THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

An Alabama Soldier Dies A Preventable Death

On October 21, 2003, 19-year-old Daphne, Alabama, resident Paul Bueche was killed while serving at United States Camp Anaconda Base in Balad, Iraq. Paul was not killed by a stealthy insurgent, a hidden bomb or even a mortar round fired over the fence—Paul was killed when the two-piece rim of a UH-60 Blackhawk helicopter tire exploded during routine maintenance. A fellow soldier working with Paul lost both arms in the same explosion. Nearly nine months after Paul's death, the Army finally released the first of several long-overdue investigative reports into the incident. The findings of the report left the Bueche family in shock and asking for more answers.

Rather than air, as is customarily used in filling tires, UH-60 Blackhawk tires are filled with nitrogen. The tire fill procedure requires the use of a special nitrogen cart, which is specially equipped to provide pressure sufficient to fill the tire but not overfill it. The cart is divided into two sides: one side produces approximately 170 pounds per square inch (sometimes referred to as the "low pressure side") of nitrogen, while the other side can produce up to 4,000 pounds per square inch ("high pressure side"). Blackhawk tires are to be pressurized to approximately 160-170 pounds per square inch, and on October 21st, Paul and other soldiers were ordered to utilize a nitrogen cart to refill and replace the tires on the subject helicopter. But, the low-pressure side of the cart they were given was broken, and incredibly they were ordered by a supervisory officer to use the high-pressure side of the cart instead. Also, a tire-fill-kit, which would have offered additional overfill protection, was not available to the young soldiers. When Paul and his fellow soldiers used the cart as ordered, the Blackhawk tire immediately over-pressurized and the split rim exploded into several lethal pieces. Although he was standing several feet away from the tire, Paul was killed instantly.

The Army report properly concluded that several pieces of vital equipment were not available and/or not in proper working condition, resulting in the over-pressurization of the tire. Further, the report acknowledged that senior officers ordered Paul and the other soldiers to use the high-pressure side of the cart in direct violation of several written manuals and safety procedures. The officers who gave the orders were not injured, their names were blacked out in the report, and there is no evidence whatsoever that they were ever even reprimanded. Rather than the Army being immediately forthcoming with these troubling facts, the family had to beg repeatedly for the report because the Army failed to assign a briefer after the report was completed. As if to add insult to injury, on the day that Ms. Bueche received Paul's autopsy in the mail, she also received another Army envelope—it contained a request for Paul to rate any medical care provided by the military during his last few months of service, including a demand for an immediate response.

Mike Andrews of the Products Liability Section in our firm is working with Mr. and Mrs. Bueche on this case. Mike attended the Army briefing on July 5th at the Bueche home in Daphne. The Army briefer, who also works for helicopter manufacturer Sikorsky, was quick to assure the family that nothing about the design of the Sikorsky Blackhawk caused this incident. According to the Sikorsky representative, the soldiers were killed because they followed orders. Several local and national press agencies are following this story and for good reason. At the request of several media outlets, we issued the following statement on this case:

Based on what we have seen so far in our review of the military investigation into Paul Bueche's death, there was a clear lack of leadership, control and accountability in the chain of command at U.S. Camp Anaconda, Balad, Iraq in October 2003. The military investigation confirms this - in fact, the Army/Sikorsky representative who delivered the briefing said as much. We are investigating any possible claims that may exist for this family, but we know that traditionally the Courts have decided all similar cases in favor of the government. Even under our weak workers compensation laws, which

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are structured in favor of businesses, if this death had occurred while working for a private employer in the State of Alabama this family could clearly seek recovery directly from the employer - in fact, under these facts the local District Attorney might even be involved. However, in this case, we understand that the officers who gave orders to use the equipment in the manner in which it was being used, in the manner that led to Paul Bueche's death and Pete Damon's tragic injuries, have not even been reprimanded.

Finally, after months of pleading with the Army to release the investigation report so that the family could learn the facts surrounding the death of their only son, Mr. and Mrs. Bueche received Paul's autopsy report along with a letter requesting Paul to rate any medical care provided by the military during his last few months of service - including a demand for an immediate response. We are obviously curious to see how the Army intends to sanction Paul Bueche when he fails to respond to the questionnaire. The fact that these two reports arrived the very same day is appalling and is further proof of a lack of clear leadership, control and accountability in this chain of command. There has to be accountability at some level, and we have not seen it in this case. We intend to ask Congress to launch a congressional investigation into the lack of leadership, control and accountability that led to Paul Bueche's death.

To date, over 900 U.S. soldiers have been killed in Iraq. We do not have a breakdown yet how many have been killed by enemy forces and how many, like Paul Bueche, were needlessly killed or maimed by following orders to use faulty equipment. We will update this story as our investigation continues, but one thing is already clear—a death such as this demands accountability at some level. Historically the laws have been interpreted to shield the government from such accountability. We will be asking Congress to review those laws and to create an exception for such circumstances when an order to use faulty equipment results in an entirely preventable death or injury.

GOVERNOR RILEY APPOINTS JIM MAIN AS FINANCE DIRECTOR

Governor Bob Riley has appointed Jim Main to one of the most important positions in state government. Jim will serve as Director of the Department of Finance. The long-time friend of the Governor has an extensive and varied background in the fields of law, small business and public service. Jim understands the enormous fiscal challenges facing Alabama and also knows the real reforms of state government that are needed. He should also know how to help bring them about.

The new Finance Director says that he plans to work to bring greater accountability and transparency to the State's budget process. I believe he has the ability and background that will assist him greatly in achieving those goals. Governor Riley has confidence in Jim's ability and has turned over a major job to him. The goal is to develop a budget process that enables our citizens to know not only how much each agency of government receives, but also how they spend the money.

Jim, who has practiced law for 25 years, was a partner in our law firm for several years. He subsequently served in the Administration of former Governor Fob James as Chief of Staff and Legal Advisor. The Bullock County native is also a licensed pharmacist and operated Main Drug Store in Union Springs after earning his pharmacy degree in 1968 from Auburn University. Jim received his law degree from the University of Alabama in 1972. Interestingly, he is a past president of the American Pharmaceutical Association, past president of the Alabama Pharmaceutical Association and Chairman of the Dean's Council at Auburn University's School of Pharmacy.

In my opinion, Jim Main's appointment will be good for the State. He is extremely intelligent, works hard, understands the workings of state government, has tremendous "people skills" and is a good family man. Early reports from legislators concerning the appointment were extremely favorable. I sincerely believe this will prove to be one of the best appointments made by Governor Riley during his tenure.

ATTORNEY GENERAL FORMS UNIT TO PROTECT FAMILIES

Attorney General Troy King plans to get tough on criminals who target families, and that's good news. The Attorney General announced that he is forming a Family Protection Unit. The new unit will fight crimes that hurt Alabama families, such as identity theft, welfare fraud and crimes against children. Existing staff and resources will be utilized to form the new unit. Deputy Attorney General William Dill will head the new unit. As I understand it, the Family Protection Unit will concentrate efforts in the following areas:

- Child abuse and exploitation
- Elder abuse and exploitation
- Consumer protection
- Welfare fraud
- Identify theft

Each category listed above is most important and concerns all Alabamians, directly or indirectly. I certainly believe that there is a great need to protect Alabama citizens from wrongful conduct, and protecting families is a great place to start. The new Attorney General is to be commended for taking this step.

Hospitals Sue Over Low Medicare Rates

Seventy-eight Alabama hospitals, along with other hospitals from Louisiana and Mississippi, have filed a lawsuit against the U.S. Department of Health and Human Services. The hospitals are seeking more than $261 million in back Medicare payments they say they are owed. According to the complaint, the Medicare agency illegally used an incorrect formula to compute the hospitals' rates, lowering their payments in fiscal years 2003 and 2004. The lawsuit was filed in federal court in Washington, D.C. The Alabama Hospital Association, which is coordinating the suit, says the practice has been going on for years. The method by which the federal insurance program for the elderly and disabled calculates labor costs at hospitals across the country will be the issue before the court.

Medicare "grossly underestimates" the true labor costs of the hospitals because of irrelevant geographical boundaries. The agency then relies too heavily on those labor costs to determine how much the hospitals are paid per procedure. I understand that Alabama hospitals have long been among the country's worst-paid by Medicare because of the flawed formula. For example, while hospitals in Alabama get paid significantly less than hospitals in Georgia, their cost of delivering care is not correspondingly lower. Since there are 106 general hospitals in Alabama and only 78 are participating in the lawsuit, I expect others to join in this litigation.

Special Session

It appears that a Special Session will be called by the Governor before the end of the year. I only hope that careful planning will take place and a real plan developed before bringing the legislators to Montgomery. As I have stated on numerous occasions, it is very easy to spot our problems. Unfortunately, finding real long-term, permanent solutions is another thing. Sometimes, the only folks who benefit from a special session are the lobbyists and their special interest bosses. I hope this one—if it becomes a reality—will be different.

Political Jockeying

I predict that over the next several months the political sheep will get separated from the political goats. The candidates for elections to statewide office in 2006 are already lining up. Interestingly, the special interest groups and their lobbyists are already seeking out their candidates for Governor and Lt. Governor. I have had access to some early polls that indicate a number of potential candidates are being considered for the two posts. In addition to the current Governor, there are several potential candidates for the state's top job. Some of the names that have surfaced are Lucy Baxley, Lowell Barron, Ron Sparks, Roy Moore and Jeff Sessions. Each of these "potential candidates" appears to have significant support around the state. In addition, former Governors Don Siegelman and Jim Folsom do fairly well in some of the polls. Interestingly, Siegelman has been traveling the state meeting with groups and speaking wherever he can. I was sort of surprised when the name of Dr. Paul Hubbert as a potential candidate surfaced last week. My understanding is that a group of fairly prominent citizens met with Paul recently and encouraged him to run.

Seth Hammett was among those being mentioned, but he took his name out of the hat on July 15th. Seth has done an outstanding job as Speaker of the House and would have been a strong candidate. But, his leadership and experience are needed in the Legislature. I believe Seth made the right decision. I do believe, however, that he will make the run for Governor in the future.

I suspect the person who emerges as the front-runner in the Governor's race will be the man or woman who makes the fewest political mistakes over the next 12 months. I believe the experts who counted Governor Riley out after the failed tax referendum may have been jumping the gun. The Governor appears to have made a comeback and at this point would have to be considered the person to beat. In any event, it will be most interesting to watch the political posturing that will occur during the next few months. There is one thing for certain in this state and that is there is nothing like Alabama politics!

II. COURT WATCH

Jury Awards $2.9 Million Verdict In Fraud Case

A Henry County jury awarded a record $2.9 million verdict in a securities fraud case handled by our firm. The jury awarded $900,000 in compensatory damages and an additional $2 million in punitive damages against World Capital Brokerage of Tampa, Florida. Ray and Shirley Robinson, who live in Abbeville, invested $275,000 with the defendant. The funds were to be invested in commodity futures with a guarantee that the investments were totally safe. A 12.5% annual return was guaranteed on the investment. Evidence at trial revealed that the Robinsons did not receive the guaranteed return and instead lost their entire investment. World Capital Brokerage could not tell the jury what happened to the Robinson's $275,000.00 investment or even whether it was invested at all.

World Capital Brokerage and its agents are guilty of not only stealing our clients' money, but also stealing their future. The conduct exhibited by this company is nothing less than reprehensible. Unfortunately, when corporations around the country read about how Enron's bosses were lying, cheating and stealing, that tale did nothing but encourage them to follow suit. Gibson Vance and Chris Sanspree from our firm, along with Chris Money of Abbeville, represented the Robinson family.

Supreme Court Justices Rule For The Bad Guys

The U.S. Supreme Court has blocked a law clearly designed to shield Web-surfing children from pornographic pictures and on-line come-ons. The High Court, in a 5-4 ruling, stated that the law would cramp the free speech rights of adults to see and buy what they want on the Internet. The majority didn't want to be accused of muzzling free speech. Justice Anthony M. Kennedy wrote for the majority: "They impose selective restrictions on speech at the receiving end, not universal restrictions at the source." I had hoped that the Court would recognize the evils of pornography and how it is undermining mortality in this country.

The 1998 law, signed by then-President Clinton, and backed by the Bush Administration, would require adults to use access codes or other ways of registering before they could see objectionable material on-line. The law would punish violators with fines up to $50,000 or jail time during the court challenge. Artists, bookstores, an on-line sex therapist, a gynecological information site and others had brought the lawsuit. The American Civil Liberties Union argued on appeal that the law could make criminals out of anyone who offered racy or explicit material to adults. In the ruling, a majority of the Court said that the federal judge who initially blocked the Child On-line Protection Act six years ago rightly found that the law was most likely unconstitutional. Justice Kennedy wrote: "There is a potential for extraordinary harm and a serious chill upon protected speech" if the law takes effect. Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg and Thomas.

In dissent, Chief Justice Rehnquist and Justices O'Connor, Scalia and Breyer disagreed with a majority of the Court and felt the law should be upheld. The case was sent back to lower courts in Philadelphia. I hope, the government will continue to defend the law (which is known as COPA). Material that is indecent, but not obscene, is protected by the First Amendment. Whether we agree or not, adults may see or purchase pornography, but children must be protected and shielded from the filth found on the Internet. Unfortunately, most Internet web sites, chat rooms and other Internet venues are available to adults and minors alike. Congress has tried repeatedly to find a way to shield youngsters from the Web's dark side without running afoul of the First Amendment. I had hoped that the U.S. Supreme Court would have come down on the side of children in this case. Unfortunately, they didn't see fit to do so.

The justices previously had unanimously struck down the first version of a child-protection law passed by Congress in 1996. At that time, the Internet was just becoming a common means of communication, research and entertainment. After that defeat, Congress responded by passing COPA, saying the new law was designed to go after pornographers or others who place material deemed harmful to minors within their easy reach. Free speech advocates wanted the Court to strike down the law outright. However, they have to be highly pleased with this latest ruling. A Justice Department spokesman told *Associated Press*:

> *Our society has reached a broad consensus that child obscenity is harmful to our youngest generation and must be stopped. Congress has repeatedly attempted to address this serious need and the Court yet again opposed these commonsense measures to protect America's children.*

Frankly, I can't see how free speech can protect raw pornography that is made available for children. People all across this country should be shocked by this decision. I believe the churches should be up in arms and get involved in the fight. The two political parties should join hands on this issue and do everything possible to protect our children. I encourage our readers to contact both the Bush and Kerry campaigns and ask them to take a strong stand on this issue. It would also help to contact Senators Shelby and Sessions and the members of Congress in your district.

