

# THE JERE BEASLEY REPORT

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

MAY 2003

## I. CAPITOL OBSERVATIONS

### Massive Fraud On Wall Street—The Alabama Connection

Under the terms of a \$1.4 billion settlement announced on April 28th between securities regulators and Wall Street firms, Alabama stands to receive over \$5,000,000 upon final acceptance of the terms of the agreement. The settlements result from allegations of conflicts of interest at brokerage houses where analysts recommended stocks due to improper influence from their investment banking colleagues. Unfortunately, Wall Street has been rocked by a series of accounting scandals that have taken a staggering toll on the economy and the pocketbooks of American citizens from all walks of life. Recent corporate wrongdoing has cost Americans more than \$200 billion in lost investment savings, jobs, pension funds, and tax revenue. These losses, as large as they are, tell only part of the story. The loss of trust, which certainly is not easy to quantify at this point, could ultimately cause the U.S. economy billions of dollars in lost revenues, profits, exports, and jobs.

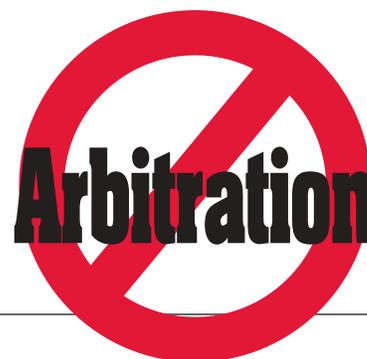
Hopefully, this settlement will get the attention of persons in high places, both in government and in the corporate world. The message should be that the sort of conduct that gave rise to the investigation and ultimate settlement

won't be tolerated. While the \$1.4 billion is large, it really may not be adequate fines for the 10 corporations. For example, the \$300 million fine to Citigroup is less than 1% of the corporation's last year's revenues, which topped \$92 billion. I firmly believe that in addition to the money paid, and hopefully to be paid in individual claims, a number of offenders should spend time behind bars. We can't treat street crime one way and white-collar crime in a totally different manner. Investors should be able to pursue their individual claims and that should have been preserved in the settlement.

Joseph P. Borg, Director of the Alabama Securities Commission, was President of the North American Securities Administrators Association (NASAA) when the states joined resources to undertake the investigation. He was instrumental in getting the massive investigation underway. This sad chapter in the history of our financial markets will go down in history as some of the worst examples of greed, arrogance, and a total disregard by corporate employees for the folks they were supposed to be working for. Many believe the industry reforms required in the settlement will provide for more objective research and stronger protections for investors. I don't believe anybody had any idea that the large brokerage houses were operating in this fashion. I suspect the truth is they never thought they would be caught. While I am afraid that some of the wrongdoers may now enjoy immunity from criminal prosecution, I hope that my information on that score is incorrect.

## IN THIS ISSUE

I. Capitol Observations . . . . .	1
II. Legislative Happenings . . . . .	4
III. Nursing Home Update . . . . .	7
IV. Congressional Update . . . . .	11
V. Court Watch . . . . .	12
VI. The National Scene . . . . .	14
VII. Corporate Wrongdoing . . . . .	18
VIII. Arbitration Update . . . . .	20
IX. Product Liability Update . . . . .	21
X. Mass Torts Update . . . . .	25
XI. Business Litigation Update . . . . .	30
XII. Insurance and Finance Update . . . . .	33
XIII. Environmental Concerns . . . . .	39
XIV. Monsanto Update . . . . .	41
XV. Premises Liability Update . . . . .	41
XVI. Tobacco Update . . . . .	43
XVII. Workplace Hazards . . . . .	43
XVIII. Transportation . . . . .	44
XIX. Healthcare Issues . . . . .	45
XX. The Consumer Corner . . . . .	47
XXI. Recalls Update . . . . .	47
XXII. Firm Activities . . . . .	49
XXIII. Closing Remarks . . . . .	51



Under the terms of the settlement the firms are required to distribute \$30 million over a period of five years to the Investor Protection Trust (IPT). The money will be used to fund investor education initiatives on the state and national levels. The IPT is an established charitable organization with experience handling settlement funds and a history of investor education successes. A designated amount from this fund will be allotted for financial education programs in Alabama.

Current NASAA President Christine Bruenn, Securities and Exchange Commission Chairman William H. Donaldson, New York Attorney General Eliot Spitzer, NASD Chairman and CEO Robert Glauber, New York Stock Exchange Chairman and CEO Dick Grasso, and the lead state securities regulators announced the completion of the enforcement actions at a press conference at the SEC, implementing the global settlement in principle reached and announced by regulators last December. The Alabama Securities Commission was one of the 10 lead states investigating Wall Street with federal co-regulators. That settlement followed joint investigations by the regulators of allegations of undue influence of investment banking interests on securities research at brokerage firms, and the enforcement actions announced at the news conference track the provisions of the December global settlement in principle.

The ten firms against which enforcement actions were announced are: Bear Stearns & Co. Inc. ("Bear Stearns"); Credit Suisse First Boston, LLC ("CSFB"); Goldman Sachs & Co. ("Goldman"); Lehman Brothers, Inc. ("Lehman"); J.P. Morgan Securities, Inc. ("J.P. Morgan"); Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("Merrill Lynch"); Morgan Stanley & Co. Incorporated ("Morgan Stanley"); Citigroup Global Markets Inc. f/k/a Salomon Smith Barney, Inc. ("SSB"); UBS Warburg LLC ("UBS"); and U.S. Bancorp Piper Jaffray Inc. ("Piper Jaffray").

I am thankful that we have a man such as Joe Borg looking out for the interests of Alabama investors. His tenure on the national scene has given him a great deal of prominence that brings credit to the State of Alabama. Joe and all of his staff are to be commended for their work. I only wish that the Alabama team had been in total charge of the entire affair. In any event, I guess we should be satisfied that some good did result from the investigation that the Borg team helped to start.

### **Alabama Doctors File Lawsuit**

Approximately 10,000 doctors nationwide were left without medical malpractice insurance when their insurance company stopped paying claims and went into receivership. A civil lawsuit was filed by our firm on behalf of approximately 10,000 doctors nationwide. Approximately 800 Alabama doctors who were insured by Doctors Insurance Reciprocal (DIR) and Reciprocal of America (ROA), which are now in receivership in Virginia and Tennessee, respectively, are a part of the lawsuit. These insurance companies and their top officers devised a fraudulent scheme to deceive the doctors, hospitals, and nursing homes who were insured against malpractice claims. The insurance companies also committed a fraud on state regulators, including the Alabama Insurance Department. DIR and ROA insure 46 hospitals, some 800 physicians, and a number of nursing homes in Alabama. Interestingly, the insurers generate more premium dollars in Alabama than in any other state. These out-of-state insurers funneled premium money to other insurance companies as "pay offs" to hide their declining profits and unstable financial condition.

DIR and ROA used these "pay offs," totaling millions of dollars, to "rent" an appearance of solvency and keep state regulators from discovering the dire financial condition of DIR and ROA.

Many of the premiums paid by participating doctors, hospitals, and nursing homes were sent to offshore companies to cover up the scheme. While doctors, hospitals, and nursing homes that have been covered by DIR and ROA have millions of dollars in equity with the insurers, they won't recoup those funds because of the fraud perpetrated by the companies. These insurance companies made secret agreements to hide the true financial stability of DIR and ROA. As a result, the insureds were badly misled. Eventually, regulators discovered the fraudulent conspiracy, downgraded the insurers' ratings, and took over their operations. Many patients of doctors who had coverage through DIR and ROA now find themselves with a doctor who can't practice medicine without insurance coverage. What these companies did is pretty much the same as the massive frauds committed by Enron, Tyco, WorldCom, HealthSouth and many other large corporations. The only real difference here is that this fraudulent conduct involves insurance. The lawsuit was filed in the U.S. District Court in Montgomery, Alabama. I will help Dee Miles and Jay Aughtman from our firm, along with Dennis Goldasich and Erby Fischer of Cross, Poole, Goldasich & Fischer of Birmingham, Alabama. The defendants in the lawsuit are: General Reinsurance Corporation, Reciprocal of America, Doctors Insurance Reciprocal, PricewaterhouseCoopers, Milliman U.S.A., John William Crews, Ken Patterson, First Virginia Reinsurance, and General Cologne Reinsurance, P.L.C.

### **Hospitals And Lawyers Sue Insurance Companies**

After filing the doctors' case, we filed two more lawsuits in the growing malpractice insurance scandal that affects a number of states, including Alabama. These new lawsuits are against the same companies and individuals who were sued previously. One of these law-

suits is on behalf of over 1,000 hospitals, located in 19 states. These hospitals, including 46 located in Alabama, have been victimized in connection with their malpractice insurance coverage. It is most significant that the Alabama hospitals responded to a capital call in 2002 and sent over \$20 million to the insurance companies involved. The defendants knew at that time the insurance companies making the request were in serious financial trouble. This lawsuit was also filed in the U.S. District Court in Montgomery, Alabama.

The last of the three lawsuits was filed in Memphis, Tennessee, on behalf of over 14,000 lawyers who have also had a similar experience with these companies and now find themselves without malpractice insurance. We will seek class certification in each of the lawsuits. Our clients and members of the class will be entitled to both compensatory and punitive damages. As stated above, the conduct of these defendants is comparable to what we have seen in the other corporate scandals. It should make no difference that the conduct in this scandal involves insurance. Incidentally, we have learned that there are currently 23 major corporations in this country that allegedly have committed acts that justify criminal and quasi-criminal investigations by the federal government. It is no wonder that the American public has lost both respect for as well as confidence in Corporate America. Certainly, persons who take out an insurance policy and pay their premiums should be able to trust the folks who run the company.

### **Tennessee Asks Virginia To Speed Claims**

In a related matter, Tennessee insurance regulators have asked their Virginia counterparts to move more quickly on an appeal filed in February in the case of Reciprocal of America,

the insolvent Richmond-based malpractice insurance company. In the recent filing on April 24th with the State Corporation Commission, the Tennessee Insurance Commissioner is seeking an “expedited review” of the status of three subsidiaries of Reciprocal of America. Those subsidiaries are based in Richmond, but chartered in Tennessee. As previously reported, the parent company was taken over by the Virginia Bureau of Insurance in January. The new filing may serve to move Tennessee’s appeal a step forward in the review process. There will be many more developments in this matter over the upcoming months.

### **Round Two—A Retrial Of The State’s Case**

The Alabama Supreme Court has declined to reconsider its decision striking down a \$3.5 billion verdict against Exxon Mobil, the largest civil court judgment in state history. There will be a new trial on the state’s claims against the giant oil company. In December 2000, a Montgomery County jury ruled that Exxon Mobil had fraudulently underpaid the state on royalties from natural gas wells drilled in state waters along the Alabama coast. The State of Alabama was awarded \$87.7 million in compensatory damages and \$3.42 billion in punitive damages. Almost four months ago, the Alabama Supreme Court threw out the verdict in a 6-3 decision. The majority opinion held that the trial judge had made a technical error when jurors were allowed to see an internal Exxon memo that outlined the company’s options on royalty demands from Alabama’s conservation department. While this memo was extremely damaging to Exxon, the evidence remains extremely strong against Exxon. In my opinion, the result would likely have been the same in the first trial had the memo not

been shown to the jury. Since the Supreme Court Justices refused to rehear the case, it will now go back to the state court for “round two.”

### **Exxon Mobil Wins \$416 Million**

It appears that Exxon Mobil Corp. doesn’t mind the court system so much when it believes the corporate giant is the victim of wrongdoing. A few weeks ago, a Delaware jury awarded Exxon Mobil \$416 million in a lawsuit brought against Saudi Basic Industries Corp. The defendant was Exxon Mobil’s partner in two plastic manufacturing plants in Saudi Arabia. The jury in Delaware State Superior Court returned the verdict finding that the Saudi company, known as Sabic, had overcharged Exxon for the price of technology used to make polyethylene plastic at the plant. The petrochemical conglomerate is 70% owned by the Saudi Arabian government. Exxon Mobil and Sabic have a 50-50 partnership in two plants. One is Exxon Chemical Arabia Inc., dating back to 1984. The other is Mobil Yanbu Petrochemical Inc., acquired in Exxon’s merger with Mobil. The verdict included Exxon Mobil’s half of \$184 million in overcharges billed to the joint ventures, and another \$324 million of what Lender called “benefit damages.” Under Saudi Arabian law, which governs the partnership contracts, the jury found that Sabic must also pay an amount equal to the profits it had earned from the overcharges. I have to wonder if this case is what the “tort reformers” refer to as a frivolous lawsuit.

### **Amber Alert System To Begin June 1st**

A most important announcement occurred last month that went pretty much unnoticed because of war news and legislative activity. Nevertheless, in

my opinion, implementation of the Amber Alert system is very important. It will quickly notify police and the public when a child is abducted. The program will begin in Alabama on June 1st. Law enforcement officers are currently being trained to operate the system. The goal is to make sure everybody is involved statewide. The announcement concerning the Amber Alert System was made to a group of law enforcement officers and victims service officers at a conference in Montgomery. Whenever there is a confirmed abduction of a child age 17 or younger considered at risk of death or serious harm, the Department of Public Safety will send out an alert that will update radio and television stations periodically.

The program is named after Amber Hagerman, a 9-year-old girl abducted and found slain in Arlington, Texas in 1996. The system, which involves radio alert tones and "crawl" messages at the bottom of television screens, will be coupled with the coordination of state agencies to search for abducted youngsters. The messages will include such information as the child's age and a description of the suspect if available. Under the system, a call to an emergency number involving abducted children will go directly to a person in charge of issuing the broadcast alerts. The Amber Alert system uses emergency alert system technology that the Federal Communications Commission already requires each station to have. Besides the radio and TV messages, electronic signs on interstate highways in the state will also include information about an abduction. This system appears to work well when properly utilized. Our young children must be protected to the fullest extent possible. Hopefully, the Amber Alert System will give us a badly needed tool in our state. We should give everybody involved in bringing the Amber Alert system to Alabama our thanks.

## **Neighboring States Agree On Development Project**

Governor Bob Riley and Ronnie Musgrove, Mississippi's Chief Executive, have agreed to move forward with a plan to locate an industrial park on the state line. The neighboring states will share equally in the costs and benefits. The two governors said one purpose of the joint venture would be to create jobs in disadvantaged areas of southwest Alabama and southeast Mississippi. This appears to be a good way to make the best use of the resources, property and location, of the two states. Currently, attracting new jobs and industries has to be a top priority for each state. Governor Riley first suggested the plan as a way to provide jobs for residents in the Black Belt region of west and southwest Alabama. Since southwest Alabama and southeast Mississippi share many of the same economic problems, it makes sense for the two states to work together to attract industry. "Instead of bidding against each other for industry, we can partner our resources and spend less money," Riley said at a Capitol news conference. The cost of developing the industrial site and offering incentives to business prospects will be shared. Tax revenue from new industry will be shared equally.

The Mississippi Legislature has already passed legislation that allows Governor Musgrove to enter into this type of project with other states. Similar legislation will have to be passed for Alabama. Hopefully, this agreement will open the door to other Alabama-Mississippi joint projects that could be located anywhere along the state line from Mobile to Florence. ADO Director, Neal Wade, played a key role in putting this unique arrangement together. I predict that the appointment of Neal Wade to head up our state's industrial development efforts will pay big dividends for Alabama citizens.

## **Jim Main Joins The Riley Team**

Last month, Governor Bob Riley named Jim Main as Senior Counsel for his Administration. Jim is experienced in the working of state government, having served as Governor Fob James' Executive Secretary. During that time, Jim was responsible for overseeing the everyday operations of the governor's office. Jim also served one year as Legal Adviser to Governor James. He previously practiced law for 25 years in Anniston and Montgomery and was a partner in our law firm before joining the James Administration. Jim is also a licensed pharmacist and a past president of both the Alabama Pharmaceutical Association and the American Pharmaceutical Association. Jim Main, an intelligent person with good people skills, is also a good family man. I sincerely believe he will be a real asset to the Riley Administration.

## **II. LEGISLATIVE HAPPENINGS**

---

### **The Alabama Senate Faces The Self-Inflicted Insurance Crisis**

The Alabama Nursing Home Industry is engaged in one of the most extensive lobbying efforts in recent years, trying to convince the State Senate that the worst bills you can imagine should be enacted into law. It is also one of the most expensive. The lobbying team, led by former Siegelman advisor Joe Perkins, includes some high-priced and experienced talent. The nursing home lobby team includes the acknowledged leader Joe Perkins, former Lieutenant Governor Steve Windom, former President of the Senate Ryan deGraffenried, former Siegelman Chief of Staff Paul Hamrick, former House member, Taylor Harper, and former Senator Joe Fine, who is said to be the highest paid lob-

byist in the State. Interestingly, the nursing home effort in the Senate is being pushed hard behind the scenes by President Pro Tem Lowell Barron. An extensive advertising campaign started weeks ago. The Perkins team has already spent a tremendous amount on some slick TV advertising. Recently, Perkins put out a TV ad, which may go down in history as being one of the worst ever, ranking right down with the infamous “skunk ad,” which incidentally was the work of Mr. Perkins.

I have not heard a single Senator say that the four bills are good for the residents in Alabama nursing homes. In fact, some of the sponsors have even acknowledged that the bills should not be passed without major changes. A public hearing was held on the package of bills on April 9th. The nursing home bosses brought in four busloads of their employees who got a paid day-off from work. There were hundreds of persons from around the state who came to oppose the bills. Opposing the bills at the hearing were the AARP, the National Nursing Home Protection Coalition, the AFL-CIO, the Alabama Trial Lawyers Association, and hundreds of families with loved ones in Alabama nursing homes who have suffered losses. Alabama Arise and the Alabama Democratic Conference had previously made known their opposition to the bills. The hearing was conducted by Senator Bobby Denton, assisted by Senators Roger Smitherman and Larry Means. There appears to be tremendous bipartisan opposition to the bills in the State Senate. There is almost universal opposition among people around the state to giving Alabama nursing homes virtual immunity from lawsuits. For example, I don't believe any person really believes that limits should be placed on wrongful death cases in Alabama. Neither could anybody justify passage of a bill that would not even allow a lawsuit to be filed regardless of how bad the conduct was.

The thing that really concerns me is that the people who will be affected by

this legislation—the residents who are confined to nursing homes throughout the state—have pretty much been left out of the public debate. Were it not for the AARP and Alabama Watch, who speak publicly for them, this large number of people would have had little voice in what is being done to them in the Senate. Fortunately, a number of Senators have also worked hard to protect the interests of the residents. Going into the hearing, most observers believed the Senate committees would work hard to make the necessary changes to the bills before passing them out to the full Senate. That didn't happen in at least one committee.

### **Committee Action On The Bills**

Surprisingly, Senator Denton's committee put the so-called “Pool Bill”—which is nothing more than a “caps bill” in “pool clothing”—out to the full Senate on April 15th. Most of the discussion at the committee hearing was over the tremendous number of calls received by the Senators from persons back home in their counties. Some of the Senators supporting the bill were offended because they had received these phone calls at their homes. Voting against the bill in committee, which was a vote for the people, were Senators Smitherman, Penn, and Enfinger. Hopefully, the six Senators who voted the bill out of committee will take the time to study this bill and others in the package. One of the Senators, who had actually sponsored one of the bills, admitted that he had never even read his bill. Without a doubt, these four bills are as bad as I have ever seen.

### **Senate Leaders Say Part Of Reform Package Has Best Chance**

Democratic Senate leaders say they will try to pass two of the five recommendations from the Governor Riley's constitution commission. Those provi-

sions are providing limited home rule and recompiling the constitution to remove racist language. However, the rest of the commission's recommendations, i.e., unearmarking tax revenue, giving line-item veto power to the governor, and requiring the Legislature to pass new taxes by a certain vote—more than a simple majority, are not on the Democratic leaders' priority list for the current legislative session. According to media reports, Senator Jeff Enfinger, D-Huntsville, Senate floor leader and chairman of the Legislature's Joint Committee on Constitutional Reform, believes that limited home rule and recompilation “have the most support in the Legislature.” It is unfortunate that constitutional reform hasn't been put on the fast track in the Legislature. Perhaps, it would work out better in a special session for that purpose, which would allow all five of the Governor's recommendations to be considered.

### **House Bill To Limit PAC Transfers Starts Its Journey**

An important bill has started its journey through the minefield known as the legislative process in Alabama. Transfers of campaign contributions that can hide the true source of a candidate's support would be banned under a bill reported out of the House Constitution and Elections Committee. The bill, if passed and signed into law, would ban transfers of money between political action committees. Representative Jeff McLaughlin, D-Guntersville, the sponsor of the bill, stated: “The voter needs to know where money is coming from to support a candidate. It's that simple.” The bill will now go to the full House. PACs formed by lobbyists, companies, political parties and other groups put well over \$20 million into the campaigns of politicians running for state offices in Alabama last year. PAC-to-PAC transfers have been used widely by both Democrats and Republicans and under the current

campaign law are completely legal.

When PACs give money directly to candidates, voters can know generally which company or interest group gave money through the PAC. Many times, however, one PAC will transfer money to a pass-through PAC that mixes contributions from a wide variety of PACs and then gives money to candidates. Such mixing of PAC money can make it virtually impossible for voters to discover the original contributor to a candidate. PACs by law can funnel a contribution to a candidate through two or three pass-through PACs. Many believe the practice is nothing more than money laundering.

The McLaughlin bill would ban most PAC-to-PAC transfers of campaign money. Exceptions would be allowed for transfers between PACs of a national, regional, state and local branch of the same organization, such as a political party, union or chamber of commerce. I believe PACs of companies, law firms, or other groups that transfer money to the PAC of a non-profit association to which those companies, law firms, or other groups belong for principal purposes besides influencing elections are also exempted. Passing the bill through the “legislative minefield” will be hard because the special interests like the current system of hiding donors’ identities. I would like to see the bill amended to eliminate PAC-to-PAC transfers with no exceptions. If you agree, let your local legislators know.

### **A Compromise On Payday Loan Bill In House**

The Alabama House of Representatives has voted to “regulate” the payday loan industry. Representative Mike Hill, R-Columbiana, was the bill’s sponsor. The bill has now gone to the Senate. Only one lawmaker voted against the bill, which in the opinion of many observers would legalize “loan-sharking.” In its present form, the legislation would regulate payday loan and check-

cashing stores where customers seek short-term loans. It would cap the interest rate at 16.5% over the period of the loan. This doesn’t mean, however, that the annual percentage rate is only 16.5%. In fact, it will allow interest rates of over 400%. The bill would also limit the loans to the lesser of \$500 or 50% of the customer’s net income for the loan term. The bill limits the borrower to one “rollover” extension, which is certainly a good feature. The House bill was said to be a compromise. Unfortunately, for the borrowers, the interest rate allowed is still much too high.

Representative Jeff McLaughlin, D-Guntersville, cast the sole vote against the bill. Several observers believe that this multi-billion dollar industry that has exploited the poor with exorbitant interest rates may have won the war. Under the bill, a person who borrows \$500 for 10 days would owe \$82.50 in interest when the loan was due. Sponsors of the bill, supported by the state Banking Department, agreed to an amendment that creates a database of people who have taken out the payday loans. Supporters of the amendment said it would prevent several companies from lending to the same person. Another amendment sought by a consumer group to establish a statewide database to track loans and limit the maximum amount one person can borrow to \$500 was also added. A \$10 fee payday loan companies could charge customers to set up a plan to repay the loan was also eliminated. The bill has failed in the Legislature for the past four years. Each time the Senate would pass the bill and it would be defeated in the House. This time the lobbyists started the bill in the House. The opposition to the bill went away after supporters agreed to the amendments. Hopefully, this measure will keep desperate people from loading up on multiple loans. Many lawmakers described the bill as better than nothing. However, some insiders believe the Senate will strip some of the consumer-friendly amendments

added in the House. Here’s what the Montgomery Advertiser had to say about the effort to “regulate” payday loans:

#### **Payday Loan Bills Make Usury Legal**

It probably will do no more good than shouting in the face of a hurricane, but we’ll say it again anyway: Any legislation that legalizes the payday loan business is legalizing usury of biblical proportions. The Bible has numerous admonitions against charging unfair interest to the poor, cautioning those who would do so that they won’t find a place in heaven. We normally don’t cite the Bible over legislative issues, assuming that most lawmakers believe in a separation of church and state. But considering the fuss so many elected officials, including many legislators, have made over government posting the Ten Commandments, maybe it’s not too much to expect a little consistency from them. Despite the biblical admonitions, two committees of the Alabama Legislature last week approved bills that could legalize the payday loan industry and allow them to charge poor Alabamians interest rates that work out to more than 400% on an annual percentage rate basis.

If that’s not usury, what is? It appears the payday loan bills are on a fast track to pass the Legislature this year. Frankly, the payday loan industry has been so unfettered by any laws that this legislation would actually improve things a bit. (But not enough that those legislators worried about their place in heaven should relax.) Isn’t it a shame that the debate has come down to a completely unregulated industry that charges confiscatory interest rates vs. a barely regulated industry that charges slightly less confiscatory rates? What the state needs is to bring payday lenders under the same rules as other small lenders. Since that seems less and less likely, thanks to the clout of

the industry, at least the bills under consideration need to be amended to do more to protect consumers.

One model is Florida's. Alabama Arise, a group that lobbies on the behalf of the state's poor, wants some of that state's protections written into the Alabama legislation. It calls for loans that are not repaid on time to automatically offer a repayment plan spread over several months. It also calls for the annual percentage rate for loans to be limited to just 390%, as Florida does, instead of the 429% allowed under these Alabama bills. Despite the whining of the payday loan industry in Alabama that the Florida provisions would put them out of business, the industry is actually thriving there. Alabamians should pay close attention to the roll call votes when these payday loans reach the floors of each legislative chamber. It will be interesting to compare them to the rhetoric of these same legislators on issues like prayer in schools and posting the Ten Commandments in government facilities. If the Legislature won't do the right thing by bringing payday lenders under existing small loan regulations, at least it should amend the proposed bills to add those small protections for consumers that Florida requires.

The State Senate will ultimately decide whether Alabama consumers—especially those in the low-income category—get any more relief on the payday loan issue. I hope that the so-called compromise bill passed by the House will be used as a vehicle to make the legislation even more consumer-friendly. As it presently stands, even with the changes, I am not convinced that the House-passed bill is a fair resolution of the matter. I really believe the lenders should be treated much the same as the small loan industry. The interest rates allowed to that industry are high enough for the payday lenders. Why should the payday

lenders receive preferential treatment? While the industry clearly should be regulated, there must be adequate safeguards for those who have to deal with the payday lenders. This must include a rate of interest that gives the lenders a fair return on their money, but is not unfair to the borrowers. When you consider that this is a multi-billion dollar industry nationwide, it is fairly easy to understand how powerful they have become.

