

# THE JERE BEASLEY REPORT

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OCTOBER 2003

## I. CAPITOL OBSERVATIONS

### *A Battle Lost*

The crushing defeat of Amendment One on September 9th was a real surprise. I felt the vote would be a negative one, but never thought that the margin would be so great. Some have called it “a battle lost.” Others have labeled the fight as a “courageous effort.” In any event, I believed that the approval of this Amendment was crucial to the future well being of all Alabamians and I haven’t changed my opinion. The ultimate question will be “who really lost the battle?” Without question, the people have spoken clearly that they want no additional taxes and want the size of state government reduced drastically. Obviously, folks around the state haven’t been satisfied with the performance of state government in recent years. Taking all of this into account, there is usually a silver lining even in the darkest cloud. Maybe that silver lining is the simple fact that people will now get more involved in the operation of state government and will demand that some meaningful changes in the way we do business in Alabama finally take place. It isn’t enough to just be against increasing taxes—now actions must be taken that will make government operate more efficiently and hopefully much more effectively. If nothing else, the campaign brought some most

serious financial problems into focus and brought public awareness to a much higher level. It was most interesting, however, to observe the first few days of the special session. It appears that folks still want the services, but just don’t want to pay for all of them. We are going to the printer just as the session ended on September 26th. The Governor and Legislators were able to pass both budgets. Unfortunately, lots of folks are going to be hurt badly and a good number of programs will be severely damaged. The real problems were simply postponed until next year’s regular session.

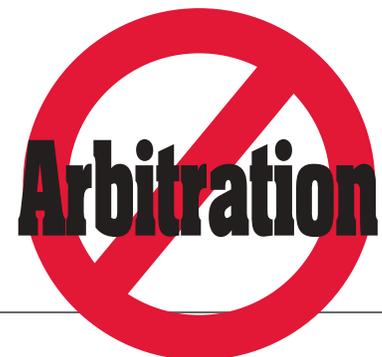
### *The Governor Recognized*

It is rather significant that *Governing Magazine*, a national publication that covers state and local government, named Governor Bob Riley its Public Official of the Year for proposing his tax and accountability plan. The Governor, who was said to have “shown rare courage and admirable leadership,” is to receive the award on November 13th in Washington and will be featured in the November issue of the magazine. This marks the 10th year that *Governing Magazine* has given its Public Official of the Year awards. The awards are given in 10 categories, ranging from city officials to governor. One governor is selected each year.

*Governing Magazine* releases a biennial assessment of state government management and performance. You may recall that Alabama got a D grade in 1999 and a C minus in 2001. In February of this year, the magazine pub-

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lished a study of state tax systems that rated Alabama's as one of the three worst in the nation, in part because of its reliance on high sales taxes and the lowest property taxes in the nation. Our Governor has established himself as someone who had the courage to address his state's financial problems. His biggest challenge now faces him with the Legislature having entered into a special session on September 15th develop workable budgets for education and the operation of state government. I admire Bob Riley for his willingness to put his political future on the line and for doing what he believed was best for Alabama. I am still convinced that his plan was a good one and sincerely hope and pray that our state won't suffer unduly in years to come because of its rejection. Regardless, I am firmly convinced that Bob Riley deserves the honor he will receive! I predict that history will prove him to have been a worthy recipient.

### ***More Tax Breaks For The Rich***

The *New York Times* reported earlier this year that Alfa Mutual Fire Insurance Company, because of a loophole in the tax code, has saved about \$58 million in federal corporate income taxes over a 3-year period. This apparently comes about due to an exemption created by Congress some 50 years ago. The loophole is said to be legal and I am sure that it is. In 1954, Congress exempted insurance companies from taxes under certain conditions. This related to the amount of premiums collected each year. However, Congress did not limit how much in assets these insurance companies could own and invest free of taxes. It appears that Alfa sets aside as reserves far more money than ever would be needed to pay claims. The company then invests that money tax-free, according to the Times article. Apparently, the law does not apply to life insurance, but covers only property and casualty. I understand that Alfa uses

its fire insurance company to get this substantial tax break. I have to wonder how many other tax breaks of this sort Alfa now enjoys.

### ***Alabama Good For Business***

With all of the talk about how bad Alabama's courts have made it for Corporate America, it is most interesting to read where Alabama is listed in the top 10 for being a "good place" for business to locate. In fact, our state is ranked as number 4, which is not too shabby. According to the report, a pro-business regulatory environment, affordable housing and a good year-round climate have combined to make Alabama a mecca for fast-growing start-ups. The report, written by Philipp Harper, used a great deal of data collected by some very talented researchers. The result of this research was Microsoft Central's list of the 10 best and 10 worst states in which to be an entrepreneur. The research came from two reports, each released in July 2002: "Small Business Survival Index 2002: Ranking the Policy Environment for Entrepreneurship Across the Nation" and "Entrepreneurial Hot Spots: The Best Places in America to Start and Grow a Company, 2001." The "Survival Index" is a product of the Small Business Survival Committee, an advocacy group based in Washington, D.C. The "Entrepreneurial Hot Spots" were identified by Cognetics, a Waltham, Mass.-based firm whose main research focus is America's fastest-growing small companies.

The Small Business Survival Committee's index identifies 20 different ways in which government imposes costs on business, and then measures the performance of the 50 states and the District of Columbia in each area. The factors being analyzed include taxes, electricity costs, workers' compensation costs, total crime rate, right-to-work laws, number of bureaucrats, and state minimum wage. Each state is assigned a numerical score in each cat-

egory, and then an aggregate score. The lower a state's total score, the friendlier it is to small business. Obviously, Alabama is most attractive to business. I have been convinced for years that the biggest drawback to our state's actually bringing new industries into the state is our system of public education, which has been underfunded for years.

This is the way the states stack up:

1. Nevada
2. Florida
3. Texas
4. Alabama
5. Virginia, Arizona (tie)
6. Tennessee
7. Colorado
8. South Carolina
9. Georgia

### ***The DOT Lawsuit***

After years of waiting, hundreds of plaintiffs in the racial discrimination lawsuit against the Alabama Department of Transportation have finally received funds. This result came about over 18 years after the suit was filed. Checks totaling \$46 million were distributed to African American plaintiffs. There were 2,500 blacks eligible to file claims. Of these, 1,800 met the filing deadline. White plaintiffs, who joined the suit after it was filed, will receive \$8.4 million. The money for black and white plaintiffs has been held in separate escrow accounts since 2001. The settlement covered back-pay claims filed by persons who worked for DOT from May 1979 to May 2001. The thing that puzzles lots of folks is the fact that a consent decree was entered in this case by the court in 1994. Many believe the case should have been over years ago. In fact, had DOT faced up to the problem when the lawsuit was first filed, it would have been resolved then. Had that been done, the state would have saved a tremendous amount of money. The decree set the procedures to be used in calculating the amount

each plaintiff will receive. Factors such as job history, experience and qualifications taken from claim forms were fed into approved computer programs that calculated individual awards. Governor Riley and Joe McInnes, DOT Director, are to be commended for putting this case on the fast track for completion.

## ***The Tri-State River Pact In Trouble***

We reported last month that the Tri-State River Pact appeared to be a sure thing. Now, Florida has thrown a monkey wrench into the process. The river-sharing agreement involving Alabama, Florida, and Georgia is now in trouble. According to the *Atlanta Journal-Constitution*, the Governors of Alabama and Georgia demanded that Florida Governor Jeb Bush keep his word, which appeared to be a reasonable request. Florida tried to add some conditions regarding flow levels of the Chattahoochee River as it crosses the Florida line into the Apalachicola River and into oyster-rich Apalachicola Bay. The states had until August 31st to either extend their negotiations or sign a deal, and neither one happened. Now, the only option is for the U.S. Supreme Court to decide the issues. In fact, Governor Jeb Bush let it be known that was his intent.

The states have debated for 5 years how to meet the water needs of metropolitan Atlanta and farming in southwest Georgia while ensuring enough still flows into the environmentally sensitive Apalachicola Bay in Florida. The Chattahoochee flows from Atlanta to Columbus, where it forms the border between Alabama and Georgia. The Flint forms south of Atlanta and flows southwest to Lake Seminole. It converges with the Chattahoochee to form the Apalachicola, which flows through the Florida Panhandle to the Apalachicola Bay, which produces 90% of Florida's oysters and 10% of the

nation's. Lots of folks don't realize how important "water issues" are for our country. This is only a small but important part of the total picture. It is hard to justify in this case how Governor Bush could go back on his agreement.

## **II. MONSANTO UPDATE**

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### ***An Historic Environmental Settlement***

After years of protracted litigation, the federal and state court Monsanto lawsuits were settled. A global settlement with a value in excess of \$700 million was reached in late August for problems related to polychlorinated biphenyl (PCB) contamination that occurred over decades in Anniston will finally be taken care of. The settled claims include those in the Alabama federal district court case, *Tolbert v. Monsanto Co.*, and the state court case, *Abernathy v. Monsanto Co.* After extended negotiations that lasted for over 12 weeks, Monsanto, Solutia Company, and Pharmacia Corp. have agreed to pay damages and fund medical and prescription benefits and community improvement programs. Pfizer, a non-party, will also contribute about \$25 million to the total package. More than 20,000 current and former Anniston residents were involved in those two civil actions. The court orders in the two cases were signed on September 9th. This gives final approval to the settlement.

This is a positive end to decades of contamination. The settlement will bring badly needed relief to residents of west Anniston and the surrounding area. This was far and away the largest settlement of a toxic torts lawsuit arising from environmental contamination in United States history. Previously, the Erin Brockovich settlement

of \$333 million was the largest. Environmental and legal experts from around the country are characterizing the global settlement as the most significant settlement ever in a case of this sort.

Company documents dating back to the 1930s revealed that Monsanto had been aware of the health hazards of PCBs for decades and failed to warn the public of the danger. Despite this knowledge, the company allowed the PCBs to be released into the air, waterways and food chain of the residents of west Anniston. It is hard to understand how the federal government and specifically the EPA could have allowed this sort of thing to go on for so many years before taking any real action. This is clear evidence of what can happen when you have weak regulation of an industry.

The settlement agreement incorporated the consent decree (or settlement agreement) entered into by the Environmental Protection Agency (EPA) involving Solutia and Pharmacia (Monsanto's successor), which now mandates a total clean-up of residential and commercial properties contaminated by PCBs. Further steps will be taken to study and remedy PCB problems in public lands and waterways in the area. Clearly, our lawsuit brought about the consent decree and actually made it much stronger. U.S. District Judge U.W. Clemon required significant modifications to the agreement making the decree much better than originally proposed. It is most important that the clean-up and remediation will now be under Chief Judge Clemon's supervision and control. That is a huge accomplishment and will assure that the clean-up and remediation jobs are done properly.

Judge Clemon and Alabama Circuit Court Judge Joel Laird announced the global settlement of the two PCB-related personal injury lawsuits brought against Monsanto Company, Pharmacia Corp. and their subsidiary

company, Solutia, Inc. in a news conference in Anniston. As part of the settlement, our federal court clients will be eligible for compensation payments administered by a court-appointed Special Master, referred to as a Settlement Administrator, from a \$300 million settlement fund. The funds to be provided for a variety of community-based projects will improve the lives of residents in the community, which was an important part of the settlement.

Lawyers who handled the federal court case were: Rhon Jones, Mark Englehart, David Byrne, Scarlett Tuley, and Larry Golston for our firm; Johnnie L. Cochran, Jr., Keith Givens, and Jock Smith for the Cochran, Cherry, Givens, & Smith firm; Bob Roden, David Shelby, Sherry Thomas, and Jodi McKelvin of Shelby, Cartee; Frank Davis, and Johnny Norris of Davis & Norris; and the firm of Burr & Forman. I was privileged to have been a part of the team.

The state case clients were represented by Donald Stewart and two out-of-state firms. The state litigation started up some 10 years ago. Donald Stewart actually commenced this fight pretty much alone over 10 years ago and is due special recognition for his valiant efforts. I was privileged to work with some good lawyers and for some fine and deserving clients. The result in the two cases will make sure that residents in west Anniston will be able to live in the future without having the fears and uncertainty of PCB contamination affecting their lives. Future generations will benefit from what happened in the two courthouses. Up until the last year, nobody in legal circles gave the two cases much chance for success. It took years of hard work, two very good judges, and the jury system to make this settlement a reality.

## ***More On The Monsanto Settlement***

The amount of money being paid by the defendants to compensate injured persons in the federal and state court cases is historic. Perhaps as important to our clients, and we believe equally historic, are the obligations that the pact imposes on non-party and pharmaceutical giant Pfizer Inc. to supply various health-related benefits to the Anniston community. Some are on a “one time basis,” while others extend for up to 20 years. Pfizer agreed reluctantly to provide these benefits in our federal case under the threat of being added as a defendant, which would have forced it to shoulder the responsibility it assumed upon recently merging with defendant Pharmacia. The Pfizer-funded benefits will address the harm to the health of our clients and other Anniston residents that was caused by decades of exposure to defendants’ PCBs.

Under our federal settlement, Pfizer must provide:

A \$2 million grant to establish or improve a community health clinic in west Anniston to serve low-income patients in Calhoun County;

A \$500,000 grant to be used to pay for medical examinations for uninsured patients in Calhoun County;

Prescription drug benefits for plaintiffs for up to 20 years, unless terminated earlier for good cause. Specifically, patients who meet certain eligibility criteria would receive, through the health clinic, free medicines, including many of Pfizer’s leading medicines that treat conditions that are particularly prevalent among poor patients. This benefit is estimated to have a value of up to \$1 million per year;

Expanded marketing and usage of the Pfizer Share Card program. This will enable low-income Medicare eligible enrollees who do not qualify for or who otherwise lack prescription drug coverage (an estimated 4,000 persons

in Calhoun County) to obtain Pfizer medicines for a \$15 co-payment per prescription. With substantial enrollment, this benefit is estimated to have a value of up to \$2.3 million per year.

In addition to the initial \$2 million medical clinic “seed grant” from Pfizer, the other defendants will pay \$2.5 million a year for each of the next 10 years to continue funding that clinic. Pfizer’s contributions – not including the \$25 million in annual payments by the other defendants — may reach as much as \$75 million over the next 20 years. Medical monitoring and resources to address health care needs have been major concerns of the Anniston community ever since awareness of PCB-related health problems first arose. Health care benefits were a critical part of our first settlement demand in this case, and we would not have agreed to settle without them.

As noted above, the settlement in our federal case also incorporated the consent decree negotiated by the EPA to recover costs of clean-up from defendants Solutia and Pharmacia. As described in earlier issues of this Report, the first proposed agreement between EPA and defendants was submitted for federal court approval shortly after a Etowah County jury in the state court cases had found Monsanto, Solutia and other defendants liable on multiple counts for decades of secretly poisoning Anniston and its residents. The timing and content of the first proposed agreement smelled of a “sweetheart deal” between defendants and the Bush Administration (some of whose high officials had ties to the defendants), designed to avoid much more stringent clean-up requirements likely to have been imposed by the state court. (For more detailed information on the circumstances surrounding the origin of the decree, go to the Website of the Environmental Working Group, a citizen organization that actively fought to bring the Anniston PCB story to light, at

www.ewg.org/reports/whitman). After EPA and defendants Solutia and Pharmacia made significant changes to the proposed agreement in response to public comments (especially criticisms) of the decree and pressure from the court, Judge Clemon approved the revised decree on August 4th of this year.

In its improved final form, the EPA consent decree addresses claims relating to costs of testing, assessment and remediation of properties within specified areas of Anniston and nearby communities. While not perfect, the important relief it provides to those residents within a defined geographic area includes the following:

- Solutia will immediately begin work on an investigation/feasibility study to determine the full extent of PCB pollution in Calhoun County;
- Solutia will carry out an expedited testing program and clean up those residential properties that have PCB levels between one and ten parts per million;
- EPA will conduct an assessment of all PCB pollution in the local waterways, landfills and floodplains;
- EPA will serve as the lead government agency overseeing the assessment and emergency and final clean-up of PCB pollution in Calhoun County;
- Solutia will pay \$12 million over 12 years to fund educational grants for programs for western Anniston children;
- Solutia will provide additional grants to local community groups and hire qualified experts on environmental clean-up measures and community revitalization.

The costs associated with just these phases of the consent decree are estimated at approximately \$51 million. Judge Clemon's ongoing oversight of the parties' performance under that decree, along with the appointment of a special Technical Special Master -

which the court insisted on as a condition of approving the decree - to advise the court on the technical aspects of the decree, are the best guarantees that EPA and the defendants will have their "feet held to the fire" and will not shirk their clean-up responsibilities to the people of Anniston and neighboring areas under the decree.

As a further part of our federal court settlement, as the lawyers for the plaintiffs, we insisted on the appointment of a "settlement administrator." This official, under the oversight of Judge Clemon, will determine what claims will be paid, which plaintiffs will be entitled to be paid, and how much each person will receive out of the federal court settlement fund. With only two specific exceptions, all expenses related to administration of the settlement fund - including the costs of hiring persons with specialized expertise to help set up the settlement "matrix" - will be paid by defendants.

I am most pleased that Judge Clemon has selected as settlement administrator the Honorable Julius L. Chambers, a highly distinguished attorney in Charlotte, North Carolina. A founding partner in North Carolina's first racially-integrated law firm, Mr. Chambers has practiced law for nearly 40 years, taught at some of the United States' leading law schools, served as university chancellor of his undergraduate alma mater, acted for several years as Director-Counsel of the NAACP's Legal Defense and Educational Fund (a position previously manned by the Honorable Thurgood Marshall, later the U.S. Solicitor General and Justice of the U.S. Supreme Court), and handled numerous landmark civil rights cases in the U.S. Supreme Court. I don't think Judge Clemon could have made a better choice.

I also can't say enough about Judge Clemon's role in bringing about the settlement. With the permission of the parties, Judge Clemon actively participated in settlement talks that extended

over nearly three months, the most active such role I have ever seen a judge play. With the assistance of an outstanding mediator, Professor Eric Green of the Boston University School of Law, Judge Clemon brought to the table not only the parties in the case before him, but also the plaintiffs in the state court cases, the EPA, and Pfizer, and even enlisted the help of the circuit judge presiding over the state cases, Judge Joel Laird. Without Judge Clemon's persistence and creativity in helping to broker an agreement, I doubt very much the global settlement would have been achieved.

Both those involved in the settlement and those outside it recognized the significance of this achievement to the people of Anniston. David Baker, a state court plaintiff and the tenacious head of Anniston's grass-roots citizen group Community Against Pollution (CAP), said of the settlement: "It is an eye-opener of the community to know that Monsanto is trying to do the right thing." Shirley Baker, a federal court plaintiff and director of health issues for CAP, following a joint press conference called on the day after the agreement was reached, exclaimed that "We want to let everybody know this is a wonderful day. We are elated." And, an analyst for the Environmental Working Group remarked upon the announcement of the settlement that "This should mark the beginning of the end of Monsanto's toxic legacy in Anniston. We're sure there will be much-deserved celebration in the community tonight." We feel blessed to have been given the responsibility for helping to represent all these plaintiffs' interests, and humbled to have been part of this outcome.

### III.

## LEGISLATIVE HAPPENINGS

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### *The Special Session*

Governor Riley called the Legislature to the State House to deal with what many believed to have been a most difficult - if not impossible - task: to adequately fund public education and the operation of state government with existing revenues. A look at the budget proposed on the first day of the session revealed that it would require some real and substantial cuts in both budgets. The legislative leadership, however, decided to make the cuts less substantial and came up with revised budgets for the general fund and the Special Education Trust Fund. The session started on September 15th and ended on September 26th. Governor Riley signed both the education budget and the general fund budgets. Severe cuts were imposed on many state government functions. While this session was tough, it will be mild compared to what is in store for the Legislature next year. The present budget cuts will be insignificant in the scheme of things. Next year's budgets will really get the ax. If my information is correct, the future cuts will literally shut down many of the state agencies. We are in for some "tough times" in Alabama. The Governor and the Legislature did the very best they could under most difficult circumstances. I would rank the session a success taking everything into consideration.

### *Nursing Home Immunity Bills On Hold*

The nursing home industry saw fit not to inject their immunity bills into the special session. Had they done so, it would have been a mistake in my opinion. The Legislature has to deal

with the state budget, which is the only reason they are in Montgomery, and anything else should have been deferred to another day. Since the nursing home bosses didn't mind virtually destroying the last session, some observers had believed the bills would surface during this emergency session of the Legislature. To the nursing home bosses' credit, they did the right thing - for a change.

### IV.

## COURT WATCH

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### *Chamber Of Commerce*

The U.S. Chamber of Commerce is beating its chest and saying that it will again target the Alabama Supreme Court in next year's elections. The Chamber has bragged about its success in taking over the judicial branch of government in several states. A spokesman for the Chamber said the group won 32 out of 35 judicial races in 2000. Insiders say the Chamber hopes to raise more than \$100 million this year from Corporate America and use it to "buy" their version of "justice." It has been revealed from news reports that the Chamber has given tremendous sums of money to state-based political action groups, which in turn gave the money to judicial candidates backed by the Chamber. It is difficult to understand why the Chamber would target Alabama. The Alabama Legislature has passed nearly all of the tort reform that the Business Council and other groups requested. We were all told that this was the end of tort reform in Alabama. I understand from representatives of our local Chamber of Commerce that it does not approve of the U.S. Chamber's judicial politics. I don't believe that citizens in Alabama want any further tort reform and for that reason are probably questioning why Alabama is being targeted. With all of

the corruption that has been exposed in Corporate America and the hurt and damage that it caused, it would appear the U.S. Chamber would make that its target. Instead, they target the victims.

### *The Role of Litigation*

The role of litigation in preventing product-related injuries in this country is well documented. Without the court system, and specifically the civil jury, I am convinced that there would have been few significant developments in the evolution of product safety in the United States. If we had depended on the federal government, including Congress and NHTSA, to do the job, we would have seen little progress in this important area. If you are interested in some good information on this subject, I recommend an article published in the *Epidemiologic Review* (*Epidemiol Rev* 2003; 25:90-98). The article is written by Jon S. Vernick, Julie Samia Mair, Stephen P. Teret, and Jason W. Sapsin from John Hopkins Bloomberg School of Public Health. You can obtain copies of the article from John Hopkins by writing them at 624 North Broadway, Baltimore, Maryland 21205. You can also reach Jon S. Vernick by e-mail at [jvernick@jhsph.edu](mailto:jvernick@jhsph.edu).

### *Reflections From Jurors In The PCBs Trial*

A great deal has been written about the historic PCB settlement referred to above. A jury in Etowah County, Alabama, had been hearing state court cases for about one year when both the state and the federal cases were settled. I believe you will find the following Associated Press report concerning the thoughts of the men and women who made up this jury most interesting. In my opinion, jury service is one of the highest callings that men and women can have today. Unfortunately, many politicians fail to recognize this. The following will give you some insight on

how our jury system works and how important it is to our country.

*It's been kind of like a marriage — for better or worse, in sickness and in health, 'til death do they part. It didn't exactly take a death to part them, but it did take the conclusion of the longest-running jury trial in the state's history. A settlement has been announced that Solutia Inc. and Monsanto Co. agreed to pay \$700 million to settle claims by more than 20,000 Anniston residents over PCB contamination. The case was filed in Calhoun County in 1996, but transferred to Etowah County in July 2001 and the jury was selected in January 2002.*

*The 15 jurors still are not released from duty until the final papers are signed, Calhoun County Circuit Judge Joel Laird said. The jurors cannot talk about the case until they are released, but he did allow them to talk about the effects of the 20-month trial. The jurors, all from Etowah County, can now go back to their families and jobs on a full-time basis. The jurors collected their final checks from Etowah County Circuit Clerk Billy Yates on Friday and cleaned out the jury room that's been like home for 20 months. The last meeting of the group was emotional at times. A total of more than \$45,000 has been paid by the state to the jurors at a fee of \$10 per day and 5 cents a mile, Yates said.*

*Collections of snacks, paper plates, a cooler and a coffee maker were stacked on the large conference table that has served for many "round-table" discussions — and not just about the evidence in the trial. "We've all gained weight," Kathy Walker said. For the first several months, jurors could not even talk about the case while in the jury room, so they learned about each other. Vicki Judd's*

*daughter, Brianna, was four months old when the trial began. She celebrated her second birthday Sunday. Judd brought pictures every month to keep everyone up to date on her baby, telling stories of her first steps and her first words.*

*"On her first birthday we joked that we'd still be here when she was 2," Judd said. "We didn't have any idea that would really happen." James Neff shared the word of his wife's pregnancy and was still around when their baby daughter was born. He also lost his mother and father-in-law in the 20 months of jury duty. Rhonda Salster's son is a student at Highland School and shared her grief with the jurors when the school was destroyed by fire. "We've shared books, recipes," Salster said. "This is a life-changing experience I'll never forget. I wouldn't trade it for nothing in the world." Placing 15 strangers in the same room, day in and day out, for 20 months can be testing, said Shirley Beasley, who works in home health.*

*"We've had some good days and bad days," she said. One juror lost her job, another had a problem getting all her pay from her employer and one man was turned down for a new job because there was no way to know how long the trial would last. Some were lucky enough to have no problems at all. Joel Smith, a supervisor at Gadsden Waterworks, said he lost no pay, no money and no seniority. "I want to thank my employer for not giving me a hard time," he said. With at least one pastor in the group, it was not unusual for discussions to turn to belief in God. "It was divine intervention to bring us together," said Johnny Flenoir, who works with the Headstart program in Gadsden. "We ended up cooking, talking, we experienced sickness, death. ..." Flenoir said. "It's like a family. To put these*

*people together was not always easy every day."*

*He asked the judge for permission to go by Headstart a few minutes each day, to visit with the pre-school kids. "Don't forget to come to my homecoming," Donnie Ewing told his friends before leaving the jury room. Ewing, pastor at Lighthouse of Hope, reminded them of the date, September 21. The stress, at times, was high, but the positive outweighed the negative, most jurors said. "Through it all we persevered," said Gale Chaffin, a teacher at Job Corps. "I kept believing there was a purpose for this," she said. "I knew I had a chance to make a difference." The jurors learned a better appreciation and understanding of the judicial system. "It was a good experience," Smith said. "We probably know more about PCBs than anybody in the world."*

Persons who fail to recognize and appreciate how valuable the jury system is to the citizens of our country, have most likely never had the opportunity to serve on a jury. Many of our citizens try hard to avoid jury service when called to serve. Hopefully, the above report will help to explain why jury service is critically important and may prompt all of us to answer the call when we are called for jury duty.

