

THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

The Decision On A Fair Tax Package

As we all know by now, Alabama voters will decide on September 9th whether to accept or reject the Governor's proposal to move Alabama forward. Governor Riley's tax reform and governmental accountability plan will—if approved—change how public schools and state government operate. Included in his package are significant changes that will definitely improve accountability. The plan would fill state budget shortfalls that could reach \$675 million next year. Clearly, failing to fill that hole would slash state services in a number of critical areas. More importantly, if approved, the Governor's plan will help create a world-class education system in Alabama and ease the tax burden on poor people. According to the Governor, "We have an opportunity now to transform Alabama and transcend anything that we've ever done before." I believe most Alabama citizens agree with his assessment. Certainly, there will not be another opportunity to reform a broken taxing system for decades if the voters reject the Governor's plan. Some opponents are saying, "if it ain't broke, then don't fix it." Well, simply put, in response I would say that the system is broken and has been for years. I hope and pray that people will go to the polls and vote "yes" on September 9th.

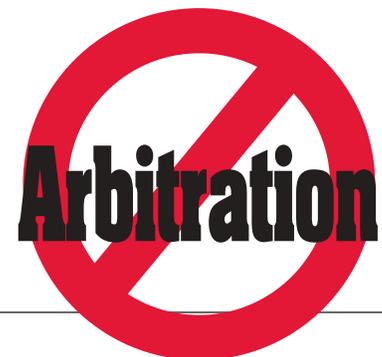
Groups Join Forces To Support Riley's Tax Plan

The battle lines are forming over the Governor's proposals to move our state forward. An impressive group of organizations have joined forces to campaign for the plan. The newly formed Alabama Partnership for Progress consists of 47 groups, including the Business Council of Alabama, the Alabama Education Association, the Alabama Arise (a lobbying group for the state's poor), the Alabama Watch consumer group, the child advocacy group Voices for Alabama's Children, and the League of Women Voters of Alabama. It is pretty obvious that these groups haven't always been on the same side politically. This showing of unity among such diverse groups is a very good sign. Members of the coalition are: A Plus Education Foundation; Alabama Appleseed Center for Law and Justice; Alabama Arise; Alabama Child Caring Foundation; Alabama Association of Elementary School Administrators; Alabama Association of Licensed Early Care Educators; Alabama Association of Middle Level Administrators; Alabama Association of School Administrators; Alabama Association of School Boards; Alabama Association of Secondary School Principals; Alabama Association of Supervision and Curriculum Development; Alabama Civil Justice Foundation; Alabama Conference of Social Work; Alabama Department of Education; Alabama Department of Postsecondary Education; Alabama Disabilities Advocacy Program; Alabama Education Association; Alabama Education Retirees Association; Alabama PTA;

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Alabama Watch; Birmingham Regional Chamber of Commerce; Business Council of Alabama; Campaign for Alabama; CASA of Marshall County; Children's Aid Society; Children's First Foundation; Community Action Association of Alabama; Council for Leaders in Alabama Schools; Episcopal Diocese of Alabama; Federation of Child Care Centers of Alabama; Greater Birmingham Ministries; Higher Education Partnership; Huntsville-Madison County Chamber of Commerce; Junior League of Lee County; Kid One Transport; League of Women Voters of Alabama; League of Women Voters of Auburn; League of Women Voters of Baldwin County; League of Women Voters of Gadsden; League of Women Voters of Greater Birmingham; League of Women Voters of Mobile; League of Women Voters of Montgomery; League of Women Voters of Tuscaloosa; Montgomery Area Chamber of Commerce; National Association of Social Workers; Save Kids of Incarcerated Parents; and Voices for Alabama's Children.

In addition to the groups mentioned above, there are others supporting the Governor's plan. The Alabama Retail Association, a powerful group representing thousands of Alabama businesses, announced its support of the plan. U.S. Steel has also signed on, which is most encouraging. I believe many other groups will join the coalition and work to help win the battle on September 9th. I was glad to see Pat Dye and Gene Stallings, two of my favorite people, endorse the plan. These two coaching legends have many friends around the state and their support will certainly have an effect. With all of the false information being circulated, and the natural tendency to oppose new taxes, the Governor needs all the support he can muster. Certainly, the groups making up this coalition, along with others to come, should be able to carry the day. Frankly, I have real difficulty understanding how anybody—without a special interest motivation—could in good conscious oppose the plan.

State Chamber Of Commerce Endorses Tax Plan

It is most significant that the Chamber of Commerce Association of Alabama (CCAA) has endorsed the tax reform plan. With more than 110 local chambers of commerce in its membership, the CCAA says it represents nearly 50,000 Alabama businesses and industries. The CCAA president and CEO Ralph Stacy said in a news release which was supplied to us: "While the revenue portion of the governor's package affects each Alabamian differently, the accountability measures that are built in touch each of us regardless of station in life. CCAA believes that efforts to foster good government also positively affect the future of the business community of Alabama." The CCAA will team with Alabama Partnership for Progress members to help pass the proposal. As mentioned above, the organization is a grassroots coalition of more than 50 Alabama organizations. The support of the association is critically important and greatly appreciated. There has also been a great deal of support from local Chambers of Commerce.

Chamber Of Commerce Support

Since I live in Montgomery and serve on the Board of Directors of the Montgomery Area Chamber of Commerce, I was most pleased that the Chamber has voted to support the Governor's package. The Chamber's membership-based Governmental Affairs Task Force and Executive Committee reviewed the issue before its final passage. The text of the position statement follows:

For many years, the Montgomery Area Chamber of Commerce has been on the record in support of comprehensive statewide tax reform when combined with strong education accountability and efficiencies in government. The Chamber also has supported, time and time again, increased local funding for public education. The Chamber has long believed that

improving education is inextricably tied to the economic and personal growth of our citizens. As such, it is the cornerstone of the Chamber's ability to effect positive change through its mission of job creation and quality of life improvement.

The revenue and accountability reform package proposed by the Governor offers the first real attempt since 1901 at meaningful reform of the state's tax and education systems. While it is still too early to determine the exact financial benefit the reform package will have on Alabama businesses and families, it will be most significant. The Montgomery Area Chamber of Commerce commended Governor Riley and the Alabama Legislature for their historic passage of the reform package. Now it is up to the people of Alabama to decide which road our state takes after September 9th. We can either tread water a little longer, fall backwards, or move forward. For me, the choice is an easy one. I plan on doing all I can to help the Governor pass the plan.

ALFA Opposes The Governor

It was no surprise when the Alabama Farmer's Federation (ALFA) officially came out against the Riley tax reform initiative. ALFA had fought hard to kill the package in the Legislature. ALFA argues that the tax on farms is too high and that the money raised is too much. ALFA's position on this issue gives the Governor an opportunity to let folks know just what ALFA really is. ALFA claims that by capping the current use evaluation at 2,000 acres the Riley plan raises taxes on farms too much. What ALFA fails to include in its argument is that large landholders and giant corporations that have enjoyed low taxes for years will finally have to pay a fair share of the amounts needed to run a modern state government. It should be remembered that 95% of the farms in Alabama contain less than 2,000 acres. All ALFA is doing is seeking to "protect" the remaining 5%. ALFA

claims it is concerned that if current use is changed on these larger holdings and they are assessed at market value, landowners in rapidly growing parts of the state would be "forced" to give up their "farms" and to develop their property. The last time I checked, very few of these 2,000 acre farms are in rapidly developing areas. Most of the large farms are owned by corporate farmers. ALFA has put out a great deal of false information to small farmers in Alabama over the past weeks. They owe it to the public to be totally truthful in opposing the Governor.

ALFA also fails to tell folks that the 2,000-acre cap applies only to state taxes. At the county, municipal and school district level, current use assessments remain in force on all acreage. More than 80% of the property taxes levied in Alabama are levied in counties, municipalities and school districts. ALFA will spend a tremendous amount of money to convince citizens to vote to keep 5% of Alabama "farmers" from paying taxes that, even if raised as the Governor proposed, will still be below the regional average. ALFA should be leading the fight to put our state on a firm financial footing and to adequately provide for the future. However, ALFA has never operated in that manner and I guess it's too late to teach an old dog new tricks.

State Debt Almost Doubles In Ten Years

Most Alabamians don't realize how much in debt the state is at present. Alabama State government owes almost enough money to pay for the state's two major operating budgets for a year. Presently, the state owes \$4.9 billion from bond issues taken out over the years to fund new highways, build new schools, improve drinking water systems and the state docks, refurbish state parks, and finance other projects. The state's education and General Fund budgets for

the current fiscal year total about \$5.3 billion. The state's debt has almost doubled over the past decade, growing from \$2.8 billion in 1993. Much of the growth over the past 10 years has come from a major bond issue to build new schools and remove portable classrooms from school yards, a bond issue to improve the state's roads and bridges and another to refurbish the state's parks. The interest on this debt is staggering.

The state will have to pay about \$370 million back during the next fiscal year and will owe \$400 million in 2006. The state continues to pay for some bonds that were scheduled to be repaid by now, but instead were refinanced. Obviously, this extends the payment term. It is critical that there is sufficient money from the state's operating budgets so that the bond payments can be made every year. The State is still paying for an infrastructure that has already worn out. While bonded indebtedness has its place, it can't be a substitute for a pay-as-you-go system, which has to be the primary method of operating government.

Majority In Alabama Back Judge's Stand On Ten Commandments

The results of a recent survey concerning Judge Roy Moore shouldn't have come as a big surprise to many folks. It reveals what I already knew and that is a very large majority of Alabamians back the Chief Justice's stand on the Ten Commandments. Specifically, based on this poll, 77% of the people believe the monument should remain on display in the state judicial building. Results of the Mobile Register-University of South Alabama poll showed 77% of the people surveyed either "strongly approve" or "approve" of the monument and agreed that Judge Moore should appeal the order to remove it to the U.S. Supreme Court. The poll was conducted after the July 1st decision by a

three-judge panel of the Eleventh U.S. Circuit Court of Appeals, which upheld a lower court ruling that the monument violates the First Amendment's ban on government-established religion. Judge Moore's position is that the issue before the Court involves the acknowledgment of God as the foundation of our moral law, under both the United States Constitution and the Constitution of Alabama. I must confess that I agree with that position. I sincerely hope that the U.S. Supreme Court will take this case and decide once and for all that displaying the monument is a good thing. Many believe this will be the most important case to be presented to the Court in years. When we look around today and see a country that is in deep trouble in so many areas of our daily lives, I have to believe that we should be calling on God's guidance and direction, rather than rejecting Him.

Commissioner Sparks Works To Help Alabama Farmers

The Alabama Department of Agriculture, with the help of one of my favorite entertainers, has undertaken a campaign designed to help the state's ailing farmers. Television commercials, billboards and posters are being used, effectively touting Alabama produce as "A+." The ads are encouraging Alabama consumers to "Help Alabama Grow" by buying products grown in the state. Ron Sparks is doing an excellent job as Commissioner and is a real friend of Alabama farmers. His latest effort is certainly a good one. The 30-second television spot features Commissioner Sparks and Randy Owen, lead singer for the band Alabama, who is well known throughout the country and certainly well respected in our state. Randy currently serves as a member of the state Board of Agriculture and Industries. The Commissioner and Randy were high school friends and have remained close over the years.

The campaign will also feature billboards along Alabama's highways and labels on products identifying them as Alabama grown. Agriculture is the Number One industry in Alabama and Alabama farmers must be supported. The new ad campaign was made possible by a grant from the U.S. Department of Agriculture. This ad campaign is "Phase One" of a plan to help keep Alabama farmers from going under. The Commissioner is working hard to find additional funding to help give Alabama agriculture a boost. Finding ways to increase Alabama's exports is a top priority for Commissioner Sparks. We should all give him our support and thank him for taking actions that are good for Alabama.

Some Social Workers To Be Issued Bulletproof Vests

We are living in a violent, hate-filled world with problems of all sorts affecting mankind. It is a sad commentary on the times and on people generally. Who would ever have believed that Alabama social workers would have to wear bulletproof vests. However, we are told that these state employees will do exactly that when making home visits because of a rising number of encounters with makers and users of crystal methamphetamine. Alabama Department of Human Resources Commissioner Bill Fuller says reports of child abuse and neglect are increasingly linked with the use of the dangerous drug. The Commissioner estimated the vests would cost between \$100,000 - \$200,000. Some of the department's 14,000 child welfare social workers will also be trained by the Alabama Bureau of Investigation in handling confrontations with crystal meth producers and other drug users. Authorities say crystal meth users are extremely dangerous because the powerful stimulant makes them feel "ten feet tall and bulletproof." This drug—combined with the widespread use of crack cocaine—is causing tremendous

problems in Alabama. It is difficult to understand how our country has failed so badly in the drug war. We have come from a society where folks weren't afraid to walk the streets at night—and many didn't even lock their doors—to our current state of affairs in this country. While I don't believe we will ever go back to those times in America, I do strongly believe that we must do all within our power to make our homes and streets safe for all people.

ADECA Will Hunt Misspent Grants

Apparently, the Alabama Department of Economic and Community Affairs (ADECA) will try to recover several million dollars in grants the department believes have been misused by various people and groups. ADECA Director John D. Harrison has hired a veteran prosecutor (Mobile lawyer Bill Wasden, a former assistant Attorney General) to handle the work. Apparently, ADECA is looking at criminal prosecutions in cases involving the misappropriation of state funds. ADECA Assistant Director Bill Johnson told members of a legislative committee recently that there could be \$5 million to \$8 million in grants and awards that the department believes have been misspent. ADECA is faced with repaying the federal government, or a reduction in future federal grants, for at least two projects where federal auditors allegedly found problems. I understand that the Attorney General's office will make the final decision in this matter.

The FCA - Making A Difference In Alabama Schools

The Fellowship of Christian Athletes (FCA) has a presence on over 350 campuses through its ministry's on campus Huddle Groups in Alabama. These groups meet weekly for Bible study, prayer, and Christian fellowship to offer young people a positive alternative to the negative peer pressure they are

facing today. In the 2002-2003 school year, over 35,000 students attended FCA huddle meetings. Each summer, thousands of young people and coaches from across the nation attend FCA National Camps. These camps provide a week of inspiration and motivation. Many young people return from the Boy's and Girl's Athletic Camps as well as the Leadership Camps ready to make a difference in their personal lives and on their school campuses. There were 240 athletes and coaches from Alabama who attended FCA camps this summer.

FCA currently employs seven directors statewide as well as chaplains at both Auburn University and at the University of Alabama. Montgomery has an Urban Director, James Callier, who meets regularly to disciple many of the local young men. Statewide, there are a total of ten FCA directors ministering to juniors and seniors in high school and on college campuses. The FCA staff's role is to encourage and minister to coaches and athletes.

There is a great need to expand the FCA staff to better serve Huddle Groups throughout the state. The current FCA statewide budget is 1.3 million dollars. The FCA's goal is to double its staff in Alabama to help the current staff better serve athletes and coaches. FCA has a great need for local involvement to help support the financial needs of the ministry. The immediate urgent need is to raise enough money to hire directors for the Dothan area and the Mobile-South Alabama area before school begins this fall. FCA needs your help to expand the ministry. If you are interested in helping make a difference on school campuses throughout Alabama, please contact John Gibbons (334-279-9399), P.O. Box 230685, Montgomery, Alabama 36123. I can think of no better way to help young people than to support FCA financially and with your time and talents. I strongly encourage each of you to get involved.

Fighting The Battle Alone

Many of us face trials and tribulations on a recurring basis, and sometimes we feel that the odds are stacked against us when we have to take an unpopular stand or engage in a fight over matters of principle. I know on occasion these fights can seem sort of lonely. A friend of mine sent me the following message, which helped me, and I thought it was worth passing on. I do believe that there is an ongoing fight between the forces of evil and good. Fortunately, since we have the Master on the side of good, we know the “end result.”

The story is told of an old lady who had moved to the United States from Europe when she was a child, but now she wanted to officially become a citizen of this country. After months of going through all the necessary red tape, she was finally ready to take the required oath. “Raise your right hand, please.” She raised her right hand. “Do you swear to defend the Constitution of the United States against all its enemies, domestic or foreign?” was the first question. The little old lady’s face paled and her voice trembled as she asked in a small voice, “Uhhh . . . all by myself?” I know the feeling. When I read what the apostle Paul had to say about the great spiritual battle going on, I tremble a bit. Paul said, “For we do not wrestle against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this age, against spiritual hosts of wickedness in the heavenly places.” (Eph. 6:12)

The thoughts of waging such a battle alone is enough to cause even the most stouthearted to tremble. But we don’t go into battle alone! We go forth as a part of the army of God, led by the Son of God in all his glory, and side by side with every brother and sister in Christ on the face of this earth. The battle is still a difficult one. There will be many casualties along

the way. But, thank God, we do not fight it alone!

II. LEGISLATIVE HAPPENINGS

McDowell Lee—A Living Legend

McDowell Lee, a native of Barbour County, Alabama, has served as Secretary of the Senate for some 40 years. Any person who has ever dealt with the Alabama Legislature and specifically the Alabama Senate, has come away with a real appreciation for this man’s ability, dedication, and knowledge of the legislative process. Without question, he is one of the most unique individuals with whom I have had the pleasure of working with. Mr. Lee has one trait that I believe is one of his best attributes—he is intensely loyal to his friends. At the same time, he is at least courteous to his enemies, which hopefully are now very few. Finally, there is not another person in the state who has more knowledge about the workings of state government. I am fortunate to call the Secretary of the Senate my good friend. McDowell Lee is a living legend and for the good of our state, I pray he will be around for several more years as the “boss” in the Senate.

Another Special Session

The Governor will have to call another special session of the Legislature to pass budgets to operate state government and fund public education. This will happen regardless of how the September referendum turns out. However, if the voters reject the tax reform package, the Legislature will face the toughest session in recent memory. The Legislators will have to fund all of the essential functions of state government, including a public education with a reduction in the

current budgets of between 20% and 25%. Obviously, this will require massive cuts in a number of areas. It will be impossible to pass a budget with cuts of that magnitude without hurting people in this state badly. For that reason, each member of the Legislature should take the lead in their area to promote the Governor’s plan. Those who sit out the fight—or take a negative stand—will regret it in the special session and I predict for years to come.

Predatory Lending

Alabama needs to take a stand in the fight to control the predatory lending industry. This will require legislation. One of the first things needed is amending the payday loan bill that was passed during the last hours of the regular session. It now appears that the bill passed was very weak and not good for consumers.

III. COURT WATCH

Secret War On Judges

I read an advance copy of an article in Forbes Magazine that should be required reading for every American citizen. It should concern all Americans when they learn that the U.S. Chamber of Commerce has been engaged in a “secret war” on judges in this country. According to the article dated July 21, 2003, the Chamber has spent \$100 million since 2000 and will spend \$50 million or more in judicial races during the current year. The prime objective, according to Forbes, is to vote out judges supported by trial lawyers, labor unions, and the Democratic Party and put their own judges in who will be sympathetic to insurance companies, multinational corporations, and the Republican Party. The Chamber is also apparently taking aim at state Attorneys General, state legislators, and trial

lawyers. A study by the Brennan Center for Justice at New York University Law School and the National Institute on Money in State Politics mentioned in Forbes says that candidates spent \$46 million in state judicial elections in 2000. This was up 60% from the previous election. The Forbes article made this very strong statement: "the Chamber thus has reshaped the once sedate, lawyer-friendly game of electing judges, roiling it with vituperative politics replete with attack ads, whisper campaigns, and allegations of election-law violations." The article stated further: "ads have grown increasingly negative and controversial and in some cases [have] fallen far beneath the level of dignity most Americans associate with the judicial system. Adding to the intrigue, the Chamber cloaks its efforts by sidestepping disclosure laws that require revealing contributions. Instead of donating cash to candidates, it provides ad money and couches the effort as informational and policy-based. "We're seeing that politics is rearing its ugly head," says Professor Lester Brickman of the Cardozo Law School in New York. "But politics has always been present, if shrouded in black robes. Now it's out in the open." This should come as a shock to most folks, but it certainly isn't to anybody in our law firm. Unless the trend is reversed, we will experience many more corporate scandals and much more corporate wrongdoing. This blatant movement to take over American courts and destroy the jury system is well financed and even better planned.

