The Uzan family has contended in court that the entire conflict reflects their suppliers’ unwillingness to face up to the losses stemming from the global crash in the telecommunications markets, recession in Turkey and a large devaluation of the Turkish lira. The Uzans say that the terms of the agreements call for “arbitration” of all issues in Switzerland. However, the Uzans are being sued in New York under state fraud laws and the federal racketeering law. If Motorola and Nokia win, they will ask that the damages be tripled, as the racketeering law allows. The American corporations say the problem is not one of contract interpretation, but instead is one of deliberate deception, manipulation of the Turkish courts, and financial skullduggery. These contentions sound strangely like those made by American consumers. Although American courts tend to support arbitration clauses strongly in business contracts, a federal district judge ruled that Telsim’s contracts do not apply because the suits are against the “people” who control Telsim and not the “company” itself. The judge also ruled that the contract allowed the suppliers to go to court rather than arbitration. The judge had frozen the Uzans’ New York assets last year, including eight apartments. At that time, he said that “every preliminary indication” pointed to “repeated acts of fraud and chicanery” adding up to “a rather massive swindle.”

None of the defendants or their

lawyers attended the trial. Contempt fines starting at \$100 million a month and doubling each month were imposed by the court last fall. That ruling was stayed on appeal. Motorola, based in Schaumburg, Illinois, claims that it is owed more than \$2 billion by Telsim. Nokia, based in Finland, is seeking \$700 million. Interestingly, the two corporations are confronting one of the world's wealthiest families, according to Forbes, which estimated the Uzans' net worth last year at \$1.3 billion. The Uzans' business empire comprises well over 100 companies, including a construction company, power and communications businesses, banks and media properties. Again, a most significant part of this case dealt with the arbitration issue and the court's refusal to find arbitration to be proper.

Panel Orders Wachovia To Pay Aggrieved Investor \$16.5 Million

The Wall Street Journal reported recently that Wachovia Corp. was ordered to pay a former client of a brokerage firm it acquired almost \$16.5 million. Interestingly, the award, including \$12.4 million in punitive damages, was a record-setting case involving an aggrieved investor. According to the Journal, Richard Ryder, publisher of Securities Arbitration Commentator, a newsletter that tracks arbitration cases, believes this to be the largest award ever requiring payment of punitive damages to a customer by a major brokerage house. The award against North Carolina-based Wachovia dates to 1997, when Luc Castelein, now 65 years old and a resident of Switzerland, opened a brokerage account with Douglas Reid, who is alleged to have falsely

represented himself as an employee of securities firm Bear Stearns Cos. The client wired \$12.5 million to an account at Bear Stearns after a meeting with Mr. Reid. Although Mr. Castelein was told he would be the only person authorized to trade his account, Mr. Reid is alleged to have forged documents to gain control of Mr. Castelein's money.

The client was promised high returns on his investment. Instead, Reid traded heavily in the account, charged higher-than-normal commissions, and then transferred much of the money out of the account to third parties. The National Association of Securities Dealers panel found that not only did Corporate Securities fail to adequately supervise Mr. Reid, it didn't look into his background when he was hired. As a result, the firm failed to uncover public complaints on his disciplinary record. The fact that he had been fired from his previous job was never revealed. It is shocking that a person who was never employed by Bear Sterns could do what he did. Obviously, this type activity should never happen.

Franchises Get \$7.9M In Krispy Kreme Suit

An arbitration panel has awarded \$7.9 million to two individuals who sued Krispy Kreme Doughnuts Inc. Kevin Boylan and Bruce Newberg, who were described as would-be California franchisees, accused Krispy Kreme of breach of contract, intentional interference with contract and business relations, and other claims after Krispy Kreme awarded development rights for northern California to another group. Golden Gate Doughnuts LLC, a group in which

Krispy Kreme owned a 67 percent share, was picked over the claimants. The suit was originally filed in Superior Court for Los Angeles County in March 2000. The case was later transferred to arbitration by the American Arbitration Association. Krispy Kreme claimed no oral agreement was ever reached and no written agreement was executed with the claimants.

Stations Get Permission To Sue Shell

Royal Dutch/Shell Group, parent of Shell Oil Co., is being sued by a group of gas station owners. These owners claim that the U.S. subsidiary unfairly set prices for gasoline. A state appellate court agreed with the plaintiffs when the 14th Court of Appeals in Houston reversed a lower court ruling that a group of 320 Shell station owners didn't have sufficient evidence to bring claims against Shell. The gas station owners had accused Shell of trying to drive them out of business so the company could replace them with more profitable company-owned or independently operated stations. This is a tremendous victory on behalf of gas station dealers nationwide that have been affected by price discrimination by major oil companies. Gas station owners have been fighting oil companies in litigation over gasoline prices for a considerable period of time. Last year, a federal appeals court upheld a ruling ordering Exxon Mobil Corp. to pay \$10 million to franchisees who had accused company-owned gas stations of charging consumers less for gasoline in order to drive franchisees out of business.

XII. INSURANCE AND FINANCE UPDATE

Race-Base Update

As we have reported in previous editions, this firm is actively representing over twenty thousand individuals, arising out of race-based insurance claims filed in states throughout the Southeast. Currently we are pursuing cases against Liberty National, Liberty Life, Metropolitan Life, American General, Life of Georgia, National Security and Unitrin. We are in various stages of litigation against each of these companies, and have trial dates set against these companies in the near future. Our firm is committed to representing these individuals to insure that they receive a proper recovery for the years of discrimination perpetuated against them by these companies. Most of these companies have admitted that, during the early to mid-part of the last century, they charged African-Americans a higher rate, based solely upon their skin color, for life insurance. African-Americans were charged this “skin tax” by these companies based on incorrect and faulty mortality tables for many decades. What perhaps is even worse in these cases, is that many of these companies continued to charge African-Americans a higher premium for their insurance even after they discovered that the mortality tables they had based these premiums on were in fact incorrect.

We believe that these cases are especially egregious because these insurance companies manipulated African-American buyers by making them feel guilty over the prospects that if they did not buy a

policy of insurance, their survivors would be left to pay for their burial. Furthermore, these companies routinely sold individuals several policies, and in many instances, it can be proven that individuals spent as much as one-third of their gross income on these type insurance policies. In many examples, families would go without proper food and clothing because the bread-winner wanted to make sure they were able to afford insurance policies. In addition to these companies selling African-Americans higher-priced insurance policies. The companies also prevented them from purchasing more favorable but less expensive life insurance policies. Also, African-Americans frequently paid more premiums than what their policies were actually worth and ultimately received no benefits. This practice by insurance companies can't be justified. Nor should actions of this sort by any insurance company be tolerated.

Lending Act Under Attack

A Georgia law aimed at protecting consumers from unscrupulous lenders faces an uncertain future as it comes under attack by the federal government, industry groups, and state lawmakers that believe the law may have caused more harm than good. I don't think any consumer advocacy groups were surprised at this turn of events. The Office of Thrift Supervision (OTS) recently announced that federal law pre-empts provisions of the Georgia Fair Lending Act (GFLA). The OTS has determined that the Georgia statute conflicts with OTS regulations governing lending operations concerning terms of credit, loan-related fees, disclosures, and the

origination or refinancing of a loan. The OTS said the Georgia law would require federal thrifts to treat customers in Georgia differently, imposing increased costs and an undue regulatory burden.

In response to the OTS ruling, Standard and Poor's announced it would not rate mortgage-backed securities transactions that contained any conforming-balanced mortgage loans and manufactured housing loans governed by GFLA. Standard and Poor's further stated “since it is not feasible to ensure that all GFLA-governed loans have been originated in compliance with the act - and given that liability associated with non-compliance may subject depositors and trusts to liability exceeding a loan's principal balance - these loans are being disallowed in a representation that no mortgage loans meeting the definition of home loans will be required in transactions.” Assignees will be subject to potentially severe liability under the act - something that might leave transaction parties in securitizations subject to penalties for violations.

