

THE JERE BEASLEY REPORT

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

SEPTEMBER 2003

I. CAPITOL OBSERVATIONS

The Right Thing To Do

Voters will have an unparalleled opportunity on Tuesday, September 9th when they go to the polls. Our choice will be very simple: Either we can do the “right thing” and vote yes or we can vote no and continue our downhill spiral. This opportunity—if missed—won’t appear again for decades. I fully realize that there is opposition to the Governor’s plan for progress from folks who honestly believe there is already enough money coming to Montgomery. I also realize that there are others—including Alfa and the large timberland owners—who are opposing the Governor for selfish reasons. The question is simply what is the “right thing” to do for Alabama and its citizens. While some of us will have to pay a little more, a large percentage of Alabama citizens will have no increase in their taxes and a great number will pay much less.

Fair Taxation Is Moral Issue

It is rather interesting that the forces opposing the Governor’s plan for progress have ignored the real issue in this campaign. Simply put, we have an immoral and inequitable tax structure in Alabama. Tax systems that put an unfair burden on the poor are worse than bad policy, they are morally wrong. Alabama has a tax structure that is grossly unfair to a vast majority

of our citizens. From a moral perspective, it is easy to see why the opponents have dodged the issue. It is really disturbing when a local group that labels itself the Alabama chapter of “The Christian Coalition” ignores the moral and ethical issues in this fight and puts out misleading information to the public. More will be said on that group below. Alabama’s system of taxation has been described as “the most disgusting and unfair” in the country. Our state gets more than half its revenue through an excessively high sales tax, which applies to staples of life such as food. We also have an income tax, which is most regressive because it taxes all income above \$4,600 a year. I have yet to hear anybody from the opposition come close to justifying this type taxation.

The tax system in our state is entrenched by generations of use, and that makes it tough to change. Two questions should be answered by the plan’s opponents. First, is our current tax system fair? Next, does it provide adequately for our needs? In my opinion, “fairness” and “adequacy” have to be decided on moral values. Regressively taxing the poor is not only oppression, it’s bad tax policy for any state. Not only is it bad economic policy, it’s also morally wrong based on biblical principles. Many observers believe the battle to reform our tax structure has to be fought on moral grounds, and I totally agree with them. There are a select few groups in our state that have never paid their fair share, and which are now spending hundreds of thousands of dollars—if not millions—to maintain the status quo. There is a certain amount of greed

IN THIS ISSUE

I. Capitol Observations	1
II. Legislative Happenings	7
III. Court Watch	7
IV. Congressional Update	8
V. Campaign Finance Reform	9
VI. Product Liability Update	10
VII. Premises Liability Update	14
VIII. Workplace Hazards	16
IX. Tobacco Update	16
X. Transportation	18
XI. Ford/Firestone Update	20
XII. The National Scene	20
XIII. The Corporate World	22
XIV. Arbitration Update	27
XV. Mass Torts Update.	29
XVI. Business Litigation	32
XVII. Nursing Home Update.	34
XVIII. Healthcare Issues	37
XIX. Environmental Concerns.	40
XX. Insurance and Finance Update . . .	41
XXI. The Consumer Corner.	43
XXII. Recalls Update	44
XXIII. Firm Activities	44
XXIV. Closing Remarks	47



and arrogance involved in this battle. The only way to defeat greed and arrogance, which we have plenty of, is for folks who want Alabama to move forward to overcome the apathy that exists and get voters out to the polls on September 9th. If we fail to win this battle, the losers will be our children, grandchildren, and great-grandchildren. Our state simply can't afford to lose this battle. If the opponents to the plan win—we all lose! I urge you to vote yes and to encourage your family and friends to do the same.

U.S. Christian Coalition Goes For Riley plan

Last month, the tax and reform package got a badly needed boost. Some in the media considered it coming from an unlikely source, the Christian Coalition of America. Coalition President Roberta Combs endorsed the \$1.2 billion plan during a news conference on August 6th. President Combs stated: "We are urging our members and all people of faith in Alabama to support (Riley's) bold and courageous initiative." Alabama voters were urged to "seize this transforming moment" and approve the Governor's package. It was most refreshing to hear the national group's leader describe why they support the plan. First, the proposal furthers two causes central to the Coalition's philosophy: (1) helping the poor by making taxes more fair, and (2) preserving programs designed to help families.

It is rather ironic that John Giles, president of the state chapter, has been one of the chief spokesmen against the Riley plan. On numerous occasions I have questioned the local group's motives and now believe more than ever that their position has a direct connection to their funding sources. I have to wonder how much special interest groups such as Alfa have contributed to the local chapter. That is a question that must be answered since they are "neck deep" in Alabama politics.

As usual, David Azbell, the Governor's

spokesman, shows his good political instincts. When asked what it means that the state chapter of the Christian Coalition is one of the plan's most vocal opponents, David told the media, "I think it shows that John Giles speaks for John Giles and not for the Christian Coalition." As many of you may know, David is the son of the late Joe Azbell, who many consider to have been one of the most astute political minds of the 20th Century. It is obvious that David learned his lessons well. He has done an excellent job for Governor Riley and is a credit to the Administration.

There May Be More Changes On The Horizon

It is rather unique that in proposing the largest tax increase in state history, a Republican Governor is fighting to transform Alabama forever. I find it quite sad that Bob Riley doesn't have the support of his own political party in this fight. There is no way for the Alabama Republican Party to justify its failure to actively support the Governor and to support a plan designed to bring progress and economic security to the state. Many big-time Republicans are mad as the dickens at what they perceive to be the Governor's abandonment of the GOP's customary no-new-taxes stand. Charlie Wilson, veteran and well respected GOP activist, told the Mobile Register, "If you took a poll of all the people who were going to pay more under this plan, they would be three-quarters Republicans." I know that Charlie supports the Governor and will vote yes on September 9th, and I believe that speaks well of him. However, the Tuscaloosa stockbroker hit the nail squarely on the head. Clearly, the leadership of the Republican Party opposes the plan. Unfortunately, most Republicans are putting their personal interests ahead of what is good for the state and the vast majority of its people. That may well come back to haunt the GOP in future elections in Alabama.

Frankly, I was shocked when the

Alabama Republican Party's 21-member steering committee overwhelmingly came out in opposition to the Governor. I understand that some of the GOP leaders have even threatened to run a candidate against Governor Riley in the Republican primary in 2006. According to knowledgeable sources, primary challenges to other Republicans, including the Governor, from "anti-tax candidates," are certainly a possibility. GOP Chairman Marty Connors, who has been a vocal critic of the tax package, should have to account for why the GOP is against progress for Alabama. They have tried hard to shuck their "country club" image in recent years. In fact, many Alabama citizens vote Republican when their votes make little "economic" or "social" sense. Now, when the GOP gets a chance to really show they are the new and inclusive party of the people they claim to be, Republican leaders revert back to their old ways. Some Democrats believe the discord within Republican circles is an opportunity to score political gains. However, this is not a time for partisan politics. I believe that Alabamians, regardless of party affiliation, should support the Governor and vote for his plan. In fact, the State Democratic Party has supported the Governor and is working hard to convince ordinary folks to vote yes for the good of the state.

Clearly, the tax package is geared to cut tax bills for most all low-income citizens. It will increase taxes for higher income taxpayers and that, in my opinion, is right and just. We have been on the bottom in too many areas all of my lifetime. Alabama has suffered from years of neglect when it comes to solving our state's educational and economic problems—which go hand-in-glove—and that brings us to our current state. We have seen "patch" after "patch" put on the "tire" of state government. That old tire won't take any more patches. It is high time for Alabama citizens to say, "enough is enough" and work together to take Alabama to the heights we have been promised for years by politicians.

What Happens If The Vote Is No?

Should the referendum fail, somebody will have to step up to the plate and at that point, the Governor and the Legislature would have only three weeks to put together a state spending plan for fiscal 2003-2004. Personally, I don't believe any legislator will vote to impose taxes on the people if the voters reject the tax and accountability plan on September 9th. Many political observers believe the campaign leading up to the vote could result in a rupture between two major forces within the GOP: the so-called economic conservatives who generally come from the business community and the so-called social conservatives grounded in the Christian evangelical movement. I am convinced now—more than ever—that the Alabama chapter of the Christian Coalition is nothing but a political organization that takes in large sums of money and has a definite political agenda. Christians should be leading the fight to pass the plan. I recommend that John Giles and other leaders of the political special interest groups take a few minutes and read the words of Jesus and then answer how they can turn their backs on the poor in our society. It's what we do to and for the "least of these" in our society that should be our moral compass on the tax and accountability plan. I plan on voting yes and sincerely believe that is the right thing to do!

Arizona Will Be Watching Our Voters

The following editorial appeared in the Arizona Republic on July 7th and is certainly worth reading. It points out how outsiders view the upcoming referendum vote.

There's an important election in a few months that will determine Arizona's national reputation and standing. Unfortunately, no one here will be able to cast a ballot. That's because the election

is in Alabama. Voters there will decide in September whether or not to raise their property and income taxes. The whole package would mean a \$1.2 billion boost to Alabama's treasury, the largest increase in that state's history. But it would also mean something for Arizona. It would mean we would move down a notch on any number of national rankings of states. We need Alabama to remain dismal. It helps save Arizona from being all alone in the cellar.

As bad as the statistics here look, a proud Arizonan could always point to the Deep South states and say how well we're doing compared with them. But if Alabama votes to tax itself, the South could start rising again. The new tax money would be used for new education programs and scholarships. Much of the money would go to plug that state's deficit. The plan also would revamp Alabama's tax code, putting less of a burden on the poor and more of a burden on the middle class and the wealthy, particularly landowners.

Republican Governor Bob Riley is pushing the plan to Alabama voters by saying that it is the Christian thing to do. He was quoted in the New York Times as saying, "I've spent a lot of time studying the New Testament, and it has three philosophies: love God, love each other and take care of the least among you." If the Bible Belt actually follows the lessons in the Bible and starts taking care of the least of its brethren, Arizona could lose the cushion those states provide, keeping us from hitting bottom. We're already last in a few categories, mostly in education. Arizona is last in the nation on per-student spending. We have the highest dropout rate.

Those facts are not linked, of course. Just ask the Goldwater Institute or the Republican leadership of the Legislature. In other

measures of well-being we hover near the bottom. In the latest Kids Count survey, which looks at a host of factors related to children, Arizona ranked 45th overall. Alabama was worse than us, thankfully, at 48th. We're just above Alabama in the rate of child deaths. But we fare worse in births to teen mothers. Based on percentage, there are fewer children in poverty in Arizona than in Alabama. But we have more without health insurance. But that nip-and-tuck could change if voters approve this revamping of Alabama's tax system, which, like Arizona's, currently relies heavily on sales taxes. Governor Janet Napolitano currently has a commission looking at Arizona's tax code. Its recommendations, which will probably involve closing corporate loopholes, lowering the sales tax and increasing the number of taxpayers, will have a tough battle in the Legislature.

However, Arizona voters have shown they are willing to raise their taxes, if it means better education and health care for children. In Alabama, Governor Riley's plan is running behind in the polls. He started airing radio ads over the weekend, touting his plan as a way to invest in Alabama's future. Arizona might be well-served to invest in the campaign to defeat it, just to preserve Arizona's present status. Because right now, the only listing of states where Arizona does well is alphabetical. And Alabama is already beating us in that.

When one of our sister states is pulling for a "no" vote on September 9th, it should tell us all why we should be in full support of the plan. Alabama must move forward and not let a few special interests hold us back. Our state has tremendous potential, which has been largely unrealized. We have the climate, natural resources, and people who work hard, and

are geographically located in a perfect spot. Unfortunately, we have adopted a patchwork approach to solving the problems that have held us back. We are now at a crossroads and what happens on September 9th will decide whether we move forward or continue to lag behind the rest of the country in all economic indicators.

Alabama Partnership Grows With New Members

The coalition pushing the tax and accountability plan has continued to grow. At press time, new members included the following: the Children's Trust Foundation, Region 2020, the Alabama Heart Association, the Alabama Soft Drink Association, the Alabama Residential Childcare Association, the YWCA of Central Alabama, One Montgomery, the Alabama Historic Ironworks Association, the Alabama Poverty Project, A Plus Education Foundation, and Citizens for Responsible Government.

Dr. David Bronner has given his full support to the plan and that will do a great deal to help assure its passage. Most observers believe that Dr. Bronner has a tremendous following in Alabama. Without question, he is highly respected in financial circles. I believe Dr. Bronner will have as much influence with voters as any one person in the state could have. The initiative has united people of widely varied interests and concerns in a way our state has never seen. Hopefully, there will be a carry-over of this unity and cooperation after September 9th.

DA Association Endorses Tax Plan

If you asked every person in Alabama how they feel about law enforcement, I suspect the response would be that Alabama citizens want strong and effective enforcement of the criminal laws. In a most significant move, Alabama's

District Attorneys have endorsed Governor Riley's accountability plan, saying the plan is needed to repair a badly broken criminal justice system. The Alabama District Attorneys Association stated that the District Attorneys "strongly support the plan for progress set forth by Governor Riley." Clearly, the Governor's plan will benefit all of law enforcement. Without additional funding, however, there will be a 33% cut to District Attorneys statewide. Such a cut would require District Attorneys to lay off 350 prosecutors, investigators and support staff, according to the Association's Executive Director. The District Attorneys pointed out that additional cuts in the proposed budget would likely result in another suspension of jury trials, further delay the processing of DNA and drug tests necessary for criminal convictions, and worsen an already critical situation in overcrowded prisons.

It is undisputed that we have a financial crisis in this state that adversely affects law enforcement efforts at every level. As has been verified, there are now 26,000 inmates in a system built for 12,000 and only six troopers on the road statewide after midnight each day. Both of these numbers are shocking. Each creates a definite hazard for people in our state. Alabamians demand strong law enforcement and have a right to expect it. However, we don't fund the various departments and agencies that actually do the work. For example, the State Department of Forensic Science is grossly underfunded and understaffed. There are many investigations that can't be completed because the Department simply can't keep up. As a result, local prosecutors are hampered in their efforts to bring criminals to justice. It is difficult to understand how so-called conservatives in our state could refuse to recognize the magnitude of the fiscal problems facing law enforcement agencies in Alabama.

Shame On Alfa's Leadership

An editorial appearing in the Anniston Star on August 4th is right on point. Alfa is a big, profitable insurance company that has held our state back for years. If anybody believes farmers are Alfa's top priority, they are badly mistaken. Since the writer obviously has great insight into what Alfa really is and what motivates its leadership, I am setting the editorial out in full for your consideration.

Of all the "special interests" that have thrown around their political muscle and PAC money in an effort to shape the state in their own image, few have been more callous in their disregard for fair play and corporate citizenship than the Alabama Farmers Federation and its equally greedy cohort the Alfa Insurance Co. Touting itself as the savior of the "family farm," the Farmers Federation has ignored the fact that the true family farm is well protected under the Riley tax reform and accountability package. Instead it has launched a campaign to convince voters that the man behind the plow and the way of life he represents is threatened by the changes the Governor proposes. Shame on you Alfa. And why is the Farmers Federation opposing a plan that will lift the tax burden and make life easier for family farmers as well as most other citizens of Alabama?

Alfa is doing this in order to keep 497 landowners from losing the current use loophole that has allowed them to enjoy the services this state provides without paying their fair share of the expenses. That's right, there are only 497 farms in the state of Alabama that exceed more than 2,000 acres—the point at which the current use assessment will be replaced by an assessment based on fair market value. Shame on you Alfa. The insurance side of

the corporation, which is the cash-cow for the lobbyists, is just as self-interested, just as selfish. Recently it was revealed that Alfa Insurance, using an obscure, half-century old federal law designed to help small companies, wormed its way out of \$58 million in federal taxes.

Nothing illegal here, but it makes you wonder why Alfa screamed like a stuck pig on learning its taxes will go up around \$9 million under the Riley plan, when it has plucked so much from the federal goose. Shame on you Alfa. But there's more. No sooner did it realize that its taxes might go up than the good corporate citizens of Alfa announced that they would pass the increase along to their policyholders. Alfa will do this even though under the Riley plan it will get to keep most of the tax break that it and it alone gets for engaging in certain economic development activities. Shame on you Alfa. So here is a company asking voters to reject a plan that brings a measure of fairness to our tax code so it can protect a handful of agribusinesses. Here is a giant corporation that takes advantage of a federal tax loophole created to help small companies, then turns around and threatens to pass along to its clients a tax increase that in fairness it should be paying. Shame on you Alfa.

Small farmers and persons connected with agriculture should study the tax and accountability plan and see which side is telling the truth. Obviously, somebody is misleading Alabama farmers. Alfa's interest is more in the insurance business and in their own financial holdings. They have a large political war chest and are obviously willing to spend a significant part of it to defeat the Governor's plan. It would be most interesting to learn how much money Alfa has spent through the Christian Coalition on the referendum fight.

Front Group For Big Tobacco Fights Progress

Over the years, we have seen a multitude of abuses in the funding of political campaigns in this country. Certainly, Alabama has seen its share. I have always believed that a political extension of the national Republican Party labeled Citizens for a Sound Economy (CSE) was a classic example of how special interest groups play the political game, influence elections, and successfully hide the sources of their money. CSE has always refused to make public a list of its membership and has never disclosed its contributors or the amounts they give. It is well known, however, that the tobacco, insurance, and drug industries have been large contributors. Citizens for a Sound Economy touts itself as a grass roots organization, dedicated to help consumers. It claims to have over 7,000 members in Alabama and 280,000 nationwide. However, when The Montgomery Independent recently asked the group to prove it had a membership of 7,000 in Alabama by showing the paper's staff a list of its dues-paying members, CSE refused to provide access to their list. The request was both legitimate and timely due to the active involvement in the fight against Governor Riley. The Independent wrote in a timely editorial:

In reality CSE is a skill organization for big tobacco and other huge multi-national corporations. Since one of the planks in Governor Bob Riley's tax and accountability package levies an additional tax on cigarettes, it isn't difficult to determine where CSE is getting the funds to help fight the Governor's package.

In 1998 alone the tobacco industry gave CSE \$1.1 million. It was no surprise that this was a time when CSE was opposing new tobacco taxes. It also came as no surprise when it was discovered that \$1.25 million in donations to CSE from U. S. West came at a

time when CSE was lobbying for phone deregulation, a move that would allow U. S. West to provide long-distance service. It surely must have been just sheer coincidence that while CSE was fighting a federal plan to protect the Everglades by restricting sugar cane growing on several thousand acres of land, that the three largest sugar companies in Florida suddenly contributed \$700,000 to the organization. As I pointed out previously, the new co-Chair of CSE is Riley's old buddy, the former Majority Leader of the U. S. House of Representatives, Dick Arme y of Texas.

Riley ought to publicly tell Arme y and CSE to butt out of Alabama's business. It was George Wallace who instilled in us that we are "just as cultured and refined and smart as anybody on the face of the earth." I don't think he excluded Texas, Mr. Arme y. We can make up our own minds about the Governor's plan... without your input. A report by Public Citizen, a real advocate for consumer rights, shows that, in addition to the tobacco industry, the oil and gas industry gave CSE \$2.3 million; the telephone companies, \$1.5 million; and the electric companies nearly three-quarters of a million, all in 1998 alone. As Alabama voters we ought to look closely at out-of-state organizations, which try to influence our vote. Unfortunately the mainstream media in this state doesn't do this for us.

Governor Should Be Given Power To Shut Down Anniston Incinerator

On August 9th, the chemical weapons incinerator in Anniston fired up and started its mission. The first days of operation have gone by with no reported problems. Governor Riley had asked for the power to shut down

the operation of the incinerator. "If the Army does not live up to commitments it makes, or if something should happen that creates the need, the Governor should have the ability to stop incineration," David Azbell, Riley's press secretary, told The Anniston Star. "It's in the best interests of not only the people who live near and around the incinerator; it's in the best interests of all Alabamians." I totally agree and believe the Governor should have been given this authority. I do know that attorneys for the state and the Army were in negotiations over the issue. Hopefully, this was resolved before the incinerator started up.

The Army built the incinerator to destroy the 2,253 tons of deteriorating chemical weapons stored at the Anniston Army Depot. The Army has consistently maintained that the stockpile, which includes nerve and blister agent, presents a danger to the community. Obviously, this is a correct assessment. The Army believes that the incinerator is totally safe. Hopefully, that assessment is equally correct.

While the permit could be revoked if violated, it doesn't address school protection or the promise that disabled and elderly residents will have what they need to be safe in case of an accident at the depot. The Army has chemical weapons stockpiled at eight sites around the U.S., including Anniston. By signing an international weapons treaty, the U.S. has agreed to destroy its stockpile by 2007. The Governor should be commended for his insistence on further protection for residents in the affected area. Most believed the incinerator is needed so that the stockpile of weapons can be removed. However, every precaution required to safeguard residents in the community must be in place. A federal court in Washington, D.C. refused to stop the incinerator, and that allowed the start-up last month. We must all pray that this project can be completed without any serious incidents occurring. Hopefully, all necessary precautions have been put in place to protect all people in the area.

Area Governors Sign Water Agreement

In late July, the Governors of Florida, Georgia, and Alabama signed a memorandum of understanding regarding the sharing of water from the Apalachicola, Chattahoochee and Flint rivers. This was a most significant happening but for some reason received very little attention. Florida, Alabama, and Georgia are now officially parties to the memorandum agreement, which details the principles of their agreement on how to allocate water from the three-river basin over the next four decades. I grew up in Barbour County, and know that the Chattahoochee flows from Atlanta to Columbus, Georgia, forming the border between Alabama and Georgia south of that point. The Flint River forms south of Atlanta, flows southwest to Lake Seminole, and converges with the Chattahoochee to form the Apalachicola, which flows through the Florida Panhandle. Few persons in any of the three states fully comprehend the problems concerning the sharing of the water from these rivers.

The agreement details how much water would flow south and sets an expiration date of 2040 for the plan. While there are some issues still to be resolved between the three states, this agreement is certainly welcomed. The Governors announced that they had hoped to have a draft agreement finished by the end of August. At press time, I am not sure if that happened. A 60-day public comment period on the proposal will be required. If the agreement is signed after that period, the federal government will begin a 255-day comment period. A satisfactory completion of this transaction is critically important to each state. There are many complicating factors involved, including the water consumed by metropolitan Atlanta.

The Dexter Avenue King Legacy Project

There is a project being promoted in Montgomery that deserves comment. The Dexter Avenue King Memorial Foundation, Inc. is a 501(c) (3) non-profit, tax-exempt corporation, whose purpose is to promote interracial and intercultural understanding and advance social and public welfare. The Memorial has three major programs: tourism, outreach, and education. The foundation was created in 2001 to facilitate the realization of the Dexter Avenue King Legacy Project. The goal of the project is to open the Dexter Avenue King Memorial Baptist Church and the parsonage to the public as tourist sites for education and inspiration. Dr. Martin Luther King, Jr. was pastor of the then-Dexter Avenue Baptist Church and resided in the parsonage from 1954 through 1960. Both of the sites are on the National Register of Historic Places. We can't afford to lose either of these sites for obvious reasons. This project, if successful, will make sure that doesn't happen.

The mission of the Dexter Avenue King Legacy Project is to enhance public appreciation of the Civil Rights history of the church, the City of Montgomery, and the State of Alabama through engaging, empowering, educational interpretation that is also inviting, entertaining, and unique. Many believe it will be the missing link in the telling of the Civil Rights struggle. The story of Dr. King's historical role and leadership roles in the Montgomery Bus Boycott may well fill that gap. I believe that this project's success will be a good thing for both the City of Montgomery and the State of Alabama. In fact, it could help heal lots of wounds that have lingered on throughout the country. Now we have an opportunity to showplace the Memorial and make the facilities available to persons who visit the Capitol City. If you would like to send a financial gift to the Foundation, you may do so by sending a check to: Dexter Avenue

King Memorial Fund, Inc., Post Office Box 4901, Montgomery, AL 36104. If you want more information, call 334-269-5327 and ask for Ms. Olivia Frazier.

II. LEGISLATIVE HAPPENINGS

The Upcoming Special Session

As previously mentioned, the success of the special session that must be called to come up with budgets for the operation of state government and to fund public education at every level will depend on what happens on September 9th. If the voters reject the plan, the legislators will face an impossible task. Hopefully, they won't have to face that type session. With so many departments and agencies currently under federal court orders that can't be cut, funding the rest of state government's obligations will be extremely difficult, if not impossible. With cuts in revenues of as much as 20-25% from last year's budget, it will be virtually impossible to get the job done. I don't expect the Legislature to pass any new taxes if the voters say "no" on September 9th. That means drastic cuts will have to be made. Otherwise, all of government will have to shut down on October 1st. The public schools will be left in an intolerable situation and many may have to close. I certainly hope and pray that the members of the House and Senate won't have to face what many predict will be an impossible task in the special session.