### III. NURSING HOME UPDATE

---

#### **Nursing Home Wrongful Death Lawsuit Settled**

According to a story in the Tallahassee Democrat, the former owners of a Florida nursing home agreed to pay \$2.2 million to the family of a patient who developed infections and flesh rot so severe that his genitals had to be amputated. The former parent companies of River Chase Care Center agreed to settle the wrongful death suit last week with the children of the 62-year-old Florida resident who died in November 2001. The case was described as “the worst case of abuse” seen in a while. The resident had been a construction worker when an on-the-job accident in the late 1970s paralyzed his lower body. Subsequently, his wife divorced him. In 1988, he was admitted to the nursing home where he was confined for 13 years. According to the report, his care began to decline and he eventually suffered from nearly three dozen bedsores, unexplained burns, malnutrition, dehydration, and gangrene of the genitals, which required their removal. It was alleged in the suit that nursing home workers “conspired to conceal” Oliver's worsening physical and mental condition—including an undiagnosed stroke—from

his family. The faculty's staff “altered, defaced, or falsified” medical records to hide the wrong doing, according to the newspaper's report on allegations from the suit.

It is this sort of treatment of an innocent man who was apparently badly neglected, abused, and mistreated that should be severely punished. Unfortunately, this sort of story is not uncommon. It is exactly the type thing that the Alabama Nursing Home Association wants to protect in our state.

#### **Some Interesting News**

Some of the nursing home owners from Alabama have formed an insurance company that is providing liability insurance coverage to Alabama nursing homes. I don't know who all is involved, but I am told that Norman Estes, Billy Jones, and Frank Brown are owners of this insurance company. Each of these men is the owner of a good number of nursing homes in the state. Owning the insurance company wouldn't be so bad if there was government regulation of Associated Long Term Care Insurance Company, which is referred to as a captive company. Unfortunately, there is absolutely no regulation since it is an “off-shore company.” To add to this mystery, the nursing home owners picked the Cayman Islands as the location of their company. This assured that no state regulatory agency—including the Alabama Insurance Department—would have any control over the company. This means that nobody has access to the company's records or books. I suspect that the offshore company gets substantial tax breaks—in addition to the desired secrecy—from landing in the Cayman Islands.

The nursing home industry is claiming that it is experiencing increases in their liability insurance coverage. They have thrown out numbers and expect everybody, including the Legislature, to accept them as factual without further

inquiries. We don't believe these numbers are anywhere close to being accurate. For that reason, I have challenged the owners of this offshore insurance company to open all of their books to the Alabama Insurance Department and to the Alabama Legislature so that some light can be shed on this mystery company. Until that is done, the Legislature should put off any action on the lawsuit immunity bills that are now pending in the State Senate.

On April 25th, I made a request to Senate Pro Tem Lowell Barron to have all of the bills carried over to the next session of the Legislature. A Special Committee should be created to make a full and complete investigation of the so-called insurance crisis and the well known and documented long term healthcare crisis that are causing problems in our state. Appointments to the Committee would be made by the Governor, Lieutenant Governor, Senator Barron, and the Speaker of the House. I believe that at least 40% of the committee make-up should be consumers or representatives of consumer groups. At least one person should be a member of a family who has a loved one in a nursing home. The owners of the nursing homes should also be represented. I would also suggest that the Insurance Department have a representative. This committee would have to be given the ability to seek out the truth and make a recommendation to the Governor and Legislature so that any needed changes in the law could be made.

An overwhelming majority of Alabama citizens believe that the Legislature should not put caps or limitations on damages. This is especially true when death is involved. People definitely don't want the nursing homes to have immunity from lawsuits. The last Governor and Legislature have already given the nursing home industry more protection in Alabama than it has in any other state. That can't be challenged and hasn't been to this day. Before any

more damage is done to the rights of victims of abuse, neglect, and mistreatment, the members of the Legislature should have full and complete information relating to the nursing home insurance problems. The only entities that stand to gain if the nursing home bills are passed are the large chain nursing homes and the insurance industry. I have wondered why the large chains have been kept in the background when they have the most to gain of any nursing home owners. Those in government have an obligation to protect the rights of two segments of our population, i.e., young children and the elderly. In this nursing home fight, the choice is very clear and it affects the second group. The Legislature can favor the owners of the nursing homes—including the large chains—or they can protect the elderly by defeating the nursing home immunity bills.

### **Status Of The Immunity Bills**

Thus far, the public debate over the nursing home immunity bills has been focused on two groups—nursing home owners and trial lawyers. The nursing home lobbyists, utilizing a multi-million dollar advertising and lobby campaign, have skillfully made trial lawyers their target. Unfortunately, the two groups that should have been at the negotiating table have been almost totally ignored. The powerful insurance industry was not visible at any time, and I suspect that was by design. Obviously, the industry would have had a difficult time answering questions about their own financial failures in the stock market. More importantly, the Alabama citizens who have to be confined in Alabama nursing homes and their families were shut out of the public debate and the private negotiations. The absence of both the insurance industry as well as the potential victims of nursing home abuse was most unfortunate. Hopefully, the fact that an "insurance crisis" exists that was not caused

by lawsuits or juries, will finally take center stage. Clearly, the insurance industry is finally being exposed as the real culprit. More importantly, however, is the fact that the level of care, attention, and medical treatment received by the nursing home residents has been on display, and that clearly must be improved. That is something that the Alabama Legislature must address. Giving nursing homes immunity from lawsuits is clearly not the answer. Neither is the placing of caps on damages that can be awarded for bad conduct resulting in severe injuries and even death. There has not been a single instance in any state where caps on damages have lowered insurance rates.

### **AARP Takes A Stand**

The AARP, which has over 400,000 Alabama members, has taken a stand against caps on damages of any kind. This organization is a strong consumer advocacy group and does great work. Their opposition to the nursing home bills mirrors the feelings of most Alabama citizens. It will be difficult for politicians to support bills pushed only by the nursing home owners and the insurance industry and to turn their backs on the victims of nursing home abuse. I commend the AARP for getting involved in this fight.

### **Alabama Democratic Conference Resolution**

A few weeks ago, the Alabama Democratic Conference took some very strong action in the nursing home debate that has been ignored by the media. A resolution passed by the politically powerful group is set out below.

Whereas, Alabama nursing home residents are entitled to first class care and treatment and attention while in our state's nursing homes;

Whereas, some nursing homes in Alabama have a bad record when it

comes to the abuse, neglect, and poor treatment of residents in their homes;

Whereas, 4 bills have been introduced in the State Senate that are bad for people and good only for the owners of the nursing homes in Alabama, including the large chain operations;

Whereas, the nursing homes already have unfair advantage over people who are mistreated in some manner while a resident in an Alabama nursing home;

Whereas, the nursing home owners also have a state-sponsored monopoly which the ADC believes is grossly unfair and hinders the competition that would come in an open market;

Whereas, the Alabama Democratic Conference opposes the legislation and also believes that some affirmative legislation should be passed to assist Alabama citizens who by necessity have to be placed in nursing homes in our state.

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. The Alabama Legislature is hereby requested to defeat Senate Bills 266, 267, 268, and 269;
2. The Alabama Legislature is hereby requested to take nursing homes out of the Alabama Medical Liability Act;
3. The Alabama Legislature should pass a patients' bill of rights so as to protect our citizens who are residents in nursing homes in Alabama;
4. The Alabama Legislature should create a joint commission to study the nursing home industry in Alabama to determine if any additional protections for Alabama citizens should be enacted by the Legislature;
5. The Alabama Legislature should pass a bill to take Alabama nursing

homes out of the Certificate of Need Law in Alabama and thereby open the market for needed competition.

## **Proposed Liability Limits Will Hinder Nursing Home Care**

The Tuscaloosa News wrote an editorial on the nursing home debate that was badly off the mark. Donna R. Lenhoff, the Executive Director of the National Citizens' Coalition for Nursing Home Reform, answered the editorial and pointed out the real problems. The following is that response:

A recent Tuscaloosa News editorial urges Alabama legislators to restrict liability limits in cases alleging nursing home abuse and neglect, stating, "... on the whole, the Alabama nursing home industry has an admirable record, with a level of care 20% better than the national average." As the nation's largest long-term care residents' advocacy group representing more than 1.6 million frail elderly and disabled nursing home residents and their families we would like to set the record straight. NCCNHR recently conducted an analysis of Alabama nursing homes using databases compiled by the Centers for Medicare and Medicaid Services (CMS), and found that there are serious deficiencies in most nursing homes in Alabama.

In fact, the vast majority of nursing homes in Alabama (92%) violated federal health and safety standards during recent state inspections. Only 19 of the 229 nursing homes in Alabama (8%) were found by state inspectors to be in full or substantial compliance with federal health and safety standards. The remaining 210 nursing homes had at least one violation that had the potential to cause harm to their residents. Many Alabama nursing homes (26%) had violations that caused actual harm to residents or placed them at risk of

death or serious injury. Common actual harm violations include: failing to prevent physical or sexual abuse of residents; failure to prevent or properly treat bedsores; and failure to provide adequate nutrition and hydration to residents. And, according to self-reported data from the nursing homes, more than half of Alabama nursing homes (55%) did not provide adequate staffing. Recent federal reports have found strong and compelling evidence that inadequately staffed nursing homes provide substandard care. These statistics are shocking, but unfortunately not surprising. In Alabama and across America, many of our nation's home residents suffer terrible neglect and all-too-frequent abuse in facilities that violate laws designed to protect some of society's most vulnerable residents. Now, the Alabama Legislature is considering bills that would strip nursing home residents of their rights, safety and dignity. Limiting damages awarded for pain and suffering would eliminate one of the few protections shielding elderly and disabled nursing home residents in Alabama. This Legislature will determine the fate of Alabama nursing home residents.

Will the nursing home industry be forced to meet a higher standard of care, or will Alabama legislators pass laws that strip legal protections from some of our most vulnerable elderly?

Donna R. Lenhoff is executive director of the National Citizens' Coalition for Nursing Home Reform in Washington, D.C.

## **Montgomery Advertiser Poll**

The *Montgomery Advertiser* conducted a poll recently that has received almost no public attention. While the polling was not scientifically carried out, it is worth mentioning. The question was put: "Four bills are pending in the state Senate that would reduce nursing home liability in wrongful

death cases. Should the Legislature put a limit on damage awards in nursing home cases?" Interestingly, 56.4% of the persons responding said "no," with 42.9% answering "yes." I am told that the powerful nursing home industry has conducted its own poll and that it pretty much tracks the result of the *Advertiser* polling. If it were different and favorable to the nursing home industry, we would have heard about it. People all over the state oppose the nursing home industry's package of bills. No person who has investigated the issue could possibly back these bills, which effectively would give the industry immunity from lawsuits.

### **Truth In Advertising Needed**

The expensive advertising campaign by the nursing home industry, including TV, radio, and newspaper, missed one important and badly needed element, and that is the "truth." The ads, put together by longtime Siegelman confidant and political advisor Joe Perkins, are filled with untruths and half-truths. Typically, the ads attack trial lawyers in an effort to sell the public on the notion that it is fine to give Alabama nursing homes virtual immunity from lawsuits. The advertising campaign should lead to a "truth-in-advertising bill" being passed by the Legislature. However, reports from around the state indicate one of the current ads may have backfired on the nursing home bosses. Usually hitting "below the belt" doesn't pay dividends, and I suspect that's the way the latest TV ads were viewed by the public. The fate of the nursing home bills may well depend on which group has the truth on their side. Based on the content of the nursing home owners' advertising, this isn't a close call.

### **Nursing Home Deficiencies Have Increased Since 1998**

The nursing home owners are claiming that nursing home care in Alabama

is in great shape. However, that assessment is far from factual. In March 2003, the Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services released a study confirming that nursing home deficiencies have increased since 1998. The study found that in 2001, 89% of nursing homes received at least one deficiency, an increase from 81% in 1998. All nursing homes participating in the Medicare and/or Medicaid program must meet certain federal requirements in order to continue participation in the programs. Certification is achieved through routine facility surveys conducted by state surveyors. When a nursing home fails to meet a specific requirement with regard to the care of its residents, the nursing home receives a deficiency citation. Thus, increases in the number of deficiencies that nursing homes accumulate are of particular concern because such an increase could indicate a decline in the quality of care offered to residents in those facilities.

In 2001, a total of 15,077 nursing homes were surveyed; only 1,690 nursing homes did not receive any deficiencies. The nursing homes surveyed received an average of 6.2 deficiencies, an increase from the average of 5.1 deficiencies in 1998. The study found that 78% of nursing homes received a deficiency in one of the categories related to "substandard quality of care." The proportion of nursing homes that received a deficiency in "quality of care" categories increased by 8 percentage points, from 70% in 1998 to 78% in 2001. The study noted a considerable increase in deficiencies related to resident assessment, pharmacy and dietary services. The largest increase was in the proportion of nursing homes that received a deficiency related to resident assessment. Federal regulations require that a nursing home must make a comprehensive assessment of a resident's needs within 14 days of that resident's admission to the facility, when

there is a significant change in the resident's physical or mental condition, and annually. Nursing facilities must also make a quarterly assessment of its residents.

The study also found a slight increase in the number of nursing homes receiving immediate jeopardy deficiencies. Immediate jeopardy is when death or serious injury actually or potentially occurs. According to the study, in 2001, the proportion of nursing facilities receiving an immediate jeopardy deficiency increased from 1.4% to 2.3%. The study also found a wide variation among states in the number of deficiencies that nursing homes received. According to the study, some states were more likely than others to cite deficiencies. The states with the highest deficiency rates were California, Arizona, and Nevada. The states with the lowest deficiency rates were Vermont, Virginia, and Rhode Island. The study identified several factors that contributed to variability in citing deficiencies across state agencies, including an inconsistent survey focus, unclear guidelines, the lack of a common review process for draft survey reports and high surveyor staff turnover.

Perhaps most interesting is the differing perceptions of nursing home care that the study yielded. Fifty-one state Survey and Certification Directors, 32 state surveyors and 32 nursing home administrators were surveyed regarding the quality of care in nursing facilities. The majority of state directors and state surveyors reported that quality of care had stayed the same or declined over the last 3 years. Nursing home administrators were more positive; 59% of nursing home administrators said that care had improved over the last 3 years.

### **Bedsores: Prevention Cost Compared To Treatment Cost**

One effect of the debate over the nursing home's immunity bills is to educate folks on the cause and effort of

bedsores, a most significant problem in nursing homes. Most Alabama citizens don't know what a bedsore is or what causes it. Bedsores are known by many names, such as decubiti, pressure sores, pressure ulcers, and dermal ulcers. No matter what one chooses to call them, they all achieve the same damaging effects. A bedsore happens when there is tissue damage stemming from the external application of intense pressure for a short-term period or low pressure for a long-term period. Bedsores usually develop over bony prominences of the body in such areas as the sacrum, hips, ankles, heels and toes. However, a bedsore can manifest in other body locations too, if there are improper conditions present. A bedsore may form over the cartilage of the ear and/or the dorsum of the head in a resident who lies excessively in one position on a moist surface. A bedsore also can form over the bony part of the cheekbone where a feeding or nasogastric tube has been too tightly secured without periodic repositioning. When a bedsore gets infected, it may lead to serious health problems, including death. Fortunately, bedsores can be prevented in most every case. However, residents in many Alabama nursing homes nonetheless develop bedsores.

Bedsore development is often associated with insufficient turning and poor body alignment while the resident is confined to a bed. Long periods of sitting in one position while in a chair also can cause such skin breakdown. Dehydration, malnutrition, continual skin wetting from lying in stool or urine, and skin abrasions from being dragged across rough bed sheets heighten the occurrence of bedsores. Proper nursing care is one of the fundamental interventions for the prevention and restoration of bedsores. As could be expected, the incident of bedsores in a nursing home population is highly correlated with low staffing levels. For many nursing home residents, the development of this potentially life-

threatening condition is considered as highly preventable, with proper nursing and medical care. Consequently, failure to anticipate and prevent bedsore development in a resident can reflect negligence by a nursing home, its staff, and attending physicians.

The combination of large numbers of nursing home residents who develop bedsores, coupled with the staggering costs of their treatment, is why more nursing homes are being accused of negligence. For example, the Agency for Health Care Policy and Research (AHCPR) reports that prevalence of bedsores in nursing homes is as high as 23%. In the National Long-Term Study, conducted by Bergstrom and Braden and published in 1992, noted that 35% of residents in skilled care institutions are reported to have developed bedsores. Accurate expenditures for treatment of bedsores are difficult to compute; however, all studies estimate that these figures are high. At the upper end of the range, according to a National Decubitus Foundation equation, additional costs related to the extended hospital stay of the average bedsore patient are \$50,976.00. Nationally, this translates into an annual expenditure of health funds amounting to over 55 billion dollars, and this is a conservative estimate according to the Foundation. The Merck Manual of Geriatrics places the additional cost per patient of bedsore care between \$2,000 and \$10,000. A 1996 study by Xakellis & Frantz of thirty nursing home patients revealed that treatment costs, including those of hospitalization, were almost \$3,000 greater per bedsore.

The above-mentioned statistics are additional costs to the care of a resident, which if treated properly in the first place would not have occurred. In order to promote profitability, many nursing homes cut staffing levels, which leads to staffing deficiencies and causes residents to suffer. Understaffing

in a facility results in an inability to properly care for all of the nursing home's residents. This often leads to residents lying or sitting for long periods of time in one position. As noted above, this situation causes bedsore problems. When the means necessary to prevent bedsores are not provided, the residents suffer. Consequently, the increased cost of treating bedsores is directly related to the decision by the owners of nursing homes to choose profits over resident care.

## IV. CONGRESSIONAL UPDATE

---

### The War Effort

With the successful war effort winding down, the Bush White House can now direct its attention to the massive economic problems in this country that have been largely ignored. Hopefully, the President will shelve his tax cut proposal due to the tremendous costs associated with the war and its aftermath. In the present climate, it simply doesn't make sense to give a tax cut to the rich and increase already high deficits to even more shocking levels. Our economy is "sick" and the "medicine" needed to cure it should not include a tax cut at this time. Without question, we will be facing tremendous post-war costs in Iraq in addition to what we have already expended on the war effort. Regardless of why we fought this war, our troops did a superb job. The American people supported the persons who fought this war and all of us should be very proud of their effort. Hopefully, our post-war presence in Iraq will go smoothly. Prospects for that happening, however, don't look overly promising at this juncture.

## **Tort Reform At A Most Inappropriate Time**

The waging of war didn't slow down the efforts by the "tort reformers" to continue their assault on the court system. Special interests continued to lobby members of the House and Senate, urging them to support all sorts of tort reform legislation. The major effort was in the medical malpractice arena. However, there is also a tremendous amount of other bad legislation pushed by the tort reformers that, if passed, would not be good for American citizens.

## **Need For A Patients' Bill Of Rights**

Instead of giving wrongdoers virtual immunity from lawsuits, Congress should pass the badly needed patients' bill of rights legislation. The hotly debated "patients bill of rights," which remains stalled in Congress, would have expanded patients' right to sue in disputes with health insurers. Opponents take the tort reform line and say the proposal would raise premiums and lead to lawsuits against employers over health care disputes. The issue has now moved into disability insurance. Disability policies offered through employers should come with a warning that certain constitutional rights are being taken. Over 150 million Americans are being duped into buying employment-based health and disability policies that strip them of all protections against fraudulent insurance practices by virtue of federal law. Clearly, state insurance commissioners should require such warnings. However, the insurance industry claims that very same federal law (ERISA) prevents commissioners from requiring a warning. A 1995 memo obtained in pending lawsuits clearly reveals that one large disability insurer used this law to their advantage. "The advantage of ERISA coverage in litigious situations are enor-

mous," a Unum Provident memo says, citing 12 claims that settled for \$7.8 million in total. "If these 12 cases had been covered by ERISA, our liability would have been between zero and \$0.5 million." Most folks believe that an insurance policy should pay off on legitimate claims. A policy that won't pay isn't worth the paper it was written on. That's not a very good policy no matter what the price. The disability insurance companies are currently hiding behind ERISA to avoid paying legitimate claims. Hopefully, the courts are beginning to recognize this and will protect persons who are being victimized. Without a doubt, Congress should step up to the plate and make absolutely sure that policyholders are protected. Congress should pass the Comprehensive Patients' Bill of Rights that is being pushed by the AARP and other consumer groups. Any further delay should not be tolerated. We should all urge our U.S. Senators and Members of the House to pass the patients' bill of rights.

## **V. COURT WATCH**

### **At Least One Doctor Now Believes Caps Are Wrong**

There has been a great deal of activity from the tort-reform camp pushing for caps or limitations on damages that can be awarded in lawsuits. It appears that groups pushing caps or restrictive limits on damages trust folks to do lots of important things, such as electing a President, Governors, and members of Congress, but don't trust the very same folks when they are asked to serve as jurors. A multi-billion dollar media and lobbying effort by Corporate America over the past 20 years had a single goal, and that was to destroy the civil justice system. During my time as a lawyer, I have found that most folks never expect to become a victim and have to

file a lawsuit. Once they do, however, their perspective always seems to change, as does their attitude about the jury system.

A tragic case arising in North Carolina gives a prime example of how persons who never expect to be victims feel when it is their "ox that is being gored." Dr. John Faulkner did not have the time or the inclination to rally at the North Carolina legislature with his medical colleagues last month. Unfortunately, the doctor's schedule was already full. The family physician had household chores and a daily routine created by having to deal with his five children. School, homework, lessons of all sorts, practices, and the like can surely keep a parent busy. In addition, as he has done for the past 10 months, Dr. Faulkner had to provide almost constant care for his wife. Mrs. Faulkner was the main reason he was not marching with the doctors to call for a cap on medical malpractice lawsuits. She was badly burned last June when a cauterizing tool ignited oxygen that was being pumped into her nose during a routine procedure in an operating room. Her upper lip was melted off, and her face, neck and chest suffered second- and third-degree burns that will require numerous reconstructive surgeries. After a three-week hospitalization, Mrs. Faulkner was released to begin a new life coping with constant pain, numbed by powerful medications. Her energy and normal drive were almost nil. The suffering and mental pain and anguish that go along with burn injuries to the face can be most difficult to deal with. To make matters worse, this mother is no longer able to care for her children, and that is very hard for her.

The Faulknors filed a lawsuit against Franklin Regional Medical Center, its corporate owner and the doctors who performed the medical procedure. Mrs. Faulkner's plight points out clearly why caps on non-economic damages are just plain wrong. Because she, at age 44, stayed at home, this wife and mother is not eligible for economic

damages calculated on lost earnings. Under the bill supported by the North Carolina doctors, the value of her pain and suffering would be \$250,000 or less. Here's what Dr. Faulkner had to say about putting caps on damages: "It's an insult. If you can cap my wife's pain and suffering, we'd be delighted. But until you can cap my wife's pain and suffering, you shouldn't cap what it's worth. That's for a jury to decide." He was "dismayed that doctors have chosen to fight medical malpractice insurance rates by attacking the rights of patients injured by neglect or error." He further makes the point that the malpractice insurance industry stands to gain, while patients lose. In this regard, this doctor, who now finds himself a victim, said: "It seems to us to be thoughtless and cruel. This is not the kind of behavior you would expect from physicians who, by their very nature, should be the patient's advocate. We know that the insurance companies don't care about the patients. They answer to Wall Street. The question is, who is really behind this?" That is a question that requires an answer before caps on damages are imposed on people—whether they live in North Carolina or Alabama.

### **Judge Approves Unborn Child's Estate As Plaintiff In Lawsuit**

An Alabama judge has cleared the way for the estate of an unborn child killed along with her mother in a traffic accident to be a plaintiff in a wrongful death lawsuit. The parents of the child's mother requested that the Probate Court in Baldwin County give them the legal right to sue on behalf of both victims. Currently, Alabama law allows the father or mother of a deceased fetus to file a lawsuit. However, in this case, the mother was killed and the father is unknown. So the question was whether another family member could be appointed legal representation for the deceased fetus. The probate judge

appointed administrators of the two estates, which opens the door for a novel lawsuit to be filed. The deceased mother was only weeks away from her due date when she was killed.

The Alabama Supreme Court recognized the right to collect damages on behalf of an unborn child in a 1974 case. In 1993, however, the state high court limited such civil actions to unborn children who had reached the point of viability. A statement from the deceased woman's doctor, saying that the pregnancy was proceeding normally and had reached the time when the baby could live outside the womb, was presented to the Probate Court in this new case from Baldwin County. It is expected that the administrator of the estate will now file a wrongful death lawsuit. A challenge to the right of the administrator to file the case is expected from the alleged wrongdoer's lawyers, who will claim the administrator lacks legal standing to sue.

### **Supreme Court Sets Limits On Size Of Damage Awards**

The U.S. Supreme Court has set new limits on punitive damages in its latest ruling in the long-running effort to shield corporate defendants from jury awards. The Court has wrestled with the punitive damages issue for about 20 years. While this decision in favor of the State Farm Insurance Company went beyond recent rulings in this case, how far or how restrictive the Court's opinion will prove to be is subject to debate. The Court's declaration that juries should generally not be permitted to consider a defendant's wealth when setting a punitive damage award was somewhat of a surprise. While the practice is common, the Court had not previously addressed it in a majority opinion. "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," Justice Anthony M. Kennedy wrote for the majority of the Court.

The Court overturned \$145 million in punitive damages that a Utah jury awarded against State Farm. The Utah Supreme Court has upheld the verdict. The jury had awarded only \$1 million in compensatory damages to a Utah couple, State Farm policyholders, who sued the company for its refusal to settle a claim and for exposing them to personal liability beyond the limits of their policy for a car accident in which a jury found the husband liable. State Farm eventually paid the claim. The ratio of 145 to 1 resulted in a damage award that was "neither reasonable nor proportionate to the wrong committed," according to the Court. In a dissenting opinion, Justice Ruth Bader Ginsburg objected that the Court had "arrogated to itself a task best left to state Courts and state legislatures." She called the Court "boldly out of order."

Justices Antonin Scalia and Clarence Thomas also dissented in separate opinions, citing their views expressed in earlier cases that the Constitution's due process guarantee simply does not apply in the context of punitive damages. The three dissenters had also dissented in the infamous BMW punitive damages ruling. Chief Justice William H. Rehnquist, who had dissented in the BMW case, changed sides, joining Justice Kennedy's majority opinion along with Justices John Paul Stevens, Sandra Day O'Connor, David H. Souter and Stephen G. Breyer.

State Farm's appeal presented a number of issues. The Court held that the punitive damage award failed to meet any of the guidelines the Court set in the 1996 case for evaluating such awards. The BMW decision had not set a particular ratio between punitive and compensatory damages that would be acceptable, but suggested that 4:1 would be a reasonable maximum in most cases. In this case, however, it is unclear exactly where the Court would draw the line. It appears that the higher the compensatory damages, the smaller the acceptable ratio will be. The part of

the opinion dealing with that issue drew a sharp response from Justice Ginsburg, who felt that such line drawing “could hardly be questioned” if done by a Legislature or a State Supreme Court. However, she said it was “boldly out of order” when done by the United States Supreme Court and imposed on the states. Her opinion included a discussion of State Farm’s business practices that was much worse and more unflattering than the description of the case history contained in the majority opinion. The State Farm decision was undoubtedly not the Court’s last word on punitive damages. Several times, Justice Kennedy noted the Court was dealing with a case in which only economic, and not physical, harm had occurred, suggesting the Court might make a more generous allowance for punitive damages in product liability cases involving injury or death.