Opponents of the GFLA believe that the Standard and Poor's announcement could lead to many banks leaving the state. (Where have we heard similar threats before?) If this happens, the industry groups contend, it will become more difficult for consumers to find competitive loans. Some state lawmakers believe that amending the GFLA to remove servicers, assignees and purchasers from the definition of creditor, thereby relieving them of potential liability, would keep banks from leaving the state. However, removing the assignee liability provision in the GFLA would effectively gut the act because it is the institutions that

purchase loans in the secondary market that foreclose on bad loans. If the provision is removed, sub-prime lenders would continue violating the law.

Recently, at the Predatory Lending Law Meeting of Georgia's House Banks and Banking Committee, consumer advocates could only listen while representatives of the mortgage industry criticized the GFLA. The debate focused primarily on who would be hurt more by the law and proposed changes - the consumer or the industry. The industry contends that the GFLA includes confusing guidelines and unfair terminology that have caused some lenders to restrict activities to avoid possibly violating the act. If the mortgage industry has their way, they will be free from liability and continue to lend money to people to buy houses that they cannot afford, and in the end foreclose on the bad loans. The Georgia law is designed to protect poor and elderly borrowers, and it is now under attack. Some supporters of the current law are prepared to make reasonable changes, but they worry that much of the consumer protection will be stripped out of the act. In my opinion, that's exactly what will happen.

Sub-prime lenders target a market of consumers who are not considered credit worthy by traditional banks. These sub-prime lenders are often referred to as predatory lenders because they prey on the most vulnerable people in our society and typically target minorities, working poor, and the elderly with their high-priced loans. Because of this, a strong predatory lending law with the strict liability provisions is needed now more than ever.

How Much Is Too Much?

A recent issue of the National Underwriter magazine, an insurance industry magazine examining life, health and financial services in the insurance industry, had an article discussing regulation of practices that cause consumers to pay too much money for small death benefit policies. The debate the industry is grappling with is "how much is too much for consumers of modest means to pay for a policy with a small death benefit?" For most of us, the answer is simple and needs no further debate. Isn't one penny over the face amount of the insurance policy "too much" to pay for a life insurance policy?

Apparently, the insurance industry has a totally different approach toward consumers who pay more in premiums than the actual face amount of the policy is worth. In fact, the industry finds nothing wrong with the concept of consumers paying more premiums than the face amount of the policy. The insurance industry defends its position by stating that policies are sold in a certain block of business, and that block of business has a premium that is based on how many persons continue to pay for their policy in that particular block. When policies lapse, the risk of that block of business is raised and the premiums required for those policies must continue. They further defend that lapse rates on these type policies tend to be over 50%.

It is interesting to note that the insurance industry appears to give no consideration to the idea that it is morally offensive to charge a person of modest means more premium than the face value of the policy. The morality, or lack of

morality, in overcharging someone for life insurance appears never even to have occurred to folks in the insurance industry. Most consumers understand that insurance is no more than a bet, or wager, on when a person will die. The insurance is betting that you will live longer than you anticipate. While sometimes the insurance company loses the bet, most of the time they will win their bet. In small death benefit policies, the insurance companies have no significant risk, and it certainly appears that their bet is a "fixed" bet.

While it would appear to most consumers that there really is no debate, no consumer should be charged more than the face value of the policy. At least someone in the insurance industry is beginning to talk about how morally corrupt it is to collect premiums above the face of the policy. Hopefully, some regulation will be forthcoming that will put a stop to this insidious practice.

XIII. ENVIRONMENTAL CONCERNS

Eleventh Circuit Clears Way For Private Citizens To Enforce Clean Water Act

In February, a three-judge panel of the 11th U. S. Circuit Court of Appeals in Atlanta held that lawsuits filed by private citizens seeking to enforce the federal Clean Water Act can go forward against a polluter. This will now be allowed even if a state environmental agency has already fined a company for violating the Act. The Court of Appeals based its decision in part on the fact that state environmental agencies (in this case,

the Alabama Department of Environmental Management, or ADEM) and the federal Environmental Protection Agency have separate systems in place to enforce the Act. Thus, private citizens can file suit against a polluter in federal court in situations where the applicable state environmental agency has taken no action against the polluter or when the citizen believes that the state agency's actions have not adequately addressed the wrongdoing.

The Clean Water Act was enacted into law in 1972 and sets up minimum technology and water quality standards for industries requesting permits. The ruling by the federal appeals court clears the way for individual lawsuits against polluters. In my opinion, this is a major victory for Alabamians who want to clean up our air and water and to protect our environment for future generations. Clearly, this is a decision that all Alabama citizens should applaud. Water pollution is a very serious issue in Alabama. This decision will provide Alabama citizens with new ways to hold polluters accountable.

ADEM Funding And Organization Not Adequate

I have long been an advocate for better funding and staffing for ADEM. According to a research paper released by a Samford University think tank, ADEM, Alabama's environmental agency, is poorly funded and organized inappropriately. Alabama spends about \$1.36 per person on environmental protection, compared to the \$4.64 to \$18.51 spent by three neighboring states, according to the report by the Public Affairs Research Council of Alabama. The report indicates that ADEM has to rely fees rather than being funded by the State

General Fund, and that in itself is a problem. The report states that: "Clearly it is appropriate to place part of the burden for environmental protection on those whose activities may cause pollution of the water, air or land. But relying solely on this source risks making the regulatory agency dependent on those it is supposed to regulate with objectivity."

The report is also critical of ADEM's organizational set-up. The Governor has no input into the selection of the director of the agency since this position is not appointed by the Governor. As a result, the Governor is insulated from public opinion, according to the report. If the Governor had to account to the voters for Alabama's poor environmental record, I believe that things would get better and very soon. Hopefully, Governor Riley will take an active role in protecting Alabama's air and water. If he does this, it will make a tremendous difference.

Environmental groups have been calling for reform of ADEM for several years. They believe the report is another step toward changing the agency. ADEM clearly needs to be restructured to better serve the public and also needs better leadership to carry out environmental protection policies for the public. I have always felt that ADEM acted much like an extension of the industrial community in Alabama, rather than being a strong protector of the environment in Alabama. Perhaps, this report will wake up Alabama citizens who have been fairly silent on environmental issues.

Jury Finds West Virginia Coal Company Liable

A jury has ordered Elk Run Coal Co., a Massey Energy subsidiary, to

pay residents of a coalfield town \$473,000 in damages caused by coal dust falling on their property. The decision against the coal company also gave the court the authority to implement a dust control plan. A lawsuit had been filed by more than 150 residents who claimed Elk Run's operation, located no more than 750 feet from some of their homes, has destroyed property values in the southern West Virginia town, population 200. One of the plaintiffs said the town's residents had been "prisoners" in their homes because of coal dust falling from Elk Run's operations. Their stated goal was to stop the coal dust so they can live their lives again. In its verdict, jurors found that Elk Run failed to control air pollution and protect neighboring areas from its operations as required by federal and state law. The jury declined to award punitive damages, finding that Elk Run had not acted with intentional or reckless disregard.

Texas Jury Awards \$23 Million For Cancer Caused By Gas Leak

A state court jury in San Antonio, Texas, has ordered the City of San Antonio to pay \$23 million to the parents of an eight-year-old girl who suffers from leukemia. The jury found that the girl's leukemia, diagnosed five years ago, was caused by toxic gases leaked from a city landfill near the girl's home during the 1990s, including from 1993 through June 1994 while the girl's mother was pregnant with the child.