Jury Patriotism Act Needed

With juror turnout levels sinking to crisis levels across the country, the American Legislative Exchange Council (ALEC) is calling on state legislatures to pass the Jury Patriotism Act. I have always felt that jury service was a requirement of citizenship, and that view hasn't changed a bit. This is model legislation designed to increase juror participation rates. "Avoidance of jury service has seriously jeopardized the rights of litigants and the fight for fair juries must continue," according to Kristin Armshaw, ALEC's Civil Justice Task Force Director. ALEC has found that no-show rates among summoned jurors in several jurisdictions have reached alarming levels. A number of states, including Arizona, Colorado, Mississippi, Missouri, Oklahoma, Utah and Vermont, have recently introduced legislation based on ALEC's proposal. The Jury Patriotism Act proposes:

- Providing jurors one automatic postponement of service;
- The elimination of occupational exemptions, which currently exempts professionals, including podiatrists in New York, pharmacists in Missouri, and acting professors in Tennessee;
- Greater protection for employees called to jury service;
- Tightening of hardship excuses for not serving;
- Tougher penalties for failing to answer a summons; and
- Establishment of a lengthy trial fund to relieve the financial burden on jurors serving on prolonged civil cases.

I believe that the Jury Patriotism Act should be passed by the Legislature in Alabama. It simply balances civic duty with the realities of everyday life. The right to trial by jury is a fundamental right that dates back to the introduction of the Constitution. Surveys indicate Americans continue to overwhelmingly support the jury system. To make the system work as it should, we must ensure that "the jury pool accurately reflects society." If you agree, contact Governor Riley and your local legislators and ask them to help on this project.

Cattlemen Appeal Decision

Cattlemen who won a price-fixing verdict against the nation's largest beef packer in a Montgomery federal court, have filed an appeal to the U.S. Court of Appeals for the Eleventh Circuit. You will recall that the landmark jury verdict was thrown out by a federal judge on post-verdict motions. The cattlemen will contend on appeal that the judge wrongfully substituted his judgment for that of the jury. This case is being watched very closely by cattlemen around the country.

U.S. Supreme Court Rejects 3M's Appeal

On the final day of its term, the U.S. Supreme Court refused to take up a closely watched antitrust case in which office supply giant 3M Co. had been hit with a $68 million verdict. LePage's claimed in the suit that 3M set out to drive the company out of the market for transparent tape by offering "bundled" rebates to large retailers for reaching sales goals in several categories of 3M products. In reality, according to the suit, the rebates could be earned only by removing LePage's products from their shelves. A jury agreed, and in an October 1999 verdict awarded LePage's $22,828,899 in damages—a figure that was automatically trebled by the federal district judge for a total judgment of $68,486,697. Interestingly, the appeal bond has now grown to more than $90 million during several years of appeals. In its first appeal, 3M prevailed when the U.S. Circuit Court of Appeals for the Third Circuit overturned the verdict by a 2-1 vote.

The case was later reargued before a 10-judge en banc panel (all of the judges on that court). The en banc panel reinstated the verdict by a vote of 7-3. 3M's argument that the theory of LePage's case was fatally flawed since there was no evidence that 3M ever sold any of its products at below-cost prices was rejected. Instead the evidence showed that 3M had set out to "kill" the niche market LePage's had created for discount "private label" or store-brand tape with customers such as Kmart and Staples.

3M was able to put together an impressive group of friends in urging the U.S. Supreme Court to take the case up. Among those joining in filing amicus briefs in support of 3M's petition were Procter & Gamble Co., Coca-Cola Co., Honeywell International, Xerox Corp., Verizon Communications, Johnson & Johnson, Morgan Stanley and Eastman Kodak Co. A team of lawyers in the Attorney General's office recommended that the highest Court refuse to hear the case. Their brief said that, while the business community could use some guidance on the application of antitrust law to the practice of bundled rebates, the LePage's case "does not present an attractive vehicle for this Court to attempt to provide such guidance." The order denying 3M's appeal appears to have been the correct result. I wonder if the U.S. Chamber of Commerce considers this corporation suing another corporation "a frivolous lawsuit."

Chamber of Commerce Pulls Out Of Debate

Back in March, Public Citizen President Joan Claybrook invited Tom Donahue, who is President of the U.S. Chamber of Commerce, to a debate in front of the national press. The subject of this debate was to be the anti-consumer overhaul of the class action system. As we all know, the Chamber was one of the prime pushers of this ill-fated measure in Congress. Had it passed, the legislation would have dramatically curtailed the rights of consumers to file and pursue state-law class action claims by shifting them to the federal courts.

The debate was to bring together the heads of two organizations with differing views on the subject. Certainly, a lively discussion by knowledgeable folks would have been a good thing for the uninformed. The debate would have allowed journalists to better understand the reasons for either supporting or opposing the legislation. A tentative date for the debate was set for mid-June. However, without warning, the Chamber President pulled out of the debate with no explanation. It would certainly appear that if the bill pushed by the Chamber is actually good for the public, Mr. Donahue would have been willing to discuss its pros and cons in front of the national press. Unfortunately, the man "ducked out" and nobody in the national media seemed to care. Where is Fox News when the country needs them?

Settlement Falls Through In Crematory Lawsuit

A proposed settlement between a Georgia crematory operator and as many as 1,600 plaintiffs has apparently fallen through. You will recall that hundreds of bodies had been hidden away at the Georgia facility instead of being cremated. A $39.5 million settlement was announced in March. It now appears that the defendants' liability insurance company has pulled out of the deal. As a result, a trial in the class action lawsuit has been set for August 23rd in a federal court. I had been under the impression that the insurance company, Georgia Farm Bureau, had agreed to pay the settlement. It now appears that there was no coverage for the wrongful conduct. A criminal trial is also scheduled to begin in October for the operator who faces 787 felony counts, including theft by deception, abuse of a corpse, making false statements and burial service fraud. More than 330 sets of uncremated human remains were found on the operator's property in February 2002.

III. THE NATIONAL SCENE

A Good Choice For Vice-President

The choice of John Edwards for the second spot on the Democratic ticket was a very good decision by John Kerry. If all of his choices are of that nature, our country will be in very good shape in the near future. I really believe this may turn out to be the best move Senator Kerry has made in his quest for the presidency. I have known John Edwards for several years and I know firsthand what sort of man he is. As they say where I come from, "he will do to hunt with!"

John Edwards is a good family man who has the right values for America. John has the uncanny ability to frame his positions in the language of morality and traditional American values. No one can question his intellect or his integrity. The thing that I really like about John is the fact that he is a true champion for middle-class Americans and those struggling to reach the middle class. He hasn't forgotten where he came from and understands the problems faced on a daily basis by American citizens. When all the GOP can say about the Senator from North Carolina is that he is a trial lawyer and inexperienced, that's good news for the Kerry-Edwards ticket.

The Government's Deficit Soars

The federal government's deficit has ballooned to $326.6 billion in the first nine months of the 2004 budget year. That's more than 20% larger than the $269.7 billion shortfall for the corresponding period last year. The biggest spending categories are: programs from the Health and Human Services Department (including Medicare and Medicaid)—$407.1 billion; Social Security—$397 billion; military—$322.3 billion; and interest on the public debt—$274.9 billion. Some private economists have predicted that the budget shortfall for this year will be about $450 billion. This would set a new record in dollar terms. The government produced a record $374 billion deficit last year. I have to wonder when it will sink in to the folks in charge that we have to get things under control. It's no longer possible to blame the Democratic Party for the problem.

Former Enron Boss Indicted

I must admit that I was shocked when I learned that Kenneth Lay had finally been indicted by a federal grand jury in Houston. I, like a number of others, had decided that Lay's political clout would shield him from any criminal charges. I doubt that any American citizen is unaware of the fact that Enron's collapse in 2001 wiped out the retirement, savings and jobs of thousands of employees. It also devastated the company's own stockholders. Most significantly, the Enron collapse led a parade of corporate accounting scandals that set off investigations all across the country and in the nation's capital. I was also surprised to learn that our President says he hardly knew Kenny Boy. Lay and other Enron executives had contributed more than $600,000 that can be traced to the Bush campaigns. Enron was the second largest contributor to the President's political career. Only credit card giant NDA topped the Enron giving. Lay had been considered as a prime candidate for a top Cabinet position before the Enron problems surfaced. In fact, he told the media recently that he was still considering such a move.

The former Enron Chairman and CEO was indicted on 11 criminal counts. The indictment includes charges of securities fraud, wire fraud and making false and misleading statements. You will recall that several former Enron officers and executives, including former CFO Andrew Fastow, have already pleaded guilty to criminal charges arising from the Enron debacle. As part of Fastow's plea agreement he confessed to his part in Enron's fraudulent schemes and agreed to cooperate with the government in exchange for a 10-year prison sentence. Another former Enron CEO, Jeffrey Skilling, was also indicted but has pleaded not guilty. The indictment of Lay is significant because it shows that the corruption at Enron reached the highest level of authority at the company.

Thus far, the federal government has launched 30 separate prosecutions related to Enron, including a criminal case against Arthur Andersen and criminal investigations concerning 20 former Enron employees. I don't know what effect the indictment will have on the elections this fall. Clearly, the serious problems in Corporate America and all of the known scandals should be discussed. The fact that corporate corruption has become so common has made it a political issue. There are a number of politicians who clearly want to sweep the Enron story under the rug. But, this won't happen because of the fact that Lay and Bush appear to have been more than just casual friends.

Bush Campaign Continues To Pull In The Big Bucks

The largest of President Bush's big-money backers were revealed last month when the Republican National Committee released the names of 62 "Super Rangers." These are fundraisers who have collected at least $28.5 million for Bush's re-election efforts. The "Super Rangers" are high-powered fundraisers who have collected at least

$300,000 for the RNC. Most of these "rainmakers" already ranked among Bush's largest financial backers. Forty-five of the Super Rangers previously had been crowned "Rangers" after raising at least $200,000 for the 2004 Bush-Cheney campaign - meaning they each have raised at least $500,000 this cycle. Nine more had achieved "Pioneer" status by collecting at least $100,000 for Bush. Public Citizen has done an analysis of the Bush fundraising efforts. It is most interesting to see the sources of the Bush funds. Public Citizen President Joan Claybrook made this observation:

> *The fact that any individual is allowed to bundle half a million dollars for the President is an affront to our democracy. But the Bush Administration has made clear from day one that it will shower its supporters with special favors, insider access and plum appointments. No wonder so many executives and lobbyists are competing for these titles.*

As of July 1st, the Bush campaign had raised $216 million, which is absolutely shocking. Since early April, the GOP has shifted its fundraising focus from the presidential campaign to what is called the RNC's "Victory Fund." While donations to the Bush campaign are capped at $2,000, individuals can give a maximum of $25,000 to the RNC. The Bush campaign must spend all of its money before the Republican National Convention. The President will then opt into the presidential public financing system and pocket $75 million to be used during the two months prior to Election Day.

WhiteHouseForSale.org, a website created by Public Citizen in conjunction with Texans for Public Justice to track contributors to Bush's 2004 re-election campaign, has posted the names of all 62 Super Rangers, along with their home states, employers and occupations. It also features charts showing the 24 states that are home to Super Rangers - led by California with nine - and detailing which industries have collected the most cash for Bush and the RNC. Nearly a third of the Super Rangers are from the finance sector. Frank Clemente, director of Public Citizen's Congress Watch, observed that the need to fix the presidential public financing system has never been greater. He believes we need to rescue our election process from the fat cats and return it to average Americans. I totally agree with Frank's perspective and believe that most folks in our country do.

Special Interests Still Buy Influence By The Millions

The Birmingham News had an excellent editorial in its July 7, 2004 edition, concerning the upcoming national conventions for the two major parties. I believe it is worth passing on. The amounts given to political party conventions should be subject to strict campaign spending restrictions. Unfortunately, that's not the case. The following is the News editorial:

> *The federal McCain-Feingold campaign finance reform law in 2002 banned so-called "soft money" political contributions. Soft money is unlimited corporate, union and individual contributions to the national political parties, which then filtered the dollars to their locals, which used it for political ads. Candidates didn't have to worry about claiming the money as direct contributions, but still benefited from the friendly TV ads. In return, special interests that gave liberally were likely to get pretty liberal access to the members of Congress they supported. But there's no more of that since McCain-Feingold, right? Well, not so fast. As the national political party conventions near - the Democratic National Convention in Boston in late July and the Republican National Convention in New York in late August - it's becoming clear the special interests still have a huge gateway to buy influence. Many companies don't care about which party they are buying influence with, either. For example, 21 corporations—including telecommunication companies AT&T and Verizon, pharmaceutical firms Pfizer and Bristol-Myers Squibb, and Marriott, Microsoft and insurance giant AIG - have given to both conventions this year.*
>
> *They're not giving just a tad, either. Verizon has donated $3 million to each of the conventions. Companies play both sides because they are buying influence, not a philosophy. Another way special interests will buy access this year is by hosting special parties honoring one particular member of Congress or another at the conventions. Banks, a union, a defense contractor and a pharmaceutical company have put up $100,000 each to host a tribute to Senator Ted Kennedy, D-Mass. The Bank of America is putting on a lavish event in New York to honor Representative David Dreier, R-Calif. Senator John McCain, R-Ariz., said he wanted McCain-Feingold to stop the flow of all soft money, even the donations to the political conventions. That prohibition, however, never was written into the bill. With no real news coming from either of the political conventions, there's not much else for the politicians to do except be "honored." There still are plenty of special interests willing to pay big bucks to honor and celebrate those politicians, too, for nothing more than a little face time, of course.*

Unless we can find a way to convince the next President and members of Congress to address the political spending problems in our country, the powerful special interests will continue to run our government. I am convinced that the bosses in Corporate America have no real allegiance to any political party. They simply buy their way and deal with both parties, giving more to Republican candidates currently because they are in power. They would give to Ralph Nader if he had any chance of becoming a viable candidate. The motivating factor for Corporate America is greed and taking care of their own special interests, regardless of what's good for America. I hope and pray that mentality will change one of these days. Many thought all of the corporate scandals would have caused some changes. Instead, the political giving has increased.

Consumers Union, Suzuki Settle Their Lawsuit

The publisher of *Consumer Reports* magazine and Suzuki Motor have settled their lawsuit that had been ongoing for over 8 years. The Japanese automaker claimed the magazine doctored road tests in 1988 that found the Suzuki Samurai tipped over too easily. Suzuki filed the suit in 1996 — a year after it quit selling the small sport utility vehicle—in U.S. District Court for the Central District of California. Consumers Union, which publishes *Consumer Reports*, and Suzuki made a joint announcement last month that the lawsuit had been "dismissed." Interestingly, Suzuki said it had not demanded or received monetary compensation. The two parties had good things to say about each other in settling their differences.

Even with the settlement in place, Consumers Union and Suzuki said they still disagree on the validity of Consumer Reports' avoidance maneuver tests on the Samurai in 1988. As expected, Suzuki disputes the findings and Consumers Union stands by them. Consumers Union President Jim Guest stopped short of calling the resolution a victory for the nonprofit organization, but told the media that "we're certainly very pleased with the way the lawsuit's been resolved. From our point of view, the case has been dismissed, we've issued no retractions or corrections, paid no money and fully stand by...the article we published." You will recall that the Consumers Union had stated that the SUV was "not acceptable" after running the tests.

News groups, including the *Associated Press*, had urged the Supreme Court to review the appeals court decision. These groups believed the public has been protected over the years by reports on the dangers of certain products. Consumers Union had stated that it had never questioned the safety of any other Suzuki model it has tested. It said the statement that the Samurai "easily rolls over in turns" was limited to severe turns in Consumer Reports' short course avoidance maneuver. I hope that the lawsuit doesn't put a damper on the reporting of consumer safety issues in the future. If that happens, the public will be the losers.

