

THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

RULING IN EXXONMOBIL CASE

On March 29th, the trial judge entered a lengthy order on the defendant's post-verdict motions in the State's case against ExxonMobil. In November, a Montgomery County jury, after a month-long trial, ruled that ExxonMobil had cheated the State out of royalties from natural gas wells drilled in state-owned waters along the Alabama coast. In the post-verdict order, the compensatory verdict of \$103 million was left intact. The punitive award, however, was reduced to \$3.5 billion. Judge Tracy McCooley, who presided over the lengthy trial and the hearings on the defendant's post-verdict motions, wrote an excellent opinion on the liability issues. The court made it crystal clear that the giant oil company was guilty of intentional fraud that occurred at the top levels of the company. Judge McCooley put a great deal of emphasis on the internal Exxon documents that were very damaging, showing that the company set out to cheat the State and felt it would never be caught. A pertinent part of the judge's order stated:

This court is thoroughly convinced, as was the jury, that Exxon intentionally and deliberately took actions, from the moment the leases were signed, to commit fraud upon the State. Exxon engaged in a carefully planned scheme, conceived

and approved at the highest echelons of its corporate offices, to keep nearly \$1 billion in easy money that it knew was due.

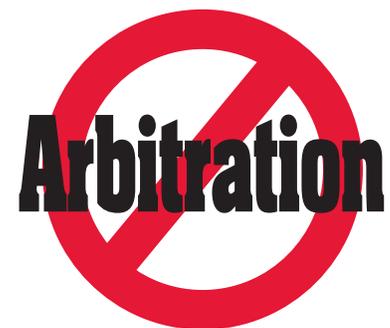
ExxonMobil will appeal to the Alabama Supreme Court. It is highly significant that two juries have heard this case with each jury finding Exxon to have committed fraud and then covered up its wrongful conduct. This will be the second trip to the Alabama Supreme Court. You will recall that the first case was reversed and sent back to the trial court on an evidentiary issue. The record from the trial sent up this time will be without any evidentiary problem. In fact, the record is much stronger on the liability issues than was the first one.

The Alabama Supreme Court—which will have to follow the established law dealing with corporate fraud—should have little trouble affirming this case and allowing the full amount of damages to be recovered by the State. We expect Exxon to put its normal spin on the judge's order. However, I would encourage anybody who doubts that the conduct by Exxon was extremely bad to read Judge McCooley's excellent order. We are posting the complete order on our Website: www.BeasleyAllen.com.

While we were disappointed with the reduction in punitive damages, the court may have done the State a favor since a \$3.5 billion punitive award will clearly pass "constitutional muster." The order will bring the verdict in line with guidelines from the U.S. Supreme Court for punitive damages.

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GOVERNOR RILEY APPOINTS A NEW ATTORNEY GENERAL

Governor Riley has appointed Troy King to serve as Alabama's Attorney General. At the time of his appointment, King, 35, was serving as Legal Advisor in the Riley Administration. Troy previously worked as an Assistant Attorney General for four years and in the administration of former Governor Fob James. The new Attorney General has made a commitment to honest and fair government for every Alabama citizen. Troy, a man of great integrity, is widely respected. In making the appointment, the Governor stated that Troy would make all Alabamians proud to call him their Attorney General.

I worked with Troy on the Exxon case and was impressed with his knowledge of the law and with his dedication to his work. Perhaps the thing that impressed me the most is the fact that Troy is a dedicated family man. A native of Elba, Troy graduated with honors from Troy State University in 1990 and earned his law degree from the University of Alabama School of Law in 1994. He is married to the former Paige Pinson of Montgomery. They have three children—son Briggs and daughters Colden and Asher.

PENNSYLVANIA SUES DRUG MAKERS FOR DECEPTION

Pennsylvania became the eleventh state to sue the pharmaceutical industry for cheating the state. It is suing 13 major pharmaceutical companies for inflating prices in a scheme that cost the government, insurers, and consumers hundreds of millions of dollars. The lawsuit, filed in state court, is being called "the broadest effort to date to fight the problem" of price manipulation by drug companies trying to gain market share. The artificially inflated prices can be brought down to reality with lawsuits of this nature. Named as defendants are TAP Pharmaceutical Products Inc., AstraZeneca, Bayer AG,

GlaxoSmithKline, Pfizer Inc., Amgen Inc., Schering-Plough Corp., Bristol-Myers Squibb Co., Johnson & Johnson, Baxter International Inc., Aventis Pharmaceuticals Inc., Boehringer Ingelheim Corp. and Dey Inc.

SENATOR RICHARD SHELBY DESERVES ANOTHER TERM

Senator Richard Shelby has done an outstanding job of representing Alabama in the U.S. Senate. The senior senator from Alabama, who is well-respected among his colleagues, has established himself as a real leader in the nation's capitol. While the Senator and I do not agree on all political issues, I have great respect for him. He has represented all sections of Alabama and all of our people very well during his years in Washington. Personally, I believe that Senator Shelby deserves another term in the Senate. He has been a real champion for consumers and people generally, and that type of performance crosses party lines. Frankly, I don't believe there is a political figure in Alabama who could beat the Senator in either the Republican primary or the general election.

UNFUNDED PROGRAMS COST STATES \$29 BILLION

Some of the financial problems facing state governments all over the country have been caused by the federal government. Over the years, the federal government has created programs and left funding for those programs to the states. States will wind up paying at least \$29 billion this year to cover the costs of programs and initiatives handed down from Washington. These range from education to homeland security. Washington is leaving an increasingly large burden for states and it doesn't appear to be getting any better. A bipartisan group of state legislators documented the costs in a report released last month. The biggest burdens on the states came from

special education requirements, President Bush's new No Child Left Behind education law, and prescription drugs. The costs to the states include:

- \$10 billion for special education programs
- \$9.6 billion for No Child Left Behind
- \$6 billion for prescription drugs for Medicare-eligible patients
- \$1 billion for environmental regulations

According to the report, the costs are expected to rise to \$34.2 billion next year. This will create onerous burdens at a time when state finances are still weak. The fiscal weight of unfunded mandates has "changed dramatically, especially in the last three or four years." While a 1995 federal law was supposed to put an end to such laws, the report found that the measure has been largely undermined. Exemptions to the statute, conditions put on federal grants to states, and the failure of Congress to fully fund the laws it passes have made a joke of the 1995 law.

NEW LNG HUB WOULD SEND GAS TO MOBILE

An abandoned sulfur mining complex about 20 miles off the southeast coast of Louisiana may become the nation's first offshore importation facility for liquefied natural gas. Pipelines would bring natural gas from the facility to shore in Alabama and Louisiana. New Orleans-based McMoRan Exploration Co. has submitted a permit application for an LNG terminal to the U.S. Coast Guard. That agency oversees safety and regulatory issues for LNG terminals in federal waters. By newly established federal law, the Coast Guard must decide whether to grant approval for the project within 365 days.

McMoRan proposes to turn an existing group of interconnected rig platforms into a massive offshore port for LNG tankers arriving from all over the world. The terminal would accept LNG from any shipper regardless of corpo-

rate affiliation. The facility would offload the super-concentrated, super-cooled liquid form of natural gas and turn it back into the familiar form used to heat homes and produce electricity. The gas would then be injected into the nation's gas supply grid through offshore pipelines. Initially, the terminal would be able to process about 1 billion cubic feet of gas per day. If approved, this facility may negate the need for ExxonMobil's proposed facility in Mobile County. I hope that will prove to be the case.

II. LEGISLATIVE HAPPENINGS

A TOUGH SESSION GETS TOUGHER

The current legislative session has become the most partisan since Alabama became a two-party state. In my opinion, this is not good for the people of Alabama. I hope leadership from the opposing camps will find a way to join forces and rescue a session that has all the earmarks of a failure. Fortunately, there is still adequate time left to turn things around. However, more band-aid approaches to our state's problems aren't the answer and shouldn't be tolerated. There was some hope that help was on the way. A bipartisan group of legislators completed its work on a list of tax and accountability bills and came up with some special proposals. The leadership in the House and Senate appointed the 10-member committee to develop a tax and accountability plan after Governor Riley's accountability plans were stalled in the House. The budget for the state General Fund would spend \$1.2 billion for the next fiscal year.

The bills recommended by the committee—if passed—would provide about \$326 million. While this is a start, it is no answer to the mounting financial problems facing state govern-

ment. In fact, if all of the bills passed, it would be little more than another partial solution to the much larger problem. As expected, a coalition of business organizations immediately let it be known they opposed any new taxes. The group, which are adamantly opposed to passing any tax increases regardless of the need or who proposes them, urged the Legislature to pass bills to reform government spending practices before considering raising new revenue.

I tend to agree with Senator Bobby Denton, the dean of the Senate with 26 years of service, who says the proposals represent another year of the Legislature trying to patch the budgets to get through one more year. The package does include several government accountability measures, including several similar to those offered originally by the Governor, including banning pass-through pork projects and limiting money transfers between political action committees. I will be shocked if the entire package passes and surprised if any tax measure becomes law.

POWERFUL SPECIAL INTERESTS

If anybody doubts the power of the special interest groups that do their very best to control what happens in the Alabama Legislature, come down and check the list of lobbyists and see for yourself who they represent. The "people of Alabama" need help, but it won't come from the special interest groups. Perhaps it will take a session of the Legislature that fails to solve the fiscal crisis facing our state. Ordinary people badly need more politicians who will remember them after the elections are over. Without question, the Governor and Legislature should take the immediate steps required to curtail the power of the powerful special interests and their lobbyists. When that happens, Alabama will be a better place for all of its citizens.

III. COURT WATCH

A GOOD APPROACH TO ELECTING JUDGES

A bill introduced by Senator Myron Penn, if passed by the Legislature, will require the State Supreme Court to be elected from districts. The Chief Justice would be the only member of the court to be elected statewide. I believe this would be a very good approach for electing the court. The proposed legislation would have eight members of the Alabama Supreme Court run from districts rather than statewide. This approach makes sense for a number of reasons. First, it would assure that all areas of the state are represented on the court. It would also bring racial diversity to the court. The legislation would also cut down on the cost of campaigning by having candidates elected in districts. In the last election cycle, according to reports, Supreme Court candidates averaged spending more than \$1 million each on their statewide races. The Penn bill uses the eight districts of the State Board of Education for the Supreme Court races. It also makes sense for the chief justice to run statewide. This is a bill that should have tremendous support with people around the state. I hope there will be bipartisan support in the Legislature. Frankly, I believe it would be difficult to oppose the bill and have to explain it back home. It would be impossible to argue successfully that each geographical area of the state doesn't deserve representation on the highest court in the state.

CHEVRONTEXACO ORDERED TO PAY

A jury has ordered ChevronTexaco Corp. to pay the State of Louisiana more than \$82 million after finding that the company "willfully defrauded" that state out of oil royalties between 1987 and 1999. ChevronTexaco will

appeal the verdict issued by a state district court jury. However, the jury refused to cancel eight state mineral leases held by the oil company, as state attorneys had requested. The private attorney who represented the state contended that ChevronTexaco sold oil at prices ranging from \$1 to \$1.50 per barrel more than it paid the State for its share of oil from state leases. The jury found that Chevron had short-changed the state by \$13.5 million in royalties and assessed damages. The suit was originally filed against Chevron U.S.A., which merged with Texaco to become ChevronTexaco. During the years from 1987 through 1999, Chevron said it paid the State \$250 million in royalties.

COURT UPHOLDS \$1.3 BILLION VERDICT AGAINST EXXON

The U.S. Court of Appeals for the Eleventh Circuit in Atlanta has denied a request by ExxonMobil Corp. that the court reconsider a \$1.2 billion verdict awarded last June to some 10,000 Exxon service station dealers. The appellate court denied Exxon's request that a full panel of the court's judges rehear a case that had been presented to a three-judge panel. Last June, the panel affirmed a February 2001 Miami federal court verdict that concluded Exxon for 12 years had overcharged dealers for motor fuel deliveries and then concealed the overcharges. The class includes about 10,000 current or former dealers who owned or operated Exxon service stations between March 1983 and August 1994 in 34 states and the District of Columbia. ExxonMobil will likely appeal this latest ruling to the U.S. Supreme Court. The amount due now amounts to \$1.3 billion, including interest. Having just dealt with ExxonMobil in the State of Alabama's fraud case against the giant oil company, I wasn't surprised to read the spin put on the case by the company. A spokesperson for Exxon-

Mobil stated, "We are very disappointed with this decision. We operated in good faith and met our obligations in the best interests of both the dealers and customers." That appears to be the company line in every case lost by ExxonMobil.

For 12 years, Exxon imposed a 3% credit card transaction processing fee on dealers. As an offset, it offered a "discount for cash" on wholesale fuel prices, helping dealers compete with retailers selling on a cash-only basis. Exxon, the dealers contended, never delivered the discounts. About 75% of Exxon's dealers participated in the program, which was voluntary. As a result of this latest ruling, dealers who file claims by the August 29th deadline could begin receiving payments as early as September. The average recovery is expected to be about \$130,000, which includes compensation plus interest. Poor record-keeping by Exxon and the years of delay have hurt efforts to locate all the claimants.

The decision marks the latest in a series of legal setbacks for ExxonMobil, the world's largest listed oil company. In January, a federal court judge in Anchorage, Alaska, increased punitive damages against Exxon, related to the 1989 Exxon Valdez disaster, by \$500 million to \$4.5 billion. The increase came after Exxon twice succeeded in convincing the U.S. Court of Appeals for the Ninth Circuit in San Francisco to dismiss the Anchorage court's damages as excessive. Exxon Mobil maintains it has already paid billions in fines and environmental clean-up costs and should not be forced to pay such high punitive costs.

A JUDICIAL RACE TO WATCH

A race for a seat on the Illinois Supreme Court is getting national attention and will be watched closely. A number of business consortiums, including the Illinois Civil Justice League and the U.S. Chamber of Com-

merce, are waging a well-financed campaign in Illinois as a part of their national battle to reform the practice of class action lawsuits by influencing key judicial races. It has been reported that it will be one of the most closely scrutinized judicial races in the country. It could also be the most expensive. In past judicial races spread among more than a half-dozen states, the Chamber and business groups have collectively directed millions of dollars to influence key judicial races. Class action reform advocates estimate \$3 million could be raised in Illinois to support their candidate.

It is interesting to note that the candidate backed in Illinois by the so-called reform groups was pretty much unknown to the groups. However, his opponent just happens to be a Democrat. It is quite sad that some folks believe they can go out and attack the judiciary at random without even knowing anything about who the candidates really are. It appears that the U.S. Chamber cares very little about truth. Obviously, they spend a lot of Big Corporate money to influence court seats. Some say the Chamber is nothing but a front group for industries pushing tort reform and who want to "buy" justice. The U.S. Chamber has identified 10 other jurisdictions as "judicial hell-holes." Four hot spots are located in Texas, three in California and one each in Louisiana, Mississippi and Missouri. The Chamber has poured hundreds of thousands of dollars into dozens of judicial campaigns nationally in the last few years.

SUPREME COURT TO WEIGH SUITS OF HMOs

The U.S. Supreme Court heard a case last month that will decide whether health maintenance organizations can be sued in state courts for negligence and medical malpractice. The Court heard arguments last month in consolidated cases, Aetna Health Inc. v. Davila,

and CIGNA Health Care Inc. v. Calad. This is the High Court's fourth venture into the arena of managed care in four years. It may well be its most important for folks who have to deal with health-related issues that involve HMOs. I hope the result will be good for consumers. Aetna and CIGNA, backed by the Bush Administration and business and health care groups, argued that medical malpractice claims are preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA), which regulates employee benefits plans, including HMO and managed care plans. They contend that ERISA provides an exclusive set of remedies for the claims of Davila and Calad. The plaintiffs' lawyers, as well as consumer and patient advocates, argued that HMOs should face liability when they don't just "determine coverage," but instead "chart the course of treatment for patients." States can exercise their police power to protect their citizens' health and regulate insurance by providing legal remedies for negligence or other wrongdoing consistent with ERISA. Interestingly, President Bush now urges striking down the Texas statute that he signed into law as Governor Bush (after opposing it) and then championed, just 4 years ago, as Presidential candidate Bush.

ERISA's remedies do nothing for injured parties, and both the government and HMOs have to know that. The course of treatment followed in the cases argued before the High Court was dictated by their HMOs' medical-necessity decisions, even when the patients' physicians objected. The patients were injured by that treatment and should be able to show in state courts that the HMOs did not meet Texas' professional medical standard for HMOs. Interestingly, one of the plaintiffs is from Texas—the first state to allow its citizens to sue their health plans. A patient can sue in Texas without exhausting administrative appeals if the plan's decision has

caused harm. Ten other states have similar laws, according to the National Conference of State Legislatures. Texas shared argument time with the Texas plaintiff and defended the states' traditional power in this area. Aetna and CIGNA removed the state court suits to federal district court, asserting successfully that the state law claims were completely preempted by ERISA. The U.S. Court of Appeals for the Fifth Circuit reversed. The case is now before the U.S. Supreme Court.

The federal Courts of Appeal are split over whether state law claims against HMOs for negligence or medical malpractice are preempted by ERISA. The 2nd, 5th, and 11th Circuits (which includes Alabama) have said no, with the 1st, 3rd, 4th, 7th, and 8th Circuits saying yes. It should be significant that in a case styled, *Pegram v. Herdrich*, the U.S. Supreme Court held in 2000 that HMOs making mixed decisions are not ERISA fiduciaries. The AARP Foundation filed an amicus brief saying the ERISA remedies are unrealistic. That position is readily apparent. There is no way to justify allowing an insurance company or HMO to override a doctor's medical advice for a patient.

SUPREME COURT HEARS ONLINE PORN CASE

The U.S. Supreme Court has been presented with another opportunity to protect Web-surfing children from smut that adults can legally see and buy. The Justices struck down the first version of a child-protection law passed in 1996, during the Clinton Administration, and refused to sign off on a replacement law passed two years later. That law has never taken effect, and is now before the Justices for a second time after the Court sent it back to lower courts for review. The government lawyer, Ted Olson, told the Court that Internet porn is "persistent and unavoidable" and that government has a strong interest in shielding teenagers and younger children from it. I totally

agree with that statement. Interestingly, the government's top Supreme Court lawyer had done a little checking on his own to see how easy it is to find porn sites. Ted sat at his home computer over the weekend prior to his argument and tried a little experiment he says illustrates the need for a law protecting children from online smut. He typed in the words "free porn" on an Internet search engine, and got a list of more than 6 million Websites. That should shock all of our readers.

Free pornography is easy to find online, placed there as a hook to lure paying customers. Minors can find that free material as easily as adults, although it would be illegal for a storeowner to sell them a paper copy of a magazine that shows the same images. The 1998 Child Online Protection Act (COPA) would make it a crime for commercial Websites to knowingly place material that is "harmful to minors" within their unrestricted reach. COPA could mean six months in jail and \$50,000 in fines for first-time violators and additional fines for repeat offenders. It is on hold pending court challenges. The American Civil Liberties Union claims the law violates the First Amendment guarantee of free speech. The ACLU challenged the law on behalf of online bookstores, artists and others, including operators of Websites that offer explicit how-to sex advice or health information. The U.S. Court of Appeals for the Third Circuit first ruled the law unconstitutional on grounds that it allowed Internet content to be judged by "contemporary community standards." Given the widespread availability of the Internet, the appellate court said the law would force every site to abide by the most restrictive community's standards. In its first look at COPA, the Supreme Court delivered a partial victory to the government by ruling that the community standards issue alone did not make the law unconstitutional.

The case was sent back to the lower

court for a fuller examination of the other free speech objections raised by the ACLU. The Philadelphia-based federal appeals court then struck down the law a second time, on much broader grounds. ACLU claims the law was unconstitutional censorship when it was passed and is both unconstitutional and unnecessary now. The government's interest in protecting children from sexually explicit content should override the constitutional arguments by the ACLU, in my opinion. I hope the High Court will agree.