Lawyers for the family accused the City of negligence in allowing gas to leak from the nearby landfill through utility tunnels into residents' homes in the neighborhood and not taking measurements of

gas levels in the area in the 1990s. The landfill had been used for trash disposal in the late 1960s, and then was covered with soil by the City in 1972. The subdivision where the girl's family lived was a problem area for methane gas leaks in the 1980s, at times so severe that it led to the evacuation of some homes in the neighborhood. In fact, neighborhood residents filed a class action lawsuit against the City in the early '80s because of problems with the landfill. The City settled the suit, and any later problems in the late '80s and early '90s were largely kept quiet, according to evidence at trial. A gas collection system, installed by the City when it became apparent that dangerous gases were leaking into the subdivision, broke down often and was replaced in the late '80s; the replacement system too malfunctioned frequently but was not replaced until 1998.

Lawyers for the girl and her parents argued that the family was repeatedly exposed to several carcinogenic chemicals and gases, including benzene, during the mother's pregnancy with the girl, and that the exposure during pregnancy and gestation caused the young girl's cancer at the age of three. The parents, who had moved into the neighborhood in the early '90s just shortly before the mother became pregnant, had not been told by the previous owners about the landfill problems. The parents learned of the problems only when they tried to sell their house. At that time they began to suspect there was a connection between the landfill and their young daughter's deadly disease. The City denied there had been any gas migration in that area from 1991 to the present, and further claimed, contrary to evidence offered by the

plaintiffs, that there was no scientific evidence supporting any connection between such gases and the young girl's leukemia. The jury obviously rejected the City's arguments on both counts. The City has vowed to appeal.

Defendants in cases of exposure to toxic substances commonly claim there is no scientific or medical evidence either that the substance caused the particular plaintiff's disease or injury or that the substance can even cause that condition at all. This is so even where government regulatory bodies, backed by national or international scientific organizations, find substantial and even overwhelming evidence that the particular substance causes or is linked to cancer, organ damage, or a wide range of other serious health conditions. For example, we fully expect that Monsanto and the other defendants in our lawsuit arising out of the widespread contamination of Anniston, Alabama with polychlorinated biphenyls (PCBs) will deny any link between PCB exposure and our clients' cancers, even though PCBs are known to cause cancers in animals and are considered by relevant agencies to be "probable human carcinogens," and even though closely-related chemicals are considered to be among the most carcinogenic of man-made substances. Only through jury verdicts, such as the one in San Antonio, can those responsible for intentionally or negligently poisoning communities and causing disease and death be held accountable for the harm they inflict.

XIV. PREMISES LIABILITY UPDATE

\$3 Million Award Against Gulf Power Co.

A Florida jury returned a verdict in favor of a Pensacola man who was shocked by a transformer. The lawsuit against Gulf Power Co. resulted in a \$3 million verdict. The utility was sued after an apartment was electrified by a loose cable connecting the apartment to a nearby transformer. The plaintiff had been shocked and knocked unconscious in the incident, which occurred in 1999. He claimed the experience left him with permanent neurological problems. The jury awarded him \$3.062 million to cover lost wages, future medical costs, pain and suffering. The plaintiff was a software engineer, who was forced to quit working after the incident. The accident occurred after phone company workers doing repair work noticed one of three wires that run from the transformer to the apartment building was loose. That sent an electrical surge through the plaintiff's apartment, burning his computer, appliances, and an air-filtering machine. When the filter started smoking, the plaintiff tried to unplug the machine. When he grabbed the cord, which was plugged into a brass plate, he was knocked unconscious.

Night Club Safety Needs

The recent nightclub tragedies in Chicago and Rhode Island have put in focus a most serious problem. Many of the nightclubs around the country especially on weekends are badly overcrowded, and it

appears that oftentimes inspections and codes are less than satisfactory in many places. The tremendous number of lives lost in these two incidents will bring the safety issues into sharper focus and hopefully will bring about some needed reforms. The most obvious need is to ban pyrotechnic shows in all nightclubs and other inside venues. Such displays are inherently unsafe inside nightclubs, and a total ban would be the safest course to follow. The overcrowding issue must also be dealt with. Adequate exits are also a must. Sprinkler systems should be required when feasible. There will be careful studies and investigations into the two incidents to determine exactly what happened and who was to blame for the loss of life. We must all put safety as a higher priority in this country, whether it be nightclubs, products, workplaces, or elsewhere. Sometimes, it takes a tragic event to get our attention. In this instance, it took two. It remains to be seen if the safety issues will be adequately addressed.

Amusement Park Lawsuit Settled

As the winter months pass by, many Americans will be planning vacations and weekend outings. In fact, some already have done so. Trips by families to amusement parks will likely be included in many of these plans. We know from experience that amusement parks in the southern states have been able to escape government regulations in most instances. A significant settlement was reached recently in a lawsuit against a California amusement park, putting this safety issue in focus once again. A man, who fell 35 feet from a Ferris

wheel in the park agreed to the settlement. A judge had previously awarded the man nearly \$4.9 million. The settlement came after the park formally challenged the judge's decision. The judge, who heard the case without a jury, had ruled in December that the park's negligence led to the man's fall, resulting in some rather serious injuries. The two sides arrived at a settlement amount during a post-trial mediation hearing. As part of the agreement, the new amount is confidential. However, it was quite clear from the trial testimony that there has been a lack of oversight and regulation of amusement park rides. Currently, the park owners and operators don't have to disclose accidents. They are accountable only to themselves. Amusement park safety should be addressed in all states, including those in our section of the country. Thus far, attempts to regulate the industry have been unsuccessful. While we don't have the number of parks that the State of Florida has or a park that rivals Six Flags near Atlanta, Georgia, we still need to enact safety laws in Alabama.

Agencies Studying Cancer Risk On Playgrounds

The federal government is now showing more interest in a problem that over the past several months has received a great deal of attention from consumer groups. The Consumer Product Safety Commission has jumped into the long-running debate about the health dangers of playground equipment made of pressure-treated wood. According to a statement released last month by the Chairman of the Consumer Products Safety Commission, a new government report has established

that children may face an increased lifetime risk of developing lung or bladder cancer from using playground equipment made of wood treated with arsenic-based preservatives. The report found that almost all wood playground equipment now in use has been treated with a pesticide called chromated copper arsenate (CCA). Children are exposed to arsenic residue when their hands, feet and mouths come in contact with this playground equipment.

The Commission will hold a public meeting this month to consider a proposed immediate ban on the use of this arsenic-based preservative in playground equipment. Although manufacturers of the preservative have agreed to stop using the chemical in new wood play sets and other consumer products by December 2003, the Commission is strongly considering putting a halt to production at an earlier date. The EPA began requiring consumer warning labels on treated lumber containing arsenic in 2001. In addition to playground equipment, arsenic-based wood preservatives are also commonly found in utility poles and wood decks. Hopefully, the Commission will take a stand and enforce an industry-wide ban on the use of CCA preservatives right now. If the Commission allows this industry to continue treating wood with CCA for even one more month, untold numbers of children in this country will be put at risk.

It was recommended, however, that the CPSC take no action until the Environmental Protection Agency completes a major study of the issue. I understand that a preliminary risk assessment is expected to be available for public comment in three to four months. The EPA reached an agreement a

year ago to phase out use of the preservative in new wood products by the beginning of next year. As we all know, this preservative has been the principal chemical used on decks, playgrounds, picnic tables and similar outdoor structures. The EPA has said that there is no reason to remove or replace existing structures.

The CPSC report represents the first time a federal agency has concluded that there is a heightened danger for children using playground equipment made of pressure-treated wood. It is hoped that the CPSC findings will put pressure on the EPA to take stronger action. The EPA is following a process of independent scientific peer review recommended by the agency's scientific advisory panel. The CPSC recommends that children avoid eating on playgrounds that contain the equipment. The CPSC action resulted from a petition from the nonprofit research organization Environmental Working Group, which sought a ban of the use of CCA-treated wood on existing playground equipment.

XV. WORKPLACE HAZARDS

The FIGHT Project – A Valuable Ally – Available To All

Since his son's death in a workplace accident in 1993, Ron Hayes has devoted his life to prodding the U.S. Occupational Safety and Health Administration to do a better job. Ron was named last year to serve on the National Advisory Committee. That Committee was established to advise the Secretary of Labor and the Secretary of Health

and Human Services on matters pertaining to the administration of the Occupational Safety and Health Act of 1970. The Committee is made up of four persons from government, four from the unions, and four from the public sector. Ron represents the public on the advisory board. He was reappointed this year for a full term and that is real good news for those of us who are interested in safety and the welfare of working men and women.