Nader Aid Comes From Interesting Sources

A watchdog group has filed a complaint with federal election officials, accusing two conservative organizations of illegally helping Ralph Nader's presidential campaign. The Nader and Bush campaigns were named in the complaint. It is widely believed that Nader's campaign is being supported by President Bush's re-election campaign. Citizens for Responsibility and Ethics in Washington filed its complaint with the Federal Election Commission. It says the Oregon Family Council and Citizens for a Sound Economy violated election laws by telephoning people and urging them to help Nader get on Oregon's ballot for the general election. As expected, the groups denied any wrongdoing.

According to an *Associated Press* report, the two groups acknowledge trying to influence Nader's petition drive in Oregon, in hopes that getting him on the ballot would take votes away from John Kerry and help Bush win the battleground state. According to the watchdog group, the conservative organizations are also corporations that are prohibited by election law from making campaign donations. Citizens for a Sound Economy is a big player in political races around the country. The group brings in tremendous amounts of money that, in my opinion, it uses for political purposes. It appears that the Bush-Cheney campaign was involved to some extent, according to media reports. This sort of thing has the smell of none other than the man who directs all facets of the Bush Administration and also the directing the campaign, Karl Rove.

Shame On The U.S. Chamber Of Commerce

I was shocked to learn that the President of the U.S. Chamber of Commerce is promoting overseas outsourcing of jobs as a way to boost the economy. I have to wonder how jobless white-collar workers, particularly in the technology industry, feel about his move. The Chamber apparently believes exporting high-paid tech jobs to low-cost countries such as India, China and Russia is the right thing to do. Frankly, that makes no sense to me.

In early June, the Bureau of Labor Statistics downwardly revised projections for white-collar job growth for 2002-2012, based on accelerated job migration. The agency reported that seven of the 10 occupations expected to gain the most ground are low-wage occupations that do not require a college degree. A well-respected technology-consulting firm, Gartner Inc., estimates that 10% of computer services and software jobs will be moved overseas by the end of this year. A recent survey released by the staffing firm, Hudson Highland Group, Inc. reveals that 18% American workers are worried about losing their jobs. People who have lost jobs to offshoring - an estimated 250,000 a year, according to government estimates—are really hurting. Tom Donohue, the President of the Chamber of Commerce, was quoted as having said that people affected by offshoring should "stop whining." That is about as callous a statement as any person who has a good job, making big bucks, could have made.

Over the past two years American companies have exported high-paying jobs in research and development, software engineering, chip design and biotechnology startups to India and China. For example General Electric Co., which offshores about 70% of its technology work, designs medical equipment in its Chinese research center and studies nanotechnology at a lab in India. Motorola is hiring 5,000 researchers for a global research and development center in Beijing, while Intel employs hundreds of researchers at its Russia Software Development Center in Nizhny Novgorod.

It's no surprise that the Chamber President, who tripled the Chamber of Commerce's lobbying team and aggressively promotes pro-business policies, endorses offshoring. The organization, which represents 3 million businesses, champions tax cuts, free trade and more liberal trade deals with China. One observer stated: "The jobs go offshore today and the economic benefits don't come around for years. For any of the unemployed in this country to accept this business leaders' position as helping them is like believing Richard Nixon saying, `Trust me, I'll take care of it all. Things will be fine.' " I don't believe sending our jobs overseas helps our people. Neither do I believe worrying men and women in our country agree with the Chamber's position.

Are Millions Being Wasted In Iraq? Whistleblowers Say So!

New testimony from former Halliburton workers and congressional auditors released in Washington, D.C., has revealed millions of dollars worth of wasteful practices, major overbilling and virtually no oversight of the company's work to support the U.S. invasion and occupation of Iraq in March 2003. Under an agreement for logistical support for Operation Iraqi Freedom, Kellogg Brown and Root (KBR), a Halliburton subsidiary, has received $4.5 billion for activities in Iraq and Kuwait since the invasion of Iraq. This includes more than $3 billion to import fuel and repair oil fields. I understand the full contract may eventually be worth as much as $18 billion. The testimony, submitted to members of Congress, paints a bad picture of how Halliburton and its subsidiaries are billing the U.S. government and taxpayers. A labor foreman said dozens of workers were told to "look busy" while doing virtually no work for salaries of $80,000 a year. An auditor related how the company was spending an average of $100 for every single bag of laundry and $10,000 a month for company employees to stay in five-star hotels.

David Walker, head of the General Accounting Office, the investigative arm of the Congress, told members of the Congress who attended a hearing at the Government Reform Committee in the House of Representatives: "We saw very little concern for cost considerations. There are serious problems, they still exist, and they are exacerbated in a wartime climate." William Reed, director of the Pentagon's Defense Contract Audit Agency, also released a report to members of Congress that stated: "In our opinion, the contractor's billing system is inadequate in part. We also found system deficiencies resulting in material invoicing misstatements that are not prevented, detected, and/or corrected in a timely manner."

I believe most American taxpayers will be shocked to learn that Halliburton has a cost–plus contract with the government. Critics say that the Halliburton's contract with the military has been especially problematic for that reason. Under a "cost-plus" contract, the company is repaid for all expenditures, plus a percentage fee and possible bonus on top of that. Jim Donahue, coordinator for Halliburton Watch stated: "While the Bush Administration failed to adequately plan for the safety of our troops–as proven by its failure to provide sufficient body armor—it made certain that Halliburton would make a killing long before the war began."

In January and February 2004, a series of articles in the media, especially in The *Wall Street Journal*, chronicled the overcharging and fraud in Halliburton's operations. In response Halliburton hired what it dubbed the "Tiger Team" to audit and correct problems. Not only did the "Tiger Team" not correct anything, the team continued "questionable auditing and administration practices." The team's sole purpose was to close as many subcontracts as possible, under the mistaken assumption that everything that was closed prior to the arrival of the government audit team would be exempt from further scrutiny. For three months, this Tiger Team occupied waterfront villas at the Hilton hotel and shuffled papers, but did nothing to effectively clean up old subcontracts. It had been reported that Halliburton housed the Tiger Team at the five-star Kempinski Hotel for $10,000 per employee per month. At the same time, soldiers were required to live in tents at a cost of $1.39 a day. The military requested that Halliburton employees move into the tents, but they refused. The Halliburton corporate culture has been described as one of intimidation and fear. I have to wonder where that mentality comes from?

Government Knew Of Indictment But Awarded Contract Anyway

Federal government officials knew that Reliant Energy Services was under indictment when they awarded a related Reliant company a $35.9 million contract. This was admitted in a recent letter to Public Citizen. But the officials rationalized the award by falsely claiming that the two subsidiaries are geographically separate entities and that the actions of one cannot be attributed to the other. In truth, Reliant Energy Services—the indicted subsidiary—and Reliant Energy Solutions East, which got the contract, are owned by the same parent company (Reliant Energy) and share top officers. The two subsidiaries do business with each other and are controlled by Reliant Energy. The close relationship between the two companies has been documented by Public Citizen. The government claimed that Reliant Energy Services operates in the West and that Reliant Energy Solutions East operates on the East Coast, and concluded the two were separate. However, Reliant Services conducts most of its operations on the East Coast and sells large quantities of electricity to its East Coast sister company, according to Public Citizen.Joan Claybrook, Public Citizen President, stated:

> *All available data contradict the government's explanation for awarding a contract to people who are at the helm of an indicted company. These subsidiaries are like peas in a pod. The government should review the contract and begin debarment procedures immediately.*

On April 8, Reliant Energy Services was charged with conspiracy to commit wire fraud and manipulation of the price of electricity. Additionally, Reliant Energy Services agreed to pay $125 million to government authorities in fines, settlements and refunds for intentionally shutting down power plants to create blackouts that drove up profits. On May 19, the Department of Defense awarded the contract to the Reliant Energy Solutions East. Precedent has been set for barring companies from new contracts when they are either under investigation or have been convicted of a federal crime. Both Enron and Arthur Andersen were barred from federal contracts when they were indicted. Public Citizen has called on the federal government to debar Reliant Energy Solutions East from this and future contracts. It is most difficult to see how the officials who will make the decision could do otherwise.

According to the Code of Federal Regulations, 48 CFR 9.400, government agencies can prohibit companies that have been indicted from receiving federal contracts. The American taxpayers should be up in arms over this sort of thing. With all of the corruption being uncovered in Corporate America, doing business with a corporation that has been indicted on a criminal charge sends a bad signal.

Winning Contractors – An Update

The American people are beginning to realize that lots of money is being made as a result of the war in Iraq by private companies. More than 150 American companies have received contracts worth up to $48.7 billion for work in postwar Afghanistan and Iraq, according to the latest update of the Center for Public Integrity's Windfalls of War project. The Center has continued to file Freedom of Information Act requests with, among others, the Department of Defense, the State Department and the U.S. Agency for International Development in order to see who is profiting from the war effort.

Much of the work in Iraq continues to be uncoordinated within federal agencies, and no agency seems to have a full picture of all the postwar contracts. Reports and hearings regarding the Iraq war and occupation effort painted a picture of undermanned and overworked contracting staffs without sufficient knowledge of the contracting process. It appears that contracting rules were stretched for the sake of expediency, particularly in the early days of postwar reconstruction. This lack of resources has also resulted in inadequate oversight of the current contracts, according to published reports by the General Accounting Office and the Inspector General, (IG) of the Department of Defense.

Problems with awarding contracts have plagued the Iraq reconstruction process from the very beginning. In the early days, the Office of Reconstruction and Humanitarian Assistance (which became the CPA in May 2003) suffered from a lack of personnel. In one instance a contract for $15 million wound up costing over $91 million to date, with more to come. There was no formal contracting plan to purchase equipment. A specialist from the Defense Contract Management Agency told IG investigators from the Department of Defense that officials of the Office of Reconstruction and Humanitarian Assistance "neither followed nor tried to learn the acquisition process." In addition, ORHA wanted quick results and, yielding to pressure, contracting officers from the Defense Contracting Command-Washington did not correctly award or manage the contracts. Of the 24 contracts awarded by the DCC-W that the Defense Department's IG investigated, 22 did not follow the Federal Acquisition Regulation, part of the official guidelines governing the contracting process. This lack of structure in the contracting process, coupled with the need to start work as quickly as possible, led to contractors providing draft statements of work and cost estimates to contracting officers, when the government usually provides this information, according to GAO. In addition, contracting officers often allowed contractors to begin work before key terms of the contracts, including price, had been agreed on.

Former WorldCom Employees Settle For $51 million

A settlement has been reached that will help WorldCom employees, but it's just a drop in the bucket as compared to their actual losses. MCI Inc., former WorldCom Inc. chief Bernard Ebbers and 18 ex-WorldCom officials will pay about $51 million to settle a suit by employees who lost billions of dollars when the long-distance telephone company collapsed. The agreement leaves 401(k) fund trustee Merrill Lynch Trust Co. of America, a subsidiary of Merrill Lynch & Co., as the only active defendant in the pending lawsuit. The employees of WorldCom, which emerged from bankruptcy in April as MCI, are seeking about $100 million from Merrill.

IV. THE CORPORATE WORLD

Justice Department Funding

Because of all of the corporate corruption, one would think that Congress would be pumping more funds into the Justice Department's budget. It is undisputed that the Justice Department still lacks adequate resources for prosecuting and deterring corporate crime. Some observers even question their focus. Certainly, it never should have taken almost 3 years to bring a criminal indictment against Kenneth Lay. The Department needs adequate funding and resources so that it can do its job. A push from the White House is also badly needed, but don't hold your breath on that one. The President and Congress must give the Department of Justice adequate funding so that corporate crime can be effectively prosecuted in the criminal courts. Prosecutors are finally going after executives at the highest levels, and that's long overdue. Before Enron, corporate executives felt secure and almost immune from scrutiny from the Justice Department. Clearly, we must clean up Corporate America, and for that reason, there can be no letup by the Justice Department.

Bank Of America Settles Suit Over The Collapse Of Enron

The *Wall Street Journal* reported recently that Bank of America Corp. became the first bank to settle a class action lawsuit alleging that some of the top U.S. financial institutions participated in a scheme with Enron Corp. executives to deceive shareholders. The Charlotte, North Carolina, bank, the third-largest in the U.S. in assets, agreed to pay $69 million to investors who had billions of dollars in losses as a result of Enron's collapse amid scandal in 2001. It should be noted, however, that Bank of America was not a major player in the Enron scandal. There are bigger fish to fry. Other banks and securities firms, which are still defendants in the suit, can't feel too good about their prospects.

Bank of America had relatively small-scale financial dealings with Enron compared with other banks. As I understand it, the Bank was sued solely for its role as an underwriter for certain Enron and Enron-related debt offerings. Bank of America wasn't actually accused of defrauding the energy company's shareholders. Other remaining defendants in the class action suit, which is in a U.S. District Court in Houston, are alleged to have helped Enron with phony deals to inflate the energy company's earnings, potentially exposing those banks and securities firms to much steeper damages.

More Corporate Convictions

John Rigas, the founder of Adelphia Communications, was found guilty last month of conspiracy and securities fraud for his role in the diversion of hundreds of millions of dollars from the cable television company and driving it into bankruptcy. A New York jury also found Rigas' son, Timothy, the company's former chief financial officer, guilty of conspiracy. But, another Rigas son, Michael, a former executive vice-president, and Adelphia executive Michael C. Mulcahey, former head of internal financial reporting, were acquitted of conspiracy charges. The jurors were not able reach a decision on several other charges facing Michael Rigas. The original charges involved 24 counts of conspiracy, securities fraud, bank fraud and wire fraud. As you probably know, Adelphia Communications was a very large cable TV company.

This trial lasted for over three months. Federal prosecutors apparently proved that the Rigas family used the company as a "personal piggy bank" to finance a lavish lifestyle at the expense of shareholders. The defendants had tried to cover up the financial abuses by manipulating the company's financial reports to banks, investors and government regulators. Some of the items purchased by the Rigas with Adelphia funds included a $25 million tract of timberland to protect the view from a family mansion, a $13 million golf course, and hundreds of millions of dollars of company stock and bonds. Adelphia gave the elder Rigas, 79, cash advances of as much as $1 million a month without any documentation or agreement to repay, according to prosecutors. The defendants had denied any wrongdoing, saying that their transactions were legitimate and properly disclosed. Apparently, the jurors didn't buy that and neither will the company's shareholders.

Schering-Plough Settles Medicaid-Fraud Case

According to the *Wall Street Journal*, Schering-Plough Corp. will pay the U.S. government $350 million in fines to settle charges it defrauded the Medicaid health program for the poor. At press time, the particulars of the settlement, including the amount of the fine, were still being negotiated with the U.S. Attorney in Philadelphia. Ultimately, any settlement will have to be approved by a federal judge. Under the agreement, the company is expected to plead guilty to a criminal charge. The settlement, if finalized, would bring Schering-Plough a step closer to resolving a host of government investigations that have plagued the company. But other investigations remain outstanding. Other drug companies could be stung by settlements on similar allegations of overcharging Medicaid. I am hopeful, the Schering-Plough settlement, which is believed to include a plan to overhaul the company's procedures and practices to avoid future wrongdoing, will establish a new compliance standard for other companies.