ANOTHER ATTACK ON MISSISSIPPI

Once again, the U.S. Chamber of Commerce has singled out Mississippi as having the worst legal system in the nation. In the U.S. Chamber Institute for Legal Reform's annual study, Mississippi ranked 50th among states. This was because a Harris poll of 1,402 "corporate lawyers" determined that juries in that state are unfair. Knowledgeable observers say the U.S. Chamber of Commerce has become nothing but a stalking horse for the national tort reform effort. The group is spending millions of dollars nationwide in its push to control judicial elections and has zeroed in on Mississippi. Few have challenged the Chamber to identify the source of their funding. The time has come, however, to demand that this information be made public. Perhaps, had the Harris group questioned only Mississippi consumers, the results would have been quite different. It is most unfair to make charges against juries and judges in any state based on polling a group of lawyers with direct ties to Corporate America.

It is undisputed that efforts to discourage lawsuits are the top priority for the Chamber. According to reports, the Institute for Legal Reform plans to spend \$40 million this year to lobby Congress and state legislatures and file briefs in defense of lawsuits. It also plans advertisements to help elect state appellate judges that the institute labels "liability

restrainers" and defeat those who are referred to as "liability enhancers." I don't know what those terms mean, but I do know what the Chamber is doing is not good for the overwhelming majority of American citizens. The political mission of the Chamber of Commerce is indeed a strange one.

FUNERAL HOMES SETTLE IN FEDERAL CIVIL LAWSUIT

The funeral homes named as defendants in a civil lawsuit that was being tried in Rome, Georgia, along with Tri-State Crematory operator Ray Brent Marsh, have settled all claims. The lawsuit, pending in federal court, stemmed from the criminal case against Marsh, who is accused of dumping 334 bodies and passing off cement dust as ashes to families of some of the deceased. Marsh also faces 787 state felony charges. The class action suit was originally filed on behalf of 1,600 relatives of people whose bodies were sent to the Georgia crematory between 1988 and 2002 from funeral homes in Georgia, Tennessee, and Alabama.

The suit involved charges of negligence and fraud. The funeral homes had sent corpses to the crematory and were charged with in effect closing their eyes to what was taking place at the crematory. The operators were also blamed for mishandling human remains. The families of more than 300 people whose bodies were found strewn across the grounds of a Georgia crematory will receive nearly \$40 million in the settlement. The 58 funeral homes involved agreed to pay \$36 million and the Georgia Farm Bureau Insurance Company, the insurer for Tri-State Crematory, will pay \$3.5 million. The Marsh family, which operates the crematory, also agreed to preserve two acres as a tribute to the dead. The funeral homes, located in Georgia, Tennessee, and Alabama, had sent the bodies to the crematory between 1988 and 2002.

IV. THE NATIONAL SCENE

JOHN EDWARDS LEAVES THE ARENA— FOR NOW—WITH DIGNITY

John and Elizabeth Edwards went home to Raleigh, North Carolina on March 3rd after making a decision to call a halt to John's presidential campaign. Senator Edwards, who had made a tremendous impression on people throughout the country, made his final speech of the campaign to friends, family, campaign supporters, volunteers and staff. I supported Senator Edwards and don't regret it one bit. I am including a few excerpts from the text of Senator Edwards' speech, which tell a great deal about the man and his mission.

It's good to be home!

Thank you all so much for being here. I have never loved my country more than I do today. You know, the truth is, all my life, America has smiled at me and today I am smiling right back!

More than anything, I love the American people. The people I have listened to the people I have embraced, the people who made me laugh, inspired me, inspired you. People who made me think. People who have made me reach.

And today, I see their faces. I see the faces of the men and women who worked in the mill in Robbins, North Carolina - the mill my father worked in, the mill I worked in. I can picture their faces as clear as they are in front of me right now, lint in their hair and grease on their faces, men and women who represent the best of what America is.

They went to work day after day, decade after decade in the mill because they believed that if they

worked hard and did what was right, they could build a better life for themselves and their families.

I see the faces of the workers at Tower Automotive in Milwaukee, Wisconsin. They are wondering, where do they go after the doors to their factory close? What do they do? Have they not done the right things in America? Have they not worked hard, been responsible, raised their kids? Where do they go now and will they have a president and an administration who understands their lives and who will stand up for them?

I see the faces of the young men and women that I met in Afghanistan, at night. They are proud of their country, proud of serving their country, but worried about their families back home. They are worried about what would happen when they went back.

I see the men and women at Page Belting in Concord, New Hampshire who wonder if anyone understands the struggles that they face and most Americans face every day in their lives.

And I also see the earnest, young, wise faces from Central High School in Des Moines to Pomona College in California. Young people, looking desperately for inspiration - looking for someone who will lift them up, make them believe again that in our America, with their help, with their energy, and their enthusiasm, everything is possible.

Most of all I see all these faces, turning from skepticism and despair to inspiration and hope, because they believe in this country. They believe in themselves and they know that you and I together are going to change this country, and build one America that works for all of us.

It has been my greatest honor to

have walked with you. From the beginning, this has never been my campaign. This has been your campaign. And I am blessed to have been a part of it. And I'm also blessed to be back here at Broughton High School with so many friends and family, members of my community.

As I leave this stage today, I leave it to you to make certain that in our American, our children can prosper and dream. This cause, this challenge to change America, belongs to you. You should not step back. You should step up.

It is up to you to make certain that in our American, our children can prosper and reach and dream.

It is up to you to choose a president who will end our two Americas so that every child can have the same chance I had.

It is up to you to make sure that the 35 million Americans living in poverty are never ignored again.

It is up to you to make this generation the generation that grows up in an America that is no longer divided by race.

It is up to you to demand a campaign that is about attacking people's problems, not politicians attacking one another.

Those of you who cast your votes for me cast your votes for a new kind of politics. You wanted a positive campaign and you got one for a change.

I couldn't ask for better company today. With the love of my life by my side. To have your life blessed with four beautiful children, and family and friends, you couldn't ask for anything more.

Like most Americans, in my life, I have learned two great lessons: one that there will always be heartache

and struggle, and two, that people of strong will can make a difference. One lesson is sad, and the other is inspiring. And what makes us Americans is that we choose to be inspired.

We can change America so that the America I love, the America you love can be again that bright, shining star, that beacon that stirs our hearts when we hear our anthem or see our flag. We can make it so. We are greater and stronger than anything that stands between us and that destiny.

We should never settle for less than our highest aspirations in our leaders and for our country. Because we are America - where all things are possible.

And our message today is this: we want to change America and we will!

While I believed that John Edwards would have made a great President—and I still do, he was not able to survive the difficult and extremely expensive primary system. Perhaps, John will be picked as the Vice-President nominee. If so, the North Carolina Senator will be a tremendous asset to the ticket. If not, I hope John will remain on the political scene—America badly needs him.

A NATIONAL DEBATE UNFOLDS

Richard Clarke, who served in the administrations of several presidents, including George W. Bush, has made some very serious charges concerning the anti-terrorism efforts of the current President. In an exclusive interview on *60 Minutes*, the former Bush aide was extremely critical of the President and several of his aides. Clarke told CBS News that White House officials were less than receptive in their response when he urged them months before September 11th to meet so discussions could take place on what he saw as a severe threat from al Qaeda. In sub-

stance, Clarke said the Bush White House literally ignored terrorism for months. Clarke described the President as having done “a terrible job on the war against terrorism.” Interestingly, Clarke has made his allegations in a book, *Against All Enemies*, by Free Press, a subsidiary of Simon & Schuster. Both CBSNews.com and Simon & Schuster are units of Viacom.

Clarke helped shape U.S. policy on terrorism under President Reagan and the first President Bush. He was held over by President Clinton to be his terrorism czar and then held over by the current President Bush. In the 60 Minutes interview and the book, Clarke tells what happened behind the scenes at the White House before, during and after September 11th. When the terrorists struck, it was thought the White House would be the next target, so it was evacuated. Clarke was one of only a handful of people who stayed behind and apparently ran the government’s response to the attacks from the Situation Room in the West Wing.

The Bush Administration’s record on terrorism leading up to and following the September 11th attacks will be an issue this fall. According to Clarke, President Bush and his top officials ignored urgent warnings from early 2001 that the United States faced an imminent threat from al Qaeda. President Bush and several of his aides have denied that the allegations made by Clarke are true. Clarke testified before the 9/11 Commission on March 23rd. The Commission has attracted several “face cards” including Donald Rumsfeld and Colin Powell. It has been interesting to watch the intense attacks on Clarke’s credibility from the White House.

AN UPDATE ON THE ECONOMY

It is quite evident that the state of our nation’s economy will be a major campaign issue this year, as it should be. Our economy is suffering and people all over the country can attest to that without having to be reminded.

In 2000, the federal government had a budget surplus of \$236 billion. Presently, the estimated budget deficit—the amount the U.S. government will be in the red this year—is \$521 billion. I am amazed that many of my conservative friends do not consider the mounting deficit to be a real problem. It’s my opinion that deficit spending is bad and when it reaches the levels we are experiencing, it will ultimately lead to financial collapse. Tax cuts for the rich do nothing but compound the problem.

There is another part of the economic picture that deserves attention—we are losing jobs in the United States in droves. There have been over 3 million private sector jobs lost over the past 3 years, and that is undisputed. In January of this year, there were 8.3 million Americans unemployed, which means lots of families in this country are hurting badly. We can’t continue to lose jobs, and that’s why the Bush Administration’s policy on the exporting of jobs to foreign countries makes no sense. I would like to hear an explanation for how this policy—combined with our Mexican border problems—helps our economy.

Clearly, our economy is not doing well and there must be some tough decisions made and soon. At present, our economic policies are pretty much like a ship without a rudder. I have to believe that there are enough smart folks in Washington who should be able to fix our economic problems, but it will take some fiscal leadership from the White House. Unless some drastic changes are made and soon, the economy will continue to flounder.

CONGRESS WAS MISLED ABOUT MEDICARE COSTS

The Bush Administration’s top Medicare budget expert claims that he was told he would be fired if he revealed the true cost estimates of the Bush Medicare bill passed last year. Richard Foster, the chief actuary for

Medicare, provided estimates to the White House that the Bush Medicare bill—written by and for the pharmaceutical and insurance industries at the expense of America’s seniors — would cost between \$500 and \$600 billion. Apparently, Foster was not allowed to share his estimates with Congress and now says he was told he would be fired if he made the facts about the Bush Medicare bill public.

Instead of sharing that vital information with Congress, the White House pushed the bill through both the House and Senate. An investigation into the deceptions and intimidation has been requested. House Democrats sent a letter to the Inspector General’s office in the Department of Health and Human Services (which oversees Medicare) requesting that the an investigation be launched to determine whether Mr. Foster indeed faced inappropriate pressure to withhold information from lawmakers. The White House is now joining in the request for an investigation.

The revelation of the White House’s alleged deception is just the latest in a string of scandals related to the Medicare bill. The House Ethics Committee is investigating allegations that the Republican leadership attempted to bribe a Congressman to voting for the bill. The New York Times has reported that the Bush Administration distributed taxpayer funded videos of fake reporters praising the Bush Medicare bill to local TV stations to use in their reports. I don’t believe there can be any doubt that the Medicare bill is not good for seniors. Instead of helping folks who need help, it will benefit the insurance and HMO industries. All of this could cause some election difficulty for a number of good members of Congress who thought they could trust those who were pushing the bill and voted for it. Had the Bush Administration’s cost estimates been revealed, it could have torpedoed congressional passage of the

Medicare prescription-drug plan. When the House passed the benefit by five votes in November, the White House was embracing an estimate by the Congressional Budget Office that it would cost \$395 billion in the first 10 years. But for months, Administration analysts in the Centers for Medicare and Medicaid Services had concluded that the drug benefit could cost upward of \$100 billion more than that. The highest figure I have seen is over \$600 billion. Withholding the higher cost projections was important because the White House was facing a revolt from 13 conservative House Republicans who had vowed to vote against the bill if it cost more than \$400 billion.

HALLIBURTON NOW FACES CRIMINAL PROBE

Last month, we mentioned a few of Halliburton's mounting problems. The Pentagon's investigation into allegations that a Halliburton subsidiary overcharged for gasoline delivered to Iraq last year has now grown into a criminal probe. The Defense Criminal Investigative Service, the criminal investigative arm of the Inspector General's office, is investigating allegations of fraud on the part of Kellogg Brown and Root (KBR), including the potential overpricing of fuel delivered to Baghdad by a KBR subcontractor. The major points of emphasis in the ever-expanding Halliburton scandal are as follows:

- December 11, 2003: Pentagon audit finds "substantial overcharging" in \$1.2 billion dollars of Halliburton fuel sales in Iraq;
- January 14, 2004: Pentagon's top auditor asks Defense Department's inspector general to launch a formal investigation;
- January 22, 2004: Halliburton disclosed two workers took large kickbacks as part of a \$6.3 million dollar overcharging scheme involving a Kuwaiti-based company;
- February 1, 2004: Investigators find

Halliburton overcharged more than \$16 million dollars from meals at a U.S. base in Kuwait;

- February 3, 2004: Total overbilling for meals rises to \$6 million dollars;
- February 16, 2004: Halliburton agrees to withhold billing on an additional \$140 million dollars in food services;
- March 10, 2004: Defense Department Inspector General asks Justice Department to join Halliburton investigation

The American people will not tolerate war profiteering by companies. This is especially true when the companies have strong political ties to an administration. However, company and Administration officials claim that politics had nothing to do with Halliburton's obtaining contracts in Iraq. According to Defense Department records, from fiscal year 1996 to 2000, Halliburton won \$2.4 billion in contracts. During the first two years of the Bush Administration, Halliburton's take was about equal to its average over the last five years of the Clinton Administration. But in fiscal year 2003, Halliburton became the seventh biggest Pentagon contractor, with \$3.9 billion in Defense Department business. If Halliburton's conduct violates criminal laws, a criminal prosecution is clearly in order. It will be interesting to see whether pressure is put on the investigators to back off of this politically connected corporation.

UNFAIR GAS PRICES

People all over the country are greatly upset over high gas prices. The increases result from uncompetitive actions by a handful of mega-companies. Forecasts say that gas prices will soon reach historic highs, with the national average going over \$1.80 a gallon for regular. Some say that the top prices may exceed \$2.00 per gallon. Clearly, it appears we are headed for the highest prices since 1985. Uncompetitive actions by a handful of companies with large control over our nation's gas

markets is directly responsible for these high prices. Domestic refining and transportation costs account for one-third of the price of a gallon of gasoline - costs that are largely determined by the major oil companies operating in the United States. This share of company costs tacked on to the price of gasoline has been increasing.

The new mega-companies, the result of mergers since 2000, are realizing record profits. The top five companies in America—ExxonMobil, ChevronTexaco, ConocoPhillips, BP-Amoco-Arco and Shell—now control half of all domestic oil production, half of all domestic refinery capacity, and nearly two-thirds of the retail market. The fact that a handful of companies control half of the domestic oil production is particularly significant given that the United States is the third largest oil producer in the world. The market leader, ExxonMobil, posted after-tax profits of \$21.5 billion in 2003. When a few large companies control the market, they can manipulate the system to ensure enormous profits. American consumers are being gouged in the process.

The U.S. Federal Trade Commission concluded in March 2001 that oil companies had intentionally withheld supplies of gasoline from the market as a tactic to drive up prices—all as a "profit-maximizing strategy." Unfortunately, these actions, while costing consumers billions of dollars in overcharges, are perfectly legal. The approval of recent mergers has allowed these large oil companies to push smaller, independent refining companies out of business for the sole purpose of limiting refining capacity. It is significant that this comes at the same time that environmental regulations are requiring more refining capacity. Internal company documents describe the aggressive strategies employed by the large oil companies to shut down refineries with capacity of more than 830,000 barrels of oil a day - more than enough to meet environmental regulations if these were open today.

The obvious question is how do the oil companies get away with this sort of thing? Collectively, the oil and gas industry has spent more than \$270 million to lobby Congress and the White House and provide cash to federal election campaigns since the 2000 election cycle. Of this amount, \$66 million was given to federal candidates running for office, with 80% of those contributions going to Republicans. The oil companies are among the largest and most partisan of industries. The top five companies, including the American Petroleum Institute, account for half of all these lobbying expenditures.

The energy bill pending in Congress does nothing to address uncompetitive activities by large oil companies. Instead, it rewards them with billions of dollars in new subsidies in the form of tax breaks for new production and other perks. It makes no sense to give tax breaks to ExxonMobil, which just posted \$21.5 billion in profit. We appreciate Public Citizen furnishing this information for our readers.

KERRY IS GETTING TASTE OF THE ROVE CAMPAIGN TACTICS

The White House political chief has put John Kerry on notice that the Bush campaign has just begun to demonstrate the kind of targeted, multi-front campaign he plans to run against John Kerry. Karl Rove, the political mastermind behind the President, addressing a small group of conservative activists, assured them that Bush planned a nimble campaign able to counterpunch even before the Massachusetts Senator can open his mouth. Rove is said to have pointed with pride to the Bush camp's response last month, when it got word that Kerry planned a national security speech to veterans in West Virginia. Less than 24 hours after learning of the speech, the Bush campaign pulled an ad out of the can criticizing Kerry for his Senate votes on military spending. It also dispatched volunteers to hand out pro-Bush material to West

Virginians. Radio ads in the state were put up immediately.

It was interesting to see that Senator John McCain came to the rescue of Senator Kerry last month on the national defense issue. Senator McCain, who is very popular around the country and especially with veterans, says that Rove is off base in criticizing Kerry on his defense stance. Senator McCain had his own taste of the Karl Rove brand of "sleazy politics" when the Arizona Republican took on the then-candidate Bush in the South Carolina primary during the last election year.

AIG BOSS ATTACKS LAWYERS

Maurice "Hank" Greenberg, the chairman of American International Group Inc. (AIG), the world's largest insurer, has labeled lawyers opposed to tort reform as "terrorists." Greenberg also charged that class action lawsuits are a "blight" on the United States. The AIG Chairman made his remarks a day after U.S. Secretary of Education Rod Paige sparked an uproar when he called the nation's largest teachers' union a "terrorist organization." In remarks to business executives in Boston, Greenberg likened the battle over reforming class action litigation to the White House's "war on terror." Apparently, this is the opening shot in the election year by the insurance industry. Greenberg's remarks are an insult to the American people and the American Constitution. President Bush has often used the word "terrorist" to describe various groups and individuals. His Education Secretary didn't just call teachers "terrorists" by coincidence, in my opinion. Clearly, that was a calculated and planned decision. Paige's comment about the National Education Association, which represents 2.7 million teachers and other educators, was beyond reprehensible. Paige made the remark while discussing the federal "No Child Left Behind" education law with governors at the White House. Now we see one of the President's top supporters from the

insurance industry using similar tactics. It appears that any groups that are not in lockstep with the right wing faction of the GOP will be subject to attacks of a like nature.

V. CAMPAIGN FINANCE REFORM

A BRIEF UPDATE

There is not much to report from the campaign finance reform arena this month. With the presidential elections starting much earlier than usual, the prospects of anything happening on this front in Washington are dismal at best. However, the excessive fund-raising and wild spending by campaigns are the best evidence of the need for a cure. Perhaps, after the elections are over, some meaningful reform will take place.

KERRY LAGS BEHIND BUSH IN ONE AREA

Senator John Kerry has a long way to go to catch President Bush in fund raising. If the Massachusetts Senator is to be the next President, he must close the gap and do so quickly. Interestingly, Kerry brought in a record \$1.2 million over the Internet in less than 24 hours after locking up the Democratic presidential nomination. Many believe the Massachusetts Senator can compete financially with Bush through this summer's political conventions. Federal spending restrictions take effect for the general election campaign in the fall.

At this writing, Bush had about \$200 million in the bank. Federal law allows donors to contribute up to \$2,000 to an individual candidate. In its most recent public report, the Kerry campaign said it had \$2.1 million cash on hand as of February 1st, with debts of \$7.2 million. The two candidates are limited to spending \$74.4 million apiece after receiving the nominations,

meaning that Kerry must make his money last longer than Bush does. This is because the Democrats hold their convention in late July, five weeks before the GOP does.