Ron formed The FIGHT Project (Families In Grief Hold Together) several years ago. The FIGHT Project, a non-profit organization, has helped hundreds of families who have had loved ones killed or hurt in workplace accidents. The work of Ron Hayes' organization has been good for both workers and the owners of businesses. One of the goals of The FIGHT Project is to raise public awareness of workplace safety issues. Ron and his wife, Dot, have provided tremendous support for a great number of people and have brought about some needed changes in the workplace. However, their work is far from over. Each year, over 10,000 people are killed on the job.

If any of our readers have any suggestions concerning health and safety issues on the job, please feel free to contact Ron or Dot Hayes at Post Office Box 1555, Fairhope, Alabama 36533. Their telephone number is: 800-388-8644 - Access Code 19. If you prefer, you can communicate by fax: 334-990-8644; e-mail: fproject@bellsouth.net; or Website: www.oshawatchdog.org. I definitely recommend visiting this Website. The work done by Ron Hayes is an example of what dedicated individuals can do when given an opportunity. He and Dot are true "American heroes!"

Burn Accident Results In Jury Verdict

Last month, a Mobile County jury awarded \$9.5 million to a man who suffered third-degree burns over 60 percent of his body during a September 2001 on-the-job accident. The worker, who was represented by my friend Skip Finkbohner, was required to perform inherently dangerous work in his job that required him to spray-paint an attic over a carport. The contractor had failed to identify an existing hazard and to eliminate such hazard. There was no effort made to prevent the worker from getting into harm's way. The combination of a product that was flammable and no ventilation in the attic was asking for problems. The flammable gases were ignited, causing a flash fire. The jury award consisted of \$8 million in compensatory damages and \$1.5 million in punitive damages.

Workplace Hazards

In this country, if you kill, cripple or dismember someone, you should expect to go to jail - unless that person works for you. Unlike the laws that govern ordinary people, the laws regarding workplace safety offer unfair protections to businesses that expose employees to unnecessary and preventable dangers. The International Labor Office (ILO) estimates that about 2 million people are killed by their work each year - a staggering figure that prompted the ILO Safe-Work Program Director to comment "if terrorism took such a toll, just imagine what would be said and done." However, workers compensation laws (originally enacted to provide financial protection for injured workers) often

act to restrict the types of lawsuits that can be brought for workplace injury. In many cases, these laws prevent the injured employee or his family from being able to sue at all. In addition to the risks associated with mismanaged and poorly supervised worksites, all too often a defective product also plays a role in a workplace injury or death.

We currently represent a man who was employed by an Alabama construction contracting company and was originally hired (because of his commercial driver's license) to drive a transport truck carrying equipment to various jobsites. During the short time he was employed by the contractor, he was also asked to begin operating some of the heavy equipment used in some of the jobs. Among the pieces of equipment was an earth-boring machine used to tunnel under streets to install various pipelines. While our client was operating the machine as instructed by his employer, the machine violently overturned and crushed him several times. Incredibly, after being transported by air to a trauma hospital where he underwent numerous surgeries, he survived his ordeal. However, he lives in constant pain and it is highly unlikely that he will ever return to work.

During the course of our lawsuit, we have learned several disturbing things about this incident and the equipment involved. The manufacturer has admitted that incidents of this type have occurred before, and they also admit to having been sued for similar incidents involving injury or death. More importantly, the manufacturer admits that the machine can produce sufficient force to cause it to overturn while in operation but the evidence shows that they have failed to design that known hazard out of

the machine. Following the incident, the contractor hired an electrician to install a safety switch on the machine in an attempt to improve the machine's safety. The electrician testified that the switch costs less than twenty dollars and only took a few minutes to install. Not surprisingly, the manufacturer has taken the position that the switch is unnecessary, that it would not have prevented this tragedy and that the contracting company is at fault for instructing our client to use the machine in an unsafe manner. However, the contractor has pointed the finger at the engineering firm hired to oversee the project because that firm drafted contract documents that required that the machine be used as it was being used on the day of the incident.

Unfortunately, workplace injuries and deaths are not uncommon in Alabama. Laws that were originally enacted to provide protection for injured workers have been perverted into shields for negligent employers. Manufacturers who are aware of hazards created by their products point fingers at others when workers are maimed, crippled or killed. Third parties who undertake to oversee and control jobsites are the first to take credit for a job well done, but the last to accept proper responsibility for plain negligence. However, our firm is strongly committed to representing people injured on the job, and we will keep you updated as this important case progresses.

XVI. TRANSPORTATION

The Effect Of No Health Insurance In Motor Vehicle Accidents

A few weeks ago, the Wall Street

Journal reported some rather disturbing news. It appears that car accident victims who have no health insurance are more likely to die than folks who have been hospitalized with insurance coverage. This is according to a new academic study. I am not too surprised that a person's health insurance status - at least in the emergency room - may have a direct influence on the level of care received. Automobile accident victims in Wisconsin who lacked health coverage were 37% more likely to die from injuries than their insured counterparts, according to research released last week by Joseph J. Doyle Jr., an Assistant Professor at the MIT Sloan School of Management. According to the Journal report, Doyle studied 26,000 cases between 1992 and 1997 throughout Wisconsin. To measure levels of care, Doyle studied patients' facility charges, which outline treatments like X-rays, drugs and length of the hospital stay. He found people without health insurance received 20% less care than their insured counterparts.

AAA Gives Specific Ways To Keep Children Safe

As has been widely reported, motor vehicle crashes are the number one killer of children between ages 4 and 14. Statistics from the National Highway Traffic Safety Administration confirm this sad state of affairs. There are many things that can be done to help protect our children and grandchildren while they are passengers in a motor vehicle. I have been a member of AAA for a number of years and appreciate their good work. AAA furnishes these tips to help keep children safe while they are riding:

- Children 12 and younger should ride in the back seat. Research shows that children are almost 40 percent less likely to be killed in a crash if they are riding in the back seat. A child fits properly in a seat belt when he or she can sit with his or her back straight against the seat back cushion and knees bent over the edge of the seat.
- When you tug on the car seat where the seat belt passes through, you should not be able to move the seat more than one inch in any direction. If the seat moves, tighten the belt. The straps should route through the appropriate slots and not be twisted.
- Check all moving parts regularly. Tug against the latch after snapping the child in to be sure that it is buckled firmly. The harness should be snug and lie flat on the child with no slack. The retainer clip should be at the child's armpit level when the harness is snug.
- If a child is too small to use a seat belt, then he needs an approved safety seat.
- Check the seat manufacturer's instructions booklet to be sure your child is the appropriate height, weight and age for the seat and how to install the seat properly.

For more information, go to AAA's Website: www.aaapublicaffairs.com, then select "For Kids' Sake." There is also other helpful information that can be found in the AAA Website. There are several other good Websites that you might want to utilize.

DOT Agrees To Issue Long-Overdue Truck Safety Rules

The U.S. Department of Trans-

portation (DOT) has agreed to issue a series of vital truck safety rules to settle a lawsuit brought by safety advocates last fall. The agency had failed to meet congressional deadlines for issuing the safety rules, but has now agreed to issue the rules within the next year and a half, beginning with a rule on drivers' hours-of-service this spring. Other rules relate to such key issues as hazardous materials, background checks for drivers and training requirements for multi-trailer rigs. Safety advocates filed suit in November 2002 in the U.S. Court of Appeals for the District of Columbia because the DOT had missed deadlines set by Congress to address safety issues by as much as 10 years. The groups who sued were Public Citizen, Citizens for Reliable and Safe Highways (CRASH), Parents Against Tired Truckers and Teamsters for a Democratic Union.