## **Exxon Deals With Punitive Damages**

A few weeks ago, a federal appeals court ordered an Alaska court to reconsider a multi-billion dollar punitive damage award against ExxonMobil Corp. arising out of the Exxon Valdez oil spill. The original verdict was for \$5 billion as damages to punish Exxon for spilling 11 million gallons of crude oil in the Prince William Sound in 1989. The federal appeals court in San Francisco felt the award was excessive and sent the case back to the trial judge in

Alaska. Subsequently, the trial judge reduced the award to \$4 billion in an order entered last year. Exxon appealed again, saying the reduced figure was still too high. The same appeals court has now sent the case back to the trial judge for further consideration.

### **35 States File Amicus Brief**

Attorneys General from 35 states, including Alabama, supported by 43 state bank commissioners, have filed an amicus brief in support of Connecticut Banking Commissioner John P. Burke in a case pending in the U.S. District Court for the District of Connecticut. The case is styled, *Wachovia Bank N.A. and Wachovia Mortgage Corporation v. John P. Burke*, Civil Action No. 303 CV 070738 (JCH). Wachovia has challenged Connecticut's authority to license and supervise Wachovia Mortgage Corporation, a state-chartered mortgage lender. The case raises the issue of whether states have authority to license and regulate state-chartered non-bank subsidiaries of national banks. Wachovia claims in its suit that federal law preempts the authority of state officials to regulate their mortgage subsidiary. This presents a most important issue that affects all states. The state group's amicus brief contends that state-chartered operating subsidiaries of national banks do not possess any blanket immunity from state regulation. New York Attorney General Eliot Spitzer made this observation:

*This case is another illustration of the unrelenting efforts by federal regulators to undermine the states' ability to protect their citizens from fraudulent and deceptive corporate practices. Protecting consumers from such practices has always been a priority for state regulators, and today consumers need more protection, not less.*

This case is part of a campaign by the Comptroller of the Currency to obtain

through the courts a new body of law and a new regulatory structure to shield national banks and their non-banking subsidiaries from state law and state law enforcement. It is believed that the Comptroller's efforts will undermine our nation's long history of cooperative federalism in the regulation of financial services providers. The efforts by the federal government are dangerous for both consumers and financial institutions. State law and state law enforcement long have provided a check on abusive practices.

The courts have repeatedly upheld the authority of states to regulate state-chartered providers of financial services, particularly in the area of mortgage lending. In recently enacted federal banking laws, particularly the 1994 Riegle-Neal Banking and Branching Efficiency Act, Congress reaffirmed the states' authority to apply consumer protection laws to all financial institutions engaging in business with their citizens. In the specific field of mortgage lending, the business in which Wachovia Mortgage engages, both federal and state courts have upheld the validity of state laws designed to prevent lenders from engaging in fraud, predatory lending, redlining and other unconscionable practices.

### **Cost Of Medical Malpractice Has Not Cut Access To Care**

A study by the General Accounting Office confirms that rising medical malpractice liability insurance costs have not significantly reduced access to health care. The GAO report, "Medical Malpractice: Implications of Rising Premiums on Access to Health Care," studied the experience of physicians in nine states. Five of the states—Florida, Nevada, Pennsylvania, Mississippi and West Virginia—had reported medical malpractice coverage-related problems, while the other four—California, Colorado, Minnesota and Montana—had not. While the GAO found isolated

instances of reduced access to health care in the five problem states, it also found that "many of the reported provider actions were not substantiated or did not affect access to health care on a widespread basis."

The GAO noted that "some reports of physicians relocating to other states, retiring or closing practices were not accurate or involved relatively few physicians" in the five problem states. The report concluded that it was too early to determine the real effect of tort reform measures. However, at this point, it is quite clear that many of the myths created by the tort reformers simply aren't true. Nevertheless, this hasn't kept those in Corporate America who are financing the tort reform movement from putting out more untruths to the media and the public.

### **American Medical Association Should Notify Lawmakers About False Statements**

Eight consumer groups have called on the American Medical Association (AMA) to notify federal and state lawmakers, as well as the AMA's own membership, that it has made false statements about the impact of medical malpractice insurance problems on access to health care in the United States. The action comes in response to the GAO study mentioned above. The GAO examined the basis behind the AMA's efforts to enact severe "caps" or limits on compensation for patients injured by medical malpractice, specifically looking at whether access to health care has been affected. Based on new evidence compiled by the GAO, according to the groups' letter, "AMA and doctors' groups have misled, fabricated evidence, or, at the very least, wildly overstated their case about how these medical malpractice insurance problems have limited access to health care." Clearly, the AMA has been part of a political campaign to pressure lawmakers into severely limiting injured patients' rights.

The groups are requesting that any "AMA representative who has testified falsely before any state legislative body or Congress on any of these matters be immediately suspended and precluded from providing testimony to any government body in the future." The letter was signed by four national consumer groups: Center for Justice & Democracy, Public Citizen, U.S. Action and U.S. Public Interest Research Group; and four local groups from the five so-called "crisis" states that GAO examined: Florida Consumer Action Project, Progressive Leadership Alliance of Nevada, Citizens for Consumer Justice (Pennsylvania) and West Virginia Citizen Action. According to the groups, "GAO's findings should be of tremendous concern to the AMA leadership and to its members. It demonstrates that the AMA has abused its leadership on this issue by promoting false information to Congress, state lawmakers, the public, and to your own members: doctors who legitimately want their insurance problems solved." Thanks to the Center for Justice & Democracy for furnishing this information to our readers. Hopefully, the AMA will do the right thing and do it promptly.

### ***Failure To Preserve E-Mails Brings Criticism From Judge***

Most all businesses and many individuals now utilize e-mails on a regular basis. In litigation, it is important to ask for and get e-mail traffic from defendants. Recently, a New York federal judge castigated UnumProvident, the nation's largest provider of disability insurance, which has been accused in a class action suit of plotting to deny high-cost claims, for failing to take adequate steps to prevent the erasure of e-mails ordered preserved by a December agreement. Policyholders had sued the Chattanooga, Tennessee-based disability insurer in November for allegedly providing incentives to employees to deny claims. In discovery, the plaintiffs had sought records of the

e-mails sent in the three days following the airing of each of two television reports on UnumProvident's alleged plot: an October 13, 2002, broadcast of NBC's "Dateline" and a November 17, 2002, episode of CBS's "60 Minutes." Instead of preserving the e-mails as it agreed to do, UnumProvident limited efforts to taking a "snapshot" of the company's e-mail system between December 20 and December 23, 2002, failing to prevent the erasure of earlier e-mails stored on backup tapes. While the judge found that the company's actions to be unintentional, the court criticized UnumProvident's poor compliance with the December 27th preservation order.

### ***Judge Allows 9/11 Suits Against Airlines***

A federal judge has ruled that lawsuits can proceed against airlines, the Port Authority of New York and New Jersey and the Boeing Co. for injuries and deaths in the September 11th terrorist attacks. The 49-page ruling by U.S. District Judge Alvin Hellerstein was based on the cases of about 70 of the injured and representatives of those who died in the 2001 attacks on the World Trade Center, the Pentagon and the crash of a hijacked plane in Pennsylvania. The judge said the Port Authority, which owns the World Trade Center property, "has not shown that it will prove its defense of governmental immunity as to negligence allegations made by WTC occupants."

The defendants had argued that the lawsuits against them should be dismissed because they had no duty to anticipate and guard against deliberate and suicidal aircraft crashes into the towers. They also contend that any alleged negligence on their part was not the proximate cause of the deaths and injuries. It is most significant that the judge believed that the evidence he had seen does not support Boeing's argument that the invasion and

takeover of the cockpit by the terrorists frees it from liability. It was contended by the plaintiffs that Boeing should have designed its cockpit door to prevent hijackers from invading the cockpit. This was certainly an alternative that was available to the industry. The plaintiffs had also argued that American and United Airlines and the Port Authority were legally responsible to protect people on the ground when the hijacked aircraft smashed into the twin towers, causing them to collapse. It will be most interesting to see how these cases proceed.

### ***The Lawsuit Deadline***

Victims of the terrorist attacks had to file their lawsuits before the 2-year anniversary of September 11th expired. The State of New York extended its deadline to file wrongful-death suits in connection with the attacks until March 2004. In most states, including Alabama, wrongful-death lawsuits must be filed within 2 years from the date of death. Some lawyers believe New York's extension might be legally challenged or could apply only to residents of New York. For this reason, families from New Jersey and Pennsylvania sought to preserve their right to sue. Others likely did the same. Many of those who filed lawsuits want answers concerning what happened on and leading up to September 11th.

### ***Abuse Cases Settled For \$85 Million***

The Boston Archdiocese has agreed to pay \$85 million to settle more than 500 lawsuits from individuals who claim Roman Catholic priests abused them. To date, it is the largest known payout by a U.S. diocese to settle molestation charges. The settlement was finalized after months of negotiations. It marks a major step toward quieting the crisis that has torn at the fabric of America's fourth-largest archdiocese for nearly 2 years. Unfortunately, the scandal has spread

throughout the country and beyond. Under the terms of the agreement, victims would receive awards ranging from \$80,000 to \$300,000. The amount of awards to victims will be decided by a mediator, based on the type of sexual abuse, the duration of the abuse, and the injury they suffered. This is a sad chapter in the history of our country. There are lessons to be learned and hopefully they have been learned by all concerned.

### ***The Federal Government Can Seek Money From Implant Settlement***

A federal appellate court has ruled that the federal government can seek reimbursement for the cost of treating women with silicone breast implants under a \$4.2 billion settlement of implant claims. The U.S. Court of Appeals for the Eleventh Circuit ordered a lower court to reinstate the government's lawsuit seeking money for the cost of covering Medicare beneficiaries. The ruling stemmed from a 1995 settlement of thousands of lawsuits by women who claimed implants endangered their health or made them sick. The government sought money through the settlement for the cost of caring for women who blamed health problems on implants. The lower court dismissed the case and the government appealed. The effect of the 11th Circuit decision is that the case can now go forward. The settlement initially involved eight companies, but it now involves only Baxter International Inc., Bristol-Myers Squibb Co., 3M Co., Union Carbide Corp. and Union Carbide Chemical and Plastics Co.

## **V. CONGRESSIONAL UPDATE**

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### ***End Of Summer Recess***

Congress returns to our nation's capitol with a healthy backlog of signif-

icant legislation waiting for them. Hopefully, some of the measures backed by consumer groups will begin to move. The lingering war in Iraq, the failing economy, a rapidly rising deficit, and the upcoming presidential race will definitely have an effect on what happens in Congress. I suppose it would be asking too much to request that all members of Congress put the interests of people back home above the special interests that seem to have so much control over what happens in Washington for a change. With all of the problems facing folks in this country, it is now time for the powerful special interest groups and their lobbyists to take a back seat and let the system work. Congress needs to get down to work and consider legislation that benefits real people and not just the powerful corporate world. People don't trust the politicians, and that isn't confined to Alabama. It would help a great deal if the politicians started listening to ordinary or what some refer to as "regular" people - for a change.

### ***Seniors Still Getting The Shaft***

Many senior citizens believe that they would be better off without either of the "dueling" prescription drug plans facing Congress this fall. The plan includes a complicated set of premiums, deductibles, co-payments, and gaps in coverage. When members of Congress returned to Washington, they had to realize that something has to be done to resolve this problem. Most capitol observers believe Congress needs to come up with a compromise plan in the next two months. Refusal to solve this mounting problem will be a major factor in the presidential election next year. Obviously, there are huge risks in doing nothing, for both the President and for Republicans who lead Congress. They have promised action and haven't delivered.

Failure to reach a satisfactory agreement will cause a terrific backlash

among senior citizens and especially from the AARP membership. In spite of all the warnings, it appears that a number of GOP lawmakers will oppose any prescription drug program that costs more than \$400 billion over the next 10 years. It is difficult to understand how they can support spending hundreds of billions to occupy and rebuild Iraq, but can't find money for senior citizens in this country.

### ***The Blackout Hearings***

Congress is busy attempting to find out what caused the recent blackout that paralyzed a portion of the country, including New York City, for a considerable length of time. The first question before Congress must be whether our electric transmission system should be designed for reliability or for Enron-style power marketers. Unfortunately, the White House and certain members of Congress seek to exploit the recent blackouts by providing more large subsidies for the energy industries. Deregulating transmission, as proposed by the President and the House of Representatives, will erode reliability while providing hefty profits to an electric industry undeserving of such subsidies. If the blackout hearings are to have any merit, they must focus on how deregulation by federal and state governments has affected reliability and affordability in America's electricity markets.

Many consumer groups believe that electricity deregulation has eroded reliability by favoring the needs of power marketers over the needs of consumers. These marketers move electricity over longer geographic distances in pursuit of higher profits. The consumer groups believe consumers will benefit from decentralized, local markets. America's transmission system was designed to accommodate local electricity markets - not the large, free-wheeling trading of electricity featured under deregulation. Sending power over a much wider area strains a trans-

mission system designed to serve local utilities. It simply can't be shown that deregulation has helped consumers in local markets anywhere.

## ***The Bush Energy Plan***

Rather than require electric companies to return to their century-old obligation to re-invest in transmission, the President and the Republican leadership in the House of Representatives apparently propose increasing power prices by allowing owners of transmission lines to charge whatever price they choose. Section 16011 of the House energy bill would saddle consumers with as much as \$100 billion for the construction of new transmission lines that big energy companies are seeking. Consumers clearly don't need this sort of thing. This consumer-funded subsidy will prioritize the construction of power lines preferred by the power marketers who are intent on moving large loads of electricity that will bypass the needs of local households. The focus of the hearings should be on protecting consumers by re-evaluating the wisdom of deregulation. The President should put the needs of consumers first and make sure that Congress does its job.

## **VI. CAMPAIGN FINANCE REFORM**

### ***Supreme Court Hears Campaign Finance Case***

The U.S. Supreme Court is deciding what to do in one of the most important cases that it will hear this year. The High Court was told last month that Congress overstepped its bounds in passing legislation imposing complicated new rules intended to clean up election campaign finances. The infamous Kenneth Starr told the Court that

the law "intrudes deeply into the political life of the nation" and "in a word, goes too far." Starr, the former independent counsel who investigated President Clinton at a cost nearing \$100 million, is now serving as the lead attorney for challengers to the law. It is significant that the Justices returned early from their summer break for the first time in nearly three decades to hear arguments in this important case. Clearly, the results in this case will guide next year's campaigns. Justices closely questioned lawyers who contend the law is an unconstitutional infringement on free speech rights.

Groups as varied as the American Civil Liberties Union and the National Rifle Association are challenging the 2002 law, which bans huge, unlimited donations to political parties known as "soft money," and tightens controls on political advertising in the weeks before an election. Government lawyers were defending the law. This may well be the last chance for years to come to curb the flow of big money into national political campaigns. It probably made the walls tremble when Starr characterized the new law as "a federal intrusion on state sovereignty."

Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.), principal authors of the law under challenge, attended the session and sat side-by-side in the Court. The question before the High Court deals with First Amendment free-speech protections. It is interesting to note that the Justices spent a great deal of time dealing with the "federalism" overtures of the case. Seth Waxman, the lawyer arguing in favor of the law, made the most telling statement of all when he said:

*We have a dialectic going on here between people who want to use money to influence people in government and the institutions that need to preserve a sense of integrity and faith in the process.*

I hope and pray that the Justices who sit on our nation's highest court will do

the right thing and uphold the law in this case. The First Amendment was never intended to protect the sort of thing we have experienced on the political scene over the past several years. Confidence in government can only be restored if we "clean up" the political spending abuses.

## ***Alabama Legislature Should Act***

The Alabama Legislature should do something about our weak and totally ineffective campaign laws. The spending by opponents to the Riley Tax and Accountability Plan is clear and convincing evidence that the legislators need to rewrite the laws that govern political spending in Alabama. Millions of dollars appear to have been funneled through groups formed just for this fight, with absolutely no reporting requirements. Voters are entitled to know "who" is putting up political money so they can decide "why" they are doing it. Our election laws in Alabama are woefully inadequate and must be changed before the next elections.

As if we didn't already know how bad things are here, we were reminded again when Alabama got an "F" in a new national study that ranked our state almost at the bottom. The public's access to information about the financing of political campaigns was the subject of this study, called "Grading State Disclosure." The results gave an "F" to 17 states and ranked Alabama 47th among the 50 states. According to a report on the study, Alabama "has significant room to improve," which I believe is a gross understatement. It should be noted that only the Alabama Legislature can solve this problem. As the study pointed out, the Secretary of State's office does well considering how weak our current laws are. The voters say they don't trust politicians. Passing some meaningful campaign finance reform legislation on the local level would go a long ways toward restoring

confidence in our system of government in Alabama.

## VII. PRODUCT LIABILITY UPDATE

### ***Significant Jury Award In Alabama***

On Friday, August 30th, a jury sitting in Lamar County, Alabama, awarded a \$12 million verdict to Donna Blair, a resident of Monroe County, Mississippi, in a case involving a defective product that killed her son. This product liability lawsuit was brought in Alabama against Pro Tech Industries, Inc. for its defective cab guard. The cab guard was installed on the truck to make sure that the truck driver's load would not intrude into the cab. Instead of designing and manufacturing a cab guard that works, however, Pro Tech used poor design and fabrication and inferior welding procedures that resulted in a failure. The result was Tim Morgan's death. Pro Tech failed to do what it should have done to save money and therefore put profits over the safety of its consumers. The Pro Tech cab guard was so dangerous that the judge ruled it was defective as a matter of law. In fact, the defendant's lawyers were unable to put an expert witness on the stand to defend the improper design.

Shockingly, Pro Tech claimed and advertised that its cab guard met the minimum federal standards and provided maximum protection, even though it clearly did not. The minimum standards require the cab guard to be able to withstand one-half of the load applied uniformly across the back of the guard. Pro Tech never tested the model cab guard on this truck and that is absolutely indefensible.

Tim Morgan, the decedent, was driving a log truck for Eskeridge Trucking Company when the passenger side

wheels went off the side of the road. Before he could ease the truck back onto the road, the truck tipped over on the passenger side. This should have been a survivable accident. However, when the vehicle turned over, part of the load slid forward, hitting his Pro Tech protection device - the Pro Tech cab guard. The Pro Tech protection device failed, allowing the few logs that slid forward to press against the back of the cab, causing nearly three feet of intrusion into the occupant compartment. This should never have happened and wouldn't have if the design had been adequate.

This verdict sends a message to manufacturers of all products that safety must be a major concern. Corporations cannot put their own profits over the safety of its customers. Tim Morgan died a tragic death and one that shouldn't have happened. We have now demanded that Pro Tech recall these dangerous products and fix them before someone else is killed or severely injured. Pro Tech has sold approximately 30,000 of these guards. Each of them is very dangerous and will not protect the driver as required. There will be many more victims, such as Tim Morgan, if this product is not recalled immediately. It should be noted that the \$12 million verdict is the largest verdict on record for Lamar County, Alabama. The verdict included \$6 million in punitive damages. Our firm, along with Clatus Junkin of Junkin & Harrison in Fayette, Alabama, represented the family of the victim.

### ***Suit Settled Against GM***

The woman who received a debilitating brain injury when her van crashed into a boulder has now settled her lawsuit against General Motors Corp. We reported on the 3-week trial in Maine that ended in a mistrial in June. Now, because of this settlement, the case will not be tried again. Terms of the settlement are confidential. The

plaintiff claimed that a defective seat and seat belt in her Chevrolet Lumina were to blame for the brain injury she received in the March 2, 1999 crash. She had significant medical bills, will never again be able to hold a job, and will need care for the rest of her life.

During the trial, the jurors heard testimony from experts in car seat design, crash reconstruction and kinematics - the science of how bodies move inside vehicles during crashes. GM memos that described an internal debate between engineers and other company officials over the safety of seats like the ones in the plaintiff's van were put in evidence. Ultimately, the eight jurors were divided 4-4, resulting in a mistrial. The case had been scheduled to be tried again early in 2004.

### ***Defective Doors Cause Thousands Of Deaths Each Year***

The danger of being ejected from a vehicle is well known throughout the automobile industry. Automobile manufacturers are familiar with research and statistics revealing that the likelihood of serious injury or death is 400% greater if a vehicle occupant in a collision is ejected as opposed to being kept in the survival space (seated position) of the vehicle. It is now well settled that automobile manufacturers are required to design automobiles that are crashworthy. Crashworthiness means that a vehicle, if properly designed and manufactured, will protect the occupant from serious injury or death in a survivable collision. Accordingly, automobile manufacturers must design vehicles with safety devices such as doors, airbags, seats, seatbelts, and the like to protect occupants in the event that a collision occurs. The goal is to protect occupants from serious injury or death in collisions that are survivable. There can be no serious dispute that doors on your automobile should not spring open in a survivable wreck.

There has been a tremendous amount of research over the years to determine what types of accidents are considered survivable. Scientific studies have been done to determine the forces a human being can undergo and survive in a collision. Once that scientific data was gathered, minimum standards were put in place for the protection of the consuming public. These minimum standards promulgated by the federal government require automobile manufacturers to conduct crash tests with instrumental dummies in the vehicle to determine whether a vehicle meets certain minimum crashworthiness requirements. These dummies are used to measure the forces that a real person would experience if they were in a similar collision.

The forces involved are measured in units called "G" forces. To pass these minimum standards, the dummies' chest loads must be below 60 G's. The forces to the occupant's head are required to be below 1,000 on a scale called "The Head Injury Criteria," commonly referred to as the "HIC." The criteria are based on studies conducted by the government, the medical community and the automobile industry. This unit of measurement for the head injury criteria is based on scientific data proving that an occupant in a 30 mph offset frontal collision should be able to withstand 80 G's to the head.

Accordingly, in collisions where the forces are below 60 G's to the chest and 80 G's to the head, an occupant should survive the collision without life-threatening injuries. This is based on studies conducted by the National Highway Traffic and Safety Administration. However, many occupants are dying in collisions well below this threshold level. In many cases, doors on vehicles are opening in collisions, allowing occupants to be ejected. When an occupant is ejected, the likelihood of serious injury or death increases by at least 400%. This is because the occupant

could be run over by other vehicles or fall on the road surface where fatal head injuries are often sustained. All of this shows the need to always wear your seatbelt and make sure everyone else in the car is belted as well. While this will not assure survival without injury, the statistics clearly show that belted occupants do much better in crashes overall.

### ***Fuel-Fed Fire Claims 3 Members Of Family***

Tara Howell Parker, the wife of NASCAR driver Dale Jarrett's crew chief, and her two younger sisters were tragically killed last month in North Carolina. The three sisters were headed west on an interstate highway in a Lincoln Towncar Limousine after attending a concert. Construction and heavy traffic brought their vehicle to a stop near an overpass. That's when a Ford F-150 pickup - which Greensboro police say was driven by a drunken driver - hit the vehicle from the rear. The 1998 Lincoln's gas tank was ruptured, sparking a fiery explosion that killed all three sisters. The Lincoln had the same fuel tank design as the Ford Crown Victoria, which has been the culprit in a great number of fire related deaths. Two people in a 1997 Ford

Parker, crew chief for NASCAR's No. 88 car. Two months ago, the couple adopted a son, Jagger, and recently purchased a motor coach so they could stay together at the racetrack as a family. Her step-sister, Mysti Howell Poplin, 24, was a new mother, raising an 8-month-old daughter with her husband. The youngest was half-sister Megan Elizabeth Howell, 16, a high school junior, who was a popular student.

## **VIII. MASS TORTS UPDATE**

### ***The Powerful Pharmaceutical Industry***

It is undisputed that the pharmaceutical industry is one of the most powerful political forces in this country. Their influence over both Congress and the Federal Drug Administration is frightening. The companies have tremendous amounts of money to spend on politics and on the molding of public opinion, and they spend it freely. To give you an idea of the size of this industry, consider the following:

COMPANY	LOCATION	TOTAL SALES IN THE USA (IN BILLIONS)
Pfizer	New York	\$20.0
GlaxoSmithKline	Middlesex, England	17.9
Johnson & Johnson	New Brunswick, NJ	13.7
Merck & Co.	Whitehouse Station, NJ	13.0
AstraZeneca	London	10.8
Bristol-Myers Squibb Co.	New York	9.0
Novartis	Basel, Switzerland	8.2
Pharmacia Corp.	New York	7.5
Wyeth	Madison, NJ	7.5
Eli Lilly and Co.	Indianapolis	6.9

Escort - who became involved in the wreck after the truck pushed the limo into it - were not injured.