According to a story in The *New York Times*, the government has alleged that Schering-Plough failed to give the best prices for its drugs to Medicaid programs, a requirement under federal law. The crux of the case, according to the Times and *Wall Street Journal*, concerns alleged kickbacks paid to private-sector purchasers of Schering-Plough drugs. The kickbacks allegedly lowered the net price of the drugs below the price paid by Medicaid. The payments were sometimes labeled as educational grants. Because federal and state governments jointly fund Medicaid, they are expected to share the fine collected from Schering-Plough. Last year, the drug maker paid the balance of a $500 million fine to the U.S. Food and Drug Administration that was part of a 2002 consent decree with the government after inspections had found violations of manufacturing practices at four facilities.

It is most unfortunate that drug companies—and others—who make good money as a result of federal programs believe they can cheat the government and U.S. taxpayers and get away with it. This corporate mindset is apparently so deeply rooted that it is hard to make the cheating stop. I hope, the government will keep up its good work. However, most of the credit may have to go to the whistle-blowers, who are exposing the fraud and corruption.

Bank One To Settle Hedge Fund Allegations

Bank One Corp. has reached a settlement over improper mutual-fund trading practices. This came before the merger with J.P. Morgan Chase & Co. The nation's sixth-biggest bank agreed to a deal that will cost the company $90 million. The breakdown calls for $40 million in civil penalties, $10 million in restitution and $40 million in fee reductions for investors over the next five years. The agreement involved Bank One's investment unit, Banc One Investment Advisers. Clearly, fund investors must be protected. New York Attorney General Eliot Spitzer was responsible for the settlement and he was joined by the SEC. The market timing practices were discovered last summer during Spitzer's investigation of hedge fund Canary Capital Partners LLC. Dozens of fund companies were subpoenaed and a handful of others have already agreed to multimillion-dollar settlements to resolve accusations of wrongdoing, including Alliance Capital Management and Bank of America. Market timing—a type of quick, in-and-out-trading—is not illegal, but is prohibited by many funds because it tends to skim profits from long-term shareholders. Regulators say funds that allowed selective market-timing committed fraud. I agree with their assessment.

Rite Aid To Pay $7 Million To Settle Drug Case

Over the past few issues we have had lots to write about concerning Rite Aid Corp., the third-largest U.S. drugstore chain. Now the drug chain has agreed to pay $7 million to settle allegations that it submitted false prescription claims to government health insurance plans. Rite Aid billed government health care programs for drugs that were never delivered to beneficiaries of the government health card programs and were later returned to stock. Under the settlement agreement, Rite Aid will pay $5.6 million to the U.S. government and $1.4 million to 28 states and Washington, D.C. The settlement covers a five-year period (1997 through 2001).

Corporations doing business with the U.S. government can't be allowed to cheat and get away with it. American taxpayers shouldn't be burdened with the costs of improper or false billings submitted to the government. Companies that make such billings must be prosecuted. I was shocked to read Rite Aid's response. A spokesperson stated that Rite Aid was simply involved in a once-common industry practice and that at least three other major drug store chains had entered into similar settlements in recent years. A portion of the settlement will go to settle "whistle-blower" complaints filed against Rite Aid. Under the False Claims Act, private individuals who bring lawsuits against companies can receive a portion of the recovery if the government agrees to take part in the suit.

Wal-Mart Settles Drug Insurance Suits

Maybe Rite Aid was right when it said what it was doing was a common practice. We now learn that Wal-Mart Stores, Inc. settled a lawsuit alleging that the company billed government insurance programs for unfilled prescriptions. Wal-Mart, the world's largest retailer, agreed to pay $2.9 million dollars to resolve allegations its pharmacies billed insurers for full prescriptions, but delivered only part of an order during the period 1990 through 2000. I hope, the government will clamp down on companies that lie, cheat and steal. I happen to believe cheating is cheating, regardless of who is committing the wrongful acts—and that includes large corporations.

Worldcom Suits Continue

The June deadline for 17 remaining bank defendants to settle a lawsuit brought by investors under the terms already agreed to by CitiGroup, Inc. has passed. The failure of these remaining bank defendants to reach a settlement, however, won't necessarily prevent them from settling the lawsuit before it goes to trial. The case is currently scheduled for January 2005. The largest remaining defendants, J.P. Morgan and Chase & Company, Deutch Bank AG, and Bank of America Corp. were given a deadline to settle under a formula used to calculate the size of CitiGroup's payment. Citigroup was to pay $2.65 billion dollars under the settlement. The formula assigned damages based on the portion of $17 billion dollars of WorldCom bonds sold by each underwriter.

CitiGroup agreed to settle the class

action lawsuit on May 10. It was alleged that CitiGroup and 17 other underwriters of WorldCom bonds did not conduct adequate due diligence before bringing the securities to market in 2000 and 2001. Later, the plaintiffs, led by the New York State Common Retirement Fund, indicated that the 17 other underwriters would owe a total of $2.85 billion dollars under the formula. Reports indicate that none of the large remaining underwriters have boosted their litigation reserves. However, that may have changed when the banks announce their second-quarter earnings in July. We hadn't seen those reports when this issue went to the printer. Reports indicate that some members of the underwriting group are in disagreement that they should be treated the same as CitiGroup. They argue that they were not as deeply involved with WorldCom as CitiGroup. It should be noted that part of CitiGroup's settlement related not to bond underwriting, but to the actions of Jack Grubman, its former star telecommunications analyst.

Amnesty Fuels Criminal Antitrust Probe Of Chemical Industry

A two-year old price-fixing probe that began in an obscure corner of the chemical industry has snowballed into a series of international investigations involving industry giants such as Dow Chemical Co., DuPont Co. and Bayer AG, the *Wall Street Journal* reported recently. U.S. and European investigators currently are looking into alleged conspiracies to fix prices in a half-dozen chemicals used in plastics, rubber and synthetic materials in the U.S., Canada, Europe and Japan. The commodities are used in industries from automobiles to furniture and flooring.

At least four grand-jury investigations stemming from the investigations currently are under way in San Francisco. Among the latest markets under scrutiny are a widely-used plastic, urethane, and a synthetic rubber known as neoprene, the Journal reported. In pursuing the alleged conspiracies, U.S. and European prosecutors are showing that granting amnesty from criminal charges to the first company to blow the whistle on a conspiracy can be a potent weapon against cartels. Companies granted amnesty can escape huge fines and sometimes avoid jail time for executives, according to the Journal report. So far, the inquiry has resulted in one guilty plea and a $50 million fine for UniRoyal and its parent, Crompton Corp., of Middlebury, Connecticut, in the case that initially spurred the investigations.

In a plea agreement announced in April, Crompton acknowledged conspiring with others to artificially boost prices of chemical used to make rubber, a $1 billion annual market, between 1995 and 2001. It had been fingered for illegal conduct by a rival that had gone to the Justice Department. Those initial charges, though, are now viewed as "just the tip of the iceberg" as U.S. and European investigators turn their attention to other companies and new markets, the Journal reported. Crompton brought other allegations of price-fixing to the attention of U.S. and European investigators, gaining criminal immunity in those markets. Other companies soon lined up, racing to be the first to report more alleged price-fixing in exchange for lenient treatment or amnesty.

Bayer To Pay $66 Million To Settle Price Fixing Charge

Bayer, Germany's second-biggest drug and chemical maker, has agreed to pay $66 million to settle a U.S. charge it participated in a global conspiracy to fix prices of chemicals used to make rubber. Bayer agreed to assist the government's investigation that has already netted the guilty plea of Crompton Corp., which was fined $50 million for its role in the cartel. European Union and Canadian authorities are also investigating the cartel. Bayer agreed to plead guilty in federal court in San Francisco to one charge of conspiring with other participants to fix prices between 1995 and 2001. The cartel has harmed millions of American consumers who use a broad spectrum of products manufactured with rubber chemicals. Bayer will likely face civil lawsuits brought by tiremakers and other purchasers of chemicals for making synthetic rubber.

Florida Radiologists Settle Fraud Case

When it comes to cheating the government, not all of the cheaters are large corporations. For example, Radiology Regional Center (RRC), a group of radiologists in southwest Florida, will pay the United States more than $2.53 million to settle allegations that it submitted false claims to the Medicare Program. Federal officials allege that Radiology Regional Center knowingly submitted claims to Medicare for which it was not entitled to payment. It is alleged that during part of the 1990s and early 2000s, RRC billed Medicare for ultrasound procedures, reconstruction procedures and magnetic resonance imagings (MRIs) that had not been ordered by the patients' treating physicians. Federal officials alleged that RRC billed for two venous or arterial studies for the same patient on the same date although only one of the procedures was properly billable as a diagnostic procedure and, instead, should have been billed as a screening mammogram. The civil settlement arises from a whistleblower suit brought by a former RRC employee. As I have said repeatedly, it is most distressing to see anybody cheat the government. This is especially true when you realize the massive money problems that our government is experiencing.

MCI Sues Former CEO Ebbers For $408 Million

MCI Inc. has filed suit against its former CEO Bernard Ebbers. MCI wants him to repay $408 million the company loaned him over two years.

The suit, filed in U.S. Bankruptcy Court for the Southern District of New York, also seeks to void Ebbers' resignation agreement, which promised him a lifetime pension of $1.5 million a year, an office and computer, and use of the company jet. Ebbers was forced from the company in April 2002 after the loans became public. The company filed for bankruptcy in July of that year after internal investigators uncovered an accounting fraud that ultimately totaled $11 billion. The company came out from bankruptcy protection in April of this year. MCI is totally acting out of an obligation to its shareholders to recover as much of the money owed the company as possible.

Ebbers, who is charged with fraud and conspiracy connected to the accounting fraud, has pleaded not guilty. MCI, then known as WorldCom Inc., made the loans to Ebbers beginning in the fall of 2000 and ending with his resignation in April 2002. The loans were restructured when Ebbers resigned in April 2002. Under the terms, Ebbers was allowed to repay the loan over five years at a below-market interest rate. But he missed the first $25 million payment in April 2003. The loans came about because Ebbers had used more than 5.7 million shares of WorldCom stock as collateral for bank loans he used to buy a shipyard, a ranch and interest in timber companies. When his banks called in his loans, the company loaned him the money to keep him from selling the stock. Thus far MCI has recovered $70.4 million from Ebbers. The Sarbanes-Oxley Act, a securities law passed in response to the WorldCom fraud, Enron Corp.'s collapse and other corporate scandals, prohibits companies from lending money to their executives and directors. A former executive of the company, CFO Scott Sullivan, has pleaded guilty to fraud charges and agreed to testify against Ebbers.

Chemical Companies Settle

DuPont Dow Elastomers LLC, a joint venture of the two largest U.S. chemical companies, has agreed to pay $36 million to settle antitrust claims by customers it overcharged for neoprene, a synthetic rubber. A federal judge in Washington has given preliminary approval to the settlement. DuPont Co., based in Wilmington, Delaware, has agreed to pay 100% of any liability of the joint venture up to $150 million and 75% of any amount exceeding that figure.

V. CONGRESSIONAL UPDATE

Bring Democracy Into The Halls Of Congress

All of the feuding and fussing in our Nation's Capitol would make the founders of our Republic turn over in their respective graves. It is also getting the attention of folks around the country today. I received a statement from Public Citizen President Joan Claybrook recently that I feel is worth being read by every American who loves our country and wants to preserve it. The following is Joan's statement:

> *Democracy is a dearly cherished way of life, but sometimes its rules are hard to live by. Principles of free speech and tolerance for others are particularly difficult rules to live by for those who are in the majority and in control. While Congress works so hard at protecting the principles of democracy at home and abroad, it frequently ignores those same principles for how Congress works. That is why I am delighted to be here to announce Public Citizen's support of Representative Marty Meehan's "Democracy in Congress Act." Congress has long had a history of partisan bickering leading to functional breakdown, in which the party in control attempts to squelch the speech of the minority party and derail full and open deliberation of public policies. Democrats, when they were the majority party, attempted to muzzle Republicans through unfair rules and procedures in the 1990s. Republicans are doing the same against Democrats today.*

It is time to stop the bickering and functional breakdown, and bring democracy into the halls of Congress. Republicans proposed exactly this back in the 1990s; Representative Meehan proposes it today. Let's finally listen, recognize the value of democracy in the policymaking process and get Congress on track in addressing the nation's and the world's problems. Some of the problems of a Congress that operates in an undemocratic way have become ever-so obvious in recent years. Touching upon some of the most critical legislation passed by Congress, these problems include: First, an absence of full deliberation on legislation. Today, the minority party is not allowed under the rules of Congress to conduct formal hearings on legislative matters or offer a full minority alternative bill to proposed legislation. Even more alarming, congressional rules allow the majority party to fundamentally re-write legislation in conference committee behind closed doors and without any accountability. Republicans inserted a variety of special-interest giveaways in the Homeland Security Act - such as the exemption for the Eli Lilly Company from lawsuits for faulty products - that were wholly unrelated to homeland security. No one even knew who inserted these special-interest provisions, even after TomPaine.com offered a $10,000 reward for the identity of the Congress member—or lobbyist—who inserted the Eli Lilly giveaway.

The Democracy in Congress Act will end these back-door, secretive deals by:

- Guaranteeing that the minority party may introduce full alternative bills and amendments to pending legislation for consideration by the House
- Requiring that final text of bills, amendments and conference reports be in print and publicly available online for three days before a final vote;
- Creating a "stand by your earmark" rule that would require each amendment to a bill in conference committee to be publicly recorded and attributed to a specific lawmaker; and
- Stopping the practice of extending the time period for congressional votes for the purpose of lobbying members to change their vote beyond 30 minutes. The time period for casting votes should not be changed whenever the majority party thinks it might be losing the votecount.

A second structural problem is the lack of public accountability for lobbyists. Lobbyists have proven instrumental in shaping, if not drafting, the legislation that comes out of Congress. Yet, the public knows very little about what these lobbyists do and who they represent. Sure, there are some general disclosure requirements imposed upon lobbyists: They report how much they are getting paid and the general issue areas they work on to the Clerk of the House and the Secretary of the Senate. The Senate Secretary—but not the Clerk of the House—has at least scanned some of these reports onto its Web site, but even professional researchers can make little heads or tails of these scanned reports.

The lobbyist reports on the Secretary of the Senate's Web page are not searchable or sortable by bill number or special-interest group and are not easily downloadable to be placed into a more useful database program. Quite frankly, if you do not live in Washington and have a lot of free time on your hands, you cannot figure out who is lobbying for what and on behalf of whom. Adding to the veil of secrecy when it comes to lobbying, whole categories of lobbying activity known as "grass-roots lobbying," in which a special interest group buys TV ads across the country to muster public opposition to legislation, is not reported at all.