Joan Claybrook, President of Public Citizen, who served as Director of the National Highway Traffic Safety Administration during the Carter Administration, stated in a news release, "The DOT should have issued these rules years ago when Congress told them to. It's unconscionable that it has taken a lawsuit to compel the agency to do its job. But under this settlement, DOT must issue these key safety standards by June 2004, and our highways will be much safer as a result." I can't say enough about the good work for consumers and for safety that Joan and her folks do.

Each year more than 5,000 people die in truck crashes, and another 130,000 plus are injured. These long-overdue but critically needed federal rules will keep unsafe trucks and unsafe commercial drivers off the road and lives will be saved. The agreement

reached with the DOT will put the American public - and not the trucking industry - in the driver's seat. Under the agreement, the DOT has agreed to issue final rules pertaining to:

- Truck driver fatigue and required rest periods, hours-of-service and other fatigue-related issues. The DOT estimates that 755 fatalities and 19,705 injuries result from fatigued drivers each year on U.S. roads. Unfortunately, the agency is now nearly four years late in issuing the rule. The DOT has agreed to issue this rule no later than May 31, 2003.
- Minimum training standards for entry-level drivers of commercial motor vehicles, which now will be required. Congress had required the DOT to issue a final rule by December 18, 1993, more than 10 years ago. However, the DOT has promised to issue a final rule by May 31, 2004.
- Minimum training requirements for drivers of longer-combination vehicles (multi-trailer rigs), which now will also be required. Congress had set a Dec. 18, 1993, deadline for a final rule. The DOT has agreed to issue a rule no later than March 30, 2004.
- Requirements for authorization to transport hazardous materials. The DOT is more than 11 years late in issuing this rule, which has security implications highlighted by the 2001 terrorist attacks. The agency has promised to issue this rule by June 30, 2004.
- Background checks for new commercial drivers, which too will be required. This will include the information that

prospective employers are required to obtain and the information that prior employers are required to provide. This rule is now four years late. The DOT has agreed to issue the rule no later than March 30, 2004.

The groups will partially stay their lawsuit pending DOT's rule-making proceedings. If the agency fails to meet any of the deadlines it has agreed to in the settlement, the groups will be able to go to court to enforce the deadlines. It appears that the DOT's legal violations were so blatant and the safety issues so pressing that the court would have had compelling legal grounds for forcing the agency to act, according to Marka Peterson, a lawyer with the Public Citizen Litigation Group, which prepared the suit. Obviously, Public Citizen and the other groups are pleased that the agency has agreed to not delay these rules any longer. However, based on past history, the safety advocates will have to watch the progress carefully and take action if need be to enforce the agreement.

XVII. HEALTHCARE ISSUES

A Shocking Development In Virginia Affects Alabama

A Virginia-based insurance company was taken over by regulators in late January. Reciprocal of America, the largest malpractice insurer for hospitals in Alabama, went into receivership. This means the State of Virginia will manage the company for the protection of current policyholders. Apparently, the news about Reciprocal going

into receivership came as a shock to the Alabama Hospital Association. While some hospitals are self-insured, many buy malpractice insurance through outside companies. It has been estimated that 80 percent of the hospitals that buy malpractice insurance in Alabama have policies with Reciprocal. This means about 45 Alabama hospitals will have to find their malpractice insurance coverage with another company. Knowledgeable observers fear that the chances of this company avoiding outright bankruptcy are not good.

As has been reported, malpractice insurance has become scarce in several states across the country. Naturally, the tort reformers are blaming jury awards from lawsuits for this problem. A declining stock market has drawn available capital from insurers, and this is the real cause of the problem. Apparently, the problem caught the Alabama Department of Insurance by surprise. David Parsons, Deputy Commissioner stated that "there are still healthy companies in Alabama that provide malpractice insurance, which is keeping Alabama out of crisis situations like Mississippi - where almost no companies are offering malpractice insurance." Those who have their malpractice insurance through Reciprocal will be covered until their policies expire later this year, according to the Insurance Department. Clearly, at that time, they will need a new provider. The Virginia State Corporation Commission took over operations of Reciprocal after the commission's Bureau of Insurance found the company "to be in a hazardous financial condition." Nothing happened in Alabama to cause this problem. Certainly, it can't be blamed on lawsuits.

According to media reports, Reci-

procal's largest market is in Alabama. The company does nearly one-third of its business in our state. As of September, Reciprocal had written nearly \$105.3 million in premiums - \$32.4 million of which were in Alabama. Deputy Commissioner Parsons believes the best alternative would be for all the doctors and hospitals to find malpractice insurance with the same company. I understand that insurance leaders in our state have been in meetings attempting to come up with a new provider for all of those who will lose their coverage. It has been reported that as many as 800 Alabama doctors are insured by Reciprocal. According to the Alabama Insurance Department, doctors who are renewing with the Virginia-based company, or would have, are now not able to do so. Some kind of plan for those doctors will have to be devised. Reciprocal policyholders in Alabama will have received an explanatory letter by the time this Report is received.

I believe that a number of Alabama hospitals have malpractice insurance through Medical Assurance, a doctor-owned group that provides policies to the majority of Alabama doctors. Medical Assurance is in excellent financial condition and was granted a request to increase its rates in March, according to Johnny Johnson, Deputy Commissioner of the Property and Casualty Division of the Insurance Department.

Apparently, Reciprocal had been in financial trouble for several months. After raising nearly \$53.5 million from its members last summer, Reciprocal sent a letter last month announcing a "mandatory capital call." Members were asked for \$100 million to meet state capital requirements. I understand

that the Alabama Hospital Association furnished \$20 million of this amount, which apparently will be lost. The Hospital Association elected to form a trust several years ago to handle malpractice insurance matters. Instead of taking that approach, Alabama doctors elected to form their own malpractice insurance company. Obviously, this was a good decision.

No Action In Washington On Issues

For the past few years, there have been no significant happenings in Congress on the numerous healthcare issues. Instead of helping American consumers and especially seniors, the Bush White House has elected to help the insurance industry by proposing tort reform measures. The failure to support a Medicare prescription drug benefit or to pass a Patient's Bill of Rights has been a major disappointment. The availability of health insurance coverage for American families remains a problem of a serious nature. Hopefully, things will change in Washington and healthcare issues will get the attention they deserve.

Patients' Bill Of Rights

Hopefully, patients' bill of rights legislation will be passed both in Washington and in our own state legislature this year. Instead of restricting the rights of individuals, our political leaders should take steps to protect them. There are a few states such as Florida that have already passed this type of consumer-friendly legislation. I am not sure there is anything happening on this issue in Congress at present. I know that an effort to pass a bill will be made in the

Alabama Legislature this year. Hopefully, it will pass and be signed into law.

XVIII. THE CONSUMER CORNER

Federal Judge Upholds State Casket Law

For the past several years, some consumer groups have complained concerning the costs of caskets for burial purposes. In Oklahoma all caskets have to be purchased from a licensed funeral director. A federal judge ruled recently that an Oklahoma state law that prohibits anyone but licensed funeral directors from selling caskets is constitutional. The judge ruled against claims that the law creates a casket cartel, driving up costs and taking away a consumer's right to search for the best deal. A few other states have similar laws. An Internet seller of funeral supplies sued the state Board of Embalmers and Funeral Directors because she couldn't do business in Oklahoma. A funeral director's license in Oklahoma requires two years of college, a one-year apprenticeship, and the embalming of 25 bodies. Should consumers have a choice to buy their caskets at reasonable prices? That was the question presented to the court.

There has been other litigation around the country dealing with this problem. A lawsuit in 2000 alleging a casket monopoly in Tennessee was won. Similar laws have been struck down in the last few years in Mississippi, South Carolina, and Georgia. Besides Oklahoma, states that currently allow only licensed funeral directors to sell

caskets are Maine, Vermont, Delaware, Virginia, Louisiana, Minnesota, Idaho, and last - but not least - Alabama. The number of independent casket sellers has grown across the country in the last decade because of a 1994 Federal Trade Commission regulation that prevents funeral homes from charging "casket-handling" fees if consumers choose to buy their casket from another business. The costs of funerals, including casket costs, have grown at a rapid pace. I suspect there will be successful challenges of laws such as that in Oklahoma in the future.