A very good “commentary” on the effort of this decision is found in the April issue of *Business Week*. It was pointed out that “punitive damages are levied only in about 2% of all cases. In the vast majority where they are applied, they (punitive damages) don’t even approach the 9-1 guideline put forth in State Farm.” It was pointed out that in personal injury cases and cases involving “reprehensible” conduct, the ratio could be higher.

### **Another Interesting Development From the Court**

The U.S. Supreme Court has denied certiorari in the Six Flags Over Georgia Theme Park case. Time Warner Entertainment Company will now have to pay the Plaintiffs \$257 million in punitive damages. The high court’s refusal to hear Time Warner’s appeal of the punitive award will result in the largest civil jury verdict in Georgia history being paid. The jury had originally awarded \$197 million in compensatory damages in addition to the punitive

award. Investors had claimed in the case that Time Warner short-changed the park on capital investment, by lowering the sale value. As a matter of interest, Ted Turner had testified for Time Warner at trial. It is significant that additional briefs were filed in the U.S. Supreme Court in this case after the high court handed down the State Farm case referred to above.

### **Support For The Alabama Attorney General**

Attorney General Bill Pryor has been nominated by President Bush to fill a vacancy on the U.S. Court of Appeals for the Eleventh Circuit. On March 25th I wrote U.S. Senators Richard Shelby and Jeff Sessions in support of the Attorney General’s nomination. I have been told that my support of the Attorney General came as a surprise to some political observers in Montgomery. Whether that is true or not, I am convinced that my support is well-founded. While the Attorney General and I come from different political parties and have disagreed on a number of issues, I have tremendous respect for him personally and believe that he has served the state well as Attorney General. Certainly, I would have done several things differently, but that alone does not keep me from supporting his nomination. Bill Pryor is extremely bright and is widely recognized as a real student of the law. More importantly, his character is beyond reproach and that is where a judge search should start. In my opinion, he will be fair and judicious if he is confirmed by the U.S. Senate. One of the primary reasons for my support for Bill Pryor is the fact that he is a family man who has strong moral beliefs. In my opinion, that is most important and is a major plus for him. Hopefully, Senate confirmation will not be a problem. Since I believe he will follow the law, I am convinced that Bill Pryor will be a good judge if given the opportunity.

Actually, he has the ability and experience to be outstanding if he will simply follow the law.

## **VI. THE NATIONAL SCENE**

---

### **Doing Business With The Enemy**

The Office of Foreign Assets Control (OFAC) has released a list of 54 settlements by corporations charged with violating Trading With the Enemy laws. These companies include ChevronTexaco trading with Iraq; Caterpillar, Wal-Mart, and ESPN dealing with Cuba; ExxonMobil and Wells Fargo Bank trading with Sudan; and Union Bank of California and Fleet Bank with Iran. Because OFAC chose not to release the enforcement memoranda, the details of the settlements were not available at press time. Interestingly, there was no settlement date or summary explanation of the alleged violations contained in the OFAC release. Hopefully, we will have more information for the June issue.

### **Reality TV**

Commercial television is so bad that it is dangerous to allow small children to watch many of the shows. There is a new type of programming that is attracting a great number of viewers. I haven’t watched the first show of what is being referred to as “Reality TV,” and that obviously puts me in a very small minority of American citizens. Obviously, the television networks believe they have hit on a winning formula in “Reality TV.” Many observers believe this new format crosses the line from entertainment to abuse. It is fairly inexpensive to produce these shows, and the more shocking and gross they are, the better. I understand that the producers of the shows quite often do

some pretty “sorry” things of a shocking nature in order to sell their product. For example, when a “reality” television show places a bloody corpse in a couple’s hotel bathroom, then interrogates them as if they’re suspects in a murder, that is going much too far. Another incident involved a fake security guard at a busy airport forcing a passenger through an airport luggage X-ray machine, leaving him battered and bleeding. A third “sick” episode was when a “performer” on stage actually defecated on a front-row audience member. These are just a sampling of incidents that have resulted in lawsuits in recent months. As “Reality TV” shows grow in number, more lawsuits will be filed. Increased competition will also make it tougher to attract viewers. The economics of “Reality TV” makes its growing presence virtually inevitable. No professional actors or writers are required. Some of the shows involve contestants who push themselves to extremes for viewers on the outside chance they might win a cash prize. Oftentimes, it is a competitive sort of setting. I predict there will be a marked increase of lawsuits. There are several possible causes of action, including intentional infliction of emotional distress, negligence, wantonness, and false imprisonment.

In my opinion, the producers are engaging in behavior of a most disgusting nature. As “Reality TV” shows compete for viewers, these producers will create even more extreme situations. This will result in more people who will be willing to sue. In fact, the content of these shows pretty much guarantees that there will be lawsuits. A trend has started that is pretty bad. What the producers of the shows try to do is something that almost, but not quite, gets them into legal problems. Based on ratings, the shows that will be most successful are the ones that push the envelope and are the most outrageous ones. These are lawsuits waiting to happen. Simply put, TV shows that are designed

to humiliate people, make them look horrible in some way, or hurt them physically or emotionally, are asking for lawsuits. Frankly, the American people—and especially our children and grandchildren—would be better off if TV sets were restricted to G-rated shows. If that were possible, it would certainly do away with “Reality TV” shows.

Oftentimes, the people who are being victimized have no idea they are being filmed. These people are placed in embarrassing or outrageous situations without their consent. As “Reality TV” continues to push the envelope of acceptable behavior, victims are being forced to file lawsuits. It’s the outrageous nature of these setups that distinguish current reality TV from the original version of shows such as “Candid Camera” that originally aired more than 40 years ago. There’s another troubling aspect to these programs—and one that does not portend well for people hoping to kill them off, and that is TV producers may actually want the publicity generated by a lawsuit. Ironically, lawsuits can actually be beneficial to the promotional departments of these shows. I would encourage persons who watch TV on a regular basis to do three things: (1) don’t watch the shows; (2) write the TV networks and express your opposition to the shows; and (3) don’t buy products from companies that advertise on the shows.

### **A Look At How Some CEOs Are Doing**

With the sick economy and the escalating corporate scandals that have rocked our country, one would expect that the CEOs of the major corporations would be feeling some of the hurt. To the contrary, the compensation of these CEOs hasn’t slowed down a bit. SEC Chairman William Donaldson, who earned \$18.7 million three years ago as Chairman of Aetna Inc., is now calling for corporate boards to rein in pay

packages and perks for top executives. The new SEC chief became Chairman of Aetna, the biggest U.S. health insurer, in February 2000. He was given \$1 million in salary in 2000 along with a \$6 million bonus, \$5.6 million in restricted stock, \$50,000 in other compensation, and stock options that the company valued at \$6 million at the time of the grant. This can be documented by looking at Aetna’s SEC filings.

So now let’s take a look at how some of the current corporate bosses are doing. It is rather shocking that those at the top of the corporate world have not shared in the losses that their investors and employees suffered. Instead, those at the top have continued to enjoy massive salaries, bonuses and perks unrelated to performance. It is difficult to justify how companies that are doing so “poorly” can pay their top officers so well. It is even more difficult to understand where corporate executives have been guilty of gross wrongdoing. In any event, while most stockholders have suffered tremendous economic losses, the good times still roll for many corporate bosses. Nobody can dispute that Corporate America has been tarnished by high-profile scandals, fraud, and executive wrongdoing. Unfortunately, the incidences of wrongdoing continue to mount. The national economy is sputtering with diminished corporate profits.

However, when it came to pain and suffering — at least pay-wise — most CEOs barely felt the country’s economic pain last year. CEOs running 100 of the biggest companies in the country pulled in median 2002 compensation of \$33.4 million, essentially unchanged from 2001, based on an exclusive database analysis by USA TODAY and the Investor Responsibility Research Center, a corporate-governance watchdog. The analysis includes salaries, bonuses, incentive pay, stock awards, gains from exercising stock options and the potential value of stock-option grants. Based on this study,

CEO salaries and bonuses surged 15% in a year when salaries for rank-and-file workers suffered. There is also a very good article on executive pay in the April issue of *Business Week*.

The following are some examples of how some of the CEOs fared. MBNA, the credit card giant, reported that Alfred Lerner had pulled in compensation valued at more than \$250 million last year. Oracle's Larry Ellison reaped stock-option gains of \$706 million in 2001. I wonder how this company's shareholders feel about this? Tenet Healthcare's Jeff Barbakow pulled in nearly \$190 million. Dwight Schar of homebuilder NVR had a compensation package of \$219 million. Of course, Alabamians know about HealthSouth and its now infamous CEO, Richard Scrushy. Mr. Scrushy will pay taxes of between \$12 million and \$20 million this year, which indicates that he was doing pretty well living at the corporate trough.

Stockholders at most companies where CEOs exercised options generally suffered. While Sun Microsystems' stock sank 68%, Scott McNealy's stock holdings realized a \$25 million gain from exercise of options. Wireless communications marketer Qualcomm's stock was down about 40%, but Irwin Jacobs gained \$61.4 million by exercising options. He also received a 33% increase in his bonus. Additionally, options worth up to \$36 million "in consideration of his leadership," were granted by the company. While Walt Disney shares lost 19% in fiscal 2002 and are off 60% since 2000, Michael Eisner received a \$5 million bonus. This bonus was granted, according to the entertainment giant's board, because of "the effectiveness and quality of leadership in a difficult economic environment that challenged all of the company's major businesses." Too bad for Disney's stockholders who have lost money. Semiconductor maker Texas Instruments shares have slumped 80% since early 2000—about 40% in

2002 alone. Yet during the past three years, its board has granted CEO Tom Engibous stock options worth about \$142 million. This total includes a 2002 grant valued at \$44 million. The fact that Apple Computer shares plunged over 80% during its fiscal year, didn't keep Apple directors from agreeing to swap Steven Jobs' 27.5 million worthless options for 5 million restricted shares, valued at about \$75 million. Until the award, Mr. Jobs held just two shares of company stock. The restricted shares come under a new board-approved "retention and incentive program."

This list of corporations that have taken good care of the big bosses while their stockholders suffered could be much larger. I suggest you take a look at the list set out in *Business Week*. You will find several CEOs listed whose companies include Tyco International, Sun Microsystems, and Tenant Healthcare. Even in good economic times, the compensation of the CEOs would be excessive. Suffice it to say—this sort of thing "smells to high heaven" when you consider that we have a bad economy coupled with the massive corporate scandals.

### **A Little Known Board With Great Influence**

Most American citizens have never even heard of the Defense Policy Board. I would be less than candid if I didn't confess that I first learned of the Board's existence during the Iraq War. There are 30 members of this board, which is the government-appointed group that advises the Pentagon. At least nine of the 30 have ties to companies that have won more than \$76 billion in defense contracts in 2001 and 2002. Four members are registered lobbyists, one of whom represents two of the three largest defense contractors. Richard Perle, the board's chairman, resigned on March 27, 2003, amid allegations of conflicts of interest for his

representation of companies with business before the Defense Department. However, Mr. Perle hasn't completely lost his influence since he will remain a member of the board. Eight of Perle's colleagues on the board have ties to companies with significant contracts from the Pentagon. While members of the board disclose their business interests annually to the Pentagon, the disclosures are not made available to the public. The forms are filed with the Standards of Conduct Office, which is supposed to review the filings to make sure they are in compliance with government ethics. For some reason, that doesn't do much for me.

The companies with ties to Defense Policy Board members include prominent firms like Boeing, TRW, Northrop Grumman, Lockheed Martin and Booz Allen Hamilton. There are also smaller players like Symantec Corp., Technology Strategies and Alliance Corp., and Polycom Inc. Most citizens have very little information or knowledge about defense contracts. Defense companies are awarded contracts for numerous reasons. Clearly, there is nothing to indicate that simply serving on the Defense Policy Board confers a decisive advantage to firms with which a member is associated. According to its charter, the Board was set up in 1985 to provide the Secretary of Defense "with independent, informed advice and opinion concerning major matters of defense policy." The members are selected by and report to the Under Secretary of Defense for Policy. All members are approved by the Secretary of Defense. The Board's quarterly meetings—normally held over a two-day period—are classified, and each session's proceedings are summarized for the Defense Secretary. The board does not write reports or vote on issues. Notices of the meetings are filed at least 15 days before they are held in the Federal Register.

The current list of Board members reads like a who's who of former high-level government and military officials.

The Board focuses on long-term policy issues such as the strategic implications of defense policies and tactical considerations, including what types of weapons the military should develop. Some observers believe the Board is just another public relations shop for Secretary of Defense, Donald Rumsfeld. The character of the Board is said to have changed under Rumsfeld. Previously, the Board was felt to be more bipartisan. Under Rumsfeld, however, it has become more interested in policy changes, even though the Board has no official role in policy decisions.

If nothing else, it is very clear that Defense Policy Board members with ties to companies that do business with the Defense Department are great in number. For example, the Board now includes a former chairman of the Joint Chiefs of Staff who served over 38 years in the Navy (a director or advisor of at least five corporations that received more than \$10 billion in Pentagon contracts in 2002); a retired Air Force General (sits on the board of directors of companies that received more than \$900 million in contracts in 2002); a retired General who served 35 years in the U.S. Marine Corp. (joined Bechtel in 1998); a former CIA director (a principal in the Paladin Capital Group, a venture-capital firm that is soliciting investment for homeland security firms); a former high-level military officer who served as vice chairman of the Joint Chiefs of Staff (sits on boards of five companies that received more than \$60 million in defense contracts last year); a former Secretary of Defense; and a former CIA director, who also served as energy secretary in two separate Administrations (ties to defense contractors). There are also four registered lobbyists who serve on the Board. Unfortunately, there is nothing unusual about this sort of thing in our nation's capitol and that may well be part of our country's problems. I guess it is better that the average citizen not know how our national government really "operates."

## **Halliburton Subsidiary Awarded \$7 Billion Iraq Contract**

A government contract awarded without competition to a Halliburton Co. subsidiary to fight oil well fires in Iraq will be worth at least \$7 billion over two years. I guess that is what we would refer to as a "no bid contract" in Alabama. The contract will also allow Halliburton subsidiary KBR, a politically-connected engineering and construction company, to earn another 7% in profit, valued at \$490 million. The Corps of Engineers released the details in response to a congressional inquiry. A Congressional investigation has been requested into how the Bush Administration is awarding contracts for the reconstruction of Iraq. These contracts are conservatively estimated to cost as much as \$100 billion. The General Accounting Office, the investigative arm of Congress, is being asked to determine whether Vice President Dick Cheney's former company may have received favorable treatment in their Pentagon contracts. Surely, it was just a coincidence that Cheney's company was picked to help rebuild Iraq even before the shooting started.

Lieutenant General Robert B. Flowers, the Corps of Engineers commander, said in a letter that KBR was asked to develop plans to restore Iraq's oil infrastructure based on an existing contract with the company that was awarded in December 2001. I suspect there are other companies capable of performing this project that could pass requisite security clearances if given the opportunity. Surely, the Bush Administration had valid reasons for granting a contract of this sort without competition. However, I have to wonder what the rationale was for a "sole-source contract" that has a "multi-year duration" and a "multibillion dollar price tag." Details on how the cost of the work was determined and when the Army would replace the contract

with one awarded through competition are things that should be made available to members of Congress. Federal procurement data reveals the government has awarded KBR work worth more than \$624 million from October 2000 through March 2002.

There had been previous problems with KBR, including overcharges. For example, the GAO found in 1997 that the company billed the Army for questionable expenses for work in the Balkans. This included charges of \$85.98 per sheet of plywood that cost \$14.06. I know lots of lumber dealers in Alabama who would sure like to sell top grade plywood for \$85.98 per sheet. Another example involves more work in the same Balkans' project. A year 2000 follow-up report on the Balkans work that found inflated costs. For example, there were charges for cleaning some offices up to four times a day. There were \$2 million in fines paid by KBR in February of 2002 to resolve fraud claims involving work at Fort Ord, California. The Defense Department inspector general and a federal grand jury had investigated allegations by a former employee that KBR defrauded the government to the tune of millions of dollars by inflating prices for repairs and maintenance. As you may recall, the Securities and Exchange Commission began a formal investigation in December into Halliburton's accounting practices. An accounting change made in 1998, during Cheney's tenure as CEO, was the focus of this investigation. To avoid the appearance of favoritism, the Vice President's company should back off and allow this contract to be opened up for competition.

## VII. CORPORATE WRONGDOING

---

### **HealthSouth Lawsuit**

Less than a week after The Securities and Exchange Commission temporarily suspended trading in the securities of HealthSouth Corporation, our firm filed the first of several securities fraud lawsuits against the Birmingham-based company and CEO Richard Scrushy. The first complaint alleges numerous serious violations of federal securities laws, including the issuing of false financial statements. Both the company and Scrushy are accused of civil fraud. HealthSouth is accused of intentionally and falsely inflating its financial position on orders from Scrushy to make it appear the company was meeting or exceeding Wall Street expectations. This is another case where a giant corporation appears to have lied to both the Government and the public. While Scrushy and others profited, investors suffered tremendous financial losses as a result of the numerous acts of fraudulent conduct. Mr. Scrushy has personally profited from the fraudulent scheme he allegedly put in place to artificially inflate both the earnings and assets of the company. The CEO is said to have known that HealthSouth's financial statements were false and greatly overstated the company's operating results. Our clients were victims of this corporate giant and its greedy CEO.

This case is just another example of how some in Corporate America appear to believe they can lie, cheat, and steal and not have to pay the consequences. In every such case innocent people are victimized. HealthSouth is the one of the nation's largest health-care providers, operating 1,700 facilities in the United States, Britain, Australia, Canada, Puerto Rico and Saudi Arabia. The lawsuit, only the first of what likely will be thousands of civil

cases, was filed in the Circuit Court in Montgomery County, Alabama. Rhon Jones, who heads up our Business Litigation Section, will be the lead lawyer for the firm. In addition, other lawsuits will be filed very soon. Other individuals and companies will be added as defendants as our investigation of this matter goes forward.

### **Congress Gets Into The Act**

Congress has now gotten into the HealthSouth debacle by launching its own investigation. Late last month, thousands of documents were requested of the company and its former auditor, Ernest & Young. Hearings are expected this summer before a House Committee. This does not bode well for the corporation, Mr. Scrushy, and perhaps other potential defendants.

### **HealthSouth Cases Test For New Business Rules**

For years, corporate executives have sworn their company's books are accurate and complete. With all of the corporate scandals, however, things have changed. Shouldn't the big bosses be held responsible when the numbers don't add up? The accounting fraud investigation of HealthSouth is the first time the government has used false-certification criminal charges. The new rules were adopted last summer and the outcome of the Scrushy case could signify whether the law has real teeth. While regulators have already gotten a number of HealthSouth executives to admit to the fraud, they now must prove Richard Scrushy, founder and chief executive, knowingly lied under oath when he signed off on the company's finances. The company has subsequently fired Scrushy as his fellow officers line up to enter guilty pleas. At last count, 10 top officers have admitted to their part in the corporate wrongdoing.

### **A Look At The New Law**

Making executives certify their company's finances started last summer after the rash of accounting scandals rocked the business world. By making them personally accountable, it was believed that the bosses no longer could blame the company's auditors or plead unfamiliarity with its finances. All the executive misbehavior has clearly caused a great deal of mistrust in Corporate America. The Securities and Exchange Commission ordered CEOs and CFOs from 947 of the nation's largest public companies to sign sworn statements that their earnings for the previous two quarters of 2002 and their annual reports for their most recent fiscal year were accurate and complete. The Sarbanes-Oxley Corporate Reform Act, passed by Congress, provided steep fines and penalties - up to \$5 million and 20 years in prison - for executives who knowingly certified fraudulent financial statements. The Act also extended certification to all public companies going forward. While a few executives held off on certifying last summer because they had identified some problems with their company's finances, most leaders apparently signed off on the statements. The certifications that the executives had to sign required them to swear that the finances were legitimate "to the best of my knowledge." Surely, their friends in Congress didn't leave the CEOs a loophole in the law by including this language.

### **Scrushy, HealthSouth Get Spot On Scandal Site**

Richard Scrushy now finds his name on a corporate scandal Web page. The Corporate Library, a research group, recently added Scrushy and HealthSouth to its corporate scandal quick sheet at [www.thecorporatelibrary.com](http://www.thecorporatelibrary.com). The online list features fallen leaders such as former Kmart CEO Charles

Conaway, former Tyco CEO Dennis Kozlowski, former Worldcom CEO Bernard Ebbers and former Enron CEO Kenneth Lay. Each listing includes a summary of the company's downfall, regardless of the reason, and includes a memorable quote from the CEO. Scrushy's quote, appearing from the company's 2001 annual report, says: "In 2001, we set new records as we pushed our revenues well over \$4.3 billion and celebrated another year of fulfilling Wall Street expectations, maintaining our record as the Fortune 500 company with the second-longest streak for meeting or exceeding analysts' expectations." Scrushy's downfall can be tied directly to plain old greed and arrogance. However, I have to wonder why the government is treating Scrushy differently from Kenneth Lay—could it be that Mr. Lay has political friends in high places?

### **Where Are The Enron Big Bosses Now?**

Kenneth Lay, or "Kenny Boy" as he was referred to by a former Texas Governor, was once called a most brilliant man. In the fall of 2001, Fortune magazine had planned a cover story with the former Enron chairman in a group photo touting "the smartest people we know." When the Enron scandal erupted, Lay was quickly pulled from the cover. Since that time, "Kenny Boy" has been Enron's invisible man. For anyone concerned with restoring credibility to corporate governance reforms, the lack of news about Mr. Lay's role in Enron's collapse is troubling to say the least. Last year, former Enron chief financial officer Andy Fastow was indicted on 78 counts of fraud, money laundering and obstruction of justice. A few weeks earlier, former Enron executive Michael Kopper pleaded guilty to conspiracy to commit wire fraud and money laundering in connection with self-dealing transactions. The former head of Enron's California energy

trading operation, Timothy Belden, pleaded guilty to conspiracy to submit false information to California power authorities. Last month, two more midlevel Enron employees, Kevin Howard and Michael Krautz, were charged with securities fraud, wire fraud and lying to investigators stemming from activities of Enron's broadband unit.

While there has been a great deal said about prosecuting corporate criminals, the high-ranking executives who became the public faces of the Enron debacle, former CEO Jeffrey Skilling and Mr. Lay, haven't been called before a criminal court judge, to my knowledge. It may be that federal investigators are having difficulty connecting the dots to determine whether either man engaged in criminal activities. Admittedly, the Enron scandal was a most complicated "house of cards." What these men knew and when they knew it are among a number of unanswered questions that continue to hang like a dark cloud over the credibility of corporate reform. While it is important that investors, the Securities and Exchange Commission, and others pursue civil actions against Enron and offending officers, it appears to be critical that federal authorities pursue legitimate criminal cases. President Bush promised last year that corporate wrongdoers would be swiftly punished. Unfortunately, that promise will ring hollow as long as a legal void fosters a perception, rightly or wrongly, that Enron's top management is getting a pass.

### **Settlement Of Lucent Technologies Securities Class Action Litigation**

In late March, an agreement was reached to settle the Lucent Technologies Inc. securities class action lawsuit pending in U.S. District Court for the District of New Jersey. At the same time, Lucent settled related ERISA, bondholder, derivative and state securities cases. Under the global agreement,

Lucent will pay \$315 million in common stock, cash or a combination of both, at the company's option. Lucent will also pay up to \$5 million for the cost of settlement administration. Additionally, Lucent will issue 200 million warrants to purchase shares of common stock based on a valuation using a strike price of \$2.75 with a 3 year expiration term. In addition to the cash, stock and warrants that Lucent will contribute, certain of Lucent's insurance carriers have agreed to pay \$148 million in cash into the total settlement fund. Lucent spinoff Avaya will also contribute \$26.5 million in cash or stock plus a percentage of the valuation of the warrants that will be issued.

The vast majority of this global settlement fund will be used to compensate persons who purchased Lucent stock during the class period of October 26, 1999 to December 20, 2000. The balance will be paid to claimants in the various related cases. The Parnassus Fund, which is a mutual fund, was selected by the District Court in 2001 to be a co-lead plaintiff in this lawsuit. It is most significant that, even with the substantial amount of the settlement fund, Lucent investors will only recover a portion of their losses. The settlement ends complex litigation that has been ongoing for a number of years, but it will leave persons who lost heavily in their investments with little to show for their efforts. In my opinion, this company, its officers, directors, and accounting firm should be totally responsible for all losses. Brokerage houses should also have reason to be concerned as a result of their continuing to push purchases of Lucent stock by their customers long after warning signs were on the horizon. It is quite obvious that uninformed investors were put into this stock, and I suspect the brokerage houses failed to check this company out adequately or to follow up on leads. Many of the brokers were riding the crest of a wave that had to fall dramatically and failed to take that into account.

## Multi-Million Dollar Settlement By Drugmakers On Medicaid Overcharges

Drugmakers Bayer® AG and Glaxo-SmithKline have each agreed to pay a multi-million dollar Medicaid abuse settlement to resolve allegations they overcharged the government insurance program for the poor. According to media reports, Bayer® will pay the government \$251 million and Glaxo will pay about \$87 million for failing to give Medicaid the lowest price charged to any consumer. Bayer® has confirmed the settlement. The U.S. Attorney's office in Boston and Medicaid fraud investigators around the country handled this case. Bayer® has set aside \$257 million to cover the costs of the settlement. The settlement was announced by prosecutors in Boston. In addition, Bayer will pay a criminal violation fine of \$5.5 million.

The Boston Globe reported that Bayer® was pleading guilty to violating the Federal Prescription Drug Marketing Act for overcharges involving Cipro (antibiotic) and Adalat (high blood pressure drug). Glaxo, which was not accused of criminal wrongdoing, is paying a civil fine for overcharges involving Paxil (anti-depressant) and Flonase (nasal allergy spray). The investigation focused on allegations that the companies hid their lowest prices from Medicaid by repackaging or relabeling their drugs under a middleman's name. The middleman then sold the drug at a deep discount not reported to the government. By law, the companies are required to report all their prices and then pay Medicaid a rebate if they charge anyone less than the government. Glaxo agreed to an \$87.6 million settlement on these charges.

This fraud involved the "Medicaid Best Price Statute." In substance, the companies failed to give the Medicaid program the lowest price charged to any customer, as required by law. "The government and the Medicaid program

depends upon the honesty of the companies in truly offering the lower prices, and here two companies have been found wanting," according to Dr. Peter Lurie, deputy director of Public Citizen's Health Research Group in Washington D.C. In this regard, Dr. Lurie added: "It's a very significant fine, and I do think [it] sends a message that hopefully will be heard by other companies that these kinds of practices are unacceptable. If Medicaid can't get a decent price, who can?" he added. "It's an enormous payer with tens of millions of subscribers."