Parker, a 29-year-old former Miss Winston, who 2 years ago received a heart transplant, was married to Shawn

The top 10 listed above do not include such companies as Schering-Plough Corp., with sales of \$5.9 billion and Abbott Laboratories with sales of \$5.6 billion. In fact, the company listed as number 20 by IMS Health is a

company called Purdue Pharma out of Connecticut with sales of \$1.9 billion. When the average consumer is having difficulty paying the high prices of prescription drugs in this country, it is significant that the drug industry is making record profits. Voters may soon begin to wonder what is going on in Washington and demand some changes.

### ***Information About "Bad Medications"***

Many of us don't know enough about the prescription drugs we take. Most of the information we get most likely comes from "marketing" efforts by the drug company. If you are concerned about medication that you, family members or friends are taking, you should consider visiting a Website at [www.worstpills.org](http://www.worstpills.org). This Website, sponsored by consumer advocacy group Public Citizen, provides valuable information about medications and the side-effects and injuries they can cause. There are also other excellent publications put out by Public Citizen, which you will find helpful and informative. I recommend that you visit this consumer advocacy group's Website, [www.citizen.org](http://www.citizen.org). A great deal of good information on issues affecting consumers is readily available. I encourage any person who believes in consumer rights to join Public Citizen and contribute financially to their efforts.

### ***Petition To Ban Diet Drug Renewed***

Public Citizen is informing the public that the diet drug Meridia® has been associated with the deaths of 49 patients since it came on the market 5 years ago. The group has now renewed a petition to the Food and Drug Administration to have the drug banned. Public Citizen, which initially petitioned the FDA regarding Meridia® more than a year ago, supplemented its

effort with new information from the FDA "adverse event" database through the end of March. In addition to the 49 deaths, Public Citizen said 124 users have been hospitalized for serious heart and cardiovascular problems since the drug was approved. "There is no justification in continuing to market a drug that provides minimal weight reduction while increasing the likelihood of injury and death," the petition said. Many of the newly reported deaths, according to the petition, were of people younger than 50.

Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, said he had been told that the FDA is studying whether weight-loss drugs such as Meridia®, which contain amphetamine-like compounds, cause more heart and cardiovascular disease than other weight-loss medications. According to information from Dr. Wolfe, a troubling new category, which was not addressed in Public Citizen's original petition, is the impact of Meridia® on the developing fetus. Apparently, when pregnant women take the drug, the new analysis indicates a link to spontaneous abortions, stillbirths and congenital malformations, including those of the heart and central nervous system in the fetus.

After the initial Public Citizen petition was filed, the FDA began an additional review comparing adverse event reports for Meridia® and for Xenical, another major weight-loss drug that doesn't have amphetamine-like components. Abbott Laboratories, the manufacturer of Meridia®, claims the drug is safe. To the contrary, Dr. Wolfe believes this drug increases the risk of death. Public Citizen said in its petition the average weight loss announced at the drug's approval was 6-1/2 pounds after a year of taking 10 milligrams daily. The petition also said cardiovascular birth defects were reported in four babies born to women taking the drug, which are consistent with those seen in animal studies done before approval of the drug. Last year, the FDA reprimanded

Abbott for not properly reporting the deaths of patients taking Meridia®. The agency said information about seven deaths was not reported properly, one death was not reported at all, and reports on three other deaths were incomplete. Abbott has acknowledged the error, but said the problems occurred before it owned the drug, which was developed by Knoll Pharmaceuticals. This, in my opinion, is no excuse for Abbott not reporting these events to the FDA as soon as they learned about them.

Even before it approved the drug, the FDA was concerned about the safety of Meridia®. An FDA advisory committee in 1997 voted 5-4 that the benefits of the drug did not outweigh its risks. I commend Dr. Wolfe and Public Citizen for their efforts to protect consumers on health issues. Their persistence is paying dividends. At this time, no date had been set for a hearing on the petition.

### ***Serzone® Should Be Pulled From The Market***

Serzone®, an antidepressant drug manufactured by Bristol Myers Squibb Company, was first approved for marketing in 1994. Concerns over liver toxicity arose after marketing of the drug on a worldwide basis. In January 2001, Canadian officials required Bristol Myers Squibb to send a warning to physicians in that country about the liver toxicity associated with the drug. On January 8, 2002, the FDA ordered that a "black box warning" be placed on the package warning of cases of life-threatening liver failure and death that had been reported in patients treated with Serzone. In January 2003, the manufacturer withdrew Serzone from the Swedish market after the Swedish Medical Products Agency announced that liver enzyme monitoring would be required in their product label. When Bristol Myers Squibb learned that other European countries were considering similar monitoring and labeling

changes, the company withdrew Serzone® from the entire European market that same month. On March 6, 2003 Public Citizen filed a petition with the FDA to ban Serzone® in the United States, citing its dangerous propensity to cause liver damage.

On August 29, 2003, Bristol Myers Squibb announced that it was discussing the safety of Serzone with Canadian regulators, but declined to say whether it is actually on the verge of pulling the medicine from Canadian drug stores. It is significant that Serzone® has been pulled from all markets in the world except Canada, the United States and Australia. It appears that the rest of the world has stood up to the powerful drug company and questioned it about the liver toxicity associated with this drug. As a result, the company was forced to pull the drug from those markets. Why is the federal government in this country dragging its feet on this decision when people's lives are clearly at risk? What happened to the days when the FDA could be counted on to ensure that Americans are sold only the safest drugs? This episode may remind some people of the diabetes drug Rezulin® that also caused liver injuries. Rezulin® was pulled in most markets in the world almost 2-1/2 years before it was taken off the market in the United States. I have to wonder why I am surprised at the government's inaction. Surely, it can't be due to the money and influence of the powerful pharmaceutical industry. The American people deserve better than they are getting from the FDA.

### ***Diabetes Medications Can Worsen Heart Failure***

Our law firm represents thousands of individuals who have taken the drug Rezulin (Troglitazone) to treat their diabetes. Rezulin was withdrawn from the market in March 2000 following various reports concerning liver toxic-

ity. We also found that some of our clients suffered injury to their heart or a worsening of their heart condition from taking Rezulin. Risks associated with diabetes are hypertension and associated heart problems. The disease process is serious enough without introducing medications that can make a patient's heart condition even worse.

Recent government-sponsored research was published in the July 2, 2003 *Journal of the American Medical Association*. The article states that diabetes drugs Metformin (Glucophage), Rosiglitazone (Avandia), and Pioglitazone (Actos) were being prescribed inappropriately to patients with heart failure and that the inappropriate prescribing of these drugs has been increasing over time. The research was done by the National Heart Care Project, an initiative of the Centers for Medicare and Medicaid Services, to improve the quality of care for Medicare recipients hospitalized with heart failure. The study was designed to determine the extent of use of Metformin or any glitazone on patients hospitalized with heart failure who also had a diagnosis of diabetes. These medications contain some warnings about their use in patients with heart failure. However, the authors of this study concluded that the study "demonstrates that elderly, diabetic patients hospitalized with heart failure are commonly treated with antihyperglycemic (blood sugar lowering) drugs that are not recommended for patients with moderate to severe heart failure."

The pharmaceutical companies manufacturing these medications, as well as the FDA, should take action to ensure that physicians prescribing these drugs understand they can worsen a diabetic patient's heart failure. Either the physicians are ignoring the warnings or the warnings are not adequate and should be strengthened. Based on our experience, I believe the failure to provide adequate warnings by the industry is the real culprit.

### ***Baycol Class Certified In Canada***

A British Columbia Supreme Court Judge has issued an order certifying a class of "all residents of British Columbia who ingested Baycol." Justice Victoria Gray issued her reasons for certifying the class on August 25th. The court certified three common questions: (1) whether Bayer breached its duty of care; (2) whether Bayer's marketing and sales were "deceptive or unconscionable acts or practices"; and, (3) whether Bayer's marketing and sales of Baycol breached the Canadian "Competition Act." The court did not certify the issue of whether Bayer owed a duty of care to the people who ingested Baycol. Justice Gray stated that "access to justice is the overriding consideration. Only a class proceeding will put the parties on a more even footing. The cost of proving the common issues is an overwhelming deterrent to individual claims, because the potential side effects of Baycol, while serious, likely will not support individual claims." No court in the United States has certified a Baycol class as of this writing. However, there are several class actions pending, and this ruling may help attorneys for victims in this country.

### ***Federal Judge Denies Class Action Against Bayer®***

A U.S. federal judge denied class action status to several thousand lawsuits against German pharmaceutical maker Bayer over its anti-cholesterol drug Baycol. The court ruled that the cases were too diverse in issues and medical conditions to qualify as one class of plaintiffs who suffered from the use of Baycol. Bayer faces more than 11,000 lawsuits nationwide by people who used the drug before it was pulled off the market 2 years ago. About 100 deaths and 1,600 injuries worldwide have been linked to a muscle disorder caused by the drug.

Bayer said it has paid out over \$432 million to settle 1,211 lawsuits involving the drug.

### **Update On PPA Litigation**

Litigation surrounding the recalled cough, cold and appetite suppressant active ingredient Phenylpropanolamine (PPA) continues to develop and progress in both state and federal courts. Recent developments on both fronts have piqued interest and prompted many cases to be set for trial. On September 4, 2003, Judge Norman Ackerman, coordinating judge for the complex litigation center in the Court of Common Pleas of Philadelphia, Pennsylvania issued his Order and Opinion concerning defendants' attacks on plaintiffs' generic causation experts. The attack, similar to a Daubert challenge in federal court, sought to exclude critical evidence about whether PPA can cause ischemic and hemorrhagic strokes in all groups of individuals. As in the earlier challenges in federal court, defendants set out a broad-based attack on the general propositions established in the Hemorrhagic Stroke Project (The Yale Study), an industry-funded study that resulted in a published article in the *New England Journal of Medicine* in November 2000.

As we reported many months ago, the Yale study is the culmination of a large-scale, case-controlled study funded by two members of the PPA product manufacturing industry. The Yale Study was set up to investigate the possible risk of hemorrhagic stroke related to the use of PPA-containing appetite suppressant and cough/cold over-the-counter products. Industry members participated extensively in the design of the study and received periodic advanced updates on the status of the study. During the pendency of the study, statements were made by the vice-president of the Non-Prescription Drug Manufacturers Association

(an industry trade group now known as the Consumer Health Care Products Association, or CHPA), that this research was being "conducted by the manufacturers of PPA-containing weight control products to further confirm the safety of PPA."

In truth, the Food and Drug Administration had been expressing, at best, reservations over the safety of PPA since 1985, when it deferred issuing a tentative opinion on the safety and efficacy of the ingredient. At a time when other cough/cold product active ingredients - phenylephrine and pseudoephedrine - were tentatively identified as GRASE (Generally Recognized as Safe and Effective), the FDA deferred its determination as to PPA. Likewise, in 1994, when the FDA took final action to classify phenylephrine and pseudoephedrine as GRASE, the Administration again deferred ruling on PPA because of safety concerns.

The judge's ruling in the Pennsylvania court basically mirrors the ruling of another judge in a multi-district litigation proceeding in a United States District Court. Similar to the state court ruling, the prior federal court decision confirmed that "general causation" experts may testify that PPA is capable of causing ischemic and hemorrhagic (non-ischemic) strokes. With these rulings behind us, the path is now cleared for judges to start setting cases for trial in Philadelphia, and to begin the process of remanding federal cases to the local United States District Courts for the scheduling of trial dates.

Meanwhile, individual state court PPA cases are progressing to trial. Our first scheduled PPA trial is set to begin October 20, 2003 in Guilford County, North Carolina. In this tragic case a 54-year-old gentleman, with a remarkably clean medical past, ingested a generic equivalent of a popular effervescent PPA-containing cold formula. Within 24 hours, he suffered a massive intracranial hemorrhage that left him dependent upon a respirator to sustain his life.

When these measures were removed, his death was inevitable.

### **Ephedra Industry Goes Before Congress**

On and off for the last 18 months we have been reporting on the progression of the growing litigation surrounding various ephedra-containing dietary supplements and energy products, and the industry that makes them. The unfortunate death of Baltimore Orioles' pitching hopeful, Steve Bechler, caught the attention of much of society. Even Congress seemed to get the message. On July 23 and 24 of this year, the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations held hearings to investigate several key players in this industry. The validity of claims made by the makers of these very dangerous products was given close scrutiny. Other invited guests included distinguished medical experts and family members affected by these products, notably the family of Steve Bechler. The hearings demonstrated the vast distance between legitimate science and medicine on one hand, and the companies that market these dangerous products on the other.

In an interesting twist of events, two of the founding members and former executives for Metabolife International, one of the largest manufacturers of ephedra-containing products, refused to offer testimony. Instead, they asserted a Fifth Amendment right against self-incrimination, refusing to answer questions or offer prepared statements on the grounds that it may implicate criminal activity. Similarly, the testimony of various industry members underscored what we have previously reported, that this is an industry lacking any legitimate scientific basis for its product claims. It also showed that the industry is totally without any safety surveillance system. The claims of many of the industry members provoked

interesting and stinging questions from panel members.

The hearings, while not going so far as to provide a basis for removing ephedra-containing products from the market, appear to be a very good first step. The full outline of the hearing's events can be viewed at the following Website: <http://energy-commerce.house.gov/108/Hearings/07232003hearing1021/hearing.htm>, or a link can be obtained through [www.beasleyallen.com](http://www.beasleyallen.com). We continue to investigate and file ephedra-related cases involving serious and catastrophic injury.

## IX. INSURANCE AND FINANCE UPDATE

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### ***Uninsured Motorist Coverage— What Is It And Who Needs It***

I find that a number of people who have liability insurance on their vehicles don't understand all of their coverages. A prime example is uninsured motorist coverage. Uninsured and underinsured motorist coverage refers to the statute and interpretive case law that governs and attempts to solve the peculiar problems that arise when an at-fault driver causes bodily injury to another in a motor vehicle wreck, and either does not have automobile insurance or has insurance that is insufficient to fairly compensate a victim for all damages. Recognizing the havoc that is often caused by an at-fault driver, the Alabama Legislature, through statute, forced Alabama insurance companies to incorporate into their automobile policies coverage to provide the insured monetary benefits if the insured was injured by an at-fault driver who lacked automobile liability insurance or had insufficient insurance to cover all damages.

Because the statute requiring

Alabama insurance companies to incorporate uninsured/underinsured coverage into their automobile policies was not very specific, Alabama courts have been forced to interpret the meaning of particular provisions to fill gaps for issues that were not addressed in the statute. The foundation for uninsured/underinsured motorist law in Alabama is the Uninsured Motorist Act, passed in 1966, codified in the Alabama Code at § 32-7-23. This statute has been amended through the years, and in 1985 the Legislature amended the statute and in essence created what is referred to as "underinsured" motorist coverage in Alabama.

An automobile insurance company's obligation in an uninsured motorist context is generally governed by statute and the language within the policy issued by the insurance company. The uninsured motorist claimant is generally concerned with the insurance company's duty to pay under the policy. Although the insurance company has a duty in an uninsured motorist context to reasonably investigate the claim and report its findings, the problem for the claimant is that most uninsured motorist provisions only trigger the insurance company's duty to pay after the claimant has established, among other things, the fault of the uninsured motorist and the extent of the injured claimant's damages. If the insurance company disputes that the uninsured motorist was at fault or disagrees with the claimant's assessment of damages, the insurance company simply does not have to pay. If this happens, generally the claimant will have to file a lawsuit to collect his or her benefits under the policy.

Generally, the question arises when there has been a wreck with an uninsured at-fault driver, "Do I have coverage and if so, how much?" The law in Alabama requires every insurance company that issues automobile liability policies to provide uninsured/

underinsured motorist coverage in every policy that is issued in this State. According to the statute, the insurance company must include motorist coverage in every policy unless the insured rejects such coverage. Any rejection by an insured must be in writing. Even if the policy itself does not contain uninsured motorist coverage, but the person obtaining the policy does not reject the coverage, the courts in this state have interpreted that the coverage will be provided.

Anyone who purchases an automobile liability policy in this state and is the named insured under the policy will be provided uninsured/underinsured motorist coverage to the extent of the policy limits they have purchased for the particular policy. If a person is married (even if separated) and the spouse has a separate automobile insurance policy, this policy will provide coverage to the injured claimant. If at the time of the wreck the injured claimant lived with relatives or the relatives lived with the injured claimant and those relatives possessed an automobile liability insurance policy, there is potential coverage through that particular policy. Likewise, if at the time of the wreck the injured claimant was an occupant in a vehicle that was covered by an automobile liability policy that the injured party did not own, the policy that provided coverage for the vehicle would provide uninsured/underinsured motorist coverage for the injured occupant. And, if at the time of the wreck you were operating someone else's vehicle that was covered by an automobile liability insurance and you were a permissive driver or had permission to drive that person's vehicle, their policy would provide uninsured/underinsured coverage to you.

Underinsured motorist coverage, like uninsured motorist coverage, also has its peculiarities. The problem for the injured claimant is that most underinsured motorist provisions only trigger

the insurance company's duty to pay after the injured claimant has established, among other things, the fault of the underinsured motorist and the extent of the claimant's damages. Further, underinsured motorist benefits are not triggered until the injured claimant can establish that his or her damages exceed the available coverage for any applicable liability policies. In other words, an injured claimant would have to be able to prove that his damages exceeded or would expect to exceed the total amount of coverage that the at-fault driver had at the time of the wreck.

At this time, I am not aware of any new developments that may have a considerable impact on the law of uninsured and underinsured motorists. As you are aware, in May of 2000 the Alabama Legislature passed and our Governor signed a bill that required mandatory liability insurance. The Act stated that no person shall operate a motor vehicle or permit another person to operate their motor vehicle unless the vehicle is covered by a liability insurance policy, or motor vehicle liability bond, or a deposit of cash. The amount of insurance must be at least \$20,000 per person and \$40,000 per accident. These amounts refer to the policy's liability coverage. Most insurance companies will only issue uninsured or underinsured motorist coverage equal to or less than the amount of liability coverage.

I would recommend that everyone check his or her declaration sheet. This is the part of the policy that provides information concerning the various coverages afforded by the policy. Most will find that the cost of uninsured motorist coverage is relatively cheap considering the amount paid for liability coverage. I wholeheartedly recommend that if you have the minimum limits, you should increase both your liability and your uninsured motorist coverages immediately. If you don't know what your limits are, call your

insurance agent and find out. You can add as much as \$500,000 in UM coverage with most companies and up to \$1,000,000 with a few. It only takes one catastrophic car wreck with an uninsured or underinsured motorist to find out that you are inadequately covered when it comes to this type of coverage. So, I would add as much under your "UM" coverage as possible or as much as you can afford.

### ***Hyundai Settlement Thrown Out***

In November of last year, our firm filed a class action lawsuit against Hyundai Motor Company in Tennessee. We alleged that the carmaker fraudulently misrepresented the horsepower on several models of cars. Before we could even begin conducting discovery, Hyundai attempted to settle a national class action in Texas with very little value for consumers. However, the filing served to effectively stay our lawsuit. As a result, we joined with several other law firms across the country to stop what we consider to have been a "sweetheart deal" in Texas. That national class action settlement, which Hyundai tried to push through the Texas court, has now been overturned. On August 27th, a federal district court in Beaumont, Texas, set aside the class action settlement in which Hyundai had proposed to resolve a decade of horsepower misrepresentations with "coupons." After admitting to overstated horsepower affecting more than 1.3 million vehicles, Hyundai had sought to foreclose any future claims by giving "coupons" to affected car buyers.

The case arose out of Hyundai's admission in September 2002 that it had misstated horsepower by as much as 9% on over 1.3 million vehicles sold in the United States from 1991 through 2002. As its proposed solution, the car manufacturer offered extended warranties or roadside assistance to a small fraction of affected purchasers. Class action litigation ensued nationwide,

and Hyundai quickly settled the claims in Beaumont, Texas, for new car rebates or oil change coupons. The proposed settlement was entered into without the benefit of any investigation by the settling parties and before Hyundai was required to produce any documents in the other pending class actions. Class action plaintiffs nationwide, including our clients, intervened in the Beaumont lawsuit and prevailed. Now, Hyundai must turn over documents and produce its top executives for questioning under oath. This will include Hyundai's former CEO Finbarr O'Neill, who recently resigned. The investigation uncovered evidence suggesting that Hyundai deliberately overstated horsepower figures for a number of years. Moreover, it was revealed that even Hyundai's current, "corrected" horsepower numbers for some of its most popular vehicles - including the V6 models of the Tiburon, Sonata, and Santa Fe - are still significantly greater than revealed by Hyundai's own independent testing, which the company has kept secret.

Lawyers for other vehicle owners argued the "coupon settlement" was unfair and would cost Hyundai only \$6 million. The Texas judge reversed his preliminary approval, citing evidence gathered by the objection owners that might help them obtain a larger settlement. This included evidence, the judge said, that the inflated horsepower figures "were approved by high-level decision makers at Hyundai and that Hyundai's actions may have been influenced by a desire to enhance its competitive standing in the marketplace." The objecting car owners claim Hyundai's overstatement of horsepower was deliberate. Hyundai had a conscious plan to intentionally misrepresent horsepower to gain a competitive advantage in the marketplace. The class action plaintiffs requested that the court set aside the settlement based on evidence that:

*Hyundai knew that it was misstat-*

*ing horsepower. Internal communications among Hyundai executives demonstrate their concern that horsepower figures would affect competitive standing in the marketplace. Years before admitting to their "mistake," Hyundai's CEO, Finbarr O'Neil, and Hyundai's legal, public relations, and product planning departments approved the use of uncorroborated horsepower numbers. After investigation by the Korean and Canadian governments, Hyundai felt compelled to admit that its figures were inaccurate in the United States.*

*Hyundai is still misrepresenting horsepower. Before disclosing the understated numbers, Hyundai commissioned horsepower testing on four of its vehicles' engines by Southwest Research Institute ("SwRI"). SwRI was recently in the news as the Texas company that tested for NASA the devastating effects of foam on the space shuttle wing. Even though the testing sought to maximize the horsepower numbers, SwRI's findings were lower than what Hyundai now claims are "accurate" numbers. Having learned the preliminary findings, Hyundai executives directed that the final report be directed to their outside attorneys in an apparent attempt to hide the findings. Hyundai had other test results available as well to indicate that the "corrected" figures are still overstated. Hyundai has never released these findings to the public.*

*The coupon settlement is unreasonable. The proposed, abusive settlement would have given consumers coupons that could only be used to purchase new Hyundai vehicles or, in some instances, oil changes at Hyundai dealerships. This contrasts with Mazda's recent program for purchasers of its RX-8, who are being given \$500 debit cards and*

*free maintenance for similar horsepower overstatements. Additionally, the settlement would have reduced benefits available to some Hyundai owners, who have been able to negotiate cash awards by complaining to Hyundai's customer service department.*

Hyundai Motor America announced in late August that CEO Finbarr O'Neil, had resigned to take a position with Mitsubishi North America, Inc. We now plan to request a lift of the stay in Tennessee. If this is granted, we can then go forward with class certification on behalf of consumers. Now that the settlement has been set aside, we expect that Hyundai will face several class actions dealing with this subject in different states.

## **X. PREMISES LIABILITY UPDATE**

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### **Another Hot Coffee Case**

A man who said he suffered severe burns when a pot of hot coffee was spilled into his lap at a Disney restaurant 2 years ago was awarded \$668,000 by a jury. A 28-ounce pot of coffee was spilled on the 33-year-old as he dined with his wife and daughter at the Disney Polynesian Resort in 2001. The man suffered extensive blistering, as well as pigmentation changes to his genitals and groin, according to court testimony. As all of you know very well by now, in 1994, a woman was badly burned after spilling coffee from a McDonald's restaurant in New Mexico. She was subsequently awarded \$2.9 million by a jury. The award was reduced to \$640,000 on appeal and was then settled out of court. That case became the rallying cry for tort reform across the country. Unfortunately, the real facts of the case were never discussed by either the tort reformers or

the media. The fact that the lady received severe third degree burns over her body or that McDonald's made its coffee much hotter than any of its competitors, making it unreasonably hot for a drive-through window sale, was lost in the media explosion that followed the verdict. Neither was the fact that McDonald's had a number of prior claims ever discussed. The case is still being used by the tort reformers to sell their anti-consumer message.

## **XI. WORKPLACE HAZARDS**

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### **Three Persons Killed In TV Tower Collapse**

Three workmen were killed in Huntsville when a tall television tower collapsed during maintenance. The tower, which rose over 1,000 feet, including antenna, fell to the ground while the work was being done. Two workers died at the scene and the third died later at Huntsville Hospital. The three men were above the 700-foot level, adding support to the tower and putting in equipment for digital cable, when the tower buckled below them. The tower collapsed on itself before the top part fell over. The tip of the antenna landed behind the television station, which sits atop Monte Sano Mountain. SpectraSite Communications, which is located in Irving, Texas, owns the tower and employed the three workers. At press time, the cause of the accident had not been determined. An investigator from the Occupational Safety and Health Administration has already been to the site. The tower, leased to WAAY-TV, was put up in 1976.

### **Update On McWane, Inc.**

McWane, Inc., which has been criticized for a poor safety record, has been

fined \$103,500 by OSHA for safety violations. These violations were uncovered during government inspections of McWane's Anniston plant. McWane admitted to 21 serious and 3 repeat violations at the M & H Valve Fire Hydrant Plant. These violations were for lead emissions, fall hazards, material storage, operating unguarded machinery, and electrical hazards, according to OSHA. McWane's safety record has been one of the worst in the country. Nine workers were killed and another 4,000 injured since 1995 at the company's plants. OSHA issues a "serious citation" when there is a "substantial probability that death or serious physical harm could result." Hopefully, this company has seen the "light" and will work diligently to make the workplace safe for its employees.