Several states were mentioned in the Forbes article, including Alabama. The American people, and especially consumers, should be extremely concerned over this once secret and now wide-open war on judges. The article indicates that big money is "rolling in from drug companies, heavy manufacturers, large retailers, insurance companies, and banks." Any person who believes in the jury system, and does not believe that the courts should be "bought,"

should read the Forbes article. More importantly, working men and women, retirees, and anybody who loves "liberty" and "fairness" should roll up their sleeves, get involved, and be willing to go to work to save our courts.

The Continuing Erosion Of The Right To Trial By Jury

Expert testimony is an essential part of a plaintiff's evidence in a products liability or personal injury case. During trial, a plaintiff's expert witness can provide valuable information for the judge and jury regarding a certain aspect of the litigation. Often times an expert witness can help a jury understand a difficult concept regarding causation, for instance. On June 28, 1993, the United States Supreme Court issued an opinion in *Daubert v. Dow Pharmaceuticals, Inc.* that has made the admission of expert testimony a great deal more difficult. While this is primarily for lawyers, I hope our non-lawyer readers will find the following information interesting. It will give you an idea of how things have changed and how it is getting harder to obtain justice in many meritorious cases.

Before the opinion of the Court in *Daubert*, most federal and state judges relied on a two-prong standard for deciding if expert testimony should be allowed in the courtroom. The first standard was whether the testimony related to an issue in the trial and would be helpful to the jury. The second was whether the methods employed by the expert in reaching his conclusions were generally accepted within the expert community. However, the Supreme Court in *Daubert* determined that judges should act as "gatekeepers" and admit only evidence that was "relevant and reliable." That Court went so far as to suggest four criteria in determining if the science in question was credible and admissible:

- Is the evidence based on a testable theory or technique?

- Has the theory or technique been peer reviewed?
- Does a particular technique have a known error rate and standards controlling the technique's operation?
- Is the underlying science generally accepted?

The Court further suggested that the criteria outlined in the *Daubert* opinion should not be a "definitive checklist or test." This allows trial judges to utilize criteria of their own. However, *The Wall Street Journal* reported in a June 27, 2003 article titled, "Ban on 'Junk Science' Also Keeps Jurors From Sound Evidence" that legitimate scientific evidence has become much more uncommon in the courtroom since the *Daubert* ruling. The article further reports, "Judges are dismissing testimony by physicians as anecdotal [unreliable], setting standards for scientific evidence higher than what doctors and researchers use, and barring testimony when scientists in different disciplines disagree." Judges and lawyers have been allowed to demand a certainty from science that is not reasonable, given that science is usually unable to reach such definitive conclusions. Even if a case is backed by legitimate science, a judge can deem the evidence unreliable or too ambiguous for a jury, and the case will be dismissed before trial. Judges now have the authority to deny a jury trial to a badly injured person based on their own limited knowledge of a scientific subject.

Chief Justice William Rehnquist, in his dissenting opinion in the *Daubert* case, voiced legitimate concerns about the majority opinion allowing judges to become "amateur scientists." A recent report published by the Project on Scientific Knowledge and Public Policy (Project) titled, "*DAUBERT: THE MOST INFLUENTIAL SUPREME COURT RULING YOU'VE NEVER HEARD OF*" outlines some of the specific problems with the *Daubert* ruling. According to the report, polluters and manufacturers

of dangerous products have been using the ruling to keep scientific or any other evidence against them out of the courts. Pre-trial “Daubert hearings,” in some cases, exclude evidence that a plaintiff must depend on, and the case, crippled from the hearing, cannot proceed. Usually, these hearings and their effects are not made known to the public, since the judges conduct the proceedings before trial.

According to the report published by the Project, product liability and toxic tort cases had been rapidly increasing in the two decades leading up to Daubert, and corporations that manufactured hazardous products were losing battles in court and paying large sums of money in damages to people who died or were injured by their products. Peter Huber and the Manhattan Institute, which is well funded by corporate backers, promoted the phrase “junk science” through a public relations campaign aimed at discrediting the work of scientists who found evidence of adverse health effects caused by exposure to chemicals in toxic tort cases. The report further states, “The term ‘junk science’ has no real meaning. In his widely publicized and distributed book, *Galileo’s Revenge*, Huber offers only a broad-ranging ‘I know it when I see it’ description of ‘junk science’.” Junk science is basically science that someone, the user of the phrase, disagrees with. The real problem with applying the term “junk science” is determining which expert a judge should use to determine if another expert’s testimony is credible or not. As stated above, there is no definitive answer. The report also indicates that Huber and his colleagues never label researchers who are funded by the tobacco industry, which also helped finance the “junk science” movement, as junk scientists.

After the publication of his book in 1991, Huber became a popular figure among judges and policymakers. In his book, Huber made charges against and

attacked many scientific endeavors of the environmental and occupational sciences because the endeavors appeared to threaten corporate interests. As a result of Huber’s elevation to a position as one of the country’s leading voices in the debate over tort reform, Judge Alex Kozinski used Huber’s definition of “good science” as the main clarification of the scientific method when he wrote his opinion in the Daubert case for the U.S. Court of Appeals for the Ninth Circuit, where the case was remanded by the U.S. Supreme Court. Through his book’s influence on the Daubert opinion and because of the way the opinion is being interpreted, Huber has been able to influence the entire civil litigation system with his point of view about expert testimony.

The report also listed a few trends following the *Daubert* opinion:

- The percentage of expert testimony by scientists that has been excluded from the courtroom has risen significantly.
- The expense of defending a Daubert challenge appears to be having a “chilling effect” upon plaintiffs, who don’t have the same resources as large corporations and often cannot afford to defend against aggressive attacks on their experts.
- Scientists and physicians are increasingly reluctant to provide expert testimony in civil litigation cases because of the lengths to which defendants go to discredit them and their work.
- The percentage of judgments dismissing a case before trial has more than doubled since Daubert. Over 90% of these judgments were against the plaintiffs and in favor of the defendants.
- Encouraged by their success in the courtroom, powerful interests are now trying to extend the reach of Daubert-like evidentiary standards to the regulatory arena, where they may affect the federal government’s

ability to understand and act to reduce risk from hazardous exposures.

Furthermore, rulings from a *Daubert* hearing are extremely difficult to reverse. In a 1997 case, *General Electric v. Joiner*, the Supreme Court ruled appellate courts should not overturn the admissibility decision of a trial court unless the trial court abused its discretion when considering the evidence. Also, in 1999 the Court clarified the Daubert ruling in *Kumho Tire Co. v. Carmichael* by finding that the ruling should be applied to all expert testimony, even if it is based on the experience of the expert, and not only testimony which relies on science. These later rulings make a plaintiff’s burden extremely onerous when attempting to build a case against a defendant using expert testimony. So far, approximately 20 states have adopted the standards articulated in Daubert for use in state cases, while Daubert applies to all cases pursued in federal court.

The *Daubert* and *Kumho* decisions have resulted in a disparity in our justice system. These two decisions hand judges extensive powers to decide not only if certain evidence should be admitted into the courtroom, but whether a case should proceed at all when there are differences of opinion among experts. Daubert has led to unreasonable demands of scientific certainty when considering expert testimony that is crucial to a plaintiff’s case. An unfortunate legal precedent is being set by the continuing inaccurate interpretations of science. However, I must say that to date, our firm has not had any difficulty with experts in our cases. That speaks well for our lawyers and for the experts we select and use. It also speaks well for the judges we practice before—both in and outside of Alabama—and hopefully, that trend won’t change in the future.

Business Groups Hire Lobbyists

Consumers have very few groups in Washington that really work for their interests and even fewer “politicians” on their side. When you get past the AARP and Public Citizen, you don’t have a very long list to check out. Now we learn that at least a hundred companies and industry associations have hired some 500 lobbyists whose job is to further restrict the rights of consumers. For example, Congress is being asked to make it much harder for consumers to file class action lawsuits. Consumers need help to combat unfair and corrupt corporate practices and, when used properly, the class action lawsuit is a valuable tool. Most of the corporations claiming to have been victimized by unjustified class actions have actually engaged in harmful practices that would not have been corrected had consumers not been represented in such suits.

The companies have spent millions of dollars to lobby lawmakers to pass a measure that would dramatically change the rules applying to class actions. If passed, this will enable corporations to injure or defraud consumers while hiding behind legal loopholes. Those leading the charge in Washington are life insurance companies, property and casualty insurers, health maintenance organizations (HMOs), banks and finance companies, auto manufacturers, retailers, pharmaceutical manufacturers, gas and oil corporations, and tobacco companies. The bill being pushed fails to even address the abuses they complain about in their hypocritical lobbying. This is simply because these companies favor settlements that pay little to consumers or other plaintiffs.

I am sure that there have been some abuses in the use of class actions. In fact, some corporations have used “sweetheart” class action lawsuits on occasion to avoid their legal massive obligations to consumers who have been damaged by their wrongdoing.

However, legitimate class actions also play a big part in giving consumers a method of obtaining badly needed relief. These corporations would have us believe that all class action lawsuits are frivolous and trivial. But their record is “replete with roguery and rip-offs that could only be remedied through class actions,” according to Public Citizen President Joan Claybrook. This tireless worker for people added: “Class actions have forced these companies to refund hidden charges in bills, compensate homeowners for polluting their properties, pay employees who worked overtime ‘off the clock’ and recall cars with defective ignitions. Congress must not open an avenue for Corporate America to skirt the rules at the expense of workers and consumers.”

At least 100 major companies and pro-business associations unleashed at least 475 lobbyists on Capitol Hill from 2000 through 2002 to promote their anti-consumer agenda. Many of these lobbyists have revolving-door connections to top government offices. For example, at least 131 of the 475 lobbyists who registered to work on class action legislation had some kind of government connection. At least 10 are former members of Congress, which is not surprising. The influence of special interests is always reflected in political contributions. The 29 corporations and business groups that have lobbied most actively for class action legislation gave a total of \$49 million over the past three election cycles to influence elections. The legislation (H.R. 1115) has already passed the U.S. House of Representatives. However, since it passed by a one-vote margin, the margin of victory was a major disappointment to the companies pushing the bill. The bill must now go through the U.S. Senate. Hopefully, the Senate will at least make the badly needed changes in the measure.

If the House bill passes, corporate defendants would be given substantial procedural advantages. Its main mechanism is to divert many class actions from state to federal court. This would

help companies and harm consumers. It is much harder under the rules to certify a lawsuit as a class action suit in federal court than it is in state court. Under the House bill, many class action suits would never even reach court. The House legislation would allow any decision to certify a class action to be appealed. As a result, cases would be delayed by an average of 11 months—the median time it takes a U.S. Court of Appeals court to decide a case. In some circuits, this delay could be as long as 16 months.

The “class action rap sheet” of industries most heavily lobbying on the bills shows an array of legitimate suits aimed at serious abuses. Life insurers paid billions for deceptive sales practices. HMOs and property/casualty insurers are charged with manipulating software to underpay health care providers and claimants. Banks and finance companies have paid millions for misleading customers about interest rates and charging hidden fees. Retailers have been forced to pay overtime wages to employees forced to work off the clock. Tobacco companies have been called to account for misrepresenting tar and nicotine levels of so-called “light” cigarettes. The study also found that the misconduct of some industries ranged widely. Petroleum companies have faced suits for consumer fraud, environmental damage, and employment discrimination. Auto companies have been ordered to replace defective parts and to refund padded insurance premiums. Pharmaceutical companies faced the widest range of suits in terms of both misconduct and the widest range of plaintiffs. In addition to consumers, independent pharmacies and HMOs have been plaintiffs. Jackson Williams, legislative counsel for Public Citizen’s Congress Watch, made this prediction:

Corporate lobbying campaigns on class actions should be viewed as a preview of coming scandals. In the 1990s it was the accounting industry lobbying to weaken class actions, fol-

lowed in 2001 by the Arthur Andersen/Enron debacle. This report shows what's likely to happen in the next decade if the bill passes: rampant consumer fraud and abuse of workers.

Florida's Medical Malpractice Crisis

There has been much said and printed about Florida's so-called medical malpractice crisis. Testimony before the Judiciary Committee of the Florida Senate virtually demolished the argument that patients' rights must be sacrificed if there is to be an affordable insurance market for doctors and physicians. Among the startling admissions, according to media reports, was that there are no "frivolous lawsuits" against doctors because Florida law put a stop to them more than 14 years ago. According to media reports, the medical lobbies have only anecdotes, not hard facts, to back their claim that Florida is losing doctors, emergency rooms and trauma centers. If anything, according to reports, there are more licensed doctors every year.

It was also pointed out that the Office of Insurance Regulation in Florida doesn't probe the data that insurance companies submit to justify their rates and doesn't require executives to attest to the truth of it. Clearly, according to recent admissions, there has been no explosion in actual malpractice or litigation. In fact, the insurance company that underwrites most of the Florida doctors considers this its most profitable state. The *St. Petersburg Times* quoted the company's president: "If we can't make money at these rates, we ought to quit." His company pays the Florida Medical Association \$500,000 a year, which is 10% of the FMA's budget, to recommend its policies to Florida doctors regardless of what competitors might charge. That is certainly good to know, but is hard to explain.

The *St. Petersburg Times* reported further on the recent admissions in Florida:

The virtue of sworn testimony - an extreme rarity in Tallahassee - is to separate opinion from fact. The malpractice controversy was on a wrong track from the beginning because of the refusal of the governor's task force to put its witnesses under oath. But while the Senate's 11th-hour decision to take sworn testimony may have stiffened its resolve against a \$250,000 cap on noneconomic damages, the development came too late to throw the train altogether off the track. The big question, Senators say, is how much higher the limit will be. That's the wrong question; the right one is whether insurance reform is what Florida doctors really need. Physicians would also benefit, it seems clear, if the legislation were to include a ban on insurance industry payola to their professional associations. And while they're at it, lawmakers should come to the aid of every Floridian by fitting the Office of Insurance Regulation with a sharper set of dentures. The larger lesson this week is that all legislative testimony should be taken under oath - not for fear that unsworn speakers might lie, but to remind them to distinguish their facts from their propaganda. A law or other public policy can never be better than the facts that go into the making of it.

Maybe the Alabama Legislature should consider putting tort reform witnesses who testify before legislative committees under oath. It will also help if the Legislature would give the Insurance Department the authority to do its job. Certainly, the turn of events in Florida puts a new light on the tort reform effort in that state. The difference in the "sworn testimony" was quite revealing.

The Truth About The Lawsuit Stories

There have been a number of lawsuit result stories put out that are totally false. For example, in a U.S. News & World Report column about frivolous lawsuits, owner Mort Zuckerman was guilty of spreading some false reports when he wrote the following:

A woman throws a soft drink at her boyfriend at a restaurant, then slips on the floor she wet and breaks her tailbone. She sues. Bingo—a jury says the restaurant owes her \$100,000! A woman tries to sneak through a restaurant window at a nightclub to avoid paying the \$3.50 cover charge. She falls, knocks out two front teeth, and sues. A jury awards her \$12,000 for dental expenses.

These were stories obviously intended to have an effect on tort reform battles being currently waged in Congress and in several states. Unfortunately all of what Mr. Zuckerman published was totally false. Two Websites—www.StellaAwards.com and www.Snopes.com—say the cases of the soda-slipping Pennsylvania woman and the window-wriggling Delaware woman are fabricated with no public records being found to substantiate them. A number of newspapers and columnists have touted the same phantom cases since they first surfaced in 2001 in a Canadian newspaper. Interestingly, a spokesman for Zuckerman did not dispute that the pair of cases in the column two weeks ago were fiction. However, according to reports, he would not address whether the magazine will publish a retraction. I guess the moral of this story is that if a "lie" is repeated enough, it soon becomes akin to the "truth."

IV. CONGRESSIONAL UPDATE

A Rising Star On Capitol Hill

A freshman member of Congress from Alabama is attracting a great deal of attention in our nation's capitol. After just six months in office, U.S. Representative Artur Davis has attracted a great number of new followers. The Congressman grew up in Montgomery where he attended Jefferson Davis High School. Lindora Snider, a friend of mine, taught Artur in high school and says she is not a bit surprised at the success of her former student. Having had the opportunity to observe Artur over the past few months, I must say that I am most impressed. He has a tremendous ability to communicate his message to people from all walks of life. Artur has a message that appeals to working folks, retirees, and persons from all walks of life who want to move Alabama forward economically and socially. I predict a bright future for this newcomer to the political arena. We need more like him!

Anti-Consumer Legislation

There has been more anti-consumer legislation introduced in Congress during the Bush Administration than I have seen in many years. It is quite clear that the agenda for the 108th Congress is very much anti-consumer. Fortunately, there are a good number of Senators and a few House members who are willing to stand up to the powerful lobbying efforts and fight for ordinary citizens. The more people see of the heavy-handed attitude and tactics of the Bush White House and the Republican Party leadership, the more they are beginning to realize that we need a change at the top. While President Bush seemed unbeatable a few weeks ago, it now appears that there are some serious chinks in his political armor.

V. CAMPAIGN FINANCE REFORM

Bad Guys Still Giving Big Money

Thirty-one corporations that have had to pay criminal fines gave more than \$9 million to the Democratic and Republican parties during the 2002 election cycle, according to a report released recently by Corporate Crime Reporter. These corporations gave \$7.2 million to Republicans (77%) and \$2.1 million to Democrats (23%), the report found. The report: Dirty Money: Corporate Criminal Donations to the Two Major Parties, was released at a recent news conference in the nation's capitol. The top five corporate donors with questionable backgrounds, ranked by total amount of contributions to the major political parties in the 2002 election cycle are: Archer Daniels Midland (\$1.7 million); Pfizer (\$1.1 million); Chevron (\$875,400); Northrop Grumman (\$741,250); and American Airlines (\$655,593).

The report checked the political contributions of more than 100 major companies convicted of criminal charges from 1990 to this year. "The Republicans and Democrats are awash in dirty money," said Russell Mokhiber, the editor of the Corporate Crime Reporter. "They took in more than \$9 million from convicted criminals. Last year, when the heat was up on WorldCom and Enron, politicians from all stripes returned campaign contributions from these two tainted entities or sent them on to charity. The parties should do the same." It is quite obvious that we have a double standard for persons charged with criminal offenses. Until we start putting the persons responsible for the crimes committed in the corporate boardrooms of America in jail, the list of companies making these political contributions will continue. We must treat persons who steal with a pen just as harshly as we treat other common criminals.

Section 527 Internet Disclosure System

The government's new Internet disclosure system of the financial activity of Section 527 groups is a vast improvement over the previous system, but still has some shortcomings. At least it is a step in the right direction. The 527 groups have been wrongfully used to influence elections, something that was never intended by Congress. You will recall these are political organizations that can collect unlimited soft money contributions from special interests and then spend the funds to influence elections. Recently, the IRS unveiled its new Internet disclosure system of the financial activity of Section 527 groups. While the Section 527 disclosure site is much better than it used to be, it can be improved. The site now includes advanced search features by contributor name and by range of contributions. The database may be downloaded by the public into other database programs. Congress passed a Section 527 disclosure law in November 2002 (H.R. 5595). This required the IRS to enhance the quality of the information filed by 527s and post this information promptly on the Internet in a searchable and downloadable fashion. The law required that the IRS meet these requirements by July 1, 2003. The IRS has since updated its Web disclosure system for Section 527 groups. The IRS has done a reasonably good job of carrying out its congressional mandate and that is good news. The IRS is utilizing modern technology when it comes to electronic filing and disclosure of new Section 527 reports. Many believe the agency should do the same for disclosure of the financial activity reports of electioneering 501(c) non-profit groups, which are not covered by the Section 527 disclosure law. The IRS' Section 527 disclosure Website is at www.irs.gov/charities/political/article/0,,id=109644,00.html.