The Nursing Home Industry

We are told that their lobbyists have convinced the nursing home bosses that another effort to pass the ill-fated nursing home bills should take place during the special session. I understand bills have already been drafted and key legislators have been contacted to ask for their support. Frankly, it is difficult to comprehend the

mindset of the nursing home bosses. Our state is facing a financial crisis and the nursing home bosses are again trying to feather their own nests. I don't believe people around the state will stand for that.

III. COURT WATCH

A Federal Judge Speaks Out

A great deal has been written about the unparalleled attack on the jury system in America. However, a report in the Boston Herald gives some real insight on the issue from a sitting federal judge. According to U.S. District Court Chief Judge William G. Young, the top federal judge in Massachusetts, the American jury system is in trouble. In an "open letter" circulated to his judicial colleagues, Judge Young has some strong words about the "withering away" of the nation's jury system - calling it the "most profound change in our jurisprudence in the history of the Republic." It is most significant that the judge is greatly concerned that his fellow federal judges apparently don't share his interest in the topic. His 23 page letter stated in part: "As district judges, we ought to be in the forefront of a national debate concerning this matter. We are not. In fact, we operate as though we don't much care."

The judge calls jury trials the "most vital expression of direct democracy in America today." This experienced and well respected jurist urged his colleagues to stop the erosion of jury trials in their courts and stated, "Without juries, the pursuit of justice becomes increasingly archaic . . . juries are the great leveling and democratizing element in the law." Recently, the New York Times reported that federal courts have run out of money to pay jurors - a problem that prompted judicial officials to ask their colleagues on the federal bench to consider delaying "non-critical civil trials." This report apparently struck a nerve with Judge

Young. At least it gives credence to the point the judge is making—that jury trials, for a variety of reasons, are becoming "marginalized in both significance and frequency."

In his letter, Judge Young expresses deep concern for the slow eradication of the jury system and the magnitude of problems this will create. Between 1989 and 1999, he points out, civil jury trials plunged 26% and criminal jury trials dropped 12%. At the same time, Congress cut the budget by 6% for federal jurors in 2001. However, Congress isn't the only culprit. Corporate America, with plenty of help from a number of political leaders, is assisting in the slow, but steady erosion of the role of juries in the judicial system. Relying on such statutes as the Federal Arbitration Act, many companies are "opting out of the legal system altogether." What does this mean for ordinary citizens? According to Judge Young, the unilateral imposition of mandatory, binding arbitration clauses serves to "trump all sorts of civil rights and consumer protection litigation. In sum, if we don't use our courtrooms, we will lose them, and much more besides." I have never met this judge, but I can tell from his remarks that he fully understands the importance of the jury system in our country. I sincerely believe most trial judges share Judge Young's passion about the importance of preserving the jury system.

Stay Issued In Halliburton Asbestos Case

A federal bankruptcy court has given Halliburton Co. more time to review thousands of pending asbestos claims. Halliburton had sought a temporary restraining order to review the validity of each of the cases, which now involve more than 300,000 claimants. The court set a new deadline of September 30th for the review. It is significant that this was the third extension of the stay granted by the court. The company agreed to a settlement in December worth about \$4 billion in cash and stock. Halliburton inherited

most of the claims four years ago, when the oilfield services, engineering and construction conglomerate once led by Vice President Dick Cheney acquired Dresser Industries Inc. for \$7.7 billion.

The Dresser acquisition was overseen by the Vice President before he left in 2000 to join the Bush ticket. We have been asked how these cases wound up in bankruptcy court and why in Pittsburgh. The reason the case is being heard in Pittsburgh is because most of the asbestos claims were filed against a former Dresser subsidiary, Pittsburgh-based Harbison-Walker Refractories Co. The reason the claims are in bankruptcy is that the subsidiary filed for Chapter 11 bankruptcy protection last year. Now the bankruptcy court has jurisdiction over all of the claims, and that has greatly slowed the process. Quite often, the bankruptcy courts are used by corporate wrongdoers in attempts to discourage claimants who have legitimate claims and deserve to be given their day in court.

IV. CONGRESSIONAL UPDATE

The Pryor Nomination

A great deal has been written and said concerning our Attorney General and his derailed nomination to a federal judgeship by President Bush. Frankly, I was somewhat surprised that this nomination caused such a stir. I urged the U.S. Senate to confirm the nomination of Bill Pryor to the Eleventh Circuit Court of Appeals. As I have stated on more than one occasion, I have disagreed with the Attorney General politically on a number of issues. However, I sincerely believe that he is highly qualified to serve on the federal bench. In my opinion, judicial appointments should be as non-partisan as possible. We should all want qualified men and women on the bench regardless of

party affiliation. Of course, this has to start in the White House on the federal level. It also has to carry over to the Senate. I know of nothing in Bill Pryor's background that would cause him to be unqualified to serve as a judge. The fact that I disagreed with him politically doesn't make the Attorney General unfit for office. Some may even say that would add to his qualifications. Personally, I believe Bill Pryor is highly qualified when the proper criteria are applied. Clearly, Bill Pryor is a conservative. However, that alone should not preclude him from serving as a Judge. I requested members of my political party to vote on the Attorney General's nomination and not engage in a filibuster to block it. I contacted Senator Tom Daschle and urged him to back off the threat to kill this nomination. Obviously, my efforts and those of others were unsuccessful. If the Senate had voted, I believe that Bill Pryor would have passed the test and would now be a member of the court. I sincerely believe that the Attorney General should get a second chance in the U.S. Senate.

Electricity Provision Of Energy Bill Would Hurt Consumers

As we went to the printer, members of Congress were in recess and had gone back home. The debate over the Senate energy bill will continue when the Senators and House members return to Washington. If lawmakers approve a portion of the bill dealing with electricity, consumers and the economy both will suffer from higher electricity costs and even less accountability from energy corporations and federal energy regulators. As it stands, the electricity title proposed by Senator Pete Domenici (R-N.M.) empowers many of the same energy companies that stole billions of dollars from American consumers to repeat the same games played during the West Coast energy crisis. Moreover, the push for further deregulation almost certainly would encourage a wave of

mergers that would benefit the energy superpowers, which include the Southern Company. Wenonah Hauter, director of Public Citizen's Critical Mass Energy and Environment Program made this statement:

Senate lawmakers face a crucial decision: Do they listen to the voters and take the health of the economy into account? Or will \$21 million worth of campaign contributions from corporate utilities do the talking? This bill is a compromise between energy corporations and city-run utilities. Consumers were left out.

The national media has pretty much ignored the fact that Senator Domenici's electricity amendment would repeal the Public Utility Holding Company Act (PUHCA). That Act was designed to protect consumers by preventing multi-state electricity companies from investing ratepayer money in risky schemes that do not contribute to the delivery of affordable and reliable energy. PUHCA was also intended to prevent a single company from controlling electricity, telecommunications, water and other essential services. Convergence stifles competition and consumer choice, which can lead to poor service and higher bills. Repealing PUHCA's strong rules will encourage these same utilities to replicate Enron's complex corporate structure, making it easier for companies to hide debt from shareholders and raise prices for consumers. Repealing PUHCA also would result in a few large utilities dominating U.S. electricity markets. These utilities could use their market dominance to increase prices across the board. In repealing PUHCA, the amendment's sponsors try to appease opponents by giving the government access to energy companies' books and records and providing the Federal Energy Regulatory Commission with merger review authority. However, this appears to be a smokescreen. PUHCA has tough rules that prevent fraud from occurring in the first place. Giving access to records will do nothing to prevent fraud from happening. I

believe that a conference committee will draft its own version of the energy bill. I hope the amendment offered by Senator Domenici will be left out of the committee's report. Public Citizen and other consumer groups have tried their best to alert the public on this important issue. They have also attempted to convince members of Congress to do the right thing and protect consumers.

Pending Legislation

There hasn't been much to write about insofar as good results in Congress are concerned. Hopefully, things will pick up soon. Clearly, there is much yet to be done. For example, Washington must do something about the excessively high cost of prescription medicine. The pharmaceutical companies are making a financial killing and customers, especially the elderly, are paying way too much for their medicines. Caught in the middle are the retail pharmacies, which are operating on very small profit margins and facing almost monthly price increases from the manufacturers. Something must be done and it has to happen in our nation's capitol.

We are also waiting for action on the legislation designed to add prescription drugs to the Medicare program. The powerful drug and insurance industries—aided by the Bush forces—have stalled any action on the pending legislation. The AARP is hard at work trying to break the logjam. I hope they will be successful. This has to be top priority for lawmakers when they come back from the summer recess.

V. CAMPAIGN FINANCE REFORM

“Soft Money” Will Flow In Political Party Conventions

Despite the soft money ban in the nation's new campaign finance law, the Federal Election Commission (FEC) has

approved a regulation that will allow convention “host committees” to raise and spend unlimited soft money from special interests to pay for the national party nominating conventions. There is no way to justify allowing soft money financing of convention-related activities. This is especially true since a system of public financing of the conventions was designed to displace most private financing. The consumer advocacy group, Public Citizen, has renewed its charge that permitting soft money in political party conventions is contrary to federal law. Clearly, the FEC should be prepared to reconsider its soft money regulations, including the convention-funding rules, after final resolution of the pending litigation in *McConnell v. FEC*. The legality of last year's landmark campaign finance reform law banning party soft money, the Bipartisan Campaign Reform Act (BCRA), is being challenged in that case.

In the past, party conventions were largely financed with government money. Because of revisions the FEC made to regulations, however, soft money started to pour into national political parties from businesses, other special interests and wealthy individuals seeking favors from the parties. Public Citizen contends that the current way in which the nominating conventions are funded is inconsistent with the original purposes of the Federal Election Campaign Act of 1971, as subsequently amended, and violates a campaign finance reform law passed by Congress last year. Given that soft money has already been flowing into the 2004 party convention coffers, it is unlikely that the FEC will close this loophole for the 2004 conventions. However, Public Citizen is asking the FEC to re-evaluate its convention-funding regulation for future party conventions after the U.S. Supreme Court issues its ruling on the legality of the BCRA.

One of the key pillars of the BCRA prohibits the national parties from raising or spending “soft money”—unregulated money from wealthy individuals in excess of legal contribution

limits, as well as money from corporations and unions. Unfortunately, the FEC rule suggests that federal campaign finance law does not explicitly include party conventions in the ban on party soft money activities. Nearly \$100 million in soft money from corporations and special interests—many of which have business pending before the White House and Congress—should not be allowed to be used in a nominating convention. It simply allows special interest groups and Corporate America to buy favors. As stated by Public Citizen in a news release:

That amount of giving usually comes with expectations of getting something in return. Public Citizen is asking that the FEC do a complete statistical analysis of the 2004 conventions and document the sources, uses and abuses of soft money in the convention proceedings. This information should be reviewed, along with the legislative history and intent of federal election laws, in light of the upcoming Supreme Court guidance. Hopefully, the public—once they realize what is going on—will demand that both national political parties refuse to take this “soft money.”

However, it is more likely for the sun to start rising in the West than for the FEC to do the right thing on this issue.

The September 9th Referendum – A Case In Point For Reform

The tremendous sums of money being spent by the opponents to the Governor's tax and accountability plan points out some real weaknesses in Alabama's campaign finance laws. Already, millions of dollars have been spent with more to come, and the voters won't have a clue who gave the money or even how much they gave. This is just plain wrong and must be corrected. No group, regardless of the side they are on, should be allowed to

spend money in an effort to influence a vote without having to be identified and to make full disclosures. Both the source and amount of all such political money should be reported and made public at least 10 days prior to an election. Strong penalties for violations should be imposed. Until this is done, we will continue to witness abuses in the system. We badly need campaign finance reform in Alabama. Maybe the current fight over the Governor's tax and accountability plan will put the issue in better focus. I believe lots of folks are wondering why a few companies and individuals are spending millions to hold Alabama back. Frankly, I feel that some answers need to come forth before September 9th.

VI. PRODUCT LIABILITY UPDATE

An Alliance That Will Pay Dividends

A strong, but somewhat unlikely, combination has joined forces to fight for American consumers on auto safety. One member is a strong consumer advocate who has been fighting with car companies since she headed highway safety efforts in the Jimmy Carter Administration. The other partner is an outstanding Republican committee chairman who has become a thorn in the side of the industry simply because he wants the industry to put safety at or near the top of their priority list. The working relationship between John McCain (R-Ariz.), Senate Commerce Committee chairman, and Public Citizen's Joan Claybrook has certainly gotten the attention of everybody in Washington. Senator McCain and Joan Claybrook have known each other for about a decade and have worked together since she began helping push campaign finance reform, the conservative Senator's pet project, seven years ago. However, their

working relationship has become much more obvious this year. These two powerful allies have crafted the most sweeping reform of auto safety in the 12 years since air bags were mandated. Interestingly, they've done it with little if any input from federal regulators or automakers.

This partnership could require redesigns of trucks to make them less dangerous to cars and force installation of side and head air bags to meet tougher tests. The bill is expected to come up for a Senate vote early this month. Needless to say, the pairing of the former Navy pilot and the brilliant consumer advocate has created a real stir in both government and auto industry circles. Clearly, Senator McCain holds conservative views on many of the social issues contrary to positions that Joan Claybrook favors and has fought for. This "dynamic duo" also differs on other issues. For example, the Senator backs pro-industry views on such issues as international trade, and the consumer advocate backs the labor position. Many believe that, although the campaign reform fight brought them together, their disagreements may be the tie that binds.

With all of their differing views on certain issues, the two are in virtual lockstep on auto safety and that is certainly good news. At a Commerce Committee hearing in February, the Senator repeated almost verbatim charges against automakers that Joan Claybrook has been making for years. The Senator has stated, for instance, that the industry has opposed every safety advance including seat belts. When the committee passed a highway projects bill earlier this year, it contained every major auto-safety measure Ms. Claybrook asked for in testimony before the panel. It also included some corrections to existing auto-safety law that she authored. For years Joan Claybrook has been one of the best and most effective advocates for auto safety. It is refreshing and most encouraging to see a powerful U.S. Senator joining with her. This is a winning combination and

that is good news for consumers and for auto safety.

The National Highway Traffic Safety Administration, the regulatory agency that develops and enforces safety standards, appears to have played a minor role in the highway bill. According to knowledgeable observers, NHTSA gave technical advice on provisions drafted by Public Citizen and that's about the extent of the agency's involvement with the legislation. Senator McCain and Joan Claybrook clearly share a distrust for the auto industry and with good reason. The auto-safety legislation, championed by consumer groups, runs counter to the tendency of most Republicans to do the bidding of the auto industry. It is not surprising that the position taken by Senator McCain has not set well with the Bush White House.

Verdict In Exercise Equipment Lawsuit

A jury has awarded \$16.2 million to a man who became a quadriplegic after a faulty exercise machine crushed his spinal cord. During the 23-day trial, Flex Equipment Co. Inc. acknowledged removing safety stops on the machine that could have prevented the victim from injuring himself. The jury found Flex Equipment liable and ruled that the company had acted with malice and oppression. Flex was ordered to pay \$16,274,966 in actual, compensatory damages. A punitive damage phase of the trial was to follow. We didn't have the results when we sent this issue to the printer. Gold's Gym Holding Corp, which was also a defendant in the case, settled with the plaintiff on a pro tanto or separate basis for \$7.3 million before the case went to the jury. Manufacturers, such as Flex Equipment, have a duty to take reasonable precautions for the safety of the equipment they manufacture. The plaintiff in the case, a first-year law student at Pepperdine University, was crushed in January of 2001 while doing squats on the exercise machine at a Gold's Gym. He is now a quadriplegic

and will require constant care and attention for the rest of his life.

Crib Lawsuit Settled

Evenflo Co. of Piqua, Ohio, the manufacturer of a portable crib that collapsed and killed an 8-month-old baby has agreed to pay \$2.6 million to settle a lawsuit with the infant's family. The company, which made the Happy Camper portable crib that asphyxiated the infant in April of 1997, agreed to the settlement. Sears, Roebuck and Co., which sold the crib, also participated in the settlement, but under the terms, Sears bears no financial liability. The infant's mother said she "hopes the settlement raises awareness about problems with the Happy Camper and similar portable cribs, which altogether have killed at least 15 children in the United States." The infant had been placed in the crib for a nap while his grandmother baby-sat. He was killed when a hinge on the crib's top rail collapsed, trapping his chest.

Even before this infant was killed, the company was aware of two other deaths and many reports of collapses of its cribs. They knew of the hazardous condition created and had to realize that small infants would be at risk. Two months after this death, Evenflo issued a recall for its Happy Camper, Happy Cabana and Kiddie Camper models. The company offered free hinge cover kits to prevent future collapses. Evenflo sold 1,200,000 of the cribs between 1989 and 1997. In response to a rash of deaths in portable cribs in the 1990s, the U.S. Consumer Product Safety Commission worked with manufacturers to develop a new voluntary standard for portable crib design. Since 1998, the standard requires cribs to have automatic-locking center hinges, and since 1999, they are required to withstand 100 pounds of weight.

GM Settles \$1.2 Billion Damage Case

General Motors Corp. has agreed to settle a lawsuit arising out of a 1993 car fire that resulted in a \$1.2 billion punitive damage award against the automaker. To date, GM hasn't seen fit to release any details concerning the settlement. The amount that GM is to pay is also confidential. In July 1999, a California jury ordered GM to pay \$4.9 billion to six people who were burned in 1993 when their 1979 Chevrolet Malibu exploded after being hit from behind by a drunk driver. A month later, the judge in charge of the case reduced the \$4.9 billion judgment, the largest amount ever awarded in a product-liability case, to \$1.2 billion. At that time, the judge wrote that GM placed the Malibu's fuel tank behind the axle "in order to maximize profits, to the disregard of public safety." This was obviously a very bad design for placement of the fuel tank and created a definite hazard. However, GM is still standing behind "the performance of the Malibu," which it says has had "an outstanding safety record for many years." The company's position, while indefensible, is not surprising.

Improving Airbag Safety For Children

As of January 2002, the National Highway Traffic Safety Administration estimated that airbags have helped save over eight thousand lives in this country. Unfortunately, airbags have also been linked to over two hundred deaths. Most of these deaths involved children. The number of deaths has continued to rise while safety experts and NHTSA wrestle with the problem of making airbags safer. Perhaps, it will be helpful to take a brief look at some of the history of the dangers of airbags. In October of 1997, Parents For Safer Airbags published *The Airbag Crisis—Causes and Solutions*. This work focuses attention on the public shock over discovery that airbags, while rec-

ognized as a much-touted safety device, can on occasion kill and seriously injure children and small adults. This can occur in low-speed collisions in which little or no injury should be experienced. NHTSA reported that 33 drivers, of whom approximately 80% were women 5'4" or shorter, and 49 passengers, of whom 45 were children under twelve years of age, had been killed by airbags in low-speed collisions. These deaths included terrible cases of broken necks, instant brain death and decapitation. In May 2000, NHTSA upgraded requirements to improve the protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and to minimize the risks posed by airbags to infants, children, and other occupants, especially in low-speed crashes.

Federal Motor Vehicle Safety Standard 208 governs safety restraint systems in all passenger vehicles. The history of this standard has substantially determined the installation of the shoulder/lap seatbelts and frontal airbags. However, the initial standards that related to airbags were insufficient to require manufacturers to install airbags that would not themselves become hazards to vehicle occupants including the smaller women and children. As a result, manufacturers, like GM, Ford and Chrysler, were able to ignore numerous better design alternatives and install cheaper, more dangerous horizontal deployment systems in their vehicles of the 1990s. The manufacturers that opted for dangerously designed airbag systems compounded their error by failing to adequately warn consumers of the dangers inherent in those designs.

When Congress was looking into the feasibility of mandating airbags, at least three companies withheld information that should have been reported. For example, in 1991, GM, Ford, and Chrysler failed to disclose in congressional hearings that they were aware of five driver's side airbag deaths including properly belted drivers. GM also failed to disclose that it had run tests of

passenger airbags using cadavers with the following results: cadavers were severely injured; the company believed passengers and small female drivers could suffer spinal cord injuries from airbags; and the company's engineers projected 200 airbag deaths a year. By that time, these domestic manufacturers had already placed millions of airbag-equipped vehicles on the road. Perhaps, they were less than motivated to disclose truthfully the bad design of existing airbag systems. Congress was led to believe that airbags, then entering the market, posed no safety risk. That clearly was incorrect. The result was enactment of the federal airbag mandate endorsing the unreasonably dangerous designs.

Between November 1995 and November 1996, the National Transportation Safety Board put out an urgent action request to place warning labels in new vehicles stating that airbags could kill children. The manufacturers were asked to send notification letters to the owners of the 15 million vehicles then on the road with passenger side airbags. The automobile manufacturers ignored the request claiming that a public information campaign would be more effective. Unfortunately, they did not start the public information campaign, however, until ten months after the urgent request by the NTSB. During the year of non-action, an additional thirty children were killed by airbags.

FMVSS 208 now addresses the concept of minimizing the risk posed by airbags to infants, children, and other occupants in low-speed crashes. These goals are currently addressed with two testing options for manufacturers:

One option is to perform out-of-position (OOP) testing. For this, dummies are placed in positions resulting in a worst-case scenario for the front passenger compartment. For example, a portion of the passenger side testing is conducted with either a three-year-old or six-year-old dummy, positioned with either the chin or the chest placed directly on the airbag module. The airbag is then deployed,

and head/neck data is recorded.

An alternative to the occupant out-of-position testing is suppression testing. In order to pass the suppression test guidelines, the passenger side airbags are required to become inactive (not deploy) if the front passenger seat weight sensor measures a value below a certain pre-defined weight criteria. Four types of dummies are used: newborn, twelve-month-old, three-year-old, and six-year-old. Forward and rearward facing Child Restraint Systems (CRS) are used for three of the dummies. The testing aspects are numerous for this position. Each seat must be tested in three positions of full forward, middle, and full rearward. The overall testing requires many different optional positions for the child restraint systems and the dummy configurations resulting in thousands of tests per vehicle.

Although the technology for designing better and safer airbags has been around for years, the adoption of the new standard has caused manufacturers and second-tier companies to respond to the criteria with the inclusion of "advanced airbags" or "second generation airbags". These new airbags are designed to deploy with less force, possibly reducing the chance of contact injury. These "depowered" airbags can be designed with a lower inflation rate, or use a 2-stage deployment system. Ford Motor Company utilizes depowered airbags in their vehicles.

Some recent technology also focuses on developing seat design for airbag suppression systems. These systems use integrated information from the seats to classify passengers. A load sensor in the seat measures the force and classifies the occupant that communicates with the airbag controller. This detection system also includes a belt tension sensor to identify a cinched child seat. One company uses a system to detect the occupant's weight and proximity of the airbag when seated in the vehicle.

FMVSS has a phase-in for large

volume manufacturers to suppress airbags as of September 1, 2003 in 20% of their 2004 model year vehicles. Thereafter, the following year, 65% of the 2005 models must comply. Finally, 100% of 2006 model year vehicles must meet the standard. Meanwhile, early mistakes in adopting inadequate standards allowing manufacturers to install unreasonably dangerous airbag designs will continue to cause the death toll to rise in the years to come. It is most unfortunate that the airbag issue couldn't have been handled by both NHTSA and the automobile manufacturers in a better fashion.

Confidentiality For Tire Makers

The National Highway Traffic Safety Administration has given approval to a measure that gives confidentiality for tire manufacturers. The manufacturers will get confidential treatment for whatever production numbers they give to NHTSA under "early warning" information reporting requirements. Under the agency's ruling, warranty claims, field reports, and consumer complaints will also be kept confidential. Claims or notices involving death, personal injury, or property damage are exempt from the ruling. The effective date of the confidentiality rule is September 11th, which is the same day by which petitions for reconsideration must be submitted. The Rubber Manufacturers Association (RMA) fought hard for confidentiality. The ruling can be found in the Federal Register. The RMA appears to be quite pleased that production figures and warranty adjustments will be kept confidential. At least, death and personal injury information is still considered within the realm of "public information."