The Democracy in Congress Act will help tear down the veil of secrecy in lobbying by:

- Requiring lobbyists to file their reports electronically and the House and the Senate to disclose those reports in a searchable, sortable and downloadable format on the Internet, like the Federal Election Commission does for campaign contributions;
- Requiring lobbyists to disclose their one-on-one contacts in person or by phone with members of Congress or the executive branch;
- Requiring lobbyists to report the total amount spent on "grass-roots" lobbying activity intended to influence federal legislation; and,
- Requiring members of a lobbying "coalition" to disclose how much they contributed to fund the lobbying activities of that coalition. Currently, only the coalition reports its total lobbying expenditures, while the contributions by members of the coalition remain cloaked from public view.

Congress will function well only when it learns to value the principles of democracy and operate under open and fair procedures. The Democracy in Congress Act brings Congress a long way toward the democratic ideal.

State Attorneys General Help Stop Class Action Bill

As we all know, the class action bill in the U.S. Senate was derailed last month. I consider that to have been a victory for American consumers. The warning letter sent to congressional leaders by New York Attorney General Eliot Spitzer and Oklahoma Attorney General W.A. Drew Edmondson on behalf of 11 other Attorneys General played a big part in stopping the Senate from acting on the bill. The grave threat to consumer rights posed by the so-called "Class Action Fairness Act," was graphically pointed out by the letter. The act, which was pending before the Senate, was effectively killed when it was put off again on July 8th. Sponsors couldn't garner the required number of votes to bring it up, and that really wasn't much of a surprise. The Attorneys General stated that passage would have denied millions of consumers the ability to hold companies accountable for unscrupulous business practices. The Attorneys General wanted the bill amended to provide for nationwide class action lawsuits. The bill, S. 2062—if passed—would remove the class action lawsuits from state courts and place them instead in the federal courts. The power to adjudicate many consumer lawsuits against company wrongdoing would have been denied to the state courts. There can be no justification for passage of this bill. The federal courts are already loaded with work and couldn't handle the influx of cases from all parts of the country. A coalition of corporations and business groups has lobbied relentlessly for passage of the bill.

Assault Rifles Should Be Banned

The recent killing of three Birmingham police officers by a man using an assault rifle has put a hot political issue back in the spotlight. Personally, I really believe that all assault rifles should be banned in this country. A bill in Congress, supported by top law enforcement officers, will address this problem. I hope, this bill will become law. The SKS, a semiautomatic rifle whose rounds can penetrate the protective vests worn by most police officers, has been used to kill a number of police officers around the country. The SKS and similar semiautomatic rifles should not be available to the general public. I understand that the SKS, a Soviet-made rifle that preceded the AK-47, is the semiautomatic rifle most often used against police officers. I strongly oppose gun control, but I also support law enforcement and the men and women who put their lives on the line every day, and I can't justify allowing these military rifles to be on the streets.

The three officers in Birmingham were wearing protective vests when they were shot while trying to arrest a man on a misdemeanor assault warrant. The SKS is readily available at gun stores throughout Alabama because they are not among the "assault weapons" banned by Congress in 1994. A federal bill that would make permanent the current ban, which ends later this year, also would broaden the definition of "assault weapon" to include the SKS, Bushmaster (which is much like the U.S. Army's M16) and similar models.

In March the U.S. Senate narrowly approved a 10-year extension of the ban without the broader weapon definition. Apparently, there are "millions" of these rifles in circulation at present. The SKS is popular because it's a lightweight, easily concealable weapon that can be bought for about $200. At some point, the politicians who oppose all forms of gun control must realize that we must protect law enforcement officers who have become the targets of assault rifles in the hands of criminals. I have never heard a good explanation for letting this happen.

Identity Theft Legislation Passes

A bill has been passed in Congress that will require five-year prison sentences for people convicted of using or providing fake IDs to help terrorists. The bill was approved with bipartisan support and was signed by President Bush. The ability of judges to give probation, reduce sentences or give concurrent sentences for identity theft linked to felony crimes will be taken away. This will give prosecutors better tools to punish identity theft, especially when it is used to commit terrorist acts. I have not read the new law, but based on what I have been told by friends in the U.S. Senate, it is a good one.

VI. PRODUCT LIABILITY UPDATE

Chrysler Loses In Seatback Case

On March 24, 2004, after a 5-week trial, a jury found that the front seatback in a Chrysler Plymouth Voyager minivan was defectively designed. The seatback had collapsed in a 25-30 mph rear impact. The plaintiff, a 48-year-old female at the time, alleged traumatic brain injury, TMJ (jaw) dysfunction, two herniated disks and other problems, which totally disabled her. DaimlerChrysler Corporation basically argued that the vast majority (perhaps 95%) of the cars on the road have similar seatback strength and that it far exceeded the federal standard for seatback strength. The carmaker also claimed any injury that occurred was due to the crash itself, not the seatback yielding rearward. The defense also tried to say that certain of the plaintiff's injuries existed before the accident or were not as severe as plaintiff alleged. Plaintiff did not dispute the first two defenses. The jury found that the seatback was defectively designed and awarded $2,160,000. DaimlerChrysler is liable for $1,296,000 of the award. The other defendant was the driver of the vehicle that struck the plaintiff's car on March 21, 1999. That defendant's insurance carrier settled early in the trial for $600,000.

DCX Minivan Airbag Class Action Gets The Go-Ahead

The U.S. Supreme Court has refused to stop a national class action over the safety of minivan airbags. Oklahoma's top appellate court had ruled that a lawsuit against DaimlerChrysler Corp. could proceed on behalf of a class. The class would include up to 1 million owners of 1996 and 1997 minivans in Oklahoma. The case was filed under a Michigan law. The nation's highest court declined, without comment, to consider the appeal. The claim was that front passenger seat airbags in the minivans deploy in low-speed accidents and with excessive force, potentially hurting children or small adult passengers. A state judge who supported giving the case national class action status, noted that it would cost $300 to $500 to replace airbags in each vehicle.

The Oklahoma Supreme Court ruled last year that the lawsuit could go forward, under Michigan law because that's where DaimlerChrysler's North American headquarters are based. In its appeal, DaimlerChrysler argued that the Oklahoma Supreme Court violated the commerce and due process clauses of the U.S. Constitution by approving the class. The automaker said class certification occurred only because the lower court improperly presumed that Michigan breach-of-contract law would apply, rather than the law of each car owner's home state. The company contended that such a trial would be unconstitutional.

The suit, which seeks unspecified damages, says the passenger airbags deploy too forcefully in 1996 and 1997 Chrysler minivans, including the Plymouth Voyager and Dodge Caravan. The lawsuit claims that the company's decision to install the airbags has caused death or serious injury in a number of cases. The plaintiffs' lawyers stated in their brief: "Neither technology nor governmental regulation required it to use the defective, overpowered airbag it chose." This case involves folks whose airbags "haven't deployed and caused injuries." The U.S. Chamber of Commerce led the fight against the lawsuit on appeal.

How To Save Your Neck In A Rear-end Collision

Finally, a long overdue vehicle safety improvement is actually happening. The designs of head restraints in more and more passenger vehicles are finally being improved so that many occupants are better protected from what is commonly referred to as "whiplash injury." For years, head restraints were poorly designed. Most of them were adjustable, but even when they were adjusted to their highest positions, they still weren't behind and close to the backs of the heads of many occupants. Safety experts tell us that's where the restraints need to be in order to protect the neck in a rear-end collision. Today, more head restraints can be positioned correctly and the geometry is getting better. But, many people still don't adjust the positions of their restraints. In 1995, the Insurance Institute for Highway Safety began to rate head restraint geometry, finding only 3% of vehicles had good head restraints, while those in 82% of new passenger vehicles were poor. Since that time these proportions have been changing steadily for the better. By the 2003 model year, 45% of passenger vehicles had head restraints rated as good. At the same time, the percentage of vehicles with poor restraints had dropped to 10. Institute chief operating officer Adrian Lund says: "This improvement shows automakers have gotten the message. It used to be that unless you were short, you'd have trouble finding a vehicle with head restraints that extended high enough to protect you. Now automakers are making improvements so that in many vehicles even taller people can position the head restraints where they need to be."

A well-designed head restraint, in concert with the seatback, can reduce the risk of whiplash injury by reducing the differential motion of an occupant's head and torso in a rear-end crash. Unsupported, the head will lag behind as the torso is accelerated when a car is hit from behind. This differential motion can cause the neck to bend backward in a motion that resembles the lashing of a whip — the greater the torso acceleration, the more sudden the motion. The necessary first step toward preventing differential movement between an occupant's head and torso is a restraint that's positioned as close to the back of the head as possible. Head restraints designed with poor geometry cannot be positioned this way for many occupants, so the restraints cannot begin to prevent whiplash injuries.

Since 1995, the Insurance Institute for Highway Safety has been rating head restraint designs good, acceptable, marginal, or poor based largely on the geometric criteria of height and backset. In 2001 the Research Council for Automobile Repairs, an international consortium of research centers, agreed to a slightly modified version of the Institute's rating scheme, which now is in use internationally. As usual, the U.S. government isn't keeping up. The National Highway Traffic Safety Administration's head restraint standard is the same today as when head restraints first were mandated in 1969. The federal standard was weak to begin with when it first took effect almost 35 years ago. Now it is woefully inadequate. The U.S. standard lags way behind requirements in Europe. As long ago as 1974, NHTSA did propose upgrading the standard, but then let the matter drop. The agency later began the rulemaking process over again and proposed a substantial upgrade in 2001. Unfortunately, the task still hasn't been completed. More than two years have elapsed since the last proposal for upgrading this standard, and still there's no final rule. NHTSA keeps putting it off—over and over again—and there can be no excuse for its delays.

Even without federal action, head restraints are being improved. Geometry isn't the only aspect that's getting better. Some automakers are designing advanced head restraints that position themselves closer to occupants' heads. Seat stiffness is also being adjusted to control torso movement in rear-end crashes. Some of these designs have been found to reduce neck injuries in real world crashes. While such advancements are welcome, it's important to keep them in perspective. It's commendable that almost half of all 2003 passenger vehicle models have good head restraints. But this still leaves more than half with head restraints rated less than good. And most of them have to be adjusted upward to provide even an adequate degree of protection. Every head restraint should be designed to protect the necks of people of a range of sizes in rear-end crashes. Even as automakers improve head restraint geometry, many motorists aren't reaping the full benefits. The restraints in about four of every five-passenger vehicles still have to be manually adjusted upward to protect many occupants.

SUVs Catch Fire Following Oil Changes

The Washington Post has reported more than two-dozen cases of late-model Honda CR-V sport utility vehicles bursting into flames shortly after their first oil changes. The newspaper cites records provided to the federal government by Honda. No injuries have been reported, and many of the vehicles—from the 2003 and 2004 model years—were destroyed. According to The Post, the National Highway Transportation Safety Administration (NHTSA) concluded this month the incidents are the fault of dealerships and mechanics. The regulatory agency says the problem stems from improperly installed oil filters that most likely leaked oil onto the vehicles' hot exhaust systems. While Honda doesn't believe a design flaw is to blame, it is still studying the cause of the fires. Honda says it's not planning a recall.

Auto safety advocates are bothered that the NHTSA did not take a stronger stand on this matter. Sally Greenberg of Consumers Union, publisher of Consumer Reports told *The Post*:

> *Relatively new cars catching on fire? Running the risk of injuring their occupants? It's a very unusual and a very dangerous situation. The fact that a routine oil change could have such catastrophic results suggests a dire and a dangerous situation that both the automaker and the auto safety*

agency should have looked much more closely at.

The Post told the story of a driver in Virginia last January whose 2003 CR-V caught fire. She reportedly swerved onto the shoulder of the highway and then her electrical system shorted out and all the doors locked. That woman fortunately escaped without injury. About 140,000 CR-Vs were sold in the United States in 2003. Clearly, a safety hazard exists that must be remedied. I wish my confidence level with NHTSA was such that I would believe prompt remedial action by the agency was going to happen. I hope, it will. In any event folks need to be aware of the problem.

Rollover Deaths in Alabama

Sean Reilly, who writes for the *Mobile Register* from the paper's Washington Bureau, recently wrote an excellent piece on rollover deaths in Alabama. The article appeared in the Register on Sunday July 18th. I recommend that all of you read this excellent article. Unfortunately, the article featured the tragic accident that occurred involving four University of Alabama students. Two of the young people were killed in the rollover of their sport-utility vehicle, which simply swerved to avoid a tire tread in the road. This was an emergency movement that can be safely made by a driver in a passenger car. But, the situation is quite different when an SUV is involved.

Alabama ranked seventh in the nation in rollover deaths from 1991 to 2002. The rollover rate for SUVs, as we have reported on previous occasions, is more than three times higher than for passenger cars. Alabama had more than 3,500 rollover deaths from 1991 to 2002 as reported in the Register on a per-person basis, using 2000 census data. Alabama's rollover death rate was the highest in the country. I hope, Congress will act on the pending legislation that, if passed, will help save lives and untold misery for persons driving SUVs.

Roof Crush Cases

On September 30, 2003, a Nebraska jury awarded $19.5 million to Penny Shipler, a 36-year-old mother left paralyzed from the neck down in a 1997 motor vehicle accident. The victim was a passenger in a 1996 Chevrolet Blazer that was involved in a roll-over accident. During the roll-over, the vehicle's roof crushed on Ms. Shipler, causing her to suffer a complete spinal cord injury. Unfortunately, the design of the roof in the Blazer was defective, causing the hazard.

We currently represent a woman who suffered a severe brain injury while driving a GMC Jimmy (which is the same vehicle as a Chevrolet Blazer). She, too, was involved in a rollover where the roof crushed, causing her to be severely brain injured. These two cases are just a few of the many cases in which people are being injured because of weak roofs on SUVs. A roof is part of the structural support of a vehicle and helps form part of the survival space in a vehicle should it be in a crash. If a roof crushes substantially during an accident, it intrudes into the occupant's survival space, thus, causing neck and brain injuries. There are an estimated six million Blazers, including pickup trucks, on the road.

As we have pointed out, studies have shown that SUVs are two and a half times more likely to roll over than passenger cars. In a recent report by the Insurance Institute for Highway Safety, the Blazer was ranked among the least-safe SUVs on the road. GM has known for many years that its roofs are too weak. Instead of making the roofs stronger, however, it relies on inadequate government standards that fail to require manufacturers to conduct dynamic rollover tests on their roofs. GM has failed to build its vehicles with sturdier roofs, and, as a result, people like our client and Ms. Shipler continue to be severely injured or killed.

VII. MASS TORTS UPDATE

Bayer Is Settling More Lawsuits

Bayer AG has agreed to pay $1.06 billion to settle 2,771 lawsuits relating to its withdrawn cholesterol treatment Baycol. According to a news release from the company, Bayer has 8,048 cases pending, 515 fewer than a month ago. Bayer had paid out $1.04 billion to settle 2,710 cases as of June 14th, with insurance covering payments up to $1.2 billion. Bayer has set aside an additional 300 million euros ($371 million) for their claims. As we have reported in prior issues, Bayer withdrew Baycol, a member of the statin class of medicines, from the market in August 2001, after a number of patients developed muscle weakening and kidney failure. The drug was linked to at least 100 deaths. Our firm currently has 1,575 additional cases filed and pending in the Multi-District Litigation. We have eight pending cases in state courts in Mississippi that are not in the MDL. We are also investigating a number of other potential claims and will soon file those that prove to have merit.