This is one of the largest Medicaid abuse settlements in US history. The two drug companies clearly overcharged the government insurance program, and that can't be allowed. All 50 states will share the settlement money. This was a whistleblower case. Federal officials were alerted to the alleged fraud by Bayer®. The whistleblower will get a portion of the settlement. The Medicaid program is a shared federal and state program to provide health insurance to the poor. The settlement comes as state and federal prosecutors nationwide are investigating drug pricing and sales tactics by dozens of pharmaceutical companies that they allege have defrauded the public to the tune of billions of dollars and who have driven up the nation's Medicare and Medicaid bills.

In the fall of 2001, federal prosecutors in Boston won a record \$885 million settlement from TAP Pharmaceutical Products in a combined criminal and civil case that alleged the company inflated the price of Lupron, the top-selling drug for prostate cancer. TAP officials were indicted and are awaiting trial on charges of giving kickbacks to doctors to induce them to prescribe Lupron. Some 20 lawsuits filed against two dozen pharmaceutical companies by citizens and states across the country have been consolidated into one case before a federal judge in Boston. The suit alleges that the compa-

nies inflated the prices the government paid for prescriptions for the elderly and disabled through the Medicare and Medicaid programs.

## VIII. ARBITRATION UPDATE

---

### Very Little New To Report

There have been few significant changes in the arbitration fight over the past month. Alabama courts continue to struggle with the issue. Nationally, people have been awakened to the evils of arbitration. Thus far, however, few politicians have come to their rescue. Anyone who doubts that mandatory, binding arbitration isn't a part of the tort reform master plan has been on another planet for the past few years. Never in the history of American jurisprudence has a federal law been so abused and used for purposes never intended by Congress. For those who have never read the U.S. Constitution, this is what our forefathers had to say about the sacred right to a jury trial:

#### AMENDMENT VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

I don't know how the Constitution could be any clearer. No citizen should be forced to give up a constitutional right. Prisoners certainly don't. We go to extreme lengths to make sure that a criminal's rights are protected. I have to wonder why in a civil action some feel differently about the Constitution.

## **A Good Ruling From The Alabama State Bar**

There was one development, however, that is certainly worth mentioning. An extremely important opinion was released by the Alabama Office of General Counsel regarding the use of arbitration agreements in lawyer-client fee contracts. In resolving the issue, the Office of General Counsel referred to the Alabama Rules of Professional Conduct, Rule 1-8(h). The opinion went on to say, however, that by signing an arbitration agreement, a client would be giving up constitutionally guaranteed rights, stating:

“The fact that binding arbitration denies the client adjudicatory rights afforded by the United States Constitution, the Alabama Constitution, and state law, constitutes, in the opinion of the Disciplinary Commission, a limitation on the lawyer’s liability to a client for malpractice.”

In my opinion, this is an outstanding ruling on a most sensitive subject. I commend the State Bar for taking the proper action. I do not believe that a lawyer should ever attempt to put an arbitration agreement in a contract with a client. The above referenced opinion now makes it quite clear that it cannot be done.

## **IX. PRODUCT LIABILITY UPDATE**

### **Fraud Suit Revived Against Ford Motor Company**

The South Carolina Supreme Court has revived a lawsuit that charges Ford Motor Company with fraud in its defense of Ford Bronco II rollover claims. The Environmental Working Group, a Washington-based environ-

mental research group, says it will ask the U.S. Justice Department to open a criminal probe of Ford’s actions in defending rollover claims against the Bronco II and the Econoline 350 van. The lawsuit alleges that Ford committed “fraud upon the court” in a 1993 trial by having company lawyers conceal damaging documents and by paying a former Ford engineer and designer to give false testimony as an expert witness about the Bronco II. We have previously reported on this situation several months ago. The complaint also alleges that Ford’s lawyer concealed a company memo “acknowledging jacking, stability, and design problems with the Bronco II.” This case will be watched closely as it goes back to the trial court.

### **Car Safety Groups Challenge NHTSA**

A quintet of automotive safety groups accused the National Highway Traffic Safety Administration of becoming a “toothless tiger” that was unwilling to properly perform its enforcement role in automotive safety investigations. Led by the Washington-based Center for Auto Safety, the groups complained to NHTSA Administrator Jeffrey Runge that his agency recently stopped publishing its monthly list of “defect investigations,” which told consumers about car and truck models that were being investigated and for what reasons. NHTSA still orders vehicle recalls, but the groups want the investigation list reinstated.

### **Sweeping Civil Justice Legislation Is Anti-Consumer**

As this issue of the Report goes to the printer, it is quite clear that the rights of consumers are being attacked both in Congress and in state legislatures throughout the country at an alarming rate. Enormous handouts to

corporations, including product manufacturers, are being doled out. The “tort reform” efforts are anti-consumer and, if successful, will dramatically undermine the legal landscape in this country. Unfortunately, the suggestions of business lobbyists are being accepted by many in the media without any attempt to balance the concerns of business with the safety and health interests of consumers. The influence of industry lobbyists in Washington and in the state legislatures is as strong as “old snuff.”

Change are being proposed in several states’ product liability laws that would limit manufacturers’ liability for products that injure or kill people if those products comply with federal safety standards. It should be noted that these are nothing more than minimum standards. Clearly, regulatory standards alone are not sufficient to guarantee the manufacture of safe products. These federal safety rules, setting minimum thresholds in many instances, remain unchanged for long periods of time. These standards don’t reflect the capability of a manufacturer to make a product safer because they apply industry-wide.

Consider the Ford-Firestone debacle, which involved defective Firestone tires that were prone to tread separations, leading to catastrophic crashes, many of them rollovers. More than 200 people were killed and 700 people injured seriously in crashes involving the tires. The Firestone tires passed the antiquated 30-year-old federal tire safety standard. Nevertheless, the U.S. Department of Transportation found them to be defective and required them to be recalled. If complying with federal standards gave manufacturers immunity, Firestone wouldn’t be liable for injuries or deaths caused by the defect because the tires met the federal safety standards. That would be criminal.

Consider also that numerous people, particularly police officers, have been killed or burned by explosions of the

gas tanks of Ford Crown Victorias when the vehicle is rear-ended at highway speeds. The car meets the federal gas tank standard, which has not kept up with technology improvements since it was set in 1974. The manufacturer wouldn't be liable for those killed and injured in Crown Victoria gas tank explosions even if the government were to rule that the vehicle is unreasonably dangerous.

Making manufacturers liable for harmful products is important, not only because consumers deserve to be compensated for injuries caused by the products, but because manufacturers need incentives to incorporate state-of-the-art safety elements into product designs. Liability also provides incentive for victims, survivors and their attorneys to investigate whether a product is unreasonably dangerous. We all know that lawsuits have exposed dangerous products, forced manufacturers to make them safer, compensated injured victims, and alerted the public and federal agencies to safety defects and hazards. Consumer groups must continue to oppose the changes in product liability laws that would result in dangerous and hazardous products being placed on the market. Putting profits over safety and allowing marketing to override design engineers on safety issues can't be tolerated. Rather than punishing victims of corporate wrongdoing in product liability fraud, the government should do a better job of regulating and setting safety standards.

### **\$5 Million Verdict Against BIC**

A child who was severely burned when her younger brother dropped a lighter on her dress, was awarded \$5 million by a Texas jury. The lawsuit was against the BIC Pen Corp., the maker of the lighter. The child was 6 years old when she suffered third-degree burns over 60% of her body. The 1998 accident occurred in her family's apartment in Bay City, Texas. The personal

injury and defective product suit alleged that the lighter was made with an inadequate child-resistant mechanism. The child has horrific disfigurement and will have to have more surgery for the scarring. The jury's decision was based on the lack of safety testing of BIC lighters and the severity of the child's burns.

The child and her 5-year-old brother were alone in a bedroom melting crayons when the brother dropped the lighter on his sister. Her dress burst into flame and she ran about the apartment and was badly burned before an adult could put the fire out. An expert witness testified at trial that BIC lighters weren't child-proofed to specifications set forth by the Consumer Product Safety Commission. BIC tests every lighter it manufactures for flame height and flame color, but only tests 50 out of every 4.5 million lighters made to see if they are child-proof. The jury awarded \$1 million for past and future physical and mental anguish, \$1 million for past and future physical disfigurement, \$1 million for past and future physical impairment and \$2 million in punitive damages. Prior to this case, BIC had been successful in a good number of cases.

### **First Jury Verdict Against Bridgestone For Recalled Tires**

There have been a good number of civil actions settled by Ford and Bridgestone where the Firestone tires were at issue. Finally, a jury was allowed to hear a case and make a finding. In the first jury verdict involving recalled Bridgestone/Firestone tires, a Florida jury found that the company's ATX tires were defective and partly responsible for injuries to a family whose Ford Explorer rolled over after the tread on the rear tire separated from the rest of the tire. It was a case with relatively minor injuries, which resulted in only \$55,400 in damages. The verdict was significant, however, and may result in

more and perhaps quicker settlements in similar cases pending around the country. While the verdict was very small, it should serve as a boost for other cases. Significantly, it was proved in a court of law that the tire was defective. Bridgestone/Firestone recalled the tires in August 2000, and has since faced a federal investigation over the issue. About 500 federal cases have been consolidated in multi-district litigation in the Southern District of Indiana. Other cases are pending in state courts around the country. According to our information, the company has settled more than 800 cases to date.

The Florida case was brought by the driver of a Ford Explorer who was on I-75 in Miami with her two children when the tread on one of the rear tires separated. The vehicle veered to the left. The driver tried turning to the right, and the car rolled over onto its roof. Both children were unharmed, but their mother suffered a cut on her hand and a severed tendon. The tires were ATX II steel-belted tires, one of three types of Bridgestone/Firestone tires that were recalled. Interestingly, when the jury panel was asked in voir dire if they would put Firestone tires on their cars, almost everyone said they would not. Although the tread that tore off the plaintiffs' tire was never found, the rest of the tire was brought to court. The jury was able to see the tire in the courtroom with the tread being totally gone.

John Lampe, Firestone's CEO, gave a deposition in the multi-district litigation that was used at this trial. Lampe admitted in the deposition and in Congressional hearings that his company made a "mistake" in the way it evaluated the performance of the tires. Specifically, when the company evaluated its tires, it only considered information about customer dissatisfaction from its dealers, such as returns and warranty claims, but it ignored personal injury and property damage com-

plaints. The company closed its eyes to lawsuits over rollover claims and property damage claims. People around the country were reporting problems to Firestone. Firestone ignored these complaints. Ford began to question the tires after it received numerous complaints about their performance in Saudi Arabia and Venezuela. Firestone claimed drivers were underinflating the tires. Ford made Firestone produce all personal injury claims, property damage claims and warranty claims. Ford fed them into a computer, and the results showed that tires made in the Decatur, Ill., plant were totally out of line in terms of accidents. Ford demanded a recall and, based on pressure from Ford, Firestone made its first recall in August 2000. Lampe, the CEO, admitted in his testimony that, when Firestone did its own "root cause investigation," it identified a problem with a rubber compound used in the Decatur plant to glue the belts together. The rubber compound holding together the layers of the tire lost its adhesion ability, particularly in warmer climates and on heavier cars like sports-utility vehicles.

### **Ford And Firestone End Their Partnership**

The business relationship between Ford and Firestone had its start when Henry Ford and Harvey Firestone made a deal about 100 years ago with nothing more than a handshake. The partnership ended with little fanfare. A matter-of-fact memo marked the end of the relationship. Bridgestone/Firestone sales executive John Behr said in a note to Ford's purchasing department, "That shipment (represents) the end of the business relationship between Ford and Bridgestone/Firestone in the U.S. and Canada. I therefore assume that today, April 1, 2003, represents the first day in about 97 years that Ford and Bridgestone/Firestone are not doing business in these markets." This corpo-

rate break-up has been nearly two years in the making. John Lampe, chairman, chief executive officer and president of Bridgestone/Firestone Americas, announced in May 2001 that he was severing ties with the automaker. The relationship between the longtime friends unraveled in 2000 with the recall of millions of tires amid reports that they were prone to losing their tread while traveling at highway speeds. The tires were standard equipment on the Ford Explorer. As we all know now, the tires have been linked to at least 271 U.S. traffic deaths. As a result, there have been hundreds of wrongful death and personal injury lawsuits. Most of these lawsuits are still pending. Officials from both companies have exchanged blame for the tire failures since they came to light. Since Lampe's announcement, the company has continued shipping tires to Ford while the automaker lined up new suppliers. It still will supply tires to some Ford operations outside the United States.

### **Ford And Firestone Settle Venezuelan Cases Filed In U.S. District Court**

For many years before the August 2000 recall of Firestone Wilderness AT and ATX tires, Ford and Firestone were aware of tire detread and rollover accidents of the Ford Explorer in foreign countries. Countries that were reporting serious injuries and deaths from such accidents included Saudi Arabia, Malaysia, Venezuela, Columbia, Costa Rica and Argentina. In most instances, those countries did not have a government regulatory agency with authority to cause a recall of defective products. In fact, evidence discovered during the multi-district litigation suggests that Ford and Firestone attempted to quiet the news of such foreign accidents in order to avoid reporting requirements of NHTSA in the United States.

Eventually, public scrutiny and daily

news reports served to kindle public anger over the injuries and deaths, which led Bridgestone/Firestone to recall its tires in August 2000. It was the second largest tire recall in U.S. history. Hundreds of lawsuits have been filed because of the alleged tread separations on the Bridgestone/Firestone tires and design defects in the Ford Explorers. Many of these lawsuits concerned foreign nationals who had accidents in South American countries of Venezuela, Columbia, Costa Rica and Argentina. These foreign cases were filed in the United States. Ford and Firestone vigorously resisted the foreign plaintiffs obtaining jurisdiction in the United States and consistently denied liability throughout the course of this litigation.

In a recent turn of events, Ford and Firestone have both moved aggressively to settle over 120 cases involving deaths and physical injury in South American accidents. There has been no disclosure of settlement amounts nor have any details been disclosed about the specific numbers of cases involved in the current settlement effort. Plaintiffs' counsel for the Venezuelan plaintiffs have indicated that they are in the process of presenting settlement offers to their clients in Caracas, Venezuela. There are many other pending cases remaining in the multi-district litigation against Ford and Firestone.

A Bridgestone/Firestone representative recently declined to comment to the media on whether the tire company has started to offer these settlement deals. In recent news coverage, the Firestone representative stated: "There has been, and will continue to be, ongoing communications with plaintiff lawyers. We have always taken the position that, when we can reach an agreement that is acceptable to both sides and avoid a long, protracted legal process, we will try to do that." Many families who have suffered deaths and serious physical injuries to their loved ones believe that Ford and Firestone have prolonged and protracted the liti-

gation derived from foreign accidents, while taking a more aggressive approach at settlements for accidents occurring within the United States. Our firm is currently handling several Venezuelan accident cases involving death and personal injury against Ford and Firestone, as well as domestic cases where the accidents occurred in the United States.

## **DaimlerChrysler Seat Belt Buckle Said To Be Defective**

Two Texas families have sued DaimlerChrysler claiming that two women died and three children were hurt because faulty seat belts came unlatched, resulting in these persons being ejected from their minivan. The lawsuit is among a growing number of similar claims on behalf of owners of Chrysler, Dodge and Jeep vehicles that have what is referred to as a Gen 3 buckle on seat belts. The buckle is prone to unlatching during wrecks or from around child safety seats during sharp turns or sudden stops. The buckle is patently unsafe and should be recalled immediately. The December wreck giving rise to the lawsuit referred to above involved a 1996 Chrysler Town & Country minivan. The vehicle hit a culvert and flipped over. The lawsuit says that even though the 5 occupants of the minivan were wearing seat belts, all five were ejected from the minivan when the seat belt buckles unlatched. The Gen 3 buckle has a button that protrudes from its cover enough so that a falling object or flailing arms can unlatch it easily. Other buckles have buttons more in line with the rest of the buckle that must be pushed below the cover to unlatch. Clarence Ditlow, head of the Washington D.C.-based Center for Auto Safety, points out the problem isn't obvious after a crash and it can appear the occupant wasn't wearing a seat belt. Last year the safety group asked DaimlerChrysler to recall all Gen 3 buckles and replace them with a safer model.

## **New Side Impact Crash Test Results**

Most vehicles are failing or scoring poorly in a new test that the insurance industry hopes will better measure the danger of being hit in the side, especially by a pickup or sport-utility vehicle. The test was demonstrated publicly for the first time last month by the Insurance Institute for Highway Safety (IIHS) at its crash-test site in Virginia. As I understand it, the test was supposed to deal with the question whether SUVs are dangerous to other vehicles. However, an unexpected result developed. Vehicles with side air bags didn't fare well, because the bags didn't always inflate. According to IIHS, they are getting very "poor performance" from the first batch of vehicles tested, which were small SUVs. IIHS will soon test cars. Significantly, the organization predicts the cars will score even worse than the SUVs.

For a number of years, IIHS has conducted front crashes. The results of their testing are widely regarded when determining whether a design is safe or not. This is the trade group's first side-crash test. A barrier simulating the oncoming truck hits the side of the vehicle being tested 12 inches higher than the impact point used in government tests. That's to simulate higher bumpers and frames of SUVs and pickups, a height that's more likely to threaten the heads of passengers in the other vehicle. The IIHS impact barrier is also shaped somewhat like a truck bumper. The government uses a flat barrier to help predict head injuries. As previously reported, head injuries are blamed in more than half the nearly 10,000 side-crash deaths that occur each year.

Pickups and SUVs may be more dangerous than previously portrayed. If the IIHS test better duplicates actual wrecks, and most vehicles fail or score poorly, it will answer that question. The government's side-crash scores, in which side air bags do usually inflate,

and the more dire results expected from IIHS may well clash. It will be interesting to get the auto industry's assessment of the IIHS test. The tests show that some side air bags did not inflate even when the test vehicle was slammed at a speed of 31.5 miles per hour. While IIHS has long been an advocate for side bags, the safety group isn't ready to say the side bags are failures. Additional testing will give us a better reading on this safety issue. If you need more information, you can review results from the tests at the IIHS Website at [www.iihs.org](http://www.iihs.org).

## **Newly-Designed Cars Do Better In Crashes**

Five newly designed cars and SUVs performed well in high-speed crash tests by the insurance industry. The Insurance Institute for Highway Safety tested three SUVs and three luxury sedans by crashing each vehicle into a barrier at 40 miles per hour. The vehicles were angled so the driver's side got the brunt of the force. Five vehicles that were newly designed for the 2003 model year received the highest rating. Those were the midsize Volvo XC90 SUV, the smaller Honda Element and Mitsubishi Outlander SUVs and the Cadillac CTS and Infiniti Q45 cars. The sixth vehicle tested - the 2002 Acura RL, which was designed several years ago - received the second-highest rating of "acceptable." According to IIHS, the front of the Acura collapsed too far into the vehicle, damaging the legs of the crash-test dummy. The dummy's head also hit the side of the car with too much force.

The Cadillac CTS also earned an "acceptable" rating in an earlier test, after the Institute determined that the air bag deployed too late to offer the best head protection. Cadillac changed the air bag crash sensors in models made after October 2002, and earned the highest rating when it was tested this second time. It's uncommon to test

a vehicle twice because manufacturers don't always make design changes after getting test results. In this instance, Cadillac made the change. While some automakers are responding to crash-test results and building safer vehicles, there are still problems. On the positive side, for example, the 1997 Infiniti Q45 got the third-highest rating, or "marginal," when it was tested several years ago. The air bag deployed too late and the legs of the crash-test dummy were injured. Those problems were solved in the 2003 Infiniti Q45, according to IIHS officials. The Insurance Institute has suggested that design changes are still needed in SUVs and luxury cars.

### **Jury Awards \$25 Million In Suit Over Cabin Cruiser Deaths**

A jury has ordered Kohler Co. to pay \$25 million in punitive damages to the survivors of a couple who died when a Kohler generator on their boat leaked carbon monoxide. A jury in St. Louis reached its verdict on punitive damages a day after it ordered Kohler and another defendant in the case to pay about \$525,000 in damages to compensate the family for its loss. The occupants were killed on a cabin cruiser in 1999 when they were overcome by carbon monoxide. It was proved that Kohler, based in Wisconsin, had used inferior metal to make the exhaust tube, which leaked, and had failed to recall the part even though four other people had died in similar incidents, in 1986 and 1995. Instead of using a material that would have lasted the life of the generator, they used a cheap material. During the trial, Kohler announced it would recall the part. Of the punitive damages awarded, half will go to Missouri's tort victims' fund.

## **X. MASS TORTS UPDATE**

---

### **Government Report Confirms Inadequacies Of FDA Drug Approval Process**

In March of 2003, The U.S. Department of Health and Human Services (HHS) issued a new report, "FDA's Review Process For New Drug Applications; A Management Review." In a press release on March 31, 2003, Public Citizen commented that the HHS report, "confirms that the federal government's current drug review process does not adequately protect consumers from harmful prescription medications." All new drugs must be reviewed for safety and efficacy before being put on the U.S. market. From its origins in 1906 until 1992, the FDA had been a purely government-funded agency. Then in 1992, The Prescription Drug User Fee Act (PDUFA) was passed. This legislation authorized the FDA to collect user fees from the pharmaceutical industry to help speed up the review of New Drug Applications (NDAs). It also established time goals for FDA review of the NDAs. In 1997, the FDA Modernization Act reauthorized user fees for another 5 years. The time goals were shortened, and this new legislation called for the FDA to work more collaboratively with the industry. In June 2002, the Public Health Security and Bioterrorism Preparedness Act of 2002 once again reauthorized user fees. The part of this 2002 legislation addressing user fees is referred to as "PDUFA III."

The purpose of the HHS report was "[t]o assess how well the Food and Drug Administration manages its new drug application review process." The HHS surveyed the FDA's Center for Drug Evaluation and Research ("CDER") reviewers, officials, and managers who review the NDAs. Forty

percent of long-term reviewers who responded to the survey said that the drug review process had worsened since they were first employed with the FDA. Fifty-eight percent said that the allotted 6-month review period for priority NDAs was inadequate; twenty five percent felt similarly about the 10-month review period for most standard applications. Eighteen percent of the physicians and scientists surveyed felt pressure to recommend approval for drugs despite their reservations about the drug's safety, efficacy or quality. Those surveyed did not disclose the specific source of the pressure.

The report concludes that FDA "reviewers face workload pressures that increasingly challenge the effectiveness of the process. Beyond these pressures, three other factors threaten the effectiveness of the process: the rushed review of drug labels that takes place toward the end of the review process, the limited guidance available to reviewers in determining the extent and type of post marketing commitments to request of sponsors, and the limited information that FDA makes available to the public on the basis for its decisions concerning NDAs. Overall, these findings present a significant warning signal, one, that if not fully addressed, could jeopardize the gains that FDA has made in recent years."

In December 1998, Public Citizen conducted a similar study with consistent findings. In that study, nineteen FDA medical officers identified twenty-seven new drugs that they had reviewed in the previous 3 years that they thought should not be approved but the agency approved anyway. Seventeen Medical Officers described the current [1998] standards of the FDA review for safety and efficacy as "lower" or "much lower" compared to those in existence prior to 1995. And several Medical Officers said they had been instructed by their superiors to censor their reports or presentations. The following are some comments

made by those FDA Medical Officers surveyed in 1998:

- “We are shifting the burden of proof on safety onto ourselves. Instead of asking the drug companies to prove the drug safe, we are trying to prove the drug dangerous. If we cannot show that the drug is dangerous, then it is assumed safe.”
- “We are told that approvability is our goal with ‘problems’ to be addressed in labeling.”
- “So often, we identify a problem pre-approval, and it is simply inserted into the label with everything else the practitioner has no time to read.”
- “Rapid approval often means insufficient time to examine carefully original data, accepting ‘on faith’ validity of randomization, screening, use and misuses of inclusion and exclusion criteria. There is insufficient time to discuss outlying observations.”
- “What are the options; everything must now be ‘approved’ or approvable.”
- “This is a formula for disaster. The patient does not benefit.”
- “I think it is abused by companies for marketing reasons, when the benefit to public health (or some small subset) will be minimal at best.”
- “Superiors will try to get reviewers to change his/her mind so that they will not need to take the heat if something goes wrong.”

Public Citizen concluded in 1998 that “[t]hese findings should raise a red flag that the very integrity of the drug approval process in the U.S., long an example to the rest of the world, is being seriously eroded. It is inexcusable to, in effect, override the opinion of the person most familiar with a drug’s safety and efficacy data in many cases and approve the drug.” The consumer watchdog group also found that inappropriate pressure from Congress, the drug companies and senior FDA officials creates an atmosphere in which the likelihood of drug approval is maximized. The pressure takes the

form of inappropriate phone calls, pressure to withhold data or personal opinions unfavorable to the drug from FDA Advisory Committees, and pressure from supervisors on Medical Officers to change their opinion in the direction of approving the drug... Together, these forms of coercion threaten to undermine the scientific credibility of FDA reviews and to reduce the public’s trust in the agency.

Moreover, the organization expressed the following disturbing revelations: “Three additional areas of concern were identified by the Medical Officers. The first is the apparently growing use of the label to address safety concerns and facilitate approval, instead of denying approval. One Medical Officer quoted a high-ranking FDA official as saying ‘everything is approvable. We can use the label creatively to lower the problems.’ This represents a complete abdication of responsibility by the agency, particularly because it is well known that few physicians actually read the label. Second, at least some drugs have received approval by deferring unresolved questions to a post-marketing study to be done by the drug company. But, as the Medical Officers made clear, these studies are often of poor quality or not carried out at all. The result is drugs coming onto the market with unresolved questions, usually safety issues. Finally, it is clear that many Medical Officers feel that their opinions are being overlooked, even though they are most familiar with the data on the particular drugs they are reviewing. As one Medical Officer put it, ‘The Advisory Committee (or anybody) don’t pay much attention to what the primary reviewers say.’ Said another: ‘in the last two years, I recommended that two drugs not be approved. They were both approved without consulting me. This never happened before. In one case, the drug did not meet the standards set up by the division, so they nullified the standards.’

The review process at the FDA has not changed since 1998. If anything, things have gotten worse. New legislation continues to weaken the review process, erode the power of the FDA, and give more control to the pharmaceutical industry. As Peter Lurie, MD, MPH, deputy director of Public Citizen’s Health Research Group stated, “[t]he FDA is supposed to rigorously screen all new drugs and ensure that they are safe and effective before they are sold to millions of people. Unless the agency gets out of the snug bed it is currently sharing with the industry, unsafe drugs will continue to slip through the safety net.” In 1998, Public Citizen quoted one Medical Officer at the FDA who stated, “[m]y feeling after more than twenty years at FDA is that unless drugs can not be shown to ‘kill patients’ outright then they will be approved with revised labeling and box warning.” Based on the new information, it appears that consumers continue to take a back seat in an FDA vehicle being driven wherever Big Pharma wants to go.