VI. PRODUCT LIABILITY UPDATE

An Update On NHTSA's New Chief

You have to go back to Joan Claybrook to find a person in charge of the National Highway Traffic Safety Administration who is a real strong proponent of auto safety. Now, Dr. Jeffrey W. Runge, the new Administrator, keeps up with the number of people who died in traffic accidents last year. That is most encouraging in that it shows he cares about people. Dr. Runge, a former emergency room physician has seen his share of victims of highway crashes. He now finds himself heading up an agency whose duty is to protect citizens and make our highways safe. However, the new man on the job learned the hard way that it doesn't pay to criticize the powerful auto industry. You will recall that he said that sport-utility vehicles are prone to roll over, that they are too dangerous in crashes and that he wouldn't let his young daughter own one "if it were the last vehicle on earth." A few weeks later, appearing before a Senate committee, he didn't exactly back off, but said he hoped industry could move faster than government on safety improvements. Dr. Runge said his comment about his daughter was intended to convey only that families should be careful about allowing young drivers to drive SUVs because they handle differently than cars. It was quite obvious that the Bush Administration was none too happy with his comments.

Despite the political storm, Dr. Runge got attention. The auto industry is now at least engaged in a voluntary effort with NHTSA to improve SUV safety. While Dr. Runge may have learned an uncomfortable lesson from the SUV speech, it won't be the last time the administration will hear unpopular

words from him, according to Washington sources. The new Administrator came to the office as a political novice, but has shown an ability to work with, and around, the restrictions of politics. Among other things, he works for an administration that is firmly opposed to withholding highway funds until the states take certain safety actions. Rather than sanctions, in which states are denied money, Dr. Runge must work with incentives, in which states get extra money for taking action.

The auto industry was reported to be pretty upset about Dr. Runge's SUV comments. Even so, the automakers are now working with the new Administration on several issues, including his crusades for seat belt laws and against drunken driving. Based on everything I have heard and read about Dr. Runge, he will work hard to bring about a reduction in the number of deaths that are occurring each year on our highways. If the President and his group of political advisors would back NHTSA fully, we would see some tremendous advancements in auto safety under the direction of the new Administrator. We can't afford to turn auto safety decisions over to the auto industry and hope they will voluntarily do the "right thing." For all too long, the industry has put "profits" over "safety" and the public has suffered as a result. The right wing of the Republican Party has been most effective in using their "anti-big government" message to make the regulation of the auto industry fairly ineffective over the years. The President and Congress should make sure Dr. Runge and NHTSA are given the funding and tools required to do their job. Hopefully, that will happen and soon.

Recent Court Ruling Could Affect Cases Against GM

A three-week trial resulted in a mistrial in a product liability case against General Motors. The jury deliberated for nearly five days before being released without a verdict. The jury was

clearly deadlocked. The eight men and women were evenly divided over whether General Motors Corp. was liable for a debilitating head injury suffered by a lady whose Chevrolet Lumina van spun into a rock beside a rural highway in 1999. The case involved allegations of a defective seat-back. Even though this case resulted in a hung jury, it could have ramifications that will affect other cases around the country against GM. Internal General Motors documents were introduced as evidence in the case that could advance dozens of similar lawsuits against the automaker in courtrooms all over the United States.

Memos and reports shown to the jury detail an internal debate within General Motors, in which safety engineers fought to design and test safer car seats for decades before their introduction in the late 1990s. Court documents include a study by General Motors safety engineers that concludes a new seat design would prevent many serious injuries. Perhaps the most damaging is a memo to engineers from General Motors attorney Gary Toth, who argued against introducing a new seat design. Toth feared it would make the company look as if it were acknowledging it had a problem that needed fixing.

The GM lawyer labeled the decision "a legal call" in the memo. He wrote that "it would appear initiating a special program tends to damn those seats currently in the field." The documents prove what we have been saying for years: before General Motors introduced high-retention seats that reduced passenger ejections, it was selling a dangerous product, and the company knew it. All the written data in GM's files shows that after a seven-year internal fight between engineers and marketers, there was a major fundamental philosophical change in the way seats were designed. It had little to do with making a "good" seat "better," as has been claimed by GM.

Millions of General Motors vehicles

still on the road have front seats that bend backward—or “yield”—in rear-end collisions. Seats exactly like the one in the Oregon case were used in the Chevrolet Vega and Astro Van as well as the involved Lumina. We believe there are between 40 and 50 pending lawsuits against General Motors on the issue of seat-back strength. General Motors’ documents outlining the company’s internal debate over seat design have been known to us and to other victims’ lawyers for years. However, until recently, these damaging documents have never been shown to a jury because General Motors has successfully argued that they were privileged communications between the company and its lawyers. In a recent series of decisions, however, judges around the country have ruled that parts of the documents are admissible. A Maine Superior Court Justice went the furthest yet. He admitted entire documents, like the Toth memo, that had previously been seen only in part. This is the first case in which a victim’s lawyer was able to put in the whole document and use it to the fullest extent.

According to the GM documents, the debate over “rigid” versus “yielding” seats has been going on since the 1960s. We have run into this issue in a number of seatback cases. Supporters of yielding seats say they prevent whiplash injuries in minor crashes. Rigid-seat adherents say they could prevent more serious injuries by keeping the passenger in place. Obviously, the more serious injuries occur when a seatback fails to do its job. It is widely accepted that a seatback is a restraint and part of the vehicle’s safety system.

In 1990, General Motors’ top safety scientist, David Viano, convened a study of lawsuits against the company to see if seat design could prevent injuries in severe rear-end collisions. The panel found that about half of the injuries were related to the yielding seat back, and almost all of them were caused by the passengers striking hard objects behind them in the vehicle. The

automaker’s “Seat Back Litigation Study” concluded that in 38% of the cases studied, a stronger seat back could have prevented or lessened the severity of injuries by keeping the occupant in place during a crash. However, the study’s findings did not make it into production cars for almost a decade. In a 1995 memo to Viano, safety engineer Dick Neely complained that company officials were preventing progress on seat design with an endless series of questions intended to stall their work. According to Neely, one official said, “he just want(s) an adequate seat and he doesn’t want a world class type seat.”

Neely wrote to Viano: “Dave, it’s the same thing over and over again each time we present here. There are enough players to start the questioning. It’s like throwing raw meat into the middle of a pack of dogs that just feed on each other with questions . . . I had such a headache coming out of there I didn’t know (what) to think.” Viano forwarded the message to his colleagues with his own comments. “I can only imagine what Dick Neely is feeling after 3? years of trying to do a basic technical evaluation of what seats ought to be for overall safety of our customers,” Viano wrote. “I am extremely disappointed with the quality of the deliberation that is going on within our company.” For years, General Motors has argued that the seat-back study should not be introduced as evidence. They claim it is because the study is made up of communications between the company and its lawyers. But in the recent Oregon case, the plaintiffs showed that even though the study contained information derived from lawsuits, it was driven by the “engineers” and its findings were not “legal” advice. This is clearly the correct interpretation. We learned long ago that GM and other carmakers would involve lawyers on non-legal studies in order to claim a privilege.

Viano actually appeared as a witness in the Maine case. He testified that the seat he tried so hard to get General Motors to introduce would not have

made a difference in that accident. His testimony most likely had a significant effect on several jurors and probably explains the hung jury.

Contact Between Cranes And Power Lines

Our firm recently resolved a wrongful death case against a crane manufacturer and a crane leasing company. The case stemmed from an accident where a crane contacted a power line resulting in one death and a personal injury. The case was settled just prior to jury selection. Contact between cranes and overhead power lines is a major cause of fatal occupational injuries in the United States. Based upon an analysis by the National Institute for Occupation Safety and Health (NIOSH) of the data from the Supplementary Data System of the Bureau of Labor Statistics, there were approximately 2,300 lost workday occupational injuries in the United States in 1981 which resulted from contact with electrical current by crane booms, cables, or loads. These 2,300 injuries were extremely severe, resulting in 115 fatalities and 200 permanent total disabilities. Comparable statistics contained in studies conducted by the National Safety Council from 1965 to 1976 produced an estimated annual average of 150 fatalities resulting from such incidents. NIOSH believes that this type of event is the most common cause of fatalities associated with mobile crane operations.

In July 1985, NIOSH published a report citing the above statistics and requesting assistance in preventing electrocutions from contact between cranes and power lines (NIOSH publication No. 85-111). In this publication, NIOSH discussed a variety of safe work practices that could be instituted to minimize these types of occurrences. In addition to safe work practices, the NIOSH alert also notes that certain safety devices designed to reduce or eliminate electrocution hazards can be used on cranes. These safety devices are

boom guards, insulating links, and proximity warning devices. The boom guards are insulated and protect the crane boom from becoming energized in the event of a power line contact. The insulating links mount at the hook of the load line and will not allow electricity to be conducted in either direction beyond the link. Proximity warning devices detect electrostatic fields which emanate from electrical power lines. These devices alert crane operators and ground crew when the crane boom comes in close proximity to power lines.

The 1985 NIOSH alert apparently had little effect on this catastrophic hazard. In May 1995, 10 years after the 1985 alert, NIOSH issued another alert titled *Preventing Electrocution of Crane Operators and Crew Members working near Overhead Power Lines* (NIOSH publication No. 95-108.) Again, this alert mentions the availability of boom guards, insulating links, and proximity warning devices. Additionally, the 1995 alert discusses a device that was becoming widely used in Canada, a range-limiting device. A range-limiting device allows the crane operator to pre-program invisible walls into the field of operation. When the crane boom moves in close proximity to these pre-programmed walls, the operator is alerted through audible and visual warnings. If the operator fails to stop the crane, the functions of the crane will automatically shut down and prevent the crane boom from moving into the hazardous area. All of the above mentioned devices are specifically designed to prevent electrocutions from crane power line contacts.

In addition to the alerts, certain governmental agencies have required the use of these devices. As an example, the Air Force required at least one of these devices to be used when cranes were working in the vicinity of power lines. The Army Corps of Engineers, when awarding contracts, specified that these devices must be used on cranes working around overhead power lines.

In June 1998, our client's husband was working on a construction crew drilling caissons for a new bridge. The crane operator on the job site swung the crane to get in position to move some equipment. In swinging the crane, some slings hanging from the load hook accidentally brushed against a 7,200-volt distribution line. The current was conducted through the load hook and down through the crane into the ground. Even though our client's husband was standing several feet from the crane, the current traveled through the ground and electrocuted him. The crane was not equipped with any of the above mentioned safety devices. We brought suit against the crane manufacturer and the crane leasing company that rented the crane to the construction crew.

During the pendency of the case, the crane manufacturer began installing a range-limiting device as standard equipment on various models of its cranes, including the model involved in our case. This is the first instance of which we are aware where a crane manufacturer has installed a safety device designed to reduce the hazard of electrocution as standard equipment on a crane. While we applaud this move, it clearly should have been done many years before. Too many hard working men and women needlessly lost their lives because of the delay in making this device standard equipment. We hope other crane manufacturers will now follow suit and make this valuable safety device standard equipment on all cranes.

To our knowledge, the crane rental company has not taken any steps toward eliminating the hazard. During the discovery process, it was learned that the crane leasing company had been involved in a previous lawsuit where a ground crew member was electrocuted when a crane it rented contacted a power line. The allegations in that case, which occurred in 1981, were very similar to the facts in our case. The complaint from the 1981 case alleged that the crane was unreason-

ably dangerous because it didn't have one of these safety devices on it. We hope the crane leasing company will install these devices on the cranes they lease. Without them, there will surely be a third death. Graham Esdale and Kendall Dunson handled the case for our firm. We were fortunate to have David MacCollum as an expert in this case. This dedicated man has worked hard for many years to bring about needed safety changes relating to cranes. People who work with and around cranes owe Mr. MacCollum a tremendous debt of gratitude.

Hidden Dangers In Rental Equipment

The summer months usually provide homeowners with a chance to perform needed renovations and repairs around the home. Property related emergencies will arise on occasion that cannot wait until a more convenient time to be addressed and have to be remedied immediately. More often than not, the homeowner is like me and does not own specialty equipment to perform this work. Instead, they resort to renting what is needed from a local equipment rental store. Rightly so, the homeowner trusts and relies on the rental store to provide him with not only the right tool for the job, but also a tool that is safe for its intended operation. Perhaps most importantly, the homeowner relies on the rental store to give him proper instruction and warnings regarding safe use of the equipment. However, we have learned that is not always the case. Each year, individuals are injured while using rented equipment and their injuries can usually be traced back to some defect in the design or maintenance of the equipment or the lack of proper warning regarding safe use of the equipment. As a result of such unnecessarily hazardous equipment, sometimes a joyful family home can be turned into a place of unthinkable tragedy.

We currently represent the young

wife of a man who was killed at his home while using a rented electric drain cleaner. When his drain line became clogged, this young man rented an electric cleaner, sometimes known as a drain snake, from his local rental store. No doubt he trusted the store to provide him with a safe and properly equipped machine. However, when he returned home and began to use the drain cleaner he was electrocuted and killed in his own yard. When his wife, pregnant with twins, tried to rescue him she also received an electric shock. During the course of our investigation into this case we have learned several very disturbing things. Sometime during the period that it owned this electric snake, the rental store had to replace the original electrical cord for the machine; the original cord was equipped with what is known as a Ground Fault Circuit Interrupter (GFCI) to protect the operator against electrocution. However, the rental store replaced the original cord with one that did not have a GFCI protector. In fact, the cord that was on the machine on the fatal day was actually frayed in several places and the machine did not have any warnings on it whatsoever.

Clearly, an electrical machine that is intended to operate in a wet environment should be equipped to protect the operator from electrocution, but the rental store removed that protective device. The machine should have carried warnings to advise the operator of the extreme and deadly hazard associated with operating the machine in such a dangerous condition absent the GFCI. However, when the machine was seized at the scene by law enforcement, it had no warning stickers whatsoever. Because we cannot place a value on a human life, Alabama law provides for the award of punitive damages in wrongful death cases and the callous actions of the defendants in this case should certainly support a large punitive verdict.

More Problems For Ford

Recently, the Federal Government began investigating reports about problems with air bags in the Ford Taurus and Mercury Sable vehicles. According to reports, there have been over 260 complaints of the front airbags failing to deploy during crashes. The investigation is specifically looking at the 2000 and 2001 Taurus and Sable. The investigation comes on the heels of a fatal accident in which a driver hit a bridge at 33 mph. According to the National Highway Traffic Safety Administration (NHTSA), the front airbags failed to deploy after contact with the bridge. The driver was killed and the passenger suffered serious injuries.

The front airbags in vehicles are designed to deploy in moderate to severe frontal and near-frontal collisions. Most airbag systems contain crash sensors. These crash sensors are located either in the front of the vehicle and/or in the passenger compartment. The sensors measure deceleration, which is the rate at which the vehicle slows down. For the most part, if you are involved in a frontal crash where your vehicle decelerates at a rate of 15 mph, the crash sensors should detect the deceleration and the airbags should then deploy. From the onset of the crash, the entire deployment inflation process takes only about 1/20th of a second, faster than the blink of an eye. Obviously, airbags must inflate rapidly if they are to reduce the risk of the occupant hitting the vehicle's interior. This technology is truly remarkable when you realize that a fully inflated driver-side airbag is approximately the diameter of a large beach ball. The passenger airbag may be 2-3 times larger than the driver side airbag. The passenger airbag is bigger because the distance between the right front passenger and the instrument panel is much greater than the distance between the driver and the steering wheel.

As we all know, the purpose of the

airbag is to help reduce injuries and fatalities in a crash. More specifically, the airbag is designed to prevent an occupant's head or upper body from hitting some part of the vehicle's interior during an accident. They also help reduce the risk of serious injury by distributing crash forces more evenly across the occupant's body. NHTSA upgraded the level of investigation into the Ford Taurus and Mercury Sable only after it conducted preliminary research and only after it requested data from Ford. This investigation could eventually lead to a recall. There are approximately 895,936 2000-2001 Taurus and Sable vehicles on the road. There can be no excuse for airbags not deploying in a severe frontal or near-frontal accident. Ford should take steps to conduct its own investigation and recall these bags if there is a problem. If you currently own one of these vehicles, I would recommend you contact NHTSA and find out the status of its investigation. You can call NHTSA's toll-free hotline at 1-888-327-4236. You may also contact them on the web at www.nhtsa.dot.gov. NHTSA's Website is also a great source of information to learn more about airbags and how they work. If you are about to purchase a vehicle or would just like to learn a little bit more about the safety of the vehicle you own, you should check out their Website.

Honda Cars To Offer Crash Avoidance System

Honda Motor Co. has developed a new computerized radar system that warns drivers of an impending crash with slight braking and a tweaking of the seat belt. Initially, the "collision mitigation brake system" will be offered on the most expensive model of the new Inspire sedan. The sales price is \$30,000 in the USA (3.5 million yen). I understand there are no plans to export the feature or the Inspire. However, the Japanese automaker wants the anti-collision system to

become standard on all Honda models in the future. The system comes as part of a package of options and is not priced separately. Japan's biggest automaker, Toyota Motor Corp., had come out with a similar crash warning system, which is offered as an option for a luxury model sold only in Japan. According to reports, sales have been limited with less than 90 sold so far.

There is a difference in how the two systems work. The Toyota system, which brakes and tightens the seat belt ahead of a crash, does not go on until the driver first steps on the brakes. Honda's system is unique in working even before the driver responds. A radar in the front of the car stashed behind the "H" logo detects vehicles within a range of about 300 feet ahead. The system initially pulls on the seat belt and brakes slightly to warn the driver. A buzzer also goes off and a small light flashes on the dashboard. If the driver steps on the brakes, another system kicks in to strengthen the power of the brakes. If the driver fails to respond, the car brakes more and tightens the seat belt further to soften the blow of the crash. While other automakers are working on similar technology, none are offering such a feature on a commercially sold product at this time. The Honda system is not designed to stop the car completely because that would be against Japanese regulations. Even if that were to be approved, technological challenges remain to design a car that can assess its surroundings enough to come to a safe stop on its own. Obviously, if this approach proves to be workable, it will be a tremendous boon to auto safety.

Family Of Child Who Choked On Candy Awarded \$50 Million

A California Judge has awarded more than \$50 million to the family of a toddler who died after choking on a gel candy. The case involved the parents of a 2-year-old child, who choked on a candy made with konjac jelly on Febru-

ary 22, 2001, in Pocasset, Massachusetts, and died several days later. When the manufacturer of the candy failed to produce depositions as ordered by the court, the trial judge declared the trial a default and entered judgment for the family. The plaintiff then presented the videotape of his son as evidence to prove how much damage the company's wrongdoing had caused. The judge said that the case was what punitive damages are designed for.

Earlier this year, a jury awarded a family \$16.7 million in a different gel candy case. There, an eleven-year-old child lapsed into a coma and eventually died after choking on a piece of gel candy that lodged in her throat. The verdict in the nationally watched case was the first of legal challenges confronted by Taiwanese candy maker Sheng Hsiang Jen Foods. After Mercury News articles raised awareness about the potential danger, the U.S. Food and Drug Administration banned the importation of gel candy in October 2001. There is legislation pending in Congress which would give the FDA the power to recall and put warning labels on food and candy. The bill was referred to the House Subcommittee on Health. The candy is nicknamed "the deadly mouthful" in Japan, where it is blamed in eight deaths.

VII. WORKPLACE HAZARDS

Attorneys Settle Case Against Tyler Pipe's Manufacturers

Dozens of Tyler Pipe Co. employees, former employees and family members of deceased workers have settled their lawsuits against manufacturers which sold dangerous silica-based materials to the East Texas foundry. As previously reported, this facility has been under fire for dangerous working conditions. The amounts of settlements are confi-

dential and under court order. The manufacturers included U.S. Silica Co., based in West Virginia, AMCOL International Corp., based in Illinois, and The Hill and Griffith Co., based in Kentucky. There are still about 40 more cases set for trial in the Texas court involving Tyler Pipe and its manufacturers.

You may recall that Tyler Pipe is owned by Birmingham, Alabama-based McWane Inc., one of the world's largest manufacturers of cast iron water and sewer pipes. Since 1995, McWane has recorded more than 4,600 injuries and accumulated more than 400 safety violations, four times the total of its major competitors combined. This is a pretty "sorry" safety record by anybody's standards.