Groups such as MoveOn.org Voter Fund and the Media Fund, have risen to prominence since enactment of a new law meant to rein in the influence of big money in campaigns—legislation that Kerry and other Democrats supported and many Republicans opposed—and may be a real factor this year. While they may raise money in donations of unlimited size from individuals, they are barred from coordinating their activities with campaigns. Nor may these groups air commercials that explicitly urge a vote for or against individual candidates.

VI. CONGRESSIONAL UPDATE

THE HOUSE ETHICS SYSTEM IS BROKEN

There has been a great deal of conduct in Congress that certainly appears to be questionable and highly suspect. Now, the House ethics system is virtually shut down because public interest groups are barred from filing complaints. Eight organizations — from Common Cause to Judicial Watch — claim the ethics committee has taken action on only five cases since 1997. The last one was when the panel ended an investigation of former Speaker Newt Gingrich. The former Speaker was forced to pay a \$300,000 fine after the probe on charges he used charitable funds for political purposes. The groups recommended that the House rescind a rule, established after the Gingrich case, that barred non-governmental organizations from filing complaints. Hopefully, the House will change the rule and allow these complaints to be filed.

THE ENERGY BILL IS STILL BAD

The latest energy bill (S. 2095) supports diametrically opposite policies regarding electricity rate regulation. Together, these policies would result in elimination of virtually all consumer protections for electricity ratepayers. In addition, it would give unbridled control over price-setting from public utilities to private companies. All of this comes from to an analysis made by Public Citizen. The revised bill clearly weakens the ability of the Federal Energy Regulatory Commission (FERC) to regulate consumer electric rates. In recent years, FERC has allowed the market to set electric power rates on the basis that there is adequate competition for sales of electric power. Simultaneously, the energy bill would repeal the Public Utility Holding Company Act (PUHCA), which industry insiders agree will result in massive consolidation of utility ownership, suppressing competition. Thus, the bill would create unregulated, monopolist, giant utility owners through PUHCA repeal, while deregulating electric power rates under FERC.

OPPOSITION TO STOCK OPTIONS NEEDED

We should all encourage members of Congress to oppose H.R. 3574, the Stock Option Accounting Reform Act. The bill is terrible policy that panders to big-donor technology companies that want to be able to continue to mislead investors and the public by failing to account for stock options, which have become a major form of compensation. It also introduces politics into the process of setting accounting standards. It is widely recognized that this loophole in financial accounting can inflate company earnings, reduce corporate taxes, and mislead investors. Without a doubt, unexpensed options were a major factor in the recent corporate scandals. Congress should have learned its lesson, but I'm not sure it did. That's why members need to hear from folks back home.

The decision of the Financial Accounting Standards Board (FASB) to expense options reflects simple common sense. Options are compensation and compensation is a corporate operating expense. The practice of "expensing options" is an absolute necessity. It is an important part of the effort to protect employees, investors and consumers from the devastating consequences of corporate accounting scandals. We can't afford to allow H.R. 3574 to block the FASB from enforcing this long-overdue rule. FASB should remain the independent accounting standards-setting board. The common-sense decision by the FASB to "expense" all stock options must remain in place. In order to restore confidence in American business and encourage sustained economic growth, we must begin by restoring honest and accurate accounting standards.

VII. THE CORPORATE WORLD

RESTORE THE TRUST

Have you lost money as a result of the recent mutual fund scandals? More than two years after the Enron scandal broke—shocking the country—it appears that Wall Street is still riddled with corruption. At present, the SEC, the government organization that's supposed to protect us from this kind of scandal, is making important decisions on how to reform the mutual fund industry, and they're asking for feedback. Folks around the country must demand that the SEC stop the scandals and weed out the bad guys from the mutual fund industry. The SEC will only be accepting comments from the public until the 12th of this month. Contacts from the public can influence the SEC's decision on a recently proposed rule to reform the mutual fund industry. We should all remind the SEC

that it's their job to protect folks from the mutual fund scam artists. These people must be stopped from raiding the investments and hard-earned retirement savings of American citizens to feed their own greed. Take a few minutes to write the SEC if you get this issue before the April 12th deadline. Also, contact your representatives in Washington and let them know how you feel. We should all thank the New York Attorney General for bringing the problem to the public's attention and for taking strong action to reform the industry.

CHANGES IN CORPORATE GOVERNANCE

It doesn't take a national poll to know that the public has lost confidence in Corporate America's ability to treat shareholders and consumers fairly. The vast volume of corporate corruption that we have experienced over the past few years has made the American people suspicious of those who run the companies. It now appears that some significant changes are finally taking place in the manner in which large corporations are being run. The relationship between management and boards of directors at U.S. multinational companies has been changed dramatically through an array of corporate governance initiatives begun in response to corporate scandals, the Sarbanes-Oxley Act, and other requirements. According to the PricewaterhouseCoopers Management Barometer, which makes assessments of this sort of thing, the following activities are taking place:

- 88% of senior executives report that directors at their company are expected to have more input on a variety of issues
- 73% say their board will be more vocal on risk identification and risk management
- 72% say their company has established a "whistleblower" complaint process, as required by Sarbanes-

Oxley, even though this provision is not yet in effect. 5% of these report an increase in the number of complaints received and addressed by the audit committee

- 64% report that their audit committee reviews the company's 10-Q prior to filing with the SEC
- 63% have made changes or improvements in the skill sets of their audit committee
- 57% of audit committees and 47% of boards have performed a self-assessment in the past 12 months

MARTHA STEWART'S CONVICTION

I have mixed feelings about the criminal conviction of Martha Stewart. Based on my limited knowledge of the trial testimony, it appears she was guilty as charged, and for that reason, I believe justice was done. However, there are many others in Corporate America who have done much worse and have successfully avoided criminal prosecution. The best example of how having "good friends" in "high places" can keep a person out of the criminal courts is none other than "Kenny Boy" Lay. When you compare the harm done by Martha Stewart to that resulting from Mr. Lay's alleged wrongdoing, one has to wonder how the former leader of Enron has escaped indictment.

WHISTLEBLOWER CASE SETTLES FOR \$11.3 MILLION

In 1997, Kevin Spear, a former sales representative for Quest Diagnostics, filed a whistleblower case under the False Claims Act, alleging that his former employer had improperly billed Medicare for medically unnecessary tests at labs across the country. Recently, Quest agreed to settle this case and pay the federal government more than \$11.3 million regarding these allegations. According to a recent article on Newsday.com, "laboratories owned or operated by Quest submitted claims to Medicare and MediCal, Cali-

fornia's state subsidized medical care program for medically unnecessary tests for apolipoproteins proteins, which help test for urinary ailments. The fraudulent billing took place between 1990 and 1997, the government said. They also billed for urine microscopy examinations and calcium and parathormone tests when calcium test results were elevated. That enabled them to be reimbursed at higher than permissible rates."

Under the Federal False Claims Act, workers are encouraged to bring lawsuits on behalf of the federal government for false claims, and in turn to share in any financial recovery. These cases are also referred to as "Qui Tam" lawsuits. Qui Tam is an abbreviation for a Latin phrase meaning, "Who sues on behalf of the king as well as for himself." In 2001, over 300 Qui Tam cases were filed and pursued by the United States Department of Justice. These cases resulted in recoveries of \$1.07 billion. These whistleblower, or Qui Tam, cases come in various forms. Typically, the case arises from a current or former employee who has first-hand knowledge of false claims being submitted to the federal government. Often these false claims come in the form of improper filings to Medicare and Medicaid. Also, these cases involve businesses that contract with the United States government. Our firm is actively handling several of these cases at this time.

TWO BANKS PAY \$515 MILLION IN MUTUAL FUND SCANDAL

Two large financial institutions will pay \$515 million to resolve allegations of improper mutual fund trading. This will settle the largest fund scandal to date, according to an Associated Press report. Under terms of a tentative settlement that must still be accepted by the Securities and Exchange Commission, Bank of America and FleetBoston Financial also agreed to cut fees investors pay by \$160 million. Eight

members of the board of directors of Nations Funds, Bank of America's group of mutual funds, will have to relinquish their positions within a year for their alleged role in allowing the trading violations. It's the first sanction of its kind in what has become an industry-wide investigation. These directors failed to protect the interest of investors. The first charges were brought last September in the controversy that has rapidly enveloped the \$7 trillion fund industry. The directors acknowledged the problem of market timing, but then allowed favored clients to engage in that harmful practice. The departure of these board members should sound an alarm for all those who serve in similar capacities.

The proposed settlement requires Bank of America to pay \$125 million in civil fines and \$250 million in restitution to investors. FleetBoston would have to pay \$70 million in civil fines and an additional \$70 million in restitution. In addition, the two financial titans—which plan to merge—agreed to make certain changes in their mutual fund operations, including the board overhaul. By year's end, Bank of America will have to be completely out of the securities clearing business, that of executing transactions for other parties. New York Attorney General Eliot Spitzer is directly responsible for bringing about the cleaning up of a corrupt industry that apparently believed it was above the law.

STUDY WARNS U.S. FACING ASBESTOS CRISIS

Ten thousand Americans die each year from asbestos-related diseases, and the number appears to be increasing in a growing public health crisis. A report by an environmental research group has revealed some significant findings. The analysis by the Washington-based Environmental Working Group projects that more than 100,000 people in the United States will die of four asbestos-related diseases—mesothe-

lioma, asbestosis, lung cancer and gastrointestinal cancer—over the next 10 years. The report called for an immediate ban on asbestos, federal asbestos health screening and a "fair measure of assistance" for victims of asbestos exposure. The asbestos cases are a clear message that a public health issue exists.

The nonprofit research organization said it based its analysis on 25 years worth of U.S. government data on asbestos mortality and examined the toll from just two causes of asbestos deaths—mesothelioma and asbestosis. The report said that while most of the deaths were among workers who were exposed to the fire-proofing mineral decades ago, more than one million people are currently exposed to asbestos on the job and millions more are exposed to asbestos in the environment. As previously reported, asbestos was widely used for fireproofing and insulation until the 1970s. Inhaled asbestos fibers are now linked to cancer and other diseases.

I don't believe the public fully comprehends the serious nature of the problem. According to the report, we are at the beginning of a tidal wave of asbestos diseases and mortality that needs to be brought to the attention of the public, federal policymakers, and health officials. Dr. Richard Lemen, an occupational and environmental health consultant and former Assistant U.S. Surgeon General, believes public health agencies need to work to dispel the misconception that the fibrous mineral is no longer a threat. An educational campaign and public health campaign to educate people that it still exists is badly needed.

FORMER WORLDCom CHIEF INDICTED

Former WorldCom CEO Bernard Ebbers was indicted last month on federal charges stemming from the multibillion-dollar accounting fraud at the telecommunications giant. According to an Associated Press report, the

charges include securities fraud. Ebbers resigned from WorldCom in April 2002, well after its stock price had begun a steady decline and soon after questions began to swirl about the company's finances. Two months later, WorldCom announced it had uncovered nearly \$4 billion in hidden expenses—the beginning of a spiral that would become the largest corporate fraud in U.S. history. The fraud is now estimated at \$11 billion.

WorldCom filed for bankruptcy July 21, 2002. Ebbers and Scott Sullivan, former WorldCom chief financial officer, were also charged with 15 violations of state securities laws in Oklahoma. They are among six ex-WorldCom employees charged there in an accounting fraud prosecutors say cost state pension funds \$64 million. Oklahoma's Attorney General dropped the criminal charges against Ebbers in November, but has said he plans to refile them this year.

VIII. BUSINESS LITIGATION

INVESTIGATION OF SHELL'S BONUS AWARDS

The Securities and Exchange Commission has been investigating whether bonuses and other incentives may have encouraged managers at the Royal Dutch Shell Group to overstate the company's energy reserves. The SEC is looking at the extent to which Shell tied bonuses awarded to executives to the booking of oil and natural gas reserves by the company. Reserves are estimates of the amount of oil and gas a company believes a field will produce. These reserves are critically important to investors' assessments of an energy company's value. The SEC is attempting to find out how many Shell executives received the bonuses and how high up the management-chain these bonus

awards went. It is significant that the Justice Department has now opened its own investigation into the matter.

Shell disclosed earlier this year that it would slash its reported oil and natural gas reserves by 20%. This was a shock to many observers. Questions were raised about whether senior executives or managers at Shell's various operating units around the world had financial incentives to overstate reserves. In early March, Shell ousted its chairman and also the head of exploration and production. This came after Shell's boards had been briefed on the preliminary findings of an internal review into the reserve issue. It appears that senior executives at Shell knew of potential reserve shortfalls at least two years before disclosing them. Shell executives in the exploration and production business, including the company's top reserve auditor responsible for reserve bookings from Shell's many global units, received bonuses based in part on the amount of energy reserves the company replaced each year.

U.S. CHAMBER OF COMMERCE THREATENS TO SUE

The U.S. Chamber of Commerce has threatened to sue the Securities and Exchange Commission (SEC) if it adopts a proxy-access proposal that would give shareholders greater power. The proposal of the SEC would make it easier for shareholders to nominate candidates to corporate boards and get their names on the proxy ballots that companies mail to shareholders before annual meetings. This would save on the expense of separate mailings or, in some cases, a full-blown proxy fight. According to the SEC plan, which was proposed last October, shareholders would have access to corporate proxies only if certain "triggering events" demonstrated problems of companies.

The SEC has identified two triggering events: if more than 35% of votes by shareholders are marked "withheld" for

one or more board candidates; or if a majority of votes approve a shareholder proxy-access plan offered by holders of more than 1% of shares who have owned a stock for at least a year. According to an article in the *Wall Street Journal*, U.S. Chamber of Commerce President Thomas Donohue stated at business discussion groups that the Chamber might take the SEC to court to test its authority on the issue. This is strange talk coming from a proposal that would give shareholders more access to the companies they own shares in and from someone who has repeatedly criticized lawyers who file lawsuits for people who are injured or damaged.

BANK OF AMERICA SETTLEMENT

A California judge has given preliminary approval for a \$33 million dollar settlement in a class action suit involving Bank of America Corporation. The case involved charges for the company's trustee services. The potential settlement would resolve a 10-year dispute involving alleged overcharges on trusts managed by Security Pacific National Bank, which merged with Bank of America in 1992. This potential settlement follows \$78.5 million dollars in payments by the bank to settle other portions of the case several years ago.

PARMALAT SCANDAL GROWS

A former Bank of America Corp. executive in Italy has now informed investigators that he misappropriated \$27 million dollars in a kickback scheme involving Parmalat. The North Carolina bank says it was not aware of the alleged improprieties by the former executive. It is unclear whether Parmalat officials were aware, but these disclosures could not have come at a worse time for Parmalat or the banks involved. At this writing, Securities and Exchange Commission officials were in Italy studying the involvement of American banks in the Parmalat affair. Bank

of America was one of Parmalat's most important lenders in recent years. A central part of the alleged fraud at Parmalat involved a multi-billion dollar bank account that Parmalat falsely claimed to hold at Bank of America.

Also, these new disclosures certainly suggest that the alleged scandal at Parmalat went beyond the founder Calisto Tanzi and his senior executives and family members. Investigators now believe years of systematic fraud created on Parmalat's balance sheet a multi-billion dollar hole, they suspect not only went to cover operating losses, but also to line the pockets of the company's executives through offshore money transfers. This Bank of America executive involved in the \$27 million dollar theft is a key figure in investigations by both Italian prosecutors and the Securities and Exchange Commission. The focus of the investigation is now turning to determine whether this theft led to inflated fees for Parmalat, and whether other officials at Bank of America knew about the scheme.

EDWARD JONES "PREFERRED FUNDS" FRAUD

Since January of 1999, brokerage giant Edward Jones has been lying to its mutual fund clients, according to class action litigation, filed in Jones' home state of Missouri. Jones has maintained a list of seven "preferred" families of mutual funds: American Funds; Federated Investors; Goldman Sachs; Hartford Mutual; Lord Abbett; Putnam Investments; and Van Kampen. Jones touted these seven funds as those that "share our same commitment to service, long-term investment objectives, and long-term performance," according to their Website. What neither the Website nor their brokers disclosed was that Jones had a special relationship with those seven fund families. Specifically, each of those fund families were paying Jones additional fees for each of their fund shares sold to Jones' clients. These are

referred to in the industry as “pay to play” fees, revenue sharing or “soft money.” Despite the fact that Edward Jones has access to and can sell thousands of mutual funds, between 90% and 95% of the fund shares sold by Jones were from the seven “preferred” funds. Edwards Jones’ failure to disclose this “secret” relationship deprived millions of investors the ability to make an informed decision regarding the investment of their life savings.

COMPANY SUES SUPPLIER IN ASBESTOS CASE

As we went to the printer, a trial in an asbestos-related suit in which the plaintiff wants up to \$6 billion in damages had started in Texas. But this time, the plaintiff is not a dead or injured worker, but rather a company. California-based Kelly-Moore Paint Co. Inc. (KM) is suing Union Carbide Corp. (UCC) and UCC’s successor, Dow Chemical Co. The paint company is seeking \$1.2 billion in actual damages and treble punitive damages from UCC and Dow for allegedly not telling Kelly-Moore about the risks involved in using asbestos-containing products. The paint company contends that UCC and Dow are liable for the loss in business value it suffered as a result of past and anticipated future asbestos litigation. KM filed the suit in May 2002 and it alleges in its fifth amended petition that UCC engaged in fraud and negligent misrepresentation when it sold KM raw asbestos fiber under the brand name Calidria in the 1960s and 1970s.

The fraud case appears to be the first of its kind in an asbestos setting. Simply put, the issue is, did Union Carbide lie about asbestos health effects in order to seduce Kelly-Moore into buying more asbestos? Kelly-Moore alleges in its lawsuit that UCC induced KM to buy the Calidria brand by concealing or failing to disclose the true hazards of that material. UCC sold KM tons of raw asbestos fiber between 1963 and 1978 for use in KM’s joint compounds, manu-

factured under the PACO brand name, and other products. KM alleges that Dow and UCC reviewed and edited a document entitled “Safe Use of Calidria” in 1973 that contained “half-truths” about the risks of asbestos. It is alleged that the defendants represented that Calidria was safer to use than traditional chrysotile fiber, although Calidria actually was more hazardous.

The paint company further alleges in the suit that the defendants knew the use of asbestos below the threshold limit value (TLV) of 5 million particles of asbestos dust per cubic feet would result in physical injury to the users of PACO and other asbestos-containing products, but continued to represent to the public and to KM that the TVL was a “safe level of exposure.” A 1967 report written by T.C. Sayers, a UCC analyst, points out that a “number of informed people” no longer accepted the TLV.

E-MAIL PROVIDERS SUE UNDER NEW ANTI-SPAM

Four of the nation’s largest e-mail providers have sued hundreds of online marketers under the CAN-SPAM Act, which is a new federal law that outlaws the worst kinds of “spam” e-mail. The lawsuits—filed by EarthLink Inc., Microsoft Corp., Yahoo Inc., and Time Warner Inc. unit America Online—mark the first time the federal law has been tested since going into effect in January. Six suits were filed in federal courts in California, Georgia, Virginia and Washington state. They claim the defendants obscured their identities and used other deceptive tactics to send out hundreds of millions of pitches for get-rich-quick schemes, pornography and other types of spam. Spam accounts for roughly half of all e-mail traffic. Company officials said the CAN-SPAM Act makes their fight easier by imposing national standards and increasing penalties to force spammers out of business.

The civil suits filed by the e-mail providers seek unspecified amounts of

damages and penalties. Violators could also face jail time under the new law. However, government prosecutors have filed no criminal charges so far. To give you some idea as to the magnitude of the problem, one group of defendants in Canada sent nearly 100 million messages to Yahoo customers in January alone and resold the e-mail addresses of those who responded, according to one lawsuit.

ANOTHER HOSPITAL CHEATS GOVERNMENT

The Tenet hospital chain will pay \$22.5 million to settle a government whistleblower lawsuit. North Ridge Medical Center in Fort Lauderdale, Florida, which is owned by Tenet, over-billed Medicare by millions of dollars. The Justice Department made the announcement last month and stated it was the largest settlement under the False Claims Act involving a single hospital. The statute under which the claim was brought prohibits hospitals for billing Medicare for care given to patients by doctors who have a financial relationship with the hospital. Tenet has had a history of cheating the government. I have to wonder whether some in Corporate America believe it’s fine to cheat even when the victim is the federal government.