Safety Agency Told To Rewrite Rule

Auto safety advocates have scored a significant victory in the courts. A three-judge panel of the United States Court of Appeals for the Second

Circuit ordered the government to rewrite a rule that would have allowed automakers to install ineffective tire pressure monitoring systems and would have left too many drivers and passengers unaware of dangerously underinflated tires. The judges ordered the National Highway Traffic Safety Administration to rewrite a regulation issued in July 2002 that set forth standards for devices to alert drivers when tires are underinflated. This good result came as a result of a lawsuit brought by consumer advocates Public Citizen, the Center for Auto Safety, and the New York Public Interest Research Group. Driving on underinflated tires is dangerous and far too common. More than a third of the passenger cars and light trucks on the road have at least one tire underinflated by 20%. More than a quarter has at least one tire underinflated by 25% and a fifth has at least one tire underinflated by 30%. To address this problem in the wake of the Ford/Firestone tragedy, Congress in November 2000 directed NHTSA to issue a rule requiring a warning system in new vehicles to alert the driver when a tire is significantly underinflated.

During the course of its rulemaking, NHTSA identified two types of systems that detect underinflated tires. One system warns a driver when any one tire or any combination of tires is 20% or more underinflated, based on the auto manufacturer's recommended tire pressure. It functions as soon as the vehicle is turned on, operates effectively on any type of road surface, and can be installed in any vehicle. The other system, which works with a vehicle's anti-lock braking system, warns a driver when any single tire is 30% or more underinflated or when three tires are 30% or more underinflated as compared to the other tires. However, the system is seriously flawed. It cannot detect when all four tires are underinflated or when two tires on the same side or the same axle are underinflated. It does not function until the vehicle has been driven for up to 10

minutes, and it does not function at speeds above 70 miles per hour or on bumpy or gravel roads. The system cannot detect 30% underinflation in half of the instances in which it occurs.

According to NHTSA's estimates, if installed in all passenger vehicles and light trucks, the first system would prevent 141 to 145 deaths and prevent or reduce the severity of more than 10,270 injuries each year. If all vehicles with anti-lock brakes used the second system and the remaining vehicles used the first system, only 79 deaths would be prevented and 5,176 injuries prevented or reduced in severity. Notwithstanding NHTSA's express recognition that the first system is more reliable and effective and that it would better fulfill the purposes of the statute, the agency, under pressure from the Office of Management and Budget and the auto industry, issued a rule allowing manufacturers to install either system. The court held that the portion of the rule allowing auto manufacturers to meet a weaker standard violated the express requirements of the statute and was arbitrary and capricious. The court vacated the rule and sent the matter back to NHTSA so the agency can revise the rule in accordance with the statute and the court's decision. The OMB has no business making decisions on auto safety. The agency tried and failed to override the judgment of the safety experts at NHTSA. The court restored NHTSA's rightful role in putting safety ahead of industry convenience, and that will be good for consumers.

The Risk Of Fires Associated With Defective Fuel Systems

Greg Allen and I were discussing a case he is currently handling for the firm involving a post-collision fuel-fed fire. The case involves two deaths and a badly burned small child, age 7. This case will be tried in federal court—if not settled—very soon. Our discussion brought to mind how badly the federal government and the automobile industry have acted when it comes to this

problem. We have handled a number of similar cases where occupants of a vehicle have been badly burned as the result of post-collision fires. It is well known that vehicle manufacturers have a duty to the public to design vehicles that will not create a fire hazard in survivable collisions. However, government safety standards only reduce the chance of fire in some types of crashes, and automotive manufacturers have failed to adopt their own standards to avoid such fires. While automotive manufacturers have long been aware of the risk of fires associated with defective fuel systems, the incidence of vehicle fires has continued to be a serious problem. Any fuel leak creates a very high danger of fire in the event of a collision. There are only three elements required to create a post collision fire: fuel, oxygen and an ignition source. Obviously, oxygen is readily available. Clearly, there are numerous ignition sources present during a collision. In the event of a fuel leak, the potential for a fire is very great. We will set out the most common fuel system defects below that can cause fuel leaks, which result in post-collision fires.

Fuel Tanks - Defects in the design and placement of fuel tanks have caused a terrific number of deaths and most serious injuries. Perhaps the widely publicized fuel system defects involved the Pinto cases and the General Motors "sidesaddle" trucks with fuel tanks located outside the frame rail. Fuel tank defects can be caused by improper location of the tank on the vehicle. Defects can also involve placement of the tank near objects that can potentially puncture the tank, the material from which the tank is constructed, the actual construction of the tank including improper welds, and the failure to adequately shield the tank. Each defect can definitely lead to a post-collision fire.

Fuel Lines - Fuel-injected engines require fuel to travel through fuel lines at high pressure. Due to the high pressures involved, even a small compro-

mise in a fuel line can result in a large amount of fuel escaping from the fuel system. Failure in a line may be caused by the location or routing of the line. Failure in a line may also result from the use of inappropriate materials. Overall fuel system integrity of a vehicle must be maintained. The location and composition of the fuel lines is critically important in proper design of the system.

Fuel Pump - Most fuel-injected engines have electric fuel pumps. It is critical that electric fuel pumps shut off in the event of a collision. After a collision, if a fuel pump does not shut off, the pump will continue to circulate gasoline through the fuel system. This supplies a constant source of fuel for any resulting fire. Various mechanisms are available that can be used to shut off the fuel pump in the event of a collision. It is important for the fuel pump to shut off following a collision. Obviously, this will play a significant role in avoiding a serious post-collision fire.

Siphoning - Fuel can siphon from a fuel tank after a collision. If this happens, a continuing source of fuel for a vehicle fire is supplied. Siphoning is the flowing of fuel through a point of compromise in a fuel system due to gravity. A substantial amount of fuel for a vehicle fire can result when fuel is siphoned from the tank. Manufacturers have known of the danger of fuel siphoning for years, but they have virtually ignored the risk. While anti-siphoning devices are inexpensive, these devices haven't been incorporated on very many vehicles.

Manufacturers have an obligation to ensure vehicle occupants are not exposed to easily preventable risks of death and disfigurement from vehicle fires. However, the government hasn't done its job. NHTSA has refused to promulgate regulations regarding the placement, design or materials used in fuel tanks or fuel systems, the post-crash functioning of fuel pumps, or prevention of fuel siphoning after a crash. As a result, the manufacturers have not seen fit to implement readily available

designs of fuel systems and make their vehicles safer. This, in my opinion, is inexcusable.

A Needed Correction

In the August issue of the Report, I made a mistake that must be corrected. In the section under Product Liability Update entitled, "More Problems For Ford," I made an error. In the second paragraph of the article, I stated incorrectly that an applicable rate of speed was "15 mph," which is most significant. Instead, it should have read "18 mph." Please make this correction if you have kept the August issue. Even though this might appear to be a small error, it is very important. I apologize for this mistake and hope it has not caused any problems to our readers.

VII. PREMISES LIABILITY UPDATE

Jury Awards Boy's Family \$104 Million In Pool Death

As we near the end of summer vacations, I have to report on an incident that occurred in a swimming pool, with a most tragic result. A Miami jury has awarded \$104 million in damages to the family of a teenager who suffered permanent brain damage after his arm was sucked into a drain at the bottom of a swimming pool. Jurors ordered Sta-Rite Industries to pay the family of the 15-year-old \$32 million for medical expenses and \$72 million for pain and suffering after a two-week trial. The panel will reconvene later, under Florida law, to hear arguments for punitive damages. The company makes pumps and filtration systems for pools and spas.

On June 17, 2000, the teenager was playing with some friends in the pool at his mother's apartment complex, when he touched the pool drain and his arm was sucked in. At least six people, including an off-duty police officer, tried for nearly 15 minutes to

free him but were unsuccessful. The boy was finally released when the officer broke down the door of the pool equipment room and switched off the drain. He lapsed into a coma and now lives in a vegetative state. Two years ago, the family settled their separate claims against the owner of the pool and the company that maintained it for \$7 million. The case then proceeded against the manufacturer. Evidence at trial proved to the jury's satisfaction that Sta-Rite was negligent in designing and making the drain. Also, the family proved that the company failed to install a safety device that automatically shuts off the pump when intake is obstructed. Unfortunately, this verdict was not the first against Sta-Rite. In 1997, a jury in Raleigh, North Carolina, awarded \$25 million in compensatory damages to the family of a 9-year-old child, who lost most of her intestines when she got stuck to a drain in a wading pool in 1993. The suction literally pulled her intestines out of her body. Hopefully, this corporation has learned its lesson.

Kmart And The Courts

An interesting case involving Kmart has been decided in Louisiana. A state appellate court nearly tripled the \$1.45 million damage award to a Kmart shopper who was injured by falling merchandise. A five-judge panel increased the plaintiff's total award to \$4.4 million. The case was on remand from the Louisiana Supreme Court. A Louisiana jury had awarded the plaintiff \$1,452,222 in damages after an October 2000 trial. Suit had been filed against Kmart in 1998 for injuries sustained in a Kmart store in New Iberia, Louisiana, on February 12, 1998. According to the suit, the shopper was picking out items from a bottom shelf when she was hit in the head by falling merchandise.

Testimony from the plaintiff's family and physicians showed that the lady experienced physical limitations, impaired thinking and emotional and psychological changes after the acci-

dent. Prolonged depression, fatigue, lack of concentration, dizziness and hallucinations had forced her to quit her job and left her unable to care for her children. Both the plaintiff and Kmart appealed the jury's verdict. The plaintiff contended the award was too low. Kmart argued that the accident was not its fault. Kmart also contended that the plaintiff had failed to prove that her medical problems were a direct result of the accident. The appellate court upheld the trial court's ruling that head trauma suffered in the accident was the direct cause of the plaintiff's medical problems and that the jury acted justly because she had not exhibited any of the problems before the accident.

On appeal, the plaintiff claimed the jury should have increased her special damages award by more than \$2 million after a specialist testified she would need permanent 16-hour-per-day care. Her rehabilitation specialist said the plaintiff's life-care plan should address "a person who has become totally disabled and cannot work or function in her day-to-day activities." The appellate judges upped the special damages award to \$3.46 million, based on costs of 16-hour-per-day care over 39 years. In their ruling, the judges noted that Kmart did not present experts to refute the claims proposed by the plaintiff's experts. The judges further ruled that the jury should have awarded general damages to her in addition to the \$1.45 million it awarded her in special damages. The court gave an additional \$500,000 in general damages. Finally, the judges increased the consortium awards for the plaintiff's two children from \$10,000 to \$25,000 each. The judges disagreed with Kmart's assertion that they were not liable for the accident and ruled that the plaintiff had proven that the merchandise was in an unsafe position and that neither the plaintiff nor any other customer had caused the merchandise to fall. We have handled a number of cases of a similar nature where merchandise was stacked much too high, creating hazards for customers in the stores.

Elevators Can Present Hazards

Most people have little concern for their own safety when using elevators. Millions of people ride elevators every day. Most of us assume that elevators are properly maintained and safe for use. However, as we know all too well, elevators are not always completely safe. "An elevator is a mechanical device, and anything that can go wrong will go wrong," according to Richard Atkinson, executive director of the National Association of Elevator Safety Authorities International, which trains elevator inspectors. An average of 27 people died annually in elevator accidents between 1992 and 1998, according to a 2001 federally financed analysis by the Center to Protect Workers' Rights. More than half of the deaths involved elevator inspectors or technicians, and the death usually involved a person falling down the shaft, according to the Center's report.

A recent case that occurred in a hospital setting in Louisiana is an example of what can happen. There, a 76-year-old patient was crushed by an elevator car that descended suddenly as he was being wheeled out of an elevator at Kenner Regional Medical Center. The hospital had put in a service call, and a maintenance worker with Schindler Elevator Corp. was at the scene troubleshooting the Otis elevator at the time of the accident. The incident was under investigation at press time.

There have been other fatal incidents. In 1999, a 56-year-old woman from Michigan was admitted to St. Joseph Mercy Hospital for a stress test. As she was being rolled into an elevator on a gurney, the elevator rose suddenly, wedging her body between the elevator car and shaft wall, and dragging her between four floors as her family watched. In 2000, a Fairfax County, Virginia, woman was crushed in a similar manner when an elevator at the Fairfax County government complex shifted as she was stepping into the car. In each case, the elevators were being serviced, according to published reports, near

the time of the incidents.

Elevators are designed with redundant safety features recommended by the American Society of Mechanical Engineers. For example, an elevator is designed to not move when the doors are open, and the doors are designed not to open unless the elevator's arrival at a floor triggers the release of a "safety interlock." Often, older elevators have not been retrofitted to meet the newer standards. In those cases, there was an attempt to strike a balance between cost and safety.

There have been a few changes since elevators first came into use. Elevators became practical people movers after Elisha Graves Otis invented the "safety brake" in 1852. The device brought the elevator to a stop when the hoist rope broke. Otis' company installed the first passenger elevator in 1857 in a New York building. It was powered by steam. The corporate descendent of Otis' firm, Otis Elevator Co., is the world's largest manufacturer and servicer of elevators. Today's high-rise elevators are hoisted by several cables, each of which can support the elevator car on its own. Elevators in low-rise and mid-rise buildings often are operated by a hydraulic system in which fluid is pumped into a column underneath the elevator car to raise it, and back into a reservoir to lower it. An elevator inspection usually involves checking the panels, circuits and cables to ensure everything is in working order. I understand that the inspector often climbs to the roof of the elevator and rides it up to check the alignment of the interlock switches and the alignment of doors to the elevator shaft. While the frequency of elevator accidents is not that great, they do happen. Owners of buildings with elevators have a duty to make sure they operate safely. Companies that inspect and maintain them also have a duty to make sure the elevators we use are safe.

Veterans Stadium Railing Suit Settled

Most folks who attend sporting events don't think much about the safety of stadium seating. A case that arose from an accident at Veterans Stadium in Philadelphia was settled recently for \$1.1 million. The plaintiff in the case was a young man named Kevin Galligan. Kevin's dream was to follow in his father's footsteps by graduating from West Point and serving in the military. However, when a railing at the stadium collapsed during the 1998 Army-Navy game, Kevin suffered a compression fracture to his neck and a sprained wrist. His dream of being a soldier fell with the 12-foot drop from the bleachers. A lawsuit was filed against the city, the guardrail manufacturer and a stadium security company. The accident happened because the city ignored structural corrosion in the rail system and failed to take corrective action. I suspect there are a number of older stadiums around the country that have similar problems. Hopefully, inspections and required testing will find all of them so that corrective measures can be taken.

VIII. WORKPLACE HAZARDS

Another Employee Injured At Tyler Pipe

McWane Industries just can't seem to stay out of the news. Federal labor officials are now investigating another incident at Tyler Pipe, which is owned by the Birmingham-based McWane, that left a maintenance worker in critical condition with a collapsed lung and broken ribs. The U.S. Department of Labor's Occupational Safety and Health Administration is looking into whether proper safety equipment was provided at the steel foundry, which has a terrible safety record. The accident involv-

ing the 46-year-old employee is another in a series of accidents at the facility. OSHA's investigation will take up to six months to complete. If violations are found, citations that could carry fines can be issued.

The incident comes as Tyler Pipe, which employs about 1,700 workers, contends it is trying to repair the company's reputation for safety violations that have been linked to worker injuries and deaths. Many of these were documented by The New York Times and Public Broadcasting Service's "Frontline" earlier this year. This accident occurred as the employee was doing routine maintenance work on a machine that makes cast iron fittings. Tyler Pipe pleaded guilty a year ago to violating the Occupational Safety and Health Act for an incident that resulted in the death of an employee crushed by a machine. A U.S. Magistrate Judge sentenced the company to pay a \$250,000 fine and placed the company on probation for one year. The company agreed it would not commit a federal, state or local criminal offense during that period.

Fired Worker Wins His Retaliation Case

Recently, a Texas jury awarded \$612,000 to a former Celanese Chemical Corp. operator. The jurors found that the company retaliated against the employee because he had filed a workers' compensation claim. The employee, who had worked at the plant for 32 years, began having trouble with his hearing. Medical tests indicated the hearing loss was caused by excessive noise in the Bay City plant. Celanese denied the claim and then fired the employee for "loading the wrong chemical into a tank." However, evidence at the trial indicated that incorrect loading is not typically a firing offense. The company contended that the \$50,000-a-year employee was on a "phase three termination warning" and another error would result in termination. Interestingly, the company couldn't produce the notes that should

have gone into his personnel file to document earlier warnings. After his termination, the employee went to work for Wal-Mart assembling bicycles. He eventually got his hearing aids, but had to pay the \$5,000 cost out of his own pocket. Our firm has handled a number of similar cases where employers wrongfully terminated or punished an employee who filed a claim for workers' compensation benefits.

IX. TOBACCO UPDATE

The Incredible Power Of The Tobacco Industry

It is most difficult to understand how an industry that kills over 400,000 Americans each year could exercise such tremendous power in this country and wield such great influence over politicians. Nevertheless, the simple fact is that the tobacco companies are among the most powerful of all special interest groups in this country. We continue to fight a battle in the courts on behalf of their victims that sometimes seems hard to justify. It is very much like David taking on Goliath, except that the tobacco giants are much stronger than the Old Testament giant. They also have much more money!

Split Jury Verdict In Louisiana Tobacco Case

On July 28th, a jury decided major U.S. cigarette makers must fund a smoking cessation program for Louisiana smokers. However, the jurors failed to require the tobacco companies to provide funding for a medical monitoring program. The split verdict came in the class action case, which was tried in a New Orleans federal district court. Plaintiffs in the case wanted the top four U.S. cigarette companies to pay for monitoring to detect smoking-related diseases, as well as fund smoking-cessation programs for Louisiana's smokers. The jury rejected

the plaintiffs' principal claim for medical monitoring, which has given the tobacco industry good reason to claim victory. Defendants in the Louisiana case include Philip Morris USA, a unit of Altria Group Inc.; R.J. Reynolds Tobacco Co., part of R.J. Reynolds Tobacco Holdings Inc.; Brown & Williamson Tobacco Corp., a unit of British American Tobacco p.l.c.; and Lorillard, which is part of Loews Corp. and trades as Carolina Group. Other states have been considering this type of litigation as a possible tool to help accomplish that same type of service for their own addicted smokers, according to Edward Sweda, Senior Attorney for the Tobacco Products Liability Project at Northeastern University. The smoking cessation programs offered by state governments for smokers have been cut back in many states under budget constraints. It makes sense for the tobacco companies to pick up the costs of these programs. For this reason, I consider this part of the jury's decision to be most significant.

This portion of the trial did not determine liability to any class member or representative. Tobacco companies had won the only similar claim to come to trial, a West Virginia case, in November of 2001. In that case, plaintiffs asked for medical monitoring funding, but did not ask for smoking cessation funding. The companies that are defendants in the Louisiana case were also defendants in the West Virginia case. About 7,000 people in Louisiana die each year of smoking-caused diseases, according to the Tobacco Products Liability Project.

A Victory For Philip Morris

A jury has given Philip Morris a victory in a smoker's lawsuit. The company was cleared of negligence and misrepresentation in a California state court lawsuit by a man who blamed the tobacco giant for the 48-year smoking habit that caused his lung cancer. The 64-year-old alleged that Philip Morris, the nation's largest ciga-

rette manufacturer, misled him by failing, for years, to acknowledge that smoking is addictive and may cause cancer. Jurors in the Lost Angeles County, California, action sided with Philip Morris on five of six counts, rejecting allegations of negligence, misrepresentation, of making defective products and of failing to warn smokers about its products. The jury deadlocked on whether the company fraudulently concealed information about the dangers of smoking.

Philip Morris is calling the verdicts "a resounding victory." It is still possible, however, for the plaintiff to win a jury verdict in his remaining claim. The case focused on whether the company was responsible for the smoking habit developed when the man was 16. Jurors were shown a video clip of tobacco company executives testifying under oath before a congressional committee in 1994 that nicotine is not addictive. Other executives later told Congress that nicotine is addictive and that smoking could cause cancer. Philip Morris argued that the company had nothing to do with the man's decision to start smoking and said he only switched to its Marlboro brand in 1964. Cigarette packs have carried warning labels since 1966 and this most likely affected the plaintiff's case. One of the jurors, according to media reports, said jurors agreed that smoking was a substantial factor in Reller's illness, but added that the plaintiff hadn't proven the company's cigarettes caused his cancer. Obviously, the jurors didn't believe that Philip Morris was the culprit.

Smoking By Girls Increasing Worldwide

The tobacco industry continues to target specific segments of our society in its marketing efforts. Government anti-tobacco campaigns should target girls and women because surveys show teenage girls are now smoking almost as much as boys in many nations, officials told an international conference Thurs-

day. A report released at the 12th World Conference on Tobacco found that the gender gap in tobacco consumption among youths is closing. The report said there were no significant gender differences between cigarette smoking rates of 13- to 15-year-olds in more than half of the 150 countries surveyed. The results of the survey, the first of its kind, were similar for other tobacco products. Charles Warren of the U.S. Centers for Disease Control and Prevention told the Associated Press: "Programs specific to gender must be developed which emphasize the serious health consequences of tobacco use."

Researchers have concluded that their findings indicate tobacco-related deaths would increase significantly if the trend in teenage smoking continues. The global survey revealed that only in the eastern Mediterranean region were boys still smoking significantly more than girls, while Europe and the Americas had the smallest gender gap in tobacco consumption. In Europe, 33.9% of boys smoke cigarettes regularly, compared with 29% for girls. In the United States, 17.7% of boys are smokers compared with 17.8% of girls. However, boys still smoke more than girls worldwide, with the survey showing that on average 15% of boys smoke regularly compared with 6.6% of girls. The increase in young girls' tobacco use was attributed mainly to aggressive marketing aimed at women, in which the tobacco industry portrays smoking as fashionable. All of us have seen the commercials that without a doubt are designed to attract smokers who are both young and female. "Transnational tobacco companies continue to identify women and girls in developing countries, and particularly in Asia, as a vast untapped market," the report concludes. Among adults, worldwide, 47% of men smoke regularly compared with 12% of women, according to World Health Organization estimates. The report, compiled by the CDC and WHO, was presented at a six-day convention attended by more than 2,000 experts from 115 countries.

X. TRANSPORTATION

School Bus Safety Must Be A Priority

Pretty soon, if not already in some areas, we will be seeing school buses loaded with children on our roadways. It has been reported that there may be as many as 250 school buses operating in Alabama that may have a welding defect that could expose children to more peril in a rollover accident. Specifically, the roofs can collapse all the way down to the seat level. The defect was revealed after a Florida bus accident earlier this year. Fortunately, the bus involved there was carrying no children at the time. However, the driver was injured when the bus rolled and the roof collapsed. The federal government issued an advisory in June regarding buses made by Carpenter Bus Co. before 1995. The agency is specifically looking at those buses made in the Mitchell, Indiana, plant.

I understand that officials in Alabama have been attempting to locate any Carpenter buses that may be in Alabama. Obviously, there are a good number since Jefferson County found 117 of the buses in its fleet. Since school is starting in a number of counties, school boards and safety advocates in state government must inspect all of the fleets and move any potentially defective buses off of routes that carry children. Some say that only routes that require greater speeds and carry more risk of rollover accidents should be addressed. However, since it's not clear the defect can safely be repaired, all school systems must ultimately replace the buses. The replacement cost will be substantial. It has been estimated it will cost as much as \$15 million statewide to remedy this problem. The Alabama Department of Education believes replacement is the safest route, but realizes at the same time that budgets statewide are tight. For that reason, I understand that buses that

pass inspection will continue to operate while money is sought for replacements. If the lives of school children are at risk, steps must be taken immediately to protect them. Defective buses that cannot be safely repaired must be replaced.

Tracks Blamed In Fatal Florida Amtrak Crash

The National Transportation Safety Board has completed its report concerning the fatal crash of the Amtrak Auto Train in Florida last year. Poor track maintenance was to blame for the crash, according to the report. Apparently, the track's owners, CSX Transportation, did not ensure the track was properly aligned and had adequate supports. "This is something that should have been prevented through proper maintenance," according to NTSB Chairwoman Ellen Engleman. The Auto Train, one of Amtrak's most popular services, travels between the Washington, D.C., suburb of Lorton, Virginia, and Sanford, Florida, just outside Orlando. The train was headed north when it derailed near Crescent City, Fla., shortly after 5 p.m. on April 18, 2002. Twenty-one of 40 cars left the track. Four people were killed and 36 seriously injured.