VIII. TOBACCO UPDATE

The Alabama Supreme Court Rules On Tobacco

On June 30, 2003, in *Tillman v. R.J. Reynolds*, the Alabama Supreme Court issued an Opinion, which held that "good tobacco is not unreasonably dangerous." While this holding went a long way toward immunizing big tobacco from liability, it did not completely close the door. However, the Court, in a related case, appears to have put the final nail in the coffin of all those who have suffered physical injury and death at the hands of the tobacco industry. In *Spain v. Brown and Williamson Tobacco Company*, the Alabama Supreme Court held that the statute of limitations in a tobacco case begins to run when the smoker recognizes their addiction. To my knowledge, the Alabama Supreme Court is the only Court in the United States to have reached such a conclusion. It is rather interesting to see how the Court arrived at this conclusion. In the briefs filed and at oral argument, lawyers for both Brown and Williamson and Spain argued that the statute of

limitations should not be tied to addiction. In fact, during discovery and at trial, the tobacco companies routinely deny that cigarettes are addicting. The fact that tobacco companies and plaintiffs alike consistently argue that the statute of limitations should not be tied to addiction may well explain why no other court in the country has ever reached this conclusion.

The practical effect of this ruling by the Court is that no jury in Alabama will ever hear evidence of the many different types of serious diseases associated with cigarettes. The Alabama Supreme Court will likely hold that a person must have been addicted to cigarettes long before any disease manifests itself. An Alabama jury will never hear evidence of the massive public relations campaign undertaken by the tobacco industry to refute Surgeon Generals' Reports and other reputable scientific organizations' claims of disease causation associated with cigarettes. No Alabama jury will ever hear evidence of the many carcinogenic additives put in "good tobacco" in an effort to keep customers addicted. No Alabama jury will ever hear evidence of how the tobacco industry targeted teenagers because of their lack of judgment and risk taking youthful attitudes in an effort to provide a lifelong addicted customer base. No Alabama jury will ever see and get to read tobacco company documents describing how "good tobacco is the perfect type of a perfect pleasure." A memo that says, "it is exquisite, and it leaves one unsatisfied. What more can one want. Let us provide the exquisiteness, and hope that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to the bank." [Emphasis added.] This is not a figment of anybody's imagination. It comes from an internal tobacco company document. Surely, this is not the sort of thing that should be hidden from public view.

It should be noted that *Spain* was a

5-4 decision and I believe there is an application for rehearing pending. Hopefully, the Court will take a long and hard look at its original decision.

IX. TRANSPORTATION

Good And Bad News On Safety

NHTSA's 2002 Highway Fatality Statistics have confirmed a pressing need for safety improvements. The National Highway Traffic Safety Administration's release of its final count of the number of traffic fatalities for 2002 offers grim evidence that we still have a serious safety problem that needs immediate attention. Tragically, the number of deaths reached the highest level in 12 years. Rollover crashes were responsible for 82% of the increase. Hopefully, this will get the attention of both the public and the automobile industry, as well as Congress. We know that car-makers can and should protect motorists from death and serious injuries in rollover crashes.

However, there is some good news, which is that legislation approved by the Senate Commerce Committee contains strong measures to make driving safer. This bill contains a host of automobile safety improvements and builds significantly on the reforms in the TREAD Act of 2000. The bill requires improvements in the crashworthiness of automobiles, including sport utility vehicles, in which rollover fatalities increased by 14% in 2002. The proposed law contains long-overdue safeguards to protect SUV occupants in rollovers and has aggressive measures to protect other motorists. Under the Senate provisions, NHTSA would create new safety standards to prevent rollover crashes and to strengthen vehicle roofs so that passengers would be far more likely to survive these devastating crashes. Additional standards for frontal and side impacts also would improve survival rates. These are sensi-

ble steps that are desperately needed, as these new statistics show. There is a great deal of work to do in the field of auto safety. This bill is a step in the right direction. Congress can literally save thousands of lives by committing to safety and passing this legislation.

Many Highway Bridges Are Deficient

Studies show that more than a quarter of all U.S. highway bridges are considered deficient. While this is a high number, it is a marked improvement after a decade of increased government spending. The number of bridges considered deficient—those that need repairs, that cannot adequately handle traffic loads or do not meet safety standards—declined 18% from 1992 to 2002. These numbers went from 199,090 to 163,010, according to an Associated Press computer analysis of Federal Highway Administration data. Unfortunately, that new total still amounts to 28% of all bridges in the country. Failure to make timely fixes to aging bridges can have deadly consequences. The drop in deficient bridges coincided with passage of two federal transportation bills that earmarked \$36.5 billion for repairs beginning in 1992. That was more than double the \$15.3 billion allocated during the previous decade. Since the numbers still remain alarming, the problem with obsolete and structurally deficient bridges must continue to be addressed. Congress is preparing to renew the legislation, which determines how much federal money will go to states to build and repair roads and bridges. The current six-year bill expires September 30th. Persons who travel the highway system in this country are entitled to believe that government—both federal and state—have made sure that bridges are safe for use. Nothing less can be tolerated.

State Rates 8th For Dangerous Intersections

Alabama did not fare very well in another recent study relating to highway safety. A four-year analysis by Reader's Digest magazine found that more than 24,000 Americans died in vehicle crashes because of road conditions from 1998 to 2001. Thirty-five percent of the crashes occurred at intersections where confusing lanes, blind spots or inadequate signs contribute to crashes. Thirty-one percent occurred in dark conditions. The analysis rated Alabama as number 8 in the nation for dangerous intersections, which is not good news. By 2020 there will be more than 40 million licensed drivers over age 65. The study spurred the American Automobile Association to launch a campaign urging Congress to make intersection safety a priority. If you would like more information on how to help make America's roads safer, go to www.rd.com or www.aaa-publicaffairs.com.

Safety Groups Challenge New Rule Governing Truckers' Hours

Public Citizen, Citizens for Reliable and Safe Highways, and Parents Against Tired Truckers have challenged the new government regulations covering the number of hours truckers drive. In a petition filed in early June, the three groups asked a federal court to review the final hours-of-service rule issued on April 16th by the Federal Motor Carrier Safety Administration (FMCSA). This is the first step in legally challenging the rule. Under the new rule, truckers can spend more consecutive hours driving than previously, which obviously increases the risk of crashes. The new rule permits a 14-hour workday with up to 11 hours of consecutive driving. Previously, truckers could drive no more than 10 consecutive hours. Also, truckers now can be compelled to drive up to 77 hours in seven days, or

88 hours in eight days. Overall, the new rule increases truckers' driving hours by more than 20%.

The federal agency did this despite the fact research shows that increasing the length of time a worker must spend performing certain tasks correspondingly reduces alertness and performance, and leads to an increased risk of driver error. Other research shows that when workdays are lengthened, the corresponding length and quality of sleep for recovering performance and alertness is reduced, so that even having enough time to sleep does not ensure that one receives sufficient quality sleep. The FMCSA has estimated that in 15% of all fatal crashes involving trucks, fatigue is a primary or contributing factor. Our firm's experience in handling cases of this sort makes us believe the percentage should be much higher.

Large truck crashes are particularly lethal because they usually involve much smaller passenger cars. In fact, 985 of those killed in truck-vs.-passenger vehicle crashes are in the smaller vehicles. "The new rule is a formula for more truck crashes, more deaths and more injuries," said Joan Claybrook, President of Public Citizen, who is a former Administrator of the National Highway Traffic Safety Administration. "This rule works truckers harder than ever. It also violates the mission of FMCSA, which is safety." Further, the rule does not require on-board recorders, which would provide reliable data on how many hours truckers drive. Many truckers have admitted that they frequently lie when they fill out their paper logbooks. We appreciate Public Citizen for bringing this information to our attention. Hopefully, the groups will be successful in their efforts. The traveling public, including truck drivers, will be the beneficiaries if their efforts pay off.

Hands-Free Phone Not Safer For Drivers

In prior issues, we have mentioned the dangers of talking on a mobile phone while driving your car. Now a recent study reveals that it is just as dangerous when using hands-free equipment, as when holding the phone in your hand. This is according to a Swedish study. The National Road Administration (SNRA) tested 48 people in driving simulators, dividing them into two groups — one with and the other without hands-free mobile phone devices. The drivers in both groups received about 10 phone calls each during 1.5 hours of simulated driving in different conditions. The test revealed almost no difference in reaction time between the two groups. Many European Union countries, though not Sweden, and some U.S. states ban talking on mobile phones while driving, because it has been proven to cause accidents. But laws often permit hands-free gadgets with headphones or loudspeakers, and millions of cell phone users have installed such devices. It is the distraction of the phone conversation that is the problem.

The Swedish findings were in line with a recent report in the Psychological Science journal, which suggested hands-free technology may not reduce the risk of accidents because a driver's attention, rather than problems with physically handling a cell phone, is a more important factor in safe driving. The SNRA, which carried out its study at the request of the Swedish government, said it would not recommend a law against talking on your mobile phone while driving. However, it is abundantly clear that the use of a telephone while driving a car in traffic can create serious problems for all concerned.

X. THE NATIONAL SCENE

The National Debt

The federal government will pile up \$1.9 trillion dollars in new debt over the next five years. An annual deficit of \$226 billion is projected by 2008. Unfortunately, the current budget deficit is at an all time record - \$455 billion—and that is most disturbing. It is expected to rise to \$475 billion in fiscal year 2004. Unfortunately, this does not include—as I understand it—the additional costs for the military occupation of Iraq. The monthly cost of occupying Iraq is currently \$3.9 billion each month and it is projected that our troops will be there for years to come. Eventually, the American people will start asking what was our “exit strategy” for this war. Frankly, I don’t believe we really had one or if we did it was faulty. I am afraid we are in for some tough economic times as a result of what appears to be a series of fiscal blunders in Washington.

More On Iraqi Contracts

As you may know, the U.S. Army denied a Freedom of Information Act (FOIA) request for written justifications and approvals of decisions that limited competitive bids for reconstruction contracts in post-war Iraq. In denying Public Citizen’s March 25 request, the Army asserted that no relevant information was available. The Army awarded at least one contract in Iraq to Kellogg Brown & Root Services (KBR), a division of Halliburton, to repair and rebuild Iraq’s petroleum production, refining and distribution systems. Letters from the Army Corps of Engineers indicate that the Corps awarded the KBR contract following approval by Army headquarters. In the FOIA denial, however, the Army attested that it has

no documents concerning the approval of the contract. Public Citizen has appealed the Army’s denial. “The Army’s determination that no responsive records exist is plainly erroneous,” the appeal letter states. “The only possible explanation for this determination is either that an inadequate search was conducted or that the search was unreasonably restricted to exclude the bodies of records that would be expected to contain the records requested.”

There appears to be a clear conflict between the information provided by the Army to Congress about KBR’s contract in Iraq and the Army’s claim that it lacks information on how that company landed the contract. Public Citizen made its original FOIA request after media reports suggested that the Department of Defense was circumventing competitive bidding procedures in awarding procurement contracts to rebuild post-war Iraq. This is one of two outstanding Public Citizen FOIA requests pending regarding the awarding of contracts in post-war Iraq. Public Citizen filed a second FOIA with the U.S. Agency for International Development (US AID), which has awarded a number of no-bid contracts. US AID continues to process Public Citizen’s request.

Politics As Usual In Washington

A few years ago, the National Republican Party launched a campaign to oust Democrats from top lobbying jobs in Washington. Frankly, that was not a real big surprise. Now, Republicans are seizing a significant number of the most influential positions at trade associations and corporate government affairs offices. As a result, they are reaping big financial rewards. Partly because of the “K Street Project” — and partly because of GOP control of Congress and the presidency—virtually every major company or trade association looking for new top-level representation is hiring or seeking to hire a prominent Republican politician or staffer. For example, during the current

year, General Electric, Comcast, Citigroup and many other Fortune 500 companies have hired Bush Administration officials and former GOP congressional advisers for top lobbying posts. This trend could deeply influence Washington politics, policy and fundraising for years. Already in control of the White House and Congress,

Republicans are tightening their grip on the largely unseen but vital world of big-time lobbying. Many contend that lobbyists make up a fourth branch of government. Lobbyists for major trade groups not only represent clients’ interests but also play key roles in political fundraising and often help shape legislation. The K Street Project — named for the Washington corridor where most of the lobbying firms reside — is now planting a new crop of Republican lobbyists rich enough to give back to the party in the years ahead. Before Republicans won control of the House in 1994, they received about 40% of business contributions. Now they get 60% or more, according to the nonpartisan Center for Responsive Politics. Moreover, by placing Republicans in these high-paying jobs, a whole new class of wealthy donors has been created. Most high-level lobbying jobs pay at least \$300,000 per year, and some lobbyists are pulling down two or three times that amount annually.

Private Insurers And Medicare

It’s coming down to the wire now for the vote in Congress on providing a prescription drug benefit to seniors and folks with disabilities. I will never believe that handing over more control to private insurers in delivering health care services to Medicare beneficiaries will do anything but result in unreliable coverage. The House bill—pushed by insurance companies, HMOs, and the White House, also places restrictions for patients in choosing their own doctors. The House voted by a one-vote margin and passed a seriously flawed privatization bill. Senators have voted

on their own proposal. Now, the issue will go to a “conference committee” of both chambers, and a compromise will be developed. Hopefully, the end result won’t be a plan that turns the prescription drug benefit plan over to private insurers. Hopefully, enough members of the House and Senate will stand up to the powerful insurance and HMO lobby, and even the Bush White House, and do what is right. Decent healthcare for seniors and folks with disabilities should be their goal. To do something that doesn’t achieve that goal, in my opinion, would be a major mistake. The House bill is definitely bad for seniors and persons with disabilities and will hurt folks, rather than help them. A Conference Committee will ultimately decide the fate of this legislation and hopefully consumer groups—including the AARP—will be able to have some influence on the final product. In fact, the AARP has let it be known that the House-passed bill—or anything similar—is worse than no bill at all. Neither does the group, which has 35.5 million members, think much of the bill passed by the Senate. I suspect the final version from the conference committee will depend on whether candidates have a greater fear of the powerful insurance and HMO lobby or the of the AARP.

Senator Edwards Unveils Plan For Corporate Reform

I understand that the Bush White House, and specifically Karl Rove, is extremely concerned that Senator John Edwards will be their opponent next year. Recently, Senator Edwards unveiled a broad plan aimed at restoring integrity to a Corporate America buffeted by scandal, with the eventual goal of boosting the economy. The North Carolina Senator proposed a series of business reforms, arguing that “what’s holding our economy down is the callous view of a few at the top in Washington and in the corporate world that the values that got us here can now be left behind.”

John comes from a working-class family—his father was a textile mill worker—and that gives him an advantage over many of his rivals. He made his case for corporate accountability in terms of the impact on employees. It helps when a political leader understands problems from a working person’s perspective. With all of the corporate scandals that our nation has experienced over the past few years, it is refreshing to hear a candidate address the real this issues facing our nation. Edwards’ plan would strengthen laws that require chief executive officer’s pay to be linked to performance, would eliminate tax breaks for executive pensions that are disproportionately larger than those for rank-and-file workers, and would give shareholders greater control over corporate boards.

Senator Edwards would also make it harder for companies to hide their money in tax shelters by requiring them to explain why profits they report to the IRS differ from the amount reported to shareholders. I have wanted to hear another candidate for President discuss issues that affect American citizens who work hard, pay their taxes, and raise their families. It is also refreshing to have a person running for President who is not concerned about cutting off his access to the hundreds of millions of dollars in campaign contributions available from the rich and powerful. John Edwards certainly appears to have what it takes to be that candidate. However, I am not sure the voters in America are ready to elect the son of a “mill worker” as their President. Such a person may think too much like a working man and that scares the likes of the “Kenny Boy Lays” of the world. If you want to know more about John Edwards, go to his Website: www.johnedwards2004.com.

XI. THE CORPORATE WORLD

Texas Reaches \$18.5 Million Medicaid Settlement

The state of Texas will receive \$18.5 million in a Medicaid fraud settlement with a subsidiary of German pharmaceutical giant Merck KGaA. The subsidiary, Napa, California-based Dey Inc., falsified price reports for its products to the Texas Medicaid program, according to the Texas Attorney General’s office. Dey manufactures and markets inhalant products that are prescribed for people with respiratory illnesses. Under Texas law, drug manufacturers are required to report their wholesale prices. The Texas Medicaid program then uses this pricing information as a basis for calculating providers’ costs and reimburses Medicaid providers accordingly. The Attorney General’s civil Medicaid fraud section found Dey deliberately falsified its pricing reports, which directly led to overpayments by the Texas Medicaid program. The State of Texas will get back every cent it overpaid as a result of unethical practices made at the expense of Texas taxpayers, according to a statement from the Attorney General’s office. In addition to the money recovered from Dey for past violations, the Texas Medicaid program will save millions of dollars in the future as a result of evidence the Attorney General’s Office uncovered in its investigation. Similar legal action against two other drug manufacturers—United Kingdom-based Warrick Pharmaceuticals Ltd. and Columbus, Ohio-based Roxane Laboratories Inc.—is still pending in a Texas state court. The case is set for trial in August. I predict Texas will do extremely well if the case goes to trial.

West Virginia Sues Wall Street Firms

West Virginia's Attorney General has filed suit against Wall Street's 10 largest firms for violations of the state's Consumer Protection Act. The charges are virtually the same as those settled by investment banks with federal regulators in a \$1.4 billion deal earlier this year. The State of West Virginia is seeking an estimated \$360 million in penalties for analyst conflicts of interest and IPO spinning. Under the federal settlement, West Virginia would receive \$4 million. The state auditor, who regulates securities in West Virginia, agreed to take part in the settlement. West Virginia will abandon the federal deal if it interferes with the consumer protection suit.

While the federal settlement addresses future conduct, the West Virginia case is a law enforcement action that addresses wrongdoing. Evidence in the state's suit includes documents uncovered by the Securities and Exchange Commission and the New York Attorney General—including internal e-mails showing analysts with the firms skewed their stock research for the sake of investment banking profits. The suit, filed in state court, names all of the firms involved in the global settlement: Bear Stearns, Credit Suisse First Boston, Goldman Sachs, Lehman Brothers, Citigroup Global Markets, J.P. Morgan, Morgan Stanley, Merrill Lynch, UBS Warburg, and U.S. Bancorp Piper Jaffray. Under West Virginia's Consumer Protection Act, any unfair, deceptive or dishonest act directed at a West Virginia resident is punishable by a fine of up to \$5,000 per offense. The suit alleges there could be hundreds of thousands of violations in the case.

The state's case differs from the regulatory action in that it is "meant to punish the people engaged in fraudulent conduct." The global settlement calls for firms to contribute to a \$387.5 million investor restitution fund, to pay \$432.5 million toward independent research and to put \$80 million toward

investor education. The firms also must pay a total of \$487.5 million in penalties, to be paid to states based on population. It is quite obvious that total losses resulting from the wrongful acts of the companies involved in the federal settlement will be much larger than the amounts required to be paid in that settlement.

Corporate Crime Wave Continues

According to an article published in the Boston Globe, the FBI is opening three to five investigations per month of suspected fraud of \$100 million or more by executives at publicly traded companies. This is certainly not good news for investors or for the nation's economy. It is somewhat surprising that the reforms in Congress to date have been less than productive. In addition, the Securities and Exchange Commission's \$1.4 billion settlement with Wall Street firms turned out to be merely a slap on their collective wrists. Millions of small investors, pension holders, and retirees lost most of their life savings amounting to hundreds of billions of dollars and very little has been done about it. I have to wonder where the SEC's priorities really are. Because of misleading information and phony corporate accounting supported by banks, brokers, and stock analysts with clear conflicts of interest, the citizens who have lost so much have very little to show for all of the activity from Washington.

Things That Can Be Done To Protect Investors And Employees

There are a number of actions that should be taken by Congress to avoid more problems for investors and company employees. Citizen Works has identified three initiatives that can be waged successfully over the next few months in Washington:

- The corporate offshore tax haven

loophole must be closed. This scam has cost the U.S. government billions of dollars. Taxpayers are left picking up the bill bearing historic budget deficits.