IX. PRODUCT LIABILITY UPDATE

\$47 MILLION AWARDED IN FORD SUIT

Last month, a Georgia jury awarded a family more than \$47 million, finding Ford Motor Co. liable in an accident that left the family’s daughter paralyzed from the chest down. The Ford vehicle involved was a four-door 2000 Lincoln LS Luxury Sedan. The accident occurred after the driver veered to the center of the road and into the path of an oncoming truck, causing a near

head-on collision. The child was belted in her seat during the accident. The impact of the crash thrust her forward until the seat belt stopped her and the fold-down seat collapsed on her back. It was proved that the vehicle's back fold-down seat failed to securely latch and collapsed on the child during the crash in 2000. The jury first awarded \$33.9 million in compensatory damages and then considered the punitive damages in the second phase of the case. The jury then awarded \$14 million in punitive damages. Clearly, Ford showed a "conscious indifference for the consequences" of its actions by ignoring a known safety issue. Concerns about the latch system were common enough that Ford changed its design in 2001. However, Ford did not recall the vehicles with the known defect even though it certainly knew all about it.

Ford admitted at trial there had been problems with the seat's latch system, but claimed it involved only a small percentage of the 2000 sedans. Ford claimed customers could easily detect a malfunctioning latch, which a Ford dealer could replace. That is a most interesting defense—putting the burden on consumers to detect and correct Ford's defects, and denying Ford's obligations. It is interesting that a Ford engineer sent his supervisor an internal memo relating to the Georgia case citing his concerns about a "safety issue" regarding the cars that needed review.

JURY AWARDS \$52 MILLION IN SUIT OVER FORD TRUCK BRAKES

A federal jury in Nevada has awarded \$52 million in damages to the family of a 3-year-old Nevada boy who was killed nearly 10 years ago when a Ford pickup truck rolled over him because of a defective parking brake. In a prior trial, Ford Motor Co. had been ordered to pay as much as \$150.8 million. That award was subsequently lowered to \$69.1 million, but the U.S. Court of Appeals for the Ninth Circuit in San

Francisco reversed that verdict in 2002. The case was sent back to the U.S. District because of faulty jury instructions for a new trial.

In the retrial, a new jury returned the \$52 million verdict against Ford. It has been reported that Ford had been having parking brake problems for 10 years with the F-series trucks. A month after the young child died, Ford recalled 884,000 1992-94 F-series pickup trucks and Broncos, 1993-94 Ranger pickups, Explorers and Mazda Navajo sport utility vehicles to repair the parking brake mechanisms. The recall notice told consumers only that the problem with the brakes was that they sometimes would fail to engage initially. Ford failed to say that after the brake had been engaged, it later could disengage spontaneously for no reason. The public was led to believe the reason for the recall was a different, much less significant problem. There have been more than 1,100 incidents in which Ford trucks' parking brakes have disengaged spontaneously, resulting in 54 injuries and one death.

CONSUMER GROUPS CHALLENGE REGIONAL MOTOR VEHICLE RECALLS

The Center for Auto Safety and Public Citizen have filed a lawsuit that challenges the policy of the National Highway Traffic Safety Administration (NHTSA) of allowing vehicle manufacturers to limit certain recalls of defective vehicles to select states. The complaint, filed in the U.S. District Court for the District of Columbia, charges that regional recalls violate the National Traffic and Motor Vehicle Safety Act in several ways:

- the Act requires that all owners of defective motor vehicles receive notice and a free remedy
- NHTSA's policy of permitting regional recalls has been applied arbitrarily
- NHTSA illegally implemented the policy by failing to provide notice and solicit public comment before

allowing the regional recalls

As required by federal law, when either NHTSA or a manufacturer discovers a defect in a class of cars, the manufacturer notifies owners of affected vehicles nationwide that they are entitled to a free repair or replacement. However, since at least the mid-1980s, NHTSA has been quietly allowing manufacturers to conduct regional recalls by providing notice and a guaranteed free repair only to those owners whose cars are registered in selected states, usually covering less than half of the country.

Over the past 10 years, there have been nearly 40 regional recalls, with two announced in the past year. Manufacturers conduct regional recalls when a particular defect is more likely to manifest itself when exposed to regional weather conditions, like snow or heat. For example, in 1999, Ford recalled Windstar minivans to correct a fuel tank defect that caused cracks in hot weather. These cracks could leak fuel and vapor, creating a serious fire hazard. With NHTSA's blessing, Ford conducted a recall in only 11 states, the 10 southernmost counties in California, and one county in Nevada. This left consumers in some of the hottest parts of the country without a guaranteed free repair. If a vehicle has a defect that makes it unsafe, the defect needs to be fixed on all similar vehicles. NHTSA normally required manufacturers to conduct nationwide recalls. However, the agency eventually gave in to the automobile industry. Safety experts believe that geographic recalls reduce auto company recall costs at the expense of public safety.

PUBLIC CITIZEN URGES CONGRESS TO PASS NEW AUTO SAFETY STANDARDS

By enacting important new safety measures and standards, Congress could prevent thousands of deaths each year in automobile crashes, according to written testimony by

Public Citizen President Joan Claybrook. The testimony was submitted to the U.S. House Commerce, Science and Transportation Committee, which held a hearing on reauthorization legislation for the National Highway Traffic Safety Administration. Vehicle crashes are the leading cause of death for Americans between the ages of 2 and 33, and fatalities have been increasing in recent years. In 2002, 42,815 people were killed on the highways, the most since 1990. Congress in 2000 enacted legislation that improved tire safety standards but did not improve standards in other areas. Many hazards remain unaddressed, even though Congress took the action it did. Congress now needs to pass legislation that will establish rollover prevention and protection standards, anti-ejection standards and other crucial, long-overdue safeguards. It is time to ask American automakers to build a safer, better vehicle.

Sections of the Senate-passed reauthorization bill, which were sponsored in a bi-partisan move by U.S. Senators John McCain, Ernest Hollings, and Mike DeWine, mandate the changes that Ms. Claybrook asked House members to enact. Lawmakers should not accept the arguments of the auto industry against these new protections. Safety provisions in the Senate-passed bill target areas where the most lives could be saved, the remedies are feasible and reasonable, and decades have passed without action. The House should enact rollover prevention and survival. Poorly designed SUVs that are prone to rolling over - and deadly to occupants when they do - are a cause for the increasing numbers of deaths on U.S. roads in recent years. Rollover fatalities accounted for 82% of the total fatality increase from 2001 to 2002. NHTSA recently has implemented a consumer information program and dynamic testing program to indicate how a vehicle will perform on the road, but both are grossly inadequate.

Rollover crashes should be surviv-

able, but SUVs are often built with weak roofs that crush as the vehicle rolls, seriously injuring or killing those in the vehicle. The current roof crush standard is woefully out of date and tests only one side of the roof, thereby permitting manufacturers to make vehicles that are deadly in real crashes. NHTSA estimates that a more rigorous standard would save 1,400 lives each year. A safety standard for rollover prevention in the form of a dynamic test that would test both sides of the roof and a set of standards that would make rollover crashes more survivable should be enacted.

Historically, voluntary programs by the automobile industry have done little to improve auto safety because there is no accountability or transparency in the process. Instead of relying on the industry's program, lawmakers should create standards the public can rely on that address the safety concerns that are most apparent. As Ms. Claybrook told Congress, "we know what the problems are," and we have "the technologies to engineer safer cars." She correctly assessed the current problem: "Safety rules cannot continue to lag so far behind."

URGENT NEED FOR STANDARDS ON 15-PASSENGER VANS

In previous issues, we have frequently stated that safeguards for 15-passenger vans are badly needed. These vans, as we all know, are popular with church groups, schools and other organizations. Unfortunately, these vehicles fall outside the scope of many federal motor vehicle safety standards. However, we know the vans are highly dangerous and prone to roll over when fully loaded. NHTSA has issued consumer advisories on the dangers, but has failed to take steps to improve the design of the vehicles. Congress should mandate that 15-passenger vans be subject to safety standards and dynamically tested for rollover and roof crush.

They have the bill before them that will get the job done. There can be no excuse for any further foot-dragging by Congress.

OMB UNDERMINES VITAL PUBLIC PROTECTIONS

Few people realize how the White House Office of Management and Budget can adversely impact health and safety regulation. OMB's annual report to Congress is a prime example of how the agency operates. The report is based on an analysis full of factual deficiencies, conceptual fallacies and scientific distortions. The report gives lawmakers a thoroughly skewed picture of the value of federal health and safety regulations. It amounts to an invitation to industry to identify more rules to be eliminated or weakened.

The cost-benefit analysis utilized by the OMB attempts to assign a monetary value to the costs and benefits of regulations, with an eye toward eliminating rules with a higher cost than benefit. The method ignores benefits that cannot be expressed in terms of money. It also disregards the principle that industry should bear the cost of alleviating the harm it causes. Regulatory accounting gives a false appearance of technical objectivity to a political decision that regulated industries' interests override the public's interest. This defies logic and can't be justified. OMB's report to Congress is misleading because it ignores the costs to the public of scores of public health, safety and environmental protections that have been weakened and blocked during the past three years.

In 2001, OMB asked the public to nominate regulations that should be rescinded or changed. This "hit list" turned out to be nothing but a corporate "wish list." OMB has invited industry and other parties to identify rules affecting the manufacturing sector that they would like to see scaled back or eliminated. Those in government should be protecting American

workers instead of taking away hard-won health, safety and environmental protections. The Bush Administration has an obvious anti-regulatory agenda. The Rove-led White House should be pushing for enhanced health and safety protections and formulating safeguards that save lives. Instead, they are moving rapidly in the opposite direction. One has to wonder whether Rove's decisions are tied to campaign contributions.

BETTER REPORTING NEEDED

Every year, bad things happen to children in cars that do not show up in a fatality database run by the National Highway Traffic Safety Administration: Children die in power window accidents, they get locked into cars that heat up like ovens, they are backed over by unsuspecting adults. Also missing from the Fatality Analysis Reporting System (FARS), in some instances, are deaths caused when vehicles on the side of the road are hit and burst into flames. There is a reason for the information gap, and it's that the system was not designed to include accidents that didn't occur in traffic on the nation's highways. As a result, injuries in vehicles in parking lots, on a highway shoulder or in a driveway aren't counted in the FARS. These incidents are known as non-traffic, non-crash events. To make it into the database, the vehicle must be "in transport" on a public road or highway, and the death must occur within 30 days of the accident.

These distinctions are extremely important because the FARS database is the nation's premier census for crash-related deaths. Statistics derived from it—seat belt usage, what time of day accidents happen, and whether it was at a stop sign or a stoplight—are the driving force behind almost everything the regulatory agency does. The FARS, created in 1975, depends on states gathering information about a crash, from police reports, medical records, death certificates and other sources.

Information then is compiled on the vehicle, the persons involved and the nature of the accident. About 6.3 million crashes were reported to police last year. Among them were 37,000 fatal crashes and 43,000 fatalities that ended up in the federal database. The FARS must be expanded, and Clarence Ditlow, director of the Center for Auto Safety, is leading the charge.

Mr. Ditlow is particularly concerned about fires in Crown Victoria police cruisers made by Ford Motor Co. His research shows gaps in FARS in incidents of Crown Victorias parked by the side of the road that have burst into flame after being hit by another vehicle. Sometimes the cause of the accident and, ultimately, death, does not indicate it involved a fire, he said. Or there is no information about the vehicle at all because it was not "in transport." The death might be in the system, he found, but it might show up in the pedestrian category. And it would not appear in a computer search for deaths in Crown Victorias. The Center said that for 2002, it counted eight deaths in seven crashes involving fires and Crown Victoria police cars. However, the database showed only four fire crashes and five deaths. The safety group objected to the agency's decision in October 2002 to close, without taking action, an investigation of fires in Crown Victorias and other models built on the same platform. Their objection certainly appears to have had merit.

The Center also filed a petition in January asking the NHTSA to reconsider a rule it had just issued to update how manufacturers must build vehicles to protect occupants from fuel tank fires. Janette E. Fennell, founder and president of Kids and Cars, a child safety advocacy group, also has been pleading with the agency. She wants the FARS to include the deaths of children caught in power windows, backed over by vehicles, or victims of some other mishap when the car is not "in

transport." Ms. Fennell counted 154 deaths of children in various vehicle-related accidents last year that are not in the database, or are coded incorrectly. She wants the NHTSA to direct car manufacturers to use technology—such as auto-reverse on power windows—to stop the accidents.

The safety groups say omitting these deaths deprives regulators of data they need to make regulatory and recall decisions. They also want the agency to count accident deaths that occur within a year, instead of a month. Jeffrey W. Runge, the director of NHTSA, concedes his agency needs to have "some measurement devices" for deaths that don't occur on a public road. The solution, however, must be commensurate with the size of the problem, according to Dr. Runge. This means that the agency and safety groups are not likely to come to the same conclusion about what should be included in, or excluded from, the death tally. I believe the safety groups are on the right side of this issue.

2004 MODEL YEAR ROLLOVER TEST RESULTS FROM NHTSA

This year marks the first year that the National Highway Traffic Safety Administration has tested rollover resistance by using the agency's enhanced rating system. The new enhanced rating system includes a dynamic track test known as the "fishhook" maneuver. The fishhook test is a series of turns made by a computerized steering system that are performed at various speeds. The test is also called the "Road Edge Recovery Test," which is an effort to replicate real world emergency avoidance maneuvers.

For years, consumer groups and auto manufacturers have been at odds at how best to test the rollover resistance of SUVs. Consumer advocate groups have long argued that tests used by manufacturers, such as Ford's J-Turn test, did not replicate real world emergency avoidance maneuver conditions

or test the vehicle at its “limits.” At the same time, auto manufacturers have argued that avoidance maneuver tests such as the Consumer Union’s CU tests, both long and short courses, were not repeatable or reliable tests.

After many years of inaction, NHTSA finally adopted a “fishhook” maneuver as its dynamic rollover resistance test. This is the first time NHTSA has included a dynamic test as part of its rollover evaluation. In selecting the current test, NHTSA reviewed a number of proposed tests for determining rollover resistance. Numerous proposed test methods, including the CU test procedure and Ford’s J-Turn test, were considered. NHTSA declined to use the CU test, although it stated the test would be a useful test for auto manufacturers to use to evaluate rollover resistance. NHTSA also declined to use Ford’s J-Turn test, because it was a sub-limits test.

NHTSA’s new test procedures will provide consumers with a star rating system for a vehicle’s rollover propensities. Of the 28 vehicles tested in February 2004, none obtained the highest 5-star rating. A 5-star rating means that a rollover during a single vehicle accident is less than 10% likely to occur; a 4-star means that there is a 10-20% chance of a rollover; a 3-star means there is a 20-30% chance of rollover; a 2-star means a 30-40% chance of rollover; and a 1-star means there is a greater than 40% chance that the vehicle will roll over in a single vehicle crash.

The Chevrolet Trailblazer 4 x 4, Chevrolet Silverado Extended Cab, both 4-wheel and 2-wheel drive, Ford Focus Wagon, Subaru Outback Wagon, Toyota Echo, and the Volvo XC90 4-wheel drive all received a 4-star rating. Interestingly, six of the test results for the 28 cars tested are still under review and have not been released. The vehicles under review, with one exception, are all Ford products and include the Ford Explorer 4-wheel drive and 2-wheel drive, the Ford Explorer Sport

Track 4-wheel drive (2-door Explorer). The worst vehicle tested by the NHTSA turned out to be the Ford Explorer Sport Track, which is a crossover vehicle between the Ford Explorer and a pickup truck. The vehicle has 4 doors and a short bed. The Sport Track received a 2-star rating.

In 2002 there were nearly 11 million crashes, including passenger cars, SUVs, pickup trucks and vans. Although only approximately 3% of these accidents involved rollovers, rollovers accounted for approximately 33% of the deaths that occurred in the crashes. The NHTSA’s new dynamic testing is a step in the right direction for ensuring that popular vehicles such as SUVs are reasonably safe for consumers. The new test procedure will force manufacturers to design their vehicles to perform better in accident avoidance maneuvers.

U.S. REJECTS PETITIONS ON CRASH TEST DUMMIES

U.S. regulators have denied a request from the Insurance Institute for Highway Safety, a prominent insurance industry group, to change how crash test dummies are seated in cars. The National Highway Traffic Safety Administration did not rule out, however, revisiting the issue if evidence subsequently shows that longtime government standards are inadequate. The Institute said in a 2002 petition that standards for dummies placed in adjustable front seats for common tests do not reflect real-world driving conditions. The group also said that manufacturers could easily manipulate seating positions to gain more favorable results. We know from experience that this is done by the car manufacturers.

Dummy seating positions in crash tests should reflect where people actually sit in real cars. The Institute, backed by leading insurance companies, conducts its own crash tests and works with regulators on safety measures. Seating positions were challenged in

the two most common types of trials mainly performed by manufacturers—front- and side-impact crash tests. These tests mainly position belted dummies constructed to represent the average sized adult male at 170 pounds and a female weighing 108 pounds. Federal regulations require the seat placed at the midtrack position for the male dummy in both tests and at the full-front forward position for the female in the frontal crash test. The rules allow manufacturers to set seatbacks to their recommended angle. The insurance group believes seating positions should follow criteria developed by experts at the University of Michigan. Those experts compared the seating positions of 600 adult volunteers with the government standards and concluded the volunteers sat slightly farther back than where the government requires. Regulators say their standards do not meet all real-world positions but that they are adequate in most cases. NHTSA claimed that the insurance group didn’t give “compelling evidence” to conclude that its proposal was any better. The group says it will go back to the regulatory agency with updated data and will press very hard for the changes.

UPDATE ON CONSUMER REPORTS LAWSUIT

Suzuki is still at war with Consumers Union, which publishes *Consumer Reports*. The battle involves a 1988 product review of the Suzuki Samurai SUV. In 1988, *Consumer Reports* published an article critical of the stability of the Suzuki Samurai. The article stated that the Samurai was judged “not acceptable” because of its propensity to tip up in sharp turns. In 1996, one year after American Suzuki stopped selling the Samurai, Suzuki sued *Consumer Reports* claiming that the publication’s testers deliberately tipped the vehicle up to create headlines and sell magazines. The case was dismissed by the trial judge in 2000, finding there

was insufficient evidence to go forward with the claim. Suzuki appealed the case to the U.S. Court of Appeals for the Ninth Circuit, and the case was reversed and reinstated.

It is expected that the case will go to trial this year. *Consumer Reports* claims that a verdict in favor of Suzuki will have a chilling effect on the ability of *Consumer Reports* to do critical product reviews that are important to inform consumers of potential product defects. I hope this case will be rejected again—this time by a jury. Consumers are entitled to information relating to potential product defects when they are considering the purchase of a vehicle, especially when their lives and the lives of their families are at stake. It is interesting to note that General Motors Corporation owns 20% of Suzuki Motor Corporation of Japan.

X. TRANSPORTATION

JUSTICES SAY AIRLINE IS LIABLE FOR A FATAL REACTION TO SMOKING

The U.S. Supreme Court has ruled that Olympic Airways is liable for the death of a 52-year-old passenger who had an asthmatic reaction to cigarette smoke. Liability was based on a flight attendant repeatedly refusing to move the passenger farther from the smoking section. In a 6-2 decision, the Court upheld a lower court ruling that the flight attendant's refusal constituted an "accident" under the Warsaw Convention, the treaty governing airline liability. Olympic will pay the passenger's widow \$1.4 million. The victim, a California doctor, was traveling home from Athens to San Francisco with his wife and children in January 1998. The doctor's wife asked three times that her husband be switched to a seat nearer the front of the plane, which would have placed him away from the smokers. First, the flight attendant said

there were no empty seats. Later she allegedly said she was too busy to help him find a passenger to switch with.