After the wreck, the train's engineer told investigators he had seen a misalignment of the track just ahead and was trying to apply the brakes when the force of the derailment threw him against the wall. CSX employees and Florida rail safety inspectors told the NTSB that the section of track was troublesome because it was built on a steep embankment, and the gravel used for ballast kept sliding away. According to the NTSB, inspections after the accident found sections near the derailment lacking the necessary ballast in the "crib" between ties and along the track's shoulders. Full crib ballast is needed to keep ties and rails from slipping out of place. A CSX coal train passed over the track just before the Auto Train took the curve, and that crew told NTSB investigators they

noticed no roughness or irregularity. CSX employees also had inspected the section of track twice earlier on the day of the accident, and Florida rail safety inspectors had checked it a week-and-a-half before and found nothing wrong.

In its recommendations, the NTSB said CSX should develop a program to ensure compliance with the company's maintenance standards. According to a company spokesman, CSX has already implemented NTSB's recommendations. Since the accident, the company claims it has improved training for employees who maintain and inspect tracks. CSX is testing laser technology to help identify places that need more ballast. All of this, if actually carried out, will help avoid future accidents of the sort referred to above.

Event Recorder Data Important

Railroad crossing accidents are fairly common around the country. In those cases, there are lots of legal obstacles to overcome. Discovery and a proper investigation are always essential and must be carried out with careful planning and hard work. Many railroads record important data by using electronic detection devices and store such data in computer files. For example, federal regulations require that the lead locomotive of every train operated faster than 30 miles per hour be equipped with an event recorder that records data relating to the operation of that locomotive. Such things as speed, application of the brakes, and the like are recorded. Most railroads also record data regarding the operation of the locomotive horns even though federal regulations do not specifically require it. Information of this sort is extremely important in rail crossing accident litigation. However, it is up to the lawyer representing the victim or a deceased victim's family to make sure that this information is obtained through discovery efforts. In order to get what is available and needed, lawyers and their support staff must be computer literate and know what to request and how to ask for it.

Then the lawyers must be willing to fight the discovery battle that will surely follow. Discovery fights with the railroads are not for the “faint of heart.”

Economy Class Syndrome Lawsuits Against Airlines

A rather significant court ruling in two pending cases may be bad news for the airline industry. The two cases, filed by passengers on trans-Atlantic flights who developed “economy class syndrome,” the nickname given deep vein thrombosis (DVT) because it is caused by hours of sitting in cramped conditions, will now be watched very closely. A U.S. District Court judge has ruled that the plaintiffs are entitled to pursue claims under the Warsaw Convention, which governs airline liability. The convention holds that an airline is liable if a passenger suffers death or bodily injury in an accident while on board an aircraft or while embarking or disembarking. There has been a movement attempting to make airlines responsible for passengers who develop deep vein thrombosis—the potentially deadly blood clots often linked to long flights. It now appears that these cases will go forward.

The federal court order referred to above defined the “accident” as “the airlines’ failure to warn passengers of the health risks.” While the decision marks only the second time such a case has been allowed to proceed, it is a most significant ruling. A judge in Galveston, Texas, refused to dismiss a DVT suit against Continental Airlines last year. The most recent lawsuits were filed by two passengers on flights from Paris to San Francisco. One of the plaintiffs is suing Continental Airlines. The passenger had a near-fatal heart attack and had open-heart surgery to remove a blood clot two weeks after her flight on April 12, 2001. This passenger, who had traveled to Europe to run in the Paris Marathon, now takes blood thinners daily. Another passenger from Arizona is suing American Airlines. He developed a blood clot in his leg after a flight in July of 2001, but recovered

from the effects of the clot.

This ruling means that airlines are finally going to have to start taking deep vein thrombosis seriously. I understand that approximately 10% of air travelers develop DVT. However, most clots dissolve naturally in the bloodstream. Unfortunately, the clots that don’t dissolve can travel to the lungs, causing a potentially fatal pulmonary embolism. Clots that bypass the lungs can travel to the brain, leading to stroke. Lawyers who are handling cases of this sort contend airlines should be held liable for failing to warn passengers about the risks associated with long air travel. Airlines have known of the risks for years, but have denied such risks existed. Now warnings are being made to passengers without much explanation from the airlines.

Experts point to a number of factors that might contribute to increased risk for DVT on long-haul flights. During air travel, dehydration and decreased oxygen content in the blood can trigger clotting mechanisms. Sitting immobile for long periods also can contribute to blood pooling, especially in the lower legs. It has been reported that passengers flying long distances can take a number of common-sense precautions to lessen the likelihood of blood clots. Those include staying adequately hydrated, moving around periodically and wearing compression stockings. Of course, most persons traveling on such flights don’t realize that risks of the sort mentioned above would exist. Many airlines now tell passengers to follow such precautions, either in safety videos, in-flight magazines or on ticket jackets. Airlines should go further, however, and tell passengers that they could get a blood clot and die. An inadequate warning really doesn’t get your attention. For information on DVT symptoms, risks and prevention, go to www.airhealth.org.

Verdict Against A Florida County

A Florida county is now facing a record \$11.9 million trial verdict over its failure to improve a heavily traveled intersection near Apopka, Florida, the scene of a traffic accident two years ago. In that accident, a grandmother was left permanently brain-damaged. A jury in Orlando recently awarded the two daughters of the injured woman a total of \$11.9 million in damages. Their injured mother was in a coma for eight months after the crash and now requires around-the-clock care. One of the daughters commented after the jury returned the verdict: “We no longer have a mother, and our children don’t have a grandmother. It’s hard to put into words how it’s affected our family.” The victim in this accident was 58 years of age and the manager of an expressway toll plaza when the accident happened in April of 2001. She had spent the day with her grandson, and was driving the 5-year-old to her daughter’s house. The highway had a 50 mph speed limit, and accident-reconstruction experts determined that the woman was driving about 25 to 30 mph when she reached the intersection in question. There was a stop sign at the intersection. Apparently, the woman never saw it and was hit by a truck heading north on the intersecting highway.

The victim can no longer walk, talk, or feed herself at present. She now lives with one of her daughters in New Hampshire. The intersection remains without a traffic light, despite years of complaints and a big stack of accident reports. The way the intersection is configured, if you’re heading east on the highway, you can’t see from a distance that there’s an intersection or a stop sign. County records indicate that flashing warning lights that had been at the intersection in the early and mid-1970s, were removed in 1977. According to official records, county officials received numerous complaints about the intersection after that time. County

workers put up a larger stop sign and added a warning sign a decade ago. However, that didn't stop the accidents. There have been crashes at the site every year since at least 1992, including one in January 2001, three months before this accident. Persons who live in the area around the intersection have complained about the hazards.

County officials rejected two pretrial settlement offers—one for \$100,000 and a second for \$1 million. In Florida, damages against local governments are capped at \$100,000. To receive more, the attorneys for victims must file a claims bill in Tallahassee asking the State Legislature to award the full amount. The Legislature can deny the claim, award a lesser amount, or award the full amount. The county has \$10 million in liability insurance. Interestingly, there's still no warning light at the intersection where this woman was seriously injured more than two years ago.

XI. FORD / FIRESTONE UPDATE

Update On Pending Cases

We are still working hard to get a number of our Ford and Firestone cases out of the Multi-District Litigation (MDL) panel, and back to the original courts. We hope that will happen soon. However, Ford and Firestone have done everything possible to delay return of the cases. The corporate mindset is most difficult for a person with feelings and compassion for other people to comprehend. We have clients in our cases who have suffered tremendous losses and who have been greatly damaged. Clearly, they deserve their day in court. At best, delays are difficult for families to understand and corporate defendants know that. Our clients and other victims live with their pain and misery on a daily basis and somehow that doesn't seem fair. In any event, we are trying hard to represent

our clients to the best of our ability, fully realizing the predicament they are in. Hopefully, the cases that remain in the MDL will be released soon.

Firestone Class Settlement Gets Early OK

A Texas judge has given preliminary approval to a national class action settlement involving Bridgestone Corporation's Firestone unit and its August 2000 recall of 6.5 million tires. As part of the settlement, Firestone would spend \$15.5 million on a three-year consumer education program focusing on tire safety, and incorporate technology that would improve the high-speed capability of some tires. Lawyers are to come up with a plan to notify those eligible for the settlement. The proposal is subject to a final fairness hearing. The settlement does not apply to persons who suffered personal injuries or have property damage as a result of an accident involving the recalled tires. As we have reported, hundreds of personal injury lawsuits are still pending over rollover accidents involving tread separation. Federal authorities have linked the tires, mostly installed on Ford Explorers, with 271 deaths and hundreds of injuries. I believe those numbers are very conservative. Some of the personal injury lawsuits have been settled out of court. Firestone, based in Nashville, Tennessee, says it will incorporate the new manufacturing technology involving cap strips, nylon strips or comparable elements in some tires for seven years.

The company said that any consumer that did not have the recalled tires replaced earlier can take the tires to a Firestone Tire and Service Center to be replaced free of charge. Consumers who had the recalled Wilderness AT and ATX tires can get more information toll-free by calling 866-345-0360. Firestone had fought an earlier attempt in an Indianapolis federal court to have such claims certified as a national class action. The company elected to settle the case in a Texas state court and

expand it nationwide. Supposedly, Firestone did this to avoid the "burden and expense" of long and drawn out legal action. When you consider how Firestone has refused to settle many valid personal injury and death cases and appears to have little concern for the many victims of its wrongdoing, I have to question its motives in settling this class action lawsuit.

XII. THE NATIONAL SCENE

Edwards Wants Child Health Care For All

John Edwards, who may well become our next President, wants to require parents to have health insurance for their children, making medical care an American birthright much like education. The North Carolina Senator wants \$25 billion annually in tax credits to help parents pay the cost of enrolling their children in private or government plans. The Edwards plan is a targeted alternative to costlier and more widespread proposals to cover the uninsured being offered by several of his rivals for the Democratic nomination. The Senator said the nation's 12 million uninsured children should be the first priority in reforming the health care system. Senator Edwards told a New Hampshire health center, "The only way we can tackle this problem in an effective and responsible way is to ask for responsibility from parents to make sure their children have health care, responsibility from government to help families get insurance and deal with rising costs, and responsibility from drug and insurance companies to bring the cost of health care down."

A plan that helps keep children healthy is badly needed. Insuring children is certainly less costly than covering adults because they generally don't require as much medical attention. Edwards' plan, estimated to cost \$53

billion a year, also includes some targeted subsidies aimed at helping more than 8 million uninsured adults afford health care. Significantly, it proposes cost-control measures estimated to save \$15 to \$17 billion annually. The amount of the tax credit for children's insurance would vary depending on income and family size. The credit would be available to families with fewer than four members earning up to \$75,000 and families of four or more earning up to \$100,000. Senator Edwards said a typical family of four with income of about \$60,000 and already covering the children through a parent's job would get a tax break worth roughly \$300. Parents would have to provide proof of their children's insurance when filing tax returns. Those who refused to provide coverage would have their children automatically enrolled in a government plan, with the cost taken out of their tax benefits.

Was Iraq In The Vice President's Sights?

Documents released under the Freedom of Information Act have revealed that an energy task force led by Vice President Cheney was examining Iraq's oil assets two years before the war began. The papers were obtained after a long battle with the White House by Judicial Watch, a conservative legal nonprofit foundation that opposes government secrecy, and which is suing for the actions of the task force to be made public. Many observers contended before the shooting ever started that oil was the real reason for the war. I even "suspected" that myself. In any event, the emergence of the documents could fuel claims that America's war in Iraq did have as much to do with oil as national security. It appears that the Bush Administration has started to lose the battle to keep its internal workings secret. The 16 pages, dated March 2001, show maps of Iraq oil fields, pipelines, refineries and terminals. A

document titled Foreign Suitors for Iraqi Oilfield Contracts is also included, listing which countries were eager to do business with Saddam's regime. Judicial Watch requested the papers two years ago as part of its investigation into links between the Bush Administration and senior energy executives, including Enron's former chairman Ken ("Kenny Boy") Lay. It seems significant that the Vice President has fought the release of the documents at every step of the way. A federal court ordered in July that at least some of the task force's working papers should be made public.

I don't have enough information to fully comprehend the magnitude or importance of the documents released. The U.S. Department of Commerce said in a statement: "It is the responsibility of the Commerce Department to serve as a commercial liaison for U.S. companies doing business around the world, including those that develop and utilize energy resources. The Energy Task Force evaluated regions of the world that are vital to global energy supply." As I understand it, Judicial Watch hasn't claimed that the documents are proof of any particular intent, but instead, say these documents should be open to public scrutiny. The documents did change thinking in the nation's capitol, and some believe they represent a surprising development. It had been assumed that the U.S. government was stonewalling over the energy task force papers because their release would show the extent to which major party benefactors, including Enron, effectively wrote national energy policy. Judicial Watch and other watchdogs are now curious what else may be revealed if the documents become public. A court ordered the government to comply with the Freedom of Information Act and give up these documents more than a year ago. I don't know why the papers were suddenly released. The Vice President contended that his consultations with the energy industry should be private so that all parties can speak freely. However, a federal court

recently described this invoking of executive privilege "extraordinary" and "drastic." In any event, I believe that the documents that don't compromise national security should be made public. Obviously, those that do - fall into another category.

Should The Bush Executive Order On Iraq Oil Be Investigated?

I understand that President Bush has issued an Executive Order, so far unreported by the media to my knowledge, that purports to grant broad legal immunity to oil companies operating in Iraq. Several watchdog groups believe the Order, on its face, to be outrageous, and they want an investigation. Executive Order 13303, issued on May 22, 2003, claims to be essential to Iraqi reconstruction efforts. A cursory reading of the Order indicates that its real purpose is to protect oil companies by allowing them to act with impunity for any activities undertaken relating to Iraqi oil. Thus far, this order, which contains broad language that seems to sweep aside federal statutes, including the Alien Tort Claims Act, has received almost no public attention. It has been brought to light by a researcher with the Sustainable Energy and Environment Network (SEEN) and reported by Earthlinks International.

Under this Order, as I understand it, an oil company complicit in human rights violations, or one that causes environmental damage, would be immune from lawsuits. The language of the Executive Order is very broad. President Bush declares a national emergency as the basis for protecting the Development Fund for Iraq (an entity intended to fund reconstruction efforts with oil proceeds, overseen by an international board including World Bank officials) as well as all Iraqi petroleum, petroleum products, "interests," proceeds, and contracts related to Iraqi petroleum. Claiming that interference with Iraqi petroleum, petroleum products, and "interests therein" jeopardizes reconstruction efforts in

Iraq, the Executive Order offers a wide range of protections to certain persons, entities and assets associated with the Iraqi oil industry. The document is apparently intended as a sweeping grant of immunity to individuals, corporations, agencies and others involved in Iraqi oil sales, marketing, or other oil-related activities.

The Order provides protection at both ends of the spectrum. The activities that generate the oil and the profits and proceeds that ensue are protected. Those U.S. companies engaged in petroleum-related work in Iraq are purportedly given broad immunity from suits for environmental damage, workplace harms, contractual disputes, and numerous other wrongs. For example, a U.S. oil company benefiting from human rights abuses, no matter how egregious, apparently falls within the Order's immunity from suit. Similarly, the Order purports to protect any assets derived from Iraqi oil from judgment, garnishment, or any other seizure in U.S. courts. For example, if a corporate entity or an individual engages in criminal activity in the U.S., its assets traceable to Iraqi oil are protected by this order. Obviously, the oil industry has tremendous influence in the Bush White House. Congress has been called on by Earth Rights and the Government Accountability Project to investigate the issuance of this Executive Order. I seriously doubt that will happen.

XIII. THE CORPORATE WORLD

The Corporate Scandals

I sincerely hope and pray that our nation's economy will be able to survive all of the scandals in Corporate America that have been uncovered over the past few years. Clearly, the American people have had a wake-up call and I believe the message has reached a good number of the members of Congress. Without a

doubt, we must restore confidence in the institutions that helped to make our country great. In years past, ordinary citizens had great respect for the corporate world and for its bosses. They sort of looked at these bosses as a cross between "Daddy Warbucks" and "John D. Rockefeller." They knew these bosses were rich, powerful, and maybe even arrogant, but at the same time, basically honest. None of us really believed that things in Corporate America could be so rotten. Were we ever wrong! Now there is a great deal of rebuilding in this country that must occur. It is still somewhat ironic that many of our political leaders are more interested in protecting the wrongdoers, rather than punishing them. Protecting the victims of the corporate corruption should be a high priority. I wonder how many folks believe our political leaders really share that view. In any event, there is little reason to blindly trust the corporate bosses any longer. It is now time for Congress to push forward for a complete reform of the system.

A Look At The Impact Of Sarbanes-Oxley

As a result of the corporate scandals, Congress did take some action. The Sarbanes-Oxley Act became law on July 30, 2002. Sarbanes-Oxley has consistently been called the broadest-sweeping legislation to affect corporations and public accounting since the 1933 and 1934 Securities Acts. Sarbanes-Oxley came about only after public pressure created by the corporate scandals, including those at Enron, Arthur Andersen, Tyco, Global Crossing, and WorldCom. It was intended to address systemic flaws in the way corporations have been reporting their numbers for decades. Congress begins hearings for the legislation as early as December 2001. However, the Act that was signed into law a year ago has as its core an accounting oversight board introduced in the 1970s. The legislation hung around for years—off and on—until Enron reared its ugly head. When

Enron blew up, the senators who first looked at legislation for a new oversight board used an old SEC draft, with its 30-year-old roots, and it quickly became law.

Sarbanes-Oxley developed the Public Company Accounting Oversight Board, a private, nonprofit corporation, to ensure that financial statements are audited according to independent standards. Sarbanes-Oxley also holds chief executives and chief financial officers directly responsible for the accuracy of financial statements. Penalties run up to \$5 million in fines, a 20-year jail term or both. The law seeks to rule out conflicts that would make securities analysts less than objective and gives board audit committees—rather than CEOs or chief financial officers—full control of auditors. So far, Sarbanes-Oxley has already had some positive effects.

More Needs To Be Done To Clean Up Corporate Crime

In commemoration of the Sarbanes-Oxley Act, Citizen Works has presented a list of eleven "next step" reforms that are deemed necessary to continue the crackdown on corporate crime. Even though it is still awaiting full implementation by the SEC, the Sarbanes-Oxley was a first step. It is now time for regulators and members of Congress to move forward and complete the work. However, the only people who should be celebrating after one year of Sarbanes-Oxley are the corporate lobbyists who have prevented any significant reforms from being passed. This delay exists even with the avalanche of corporate looting of trillions of dollars from millions of workers and small investors and the loss of their jobs and pensions. To date, just one major CEO has gone to jail. If Washington is serious about getting tough on corporate crime, fraud, and abuse and continuing accounting scandals, much more work needs to be done. President Bush has given little help in the fight against corporate crime. As a result, we see an inadequate budget for the DOJ's corporate criminal enforcement actions. Citizen Works has

made the following next-step suggestions for corporate reform:

Give the owners more control over the corporation. Many of the corporate scandals involved corporate governance failures. Corporations should open up proxy ballots to minority shareholders and should introduce cumulative voting so that shareholders can democratically nominate and elect the corporate board of directors. Shareholders should also vote on major corporate decisions, like executive pay and mergers and acquisitions of \$1 billion or more.

Rein in excessive executive pay. Despite repeated scandals and out-rages, CEO pay remains obscenely high and largely unlinked to performance. As a start, the SEC should require shareholders to approve annually all executive compensation plans.

Expense stock options. Keeping stock options off the balance sheet allows corporation to continue to inflate profits and mislead investors. In order to have honest accounting, options must be counted as expenses. Congress should drop any effort to delay FASB's effort to finish this inevitable reform.

Regulate derivatives trading. Unregulated derivatives trading has been a key factor in most major financial scandals of the past decade. They also figured prominently in the recent Freddie Mac fiasco. Rules for derivatives trading should be enacted regarding collateral-margin, reporting, and dealer licensing in order to maintain regulatory parity and ensure that markets are transparent and problems can be detected before they become a crisis.

Crack down on corporate tax havens. Every year, U.S. corporations cheat the Treasury Department out of billions of dollars through offshore tax havens. Some companies have even moved their headquarters there while keeping their operations in the United States. The government needs to start going after these tax cheats.

Eliminate the gap between what companies tell the IRS and what they tell shareholders. Corporations report

very different incomes to the IRS and to shareholders. In 1998, the gap was \$159 billion, up from \$92.5 billion two years earlier. From 1996 to 1999, Enron paid no federal income tax, reporting tax losses of three billion dollars while reporting to its shareholders rosy profits of over two billion dollars. Either corporations are cheating the government or lying to shareholders - and either way it needs to stop.

Establish an annual corporate crime report and database. It is hard to fix the problem of corporate crime without good, well-organized data. To remedy this, the Department of Justice should establish an online corporate crime database and the FBI should produce an annual corporate crime report as an analogue to its annual Crime in America report, which focuses principally on street crime.

Enact tough contractor responsibility standards. MCI/WorldCom enjoys approximately \$1 billion a year in government contracts despite having paid \$750 million to settle charges in the largest accounting fraud case in history. The federal government should not be rewarding corporate criminals with taxpayer money. Instead, it should enact high standards for contractors.

Restore protections for investors. The Private Securities Litigation Reform Act of 1995 created the conditions for the financial scandals by making it harder for defrauded investors to sue the aiders and abettors of corporate fraud—the bankers, lawyers, and accountants. Until this law is repealed, defrauded investors will have little success in seeking restitution through the courts.

Enforce the Foreign Corrupt Practices Act. The Senate Finance Committee released a report indicating that the SEC and the Department of Justice failed to act on an IRS referral of “serious allegations” regarding potential violations of the Foreign Corrupt Practices Act by Enron. The disturbing question is: how many of these cases are not being aggressively pursued. Other potential violators include Tyco, Xerox,

Halliburton and Accenture.

Let state regulators do their job. The SEC has indicated its support for legislation that would preempt the ability of states to work independently of the SEC to seek structural changes in brokerages and investment banks. As one state official said, the bill “would basically neuter state protections for investors.” This bill must be defeated.

Rules For Auditors Proposed By Board

The Public Company Accounting Oversight Board, the accounting industry's oversight board, has proposed new rules for investigating and punishing auditors. Some members of the Board urged corporate directors to insist on reviewing their audit firms' inspection reports. I suspect most shareholders thought this was already being done on a regular basis. Obviously, that was not the case. The Board was attempting to address one of the more controversial aspects of the Sarbanes-Oxley law, which was passed a year ago to toughen oversight of the accounting profession. The new law prohibits the Board from telling the public about problems it uncovers at accounting firms—such as shoddy auditing practices or a lack of independence from clients—if the accounting firm fixes the problem within 12 months. Investor groups have objected, with good reason, that the ban leaves shareholders in the dark about bad audit work. Two Board members offered a way around the restrictions, urging corporate directors to force accounting firms to turn over their inspection reports in order to win or keep the companies' business. That seems to be a reasonable thing to do.

Annual reviews of firms that audit more than 100 public companies were performed by the Board's inspectors. Apparently, they have already started inspecting the nation's four largest accounting firms. Smaller firms that audit public companies will face a review every three years. Special emer-

agency teams will be in place to conduct quick investigations when an audit blowup or corporate scandal emerges. Firms and accountants who are registered with the Oversight Board could be punished for breaking securities laws, failing to reasonably supervise other accountants, and refusing to cooperate with an investigation. Disciplinary proceedings would be private unless both sides consented to the proceedings being open to the public. Auditors and their firms could be suspended or barred from auditing public companies, hit with monetary penalties, forced to submit to independent monitoring, or required to undergo more training.

There was a time for public comment, which expired on August 18th. The Board then was required to submit the rules to the Securities and Exchange Commission for approval. The Board is also negotiating with regulators in the European Union, Canada and Japan over how to handle inspections and discipline of accounting firms with overseas operations. With all of the corporate scandals that have shaken our economy and hurt hundreds of thousands of investors and employees, the Oversight Board must do its job. Congress should move to plug any loopholes that now exist.

Shell Oil Co. To Pay Government A Multimillion Dollar Settlement

Shell Oil Co. will pay the federal government \$49 million to settle a lawsuit over the unauthorized release and burning of natural gas from seven of its deepwater platforms in the Gulf of Mexico. Shell did not have permission from federal regulators to burn off the gas, did not report the activity and did not pay required royalties on it to the federal government. Most of the gas was disposed of, through processes known as “flaring” and “venting,” from 1994 to 1998. The largest well involved was the company’s Auger deepwater facility, located about 130 miles off the

Louisiana coast. Shell was concentrating on oil production at Auger. Because of the way the facility was equipped at the time, the company found it uneconomical to transport large quantities of the gas that was brought up with the oil. According to the U.S. Attorney’s office, “It appears that what they did was trade oil for gas.” However, federal regulations restrict the amount of gas that can be disposed of and require payment of royalties even on some gas that is burned off rather than sold.