- Stock options must be expensed and CEO greed curbed. Excessive distribution of stock options to top corporate executives has fueled an epidemic of crime, fraud, and abuse at many major corporations. According to the Financial Times, 208 executives and directors from the 25 largest U.S. companies that filed for bankruptcy protection between January 2001 and July 2002 walked away with gross pay packages of \$3.3 billion—most of it in the form of revenues from stock sold before the company collapsed. U.S. Senator Carl Levin has been quoted as follows, "virtually every corporate disaster that has struck in recent years has had a stock option component." Warren Buffet, who certainly is in a position to know, stated that CEO compensation is going to be "the acid test of corporate reform." Buffet says that "we have seen more misdirected compensation in the last five years than in the previous 100." The accounting loophole that allows companies to deduct options from their taxes without having to declare them as an expense in their reports to shareholders must be taken away. This loophole has created the incentive to pay executives increasingly large blocks of stock options.
- Public interest institutions must be given a permanent voice in the conduct of corporate behavior. In the last five years, 845 public companies have restated their earnings a total of 919 times. During 2002, there were reinstatements at 330 companies—a new record. The Government Accounting Office estimates that restatements have cost investors over \$100 billion. Citizen Works, in response to the crisis in the accounting profession, helped to launch an accounting watchdog group named

the Association of Integrity in Accounting (AIA). The integrity of the accounting profession is premised on individuals who acknowledge their responsibility to maintain expertise, to exercise independence of thought and action, and to serve and be guardians of the public interest. However, the influence of corporate pressures on professional standards has eroded and compromised this integrity in many cases. The mission of the AIA is to provide an independent forum to present and advance positions on a wide range of critical accounting and auditing issues, standards and regulations affecting the accountability and integrity of the profession and the public interest in maintaining trust and confidence in accounting.

Citizen Works is a 501(c)(3) organization. I believe the group is performing a valuable service and should be supported. Any gift to this group is tax deductible to the full extent provided by law. You can visit their Website: www.citizenworks.org.

HCA Inc. Agrees To Pay \$631 Million Settlement

HCA Inc. and Justice Department officials have signed an agreement that calls for the hospital company to pay \$631 million in civil penalties and damages to settle Medicare fraud charges. You will recall that the settlement, announced in December, resolves what federal officials called the department's most comprehensive health care fraud investigation. With the latest settlement, the nation's largest for-profit hospital chain has agreed to pay the government \$1.7 billion in civil fines and criminal penalties in recent years. HCA Inc. operates 200 hospitals and 70 outpatient surgery centers in 24 states, England and Switzerland.

During the mid-1990s, whistleblowers accused HCA of filing false claims for reimbursement from

Medicare and Medicaid and paying kickbacks to doctors so they would refer patients to its hospitals. The company agreed to pay \$250 million to the Centers for Medicare and Medicaid Services under another agreement dating to last year. An additional \$17.7 million will be paid to Medicaid programs in states that made similar fraud charges. The company took a \$468 million after-tax charge last year as a result of the settlements. Hopefully, cases such as this will assist in the fight against health care fraud. Clearly, this type fraud should never be tolerated. In 2001, HCA pleaded guilty to defrauding government health care programs and paid \$840 million in fines and settlements.

Tech Companies To Pay \$1 Billion In IPO Case

Hundreds of companies that staged hot initial public offerings (IPOs) during the tech boom will now pay \$1 billion to investors under a tentative partial settlement announced in late June of this year. The companies will also cooperate in ongoing litigation against 55 brokerage firms accused of funneling huge payoffs to insiders through secret deals. There were 309 separate suits filed against 55 investment banks and more than 300 companies that went public between 1998 and 2000. Additionally, an unspecified number of individual corporate officers and directors were defendants. According to reports, the total number of defendants could be more than 1,000. Some of the companies involved include Global Crossing, MP3.com, Ask Jeeves Inc., and Red Hat Inc. The proposed settlement guarantees the plaintiffs will receive at least \$1 billion, to be paid by the tech companies' insurers. The plaintiffs hope that settling with the companies that issued the stock—who they say knew or should have known about the alleged misconduct—will strengthen their position as they continue negotiating with the invest-

ment banks. Many believe the primary target in this case should be the underwriting community.

The plaintiffs are seeking to recover billions of dollars from the investment banks, which include J.P. Morgan, Credit Suisse First Boston, Morgan Stanley and Smith Barney. Those firms are accused of plotting to artificially inflate the value of IPO stocks through a practice called "laddering," in which larger shares are allocated to investors who promise to take bigger stakes after the stock hits the open market. In addition, some customers who invested in IPOs were compelled to give extra compensation to the banks, sometimes through inflated commissions on other trades. After the so-called "quiet period" that follows IPOs, analysts who worked for the banks are said to have issued favorable research to build up the stocks, whether they were worthy or not.

As part of the settlement, the tech companies have agreed that any claims they might have against the investment banks will be assigned to the plaintiffs' class. Their cooperation may serve to speed up the discovery process. The settlement must be approved by the court. No funds will be paid to investors until the case against the banks is resolved. If more than \$1 billion is recovered from the banks, the tech companies' will not have to pay anything. If the award is more than \$5 billion dollars, the tech companies and their insurers will be able to recover expenses. The settlement was reached after more than a year and a half of negotiation between lawyers for the investors, the tech companies and at least 42 primary insurers. This appears to be one of the most complicated cases in U.S. history. Many believe this to be the most complex securities litigation that has ever been brought, which makes the settlement process equally complex. Cases of this sort take a great deal of time, effort, and expense.

The trial judge reviewed more than 1,000 suits and found that investors

had presented “a coherent scheme” in which the banks joined with Internet companies to defraud the public by hiding secret deals and analyst conflicts to artificially inflate new shares and deliver payoffs to insiders. If these allegations are true, the judge wrote in a 238-page ruling that, “this scheme offends the very purpose of the securities laws.” The Securities and Exchange Commission and the National Association of Securities Dealers conducted an extensive investigation of Wall Street’s dealings in IPOs. Regulators have recommended strict limits on several questionable practices popular during the tech boom, including “laddering.” Ten of the largest investment banks agreed to change their research and IPO practices in a \$1.4 billion settlement reached with regulators earlier this year.

KPMG And First Union

There have been so many accounting scandals uncovered over the past several months, that we tend to overlook a few or don’t fully understand their impact. Recently, the *Wall Street Journal* reported on what appears to be a most interesting scheme. In the late 1990s, First Union Corp. earned referral fees from wealthy banking clients. Typically, these were entrepreneurs facing capital gains of tens of millions of dollars after selling stakes in businesses. These fees were received by First Union Corp. for directing them to KPMG LLP. In turn, the accounting firm received fees from selling them tax shelters. KPMG, in some cases, received \$400,000 or more per transaction. KPMG had an additional role—as First Union’s auditor—and that’s what makes the *Wall Street Journal* story worth checking out.

First Union, which is now Wachovia Corp., told the *Wall Street Journal* that the relationship was appropriate. However, there has been a great deal of new information revealed in lawsuits filed recently by some of the entrepre-

neurs against the accounting firm. Issues of auditor independence have been brought to the forefront in recent months as investors have demanded stricter governance standards. Audit firms, in order to protect shareholders, employees, and the economy generally, have an obligation to be independent and fair. When business relationships exist between auditing firms and their clients a motivation is provided for auditors to possibly ignore the rules on tough accounting calls. Certainly, the fear of jeopardizing sources of revenue—other than their audit fees—has to be considered. If an accounting firm receives large fees from an additional relationship with an audit client, auditors—however well intentioned—could be compromised by their firms’ desire to make management happy and to keep the money flowing from fees.

The lawsuits, filed over the past 14 months in federal and state courts, contend KPMG and First Union jointly marketed the strategies. Subsequently, those strategies have come under review by the Internal Revenue Service. In substance, the lawsuits claim KPMG sold bad tax advice. Among other things, the complaints filed allege fraud, malpractice and breach of fiduciary duty. Some of the suits also name First Union as a defendant. The promotion of tax shelters, when a financial institution and its auditor are involved, simply doesn’t seem right. There are clear SEC rules on auditor independence and those rules must be adhered to. Under long-established SEC rules, an auditor is prohibited from “direct or material indirect” business relationships with an audit client outside of the normal course of business. The rules specifically prohibit “joint business ventures.”

According to the *Wall Street Journal* report, First Union paid KPMG \$7.3 million for audit work and \$24.8 million for nonaudit work in 2000, the first year such fee disclosure was required by regulators. First Union merged to form Wachovia in 2001, which then became a KPMG audit

client. About half of the lawsuits filed against KPMG in recent months involve banking clients of First Union. The suits claim that clients directed to KPMG typically paid First Union \$100,000 each, as part of the overall cost of entering the transaction.

These latest instances are not to the only time KPMG has been in trouble. In 2001, the SEC issued a cease-and-desist order against KPMG for improperly loaning money to a senior executive at an audit client back in 1995. Last year, the SEC censured KPMG for independence violations for improperly investing in a mutual fund operated by an investment company it had audited. Even in the absence of demonstrated investor harm or deliberate misconduct, the SEC treats violations of the auditor-independence rule as most serious according to a news release from the agency. Audits performed by accounting firms are obviously relied on by investors and employees. That reliance should never be compromised as a result of what I refer to as “double-dipping” by the auditors. I believe most accounting firms want those firms who have caused the problems to “straighten up and fly right.” Interestingly, most of the culprits are the “big boys.”

Major Information Brokers Face Class Action For Invasion Of Privacy

There have been two class action lawsuits filed in U.S. District Court in West Palm Beach, Florida, that deal with invasions of privacy. The suits allege that two of the nation’s largest information brokers have invaded the privacy of millions of Florida motorists by obtaining sensitive personal data from the state and reselling it. The suits also accuse the state of Florida of failing to protect its residents from criminal invasions of privacy. According to the complaints, ChoicePoint Inc., which has its data mining operations headquartered in Boca Raton, and Reed Elsevier, the parent of LexisNexis, have violated the

federal Driver's Privacy Protection Act. The companies are alleged to have obtained for resale personal information from Florida state records without the "express consent" of licensed drivers and registered car owners. The lawsuits are seeking \$2,500 in damages per violation, per class member, in addition to unspecified punitive damages. There are more than 13 million licensed drivers in Florida, with more than 15 million registered vehicles. Both defendant companies deny any wrongdoing.

Congress passed the federal Driver Privacy Protection Act in 1993 in response to several notorious crimes—including the 1989 murder of actress Rebecca Schaeffer—in which perpetrators used information contained in publicly available motor vehicle records to identify, locate and stalk their victims. Despite the law, the buying and selling of public information is big business. For example, according to reports, during fiscal year 2001-2002, the state of Florida collected about \$27 million from the sale of driving and motor vehicle registration records stored in its massive data banks, according to an official of the Florida Department of Highway Safety and Motor Vehicles. Fees charged by the department are set by statute. A three-year history for a single driver, for example, costs \$2.10. A list of motor vehicle owners costs a penny a vehicle. The department sells information to a number of corporations. Two of the largest are ChoicePoint, based in Alpharetta, Ga., and Reed Elsevier, the U.S. holding company for Great Britain's Reed Elsevier PLC and the Dutch Reed Elsevier NV. ChoicePoint, a publicly traded company with revenues last year of \$753 million, describes itself as "the leading provider of identification and credential verification" information to business, government and individuals. Co-defendant ChoicePoint Public Records Inc. in Boca Raton has 300 employees and annual revenues of \$50 million.

Reed Elsevier's LexisNexis Group is a

global provider of information to government, legal, and academic markets. According to the lawsuit, LexisNexis obtains for resale personal data about millions of Florida drivers and car owners "on a weekly basis." Purchasers in those markets can include insurance firms, auto manufacturers and car rental companies. As stated in the complaint, a key question for the court will be whether obtaining personal motor vehicle information for resale is allowed even when the party buying it for resale intends to use it for a purpose specifically authorized in the federal act, such as research activities and court proceedings.

As originally enacted, the Driver Privacy Protection Act made it unlawful in most cases to disclose or obtain personal information from any motor vehicle record unless the subject of the information had authorized such disclosure. Marketers were allowed to use the information as long as states gave licensed drivers and vehicle owners the opportunity to opt out if they wanted their personal data kept confidential. In 1999, Congress amended the Act to eliminate the opt-out provision for marketing to give drivers more control of their personal information. Now, such data can only be obtained if the subjects of that information give their "express consent" to its release. The change took effect in June 2000.

In addition, it is unlawful to obtain such information "for the purposes of reselling such information, even if the party engaged in the resale of such information intends that it be resold only for a purpose permitted under the DPPA," the suits say. The Internet site of the Florida Department of Highway Safety and Motor Vehicles shows that the department requires licensed drivers to apply to the state to have their personal information shielded from release. Florida's law does not conform to the current federal requirements for disclosure. Some particularly sensitive personal information, including Social Security

numbers, is exempt from release under state law.

XII. ARBITRATION UPDATE

The National Association Of Insurance Commissioners

Last year, I appeared as an invited speaker at the National Association of Insurance Commissioners in Atlanta at its spring meeting. The subject at that session dealt with arbitration and I was asked to give my views on how arbitration works in insurance contracts. I felt that the association was finally waking up to the evils of arbitration in insurance contracts. It now appears I was right. Three insurance commissioners—from Indiana, Montana, and Kentucky—are heading a "Working Group on Consumer Protection" of the association. The group is exploring whether to recommend that every insurance commissioner in the country should move to ban all pre-dispute binding arbitration clauses in insurance contracts. While most state regulations of arbitration clauses are preempted by the Federal Arbitration Act, there is a strong argument that state regulations of arbitration clauses in insurance contracts are saved from FAA preemption by the McCarran-Ferguson Act. In fact, it is difficult to see how any other decision could be reached.

In addition to the Atlanta meeting, the Working Group has held hearings in New York City and I believe in Chicago. It would be a great victory for consumers if a large number of states started banning mandatory arbitration clauses in insurance contracts. The powerful insurance industry has repeatedly assured the association that mandatory arbitration is an extremely consumer-friendly process. That will go down in history as one of the biggest falsehoods of all time.

The case law relating to the question of whether the McCarran-Ferguson Act saves state laws regulating arbitration clauses in insurance contracts from preemption under the Federal Arbitration Act is very clear. The McCarran-Ferguson Act provides in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §§ 1012(b) (1994). Clearly, the states can prohibit the use of arbitration in insurance policies.

More than a dozen different state and federal appellate courts have held in reported decisions that state insurance regulations prohibiting or restricting use of arbitration clauses in insurance contracts are not preempted by the Federal Arbitration Act because of the operation of the McCarran-Ferguson Act. The proposition that state insurance commissioners are entirely free to regulate arbitration clauses in insurance contracts can't be disputed. Industry representatives want the insurance commissioners around the country to refuse to exercise their authority to prohibit or even regulate arbitration. Insurers force their customers to arbitrate all disputes with them because they contend it is in their customer's best interests to do so. The Insurance Commissioners of America have the power to protect insureds from pre-dispute binding mandatory arbitration clauses and that is exactly what they should do.

A View On Arbitration From London

I encourage each of you to obtain a copy of the *Financial Times* (London), dated June 30, 2003, London Edition 1. (You can go to their Website: www.londontimes.com) The *Times* commented on a case decided by the U.S. Supreme Court that drew very little attention in the United States. However, this publi-

cation recognized the significance of the Court's decision. The article is included in its entirety:

Yet that case could have more impact on the everyday legal culture of Americans, and the businesses that serve them, than new rules for Internet smut control or laws to punish Holocaust profits. The case involves arbitration, the privatized form of justice that affects practically every American with a credit card, a broker or, increasingly, a job. Last week the justices answered one of the most basic questions about arbitration: whether individuals can seek strength in numbers, and bring class action arbitrations, if their arbitration agreements do not forbid such conduct. Their decision could well touch more people in the US than even the landmark decision on affirmative action. In an increasingly large number of situations, Americans do not have the right to sue; they have only the right to go to arbitration. The past two or three decades have brought a silent revolution in American law: while lawsuit reform has languished in the legislatures, it has proceeded by stealth in the realm of arbitration.

Courts, led emphatically by the Supreme Court, have encouraged the resolution of disputes by arbitration, thus dispensing with laws, juries and procedural safeguards - and with most of the costs, delays and inefficiencies of a normal lawsuit. Banks, brokers, insurance firms, car dealers and e-commerce companies now regularly include mandatory arbitration in consumer contracts, often in print almost too small to be discerned by the naked eye. More and more American employers refuse to hire workers unless they give up their right to sue. Large areas of American life and commerce have silently been insulated from the lawsuit culture. Americans may have not noticed this truncation of their rights but that does not mean they did not agree to it - or, for that

matter, benefit from it. For the legitimacy of arbitration depends on consent; and to judge from the signatures on millions of contracts for everything from septic tank maintenance to executive compensation, Americans have consented to the arbitration revolution.

Ignorance (or bad eyesight) is no defense: you are what you sign. And most of the time, ignorance is the better path. Arbitration is portrayed as second-class justice: arbitrators need not be judges, or even lawyers; they obey no laws, create no precedent and do not normally issue written opinions; they are not officers of the state. But any class of justice is better than none at all. Too many lawsuits exhaust the plaintiff, emotionally and financially, long before they deliver a resolution. Arbitration provides imperfect justice, much more quickly. In the best of all possible worlds, there are lawsuits. In the real world, there is arbitration.

Yet the devil is in the detail and the issue of class actions, which the Supreme Court tackled last week, is one of the nastier demons of the arbitration world. Should those who give up their right to sue also give up their right to sue in groups? Should arbitration preclude the class action - that great democratic leveler that allows small claimants to take on big corporations? The case involved was suitably absurd: it involved two sets of plaintiffs who took out loans from Green Tree Financial to improve their properties or buy mobile homes. The plaintiffs claimed the loan company violated a technicality of South Carolina consumer law by failing to inform customers that they could choose their own lawyer or insurance company to complete loan obligations. This was a relatively small offence but once the case turned into a class action, damages rose from a few thousand dollars to Dollars 27m (Pounds 16m).

Justice Stephen Breyer, who wrote the majority opinion in the case, said it involved “a dispute about a technicality in which no one was harmed.” He seemed especially troubled by this case: if arbitration were to have “all the bells and whistles of litigation,” he said, would this not undermine the benefits of the system? Justice Breyer asked the biggest questions about class action arbitration; but he did not answer them in his opinion. In the end the court, by a narrow and fragile majority, decided not to decide whether individuals can arbitrate as groups. The majority said the arbitrator himself should decide, placing substantial new powers in the hands of this already omnipotent individual and dashing the hopes of the business community that class action arbitrations would be outlawed altogether.

Legal experts say the court’s decision is likely to provoke another round of lawsuits. Companies will start writing arbitration agreements that forbid class actions and consumers will be forced to sign them. Courts will then have to decide whether this second generation of arbitration agreements, sanitized of class actions, are so unfair as to be unenforceable. Yet, still, no one has noticed. Americans have not realized how arbitration threatens to transform their experience as consumers and employees. They are not playing a democratic role in shaping that experience. That is a shame: nothing has yet come of all the effort expended on tort reform in Congress. Some of that wasted effort should be diverted to the cause of arbitration. Real reform starts here. And it has already begun.

XIII. MASS TORTS UPDATE

Congress Drags Feet On Ephedra

New Jersey’s Attorney General has filed a significant lawsuit against the ephedra industry. While it was most important, it barely got a “headline” due to the fact that there have been hundreds of similar cases filed. As we have reported repeatedly, the herbal supplement is linked to at least 120 deaths and 1,400 serious reactions. The drug is under assault from State Legislators, medical groups, and now the marketplace. For example, CVS, the nation’s second-largest drug store chain, will stop selling ephedra diet products. It is impossible to understand why Congress and the FDA have taken no significant action. Instead of building on the momentum that has grown steadily, Congress continues to protect the diet supplement’s industry. The fact that this industry contributes millions of dollars to politicians may well be the reason for the inactivity.