FDA Knew Of Crestor Dangers

The U.S. Food and Drug Administration (FDA) had evidence before approving the cholesterol drug Crestor that it caused an increased incidence of rhabdomyolysis (severe muscle deterioration). It is difficult to see how in the world the agency could have approved the drug. The FDA erroneously believed that this toxicity was limited to an 80-milligram dose that was not ultimately approved. The approval came despite the fact that agency officials had said that any new cholesterol drug should be approved only if it has a comparable or lower risk of rhabdomyolysis than drugs already on the market. In fact, records show that patients taking Crestor experience severe muscle deterioration at much higher rates than patients taking other cholesterol-lowering drugs. The rate of post-marketing reports of rhabdomyolysis for Crestor appears to exceed that of all other currently marketed statins (cholesterol-lowering drugs). Also, the drug is associated with primary kidney failure.

From the time of its approval in August 2003 to mid-April 2004, 18 patients, including 11 in the United States, suffered severe muscle deterioration. In addition, there have been eight reported cases of acute kidney failure and four of kidney insufficiency, according to data obtained from the FDA. Most of these patients were using the low 10-milligram dose. More than 20 additional cases of rhabdomyolysis have been reported to the FDA since mid-April, agency sources say. In March, Public Citizen filed a petition with the FDA to have the drug taken off the market. The petition is still pending. Meanwhile, AstraZeneca has launched a major direct-to-consumer advertising campaign to promote the drug. Crestor is the only statin that exhibited rhabdomyolysis before being approved by the FDA.

DRUG MAKERS ACCUSED OF AIDING IN DEATHS

A psychiatrist has filed a federal lawsuit alleging that children have been harmed and even killed by the misuse of drugs he blames on aggressive marketing by drug manufacturers. Dr. Stefan P. Kruszewski claims he was fired in July 2003 from a consulting job at the Pennsylvania Department of Public Welfare because he reported "fraud and other violations of civil and criminal law constituting pervasive abuses." Dr. Kruszewski accuses the drug companies of distorting statistics, violating regulations and exaggerating the effect of their psychotropic products—practices he says have victimized juvenile wards of the state, mental patients and prisoners. Allegedly "corrupt practices" by drug companies described in the suit include overmedication of patients, fraudulent billing, abuses of Pennsylvania's involuntary commitment law and "mistreatment of children resulting in deaths in Pennsylvania, Texas and Oklahoma."

Defendants in the lawsuit, which was filed in federal court, include Public Welfare Secretary Estelle B. Richman; Columbus Medical Services, the consulting company Kruszewski worked for; and drug makers Pfizer Inc., Johnson & Johnson, Novartis, AstraZeneca, GlaxoSmithKline and Eli Lilly & Co. The drugs at issue include Paxil, Neurontin, Gortan, Seroquel, Topmax, Risperdal, Trileptal and Zyprexa. The suit says Dr. Kruszewski conducted medical reviews and appeals for Public Welfare and served as a medical-psychiatric consultant for the department's Bureau of Program Integrity. Dr. Kruszewski seeks damages of more than $1 million for future lost wages and for allegedly being deprived of his right to speak out on matters of public concern without retaliation. The suit also alleges fraud, defamation and conspiracy.

MOST DRUG MAKERS SKIP STUDY LISTINGS

It appears that the drug industry is largely ignoring a federal law requiring that thousands of medical studies be listed on a government database. While the Internet-based database, ClinicalTrials.gov, opened in 2000, is not designed to be a comprehensive list, any study of a treatment's effectiveness against a serious disease should be listed. The requirements were further spelled out for industry in 2002 Food and Drug Administration (FDA) guidelines. An FDA check against its own internal research lists shows that in 2002, just 48% of industry-funded studies for cancer therapies alone were reported to the public database. In contrast, more than 90% of National Cancer Institute-funded studies were listed, according to FDA Associate Commissioner Theresa Toigo. The FDA hopes to finish its evaluation of 2002 study listings by year's end. Toigo told the *Associated Press* that there are no signs that treatments for other diseases fared better—or that compliance has improved much since.

Unfortunately, the federal law doesn't include penalties for database violations. This is certainly well known to the pharmaceutical companies. While this database lists only the existence of certain studies, doctor groups are debating whether some more comprehensive registry might ensure that all results of such studies eventually are made public. Doctors recently learned that drug makers never published many studies where childhood antidepressant use failed, instead publicizing only positive results. Some 5,754 ongoing studies were recently listed on ClinicalTrials.gov. While drug companies conduct the vast majority of the nation's treatment studies, only 13% of those listed were industry-funded. Even among the drug giants, their listings vary. For example, AstraZeneca listed 20 ongoing studies compared with Merck & Co.'s three. I believe the public is entitled to a full disclosure on the results of medical studies on drugs that are being prescribed and not just the good results.

SENATORS SEEKING DETAILS FOR A DRUG-TRIAL DATABASE

Three U.S. Senators, who have already expressed interest in creating a required database of clinical drug trials, have now asked federal regulators to outline what additional financing and enforcement mechanisms would be needed to create such a database. Senators Tim Johnson (D-SD), Edward M. Kennedy (D-MA) and Christopher J. Dodd (D-CT) made the request in a letter sent to the heads of the Food and Drug Administration and the National Institutes of Health. In the letter, the senators asked what could be done to either improve an existing government-run database, expand it or create a new one, so that drug makers would be required to post both the existence of a drug trial and its results.

The existing database, which is called ClinicalTrials.gov, is limited and essentially functions as an information resource for people who are looking to take part in trials of new drugs aimed at serious or life-threatening diseases. However, as noted above, many drug makers do not list all their tests in the registry. A recent controversy over how several drug makers disclosed the results of tests on the use of antidepressants in treating children and adolescents has focused attention on the question of whether a far broader, mandatory database of drug trials and their results was needed.

In mid-June, the American Medical Association adopted a resolution calling on federal officials to create a database that would track drug tests from their start to finish. Officials of the association made the move because of concerns that drug companies emphasize the results of positive tests while playing down those with negative or inconclusive results. A number of leading medical journals are considering a proposal that would require drug tests to be registered at the start as a prerequisite to publication later. Legislation is expected to be introduced any day now.

Bush & Lilly Target The Mentally Ill

Last month, President Bush unveiled his mental health program, which is labeled The New Freedom Initiative. The British Medical Journal (BMJ) reported in June 2004 that The New Freedom Initiative proposes to integrate mentally ill patients fully into the community by providing "services in the community, rather than institutions." The Initiative began when the Administration launched the New Freedom Commission on Mental Health in April of 2002. At that time, the panel conducted a "comprehensive study of the United States mental health service delivery system" and concluded, "despite their prevalence, mental disorders often go undiagnosed." One of its recommendations included a comprehensive mental health screening for "consumers of all ages," including preschool children. According to the panel, schools are in a "key position" to screen the 52 million students and six million adults who work at the schools. Also, the Commission recommended that the screening be linked with "treatment and supports," including "state-of-the-art treatments" using "specific medications for specific conditions."

Furthermore, the Commission commended the Texas Medication Algorithm Project (TMAP) as a "model" medication treatment plan that "illustrates an evidence-based practice that results in better consumer outcomes." TMAP was started in 1995 as an alliance of individuals from the pharmaceutical industry, the University of Texas, and the mental health and corrections systems of Texas. The American Psychiatric Association has praised TMAP and called for increased funding to implement the overall plan.

But, TMAP may not be the perfect model for such an important and overreaching plan, such as the New Freedom Initiative. Texas state officials with influence over TMAP received money and perks from drug companies who stood to gain from the program. This was exposed by a whistleblower, Allen Jones, an employee of the Pennsylvania Office of the Inspector General. Jones reported that the "political/pharmaceutical alliance" that developed in TMAP, which promotes the use of newer, more expensive antidepressants and anti-psychotic drugs, was behind the recommendations of the New Freedom Commission, which were "poised to consolidate the TMAP effort into a comprehensive national policy to treat mental illness with expensive, patented medications of questionable benefit and deadly side effects, and to force private insurers to pick up more of the tab." Jones also reported that companies that helped start the Texas project are major campaign contributors to Bush. Also, some members of the New Freedom Commission have served on advisory boards for these same companies, while others have direct ties to TMAP.

This Bush plan is a sweeping mental health initiative that recommends screening for every US citizen and promotes the use of expensive antidepressants and anti-psychotic drugs (such as Zyprexa) favored by supporters of the Administration. Critics of the plan say that the drug companies will profit at the expense of the public. One such company is Eli Lilly, which markets Zypreza, the third most prescribed medication in the world behind Zocor and Lipitor. Zyprexa (olanzapine) is the brand name for an anti-psychotic drug approved for the treatment of schizophrenia and bipolar mania. Zyprexa is one of a newer class of "atypical" anti-psychotic medications and is thought to work by balancing the levels of serotonin and dopamine, which are found naturally in the brain. The FDA approved this drug for the U.S. market in 1996.

But, use of Zyprexa has been linked to serious side effects such as diabetes mellitus and blood sugar disorders such as hyperglycemia, diabetic ketoacidosis (DKA) and pancreatitis. A letter by a FDA medical officer and a Duke University psychiatrist was published in November 2001, in the Journal of the American Medical Association (JAMA). The letter was a report of research by doctors that found patients taking Zyprexa were 10 times more likely to become hyperglycemic and that there is a strong relationship between usage of the drug and diabetes and blood sugar disorders. Various warnings have been issued regarding the usage of Zyprexa: Japan (April 2002)—warnings of hyperglycemia resulting in diabetic ketoacidosis and coma; Britain (2002)—diabetes warnings; U.S. (September 2003)—FDA required warning be added to the label of Zyprexa and other atypical anti-psychotic medications regarding the possible link between usage of the drug, diabetes and hyperglycemia; and Europe and Canada (March 2004)—warnings of increased risk of cerebrovascular adverse events and mortality in elderly patients.

Zyprexa has been prescribed to more than 14 million people in 84 countries since its approval in 1996. In 2003, worldwide sales of Zyprexa grossed $4.28 billion, more than 1/3 of Eli Lilly's total sales. In the U.S. that same year, Zyprexa grossed $2.63 billion; 70% of the prescriptions are paid by government agencies, such as Medicare and Medicaid, even though Zyprexa costs approximately twice as much as similar drugs. When the State of Kentucky's Medicaid program attempted to exclude Zyprexa from its list of preferred medications, the National Alliance for the Mentally Ill ("NAMI") bused protestors to hearings, placed full-page ads in newspapers, and sent faxes to state officials. All of this was paid for by Eli Lilly.

It is not surprising that Eli Lilly has close ties to the Bush family and the current Bush Administration. Former President George Herbert Walker Bush was a member of the Eli Lilly board of directors and President Bush appointed Eli Lilly's chief executive officer, Sidney Taurel, to the Homeland Security Council. Also, President Bush's former Director of Management and Budget, Mitch Daniels, is a former Eli Lilly vice-president. Eli Lilly made $1.6 million in political contributions in 2000, 82% of which went to President Bush and the Republican Party. Through these ties, Eli Lilly has influenced the Homeland Security Act to protect it from lawsuits and has obviously influenced President Bush's mental health plan greatly.

In addition to Eli Lilly's connections with the White House, medical journalist Robert Whitaker in his book *Mad In America* (2002) details how Eli Lilly's Zyprexa research was biased against the inexpensive Haldol and how claims of improved safety of Zyprexa are difficult to justify. Whitaker reports that in drug trials used by FDA reviewers, 22% of Zyprexa patients had "serious" adverse events as compared to 18% of the Haldol patients. In an effort to increase profits, Eli Lilly, among other pharmaceutical companies, has corrupted the field of psychiatry. The American public has been tricked into believing that mental illness is a chronic disease that must be treated with expensive, dangerous and unnecessary drugs. All of this results in the increased medicalization of unhappiness. It is also a travesty that the White House is actually involved in this deception.

Pharmaceutical Companies Under Investigation

Many doctors across America are being paid by pharmaceutical companies to prescribe unnecessary and overpriced medication. Federal prosecutors in Boston are investigating the marketing tactics of pharmaceutical companies such as Schering-Plough. Other companies, including Bristol–Myers Squibb, Johnson & Johnson, and Wyeth, have also been subpoenaed as part of the inquiry. The investigation is comprised of two main areas. First, the prosecutors want to know whether the companies are influencing doctors to prescribe unnecessary or even possibly harmful drugs to patients. This includes pressure to prescribe their drug when a more economical brand exists. Second, the prosecutors are probing whether the pharmaceutical companies are defrauding Medicare and Medicaid by exerting excessive control over prices. The inquiry is a result of the escalation of the pharmaceutical business into a $400 billion industry. Statistics show that in such a competitive market, drug companies are spending up to fifty percent more in marketing than they are in researching the drugs. That isn't the message put out by the pharmaceutical industry. They claim R & D is the big-ticket item. But, the facts don't back up their claim.

Marketing tactics being examined include monetary incentives commonly paid to doctors as inducements to prescribe the company's drug to patients. Often, the patients do not have a need for the prescription and are not offered a less expensive alternative. Federal prosecutors involved in the case have interviewed industry executives as well as doctors regarding the industry's efforts to persuade doctors to push their products. One such tactic is to pay doctors large amounts of money to prescribe the drugs and to participate in clinical trials sponsored by the company that require minimal action by the doctor. In a clinical trial involving its drug Intron-A, Schering-Plough, one of the largest pharmaceutical companies in the world, paid participating doctors $1,000 to $1,500 per patient for prescribing the Hepatitis-C therapy. Doctors were supposed to collect data on patients' progress for Schering-Plough. According to those participating, the physicians were not diligent in their record keeping, and Schering-Plough's oversight was lax at best. Doctors were expected to remain loyal to the company, with the understanding that if they supported another company's drug in any way they would no longer be paid for their services. In the Intron-A trial, patients did not receive the medication free of charge but were instead required to pay for the expensive yearlong therapy.

Clinical trials are not the only form of marketing that the drug companies use. Speaking anonymously to the *New York Times*, one doctor revealed that he received an unsolicited check for $10,000 from Schering-Plough as payment for a consulting agreement that amounted to no more than an assurance that he would prescribe the company's drugs to his patients. I hope, that is an isolated case. As with the clinical trial system, doctors have stated that it is understood that the checks will no longer be forthcoming if the drug companies suspect that they are not promoting their drug as the sole option for treatment.

The federal prosecutors are also investigating allegations that the companies are defrauding Medicare and Medicaid agencies by providing the drugs, with incentives, at lower prices to private payers than those prices quoted to the governmental agencies. Relevant law requires that Medicaid be charged the lowest possible price by drug companies for medications that a company distributes. I hope that, as a result of these investigations, drug companies will be forced to reevaluate their marketing strategies. The present tactics potentially place patients in danger, may cause consumers unnecessary expense, and should be considered unethical practices.