Abbott Subsidiary Pleads Guilty To Obstruction

An Abbott Laboratories subsidiary has entered a guilty plea to obstructing a criminal health care investigation and has agreed to pay \$600 million in criminal and civil fines. The subsidiary, CG Nutritionals Inc., also agreed to five years probation. The company, sister subsidiary Ross Products, and parent company Abbott also agreed to reform sales and marketing practices for medical equipment. Interestingly, prosecutors set up a fake medical equipment company in a town in Southern Illinois as part of the investigation. Undercover agents were offered various deals by equipment manufacturers to buy their goods. Abbott admitted its employees provided the agents, who posed as buyers, with information aimed at helping them overcharge Medicaid and Medicare. Abbott’s guilty plea was accepted by the court, but final approval of the settlement was postponed until after a required pre-sentencing report. Abbott, which announced a one-time \$622 million charge in the second quarter to pay the fine, said it cooperated with the government probe. The investigation was part of a broader industry-wide federal probe into fraudulent sales of medical equipment. The American people who work hard, pay their monthly bills, strive to educate their children, and try to put a little money aside each payday for their retirement, have to be wondering—“When will all of this corporate corruption end?”

MCI Banned From All New Federal Contracts

MCI has been banned from getting new federal contracts and, in my opinion, rightfully so. The General Services Administration (GSA) has been reviewing MCI’s fitness for several months. The GSA has now called on MCI to improve its internal controls and business ethics. The ban on MCI could last up to three years. This was a blow to MCI, since its largest and most important customers come from the government. However, MCI, forced into Chapter 11 last summer after discovering a massive accounting fraud, can keep its existing government contracts. MCI receives about \$800 million from federal agencies, including the Department of Defense. This company, according to Senator Susan Collins, R-Maine, who chairs the Senate committee, “has demonstrated a flagrant lack of ethics.” The Senator’s committee oversees all federal contracts.

As part of its fraud settlement last year with the Securities and Exchange Commission, MCI has stepped up internal controls. However, deficiencies cited by MCI’s audit firm, KPMG, in June showed it still had much room to improve. The Justice Department is currently investigating whether MCI defrauded AT&T, Verizon Communications and SBC Communications by not paying fees to connect long-distance calls. The Federal Communications Commission is also investigating the company. Things don’t look good for the company. It appears that MCI is facing a great deal of difficulty in months to come. Prosecutors are still probing MCI’s \$11 billion accounting fraud.

I believe there are a number of other companies that should be banned from doing business with the government. When corporations continue to defraud the federal government, eventually pay fines that amount to a slap on the wrist, and then continue to get government contracts, something is clearly wrong with the system. The average person expects the federal government to do business with honest companies. They

have to wonder how these corporations have gotten away with so much fraud and corruption for so long and still get government contracts.

More On The Enron Banks

A report released recently and reported in USA Today has to be bad news for the “Enron bankers” that assisted the company before its downfall. It certainly would appear that six Wall Street banks had to know that many of the financial deals involving Enron were illegal. The banks “aided and abetted” Enron’s former executives, according to the report released by the court-appointed examiner in Enron’s bankruptcy case. Citigroup, J.P. Morgan Chase, Barclays, BT/Deutsche, CIBC and Merrill Lynch “had actual knowledge of the wrongful conduct” in hundreds of financial transactions with Enron from the early 1990s to late 2001, shortly before Enron filed for bankruptcy protection, the report alleges. For instance, in one \$750 million deal involving Citigroup and Enron-related partnership Sundance Industrial, Citigroup executive Dave Bushnell wrote in an e-mail to a co-worker that Sundance was “a funky deal.” The aggressive accounting was “a franchise risk to us if there is (bad) publicity.” According to the report, the banks also helped to set up and close the deals, which had colorful tags such as “Mahonia,” “Nighthawk,” “Cochise,” and “Nimitz.”

More than \$5 billion claimed by the Wall Street banks against Enron may now go to the thousands of other creditors in the bankruptcy case. According to an article in the *USA Today*, the report revealed that:

- Former Enron executives allegedly entered into financial deals “designed to manipulate (Enron’s) financial statements” and which led to the release of “materially misleading statements” — violations of securities laws. The executives included former chief financial officer Andrew Fastow, former chief

accounting officer Rick Causey, former treasurer Benjamin Glisan and former treasurer Jeff McMahon. McMahon was portrayed in Enron’s internal investigation as a concerned skeptic of its accounting, but Batson’s report alleges his actions presented Enron’s finances in a false light.

- Former Enron corporate officers who had entered into numerous side agreements with Wall Street banks allegedly “concealed the existence of these agreements” from Arthur Andersen, Enron’s longtime auditor. In some cases, the executives and managers allegedly knew the business deals were based on misleading facts and served “no business purpose” — violations of accounting rules and securities law.
- Former Enron officers allegedly “controlled the flow of information to Andersen” to obtain the right accounting numbers for Enron’s financial statements.

Morgan And Citigroup Fined For Enron Role

It appears that the Enron saga will never end. If all of the wrongdoing mentioned above wasn’t enough, JP Morgan Chase and Citigroup has now agreed to pay a total of more than \$300 million to settle charges regarding their roles in Enron’s manipulation of its financial statements. JP Morgan will pay \$135 million and Citigroup will pay \$120 million into a fund organized by the Securities and Exchange Commission to help compensate billed Enron investors, as reported in *USA Today*. The Citigroup payment includes \$19 million to settle charges it helped Dynegy Inc. manipulate its financial statements. In addition to the federal payments, the two banks will pay \$50 million to the state and the City of New York to settle a similar investigation. The SEC said most of the money would go to victims of Enron’s collapse amid

allegations of massive accounting irregularities. As we all know now, the Enron “mess” was the first in a string of scandals that have tainted Corporate America since 2001. To date, the SEC has recovered \$324 million from companies to help Enron victims. Unfortunately, this is a mere “drop-in-the-bucket” for the victims. Considering the massive wrongdoing by Enron executives and all of the hurt they have done to their victims, I have to wonder why the federal government hasn’t gone after “Kenny Boy” Lay. So far, he has been among the “untouchables” or so it seems.

Justice Department Rejected IRS Call For Enron Probe

Many folks are beginning to ask a simple question, “Why did it take so long for the federal government to step into the Enron mess?” In 1999, the Justice Department declined to pursue a criminal referral from the Internal Revenue Service of possible bribes paid by Enron Corp. officials to Guatemalans close to former president Jorge Serrano. Allegedly, these were paid to win a lucrative electric-power contract. This is according to a congressional investigation made a few weeks ago. The account of Enron’s dealings in Guatemala is in a new report by the Senate Finance Committee, which spent more than a year investigating the matter. The findings were sent to the Justice Department’s Enron task force earlier this year. The payments identified by the Senate report were made to a Panamanian corporation and “were disguised as add-on fuel charges to conceal them from U.S. and Guatemalan tax authorities,” the congressional report states. Enron claimed the charges as tax deductions, which eventually brought IRS scrutiny. We all know what happened to Enron in the U.S. Unrelated Enron accounting irregularities led to the company’s demise in December 2001.

According to the *Washington Post*, internal Enron memos and an audit report by Arthur Andersen LLP “confirms that senior Enron officials were

aware of the payments and their questionable legality.” I have to wonder why the U.S. Attorney’s office in Houston refused to investigate the case. Senate Finance Committee Chairman Charles E. Grassley (R-Iowa) believes the report “turns over another rock and raises more questions about the way Enron executives operated.” In all, the IRS has apparently identified more than \$17 million in questionable payments that auditors thought were possible bribes. Enron had entered into an agreement in 1992 to sell power that the company generated on two barges off Guatemala’s coast to Empresa Eléctrica, the state-owned power utility. The project was partially underwritten by the Overseas Private Investment Corp., a U.S. agency. In its agreement with Guatemala, Enron promised to give 6% of the gross profits to a group called Sun King Trading Co. Payments of more than \$450,000 were made in 1993 to a bank in Miami, where they caught the attention of the IRS.

Serrano was forced from office in 1993 amid civil rioting, in part to protest a 47% increase in electricity rates and allegations of corruption. Among the documents included in the report is a December 1993 memo by Enron’s attorney in Guatemala, Jorge Asensio, stating that “the Sun King payments don’t represent any REAL service.” Sun King introduced Enron officials to Serrano, the memo said, “and talked him into signing the contract. It is the typical ‘finder fee’ arrangement, with the only difference that the fee was—for that service—completely out of hand.” Armed with the 1993 memo and three internal documents, an Enron whistle-blower who is not identified in the Senate report went to the IRS office in Houston in 1995. The matter was not pursued for three years until an IRS examiner found an irregularity in an Enron tax return. The IRS examiner then determined that Enron had wrongly claimed tax deductions on the Sun King payments, the Senate report states. On May 21, 1999, the IRS district director in Houston sent a letter to then-Attorney General Janet Reno alert-

ing her to information indicating that Enron may have violated the Foreign Corrupt Practices Act, which forbids U.S. companies operating overseas from paying bribes. For whatever reason, the Justice Department failed to act on what certainly appear to be highly questionable acts.

Late Enron Bonuses Raise Questions

Enron paid out \$105 million to certain employees in bonuses on the eve of its bankruptcy, apparently to let a select few cash in before a court took over the company’s finances. This 11th-hour effort by Enron was called “Project 911.” Lawyers representing about 4,000 employees who were fired days after the bonuses were paid are suing to recover most of the bonus money. It would be mighty hard to explain these bonuses to laid-off workers, who received severances that were a pittance in comparison. These late-hour bonus recipients should be held accountable for their self-dealing. At the time these bonuses were paid, thousands of regular Enron employees and retirees were facing the loss of life savings, health benefits, their jobs or pensions. There were two categories of bonus recipients: (1) a group of about 75 commodity traders, and (2) a larger group of about 500 other traders, their support staffers and other “key” employees. Enron contends the bonuses were needed to retain the key ingredients of the commodity-trading business. Now the court will decide if these bonuses were proper.

Kenny Boy Hasn’t Really Felt Their Pain

I doubt that many of the folks who were victimized by Enron feel too bad to hear that Ken (“Kenny Boy”) Lay and his wife have sold the last of their four homes in the “posh resort” of Aspen, Colorado, even if they took a loss. Lay and his wife took a loss of some \$600,000 dollars on the last home sold, even though they sold the property for

\$5.5 million. This home had been purchased for \$6.1 million. The Lays have also sold other homes—one for \$5.5 million and another for 4.5 million. I don’t know what the sales price was on the fourth Aspen home. With all of the misery caused to thousands of Enron employees and investors, I am sure that some of the Enron victims are wondering why the government has not criminally prosecuted Mr. Lay. I am sure there is a valid reason. In any event, the home sales referred to above give us a pretty good idea that “Kenny Boy” was living pretty “high on the hog!” However, I doubt that Lay really understands how a working family feels when they are cheated out of their retirement nest egg. It would be real hard for him to “feel their pain.”

Medical Firm’s Dangerous Secret

When a Guidant Corp. subsidiary pleaded guilty in June to 10 federal felonies, it acknowledged failing to report thousands of malfunctions of a medical device used to repair bulges in the body’s main artery. Twelve of the unreported cases ended in deaths. Unfortunately, the problems with the Ancure Endograft System were no secret inside the Menlo Park, California, subsidiary, EndoVascular Technologies, which made it. Every time a doctor threaded the tube-like device through an incision in the groin and implanted it in a patient’s largest artery, a sales representative was there to observe. On each occasion, a report was phoned in by the sales representative to a voice mail to which dozens of co-workers and managers could listen.

How widely Ancure’s malfunctions were known within EndoVascular is one of the most striking findings of a San Jose (California) Mercury News examination of the events leading up to the Guidant subsidiary’s guilty plea, more than three years after the device was introduced in September 1999. At least 75 patients died and 991 were injured after receiving Ancure implants, according to Food and Drug Administration records. There appear to

have been numerous problems with implanting the Ancure device. A pattern of disregard for federal requirements intended to protect patients from faulty medical devices is documented by public records and documents.

The following matters are indications of the problems that existed:

- EndoVascular maintained a dual system of tracking malfunctions, one for internal use and a second, showing many fewer problems, for complaints reported to the FDA.
- Manufacturing changes intended to fix some of the problems were not properly reported to the FDA for review and approval, as required, until after the device was temporarily pulled from the market in the middle of a government investigation.
- The dual reporting system ended only after EndoVascular workers sent an anonymous letter to Guidant managers and the FDA.
- After receiving the anonymous letter, Guidant launched a series of audits at its subsidiary and found thousands of malfunctions that had not been filed with FDA as required. Guidant failed to report the results until it learned that the government had opened a criminal investigation.

Guidant executives have acknowledged in a court settlement that its subsidiary intentionally withheld information. However, they contend that the devices—placed in 18,000 people worldwide—are safe and performing as expected. They claim that the problems involved the parts used to implant the device, not the device itself. Guidant's CEO claims that the problem was confined to its 300-employee subsidiary, EndoVascular. No current Guidant employees are targets of a continuing criminal investigation into individual misconduct. The company had stopped making the Ancure device. Sales will apparently end in October, according to reports. EndoVascular Technologies was launched in 1989 to develop a device for treating life-threatening aneurysms or bulges in the lower end of the aorta, the main vessel that carries blood from the heart to the rest

of the body. Left untreated, aneurysms can burst like an overblown balloon, resulting in almost instant death.

For decades, the standard treatment has been radical surgery. EndoVascular's device is intended to avoid the trauma of open surgery. The tube-like patch is implanted inside the aorta, threaded through an artery reached from an opening made in the groin. While major complications were greatly reduced, overall mortality was similar to standard surgery in the days following the procedure. The Ancure Endograft System is quite complicated. The implant is folded up inside a plastic jacket at the end of a long cable. At the other end of the cable, the surgeon manipulates several wires in the cable to retract the jacket and then unfold and attach the implant to the aorta's walls. The company won FDA approval for the Ancure system in September 1999. That same day, its chief rival, Medtronic, won approval for its own aortic implant, setting off a battle for customers. But almost as soon as Ancure hit the market, the company began to hear of problems not seen in the clinical trials.

XIV. ARBITRATION UPDATE

The Status Quo

Very little has changed—either nationally or in Alabama—to help the plight of consumers in this country when it comes to the arbitration issue. I sincerely believe that people all over the country are still strongly against mandatory, binding arbitration and that most politicians are still apparently for it. At least no person in political office, with a few exceptions, has seen fit to fight for consumers on this issue. In Alabama, however, there are several members of the State Senate who have tried hard to stop or slow the arbitration train. Hopefully, others will join them soon and not wait until it becomes politically expedient to do so.

Doctors Shouldn't Use Arbitration Agreements In Dealing With Patients

In my opinion, doctors should never be allowed to use pre-dispute arbitration agreements with their patients. I feel the same way about lawyers and their clients. The Center for Justice & Democracy has called on the American Medical Association to demand that doctors in Nevada immediately stop coercing patients into signing away their rights to jury trial in the event of medical malpractice. Recent reports indicate that Nevada doctors are starting to compel patients into signing mandatory binding arbitration agreements as a prerequisite for patients to receive medical treatment. These agreements force patients to sign away their legal rights to hold negligent doctors accountable in court in the event the patient is killed or injured due to malpractice. This is in direct violation of AMA policy, which says that such agreements are fundamentally unfair to patients. The AMA view was most recently articulated in a 1998 report released jointly by the AMA, the American Bar Association and the American Arbitration Association, which studied such agreements, entitled Health Care Due Process Protocol. As a result of this study, the American Arbitration Association affirmed in its Health Care Policy Statement that it will not participate in arbitration between a patient and a health care provider if the patient was forced to give up their rights before malpractice occurred. In the report's recommendations, the organizations jointly found that any alternative resolution process (ADR), like arbitration, must abide by due process considerations and must be fundamentally fair.

In disputes involving patients, binding forms of arbitration should be used only where the parties agree to do so after a dispute arises. According to recent news reports, some Nevada doctors are flaunting that policy, now forcing patients to sign arbitration

agreements simply to get medical care and before any “dispute arises,” which is generally a claim that malpractice has occurred. This policy is in direct contradiction to AMA policy. Clearly, doctors will find that forcing patients to sign away a constitutional right in order to receive needed medical treatment won’t be accepted by people.

Mandatory Arbitration Denies Employees’ Constitutional Right To Trial

There have been a great number of abuses involving the use of mandatory, binding arbitration by employers in the employment setting. Arbitration in the workplace is simply wrong and can’t be justified. No persons should have to sign away their rights in order to get or keep a job. The following article on the subject comes from the August 4th edition of the *Sacramento (California) Bee*:

Most people join companies with high hopes, but what if their employer harms them somehow? If they signed an employment application that contains an [arbitration] clause... then in a dispute with their employer, they have waived their right to a jury trial and accepted arbitration, an alternative form of justice that allows employers to sidestep public civil trials and resolve disputes in secret. Citizens’ taxes support our civil court system. A jury trial is guaranteed by the Seventh Amendment of the U.S. Constitution in most civil cases: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” Similarly, the California Constitution provides that “Trial by jury is an inviolate right.” But Corporate America, in collaboration with major arbitration associations, is rapidly taking that “inviolate” right away from the average American and privatizing the civil justice system.

Suppose your employer fires you because you are pregnant, allows a hostile atmosphere in your workplace or retaliates against you when you complain about illegal activity? If you signed an arbitration agreement, either in an application before being hired or in a document later, you can forget a jury trial. Since the early 1990s, when the U.S. Supreme Court ruled that employers could require employee arbitration, employers have been encouraged to use this nonjury system as a “cost-effective” alternative to civil trials. The mushrooming growth of arbitration associations followed strong marketing of the “alternative dispute resolution” movement. The largest such organization—the American Arbitration Association—last year administered nearly 150,000 arbitration cases in the United States, up from approximately 76,000 in 1997. In disputes subject to mandatory arbitration, arbitrators do not have to abide by some basic checks and balances available in civil courts. Arbitrators do not have to follow the rules dictating what evidence is admissible. They also do not have to be lawyers or justify rulings.

These irregular, secret hearings unfairly increase employers’ power and diminish employees’ rights. The cases are heard by arbitrators who belong to associations that solicit business from corporate customers - an incentive to favor deep pockets over individual plaintiffs. High courts have held that arbitration rarely can be overturned, even if the arbitrator didn’t follow the law. Reversing an arbitration award on an appeal to a civil court can be done in limited situations, such as when the award was obtained by fraud or the arbitrator engaged in corruption or misconduct. But the process is difficult, expensive and rare. Our tax-supported courts are begin-

ning to take notice. On July 22, the 9th U.S. Circuit Court of Appeals in San Francisco struck down the employee arbitration agreement of a major discount electronics retailer, ruling that it unfairly forced employees to give up their right to sue in civil court if they wanted to keep their jobs. The same court had also recently nullified an arbitration contract in a sexual harassment and disability-discrimination suit at another company, saying it found “such arbitration agreements typically and grossly one-sided.”

California’s Supreme Court has ruled that one-sided arbitration clauses, such as those that shift the costs of arbitration to the employee or limit damages, are unenforceable. County courts also have begun declaring certain aspects of arbitration clauses unfair. In last year’s legislative session, a bill making it illegal for California employers to compel employees and prospective employees to waive their right to a jury trial made it to Governor Gray Davis’ desk, only to be vetoed. Without doubt, arbitration belongs in the legal system. It can be a viable alternative to civil courts if the employee so chooses. But unsuspecting workers are the victims of a system that violates their constitutional rights by denying them access to the courts they pay for. Harmed employees should have the right to choose a jury trial or arbitration. Right now, employers make that choice for them. And it’s legal.

XV. MASS TORTS UPDATE

Summary Of Mass Tort Projects

In the next few months, our Mass Torts Division has several important cases set for trial. This Division, headed by Andy Birchfield, continues to evaluate and pursue claims against pharmaceutical and dietary supplement manufacturers for deaths and injuries resulting from defective and over-marketed products. Our firm has been recognized as one of the leading firms handling a number of different claims arising out of defective pharmaceutical and nutraceutical products. Currently we are investigating and pursuing claims involving the products set out below.

Baycol: This medication was prescribed to treat high cholesterol. We have Baycol trials scheduled in Mississippi in January, February, and March 2004. Baycol was the cholesterol-lowering drug that was pulled off the market of August 2001, after being linked to numerous deaths and cases of rhabdomyolysis, a serious condition involving the breakdown of skeletal muscles.

Rezulin®: Rezulin® was a prescription drug designed to treat Type II or adult onset diabetes. By the time Rezulin® was removed from the market in the United States in March 2000, the FDA had associated 89 cases of liver failure, including 61 deaths, to the use of Rezulin®. On September 8, we have a Rezulin® case scheduled for trial in Barbour County, Alabama.

Phenylpropanolamine (PPA): PPA is an active ingredient that was found in many over-the-counter cold, cough, allergy and diet pills. PPA was removed from the market on November 6, 2000, after an industry-funded study performed at the Yale University Medical School demonstrated that products containing PPA increased the users risk of suffering hemor-

rhagic strokes. Prior research supports claims of non-hemorrhagic strokes being related to this active ingredient as well. PPA has been associated with heart attacks, strokes and deaths. In October, we have a PPA trial set in North Carolina and another PPA trial is scheduled for December 1st in Pittsburgh, Pennsylvania.

Ephedra: Ephedra, or Ma Huang, is the herbal equivalent to Phenylpropanolamine, and also has pharmaceutical properties that mimic amphetamine. These products remain on the market, although in limited number, and create one of the most dangerous current risks, as people are misled into believing that "herbal" means safe. We are investigating claims of stroke, heart attack and sudden cardiac death (arrhythmias) related to products containing ephedra. In September, we have an Ephedra case set for trial in California.

Vioxx® and Celebrex®: Like Ephedra, these very popular anti-arthritis drugs remain on the market and continue to pose risks of heart attack and stroke to consumers. We are looking at a number of potential claims for clients involving Vioxx® and Celebrex®.

Serzone®: Serzone® is an anti-depression drug. While this product still remains on the market, the FDA recently instructed the manufacturer to include a "black box" warning on its label because of the drug's side effects involving the liver. A black box warning is the strongest warning available to consumers, short of removing the product from the market. We are currently investigating cases involving serious liver injury or death.

Meridia®: Meridia® is an anti-obesity drug. A consumer group recently asked the FDA to withdraw this product due to reported reactions such as heart problems, bleeding disorders, organ failure, stroke and death.

Arava®: Arava® is prescribed to treat rheumatoid arthritis. The consumer group Public Citizen recently asked the FDA to remove this drug

from the market as well, due to the reported reactions, such as liver problems, skin diseases, lymphoma, blood disorders, and death.

We currently have 6 lawyers in the Mass Torts Division. In addition, we have 57 support staff working with these lawyers. We utilize the experience and training of Dr. Jim Lauridson, a medical doctor who works full-time for the firm, to assist in handling these complicated cases. We are excited about the upcoming jury trials in this Division because the trials provide an opportunity to obtain badly needed compensation for our clients. It also gives an opportunity for us to show the public how pharmaceutical companies, in these instances, have put profits over the health and welfare of people. In addition to preparing for the upcoming trials, we are in the process of disbursing settlement checks to approximately 2,500 people who were injured by yet another prescription medication. This is the result of a confidential settlement that was reached on behalf of our clients in those cases.

Class Action Status For West Virginia Rezulin® Suit

A West Virginia Supreme Court has given class action status to lawsuits against the maker of the diabetes drug Rezulin®, which was pulled three years ago because of liver-related deaths. The court reversed a lower court decision, which denied the plaintiffs' class action request in 2001 and ruled that tests did not conclusively prove the drug caused liver damage. The lower 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®, made by Warner-Lambert Co., won Food & 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.

The state Supreme Court concluded that the lower court was mistaken in considering the merits of the claims at

this early stage and said the judge also erred in denying the class certification. During oral arguments before the court, Warner-Lambert argued that no diagnostic test could prove that a person's liver damage was caused by Rezulin®. 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.