### **Pfizer Ordered To Pay \$2 Million In Rezulin® Trial**

A New York jury has ordered Warner-Lambert to pay \$2 million in compensatory damages to a woman who alleged she was injured by taking the diabetes drug Rezulin®. As previously reported, Warner-Lambert withdrew Rezulin® from the market in March 2000 after a series of liver-related deaths were linked to the drug. Pfizer Inc. acquired Warner-Lambert in June 2000. Interestingly, the jury ruled that the plaintiff was injured by misrepresentations by Warner-Lambert, but also found that Warner-Lambert’s warnings about the risks of Rezulin® were adequate. The defendant will claim that the jury rendered an inconsistent verdict. The jury found that Warner-Lambert misrepresented or omitted material information about Rezulin® and this was a substan-

tial factor in causing the plaintiff's injury. The jury failed to award punitive damages in this case.

## **Fraud Suit Over Rezulin® Revived**

A civil fraud suit brought by health insurance companies over the controversial anti-diabetes drug Rezulin® has been revived or brought back to life by the U.S. Court of Appeals for the Second Circuit. Reversing a trial court victory for Warner-Lambert Co., the appeals court said that major health insurers had adequately stated a claim they were the "direct victims of defendants' fraudulent marketing." The lower court ruled the plaintiffs had failed to allege the required "causal connection" between the "marketing" of the drug and their "financial injury." The FDA later had accused Warner-Lambert Co. of making "false and misleading claims" about the drug's effectiveness. After the FDA began hearing reports of liver failure and liver injury in some patients who took the drug, the National Institutes of Health in 1998 stopped a clinical study of the drug out of concern for the safety of patients.

The health service providers charged in this case that Warner-Lambert continued to represent the drug as safe even though the company had reported to the FDA that 31 users had died during a six-month period in 1998. It was further contended that the company continued to lie about the drug even as evidence of liver failure in patients mounted. As previously reported, the company ultimately removed Rezulin® from the market in March 2000. The plaintiffs had alleged "an injury directly to themselves; an injury, moreover, that is unaffected by whether any given patient who ingested Rezulin® became ill." The plaintiffs' alleged injuries could not be considered derivative because they were compelled to pay for a drug that cost three times as much as the cheaper alternatives, according to the appeals

court. It was Warner-Lambert's alleged misrepresentations that caused the health care providers to overpay for Rezulin®. In effect, the court was allowing health insurers to "recover from drug companies amounts that were overpaid due to illegal or deceptive marketing practices." We believe this is a most significant appellate decision.

## **FDA Approval Is Still Pending For A Drug In Use Since 1964**

Lately, there has been a great deal of controversy over the taking of hormone-replacement therapy by women. Estratest is one of the drugs involved in the on-going debate. As many of you know, American women have been taking Estratest for nearly four decades. During the past 12 years, doctors have written nearly 35 million prescriptions for this drug. Over \$178 million a year in sales were generated for its maker, Solvay SA in Brussels. Interestingly, the drug has never been approved by the Food and Drug Administration. When an application for Estratest was submitted in 1979 to the FDA, the agency refused to grant it, citing "insufficient data." The company submitted a second application in 1981. Since that time, however, the drug has been under review by the agency. The FDA told Solvay in a 1999 letter that it would contact the company "shortly" and assured the company it didn't plan any "precipitous action" requiring that the product be withdrawn from the market at that time. You should be surprised and maybe shocked to learn that Solvay is still marketing the drug as though it were approved. For example, when it filled out a form required to sell the drug to the Defense Department, Solvay checked off that Estratest was "FDA-approved." The company has even been to court to protect the drug from what it said were unfair trade practices. In 1999, a federal appeals court in Atlanta said it was "baffled" by the agency's sluggishness. "It is incomprehensible

that Estratest has been allowed on the market without approval for 35 years," the judges wrote in a case involving Estratest. It was added: "We are accustomed to hearing arguments in situations like this bemoaning scarce governmental resources and the like, but there can be no good excuse for allowing a company to violate the law for 35 years."

The FDA began reviewing drugs for safety in 1938 and began reviewing for both safety and efficacy in 1962. It is significant that Estratest came to market in 1964—some 2 years later. There are plenty of other drugs on the market that have never been approved by the FDA. It is shocking that the FDA has only a handful of people working toward getting these drugs removed or approved. The regulatory agency says that the Estratest file is under "active review" and that Estratest "has been a concern for some time." It is inexcusable that this drug has been under review for more than two decades. Significantly, there are questions of whether Estratest is effective for its stated use of treating symptoms of menopause, or for low libido, for which it is often prescribed.

Estratest came on the market to help women with the symptoms of menopause, including hot flashes and vaginal dryness. A combination of estrogen and methyltestosterone, the drug was developed for women who weren't helped by estrogen alone. The drug company depends on this drug since it is a big money maker. Clearly, it plays an important and growing role in the company's finances. In 2001, the last year for which complete figures are available, Estratest's \$178 million in sales were 11% of the company's total drug sales and were growing at a rapid rate — up 38% from the year before.

The FDA says it is working to get unapproved drugs off the market. One recent high-profile case involving Synthroid, a widely prescribed thyroid drug that slipped onto the market more

than 40 years ago without approval. After being threatened with removal from the market, Abbott Laboratories, which had picked up the drug in an acquisition, applied for approval, and last year received it. But other drugs are yet to be approved — sometimes despite safety concerns—and that is difficult to understand. The FDA says that it has concerns about Estratest's effectiveness and that it is likely to start an administrative proceeding on the drug "very soon." In the meantime, the drug continues to be sold. How can the FDA operate in this manner? Could it be the power and influence of the pharmaceutical industry?

### **Heart Association Urges Federal Ban On Ephedra**

The American Heart Association has joined the ranks of those wanting a ban on ephedra. It has urged the federal government to ban sales of the herbal supplement. The Association says the dangers of using it far outweigh any possible benefits it could have as a weight loss aid or workout enhancer. "Ephedra has been associated with a remarkable risk profile," the Association said in a formal statement submitted to the Food and Drug Administration. It cited "growing literature" linking use of ephedra to a variety of serious side effects, including hypertension, irregular heartbeat, seizure, heart attack, stroke and death. "The potential health hazards associated with ephedrine are too serious to permit the drug to be sold on the open market," the statement said. The association urged the FDA to "strongly consider removing dietary supplements that contain ephedra from the open market."

The Heart Association, a nonprofit organization of 4 million volunteers and health professionals, is the latest in the growing list of critics of ephedra. Association President Robert O. Bonow, Chief of Cardiology for Northwestern University Hospital, said the organiza-

tion has long opposed open sales of herbal ephedra and had submitted its statement as a "comment" in response to a new FDA initiative to seek regulation of the supplement. The Association's spokesman said the evidence is stronger than ever. As we all know, ephedra has been linked in studies by the FDA and other organizations to hundreds of adverse events. Under the Dietary Supplement Health and Education Act of 1994, ephedra and other herbal supplements, unlike drugs, are not subject to pre-market testing. Nor do manufacturers have to report the incidence of harmful side effects. A previous FDA effort to regulate ephedra foundered in 1997. Recently, Health and Human Services Secretary Tommy G. Thompson reopened debate on regulating ephedra dosage and perhaps banning the supplement. I have to wonder how long innocent people are going to be subjected to the dangers associated with ephedra.

### **Military Study Of Heat-Related Injuries At Military Base**

A recent study should put another nail in the ephedra coffin. Although just a small percentage of Marines at Camp Pendleton, Calif., reported using the herbal supplement ephedra daily during 2000, half the heat-related injuries reported that year were among the Marines who had used ephedra, according to an unpublished study. This is just another confirmation that serious health risks are associated with ephedra use. A summary of the study, posted on a military Web site, was based on a survey and medical data from the First Marine Division at Camp Pendleton, Calif. It found that although 7% of Marines reported daily use of ephedrine dietary supplements during the year 2000, "half of all [Marines with] heat related injuries in 2000 in 1MARDIV (First Marine Division) had used ephedra." The information also documented specific cases of ephedra-

related injuries in military personnel, including a death from Cybertrim (a supplement containing ephedra) at Marine Corps Logistic Base in Barstow, California, and a cerebral hemorrhage in an active duty person at Point Loma Naval Submarine Base in San Diego. That Marine was using Ultimate Orange, another ephedra supplement.

Previous reports indicate that there have been about 30 deaths of active duty military personnel who were using ephedrine dietary supplement products. The Camp Pendleton information came out at the same time as the publication of an article by Sidney M. Wolfe, M.D., director of Public Citizen's Health Research Group, about ephedra in the April 18 edition of Science Magazine. Dr. Wolfe traces the history of injuries and deaths linked to ephedra and the influence of money and politics on the U.S. Food and Drug Administration's refusal to ban it. He noted that although some manufacturers are no longer selling supplements containing ephedra, the government should not rely on the marketplace to protect the public's health. "Regulation is now coming from the marketplace, operating in the vacuum created by FDA inaction," Wolfe wrote. "This is not an acceptable way to safeguard public health, and product labeling is not enough. We call on the FDA to stop the occurrence of further preventable deaths and injuries by banning ephedra products." Data show that products containing ephedra increase the risk of hypertension, stroke, heart attacks, arrhythmia and seizures. While more than 100 reported deaths in the United States have been linked to ephedra, the recent death of Baltimore Orioles pitcher Steve Bechler focused public attention on the dangerous supplement ingredient at a much higher level.

Because of these serious problems, Public Citizen in 2001 petitioned the FDA to ban ephedra. While a number of manufacturers have announced they will stop selling supplements contain-

ing ephedra, the government has yet to act. "It would appear that the FDA is part of the 'Ephedra Industry Survival Service,' not part of the public health service, Wolfe said. "The government is talking about putting warning labels on ephedra products, but that is not enough. These products can kill, and they shouldn't be on the shelves."

Both the Army and the Air Force have stopped selling ephedra products in their commissaries. The National Football League, the National Collegiate Athletic Association and the International Olympic Committee have prohibited the use of ephedra among athletes. To obtain a copy of the Science Magazine article, call the American Association for the Advancement of Science Office of Public Programs at (202) 326-6440. Copies can also be obtained from Public Citizen. To read a chronology of ephedra—including a new citation to a Website promoting ephedra use to military personnel—go to [www.citizen.org/publications/release.cfm?ID=7241](http://www.citizen.org/publications/release.cfm?ID=7241).

### **Jury Finds For Bayer® In Another Lawsuit**

Bayer® has won another court battle—this one in Mississippi. In March, a Mississippi jury gave Bayer® Corp. its second victory. The jury found that Bayer® was not liable for injuries a woman claimed she suffered after taking Baycol. The female plaintiff had sought \$50,000 in a lawsuit in state court, claiming she suffered muscle pain from taking the cholesterol-lowering drug. Bayer® has acknowledged the link between Baycol and a side effect called rhabdomyolysis — a life-threatening condition in which muscle cells are destroyed. As previously reported, Baycol was linked to at least 52 deaths worldwide before it was pulled from the market in August 2001. This was the first lawsuit to go to trial against the company in Mississippi and the second tried in the nation. As reported last month, Bayer®® was

cleared of liability in a Corpus Christi, Texas, case that sought \$560 million in damages. The pharmaceutical giant was accused to have ignored research linking the cholesterol-lowering drug to dozens of deaths.

There are an estimated 8,000 cases now pending against Bayer® nationwide. According to the most recent news reports, the company has paid \$219 million to settle about 750 cases thus far. In the Mississippi trial, Bayer® maintained that nothing in the lady's medical records suggested she was injured by taking Baycol. From all accounts, the plaintiff in that case had great difficulty in connecting her relatively minor medical problems to the taking of Baycol. Lawyers representing clients in Baycol cases should learn from the 2 defense verdicts. These two cases are clear indications that only cases with real merit should be pursued. The cases must have both wrongdoing and a serious injury or death caused by taking the drug. Bayer® was smart in picking two cases to try that it felt could be won.

### **Bayer® Settles Baycol Case In Fort Worth**

Bayer® settled a Texas lawsuit involving Baycol for an undisclosed sum less than two weeks before the case was to go to trial in Fort Worth. At press time, we didn't have any more information on this case. Bayer® said recently that it had paid \$219 million to settle 740 cases related to Baycol, which has been linked to more than 100 deaths and cases of muscle weakening. Some industry analysts originally estimated that damage payments could be as much as \$10 billion. Bayer® obviously understands that it has legal responsibilities that it must accept and resolve. Hopefully, all remaining cases can be settled within the next few months.

### **EPA Investigates Teflon**

The Environmental Protection Agency has stepped up its investigation of potential health risks posed by two groups of chemicals used in the manufacture products in a multibillion-dollar industry. One of the chemicals is DuPont Co.'s Teflon, which is perhaps the best known. According to the EPA, many "scientific uncertainties" remain about the potential health hazards both to company employees and the public at large. However, the agency hasn't taken action to stop the public from using the products. The chemicals are used in products including non-stick coatings for pans, grease-resistant coatings on carpets and clothing, and flame-resistant parts in jet engines. Two studies escalated concerns about the chemicals. Blood samples from three population groups selected at random showed low-level residues of perfluorooctanoic acid, or PFOA, that lingered in their blood for as many as four years. The second study involving larger doses of the chemical, fed to rats, showed delays in sexual maturation and an accelerated death rate.

The EPA is also concerned about a second group of chemicals, called flourinated telomers, which are used in such things as firefighting foams, cleaning products and stain-repellent coatings on carpets, textiles, popcorn bags and paper plates. The EPA suspects that, while these products are not made with PFOA, they may release the chemical as they break down in the environment. The presence of PFOA starts with the use of the chemical called ammonium perfluorooctanoate (APFO), which is used in the manufacture of products such as Teflon. In the environment, APFO, which has been used in manufacturing for more than half a century, converts into PFOA. The Environmental Working Group, a Washington research group that has been investigating the chemicals, has claimed that DuPont has withheld scientific data on potential health risks

from the EPA. The EPA is investigating the assertions. It should be noted that PFOA has been unregulated during the more than 50 years of its use. DuPont is the leading U.S. maker of both APFO and flourinated telomers.

## XI. BUSINESS LITIGATION UPDATE

---

### Rite Aid Settlements

The Rite Aid Corp. owns a good number of drug stores around the country, including stores in Alabama. I am convinced that these stores are poorly managed and often utilize non-professional employees to fill prescriptions. However, the company is also having other problems. Rite Aid Corp. and KPMG have reached a settlement in the stockholder lawsuit that was pending in a Pennsylvania federal district court. Litigation over the accounting scandal that caused Rite Aid Corp.'s stock price to drop sharply in March 1999 resulted in \$318 million in settlements to shareholders. The last settlement came when the KPMG accounting firm agreed to pay \$125 million. In a related case, a federal judge approved a settlement worth almost \$68 million in a class action ERISA suit brought by Rite Aid workers. The plaintiffs in that case complained that the company imprudently allowed their pension plans to invest in Rite Aid common stock when it was not a proper or suitable investment. In the first of the three settlements, Rite Aid agreed to pay a total of \$193 million. Initially, the settlement was structured so that Rite Aid would pay \$43.5 million in cash, which would have exhausted all of its available insurance, as well as at least 20 million shares of Rite Aid common stock promised to be worth at least \$149.5 million.

In the suit, investors alleged that between May 1997 and March 1999, Rite Aid portrayed itself as a company with "very strong" profitability and said it was in the midst of a major program to expand and modernize its operations. In fact, the suit alleged, the modernization and expansion programs were "encountering significant problems." This not only caused shareholder problems, but also contributed to major problems in the company's prescription departments.

The suit alleged that instead of publicly disclosing the problems, Rite Aid engaged in a variety of improper accounting methods designed to hide its true financial picture by both artificially inflating its earnings and deflating its expenses. Over a three-year period, the suit alleged, Rite Aid succeeded in artificially inflating its after-tax earnings by more than \$1.6 billion. The suit also alleged that KPMG was "aware of" and "recklessly disregarded" Rite Aid's improper accounting practices. In each of the three years, the suit said, KPMG issued "unqualified auditor's opinions" that said Rite Aid's financial statements conformed with generally accepted accounting principles.

The public first learned of the problems in March 1999 when Rite Aid announced that its fourth-quarter earnings would be less than expected. The news caused stock prices to drop from \$37 per share to \$22.56. Soon after, investors learned that the SEC was investigating Rite Aid's accounting practices. The company responded by restating its financial results for the previous three years. The true extent of Rite Aid's problems wasn't revealed, however, until November 1999, when a series of disclosures rocked the company and caused its stock price to fall to just \$5.38 per share. The court entered an order last month granting preliminary approval of the KPMG settlement, clearing the way for notification to the class. In a separate suit, Rite Aid workers claimed that the company

breached its fiduciary duty under ERISA by allowing their pension plans to invest in Rite Aid stock during the period that the company was inflating its earnings.

### MasterCard And Visa Settle Debit Card Suit

Just before we went to the printer, we learned that both MasterCard International and Visa USA settled their pending case with thousands of retailers. This development occurred just before their multibillion-dollar lawsuit over debit card practices was set to go to trial. MasterCard settled first on April 28th, the date set for the trial to begin, leaving Visa USA as the sole defendant to battle it out in court with the retailers, including retail giants Wal-Mart, Sears and Circuit City. The retailers said Visa and MasterCard trapped them into paying high fees by demanding that stores accept their debit cards along with their credit cards. They also say the card companies were stifling competition. Visa and MasterCard claimed their honor-all-cards policy actually increased customer choice. Each side claimed they were fighting for the best interest of consumers. However, this settlement pretty well leaves it up for consumers to decide who, if anybody, was looking out for consumers' interests.

After MasterCard settled, Visa and the retailers settled on a jury and opening statements were scheduled to be made. At that point, Visa joined in the settlement. The 1996 suit alleged that Visa and MasterCard unfairly require merchants to accept their debit cards, which require a customer's signature to verify a transaction. The plaintiffs say the process ultimately costs consumers more money. Many retailers would rather use less expensive, independent networks that clear debit-card transactions using a personal identification number, or PIN. The case was going to trial at a time when debit cards — which deduct cash from an existing

bank account rather than building up debt in a credit account — enjoy tremendous popularity. This case is a prime example of how Corporate America operates. As most Americans now know, the consumer has very little protection outside the judicial system.

When Visa followed MasterCard's lead and settled the remaining part of the lawsuit, a full blown trial was avoided. The two card issuers have agreed to pay \$3 billion and lower transaction fees. The deal was hailed by the retailers' lawyer as a major victory for merchants and their customers. The Visa deal calls for the company to pay roughly \$2 billion to the retailers and reduce debit card fees. MasterCard International will pay \$1 billion and also reduce fees. According to estimates, the two card companies could have faced billions of dollars in damages if they lost at trial.

The judge must approve the deals, which include immediate \$25 million payments. Visa will modify its "honor all cards" policy. Beginning in January, merchants can decide whether to continue to accept Visa's debit cards. The debit cards use a customer's signature to verify a transaction. Many merchants would rather use less expensive, independent networks that clear debit-card transactions using a personal identification number, or PIN. After MasterCard settled, it was pretty obvious that Visa would settle the case rather than face a trial with MasterCard having left them high and dry. I have to wonder what real and lasting benefit consumers will actually see from the settlement. Hopefully, it will result in lower prices, greater choices, and safer debit card products. We will know more about the immediate and long-term effects the settlement will have on consumers if the judge approves the settlement, which is expected to happen.

## Judge Orders \$800 Million In Credit Card Refunds

A Superior Court Judge in California ordered credit card giants Visa and MasterCard to refund an estimated \$800 million to U.S. customers who paid a hidden fee on purchases made in foreign countries. The decision finalized a tentative ruling that had been under court seal since February. The case centers on a 1% surcharge Visa and MasterCard add to the transaction amount of credit card charges requiring foreign currency to be converted into U.S. dollars. Concluding Visa and MasterCard have been concealing the conversion fee, the Judge ordered refunds dating back to 1996. Attorneys representing consumer interests in the three-year-old case described the decision as vindication for millions of cardholders who had been misled for years about the costs of their foreign charges. Visa, based in Foster City, California, and New York-based MasterCard say they will appeal. Because it's based in California, Visa is more deeply affected by the decision than MasterCard. Visa must issue refunds to cardholders throughout the country. On the other hand, the decision applies only to MasterCard's California customers. Based on estimates drawn from evidence in the trial, Visa faces \$740 million in refunds while MasterCard will have to refund about \$60 million.

The judge noted in the ruling that Visa collected \$817 million from its U.S. cardholders making purchases in foreign countries from 1996 through March 2002. That figure includes fees for debit card transactions. MasterCard collected \$195.5 million nationwide from foreign currency conversion fees from February 1996 through December 2000. A May 23rd court hearing has been scheduled to discuss how the rebates are to be made. While the currency conversion fee is disclosed in the initial agreements distributed to Visa and MasterCard customers, the surcharge fails to appear in billing state-

ments documenting the transactions. Instead, the fee is lumped into the total transaction price covering the item purchased in a foreign country. Consumer attorneys argued that the practice violated California's unfair competition laws requiring clear disclosures. The court obviously agreed.

The court ruled that the credit card conversion fees appear "reasonable." However, the surcharges "undermined the free market because most consumers aren't aware of them," according to the court. If consumers knew about the fees, they might look for currency conversion alternatives — discriminating behavior that could pressure the credit card companies to lower their fees. "In short, where there is no information, there is no competition," the court wrote. "And where there is no competition, we are on the road to serfdom." As part of his ruling, the judge ordered Visa and MasterCard to better disclose the conversion fees in the future. Interestingly, the credit card companies contended that the banks issuing their cards ultimately should be held responsible for explaining the currency conversion fees to their customers.

The separate federal lawsuit in New York referred to above also targeted Visa and MasterCard for their conversion fees. That suit also names several major banks that issue Visa cards and MasterCards. The credit card companies said there's nothing wrong with bundling the conversion fees into the transaction prices that appear on customer bills. Consumer advocates contend cardholders have a right to know when financial services providers tack on extra fees to the price of the goods and services sold by another party. Most believe the California case is going to be a great decision for consumers. There are a lot of fees in the credit card industry that aren't adequately disclosed to customers. As we have learned, the companies also slip arbitration agreements into their monthly bills, which few folks catch until it is too late.

## **British Reinsurer Covers Suits From Two Businesses Against Honeywell**

Equitas, a British Reinsurance Company, will pay \$472 million to Honeywell International to settle the company's claims arising from asbestos-related liabilities at two businesses. The deal, called a policy-buyback settlement, would cover asbestos claims at North American Refractories Co., which Honeywell sold in 1986, and the Bendix business, which Honeywell has agreed in principle to sell to Federal-Mogul Corp. This will pay all current and all future claims. The cash payment will cover all of Honeywell's claims against Lloyd's of London investors who had reinsured their liabilities with Equitas. Lloyd's is an insurance market comprised of corporate and individual investors, or Names. Hundreds of Lloyd's Names suffered tremendous losses because of claims stemming from asbestos-related illnesses in the 1970s and '80s. Lloyd's lost \$12.6 billion from 1988 to 1992, and many Names faced financial ruin because of their unlimited liability. To limit its exposure to these claims, Lloyd's set up London-based Equitas to reinsure its insurance liabilities for 1992 and all previous years. This settlement provides finality for the reinsured Names who were at risk from claims by Honeywell and its related businesses.

"For Honeywell, it provides certainty as to the amount of claims that will eventually be covered by Lloyd's of London Names," according to an Equitas spokesman. Honeywell's general counsel called the deal another step in Honeywell's efforts to resolve issues related to the North American Refractories and Bendix asbestos cases. Honeywell, a high-tech manufacturer based in Morris Township, New Jersey, has had a large number of asbestos-related liabilities. It took a one-time, pretax charge of \$1.55 billion in the fourth quarter for asbestos claims not covered by insur-

ance. Federal-Mogul, an automotive components supplier, has agreed to acquire most of Honeywell's Bendix friction materials business. Bendix makes brakes and brake linings that once included asbestos. Honeywell owned former North American Refractories from 1979 to 1986. The division, known as NARCO, currently is in Chapter 11 bankruptcy proceedings.

## **Thimerosal Vaccine Update**

We are involved in a number of claims for parents and children who are claiming that Thimerosal (which contains mercury) has caused autism in their children. These families have been deeply affected by their children's autism and we are grateful to have the opportunity to try to help them. Unfortunately, a bill that is now being considered by a United States Senate committee would throw more than 200 lawsuits filed by families who believe their children were injured by vaccines out of court and into a special federal fund. You may have read about this legislation late last year when Republicans in the Senate quietly slipped the change in at the last minute to the unrelated Homeland Security Legislation. After public outcry, the lawmakers did undo the move in later legislation, but Senate Republicans have vowed to try again through the bill that is currently in committee.

Under current law, injured families must file claims first with the Special Federal Compensation Fund, where cases are independently evaluated, before going to court. Many feel that the independent evaluation is not truly independent and that this is yet another way to prevent injured families from having their claims heard by a jury. Some families with injured children have bypassed the Compensation Fund and gone directly to court with claims that their children were harmed by a vaccine's ingredients (such as Thimerosal), rather than by the vaccine

itself. Specifically, many families have claimed that their children's autism is caused by a preservative called Thimerosal, which contains mercury and is now very much in the public eye. One would hope that even those staunchly opposed to these claims would realize that this is yet another example of unwarranted federal preemption of the States and the rights of families who believe their children were injured by vaccines. It is interesting to note that many of the lawmakers who normally staunchly defend the State's rights to protect its citizens and oppose federal intervention or "Big Government" are rallying to federalize this issue. At best, lawmakers who support this kind of federalization and preemption of States rights and jury trials are inconsistent with their beliefs. It appears that they are attempting to favor corporate backers over families who have suffered radical changes in their lifestyles because of their children's autism.

## **Pricewaterhouse Sued Over Accounting**

During the past year, Amerco Inc., the parent of truck-rental company U-Haul International, has been on the brink of bankruptcy for a number of reasons. The company is now claiming its auditor, PricewaterhouseCoopers LLP, is to blame for the company's financial problems. Amerco has now filed suit against the accounting firm in an Arizona federal district court, claiming its economic problems are a direct result of the accounting giant's bad advice. The suit seeks more than \$600 million in lost profits and compensatory damages. An additional \$2 billion is being sought for punitive damages. Douglas Carmichael, an accounting professor at Baruch College in New York, was hired by Amerco as a consultant. Mr. Carmichael was scathing in his findings, according to a declaration filed late last year in which he said PwC

“violated each and every duty” owed to Amerco. This is the same Mr. Carmichael who was appointed last week to be the first chief auditor of the SEC’s Public Company Accounting Oversight Board.

Mr. Carmichael told the *Wall Street Journal* that he stands by his reports for Amerco. However, he declined to discuss specifics of the case. Over the past two decades, he has testified as an expert witness for private litigants and the SEC in numerous lawsuits against all of the major accounting firms. He also testified periodically as an expert witness for Coopers & Lybrand before its merger with Price Waterhouse to form PwC. This should be a most interesting case to watch, especially since Corporate America doesn’t like punitive damages very much. It is rather interesting to see a CEO’s perspective change when his company is the victim.