Pfizer Will Pay $60 Million In Diabetes-Drug Settlement

Pfizer Inc. has reached a $60 million settlement in an Illinois class action case that accused the company of falsely marketing the diabetes drug Rezulin. The preliminary settlement was approved in May by an Illinois circuit judge, but remained sealed until July 2nd. The lawsuit, filed two years ago, accused Warner-Lambert Co., which Pfizer acquired in June 2000, of misrepresenting the safety of Rezulin between 1996, when the company introduced the drug, and March 2000, when it pulled Rezulin from the market. The suit alleged that the drug caused liver problems in 5% of the people who used it, contradicting advertising about Rezulin's "unparalleled safety."

All current Illinois residents who bought Rezulin can recoup up to 85% of their out-of-pocket costs for the drug, according to the terms of the settlement. Class members must prove that they were prescribed Rezulin and provide documentation of how much they spent for the drug. Any unclaimed money up to $20 million will be donated to programs for diabetes research or treatment. A notification campaign relating to the terms of the settlement started on July 5th.

GlaxoSmithKline Settles Augmentin Suit

Pharmaceutical company GlaxoSmithKline PLC has settled the antitrust lawsuit over its antibiotic Augmentin. The company will pay $92 million in the settlement. The settlement has been submitted to the U.S. District Court for the Eastern District of Virginia for review. If approved, it will end class action lawsuits filed by purchasers, pharmaceutical wholesalers, and third-party payers against the company.

VIII. BUSINESS LITIGATION

Technology Firm To Pay $10 Million Dollars To SEC

Another corporation has been charged with misstating revenues. i2 Technologies, Inc. agreed to pay $10 million dollars to settle Securities and Exchange Commission (SEC) charges that the company misstated approximately $1 billion dollars in revenue. The SEC has reported that the company, for almost five years ending in late 2002, recognized revenue in many instances earlier than it should have and booked more than $44 million dollars in barter transactions that it never should have recognized. This settlement won't even make the corporate fraud register because it is just another example of a part of Corporate America engaging in accounting fraud. The SEC says the investigation is continuing and that the full $10 million dollar penalty will be placed in a fund for distribution to injured shareholders.

Supreme Court To Review Stock Loss Case

The U. S. Supreme Court has agreed to hear a case that could make more clear what investors must prove to bring claims against companies regarding stock losses. The case involves investment losses in 1998 in Dura Pharmaceuticals. Investors brought claims against Dura alleging that the company improperly delayed release of product information that had an impact on its stock value. The Court is expected to examine "loss causation" theories in securities lawsuits by clarifying whether investors can argue that a stock was artificially inflated due to delayed disclosures. There is a split of authority in the federal courts. Some federal court circuits have allowed securities suits on this basis, while other circuits require investors to prove the disclosures specifically triggered a loss.

The claims against Dura began after it announced in February of 1998 that it expected revenue shortfalls because of slower pharmaceutical sales, increased competition and a lack of sales force. The Food and Drug Administration refused to approve a Dura asthma medication. A federal trial judge said the case should be dismissed, but a U. S. Court of Appeals allowed the class action to go forward. The decision will have an impact on investors' ability to recoup losses they claim to have suffered when companies' stock prices have been artificially inflated.

Appeals Court OKs Microsoft Antitrust Pact

Recently, a U.S. Court of Appeals approved the landmark antitrust settlement Microsoft Corp. negotiated with the Justice Department. Objections by Massachusetts that sanctions in the agreement were inadequate against the world's largest software company were set aside. This was a significant victory for Microsoft and the Justice Department. The appeals court ruled that the settlement was in the public's interest. The decision is a significant milestone in the long-running antitrust case. Any court-ordered changes to the design of Microsoft's lucrative Windows software would have reverberated across homes, industries and governments because Microsoft's products run more than 95% of the world's personal computers.

The ruling followed the March 24th decision by European antitrust regulators who concluded that Microsoft unfairly hurt rivals by building its multimedia software into Windows. The European Commission fined Microsoft a record $613 million. The central question for the appeals court involved how much deference judges should show toward the settlement negotiated by the Bush Administration and Microsoft lawyers. That agreement, approved in November 2002 by a U.S. district judge, was aimed at giving consumers more choices by, among other things, helping rivals develop competing software on computers running Windows. The provisions expire in 2007. But, the trial judge and Justice Department lawyers have acknowledged that one of the disputed settlement's most important provisions—which compels Microsoft to license some of its technology to its rivals—is not working.

Some Money Being Returned In Mutual Funds Scandal

All Americans who invest are most familiar with the mutual fund scandal. This sordid affair has been going on for months and continues to escalate. It isn't clear what investors would actually receive from the regulatory actions at this point. Fortunately, it is beginning to clear up to some degree and that's good. It has been generally understood that profits earned by so-called "market timers" will be returned to investors in the funds hurt by the timing. There is now growing hope that fees paid by investors in those same funds will also be returned. I hope persons who invested in the funds during the period that market timing occurred will receive a return of some fees. This makes good sense since those investors most likely would have sold the funds involved had they known about the market timing.

As you will recall, in this scandal, fund companies profited by allowing a few sophisticated traders to buy and sell shares in ways that hurt the returns of regular investors. Thus far the scandal has implicated approximately 20 fund companies and has affected millions of investors. The settlements with mutual fund companies to date have totaled more than $2 billion dollars. As of this writing, 10 different fund companies have yet to settle with regulators. In late June, Pilgrim, Baxter & Associates agreed to a $100 million dollar settlement with regulators. The settlement followed allegations that the co-founder of the fund invested in a hedge fund that he allowed to time the firm's PBHG funds.

While the SEC has yet to say for certain that all settlements in mutual fund cases will include the return of fees, the agency is indicating that investors will be paid for fees. Support for this hope comes from actions such as the May 2004 agreement by Strong Financial Corp. to pay $140 million dollars in penalties and restitution. This suggests that fees will be returned. Settlements involving Putnam Investments, PBHG and Alliance Capital Management have also included a provision for fees to be returned. The SEC has argued previously that investors would have sold certain funds years ago had they known of the true trading arrangements. Fund management fees have been a "hot button" topic in the settlement discussions almost from the start. New York Attorney General Elliott Spitzer has rightfully sought to make fund companies charged in the trading scandal reduce the fees they charge in the future. For example, Alliance has agreed to five years of fee reduction valued at a total of $350 million dollars.

Another benefit of the Sarbanes-Oxley Act is that regulators now may return civil penalties, not just profits generated by the improper activity, to investors as part of settlements. In my opinion, this is long overdue as firms, such as the mutual funds implicated, have reduced the sting of their payments through tax deductions. Generally, when firms are instructed to return the profits generated in settlements, those payments are usually tax deductible by the firms. Penalties, however, are not generally deductible. This means when regulators settle with fund companies for return of profits and penalties, the "penalty" portion of the settlement will most likely have some real effect on the company in the future. Stiff penalties will actually decrease the probability that a company will do the same thing again. It is the desired deterrent effect.

Complaint Alleges Fund Trading Fraud

Another complaint has been filed in the escalating mutual funds scandal, asserting that five former Prudential Securities brokers and their manager in Boston used fake identities and other tactics to help investors make more than $1.3 billion in improper mutual fund trading. The Securities and Exchange Commission filed the complaint in U.S. District Court in Boston. Allegations in the complaint provide new details in the fraud case against the former Prudential employees. The case is also the latest development in the trading scandal sweeping across the $7 trillion mutual fund industry, ensaring dozens of fund companies and executives.

The SEC initially accused the former Prudential employees of wrongdoing in November. The SEC had to refile when a federal judge said their complaint wasn't specific enough. The new filing alleges that the five brokers and their manager used different account names, broker identification numbers, and misspellings of their own names to avoid detection of the trades that would otherwise have been rejected. The SEC said the trades generated more than $5 million in commissions for the brokers. It appears that the broker-defendants profited handsomely from their alleged misconduct.

The complaint alleges the brokers made thousands of "market timing" trades from 2001 to 2003 in virtually all of the county's major mutual fund groups on behalf of seven hedge fund clients. As you probably know now—all too well—market timing is the use of quick, in-and-out trades that skim profits from longer-term shareholders. This takes advantage of different closing times for markets around the world in many instances. The practice is not illegal, but regulators have recently cracked down on companies that officially forbid market-timing but made selective exceptions for big clients or their own managers.

In the past 12 months, several major fund complexes — including Alliance Capital Management, Janus Capital Group and Bank of America Corp. — have paid hundreds of millions of dollars to settle improper trading charges brought by regulators. Fund executives, managers and traders have also been accused of wrongdoing. In this case, the SEC portrayed the fund companies as alleged victims of the brokers. The agency alleges the hardest-hit mutual fund was Houston-based AIM Investments, through which the brokers made $166 million in market timing trades. The next-largest sum was at Franklin Templeton Investments of San Mateo, California, from which brokers made $87.3 million of such trades, while Putnam Investments in Boston had $42.6 million in market timing trades, according to the complaint.

Insurance Company Sues Over Baseball Team's Loss

The Hartford Casualty Insurance Co. has filed a lawsuit against the City of Baltimore and CSX Transportation Inc. for the loss of revenue from ticket and concession sales by the Baltimore Orioles baseball team. The Connecticut–based insurer for the Orioles is attempting to recover more than $1 million in damages after a trail derailment and tunnel fire forced city officials to cancel three Oriole home games in July 2001.

Eleven cars of a 60-car train, including tankers containing toxic acids, derailed inside the tunnel, which runs under the city's central business district. The resulting chemical fire shut down the city for several days, causing millions of dollars in damages to downtown businesses and to the city. The lawsuit charges CSX with negligence in the inspection and maintenance of the company's tracks in the tunnel. The city is charged with negligence in the inspection and maintenance of municipial water lines in and around the tunnel.

As a matter of interest there have been a number of other lawsuits filed by residents and area businesses against the railroad and the city for damages related to the accident. One plaintiff was the Maryland Institute College of Art. I really have to wonder why an insurance company would file a lawsuit rather than try to take its claim to binding arbitration. Maybe the courts aren't so bad after all!

IX. INSURANCE AND FINANCE UPDATE

UnumProvident Loses Appeal

A federal appeals court has upheld an award of $7.6 million in damages for a chiropractor who lost her home and went on welfare when her benefits were cut off by UnumProvident Corp., the world's largest disability insurer, after she was no longer able to work. The giant insurer has a nationwide practice of boosting its profits by denying legitimate disability claims from policyholders or terminating legitimate payments. We have learned through discovery in our cases that UnumProvident systematically denies claims. The chiropractor practiced in Berkeley, California for 20 years. She became unable to treat patients in 1997 because of painful repetitive-stress injuries to her arm and neck. This was aggravated by a motor vehicle accident. After paying the plaintiff $8,150 a month for 18 months, UnumProvident then stopped making payments. The company claimed a medical examination it commissioned showed she was not disabled. The plaintiff, a single mother of two, was evicted from her home, lost her car, went on welfare and subsequently declared bankruptcy.

The doctors who treated the plaintiff testified that she was unable to work. Other witnesses testified at trial that internal documents revealed a UnumProvident policy of terminating disability claim payments without regard to their merits. A federal jury had ruled in the plaintiff's favor in February 2002 and awarded damages for lost benefits and emotional distress and $5 million in punitive damages. On appeal, the company argued that the plaintiff was not totally disabled because she performed clerical tasks and managed her office from 1997 to 1999. The appeals court noted, however, that the plaintiff had an occupational disability policy—which provided benefits if she became disabled from her occupation—and said California law defined her as totally disabled because she was unable to work as a chiropractor. It is most significant that the judge writing the court's unanimous opinion stated that the jury was also entitled to find that the company conducted a biased investigation and acted in bad faith, justifying punitive damages. Currently, our firm has 41 pending cases against UnumProvident.

MassMutual Settles Case

MassMutual, one of the country's largest insurance company, has agreed to settle a nationwide class action suit. The company was accused of fraud in dealing with customers about their policies. The preliminary settlement was signed in late June and was later unsealed by a federal judge in Newark, New Jersey. Cases pending for as long as nine years in at least five states, including New Jersey, were consolidated into one federal case. The allegations made against Massachusetts Mutual Life Insurance and several of its subsidiaries are similar to a number of lawsuits alleging civil fraud brought against other major insurers during the past decade. Those cases ended with settlements valued at billions of dollars and covered millions of policyholders. In this case, $165 million has been set aside by MassMutual, with an upper limit of $10,000 for each named plaintiff.

Owners of certain life and disability insurance policies between 1983 and 2003 could be eligible for part of the settlement, according to court documents. More than 8,200 New Jersey residents bought certain covered policies between 1985 and 1989. A final hearing has been set for November 22nd. MassMutual, based in Springfield, Massachusetts, earned $461 million last year and was ranked by American Banker magazine as the nation's ninth-largest insurer. A company spokesman said in a prepared statement reported that the settlement will not have a material adverse affect on the company's financial position.

The lawsuit against MassMutual accused agents of misleading policyowners into believing they would need to make only a limited number of premium payments on permanent life insurance policies. But the so-called vanishing premiums were based upon false representations about the likelihood dividends or interest would accrue to such a level that policyowners would no longer have to pay premiums. The company encouraged agents to push this type of policy rather than term life insurance by paying them higher commissions, bonuses or other benefits, according to the lawsuit. MassMutual also was accused of improperly churning, or rolling over, existing policies for new ones, and misleading customers about the impact of using cash from old policies to buy new ones. Additionally, the lawsuit charged MassMutual misled policyholders into believing their permanent life insurance policies were actually investment, retirement or pension plans. In addition to MassMutual, Connecticut Mutual Life Insurance, C.M. Life Insurance and MML Bay State Life Insurance (all subsidiaries) were named in the lawsuit. Policyowners can call (800) 242-7026 for more information relating to the settlement.

Groups Urged Greater Disclosure In The Sale Of Variable Annuities

The Securities and Exchange Commission (SEC) and the National Association of Securities Dealers (NASD) jointly issued a report on broker-dealer practices in the sale of variable insurance. The report criticized the industry for keeping consumers in the dark, and called for changes in the way variable annuities and variable life insurance are sold. The SEC and the NASD said broker-dealers often kept consumers in the dark about the long-term design of variable annuities and life insurance plans. Variable annuities are a hybrid of securities and insurance investments, in which brokers put the principal into the stock or bond market, but also insure it, guaranteeing the investor an annual sum. Large surrender charges and taxes apply if the investor takes out more than 10% of the investment in the first seven years. Variable life insurance works in a similar way.

The SEC and the NASD warned in their report that some broker-dealers, who typically earn about 5% commission on these products, played down surrender charges, risk and other snags, luring elderly people and other consumers whose short-term requirements made the variable plans unsuitable. The report made other recommendations to broker-dealers, including fuller disclosures of the risks and charges, better training of the people selling variable insurance, and a mandatory review of all variable insurance sales by a qualified person.