### ***Electrocution Hazards In The Workplace***

Power line contacts account for numerous serious injuries and fatalities at jobsites. The National Institute for Occupational Safety and Health estimates an average of 411 deaths per year occur on job sites as a result of electrical contact. Tragically, all of these accidents could have been prevented had proper hazard recognition and prevention procedures been used. Many products that are regularly involved in power line contacts are not designed to protect operators and ground personnel should a power line contact occur. Products that are regularly involved in power line contacts are cranes, bucket trucks, drill rigs, forklifts, man lifts and other aerial lifts. There have been insulating devices and various types of warning devices available to manufacturers and distributors of these products for many years. Sadly, most product manufacturers choose not to equip their products with these important safety devices.

### ***Family Settles Refinery Blast Case***

The operator of a Delaware oil refinery has agreed to pay \$36.4 million to settle a lawsuit by the family of a worker killed when a tank of sulfuric acid exploded and collapsed in 2001. The 50-year-old victim, a boilermaker, was on a catwalk above the tank when it erupted at the Motiva Enterprises refinery. The worker died in a flood of leaking acid. The settlement had to be approved by a federal judge. Under the court-approved settlement, the widow will be paid \$12.9 million. The couple's five children will be paid \$2.1 million each. The balance of the settlement will go to attorney's fees and other legal costs. The company, jointly owned and operated by Saudi Refining Inc. and the Shell Oil Co., had been cited repeatedly for safety violations.

Investigators said the tank that exploded was poorly maintained and had not been designed to store spent sulfuric acid laced with hydrocarbons. A month before the accident, one inspector had recommended that it be shut down immediately and repaired. Another inspector warned in a memo: "This tank farm needs attention now!" The settlement was reached 2 weeks before the wrongful-death lawsuit was to go to trial.

The refinery has been previously fined \$296,000 for the explosion, in which six other workers were injured. The company, based in Houston, says it was committed to improving workplace safety and had worked to address the factors that contributed to this explosion. Davis was an employee of the maintenance subcontractor at the refinery. His death has prompted Delaware lawmakers to remove a cap on financial penalties for corporations convicted of criminal conduct and to pass a new law regulating above-ground chemical storage tanks.

### ***Sloss Industries Faces Fines For Safety Violations***

OSHA has issued eight citations against Sloss Industries for failing to protect its employees. The federal agency found unsafe working conditions while investigating a March 5th accident at the company's Tarrant coke plant. OSHA has proposed \$105,000 in fines. An employee lost his leg in the latest accident. The worker fell under the moving wheels of a rail car, and as a result his leg was severed. OSHA issued six serious citations against Sloss with proposed monetary penalties attached. There were also 2 repeat citations. OSHA has a responsibility to assure that employers provide safe working places for their employees. Protecting workers' safety and health must be a priority for all employers. According to OSHA, "If this company had established a policy of safe working practices and equipment maintenance programs, this accident would have been prevented."

## **XII. TRANSPORTATION**

### ***Alabama Ranked Fifth In Fatal Crashes***

Anybody who lives in Montgomery couldn't have been overly surprised at the findings from a recently released report. Red-light running has reached epidemic proportions in Alabama, according to a University of Alabama traffic analyst. In fact, Alabama ranks fifth in the nation in the number of fatal crashes caused by motorists running red lights. This is according to a 2000 ranking by the Insurance Institute for Highway Safety. Daniel S. Turner, Director of the University Transportation Center at the University of Alabama, and other researchers took the rankings one step further. They studied statistics for a 9 year period

from 1993 to 2001 and found there were 47,501 traffic crashes caused by red-light running in Alabama. The crashes resulted in 16,500 injuries and 194 deaths during that period.

I can certainly understand the magnitude of the problem. Almost every day on the way to work, I see at least 2 or 3 motorists running a red light. In fact, I can't recall a single workday this year when I failed to observe a violation of this sort. Many times the light changed to red several seconds before a vehicle "flew" through the intersection. I have learned to sit and wait until all of the vehicles come through on red before proceeding through the intersection.

Nationally, there are 200,000 crashes at red lights and 1,100 deaths each year, according to the Federal Highway Administration. The tragic result of these statistics is that some 16,000 families in Alabama have been affected because someone caused a wreck by running a red light. Clearly, traffic accidents caused by motorists running red lights are easily prevented. State laws must be strengthened. According to Dr. Turner, stronger legislation, a public awareness campaign and traffic cameras would be a start to reducing the number of red-light deaths in the state. Red-light wrecks are usually more severe because they usually result in T-bone accidents where a vehicle is hit in its least-protected side.

### ***Aviation Disasters***

Aviation disasters fall under a highly specialized area of law that involves many federal acts, regulations, treaties, and a variety of state and federal laws. Our law firm has a great deal of experience in aviation litigation and products liability litigation. We have learned that aviation disasters require a specialized knowledge of structural design and mechanical information related to the aviation industry. Although the United States may be the safest country in

which to fly, it also has the highest number of accidents in the world. Aviation law relates to accidents and incidents that occur almost on a daily basis in this country. Aviation incidents involve commercial airliners, military aircraft, and smaller civilian aircraft. Aviation law is also a mixture of products liability law that requires an expertise in the design of aircraft. Many aviation disasters occur as a result of air traffic controller negligence, maintenance or repair negligence, pilot error, and/or defectively designed aircraft.

Aviation litigation is governed, in part, by the Federal Aviation Act and regulations that set minimum standards for aircraft manufacture, pilot conduct, and flight operations. The Federal Tort Claims Act is also federal law that applies to claims brought against certain federal employees or branches of the federal government. Aviation law can also include the Foreign Sovereign Immunities Act, which governs suits against foreign airline carriers and manufacturers, as well as foreign governments. There are also a number of state and federal choice of law rules that will apply to any aviation disaster that occurs in this country or involves U.S.-based carriers. Aviation litigation also involves questions of state and federal damage standards that may apply to death cases, as well as personal injury cases, depending on the forum in which a case is brought. Certain federal and state law also applies to military contractors who manufacture military aircraft for the United States government. There may also be numerous international treaties that govern the liability of airlines for certain type flights, particularly international flights. Based upon the complexity of the law and potential claims that are available, it is imperative to seek legal advice.

Many persons don't know what to do if a family member is involved in an aviation disaster. In many cases, airlines and/or manufacturers of aircraft will

contact the survivors of an aviation disaster or their families. An insurance company representing an airline or a manufacturer may offer to settle a family's claim very quickly. An insurance company may also attempt to offer some type of "advance" to help with many of the costs faced by families as the result of a death or severe injury. Persons should not accept any of these offers or sign anything without speaking to a lawyer. In many instances, an insurance company will offer to settle a claim for an amount substantially less than the person is entitled to. Therefore, it is important to be advised of all of your legal rights and the damages you may recover in an aviation disaster.

### ***NTSB Wants Tougher Inspections***

The National Transportation Safety Board wants more thorough inspections of planes that have suddenly changed speeds because of weather, pilot error or mechanical problems. A letter was sent by NTSB to the Federal Aviation Administration saying current procedures may be inadequate. The Board recommended that the FAA require closer inspections of planes after they've been maneuvered violently and that such incidents be reported. Airplanes that have flown through extreme turbulence may not be inspected closely enough afterward for hidden structural damage, according to federal safety investigators.

The potential problem came to the safety board's attention during its investigation of American Airlines Flight 587, which crashed in Queens, New York in 2001, killing all 265 aboard. The Airbus A300-600's rudder suddenly began swerving violently, causing the tail fin to break off. As a result of that investigation, the tail fin of another American A-300 that had been severely buffeted in 1997 was reinspected. Cracks were found and it was replaced.

## **Wellstone Crash Victims Reach Settlement**

Family members of the late U.S. Senator Paul Wellstone and five other passengers killed in an October plane crash have reached a \$25 million insurance settlement with the company that operated the airplane involved. All six passengers died in the October 25th crash. This settlement will avoid the case being forced to go to court. A lawsuit was to be brought against Aviation Charter Inc. and its affiliated companies. The National Transportation Safety Board has not determined the cause of the crash. However, preliminary reports released by the safety board this spring suggested pilot error. The twin-engine Beechcraft King Air A100 crashed as it approached Eveleth-Virginia Municipal Airport en route to a funeral that Senator Wellstone planned to attend. Investigation of the crash revealed that the pilots "failed to maintain appropriate power and airspeed." It also appeared that the company was negligent in hiring, supervision, training and retention of the crew. The passenger settlements allocate a specific amount of money for the families of each victim. Trustees for each victim will disburse the money under arrangements that will be subject to court approval.

## **Ford Dealer Ordered To Pay Damages For Selling Lemon**

A used Ford Explorer sold by a Kansas City Ford dealer in 1994 for \$25,000 turned out to be a "lemon" and the case went to court. A jury returned a verdict that will require the dealership to both return the purchase money and to pay \$840,000 in punitive damages because the business "knowingly" sold the purchaser a lemon. The dealership acknowledged that the sport-utility vehicle had been wrecked and later salvaged. However, a spokesman said the business simply

made a "mistake" in selling it. The jurors heard evidence that it was "business as usual" for the dealership to sell salvaged vehicles without informing their customers. Evidence at trial revealed that the purchaser's troubles began a few months after the sale. Repairs included an engine, two transmissions and a rusted windshield frame. The purchaser testified he didn't know the Explorer was a salvaged vehicle until 1999 when he tried to trade it and saw the automobile history report. The purchaser stated that he bought from a franchise dealer so that he would be sure to get a quality car. The dealership plans to appeal the jury verdict.

## **XIII. FIRESTONE**

### **Firestone Lawsuit Settled After Mistrial**

A major lawsuit against Bridgestone/Firestone Inc. and U-Haul International Inc. in a Ford Explorer rollover case has been settled. The suit, filed by three college students injured in a 1999 crash in Texas, claimed the Firestone tires and faulty brakes on a rental trailer contributed to the wreck. One of the plaintiffs suffered brain damage in the wreck. The others alleged that Firestone and U-Haul acted with gross negligence, fraud and malice in placing defective products on the market. As expected, Firestone and U-Haul blamed the wreck on operator error. The companies claimed the three college students were impaired by marijuana, fatigued from final exams and ignored instructions for towing the rented trailer. The crash occurred June 17, 1999, as the students were en route to Bay City, about 65 miles southwest of Houston, from California, where they attended college. The Ford Explorer was towing a trailer.

The case, originally filed in Bay City, went to trial in April 2002. The court

declared a mistrial when one of Firestone's lawyers, in opening statements, violated limitations on what jurors could be told. The case was then moved to Houston on a change of venue after the plaintiff's lawyers argued publicity about the mistrial had prejudiced any future jury picked in the county where the case had been tried. The suit had been set for trial on August 25th. In April 2001, the three plaintiffs settled with Ford Motor Co., which also had been a defendant in the suit. As has been widely reported and discussed, Bridgestone/Firestone recalled millions of Wilderness tires in August 2000. It also has paid tens of millions of dollars to settle lawsuits over the tires, which federal safety officials found were prone to separate at high speeds. However, a tremendous number of meritorious cases are still pending.

### **The Multi-District Litigation**

We are still working to get our cases out of the federal district court so they can be tried back in the courts where they rightfully belong. While it has been a long and trying experience, our clients have been very patient. Certainly, they deserve their day in court. Hopefully, that will come very soon. Ford Explorer rollover accidents precipitated by detreading Firestone tires took the lives of hundreds and injured countless more before the public was finally made aware of the threat posed to their safe travel by this SUV and tire combination. It has been over 3 years since the August 2000 recall of millions of Firestone tires. Hundreds of lawsuits were filed in the United States federal courts for accidents occurring in the United States as well as accidents in foreign countries. Ford and Firestone petitioned the joint panel on Multi-District litigation to centralize discovery in one U.S. District Court. This resulted in the creation of the MDL litigation. The assignment of U.S. District Judge Sarah Evans

Barker of the Southern District of Indiana has proved to be a good one. Judge Barker, with the able assistance of U. S. Magistrate Judge Sue Shields, has managed the massive discovery effort of hundreds of lawyers gathering evidence from thousands, if not millions, of pages of documents and over a hundred witnesses. This has taken much time, as we are approaching 3 years since the MDL proceeding started.

The common discovery effort of the plaintiffs' committee is very beneficial to all the victims of Ford and Firestone's recklessness with both safety and the truth concerning their products. It will help those yet to suffer from accidents to happen in the future. However, this MDL process has been long and frustrating to those we represent, like severely brain-damaged Erika Brzobohaty, who suffers minute by minute as hours turn to days, and days into years of agony. Her brother, Andres, lost his life at age 13 in the same accident on April 18, 2000. Erika's distress is so great that she often wishes to join her brother in death. She and her family want their day in court, and we are fighting hard to get their case back to the original court in Alabama. Discovery is over in the Brzobohaty case. Now the defendants are using motion practice at the MDL level to delay remand to Alabama. The tactics include the filing of motions by Ford that should be heard by the Alabama U. S. District Judge (not the MDL court) in hopes of avoiding a trial date as long as possible. In my opinion, this is shameless conduct for those who appear to be insensitive to the suffering they continue to cause. Hopefully, this will not prove a safe harbor for long, as we push for hearings on the motions and remands. "Justice delayed is justice denied." The truth is waiting to be revealed. Once that happens, the jury will speak like a mighty wind against those building defenses on foundations of quick sand.

## XIV. THE NATIONAL SCENE

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### ***Our Country Can't Afford The Bush Deficit***

Last month, the Congressional Budget Office (CBO) forecast a federal budget deficit of \$480 billion in 2004. This is a record shortfall that many in Congress believe will go even higher. Obviously, this poses most serious problems for President Bush as he seeks re-election. In its bi-annual budget outlook, the CBO, a nonpartisan agency, also confirmed an earlier prediction of a \$401 billion deficit in 2003 and forecast a cumulative budget deficit of \$1.4 trillion over the next decade. The report comes at a very bad time for the Bush Administration. Over the past few weeks, fiscal bad news has come in droves. This has put the Bush Administration on the political defensive and it may not be able to "spin" itself out of this mess. The White House has predicted that federal budget deficits would balloon to \$455 billion this year and \$475 billion in 2004 - far above the previous record of \$290 billion reached in 1992. The bad news is - this is without factoring in the mounting cost of the U.S. occupation of Iraq. President Bush's message to the nation on Sunday, September 7th was most alarming. The cost of \$87 billion to occupy and rebuild Iraq is much more than the people were led to believe. I suspect the numbers we are getting now are low. Remember, the original cost of the Iraq War was \$79 billion. The money now being requested is on top of that.

It is impossible to explain or justify how we can run a deficit over the next decade of \$3.7 trillion. Many believe that if money from the Social Security surpluses, now being used to pay for other federal programs, is not factored

in, the decade-long deficit will be \$6.3 trillion. It is difficult to understand how, all of a sudden, we are headed in that direction. Our economy simply won't be able to tolerate such a deficit. I understand that the CBO numbers do not take into account the \$1.2 trillion that will be lost if tax cuts scheduled to expire over the next decade are made permanent. In addition, another \$87.8 billion in new tax cuts over the coming decade are being sought by the White House. This fiscal year's deficit has already exceeded the old record of \$290.4 billion set in 1992 when the current President's father was in the White House. Republicans argue that since the economy is much larger today than it was then, the budget shortfall will have less of an impact. They claim it is not a record when measured as a percentage of gross domestic product. I understand that many economists look more at the percentage of GDP than raw dollars in assessing the impact of federal budget deficits on the economy. Either way you look at it, a deficit of this size makes no sense.

Clearly, the deficits, the tax cuts, and the political reasoning behind them will be election issues next year. Recent polls haven't been very kind to President Bush, revealing a growing discontent with his handling of the economy and the budget. The deficit and the Iraq spending are being discussed all over the country and even the ultra-conservative wing of the Republican Party is feeling the heat. It doesn't take a political genius to figure out that the economy will be a key issue next year. It will definitely affect the President's re-election bid. I believe it will also spill over into congressional races.

### ***Halliburton Is Doing Even Better In Iraq Than Reported***

While the nation is suffering, Halliburton, the company formerly headed by Vice President Cheney, is doing very

well. This company won contracts worth more than \$1.7 billion under Operation Iraqi Freedom. The company now stands to make hundreds of millions more dollars under a no-bid contract awarded by the U.S. Army Corps of Engineers, according to a report in the Washington Post. Newly available documents apparently reveal that Halliburton is doing very well. It is now quite obvious that the size and scope of the government contracts awarded to Halliburton in connection with the war in Iraq are significantly greater than was previously disclosed. It points out rather clearly the U.S. military's increasing reliance on for-profit corporations to run its logistical operations. According to the Post report, independent experts estimate that as much as one-third of the monthly \$3.9 billion cost of keeping U.S. troops in Iraq is going to independent contractors. Services performed by Halliburton, through its Brown and Root subsidiary, include building and managing military bases, providing logistical support for the 1,200 intelligence officers hunting Iraqi weapons of mass destruction, delivering mail, and producing millions of hot meals. Halliburton employees and contract personnel have become an integral part of Army life in Iraq.

While we are losing military personnel in Iraq on almost a daily basis, it is disturbing to discover how some large corporations are profiting from the "war" and "the ongoing rebuilding efforts." While most Americans may still believe the President did the right thing in going to "war," it has become very clear that the original reasons given for the mission have changed dramatically. The more we learn about the "planning" for the "war" and "occupation" of the country, the more we should all be concerned. I suspect we will see the President's "war ratings" tumble over the next few months.

## ***Bush White House Derails Effective Regulation***

The Bush Administration has proposed broad new standards for federal regulatory agencies that would require them to seek independent appraisals of the scientific basis for many new rules before issuing them. The announcement by the Office of Management and Budget (OMB) was very popular with groups linked to industry, and that comes as no real surprise. However, consumer advocates correctly warn that the proposal would paralyze new regulations and stymie enforcement. While all regulatory agencies would be covered by the proposed executive order, the Department of Agriculture and the Army Corps of Engineers would be among those especially affected. The proposal would require agencies to systematically seek "outside opinions" when evaluating scientific findings or disagreements. This is a process referred to as "peer review." In my opinion, this is nothing but a plan to weaken regulation that is already weak in too many areas.

John Graham, the Administrator of the OMB's Office of Information and Regulatory Affairs, has been openly hostile to health and environmental regulations. We warned months ago when Graham was appointed to this position that it was a "gift" to Corporate America. It appears that the gift has now been delivered. This is just another weapon for the Bush Administration and its corporate allies to use against protective regulation. According to the proposal, which is expected to go into effect in February, if a regulation costs private firms more than \$100 million a year and companies challenge the quality of the science behind it, regulators must convene a panel of experts from outside the agency to reevaluate the science. A number of scientists, public interest groups and Democrats have charged that the Bush Administration is taking the teeth out of regulatory agen-

cies, replacing scientists critical of industry with those sympathetic to corporate and ideological interests. Agencies are often wary of potential conflicts of interest in the opinions of industry scientists. Many believe that important public protections dealing with the environment, health, safety and civil rights regulations get stopped in their tracks because peer review becomes a hurdle you cannot get over. This appears to be a valid assessment. This significant change will have long-lasting ramifications. Hopefully, there will be enough public outcry that Karl Rove, the real architect of this proposal, will rein in Mr. Graham.

## ***The Bush Record On Jobs***

It is now becoming more apparent that the Bush White House has no clue on what is happening to our nation's economy. We are clearly heading in the wrong direction. We have seen that tax cuts for the rich are certainly not the answer. Our economy is in a tailspin and jobs are being lost. It now appears that George W. Bush will become the first President since Herbert Hoover whose presidency will have a loss of jobs, and that's not good by any standard. Many believe that the President's tax cuts have hurt the nation dramatically and that he is pandering to the elite in our society. I share that view. The tax cut, the largest in American history, has so far "cost" America 1.7 million jobs with more to come. For a good comparison of how this President's record compares to previous presidencies since World War II, check out the following compilation released recently by the International Association of Machinists. This group looked at the average growth in monthly employment during the terms of the last fifteen presidential administrations. This is what they found:

- Truman First Term: 60,000 jobs gained per month

- Truman Second Term: 113,000 jobs gained per month
- Eisenhower First Term: 58,000 jobs gained per month
- Eisenhower Second Term: 15,000 jobs gained per month
- Kennedy: 122,000 jobs gained per month
- Johnson: 206,000 jobs gained per month
- Nixon First Term: 129,000 jobs gained per month
- Nixon/Ford : 105,000 jobs gained per month
- Carter: 218,000 jobs gained per month
- Reagan First Term: 109,000 jobs gained per month
- Reagan Second Term: 224,000 jobs gained per month
- George Bush: 52,000 jobs gained per month
- Clinton First Term: 242,000 jobs gained per month
- Clinton Second Term: 235,000 jobs gained per month
- George W. Bush : 69,000 jobs LOST per month

While the Bush Administration is doing its best to take care of the super-rich, they are ignoring the plight of working men and women and retirees. There are some alarming signs that we must consider: national unemployment has now increased to 6%, the highest in almost a decade; the states, including Alabama, face the worst budget crisis since the 1930s; primary services such as schools, basic health care, sanitation, and law enforcement are being largely ignored, and more tax cuts for the richest among us are on the horizon. Frankly, unless things are reversed very quickly, this President - even with his record campaign war chest - will have difficulty convincing voters to grant him a second term.

## ***Skyrocketing Gas Prices Hurt Folks***

Over the Labor Day weekend, we saw record increases in gasoline prices. With our economy in the tank, this was not good news. Americans who can least afford to pay higher prices for gas are hurt the worst. Instead of promoting policies that would moderate prices - such as stronger fuel economy standards and tighter oversight of Big Oil—Congress is heading toward passage of anti-consumer energy legislation that would do little but provide billions in taxpayer subsidies on energy companies. The nationwide average price for gasoline soared to a new all-time record, hitting \$1.75 per gallon - just in time for one of the heaviest driving seasons of the year. Some industry analysts blamed a broken pipeline in Arizona and the temporary shutdown of seven refineries caused by the massive electricity blackout in the Northeast. However, disruptions of that sort occur periodically and should not cause this type of price spike. The government's failure to promote conservation and to exercise proper oversight of the industry are to blame. For example, Congress should require oil companies to maintain minimum reserves and adequate inventories. A bigger problem, on the supply side, is industry consolidation that gives a handful of companies tremendous pricing power through mechanisms such as keeping inventories of crude oil and refined gasoline low in advance of peak demand periods. I believe this is referred to as manipulation! Exxon-Mobil, ChevronTexaco, ConocoPhillips, BP and Shell control 15% of the world's oil production. These top five corporations now produce more oil every day than Saudi Arabia, Kuwait and Yemen combined. When you have a handful of mega-corporations dominating the market, gasoline prices will be manipulated.

The problem started when the

Federal Trade Commission (FTC) allowed massive consolidation of the oil industry in 1999 and 2000. These new mega-corporations are now involved in all facets of the oil and gas industry: exploration, production, refining, transportation and retail sales. This vertical integration has resulted in a handful of corporations controlling a substantial percentage of the domestic oil and gas market. This allows these companies to artificially inflate prices and take advantage of any supply disruptions by sticking it to consumers. In response to this latest gasoline crunch, the consumer group Public Citizen urges that the following be done:

- Congress should raise CAFE (Corporate average Fuel Economy) standards for all passenger vehicles, including SUVs, to 40 mpg, to be phased in by 2015;
- The federal government should require oil companies to maintain sufficient reserves and inventory to reduce price volatility;
- Congress should immediately conduct hearings to determine the cause of price spikes and conduct regular reviews of the status of competitive markets in the oil industry;
- Congress must reject the current energy legislation now pending in a House-Senate conference committee.

With the power and influence of the oil and gas industry in the Bush White House, things aren't looking very good for the consuming public on any issue relating to that industry.

## ***Groups Challenge Anti-Porn Tactics On Web***

Two civil liberties groups have sued Pennsylvania's Attorney General, claiming his tactics to stop child pornography also cut subscribers across the country from legitimate Web sites. The lawsuit was filed in U.S. District Court in Philadelphia. The groups have accused Attorney General Mike Fisher

of creating a “system of secret censorship” that goes unchecked by state courts. Anybody who does anything to foster and encourage child pornography should be “horse-whipped” in my opinion. Child pornography should never be protected by the First Amendment. Efforts by law enforcement officials to put a stop to this filth should be encouraged by the courts and backed by Congress.

The lawsuit challenges a system of notices the Attorney General’s office sends to providers to block access to sites it considers child pornography. If a provider does not respond to the notice, the Attorney General can then seek a court order under a 2002 state law that authorizes the blocks and imposes a first-offense fine of \$5,000 for noncompliance. A spokesman for the Attorney General said the “informal” notices are part of a policy developed in concert with the providers. The lawsuit asks the court to invalidate both the policy and the law, saying they interfere with free speech and interstate commerce. It also seeks to invalidate the notices that have resulted in blocking an estimated 725 sites. Among the companies that have received orders from the Attorney General’s office are Comcast Communications Inc., Earthlink Inc. and Microsoft Corp. To my knowledge, only one — WorldCom Inc. — has protested the notice. A county judge subsequently ordered that company to comply. It is high time that our courts stop pandering to the “smut peddlers,” which are making millions dealing in child pornography. I say more power to the Pennsylvania Attorney General. We should encourage others to join him, including Attorney General John Ashcroft.