## XII. INSURANCE AND FINANCE UPDATE

---

### **UnumProvident Hit With \$84.5 Million Verdict**

A federal jury in Arizona has returned an \$84.5 million verdict against UnumProvident Corp. The jury ordered the award, including \$79 million in punitive damages, after concluding that two UnumProvident subsidiaries and another insurer, General American, acted in bad faith in its handling of a claim by a cardiologist, Joanne Ceimo, in Scottsdale, Arizona. Thus far, the verdict is the largest amount awarded against the disability insurance company. As previously reported, there are large numbers of similar cases pending against this company. Under her policy, Dr. Ceimo was entitled to a monthly benefit of \$12,000 for the rest of her life if she became permanently

disabled. She had to curtail her activities as a cardiologist after a neck injury caused her hand to shake, preventing her from performing delicate procedures such as angioplasty. If the verdict in her case withstands appeal, Dr. Ceimo plans to donate half the amount to students who need economic aid. “This was never about the money,” she said. “It was always about stopping these insurance companies from intentionally hurting people.”

### **More Suits Against The Disability Insurer**

Not all of the cases against Unum have been filed by doctors and other professionals. In February 2002, a lady won a hard-fought \$7.7 million jury verdict against Unum. The case is now on appeal. When Joan Hangarter became disabled, she was sure she could count on her insurance company to protect her. She had bought a disability policy in 1990 from UnumProvident. After becoming disabled, she and her children ended up on welfare when her insurer cut off her benefits. “The person who sold me this policy said it would keep a roof over my head should I ever be unable to work,” says Hangarter, 54. “I lost the roof over my head.” Ms. Hangarter is one of hundreds of policyholders who have filed civil lawsuits against the nation’s largest disability insurer. All of the cases allege that the company unfairly cut off their benefits by targeting certain policies for cancellation, particularly high-cost cases and policies offered through employers, which come with fewer legal protections. The lawsuits against Unum have heightened scrutiny of the disability insurance industry. Debate has been renewed about a federal law that limits policyholders’ legal recourse in such disputes.

### **A Closer Look At Unum**

Unum insures about 25 million people. The company, which made

Fortune magazine’s “most admired companies” list for the third year, is now under investigation in several states, including Georgia, Florida and California. There are thousands of cases pending against the company. Georgia officials announced what they describe as a “significant” disciplinary action against Unum, culminating an 18-month investigation of the company. A \$1 million fine was levied against the company by the Georgia Insurance Department. California is also conducting a “market conduct study” of the disability insurer. “Unum, for the last several years, has had an internal policy of canceling insurance policies that are already in place,” California Insurance Commissioner John Garamendi said in a media interview. A U.S. District Judge upheld Hangarter’s verdict, stating that Unum created “a comprehensive system for targeting and terminating expensive claims.”

In two recent cases, policyholders had claims denied after a few months of receiving benefits. One involved former eye surgeon John Tedesco of Florida, who developed a hand tremor. Dr. Tedesco filed a claim with Unum, which paid his benefits for four months, then stopped payments. He was later diagnosed with Parkinson’s disease, a degenerative disorder. Dr. Tedesco sued Unum and won a \$36.7 million jury verdict in 2001. Unum appealed, then settled with the doctor for a confidential amount.

A California eye surgeon, Randall Chapman, sued Unum after it cut off his payments three months after he filed a claim saying he could not work because of phobia-caused hand tremors. A jury found in favor of Dr. Chapman and ordered Unum to pay \$31.7 million. In her decision to lower the amount due the injured eye surgeon to \$6.1 million, Judge Lynn O’Malley Taylor still scolded UnumProvident for setting up a system that appears to put more emphasis on company profits than policyholder

claims. "There is clear and convincing evidence that (UnumProvident's) bad faith was part of a conscious course of conduct firmly grounded in established company policy," O'Malley Taylor wrote.

## **UnumProvident Fires Top Executive**

With all of its self-inflicted lawsuit problems, UnumProvident Corp. is making some internal moves. In late March, it fired Harold Chandler as Chairman, Chief Executive Officer, and President. Interestingly, Chandler will receive a severance package of approximately \$8.5 million and pension benefits of approximately \$8.5 million. This company had a corporate mentality of "looking for every technical legal way to avoid paying a claim." It is not surprising that the company "dumped" Chandler.

## **Holocaust Survivors' Insurance Ordeal**

There have been many sad stories written about the horrors of the Holocaust, which was one of the worst periods in history. When Jack Weiss got out of the concentration camp at Muldorf at the end of World War II, he returned to Vrable, Czechoslovakia, to find his family home in ruins. Exhausted and weak, he moved into an abandoned house with other refugees. Scraping by on relief agency handouts, Mr. Weiss, his sister and three brothers, who had also survived concentration camps, remembered that their father, who was killed at Auschwitz, had taken out a life insurance policy from Assicurazioni Generali, a big Italian company. In the late summer of 1945, they contacted the insurance company. But when they could not produce a death certificate or policy, they were turned away. Obviously, it was difficult to get a death certificate from Auschwitz. Mr. Weiss is now 75 and lives in Los

Angeles. The insurance policy had been taken from the family when the Nazis took them away. The company gave Mr. Weiss the runaround. After a while, the family just gave up.

Now, nearly 60 years later, Mr. Weiss, a retired watchmaker, is again trying to have Generali pay the old claim. He and seven other Holocaust survivors have filed a suit against Generali for the value of their policies. It is estimated that each policy is worth hundreds of thousands of dollars. Some will be for millions of dollars. It is probable that punitive damages will be allowed. The new lawsuits, which were filed in a state court in Los Angeles, represent an escalation in a long-running battle. Some insurance experts predict that the cases could eventually involve tens of thousands of plaintiffs and billions of dollars in payments. If so, they would far exceed the \$1.25 billion settlement with the Swiss banks in 1998 on behalf of Holocaust survivors.

Generali, one of the world's largest insurance companies, is heavily involved in the battles over Holocaust-era insurance. Founded by Jewish merchants in 1831 in Trieste, the company had a thriving business in Jewish communities in Europe before the Holocaust. During those troubling times, insurance policies and annuities were utilized by many persons in Europe. Tens of thousands of people turned to these investments, trusting in companies like Generali to pay claims if trouble broke out in their home countries.

The lawsuits started in 1997 against more than 20 European insurers who were sued for failing to pay claims on these policies. Interestingly, most of the suits have been settled or dismissed. The German insurers were exempted as a result of a \$5.1 billion settlement on Holocaust issues by the United States and Germany in 2000, leaving Generali as the main defendant. A recent decision by a federal district judge in New York has allowed the new

lawsuits against Generali to go forward. Generali and another insurer, Zurich Life Insurance, a unit of Zurich Financial Services that is named in one of the lawsuits, tried to get the lawsuits dismissed, which would have forced the plaintiffs to try to resolve their claims through the International Commission for Holocaust-Era Insurance Claims, an international commission that was set up to guarantee payments. Instead, the federal judge said the Commission, financed by the insurance companies and without judicial oversight, could not be relied upon for fair treatment, calling the Commission in a sense "the company store."

The persistent dodging and stalling of the insurance companies, particularly Generali, and the woeful performance of the international commission have kept the plaintiffs going in their battle. Generali has said that legally it owes nothing to its old policyholders and their heirs, but that it has made efforts for what it calls "humanitarian reasons" to find policyholders and to offer compensation. It has paid claims over the last several years through the Commission, which was set up with the participation of three large Jewish organizations, including the World Jewish Congress, and sanctioned by the United States government. The idea was that, by adopting a nonadversarial process, the Commission would be able to get compensation to claimants quicker than could the courts.

Generali contributed \$100 million of the Commission's \$400 million — by far the biggest contribution by a single insurance company — and, like the five other insurers that joined, was promised that regulators would drop threats to suspend the licenses of the insurers' subsidiaries in the United States and try to discourage potentially embarrassing lawsuits. The Commission has been criticized by survivors and insurance experts as favoring the insurers, processing claims slowly, and offering paltry payments. Since its inception,

the Commission has offered payments on about 2,900 claims for a total of \$36.9 million. Interestingly, the Commission's expenses as of 17 months ago had already climbed to \$40 million. The offers average about \$12,500 each with some being as low as \$500. Generali has paid some claims for several hundred thousand dollars each, including one for nearly \$600,000. According to reports, Generali has paid about \$35 million, mainly through the Commission, to 2,200 claimants. A former insurance commissioner for Washington State, who reportedly had high hopes for the Commission, now says it has been a huge disappointment.

### **Even Major League Baseball Teams Go To Court**

The Los Angeles Dodgers baseball club has sued an insurance company for \$4 million in a dispute over a disability insurance policy that didn't pay off. The suit claims that the insurer did not fully honor a policy covering injured starting pitcher Kevin Brown. As most sports fans know, Brown signed a seven-year, \$105 million contract in December 1998. Injuries limited him to a total of 29 starts and 13 wins over the past two seasons. He initially injured his right elbow on July 16, 2001, and was out for the rest of that season. The pitcher returned in 2002, but was placed on the disabled list on May 27th with a sprained elbow. He was scheduled to return to the Dodgers' roster on June 11th but injured his back on May 29th when, according to news reports, he lunged to keep his son from falling off a bed. The once all-star ended the year with a 3-4 record and 4.81 ERA, and underwent surgeries on both his elbow and back.

The Hartford (Conn.) Financial Services Group Inc. maintains that the team's policy covered the 38-year-old right-hander's elbow injury and not his back problems. In the lawsuit filed in a

federal district court, the team claims Hartford Financial has reimbursed the team for only \$2 million of the \$6 million policy from May 27th through August 15th of last year. According to court documents, Hartford Financial says it won't pay the rest because the team has failed to prove that Brown suffers a "continuing disability from elbow problems" that are separate from his back injury. Brown, who has said he believes he's recovered now, is back on the mound, taking his regular turns as a starting pitcher. In fact, Brown started the Dodgers' home opener.

### **Anthem Will Pay \$41 Million Settlement**

Anthem Inc. has agreed to pay \$41 million to end a five-year wrongful denial-of-claim lawsuit in Ohio. According to an Anthem spokesman, the health insurer has adequately prepared for the financial impact of this case by setting money aside in prior years. The original \$49 million judgment in the case in 1999 was the largest denial-of-claim damage award against a health insurer in Ohio history. In fact, it is believed to be one of the largest in the country. The Ohio Supreme Court later reduced the jury award against Anthem to \$30 million, plus interest. The interest has now accrued to about \$11 million. It was expected that Anthem would go through with an appeal the case, in an attempt to delay payment or overturn the judgment, but it elected not to do so.

The case was filed by the widower of Esther Dardinger of Johnstown, Ohio, who died in 1997 at age 49. An Anthem Blue Cross-Blue Shield policyholder, she was being treated for brain cancer using a new chemotherapy technique. Anthem deemed this to be experimental and refused to pay for the treatment under Dardinger's policy. She couldn't pay the high cost of the treatments herself, so her husband, Robert Dardinger, opted for a different and covered

treatment for his wife. In the meanwhile, there was an appeal of Anthem's denial. Anthem's final notice of denial was received by her husband, on the day of her funeral. A suit was failed against Anthem in 1998.

In an unusual ruling, the Ohio Supreme Court ordered part of the award (\$14 million) to be given to the Columbus cancer hospital, which treated Esther Dardinger. Robert Dardinger, 54, of Johnstown, a retired high school teacher, has set up a charitable trust and intends to put one-third, or \$3 million, of the Anthem payment into the trust. The hospital also will put its Anthem proceeds into a trust, named for Esther Dardinger, to benefit neuro-oncology research. Anthem had earlier paid out \$2.5 million in compensatory damages in the case.

### **An Alabama County Takes Action**

The Henry County Board of Education voted at their March 13th meeting to authorize the Superintendent of Education and Board Attorney Mary F. Gunter to take the necessary action to file suit concerning the tornado-damaged Abbeville High School. The board authorized Mrs. Gunter to hire our firm to represent the County Board and assist her with the case. We were instructed to proceed with litigation, if necessary, to obtain a fair settlement of the Board's insurance claims. The insurance problem arose after a tornado severely damaged school buildings. Damage estimates submitted by the Board were very conservative. However, the insurance company made offers that were very low. In addition, the engineering firm hired by the Board believes that it will not be cost effective to repair all the damaged buildings, and that all but three buildings on the Abbeville High campus—the Cultural Arts, Science, and Main—must be torn down. It is hard to believe that the insurance company

offered only \$2.1 million to settle the claim when replacement estimates are well over \$4 million. A letter from a building systems manufacturer was submitted to the Board that indicated they would not repair trusses to be reused in the buildings. The insurance company had proposed repairing the trusses and continuing to use them, which would be extremely dangerous.

This insurance company refused to honor valid and legitimate claims made by the Board, which never had any intention of having to file suit to get a valid claim paid. However, the insurance companies gave them no choice. Estimates to rebuild the school on site are \$4.5 million, to rebuild at another location in Abbeville \$6.8 million, and to build a consolidated school \$8.5 million. These figures do not reflect roadwork and utilities that may have to be constructed. While the School Board wanted to proceed with the repair on some of the buildings, the insurance company stopped that work.

Normally, this matter would be headed directly to court. However, our legal research has found this dispute to be governed by mandatory arbitration. Alabama Code Section 41-15-8 states that the decision regarding the value of the claim made by the Henry County School Board is ultimately made by the Alabama Department of Finance, not the insurance company. Furthermore, this law dictates that if “a disagreement arises between the Department of Finance and any person or persons in charge of any insured property [Henry County School Board], . . . the matter in disagreement shall be determined by a third person.” In other words, the case goes to arbitration. It is very hard to understand how our legislature could take away a County School Board’s right to a jury trial, especially under these circumstances. This law was passed in 1990 and must admit that I was totally unaware of its existence. I wonder if many other folks knew about it at the time. The Department of

Finance has yet to make its final decision on the Henry County claim. Hopefully, they will pay this valid claim.

### **New York Passes State’s First Predatory Lending Law**

New York is the fourth state to pass a predatory lending law, following North Carolina, California and Georgia. About 25 other states have introduced or are considering similar bills. A number of cities, including New York, Los Angeles and Chicago, have passed predatory lending ordinances as well. Many of the laws restrict the terms of high-cost loans, which typically feature both high fees and interest rates, and subject lenders who violate the rules to liability. New York and Georgia are unique in that their laws put on the hook not only the lenders, but also the Wall Street firms that trade these loans as well.

New York’s new law covers loans with closing costs greater than 5% of the total loan or interest rates greater than 8% over the prevailing Treasury bond rate. Brokers and lenders who sell these high-cost loans to New Yorkers will be subject to a laundry list of banned practices. For example, they may no longer finance more than 3% of the borrower’s closing costs over the course of the loan or include balloon payments less than 15 years out. But the heart of the new law—and what has the investment community up in arms—is a provision permitting borrowers to sue assignees, typically big investment firms who buy the loans and consolidate them in mortgage pools for sale in the secondary market.

The industry is backed by a powerful group of Washington lawmakers who recently introduced a bill that would pre-empt state and local laws with what consumer advocates say is an even weaker federal law than what is already in place. Consumer groups say assignee liability is critical in the fight against predatory lending because

many of the loan originators are shady individuals who flip the loans and disappear. They also point out that, under the New York law, assignee liability is limited to instances in which the borrower faces foreclosure and the damages are capped at the amount the borrower is being sued for.

But the investment community frets that the law is unclear on assignee liability. By including incidental and consequential damages, which “could be anything, since they are open to the court’s discretion, you might as well take the cap off,” said Michael Williams, vice president for legislative affairs for the Bond Market Associates, a Washington, D.C.-based trade group. William Farris, a lobbyist with AARP, said “the law without assignee liability is not a bill because at the end of the day, if you cannot raise a claim against a person holding the note, you have no defense.” Joshua Zinner, coordinator of the Foreclosure Prevention Project at South Brooklyn Legal Services, concurred. “The industry is just trying to create alarm bells around assignee liability,” he said.

The issue is critical to the success of the New York law. Georgia’s predatory lending law, which went into effect on October 1, 2002, had to be hastily amended because the rating agencies refused to rate the creditworthiness of Georgia’s mortgage pools, saying they were too risky. Faced with the prospect of a shrunken subprime market and the exodus of subprime lenders from the state, Georgia Legislators rewrote the law to cap punitive damages. The rating agencies have since announced that they will resume rating the mortgage pools. The rating agencies have yet to announce whether they will continue to rate New York mortgage pools after its law goes in to effect, but consumer advocates did not seem overly concerned. “Based on the position they took in Georgia, they should be able to rate the mortgages,” Zinner said. While the New York law is indisputably an enormous victory for the consumer

groups combating predatory lending, the fight is far from over.

## **Premiums Boost Allstate Earnings**

Allstate Corp., the number two car and home insurer in this country, has reported sharply higher quarterly profit, helped by increases in premium rates and lower claims, and it raised its full-year profit forecast. The company, second only to industry leader State Farm, said first-quarter profit rose to \$665 million, up from \$95 million, a year earlier. This is rather interesting when we read and hear so much about how the insurance industry is suffering. Allstate has spent the last year or so raising rates and cutting unprofitable policies from its books. Total property and liability premiums rose 5% to \$6 billion, and overall revenue rose 8% to \$7.9 billion. Allstate paid out 93.1 cents in claims and costs for every \$1 received in premium, compared with 99.2 cents in the year-ago quarter. The company says it had lower mold claims and put less money aside to cover old claims. Large claims from damage caused by bad storms — referred to as catastrophe losses—rose 20% to \$133 million. I wonder if Allstate is reporting this “good” information to all state insurance regulators.

## **Insurance Most People Can Do Without**

The following is a listing of insurance compiled by an insurance watchdog group that most folks under normal conditions simply don't need. Of course, there will be individuals who will find a need for some of the coverages. I generally agree with the conclusions reached, but perhaps for different reasons in some instances. In any event, here are the recommendations that are found at [www.moneycentral.msn.com](http://www.moneycentral.msn.com), if you would like to look further.

Private mortgage insurance—This is

something that hits about a quarter of all homebuyers. When you buy a house, the mortgage company wants to make sure it won't be hurt too badly if you skip town without paying off the loan. Unless you can put down at least 20% of the home's value, you may have to get PMI. The policy benefits nobody but the lender and can be so expensive that a year's worth of premiums can add up to a 13th mortgage payment. Once the outstanding balance on your mortgage drops below 80% of the original value of the home, federal law says your lender must notify you that you can cancel the insurance. If your home has appreciated rapidly, you can also apply to cancel it, but you'll probably have to pay for an appraisal (\$300 to \$400) to prove your point.

Service contracts – These “extended warranties” are usually worth skipping. A service contract is simply a promise to perform or pay for certain repairs or services. Service contracts often duplicate what's provided in the standard warranty you get with a car or an appliance. Read your regular warranty carefully and then compare it to the service contract. You can usually purchase service contracts later after the original warranty expires.

Separate policies vs. riders – Buying separate policies to cover things like boats or RVs may not be your best choice. While some policies provide added liability coverage and other features, check out if supplemental coverage is already available through your existing homeowners policy. A major reason is cost. Think of it as buying in bulk. When you add a “rider” to an existing policy, it usually costs less than trying to buy a whole new policy. Also, many of these “things that move” are already covered by your home insurance, albeit at less-than-ideal levels.

Flight insurance – This coverage is pretty cheap. According to some statisticians, you could fly on a major airline every day for 26,000 years before you'd be involved in a plane crash. This is a

big moneymaker for the insurance company. American Express offers cardholders \$1 million in coverage for just \$14. If every passenger who flew on a scheduled U.S. commercial flight in 1995 paid \$14 for a \$1 million flight insurance policy, and the insurance company paid \$1 million for every person who died in a plane crash that year, the company still would have made \$7.4 billion. If you purchased your plane ticket with a credit card, you should check to see if you already have flight insurance. Some credit card companies give you \$100,000 in coverage just for charging your ticket on their card.

Credit insurance – Quite often, this insurance is pushed on consumers. The most important thing to remember about credit insurance is that a lender cannot make you buy it. However, many people pay for this coverage without even knowing they have it. While there are several variations (including credit life insurance, credit health or disability insurance and credit unemployment insurance), they all do the same thing: They pay the lender if you can't. So why would you want to pass on credit insurance? One good reason is that you might have enough life insurance, disability insurance or assets to cover your debts. Additionally, you can buy a term life insurance policy for less, and the payout would be higher. For example, if a 30-year-old woman in good health takes out a five-year, \$5,000 loan, credit insurance would cost \$112.50. The cost of the credit insurance is added to the total loan amount. If this same woman already had a \$50,000 term life insurance policy, and tacked on another \$5,000 to cover the loan, it would add less than \$15 to what she already pays for the life insurance policy over the five-year loan period. Even if she buys a new term life policy, it would cost her about \$500 for five years of at least \$50,000 in coverage (that's usually the minimum coverage available). And

remember, the credit insurance policy would only pay the lender whatever is owed. Credit insurance is also a big moneymaker for insurance companies. In some states, for example, insurers and lenders keep 79 cents of every dollar that consumers pay in premiums. Even in the best states (such as Maine and New York), the insurance companies keep about 40 cents of every dollar.

**Short-term, cash value life insurance**—If you don't hold onto them long enough, cash-value life insurance policies are a waste of money. Cash-value life insurance theoretically offers both a death benefit (the money paid to your heirs when you die) and a return on investment. Your equity in the policy—the cash value—builds up over the years, and you can borrow against it or simply stop paying on a policy and let the annual dividends keep the policy in force. While your survivors will still get the death benefit, these policies cost you money in big chunks in the first few years. According to a study by the Consumer Federation of America, it takes five years before one of these policies shows a positive return. And even then, that return is extremely small. Even after 10 years, the average return is only about 2%. All this is due to brokers' commissions and other fees paid in the beginning of the policy's life. If you're looking for life insurance coverage for a short period, term life is your best bet. The premiums are much lower, and your heirs will still get the death benefit.

**Life insurance for children** - This insurance offers a big death benefit, but children don't have debts or dependents. If you're thinking that a cash-value child's life insurance policy would be a good way to save for his or her college education, you can do better elsewhere.

**Mortgage insurance**—It's more expensive than it's worth. You could do much better with another policy—one that you might already have. These policies are designed to make your mort-

gage payments if you die or become disabled. If you're worried about burdening your heirs with mortgage payments, you'd be better off buying straight life insurance. Adding onto your existing life insurance policy is less expensive than mortgage life.

**Cancer insurance** - In 1994, about 10 million Americans were covered by a "disease specific" insurance policy for cancer, heart disease or stroke. But if you look closely at what you get, you'll realize there's a better way and that's health insurance. Some cancer insurance policies promise to refund your premiums every 10 years if you've had no cancer. That is not a bad deal—if you're the insurance company. A study done by the federal General Accounting Office in 1994 found that the largest companies selling plans — that cover only hospital stays or diseases like cancer—paid out as little as 35% of the premiums they took in. Some states set payout targets of 75% or more for other policies. While \$400 a year may not seem like too much to spend for peace of mind, it's the narrow coverage provided by cancer insurance that makes it a bad deal. They'll cover you if you get cancer, but some policies won't pay for cancer treatments until several years after you've bought the policy. Others require confirmation of the cancer by a pathologist, which sometimes is impractical or even impossible. And skin cancer, probably the most common form of cancer, is often excluded.

**Short-term medical coverage** - There will be arguments a-plenty here. Often, this coverage is offered to those who leave one job for another. Under the federal COBRA law, your old insurance policy can "follow" you for about 18 months after you leave, but you have to pay the whole premium. (Here's where you find out just how much your employer's been kicking in for your insurance coverage.) You don't have to pay the premiums until 100 days after your last day on the payroll. But let's say you're single, run three miles a day,

don't smoke and are terrifically healthy. You may decide that the cost of COBRA coverage is too high for the low risk of developing a medical problem before you take your next job. So, don't take the coverage. But, if you have a family, you may conclude that the risk of not having any coverage is too great.

## **Aetna Is Collecting Racial Data To Monitor Medical Disparities**

Aetna Inc. has quietly begun collecting data on the racial and ethnic backgrounds of its 14 million health-plan members — a move that raises sensitive issues of patient privacy and racial profiling for the big insurer. The strategy — now focused primarily on new insurance applicants — is part of a nascent initiative at the large managed-health-care company to tackle one of the most intractable problems in medicine: minority patients fare significantly worse than white patients in a wide range of medical conditions. Aetna says it plans to use the data to better understand differences in how white and minority patients get medical care, and to develop prevention, education and treatment programs to narrow the gap. The big concern is that insurance companies could use such information for underwriting decisions and make it difficult for the people who need coverage to get coverage. Profiling for health circumstances is wrong and shouldn't be tolerated.

According to recent studies, African-Americans, Hispanics, Asians, and others tend to get worse care for conditions ranging from heart disease and diabetes to cancer, asthma and low birth-weight. This is confirmed by a large body of evidence developed during the past decade. While such differences are strongly linked to education, income and insurance status, an influential report by the Washington-based Institute of Medicine, which advises Congress on medical issues, last year said

that the problem often persists after accounting for such factors. Even minority patients who are well-insured, well-educated and relatively well-to-do are more likely to receive lower-quality care, and that is just plain wrong. In many diseases, these differences are associated with higher death rates.

## XIII. ENVIRONMENTAL CONCERNS

---

### **Protecting Alabama Rivers**

Federal fish and wildlife officials want to protect about 1,000 miles of Alabama rivers and streams deemed critical habitats for a host of endangered mussel species. If the federal agency's proposed rule is approved, the protected status of water bodies such as the Black Warrior and Cahaba rivers would be good for water quality, but could threaten construction projects, such as a proposed dam officials say would provide drinking water for Birmingham. The U.S. Fish and Wildlife Service has a year to complete the rule, which officials said would protect eight endangered and three threatened mussels. The process includes hearings for public input. I suspect this proposed rule will be hotly debated for a time.

Alabama has many aquatic animals, making it one of the most biologically diverse states in the country. At the same time, we also lead the continental United States in extinctions. The proposal came about after Fish and Wildlife Service officials concluded that dams, water diversion, dredging, and pollution in Alabama threaten 1,093 miles of rivers and streams. According to environmental groups, the mussels are important to the ecology of the rivers. Since mussels are filter feeders, they spend their whole life sucking in water and filtering it. In effect, these animals act as kidneys of the river, a function which is critical to the life of the river.

However, at present, the mussels are only at one-tenth the level they were in the past.

According to media reports, industry leaders have not decided whether to fight the listing. Federal law requires an economic analysis of the rule. The federal agency could write a rule that will be flexible enough to allow damming of Locust Fork, a tributary of the Black Warrior. Birmingham Water Works officials say that would provide water for the city. There has to be an equitable balance between environmental concerns and economic needs. This balance must be achieved when possible. Unfortunately, protecting the environment has come out a distant second in all too many instances.