Congressional Hearing Examines Dietary Supplement's Safety

The federal government continues to drag its feet and refuses to ban ephedra, which has been linked to scores of deaths and myriad health problems. The FDA Commissioner told a House subcommittee in late July that his agency had been prevented from banning such products by a 1994 law that left dietary supplements largely unregulated. Nevertheless, the FDA is still only "considering" a ban on ephedra use, which is extremely difficult to understand. The agency claims it needs to make sure the evidence it is reviewing, such as studies on the herb and health complaints submitted to companies that use ephedra in their products, could support a ban under the law. The 1994 statute requires the FDA to prove that a dietary supplement is "harmful" rather than having the manufacturer prove that it is "safe," as with drugs. It is no secret that ephedra has been linked to as many as 100 deaths. As widely reported, health problems can include strokes, heart attacks and seizures. Health and Human Services Secretary Tommy Thompson has said makers of dietary supplements should have to tell the FDA about potential side effects, just as drug-makers do. Thompson has urged Congress to revise the 1994 law. During two days of hearings, the House panel heard from a wide range of witnesses. Testifying were scientists, health officials, the parents of two people who died after taking ephedra, and representatives of pro sports leagues and players, as well

as officials from companies that make products with ephedra.

It took the death in February of Baltimore Orioles pitcher Steve Bechler, who was taking a supplement with ephedra, to bring the ephedra problem to the public's attention. Following the death, Major League Baseball Commissioner Bud Selig banned players with minor league contracts from taking ephedra, but did not prohibit major leaguers from using the stimulant. The players' union would not agree to ban any substance that could be purchased over the counter. However, other sports leagues, including the National Football League and Major League Soccer, do ban ephedra and test players to make sure they are not using the product. Three past or present Metabolife® International officials took the Fifth Amendment at the congressional hearing and refused to testify. The San Diego-based company makes supplements that include ephedra. The Justice Department is currently investigating whether that company lied about ephedra's safety. In 1998, the president of the company told the FDA that the firm had never received any consumer complaints of serious side effects. However, the company subsequently turned over more than 14,000 records of calls from ephedra consumers with concerns about health-related issues. Tragically, innocent people are continuing to take products containing ephedra while our government studies the problem. That, in my opinion, is inexcusable.

Flaws Found In Industry's Safety Study

Some ephedra companies have promoted a medical study that claims that their product is safe and helpful for losing weight. However, documents released in late July by the House subcommittee mentioned above revealed that a panel of scientists has found serious flaws and shortcomings in the study. Some government officials said those problems could undercut its safety findings at a time when federal

regulators are trying to decide if they should ban ephedra. For several years, the industry had refused to give the regulators all the data from the study, which was conducted at medical centers in New York and Boston in the late 1990s. However, last February, the Food and Drug Administration gained access to the data, but only after it made an unusual deal with the industry. The FDA claims it had to make the deal because the agency was in a "bind." While drug companies are required to prove the safety of their products and must turn over safety data and consumer complaints to the FDA, the agency has no such authority over the makers of dietary supplements such as ephedra. It is shocking that a federal regulatory agency had to make a deal to investigate a health threat.

The ephedra companies have been able to keep the federal government at bay for years even though complaints about their products have been known for over 10 years. Under the deal, the FDA agreed to hire outside experts to help review the data. Under the agreement, the industry had the right to veto several of the possible choices before agency officials picked the scientists who did the critiques. Top agency officials said they agreed to the deal to counter industry concerns that the agency's scientists were biased against ephedra. This study, which was held up by the industry as the "gold standard," has now been discredited. Even the chief researcher who participated in the industry's study has acknowledged that the study had not proven that ephedra was safe for everyone and refused to say that ephedra was safe. Industry lobbyists and some of their supporters in Congress used the study as a tool to hold off the FDA from taking any action against ephedra. The ephedra companies have also been able to use the 1994 law as a shield to avoid regulation. They were able to beat back two efforts by the Clinton Administration to restrict ephedra sales. The law allows vitamins, health foods and herbal products to be sold,

like foods, without prior safety testing. Neither are the companies required to report consumer complaints or other safety data to the FDA. Instead, the law places the burden on the agency to prove that a dietary supplement is dangerous before it can take the product off the market.

David A. Kessler, the former FDA commissioner (1990 to 1996), opposed the 1994 law. Dr. Kessler is one of the strongest and most effective opponents of ephedra use. He says substances like ephedra are really drugs "masquerading as nutritional supplements." A nurse who used to work for Metabolife® International, the country's largest seller of weight-loss pills containing the stimulant ephedra, told the House subcommittee that he had taken 5 to 10 calls a day from customers complaining of side effects and that one-fifth of the callers had reported symptoms of cardiac problems. This nurse and nine co-workers had handled complaints on a toll-free line set up by Metabolife® International, which is based in San Diego. Calls from emergency room doctors who were trying to treat patients who had taken ephedra were also received by this nurse. Several scientists criticized studies paid for by the dietary supplements industry, contending that, given the possible dangers, it would now be unethical to ask anyone to take ephedra as part of a clinical trial.

Internet And Television DTC Advertising

People in this country are using their computers for many things. When diagnosed with a specific disease, many consumers are attempting to educate themselves about their ailment by going online and reading various medical Websites. However, what most don't realize is that the sponsors of many of these Websites are drug manufacturers who sell pharmaceutical products aimed at treating these same illnesses. According to The Wall Street Journal, Websites such as [\[plyStated.com\]\(http://www.SimplyStated.com\), which provides information on hypertension, offers "disease information you can trust." However, the Website is sponsored by Novartis, the pharmaceutical giant, which makes the hypertension drug Diovan. This seems like just another attempt by the pharmaceutical industry to mislead consumers with skewed information. I certainly don't believe that anyone should rely on Websites sponsored by pharmaceutical companies to be educated on health-related issues. When you consider that the underlying reason for the existence of these Websites is to promote their specific drug, not to educate the public on disease and health matters, it makes the companies suspect. According to Manhattan Research, a health-care research firm, more than 50% of consumers who received prescription drugs from their doctor last year said they viewed an advertised product Website for information. Consumers should be aware that the source of this Internet information is pharmaceutical companies with billions of dollars on the line. I have never understood how it can be justified for pharmaceutical companies to advertise a specific drug. We should depend on medical doctors to decide which prescription drugs are needed and which are best for us. I don't believe we should ever allow a TV commercial to make this decision for us.](http://www.Sim-</p></div><div data-bbox=)

Consumers should also be aware that these same Websites are not covered by the new federal privacy law. Therefore, all Website visitors should be cautious about revealing personal information, which many of these Websites request. Direct-to-consumer television advertisements have also come under fire recently at a Senate hearing discussing whether these commercials are actually beneficial to patients or simply a way to boost sales for pharmaceutical companies. According to a Reuters report, Dr. Arnold Relman, a former New England Journal of Medicine editor and professor emeritus at Harvard Medical School, noted that these drug advertisements were too short to contain useful infor-

mation. "My idea of education hasn't the remotest resemblance to the kind of drivel that they put out in ads," Relman stated. It was also revealed in a General Accounting Office report that the majority of these ad campaigns, which totaled \$2.7 billion in 2001, were over before the Food and Drug Administration ever warned a pharmaceutical company about a misleading or false ad. In the Reuters article, Dr. Janet Woodcock, director of the FDA's Center for Drug Evaluation and Research, said the FDA is working on a better system for administering warnings in drug advertisements, which were often "incomprehensible." Woodcock also stated that an FDA survey revealed that consumers were "appropriately skeptical" about these direct-to-consumer ads. Clearly, the pharmaceutical industry has a vested interest in getting consumers to view their sponsored Websites and buy their products. No company should be allowed to pay for Websites without a full disclosure to the public of who is paying for and sponsoring the site.

Truth Comes Out When Senate Witnesses Under Oath

Florida's Senate Judiciary Committee recently conducted a hearing to investigate the reasons for the increased medical-malpractice insurance rates in the state. During the hearing, the Committee administered an oath to all witnesses, making them swear to "tell the truth, the whole truth, and nothing but the truth." Most outsiders probably thought that was common practice, but it isn't. Over the course of the 13-hour question-and-answer session, Florida's Senators observed state officials, lobbyists, doctors, and insurance executives having to back up on previously taken positions. According to Republican Senator Durrell Peadar, Jr., though this issue has been debated for over a year, concise information was finally offered to the Senate as the oath extracted the truth from testifying witnesses.

Through sworn testimony, Florida senators learned that doctors have not been fleeing the state due to increased medical malpractice premiums, the number of applications to practice medicine in Florida has not decreased, emergency rooms have not closed due to rising medical malpractice premiums, “frivolous” medical malpractice lawsuits are not a problem, and the number of medical malpractice lawsuits has not increased. The Committee also discovered that the Governor’s task force relied heavily on data supplied by financially interested individuals and entities.

XVI. BUSINESS LITIGATION

Telemarketers Sue Over Do-Not-Call List

Most folks in this country are sick and tired of getting marketing calls at “supper time.” Many believed the do-not-call effort by the federal government would be the answer. Now, telemarketers haven’t given up and are fighting hard to stop the government’s do-not-call list. Two lawsuits have been filed over the call-blocking service for consumers. The industry claims this service will “devastate business” and “cost up to two million jobs.” According to the Federal Trade Commission, which operates the service, the free government registry for blocking telephone sales pitches has grown to more than 28 million numbers since it was opened June 27th. Registration is predicted to grow to 60 million numbers by next summer. In January, the American Teleservices Association, an industry group, sued the FTC to stop the list.

The U.S. Court of Appeals for the Tenth Circuit has now been asked to reject new regulations set by the Federal Communications Commission. Similar lawsuits brought by other telemarketers are pending. The FCC added

its authority to the list to close regulatory loopholes and block calls from certain industries, including airlines, banks and telephone companies. The FTC will start enforcing the list on October 1st. The service will block about 80% of the calls, according to the FTC. There are about 166 million residential phone numbers in the United States. The wireless industry estimates there are more than 147 million U.S. cell phone numbers. More than a dozen states with do-not-call lists plan to add their lists to the national registry this summer. According to the FTC, consumers on those lists need not register again.

Beginning in September, telemarketers will have to check the list every three months to see who doesn’t want to be called. Those who call listed people could be fined up to \$11,000 for each violation. Consumers will have to file complaints to an automated phone or online system. There are some exemptions from the list, including calls from charities, pollsters and politicians. A company also may call a person on the no-call list if that person has bought, leased or rented from the company within the past 18 months or has inquired about or applied for something during the past three months. People can register for the service by calling toll-free at 1-888-382-1222 or visiting the Website www.donotcall.gov.

Microsoft Loses Suit Over Patent

A federal court jury in Chicago recently awarded a Chicago software company and the University of California \$521 million in damages. The jury found that Microsoft’s popular Internet Explorer browser infringed on a patent. Microsoft plans to appeal the jury’s finding. Eolas Technologies of Chicago and the University of California were the only plaintiffs in the case. Obviously patents need to be respected regardless of the size and the market power of the companies involved. The Chicago company was formed in 1994 to market technology

that allows users to access interactive programs embedded in Web pages. The man who became Chairman of Eolas, Michael Doyle, along with two others, developed the technology while at the University of California-San Francisco. Eolas owns the exclusive rights to market the technology, while the university owns the patent.

Eolas and the University claimed that Microsoft made their technology part of Internet Explorer and bundled it with Windows. Microsoft contended that the patent was invalid and tried to prove that in any case it had never infringed on the patent. Microsoft said the patent described features the technology didn’t deliver. Eolas says the patent Microsoft was found to have infringed upon is the first browser system that allowed for the embedding of small interactive programs such as “plug-ins” or “applets” into Web documents. Such programs are central today to online commerce, as they power everything from banner ads to interactive customer service. The jury’s award was based on the calculation that \$1.47 a unit represented reasonable royalties for the 354 million copies of Windows sold from the time the patent was granted in November 1998 until September 2001.

I know almost nothing about patent law. However, lawyers who do this sort of work have given us some insight into this case. I understand that patent law says an idea must be considered useful, new and “non-obvious.” Many software patents, however, have been criticized in recent years as being overly broad. The Microsoft verdict, while large, is a drop in the bucket in the scheme of things for the giant company. It does show, however, that even businesses still use the courts when they have a dispute with another corporation, even if the defendant is a powerful company such as this defendant.

Dana Accuses Bank Of Conflict Of Interest

Auto parts maker Dana Corp. has sued UBS AG, accusing the investment bank of a conflict of interest in a hostile \$2.2 billion takeover bid by rival ArvinMeritor Inc. The lawsuit was filed in U.S. District Court in New York. The complaint alleges that the bank was advising ArvinMeritor at the same time it had a business relationship with Dana. An injunction is being sought by Dana to prevent UBS from advising ArvinMeritor in connection to the bid. Dana also seeks an undisclosed amount in damages and wants UBS to return all information Dana gave to the bank.

The lawsuit alleges that "UBS undertook to assist ArvinMeritor in its hostile takeover effort without any disclosure to Dana and without Dana's knowledge or consent. Rather, UBS acted secretly." UBS claims it had "a long-standing relationship with ArvinMeritor that commenced prior" to its business with Dana. ArvinMeritor, a Troy, Michigan-based supplier of shocks, struts, suspensions and exhaust systems, had offered \$15 per share in cash for all outstanding shares as part of the takeover bid of its larger competitor. ArvinMeritor had sued Toledo, Ohio-based Dana in U.S. District Court in Virginia about two weeks prior to the Dana complaint being filed, saying Dana made "material misrepresentations" in a filing explaining its rationale for rejecting the takeover bid. Dana's board had called ArvinMeritor's offer financially inadequate and a high-risk proposal not in shareholders' best interests. It recommended shareholders not tender their stock.

Wal-Mart Faces More Problems

There is a most significant lawsuit now pending against Wal-Mart. The biggest private employer in the U.S. may be about to face the world's largest employment discrimination case. On July 25th, a San Francisco federal court judge scheduled arguments on whether to certify a class of 1.5 million current

and former Wal-Mart employees in a massive sex discrimination suit. Plaintiffs claim the giant discount store chain showed a pattern of discrimination against women, preventing them from getting promotions and paying them less money than men in the same jobs. Even though Wal-Mart denies the allegations, if the plaintiffs are successful in getting a class certified, it will be a most substantial lawsuit. Wal-Mart could face the prospects of paying out billions of dollars in compensatory and punitive damages. Studies say women constitute some 70% of the company's workforce, yet less than one-third of the management is female. Plaintiffs claim to have 110 sworn statements from women in 184 Wal-Marts in 30 states, plus testimony from managers and executives as well as payroll data and over a million pages of documents. A tally of pay rates purports to show the average female employee earned \$9.26 an hour in 2001, compared with \$9.55 for men. While women make up almost 90% of customer service managers, only 15% of store managers are women. The plaintiffs say that between 1975 and 1999 Wal-Mart had far fewer female managers at stores than its competitors had. Wal-Mart denies all of these allegations.

The plaintiffs must now convince the court to certify a class of this tremendous size. Wal-Mart says the plaintiffs can't meet the burden of establishing that 1.5 million current and former employees had common experiences. Wal-Mart believes a class of this size is unmanageable. The company also claims back pay and punitive damages can only reasonably be awarded based on individual claims. A ruling on class certification is expected to come this fall. The plaintiffs say they are seeking changes in the company's workforce rules, as well as some kind of monitoring to make sure the culture will stay changed. If the judge certifies this class, it will make for a most interesting case to watch unfold.

Court Backs Workers In Xerox Pension Fight

A federal appeals court has ordered Xerox Corp. to pay \$300 million to former employees whom the court determined were shortchanged when Xerox calculated lump-sum pension benefits due them when they left the company. The decision was the second in a matter of days in which a federal court backed employees over employers in cases arising from benefits payable under "cash-balance" plans. In the first case, involving International Business Machines Corp., a U.S. district judge in Illinois held that cash-balance plans illegally discriminate against older employees. Then, a three-judge panel of the U.S. Court of Appeals for the 7th Circuit in another case ruled that a lower court was correct when it held last October that Xerox was required to use a much more generous formula in calculating lump sums for some 25,000 employees than the one it did use. Xerox has said it intends to seek a rehearing.

At issue in the case is the interest formula that a company must use in computing a lump-sum payment when a worker covered by a cash-balance plan leaves. Cash-balance plans combine some features of traditional pensions and some features of plans such as 401(k)s. Under a cash-balance plan, the company credits each worker with a percentage of pay each year (pay credits) and then adds interest payments to that balance each year. At retirement, the employees get the sum of the pay and interest earnings, which can be converted into a pension but more commonly is taken as a lump sum. When a worker leaves early, his or her lump sum is computed by projecting interest payments, but no further pay credits, to age 65. That total is then discounted back to its present value at the employee's departure date, and that is the lump sum. The interest rate used in the discount calculation is specified by law. The question in the Xerox case was whether the company could use that same rate in calculating future

interest earnings for employees who left, or had to continue using the one it applied to active employees. If the interest is credited at a higher rate and the discounting is done at a lower rate, the result is a higher lump sum. That is called the “whipsaw effect” by employers.

Xerox used the same interest rate in both projecting and discounting, but that rate was lower than the interest it credited to active employees. The later decision, written by Circuit Judge Richard A. Posner, held that Xerox should have used the active employees’ rate. Under Xerox’s plan its employees “are, in short, being invited to sell their pension entitlement back to the company cheap, and that is a sale that [federal law] prohibits,” the judge wrote. “The plan conditions the employee’s right to future interest credits on the form of the distribution that he elects to take (pension at age 65 rather than lump sum now), which is precisely what the law forbids,” according to the court. Two other circuit courts have already ruled this way. Employers are actively asking Congress to change the law.

XVII. NURSING HOME UPDATE

Nursing Home Problems Persist

The number of nursing homes nationwide cited for serious patient care violations remains unacceptably high. 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 even death, according to a recent report from the General Accounting Office, Congress’ investigative arm. The report’s authors noted the severe violations that state inspectors reported between July 2000 and January 2002 represented a decline from the previous 18 months. However, government auditors declared the risks that residents face in nursing homes remain “a cause for concern.”

The government report echoes a recent investigation that found nearly three-fourths of the most severe and repeated nursing home patient care violations were clustered in a dozen states. The report also found significant weaknesses in the federal and state safety net designed to protect nursing home residents. Despite recent efforts to improve nursing home inspections, the federal auditors found that weaknesses and inconsistencies remain. 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, the report revealed that nursing home staff:

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

Pressure sores, otherwise known as decubitus ulcers, are caused by unrelieved pressure, which results in damage to underlying tissue. Pressure sores are usually located over bony areas of the body, such as elbows, heels and tailbones. In order to avoid pressure sores, a nursing home resident must be turned and repositioned on a regular basis and kept clean and dry. Pressure sores that are not treated properly normally become infected and can lead to death.

The Need For Minimum Nurse Staffing Ratios In Nursing Homes

The nursing home industry is fond of stating that their profession is one of the most highly regulated areas of business in the United States. It is true that the regulations governing the nursing home industry are voluminous. However, an overabundance of ineffective and inadequately enforced regulations does little to assure the health and welfare of our senior citizens. More specific, care-oriented regulations are needed. Unfortunately, perhaps the most important indicator of quality

care in the nursing home setting has been left unregulated by the government. While the government regulates everything from hot water temperature to the placement of fire alarms in the nursing home setting, it has failed to impose any regulations governing the minimum numbers of nurses that a nursing home may employ in the provision of care to residents. As astounding as this may sound, there is absolutely no federal regulation whatsoever governing the number of nurses or other staff that a nursing home must employ to provide care to its residents.

We have all heard stories, especially recently, that give rise to concern about the quality of care our elderly are receiving in the nursing home setting. In response to this public concern about inadequate nursing home staffing, a long-term study was conducted by the General Accounting Office and delivered to Congress. This study included analysis of data from ten states with over 5,000 nursing home facilities. The study was conducted to answer two congressional questions: (1) Is there an appropriate ratio of nursing staff to residents; and (2) Is there “substantial evidence” that there exists a relationship between levels of staff and resident outcomes. The GAO’s study “found evidence of a relationship between staffing ratios and the quality of nursing home care,” including “staffing thresholds that maximize quality outcomes.” The report also demonstrated “that there are critical staffing thresholds, below which the quality of care delivered to nursing home residents could be compromised.” The report also found other issues relevant to a consideration of the “appropriateness” of minimum staffing levels that are outlined below:

The study indicates that current nursing work force shortages do not preclude higher minimum staffing requirements, but that implementation of a staffing threshold would require substantial increases in wage rates.

There are policy alternatives to minimum nurse staffing requirements that could result in enhanced nurse

staffing resources. For example, a requirement for minimum expenditures for nursing staffing could result in similar quality improvements.

High turnover of nursing personnel can be reduced within the current environment. For example, the study indicates that there are a number of management practices that resulted in lower turnover within tight labor markets.

Nurse staffing data currently does not exist that is sufficiently accurate for consumer information and for determining compliance with any staffing requirement that might be implemented. However, it appears that this could be remedied with little additional burden to providers. There is no definitive answer on whether the cost of implementing nurse staffing ratio requirements is so high as to preclude its feasibility. Medicare expenditures are sufficient to staff at minimum levels and total national nursing home expenditures would need to increase by an estimated 8%. Ongoing work continues on this question.

Ultimately, the GAO investigators concluded, "The relationship between quality and critical minimum staffing levels was supported by case studies of individual facilities, units, and residents." However, the investigators also found that other factors affected the quality of care in conjunction with nurse staffing levels. For example, a "strong relationship was found between nursing assistant retention and several quality measures." Thus, not only maintaining sufficient numbers of nurses and nursing assistants is important, but retaining sufficient numbers of them over an extended period of time is also important. Obviously, nurses and nursing assistants who feel more connected with and loyal to a particular facility will work harder for that facility and, hopefully, the residents. The nurses and nursing assistants who have been at the facility for extended periods are also more familiar with facility protocols and the individual resident's needs. Indeed, the relationship that develops between the individual

nurses and residents is often one of the most important factors in the provision of quality care.

Unfortunately, this relationship is not afforded an opportunity to blossom in the absence of sufficient numbers of nurses and nursing assistants at the facilities. When there are not sufficient numbers of nurses and assistants to care for the residents, the staff does not have the time, or the opportunity, to develop individual relationships with their residents. The staff become overworked, rushing to get done what they can, and have no time to spend learning about or providing for the individual needs of each resident. In the end, the governmental investigators adopted a typically bureaucratic approach and made absolutely no recommendations as to specific minimum nurse staffing ratios. Indeed, the investigators state, "We do not think there is currently sufficient information upon which to base and enforce a federal requirement." This conclusion is in stark contrast to the investigators' stated findings.

The investigators do note that numerous states have their own individual requirements. For example, Georgia requires a minimum of 2.0 hours of nursing care per day per patient. This is commonly referred to as a per patient day ratio. What this number indicates is that an average resident on an average day will receive, at a minimum, approximately two hours of nursing care total. What must be recognized is that this number includes all registered nurses, licensed practical nurses and certified nursing assistants in developing this calculation. Certified nursing assistants provide the vast majority of the care in the nursing home setting. However, their numbers alone are not utilized to calculate the per patient day ratios. Thus, although the per patient day ratio calculation may average out to 2.0 hours per day, the actual hands-on care received by each resident may be vastly lower than that. Therefore, to receive an accurate reflection of the true hands-on care per day that each patient is receiving, the facility would need to subtract out the number of registered nurse and

licensed practical nurse hours each day. This would greatly decrease the per patient day care calculations. The good news is that states like Georgia at least attempt to provide a bare minimum for nurse staffing in their states. The State of Alabama, for example, provides absolutely no minimum staffing levels whatsoever, having repealed minimum levels that once were in effect. Thus, the amount of staff giving care to our elderly nursing home residents is left entirely up to individual nursing homes to determine. I can only assume that the lack of such minimum levels is the result of lobbying by the nursing home industry.

In summary, I applaud the efforts of the congressional investigators and their ultimate conclusion that minimum staffing levels would improve the quality of care that nursing home residents receive. However, I chastise these bureaucrats for failing to have the internal fortitude to make actual real world changes as a result of their findings. In typical bureaucratic fashion, they have slinked away from the difficult task of actually implementing changes necessary to effectuate the findings of their investigation. They have taken the easy way out and chosen not to act, unfortunately to the detriment of the elderly population of our nursing homes.