Warning By Cooper Lighting About 500-Watt Halogen Bulbs

In cooperation with the U.S. Consumer Product Safety Commission (CPSC), Cooper Lighting Inc., of Peachtree City, Ga., is warning consumers that nearly 600,000 Regent 500-watt halogen bulbs may pose a fire hazard if used in torchiere floor lamps or other indoor residential fixtures. These 500-watt light bulbs generate very high temperatures compared to incandescent and lower wattage halogen bulbs and can start a fire if they come in contact with curtains, clothes or other flammable material. These bulbs are intended for use in outdoor work lights and flood lamps. The CPSC is aware of at least 290 fires and 25 deaths since 1992 involving halogen torchiere floor lamps. To meet the current Underwriters Laboratories standard, halogen torchiere floor lamps must be equipped with a protective glass or wire guard and have a halogen bulb that is 300 watts or less.

Current packaging for the Regent 500-Watt Halogen Bulb, with model numbers WM500Q and BP500Q, does not contain the recommended

warning label of the American National Standards Institute (ANSI). The label should read, "Warning: Fire Hazard! Do Not Use In Torchieres Or Other Indoor Residential Fixtures." Cooper has asked retailers to add the label to bulb packaging currently on store shelves, and new 500-watt halogen bulbs will contain the label. Wal-Mart, Lowe's, and smaller retail outlets nationwide sold these 500-watt halogen bulbs between January 1999 and October 2002 for about \$4. Consumers currently using these 500-watt bulbs in a torchiere or indoor residential fixture should remove them immediately. Consumers can continue to use the 500-watt halogen bulbs in work lights, flood lamps, and similar outdoor fixtures. For more information, consumers can contact Cooper Lighting at (800) 954-7145 anytime or log on to the company's Website at www.cooperlighting.com.

Another Identity Theft Problem – Credit Card Scams On The Rise

My good friend, Boyd Whigham, District Attorney for the Third Judicial Circuit, has furnished us some rather interesting information concerning a form of identity theft involving credit cards. A Barbour County couple has proved that identity theft is not limited to urban areas. This couple ran an extensive identity fraud scheme and in the process was able to fill their rural home with merchandise bought with phony credit cards. The scam was run for two years from a modest brick home in Clio, Alabama, a small town located in the western section of the south Alabama county. The couple recently pleaded guilty to 37

counts of conspiracy and two counts of fraud, respectively, in Barbour County Circuit Court. The husband was sentenced to 20 years for conspiracy and 20 years on each count of fraud, both involving local victims. The husband will serve at least five years in prison because the 20-year sentences were split. His wife, who was sentenced to four years in prison, is seeking probation.

When investigators went to the couple's home last June, they found piles of fraudulent credit card applications and thousands of dollars in merchandise - ranging from shoes and cookbooks to refrigerators and washing machines - that were bought using the phony cards. The investigation began after a South Carolina man complained, saying items ordered under his name were being mailed to a Clio address. The Clio couple would pay credit card companies the \$30 or \$50 processing fees to obtain cards, then take out \$150 or \$200 in cash advances. The cards would be run up to their limits, according to authorities. Apparently, the couple would just take any Social Security number at random. Interestingly, the names and Social Security numbers used were not cross-referenced. The small-town crooks ran up more than \$100,000 in charges on at least 85 credit cards issued by Provident Financial Corp., which apparently was the hardest-hit company. Other stores were cheated out of thousands of dollars in purchases using phony credit and gift cards. Federal postal inspectors and the United States Secret Service were involved in the investigation, along with the Barbour County District Attorney's office and the Clio police department. The Clio Police Chief helped

break the case when he found about 60 credit card bills and invoices, all with different names, in the couple's trash. District Attorney Boyd Whigham stated that the law enforcement agencies involved "deserve a lot of credit for having put this thing together." If this sort of thing can happen in a small town in Alabama, it can happen anywhere. The ease with which the scheme was carried out is sort of scary.

Another Man And Woman Arrested For Alleged Credit Fraud Operation

Another credit card scam has cropped up in Shelby County. Two persons there have been arrested for allegedly operating a sophisticated credit card fraud and identity theft scam. The pair, a 36-year-old male and a 35-year-old female, had 40 counterfeit credit cards when they were arrested after a suspicious sales clerk called local police. The couple was using fake cards with legitimate names and credit card numbers printed on them, according to media reports. Hopefully, the ease with which this scam was carried out is not typical of the credit card industry's operations.

Swimming Pool Safety Checklist

The loss of life each summer by drownings is extremely high and is especially high for small children. For this reason, it is a perfect time to start planning for swimming pool safety. There are several weeks during which plans can be made and carried out to make backyard swimming pools safe for our children and grandchildren. It's never too soon to start making the needed safety plans for the summer months. Backyard swimming pools

can be a most dangerous and hazardous place, especially for small children. Early planning designed to provide for the safety of backyard swimming pools should become a top priority for all homeowners who have pools. The following is a checklist that persons can use to identify and eliminate potential hazards that exist around swimming pools:

- Check local ordinances and codes for safety requirements.
- Children – regardless of their age – must be taught how to safely enjoy their pool. Children should never be allowed to go near the pool by themselves.
- All children at your home should be taught to swim at an early age.
- Make sure there is a fence completely enclosing your pool with openings no larger than 4 inches apart.
- Strong, self-closing, self-latching gates should provide the only access to your pool. Latches should be located 54 inches high and must be locked when the pool is not in use.
- Chairs, tables, children’s toys, and any other climbable objects should be kept away from the pool fence to keep folks from gaining access.
- Pool chemicals, equipment, and other hazardous materials must be stored safely in a locked, and well-ventilated area. Chemical labels must be read and all usage, storage, and disposal directions followed carefully.
- Make sure that barriers to visibility around your pool such as trees, bushes, and play structures have been removed.
- Non-slip ladders or built-in

steps should be provided at each end of the pool. The water level must be kept within 3 to 4 inches of the deck or side to make climbing out of the pool easier.

- Make sure that uninterrupted supervision is provided by a responsible adult whenever children are in the pool.
- Make sure proper safety and rescue equipment is available at poolside and that everyone knows how to use it.
- An emergency plan must be developed and discussed with family and neighbors in the unfortunate event of a drowning or serious accident.
- A phone at poolside for calling emergency medical personnel in the event of an emergency should be made available if possible, with a list of those numbers kept by the phone.
- Make sure that the entire family, babysitters, and anyone else who may be responsible for your child’s safety is familiar with how to prevent drowning and how to use 911 in an emergency. All adults and older children at home should be trained in water safety and be able to perform CPR.
- Consider providing an alarm for the pool gate, which indicates whenever the gate is opened or left ajar.
- A motion detector for the pool area can also be installed.
- Remember, it takes just a matter of seconds for a small child to drown – so make every effort to make your pool as safe as possible.

There are a number of sources for good information on swimming pool safety. I encourage all of our

readers to take advantage of this information and take the steps necessary to protect children who will be using swimming pools this summer. For additional tips on swimming pool safety, you can contact the National Safety Council at 800-557-2366, extension 2, or www.nsc.org; the National Swimming Pool Foundation at 516-623-3447 or www.nspf.com; the U.S. Lifesaving Association at 732-775-6449 or www.usla.org; or the Consumer Product Safety Commission at 301-504-6816 or www.cpsc.gov.