Drug Industry Lobbying

We all know that drug prices are much too high. At the same time, we know that retail drug stores are struggling to make a decent profit. So, where does the problem lie? In 2002, the pharmaceutical industry’s profits were five-and-a-half times greater than the median for all industries represented in the Fortune 500, making it the most profitable industry in the United States. Drug companies spent an all time high on lobbyists in 2002, and made sure that elected officials were aware of their power. They made it clear that they will not tolerate any plan threatening their profits. The size of the lobbying blitz became clear with the release of federal lobbying disclosure records for 2002. Public Citizen recently

released a report entitled “The Other Drug War 2003” in which it analyzed the lobbying records. Public Citizens’ analysis of those documents shows:

- In 2002, the drug industry spent a record \$91.4 million on federal lobbying activities that are required to be disclosed, a 12% increase from the previous year. This figure does not include at least another \$50 million spent to influence Congress through activities such as advertising and other public relations, direct mail and telemarketing, and grants to advocacy groups and academics pushing the industry’s position.
- The drug industry hired 675 different individual lobbyists from 138 firms in 2002, 24 more lobbyists than the year before. That’s nearly seven lobbyists for each U.S. Senator.
- Among those lobbyists were 26 former members of Congress, three more than in 2001.
- The Pharmaceutical Research & Manufacturers of America (PhRMA), which represents more than 100 brand-name prescription drug companies, shelled out \$14.3 million for lobbyists last year, a 26% increase from 2001 and nearly double what the group spent on lobbying in 2000. PhRMA hired 112 lobbyists, 30 more than the year before.
- The top 10 pharmaceutical companies and trade associations spent \$55.8 million on lobbying last year, accounting for more than 60% of the industry’s total lobbying expenditures. A record 24 companies and trade groups spent \$1 million or more on lobbying in 2002.
- Since Public Citizen began tracking the drug lobby in 1997, the industry has spent nearly \$478 million on lobbying the federal government. In that same period, the top 25 pharmaceutical companies and trade groups gave \$48.6 million in federal campaign donations. All told—when advertising, funding of allies and front groups, and other activities are

accounted for—the drug industry’s total spending on federal political influence topped nearly \$650 million since 1997.

While the drug manufacturers’ lobbyists worked on a variety of issues in 2002, most of their attention was focused on legislation that could threaten the industry’s profits. As expected, senior citizens have been hit the hardest by excessively high prices for prescription drugs. However, instead of promoting a prescription drug benefit as part of the traditional Medicare program, the drug companies pushed to have Medicare drug coverage provided by private insurers and HMOs. That battle is currently being fought—as reported elsewhere—and is far from over.

The success drug companies have enjoyed in protecting high prescription prices is reflected in annual profitability rankings recently published by Fortune magazine. In a year when the stock market remained listless and company after company was wounded by accounting scandals, the 10 drug companies in the Fortune 500 maintained nearly the same level of total profits in 2002 as in 2001. The following information was furnished by Public Citizen on drug industry profits:

- As a group, the 10 drug companies in the Fortune 500 saw \$35.9 billion in profits in 2002, a drop of 3.5% from 2001.
- By comparison, all companies in the Fortune 500 suffered a combined loss of 66.3% in profits from 2001 to 2002. The pharmaceutical industry soared past other business sectors - raking in profits five-and-a-half times greater than the median for all industries represented in the Fortune 500.
- Profits registered by the 10 drug companies on the list were equal to more than half the \$69.6 billion in profits netted by the entire roster of Fortune 500 companies - when all losses are subtracted from all gains. “The drug industry contends that it

needs high prices to finance the discovery of new, innovative drugs,” Clemente said. “But a closer look shows that drug-makers make far more money in profits than they spend on research and development.”

Clearly, something must be done to control the powerful pharmaceutical industry. This means Congress must break the shackles that the industry currently has in place. The FDA must become much more consumer-friendly and not appear to be more of an extension of the industry, rather than protectors of the consuming public.

Drug Maker To Pay \$355 Million Settlement

AstraZeneca Pharmaceuticals has pleaded guilty to violating a federal drug marketing law. The company will pay \$355 million to settle allegations of illegal pricing and marketing of the prostate cancer drug Zoladex. The company pleaded guilty in U.S. District Court to conspiring to violate the marketing law by giving free samples of the drug to urologists, who then submitted claims for payment for the prescriptions to Medicare, Medicaid and other federally funded insurance programs. The claims created a loss of nearly \$40 million for those programs, according to federal prosecutors. The Food and Drug Administration said AstraZeneca engaged in a “massive conspiracy” by illegally pricing and marketing Zoladex. A statement issued by FDA Commissioner Mark B. McClellan says: “FDA will not tolerate criminal conduct that exploits patients, plunders the national treasury, and adds to the cost of health care.” Apparently, the federal investigation did not find any evidence that implicated top AstraZeneca executives in criminal conduct. However, I have difficulty in seeing how a corporation can violate the law without some person or persons having been directly involved in the decision-making process. The case was resolved with a

corporate guilty plea, according to the federal prosecutors.

AstraZeneca accepted responsibility for “any improper sampling conduct that took place in the mid-1990s.” The company says it has taken steps within the new company to prevent such activities from happening again. The FDA said AstraZeneca employees used several illegal methods to stimulate demand for Zoladex. In addition to giving Zoladex to physicians who charged patients and insurance programs for the samples, the FDA said the company inflated the price of Zoladex reported to Medicare as the basis for reimbursement while deeply discounting the actual price charged to the doctors. The company previously noted in its 2002 annual report and in a filing with the Securities and Exchange Commission that it had set aside \$350 million to cover the costs of an expected settlement of the case. As part of a plea agreement, AstraZeneca agreed to pay a \$63.9 million criminal fine for violating the federal Prescription Drug Marketing Act.

AstraZeneca also agreed to pay the federal government \$266 million to resolve allegations that the company caused false and fraudulent claims to be filed with the Medicare, TriCare, Department of Defense and Railroad Retirement Board Medicare programs as a result of its fraudulent drug pricing schemes and sales and marketing misconduct. The company will pay another \$24.9 million to the federal government and the states to settle civil liabilities to the Medicaid program regarding the allegations that it caused false and fraudulent claims to be filed with the states as a result of pricing and marketing misconduct. Drugs must be marketed with the highest ethical standards and respect for the law. Until some of the corporate executives hear the “clank of a jail cell door,” I suspect the companies will continue to violate the law, pay large fines, continue to do business as usual, and make huge profits along the way.

GlaxoSmithKline Settles With Lymerix Vaccine Recipients

The maker of the discontinued Lymerix Lyme disease vaccine has agreed to settle class action lawsuits alleging that the vaccine could cause an arthritic condition in some people. Unfortunately, those who received the vaccine will get nothing from the settlement. The lawyers handling the plaintiffs' case contend getting SmithKline Beecham, now GlaxoSmithKline, to take Lymerix off the market in February, which is disputed by the company, accomplished the main goal of the lawsuits. However, the defendant, GlaxoSmithKline, agreed to pay the lawyers fees of \$926,250 and costs of \$137,997. That concerned Federal District Court Judge Jacqueline C. Cody, who presided over the settlement, and rightly so. The fees had to be justified.

For background, a half dozen class action lawsuits filed in New York, New Jersey and Pennsylvania were consolidated in one court. Concern by the court regarding the size of the award of lawyers' fees in relation to the outcome of the litigation, was the main concern. "This lawsuit has two primary purposes at its inception: to warn patients of the drug's potential dangers, and to provide funds to plaintiffs for ongoing medical monitoring. The first goal is met by removal of the drug from the market; the second was not pursued because it was deemed unnecessary," the Judge wrote in her Order.

The litigation was started at the urging of doctors worried that the vaccine could cause a risk of arthritis in some genetically susceptible people. Dr. Don Marks, an Alabama doctor, who has studied Lyme disease and the vaccine and acted as an expert witness for the plaintiffs. Dr. Marks said that in such cases, "the vaccine causes an autoimmune response. The vaccine itself can cause an inflammatory arthritis." Dr. Marks presented data to the U.S. Food and Drug Administration, which were reviewing his findings. However, before

the FDA took any action, Lymerix was withdrawn from the market.

GlaxoSmithKline denied that the vaccine caused any illness and said it has been proven safe and effective in clinical trials. The company claims it took the vaccine off the market in February 2002 for financial reasons, not because of health risks or lawsuits. Under the terms of the settlement, the company can't reintroduce Lymerix without FDA-approved label changes. The company apparently had no plans to reintroduce the product.

Class Action Status Given For Drug Suit

Class action status has been given to lawsuits against Warner-Lambert Co., the maker of the diabetes drug Rezulin, which was pulled three years ago because of liver-related deaths. The decision came from the West Virginia Supreme Court, which reversed a decision by a lower court that had denied the plaintiffs' class action request in 2001. The trial court will now hear the case brought on behalf of up to 5,000 West Virginians to recover the costs of medical monitoring to determine whether they have been injured by the drug. Rezulin® won Food and Drug Administration approval in 1997 and generated \$2.1 billion in revenue before it was banned in March 2000. FDA research linked the drug to 63 deaths from liver failure. Warner-Lambert was bought by Pfizer Inc. in 2000. More than 2 million people took Rezulin before it was pulled from the market, and Pfizer has said it faces hundreds of lawsuits and claims over the drug. Our firm currently has a number of these cases. This class action lawsuit won't have any effect on our clients' claims which are filed as individual cases.

XIV. BUSINESS LITIGATION

Wal-Mart Suing Kmart Over Bag Carousels

It is always newsworthy when a large corporation has a claim and has to decide whether to file a lawsuit or go to mandatory, binding arbitration and elects arbitration. However, that doesn't happen very often and that's why the selection of arbitration makes news. Wal-Mart Stores Inc., the world's largest retailer, is now going to court to prevent wares bought at rival Kmart Corp. from going for a spin at the register. Wal-Mart has a patent on its carousel that holds its blue plastic shopping bags. The cashier drops items into bags as merchandise is rung up, and spins the rack to make the effort easier for both the cashier and the customer lifting out the bags. The carousels are in more than 1,500 Wal-Mart stores, Williams said, and more are being added as new stores open or existing ones are remodeled. Wal-Mart has 3,430 domestic stores. Wal-Mart has filed its suit in a Delaware court to keep Kmart from using a similar device. I have to wonder why the two retail giants didn't simply hire one of their "arbitrators" to settle the dispute.

Spam Believed To Cost Businesses Billions

Anybody who has a computer knows about e-mailed spam. American businesses lose billions of dollars in lost time, productivity and e-business. Consumer confidence in the Internet has been hurt as a result. Consumers are being inundated with pornographic or false and misleading e-mails that diminish their faith in e-commerce. Many of the benefits from use of the Internet are being undermined because of the spam explosion.

It has been estimated that businesses lose about \$10 billion a year because of lost productivity, bandwidth costs and money spent on anti-spam tools. In addition, consumers are likely to delete legitimate business e-mails as they delete spam. It is fairly easy to do so. A House Judiciary subcommittee, led by Representative Howard Coble, (R-N.C.) will vote soon on an anti-spam bill. Consumers would be able to opt-out of receiving spam. The bill, if passed, would provide criminal and civil penalties to fight fraudulent spam.

Consumers Union, the influential consumer group, believes Americans should have the right to block all advertising e-mail, including legitimate business e-mail. "Consumers should have the ability to say no to all spam, even when that spam comes from companies that are not engaged in fraud," said Chris Murray of Consumer Union. Of course, there are some capitol observers who believe that First Amendment rights may be an obstacle.

NAFTA Arbitration Panel Rules Against Loewen Group

An international arbitration panel has turned down a \$780 million case against the U.S. government brought by a Canadian funeral-home company that had a bad result in a Mississippi court. The ruling involves a controversial 1995 trade provision meant to protect U.S., Mexican, and Canadian investors from discriminatory acts of a government outside of their own country. The clause within the North American Free Trade Agreement has raised alarm among environmentalists and state regulators. The law gives foreign companies special rights at the expense of local authorities or domestic competitors. This ruling is very good. It also dealt a blow to Loewen Group Inc., a Canadian mortuary company that filed the case in 1998. Loewen emerged from bankruptcy protection last year as part of Alderwoods Group Inc., based in Ohio.

The NAFTA panel ruled that Loewen didn't qualify for damages because it

had lost its rights as a Canadian company after it was taken over by a U.S. corporation. The Loewen case stems from a 1995 legal battle in Mississippi that pitted Loewen against a local mortician who sued the Canadian company in a \$5 million breach-of-contract suit involving burial insurance. The jury in Mississippi returned a \$500 million damages award against the company. The parties in 1996 agreed to a \$175 million settlement. Two years later, facing bankruptcy, Loewen filed the first-ever case against the U.S. under NAFTA, claiming the Mississippi court system "discriminated" against the company as a foreign concern and denied its legal rights by demanding an exorbitant bond. There are other similar cases that could stir greater controversy. Chief among them is a case against the U.S. brought by Methanex Corp., a Canadian producer of methanol, a petrochemical used in making a gasoline additive known as MTBE. After California phased out the additive, fearing possible health risks, Methanex filed a \$970 million NAFTA claim in 1999, claiming the decision was made for political reasons to reward a major U.S. competitor. Thus far, there has been no ruling in that case. To date, U.S. investors have won two cases against Mexico and two against Canada. The NAFTA panel has dismissed several Canadian complaints against the U.S. At present, I understand there are more than 20 cases still pending.

XV. NURSING HOME UPDATE

The Government Reports On Nursing Home Care Violations

The number of nursing homes nationwide cited for serious patient care violations remains unacceptably high. This comes from one of two separate federal reports released last month. About 20% of the nation's 17,000

nursing homes were cited for violations that put elderly and sick residents at risk for physical harm or, in extreme cases, death, according to the report from the General Accounting Office (Congress' investigative arm). State inspectors reported between July 2000 and January 2002, a decline of severe violations from the previous 18 months. However, government auditors declared the risks that residents face in nursing homes remain "a cause for concern." It's sort of like going from a grade of "F" to a "D minus." Gannett News Service obtained the GAO report in advance of a Senate hearing held on July 17th and released it to the public. The hearing explored nursing home operators and government attempts to safeguard the 1.7 million elderly and ill residents who live in these homes. Senator Charles Grassley (R-Iowa) chairman of the Senate Finance Committee, stated at the hearing: "We must do more to protect vulnerable residents of nursing homes across the nation." A recent GNS investigation found nearly three-fourths of the most severe and repeated nursing home patient care violations were clustered in a dozen states. The GNS report also found significant weaknesses in the federal and state safety net designed to protect nursing home residents. The GAO report confirms these findings. Despite recent efforts to improve nursing home inspections, weaknesses and inconsistencies remain, the federal auditors found. Federal surveyors, spot-checking the work of their state counterparts, found serious patient care violations at 16 of 85 nursing homes that had been declared free of violations. Among the violations, nursing home staff was found to have:

- Failed to prevent pressure sores.
- Failed to consistently monitor pressure sores.
- Failed to promptly notify the physician so that proper treatment could be started.

I wonder if the Alabama nursing home industry will bring the GAO

report to the attention of the Alabama Legislature. In reflecting on the regular session, I realize how very little information of the sort revealed by the GAO report was even considered by the Senate Committee that reported out an awful nursing home bill. Hopefully, that will not be the case in future sessions.

There was a second report released by the Office of Inspector General. The mission of the Office of Inspector General (OIG) is mandated by law. OIG is to protect the integrity of the Department of Health and Human Services programs—as well as the health and welfare of beneficiaries served by those programs. I have not had an opportunity to study this report in detail. However, a cursory review indicates that this report revealed serious problems in the nursing home industry. Needless to say, when both the GAO and OIG come down hard on an industry such as the nursing home industry, government at both the state and federal levels must respond. It points out clearly that giving the industry more protection is not the answer.

The Nursing Home Industry Works To Block Lawsuits

The powerful nursing home industry is working hard trying to get state legislatures across the nation to cap damage awards in suits against nursing homes. During the past year, lawmakers in nearly a dozen states have introduced legislation to limit noneconomic damages in nursing home suits. In some cases, they have proposed or adopted obstacles to a resident's right to sue, such as limiting the admissibility of certain types of evidence. Punitive damages, even in wrongful death cases, are being attacked. For example, Arkansas has raised its punitive damages standard in civil suits, requiring the claimant to prove by "clear and convincing" evidence that the facility either intentionally or negligently caused the injury. Bills limiting the use of nursing home inspection records in lawsuits are pending in Arkansas and

North Carolina. Of course in Alabama, nursing homes are given more protection than in any other state. Even so, the industry virtually killed most of this year's regular session trying to cap damages in nursing home cases.

The move to limit nursing home suits robs victims of their right to hold the facilities accountable. Caps have never worked and have done nothing to reduce the cost of insurance for the nursing home industry. In Alabama it is quite clear that nursing homes aren't threatened by litigation. What affects insurance rates are the bad investments of the insurance and nursing home industries, and the best way to prevent lawsuits is to avoid causing injury. The estimated worth of open claims involving nursing homes in 2001 represented only 2.3% of the \$99 billion spent on nursing home care nationwide, according to a recent study.

Congressional Report On Mississippi Nursing Homes

U.S. Representative Bennie G. Thompson of Mississippi recently released another Congressional report on the conditions of nursing homes in his home state. Representative Thompson commissioned the report based on the fact that he has increasingly received complaints from concerned constituents who believe that their loved ones are being neglected or abused in nursing homes. The report was prepared by the U. S. House of Representatives Committee on Government Reform, Special Investigations Division, at the request of Representative Thompson. The report focused on the nursing homes located within the Second District of Mississippi. The report was based on an analysis of state inspections conducted at nursing homes in the Second Congressional District between August 2001 and October 2002. In addition, the report examined the results of complaint investigations conducted at these nursing homes during this period. The report covered 43 nursing homes that

served more than 3,000 residents.

Representative Thompson has indicated that he is most disappointed in the findings of the report, which is certainly no surprise. The findings revealed the following:

- Ninety-one percent (39 out of 43) of the nursing homes were in violation of federal law;
 - Thirteen facilities (almost one-third of all facilities), serving about 1,236 residents, had a violation that caused actual harm to nursing home residents or placed them at risk of death or serious injury.
- Examples of the violations documented by the nursing home inspectors included the following:
- Facilities that failed to provide adequate medical care, such as allowing wounds to become infested with maggots and worms;
 - Facilities that failed to protect residents from falls and accidents that resulted in serious injuries, including the death of one resident;
 - Facilities that failed to protect residents from sexual abuse by staff and other residents; and
 - Facilities that failed to prevent or properly treat pressure sores.

I have to report that our experience confirms that such violations do exist in many nursing homes, as we have been involved in cases involving all of these very same issues. The Mississippi findings are especially interesting in light of the fact that the nursing home industry was one of the major players behind the recent tort reform measures enacted in the State of Mississippi. As the nursing home industry is seeking similar tort reform measures in Alabama, I believe a similar report on the nursing homes in our state would be very informative. Instead, we have to deal with giving nursing home owners more protection against lawsuits. Nothing is being done in Alabama to protect the residents and their families, and that is inexcusable.

Meridian Nursing Home Agrees To Settlement In Wrongful Death Case

A Mississippi nursing home has reached an out-of-court settlement in another wrongful death lawsuit. The complaint, filed in March 2001, alleged that poor care at Benchmark Health Center resulted in the death of the plaintiff's father in October 1999. The amount of the settlement is confidential and can't be disclosed. The case had been scheduled to go to trial on July 28th in Lauderdale County Circuit Court. At the time the decedent was a resident, Benchmark was owned by a previous owner. This lawsuit was one of eight filed in the last two years against Benchmark. Seven of these were wrongful death actions.

Problems Concerning Advanced Directives For Nursing Home Residents

Federal law requires that all persons entering a nursing home be offered the opportunity to select advanced directives. Advanced directives give the nursing home resident an opportunity to decide in advance the type of care they want should certain circumstances arise.

One example of an advanced directive is a living will, which indicates in as much detail as possible what actions should or should not be taken under specific circumstances. Living wills have been criticized for being too vague or too specific, and some research shows that a person's intentions and preferences regarding living wills change. Living wills most often address the issue of extraordinary actions to sustain life, such as the question of resuscitation. However, they can also cover such things as hospitalization, the use of artificial life support, tube feeding, and even the use of antibiotics.