### ***Nuclear Plants May Still Be Vulnerable***

Nuclear power plants in this country may be at greater risk than we have been led to believe. The 103 nuclear

reactors in the country were never designed to withstand the type of attack we experienced on September 11, 2001. We now know that al Qaeda specifically discussed targeting nuclear facilities. Nearly half of the facilities tested under a U.S. Nuclear Regulatory Commission (NRC) program between 1991 and 2001 had serious vulnerabilities identified. Those tests have been discontinued, and the NRC now claims that security has been enhanced and there’s nothing to worry about. But, a 2002 report by the Project on Government Oversight found that security forces at nuclear power plants remain understaffed, under-equipped and under-trained. Further, nuclear facility employees surveyed in 2002 by the NRC Inspector General stated that safety training was based on outdated scenarios and left nuclear sites vulnerable to sabotage. The agency has issued new security regulations. Frankly, I don’t know how effective they will be.

We will be spending at least \$87 billion for military and reconstruction costs in Iraq, and that has gotten a great deal of attention. Many lawmakers are lining up to vote for that sort of spending. It would seem prudent for Congress to mandate security improvements at commercial nuclear facilities as a part of our war on terror. Instead, Congress has worked against any legislation to improve nuclear security. Lawmakers have stripped security amendments introduced by Representative Ed Markey (D-Mass.) from 2002 energy legislation and allowed the Nuclear Security Act of 2002 – which would have established an interagency task force to evaluate security, emergency response and evacuation plans at nuclear facilities – to languish.

At press time, House and Senate conferees were meeting to reconcile another package of energy legislation, passed separately by the House and Senate. I understand there are no provisions in either bill that address nuclear security. It is unacceptable that energy

legislation could pass without providing these protections for American citizens. The risk is too great to do otherwise. One year ago, Public Citizen joined 10 other national environmental and public interest groups to demand that lawmakers enact legislation to address security concerns. The year has passed, and millions who live and work near nuclear facilities are still exposed to unconscionable risks. Public Citizen and the California group Mothers for Peace sued the agency this summer, so that the public – not just the nuclear industry – can have input on the rules. Hopefully, this lawsuit will achieve the desired results and that is increased security at our nation’s nuclear plants.

### ***Security Gap Exposed***

I have to wonder when the federal government is going to realize that a cargo plane can be used as a weapon by terrorists. The recent bizarre story concerning a man who “shipped himself” across the country in a crate aboard a cargo plane has to make us all wonder. Certainly, this episode exposed holes in aviation security, which apparently had never been addressed by the high-profile security upgrades for passenger air travel. In fact, I am told that almost nothing relating to air cargo has changed since the terrorist attacks 2 years ago. Unlike commercial aircraft, no air marshals fly aboard cargo planes. Neither do the planes have bulletproof cockpit doors. In fact, some don’t even have doors. Not all shipping and freight employees are subject to background checks. Airport areas where cargo is handled are not as secure as passenger terminals. Any one of these lapses should be considered serious. In combination, they should be enough to make our national leaders take action.

Having said all of this, it is high time that the federal government closes all gaps in our national security concerning aircraft flights. U.S. Senator Kay Bailey Hutchinson (R-Texas), a member

of the committee that oversees aviation, made this observation: "Despite the progress made in passenger and baggage safety, air cargo flies virtually unchecked in our skies." If a man can put himself in a crate and ship himself across the country in a cargo plane, I suspect that almost anything else can go undetected by the same route. This is intolerable and must be corrected.

### **Senate Coalition Votes To Rollback New FCC Media Ownership Rules**

In a bipartisan 55-40 vote, the Senate has rolled back the highly contentious Federal Communications Commission rules that would allow major media conglomerates to own an even larger percentage of the nation's media and permit cross-ownership of newspapers and TV stations in most communities. It will now be up to the House leadership to pass a similar resolution to ensure that these relaxed rules - which would threaten media diversity and localism - are not enacted by the FCC. "The Senate today clearly re-established the principle that separate ownership of dominant local newspapers and local broadcasters is essential to preserve the checks and balances against media bias that our democracy relies upon," said Gene Kimmelman, senior policy director for Consumers Union. "It's now time for federal regulators to listen to Congress and the public and revamp its rules to promote more competition and diversity in local news and information." I understand that millions of people around the country contacted Congress to voice their opposition. The Senate responded with a convincing vote. A ruling by the United States Court of Appeals for the Third Circuit has delayed implementation of the rules.

## **XV. THE CORPORATE WORLD**

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### **Senator Shelby Is Legitimately Concerned**

Senator Richard Shelby, Chairman of the U.S. Senate Banking, Housing and Urban Affairs Committee, is concerned about corporate misconduct in a series of high-profile accounting scandals. As we have mentioned on several occasions, these scandals have badly damaged our economy by eroding investor confidence. The powerful Alabama Senator has given his word that he will do everything within his power to restore consumer confidence in our capital markets. This is most significant and should get the attention of decision-makers in Corporate America. Senator Shelby led the Senate banking panel oversight hearing on the Sarbanes-Oxley Act. It is essential that Congress and key government agencies take every step required to restore consumer confidence and responsible corporate decision-making in today's business climate.

On this subject, Senator Shelby told the Birmingham News last month: "I have worked to help ensure that companies are held to these high standards and wrongdoers are punished aggressively and to the maximum extent of the law." Senator Shelby is not only very powerful; he is also extremely well respected in our nation's capitol. His reputation for being concerned for the plight of ordinary citizens has become legend in Washington. The Senator told a meeting of the Society of International Business Fellows in Birmingham last month that large corporations must strengthen "the tone at the top" and "internalize ethical financial reporting" in order to succeed. His advice to Corporate America was: "You can't legislate ethics, but you can make it tougher for

people who commit accounting fraud or manipulate earnings."

### **Fraud Fines In Health Industry On The Increase**

The *Wall Street Journal* has revealed some shocking information concerning the nation's healthcare industry. According to the *Journal* report, the federal government is on its way to collecting a record amount of fines and settlements from the health-care industry this year. In the last three fiscal years, the government has amassed \$4.21 billion in fines, settlements and restitution payments from its health-care investigations. It is most significant when we consider that this is well over the \$3.29 billion collected by the government in the prior 10 years combined. The U.S. Department of Health and Human Services Office of Inspector General supplied this information. The federal government is expected to collect more than \$2 billion in payments from HCA Inc., Abbott Laboratories, AstraZeneca PLC, Bayer AG, Guidant Corp., GlaxoSmithKline PLC, Tenet Healthcare Corp. and Pfizer Inc. There are more settlements to come, according to the *Journal* report. For example, Schering-Plough Corp. anticipates more than \$150 million in liability from investigations by U.S. Attorneys in Boston and Philadelphia into alleged marketing violations.

Enforcement actions have clearly increased. The number of federal criminal prosecutions of health-care companies and workers jumped 34% last year to 333, nearly double the number 10 years earlier. Between 1996 and this year, Congress more than tripled the budget for Medicare and Medicaid fraud enforcement at the HHS Office of the Inspector General and more than doubled the budget for the same type of work by the Federal Bureau of Investigation. Under a 1996 law, civil and criminal penalties collected in health-fraud probes help fund enforcement of

antifraud laws. In addition, the late 1990s saw a surge of employees and others (known as “whistleblowers”) coming forward with fraud allegations against drug companies and an increasing number of attorneys specializing in those cases. If the government joins in such a suit and wins a settlement, those who pointed out the fraud are entitled to a portion of the money collected. Now those cases, which can take years to unfold, are bearing fruit.

The companies have been under scrutiny for everything from how they manufacture and price drugs to how they pitch their products to doctors and report data to regulators on patient deaths and injuries. Guidant, for instance, agreed to pay \$92.4 million and admitted it failed to report injuries, deaths and malfunctions linked to its device for abdominal aortic aneurysms. Earlier this month, Tenet Healthcare said it would pay \$54 million to settle government allegations that its Redding, Calif., medical center performed unnecessary cardiac procedures. The settlement didn’t include an admission of wrongdoing. Bayer agreed to pay \$257.2 million, including civil damages and a criminal fine, to settle allegations it cheated the Medicaid program out of discounts and rebates on two of its drugs. The company agreed to plead guilty to charges it violated the Food, Drug and Cosmetic Act and admitted it acted with “intent to defraud or mislead.” The enforcement spotlight has shifted to the pharmaceutical industry. Opinions vary on whether the surge in penalties is due to rising incidence of fraud or a more aggressive stance taken by federal investigators.

The antifraud association, a nonpartisan group of insurers, self-insured companies and government investigators, estimates that 3% of the nation’s total spending on health care is lost to fraud every year. With this year’s projected spending at \$1.67 trillion, that means more than \$50 billion is expected to be lost, according to the association. Over

the years it became quite evident that Corporate America was living by one standard and street criminals another. Now we are seeing boardroom fraud, which certainly appears to be criminal, being exposed and prosecuted both in the civil and criminal courts.

### ***Asbestos Fine For W.R. Grace***

Recently, W.R. Grace & Co. was ordered by a federal court to pay a \$54.5 million fine for asbestos cleanup costs at a Montana mining site. The court also ruled that the Columbia, Maryland, company is responsible for all appropriate future costs to complete the cleanup. Grace estimated its total liability at about \$110 million, payment of which is subject to the outcome of its Chapter 11 bankruptcy proceedings. The ruling in favor of the federal government involves the largest fine ever in a lawsuit brought under the federal Superfund law. Based on Grace’s latest quarterly report filed with the Securities and Exchange Commission, the company had set aside \$61 million by June 30 of this year to handle the lawsuit by the Environmental Protection Agency and future cost recovery claims expected to be made by the agency.

### ***SEC Charges American International Group With Fraud***

Last month, the Securities and Exchange Commission took enforcement actions against American International Group, Inc. (AIG) and others arising from an accounting fraud committed at Brightpoint, Inc. The fraud charges against AIG resulted from AIG’s role in fashioning and selling a purported “insurance” product that Brightpoint used to report false and misleading financial information to the public. AIG agreed to pay a \$10 million civil penalty to settle the Commission’s charges. The penalty reflects AIG’s participation in the Brightpoint fraud, as well as misconduct by AIG during the Commission’s investigation of this

matter. Stephen M. Cutler, Director of the SEC’s Division of Enforcement, stated in a news release: “This case shows that the Commission will pursue insurance companies and other financial institutions that market or sell so-called financial products that are, in reality, just vehicles to commit financial fraud.”

It appears that AIG worked hand in hand with Brightpoint personnel to custom-design a purported insurance policy that allowed Brightpoint to overstate its earnings by 61%. The transaction amounted to a transfer of cash from Brightpoint to AIG and back to Brightpoint. By disguising the money as “insurance,” AIG enabled Brightpoint to spread over several years a loss that should have been recognized immediately. The SEC spokesman said that during the course of the Commission’s investigation, “AIG did not come clean.” AIG withheld documents and committed other abuses, as outlined in the administrative order, compounding its overall misconduct.

AIG developed and marketed a so-called “non-traditional” insurance product for the stated purpose of “income statement smoothing,” i.e., enabling a public reporting company to spread the recognition of known and quantified one-time losses over several future reporting periods. In this case, the key to achieving the desired accounting result was to create the appearance of “insurance.” Specifically, AIG agreed to make it appear that the “insured” (Brightpoint) was paying premiums in return for an assumption of risk by AIG. In fact, Brightpoint was merely depositing cash with AIG that AIG then refunded to Brightpoint. AIG issued the purported insurance policy to Brightpoint to allow Brightpoint to conceal \$11.9 million in losses that Brightpoint sustained in 1998. As a result of the transaction, Brightpoint’s 1998 financial statements overstated Brightpoint’s actual net income before taxes by 61%.

The Commission’s Orders direct

each respondent to cease and desist from further violating the respective securities law provisions. The Commission's Order with respect to AIG also directs AIG to (i) disgorge, with pre-judgment interest, the \$100,000 fee it charged to Brightpoint for putting the Policy together, and (ii) retain an independent consultant to make binding recommendations concerning AIG's internal controls to ensure that AIG's insurance products will not be used in the future to violate the securities laws. In addition, the Commission has also filed a related civil action in federal court in New York. Without admitting or denying the complaint's allegations, all defendants except one individual have settled the civil action, with AIG agreeing to pay a \$10 million civil penalty and Brightpoint agreeing to pay a \$450,000 civil penalty. Other individual defendants agreed to pay a total of \$145,000.

### ***Liability Of Directors And Officers***

The actions of companies such as Enron, Arthur Andersen, Tyco, and now local addition HealthSouth have caused great economic problems for our country. Nowadays, it is almost impossible to turn on the television or open the newspaper without being confronted with yet another corporate scandal. In the wake of these revelations, Americans are losing their jobs, and investors in the stock market are seeing their retirement savings evaporate overnight. In an effort to confront the issue, separate corrective and remedial measures were taken by the Legislature and the Judiciary. Congress passed the Sarbanes-Oxley Act in an attempt to curb corporate wrongdoing and increase accountability.

The question has been raised concerning legal exposure of corporate boards of directors. A Delaware court has issued a landmark opinion examining the legal duty owed by a board of directors. And just recently, the Alabama Court of Civil Appeals addressed the

issue of personal liability of corporate officers to creditors of their corporation. These topics are discussed below.

Prompted by numerous corporate and accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002, compelling U.S. businesses to clean up their act. The Act directly affects publicly held companies and their employees, specifically those most connected with the governance of public corporations. It also affects corporate managers and directors, accountants, and lawyers. The Act's goals are laudable: improving public company accounting, reforming the governance of public companies, increasing the personal responsibility of Chief Executive Officers (CEOs) and Chief Financial Officers (CFOs) in issuing company financial statements and security filings, making financial disclosure more transparent and understandable by investors, and enhancing the objectivity of securities analysts. Among other things, the Act does the following:

- It requires the CEO and CFO of a corporation to certify company financial reports.
- It establishes criminal liability for failure of corporate officers to certify financial reports, with penalties of up to 20 years imprisonment and \$5 million in fines for willfully certifying a statement that does not follow the Act.
- It requires the CEO and CFO to forfeit certain bonuses and compensation following an accounting restatement that has been triggered by a violation of securities laws.
- It prohibits insider trades during pension fund blackout periods (periods when an officer or director may not buy or sell shares of company stock).
- It prohibits personal loans to directors or executive officers.
- It requires executives and principal stockholders to report changes in securities ownership within two business days.

- It requires the disclosure of all off-balance-sheet transactions and relationships that may have a material effect on financials.
- It creates the Public Company Accounting Oversight Board.
- It prohibits an outside auditor from doing non-audit services for the client, such as consulting work.
- It directs the Securities and Exchange Commission to issue rules of professional responsibility for attorneys who practice before the commission.

The Sarbanes-Oxley Act creates a specific framework of corporate governance by placing stringent controls over accounting practices. It is a positive step in preventing and identifying fraudulent business practices. If they have not done so already, any person who serves on a corporate board should become familiar with its provisions.

The case of *In re Caremark International, Inc. Derivative Litigation*, decided by the Delaware Chancery Court in 1996, has directly impacted the role of the board of directors. In the seminal case, the shareholders of Caremark International sued the corporation and the board of directors for violations of federal law occurring while the directors were serving on the board. Caremark, a healthcare services provider, had pleaded guilty to illegalities such as payments made to persuade doctors to prescribe Caremark services. As a result, the company was ordered to pay \$250 million in civil and criminal fines, as well as reimbursements. Plaintiff-shareholders, on behalf of the company, sought recovery of these losses from the individual defendants who constituted the board of directors.

The court concluded that a director's duty of care arises in two distinct contexts: a decision-making obligation and a non-decision-making (supervisory/monitoring) obligation. In reviewing the decision-making process, the court looks to whether the process

employed in reaching the decision was irrational or made in bad faith. The court stated: “[A] decision substantively wrong, ... or ‘stupid’ ... ‘egregious’ or ‘irrational’, provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests.” (emphasis in original.)

In reviewing the monitoring aspect of the duty of care, the court observed that the directors’ liability may arise from a failure of the board to be “reasonably informed.” In order to establish a duty of care for failure to monitor, the following elements must be met: (1) the directors knew or (2) should have known that violations of law were occurring and, in either event, (3) the directors took no steps in a good faith effort to prevent or remedy that situation, and (4) such failure proximately resulted in the losses complained of.

The court opined that “it is important that the board exercise a good faith judgment that the corporation’s information and reporting system is . . . adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.” The court held that there was no evidence that the director defendants were guilty of their oversight function, because the corporation had information systems in place. Indeed, in order to establish liability, a very high burden rests on the plaintiff, because only an “utter failure to attempt to assure a reasonable information and reporting system” is ground for liability from a breach of the duty to monitor. The Caremark opinion is relevant because it gives directors an added incentive to establish compliance programs to detect corporate wrongdoing: avoid personal liability.

Just a few months ago, the Alabama Court of Civil Appeals issued a decision regarding the personal liability of corporate officers and directors to credi-

tors of their corporation. In *Galactic Employer Services, Inc. v. McDorman*, the plaintiff business brought a suit against a corporation, its officers and its board chairman, on theories of breach of contract, unjust enrichment, fraud, misrepresentation, civil conspiracy, negligence, wantonness and vicarious liability. Summary judgment was granted to an officer and the board chairman, and plaintiff appealed. The issue before the Court of Civil Appeals was whether the corporate officers owed and breached a duty to a third-party creditor in hiring and then failing to supervise a deceitful CEO. The Alabama Court held that the chairman and the vice-president of the corporation were not liable for the alleged negligence in hiring and supervising the CEO who had personally committed the wrongs complained of.

The Galactic court began its analysis by recognizing that “Alabama case law provides two differing theories pursuant to which an officer or director [of a corporation] may be personally liable, or owe a duty, to third parties. The first line of cases provides that [a] corporate agent who personally participates, albeit in his or her capacity as such agent, in a tort is personally liable for the tort.” In those cases, the courts, although not explicitly stating the basis for liability, have held officers and directors personally liable for their active participation in an intentional tort.” The court cited examples in which officers or directors actively participated in formulating, manufacturing, labeling and distributing a defective product, breached a contract, or fraudulently asserted a corporate existence, among other things. The Galactic court called this theory of personal participation the “general rule.”

The Galactic court then addressed whether officers or directors may be held liable to the corporation’s creditors for negligence. The court held that Alabama is one of a number of jurisdictions that generally do not provide for

officer or director liability to creditors for negligent or ultra vires acts, on the basis that there is no duty owed to the creditor. The court noted that officers of a corporation are ‘trustees’ for its stockholders, but not for its creditors.

Applying the two theories to the facts of the case, the Galactic court held that the corporate officers and directors were not liable for their acts of negligence in hiring and supervising a “bad officer,” which resulted in the corporation’s inability to pay the plaintiff. In addition, the court held that the plaintiff-creditor failed to present substantial evidence of personal participation of the officers in an intentional tort, because they did not commit the alleged misrepresentations and fraudulent acts. A certiorari petition is pending in the Alabama Supreme Court. If our highest court decides to grant certiorari and resolve this disputed issue, regarding duty to corporate creditors the impact to corporate officers and directors can be enormous.

I really can’t understand why there should be a legal distinction between negligent and intentional acts relating to the duty owed by corporate officers and directors. There is a growing concern with the unethical conduct on the part of Corporate America. It makes no sense to restrict the legal duty owed by the corporate decision-makers. Hopefully, court decisions combined with congressional action will result in an increase in corporate ethics and accountability. That is what people all over the country are demanding.

## XVI. BUSINESS LITIGATION

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### ***Good Work Pays Off***

The Business Litigation Division of our firm was solely responsible for handling the Monsanto case in federal

court, which was discussed in another section of this issue. Rhon Jones, Mark Englehart, David Byrne, Scarlett Tuley, and Larry Golston spent most of their working hours over the past 2 years on this important project. Other full-time personnel who did outstanding work on this case, include Donna Puckett, Kristi Hinton, Kelly Castleberry, Bonnie Foster, Teresa Curtis, Susan Harding, and Davida de Gonzalez. In addition, we had to bring in a good number of temporary employees to help out due to the massive amount of work required. It was a team effort from beginning to this point. I was fortunate to have been a part of the team. There is much yet to be done to make sure the settlement is carried out. We are most fortunate to have judges who have retained jurisdiction over the cases to make sure the corporate defendants do all that is required of them under the court orders.

### ***Another Corporate Lawsuit***

Rather than go to mandatory, binding arbitration, AT&T has sued its long-distance rival, MCI in the courts. AT&T's lawsuit was filed in federal court and accuses MCI and onvov of conspiring to unlawfully route MCI phone calls via Canada to AT&T. This allegedly wound up paying MCI costly fees to connect calls. While some of these involve old allegations, AT&T is now charging that MCI (formerly WorldCom) with massive frauds and dishonest measures. Apparently, a good number of companies were involved in the improper routing of calls by MCI. Several of AT&T's claims in its lawsuit seek damages of not less than \$10 million. The racketeering claims will carry triple damages if proved. This is another example of how Corporate America "likes" the court system when they are the victims. It is also interesting to note that these corporations don't hesitate to sue for fraud and seek punitive damages.

### ***Lawyers Can Be Whistleblowers***

The American Bar Association (ABA) recently voted to allow corporate lawyers to reveal wrongdoing to a company's upper management. If upper management fails to act, the lawyer is now free to take confidential information about the wrongdoing outside of the company. The rule effectively allows lawyers to be whistleblowers against corporations they represent. The ABA's action is a positive response to recent corporate scandals and cover-ups that have cost shareholders millions of dollars and undercut public faith in the stock market. Hopefully, this will prevent future corporate debacles such as Enron if corporate lawyers take this new rule to heart.

### ***Jury Awards \$6 Million To Birmingham RV Cleaning Company***

Recently, a Jefferson County jury returned a \$6 million verdict in a trade secrets lawsuit. As a result, a Michigan corporation must pay a small Birmingham company for allegedly stealing its confidential product information to develop a competing line in the RV cleaning industry. The jury ordered Ann Arbor, Michigan-based Thetford Corp., which produces cleaning products for recreational vehicles, to pay \$3 million each in compensatory and punitive damages to Environmental Products of America. The lawsuit alleged that Thetford learned confidential information while negotiating to acquire the five-employee Alabama company from 1999 to 2001. Thetford subsequently used that information to develop a competing product line.

Evidence at trial revealed that Thetford also stole some of EPA's biggest clients while maintaining the acquisition was continuing. The acquisition never went through and EPA filed suit in 2002. Many large corporations believe they have to lie and deceive in order to gain an unfair advantage. This

takes cases like this out of the normal everyday competition that is an accepted part of the business world. During the trial, testimony showed there was a confidentiality agreement in the acquisition that restricted Thetford's use of the information to assessing value to EPA. Instead, Thetford allegedly stole the information and used it to compete against EPA. Obviously, the jury, after hearing all of the evidence, agreed with the Alabama company. The case was handled by Dennis Goldasich and Irby Fischer of the firm of Cross, Poole, Goldasich & Fischer from Birmingham.

## **XVII. ARBITRATION UPDATE**

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### ***Arbitration In Insurance Policies***

Every now and then we hear about a victory in the arbitration wars. The following, while many may consider it a small victory, is still a win. The National Association of Insurance Commissioners has been working on an interstate compact for uniform approval of insurance products. The first draft of NAIC's first National Standards Document bans mandatory arbitration clauses. This preserves protections that exist in roughly half of the states and potentially extends important protections in the others. This comes as the result of a lot of folks working hard to lobby and educate the Insurance Commissioners about the problem. Our firm has played a small part in that effort. Hopefully, there will be a model law, although obtaining that won't be easy. Nevertheless, this is a great first sign that the commissioners are beginning to realize what is going on with the misuse of arbitration. Paul Bland of Trial Lawyers for Public Justice, Alice Weiss, and Jackson Williams of Public Citizen are due special thanks for their hard work on this project.

## **Waddell & Reed Ordered To Pay Ex-Broker**

You will recall an earlier piece on a large arbitration award. Now, an arbitration panel again has ordered a financial services company to pay a former employee \$25 million in punitive damages. This comes seven months after a New York appeals court overturned the initial arbitration award. Waddell & Reed Financial Inc. says it will again appeal the award, one of the largest ever granted in arbitration. Let's take a look at what brought all of this about. In August 2001, a three-member arbitration panel of the National Association of Securities Dealers ordered Waddell & Reed to pay \$27 million to Connecticut broker Stephen Sawtelle for allegedly smearing his reputation and trying to steal his clients after he was fired in 1997. Mr. Sawtelle claimed he was fired in retaliation for talking to the Securities and Exchange Commission as it investigated a former Waddell & Reed broker in the embezzlement of \$3 million. A New York state court reduced the compensatory damages from \$1.8 million to \$1.08 million in June 2002, but upheld \$25 million in punitive damages. In February, the Appellate Division of the New York Supreme Court found the punitive damages were "grossly disproportionate to the compensatory damages awarded" and ordered arbitrators to reconsider. The arbitrators reinstated the large award, according to reports, because of the "horrible campaign of deception and persecution" that Waddell & Reed carried out against Mr. Sawtelle.

### ***It's Time For Consumers To Unite***

The nation's courts are still struggling with the massive numbers of arbitration cases being appealed. I have reason to believe that consumers are finally waking up to the fact that arbitration is no good for people and great

for Corporate America. Once consumers unite and take the fight to the political arena and let their votes "count as one," things will finally change for good. The U.S. Chamber of Commerce, which has become an extension of the National Tort Reform Association, can try to "buy" the courts. Consumers, on the other hand, don't have either the finances or the desire to "buy" justice. However, they can join together and collectively influence elections with their votes. Congress will do something about arbitration once that occurs. But until they hear from folks back home on the issue, nothing but "talk" about the issue will occur. Saving the jury system is a challenge and one that must be met. It is certainly time for consumers to unite and take their battle to the political races.