About two hours into the flight, the passenger moved to the front of the plane to get farther from the smokers. While there, he suffered a heart attack and later died. Apparently, there were 11 empty seats and a large group of airline employees on board who could have been asked to switch seats. Smoking was mostly banned on domestic flights by the early 1990s, and in the last five years it has become rare on international flights as well.

The crucial issue in the case involved the definition of "accident." In 1985 the Court defined an accident as an "unexpected or unusual event or happening that is external to the passenger." The majority opinion ruled that the flight attendant's refusal was external and unexpected and was "a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin." This result will open the door for more litigation based on this theory of liability. There are at least 100 cases pending at present.

FEWER CRASHES CAUSED BY PILOTS— BUT MAINTENANCE STILL A PROBLEM

It appears that mistakes by pilots — the number one cause of commercial airline crashes — have decreased dramatically over the past decade. While that is good news, a new concern has emerged in the government's efforts to make air travel safer. Poor maintenance is causing major problems. A USA Today analysis of 22 years of crash data and interviews with more than two dozen aviation analysts suggests that innovative training and modern jets with better warning systems have helped pilots quickly correct what might once have been fatal mistakes. As a result, crashes caused by pilots — about two-thirds of all accidents from the 1960s through the mid-1990s — fell to about

half of all crashes from 1995 through 2001. Correcting maintenance problems, however, has remained a lower priority. As a consequence, accidents caused by maintenance errors have become the second-most-likely category of accident since 1995. More than 30% of accidents from 1997 through 2001 were caused at least in part by maintenance mistakes.

The National Transportation Safety Board is taking steps aimed at improving maintenance at all airlines. The federal government requires minimal training for mechanics after they've been licensed. Unfortunately, airlines have opposed improvements in maintenance. They say some are too costly. USA Today analyzed accidents from 1980 through 2001, the last year for which the NTSB has determined the causes of most crashes.

The analysis shows that:

- The rate of accidents and the number of people killed each year have fallen significantly. In the 1980s, accidents occurred nine times per 10 million flights. That fell to about six per 10 million flights in the 1990s. Fatalities averaged 186 per year in the 1980s and dropped 40%—to 111—in the 1990s, even as the number of flights increased.
- Mistakes by pilots remained the most common cause of accidents, but the category declined more sharply than the overall accident rate. Accidents attributed to pilots dropped from six per 10 million flights in the 1980s to below four per 10 million in the 1990s. From 1995 through 2001, the rate dropped below three per 10 million. There were 10.6 million domestic flights in 2002.
- Maintenance errors emerged as the second-most-likely cause of accidents. Maintenance caused an average of slightly more than one crash per 10 million flights in the 1990s. It was the only major category of accidents that did not decline.

The Commercial Aviation Safety Team, a joint federal and industry group that helps set the agenda for safety improvements, last year identified maintenance as a “remaining risk.” USA Today evaluated the 158 most severe domestic airline crashes on commercial planes with 15 or more seats from 1980 through 2001. The list includes accidents involving similar-sized cargo planes. The causes of the accidents were based on findings by the National Transportation Safety Board. The Board has yet to determine the causes of four of the five domestic airline accidents since 2001. I hope the federal government will continue to insist that maintenance be made a top priority with the airlines. There really can be no excuse for not cracking down on the maintenance problem.

MAINTENANCE AND BALANCE BLAMED IN NORTH CAROLINA CRASH

In a previous issue, we reported on the crash of US Airways Express Flight 5481 last year at North Carolina’s Charlotte-Douglas Airport. Federal investigators now say a maintenance error—combined with too much weight in the back of the plane—led to the crash. All 21 people aboard were killed in the crash, the deadliest in the United States in over 2 years. The twin-engine Beech 1900 commuter plane operated by Air Midwest took off normally. Within seconds, however, its nose pitched up sharply. The aircraft stalled, then rolled left and plummeted into a maintenance hangar. The investigator in charge of the National Transportation Safety Board probe says improperly rigged cables that controlled the aircraft’s up-and-down motion, combined with improper weight distribution, led to the crash of the commuter plane. According to the report, “The simultaneous existence of these two errors resulted in a virtually uncontrollable airplane.” The report was sent to the NTSB, which was to vote whether to

accept the findings.

The Board also was expected to make recommendations on safety changes. The plane was within 100 pounds of its limit when it took off. The cockpit voice recorder transcripts show the pilot and co-pilot discussed the issue on the runway. Their conversation turned frantic as the plane took off. An “emergency” was reported to the control tower. Investigators said the plane’s tail was too heavy because of the way the passengers and bags were distributed. Too much weight can change a small plane’s center of gravity and make it much more difficult to fly. The pilots could not compensate because the cables did not have their full range of motion. Safety board investigators found that a contract mechanic, several nights before the accident, improperly adjusted the elevator cables while the plane was at the airline’s Huntington, West Virginia, maintenance facility. There can be several reasons for the mechanic’s mistake, which could include inadequate oversight of the maintenance facility by the company and the government. Air Midwest contracted maintenance to Raytheon Aerospace (now known as Vertex Aerospace), which hired mechanics from Structural Modification and Repair Technicians Inc.

The Transportation Department’s inspector general reported in July that the Federal Aviation Administration does not adequately oversee the growing number of outside contractors repairing commercial airplanes. The FAA spokesman says it’s up to the airline to make sure maintenance work is carried out properly. FAA inspectors visit sites based on where they can best allocate resources to mitigate risk. Air Midwest’s parent company, Mesa Air Group, has announced that it will no longer contract out its maintenance. Also, the maintenance manual for the Beech 1900 has been revised to clarify rigging procedures. The Charlotte crash also prompted changes in the FAA’s

guidelines for assessing the weight of passengers and baggage, adding up to 10 pounds to its estimate for people and 5 pounds to luggage. The weights are used to gauge whether a plane is overloaded.

XI. PREMISES LIABILITY UPDATE

HOME FIRE SAFETY

The United States has one of the highest fire death and injury rates in the world. Fire is the second leading cause of accidental death in the home. More than 4,000 people die each year in home fires from flames or smoke. There are more than 500,000 residential fires each year that are serious enough to be reported to fire departments. More than 90% of residential fire deaths and injuries result from fires in one and two-family houses and apartments. Property losses exceed \$4 billion annually, and the long-term emotional damage to victims and their families is incalculable.

Many home fires are associated with consumer products. Some of the principal products involved in home fires are home heating devices, upholstered furniture, bedding, cigarette lighters, matches, wearing apparel, and extension cords. Cigarette-ignited fires cause more deaths than any other kind of fire. With the help of concerned consumers, the number of residential fires has declined about 30% since 1980. However, much more can be done by an alert and informed public to cut down on the needlessly high and tragic fire toll. Many of the injuries associated with flammable products result from hazards that are overlooked. Fire experts agree that one key to fewer fires is a greater awareness of how accidents can be prevented. There are a number of things that folks can do to

protect their families. By spotting the hazards and taking some simple precautions, many fires and fire injuries can be prevented. The following are some of the sources of fire:

- **Supplemental home heating** - The use of supplemental room heaters, such as wood and coal-burning stoves, kerosene heaters, gas space heaters, and electrical heaters has decreased, along with the number of residential fires. Even though there has been a decrease in fires associated with supplemental heaters, it is important to remember that about 120,000 residential fires, or about 22% of all residential fires, still occur annually from use of these heaters. These fires kill more than 600 people. Annually, there are thousands of contact burn injuries and hundreds of carbon monoxide poisonings.
- **Cooking Equipment** - Cooking equipment is estimated to be associated with more than 100,000 fires annually, causing almost 400 deaths, and 5,000 injuries. Gas cooking equipment accounts for about 30,000 fires, and electrical cooking equipment for about 55,000 fires. Never place or store potholders, plastic utensils, towels, and other non-cooking equipment on or near the range because these items can be ignited. Roll up or fasten long, loose sleeves with pins or elastic bands while cooking. Do not reach across a range while cooking. Long, loose sleeves are more likely to catch on fire than are short sleeves. Long, loose sleeves are also more apt to catch on pot handles, overturning pots and pans, and causing scalds. Do not place candy or cookies over the top of ranges. This will reduce the attraction kids may have for climbing on cooking equipment. Also, keep constant vigilance on any cooking that is required above the "keep warm" setting. Be sure all pot handles are turned inward when children are in the home.

- **Cigarette lighters and matches** - Each year more than 200 deaths are associated with fires started by cigarette lighters. About two-thirds of these result from children playing with lighters. Most of the victims are under five years old. Always keep lighters and matches out of sight and out of the reach of children. Children as young as two years old are capable of lighting cigarette lighters and matches. Never encourage or allow a child to play with a lighter or to think of it as a toy. Do not use it as a source of amusement for a child. Once their curiosity is aroused, children may seek out a lighter and try to light it. Always check to see that cigarettes are extinguished before emptying ashtrays. Stubs that are still burning can ignite trash.
- **Materials that burn** - Your home is filled with materials and products that will burn if ignited. Upholstered furniture, clothing, drapery fabrics, and liquids such as gasoline and volatile solvents are involved in many injury-causing fires each year. Most of these fires could be prevented. Most fibers used in clothing can burn, some more quickly than others. A significant number of clothing fires occur in the over 65-age group, principally from nightwear (robes, pajamas, nightgowns). In 1989, about 200 clothing fire deaths were reported; about three-fourths occurred in the 65 and older age group. The severity of apparel burns is high. Hospital stays average over one month. Small open flames, including matches, cigarette lighters, and candles are the major source of clothing ignition. These are followed by ranges, open fires, and space heaters. The most commonly worn garments that are associated with clothing ignition injuries are pajamas, nightgowns, robes, shirts/blouses, pants/slacks, and dresses. Be sure to purchase garments for children that are intended for sleepwear since they

are made to be flame-resistant. One of the major causes of household fires is flammable liquids. These include gasoline, acetone benzene, lacquer thinner, alcohol, turpentine, contact cement, paint thinner, kerosene, and charcoal lighter fluid. The most dangerous of all is gasoline. Be sure that all flammable liquids are stored in properly labeled, tightly closed non-glass containers. These products should be stored away from heaters, furnaces, water heaters, ranges, and other gas appliances. Always store flammable liquids out of reach of children.

Even after you have taken all fire safety precautions, you still need to have a plan for early warning and escape in case a fire does occur. Many fire deaths and fire injuries are actually caused by smoke and gases. Victims inhale smoke and poisonous gases that rise ahead of the flames. Survival depends on being warned as early as possible and having an escape plan. It is essential that every home have an adequate number of properly working smoke detectors. Smoke detectors are inexpensive and are required by law in many localities. They provide an early warning that is critical, because the longer the delay the deadlier the consequences. Make sure smoke detectors are installed and maintained according to the manufacturer's instructions.

In addition to smoke detectors, make sure your family has an escape plan and an alternate escape plan. Make sure escape routes and plans are rehearsed periodically. Also, make sure the escape plan includes choosing a place safely outside the house where the family can meet to be sure everyone got out safely. Include small children as part of the discussion and rehearsal of the escape plan. It is especially important to make sure they understand that they must escape; they can't hide from fire under a bed or in a closet. Your life and those of your family can be saved by foresight, planning, discussing and rehearsal.

XII. WORKPLACE HAZARDS

\$5.2 MILLION AWARDED IN ASBESTOS CASE

A Texas jury has awarded \$5.2 million in damages to the family of a refinery worker who died of lung disease. The problems were allegedly caused as a result of exposure to asbestos-laden insulation made by Quigley Co., a subsidiary of Pfizer Inc. The worker, an insulator, brick mason and laborer in a Phelps Dodge Corp. copper refinery in El Paso from 1948 through the mid-1980s, became ill after many years of handling a powdered insulation that Quigley made to protect furnaces, pipes and boilers. In February 2002, the worker was diagnosed with mesothelioma, a form of cancer linked to asbestos exposure. He died nine months later at age 77. It was proved that Quigley officials knew about the dangers of the asbestos in the insulation for years, but continued to sell the product until 1974. This is another example of where a company chose profits over the safety and health of its workers. The award will be reduced by the amount that the worker's family received in settlements from other companies that made asbestos-containing products used at the plant.

WARNING ISSUED FOR PLANTS' NEIGHBORS

The report by the Environmental Working Group is referred to in great detail in The Corporate World section of this issue. According to the report, 100,000 people live within a half-mile of high-risk factories that once processed asbestos. Among those factories is a former East Bay insulation plant in Newark. The facility, which had been known as California Zonolite, was owned by W.R. Grace from the 1960s until it closed in 1993. The company

shipped vermiculite, a mineral, from its now-closed mine in Libby, Montana, to Newark, where it was heated and turned into attic insulation.

Recent studies have shown that former workers at the Montana mine have a death rate 60 times the national average from asbestosis, a lung disease caused by inhaling tiny asbestos fibers. Some of the 100,000 people who live near 28 plants that processed much of the Libby asbestos in the United States, mostly in the 1950s, 1960s and 1970s, could face health problems. Another federal agency, the Agency for Toxic Substances and Disease Registry, is conducting public health studies of the 28 high-priority asbestos sites. Earlier this year, it released results from the first five. Results from Newark and the other 22 are due this year.

JURY AWARD TO WORKER

A jury in Missouri found that vapors from butter flavoring at the microwave popcorn factory permanently ruined the lungs of a former worker. There are 29 other former workers at the Gilster-Mary Lee plant in Jasper who have cases pending against the same butter-flavoring manufacturers. Jurors returned their verdict of \$20 million against International Flavors and Fragrances Inc. and its subsidiary Bush Boake Allen Inc. The flavoring manufacturers were ordered to pay \$18 million to the plaintiff and \$2 million to his wife. This plaintiff and the other former factory workers are suffering from damaged airways and breathing problems. They contend that the two manufacturers knew their butter flavoring was hazardous, but failed to warn them of the dangers or provide adequate safety instructions. The National Institute of Occupational Safety and Health also has linked exposure to vapors from butter flavoring to lung disease in popcorn factory workers in Illinois, Iowa and Nebraska.

Health officials insist people who microwave popcorn and eat it are not

in danger, although the Environmental Protection Agency is studying the chemicals released into the air when a bag of microwave popcorn is popped. Trial testimony showed that if the plaintiff's health remains stable, he could wait at least 10 years for a needed double-lung transplant. Life expectancy is about 10 years for lung transplant recipients. Appearing on *The Early Show* on CBS, the plaintiff said he had been working at the plant about a year when he began to experience what he first thought were cold or flu symptoms. He tried to treat the problems with over-the-counter medications, but nothing seemed to work.

IBM SETTLES BIRTH DEFECT SUIT

A lawsuit alleging that a woman's birth defects were caused by her mother's working conditions at IBM Corp. was settled last month just as jury selection was to start. All parties and lawyers involved are under a gag order. Presently, there are more than 200 cancer or birth defect cases pending around the country against IBM. In the case settled, the child's mother was pregnant with her when she was assigned to dip silicon wafers into harsh chemicals at an IBM plant in Fishkill, New York. The expectant mother alleged she inhaled noxious fumes that caused the baby to be born without kneecaps and with a deformed skull that caused brain injury and retardation.

XIII. MASS TORTS UPDATE

BAYER® CONTINUES TO SETTLE LAWSUITS

In early March, Bayer AG, the German drug maker, reported that it has now reached more than 2,224 settlements related to the 2001 withdrawal of Baycol, the cholesterol-lowering drug.

While Bayer® has paid out \$842 million without admitting liability in those settlements, there are still 9,948 claims pending. Bayer® pulled Lipobay, marketed as Baycol in the United States, in August 2001 after it was linked to a muscle-wasting syndrome and about 100 patient deaths.

PHARMACEUTICAL COMPANIES GET BIG FAVOR

Most individuals keeping up with the “tort reform” war understand the battles usually take place in the halls of a state legislature or in Congress. President Bush did his pharmaceutical industry donors a big favor in 2001 by appointing Daniel E. Troy as chief counsel for the federal Food and Drug Administration (FDA). Prior to becoming FDA chief counsel, Troy had been a partner at a Washington, D.C. firm where he represented the interests of pharmaceutical and tobacco companies against the FDA. It is now obvious Mr. Troy does not have the best interest of consumers injured by pharmaceutical products in mind because of the actions he has taken since coming into office. His appointment went pretty much under the radar screen and its significance wasn't apparent until recently.

Significantly, a severe drop in the number of warning letters to pharmaceutical companies has occurred. Also, under Troy the FDA is intervening in individual tort lawsuits in state courts arguing that FDA approval of the drug either preempts the lawsuit requiring it to go to federal court, or that the court should hold as a matter of law that the product is safe and effective. Although one of the basic doctrines of the Republican Party is “states' rights,” this principle is easily ignored given that the GOP is run largely for the benefit of Corporate America. Corporate interests haven't donated \$200 million dollars to President Bush's reelection campaign for nothing. They want to protect their special interests and in the process are running roughshod over the rights of consumers.

There is no question that individual tort litigants are in a better position than the FDA to keep drug companies honest. Over the last several years, with seven or eight drugs being removed from the market, there has been a great deal of litigation involving those drugs. In those cases, documents have been discovered incriminating the drug companies. We have seen how the drug companies can manipulate their clinical trial data and data involving adverse events to the FDA. In the litigation in which the FDA intervened at the direction of Mr. Troy, the federal district court in California ruled that Mr. Troy's preemption argument “contravened common sense” and vitiated, rather than advanced, the FDA's purpose of protecting the public. Ultimately, it is the duty of the pharmaceutical companies to provide a safe and effective product. Their problem is that, instead of following the core principle of medical ethics of “first do no harm,” pharmaceutical companies choose to follow the policy of “first, let's make a profit.” When they follow that policy as opposed to doing good for the patients, the judicial system must be available when bad things happen to consumers.

THE FDA SHOULD BAN CRESTOR

Public Citizen has called on the U.S. Food and Drug Administration to immediately remove the cholesterol-lowering drug rosuvastatin from the market. The drug, marketed by AstraZeneca as Crestor, has been linked to cases of life-threatening muscle damage and kidney failure or damage. Since it was approved just over five months ago, three patients in the United States, who were taking approved doses of rosuvastatin, developed kidney failure or muscle damage. One of those patients, a 39-year-old woman, died of kidney failure and rhabdomyolysis, or muscle damage. Data obtained from the United States, the United Kingdom and Canada show that seven cases of rhabdomyoly-

sis and nine case of kidney damage or failure occurred after FDA approval.

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. As previously reported, Baycol, another statin, was removed from the market in the fall of 2001 after at least 31 reports of fatal rhabdomyolysis. Even so, Baycol did not show life-threatening rhabdomyolysis in pre-approval clinical trials. Crestor is the only statin to have the reaction arise before its approval.

In July 2003, Public Citizen Health Research Group Director Dr. Sidney Wolfe strongly urged the FDA not to approve rosuvastatin. This was because, in addition to the risks of muscle and kidney damage, Crestor had not been shown to reduce the risk of heart attacks and strokes, even though it lowers cholesterol levels. Three other statins - lovastatin, pravastatin and simvastatin - have shown such a benefit. In the petition, Dr. Wolfe wrote that the decision by two major U.S. health insurers and the Swedish government not to reimburse patients for the drug underscores the concerns already raised and strengthens the case for banning the drug. Nonetheless, AstraZeneca is currently launching a major direct-to-consumer advertising campaign to promote the drug.

Relating to the petition, Dr. Wolfe stated: “The FDA should never have approved this drug in the face of such serious and potentially lethal adverse effects. The only way the agency can show it has concern for patient safety, and not drug industry wishes, is to pull Crestor from market immediately.” Since 1996, Public Citizen has either warned consumers not to take or petitioned for the ban of six dangerous drugs that were later taken off the market, including Redux, Propulsid® and Baycol. I agree with Dr. Wolfe and Public Citizen and believe that Crestor should be withdrawn from the market immediately by

the FDA in order to ensure the safety of American consumers.

ACCUTANE SHOULD BE PULLED FROM MARKET

Public Citizen has requested that the acne drug Accutane, which causes birth defects and life-threatening adverse events, be removed from the market and prescribed only under very limited and controlled conditions. At a meeting of a U.S. Food and Drug Administration advisory committee, Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, described how the drug causes such birth defects as malformations of the heart and brain, and can cause depression and create pressure in the brain in patients taking it. About 25% of the babies born to mothers taking the drug have serious birth defects and 50% are mentally disabled. Many women who become pregnant while taking the drug have abortions because of this high birth defect rate.