The alternative to the living will approach is the designation of a proxy,

indicating who is authorized to act on the patient's behalf if that person is unable to communicate. This designation can be done by using a durable power of attorney. States must specifically extend their durable power of attorney statutes to cover medical decisions. Under this approach one can specify both the person one wishes to act as agent and the conditions under which such a proxy should be exercised.

In the absence of a living will or proxy, someone must be identified to act for a person who is unable to act on his or her behalf. There are legal procedures to accomplish this, which vary from state to state. In general, two major classes of legally empowered agents are conservators and guardians. Determining the most qualified person to serve as conservator or guardian is an important question. Common wisdom suggests that it should be the next of kin, however, it can also be any competent person who is familiar with the needs and desires of the patient. Where there are multiple contenders for the role of conservator or guardian, the courts may have to decide who is best positioned to know the patient's preferences. In cases where there is no one appropriate, the court may appoint a public guardian.

It is clear that advanced directives are important. Despite the requirement that advanced directives be solicited whenever an older person is admitted to a health care institution, some suggest that it is unrealistic to expect that person can make clear, thoughtful determinations at such a time of high stress. However, the danger of not building the decision into the admission routine, is that it goes unattended.

Georgia Nursing Home Accused Of Poor Care

A nursing home in Columbus, Georgia, has been accused by a national consumer group of being a chronic violator. Fountain City Care & Rehabilitation was one of 11 Georgia

nursing homes identified by Consumer Reports as providing poor care for the elderly. Consumer Union, a nonprofit organization that publishes Consumer Reports, looked at nursing home inspection reports for all 50 states. More than 1,700 of the homes were placed on a list of facilities that have had problems over the past year. Of these, 290, including Fountain City Care & Rehabilitation, have appeared on a Watch List of homes that have had problems for three years.

Fountain City Care & Rehabilitation was cited in 2000, 2001 and 2002 for violations described as having a "potential for more than minimal harm," the "potential for minimal harm" or likely to cause "actual harm and/or immediate jeopardy." Over the past three years, the violations have included not providing enough fluids to keep patients healthy and prevent dehydration, and not immediately telling a resident or doctor and a family member if the resident is injured or there is a major change in his or her physical or mental condition.

According to the Georgia Nursing Home Association, six of the 11 homes placed on the Watch List have changed ownership or are in the process of doing so, while a seventh is in bankruptcy. According to Consumer Reports, nursing homes are placed on the Watch List for the following reasons:

- Deficiencies that place residents in immediate danger
- Deficiencies showing substandard quality of care
- High numbers of repeat deficiencies
- High numbers of total deficiencies
- Failing to provide public access to the inspection report

Authority As Next of Kin To Sign Arbitration Agreements

Arbitration clauses in nursing home admission agreements are becoming the norm in the nursing home industry.

Unfortunately, these days when a family member is in need of nursing care services in a nursing home setting, the family is required to sign an agreement waiving the individual's right to a jury trial for any acts of negligence that the nursing home may commit in the future. Most of the time the family member signing the agreement is a self-appointed caretaker for the newly admitted resident and has no legal authority to act for that resident, i.e., the family member does not have a power of attorney or guardianship. Nursing homes are then attempting to bind residents to arbitration agreements that were signed by family members who had no legal authority to waive that resident's right to a jury trial.

A California court decided in May that a nursing home resident's daughter did not have the authority to bind the resident to an arbitration agreement. In *Phillips v. Crofton Manor Inn, et al.*, No. B156570, 2003 WL 21101478 (Cal App. 2 Dist., Div. 1, May 15, 2003), the court held that a daughter's status as a relative allowed her to admit her father to the nursing home, but did not authorize her to sign an arbitration agreement on his behalf. According to the court, the daughter could not become her father's agent merely by representing herself as such. Something greater than next of kin was needed in order to authorize the daughter to sign the arbitration agreement, binding her father. The decision followed an earlier opinion in which another California court determined that status as next of kin did not give a nursing home resident's family the authority to waive that resident's right to a jury trial. California is not alone in this conclusion. Last year the Supreme Court of North Carolina refused to find that a wife had authority to sign an arbitration agreement on behalf of her husband while he was in surgery, without evidence that the husband had given her the authority to sign the agreement. See *Milon v. Duke University*, 355 N.C. 263, 559 S.E.2d 789 (2002), overruling *Milon v. Duke University*, 145 N.C.App.

609, 551 S.E.2d 561 (2001). The issue of whether a family member has the authority to sign an arbitration agreement on behalf of another family member being admitted to a nursing home, simply by virtue of the family relationship, has not been addressed in Alabama. Let's hope that when that issue is squarely addressed Alabama appellate courts will take the North Carolina and California approach.

XVI. HEALTHCARE ISSUES

Clots Prompt Warning Over New Stents

Last month a pretty stern warning was issued by the FDA to doctors on the use of a popular new drug-coated heart stent that has been linked to blood clots in almost three dozen people. Five persons have died. The Cypher stent is a tiny metal scaffold that props open a cleaned-out artery and, unlike other stents, emits a drug to reduce the chances the artery will clog again. But the drug doesn't prevent a different risk posed by all stents — blood clots that form around the device and can cause a heart attack. The Food and Drug Administration has received reports of blood clots in 34 Cypher stent recipients. Five of those patients died, although FDA doesn't know if the clots actually caused the deaths, a spokeswoman said. In a letter to more than 1,200 cardiac centers, manufacturer Cordis Corp. called the risk very rare considering 50,000 patients have received a Cypher stent since the eagerly awaited device began selling in April. But Cordis cautioned that some of the clots happened after doctors improperly used the Cypher by choosing stents that were too small, implanting them improperly or not giving patients appropriate anti-clotting medicine afterward. The Food and Drug

Administration echoed that warning Tuesday. In studies where Cypher was implanted under strict conditions, it proved no more likely to cause blood clots than long-used bare-metal stents, the FDA said.

It's not yet clear if clots among Cypher patients are occurring more often today than in those studies, said FDA cardiovascular devices chief Dr. Bram Zuckerman. He said clearly some physicians are incorrectly using the Cypher and should heed the following safe-use guidelines:

- Cypher stents are only for new patients, not to replace a reclogged stent.
- Recipients must take anti-clotting drugs for three months after getting the stent — not the mere two weeks prescribed for bare-metal stents — because arteries heal slower after Cypher insertion.
- Closely match stent size to artery diameter. Demand for the Cypher greatly eclipsed supply when it debuted, and Cordis said it initially concentrated on making smaller sizes but now offers a larger size.
- Be sure the stent is fully open, touching the artery wall.

XVII. ENVIRONMENTAL CONCERNS

Environmental Agency Preparing To Decide On Weapons Incinerator

State environmental officials are in the process of deciding whether to approve the Anniston Army Depot chemical weapons incinerator. At the same time, opponents are getting ready to take their case to court. The Alabama Department of Environmental Management notified Governor Bob Riley in mid-July that it is nearly ready to make its decision. Neither the state nor the

Army can say when the Army will start destroying nerve gas weapons at the \$1 billion incinerator in Anniston if approval is granted.

The depot is one of eight sites where the Army has stored Cold War-era weapons containing nerve agents or mustard gas. Under an international treaty, the United States has agreed to destroy the weapons. I have reason to believe that work will not begin before October. Of course, there is a pending lawsuit filed by opponents. Chemical Weapons Working Group, a Kentucky-based coalition of groups opposing incineration at eight sites around the country, is trying hard to stop the project. A federal judge decides whether to grant a requested restraining order. The group, which sued the Army in March, is apparently talking with lawyers for the U.S. Department of Justice. The Army intends to incinerate 2,253 tons of artillery shells, rockets and mines stored in earthen bunkers at the Anniston depot. The operation is expected to last up to 10 years and cost about \$2.3 billion, including costs of building and operating the plant.

A Change For The EPA On Cleanups At Power Plants

A federal appeals court has told the government-owned Tennessee Valley Authority that for the time-being it is "free to ignore" Environmental Protection Agency orders to clean up pollution at several of its coal-burning power plants. A three-judge panel of the Eleventh Circuit Court of Appeals in Atlanta issued the decision. This was to be a test case challenging an aggressive initiative by the Clinton Administration and states to reduce smokestack emissions from aging coal-fired power plants. The appeals court wrote that EPA must first prove its claims in a federal district court that TVA violated the Clean Air Act when it revamped nine coal-fired electric power plants without permits. Instead, the EPA had issued an "administrative compliance

order" to make expensive pollution control improvements at the plants. This led to TVA's challenge in court. The appeals court said it lacks jurisdiction to review the EPA order because it was not a final agency action. Until EPA proves a violation in court, "TVA is free to ignore the ACO without risking penalties for not complying," according to the Eleventh Circuit.

The court was somewhat critical of the EPA, saying the agency "manufactured the procedures they employed on the fly, entirely ignoring the concept of the rule of law" in some instances. Since 1998, EPA has been interpreting the Clean Air Act as requiring old coal-burning power plants to install new pollution controls to meet current air quality standards any time the plants are upgraded to produce more electricity. In 1997, Congress "grandfathered" old power plants, refineries and factories out of having to meet tougher clean air standards required of new plants. Before her departure, EPA Administrator Christie Whitman had advised utilities throughout the East and Midwest to await the outcome of the TVA case before settling air pollution cases her agency had brought against other utilities during the Clinton Administration. Whitman, who has now left her job, had over the past two years, negotiated settlements in several large cases in which utilities have agreed to upgrades costing in the hundreds of millions of dollars. Just two months ago, EPA won an agreement from Richmond, Va.-based Dominion Virginia Power Co. to spend \$1.2 billion to reduce pollution at eight of its older coal-burning plants in Virginia and West Virginia and to pay a \$5.3 million fine.

Much of the controversy over what pollution standards old plants should meet has turned on what constitutes "routine maintenance." The Bush Administration, which changed the program last year to make it easier for companies to comply with the law, is revising the government's definition of

routine maintenance. It is not real clear what lasting impact the Eleventh Circuit ruling will have. Some believe it was more restrictive than originally thought. Only time will tell if it will be used to undo the advancements made by the EPA in recent years.

XVIII. MONSANTO UPDATE

Anniston Area Residents Express Frustration

A public meeting was held in Anniston on July 15th and appeared to have accomplished very little. At that meeting, Anniston residents had little good to say about the Environmental Protection Agency officials. Less than 200 people attended the meeting. This was the first public PCBs update given by the EPA in over a year. I suspect that the sparse crowd was due to the lack of adequate public notice of the meeting and not to a lack of interest in the community. Since we represent so many people in the Anniston area, Rhon Jones from our firm attended the meeting as an observer. He observed a great deal of frustration at the meeting amongst the folks who did show up.

Some of the folks present at the meeting expressed frustration with inactivity and a lack of communication from the EPA. Some voiced confusion about who is responsible for taking action when it comes to contamination. Rhon tells us that a concerned lady made this observation: "We're looking for the light at the end of the tunnel, because we have children and grandchildren coming right along behind us, playing in the same dirt, breathing the same air." The lady was desperate and wanted to know when "the community could put contamination behind it."

Several people at the meeting said they did not understand why their

properties were not being cleaned up, why their flooding complaints were not addressed, and why the company's landfill, where PCBs have been found in the air, has not been removed. The EPA and Solutia have negotiated a broad cleanup agreement, or consent decree, which is very weak, and incapable of doing the job. Fortunately, the decree will not go into effect until it is approved by Judge U.W. Clemon. To date, there has been no indication of when the Judge will rule on the decree. Hopefully, he won't approve it in its present form.

One man at the meeting wanted to know what the agency was doing about health concerns. According to Rhon, the EPA spokesman replied: "The EPA doesn't address health issues. Another federal agency, the Agency for Toxic Substances and Disease Registry, is responsible for that." The man, who obviously was upset, replied: "In other words, we got to suffer, because we got the stuff in our system and you're not going to do anything." In recent weeks, the EPA moved its community outreach office from Noble Street to a property on West 10th Street owned by Solutia. This has caused concern among some residents who believe that the EPA is already too close to the company. For whatever reason, the EPA is moving its office. After the presentation, some said the information supplied by the EPA was too technical for anyone to understand. The meeting, hosted by Community Against Pollution, included updates on the chemical weapons incinerator and groundwater contamination. I believe that CAP intended for this meeting to be productive. Hopefully, some good came out of it. However, I am firmly convinced that based on what has happened in the past, it will take the courts and juries to get the job done in Anniston.

An Interesting Development

A former Environmental Protection Agency attorney has told the Associ-

ated Press that she was pressured not to testify about her concerns with an agreement that could save chemical companies hundreds of millions of dollars in cleanup costs for the PCB pollution of Anniston, Alabama. Janet MacGillivray, formerly a Superfund attorney who had focused on the case of New Jersey's Hudson River, said a high-ranking EPA official told her Anniston didn't make a list of national cleanup priorities because Monsanto, one of the companies found liable, didn't want it listed. Instead, the federal government took over and entered into a consent decree that mandated a federal study rather than the more extensive and immediate cleanup sought by the Anniston community. Many believed that a very strong order would have been ordered by a state judge. Such allegations should be investigated to clear the air. If true, they are most serious. If not, then reputations would have been damaged.

Before a court hearing on the consent decree, Ms. MacGillivray said she got several calls from the lead Department of Justice attorney in the case, suggesting she shouldn't testify. According to the Associated Press report, she felt intimidated. Ms. MacGillivray is now a senior attorney for Riverkeeper Inc., a Garrison, N.Y.-based environmental group. "I felt this was so inappropriate for an attorney to be calling me repeatedly, giving me various reasons as to why I would be doing something I shouldn't be. It was just an intense feeling of pressure, and it made me feel tremendously uncomfortable," according to the Associated Press report. Ms. MacGillivray decided to testify in the hearing last January and was a most impressive witness. I had the opportunity to hear her testimony since I was in the courtroom.

A Justice Department spokesman said the matter was a misunderstanding and that the lawyer had not tried to discourage Ms. MacGillivray from appearing in court. However, it was acknowledged that he did warn her

that her comments could delay the cleanup. Ms. MacGillivray came forward at the urging of the Environmental Working Group, a Washington watchdog that contends pressure from the chemical companies forced the Bush Administration to seek a better deal for them and a worse deal for the Anniston community. Ms. MacGillivray has stated that putting the consent decree into effect is almost like having the fox guard the chicken coop. I tend to agree with that assessment.

XIX. INSURANCE AND FINANCE UPDATE

Fraud Lawsuit Filed Against Cruise Lines

Royal Caribbean Cruises, Ltd. and its subsidiary brand, Celebrity Cruises, Inc., have been sued for fraud. A lawsuit was filed in Miami-Dade County Florida seeking to prevent the cruise lines from continuing the fraud. It seeks class action status for the millions of passengers defrauded to date. The lawsuit claims at least \$150 million in fraudulent taxes were charged to passengers and that the deceptive trade practices have been occurring since the spring of 2001.

Faced with decreased tickets sales in a competitive business dominated by cross-town rival Carnival Cruise Lines, Royal Caribbean, and Celebrity allegedly schemed to increase their profitability by charging excessive or illegal taxes to passengers, according to the lawsuit. To date, the cruise lines continue to charge the fraudulent taxes. The scheme is based on a legitimate IRS tax, which requires the cruise lines to charge \$3 to passengers who embark or disembark at ports in the United States. However, beginning the spring of 2001, Royal Caribbean began to overcharge the passengers an additional \$15 to \$25 in "taxes." Rather than

paying these amounts to the IRS, the companies apparently kept the money. The cruise lines also charged passengers taxes on foreign cruises where no such tax was due.

Lawsuits made against Royal Caribbean, Celebrity, and four other cruise lines in 1997 resulted in a settlement that barred the companies from charging customers any additional fees beyond what was advertised as the initial ticket price, excluding the fees passed on to the cruise lines from a government agency. Presently, it is unclear whether or not the cruise lines complied with the 1997 settlement agreement or not. The current lawsuit claims passengers were charged from \$22 to \$35 in taxes that were never broken down for the passengers. The suit claims this was fraudulent. Instead of increasing cruise prices, the cruise lines simply buried the fees in what are alleged to be phony tax charges. It will be determined in the suit if the two cruise lines did in fact violate the 1997 agreement with Florida by charging taxes not owed to the federal government. Royal Caribbean registered its business in Liberia and flags its vessels in foreign countries in order to avoid paying most U.S. taxes. However, the lawsuit alleges that for the past two years Royal Caribbean charged its own brand of illegal taxes - approximating \$90,000,000. An estimated 5.7 million passengers (mostly U.S. citizens) were affected by the charges. Including future bookings, the cruise line overcharged its customers by approximately \$150 million.

Life Of Georgia Update

Recently, our firm filed several lawsuits in Fulton County, Georgia, against the Life Insurance Company of Georgia. As we have previously reported, our firm represents a good number of Life of Georgia policyholders who purchased burial life insurance policies from Life of Georgia. Last year Life of Georgia, which services approxi-

mately one million policyholders throughout the South, settled a racial discrimination lawsuit for approximately \$55 million dollars. The class action suit, filed on behalf of millions of African American policyholders, claimed that the Atlanta based company charged blacks a higher premium rate for their life insurance policies.

The insurance industry referred to this reprehensible practice of charging African Americans a higher premium rate due simply to the color of their skin a "skin tax." We believe that we will be able to show that Life of Georgia, on an average, charged African Americans approximately 35% more for their insurance policies than it did for white policyholders. These lawsuits were filed in Fulton County, Georgia, where the corporate headquarters for Life of Georgia is located. Life of Georgia sent agents door to door, selling burial policies to underprivileged African Americans from the middle part of the last century to at least 1981. Policies sold usually paid only a few hundred dollars in benefits. The premiums paid would, in many cases, exceed the benefits. In addition to the low face value of the policies, the agents of Life of Georgia would routinely sell multiple policies to each policyholder. Additionally, the company would not allow its agents to sell to African Americans the better-valued policies that were offered to Caucasians.

This firm is looking forward to aggressively pursuing these cases as we believe that the cause we are fighting for is not only a very valid legal fight, but also is grounded in the moral belief that it is wrong to treat African Americans in a grossly unfair manner. Clearly, this company treated its Caucasian policyholders much better than it did its African American policyholders, and they won't be able to defend their pattern and practice of fraudulent conduct.

Western Southern Update

Our firm recently filed 2,256 individual lawsuits against Western Southern Life Insurance Company in Mason County, West Virginia. Each of the Plaintiffs in those cases did not want to be a part of the Western Southern sales practices class action, which was settled earlier this year. Each of our clients will pursue their own case. The class action had been pending for seven years in South Carolina. West Virginia allows the joinder of claims of Plaintiffs outside the state, as long as there are in-state parties also present within the same cause of action. Most of our clients' claims involve vanishing premium and replacement issues which have been litigated against other companies all over the United States for the last several years. Our clients all believed their available relief within the class action was insufficient and chose to exclude themselves from the class and pursue their own private cause of action.

Reciprocal Of America Update

The three class action cases we filed involving the demise of the Reciprocal of America companies are still progressing. Recently, several of the risk retention groups moved from receivership status to liquidation status. Reciprocal of America and American National Lawyers Insurance Reciprocal each filed for liquidation status. Liquidation status is the equivalent of bankruptcy for an insurance company. Insurance companies are regulated by the state insurance departments where they are domiciled. Instead of seeking bankruptcy like an individual or some other type of corporation would do, insurance companies seek liquidation status. In liquidation, all remaining assets are marshaled by the State Insurance Department in hopes of benefiting the policyholders if at all possible. Frequently, there are not enough assets to go around to all the policyholders. In

order to attain liquidation status, the insurance company's debts must far exceed its assets. We are continuing to pursue our claims against Reciprocal and also against all of the other third parties that we believe are legally responsible for all of the problems caused to doctors, hospitals, and lawyers who lost their policies. The more we learn about these cases, the worse the conduct appears to be.

XX. THE CONSUMER CORNER

A Dedicated Group Fighting For Consumers

Barbara Evans, the director of Alabama Watch, a statewide consumer group tackling issues such as fraud and accountability of state agencies, is working hard for people who have problems. This past year, the Montgomery-based group, now recognized as a nonpartisan research and education organization, campaigned against proposed nursing home legislation that would have capped damages and hurt residents and their families. "We need people to realize they are not containing lawyers; they are taking away rights for consumers," Evans said in a recent media interview. Ms. Evans is in charge of the nonprofit group that wants to hear consumer gripes—whether they are small like home repair fraud to major cases involving an entire industry.