## **XVIII. NURSING HOME UPDATE**

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### ***Nursing Home Neglect: A National Problem***

We have consistently reported concerns or problems with nursing home neglect here in Alabama and surrounding areas. However, the problems that our elderly are currently facing in many nursing homes today are not just confined to the southeast. In fact, many instances of nursing home neglect and abuse are occurring throughout the country. These events are particularly troubling, since approximately 1.7 million elderly and ill residents live in nursing homes nationwide.

According to a federal report, the number of nursing homes nationwide cited for serious patient care violations remains unacceptably high. The General Accounting Office (GAO), Congress' investigative arm and watchdog agency, found that about 20% of the

nation's 17,000 nursing homes were cited for violations that put elderly and sick residents at risk for physical harm or, in extreme cases, death. Even though the study's authors noted the severe violations that state inspectors reported between July 2000 and January 2002 represented a decline from the previous eighteen months, government auditors declared the risk that residents face in nursing homes remains "a cause for concern."

This government report echoes a recent Gannett News Service (GNS) investigation that found nearly three-fourths of the most severe and repeated nursing home patient case violations were clustered in a dozen states spread throughout the nation. The GNS report also found significant weaknesses in the federal and state safety net designed to protect nursing home residents. The GAO report too found that many state inspection processes are too predictable, allowing nursing homes to prepare for the inspections. About one-third of the most recent state surveys nationwide occurred on a regular schedule, allowing homes to conceal problems if they choose to do so. And, according to GAO, states are failing to report serious violations to federal government as required. From January 2000 to March 2002, the states referred 4,310 cases for possible sanctions, but did not report another 711. Federal auditors found that despite recent efforts to improve nursing home inspections, weaknesses and inconsistencies remain. For example, federal surveyors who have spot-checked the work of their state counterparts found serious patient care violations at 16 of 85 nursing homes that had been declared free of violations. These violations include the nursing home staff's failure to prevent pressure sores, failure to consistently monitor pressure sores and failure to promptly notify the physician so that proper treatment could be started.

The above-mentioned reports

explain how a resident in Montgomery, Alabama can suffer the same or similar injuries as a resident in a nursing home in Lima, Ohio. This occurrence can be the result of the same owners running below average nursing homes in both Ohio and Alabama or individual nursing homes modeling their “business” similar to other deficient nursing homes, in attempt to maximize their profitability. Whatever the reasons for this problem, unfortunately, it is nationwide.

### ***Alabama Should Follow The Florida Senate’s Lead***

The Florida Legislature has been struggling to confront the issue of high medical malpractice insurance premiums, as have numerous other states around the country. In Alabama, the nursing home industry, as many of you know, proposed caps on damages in lawsuits during our last session, stating that their liability insurance premiums had risen dramatically in past years due to lawsuits. In a press release last year, the Florida Medical Association said, “Due to an explosion of frivolous lawsuits and excessive awards, medical malpractice insurance rates for Florida’s doctors are skyrocketing.”

In a procedure that I hope other State Legislatures will consider using, the Florida Senate placed insurance company officials and medical lobbyists under oath to get the truth. Sandra Mortham, Chief Executive Officer for the Florida Medical Association, when asked under oath if the reason for the malpractice insurance crisis was because of frivolous lawsuits, stated: “Certainly, I’ve never said that...(our members are telling us) they are having substantial problems paying their premiums.” Robert White, president of the Florida Professional’s Insurance Company, which handles much of the medical malpractice insurance in Florida, stated the following in response to a similar inquiry: “I don’t think you can have a frivolous lawsuit

in the state of Florida. I think Florida fixed its frivolous lawsuit problem in 1988.” He further stated: “I’m a believer that there is no more malpractice than there was 10 years ago (and) as a percentage of all the cases we see, there are no more (malpractice cases) than there was 20 years ago.” This sworn testimony in Florida raised the question of how the conclusion was reached that rising malpractice insurance premiums were related to lawsuits. It was found that the information had come from a study sponsored by the Florida Hospital Association.

The Alabama Legislature and other legislatures around the country should sit up and take notice of what occurred in Florida. Politicians should not pass legislation that strips away the rights of individuals based on the self-reported findings of the very special-interest group that proposed the legislation. I commend the Florida Senate on their willingness to put people under oath to get at the truth. As Florida Senator Tom Lee (R-Brandon) told the St. Petersburg Times after hearing this testimony: “We are not going to put legislative findings in a bill that can’t be sustained by the evidence...”

In Alabama, the nursing home industry is preparing again to offer their damage caps bills during next year’s session. I urge the Alabama Legislature to make sure they know the truth before they pass legislation that will hurt Alabama nursing home residents. I am convinced that the fear of perjury charges would certainly get the attention of persons giving testimony before legislative committees.

### ***Long Term Care Facilities Form A Risk Retention Group***

There has been a great deal of talk in Alabama about insurance companies refusing to write liability insurance for nursing homes. In fact, some facility owners are claiming they can’t get coverage and that companies are leaving

Alabama. A group of long term care facilities in Pennsylvania and Ohio recently licensed a risk retention group (RRG) in Montana to insure their professional and general liability exposures. Faced with escalating insurance costs – despite excellent loss experience – the group worked with ORG Captive Management to license the RRG in Montana in less than 6 weeks. Montana had prior experience licensing healthcare captive insurance companies. These companies are formed by healthcare providers so that they can insure themselves. The fact that the facilities had excellent claims histories and still were being charged large rate increases is most significant. This is pretty good proof that the insurance industry is “crying wolf” as usual. It also reveals that there are companies eager to write nursing home coverage.

### ***Nursing Home Aides Beat 81-Year-Old Resident***

It was reported last month that an 81-year-old nursing home resident, Willie Mae Ryan, died after being beaten by nursing home aides while in her bed. The woman was a resident of Dallas County Nursing Home in Arkansas. Two nursing assistants, 17-year-old Shermika Rainey and 44-year-old Gayla Wilson, have been charged in her beating death. According to reports, Wilson, one of the aides, told Rainey that she was tired of the resident “being disrespectful” and led the teenager into her room. Rainey told police that Wilson ordered her to hold Ryan down while Wilson beat the woman with brass knuckles. The poor woman was transported to a hospital where she died 2 weeks later. The victim’s family, along with the American Association of Retired Persons (AARP), is encouraging the Arkansas Legislature to pass better laws and regulations protecting seniors from abuse. During a press conference following the death, the AARP called for the creation of a

special legislative committee to investigate the problem of inadequate nursing homes and abuse. There has now been a civil lawsuit filed by the family against the nursing home for failure to supervise its employees. The state did an assessment of the facility and learned that the home had placed residents in “immediate jeopardy” and delivered “substandard care.”

### ***How Families Can Help Prevent the Development of Bedsores***

In a scenario that is all too common, a family contacts us upon “discovering” that one of their family members who is a resident at a nursing home is suffering from a bedsore. The horror and grief that the family is experiencing at viewing such an open lesion on their loved one is completely understandable. Indeed, finding your mother or grandmother with an open, draining hole in her body would cause even the most stoic of family members to become extremely upset. Unfortunately, we don’t see most of the family members until their loved one dies.

We have learned that many people simply don’t know what a bedsore actually is. Even when they see bedsores, many consider them to be minor in nature. However, that is far from accurate. Bedsores are referred to by the medical community as decubitus ulcers. However, they can most easily be understood by reference to another common name, pressure sores. These wounds, as the name “pressure sore” indicates, are caused by pressure. When the body is allowed to lie in one spot for too long a period of time, pressure builds up over certain areas. These areas of increased pressure usually occur over bony prominences and in body parts wherein the skin is in close contact with the underlying bone. In these areas of increased pressure, gravity causes the body’s own weight to cut off the circulation of blood to this area. Once the circulation of blood

is cut off to that particular area, oxygen is unable to enter into the area of increased pressure. When this occurs, the skin essentially begins to die.

In normal, fully functional and cognitively aware individuals, it is common for the brain and body to sense areas of increased pressure. A common example is for someone who sits in a chair for too long a period of time in one particular position to switch positions or in some way move their body so that the pressure from the chair is focused on another part of the body. We do this literally hundreds of times a day without even thinking about it. However, elderly individuals may be immobile, unable to move themselves or may have mental deficits in which the brain does not recognize the signals being sent from the body that pressure needs to be relieved by changing position. For example, a severely demented Alzheimer’s patient may not understand because of her dementia that she needs to stand up, or at least move around, in her chair or wheelchair. She may instead stay seated in her chair or wheelchair for hours at a time in one particular position without ever realizing that her body is being damaged.

In a perfect world, the Alzheimer’s resident referred to above would receive adequate nursing care and supervision from the nursing home such that she would be moved about during the day and not allowed to remain seated in one position. However, those familiar with this newsletter no doubt understand that families living in the real world cannot rely solely upon the nursing staff and nursing facilities to care for their family members. The corporations that run nursing homes generally keep them understaffed to such a level that the nurses in the facility do not have time to turn and position residents in the facility in accordance with recognized standards and practices. Thus, the family members of a nursing home resident must do whatever they can to

help assure that their family member is not afflicted with bedsores.

The first step in preventing bedsores in family members is to be vigilant. Visit your family member at the nursing home often. Also vary the times of your visits so that the nursing home staff will not be able to expect you at a particular time on a particular date. This assures that you will obtain a spontaneous and accurate representation of what your family member is experiencing in the nursing home when you are not there.

The second step, and perhaps the most difficult step, involves overcoming embarrassment. Pressure sores by their very nature generally occur in areas that we consider private. For example, bedsores commonly occur on the buttocks or on the sacrum, the lower back, and upper buttocks area. Most family members do not wish to examine another family member in these private areas. However, if your family member is immobile, unable to maneuver himself or herself or suffering from some type of cognitive deficit, you must take it upon yourself to examine him or her from head to toe to assure that he or she is being taken care of. This type of resident is generally unable to monitor themselves in this fashion and will rely upon the nursing staff for such care. To keep the facility “honest,” you must get past your embarrassment and monitor, to the extent possible, your loved one.

Persons who have family members in nursing homes should also familiarize themselves with some common terminology utilized by nursing home personnel in reference to bedsores. You should know that bedsores are categorized along a continuum from Stage I to Stage IV. Stage I usually represents a beginning bedsore and can represent an area of redness, while Stage IV bedsores are generally deep, open wounds that extend down into the muscle and sometimes the bone below the skin. These bedsores are generally measured in centimeters and are described using

medical terms. Some of these medical terms include; (1) necrotic tissue - dead tissue; (2) slough - dead or dying tissue that has separated from the wound bed or sides of the wound; and (3) purulent drainage - pus filled drainage. If left untreated, bedsores can worsen and become infected. Infected bedsores can lead to a systemic infection and ultimately kill the resident.

Finally, if a bedsore does develop, ask questions. Ask the nursing home “why did this bedsore develop?”; “how did this bedsore develop?”; “what is the status of this bedsore?”; “when will this bedsore be healed?”; and “what treatment is being given to my family member to resolve this bedsore?”. These are all extremely valid questions that should be asked when any bedsore occurs. Indeed, assure that the nursing home is aggressively and steadfastly treating any bedsore that does develop, because an improperly treated bedsore can become an infected, life-threatening ailment.

Please follow the above suggestions if you have a loved one in a nursing home. Generally speaking, nursing homes are short-staffed and, accordingly, bedsores are all too common occurrences. While family members and the resident should be able to rely upon the professional services of the nursing home, the family should also “keep an eye out” for their family member. Failure to prevent bedsores is inexcusable and shouldn’t be tolerated. They can easily be prevented. If they do develop, they must be detected early and treated. Failure to do so can cost a life.

## XIX. HEALTHCARE ISSUES

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### ***Are Canada’s Cheap Drugs The Answer?***

A recent article in the USA Today raised some most interesting questions concerning the purchase of prescription drugs by American citizens from Canada. The Food and Drug Administration has issued a warning concerning the purchase of foreign drugs. The FDA says that cities and states should not encourage people to purchase drugs from other countries, nor should they look to import drugs from places such as Canada to relieve their own strapped budgets. The FDA, in response to the California Attorney General’s office, said any city or state that tried to import drugs from Canada or other countries would likely violate a federal law and would raise public health concerns. Peter Pitts, the FDA’s associate commissioner for external relations, told the USA Today: “Once you give people the false impression that ordering over the Internet is OK, it opens up a Pandora’s box of dangers.”

Several states are considering legislation to make it easier for residents to buy drugs from Canada. The FDA letter and the interest by local governments in purchasing drugs from Canada come as the drug industry tries to clamp down on international pharmacies in Canada — and as Canadians themselves debate the effects of the growing sales of drugs to U.S. residents, now estimated at close to \$1 billion. USA Today reports an increasing tension on both sides of the border:

- Some Canadians say the international pharmacies are exacerbating a shortage of pharmacists by luring them from government-funded hospitals and clinics. Conversely, the pharmacies are providing clerical and

service jobs in some regions.

- Medical societies in Canada have condemned as unethical the practice of doctors paid to “co-sign” prescriptions for U.S. patients they have never seen.
- Some Canadian pharmacists fear drug makers may limit supplies to Canada, raise prices or forego launching new drugs there if foreign sales continue.
- U.S. customers — often seniors on fixed incomes—are protesting as American regulators try to clamp down on Canadian sales through legal actions against operators who help Americans purchase drugs via the Internet. They say the services provide drugs to people who otherwise would not be able to afford them.

On September 16th, the FDA took action to stop the influx of the Canadian drugs. This dealt with a mayor in Springfield, Illinois, who refused to stop buying from CanaRX, a Canadian supplier. According to reports, some 10,000 city workers may save up to \$9 billion in their prescription drug purchases over a period of years. The FDA should have to answer one very simple question: “How can Canadian pharmacies sell drugs made by American drug companies for prices that are substantially less than what American citizens pay here for the identical drugs?”

### ***Humana To Settle Shareholders’ Lawsuit***

Physicians Corporation of America Inc., now owned by Humana Inc., has agreed to pay \$10.2 million to settle a shareholders lawsuit claiming the stock price was inflated. Settlement papers were filed calling for a total recovery of 81 cents per share, or 44 cents per share after expenses, for the owners of 12.6 million shares of common stock. Shareholders claimed Physicians Corporation tried to hide its losses on its financial statements and issued mislead-

ing disclosures. That, they said, caused its stock price to be more than \$5 a share higher than it should have been from March 31, 1996, to February 20, 1997, as the company's workers' compensation business went sour. Physicians Corporation underwrote workers' compensation policies and administered self-insured funds. The company agreed to settle the 6-year-old class action lawsuit after a U.S. District Court Judge denied the company's dismissal motions and was ready to set a trial date. The two sides are asking for prompt preliminary approval and a final hearing on the settlement package in November.

### **Doctors' Lawsuit Settled**

Cigna HealthCare has settled the lawsuit brought by more than 700,000 physicians, state and other medical societies. The national class action, pending in a Miami federal court, was settled with agreements for mutual transparency and a cash payment to the physicians from Cigna. The Philadelphia-based health care company faced doctors' charges it violated federal statutes against conspiracy, aiding and abetting claims, and claims of breach of contract, unjust enrichment and violations of various state "prompt pay" statutes. In the settlement, Cigna said it would:

- Allow physicians to choose between two forms of monetary compensation: a per capita, fixed payment from a \$30 million settlement fund for physician class members who complete a claim form; or doctors can resubmit claims for payment filed during the class period;
- Contribute \$15 million to a foundation governed by state medical society parties to the settlement. The foundation would be for charitable purposes including fostering public health improvement initiatives;
- Appoint an external party to review

and resolve billing or payment disputes;

- Pay a fee to physicians for administering vaccines and other injectable drugs, in addition to paying for the drugs themselves;
- Create a physician Web site to provide detailed information about Cigna claim coding policies and other payment guidelines;
- Create a physician advisory committee through which physicians can offer input to Cigna;
- Limit physician fee schedule changes to one in any calendar year;
- Establish an e-mail procedure to allow physicians to make inquiries on fee schedules and to obtain claim coding information;
- Eliminate the requirement that physicians submit copies of their medical records to be paid for most office visits occurring on the same day as surgeries and other procedures;
- Pay interest on fully documented claims not paid within the time limits set in the agreement; and
- Pay legal fees to be determined by the court.

The doctors and groups who filed suit put the value to physicians of business practice improvements and investments at about \$400 million. The plaintiffs put the dollar value of physician administrative overhead savings from other changes and business practices at about \$300 million during the term of the agreement. All of this makes the settlement worth in excess of \$700 million. The plaintiffs said they expect the agreement to streamline communication between physicians and Cigna, to reduce administrative complexity in the claims payment system and to help improve the quality of the health care delivery system. The settlement is being called a landmark that recognizes the importance of physicians in health care management.

### **Lead Poisoning Still A Problem**

There has been a great deal of attention concerning the problems caused by lead poisoning of children. The federal goal to eliminate lead poisoning in children by 2010 seemed achievable when it was set in 1991. Clearly, with bans on leaded gasoline and paint in place, progress has been made. The number of cases detected has fallen by 50%. Still, hundreds of thousands of small children, most of them black, Hispanic and Asian, face one of the most preventable environmental hazards in the nation. Unfortunately, this happens when they simply breathe inside their homes. Tests have shown that more than 400,000 children from 1 to 5 years of age have blood lead levels above that considered toxic by the Centers for Disease Control. That number would be much greater if the index was lowered as recommended. It would also be much higher if more children were regularly tested.

Most cases occur in large and mid-size cities where housing once considered good, is now deteriorating. A poisonous substance, lead is present in paint used on older buildings. When lead paint peels or is improperly removed, or even when it is scraped as a window is opened, it unleashes a dust fine enough to be both ubiquitous and undetected as children crawl on it and touch it. Poisoning occurs when lead is swallowed or inhaled. While lead is dangerous to everyone, children run the highest risk of neurological and cognitive damage. Lead poisoning problems most often arise in older buildings situated in low-income neighborhoods. Physical damages suffered after exposure to lead poisoning include growth impairment, diminished intelligence, decreased hearing ability, hyperactivity and an inability to concentrate, according to the National Center for Environmental Health. It takes very little ingested lead to damage the still-forming brains and nerves of children

or fetuses. Such damage can lead to permanent and debilitating health and learning problems, such as lower IQ's and retardation, and behavioral problems. Lead poisoning does not typically kill. Instead, it leaves a lifetime of expensive concerns — like special schooling and medical care — that society is left to absorb. While this is a most serious problem, there is a clear solution if those in government do the right thing now. However, further delays will only make the consequences of small children being exposed to lead poisoning much more severe. We must act promptly while the goal is still in sight.

### **Warnings On New Statin Drug Crestor**

The newly approved cholesterol drug Rosuvastatin has come under the watchful eye of Public Citizen. AstraZeneca will sell this drug under the name Crestor. It has a significant potential to cause kidney damage and failure, as well as muscle destruction (rhabdomyolysis), according to Public Citizen's Health Research Group. The U.S. Food and Drug Administration (FDA) approved the drug on August 13th of this year. It is just now becoming available by prescription. Public Citizen will issue a "Do Not Use!" warning about Crestor in the current issue of Worst Pills, Best Pills News, an online service and monthly newsletter that contains information on drug safety and effectiveness, dangerous dietary supplements, drug-induced symptoms and drug interactions. Although the site, [www.worstpills.org](http://www.worstpills.org), usually requires that users subscribe to read its articles (which we do), the full text of the warning on Crestor will be posted at no charge because of the serious danger that Crestor users may face.

Public Citizen made a formal presentation to an FDA advisory committee in July, strongly opposing the drug's approval based on its unique kidney

toxicity. The drug was approved on the condition that it be available only in 5, 10, and 20-milligram strengths, with restricted distribution of a 40-milligram dose. Such restrictions, however, will not adequately protect patients, according to Sidney Wolfe, M.D., director of Public Citizen's Health Research Group, who made this strong statement: "It was irresponsible of the FDA to approve this drug without requiring routine urine testing for protein and blood to monitor for the early signs of kidney damage. This drug is already showing signs that it is too dangerous for people to take, and it is only a matter of time, after 'enough' people have been injured or killed, that it will have to be pulled from the market."

In studies before its approval, seven people were struck by cases of rhabdomyolysis, an adverse reaction involving the destruction of muscle tissue that can lead to kidney failure. Baycol, another statin, was removed from the market in the fall of 2001 after at least 31 reports of fatal rhabdomyolysis. For more than 3 years before it was banned, Public Citizen warned patients not to use Baycol. Even so, Baycol did not show life-threatening rhabdomyolysis in pre-approval clinical trials. I understand, based on information furnished by Public Citizen, that Crestor is the only statin to have the reaction arise before its approval. Dr. Wolfe believes that, in addition to the risks of kidney damage, patients should avoid Crestor because it has not been shown to reduce the risk of heart attacks and strokes, which is a benefit of lower cholesterol levels. Three other statins - lovastatin, pravastatin and simvastatin - have shown such a benefit. It is significant that Public Citizen's "Do Not Use!" warnings have preceded safety-related withdrawals of drugs such as Baycol, Propulsid and Rezulin by months, sometimes years. For your information, the Health Research Group has

listed more than 200 drugs as "Do Not Use!" during the past 15 years.

### **Another Misfiled Prescription Case**

The family of a brain-damaged boy who received methadone instead of an anti-hyperactivity drug had filed a lawsuit against Walgreens. After a mistrial was declared by the trial judge, the family is now asking for millions of dollars in sanctions against Walgreens. The request was made after the mistrial was declared when a store pharmacist testified that a prescription that Walgreens said proved it could account for all the methadone in its store was "forged." The court was given affidavits from jurors who said they had been prepared to return a verdict of perhaps \$350 million or more in damages against Walgreens before the mistrial was declared. The child was a bright, hyperactive 7-year-old who was supposed to get a generic version of Ritalin. Instead, he got methadone, a drug used to wean addicts off heroin.

On November 10, 2001, the boy felt ill, went to sleep, and couldn't be awakened. He spent six days in a coma and two months in hospitals, where diagnostic tests confirmed strokes and permanent brain damage. After the boy's hospitalization, state police seized vials of his medicine. One of them had the Ritalin clone, the other methadone. The judge declared a mistrial after the Walgreens pharmacist testified about the allegedly fraudulent prescription. The Walgreens lawyers have withdrawn from the case, disputing any allegation of wrongdoing. Walgreens has denied all allegations in the lawsuit. Walgreens has argued that its procedures safeguarded against errors such as the one alleged to have occurred. Any injury to the child, the company argued, was not Walgreens' fault.

Interestingly, the Walgreens pharma-

cist testified that a Walgreens attorney told him a missing prescription had been found that reconciled an apparent discrepancy in the store's methadone inventory. The pharmacist, who was also named in the lawsuit, said he believed the prescription had been forged and that he told his supervisor about it. The motion for sanctions states: "Nothing was done by anyone at Walgreens ... until Mr. Mascarenas (the pharmacist) decided to confess this conspiracy in open court on August 5, 2003." The lawyer defending Walgreens denied that her law firm was involved in any misconduct.

## XX. ENVIRONMENTAL CONCERNS

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### ***The New Boss At EPA***

In August, President Bush named Utah Governor Mike Leavitt to succeed Christine Todd Whitman as head of the Environmental Protection Agency. This appointment has received mixed reviews. Environmentalists say there is a difference between the two former Governors. Ms. Whitman left the New Jersey governorship in 2001 to run the EPA. She resigned in May. Philip Clapp, President of the National Environmental Trust, an advocacy group, had this assessment of the appointment: "Like Christie Whitman, Governor Leavitt started out with a reputation as a moderate, but unlike her, he has taken a hard right turn on the environment." Larry Young, executive director of the Southern Utah Wilderness Alliance, said Leavitt's record on public lands, wetlands conservation and sprawl issues was unimpressive. "It's an appointment that fits right in line with the Bush Administration record. You're not going to see any dramatic improvement. It's business as usual," according to Young. All polls reveal that Democrats have at least a 2-1 advantage

over President Bush on environmental issues. Most folks don't trust the Bush White House to protect the environment. Not surprising, the Bush choice to succeed Whitman was met with immediate praise from industry groups and congressional Republicans. Clearly, Governor Whitman earned the respect of environmentalists during her tenure as New Jersey governor. Her appointment in 2001 was seen as a sign of the President's own moderation on the environment. Instead, her resignation - after continuous confrontations with the White House and other Administration officials who saw energy development as a bigger priority - gives a clear signal that the Bush White House is environment-unfriendly.

### ***More Deception From Washington***

A scathing report by the Inspector General of the Environmental Protection Agency confirmed what some have long suspected concerning the aftermath of the World Trade Center's collapse. The federal agency appears to have systematically misled New Yorkers about the risks the resulting air pollution posed to their health. The question is, why? Nobody should be shocked to learn that the EPA did this under direct pressure from the White House. In fact, the Bush White House intentionally changed news releases prepared by the EPA. While the Bush Administration has misled the public on many issues, this particular deception is difficult to justify. A draft EPA report released last December conceded that 9/11 had led to huge emissions of pollutants. In particular, releases of dioxins - which are carcinogens and can also damage the nervous system and cause birth defects - created "likely the highest ambient concentrations that have ever been reported," up to 1,500 times normal levels. But the report concluded that because the outdoor air cleared after a couple of months, little harm had been done. We now learn that the Bush

White House altered the release to give this false impression.

The main danger comes from toxic dust that seeped into buildings and remains in carpets, furniture and air ducts. According to a recent report, businesses that did environmental assessments of their own premises found alarming levels not just of dioxins but also of asbestos and other dangerous pollutants. The most shocking revelation from the new report is that under White House direction, the EPA suppressed warnings about known pollution problems. Hundreds of cleaning workers and thousands of residents may be suffering chronic health problems.