Accutane is approved only to treat severe cystic acne, but is prescribed to many people who have mild acne. Dr. Wolfe believes it is prescribed to 26 times more women than it should be. A program launched in April 2002 by the FDA and Roche, Accutane's manufacturer, was designed to reduce the number of pregnant women taking the drug, but it apparently hasn't worked. In the program's first year, 48 of 61 (79%) reported pregnancies ended in elective abortions because of concerns about the high rate of birth defects caused by the drug. Applied to the estimated number of total pregnancies in women taking Accutane during that year, an estimated 431 women had abortions because of the drug's high defect rate, 16 infants were born with birth defects and 31 babies were born with mental retardation. From 1982 to 2000, 162 babies were reported born with birth defects attributable to Accutane.

Officials have known for at least 20 years of the dangers associated with

Accutane. In 1983, Public Citizen petitioned the FDA to give patients warning information with the drug, and in 1988, petitioned for a ban on Accutane. However, the FDA didn't act. Public Citizen says it will petition the agency again soon for the drug's withdrawal. Dr. Wolfe believes that the drug should be prescribed only if photographic proof exists of severe cystic acne and the patient has not responded to other acne treatments. In addition, for women, a written statement should detail the patient's contraceptive practices and the patient should have a negative pregnancy test. Dr. Wolfe stated in a news release:

If the government doesn't act, this administration and advisory committee will continue to put its imprimatur on the reckless use of a drug that each year causes the need for hundreds of abortions and results in many seriously deformed infants with birth defects. This is one of the two worst epidemics of preventable serious birth defects ever seen in the United States. It is time to end it.

EPHEDRA MANUFACTURERS FIGHT BACK

In the closing days of 2003, Health and Human Services Secretary Tommy Thompson finally announced the FDA's intention to put an end to the sale of products containing ephedra. Even though this action was slow in coming, it was the right thing for the safety of consumers and should be applauded. However, with the sale of dietary supplements growing upward to an estimated \$18 billion dollars, we knew then that the companies that make and sell ephedra-containing products would not take Secretary Thompson's ban lying down. With the April 12, 2004 effective date for the ban fast approaching, NVE Pharmaceuticals—maker of the popular ephedra products, Stacker 2, Yellow Jackets and Stingers—has filed a lawsuit in the United States District Court for the District of New Jersey.

The lawsuit alleges that the government's ban on ephedra is unlawful, and asks the court to stall the ban while the legality of Secretary Thompson's actions are challenged in court. It was reported on Forbes.com that NVE has alleged that between 2000 and 2003 its sales revenues grew from \$29 million to \$80 million, nearly all from the sale of ephedra containing dietary supplements. With this dramatic increase in revenues directly tied to its products, there is little wonder why NVE would choose to challenge the ban. It's all about the money!

WOMAN'S FAMILY AWARDED \$19 MILLION

Last month, a Kentucky jury awarded more than \$19 million to the family of a Louisville mother who died more than a decade ago after taking a drug to suppress breast-milk production after birth. After a month-long trial, the jury reached a verdict ordering Novartis Pharmaceuticals Corp. to pay \$18.3 million to the family of the 32-year-old mother who died in 1993, just a few days after giving birth to her second child. The jury also ordered the estate of her doctor to pay \$784,826. The jurors unanimously agreed that Parlodel, the drug Novartis manufactured, "was unreasonably dangerous for use" and "was a substantial factor" in the death. The lawsuit was filed in 1994 against Sandoz Pharmaceuticals Corp., now doing business as Novartis, and the estate of a Louisville obstetrician.

According to the lawsuit, the doctor prescribed bromocriptine mesylate, marketed as Parlodel, to suppress his patient's lactation. It was proved that Novartis knew that Parlodel had serious side effects but failed to inform the doctor. The drug was proved to have caused a seizure, which led to death. Parlodel's packaging in 1993 included an FDA-approved warning regarding seizures. Originally developed to treat disorders that include tumors and Parkinson's disease, Parlodel was approved in 1980 to sup-

press milk production in mothers who choose not to breast-feed.

In 1989, two consumer groups urged the U.S. Food and Drug Administration to withdraw approval of Parlodel and two other drugs to suppress lactation. The Public Citizen Health Research Group and the National Women's Health Collective called the drugs "marginally effective" and "too dangerous to be used for this purpose." The drug is still available on the market.

XIV. ENVIRONMENTAL CONCERNS

ADEM WANTS TO GET BETTER

The Alabama Department of Environmental Management says it wants to be the "premier environmental agency" in the country. A draft strategic plan was distributed in the news media in late February. Under its mission statement, ADEM has the duty to "protect and improve the quality of Alabama's environment and the health of its citizens." The Environmental Management Commission, the board that oversees ADEM, proposed writing a strategic plan for the agency last year. Obviously, this was a good move and one that apparently was needed. A series of meetings was held around the state. Among the recommendations found in the draft are:

- Developing a more defined enforcement and penalty policy.
- Expanding pollution prevention programs and providing incentives for recycling and pollution prevention.
- Creating a standing committee to monitor the Legislature and assist the director and ADEM staff in meetings with the Governor and legislators on key issues, including ADEM funding.
- Establishing a committee to evaluate the director and provide comments on the performance of senior ADEM staff.

- Re-evaluating ADEM's Website and finding additional ways for the public to receive and provide information.

The report also recommended finding ways to get more money for ADEM through fees on solid waste dumped in the state's landfills. It also suggested the department evaluate its permit fees to ensure they are in line with other states and cover all permissible costs of ADEM. Interestingly, the report said that ADEM should develop better relationships with the Governor, Legislature, public and regulators. The Commissioners were to submit their responses to the draft by March 19th.

XV. INSURANCE AND FINANCE UPDATE

ALABAMA DEPARTMENT OF INSURANCE UNVEILS UPDATED WEBSITE

The Alabama Department of Insurance has launched an updated Website. It remains at the same address, which is www.aldoi.gov. The new site, designed by department Webmaster Jelene Hardy, reportedly should provide more helpful information to consumers and industry representatives alike. Insurance Commissioner Walter Bell told the *Insurance Journal*, "There's no doubt in my mind that this updated Website will make the public's dealings with the Department a lot more pleasant. The site is designed in such a way that consumers will have an easier path to the information and the help they need. I believe the companies and producers will find the new site to be a major improvement as well." The site provides sections for consumers, companies, producers and has links for various online services the Department provides for each group. I commend the Insurance Department for making this Website available to Alabama citizens.

HEALTH INSURANCE CLASS SETTLEMENT

Our law firm filed a class action lawsuit against American Medical Security Insurance Company, and its parent, United Wisconsin Life Insurance Company, based on a "death spiral" legal theory, accusing the company of price manipulation through "tiering." We have reached a tentative settlement with these defendants, tentative only because it is subject to court approval by a Montgomery County Circuit Court judge within the next 90 days. The settlement includes all policyholders from the State of Alabama and Georgia and has an estimated value of approximately \$10 million.

The "death spiral" theory centers around an insurance company moving unhealthy policyholders from one risk group to another, in an attempt to place all unhealthy policyholders in a single group, thereby increasing their premiums to a point of "pricing out" policyholders from their health insurance. Eventually, the unhealthy policyholder risk group requires such a high premium that policyholders can no longer afford those policies. Meanwhile, all the healthy policyholders are moved to healthy policyholder groups, groups that make fewer and less costly claims than the unhealthy policyholders, thereby leaving the company with just healthy policyholders, resulting in larger profits for the insurance company.

Our investigation and formal legal discovery in the case was in conjunction with the Alabama Insurance Department's own investigation. The Alabama Insurance Department reached a consent agreement with AMS and United Wisconsin prior to the tentative class action settlement we reached with American Medical Security and United Wisconsin. The relief offered under the estimated \$10 million settlement contains many options, but the most important result of this class action is that the company has now agreed, by way of injunctive

relief, to never engage in this type of pricing system in the future. If it does engage in such a pricing scheme in the future, the Montgomery County Circuit Court will have jurisdiction to sanction the company for any and all violations of the settlement agreement.

Some 30,000 policyholders will be affected by this class action settlement. I hope the impact of this settlement agreement will warn other health insurance companies not to mistreat policyholders through the use of deceptive price gouging measures. While the company denied any admission of liability, it agreed to the settlement terms mentioned above as well as not agreeing to engage in the alleged price-gouging scheme stated in the class action complaint. We look forward to finalizing this settlement.

DOLLAR GENERAL IN TROUBLE AGAIN

Last month, we reported that our law firm had preliminarily received class certification against Dollar General for violations of the federal Fair Labor Standards Act. That class action is continuing toward possible final certification in the U.S. District Court in the Northern District of Alabama, before the Honorable U. W. Clemon. Meanwhile, on March 15, it was reported that Dollar General Corporation agreed to pay \$10 million to settle a Securities and Exchange Commission investigation into accounting irregularities. The SEC must still approve Dollar General's agreement with the SEC staff. Allegations stemming from the restatement of company earnings from 1998 to 2000 were the basis for the settlement. Interestingly, the Chief Financial Officer, James Hagan, appointed in March 2001, said he would leave the company after helping to conclude the federal inquiry. The SEC has been investigating whether the Tennessee-based retailer inflated earnings by improperly reporting certain costs, including interest expense and taxes.

As part of the proposed settlement,

Dollar General said it would agree to a permanent injunction against violations of anti-fraud, records, and internal control provisions of security laws. Dollar General has increased the number of stores by 587 to a nationwide total of 6,817. The company focuses on shoppers with household incomes of less than \$30,000.00 a year, and prices its items in dollar increments. It competes with discounters such as Target Corporation and Wal-Mart Stores, Inc. The company boasts annual sales of \$1.97 billion.

This is yet another corporate accounting scandal. Here we have a company that allegedly is improperly underpaying its employees in violation of the federal Fair Labor Standards Act while at the same time it allegedly has been overstating its earnings to the regulators. We look forward to pursuing our case against Dollar General and will update our readers on any new developments that may occur in our case.

XVI. NURSING HOME UPDATE

ARBITRATION ALLOWED IN NURSING HOME WRONGFUL DEATH CASES

The Alabama Supreme Court was recently faced with the question of whether an arbitration clause in a nursing home admission contract, not signed by the nursing home resident, would require that a wrongful death case filed later by the resident's estate after her death be forced into arbitration. In a disturbing decision, the Court said such an arbitration agreement was enforceable. To my knowledge, this is the first time that the Alabama Supreme Court has ruled that a wrongful death case was subject to arbitration. As you may know, Alabama law concerning arbitration has become so one-sided in favor of big business and against consumers that it is difficult to enter into

consumer transactions without being required to submit any disputes that may arise to arbitration. The Alabama nursing home industry, with their well-publicized record of poor care in some homes, obviously saw this development as an opportunity to remove standard conduct from the accountability of a jury.

I can certainly understand how the owners of bad nursing homes in Alabama would never want juries to hear about preventable, gangrenous pressure sores the size of a dinner plate that resulted in blood infection and caused the death of a resident, or how a wound was allowed to deteriorate to the point that maggots were found in it, or how a female resident was allowed to be taken out of a nursing home and raped by a visitor. All of these things and many more have taken place in Alabama nursing homes. It is this type of conduct for which the nursing homes do not want to be held accountable by an Alabama jury.

I suppose the nursing homes figure that what is good for car dealerships and insurance companies is also good for them in their dealings with nursing home residents, who are some of the most frail and helpless people in our society, and that is sad. Nursing homes that use arbitration apparently have no shame whatsoever. They have no qualms about looking a person squarely in the face who is in the middle of a crisis and one of the most emotionally draining times of his or her life, and telling him or her, if any explanation is made at all, that they must sign an arbitration agreement and give away the right to a jury trial if he or she wants to be admitted to the facility. Even though the government has given the nursing home owners a monopoly on long-term care with a guaranteed payment, these owners still won't live up to their moral or legal responsibilities. I predict that in the very near future it will be virtually impossible for an Alabama citizen to be admitted into

any nursing home in Alabama without first signing away their constitutional right to a trial by jury.

In the combined cases of the Estate of Noella Turcotte and the Estate of Sarah Carter vs. Briarcliff Nursing Home, Inc. d/b/a Integrated Health Services at Briarcliff, the Alabama Supreme Court ruled that an arbitration clause signed by a child of the nursing home resident under the conditions previously described was valid even though it was a predispute agreement. The court said that both of the wrongful death cases, which involved serious allegations of neglect, must be submitted to arbitration. To make matters worse, the arbitration agreement in both of these cases required that the arbitrators had to be chosen from the National Health Lawyers Association (now known as the American Health Lawyers Association). This is a professional association of nursing home industry attorneys, which should tell you how they might lean. Under this ruling, not only are these serious allegations of neglect involving preventable pressure sores, dehydration, malnutrition and understaffing taken from the hands of a jury, but also these claims are to be heard by arbitrators who are aligned with the nursing home industry. I cannot conceive of how this ruling could be more unfair to consumers.

It is one thing for someone to make an informed, knowledgeable choice to arbitrate a dispute that has already occurred. It is quite another thing entirely for an elderly person, or for a son or daughter, to be forced to sign away a constitutional right, regardless of what is done to the nursing home resident, in order to get medical care. Even a prisoner in the state of Alabama can sue and have their case heard by a jury when they have been damaged by substandard medical care. If these cases stand, a nursing home requiring arbitration could hire a known murderer or rapist, and if that employee then mur-

dered or raped a resident of the home, any civil lawsuit filed by that resident's family would be decided by an arbitrator, not a jury. That, in my opinion, is outrageous.

Our firm has asked the Alabama Supreme Court to rehear these cases. The main premise of the court's opinion was that because the estate of these deceased nursing home residents were, in their lawsuit, attempting to enforce duties of the nursing home admission contracts, then the estates must also be bound by the duties of that same contract (the arbitration clause). The problem with that logic in these two particular cases is that there was no contract claim asserted by the estate in either case. Each case was a wrongful death action having nothing to do with the contract. Many groups have joined with us in asking for a rehearing. The AARP, the Silver-Haired Legislature of Alabama, Trial Lawyers for Public Justice, and many others have filed amicus briefs, asking to be heard in these cases and arguing that this ruling should not stand. I believe once a majority of the court considers the effect of the ruling, and examines the basis upon which it was reached, a different result will occur. The elderly and infirm among us deserve more rights, not less. Our Legislature and courts should not be in the business of making and interpreting law that actually invites the neglect of the most helpless and forgotten segment of our society. Can you imagine in which direction the standard of care will head with a predispute arbitration agreement that is both mandatory and binding in place?

NURSING HOME AWARD

Recently, a Mississippi circuit court jury awarded \$10 million to the family of an elderly woman whose leg was amputated. The jury found that a Clinton nursing home was negligent in the woman's care. The two-week trial

ended with a \$2 million compensatory judgment and \$8 million in punitive damages against Atlanta-based Mariner Post-Acute Network Inc., the then-owners of the Clinton Health & Rehabilitation Center. The 72-year-old resident had been a patient in 1999 and 2000. The female resident had her left leg amputated at the knee after developing sores because the nursing home staff didn't provide proper care, such as turning her in bed. The poor lady, who died in 2000, was often found lying in her own waste. Most of the abuse occurred when the nursing home was short-staffed. Records of the resident's care were falsified. The nursing home will appeal.

NURSING HOME OPERATOR FACING CRIMINAL CHARGES

The former operator of a New Mexico nursing home has been charged with 19 criminal counts of abuse and neglect. Attorney General Matricia Madrid filed the criminal complaint against Home Quality Management (HQM) of West Mesa, LLC, a Florida-based limited liability company. The complaint asserts that "substandard care" during that period led to the death of a female resident and the deterioration of the health of 5 other residents. The complaint concludes that the residents were victims of a "pattern of criminal neglect." The nursing home and 4 employees were charged.

The Attorney General, when filing the charges, stated:

Many New Mexicans trust the care of their loved ones to nursing homes in the belief that those loved ones will receive necessary medical attention and will be treated with respect. We are bringing this case because of the serious allegations that substandard care resulted in the death of one resident and the neglect of five others.

It may take the criminal courts to get

the attention of the nursing home industry. Thus far, efforts by legislators and the civil courts haven't gotten the job done. When criminal offenses occur, there should be prosecutions. Perhaps that is where attention needs to be focused.

XVII. TOBACCO UPDATE

TOBACCO LAWSUIT WILL GO FORWARD

A federal judge is allowing the Justice Department to pursue a racketeering lawsuit against the tobacco industry. Tobacco giant Philip Morris USA argued that the department's claims should be tossed out because the agency was trying to regulate the cigarette industry — a power Philip Morris claimed the Justice Department didn't have. U.S. District Judge Gladys Kessler said the department was "not engaging in policy-making" but was trying to enforce the Racketeer Influenced and Corrupt Organizations Act (RICO). The judge said Congress "explicitly authorized the Attorney General to bring RICO suits such as this one."

The lawsuit accuses the tobacco industry of concealing information that nicotine is addictive and smoking causes disease. The government also contends that the companies targeted children through advertising to lure new smokers. The case was brought by the Clinton Administration and is being continued under the Bush Administration. The government is seeking to recoup profits it says the industry illegally earned through fraud. A government estimate puts those profits at more than \$280 billion. The Justice Department is also asking the court to impose new restrictions on the tobacco industry, including a ban on vending machines and on advertising terms such as "light" and "low tar." The defendants in the case are Philip Morris USA Inc. and its parent, Altria Group

Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co.; British American Tobacco Ltd.; Lorillard Tobacco Co.; Liggett Group Inc.; Counsel for Tobacco Research-USA and The Tobacco Institute. I hope Karl Rove, who has had very close ties to the tobacco industry, will allow the Justice Department to make this lawsuit a top priority.

XVIII. HEALTHCARE ISSUES

THE FDA TAKES ANTI-CONSUMER STANCE

The U.S. Food and Drug Administration (FDA) wants to leave many consumers claiming injury from pharmaceuticals or medical devices with no real access to the courts. Clearly, if the FDA has its way, the victims will have no recourse to tort law. The FDA strategy is preemption, basically the nullification of state actions that conflict with or supplement FDA decisions. The FDA's preemption argument would take away the sole means of compensation for victims. Preemption would close off one of the few avenues by which the public learns of safety and efficacy information that pharmaceutical companies do not publish and sometimes withhold from the FDA. The judicial system provides an important check on the regulatory process that preemption would take away.

There are two kinds of preemption. The point of controversy is so-called "implicit preemption," which is one form. "Explicit preemption" occurs when Congress plainly states in legislative act that FDA decisions will preempt conflicting or supplementary state law requirements. Implicit preemption, on the other hand, rests on the view that Congress meant for FDA decisions to preempt state require-

ments even though it made no explicit statement to that effect in the act. It is a view that has long been popular with manufacturers of drugs and medical devices. The FDA was against implicit preemption until the Bush Administration came along. The FDA made an historic shift when it argued for implicit preemption at the end of 2002. The FDA has intervened in a number of lawsuits on the side of drug and medical device manufacturers, arguing that the public health will suffer if state courts are allowed to, in its words, "second-guess" the agency's regulatory decisions by ruling on consumers' tort claims. Ironically, the FDA has taken that position in the face of a rising tide of criticism over its handling of such decisions. We know from experience that persons in court cases can be in a better position than the FDA to keep drug companies honest. We sometimes see evidence in litigation that the regulatory agency doesn't. Court-ordered discovery allows us to see raw data on safety and efficacy, while the FDA may only see the completed write-ups by the companies.

A GOOD MOVE BY THE FDA

The government is now requiring that supermarket-style bar codes be placed on hospital drugs. The labels of thousands of drugs will have bar codes, and that should help ensure that hospitalized patients get the right dose of the right drug at the right time. The long-anticipated regulation, announced by the Food and Drug Administration, could prevent nearly half a million side-effects and medical errors over the next 20 years, according to government estimates. Bar codes can help doctors, nurses and hospitals make sure that they give their patients the right drugs at the appropriate dosage. This will give health care providers a way to check medications and doses quickly. It should reduce the risk of medication errors that can seriously harm patients.