Don't Use Cell Phones At Gas Pumps

Most folks don't realize that the use of handheld cell phones can be dangerous when performing tasks that all of us perform in our daily lives. We all fill our vehicles with gasoline from time to time. Many persons also have cell phones. Mobile cell phones should never be used during fueling operations. Mobile phones can ignite gasoline and the fumes that are around pumps. Mobile phones that light up when switched on or when they ring release enough energy to provide a spark for ignition. As a result, mobile phones should never be used around filling stations or gasoline pumps. Neither should the phones be used when fueling lawn mowers, boats, and the like. Mobile phones should not be used, or should be turned off, around other materials that generate flammable or explosive fumes or dust such as solvents, chemicals, gases, grain dust, and other similar materials.

Registry Will Block Unwanted Phone Calls

It appears that a national “do-not-call” list intended to help consumers

block unwanted telemarketing calls will become a reality. Observers in Washington say it will likely go into effect this year. The U.S. House of Representatives voted 418-7 to allow the Federal Trade Commission to collect fees from telemarketers to fund the registry. The total cost is estimated to be about \$16 million in its first year. Once this becomes law, needed relief from telemarketers will become a reality. Representative Billy Tauzin (R-La.), Chairman of the House Energy and Commerce Committee, sponsored the bill. All Americans will have a choice to opt-out of unwanted telemarketing calls and enjoy a little privacy at home for a change, according to Representative Tauzin.

The program will not need separate Senate approval under an agreement reached. Lawmakers agreed to retain a deal in a House-Senate compromise spending package for this year that would approve money for the do-not-call list without the need for additional legislation. Senator Ernest Hollings (D-SC) helped develop the agreement that allows the FTC to begin building the do-not-call program when the \$397 billion spending bill becomes law. If Congress approves funds for this year, the do-not-call list could begin operation by summer. However, the registry's future was threatened when Republican leaders sought to change language in the spending bill to require separate Senate approval. If this had happened, the extra step would have led to delays, jeopardizing funds for the registry this year, according to Senator Hollings, who has been a longtime consumer advocate.

The do-not-call bill, which authorizes the FTC to collect fees from telemarketers beginning this year and through 2007, has been the

focus of intense lobbying by the telemarketing industry and consumer groups. Telemarketers say the registry will devastate their business. The Direct Marketing Association, an industry group, filed a lawsuit against the FTC on grounds the registry unlawfully restricts free speech. Consumer groups and many lawmakers say the registry has overwhelming support from the public who are fed up with unwanted telemarketing calls.

Consumers could enroll in the free service via the Internet or a toll-free number. Telemarketers would have to check the list every three months to find out who does not want to be called. Those who call listed people could be fined up to \$11,000 for each violation. Charities, surveys and calls on behalf of politicians would be exempt. The FTC has limited authority to police telemarketing calls from certain industries, including airlines, banks and telephone companies. The Federal Communications Commission, which oversees calls made by those industries, has been working with the FTC and is considering adding its support to the program. Separately, the House approved a bill that allows the FTC to increase to \$22,000 the civil penalty it can impose up on people or organizations making fraudulent requests for charitable contributions or other deceptive claims during national emergencies. The legislation was prompted by fraud in the wake of the September 11th terror attacks.

XIX. RECALLS UPDATE

Chrysler Issues Recalls

DaimlerChrysler AG's Chrysler

Group has announced three recalls involving more than 1.2 million cars and pickups. The automaker said it was recalling some 1.2 million of its Chrysler LHS, 300M and Concorde models as well as the Dodge Intrepid to install stronger bolts on the driver's seat. The model years involved are 1998 to 2002. The recall includes more than 1 million cars in the United States and 135,000 in Canada. A company investigation determined the seat-recliner bolts attached to the seat frame may loosen because of premature wear. Chrysler will replace the existing bolts. For 1998-2000 vehicles with power seats, a replacement flex-shaft also will be installed. Twenty-three thousand 2003 Dodge Ram 2500 and 3500 trucks with diesel engines and manual transmissions will be recalled to reprogram the engine control software. The company determined an increased idle speed could occur following extended use of cruise control. Chrysler also will recall 11,655 1997 to 2002 Chrysler and Plymouth Prowlers to replace the lower ball joint on the front suspension to prevent it from potentially separating from the control arm due to corrosion. The automaker also said that after a full investigation by its own inspectors and the National Highway Traffic Safety Administration, the government has closed the 1993 to 2003 Jeep Grand Cherokee investigation into inadvertent backward movement of the vehicles. The company last year recalled some 1.6 million of the vehicles to install a device in the shifter assembly.

Ford Recalls 1997 Escorts, Tracers

Ford Motor Co. on Wednesday announced a voluntary recall of all

1997 Ford Escorts and Mercury Tracers to install a shield over the cars' air bag monitor. The world's No. 2 automaker said fluid leaks or condensation from the heater case could contaminate the monitor, causing system failure. About 441,000 cars worldwide are affected. Most are in the United States. "Although the rate of reported ... incidents is extremely low, Ford is taking this action to address potential air bag system concerns on these cars," the company said in a statement.

Earlier this year, the National Highway Traffic Safety Administration notified Ford regarding reports of electrical fires and unintended air bag deployment that could be associated with contaminated air bag monitors. Ford's investigation found that the monitors could become contaminated with fluid from condensation or leaks from the heater case. In a very small number of cases, the condition may have contributed to unintended air bag deployment, melted wiring, or fire, the automaker said. Dealers and customers will be notified of the condition and the required service repair. A shield will be installed and waterproof grease will be applied to the electrical connector to protect the monitor from water contamination. The procedure will be done at Ford and Mercury dealers at no cost to the customer.

CPSC Has Recalled Beanbag Chairs

Baseline Design has recalled 30,000 beanbag chairs manufactured in 1999 by Baseline Design, of Linwood, Pa. Some of these beanbag chairs have zippers that can be opened, allowing access to the polystyrene beads inside the

chairs. This poses a suffocation hazard to young children who can unzip the chair and inhale the small beads. Baseline Design is aware of three incidents in which the chairs were unzipped freely. Two of the incidents involved young children who were able to open the beanbag chair zippers and handle the small polystyrene beads, including one child who received medical attention after inhaling the beads. The recalled beanbag chairs are designed with 12-inch double zippers and have various designs, including a smiley face, a football- shape, a baseball- shape, a basketball- shape and solid green, yellow, pink and blue neon colors. The beanbags have a tag that states, in part, "Made by Baseline Design." Wal-Mart stores located in the Northeast U.S. sold the beanbag chairs from September 1999 through December 1999 for about \$30.

Consumers should check if they can unzip their Baseline Design beanbag chairs. If the zippers can be unzipped freely, Baseline Design, in cooperation with the CPSC, will provide owners with a free replacement beanbag chair with zippers that do not open. Consumers should be sure young children do not use the chairs if the zipper can be opened freely and should be sure children are not exposed to the beads inside the chair. For more information and instructions, consumers should call Baseline Design at (800) 497-3626, Extension 3046, or visit the firm's Website at: www.foamex.com.

Playnation Play Systems Has Recalled "Fun Buckets" on Backyard Play Sets

Playnation Play Systems has recalled about 1,400 "Fun Buckets,"

a vinyl bucket attached to a rope used to lift small items up to backyard play sets' forts. As children play on the play set's slide or platform, the 6- to 8-ft free- hanging rope can become entangled around the child's neck. This presents a strangulation hazard to young children. Playnation is aware of two incidents where the bucket's rope became entangled around the necks of two 4-year-olds. Both of the children were freed without injury. However, CPSC knows of 135 children who have died in the last 10 years from all types of ropes, leashes or jump ropes that were attached to backyard play sets. This recall involves "Fun Buckets" sold as an add-on option for backyard play sets. The 14-inch-deep buckets are either yellow or green vinyl and have a black nylon strap attached to the rope. The "Fun Bucket" was sold with a heavy wood bracket to attach it to the roof of a play set fort.