### ***EPA Allows Sale Of PCB-Contaminated Sites***

In another rather shocking development, the Bush Administration is now allowing the sale of PCB-contaminated sites. This reverses a 25-year-old policy barring any such sales before the land is cleaned. The decision by the Environmental Protection Agency is not good news for environmentalists, who fear the change will hide environmental problems instead of fix them. The EPA announced that it planned to end the ban on the sale of real estate contaminated with PCBs, which is now classified as a probable carcinogen. As previously reported, the rule went into effect in 1978.

The decision is purported to be designed to spur the sale of contaminated industrial sites that have lain dormant for years. The push to develop so-called brownfields, including PCB sites, has gained momentum recently in government circles. Certainly, locating new business in aging city and town centers is important. EPA claims the move is a "reinterpretation" of existing law to allow PCB sites to change hands before cleanup while still enforcing PCB regulations. Previously, the owner of a PCB site had to clean it before any sale, which made good sense. Under

terms of the “reinterpretation,” PCBs remain banned, and the land must be cleaned before it can be developed for industrial or other usage, according to the EPA. A spokesperson for the EPA told media outlets, including USA Today and the Associated Press, that the “policy will stimulate the cleanup and redevelopment of the sites. It will enhance redevelopment of contaminated sites, which is the goal of the president’s brownfields program.” Frankly, I am most concerned over this change in policy. It is most interesting that we were never told of this development by the EPA or the defendants in our PCB case until after the settlement was reached. I received a call from a reporter who is checking into the matter questioning whether the Anniston plant site could be sold. In my opinion, that can’t happen because of the consent decree referred to in another section of this issue.

### ***Pollution Upgrade Stalled***

It appears that more than 100 power plants, refineries and factories in Alabama will now be able to avoid costly anti-pollution controls. As has been widely reported, the Bush Administration has changed a federal clean air rule, which in my opinion will not be good for the environment. A U.S. Environmental Protection Agency rule change was signed and will now allow large portions of Alabama’s oldest coal-fired power plants to be overhauled without decreasing pollution. This is clearly contrary to the current interpretation of the federal Clean Air Act. According to the Alabama Department of Environmental Management, more than 100 power, pulp and paper or chemical plants in Alabama could be affected by the rule change. Environmental and public interest groups are legitimately concerned and upset over this turn of events. The EPA claims the change won’t increase pollution. Instead, they say the rule was meant to

let a plant replace a piece of equipment with something identical or functionally equivalent, as long as the plant remains within its pollution permit limits and the basic operating design remains the same.

The standard under the old rule considered whether an equipment change would increase emissions. Under the new rule, it appears that the EPA will look primarily, if not exclusively, at cost. Southern Co., the parent company of the Alabama Power Company, was among the industry leaders that led the charge in Washington for the rule change. I understand there are 10 plants in Alabama that will be affected, with 6 of these being owned by The Alabama Power Company. Several coal-fired power plants in central and north Alabama have been sued by the U.S. Justice Department for violating the Clean Air rules that the Bush Administration has seen fit to change. However, I don’t believe the rule change will affect the pending government lawsuits against about 50 plants around the country, including the 5 Alabama Power plants that upgraded their facilities but claimed the changes were not enough to require the more modern pollution control equipment. I am greatly concerned that the Bush Administration has no concern for environmental problems. In my opinion, that is wrong and will cost us greatly in the future.

Earlier this month, a federal judge ruled that FirstEnergy’s Ohio Edison Co. violated the law by upgrading seven coal-fired power plants without installing pollution equipment. This was the first time a judge had ruled against a utility in those cases. Industry advocates have complained that the current enforcement system is confusing, and has discouraged investment and expansion at a time of increased demand for expanded and reliable sources of power. Industry and EPA officials said the new rule would encourage plant improvements, provide greater regulatory certainty and reduce

dangerous emissions. Environmentalists, state officials and congressional Democrats who have long fought the rule change – which was first reported in the *New York Times* – warned that it would undermine the only effective tool to combat industrial polluters. They said it would allow antiquated industrial plants that should have been shut down years ago to go on polluting – or even increase pollution – without fear of prosecution. New York Attorney General Eliot Spitzer, a leader in the effort to prosecute utility polluters, has said he would file a court challenge to the new rule as soon as it is published, probably shortly after Labor Day.

### ***EPA Urges Look At Lower Soot Limits***

I had never really thought of soot being a health or safety problem. That is, until we handled a case involving massive amounts of soot in the air. Scientists at the Environmental Protection Agency have now urged the government to consider imposing stricter limits on the level of soot in the nation’s air because evidence shows that soot contributes to sickness and death at its current level. If you want to see the draft report by the scientists, go to the agency’s Website. This came two days after the EPA eased air pollution rules for power plants planning upgrades. The report points out that many of the nation’s cities don’t meet the current limit for yearly soot levels.

Soot consists of a mixture of liquid droplets and specks of pollution emitted by diesel-powered vehicles, power plants and factories. The scientists’ recommendations focus on the tiniest soot particles, which are the most dangerous to human health. Imposing tighter limits will certainly cause controversy because it could lead to tighter regulation of power plants, mines and other industry. Studies show that inhaling soot, which is too tiny to see, contributes to heart

problems, lung cancer and asthma. The draft report concludes that “the available evidence calls into question the adequacy” of current levels allowed by the government and that “consideration should be given to revising the current (soot) standards to provide increased public health protection.”

After the current soot levels were set in 1997 during the Clinton Administration, industry groups went to war. They claimed the levels were based on “junk science.” A lawsuit was filed and the Supreme Court ruled unanimously in favor of the EPA in 2001. This ruling came one month after President Bush entered the White House. The Bush Administration then decided to retain the Clinton Administration’s limits. If the EPA actually goes through with its proposal for new limits, they would take effect no later than April 2005. Hopefully, the new levels will be put in place. However, the fight is far from over.

### ***Firms Fooled The EPA On Cleanup***

According to media reports, documents show companies sharing liability for pollution from a defunct fertilizer plant avoided expensive groundwater cleanup after presenting skewed or incomplete data to federal regulators. The *Pensacola News Journal* has reported that, as a result, arsenic, lead and other toxic chemicals may have seeped into Escambia County, Florida’s, drinking water and will remain in an aquifer for decades. Pollution from the plant also may be responsible for radium, which can cause bone and nasal cancer. However, that link has not been confirmed. The *News Journal* reported that drinking water in parts of Pensacola and Gulf Breeze has been “tainted” for at least 4 years. Houston-based Conoco, which last year merged into ConocoPhillips, owned the plant from 1963 through 1972. The plant was last operated by Agrico Chemical Co. before closing in 1975. Those two com-

panies and three others that once had an interest in the plant, DuPont, Williams Cos. and Freeport-McMoRan, entered an agreement with the Environmental Protection Agency to develop possible remedies when the property was declared a federal Superfund site in 1989.

Documents indicate the companies planned to use studies and design computer models to avoid the most costly remedy, which would have been to pump out and treat a plume of contaminated groundwater, the newspaper reported. “Our goal was to see if we can establish beyond question limits of the plume that are smaller than EPA’s,” Conoco consultant Michael McDonald wrote in a 1992 memo. The companies argued the plume, if left alone, would not contaminate drinking water or harm nearby Bayou Texar. They persuaded EPA officials that pumping would cause saltwater to seep into the aquifer. However, a Conoco consultant wrote in a 1993 letter to officials at Williams that limiting it to one million gallons per day would minimize that potential. According to an EPA official, the *News Journal’s* research may prompt regulators to revisit the decision against pumping.

The newspaper found that the companies’ research avoided evidence suggesting the plume had contaminated water supplies at least back to 1958 when Pensacola closed a well because of it. In one instance, DuPont officials edited out parts of a 1993 study indicating the plume had caused high fluoride levels in the bayou, writing in the margins that the data “kills us.” ConocoPhillips and Agrico, a Williams subsidiary, have denied misleading the EPA. Conoco repurchased the site in 1995 to oversee cleanup efforts.

## **XXI. TOBACCO UPDATE**

### ***Reynolds Pays Sick Smoker***

R.J. Reynolds Tobacco Holdings Inc. has become the second U.S. cigarette company to pay a jury award to a smoker who developed cancer. Even though the company paid, it says the case would be appealed. A check was received from R.J. Reynolds, the No. 2 U.S. cigarette maker, for almost \$196,000, payment for a Florida jury’s 2001 decision against the tobacco company plus interest. R.J. Reynolds would get the money back should it be successful on appeal. A jury had found R.J. Reynolds liable for Floyd Kenyon’s health problems, including lung cancer, and ordered it to pay \$165,000 in compensatory damages. R.J. Reynolds then appealed the case. Previously, Brown & Williamson Tobacco, a unit of British American Tobacco Plc, had been the only company to pay in a sick smoker’s case heard by a jury. The tobacco industry has lost several cases brought by individual smokers, but the cigarette makers have appealed each of those cases. Grady Carter received \$1.1 million from Brown & Williamson in 2001. The payment represented \$750,000 in damages and \$350,000 in interest accrued since Carter won a product liability lawsuit against Brown & Williamson in 1996 in Jacksonville, Florida.

### ***Illinois High Court To Hear Appeal***

You will recall that Philip Morris had a very large judgment handed down against the company by an Illinois judge. The Illinois Supreme Court has now agreed to hear Philip Morris’ appeal directly. The court also retained a lowered bond in the case, which was reported previously. The issue was whether smokers were deceived about

the dangers of light cigarettes. The Supreme Court said Philip Morris could “skip” the state intermediate appellate level and take its case directly to the top court. The company would be bound by a \$6 billion appeals bond, which is half the original amount. In the trial court, the state judge had ordered Philip Morris to pay \$10.1 billion in damages for misleading Illinois smokers into believing light cigarettes were less harmful than regular brands.

State law ordinarily requires defendants to come up with the full amount of damages, plus interest, before they can appeal. The trial judge ordered a \$12 billion bond. Plaintiffs in the case requested \$14.64 billion. Philip Morris had claimed that the large bond would drive the company into bankruptcy and force it to default on a \$206 billion, 25-year settlement in a nationwide tobacco case. This was the first consumer class action lawsuit over light cigarettes to go to trial. It will be most interesting to see what the Illinois Supreme Court does with this case.

## **XXII. PREDATORY LENDING UPDATE**

### ***Predatory Lending Settlement Didn't Go Far Enough***

Many consumer groups around the country believe the \$484 million settlement reached between Illinois-based Household International and the Attorneys General in all 50 states didn't go far enough. The settlement involved several pending lawsuits that alleged predatory lending practices. While the settlement checks could soon be in the mail, the relief they bring may in many cases only be temporary. That's because the amount may not make up the difference between the original loan amount and the additional debt

incurred by new loans, fees and services piled on by “predatory” lenders. If consumers accept the settlement, they must waive the right to file additional claims against Household or its partner, Beneficial Finance Corp.

For example, many consumers involved in the national settlement will receive far less than what is needed to reach their equity stake before the loans were originated. In addition, some potential lawsuits failed to gain class action status, leaving the borrowers to fight the predatory charges by themselves. Many - especially older people who are retired - do not have the economic means to continue the battle and could be facing foreclosure and bankruptcy. Our firm is representing a number of consumers on their individual claims. For example, we represent 1,800 customers in claims against Beneficial. We tell our clients up front that if they have accepted payment in the national settlement (each state was allotted a specific amount), they are not eligible for additional relief.

The practice of “flipping loans” was one of several popular avenues Household Finance Corp. and Beneficial Finance Corp. used to lure thousands of borrowers into refinancing their homes at higher-than-market rates and fees. Sometimes, the lender would start this flipping chain of expensive refinancings by sending a “live” check in the mail in an attempt to get consumers to pay outstanding bills from the proceeds of the check. Once the check was endorsed, consumers were on the hook for high-interest rate loans that were subsequently refinanced, or “flipped,” into a longer-term loan. All transactions carried fees usually financed into the balance, thereby creating a debt load significantly greater than the combined amounts of the loans. Another angle to the “flip” was promoted as a “debt reduction loan.” The lender would offer a credit-poor borrower a higher-than-market rate to

consolidate the first mortgage and outstanding consumer debt (such as credit cards), explaining that the borrower could not qualify for a better rate because of a bad credit history.

The lender would subsequently inform the borrower that the house did not appraise at an amount large enough to justify the loan. The lender would then grant the borrower a second mortgage. Many times, this would be at an interest rate greater than 20%. Consumers should always do business with a lender they know or trust. If there is any doubt about a lender, always ask friends and business associates before signing anything. Unwanted solicitations should as a general rule be avoided. The offering of new ways to get you into a favorable financial position will probably get you into a “financial mess.” The old saying that we have all heard for years is still true in many cases, “If the deal sounds too good to be true, it probably is.”

### ***North Carolina Anti-Predatory Lending Law Good For Consumers***

North Carolina's anti-predatory lending law has significantly reduced predatory lending while maintaining consumer access to subprime credit, according to a report by the Center for Community capitalism at the University of North Carolina at Chapel Hill. The report found that loans in North Carolina containing prepayment penalties of 3 years or more - a typical characteristic of a predatory loan - dropped 72 % after the law's passage. By comparison, the study showed that the number of loans with prepayment penalties rose by more than 250% in neighboring South Carolina during the same time period. The report also found that the number of loans to borrowers with impaired credit increased by 31% since the full implementation of the law and subprime home purchase loans increased by 43%.

According to Dr. Michael A. Stegman,

director of UNC's Center for Community Capitalism, the study shows that since the North Carolina law went into full effect, the subprime market has behaved just as the law intended. The number of loans with predatory lending characteristics has fallen without either restricting access to loans to borrowers with blemished credit or increasing the cost of these loans. The report is the first analysis of a statewide predatory lending law that looks at individual segments of the subprime market. The database of loans included specific loan terms, some of which may be predatory.

Lawmakers passed the North Carolina Anti-Predatory Lending Law to curb predatory lending abuses in that state. Major provisions of the law prohibit typical abusive lending practices such as the financing of single premium credit insurance, loan flipping and charging prepayment penalties on loans of less than \$150,000. The law also provided protections to borrowers on high-cost loans charging fees in excess of 5%, including requiring such borrowers to receive financial counseling before closing their loan. Alabama should follow North Carolina's lead and get tougher on the predatory lenders who prey on Alabama citizens.

## XXIII. THE CONSUMER CORNER

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### ***A Consumer Class Action Gets New Life***

A federal appeals court has revived a consumer class action suit that accuses Fleet Bank of misleading customers by promising a "fixed" low interest rate on its credit cards and then raising the rate just one year later. In *Roberts v. Fleet Bank*, the U.S. Court of Appeals for the Third Circuit found that "Fleet's sollicita-

tion materials could cause a reasonable consumer to be confused" about how long the low rate would last. The appellate decision revives a claim under the Truth in Lending Act that was dismissed in June 2001 by a district court judge. The court upheld the dismissal of a claim under the Rhode Island Unfair Trade Practices and Consumer Protection Act (UTPCPA), finding that such a law does not apply to "activities and businesses, which are subject to monitoring by state or federal regulatory bodies or officers." Fleet considers that to be a victory.

The appellate court found that the lower court was correct in holding that the UTPCPA claim was exempted because the Office of the Comptroller of the Currency - the primary regulator of national banks under the National Bank Act - has the power to regulate false and misleading advertising. In dismissing the TILA claim, however, the lower court had sided with Fleet's contention that the promise of a "fixed" rate was not false since the term "fixed" simply means that the interest rate is not "variable." Fleet claimed its credit agreement made it perfectly clear that the terms of the credit card, including the interest rate, could be changed "at any time." The court obviously disagreed.

The appeals court found that Congress amended the TILA in 1988 because it "determined that consumers were being inundated with credit card solicitations that failed to disclose basic cost information about the cards being promoted." The appeals court said that before passage of the Fair Credit and Charge Card Disclosure Act, the TILA did not require issuers to provide such information until the consumer actually received the card. "Congress decided that demanding early disclosure of relevant cost information from credit card companies would enable consumers to shop around for the best cards," the court wrote. Now under the TILA, a credit card provider must disclose

certain information in "direct mail applications and solicitations," including annual percentage rates. The appellate court made this finding, which is very important:

*Fleet only mails the cardholder agreement after a consumer has accepted the invitation. Thus, a consumer will not learn, until after the acceptance of the invitation, that the APR can be changed by Fleet at any time. Indeed, Fleet's practice of mailing the cardholder agreement containing important rate change information, after the consumer accepts the card, is contrary to the TILA mandate that credit card solicitations disclose all required information.*

### ***Spamming Lawsuit Filed By EarthLink***

Recently, EarthLink Inc. filed a lawsuit in federal court against 100 individuals, mostly located in Alabama and Canada, blaming them for millions of unwanted commercial e-mail messages, otherwise known as spam. In the complaint, EarthLink, the third-largest Internet service provider, accuses the Alabama individuals of using stolen credit cards, identity theft and banking fraud to fund Internet accounts and send out more than 250 million pieces of junk e-mail. The defendants went undetected for about six months by creating an elaborate chain of bogus names, false addresses and nonexistent companies, according to the lawsuit. It appears that this was a very tech-savvy spam ring. The ring used several tricks to cover its tracks, including leasing several telephone lines in Birmingham to connect to EarthLink automatically, even if the company kicked the bogus users off.

According to the lawsuit, the defendants also sent junk e-mail to some of their own accounts to monitor EarthLink's efforts to block unwanted messages. EarthLink suffered roughly \$5

million in damages from the Alabama ring alone. EarthLink can now subpoena other companies for additional information that could help in its investigation. The lawsuit also accuses an additional 25 "John Does" (persons whose actual names are unknown at the time) in Vancouver, British Columbia, for a scheme known as "phishing," in which spammers pose as Internet service providers like America Online, to collect personal and financial information from unsuspecting subscribers.

### ***Group Gets Private Data***

I doubt seriously that top government officials such as CIA Director George Tenet and Attorney General John Ashcroft would want their Social Security numbers to be made public. However, the California-based Foundation for Taxpayer and Consumer Rights says for \$26 each it was able to purchase the Social Security numbers and home addresses for Tenet, Ashcroft and other top Bush Administration officials. On the list was none other than the infamous Karl Rove, the president's chief political adviser, who many believe is actually running the country. All of this illustrates the need for stronger protections of personal information. Specifically, the consumer advocacy group mentioned above is concerned about legislation in Congress that would amend the Fair Credit Reporting Act. The bill, sponsored by several members of the House, including Republican Spencer Bachus (R-Ala.), aims to prevent identity theft and improve the accuracy of consumer records, among other things. One shortcoming of the bill is a portion that would continue a current pre-emption of tougher state privacy laws. However, since we really don't have anything in Alabama to my knowledge, it wouldn't affect us. Of course, our Legislature could take care of that by passing a tough bill. Hopefully, that will happen very soon. In the meanwhile, the federal

legislation should be amended to remove the objectionable parts.

Putting a stop to the trafficking of information among corporate affiliates is important because some companies have hundreds of businesses under the family umbrella. For example, a banking corporation might have a number of insurance, securities and real estate affiliates it does business with, and financial data might be swapped among all of them. It is essential to stop the swapping of information among corporate affiliates. In addition to Social Security numbers, some online sites will give out a person's bank account balance for about \$300. There are at least a dozen sites that provide social security numbers and other private data. It appears that with little effort, at a modest cost, you can get this type of information very easily on the Internet. The Bush Administration has urged Congress to act quickly to strengthen the nation's credit laws and has praised the House bill. The bill is expected to come up for a vote in the first few weeks after lawmakers return from their summer recess.

### ***FTC Releases Report On Identity Theft***

The Federal Trade Commission has released the results from a 5-year analysis of identity theft. In 2002, the FTC received 161,819 complaints about identity theft, which doubled the number from the year before. Still, agency officials acknowledge many people don't report this crime. The Justice Department estimated that as many as 700,000 Americans are victimized annually. This results in costs of more than \$1,000 each to right the damage to their accounts and reputations. Identity theft has become a most severe national problem. Credit card fraud was the most common form of identity theft last year, accounting for 42% of the complaints to the FTC. Next in line, at 22%, was phone or utility

fraud. This was followed by bank fraud at 17%. Privacy advocates advise consumers to protect themselves from identity theft by checking their credit reports twice a year, shredding personal documents before throwing them away, and cleansing wallets of old receipts and printed Social Security numbers. In 2001, the FTC introduced a Web site and toll-free phone number for identity theft victims. I fear that we have seen just the tip of the iceberg. The problem will get much worse, in my opinion, before it gets better. The poor economy has most likely intensified the problem.

The federal government, in its first comprehensive look at identity theft, found that the crime has reached epidemic proportions — touching nearly 5% of adult Americans each year, and costing banks, businesses and consumers upward of \$50 billion annually. About 9.9 million individuals were victimized in 2002 and more than 27 million have been hit by identity theft in the last 5 years, according to the Federal Trade Commission study. The findings are based on a telephone survey of more than 4,000 individuals.

The most common type of identity theft involves a thief impersonating someone to use an existing credit card or checking account. But the more troubling variety of identity fraud, in which new credit is issued to the criminal in the victim's name, ensnared 3.3 million individuals last year. This latter theft is more costly for both businesses and consumers to fix, because it often goes undetected for a long time. The FTC has recommended steps to combat identity theft, including creating a standardized fraud alert; barring credit reporting companies from releasing information that the consumer had previously identified as fraudulent; boosting penalties for thieves; and forcing debt collectors and lenders to share information with the victim. Many of these recommendations are included in pending legislation that

would revamp the federal Fair Credit Reporting Act.

However, consumer advocates said the recommended steps do not go far enough. In its present form, the bill does nothing to stop identity theft from happening, critics said. It only helps victims after the fact, they complained, and it would preempt many stronger state laws that allow consumers to opt out of information sharing between corporate affiliates. The Federal Trade Commission has documented that identity theft is an epidemic. However, their solutions haven't changed from what they were two months ago.

### **Five Vehicles Score Badly In Bumper Test**

Five of six new vehicles scored "poor" or "marginal" ratings in low-speed crash tests measuring the damage from bumping into barriers at five miles per hour, according to a study released recently. The Infiniti G35 luxury car from Nissan Motor Co. Ltd. sustained the most damage. The test consisted of four crash tests on the front and rear bumpers to simulate common mishaps in commuter traffic and parking lots. The tests were conducted by the Insurance Institute for Highway Safety, the auto safety research group funded by the insurance industry. "The G35's bumpers are a disaster," Adrian Lund, chief operating officer for the Institute, said in a news release.

The Mercedes E Class luxury sedan and the Nissan Quest minivan also scored "poor" ratings. The Toyota Sienna minivan and the Saab 9-3 car both received "marginal" ratings. Only the Mazda6 sedan performed reasonably well, earning an "acceptable" rating. The new Saab 9-3, Nissan Quest and Toyota Sienna all sustained more damage than the previous models they replaced. The Quest recorded the biggest jump in damage, to an average of \$1,137 per crash test, up from \$366 previously, which earned a "good" rating. The

bumpers on the Mazda6 were designed to absorb energy and keep it away from the body, the Institute said. The institute conducts the tests and publicizes the results in an effort to pressure automakers into making stronger bumpers. I have to wonder why NHTSA doesn't do this without the necessity of "outside prodding."

### **Don't Fall For These Credit Card Tricks!**

Complaints about credit cards continue to be among the most common consumer grievance. As credit card companies intensify their marketing campaigns, more and more credit card offers arrive in our homes. It has been reported that the average household receives eight credit card offers each month. Although the competition among credit card companies is fiercer than ever, consumer costs are soaring. With a nearly saturated market, lenders are looking for new ways to boost their profits - meaning bigger fees and higher interest rates for all of us. But you can fight back, by being a cautious consumer. Liz Pulliam Weston, a columnist for MSN Money, has compiled a list of "stupid credit card tricks lenders are using to ding you, and what you can do to fight back," and I pass it on for the benefit of our readers:

**Endless Fees** - *Fees are a big part of credit card company profits these days. The amount lenders have collected in late fees has risen more than fourfold since 1996 - from \$1.7 billion to \$7.3 billion. About a third of credit card issuer profits now come from late fees, over-limit charges and other penalties, according to Consumer Action. It's not that we've become more remiss about our payments, it's that the penalties are much greater. Consider:*

- The average late fee is now \$ 29.88, nearly three times the \$ 11.96 average charge in May 1994.

- Over-limit fees, which are added to your bill when you exceed your credit limit, more than doubled in the same period, from \$12.56 to \$ 27.40.
- Cash advance fees used to average about 2% with a \$2 minimum and \$10 maximum; today those charges average 3%, with a \$10 minimum and no maximum.

*Unfortunately, it's now easier to make a late payment, because lenders are reducing grace periods. The average grace period is just over 21 days now, as opposed to nearly 30 days in 1990. And some credit card issuers now charge late fees if your check arrives just a day late. This is how you can fight back:*

- Send in at least a minimum payment as soon as your bill arrives. You can always send more in later.
- Set up an automatic transfer if you consistently carry a balance. That way, you don't have to worry about remembering to pay the credit card statement on the due date.
- If you're charged a late fee, call the card issuer and complain. Some are willing to remove the fee if you're a good customer and not habitually tardy.
- Don't use a credit card to get cash. It was always a bad deal - now it's even worse.

**Lower Your Balance** - *People with large credit card balances have always paid more interest. They are now paying higher fees as well. Citibank and Discover recently raised their late fees to \$35 for customers with balances of more than \$ 1,000; Chase Manhattan now charges the same fee if your balance is over \$1,200. Since the average amount owed on a credit card in April was \$1,402, that means a lot of people will be paying the higher fees. Fight back:*

- Pay down your balances. The more

debt you carry, the more interest and fees you'll pay, which will likely affect your credit rating.