CMS ACCEPTS PUBLIC COMMENT VIA THE INTERNET

I have recently reported on several changes to the Centers for Medicare and Medicaid Services (CMS) Website. I am pleased to report an additional change this month that I feel will be extremely beneficial to Medicare recipients and the public in general. CMS has announced that private citizens, companies and others who wish to comment on proposed regulations can now submit their comments electronically via the Internet. Historically, the only means for registering public comment on proposed changes in regulations was by the filing of a written comment in the record by mail or hand delivery. While CMS will continue to review comments delivered via regular mail, the public can now file "electronic" comments. In addition, all electronic comments will be posted on the CMS Website for public review after the comment period has closed. Typically, the comment period stays open for 30 days for Medicaid regulations and 60 days for Medicare regulations. Individuals who file electronic comments will get an automatic e-mail reply confirming that the comment has been received by CMS.

I feel that this measure will allow consumer action groups to mobilize and submit "mass comments" on important regulations addressed by CMS. CMS is responsible for the Medicare and Medicaid systems that provide the bulk of reimbursement for nursing home care. Therefore, many CMS regulations have the potential for affecting nursing home residents and their families. Anyone wishing to comment electronically can do so through the Website (www.regulations.gov). CMS currently places a quarterly update on the Website, which identifies the regulations and notices it intends to publish during the quarter. I strongly urge individuals and consumer action groups to take advantage of this innovative means for public discussion and comment.

An estimated 7,000 hospitalized patients die annually because of drug errors where a wrong drug or a wrong dose is dispensed. With the bar code system, health workers use computer equipment to scan an identifying code on a patient's wristband that reveals what medicines he or she needs and when. Then they scan the intended medication. If they pick the wrong drug, wrong dose or a pill version when a liquid was required, the computer beeps an alarm. Veterans hospitals already have adopted bar codes, relabeling their own drugs so they can be electronically identified. In a study at one Veterans Affairs medical center, 5.7 million doses of bar-coded medication were administered with no errors.

So far, about 125 of the nation's 5000-plus hospitals use bar code systems, partly because only about 35% of their pharmaceutical supplies come with the codes affixed to them, according to Bridge Medical Incorporated, a leading manufacturer of bar code systems. The new rules will force drug manufacturers to begin phasing in bar codes on all hospital-sold drugs, making it possible for more hospitals to adopt the system.

FDA PLANS BOGUS DRUG CRACKDOWN

The Food and Drug Administration has unveiled its plan to crack down on counterfeit prescription drugs. Pushing new technologies that would help track and protect medicines is apparently the FDA's focus. The initiative, which will combine with efforts by state regulators, however, doesn't include an immediate solution to a problem that investigators have identified as one of the most pressing. I am told that tracing and documenting the origins of drugs, which can sometimes change hands multiple times on the route from factories to drug store shelves, is a major problem. In a report prepared by a special task force, the FDA concluded that paper-based "pedigrees" of drugs' sales histories would be "more likely to be incomplete or falsi-

fied" than electronic versions. The FDA is urging the industry to use new technologies, such as radio chips that help companies track products, with a goal of having the new equipment in place by 2007.

A 1988 law that was supposed to require paper pedigrees for drugs, which wholesalers have long opposed as ineffective and costly, has never been fully utilized. So, for now, the FDA plans to defer fully implementing the law. Industry groups representing drug manufacturers, pharmacy companies and wholesalers apparently will support the FDA's initiative. The FDA also said it was making several other moves to deal with the rising problem of counterfeits, including an alert network to help the agency quickly warn consumers and health professionals when counterfeits are discovered. The FDA has asked the U.S. Sentencing Commission for tougher criminal penalties for making or distributing counterfeit drugs.

The agency also plans to create guidelines to facilitate company efforts to add security measures, such as special packaging, that would help detect counterfeit drugs. The National Association of Boards of Pharmacy is supposed to propose tough rules for state regulators to use in governing drug wholesalers, the middlemen who handle many prescription drugs. Individual states will have to adopt the new rules on their own. High-profile counterfeiting cases have raised concerns about bogus prescription drugs getting into the marketplace. The number of FDA investigations of counterfeits has risen sharply, from around five a year in the late 1990s to 22 in 2003. Counterfeit medicines are extremely dangerous. They can contain too much or too little of a drug's active ingredient, or sometimes none at all.

XIX. PREDATORY LENDING UPDATE

THE STATE OF GEORGIA TAKES STRONG ACTION

The Georgia Attorney General was successful in getting the Georgia General Assembly to pass a very strong bill designed to regulate payday lenders. This bill will protect Georgia consumers and should be a model for other states to follow. The bill is currently awaiting the signature of Republican Governor Sonny Perdue. Barring a veto, this legislation will likely go into effect this month. In part, the new law allows class actions to be brought against unlicensed lenders, includes payday lending in the definition of a racketeering activity and declares a legislative intent to prohibit activities commonly referred to as "payday lending." The bill will provide for civil remedies for borrowers and declare sites or locations on which payday lending is taking place to be classified as public nuisances. The new law also provides protection for members of the United States Military and their families.

This law was passed in the wake of an opinion by the Georgia Attorney General, stating that payday lending is in violation of Georgia law and "despite the fact that the Industrial Loan Commissioner has issued cease and desist orders against various payday lenders in the State of Georgia, the General Assembly has determined that payday lending continues in the State of Georgia and that there are not sufficient deterrents in the State of Georgia to cause this illegal activity to cease." Hopefully this new law will stop the practice of predatory lending. If it does not, at least the residents of Georgia are now armed with a new law, which will provide them a recovery for these illegal practices in court.

XX. THE CONSUMER CORNER

INCREASING DANGER OF BLIND SPOTS

In most cases, bigger vehicles like minivans, trucks and SUVs have bigger blind spots because they're taller, longer and wider. The Kansas-based safety group Kids And Cars tracks the number of children killed in back-over accidents each year. In 2003, 72 children died nationwide, an increase of 24% from the year before. One reason may be growing popularity of SUVs, minivans and trucks. With these large vehicles, there are large blind spots. According to a study last year by Consumer Reports the average length of a blind spot for an average-sized driver is 12 feet 6 inches in a family sedan. In a minivan, it's 15 feet 4 inches. In mid to large-sized SUVs, the blind spot extends 15 feet 10 inches. Rear-view cameras and reverse sensor systems that warn you if you're backing into something are becoming more popular with prices ranging from \$200 to \$1200. For \$20, you can buy a wide-angle window lens, which provides a better view of what's behind you. Many safety experts say the best way to prevent back-over accidents is to walk around the vehicle to make sure the coast is clear before backing up. In the nation's capital, lawmakers are now considering a bill that would require the National Highway Traffic Safety Administration to track back-over accidents and test safety devices like the cameras and lenses. S.1072 has passed the U.S. Senate and is now in the House of Representatives awaiting consideration.

The following are some safety recommendations that can help save lives:

- Walk around and behind a vehicle prior to moving it.
- Know where your children are. Make children move away from your

vehicle to a place where they are in full view before moving the car and know that another adult is properly supervising children before moving your vehicle.

- Measure the size of your blind spot (area) behind the vehicle you drive. A 5-foot-1-inch driver in a pickup truck can have a rear blind spot of about 7 ft wide by 50 feet long.
- Consider installing cross view mirrors, audible collision detectors, rear view video camera and/or some type of back up detection device.
- Keep toys and other sports equipment off the driveway.
- Hold a child's hand when leaving the vehicle.
- Teach your children to never play in, around or behind a vehicle.
- Teach children that "parked" vehicles might move. Let children know that while they can see the vehicle, the driver of that vehicle might not be able to see them.
- Be aware that steep inclines and large SUVs, vans and trucks add to the difficulty of seeing behind a vehicle.
- Be especially careful about keeping children safe in and around cars during busy times, schedule changes and periods of crisis or holidays.

OTHER STATES PULL PLUG ON CHANNEL ONE

While Alabama politicians continue to drag their feet on doing something about the Channel One problem in our public schools, officials in other states are taking action. Those states are realizing that the content of Channel One is not good for children. Channel One Network's 12-minute educational newscast is seen by more than eight million students and 350,000 teachers in middle and high schools in the United States. The newscast is broadcast on television equipment Channel One installs in each classroom. The equip-

ment, news show, and roughly 10 hours of educational programming each week are provided free of charge to schools. Channel One programming—as part of the daily school offering—has been a controversial topic across the country. I suggest that our readers check to see whether Channel One is in their local school systems. If it is, I would recommend that you check it out for content. If you agree it's bad, then contact your local political leaders and solicit their help to get this junk out of our classrooms.

200,000 BOGUS HEALTH POLICIES SOLD IN 3 YEARS

Fake health insurers, preying on consumers looking for low-cost coverage, sold more than 200,000 bogus policies in just three years, according to a report by the General Accounting Office. Small-business owners are often the targets of such scams. The fraudulent scams have resulted in at least \$252 million in unpaid medical claims from 2000 through 2002. The fake insurance is often sold by agents and initially appears legitimate. The persons holding the policies don't realize they have been cheated until they need their insurance. They soon find their bills won't be paid. The number of newly reported scams doubled from 2000 to 2002, paralleling the rapid rise in legitimate health insurance premium costs. The GAO study reveals that more than 144 unauthorized insurance entities sold policies in those years. The effort by the GAO is the first effort by Congress to quantify the extent of the problem.

The study comes as Congress considers legislation to allow more "association health plans," which let small employers band together in groups to buy coverage. Supporters say the law would help prevent fraud by helping employers find lower-priced, legitimate insurance. The legislation could increase insurance fraud, however, by

removing some state control. Many of the current scams claim to be "association" health plans. Consumers must be warned about health insurance scams. No person should purchase a policy from a company not licensed by the State Insurance Department. Actually, state regulators have little recourse until after the fact to stop such scams. Incidentally, scams of this nature have been around for a good while. The scams flourished in the 1970s and 1980s during periods of high health care inflation.

The Employee Benefits Security Administration (EBSA), part of the Department of Labor, has obtained 10 criminal indictments from 2000 to 2003 against fake insurers. Currently, the EBSA has 28 open criminal investigations. Last year, the Labor Department won a court judgment against Employers Mutual LLC, one of the biggest companies that sold policies, requiring its principals to pay \$7.3 million. Criminal penalties for selling fake policies should be strengthened in all states. The state of Florida increased the maximum penalty for selling bogus policies to a first-degree felony, which can result in a 30-year jail term. All states should enact similar legislation.

IDENTITY THEFT IS A GROWING CRISIS

Identity theft is one of the fastest growing crimes in the United States. Identity thieves work by obtaining a victim's personal identifying information, such as a social security number or driver's license identification number, and using that information to purchase merchandise, sign contracts, and engage in business while posing as the victim. Identity thieves obtain that personal information from a variety of sources, including Internet sites, the victim's mail, or by theft from a business that maintains the victim's personal information.

Identity thieves sometimes use the victim's personal bank account or

credit card numbers to obtain merchandise, but more likely than not, the identity thief opens new bank and credit accounts in the victim's name, making it more difficult for the victim to learn of the identity thief's existence. Unfortunately, all too often victims of identity theft do not realize that they have been victimized until months or years later. Usually the awakening comes by way of a call from a collection agency, demanding payment on an overdue bill, or when the victim is turned down for credit based upon a negative credit history caused by the imposter. Then the victim is forced to spend countless hours talking with creditors and credit reporting agencies to repair their credit reports, and working with law enforcement to pursue criminal charges against the identity thief.

Anyone who suspects that he or she may be a victim of identity theft should immediately contact the identity theft hotline. The hotline, 1-877-ID-THEFT, was established by the Federal Trade Commission to counsel victims of identity theft on how to resolve credit concerns. Counselors tell victims to contact reporting agencies, to obtain copies of their credit reports from each agency, and to request that a fraud alert be placed on their credit report. The counselors also encourage victims to call and write each creditor with whom the identity thief has opened an account, and to file a police report. Kimberly Ward, a lawyer in our Toxic Torts Section, has prepared an excellent and more complete paper on the subject of identity theft. The paper covers criminal and civil remedies available to victims. If anyone would like a copy, please contact Angela Talley (angela.talley@beasleyallen.com) in our office and we will send it to you.

COMING ATTRACTION

Next month we will give our readers some tips on how to avoid identity

theft. In the meanwhile, be careful of what information you give out. If you have any doubt, just don't do it.

XXI. ARBITRATION UPDATE

DEMOCRATS OFFER BILL TO BAR MANDATORY EMPLOYMENT ARBITRATION

A coalition of Senate Democrats is attempting to amend the Federal Arbitration Act to make mandatory arbitration agreements unenforceable under all existing or future employment contracts. Their plan would still allow employees and employers to agree to arbitration after a dispute arises. Senator Ted Kennedy introduced a far-ranging bill designed to bolster protections for workers under civil rights statutes. The legislation contains a provision that would overturn the U.S. Supreme Court's finding in the Circuit City Stores case that the FAA applies to contracts of employment. Under the High Court's ruling, employers can legally require new hires and existing employees to agree to binding arbitration of workplace disputes as a condition of employment. That is difficult to rationalize when one considers the power employers have over their employees even without arbitration.

The Kennedy bill would rewrite the FAA's Section One exemption for seamen and railroad workers to clarify that nothing in the federal arbitration law would apply to employment contracts. This change also would specifically override the High Court's finding in Circuit City. This bill is cosponsored by Senators Tom Daschle and Patrick Leahy, Charles Schumer, and Hillary Clinton. Another sponsor is the man who will challenge George W. Bush, Senator John Kerry. The bill says that any arbitration agreement between an employer and employee that requires the use of binding arbitration to resolve

disputes of federal statutory or constitutional claims would be unenforceable under the FAA.

The bill contains a provision that would still permit employees and employers to voluntarily agree to use binding arbitration after a dispute arises, which is as it should be. It also offers an exemption for workplace arbitration resulting from a collective bargaining agreement. Limitations on employment arbitration would apply to all employment contracts whether they were formed "before, on, or after" the date of the bill's enactment. The legislation was referred to the Committee on Health, Education, Labor and Pensions. A similar bill, H.R. 2282, was introduced in the House and another, S. 2435, was introduced in the Senate in 2002, but neither made it out of committee. Hopefully, there will be a bipartisan effort to see that this latest attempt becomes law. There is absolutely no way to justify requiring employees to sign an arbitration agreement in order to keep their jobs.

CLASS SUIT AGAINST H&R BLOCK APPROVED

The Pennsylvania Superior Court ruled last month that suits filed against H&R Block alleging unnecessary fees for electronically filing clients' tax returns may be tried as a class action and need not be arbitrated individually. H&R Block had asserted that all claims against it must be settled in arbitration, because the plaintiffs entered into a contract with a separate entity for refund anticipation loans available in connection with H&R Block's e-filing services. The trial court determined that the arbitration provision did not cover the present claims because the e-filing fee was too removed from the loan application contract that contained the arbitration provision. The Superior Court affirmed the lower court's finding that the arbitration clause was unconscionable as applied in this case. The e-filing class will even-

tually include thousands of members.

When a client utilizes H&R Block's e-filing system, the client can either have the refund check sent back in due time (usually about two weeks), or apply for a refund anticipation loan (RAL). According to the opinion, the RAL is an agreement made not with H&R Block but with another entity, in which the taxpayer receives cash within several days of filing, using the promise of a tax refund as security for the loan. The RAL service requires a separate contract with the bank. The client contracts list H&R Block as the electronic return originator, but it makes clear that H&R Block is otherwise not connected to the loans.

Going further than the trial court, the appellate panel deemed the arbitration clause unconscionable in this case. Writing for the panel, citing the two-pronged unconscionability test set out by the 2002 Superior Court decision in *Lytle v. CitiFinancial Services Inc.*, Judge Richard B. Klein wrote that the contractual terms were unreasonably favorable to the drafter and that the signing party did not have a meaningful choice regarding the acceptance of the contract's provisions. To begin with, Judge Klein wrote, "the contract in question is a classic example of an adhesion contract," typical of situations in which a consumer has little choice about a contract's terms. And while the contractual terms do not facially appear to favor either H&R Block or Household, Judge Klein called attention to the fact that here, the arbitration fees would almost definitely outweigh the damages sought.

ALLSTATE FIGHTS ARBITRATION

It has been said that if arbitration ever became fair and balanced, it would be the corporations—not consumers—who would be the objecting parties. In New Mexico, at least for resolution of uninsured motorist coverage, Allstate is unhappy with state insurance regulations designed to protect the insured.

Allstate lost in the New Mexico Supreme Court on its claim "that to compel arbitration would violate its right to a jury trial." It is shocking that a member of the insurance industry, which wants to compel arbitration when it involves consumer rights, would object to arbitration when the consumer has a fighting chance.

HOG FARMERS CAN SUE TYSON

The Arkansas Supreme Court recently ruled that farmers can take Tyson Foods, Inc. to court for canceling contracts to raise hogs. The court dismissed Tyson's argument that the hog farmers needed to settle their disputes through arbitration. Tyson had contended that since the contract contained an arbitration clause, the matter had to be submitted to binding arbitration. The Supreme Court upheld a lower court ruling that Tyson's contract was invalid because it "forced" farmers to use arbitration while Tyson reserves the right to go to court. This was a most important result and one that I hope will be followed by other courts.

XXII. RECALLS UPDATE

WIRING PROBLEMS LEAD TO RECALL OF PORSCHÉ SUVs

Porsche, the luxury German automaker, is recalling some 22,000 Cayenne sport utility vehicles worldwide to fix a wiring problem. The recall covers vehicles produced between October 1st of 2002 and July 19th of 2003. The company plans to adjust wires near the parking brake that could chafe and potentially cause a fire. Porsche has not reported any injuries from the defect. Some 10,000 Cayennes are affected by the recall in the United States.

DAIMLERCHRYSLER CORPORATION RECALLS THE 2004 DODGE DURANGO

DaimlerChrysler has recalled approximately 27,586 of the 2004 Dodge Durangos manufactured from April through December 2003. On certain sport utility vehicles, an instrument cluster circuit board capacitor may overheat, potentially resulting in an instrument panel fire. Dealers will remove the capacitor from the circuit board. The manufacturer has reported that owner notification began on December 17, 2003. Owners may contact DaimlerChrysler at 1-800-992-1997.

MERCEDES BENZ RECALLED

Mercedes-Benz USA, L.L.C. has recalled the 2004 Mercedes Benz C Class, the 2004 Mercedes Benz CLK Class, and the 2004 Mercedes Benz E Class. These vehicles were manufactured from August through October 2003. On certain passenger vehicles, some seat belt buckles may have a burr on a metal component of the locking mechanism. The presence of the burr could prevent the seat belt from locking under certain circumstances. In the event of a crash, the seat occupant may not be properly restrained, increasing the risk of injury. Dealers will replace the seat belts. I understand that owner notification started in February. Owners may contact Mercedes-Benz at 1-800-367-6372.

2004 SATURN VUE RECALLED BY GENERAL MOTORS

General Motors Corporation has recalled the 2004 Saturn Vue. Approximately 6,134 of these vehicles, manufactured from June through October 2003, are involved. Certain sport utility vehicles equipped with 3.5L V6 (L66) engines fail to conform to the requirements of Federal Motor Vehicle Safety Standard No. 120, "Tire Selection and Rims for Vehicles other than Passenger Cars." The front and rear wheel rim size

specifications on the tire/certification label are not correct. The printed wheel rim designation specified a 16-inch wheel when a 17-inch wheel designation was required. If the wheel rim size is incorrectly printed on a tire/certification label, a service technician who solely uses the tire/certification label for service information may attempt to replace a damaged wheel with an incorrect wheel. Owners will be provided with a corrected label and installation instructions. The manufacturer has reported that owner notification began on December 15, 2003. Owners may contact Saturn at 1-800-553-6000.