Administrator Scully Testifies Before Senate Finance Committee

Thomas A. Scully, Administrator of the Centers for Medicare and Medicaid Services (CMS), recently testified before the Senate Finance Committee regarding the quality of care provided by nursing homes across the nation. He testified that in 2003, about 3.5 million elderly and disabled Americans will receive care in our nation's nearly 17,000 Medicare and Medicaid certified nursing homes. These individuals use nursing homes for both long-term care and rehabilitation services. Administrator Scully noted that state and federal governments pay roughly 60% of all long-term care costs, while the residents and their families pay for 30% of

the costs. The remaining 10% of the costs is paid by a variety of sources, including long-term care insurance.

The purpose of Administrator Scully's testimony was to note changes that have resulted in the public reporting of information about the quality of care in nursing homes. He reported that a General Accounting Office report released on the date of the hearing indicated that the proportion of nursing homes nationwide with serious quality problems has declined significantly in recent months. He emphasized that for an 18-month period ending January 2002, actual harm at nursing homes was cited in one-third fewer homes, down 20% from the prior period.

The Administrator acknowledged that the improvements were due in part to a six-state pilot program that was initiated by CMS in November of 2001. This program involved the cooperation of a broad group of interested parties including consumer groups, unions, patient groups and nursing home owners. These results are promising. They are evidence of the improvements in quality of care that can result when all groups work together for the benefit of our elderly nursing home population. It is significant that tort reform and caps have nothing to do with bringing about the good results. In fact, restricting the legal rights of residents and their families would have the opposite result.

Polygraph Tests Ordered In Nursing Home Assault

According to a report in the *Arkansas Business Journal*, employees at the Dallas County Nursing Home in Arkansas are being asked to take polygraph tests in an investigation into the assault of an 81-year-old resident. As we went to the printer, the female resident remained hospitalized in critical condition. The woman had been unconscious since her attack and unable to help investigators. A nursing home employee discovered the woman's injuries about 2:30 a.m. during a routine check of her

room. The woman had last been inspected about two hours earlier.

The lady was found laying in the bed with the covers pulled up. She was "breathing funny," according to investigators. The unfortunate lady had a bloody nose. She was taken to the emergency room, where a physician determined that "she had been beaten." A back door at the nursing home was found unlocked. There were seven employees on duty at the time of the attack. It is possible that the lady had been raped, according to an Arkansas State Police investigator. It is significant that there were 31 substantiated cases of employee abuse of nursing home residents last year in Arkansas. The Dallas County Nursing Home was cited in June for "substandard quality of care" for failure to address aggression taken by residents against other patients.

Family Sues Nursing Home After Fire-Ant Death

There are at least two things we should never expect to find in a nursing home. One is maggots and the other is fire ants. We have seen the reports about maggots. Now there have also been reports of residents in nursing homes actually being attacked by swarms of fire ants. I concede that is hard to believe—but factual—and that is of great concern. Another case in Florida has been reported. The victim in that case was a gentleman named Earl Dean Griffith. Mr. Griffith enjoyed an active life of trips to the beach, traveling and watching Orlando Magic games with his wife of 51 years in their home. Mr. Griffith had surgery and had to be placed in a nursing home for rehabilitation. Now family members say the retired Illinois postal employee was helpless two years ago when fire ants swarmed his bed at the Melbourne, Florida, nursing home where he was rehabilitating. Griffith, 73, was unable to move his limbs due to complications from his surgery when the ants attacked in the early morning hours of July 26, 2001. Mr. Griffith died a day later after his body went into

shock. The Griffith family filed suit against the nursing home, Mariner Health Care of Atlantic Shores. The suit claims nursing home personnel knew there was an insect problem, but failed to notify residents or take steps to eradicate the problem. Atlanta, Georgia-based Mariner Health Care, is one of the country's largest nursing home operators. I don't believe any person would expect to find fire ants in a nursing home facility.

Another Sexual Battery Charge

A certified nursing assistant has been arrested and charged with molesting two elderly, incapacitated women at a nursing home in a neighboring state. The 51-year-old CNA was charged with sexual battery on an incapacitated elderly person who was a resident in the Quality Health Care nursing home. The 70 and 74-year-old victims, who were residents, were unable to communicate with investigators due to their complete incapacitation. This is not an uncommon event. There have been numerous media reports of such occurrences, includes some in Alabama. In fact, the report mentioned last month revealed similar occurrences as being a problem in a number of states.

Law Opens Expunged Rap Sheets

More than 70 current or prospective nursing home workers in Arkansas have been disqualified for employment in recent months because their sealed criminal convictions are being released as part of mandatory background checks. Prompted by an opinion by the Attorney General's office in March, the Arkansas State Police began including such expunged records for nursing home workers, nurses, counselors, child-care workers and others who deal with vulnerable clientele. Applicants are disqualified from such jobs if they commit certain crimes. State nursing home regulators say the additional information adds a safeguard for the elderly and disabled. So far, state regulators have discovered people with

expunged convictions for crimes such as battery, forgery and theft. Twenty-one pleaded guilty to some type of battery, and 12 had been convicted of drug crimes. "We would certainly hope that any action to better screen potential employees would enhance the protection of residents," said Carol Shockley, director of the state's Office of Long Term Care. "I just think screening is a good idea."

In 2002, Arkansas judges granted 176 expunctions of felony records and 58 expunctions of misdemeanor convictions, according to the Administrative Office of the Courts. According to Arkansas Code 16-90-903, if an expunction is approved by a judge, it means the person "shall be completely exonerated, and the record which has been expunged shall not affect any of his civil rights or liberties, unless otherwise specifically provided for by the law." In an opinion released in March, however, the Arkansas Attorney General said the laws governing hiring in certain agencies trump the confidentiality surrounding expunctions. The Arkansas State Police requested the opinion about background-check categories after seeing a June 2002 opinion issued for the Department of Education. That opinion said noncertified workers at school districts could be disqualified on the basis of expunged convictions.

The officer who heads the state police's identification division says there were people working over in some areas with "convictions that were disturbing." The only crimes that cannot be expunged are sex crimes against children. Though it rarely happens, convictions for rape, murder and violent robberies can be sealed. In the field of long-term care, the numbers suggest the new policy could affect hundreds of employees. Since 1997, about 475 people have gotten their records expunged to gain employment at one of the state's more than 200 nursing homes. If those people are still working for long-term care facilities, they likely will be discovered. State police in Arkansas are reviewing background checks they ran from April 2002 to

April 2003. Also, all nursing homes must recheck their employees over a five-year period.

XVIII. HEALTHCARE ISSUES

FDA Seeks Speedier Medical Devices Review

The Food and Drug Administration is attempting to save the time it spends reviewing certain medical devices. The hope of the agency is that guidelines and meetings with manufacturers can improve applications so that more succeed on the first try—and get reviewed a little faster. The speedup is part of the FDA's announced plan to help manufacturers submit better-quality applications. Many applications are rejected on the first try largely because FDA scientists have questions the data can't answer. Hopefully, these new guidelines will achieve the desired result. However, the FDA's role in making sure that medical devices are safe for use by the public has to remain its top priority.

More On Safer Drugs For Children

In the June issue, we discussed how drug manufacturers don't adequately study and test drugs that are prescribed for children. Before drugs can be prescribed for adults, manufacturers have to prove that they are safe and effective at the recommended doses. Despite the fact that many of these same medications are used on children, drug companies—unless they specifically market their products for pediatric use—are not required to demonstrate that their products are suitable for children or to help physicians determine the appropriate dosage. It has been pointed out by consumer groups that one obstacle to getting manufacturers to conduct such studies is the relatively small size of the pediatric market for particular medications.

Congress and the Food and Drug Administration have been working for more than two decades to devise better ways of encouraging pediatric testing of drugs. One commendable approach, part of the law since 1997, has been to offer drug companies a six-month extension on their patents if they conduct such tests. Still, nearly three-quarters of drugs children now use have not been tested for that purpose. The FDA attempted to change that in 1998 with a rule that requires companies to conduct pediatric testing of new drugs and, in situations where the FDA believes it is warranted, of medications already on the market as well. However, a federal judge overturned the so-called Pediatric Rule last year, finding that the FDA had overstepped its authority in issuing it. Now the Senate has approved a measure that would essentially write the Pediatric Rule into law. This legislation would fill an important void. It would require testing in many cases rather than making it voluntary, as with the patent extension law. In addition, it would cover a broader array of medications, including biological products, which include many cancer drugs prescribed for children. At the same time, drug-makers wouldn't be forced to conduct pediatric studies in cases where it wouldn't be logical to require that step or where it appears the product would be ineffective or unsafe for children. Hopefully, this bill will become law. The bill is backed by the American Academy of Pediatrics and an array of health and children's advocacy groups. Even the pharmaceutical industry appears to be on board now. Senator Mike DeWine (R-Ohio) introduced the measure this year. I understand that when the House of Representatives returns to work later this month, the Senate bill will be near the top of its agenda.

Post-Traumatic Stress Effects Examined

We have had several cases where problems caused by post-traumatic stress have been an important element

of damages. Damages of this kind are difficult to prove and require expert medical testimony. However, we have found that post-traumatic stress is a real problem in certain cases. We have also found that few people really understand this problem. The results of three recent studies relating to post-traumatic stress are found in the Journal of the American Medical Association. The reports “highlight the increasing appreciation of the complexity, ubiquity, and inescapability of both personal and indirect exposure to trauma and violence,” Dr. Jerome Kroll, a University of Minnesota psychiatrist, said in a JAMA editorial. The studies examined post-traumatic stress disorder, a mental dysfunction that sometimes occurs after people witness or are victimized by violence or severe accidents. Symptoms include persistent flashbacks, avoidance of things that trigger memories of the violence, and feeling emotionally numb.

About half—54%—of 638 Latin American immigrants queried in one study said they had been exposed to political violence and torture in their homelands, but few had reported that to their doctors. In addition, 26% had symptoms of post-traumatic stress disorder. The results from the study at UCLA are significant considering that Hispanics are the fastest-growing minority group in this country. In another study, researchers at Tel Aviv University questioned 512 Israeli adults in telephone surveys in April and May 2002. This followed a time of nearly incessant terrorist violence. More than half had been directly exposed to a terrorist attack or had relatives or friends who were. However, only 9% had symptoms suggesting post-traumatic stress disorder, and more than 80% said they felt optimistic about their futures. According to the study, most participants reported using coping strategies such as talking with others about the violence, faith, and seeking information on the attacks — tactics that may help explain the relatively low levels of distress.

In a separate study of 126 California sixth-graders with suspected post-trau-

matic stress, 10 sessions of school-based group therapy taught coping skills that helped substantially reduce stress symptoms. The youngsters were from two schools in East Los Angeles, an area that is economically disadvantaged. Three-quarters said they had experienced or witnessed violence involving guns or knives. After three months, youngsters who got the treatment had significantly fewer self-reported symptoms than untreated children. The initially untreated group later received 10 sessions of the same therapy, after which differences in post-traumatic stress disorder scores between the two groups disappeared. The treatment “may be a promising model for community-based programs for children who experience or witness violence,” said the researchers, led by Dr. Bradley Stein of the RAND organization in Santa Monica, California. With all of the violence in schools around the country over the past few years, it has become necessary to pay much more attention to the effects of the senseless acts of violence on the survivors. Hopefully, these studies will be of benefit in devising programs.

Overhaul Of U.S. Vaccine Strategy Urged

The Institute of Medicine (IOM) wants all Americans to get needed vaccinations. The Institute, which was created for the purpose of getting science-based advice about issues of medicine and public health, believes the government should require medical insurance to cover the shots and should provide vouchers to people without insurance. As you may know, IOM was chartered in 1970 as a component of the National Academy of Sciences. Since that time, it has provided a valuable service in carrying out its mission. The panel of medical experts made their recommendations last month. To close the gap and to assure there was no one in this country who lacked the means to pay for vaccinations would get them, was the goal. The panel wants a system designed so

that access and availability isn't something that occurs only if a child is lucky. The recommendation from the Institute urges that all private and government medical insurance cover needed vaccinations, and that the government subsidize that coverage and provide vouchers so people without insurance can get their shots.

The Centers for Disease Control and Prevention (CDC) reported recently that just 75% of the nation's toddlers are vaccinated on schedule against nine diseases for which shots are required by federal law. Coverage varies widely among states and major cities. Apparently, there are pockets of the country where far too few youngsters are up-to-date on their shots. Federal health officials have repeatedly urged communities to eliminate the disparities. Currently the federal government spends about \$1 billion annually to buy about half of childhood vaccines, which are primarily distributed through the states in programs such as Medicaid and Vaccines for Children. Additional money is also spent for some adult vaccines. There has been a sharp decline in the number of companies producing vaccines. There were more than 25 such companies supplying the U.S. market 30 years ago. Today, there are only five. That reduction in the number of companies producing vaccines has contributed to shortages of vaccines in the last couple of years. CDC has said it plans to establish a vaccine stockpile by 2006 to curtail such problems.

While most health plans already cover vaccines, the report recommended changes in federal regulations to make sure that all do, covering insured children, adults aged 65 and over and people who have health disorders that place them at higher risk for vaccine-preventable disease. Vouchers for uninsured people in those categories would allow them to obtain the same protection.

It is unclear how the changes would affect the amount of federal spending on vaccines. Most likely, it would increase because more people would be eligible for subsidized shots.

Patient Information Program

The U.S. Food and Drug Administration currently allows the private sector to dictate the content of the information patients receive at the time that prescriptions are filled. As a result, many patients are receiving incomplete and potentially misleading information because of the government's reliance on the private sector to implement a prescription drug information program. Instead, the FDA should regulate patient information leaflets as a safer alternative to the failing voluntary private-sector program. Sidney Wolfe, M.D., Director of Public Citizen's Health Research Group, told the FDA at a public hearing that the government should make some needed changes. In 1995, the FDA proposed a rule requiring the distribution of scientifically accurate and useful written information with all new and refill prescriptions, such as information about adverse effects and guidance on how to best use the drugs. The FDA had a goal that required: By 2000, 75% of patients would be receiving patient information leaflets; and, by 2006, 95% would be receiving them. A law passed by Congress in 1996 law adopted that timetable and required the private sector to design and implement the program. The FDA was mandated to accept public comments on alternative programs if the private-sector program was not working.

A new survey by Public Citizen shows that the private-sector program is not meeting the FDA's goal or the expectations of Congress. The results of the survey were made available by Public Citizen to the FDA. The survey of the quality of information accompanying 23 top-selling drugs in 2002 that are required to carry "black box" warnings found that none of the patient drug information leaflets being distributed in a Washington, D.C., pharmacy complied with the 1996 law's guidelines. These results are extremely troubling because black box warnings are the most serious type of warning the FDA can require. Further information included

in the leaflets, which had been downloaded from the National Institutes of Health's MEDLINEplus Website, was incomplete and inaccurate. It is irresponsible for the site to feature unregulated information that fails to meet minimum quality standards, and the information should be removed from the site, according to Dr. Wolfe. Although 89% of consumers are receiving some sort of information, a study conducted by the University of Wisconsin for the FDA found that none of approximately 1,300 leaflets studied for four common drugs achieved minimum goals for useful, scientifically accurate drug information. As measured by eight objective criteria, the overall usefulness of information was about 50%. Dr. Wolfe told the FDA in his testimony:

The notion that consumer drug information can be 50% useful is unfathomable. Drug information that communicates only half of what it should is misleading, and misleading drug information is potentially dangerous.

Public Citizen filed suit against the U.S. Department of Health and Human Services in February of this year because the FDA was refusing to hold a hearing on the matter. Subsequently, HHS agreed to hold a hearing. Hopefully, this hearing will be the agency's first step in the process that will culminate in FDA regulation of the leaflets. A 1999 rule gave the FDA authority to regulate information distributed with certain drugs; a minor modification of the rule could extend that authority to all drugs. The fact that even standard information is already widely distributed means that it would be no more expensive to distribute information that would help patients. Dr. Wolfe told the FDA panel:

The research has been done and the history is clear. There is no longer any legitimate argument in continuing to consider voluntary private-sector programs as a solution for providing consumers with useful, scientifically accurate written drug information. This is a failed paradigm.

We appreciate Public Citizen furnishing this information to us and we hope you will find it helpful. If you believe it is important, please contact your U.S. Senators and the Member of Congress in your district. Ask them to take action to require the FDA to do its job. If the federal government doesn't act, many in the private sector simply won't get the job done. Certainly, there is nothing in the large chain stores' history to make me believe they will voluntarily do what should be done. I do believe, however, that most neighborhood-type drug stores have pharmacists who know their customers and who want to be sure these customers are given good and proper information on the drugs they receive.

Tenet To Pay \$54 Million To Settle Probe Of Unnecessary Surgeries

Tenet Healthcare Corporation, the United States' second-largest hospital chain, will pay \$54 million to settle allegations that at least two of its doctors subjected patients to unnecessary heart operations and defrauded government insurance programs. The settlement covers heart procedures performed between 1997 and 2002 at Redding Medical Center in northern California. The money will reimburse the federal health care programs Medicare and Medicaid and the military's Tricare program that were billed, according to the U.S. Attorney's office. The \$54 million is a record for a federal medical fraud settlement involving unnecessary tests, lab reports and surgeries. As part of the settlement, Tenet and Redding Medical Center will avoid further civil or criminal charges. The two corporations agreed to change their operations. Among the measures will be a new, outside auditor to conduct random checks of Redding's cardiology program and an agreement not to perform unnecessary operations. Tenet, the hospital, and doctors still face a great number of lawsuits filed by former patients. Tenet has now agreed to cooperate in related civil and criminal probes. Federal and state

authorities launched an investigation last fall into allegations that two doctors at the Redding hospital were doing unnecessary surgeries to boost earnings.

Recently, I saw an excellent report on national television concerning Tenet's operations. FBI agents raided the offices of Dr. Chae Hyun Moon, who was director of cardiology, and Dr. Fidel Realyvasquez Jr., who was chief of cardiac surgery, after a healthy Catholic priest misdiagnosed in Redding nearly underwent triple-bypass surgery. Between July 2001 and June 2002, the two doctors were among the highest paid by Medicare in the state, both charging more than \$3.5 million to the program. The FBI said it was investigating whether they committed health care fraud, made false statements and conspired to commit fraud. The doctors allegedly performed needless catheterizations, angioplasty and open-heart surgeries. Both doctors suspended their practices in February. Dr. Moon said he couldn't get malpractice insurance and his license to practice was suspended in June. Medicare records show 167 patients treated by the physicians in a period of three and a half years died. However, it was not clear if that number was unusual based on the amount and type of operations performed. With all of the information now available, there is certainly good reason to be more than just suspicious.

While the settlement prevents further civil or criminal action against the hospital or its parent company, the same does not apply to the doctors. No charges have been filed against either Dr. Moon or Dr. Realyvasquez. The medical center, 180 miles north of Sacramento, was among Tenet's most profitable hospitals, largely because of its extensive cardiac program. If Tenet was doing what it is being accused of, they should be shut down and not merely fined.

XIX. ENVIRONMENTAL CONCERNS

Federal Judge Signs Decree For Clean-Up Of PCB Areas

U.S. District Judge U. W. Clemon has approved a proposed partial consent decree that mandates a full investigation of PCB pollution in various Calhoun County, Alabama, neighborhoods, waterways, and commercial areas. The partial consent decree, which was originally proposed by Solutia, Pharmacia, and the U.S. Environmental Protection Agency (EPA) in March of last year, encountered a firestorm of criticism from many local residents, national environmental groups, and U.S. lawmakers on Capitol Hill. The original partial consent decree was criticized for turning over a great deal of the pollution investigation to the polluters (Solutia / Monsanto / Pharmacia) and for not adequately addressing many of the pollution problems that are already known to exist. In the wake of this debate, the EPA relented and revised the consent decree to its current form.

We had been waiting for the Court to rule on this issue and now have had an opportunity to assess its impact. Judge Clemon's decision means that a consent decree has been entered and the pollution investigation and emergency response plan proposed by Solutia, Pharmacia, and the EPA has now received the approval of the Court. Work will now accelerate on a long-term investigation of the pollution and on the most urgent residential clean-ups, based on Solutia's own test results. Fortunately, Judge Clemon required that whatever is done will be under the Court's supervision. That is certainly welcomed news. It is interesting that Judge Clemon stated in his order: "Given the long and tortured history of the Monsanto PCB contamination problem in Anniston, and the cir-

cumstances surrounding the negotiations [that led to the proposed settlement] ... the possibility of collusion has not escaped the Court's attention." I don't think there is any question that this thought was foremost on Judge Clemon's mind when he ordered that the investigation and emergency residential clean-ups would be conducted under his supervision.

Judge Clemon stated in the order that he has received assurances from Solutia that the PCB site will be cleaned up promptly and that there will be "no financial limitations on the remediation and clean up costs." That too is good news for the residents of Anniston and surrounding areas. The following is some of that which will be required by the consent decree:

Solutia will submit a work plan for the expedited cleanup of residential properties that have PCB levels between one and 10 parts per billion. The plan will be reviewed by EPA and submitted for public comment. Solutia will conduct an investigation/feasibility study to determine the full extent of the pollution. EPA will conduct an assessment of all of the PCB pollution. EPA will also replace the Alabama Department of Environmental Management as the lead agency on cleanup of the waterways, landfills and floodplains. Solutia will pay \$12 million over 12 years to fund educational grants for programs for western Anniston children. The company will provide additional grants to community groups hire experts on environmental cleanup measures.

It is most significant that Judge Clemon also decided to appoint a legal expert to monitor the progress of the investigation and emergency clean-ups. I don't believe that either Solutia or the EPA really expected Judge Clemon to appoint a monitor or to retain supervisory control over the clean-up activities. This means everything required to be done under the decree will be

closely monitored, and that is good news for the residents of Calhoun County and especially those who reside in Anniston and Oxford. Unless you are familiar with what Monsanto did during the decades that it produced PCBs in its Anniston plant, I doubt that you would believe how bad the situation became before the companies were forced to take some responsibility for their wrongdoing and its consequences.

Our Pending Cases

We are continuing to prepare our cases for trial. If things go as scheduled, we are looking at an October trial date. In a move unrelated to the consent decree, we have asked Judge Clemon to reinstate Pfizer to the case. We are confident this will happen once this issue is fully briefed and considered by the Court.

XX. INSURANCE AND FINANCE UPDATE

Schiff's Insurance Observer Reports On John Hancock Financial Services

Recently, I ran across an interesting report in Schiff's Insurance Observer (SIO) on John Hancock Financial Services. In the process of securing policyholders' confidence and votes for its January 2000 demutualization, John Hancock, through a complex series of actions and omissions, deceived its policyholders into acting against their financial interests, writes Schiff's Insurance Observer. These actions and omissions are analyzed in the July 18, 2003 issue of Schiff's Insurance Observer entitled "John Hancock's CEO Should be Fired." According to Schiff's, Hancock's CEO David D'Alessandro and former-CEO Stephen Brown did not tell policyholders about a Morgan

Stanley memo that valued Hancock at more than \$26.66 to \$33.33 per share—far higher than the \$17 IPO price at which 75% of Hancock's policyholders were cashed out. The cash-out cost policyholders \$1.8 billion in lost value. Actions taken before the demutualization by D'Alessandro and Brown reportedly depressed Hancock's stock price, benefiting D'Alessandro and other insiders, who, shortly after the IPO, bought 126,950 shares with money borrowed from Hancock. Did Hancock's officers and directors know all along that Hancock was worth much more than the IPO price? If they didn't, why did D'Alessandro and others immediately borrow money from Hancock to buy stock for their own accounts, and why did Hancock subsequently spend more than \$1 billion to repurchase shares at an average price of \$35.80 per share—more than twice the IPO price?

According to Schiff's, part of D'Alessandro's compensation appears to be a flagrant violation of a law in Massachusetts, which prohibits a mutual insurer's officers and directors from being compensated for "aiding, promoting or assisting" in the mutual's conversion to a stock company. The officer received \$32.9 million in the three years following the demutualization, not counting options. Schiff's reports that despite this permanent prohibition, Hancock's Compensation Committee report stated that D'Alessandro was granted a large "incentive award" because Hancock "successfully converted to a public company." It is interesting to note that D'Alessandro's compensation increased a whopping 600% between 2000 and 2002. The Schiff article also examines insider trading by Hancock officers and directors, as well as loans to insiders.

Liberty Mutual Is Sued For Fraud Referral

A California appellate court has ruled that an insurer that allegedly maliciously reported a claimant for fraud

can be sued for malicious prosecution. Acts outside the normal claims process are not protected under workers compensation's exclusive remedy provisions, and a false accusation of fraud would not be a normal part of that process, the unanimous court held in its July 23rd ruling in *Freddie Curtis Mosby Jr. vs. Liberty Mutual Insurance Co.* In the case, Liberty Mutual stepped out of its insurer role and "took on the persona of bad cop," the court ruled. The case stems from a claim filed in 1997 by Mr. Mosby.