### **Two Companies Settle Claims Of Clean Air Act Violations**

Two companies have agreed to settle federal pollution charges by spending nearly \$680 million to reduce industrial air pollution in 16 states and retrofit school buses with cleaner-burning engines. First, Archer Daniels Midland Co. (ADM), the nation's biggest ethanol producer, agreed to a \$350.9 million settlement. The next was Alcoa, Inc., the world's largest aluminum producer, which agreed to a \$334.75 million settlement. The Environmental Protection Agency and Justice Department issued a joint statement announcing the settlement. ADM will spend \$340 million to improve pollution controls at 52 plants in 16 states and \$6.3 million to retrofit diesel engines in school buses. The company also will pay a \$4.6 million civil penalty. Alcoa agreed to spend \$330 million for a new coal-fired power plant with state-of-the-art pollution controls in Rockdale, Texas, \$2.5 million to buy conservation easements around the plant, and \$750,000 to retrofit school buses in Austin, Texas. There was also a \$1.5 million civil penalty required to be paid by the company. Both of the settlements are

subject to 30 days of public comment and court approval. The enforcement actions were initiated under provisions of the Clean Air Act that affect the way older industrial plants have to deal with air pollution when they expand, make major repairs or modify operations to increase efficiency.

The Bush Administration issued rules last year making it easier for industrial plants and refineries to modernize and expand without having to buy expensive pollution controls. This immediately resulted in lawsuits by states charging that the changes would undermine public health. The Administration is now saying that its new approach removes barriers to production and innovation. On the other hand, opponents argue it is a giveaway to industry. As we know, industry lobbied heavily for easing the rules. In my opinion, the new rules may well undermine more than three decades of established law. The Bush Administration has also been promoting a "Clear Skies" bill to impose nationwide caps on power plant, refinery and factory emissions. These emissions are three major sources of dirty air: mercury, nitrogen oxides and sulfur dioxide. Opponents argue for a broader approach to include industrial emissions of carbon dioxide, widely blamed for global warming. How anybody could ignore the dangers of global warnings is beyond my comprehension.

### **Alabama Power Company's Hydro-Dams Must Follow Water Quality Rules**

Last month, the Alabama Rivers Alliance, Lake Watch of Lake Martin and American Rivers obtained a ruling from the U. S. Court of Appeals for the District of Columbia requiring Alabama Power Company's hydroelectric dams to be held to the same water-quality rules as the rest of the State. The ruling in favor of these environmental organizations stemmed from an appeal of a

decision by the Federal Energy Regulatory Commission to re-license Martin Dam without consulting the Alabama Department of Environmental Management (ADEM). Most of the current licenses for Alabama's dams allow the water passing over the dams to be 20 per cent lower in oxygen than the minimum required under State water quality standards. The lower oxygen levels in this water wreaks havoc on the health of lake fish, which depend upon the oxygen supply in the water. In their appeal, the FERC asserted that the water from these dams was not subject to the same Clean Water Act provisions as businesses who discharge plant facility wastes into Alabama waterways. However, the U. S. Court of Appeals did not accept this argument.

In 2000, Alabama Power applied for a license to install three new turbines at Martin Dam. The new turbines would effectively increase the flow over the dam and increase the generator's capacity by 20 to 30 per cent. The FERC argued that this increase in water flow did not amount to a new discharge that would be subject to the provisions of the Clean Water Act. The Court's ruling rejected this argument and vacated the federal permit Alabama Power had received. Although the company recanted and replaced the existing turbine while the case was pending, this ruling may now force Alabama Power to install devices to increase the quality of water released from the dam. For residents of Alabama who are interested in maintaining healthy fish in their lakes, I certainly hope that ADEM will now require Alabama Power to install this badly needed equipment.

### **Even Snails Know Rock Quarries Should Be Regulated**

Last month's report addressed Alabama's lack of regulation of its rock quarries. Many communities are unable to control the location of the quarries

because the state requires no zoning approval for mining companies - only water and air pollution permits are necessary. Aware of this problem, Senator Myron Penn (D-Union Springs) has introduced a bill that could empower residents to stop rock quarry operations in their neighborhoods. The bill would require the prior approval of the governing bodies of municipalities and counties affected by proposed mining operations before operations begin.

Until Senator Penn's bill moves forward, the residents of a north Elmore County community have a new best friend. The tulotoma magnifica, a snail the size of an Easter egg, may be the county's most powerful weapon in its fight against a proposed 77-acre granite quarry site. In an effort to preserve the endangered species, mining company North Montgomery Materials will have to present a plan to protect the snail, in order to have its permit application approved. The tulotoma magnifica makes its home in the sandy bed of Weoka Creek in Elmore County. Don Graham, a Buick resident who opposes the mining operation near his home, said, "I don't think the snail, itself, will keep the quarry out, but it's certainly another reason to keep the quarry out."

The snail is found only on Coosa River tributaries and a small stretch of the Coosa. In 1990, the U.S. Department of Interior's Fish and Wildlife Service listed the species as "endangered". The label was given because its numbers had lowered, mainly because the construction of hydroelectric dams had caused a slowing of the rivers' flow. "I don't know what the ultimate impact of the rock quarry will be on the tulotoma snail in Weoka Creek, but I can say that particles washing into the creek from the quarry would not be good for the snail," said Dennis DeVries, a zoology professor at Auburn University. In addition to worrying about the snail's fate, Elmore County residents are concerned about their local roads and

water supply. A quarry pit could penetrate their underground water source. Noise and dust from the quarry are also a major issue to the local citizens. Regardless of whether David can whip Goliath again, it is refreshing to see a State Senator stand up for people against a powerful special interest. I predict that Myron Penn, the Democrat from Bullock County, will be a real force in Alabama politics for a long time.

## **XIV. MONSANTO UPDATE**

---

### **More Jury Awards In Solutia Case**

The Etowah County jury continues to award damages to the individual plaintiffs in the state court case against Solutia. The awards have been both reasonable and consistent as the jury decides the individual cases, which are being heard in small groupings. Solutia was found liable earlier for PCB pollution caused by the company's chemical plant. The property claims for about 900 more plaintiffs who didn't testify have yet to be decided. The plaintiffs have been seeking money for cleanup costs - which can exceed the value of the land, mental anguish, and reimbursement for the decrease in the property's market value from the contamination. After jurors finish awarding property damages, they are expected to consider personal injury and punitive damages. As expected, St. Louis-based Solutia, a spin-off of Monsanto, maintains the verdicts are unfair. The company contends it has already agreed to clean up the properties and, once it does, their value will not have been decreased. United States District Judge U.W. Clemon has yet to rule on whether the cleanup agreement with federal regulators can take effect.

The jury is deciding the state court

claims against Monsanto and Solutia alleging a factory that produced polychlorinated biphenyls — once a common electrical insulator — contaminated property around Anniston, increasing health risks and devaluing real estate. Jurors in February 2002 found the companies liable for property damage and emotional distress claims, and outrageous conduct, but that trial did not determine how much residents should receive. Two previous lawsuits over PCB contamination in the Anniston area were settled for more than \$40 million each. Our case involving 16,000 plaintiffs is set for trial in federal court in October.

The decisions bring the total awards against Monsanto and its spin-off, Solutia, to more than \$6 million to date, and complete the awards for the 17 plaintiffs selected as representative cases in the lawsuit. The property claims for about 900 plaintiffs have yet to be decided. Defense attorneys requested that the court certify the completed verdicts, which would enable the company to begin an appeals process. The request was denied by the trial judge. From the 1930s to the 1970s, Monsanto made the chemicals at its western Anniston plant, now owned by Solutia. PCBs were widely used to insulate electrical equipment, and have been linked to a range of health effects, from learning disorders to liver disease to cancer.

### **The Federal Court Cases**

We have mediation ordered by the court in over 17,000 claims that are pending in federal court. The mediation will commence on May 14th in Atlanta, Georgia. Hopefully, these cases can be settled so that our clients can get on with their lives. Of course, this will depend on how the corporate defendants view the litigation climate and whether or not they want to right the wrongs they have done. Obviously, liability has been established in the state

court trial. This should leave the amount of damages to be determined and agreed to by the parties during mediation. Our obligation is to see that our clients are fully compensated and that all future needs are met. I also believe that the defendants should be punished severely for their wrongful conduct, which reaches the highest levels recognized under the law.

## **XV. PREMISES LIABILITY UPDATE**

### **New York Jury Awards \$47 Million**

A New York jury recently awarded more than \$47 million to a 54-year-old man diagnosed with cancer caused by exposure to asbestos. The plaintiff, a boilermaker who worked as a contractor for two New York utilities, Consolidated Edison Inc. and KeySpan Corp. unit Long Island Lighting Co. (LILCO), was diagnosed with mesothelioma in May of 2001. The jury found both Con Edison and LILCO negligent and “reckless in their actions and for failing to warn workers of the dangers of asbestos.” While asbestos was widely used for its fire retardant and insulation properties, scientists found in the 1960s and 1970s that the inhalation of its fibers could cause lung cancer and other diseases. This was certainly known to the companies that manufactured asbestos as well as to the companies that used it. Unfortunately, this knowledge was not made known to the public. A five-week trial ended with the jury’s announcing its findings that the electrical companies had not provided the plaintiff with a safe place to work. The plaintiff had been told that he has mesothelioma and has about two years to live. For many years the owners of these plants and the contractors who controlled them have known

about the asbestos exposure and the fatal diseases caused by that exposure. They knew how dangerous asbestos was and exposed men like the plaintiff to it regardless of the consequences.

### **Corning Settles Asbestos Suit**

According to the *Wall Street Journal*, Corning Inc. will take a \$200 million charge in its first quarter to settle asbestos litigation against it and part-owned insulation maker Pittsburgh Corning Corp. The company reached an agreement with the representatives of asbestos claimants for all current and future asbestos claims that might arise from Pittsburgh Corning products or operations. Corning had earlier predicted that the costs to settle the litigation would be between \$100 million and \$150 million. Corning owns half of Pittsburgh Corning. In May, PPG Industries Inc., which owns the other half, settled all current and future personal-injury claims against it and Pittsburgh Corning with a payment of \$2.7 billion.

### **Arsenic-Treated Wood Cases**

There are a significant number of lawsuits involving arsenic-treated wood pending in our nation’s courts. While the product has been on the market since 1938, lawsuits were first filed in the 1980s. According to reports, about 35 cases have been tried or settled. Chromated copper arsenate, known as CCA, is a chemical preservative that protects wood from insects and rot. After it’s processed with the chemical, the lumber is sometimes called green or salt-treated or pressure-treated wood. It’s used in everything from decks to picnic tables to swing sets. Last year, sales reached almost 7 billion board feet worth about \$4 billion. All agree chromated copper arsenate is an effective preservative. The dispute is over the danger in its chemicals, especially arsenic. Many people have developed symptoms of arsenic poisoning

through contact with treated wood. The federal Environmental Protection Agency (EPA) has found that arsenic gets into the soil.

The Consumer Products Safety Commission released a report last month saying that children face increased risk of bladder and lung cancer through contact with wooden playground equipment. A year earlier, the EPA announced that the industry was voluntarily withdrawing chromated copper arsenate from the consumer market and that in 2004 the agency would no longer permit new residential use. Consumer groups were disappointed, however, that the agency did not conclude the wood poses “unreasonable risk” to the public or the environment and did not recommend replacing products already in use. Class actions are pending in Alabama and Louisiana. There are also what is referred to as “mass torts” cases in Mississippi. Frankly, I am not sure where this litigation is headed.

### **Jury Awards Cherry Hill Couple \$5 Million Over Beating**

Attorneys for the Trump organization are deciding whether to appeal a jury’s decision awarding a Cherry Hill, NJ couple close to \$5 million for failing to provide them adequate security at the Trump Marina Casino-Hotel in Atlantic City. It was three years ago that Felicisimo Fuentes, now 64, was walking from Harrah’s to Trump Marina along the bay walkway when he was attacked and beaten into a coma. Today’s he’s confined to a wheelchair and can hardly speak. The couple’s attorney, Gregg Shivers, says the jury concluded Trump knew that area was dangerous and should have provided better security: “The only security they had in this area of the property was one young man on a bike who came by a couple of times a day. They knew there had been three robberies along that walkway between Trump and Harrah’s

in the 11 months prior to this.” Shivers points out just three weeks prior to this attack, a woman was robbed at gunpoint along the same walkway: “I think the message it sends is if you’re a casino and you are spending lots of money to market and entice people to come down and spend money at your casino, you have a responsibility to protect those people.” The attack happened at noontime, as Felicisimo was walking to meet his wife for lunch at Trump Marina, where she worked part time as a blackjack dealer.

### **Parents Of Florida Woman Slain In Chicago Hotel Wins Case**

The parents of a North Miami Beach, Florida, woman who was beaten to death in a Crestwood hotel have settled their lawsuit against the property’s owners for \$4.6 million. The victim, a 33-year-old female, was in the Chicago area training to be a floral company salesperson when she was killed in 1996. A jury had convicted the hotel’s maintenance manager of murder in November. This man had used a key to break into the lady’s room, strangled her with pantyhose, and then beat her over the head to make sure she was dead. He is serving a life sentence for his crime. The defendants in the lawsuit filed by the victim’s parents include the Crestwood Hotel Partners Limited Partnerships, the owners of the hotel, and the Hampton Inn franchiser, Promus Hotels of Memphis.

The lawsuit alleged the hotel owners should have done a background check on the maintenance manager. It also alleged the owners were negligent for not monitoring the actions of their employees. The hotel industry as a whole has done a very good job of fooling their own customers. Folks have assumed that hotels are safe. Nobody running a hotel should give a grand master key, which would open anybody’s door, to employees who

work at the hotel. This is especially true when the hotel owners fail to monitor the employees. A portion of the settlement money will be used by the parents to raise awareness about hotel safety around the country.

## **XVI. TOBACCO UPDATE**

---

### **Judge’s Ruling Allows Philip Morris To Pay Alabama And Other States**

Concerns that cigarette maker Philip Morris USA could miss a payment deadline last month for a \$2.6 billion payment to 46 states, including \$42 million to Alabama, have been satisfied. The giant cigarette maker had warned all of the states that the court’s demand that it post a \$12.1 billion cash appeal bond would place it on the edge of bankruptcy, thus making it unable to make the required payments. The Illinois judge cut the bond in half after a hearing. He ordered Philip Morris to place \$6 billion in escrow to begin its appeal. The appeal bond was required by Illinois law before the company can appeal the court’s order last month that Philip Morris pay \$10.1 billion for misleading smokers into believing “light” cigarettes are less harmful than regular brands. The \$12 billion bond was meant to cover the judgment plus interest and costs from the class action verdict. The Illinois law is meant to ensure parties appealing lawsuits can pay the judgment if the decision is ultimately upheld. But the maker of top-selling Marlboros said it couldn’t pay both the bond and the states. Many of the states had concerns since all were counting on the tobacco money when due. Of about \$84 million due Alabama now due from tobacco companies, a little more than half is to come from Philip Morris. The case is being closely

monitored by the National Association of Attorneys General, of which the office of Alabama's Attorney General is a member. This is a most dangerous situation for the states to be in. I have to wonder how the bondholders feel about future prospects for payments being made.

"Many smokers switched to these brands in a false belief they were reducing their health risk," said Matthew L. Myers, president of the group Campaign for Tobacco-Free Kids, one of many anti-tobacco groups, which supported the verdict. Altria Group Inc.'s Philip Morris USA was the sole defendant in the case. This was the first "lights" class action to go to trial. Similar cases are pending against other companies. The lawsuit was filed on behalf of one million Illinois smokers of the two light cigarette brands. It was the first class-action lawsuit in the nation to come to trial alleging a tobacco company committed consumer fraud in its advertising of light cigarettes. Unlike many other high-profile cigarette-related lawsuits, the plaintiffs didn't claim that smoking made them sick. They accused Philip Morris of wrongly leading customers to believe the "light" brands are less harmful than regular cigarettes. They based their claims on evidence they said showed the tobacco maker concealed crucial research data revealing the detrimental effects of light cigarettes for more than 30 years. Philip Morris had maintained that the light brands show less of the toxins when tested, although individual smokers tend to get more or less toxins depending on how they inhale. The company says it used the word "light" to refer to taste, not content. There will be an appeal of this verdict.

### **R.J. Reynolds And Lorillard Sue California**

R.J. Reynolds Tobacco Co. and Lorillard Tobacco Co. are suing the state of California for state-sponsored ads the

cigarette makers claim vilify the tobacco industry. The suit was filed in U.S. District Court in Sacramento, seeking an injunction halting some of California's Prop 99 advertising. The lawsuit alleges that a substantial number of California's ads are a misuse of taxpayer funds, violate the companies' constitutional rights, and have a prejudicial effect on potential jurors who might be impaneled in lawsuits related to smoking. The lawsuit alleges misuse of tax dollars collected under the California Tobacco Tax and Health Promotion Act (Prop 99) passed in 1988. Prop 99 imposes a 25-cent tax on each pack of cigarettes sold in the state. The companies said Prop 99 tax proceeds are to be used primarily for tobacco-related health education programs and medical care for indigent citizens. The plaintiffs claim that, instead, California inappropriately began a series of radio, TV, billboard and print ads that California officials openly acknowledge are intended to vilify the tobacco industry. The suit follows Lorillard's recent legal battle with American Legacy Foundation, whose anti-tobacco ads have accused Lorillard of adding dog urine to cigarettes. That matter is still before a court.

## **XVII. WORKPLACE HAZARDS**

---

### **\$164 Million Jury Verdict In Texas**

Last month, a Texas jury returned a verdict of \$164 million in a wrongful death lawsuit. The jury awarded the sum to the family of Brad Johnson Sr., who was killed in 1999 when a tire on the vehicle he was working on exploded. The vehicle, a B30 Euclid earthmover, was owned by Trinity Materials, Inc. and Transit Mix Concrete and Materials Co. Each of these companies had business locations in Jefferson

County, Texas. The jury found the two businesses negligent in Johnson's death at the end of a seven-day trial. It was concluded that the two businesses had created a dangerous work environment by directing the decedent to use a heating tool to remove the tire. The 35-year-old man was attempting to repair the brakes on the earthmover when the left rear tire exploded, according to the lawsuit. The explosion occurred at a gravel mine in Waco, Texas. The employee died of his injuries 14 days later. The plaintiffs contended that Trinity had control over Johnson while at Plant 174 and that the company should have trained him to know that the Mining Safety and Health Administration had warned all mine operators never to apply heat to a tire. The plaintiffs further claimed that Trinity also should have trained its employees to intervene when they used the torch. At trial, Trinity claimed that Johnson was an "independent contractor" who acted on his own and was contributorily negligent. At trial, the plaintiffs asked for only \$39 million.

The suit was filed by Mr. Johnson's wife, who is left with three children. The total award was \$163,822,685.83. I believe this is the largest award to date in a Texas wrongful death case. The employee was using a heating torch to remove the tire, which caused the rubber to explode. Defense lawyers argued that the use of the heating tool caused the accident. A request will be made for the judge to reduce the award. If that doesn't happen, the case is sure to be appealed.

## **XVIII. TRANSPORTATION**

---

### **Truck Driver Fatigue Leads To Crashes**

There have been many studies and articles on the subject of driver fatigue. Commercial truck drivers aren't

allowed to drive more than 10 hours or work more than 15 hours at a time without taking an 8-hour break. In addition, drivers may not drive more than 60 hours during a 7-day period, depending on whether the company operates 6 or 7 days a week. Many studies have shown that driver fatigue is related to the absolute number of hours driven, no matter what time of day. For example, the American Association of Trucking Institute found Washington state truck drivers who had driven more than 8 hours had a twofold increase in crash risk.

Research indicates that Federal Highway Administration should increase mandatory rest periods for interstate truck drivers from 8 hours to 12-14 hours. This recommendation alone, however, will not guarantee longer rest time if the industry continues to allow drivers to falsify logbooks. Drivers are required by law to document their driving time, rest time, and on duty time. Inaccurate or false entries in driver logbooks are common practice in fatigued driver cases. A 1992 Institute survey of 1,249 truck drivers reported fewer than 20% thought written logbooks reflected the actual hours most drivers work. (see Status Report, Vol. 27, no. 2, Feb. 8, 1992).

Some have suggested that on-board computers help reduce logbook violations. However, these computers are not required and not installed by all companies. Other devices being used by some carriers warn the driver if the truck is within certain distance of another vehicle and begins to alarm the driver. The problem of driver fatigue and falsification of logbooks is real and causes a great danger to motorists on our highways. Many people have lost loved ones in collisions caused by driver fatigue or a driver who falls asleep at the wheel. This type of conduct is unacceptable, preventable and usually leads to tragic results. The Federal Highway Administration and the trucking industry must continue to

find better ways to monitor driver fatigue and reduce the risk of danger to other motorists.

### **Police Officer To Get \$10 Million In Hearse Crash**

A Texas police officer who survived a horrific Friday the 13th traffic collision has settled his case with the hearse driver who struck him and the man's funeral home employer. The \$10 million settlement will help the officer pay a \$600,000 medical bill and take care of his children's education. "The best gift to me is not the settlement, but getting up and seeing my kids every morning. That sounds corny, but it's the truth," the officer told media representatives at a news conference. "It's not really going to change who I am. It's going to help my kids. ... It really protects their future, which is more important to me than myself," he added. The out-of-court agreement was reached just two weeks before the civil lawsuit was set to go to trial.

The officer, 39, was on patrol the morning of Oct. 13, 2000, when a speeding hearse struck his squad car broadside. The collision wedged him into an 8-inch-wide space from which he was extracted by firefighters. He suffered nine major fractures, internal organ bruises and bleeding. The officer lay in a coma for 26 days, was threatened by a staph infection and endured three bouts of pneumonia. He hovered near to death for days and had 19 surgeries. This man can no longer work as a police officer. The hearse driver pleaded guilty to running a red light, but insisted he had blacked out before the collision and remembered nothing.

### **United To Pay \$3.2 Million To Settle Safety Allegations**

United Airlines has agreed to pay the U.S. Government and a whistle-blower \$3.2 million to settle allegations of substandard maintenance work on military

transport planes for the Air Force. Under the proposed settlement agreement, United denies all allegations brought by the whistle-blower, a former United mechanic who worked on the C-17 planes. The settlement must be approved by the federal judge who heard the case in South Carolina as well as by the judge in United's bankruptcy reorganization case. The allegations were brought by a former mechanic. United helps maintain the engines on C-17 planes at Charleston Air Force Base under a federal contract. The lawsuit was brought under the federal False Claims Act. It had been investigated by the U.S. Attorney's office in South Carolina and by the Air Force. The maintenance allegations had delayed United's receipt of a \$388 million federal tax refund. In March, United sued the government to recoup the refund. The government agreed to release \$360 million but withheld the rest partly because of this pending matter.

The 43-year-old mechanic alleged United fired him in 2001 after he resisted and then reported what he considered unsafe maintenance practices on the engines. He was also fired by his new employer at the base. The employee claims that since he hasn't been able to return to aircraft maintenance, he has lost a career over this. In a court complaint made public, allegations were that the airline refused to provide mechanics with necessary tools and equipment, attempted to hide oil or fuel leaks in engines, and pressured mechanics to falsify reports.

## XIX. HEALTHCARE ISSUES

---

### **Believe It Or Not, Public Citizen Gets The Government To Follow Law**

Agreeing to the terms of a lawsuit filed by the public interest group Public Citizen in February of this year, the U.S. Department of Health and Human Services (HHS) signed a settlement last month under which it will open for public comment a process intended to provide patients with useful information with all new and refill prescriptions. The department had been relying on a faulty, voluntary, private-sector program that did not meet the requirements of a 1996 law passed by Congress, and the agency had not allowed the public to comment, prompting Public Citizen's lawsuit. The U.S. Food and Drug Administration (FDA) has committed to holding a public meeting and soliciting comments on the program and alternatives to the current system, such as an FDA-regulated patient information program. Currently, the government is not regulating the quality or quantity of information patients receive from pharmacies. The companies providing the information have failed to meet the expectations of Congress.

In 1995, the FDA proposed a rule requiring the distribution of scientifically accurate and useful written information with all new and refill prescriptions. This would include information about adverse effects and guidance on how to best use the drugs. The FDA set a goal: By 2000, 75% of patients would be receiving patient information leaflets, and by 2006, 95% would be receiving them. The law passed by Congress in 1996 adopted that timetable and required the private sector to design and implement the program. The

law said 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 refused to take comments on alternative methods of improving the leaflets. This was in violation of the 1996 law. "We're pleased that the FDA is finally agreeing to open this process to the public, but it is frustrating that it has taken a lawsuit to compel it to do so," said Larry Sasich, Pharm. D., a research analyst with Public Citizen's Health Research Group. "The private industry first said it would institute a voluntary program in 1982, but consumers still are taking home prescriptions every day without useful and understandable safety information. It is ridiculous that this process has now dragged on for more than 20 years." In fact, the FDA found in a 2001 study that the private sector's most recent information campaign was ineffective. While 89% 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. I believe that doctors and pharmacists around the country will benefit by the law now being followed. Certainly, consumers will!

Public Citizen has an interest in the success of the program because its members, one of whom was named as a co-plaintiff in the lawsuit, are not receiving sufficient information about their prescription drugs as Congress intended. Since the FDA had not established a public comment period, Public Citizen was being denied its right to participate in the process. A copy of the settlement is available on the Web at [www.citizen.org/documents/Settlement.PDF](http://www.citizen.org/documents/Settlement.PDF). Public Citizen does great

things on behalf of American consumers. This is another example of their excellent work.

### **Costs Of Medical Care And Drugs Remain Challenges For Elderly**

The latest *Wall Street Journal* Online/Harris Interactive Health-Care Poll, conducted in March of this year, sampled the public's views on the most serious challenges facing care for the elderly. This poll was conducted online between March 11 and 13, 2003. The poll results were not surprising. The poll revealed that older adults considered the cost of prescription drugs and the cost of doctors and medical care to be the most significant problems facing them. Finding quality medical care and finding the time and resources to care for elderly family members also scored highly in the poll.

Significantly, the cost of nursing home care and home care for elderly patients should be paid by the government and not the families, according to the poll. The poll found that most older adults want the government to do a number of things in the future for the elderly. Leading the poll were the following:

- Provide a good prescription drug benefit;
- Increase Medicare or Medicaid funding for nursing home care;
- Give the public tax credits for medical assistance programs that would allow them to help their elderly family members;
- Increase funding for home care services; and
- Increase funding for preventive medical programs to reduce disease and disability.

The costs of prescription drugs and doctors are the most serious problems facing the country in caring for its

elderly population. The government likewise should cover more of those costs, according to the poll results. "The public is looking to the government to spend more money than it's currently doing," said Humphrey Taylor, chairman of Harris Interactive, despite the threat of government spending deficits. Nothing in this poll should come as a surprise. Congressional leaders and the Bush White House have access to the poll results.