Distributors of backyard play sets nationwide sold the fun buckets from February 1998 through February 2003 for about \$25. Consumers should take down the "Fun Buckets" immediately and return them to the store where purchased for a refund or a credit toward another product. For more information, consumers can contact Playnation at (770) 792-9300 between 10 a.m. and 5 p.m. ET Monday through Friday, or visit the firm's web site at: www.playset.com. CPSC warns consumers never to allow free-hanging ropes on play sets because of the serious potential for strangulation to children. Any free-hanging rope should be taken down immediately. Consumers should contact CPSC about any such items purchased from a retailer.

Eon Labs Manufacturing Has Recalled Nabumetone Tablets

The Food and Drug Administration has released the following information concerning a recall of Nabumetone Tablets, both 500 mg, 100 count bottles, and 750 mg, 100 count bottles, Rx only, Lot 021159, expiration date 10/2004. Eon Labs Manufacturing Inc., Laurelton, New York, issued the recall by letter and fax on November 13, 2002. The firm-initiated recall is ongoing at present. The recall was due to mislabeling - some bottles labeled to contain Nabumetone 750 mg tablets actually contain Nabumetone 500 mg tablets. There were 1,533 bottles distributed nationwide.

Schering Corp. Has Recalled Drugs

The Food and Drug Administration has released information indicating that the Schering Corp., Kenilworth, New Jersey, has an ongoing recall relating to a number of products. The recalled products are Garamycin Ophthalmic Ointment, USP (Gentamicin Sulfate) 0.3%, 3.5g tube, Rx only (Recall # D-069-3); Celestone Phosphate Injection, USP (Betamethasone sodium phosphate) 3 mg/mL, 5mL Multiple-Dose Vial, Rx only, NDC-0085-0879-05 (Recall # D-070-3); Solganal Injectable Suspension, USP (Aurothioglucose), 500 mg, 50 mg/mL, 10 mL Multiple-Dose Vial, Rx only, NDC-0085-0460-03 (Recall # D-071-3); Trilafon Injection, USP (Perphenazine), 5 mg, 1 mL Ampule, NDC-0085-0012-04, Rx only (Recall # D-072-3); Sterile Diluent (Bacteriostatic Water for Injection with benzyl alcohol 0.945% w/v), 1 mL, NDC-0009-0780-46, Rx only (Recall # D-073-3); and Bacteriostatic Water for

Injection, USP, 2 mL syringe (Recall # D-074-3). The reason for the recall was a lack of assurance of sterility. There are 4,047,706 units with distribution nationwide and in these Caribbean islands: Bahamas, Curacao, Trinidad, Jamaica, St. Kitts and Aruba.

Two Million Drill Battery Chargers Recalled

The Robert Bosch Tool Corp. is recalling about 2 million drill battery chargers that can overheat, causing the charger housing to melt and possibly ignite flammable materials near the charger. The company has received one report of a charger causing a fire that resulted in property damage. There have been 160 reports of chargers overheating, according to the Consumer Product Safety Commission. The recalled battery chargers, sold as accessories for Skil Warrior drills, are black with red trim and bear the word SKIL in red letters. The recall includes 9.6 volt, 12 volt, 14.4 volt and 18 volt chargers bearing model numbers 2375, 2380, 2475, 2480, 2482, 2580, 2582 and 2882. Chargers also were sold separately with model numbers 92950, 92970, 92980 and 92990 with part number 2610995852. The chargers were sold at home centers, hardware and discount department stores nationwide from July 1994 through February 2003. Consumers should stop using the chargers and unplug them immediately. Replacement drills and chargers are available at no cost by contacting the company at 1-800-726-4202.

XX. FIRM ACTIVITIES

Kendall Dunson Named Shareholder

Kendall Dunson was recently named a shareholder in the firm. Kendall is a graduate of the University of Alabama Law School and is licensed to practice in Alabama and Georgia. He participates in numerous legal and community organizations, including a task force charged with reconfiguring Alabama's method of rendering legal services to the state's underprivileged population. Kendall is a charter member of the 100 Black Men of Birmingham. Before coming to work at Beasley, Allen, Kendall worked for a prominent defense firm for two and a half years in its Litigation section. He was converted and now at Beasley, Allen, he practices in the areas of product liability, general personal injury, workers compensation, and accidents involving defective industrial machinery. Kendall has worked on numerous cases with a common goal of compensating clients for human losses and influencing corporations to manufacture safer products. Kendall was a member of the trial team that prosecuted a wrongful death case against a corporate defendant resulting in a \$2,500,000 verdict, the largest jury verdict at that time in Dallas County, Alabama. That lawsuit also influenced the corporate defendant to outfit its entire fleet of trucks with audible backup alarms. Kendall regularly takes time from the busy practice of law to speak to high school and grade school students about the law, college, and life in general. Kendall

regularly attends First Baptist Church in Montgomery.

A Profile On A Good Lawyer And A Good Person

Andy D. Birchfield, Jr. manages our firm's Mass Torts Section and does an excellent job in that capacity. Andy's group is now recognized as a national leader in pharmaceutical litigation. Currently, the Mass Torts Section is handling cases involving Baycol, Rezulin®, Vioxx®, Celebrex®, PPA, ephedra, Lotronex™ and Meridia®. Andy is a regular speaker at national, regional and state seminars pertaining to mass tort litigation. Prior to joining Beasley-Allen in 1996, Andy was a partner in a Montgomery firm where he litigated personal injury and civil rights cases. Since joining Beasley-Allen, Andy has handled cases resulting in verdicts or settlements in excess of \$200 million. Andy grew up in Pell City, Alabama, where he met his wife, the former Tanya Payne. Andy and Tanya have two fine children, Dow-8 and Beth-5. The family is actively involved at First Baptist Church of Montgomery where Andy serves as Deacon Vice-Chairman and Chairman of the Prayer Committee. Andy is active in a number of legal organizations. He has served as President of the Alabama Young Lawyers, President of the Montgomery County Young Lawyers, and currently serves on the Character and Fitness Committee of the Alabama State Bar. Andy has served on numerous other committees and programs in an effort to improve the legal profession. Andy graduated from Samford University (B.S., cum laude, 1988) and later graduated from Jones School of Law (J.D., magna cum laude, 1992).

We are most fortunate to have Andy in our firm.

XXI. CLOSING REMARKS

There will be a great deal of activity in and around the State House and the State Capitol starting on March 4th. The Legislature comes to town on that date and will go into its regular session. Things will get "real hot" - "real soon!" The first year of the Riley Administration will be a tough one - but one that will shape the future course of our state. As a state, we have the potential for greatness, but unfortunately that potential has been largely unfulfilled. I have heard all of my life how we in Alabama are blessed to have 10% of the nation's natural resources and the greatest people in the world. Yet, we are near the bottom in most categories when states are evaluated and graded. We now need a "world class" performance by our state leaders and the Alabama Legislature to get things moving. I hope and pray that the new Governor and the legislators can work in harmony and get down to the business at hand. There must be a non-partisan effort on behalf of all concerned if our many serious problems are to be solved. If we get the proper effort and cooperation between Democrats and Republicans alike, we will finally achieve the greatness as a state that we all hope and pray for.

Finally, I urge each of you to continue in prayer for our President, his Cabinet, the members of the U.S. House and Senate, members of the judiciary, and all of our military and their families. We should also pray constantly for our Governor,

Lieutenant Governor, and other constitutional officers and all members of the legislature. That could be exactly what is needed!

In Alabama, we have over 4,000 reservists and National Guard members who have been activated and called to active duty. Most will serve on foreign soil. There will likely be many more if reports are accurate. We have seen the emotional ceremonies in communities around the state as the men and women leave their homes and families for active duty. Folks in the affected communities must do everything possible to help take care of the needs of these families left behind. We must constantly keep the families in our prayers. There will also be a void left in the workplace. For example, in the City of Montgomery, about 50 police officers have been called up. That will put a terrific burden on the City to continue providing good and effective law enforcement. I suspect other city and county governments in our state will experience similar problems. May God bless our state and nation!

THE JERE BEASLEY REPORT

MARCH 2003

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