A falling box containing an air conditioning unit struck Mr. Mosby while he moved merchandise for a retail employer. Despite three medical reports verifying his injuries, Liberty Mutual presented the case to a District Attorney for prosecution as claims fraud and gave misleading information to prosecutors, according to the plaintiff's complaint. While prosecutors eventually filed an arrest warrant for Mr. Mosby, a judge subsequently dropped criminal charges against him. The plaintiff, an African American, also alleged racial animus by a doctor the insurer hired to examine him. Boston-based Liberty Mutual has denied any wrongful conduct. The insurer has petitioned California's Supreme Court to review the appeals court's decision. This case should be a warning to all insurance companies that use questionable tactics in order to get out of paying valid claims.

Florida AG Sues Lender's Financier

Florida's Attorney General has filed a civil complaint against Lehman Commercial Paper, Inc., alleging that the company knowingly financed predatory lending practices and enabled First Alliance Mortgage Co. to victimize approximately 1,000 Florida homeowners. According to the Attorney General's civil complaint, the Florida consumers—many of them elderly—were defrauded out of approximately \$20,000 each from late 1998 until March 2000. According to the complaint, Lehman

staff knew about First Alliance's questionable business practices. Despite this knowledge, Lehman agreed to provide First Alliance the financing that made it possible for the lender to continue its alleged predatory lending practices. The state complaint against Lehman seeks \$20 million in damages for victims, \$10 million in fines and penalties and an injunction preventing Lehman from financing those engaged in predatory lending practices in Florida.

Four Former Charter Executives Charged With Fraud

Federal prosecutors have charged four former top executives at Charter Communications with inflating revenue and subscriber figures. The effort was allegedly designed to keep investors from realizing how much business the No. 3 cable operator was losing to satellite rivals. According to a report by USA Today, the Justice Department charged former chief operating officer David Barford and former chief financial officer Kent Kalkwarf with 14 counts of mail fraud, wire fraud and conspiracy to commit wire fraud. Former senior vice president David McCall faces a count of conspiracy to commit wire fraud. Former senior vice president James Smith was charged with eight counts of wire fraud and conspiracy.

If convicted, the two officers face penalties of as much as five years in prison and a \$250,000 fine for each count. This is being touted by the Justice Department as just another step in the federal government's efforts to rebuild confidence in our market system. The Justice Department says it will use all the resources available to investigate and prosecute those corporate executives who are willing to bend the rules and cook the books. According to the indictment, \$17 million was added to revenue and cash flow numbers in 2000 through a phony ad sales deal with an unnamed set-top decoder maker. Allegedly, the company added \$20 onto the invoice price of each box. Charter held on to the cash,

however, and recorded it as an ad sale. Charter's subscriber losses in 2001 were apparently hidden, allegedly by disregarding some cancellation orders until the end of a quarter, not removing disconnected customers from the official rolls, counting as subscribers people getting service free, and making up names.

The Justice Department began its investigation in August 2002. Apparently, Charter in its corporate capacity is not a target of the criminal investigation even though the officers named have been indicted. This does not mean, however, that the company doesn't have civil liability exposure in lawsuits filed by individuals who were damaged. We are currently handling a civil lawsuit against Charter that is pending in Montgomery County Circuit Court, arising out of Charter charging customers for digital cable and not providing the service(s) being paid for. The digital cable is more costly to customers. Plaintiffs' motion for class certification will be submitted and argued on April 21, 2004.

Allstate Earnings Increase By 71%

Allstate Corp. appears to be doing pretty well financially. This year, its second-quarter net profits jumped 71% as higher revenue from recent rate increases pumped money into the coffers of the nation's No. 2 auto and home insurer. The company also boosted its guidance for the year. Net earnings were \$588 million, up from \$344 million, a year earlier. Operating income, which excludes such items as capital gains, rose 32% to 85 cents a share, handily beating Wall Street's expectations. Most businesses, in my opinion, would be pretty well pleased with an increase in profits of 71%.

The Reach Of Georgia's Predatory Lending Law Shrinks

Banks with national and state charters have joined thrifts and credit

unions in not having to comply with Georgia's Fair Lending Act, which seeks to protect mostly poor and elderly borrowers from abusive lending practices that could result in the loss of their homes. Because of recent rulings by federal regulators, the law now applies only to mortgage banks, mortgage brokers and certain other lenders licensed by the state, according to Georgia Banking Commissioner David Sorrell, whose agency enforces it. Recently, the U.S. Office of the Comptroller of the Currency exempted roughly 2,500 banks with national charters, including 62 based in Georgia, from complying with GFLA, which was enacted in 2002 and revised this year amid much controversy. The move has outraged a good number of consumer activists, who earlier this year lost their battle to retain the law's more stringent provisions. Thrifts, including 22 based in Georgia, already had been exempted from the law earlier this year by the U.S. Office of Thrift Supervision. The thrifts' exemption followed a similar move last year by the National Credit Union Administration, which supervises and insures 7,152 credit unions, including 214 in Georgia. Consumer activists, who claimed legislative changes to GFLA weakened it, criticized the comptroller's move. William Brennan, director of the Home Defense Program of the Atlanta Legal Aid Society, released the following statement: "The General Assembly sent a message that predatory lending is fine for Georgia. Now, the OCC is sending the same message. Where does this leave the victims of predatory lending? It leaves them in a vacuum." The Lieutenant Governor and a key State Senator have pledged to work hard to strengthen the law. Anti-predatory lending laws to protect citizens should be passed in Congress and in every State Legislature. Certainly, nothing should be done to undo any progress that has been made.

XXI. THE CONSUMER CORNER

Consumers Union Is No Goliath

I was reminded recently of the frivolous lawsuit that Suzuki, a 125 billion dollar company, filed against Consumers Union, the publisher of "Consumer Reports." The suit began in 1996 when Suzuki claimed that one of its automobiles, the Suzuki Samurai, was disparaged by Consumers Union. Consumers Union didn't disparage the Suzuki Samurai—it simply reported the results of its independent testing. Specifically, Consumers Union deemed the Suzuki Samurai "Not Acceptable" because of the risk of rollover. I have a great deal of respect and admiration for Consumers Union and the work they do. Since 1936, Consumers Union has published what most consider to be the objective, unbiased, accurate results of their consumer-product testing. Their sole mission, in my opinion, is to tell consumers which products were found to be effective, reliable, and safe—and also those which were not. In 1988, Consumers Union published the results of tests for 4 SUVs, including the Suzuki Samurai. Consumers Union reported that the Suzuki had tipped up severely on two wheels on the emergency-avoidance-maneuver course. A report on this testing was published and the Samurai was judged "not acceptable" because of the risk of rollover. As mentioned above, Suzuki filed suit for "product disparagement." A federal district court judge dismissed the case. On appeal, by a vote of 13 to 11, the case was returned to the trial court for further proceedings. Anybody who has access to the court's opinion should read it, especially the dissenting portion.

It is interesting to note that Consumers Union hasn't been the Samurai's only critic. During the 1980s, the New York Times, the Washington Post, and Off-Road Magazine, among others,

raised concerns about the vehicle's stability. Personally, I don't have a dog in this fight. However, from a safety standpoint, I am greatly concerned. I am glad that Consumers Union will fight for its constitutional right to state facts truthfully and express a considered judgment about those facts. The First Amendment will be meaningless if honest critics can be taken to court for making comments such as those concerning the vehicle in question. I certainly believe that a consumer advocate should have the right to state opinions concerning the reliability or safety of any vehicle so long as it can be done based upon facts and is not done maliciously or intentionally with a deliberate design to injure a party.

Pensacola Bank Dodges A Bullet Of Massive Size

Recently, a 50-year-old woman was given a \$48.7 million certified check by the Bank of Pensacola. She unknowingly carried this check for three days before getting a most urgent call from the bank. The reason for the call from the bank was because the check had been issued in error. To the customer's credit, the check was returned to the bank by the startled woman. A high bank official said the check was an "honest mistake" and that the customer could not have cashed it. Apparently, a bank teller entered the "check number" into the space for the "check amount" and, as a result, the customer became a very wealthy lady for a few days. When the error was discovered, the bank went to work trying to retrieve the check. It was called a "human error." In any event, it makes for an interesting story. Hopefully, the bank gave this "honest" customer a very nice reward!

The Safety Of Our Children Must Be A Top Priority

All of us consider the safety of our children a top priority or at least we certainly should do so. Often, however, we don't take all of the measures avail-

able to protect children and keep their risk of accidents and injury to a minimum. For those of you with access to a computer, I suggest you go to the Consumer Product Safety Commission Website at: www.cpsc.gov/kids/kid-safety. This is an excellent training tool for your children on child safety. There is a character named "Kidd Safety" who gives some valuable tips for parents and children. There is, for example, a list of safety tips for playground use. The CPSC does an excellent job and all of us should take advantage of what the agency has to offer.

CPSC's Recall Effectiveness Meetings

The U.S. Consumer Product Safety Commission (CPSC) is in the process of completing a series of three meetings addressing different aspects of the product recall process. The goal for these meetings was to develop concrete ideas that can be used by the CPSC to enhance future recalls. The first meeting, "Motivating Consumers to Respond to Recalls," was held on May 15, 2003 at CPSC's Bethesda, Maryland, headquarters. The format of the meeting was for invited panelists to participate in a morning brainstorming session to answer the following four questions: How can we motivate consumers to act? What campaigns/programs have motivated consumers to act? Which specific ideas from these programs could increase consumer response to product safety recalls? How do we measure whether we have motivated consumers? The afternoon session consisted of a presentation of the responses and a discussion with audience members about the results.

The second meeting, "New Tools," was held on July 25, 2003 at CPSC's Bethesda, Maryland, headquarters. The meeting focused on "tools" that manufacturers, retailers, and others are using to provide information and/or notify consumers of recalls. Invited panelists presented their current methods of notification, and audience discussion

was encouraged. The third meeting, "Measuring Recall Effectiveness," is scheduled for Tuesday, September 9, 2003, likewise at the CPSC's Bethesda, Maryland, headquarters. The meeting will focus on new methods that can be considered to provide a more complete account of recalled products. Invited panelists will present their ideas for new accounting methods, and audience discussion again will be encouraged.

XXII. RECALLS UPDATE

General Motors Recalls Several Chevrolet Vehicles

General Motors has decided that a defect which relates to motor vehicle safety exists in certain light duty pickup trucks and sport utility vehicles, 2 and 4-wheel drive. These vehicles have a condition in which the windshield wiper motor may fail. Solder joints near the wiring harness connector can crack, causing the windshield wipers to work intermittently. This condition can result in inoperative wipers, reducing a driver's visibility, and increasing the risk of a vehicle crash. Dealers will replace the wiper motor circuit board and cover. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Chevrolet at 1-800-222-1020 or GMC at 1-800-462-8782.

CPSC, Firm Announce Recall Of Kids' Sling Chair

Wal-Mart Stores, Inc. has recalled approximately 75,200 Home Trends Kiddy Sling Chairs. The small plastic bolt covers pose a choking hazard to small children. CPSC and Wal-Mart have received two reports of children removing the small covers and placing them in their mouths. No injuries have been reported. The chairs are steel

outdoor chairs with a white frame and a pink or blue sling fabric seat and back. The chairs measure about 9.5 inches in height. The seats have two small plastic covers located behind the back of the seat and two covers under the seat. These chairs were sold at Wal-Mart stores nationwide from November 2002 through May 2003 for about \$13. Consumers should remove the plastic bolt covers or return the chair to Wal-Mart for a refund. Customers may contact Wal-Mart at (800) 925-6278.

Recall Of Trampolines Announced

The U.S. Consumer Product Safety Commission has announced a recall of approximately 116,000 trampolines manufactured by Hedstrom Corp., of Pennsylvania. These trampolines were sold at department, toy, and discount stores nationwide between January 2003 and May 2003 for between \$160 and \$225 for the single trampolines, and between \$320 and \$360 for the trampolines banded together with safety enclosures. Welds on the frame of these trampolines can break during use, causing consumers to fall to the ground and suffer injuries. Hedstrom has received about 700 reports of one or more welds breaking from the trampoline frame rails during use, resulting in 10 injuries.

These are 12-foot, 13-foot, and 14-foot trampolines, which were sold separately, and also banded together with safety enclosures. They were sold under the brand names Hedstrom and NBF. The brand name is written on the warning labels found on the products. The recalled trampolines have model numbers 10136, 101366, 101442, 10146, 102369, 102949, 10321, 103217 or 10381. They also have four-digit date codes ranging from 0403 through 2103, with the last two digits always being 03. Model I.D. labels showing the model number and date code are located on one of the frame rail legs on the trampoline. Hedstrom is providing consumers with a free, in-home repair kit. Customers may call Hedstrom at

(800) 841-4351 or go to the company's Website: www.hedstrom.com and click on Customer Service.

Recall Of Toy Stacking Rings

International Playthings Inc., of New Jersey has recalled approximately 5,000 Earlyyears Bobbie Bear Stacking Rings. The plastic knobs on the rings can detach, posing a choking hazard to young children. The manufacturer has received three reports of small parts detaching from the rings. Thus far, however, no injuries have been reported. The recalled Bobbie Bear Stacking Rings have a blue and orange rounded bottom, two multicolored stacking rings, and an orange plastic bear head topper. The toy can be spun like a top, and makes a rattling sound when shaken. The toy is designed for children ages 6-24 months and has a model number of E00421, which can be found on the packaging. These toys sold at specialty toy stores nationwide from April 2002 through March 2003 for about \$10. Consumers should contact the company for instructions on how to return the toy to receive a free replacement item of similar value. Consumers may contact International Playthings at (800) 445-8347 or go to the company's Website at www.intplay.com.

XXIII. FIRM ACTIVITIES

Spotlight On Rhon E. Jones

Rhon Jones joined Beasley Allen in 1994. He began his practice with the firm in Consumer Fraud Litigation, but soon moved over to manage the Business/Environmental Litigation Division of the firm. This Division handles claims not just in the Southeast, but all over the country. Rhon graduated from Auburn University in 1986 and then attended law school at the University of Alabama, graduating in 1990. After graduation, Rhon worked as a law clerk for the U.S. District Judge Robert Varner.

Rhon has been involved in over 20 cases, or case groups, where the settlement or verdict exceeded \$1 million dollars. Thus far, he has participated in verdicts and settlements totaling more than \$100 million dollars. Rhon, a regular speaker at national, regional and state seminars, has also authored numerous articles and papers for publications including *Trial* magazine and the *Alabama Trial Lawyers Journal*. He is a member of the Board of Directors for the Janice Capilouto Center for the Deaf, which fills special needs for the hearing-impaired. The Pike County native is also a board member of the Family Sunshine Center, whose mission is to prevent domestic abuse. Rhon, his wife Deanne and their three children are members of First Baptist Church in Montgomery.

Larry A. Golston Jr. Is A Hard Worker

Larry Golston works in the Business/Environmental Litigation Division as well as in the Consumer Fraud Division at Beasley Allen. Larry graduated from the University of Alabama in 1995 with a Bachelor of Arts Degree. While he was at Alabama, Larry was the social chairman of Alpha Phi Alpha Fraternity. After graduating from undergraduate school, Larry stayed at the University of Alabama for Law School and graduated in 1998. Before coming to work at Beasley Allen, Larry worked for Circuit Judge James P. Smith of the 23rd Judicial Circuit, and also for Judge Sue Bell Cobb at the Alabama Court of Criminal Appeals. While working in Business Litigation, Larry has represented entrepreneurs, investors, businesspersons and corporations in civil litigation. Currently, his primary focus is Consumer Fraud Litigation. Larry frequently volunteers his time to speak to high school and grade school students about the legal profession, personal development and how to get admitted to college. Larry is married to Danielle Golston and they have one child. They are still members of More Than Con-

querors Faith Church in Birmingham. Larry has developed a reputation as a very hard worker who gets excellent results for clients.

Roman Shaul Elected Treasurer Of Young Lawyers

Roman Shaul has been elected Treasurer of the Young Lawyers' Section of the Alabama State Bar. The Young Lawyers' Section is composed of lawyers who are 36 years of age and under or lawyers who have been admitted to the bar for 3 years or less. This area of the State Bar conducts seminars and sponsors service projects designed to assist the public in their understanding of the law. Roman practices in the Consumer Fraud Division. His areas of practice include: consumer financial services litigation, discrimination litigation, and wage & hour litigation. Along with the role of Treasurer, Roman also holds the position of Chairman of the Admissions Ceremony Committee.

Division Head Administrator Sloan Downes

Sloan Downes will be celebrating her 7-year anniversary at Beasley Allen in October. She currently works as Division Head Administrator for the Personal Injury/Products Liability Division. In this position, she assists the Division Head, Cole Portis, in the overall operations of that section. Sloan also serves as Cole's Legal Assistant, where she plays an active role in many of the Personal Injury/Products Liability cases. She grew up in Mobile, Alabama and graduated from the University of South Alabama. Sloan and her husband, Dan, are anticipating the arrival of their 3rd boy. Sloan loves to spend time with her boys, as well as swimming, gardening and reading. Sloan is a valued and well-liked employee at the firm. We are fortunate to have her.

Theresa Perkins Is A Dog Lover And That's Good

Theresa Perkins came to Beasley Allen in October of 1999. She started as Graham Esdale's Legal Assistant, a position she still holds today. Theresa works in the Personal Injury/Products Liability Division. As a Legal Assistant, Theresa spends most of her time drafting complaints and other pleadings, drafting discovery and answering discovery requests. She also spends a lot of time in trial preparation, and enjoys going to trial with Graham. Theresa has a Bachelor of Science degree in Justice and Public Safety from Auburn University at Montgomery. She has also received Legal Assistant Technician and Legal Assistant Administrator Certificates. Theresa is married to Scott Perkins, who is a probation and parole officer for the State of Alabama. They have a 19 month-old daughter, Katie Rose, who attends St. Bede Children's Center. Their black Lab, "Montana," is also a big part of their family, which is very good in my opinion.

We Encounter Missions Daily – Do We Recognize Them?

Julia Anne Beasley recently returned from a mission trip to Piedras Negras, Mexico. Julie went with the youth and college group from The Encourager Church in Houston, Texas, which was led by Ken and Karen Nelson. The mission trip focused on outreach groups to several different areas in the city. The group performed skits that had spiritual lessons, sang praise and worship songs in Spanish, gave daily testimonies and preached the Word of God in many churches. The group offered fingernail painting to the girls and haircuts for the boys, played games, and spent time with the children and their families. Here is what Julie had to say about her trip:

Each of us probably owns a camera and has many photographs of our family and friends; however, many of the people in

Mexico don't have things like cameras and other items we take for granted, such as indoor plumbing, air-conditioning, clean clothes, and plenty of food. Karen had a Polaroid camera and took many pictures of the children and their families. They were so excited to get the photograph—it was a huge gift to them. They were running toward Karen and the Polaroid camera with the biggest smiles. It was a wonderful time. Although many of us did not know their language, the Lord blessed us by allowing us to love the children and people of Mexico and that love did not need to be spoken by a Spanish word but by a hug or a smile or just by giving our time to them. Many of these families lived in 'houses' that would not be suitable for our animals and yet they were so proud of them and offered us what they had. They were desperately poor financially and in the material sense; however, they were rich spiritually and full of joy in their hearts. Here in the United States, we have so much and yet we want 'more.' It is our prayer that we learn to give up the desire for material things that can never satisfy us and replace that with the desire for a deeper relationship with God and the spiritual gifts He has in store for us. Regardless of your occupation, retirement status or background, we all encounter mission fields every day. We don't have to go to another country to see that God's missions exist all around us in our homes, in our workplace, in our neighborhoods, in our friendships, even with those we don't care to be around, in our schools, in our prisons, and in every land. We must not ignore the cries of the lost, the poor, the sick, the hungry and the thirsty. God has given each of us a mission—one that leads to His heart and one

that leads to His people. Let's pray that we ask the Lord to show us the mission fields that surround us here at home on a daily basis and those that we may take into other countries. God will show us and will equip us to minister when the opportunity arises.

Julie plans to return to Mexico and to other countries in the future. We pray that Psalms 146-147 become a reality for the Mexican children, their families, and for all people. It is good to know that our employees care enough about folks to do the Lord's work—even in other countries.

Beasley Allen Sponsors Race Car

Greg Allen suggested to me that our firm should get into the race car business. As a result, Beasley Allen, along with Grant Enfinger and his team 82 Racing, are now promoting crash safety. Grant drives the Super Late Model Beasley Allen/Miller Divers Monte Carlo that our firm and Ray Miller are jointly sponsoring. Eighteen-year-old Grant is from Fairhope, Alabama. He is a 2003 graduate of Fairhope High School and is now enrolled at the University of South Alabama. Grant hopes to combine either an engineering or business degree with his aspirations of becoming a professional race car driver. Grant began racing go-carts when he was 12 years old. At the age of 15, he moved to Legends Cars (motorcycle engine powered 5/8 scale cars capable of speeds reaching 120 mph) and won thirty-five Legends feature races. Grant also held the title of Alabama State Legends Champion in 2001 and 2002 and placed third in the 2002 National Championship Professional Division.

In 2003, Grant began racing Super Late Models, which are NASCAR type "stock" cars with a 600+ horsepower engine. He won two heat races and one feature at Mobile International Speedway. At this time, Grant is arranging a limited NASCAR ARCA race package for 2004, which will include

racing at Talladega Super Speedway. The Beasley Allen/Miller Divers Monte Carlo currently features promotion for Governor Riley's September 9th Budget Reform Package, as well as the Beasley Allen Website www.CrashSafety.com. Maybe one of these days, we will see Grant as one of the top drivers on the NASCAR circuit. He has certainly gotten off to a great start.

Former Member Of The Firm

A lawyer formerly with our firm, Wes McCollum, is presently employed as an Assistant District Attorney in Lee County. Wes recently completed the Career Prosecutor Course at the National College of District Attorneys. This course provides instruction in all areas of prosecution and is taught by some of the most experienced and accomplished prosecutors in the country. The National College of District Attorneys is located on the campus of the University of South Carolina and offers continuing legal education to lawyers practicing in all areas of prosecution. Wes is married to Bee, who happens to be my youngest daughter. Wes and Bee are the parents of Mary Grace McCollum, better known as Maggie, who will enter the 3rd grade at Yarbrough School in Auburn this fall. We are all proud of Wes' work as a prosecutor and wish him well.

XXIV. CLOSING REMARKS

A few readers have questioned why I feel so strongly about the tax and accountability plan. My answer is relatively simple. First, even though I will pay more taxes, a majority of Alabamians won't. More importantly, those who can least afford to pay taxes under the present system will pay substantially less. A "yes" vote will finally enable our state to reach an unlimited potential—one that has escaped us over the years. Finally, I am voting yes because it

is the right thing to do!

I wonder what will happen in Alabama if we all spent as much time praying in earnest for our elected officials as we do criticizing them. I know that I fall far short of my responsibilities in this regard. It is so easy to find fault in others. In fact, we work hard sometimes to find those faults. I have made a pledge to do better.

In closing, I want to mention something that has really been on my mind lately. We are in a spiritual battle in this world that is not confined to the boundaries of the United States, and many of us don't even know it. The forces of evil are bound and determined to win

this battle, which has been raging since the beginning of time but which has intensified in recent years. Never doubt that our real enemy is Satan and his hosts. Satan is real and operating at full throttle. The forces of evil are superhuman, but are not all-powerful, and that's good to know. God has more than adequate power for us and it is readily available. We need to be constantly reminded that Satan's battle against God is actually being waged against His people. The good news is that the battle against Satan has already been won. If you have any doubt, read the Book of Revelation.

VOTE YES
ALABAMA
SEPTEMBER 9th

The
**Jere Beasley
Hour**

Friday from 7am-8am

WLWI - 1440 AM

Covering the Montgomery area

The
**Jere Beasley
Show**

Thursday from 5pm-6pm

WACV - 1170 AM

and

WRJM - 93.7 FM

Covering the Montgomery area,
South Alabama, and
the Florida Panhandle

www.BeasleyAllen.com

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

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

(334) 269-2343

TOLL FREE

(800) 898-2034

TELECOPIER

(334) 954-7555

WEB PAGE

www.BeasleyAllen.com

RETURN SERVICE REQUESTED

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