### **PacifiCare Health Systems, Inc. – U.S. Supreme Court Compels Arbitration**

As previously reported, a group of doctors filed suit alleging that managed-health-care organizations violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by failing to reimburse them for health-care services that they had provided to patients covered by the organizations' plans. The HMOs moved to compel arbitration, which was refused by a federal district court. At issue was whether the agreements could prohibit awards of "punitive damages." Accordingly, the lower court deemed the arbitration agreements unenforceable with respect to those claims. The Eleventh Circuit affirmed.

On further review, the U.S. Supreme Court reversed the lower courts and compelled arbitration. The court asserted it is unclear whether the agreements actually prevent an arbitrator from awarding treble damages under RICO. In reviewing its earlier decisions, the Court noted it had different statutory treble damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards. In particular, RICO's treble-damages provision had repeatedly been construed by the Court as remedial in nature. The Court stated that it was not clear that the parties intended the term "punitive" in the arbitration provision to encompass

claims for treble damages under RICO. Since the Court was unable to know how the arbitrator would construe the remedial limitations, and whether the arbitration provision would bar an award of treble damages under RICO, the Court believed the questions whether the remedial limitations on "punitive" damages render the parties' agreement unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. The Court felt it would be premature for the Justices to address those questions. As a result, they apparently felt the proper course was to compel arbitration.

### **Pharmacy Mistakes Prompt Rise In Lawsuits**

Mistakes by pharmacies have resulted in dangerous and sometimes lethal consequences across the country. A lawsuit was filed against Rite Aid in Michigan by a mother after her son was hospitalized after he overdosed on medication in March 2001. The fourth-grader's prescription was incorrectly filled by a Rite Aid store with twice the needed dose of Tegretol, his panic disorder medication. In filing the suit, the distraught mother stated: "You put so much trust in your pharmacist. You hope that they are paying attention. You hope that they won't make a mistake." Having handled other cases against the chain drug stores, I realize that there are major problems with misfilled prescriptions.

Rite Aid has denied any wrongdoing in the case, which is pending. At least seven other Detroit area families also have filed pharmaceutical malpractice lawsuits since 1999, some of which allege the mistakes have left some victims severely incapacitated and others dead. As errors mount, lawsuits increase exponentially. The pressure on pharmacists keeps growing, partly because the number of prescriptions they are filling annually has jumped

50%, from 2 billion a decade ago to more than 3 billion now. My advice is to deal with pharmacists that you know and trust. I am afraid that the large chains are depending too much on non-professionals to fill prescriptions—even though a registered pharmacist is supposed to be supervising their work.

## **XX. THE CONSUMER CORNER**

---

### **Alabama Joins In National Investor Education Initiative**

Joseph Borg, Director of the Alabama Securities Commission, continues to do an outstanding job for Alabama citizens. He announced on April 3rd that representatives from the Securities Commission are taking part in a national grass-roots investor education campaign to help provide investors with the information they need to make wise financial decisions and protect themselves from financial fraud. "With interest rates at 40-year lows, a volatile stock market, longer life expectancies and the uncertain future of Social Security, smart planning for retirement is more vital than ever," Borg said in a news release. He added, "we are now a nation of 85 million investors. Financial education has never been more important. Investors need to understand the basics of saving and investing, know how to check out an investment or salesperson and how to protect themselves against possible fraud."

"It is never too early, or too late, to start saving and investing for your future," said Borg, whose staff will be visiting high schools, making presentations to all types of organizations representing a wide cross-section of Alabama citizens, and conducting news media interviews. All of these activities occur

year round to educate Alabamians about investing, credit and about fraud prevention. "Making smart financial choices—from using credit wisely to saving for retirement and avoiding fraud—is the best way to ensure you can meet your financial goals." The investor education campaign was to be completed during April. The Facts on Saving and Investing Campaign is a joint effort of state and Canadian provincial securities regulators. The campaign is now in its sixth year.

Borg said, "One of the newest and most exciting initiatives taking place in Alabama is the formulation of an Alabama Jump\$tart Coalition. Business, government, various organizations and volunteers will pool their resources to work for the common goal of promoting financial education to all citizens. The Alabama Securities Commission is proud to participate in the new Jump\$tart Coalition along with representatives from the banking industry, Department of Education, the Alabama Cooperative Extension, the Alabama Council on Economic Education and many more dedicated and highly talented people." For more information about the Jump\$tart Coalition contact the Commission's Education and Public Affairs Division or visit the ASC Website at [www.asc.state.al.us](http://www.asc.state.al.us) and check out the Jump\$tart site through the "Helpful Websites for Investors" section. The Alabama Securities Commission enforces Alabama securities laws, licenses/registers brokers, firms, and securities products, provides background reports on financial professionals and promotes grass-roots investor education programs. We should all be thankful that Alabama has a dedicated public servant such as Joe Borg working for us. Maybe one of these days he might decide to run for an elected public office. He has a capable lawyer by the name of Randy McNeill in the office who would be a very good replacement in the event Joe ever decides to leave for another challenge.

## **Appeals Court Upholds Unsolicited Fax Advertising Ban**

A federal appeals court has upheld a nationwide ban on unsolicited fax advertising. On March 21st, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit overturned last year's ruling by a U.S. District Court judge that declared unconstitutional the Federal Communications Commission's ban on unsolicited commercial faxes. The Missouri Attorney General's office initially sued Fax.com, a broadcast fax provider, along with the now defunct American Blast Fax, on charges of violating the Telephone Consumer Protection Act's prohibition on junk faxing. The FCC joined the suit after Fax.com challenged the prohibition's constitutionality.

## **XXI. RECALLS UPDATE**

### **S. Rothschild Has Recalled Girls' Hooded Winter Jackets**

S. Rothschild & Co. Inc. has recalled about 37,000 girls' iridescent, hooded winter jackets. The rubber petal and metal snap can break off from the jacket, posing a choking hazard to young children. The company has received two reports of the rubber petal coming off the jacket, including one child who reportedly put the petal in her mouth. The snaps have come off in subsequent testing. The recalled jackets are blue, lilac, pink, raspberry and magenta and include sizes XS/2T - L4T, 2/4 - M/5-6 - L/6X, 3/6 - 6/9 - 12M - 18M 24M, and S/2T - M/3T - L/4T - XL/5T. The style numbers, which can be found on a tag attached to the left sleeve, are 52913, 52813J, 12913K, B2913, 32813, 12816C, 3281J, 82819D, 82816D, and 32816C. The jacket labels include the words, "Little Impressions," "Rothschild," "Izzi's Kids," or "Clock-

wise." The recalled jackets were made in India. Major retail stores nationwide sold the jackets from May 2002 through December 2002 for about \$25 to \$45. Consumers should stop using these jackets immediately and contact S. Rothschild and Co. at (800) 301-3411 between 8 a.m. and 3:30 p.m. ET Monday through Friday to arrange for the jacket to be repaired and returned free of charge.

### **Walt Disney Parks And Resorts Has Recalled Woody Dolls**

Walt Disney Parks and Resorts has recalled about 40,000 Woody dolls sold at the WALT DISNEY WORLD® Resort in Lake Buena Vista, Florida, DISNEY'S VERO BEACH Resort, Magic of Disney and Flight Fantastic shops located at the Orlando International Airport and Disney's Worldport shop located at Pointe Orlando. The Woody doll's clothing has buttons that can detach, posing a choking hazard for young children. Walt Disney Parks and Resorts has received one report of a child removing a button from the Woody doll. No injuries have been reported. The recalled doll is a cowboy named Woody, a character in the animated films Toy Story and Toy Story II. The Woody doll is a soft-bodied doll with soft plastic head, hands, boots and hat; wearing blue jeans, a red/yellow-checked shirt, a black/white-spotted vest with a sheriff's badge, and a red-patterned bandana, and is 13 inches tall. A label sewn into the left side seam of the doll reads, "WALT DISNEY WORLD®" on one side and "©DISNEY, ALL NEW MATERIALS, POLYESTER FIBERS," several State license numbers, and "WALT DISNEY ATTRACTIONS, LAKE BUENA VISTA, FL, PRODUCT OF CHINA" on the other side. Only the Woody dolls described above are included in the recall. These recalled soft dolls were sold from January 2000 through January 2003 for about \$12. Consumers should immediately take

the doll away from children and contact Walt Disney Parks and Resorts at (866) 228-3664 to receive a full refund. For more information, please visit the company's Website at [www.waltdisneyworld.com](http://www.waltdisneyworld.com). This recall does not involve items sold at the DISNEYLAND® Resort, through the Disney Store, the Disney Catalog, DisneyStore.com or at other retail outlets. Additionally, the talking versions of the Woody doll are not part of this recall.

### **Maytag Has Recalled Gemini Gas Ranges**

Maytag Corp. has recalled about 23,000 Gemini gas ranges. The range can experience a delayed ignition flashback fire in the upper oven, which poses a fire and burn hazard to consumers. Maytag has received nine reports of flashback fires, including three minor burn injuries and incidents where consumers suffered singed hair or clothing. The recall involves all Maytag Gemini Gas Ranges. The Gemini ranges are free standing, have separate upper and lower ovens, and come in white, black, bisque and a stainless finish. The "Maytag" and "Gemini" names and logos appear on the control panel. The recalled ranges have a model number of MGR6772 and a serial number with the alpha characters AJ through AX or CA through CC, both of which are located on a flip-up serial tag behind the upper left corner of the control panel. The ranges were manufactured in the United States.

Retail appliance stores nationwide sold the ranges from July 2002 through February 2003 for between \$1,300 and \$1,500. Consumers should immediately stop using the upper oven self-clean and broil features, and consumers should not use the upper oven simultaneously with the lower oven. Consumers should contact Maytag at (866) 580-9177 to arrange for a free, in-home repair by an authorized Maytag Customer Service contractor. For more

information, consumers can visit Maytag's Website at [www.maytag.com](http://www.maytag.com). The company reports that use of the lower oven is not affected by this repair and may be used in normal operation.

### **OWT And Sears Roebuck Have Recalled Electric Routers**

OWT Industries, Inc., of Pickens, South Carolina and Sears Roebuck and Co. (Sears), of Hoffman Estates, Ill., have recalled about 5,200 electric routers used in woodworking. The on-off switch on the routers could stick in the "on" position, posing a risk of serious lacerations to the operator and bystanders. Sears says it has not received any reports of injuries or incidents. This recall is being conducted to prevent the possibility of injury. This recall involves Craftsman® routers, model number 315.17510 with date codes of A3025 or lower. The model numbers and date codes are printed on a black data label located on the electric motor's housing. The routers have an aluminum base with black handles and a black motor. All affected routers were packaged with a cloth carry bag under the stock number 17518. Routers sold without the bag are not involved in the recall. Sears sold these routers nationwide from November 2002 through January 2003 for about \$60. Consumers should stop using these routers immediately and return them to their nearest Sears store for a product exchange. For more information, consumers can call toll-free at (800) 932-3188, or visit the firm's Website at [www.sears.com](http://www.sears.com).

### **Hitachi Has Recalled Circular Saws**

Hitachi Koki U.S.A. has recalled about 14,300 circular saws. The lower blade guards on these saws can stick in the open position, exposing the blade and posing a serious laceration hazard. Hitachi has not received any reports of

injuries, but has received two reports from consumers of the lower guards sticking. The recall involves 7 1/4-inch circular saws with model numbers C7SB2 or C7BD2 and serial numbers that begin with C62, C72, C82, C92, C02 or CN2. The model number is located on the green nameplate on the motor housing below the name "Hitachi." The serial number is stamped at the lower right of the nameplate. The saw's housing is green and the name "Hitachi" also is written on the metal blade guard.

Home centers, hardware stores and industrial suppliers nationwide sold these circular saws from August 2002 through March 2003 for between \$90 and \$100. Consumers should stop using these circular saws immediately and return them to Hitachi for a free repair. For more information, contact Hitachi at (800) 706-7337 or visit the firm's Website at [www.hitachi.com](http://www.hitachi.com). Hitachi circular saws with a circle stamped on the UPC label on the box are not included in this recall. Saws that have a light gray plastic stop between the upper and lower blade guards where they overlap also are not included in this recall.

### **General Motors Has Recalled The 2003 Cadillac CTS**

The National Highway Traffic Safety Administration (NHTSA) has announced that General Motors has recalled 2003 Cadillac CTS vehicles. The NHTSA campaign ID number is: 03V115000. Approximately 47,835 units are affected. Some passenger vehicles have a condition in which the intermediate steering shaft bolt may be loose. An improperly tightened bolt could loosen, resulting in separation of the upper and lower steering shafts causing a loss of vehicle control. If this happens while the vehicle is moving, a crash could result without prior warning. Dealers will inspect for the presence of the intermediate steering

shaft bolt and ensure that it is tightened to the proper specification. Owner notification began March 20, 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Cadillac at 1-800-458-8006.

### **General Motors Has Recalled the 2003 Buick Rendezvous And Pontiac Aztek**

The National Highway Traffic Safety Administration (NHTSA) has announced that the 2003 Buick Rendezvous and 2003 Pontiac Aztek, manufactured between January and February 2003, have been recalled by General Motors. There are potentially 4,512 vehicles involved. In some of these sport utility vehicles, the diameter of the steering column intermediate shaft is too small. This condition could allow the intermediate shaft to spin inside the steering column coupling, resulting in loss of steering control of the vehicle. If this were to happen while the vehicle is moving, a crash could result. Dealers will inspect, and replace if necessary, the steering column intermediate shaft. The manufacturer has reported that owners were notified by telephone on February 7, 2003, with a follow-up letter on February 11, 2003. Owners may contact Buick at 1-800-521-7300 or Pontiac at 1-800-762-2737.

### **General Motors Corporation Has Recalled The 2003 Chevrolet Express And GMC Savana**

Information received from the National Highway Traffic Safety Administration (NHTSA) reveals that the 2003 Chevrolet Express and 2003 GMC Savana vehicles have been recalled. Approximately 18,327 vehicles manufactured from April 2002 through January 2003 are involved. On certain

vans with a gross vehicle weight of less than 8,500 pounds, during a crash sufficient to deploy the safety belt pretensioner, the front safety belt buckles may not release after a crash, or may cause the buckle to unlatch in a crash, resulting in an increased risk of personal injury. Dealers will replace the front driver and passenger side safety belt buckle. The manufacturer has reported that owner notification began last month. Owners may contact Chevrolet at 1-800-222-1020, or GMC at 1-800-462-8782.

### **Nissan Has Recalled The 2002 Xterra And Altima**

The National Highway Traffic Safety Administration (NHTSA) has announced that 2002 Nissan Xterra and 2002 Nissan Altima vehicles manufactured between June and November 2001 have been recalled by Nissan. Approximately 64,562 vehicles may be involved. On certain passenger and sport utility vehicles, the clock spring electrical connector may not be fully secured to the driver air bag module squib pin connector. If the connector comes loose, the driver air bag will not deploy in a crash, increasing the risk of injury. Dealers will install a retaining clip on the clock spring electrical connector. The manufacturer has reported that owner notification began last month. Owners may contact Nissan at 1-800-647-7261.

## **XXII. FIRM ACTIVITIES**

---

### **Beasley Allen Radio Shows**

In addition to our Saturday radio show, we now have the Jere Beasley Hour every Friday at 7:00 a.m. on WLWI News Radio 1440-AM. This station has a very large audience in Central Alabama. We are pleased to have this opportunity. The call-in show will be hosted by

Kevin Elkins, a well-known radio personality. We will continue to do our Saturday show, which has a very good listening audience covering central and south Alabama. We are still interested in a radio hook-up in the Birmingham area. Hopefully, that can be worked out within the next few weeks.

### **PraiseFest At Jubilee CityFest**

Last year, our firm was honored to sponsor Jubilee PraiseFest. This event was an opportunity for our Montgomery community to hear positive music that proclaimed the name of Christ. The attendance at PraiseFest was staggering and the Montgomery community encouraged our firm to support this event again. We enthusiastically agreed to do so. Recently, the Jubilee CityFest committee announced that the Newsboys will be the headline act for PraiseFest 2003. This band, scheduled to perform on Saturday night, May 24th, is well known for their pop music of faith and encouragement. Throughout the Newsboys' fourteen years of success, they have produced 17 number one songs, including "Shine", "It is You" and "Entertaining Angels." The talented band has also received seven Dove awards, which honor the very best in Christian music. Currently, the Newsboys have high expectations for the success of Thrive, a new album they recently released. They are currently working on another album, Adoration: The Worship Album. Please mark your calendars to see Newsboys and other Christian bands during the Memorial Day weekend festival. Jubilee CityFest will be held May 23-25, 2003. I hope that you enjoy PraiseFest 2003! Mayor Bobby Bright and others were responsible for putting Christian music on the agenda for Jubilee.

### **Beasley Allen Hosts Semi-Annual Blood Drive**

Beasley Allen held its semi-annual Blood Drive on March 28th with Life-

South Community Blood Center. LifeSouth brought out two buses for the event, which attracted a good number of donors from the firm. Donors received a free T-shirt and cholesterol screening. LifeSouth is a primary blood supplier for Montgomery, Autauga, Elmore and Crenshaw Counties. Our firm had a very good turnout for this important happening. Several of my co-workers waited around, hoping to see me “pass out” when they drew the blood. But, I escaped one more time.

### **Shareholder LaBarron Boone Receives Distinguished Alumni Award**

Shareholder LaBarron Boone has received the University of Alabama Black Law Students Association Distinguished Alumni Award for Outstanding Achievements in the Field of Law. LaBarron was presented the award at the Black Law Students Luncheon on Friday, March 28th. All of us at the firm are proud of LaBarron’s many accomplishments. He is an outstanding lawyer and a good person—a hard combination to beat.

### **Profile Of Another Beasley, Allen Shareholder**

Mike Crow joined our firm 20 years ago. He graduated from Jones School of Law in 1986 and was admitted to the practice of law in 1987. Mike was born in Naples, Italy. His father was in the Air Force at the time. Mike is in our Personal Injury Section and mainly handles car and truck litigation, and premises liability cases, and has special interest in brain injury cases. He is the author of “The Nuts and Bolts of a Car Wreck case” and “The Use of Accident Reconstruction in a Car Wreck Case.” Mike has been highly successful in litigating against the “Big Box Stores” such as Wal-Mart, Home Depot, and others. As a result, he has a wealth of knowledge of their practices and procedures.

Mike is married to the former Marla

Taylor of Hope Hull, Alabama, and they have two children. They attend Frazer Memorial Methodist Church in Montgomery. He is also on the Board of Directors for the Central Alabama Chapter of the Alabama Lung Association. While in college, Mike played varsity basketball and has continued his interest in sports. He also raises Labrador Retrievers, which means he has to be a good fellow. Mike is a very good lawyer and is a valuable member of our firm. We are fortunate to have him here.

### **Profile Of A Good Employee**

Libby Rayborn, who serves as my Executive Assistant, has the difficult job of putting this Report together each month. Libby, a native of Georgia, has worked with me for over 14 years. She has a rare talent for dealing with people and making them all feel important, which they are. This is most important in this office. Libby is an outstanding employee who is totally dedicated to her work. Some say working for me entitles her to the “purple heart!” I would say a special award—more in keeping with her value to the firm—would be more appropriate. I certainly depend on her to run my part of the firm. She does a great deal of the work in putting out this Report each month.

Libby grew up in Douglasville, Georgia, where her dad was the minister of First Presbyterian Church until his retirement. Libby is married to Bill Rayborn. Her daughter, Ally, is entering the 6th grade at Alabama Christian Academy. Most of Libby’s time away from work is spent transporting Ally from one cheerleading event to another. When she is not a spectator of Ally’s cheerleading, Libby enjoys going to movies, traveling, and college football (especially Auburn). Libby, Bill, and Ally enjoy spending time together and with their 4 very special “rescued” dogs.

### **S.T.E.P. Foundation**

While our thoughts and prayers are with our military personnel in Iraq, keep in mind that there is a war raging right here in our backyard. That is the war against poverty. Fortunately, there is a faith-based group in Montgomery fighting the local battle on a daily basis. The S.T.E.P. (Strategies to Elevate People) Foundation is working hard to help people help themselves out of poverty by giving them basic education through programs such as sexual and alcohol abstinence training in area schools, a fatherhood initiative that helps non-custodial fathers better support their families, and violence prevention. S.T.E.P. is also active in presenting the Gospel to public housing unit residents through weekly Bible studies. Relying strictly on the financial gifts of others to keep their programs going and growing, I strongly support the S.T.E.P. Foundation and encourage all of our readers to do the same. While I am sure there are similar groups throughout the country, I am personally familiar with the work of S.T.E.P. Judge Joe Phelps, who was my longtime friend and advisor, introduced me to the S.T.E.P. folks several years before he died at a much too young age. During much of his life, Joe worked tirelessly and without fanfare for Lee Baugh and others at S.T.E.P. That was an inspiration to lots of folks—including me. I know that tough economic times are hurting fund-raising efforts by charities. I encourage you to help S.T.E.P. financially. Contributions may be made to the S.T.E.P. Foundation at P.O. Box 241347, Montgomery, AL 36124. You may get additional information by calling them at 334-262-3141 or visiting their Website (online June 1st) at [www.montgomerystep.org](http://www.montgomerystep.org).

## XXIII. CLOSING REMARKS

Perhaps the most disappointing thing about how the Alabama Legislature operates is the undue influence exercised by the special interest groups on some of the members. The 500-plus lobbyists who work day and night to influence what happens in the State House are really a fourth branch of government. I don't believe that is the way folks back home want government to work. A prime example of the tremendous influence over the process is the nursing home legislation that is pending in the Senate. All polls have indicated that the public favors the residents over the nursing home bosses in this fight. However, that certainly hasn't affected a few in the Senate. When only a handful of Senators indicate public support for the bills, one has to wonder how the bills have gotten as far as they have. If the bills pass, the plight of the nursing home residents will go from bad to worse. Alabama nursing homes already have more legal protections than do nursing homes in any other state in this country. There have been relatively few lawsuits riled each year against nursing homes in Alabama, and no frivolous lawsuits can be filed. So, I again have to wonder what is going in the Senate and why some are so interested in helping nursing home owners, especially the large out-of-state chains. It is especially troubling that hurting the folks who have to be confined to the facilities, many of which are obviously under-staffed and substandard, doesn't seem to bother the small number of Senators who are really pushing these bills.

We are facing a special session of the Legislature, which probably will have been called by the time this report is received. This session will be to "fix" the fiscal mess the State of Alabama faces. The regular session will have to go into recess so that the special session can start up. Hopefully, the Legislature will put aside party politics and help the Governor with this Herculean task. Our prayers must be with all concerned that they find long-term answers to our fiscal problems.

Finally, we must continue to pray for our leaders—both on the national level and here in Alabama—on a daily basis. This is not an option—but is an absolute necessity for all of us. This doesn't mean you have to agree "politically" with all of the public officials. In fact, healthy opposition and debate is a necessary part of our political process in this Country. Our obligation is to pray that God will give our leaders wisdom, insight, courage, strength, and the ability to do the job required of them.

# † PRAISEfest



**NEWSBOYS**

**A DAY OF  
CONTEMPORARY  
CHRISTIAN MUSIC  
AT**



**SATURDAY, MAY 24th**

**V. O. W. 12-1pm**  
**Floodgate 1:30-2:30pm**  
**Power of Prayer 3-4pm**  
**Cory Sellers 4:30-5:30pm**  
**Ginny Owens 6-7pm**  
**Newsboys 7:30-8:30pm**

Sponsored by



On the Russell Construction/Compass Bank/BellSouth Stage

**FOR MORE INFORMATION, Contact Cole Portis at  
[cole.portis@beasleyallen.com](mailto:cole.portis@beasleyallen.com)  
 OR LOG ON TO [WWW.JUBILEECITYFEST.ORG](http://WWW.JUBILEECITYFEST.ORG)**

# THE JERE BEASLEY REPORT

MAY 2003

JERE LOCKE BEASLEY  
J. GREG ALLEN  
MICHAEL J. CROW  
THOMAS J. METHVIN  
J. COLE PORTIS  
W. DANIEL MILES, III  
STEPHEN W. DRINKARD  
R. GRAHAM ESDALE, JR.  
JULIA ANNE BEASLEY  
RHON E. JONES  
ROBERT L. PITTMAN  
LABARRON N. BOONE  
ANDY D. BIRCHFIELD, JR.  
RICHARD D. MORRISON\*  
C. GIBSON VANCE  
J. P. SAWYER\* <sup>μ</sup>  
C. LANCE GOULD  
JOSEPH H. AUGHTMAN  
DANA G. TAUNTON  
J. MARK ENGLEHART#  
CLINTON C. CARTER<sup>Ω † \*</sup>  
BENJAMIN E. BAKER, JR. <sup>Δ ∑ Θ Φ †</sup>  
DAVID B. BYRNE, III  
TED G. MEADOWS \*  
GERALD B. TAYLOR, JR. <sup>∇ † # \*</sup>  
DAVID F. MICELI <sup>∇ Δ</sup>  
FRANK WOODSON  
KENDALL C. DUNSON<sup>Δ</sup>

(OF COUNSEL)

J. PAUL SIZEMORE<sup>Δ †</sup>  
A. LES HAYES, III

SCARLETTE M. TULEY  
CHRISTOPHER E. SANSPREE\*  
ROMAN ASHLEY SHAUL<sup>Ω \* κ</sup>  
LARRY A. GOLSTON, JR.<sup>∇ ∑</sup>  
D. MICHAEL ANDREWS  
RONALD AUSTIN CANTY  
MELISSA A. PRICKETT  
W. ROGER SMITH, III <sup>† ψ ϖ \*</sup>  
JOHN E. TOMLINSON  
KIMBERLY R. WARD  
NAVAN WARD, JR. \*

<sup>ψ</sup> ALSO ADMITTED IN ARIZONA

<sup>Ω</sup> ALSO ADMITTED IN ARKANSAS

<sup>Δ</sup> ALSO ADMITTED IN GEORGIA

<sup>∇</sup> ALSO ADMITTED IN FLORIDA

<sup>ϖ</sup> ALSO ADMITTED IN MINNESOTA

\* ALSO ADMITTED IN MISSISSIPPI

<sup>Φ</sup> ALSO ADMITTED IN NEW YORK

<sup>μ</sup> ADMITTED IN OHIO

<sup>Θ</sup> ALSO ADMITTED IN OKLAHOMA

<sup>κ</sup> ALSO ADMITTED IN SOUTH CAROLINA

<sup>†</sup> ALSO ADMITTED IN TENNESSEE

<sup>#</sup> ALSO ADMITTED IN TEXAS

<sup>∑</sup> ALSO ADMITTED IN WASHINGTON, D.C.

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

[www.beasleyallen.com](http://www.beasleyallen.com)

RETURN SERVICE REQUESTED

[www.beasleyallen.com](http://www.beasleyallen.com)

WEB PAGE  
(334) 954-7555  
TELECOPIER  
(800) 898-2034  
TOLL FREE  
(334) 269-2343

218 COMMERCE STREET (36104)  
POST OFFICE BOX 4160  
MONTGOMERY, ALABAMA 36103-4160

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