The problem is that not a lot of people know about Alabama Watch. The group, which survives on donations, started a statewide tour last month to reach citizens. The first town hall meeting was held at the Florence-Lauderdale Public Library where Ms. Evans talked about recent legislative fights and services that the organization provides. Alabama Watch hopes to visit medium-size cities around the state before the next legislative session

to find out what folks in the state want Alabama Watch to do.

Alabama Watch was founded in 2001 after a Lee County judge ruled that an insurance company had committed fraud against consumers. The judge ordered that money should be awarded to a new group charged with preventing insurance company fraud and geared to consumer education. Alabama Watch has spoken against the practice of high interest rates from payday loan operations and homeowners paying more money for insurance because of bad credit rating. The group also backs Governor Riley's tax and accountability plan, which I understand has upset some of the special interest groups opposing the Governor.

In a state where lobbyists wield tremendous power and spend money obscured by campaign finance laws that make it harder to track sources of funds, Alabama Watch advocates for the "little people." Part of Alabama Watch's mission is to bring people's stories to the forefront. Since Alabama Watch is one of the few groups in Alabama that works for consumers, I hope people throughout the state will support the group. You can contact Alabama Watch at (334) 263-3022, 1-800-449-7515, or 400 South Union Street, Suite 245, Montgomery, Alabama 36104. The group's Website is www.alabamawatch.org.

Counterfeit Drugs Must Be Stopped

We are currently experiencing serious problems with counterfeit drugs coming into the country. For example, millions of fake Lipitor pills discovered for sale this spring were slipped into the country from abroad. Last month, the Food and Drug Administration announced new plans to fight counterfeit drugs. FDA officials believe they have stopped imports of fake versions of the top-selling cholesterol medicine. According to reports, more than 150,000 bottles have been

recalled. FDA hasn't revealed where the fake pills came from. Since investigators are working to arrest the counterfeiters. However, the Lipitor case highlights the problem of increasing — and increasingly sophisticated — counterfeit drugs. The FDA has pledged to find new safeguards to fight the problem. Tighter oversight of imports and drug wholesalers are clearly needed. Tagging medicines with chemical tracers like those used in the explosives industry is also a possibility.

Fake medication once was a threat mostly in developing countries. While the problem is somewhat rare in this country, or at least we hope so, the problem is clearly growing. The FDA has investigated more than 20 counterfeiting cases a year since 2000, up from roughly five a year in the 1990s. Since 1996, those investigations have resulted in 44 arrests. So far, there have been 27 convictions. Some fakes are toxic and highly dangerous. For example, counterfeit injections of the blood-booster Procrit contained bacteria-laden water that could have killed weak cancer patients. Others, like the fake Lipitor, contain at least some real drug, but are weaker than the real version or are not made in a way that guarantees their safety.

Counterfeits sometimes sneak into legitimate U.S. drugstores because of loopholes in how wholesalers supply the market. Consumers also get counterfeits by buying medicine over the Internet or from operations that claim to import U.S. drugs from Canada, where they're cheaper. Those drugs sometimes turn out to be "knockoffs" from India or Thailand. Congress is considering legislation that would ease drug reimportation from Canada. The FDA has formed a task force to develop new anti-counterfeit measures. At the top of the agenda is finding technology that could show at a glance if drugs are real. Possibilities there include the watermarks and invisible inks used to prevent the counterfeiting of \$20 bills. Also, chemical taggants used to trace explosives and gunpowder are being

considered. Putting radio frequency chips into packaging could make it more tamperproof and traceable. Here are some items to consider:

- We must determine just how many counterfeits are imported. This summer, FDA and U.S. Customs officials will inspect thousands of drugs entering the country at several major ports, both mailed drugs and travelers bringing in purchases.
- We must tighten requirements for drug wholesalers so it's tougher to sneak counterfeits into legitimate supplies. Florida recently did that on its own, a model FDA praised. Wholesalers aren't always licensed and can't always trace the source of their shipments directly to a U.S. manufacturer; drugs can change hands and even packages multiple times before reaching drugstores.

The Lipitor case, which received so much media attention, illustrates some of the problems. Fake pills made it over the U.S. border, were repackaged and then sold to licensed wholesalers. The new packages were different enough for pharmacists to spot. However, it took actual consumer complaints that the pills tasted unusually bitter to alert the attention of regulators. Unfortunately, counterfeiters can make packages look almost identical to the real ones. Making sure our drug supply is safe has to be a top priority for both the FDA and Congress. Obviously, there are lots of unanswered questions and a great deal of work to be done. We should move promptly to both get answers and to take the necessary action to resolve this growing problem.

Clothing-Related Burn Injuries To Children

Safety experts now have a new tool to get a more accurate count of burns related to children's clothing thanks to a new data collection system launched last month by the U.S. Consumer Product Safety Commission. Developed in coop-

eration with the American Burn Association and Shriners Hospitals for Children, the new National Burn Center Reporting System collects comprehensive burn reports on children under age 15 from the approximately 115 burn centers nationwide that treat children, according to CPSC Chairman Hal Stratton. Under the new system, burn centers will report incidents involving the ignition, melting or smoldering of clothing worn by children. In a related, complementary effort, the National Association of State Fire Marshals is working cooperatively with the commission to retrieve and preserve children's clothing involved in burn injuries—an action that greatly enhances the investigative process. Garments collected by fire officials will be forwarded to the commission's Bethesda, Md., headquarters for inspection. At the suggestion of the NASFM, a committee consisting of the National Volunteer Fire Council, National Fire Protection Association, the International Association of Fire Chiefs and NASFM was formed to develop a protocol for use by "first responders" across the country. When making the announcement, Chairman Stratton stated:

One of our top priorities is to keep families safe from fires. We want sound science and solid data to be the basis for decisions we make on regulatory strategies. The National Burn Center Reporting System will give us a more complete picture of the most serious clothing-related burns to children and help us prevent or reduce burn incidents in the future. This new system should give researchers confidence that clothing-related burns to children will be captured. For each of the incidents reported, the burn center will provide the commission preliminary information on the incident and patient identification. A commission investigator will be assigned to the case to conduct an in-depth investigation, interviewing the victim where possible, as well as parents, fire officials and medical personnel

as necessary. All reports will be reviewed and logged into the commission's epidemiological databases.

The commission has relied on injury reports supplied by a probability sample of about 100 hospital emergency rooms nationwide to produce national estimates for specific product categories including children's clothing. The system, called the National Electronic Injury Surveillance System, is the most comprehensive injury data collection system in the world. The burn center reports will augment the injury surveillance data by providing additional and much more specific detail.

The National Burn Center Reporting System collects data exclusively from burn centers that treat children, providing a more complete sample of serious burn injuries. This additional reporting tool supplements data collected by the CPSC's other systems and will enhance their ability to measure the number of clothing-related burn injuries to children. The American Burn Association has to be pleased with the serious commitment of the Consumer Product Safety Commission to establish a new, permanent reporting system for burn incidents involving children. This is a major development. Shriners Hospitals for Children handles hundreds of pediatric burn injuries in the U.S. each year.

The primary focus of the National Association of State Fire Marshals is on preventing fires from occurring in the first place. The current data pertaining to injuries are a critical factor in determining how to effectively reduce the number of clothing related fires. Information gathered as a result of the National Burn Center Reporting System should be a real help to the commission in its efforts. The data being collected will be available for all interested parties to analyze through the commission's National Injury Information Clearinghouse. This is an excellent example of the federal government and others working together to obtain a result that is good for people throughout the country.

XXI. RECALLS UPDATE

Saturn Cars To Be Recalled

General Motors Corp. will recall 254,000 Saturn L-Series cars from the 2000-2003 model years to replace their ignition modules and spark plugs. Some of the 2.2 liter-engine cars may misfire, possibly leading to failures in the exhaust system. Failure to fix the problem could lead to damage to the brakes, fuel system and underbody components as well as undercar fire. GM says there have been seven reports of fire, but no crashes, serious injuries or fatalities. GM says 240,000 of the cars are in the United States with 14,000 being in Canada.

Acura Has Recalled The 2000 3.5RL

Acura has recalled approximately 814 of its 2000 series 3.5RL automobiles. On certain passenger vehicles, some brake master cylinders may have internal corrosion, resulting in reduced braking performance and increased stopping distances. The corrosion could eventually cause a complete brake system failure, increasing the risk of a crash. Dealers will replace the master cylinder assembly, reservoir, and brake fluid. Owner notification began last month. Owners should contact Acura at 1-800-382-2238.

Toro Company Recall Riding Lawn Mowers

Toro Company, of Bloomington, Minnesota has recalled approximately 7,500 TimeCutter Z Riding Lawn Mowers. Consumers should stop using the product immediately unless otherwise instructed. The actuator arm could fail, resulting in a loss of transmission control and risk of personal injury.

These are the model serial range descriptions:

74301 230000001-230003210 14 HP
38-inch cut zero-turn radius tractor

74325 230000001-230000500 16 HP
42-inch cut zero-turn radius tractor

74330 230000001-230003070 16 HP
42-inch cut zero-turn radius tractor

74350 230000001-230001145 17 HP
42-inch cut zero-turn radius tractor

The model and serial number decal can be found on the frame below the seat. The mowers were sold at authorized Toro dealers nationwide from January 2003 to April 2003 for between \$2700 and \$3300. Consumers should stop using their riding mowers until free repairs can be made. If you have one of the mowers, contact a Toro dealer immediately for a free repair. For more information, visit www.toro.com.

Polaris Has Recalled The 2003 Victory Vegas

According to the National Highway Traffic Safety Administration, approximately 1,070 Victory Vegas motorcycles have been recalled. The fuel system and gasoline storage tank assembly of the 2003 Victory Vegas motorcycles could be defective. On certain motorcycles with 49 state engine calibration, the fuel tank vent line could be plugged causing potential expulsion of fuel when the fuel cap is opened. If this caused fuel leakage in the presence of an ignition source, it could result in a fire. Dealers will test the vent lines on the vehicles involved. Fuel tanks with plugged vent lines will be replaced. Owner notification began last month. Owners should contact Victory at (763) 417-8650.

XXII. FIRM ACTIVITIES

Greg Allen – A Leading Products Liability Lawyer

Greg Allen graduated from Jones Law Institute in 1983 and was admitted to practice law that same year. Greg practices in our Product Liability Division where he has been involved in many cases that have resulted in substantial verdicts and settlements. He has become one of the leading product liability lawyers in the country. Greg was recently the lead attorney in a claim against General Motors for a brain-damaged child. After two weeks of trial, the jury brought back an award of \$122 million for the client. As a result of the trial, The National Law Journal profiled Greg as the Litigator of the Month. This case, which received nationwide attention, has exposed a massive cover-up by GM of safety-cutting measures in 3 models sold by the company.

Lawyers Weekly USA also featured Greg for obtaining a substantial settlement for his client in a product liability case. Greg has also tried a number of cases that have resulted in eight figure settlements and many seven figure verdicts and settlements as well. Greg is currently the editor of the Alabama Trial Lawyers Association Journal. He is the past president of the Montgomery Trial Lawyers Association and has been on the Executive Committee for the Alabama Trial Lawyers Association for a number of years. Greg enjoys working for people who have been seriously injured and need help. He especially enjoys cases of a highly technical nature, having the uncanny ability to unravel the most difficult issues. Greg is married to the former Jane Anne Howell of Lafayette, Alabama. The Allens have two children, Tracy and Evan. Tracy is a sophomore at Birmingham Southern College and Evan is in the 10th grade at St. James School. The family attends Eastern Hills Baptist Church in Montgomery.

Dr. Jim Lauridson Contributes To A&E Cold Case Files

Last spring A&E's Cold Case Files contacted Dr. Jim Lauridson about two cases he was responsible for when he was employed with the Alabama Department of Forensic Sciences. The first case involves a young African-American man named Willie Edwards who was lynched by the Ku Klux Klan in 1957. The Klan took Edwards' body and threw it off the Tyler-Goodman Bridge. After three months, Edwards' body was found in the Alabama River. When the case was brought to trial in the early 1970s, the judge threw out the case because the death certificate did not contain a cause of death.

In 1996, by the request of Willie Edwards' family and District Attorney Ellen Brooks, Dr. Lauridson was asked to reopen the case. With the procedures that now exist, Dr. Lauridson was able to determine that Edwards had been drowned and that the death was a homicide. These new procedures opened the door for the Grand Jury, but they did not indict because the earlier prosecutors had already granted immunity to one of the Klan members. The significance of this case is that Willie Edwards is just one of hundreds of African-American men "lynched in the night" who do not have memorials and may not be otherwise remembered.

The second Cold Case File involved an abandoned trailer house in Chilton County. The owners of this trailer were in the process of renovating and found two mummified infants. Dr. Lauridson examined both of these infants (who likely died one to two years apart). After extensive police investigation, the young mother of the infants confessed to abandoning them. She was unmarried and left each infant in the trailer resulting in their deaths to neglect and exposure. This woman is now in Tutwiler Prison. Dr. Lauridson has shed light and brought attention to these cases because these innocent victims deserve to be more than names on a

"cold case file." We are most fortunate to have a man such as Dr. Jim Lauridson on our staff.

Shareholder Andy Birchfield Named Chairman Of Deacons

Shareholder Andy Birchfield has recently been appointed Chairman of the Deacons at First Baptist Church of Montgomery. Andy and his family are very active members of First Baptist where he also serves as Chairman of the Prayer Committee. Andy is married to the former Tanya Payne. They have a son, Dow, and a daughter, Beth. Andy has been with our firm for seven years. He manages the firm's Mass Torts Division, which is currently handling mass torts cases involving Baycol, Rezulin, Vioxx, Celebrex, PPA, Ephedra, Lotronex and Meridia. Andy has handled several cases resulting verdicts or settlements in excess of \$200 million.

Andy is a regular speaker at national, regional and state seminars pertaining to mass tort litigation. Besides working at Beasley Allen, Andy is also very active in numerous legal organizations. He has served as President of the Alabama Young Lawyers and President of Montgomery County Young Lawyers. Andy is currently serving on the Character and Fitness Committee of the Alabama State Bar. He has also served on numerous committees and programs in an effort to improve the legal profession.

Legal Administrator – Lisa Harris

Lisa Harris serves as Legal Administrator for the firm, which simply means she runs the place. She has been with the firm for 13 years. Lisa started as a legal secretary for two lawyers. She was later moved to the position of legal assistant, where she worked for six years. Lisa was promoted to her current position in 1998. She is in charge of managing all daily activities of the firm. When Lisa is not at work, she keeps

busy with her 13 year-old daughter, Haley. Lisa is a tremendous asset to this firm and we are fortunate to have her. She has a most difficult job, but performs it in an outstanding manner.

Investigator – Ricky Moore

Ricky Moore has been an investigator with our firm since 1995. He currently works in our Personal Injury/Products Liability Division as well as helping out with any other investigative needs for the firm. Our investigators are extremely busy and stay on the road much of the time. Before joining us, Ricky worked for the Montgomery Police Department. He started at the MPD in 1978 and retired after twenty years of service. Ricky worked for nineteen years in the Detective Division. Ricky comes from a background of law enforcement. After retiring from the MPD, Ricky's father became the Chief of Police in Roanoke, Alabama, and later served as Sheriff in Randolph County. Ricky, an experienced investigator, has outstanding skills and is highly trained. Ricky Moore is a dedicated employee and a credit to the firm.

Ricky and his wife Kathleen have three children, Melissa, Will, and Molly. Molly will be a student at Troy State University this fall. Ricky and his family are active members of Coosada Baptist Church. Away from work, Ricky enjoys hunting, fishing, and playing Bluegrass music on his banjo.

Secretary To Our Investigators – Jill Cawley

Jill Cawley joined our firm eight years ago. She graduated from Valley High School in 1976. After graduation, Jill received an Associate Degree in Business from Southern Union State Junior College and an Associate Degree in Paralegal Studies from Draughton's Junior College. This talented employee is secretary to three of the firm's seven staff investigators. Her main responsibility is transcribing dictation, record-

ing conversations, and performing other duties. She is also in charge of preparing general correspondence for the entire team and posting their chargeable time and mileage expenses to the appropriate cases.

Before working in the Investigative Division, Jill worked evenings as a clerical assistant. She has also worked with the accounting department. Jill and her husband, Rob Cawley, will be celebrating their silver anniversary on December 10th. Rob is a professional chef and instructor in the Culinary Arts Department at Trenholm State Technical College. Jill and Rob have two “girls,” Cinnamon and Clove. The “girls” are part boxer, part lab and are a most energetic handful. During her spare time, Jill enjoys needlework, pets and country music. She and Rob are active members in their church, Frazer Memorial United Methodist Church. They chair the social committee for their Sunday School Class, The Encouragers. The investigators tell me they would be lost without Jill.

Legal Secretary – Cathy Hall

Cathy Hall works in the firm’s Personal Injury/Products Liability Division as LaBarron Boone’s Legal Secretary. She has been at Beasley Allen for three and a half years. Cathy’s favorite thing about her job is interacting with people. She enjoys learning about the industrial world, especially the defects of many manufacturers’ products. Cathy was born to Benjamin and Naomi Thomas and she is the sixth child of a family of thirteen. There are nine girls and four boys. Her father is a retired minister.

Cathy has two children, Christie and Cameron. They are members of First Congregational Christian Church where Cathy serves as the Superintendent of the Sunday School and President of the

Progressive Christian Fellowship Organization. She and her children also sing in the choir. Cathy has a Bachelor of Science in Criminal Justice from Faulkner University. She enjoys doing things for those who are less fortunate. Cathy loves to read, watch A&E, spend time with her family, and do the work of the Lord. We are very fortunate to have her on our team.

XXIII. CLOSING REMARKS

I can’t overemphasize the importance of the referendum vote on September 9th. As I have stated on numerous occasions, our state is at a real crossroads and what happens on September 9th will determine which direction we take. The wrong choice will guarantee that we remain on the bottom in all too many important areas of concern. I hope and pray Alabama citizens won’t believe all of the false and misleading information being put out by the Governor’s opponents. I expected a real tough fight on the Governor’s plan. However, I did expect a “fair” fight, especially from groups within the Governor’s own party. I hope some of the consultants employed by the opposition will crawl out of the “gutter,” clean up their act, and then continue their efforts in an honorable manner. If that happens, then nobody could complain. A negative vote on September 9th will allow the totally unfair tax structure in Alabama to continue. If that happens, the rich and powerful will benefit and the overwhelming majority of Alabama citizens will continue to suffer economically. We simply can’t allow that to happen.

I would like for each of our readers to take a few minutes and read Chapters 24 and 25 of the book of Matthew.

Specifically, we should all read Matthew 25:31-46. The words of Jesus, as recorded in Matthew, are certainly appropriate for us in today’s world. Sometimes, we who have been blessed forget others who have not been so fortunate. Unfortunately, many of us find ourselves in the same boat as did the 12 followers of Jesus in his days on earth. Prior to his death and resurrection, they simply didn’t understand what His message was all about. Even with the benefit of the Bible, the availability of the Holy Spirit, and the passage of some 2,000 years of time, many of us still don’t get it. However, we do have the benefit of the biblical message and enjoy a direct line to the Master. We should all strive to live a better life in our walk on this earth. While I am trying hard, I always seem to fall short. So, I ask for your prayers. Clearly, the most important tool we have available to us is prayer. Unfortunately, most of us only use this powerful tool when our “ox is in the ditch,” or when we have some special “needs.” Finally, I urge each of you to pray constantly for our leaders at every level. This is our responsibility—even for those we don’t support—and it is most important. We are all greatly concerned about our country and the many problems facing us. I close with the following, which lays out the formula for how we can “save America” and it is basic and simple.

If my people, which are called by my name, shall humble themselves, and pray, and seek my face, and turn from their wicked ways; then will I hear from heaven, and will forgive their sins, and will heal their land.

2 Chronicles 7:14

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