GM RECALLING 93,572 OLDSMOBILE AURORAS

General Motors Corp. is recalling 93,572 Oldsmobile Aurora sedans because fuel can leak into the engine and start a fire. The recall affects Auroras from the 1995-1997 model years. The National Highway Traffic Safety Administration has received 123 complaints about the problem. In one case, a fire started while the vehicle was parked in a garage attached to a home. The vehicle was destroyed and the home was damaged. NHTSA said the fuel is leaking because the nylon tubing used in the fuel rail can degrade and crack. Owners will be notified later this spring of GM's plans to repair the vehicles.

NHTSA has also reported that DaimlerChrysler AG is recalling 34,561 Pacifica sport utility vehicles and 14,621 Jeep Grand Cherokees because their engines could stall without warning and cause a crash. Vehicles from the 2004 model year are affected in those recalls.

GM RECALLS MORE THAN 4 MILLION PICKUPS

General Motors is recalling about four million 2000 through 2004 full-size pickups worldwide to replace tailgate support cables that may corrode and break. GM said its recall covers Chevrolet Silverados and GMC Sierras

from the 2000 to 2004 model years. There have been reports of 134 minor injuries but no crashes or fatalities because of the problem, the automaker said. GM said it has been cooperating with the National Highway Traffic Safety Administration on an investigation of tailgate support cables. If the cables corrode, they may break when loads are applied to the tailgate. If both cables break, the tailgate would open an additional 10 degrees, resting on the top surface of the rear bumper.

The tailgate would drop to a lower position only if the owner had previously removed the rear bumper. Last month, NHTSA said it was investigating reports that tailgates were falling off the back of GM pickups without warning. In one case, a tailgate fell off a moving vehicle. In another, the tailgate broke as a consumer was loading an all-terrain vehicle onto his pickup. The replacements will be performed at no cost to the customers. Until the repair can be made, GM said it will advise owners to avoid applying direct loads to the tailgate until the cables can be inspected.

HYUNDAI RECALL

Hyundai Motor Company has recalled the 2001 through 2004 Hyundai Santa Fe. Approximately 249,309 vehicles are involved in this recall. Certain 4-door sport utility vehicles fail to comply with the requirements of Federal Motor Vehicle Safety Standard No. 120, "Tire Selection and Rims for Motor Vehicles other than Passenger Cars." The tire pressure labels do not contain the information required by the standard. Owners will be provided with a correct label and installation instructions. The manufacturer has reported that owner notification began on December 22, 2003. Owners may contact Hyundai at 1-800-633-5151.

MAZDA RECALL

Mazda (North America), Inc. has recalled the 2003 Mazda6. On certain passenger vehicles, the fuel sender unit (FSU) may have been improperly installed in the fuel tank, producing an inadequate seal, and fuel may leak. A fire could occur in the presence of an ignition source. Dealers will inspect the top of the fuel tank, and if necessary, repair or replace it. The manufacturer has reported that owner notification began during February 2004. Owners may contact Mazda at 1-800-222-5500.

HONDA RECALLS 440,000 CIVIC AND INSIGHT CARS

Honda Motor Co. is recalling 440,000 Civic and Insight cars because their low-beam headlights can fail without warning. So far, no injuries have resulted from the defect. The recall involves 2001 and 2002 model year Civics and 2000 through 2002 model year Insights. According to the National Highway Traffic Safety Administration, the headlights' wire harness can over-heat and cause the low-beam headlights to fail. Honda was to have started notifying owners last month about the recall. Dealers will perform free repairs on the vehicles whether or not they show any heat damage.

NISSAN RECALLS QUEST MINIVAN

Nissan Motor Co. is recalling 13,757 Quest minivans because the passenger airbag could deflate when there's a child in the front seat. The recall involves Quests from the 2004 model year. Nissan discovered during vehicle testing that the airbags could fire when a dummy the size of a 6-year-old was in the front passenger seat. Federal standards require many new vehicles to have advanced airbag systems, which detect the weight of a passenger and don't fire the airbags if the passenger is too small to withstand the force. Nissan will begin notifying customers about

the recall in May. Dealers will recalibrate the system in affected vehicles.

FORD RECALLS 1.2 MILLION SEDANS

Ford Motor Co. is recalling more than 1.2 million Ford Taurus and Mercury Sable sedans because of problems with their brake lights and air filters. Ford is recalling 938,789 Taurus and Sable sedans from the 2000 through 2003 model years because their brake lights can malfunction. The defect has caused at least two accidents and one injury, according to the National Highway Traffic Safety Administration. Ford is recalling an additional 281,926 Sable and Taurus sedans from the 2003 model year because the air filter paper in the engine can smolder or burn. Ford spokesman Glenn Ray said a supplier put the wrong chemical on the filter paper. Ray said 118,000 vehicles made early in the 2003 model year will get both repairs. Vehicles made later in the 2003 model year already have a new brake light system, so they will only need to have the air filter papers replaced.

Ford recalled 157,000 Taurus models and the Sable sedans in 2000 for the same brake light defect. However, the repair didn't solve the problem, so the brake lights will now be replaced. 2004 models of the Taurus and Sable now have a new brake light system. Models made prior to 2000 also had a different system and aren't affected in the recall. Ford began notifying customers of the recall last month.

FORD TAURUS AND SABLE RECALLS

Ford has recalled the Ford Taurus and Mercury Sable for model years 2000, 2001, 2002, and 2003. Approximately 938,789 vehicles are affected by this recall. Certain passenger vehicles are being recalled to correct a problem with a malfunctioning stop lamp switch and/or associated wiring. This malfunctioning could render the stop lamps inoperable or cause them to stay

on all the time. If the switch and/or associated wiring fail in the open position, the brake lights will not actuate and the driver will not be able to shift the vehicle out of park. If they fail in the closed position, the brake lights will remain on, which will not allow the speed control to be activated. This could also cause the battery to discharge. Dealers will remove the stop lamp switch and associated wiring assembly and install a newly designed stop lamp switch and wire assembly. Owner notification is expected to begin on May 5, 2004. Owners should contact Ford at 1-800-392-3673.

CHRYSLER RECALL

Approximately 2,875 Jeep Liberty vehicles have been recalled by Chrysler. On some sport utility vehicles, certain remote keyless entry (RKE) input may cause the body control module (BCM) software to actuate the door lock motors continuously. This can cause the lock motor bearings to overheat and seize. If this occurs, the door lock system will become inoperative. Dealers will inspect and replace, as necessary, the door latch assemblies and the BCM software will be updated. At press time, the manufacturer had not provided an owner notification schedule. Owners should contact DaimlerChrysler at 1-800-853-1403.

2004 GRAND CHEROKEE RECALLED BY CHRYSLER

Chrysler has recalled 14,621 Jeep Grand Cherokee vehicles. On certain sport utility vehicles equipped with 4.0l engines, the crankshaft position sensor wiring insulation may crack and expose the wire. In the presence of moisture, this could result in sensor malfunction, which could cause the engine to stall, increasing the risk of a crash. Dealers will replace the crankshaft position sensor. At press time, the manufacturer had not provided an

owner notification schedule. Owners should contact DaimlerChrysler at 1-800-853-1403.

2004 CHRYSLER PACIFICA RECALLED

Approximately 34,561 Chrysler Pacificas have been recalled. On certain sport utility vehicles, the powertrain control module software may allow the engine to stall when it is warming up, if the vehicle is driven under certain operating conditions. This could cause a crash without warning. Dealers will reprogram the powertrain control module software. Owner notification began on March 15, 2004. Owners should contact DaimlerChrysler at 1-800-853-1403.

BRIDGESTONE RECALLS FORD SUV TIRES

Bridgestone Americas Holding Inc. is recalling 297,000 Firestone Steeltex radial tires made for Ford Excursion sport utility vehicles, following three fatal accidents. The Nashville, Tennessee-based unit of Japan's Bridgestone Corp., said the tires were made from March 1999 to December 2002 in Quebec for Ford Excursions from the model years 2000 through 2002 and some in early 2003. The tires were involved in two fatal crashes in 2002 and a third in 2003. The recall, which will be coordinated with Ford Motor Co., is dwarfed by the millions of tires Firestone replaced in recent years after federal regulators linked Firestone Wilderness AT and ATX tires to hundreds of deaths, many from rollover accidents involving Ford's popular Explorer SUVs.

Firestone said it would replace Steeltex Radial A/T tires size LT265/75R16 load range D, which it no longer makes, with various tire models to speed the process. Firestone has made about 41 million Steeltex tires of various types in the past 14 years, and about 16 million of the tires are still on the road. U.S. regulators in June 2003 rejected reopening an investigation into various

heavy-duty Steeltex tires, including the A/T model, despite legal and consumer claims that they were defective.

COOPER TIRE RECALL

The following Cooper tires have been recalled: the Mastercraft Avenger ZHP, with build dates of December 21, 2003 through January 10, 2004; and the Zeon 2XS, with build dates of December 21, 2003 through January 10, 2004. While this recall apparently only affects some 136 tires, these tires are prone to tread chunking, which may lead to tread separation. Of course, tread separation can lead to a loss of control of the vehicle that may result in a vehicle crash without prior warning. Cooper will notify its customers and replace the affected tires free of charge. Owners who take their vehicles to an authorized dealer on an agreed-upon service date and do not receive the free remedy within a reasonable time should contact Cooper's customer relations at 800-854-6288.

Interestingly, a second recall on the same tires, with build dates of January 11 through January 31, 2004 was issued by Cooper. These tires are prone to sidewall cracking on both sidewalls of the tire. In certain service conditions where excessive flexing of the tire sidewall occurs, the cracking could extend to the body ply cords. This condition could lead to the degradation of the body ply cords and loss of inflation pressure. The loss of inflation pressure could cause the tire to run under-inflated and result in early tire failure. The loss of air could result in loss of steering control, possibly resulting in a vehicle crash without prior warning. Cooper tire will notify its customers and replace the tires free of charge. Owner notification is expected to begin during March 2004. Owners who take their vehicles to an authorized dealer on an agreed-upon service date and do not receive the free remedy within a reasonable time should

contact Cooper's consumer relations at 1-800-854-6288.

CHILD CRAFT CRIBS RECALLED

Child Craft Industries of Salem, Indiana, has recalled approximately 3,500 Legacy cribs. The slats on the drop side rail can loosen and detach. When this happens, the space created by the gaps can allow a baby to become entangled, strangle or fall. There have been 12 reports of the slats on the drop side rail completely detaching. No injuries have been reported. The recalled Legacy cribs include model numbers 16741, 21021, 23111 and 28721. The model numbers are printed on the bottom rail of the head or footboard. The full-size cribs were made from ash and maple woods, and sold in a variety of colors. All carry the Legacy Brand label. These beds were sold at juvenile furniture stores nationwide from March 2002 through January 2004 for between \$399 and \$549. Consumers should stop using the cribs and contact Child Craft to receive a replacement drop side rail. Child Craft can be contacted toll-free at (888) 844-2674 or at the firm's Website, Child-craftIndustries.com.

ONE MILLION CHILDREN'S RINGS RECALLED

Certain children's rings, manufactured by Brand Imports LLC, Scottsdale, Ariz., contain high levels of lead, posing a risk of lead poisoning to young children, according to the CPSC. No injuries have been reported. The metal rings are silver in color, with shapes including hearts and stars, and with slashes of colored paint. They were sold at vending machines in malls, discount department and grocery stores nationwide from December 2002 through August 2003 for about 25 cents. Consumers should throw the ring away or contact the company for more information at (800) 967-3048.

CHILDREN'S TOY RADIOS RECALLED BECAUSE OF CHOKING RISK

A brand of children's toy radios is being recalled because the products pose a choking risk. Schylling Associates Inc., of Rowley, Massachusetts, is recalling 15,600 wooden radios because a wooden turning knob and antenna top can break off, posing a choking hazard and exposing a sharp point. The recalled "Picture Radio" song boxes have a wind-up knob, picture window, flexible antenna, and wooden carrying handle. The music boxes come in three designs: "The ABC Song," "Old MacDonald Had a Farm," and "Mary Had a Little Lamb." Each plays the respective song when the main dial is turned. The "ABC" box has a red front, yellow knobs, and lettering on the front and back; the "Old MacDonald" box has a yellow front, blue knobs, and a farm scene on the front and back; and the "Mary Had a Little Lamb" box has a blue front, yellow knobs, and a pastoral scene on the front and back. The bottom of the music boxes reads, "More Fun From Schylling."

The radios were sold at specialty stores, gift shops, department stores and bookstores nationwide from September 2003 through January 2004 for about \$12. Parents should take these toys away from children immediately and contact the company at (800) 767-8697 or online at schylling.com to receive a refund or free replacement toy.

HARBOR FREIGHT TOOLS RECALL

Approximately 9,390 heavy-duty portable industrial cord reels manufactured in Taiwan by Harbor Freight Tools of Camarillo, California, have been replaced. Electric shock or fire are possible because the internal grounding conductor may not be properly secured to the receptacle. The recalled heavy-duty portable industrial cord reels are yellow with a carrying handle, extendable/retractable extension cord and 6 electrical outlets/plugs. The units

are marked "Cord Reel Portable Power" and sold as "SKU 42053." The label on the rear of the unit contains the following information: "Cord Reel, 10 Amps, 125 Volts, 1250 Watts, Caution, Disconnect all plugs inserted into the outlets on this face before winding cord reel in either direction, Made in Taiwan, R.O.C." These cord reels were sold through Harbor Freight Tools catalogs and Website only from January 2000 through the beginning of February 2004 for approximately \$10 to \$13. Consumers should stop using the cord and reel immediately. Consumers should call Harbor Freight Tools at (800) 444-3353 to obtain a refund. Harbor Freight Tools is contacting owners of affected cord reels by direct mail where the name is known to the firm. Consumers can also visit the firm's Website at www.harborfreight.com.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Mike Andrews

Mike Andrews, a lawyer in the Personal Injury / Product Liability Section of our firm, graduated cum laude from Thomas Goode Jones Law School in 2001. While attending Jones, Mike served two terms as a member of the Law Review Board, held a position as Senator in the Student Bar Association, was the President of the Kenneth F. Ingram Senate of Delta Theta Phi law fraternity and was the Chief Justice of the Student Bar Honor Court. He was recognized for Best Scholastic Achievement in Contracts and Criminal Law and was also the recipient of the West Publishing Corpus Juris Secundum Award for academic excellence. Mike, a member of the Alabama Trial Lawyers Association, Montgomery County Trial Lawyers Association, American Bar Association, and the Alabama State Bar, specializes in product liability litigation.

Mike has the technical knowledge required to handle cases of this nature. He is a very hard worker and has handled a number of significant cases. Mike and his wife Carol have two children, a daughter, Shelby, and a son, David Michael II. They attend First Baptist Church of Dothan.

Ron Canty

Ron Canty practices in our Consumer Fraud Section. His primary areas of practice include insurance fraud, consumer rights and bad faith litigation. Ron represents policyholders and beneficiaries regarding insurance disputes. Ron graduated from Thomas Goode Jones School of Law in 2001. While pursuing his law degree, Ron clerked at our firm. Ron is a member of the Alabama State Bar, the Alabama Lawyers Association, the Montgomery County Trial Lawyers Association, the Montgomery County Bar Association, and the Alabama Trial Lawyers Association. He frequently volunteers his time to speak to high school and grade school students. Ron has been a valuable addition to the firm.

Teresa Curtis

Teresa Curtis is a legal assistant in our Toxic Torts Section. She came to work at the firm over two years ago as a staff assistant. Teresa subsequently became a legal secretary and was recently promoted to legal assistant. She currently works for Mark Englehart and Kimberly Ward. Teresa, who received a paralegal certificate and master's degree in Judicial Administration from AUM in May of 2003, does an excellent job for the firm's clients.

Laura Allen

Laura Allen currently works as a legal assistant to Paul Sizemore in the Nursing Home Section. In this position, Laura assists in all phases of case activity. She spends most of her time drafting and filing pleadings and discovery, and setting up depositions. In her role as a legal assistant, Laura participates in managing files. Laura grew up in Mont-

gomery, the youngest of five children. Her mother, Deanie Allen, is a lawyer with a distinguished Montgomery firm, Azar & Azar. Laura came to our firm two years ago as a clerical and worked her way up to her current position of legal assistant. She currently attends AUM and will graduate this summer with a Bachelor of Science Degree in Justice and Public Safety. She will also receive her paralegal certificate. We are pleased to have Laura, a most valuable employee, with the firm.

Shanna Malone

Shanna Malone serves as the Public Relations Coordinator for the firm. She is responsible for developing and overseeing media relations, coordinating and implementing the firm's charity functions, community outreach and service programs and handling the firm brochures. Shanna also serves as my assistant and works closely with Libby Rayborn, my Executive Assistant, who is my "right arm" regardless of her title. Because of the tremendous number of outside contacts that Libby handles each day, Shanna has been a tremendous help to us.

Shanna graduated from Troy State University with a Bachelor of Science in Print Journalism and Public Relations in August of 1999. She is a member of the Troy State Alumni Association, the Troy State Journalism Alumni Association, and a member of the Montgomery Chapter of the Public Relations Council of Alabama. Shanna also serves as publicity and bulletin chairperson for Union Baptist Church in Honoraville, where she is a member. Shanna is married to Shannon Malone. They have one daughter, 2 year-old Sydney and are expecting their second child this month. Shanna does a great job for the firm.

Charles Myrick

Charles Myrick has worked for the firm for over three years as a mail clerk. He is responsible for sorting and delivering the mail for the whole firm, which is a most challenging job.

Charles is married and has a 17-year-old stepson. In 1990, Charles was in a very serious accident, suffering a severe head injury. He was in a coma for over 3 weeks. Charles has come a long way and overcome many obstacles in his life. He is a very hard worker and is an inspiration to all of us. We are very proud of Charles' accomplishments.

BEASLEY ALLEN HOSTS SEMI-ANNUAL BLOOD DRIVE

Beasley Allen held its semi-annual blood drive on March 12th with Life-South Community Blood Center. Life-South brought out two buses for the event, which attracted a good number of donors. Each donor received a free cholesterol screening. LifeSouth is a primary blood supplier for Montgomery, Autauga, Elmore, and Crenshaw Counties. We are pleased to have the opportunity to participate in such a worthwhile cause.

XXIV. CLOSING REMARKS

The national political scene has become most interesting, to say the least. I cannot recall a presidential race that has garnered so much attention at this early stage. In fact, I can never remember TV commercials being run by the candidates this early. I suspect we are going to have a "battle royal" leading up to the November election date. Based on what I am hearing from the pollsters, the economy will be the big issue, with the war on terrorism running a close second. The war in Iraq will be an issue, even though both parties should fully support our troops. Without a doubt, the deficit and job loss issue will be major obstacles for the current occupant of the White House to overcome. Nevertheless, President Bush remains very popular in Alabama at this stage. It is my hope that the two campaigns will engage in a

healthy debate of the issues and avoid the temptation of getting into the gutter with their efforts. That approach would be good for the country.

With all of the strife and turmoil that surrounds us in this world, it is good to keep our eyes on things of real importance. I pass this prayer for the workplace on to you for your good:

At times, work stresses me out, I lose my composure and do dumb things. On occasion, I get anxious and overly worried about many things over which I have no control. The Lord of peace, descend on me and dispel my fears. Teach me to seek You first and not be troubled about tomorrow.

THE FIRM CELEBRATES 25 YEARS IN 2004

I have been asked to write about some of my experiences in the courtroom over the years since we are having our 25th anniversary. Perhaps I can recall a few things that are worth mentioning. One true story comes from a trial that took place a few years ago in an Alabama courthouse. We were trying a very strong case against an insurance company that involved its bad faith refusal to pay a legitimate claim. We had proved a strong case of bad faith that occurred at the district office level—with concurrence by the company's home office—and had a number of

potential prospects who could have been the ringleader in the scheme. The district manager's name was "Pete." During my closing argument, I had outlined the fraudulent scheme in some detail. I felt that I was getting the jurors' attention, and after laying out the evidence, I then asked the rhetorical question: "And who do you believe had the best opportunity to put this fraudulent scheme in motion?" One juror on the front row raised her hand and said, "It was Pete." I knew then that we were in pretty good shape with that jury and as it turned out, we were.

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