- Call your credit card company and ask for a lower rate. If you're a good customer, with good credit, the lender might be willing to rescind any increase.

**Your Credit Card Company Is Watching You** – *Most people know by now that credit card companies increase their rates if consumers miss a payment or two. And now, people are also discovering that they can lose a great rate if they miss a payment on any account, or if they open too many accounts, or charge too much on any of the cards they have. Lenders scan credit reports on a routine basis, looking for signs that their customers are piling on too much debt or having trouble paying their bills. Paying only the minimum means paying lots of interest, since it can take years, if not decades, to get rid of your debt this way. Providian, for example, is boosting interest rates to an incredible 29.99% for customers with "minimum payment activity." How you can fight back:*

- Be aware of your credit. Pay all your bills on time, apply for credit sparingly, and don't max out your credit cards.
- Be sure to always pay more than the minimum. Paying an extra \$25 a month on a \$5,000 balance can shave nearly 16 years off the time it takes to pay back the debt!
- Check your credit report at least once a year, and challenge any wrong information. Credit bureaus are required by law to investigate any item you dispute and to remove it from your record if it's not accurate.

**The Balance Transfer Roulette** – *In the past, it was common to see 0% balance transfer offers. Although they are not as typical nowadays,*

*these seemingly tempting offers can be traps in disguise. Examples:*

- Many lenders now charge 3% when you transfer a balance to their card – a fee that can wipe out any interest rate advantage.
- Most cards that offer low rates on balance transfers make up for it with high rates on new purchases.
- Some lenders may offer a great rate for a balance transfer to a new card, but that doesn't mean you'll get it! You might be "pre-qualified" only for a higher rate.

*Here's how to fight back:*

- Read the fine print. Avoid balance transfers that apply only for a few months, and lenders who might give you a higher rate than they actually advertise.
- If the card charges a fee to transfer your balance, check if you'll actually save money.
- Use one card for balance transfers and another for new purchases.
- If necessary, try to consolidate your balances to one or two cards. That will make it easier to keep track of due dates, rate changes, and other details.
- Try to pay off your balance as soon as possible. The only way to win the credit-card interest game is not to play.

*Now that you're all set to fight back, here are seven rules of thumb to keep in mind:*

- Shop around before accepting a credit card offer;
- Be sure to read the fine print;
- Limit yourself to one or two major credit cards;
- Try to pay off all balances in full every billing cycle;
- Reduce the number of direct mail

credit card solicitations by calling the pre-screening list at 1-888-5-OPT OUT.

- Check your credit reports at least once a year for errors and correct them immediately. The three major credit bureaus are:  
Equifax: 1-800-685-1111  
Experian: 1-888-397-3742  
TransUnion: 1-800-888-4213
- If you believe you are the victim of unfair interest rate charges, late fees or other penalties, and the credit card company fails to address your complaint, you should consult with a lawyer to determine what your rights are.

Hopefully, you will find the above information both practical and helpful. Much of it is plain old common sense, but we all need to be reminded from time to time. Many people don't equate the use of a credit card for purchases with the spending of cash, and that is part of the problem. A good rule of thumb is to avoid credit card use altogether or keep the number of cards in your possession to one or two. If you don't have one, you can't be abused, tricked, or mistreated.

### ***Seniors Should Be On The Lookout For Investment Fraud***

The Alabama Securities Commission, under the excellent leadership of Director Joseph P. Borg, does an outstanding job. Joe, who is Alabama's top "securities cop," has issued a warning to senior citizens, many of whom are also investors. Unsteady stock markets, record low interest rates and rising health care costs are combining to create a "perfect storm" for investment fraud against senior investors. The warning alerted senior investors to the dangers of investment fraud and urged seniors to take control of their financial health. In a news release, Joe stated: "I'm deeply concerned that a perfect storm for investment fraud is brewing

and Alabama seniors are most at risk. These are dangerous times for seniors, our most financially vulnerable citizens. They need education, they need protection.” The collapse of the bubble economy, coupled with interest rates at 45-year lows, and rising costs for medical insurance, prescription drugs and basic living expenses, have brought con artists from the side streets and back alleys to Main Street where older investors live.

State securities regulators say older investors are being targeted with increasingly complex investment scams involving unregistered securities, promissory notes, charitable gift annuities, viatical settlements, and Ponzi schemes, all promising inflated returns. Opportunists know that seniors and others living on fixed incomes are being squeezed in the current financial environment. “Their products and pitches sound tempting to many seniors who’ve seen their retirement accounts dwindle in recent years - and who don’t have the benefit of time to recoup their losses.” In Delaware, for example, a widow sold her house to purchase a promissory note offering 10 to 50% annual returns in response to an ad in a publication entitled “Better Years.” The unregistered investment turned out to be fraudulent, and the 78-year-old woman now lives with her son and works as a convenience store clerk to make ends meet.

Recently, the Commission has been very concerned because a number of senior citizens in Alabama have considered moving some very solvent pension plan funds into high-risk investments such as options or initial public offerings (IPOs). Also, some senior citizens are transferring their entire pensions to callable CDs and locking into a situation where they can’t get to their money for 10 to 15 years. The Commission has information for seniors to learn about different investment products and solid investment principles such as diversification

before they make an investment decision. The Commission urges seniors not to be ashamed to admit that they have been victims of investment fraud. Their “silence” will only help the con artists lead another “victim into the trap.” Financial fraud must be reported so criminals won’t be able to steal retirement savings from unsuspecting seniors. Joe reminds us that “Common sense tells you that if something sounds too good to be true it almost always is. But you don’t have to rely on common sense alone.” Senior investors can contact their state securities regulator with any questions about an investment. Seniors also can learn more about the dangers of investment fraud by visiting the online Senior Investor Resource Center at a site developed specifically for senior audiences, which offers a variety of important information and resources. The Senior Investor Resource Center provides:

- A checklist of questions seniors can ask before making an investment decision;
- Common sense solutions to protect your nest egg from investment fraud;
- Information about the top frauds targeting seniors;
- Contact information for securities regulators in each state, the District of Columbia, Canada, Mexico, and Puerto Rico;
- An Investor’s Bill of Rights;
- An investor fraud awareness quiz and links to a variety of investor education publications; and.
- Programs offered by state securities regulators and others to help seniors fight investment fraud.

Regardless of our age, it is never too late to learn. The Commission offered the following tips to help seniors protect their retirement assets:

- Don’t be a courtesy victim. Con artists will not hesitate to exploit

your good manners.

- Save your good manners for friends and family members, not strangers looking for a quick buck!
- Check out strangers touting strange deals. Trusting strangers is a mistake everyone makes when it comes to their personal finances. Extensive background information on investment salespeople and firms can be found in the Central Registration Depository (CRD) files available from your state securities agency.
- Always stay in charge of your money. Beware of anyone who suggests putting your money into something you don’t understand or who urges that you leave everything in his or her hands.
- Never judge a book by its cover. Successful con artists sound and look extremely professional and have the ability to make even the flimsiest investment deal sound as safe and sound as putting money in the bank. The sound of a voice, particularly on the phone, has no bearing on the soundness of an investment opportunity.
- Watch out for salespeople who prey on your fears. Con artists know that you worry about outliving your savings. Fear can cloud your good judgment.
- An investment that is right for you will make sense because you understand it and feel comfortable with the risk involved.
- Don’t make a tragedy worse with rash financial decisions. The death or hospitalization of a spouse has many sad consequences - financial fraud shouldn’t be one of them. If you find yourself suddenly in charge of your own finances, get the facts before you make any decisions.
- Arm yourself with information, and your confidence will send con men running.

- Monitor your investments and ask tough questions. Don't compound the mistake of trusting an unscrupulous investment professional or outright con artist by failing to keep an eye on the progress of your investment. Insist on regular written and oral reports.
- Look for signs of excessive or unauthorized trading of your funds. And if you are stalled when you want to pull out your principal or profits from an investment, you have uncovered someone who wants to cheat you.
- Don't let embarrassment or fear keep you from reporting investment fraud or abuse. Con artists know that you might hesitate to report that you have been victimized in financial schemes out of embarrassment or fear. Con artists prey on your sensitivities and, in fact, count on these fears preventing or delaying the point at which authorities are notified of a scam.
- Every day that you delay reporting fraud is one more day that the con artist is spending your money and finding new victims.

We appreciate very much the Commission furnishing this information to us so that we could pass it on. It is good to know that we have dedicated persons such as Joe Borg in state government. Fortunately, the "top cop" has an excellent staff working with him.

### ***Albertson's To Pay \$1.85 Million For Scanner Overcharges***

A California judge has ordered Albertson's, Inc., the nation's second-biggest grocery chain, to pay \$1.85 million for scanner overcharges in its store in that state. The judge ordered Albertson's to pay for penalties, costs and improvements, including hiring a scan coordinator whose sole duty is to ensure accurate system pricing. The case giving rise to the fine was brought by the San Diego District Attorney's office. The judge also imposed an injunction on the grocery chain to institute a "give

away" program in all of its California stores. When an item rings up at a higher price than advertised, Albertson's must give the customer the item for free, excluding liquor, tobacco and dairy products. If the customer is buying more than one of the same item, only one will be given away free. The others must be sold at the lower price advertised. Over a 16-month investigation, Weights and Measures inspectors from 15 counties in California documented 335 inspections at 157 Albertson's stores in which inspectors were overcharged for items at checkout. There are 486 Albertson's stores in California. During the inspections, conducted from September 1999 to the end of last year, inspectors discovered 780 items were incorrectly priced, resulting in overcharges of more than \$700. The consumer protection action was brought jointly by local District Attorneys acting with the California Attorney General's Office in order to address violations that occurred throughout the state. Albertson's must now take specific steps to correct pricing errors when consumers complain, and scan coordinators must check that prices advertised in the media and in the store are the prices charged at the checkout area.

## **XXIV. RECALLS UPDATE**

### ***Anti-Chemical Warfare Hoods Recalled***

About 2,000 filtered hoods designed to protect the wearer from smoke and other contaminants are being recalled because they don't protect against certain chemical warfare agents as the manufacturer had claimed. The U.S. Consumer Product Safety Commission reports that the manufacturer, Essex PB&R Corp. of Edwardsville, Ill., has agreed to refund money to people who bought the "Plus 10 Filter Breathing

Unit" hoods. The company marketed these hoods as protection against such agents as Sarin, Tabun and Soman. The device — a plastic hood with a silicon neck seal and a filter in the front — were sold nationwide on Web sites and by independent distributors from 1993 through last month for about \$150. They are sealed in foil bags with blue and white labels that read, "It's not just 10 minutes of air. It's a lifetime."

Consumers should stop using the product immediately unless otherwise instructed, according to the Commission. Federal regulators say the product could still be used as a filter hood in fire and smoke emergencies. To my knowledge, no injuries or incidents involving the product have been reported.

### ***Recall Of Smoke Detectors***

A product safety recall involving ESL Smoke Detectors was announced last month. Consumers should stop using the product immediately unless otherwise instructed. The units were manufactured by GE Interlogix (GEI), of Tualatin, Oregon. These smoke detectors may fail to work properly upon installation or if there is an extended loss of power. If the smoke alarms fail to detect fire or smoke, it poses a serious hazard to occupants inside of the dwelling. This recall is being conducted to prevent the possibility of injuries. The ESL 500N smoke detectors are hard-wired and require professional installation. The recalled alarms have the following model numbers, which are located on the back of the detectors: 521NB, 521NCSXT, 541NB, 541NCSXT, 541NCXTE, 521NBXT, 521NCSRXT, 541NBXT, 541NCSRH, 541NCSXTE, 521NCRXT, 541NCRXT, and 541NCSRXT. Also on the back of the alarms are the letters, "ESL," and the manufacturing date code of "0223" through "0323" (23rd week of 2002 through 23rd week of 2003). Units that may not work properly can be identi-

fied by the lack of the flashing red indicator light, although all units with the aforementioned model and dates codes should be replaced.

Distributors, dealers and installers of security systems nationwide sold or installed these smoke detectors from June 2002 through June 2003 for between \$125 and \$175. Consumers should contact the company to receive free installation of a replacement smoke detector. Consumers should contact GEI at (800) 648-7422 between 6 a.m. and 5 p.m. PT Monday through Friday or log on to the company's Web site at [www.ge-interlogix.com/500N](http://www.ge-interlogix.com/500N). You can also contact your installer or service provider to determine if you have a recalled unit and/or to arrange for the free installation of a new unit.

## XXV. SPECIAL FEATURE: MMI

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A few months ago, I included an article in the Report that mentioned Marion Military Institute. Red Wilkins, a long-time friend from Bay Minette, called me and shared some things that have happened at the school. He then sent me some information for readers. It appears that MMI, based on the following, is on the right track. Last year, 32 Marion Military Institute (MMI) cadets received appointments to the Service Academies. This included 19 to West Point, 8 to the Air Force Academy, and 5 to the Naval Academy. In addition, 46 cadets received an Associate Degree and were commissioned as officers in the U.S. Army. Also, 91 of the cadets were enrolled in the Simultaneous Membership Program with the Alabama National Guard and were assigned to a variety of units providing for homeland defense and other national security requirements. Graduates of MMI over the last 3 years have attended over 40 different universities, including the University of Alabama,

Troy State University, UAB, and Samford. Other schools attended included such out-of-state institutions as Texas A&M, George Washington University, University of Maine, and Ohio State University.

On August 30, 2000, Lieutenant General (Ret) Robert F. Foley became President of MMI. His appointment came after 37 years of active service in the U.S. Army. As a former Commandant of Cadets at West Point, General Foley has a strong belief in character development. He believes that because of the stringent selection process, the enforcement of proper standards of conduct and the development of a moral-ethical education program, including facilitator-led small group discussions, the environment at MMI today is positive, caring, and wholesome. General Foley is convinced that the school is a values-based education institution where honor and respect are preeminent in every aspect of cadet life. At MMI, all cadets take an oath that "a cadet does not lie, cheat, or steal," and all cadets are expected to treat one another with respect and dignity. That is certainly a worthy goal, whether it be in an educational institution, in a family setting, or in the business world. I have to believe that General Foley is totally dedicated to making all of this a reality at MMI.

The administration at MMI, including the Board of Trustees, is convinced that security is no longer an issue at MMI because the selective admission process now allows only highly qualified men and women to enroll. Enforcement of standards and character education will, to the extent possible, insure that MMI cadets have the right kind of environment in which to live and learn. General Foley, his staff and faculty certainly appear to be dedicated to providing intellectual, physical-athletic, and leader development experience within a proper moral-ethical climate at the school. They want all cadets to feel good about "who they are, where they are, and where they are headed in life." That is certainly good

news and I commend them for their stand. I appreciate Red Wilkins bringing the above information to my attention.

## XXVI. FIRM ACTIVITIES

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### ***Managing Shareholder Appointed to Board at Brantwood Children's Home***

Tom Methvin, who is our Managing Shareholder, was recently appointed to the Board of Directors at Brantwood Children's Home. Tom's appointment will be for 3 years. Brantwood provides residential foster care, academic assistance and counseling for up to 30 youth, aged 10 to 20, who are neglected, abandoned and/or abused. Tom is also on the Board of Alabama Trial Lawyers for Children and the Cystic Fibrosis Advisory Panel. He serves on the Board of the Let God Arise Prison Ministries and also serves on the Consumer Liaison Committee of the Alabama Insurance Department, which helps design ways the Department can be more consumer friendly. Tom was recently appointed to the Executive Council of The Alabama State Bar Association. This group is responsible for running the activities of the Alabama State Bar Association. With all of these activities, Tom still finds time to spend with his wife, Amy, and their two young sons.

### ***Les Pittman***

Robert L. (Les) Pittman joined our firm as a "runner" in the mid 1980s. Les started his education at Auburn University. He then spent 3 years in the United States Marine Corps and was honorably discharged as a corporal. Following his years in the Marine Corps, Les returned to college and got his degree. He received his law degree while working as a marketing representative for Alabama Gas Co. Les then served as a

law clerk to Supreme Court Justice Mark Kennedy. Les joined the firm as an associate in 1993 and became a shareholder in 1999. He has participated in over 30 jury trials throughout the state of Alabama. In 2000, Les began working in the Nursing Home Litigation Division. Subsequently, he has handled numerous cases. Several of these resulted in substantial jury verdicts or settlements for his clients. Les is married to the former Jessica Dilworth of Birmingham. They are members of First Baptist Church in Montgomery, where Les is involved in the after-school tutoring program.

### **Clint Carter**

Clint Carter, a lawyer in our Consumer Fraud Division, represents individuals and business plaintiffs throughout the region and the country. He has recently been involved in complex business litigation cases involving pharmaceutical pricing, as well as the representation of state Medicaid agencies involving average wholesale price litigation. Clint is also involved in the representation of state entities and their health and insurance plans regarding the pharmacy benefits management industry. In addition, Clint represents policyholders and beneficiaries in cases dealing with insurance disputes throughout the southeastern states. He has additional areas of practice in insurance fraud, consumer rights and bad faith litigation. Clint has been involved in several significant settlements on behalf of individual policyholders and also businesses in cases against the insurance industry. Clint has spoken at legal seminars on a wide range of topics including the trial of insurance fraud cases. Clint is married to the former Elizabeth K. Brannen of Frostproof, Florida. Elizabeth is an attorney with Hill, Hill, Carter, Franco, Cole & Black of Montgomery. They attend church at St. John's Episcopal Church in Montgomery.

### **Ben Baker**

Ben Baker joined our firm after practicing law in Birmingham for several years. He graduated from Cumberland School of Law in 1993. Ben specializes in personal injury/product liability litigation. He has appeared as a speaker for various organizations including the Alabama Trial Lawyers Association, the Birmingham Bar Association, the Cumberland School of Law, the National Business Institute, the Southern Trial Lawyers Association and the Jones School of Law. Ben is married to the former Kimberly Strag of Alexander City. They have one daughter, and recently had a baby boy. Ben and his wife are members of the Episcopal Church of the Ascension in Montgomery. One of Ben's cases is featured this month under the Product Liability Section.

### **Ted Meadows**

Ted Meadows joined our firm in 2001 and became a shareholder in 2002. He has spent his entire career representing victims who have been injured or defrauded. Now, Ted focuses on representing personal injury victims throughout the country in claims against pharmaceutical companies and medical device manufacturers. Ted is primarily responsible for handling Sulzer, Lotronex™, and Meridia® claims. He is a national leader in the Meridia® and Lotronex™ litigation arenas with lawsuits filed in multiple states. Ted is currently scheduled to try the first Meridia® case ever to be tried in the country. It will be tried in Corpus Christi, Texas. He is married to the former Carla Musgrove of Eufaula, Alabama. They have two children, Nathan and Amanda. Ted and his family are members of Saint James United Methodist Church, where he is actively involved in the Music Ministry. Ted and Carla are avid runners. He enjoys competing in triathlons, but rumor has it

that Carla can take him on the short distances.

### **Scarlette Tuley**

Scarlette Tuley graduated from the University of Alabama in 1998. While at Alabama she was an editor of the Law and Psychology Review and served on the Honor Court Defense Counsel. Upon graduation Scarlette began her practice with our firm focusing on personal injury cases. Currently Scarlette does business litigation and environmental/toxic tort litigation. In her business practice she has represented hospitals, manufacturers, food packagers, lumber companies and contractors. Scarlette is very involved with the Women's Bar in Alabama. She is the founder and current President of the Montgomery County Women's Bar Section. Scarlette has presented continuing education programs on environmental litigation and the use of technology in case preparation and the courtroom. Scarlette is married to Jay Tuley, a shareholder with the law firm of Nix, Holtsford, Gilliland, Higgins & Hitson, P.C. Scarlette and Jay have one very young son, Beck, and are members of Memorial Presbyterian Church.

### **Julie Grimes**

Julie Grimes, who started with the firm in March of 1994, presently serves as our Accounting Manager. Basically, Julie oversees all the receipts and expenditures of the firm and manages the distribution of all the client settlements. Julie is married to Keith Grimes and they have two sons, Chris and Casey, and Keith has two daughters, Celeste and Katie. They are the proud grandparents of four grandchildren, who all just happen to be boys, and are expecting the arrival of their next grandchild in April of 2004. Julie's son Chris, and grandson Chael, are both currently serving in the United States Marine Corps. Julie, who graduated

from Troy State University with a degree in Education, was a high school teacher for 5 years. She taught music and mathematics before changing studies and careers and focusing on business and accounting. We are mighty glad she came to work here. She is a dedicated and very hard worker. We are fortunate to have her in charge of our Accounting Department.

### ***Keith Scott***

Keith Scott came to work for the firm as an investigator in June of 2001. He currently works in our Personal Injury/Products Liability Division as well as helping out with any other investigative needs for the firm. Our investigators have a busy schedule. They work with clients and witnesses. An important part of their work involves helping the lawyers in product liability cases. Often, Keith and the other investigators have to locate vehicles and parts to use during trials. Serving subpoenas on a daily basis is also part of their work. Keith previously worked for the Montgomery Police Department and spent 14 years in the Detective Division before his retirement. Keith graduated from Troy State University with a degree in Criminal Investigation and is also a graduate of the Police Academy.

Keith and his wife, Marion, have two children. Their daughter, Meredith, is 15 years old and a sophomore at Prattville High School. Their son, Cy, is 11 years old and attends 6th grade at Prattville Intermediate School. Keith and his family are active members of Prattville United Methodist Church. Away from work, Keith enjoys hunting and fishing. Keith Scott is a most valuable member of our firm and is known for his dedication to our clients and for his work ethic.

### ***Fran Parmer***

Fran Parmer, who is one of our medical advisors, works in our Nursing

Home section. Her job as a nurse-employee is to review all medical records in order to determine the deviations from the standard of care by a nursing home. She then compiles a chronology, standard of care deviations (Red Flags), and summarizes her findings into a complete medical review for her lawyers. Fran assists the lawyers in preparation for depositions, demand packages, mediations, and trials. She deals with expert witnesses and assists her lawyers in understanding all of the medical issues that surround a nursing home case. Fran has been with us for 2 years, working solely in the Nursing Home Division during that time. She has a Nursing Degree and a Certification in Legal Nurse Consulting. In addition, Fran is certified in adult and pediatric CPR and a member of the National Legal Nurse Consultants. She is retired from Alabama Department of Public Health. Fran has a daughter, Nonet, who is married to John Reese, and one grandson she adores.

### ***Greta Beasley***

Greta Beasley works as a legal assistant for Clint Carter in our Consumer Fraud Division. The Crenshaw County native started with the firm in May of 1992 and worked for 4 years before she left for another job opportunity. After approximately 2 years, Greta returned to us in December of 1998 and has been back now for nearly 5 years. Greta handles global insurance settlements, helps with all aspects of discovery and communication with clients, and assists in getting cases ready for trial. When Greta first came to work here in 1992, the firm was not separated into specialized departments. She worked for Dee Miles and Julie Beasley as a legal secretary before being promoted to legal assistant. Greta was legal assistant for Julie Beasley and Les Pittman, working mostly on personal injury cases, until she left in 1996. When Greta returned in 1998, she became a legal assistant in

the Consumer Fraud Division. Since that time, she has worked exclusively for Clint Carter. Greta is married to Terry Beasley and they have two children - Kayla, age 11, and Kyle, age 8. When not at work, Greta enjoys watching her children participate in sports, swimming, and going shopping with her daughter. Greta is a good person and a definite asset to our firm.

## **XXVII. CLOSING REMARKS**

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I started a very rough draft of this part of the October issue a few days before September 9th. Actually, I had two versions: one if the voters did what I thought would be the right thing and approved Amendment One; the other version was if the voters rejected the Riley Plan. I have decided to use neither of them. To be perfectly honest, I knew from polls and having talked to folks around the state that the plan was in real trouble. Nevertheless, I still wanted to write a positive piece on the outcome without much hope that it would ever be read. My hope was that voters would finally realize how important a yes vote would be for our state. How wrong I was! It doesn't take a political consultant to teach us that it is always difficult to sell tax increases to the voters. Nobody wants their taxes raised, and now we know that about 70% of all Alabama citizens apparently don't trust our politicians. Those are two pretty big hurdles to clear.

It is interesting that few people around the state trust the Legislature as a group, but most do trust and respect their own senator and House member. I have always found that hard to reconcile. In any event, the attacks on the Riley plan were carefully planned by the experts hired by the Alfa bosses, and were carried out with the expenditure of millions of dollars. In my opinion, we will live to regret the

outcome of this vote. Clearly, there is one lesson to be learned from September 9th - "don't try to raise taxes in Alabama!" Now, all of our political leaders have an obligation and duty to work together and make the best of a very bad fiscal situation. I pray that one of these days we will work out of the monumental problems facing our people. We can't afford any more "band-aids" or "patches," but it appears that is what we will be getting for a while.

A number of our readers have contacted us with great concern over the obvious decline in the moral structure of our country. Many concerned citizens appear ready to give up, saying that the United States is doomed. While I too am concerned, there is an answer

to all of our problems. Having heard so many comments over the past several weeks about how morally and spiritually corrupt our country has become, I believe each of us has a duty to get involved and work to make things better. The most important tool we have available to us is prayer. Unfortunately, as I have said before, most of us only use this powerful tool when our "ox is in the ditch" or when we have some "special needs." We can start by praying daily for our leaders. Each of us has an obligation to pray constantly for our leaders at every level. We must include those we don't agree with or support. This is critically important. We are all greatly concerned about our country and the many problems facing

us, but sometimes all we do is worry and criticize others because we think "they" aren't doing their part. The formula for how we can help "save" America is basic, simple, and readily available. God has been telling us that He is available and certainly willing to supply our needs. It's high time we listened.

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

**2 Chronicles 7:14**

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