Viatical Investments Can Cause Misery

You may recall that we wrote on the problems relating to Viatical Investments in a previous issue. We have now learned that a company called Mutual Benefits Corporation (MBC) is operating full bore in this field. CBS News recently reported on a case where a mother invested $40,000 in what was referred to as "a Viatical settlement" with MBC. According to the report, she knew her son as dying and wanted to provide him with funds during the remaining days of his life. A sales video from the company stated: "The MBC purchaser is attracted to this type of investment because of its humanitarian and investment value."

The way this works is that a person buys the life insurance policies of people they were told were terminally ill. What happens is that the sick people don't die quickly enough. As a result MBC used new investors' money to pay premiums on old investors' policies. CBS News reported that this secondary life insurance market—from an investment standpoint—is booming. It has risen from an estimated $80 million industry in 1990 to more than $3 billion today. Regulators caution that this is a particularly risky situation for individual investors. It appears that a great number of people around the country have lost large sums of money in the Viatical settlement market.

Variable Annuities Still A Problem

The North American Securities Administrators Association, the trade group for state securities regulators, identifies variable annuities as one of the nation's most abuse-prone investments. The SEC and the NASD (the self-regulatory organization of licensed securities brokers and dealers) recently produced an investigative report that outlines abuses and proposes reform. An excellent article concerning the problem relating to variable annuities appeared in the *USA Today*, Money Section, on July 12th. You can go to www.usatoday.com and gain some insight into how unsophisticated investors are being taken advantage of.

The annual sales of variable annuities have risen from $97.3 million in 1998 to over $125 million in 2003. Interestingly, only 26% of the national sales are made by independent financial planners for their clients. We have written on this subject on pervious occasions. As you may recall, variable annuities are now owned by more than

16 million Americans, who own $1 trillion of the product. Variable annuities combine life insurance contracts with mutual fund securities. These long-term investments are designed to build tax-deferred savings for retirement. However, securities regulators warn that they are inappropriate for a good number of investors. The obvious disadvantages are:

- A part of any variable annuity is that the investments can lose value as well as gain.
- A 10% tax penalty is assessed on withdrawals before age 59 ?.
- Early-surrender charges apply for 6 to 10 years of the contract.
- Total expenses—including administrative charges and money management fees—make annuities more expensive than many investments.

This information comes from *USA TODAY* research.

An Update On Uninsured Motorist Coverage

Many drivers still operate motor vehicles in Alabama without liability insurance. There are also many other drivers who have only the bare minimum limits, which are now very low. For the purpose of this article, I will refer to the first group as uninsured motorists and the second as underinsured motorists. Uninsured motorist coverage under Alabama law, which includes underinsured coverage, refers to the statute and case law that governs and attempts to resolve the peculiar problems that arise when an at-fault driver, who is either uninsured or underinsured, causes bodily injury to another in a motor vehicle collision. Automobile liability insurance that is insufficient to fairly and adequately compensate a victim for all damages is just about as bad as having no insurance coverage available. This is because the victim's own policy will most likely carry uninsured motorist coverage of $20,000.

Recognizing the havoc and misery that is often caused by an at-fault driver, the Alabama Legislature, through statute, forced Alabama insurance companies to incorporate into their automobile policies coverage to provide the insured monetary benefits if the insured was injured by an at-fault driver who lacked automobile liability insurance or had insufficient insurance to cover all damages. Unfortunately, the limits on the uninsured/underinsured motorist coverage is oftentimes woefully inadequate. Even a limit of $100,000 is not enough when you consider the high cost of medical care and hospitalization. Because the statute (Alabama Code §32-7-23) requiring Alabama insurance companies to incorporate uninsured/underinsured coverage into their automobile policies was not very specific, Alabama courts have been forced to interpret the meaning of particular provisions to fill gaps for issues that were not addressed in the statute.

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

Generally, the question arises when there has been a wreck involving an uninsured at-fault driver, "Do I have coverage and if so, how much?" Alabama requires every insurance company that issues automobile liability policies to provide uninsured/underinsured motorist coverage in every policy that is issued in this State. According to the statute, the insurance company must include motorist coverage in every policy unless the insured rejects the coverage. I won't attempt to go into much detail on court decisions relating to uninsured motorist coverage cases. I will say, however, that the subject has always been fairly complicated. Sometimes in law, simple things become overly complicated as they make their way from the legislative act through the appellate courts.

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

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

Currently, the minimum limits for liability insurance in Alabama are $20,000 per person and $40,000 per accident. Most insurance companies will only issue uninsured or underinsured motorist coverage with the bare minimum limits. As I have stated on numerous occasions, each of you should check your declaration sheet attached to your liability policy to see what coverages you actually have. This is the part of the policy that provides information concerning the various coverages afforded by the policy. I suspect many will find that their uninsured motorist coverage is much too small. The cost of uninsured motorist coverage is relatively cheap considering the amount paid for liability coverage. If you have the minimum limits in your policy, you should increase both your liability and your uninsured motorist coverages immediately. If you don't know what your limits are, call your insurance agent and find out. You can add as much as $500,000 in uninsured motorist coverage with most companies and up to $1,000,000 with a few. It only takes one catastrophic car wreck with an uninsured or underinsured motorist to find out that you have inadequate coverage for your claim. So, I would get the highest limits possible under your uninsured motorist coverage or as much as you can afford. If your company won't give you what you need, find a good company that will.

X. PREMISES LIABILITY UPDATE

Preliminary Report On Cause Of Paris Air Terminal Collapse

A preliminary report by the commission investigating the cause of the partial collapse of the newly-constructed Terminal 2E building at Paris' Charles de Gaulle (Roissy) airport, which killed four persons and injured five on May 23rd, said weaknesses in the concrete roof structure were the probable case. The oval-shaped roof apparently weakened in several places, allowing the supporting columns to penetrate the structure, and eventually, because of the friction, caused a portion of the roof to collapse. No immediate cause was given as to why the concrete in the year-old building deteriorated so rapidly. Clearly, it shouldn't have happened. The commission, headed by Jean Berthier, president of the French Scientific and Engineering Council, concluded that the supporting pillars themselves were not at fault. Many had shown cracks subsequent to their erection, and had been repaired. The commission also said it had found no evidence of ground subsidence or shifting, which would have affected the building's foundations. Further tests are to be conducted both on the foundation, and on the materials, notably the concrete, used in the building's construction. The report cited no evidence that the rest of Terminal 2E is unsafe, which is good news. Such a finding would have increased the real possibility that the structure, which cost around 750 euros ($925 million), would have to be demolished. The terminal should have been partially reopened by the time this issue is received.

XI. WORKPLACE HAZARDS

Husband Of Woman Killed At Milk Plant Awarded $17 Million

A Texas jury has awarded $17 million in damages to the husband of a woman who died last year after she was pinned by machinery at a Borden Superior Dairies plant in east Austin. No one at the plant turned off the machine or called 911 for 20 minutes after employees noticed that Faye Martinez was trapped. A supervisor apparently knew how to turn off the machine, but he failed to do it. Instead, the supervisor left to look for maintenance. He felt it was their job to handle the problem. It was reported that the supervisor didn't want to hurt the machinery. The jury deliberated for a day after a lengthy trial.

The damages against the plant's owner, Milk Products LP, include $10 million in actual damages and $7 million in punitive damages. Martinez's husband will receive the award. A teenage son of the decedent settled out of court with the company. The 40-year-old employee had worked at the plant for six months before she died. She usually loaded cases of milk on the loading dock. But when she reported for a night shift at the plant on the day of the accident, she was assigned to a different area of the plant after another worker called in sick. The area that she reported to had machinery that pushed milk crates from one conveyor belt to another. Martinez, who was not trained on how to operate the machinery, was left alone when another employee went on a break. No one knows exactly how the employee became pinned, although apparently she tried to remove a crate from the back conveyor after the machinery stopped. She apparently believed it would jam the conveyor belts once the line started again.

Martinez apparently didn't know the crate was tripping a sensor that shut off the pushing mechanism. When she removed the crate, the mechanism came on and pushed a stack of six crates against her back. It pinned her face against the steel wall of the back plate. The other employee, who had gone on a break, came back but didn't know how to turn off the machine. He got the supervisor who left to find maintenance without turning off the machine. Some 10 to 15 employees came to the scene, but none of them knew how to turn the machine off. The plant had modified the machinery so that the off button was hidden. There was no sign or label indicating where the button was located. Workers' safety is a responsibility of the company. This case is a prime example of lax safety practices and a failure to inform employees about safety features of a machine.

The New Federal Overtime Rules Will Hurt Working Families

On August 23, 2004, a set of new regulations governing overtime compensation will be enacted by the Department of Labor. These new regulations will add a tremendous amount of strain on working families who depend on their overtime pay to make ends meet. Many of the pro-business politicians and special interest groups are supporting the change in regulations and are seeking to increase profits on the backs of working Americans by decreasing the number of people who are eligible for overtime. The Bush Administration has said that under its new overtime revisions, more Americans will actually be eligible for overtime. But, what the Administration has failed to explain is that the only employees who will benefit are those who make below $23, 660. Many of the employees who make an annual salary between the range of $23,660 and $100,000 will lose their eligibility for overtime pay. In addition to these new regulations, the Department of Labor has issued a memorandum explaining to businesses how they may comply with the new regulations so as to prevent having to pay their employees overtime. These new regulations will almost assuredly affect police officers, fire fighters, working forepersons, working supervisors, chefs, cooks, nursery school teachers and many other occupations that represent the backbone of America.

Judge Denies Appeal For Flavor Company

A Missouri circuit court judge has rejected requests by two flavoring companies for a new trial or reduction of a $20 million award to a former popcorn-plant worker. The judge denied the motions and an appeal is certain. A jury in March awarded $20 million as damages because ingredients in a butter flavoring caused an employee to develop an irreversible lung disease. Doctors testified during the trial that the victim will need a double-lung transplant. The employee–victim and his wife filed the lawsuit.

Popcorn Worker's Lawsuit Claims Lung Damage

Another suit had been filed claiming lung damage. A woman who worked at the Pop Secret microwave popcorn plant in Iowa City has sued several companies that manufacture butter flavoring, claiming that inhaling the flavoring gave her a rare lung disease. The 46-year-old lady said in the lawsuit filed in federal court that she was diagnosed with the disease, bronchial obliterans, after working at the plant for about five years. The disease is commonly known as "popcorn packer's lung." The defendant in the Missouri lawsuit referred to above, International Flavors and Fragrances Inc., of New York, is one of the companies named in this lawsuit.

The lawsuit claims that the companies "knew or should have known" the risks associated with the chemicals in the popcorn flavoring. Federal studies have substantiated the risk to popcorn plant workers, though they say the chemicals do not affect people who eat microwave popcorn. Some experts have said they expect many more lawsuits from popcorn workers soon. There are several others pending.

Probe Into Fatal Mill Accident Brings New Safety Warning

A two-year federal probe into a fatal paper mill accident in southwest Alabama has led to a new federal government safety bulletin on handling deadly sodium hydrosulfide. The U.S. Chemical Safety and Hazard Investigation Board has released a bulletin that warns of the dangers of the chemical. Safe practices are set out to prevent accidents when handling the chemical. The Board's action follows a hydrogen sulfide leak in early 2002 that caused two deaths and eight injuries at a Georgia-Pacific Corp. plant. The Naheola mill is one of the largest in Alabama with about 2,000 employees. Federal investigators found 45 accidents linked to sodium hydrosulfide that have caused 32 deaths and 176 injuries since 1971. The chemical board reported that accident data are incomplete and there may have been more deaths and injuries. The safety bulletin came as a result of the Naheola accident.

The federal board previously had recommended that Atlanta-based Georgia-Pacific review sewer safety procedures at all its plants because of the deadly hydrogen sulfide leak at the Naheola mill. The two men who died worked for a construction company contracting with Georgia-Pacific. Hydrogen sulfide is a naturally occurring gas produced by decaying organic matter. It's a poisonous gas characterized by an odor akin to rotten eggs. Pulp mills typically use hydrogen sulfide and other chemicals to turn wood into raw fiber for paper.

Employees Are Being Killed In The Workplace

During an average week in the United States, one employee is killed in violent assaults by current or former co-workers. An additional 25 employees are seriously injured each week. That is an alarming fact and one that most folks don't fully comprehend. Many believe that a good number of the attacks could have been prevented. In all too many instances, employees and companies where violence has occurred have ignored and downplayed warning signs by workers before the attacks. An excellent article on this subject appeared in the *USA Today* on July 16th. We have to take a serious look at this mounting problem. No longer can this nationwide situation be ignored. We are currently handling cases where a co-employee has killed an employee, and we find that most employers are not well equipped to recognize and deal with situations that arise that can lead to subsequent attacks. It appears that many employees are simply not taking the matter seriously, and that's a mistake.

XII. TRANSPORTATION

New Trucker Guidelines Thrown Out

In a major victory for the safety of motorists and truck drivers, a federal court has struck down a Bush administration regulation that increased both the consecutive hours and the weekly hours that truck drivers are permitted to drive without rest. On July 6th the U.S. Court of Appeals for the District of Columbia Circuit said the Federal Motor Carrier Safety Administration (FMCSA) failed to consider the effect of the new rules on the health of truck drivers, as it is required to do under law. The three-judge panel also expressed grave doubt that any of the challenged aspects of the agency's regulation could survive scrutiny. The court ordered the agency to revise its regulation in a manner consistent with the court's opinion.

I believe this is a victory for the safety of both truck drivers and the motoring public. We see so many motor vehicle crashes where a tired truck driver caused the wreck, resulting in death or serious injury. Clearly, drivers who are fatigued are a major hazard on our highways. This rule was a formula for more deaths and injuries. The Federal Motor Carrier Safety Administration ignored its mission and approved a standard that violates its own statute. Public Citizen, along with Parents Against Tired Truckers and Citizens for Reliable and Safe Highways, challenged the rule promulgated by the Bush Administration in April 2003, after first suing the agency in 2002 for not issuing five truck safety regulations proposed under the Clinton Administration in 2000. The FMCSA agreed to issue the "hours of service" rule after the first suit but significantly revised the original, proposed standard. Advocates for Highway and Auto Safety filed an amicus brief on the winning issue of driver health.

Large truck crashes are particularly lethal because they usually involve much smaller passenger cars. In fact, 98% of those killed in truck vs. passenger vehicle crashes are in the smaller cars. Nearly 700 truck drivers die in crashes each year. Truck driving is one of America's most hazardous occupations. Under the new rule, truckers spend more consecutive hours driving than previously. The rule permitted a 14-hour workday with up to 11 hours of consecutive driving. Previously, truckers could drive no more than 10 consecutive hours. As the court noted, the agency made this change despite the fact that it "freely concedes" that the risk of driving long hours increases geometrically during the 10th and 11th hours on duty. Also, under the new rule, truckers were allowed to drive up to 77 hours in seven days, or 88 hours in eight days—a more than 25% increase over the old rules.

Not only did the court take the agency to task for permitting these dramatic increases in driving time, it faulted the agency for failing to make other important improvements to the rules that the agency initially proposed but then abandoned in the final regulation. The court found "unimpressive" FMCSA's justifications for failing to prohibit the practice of drivers splitting their required rest into two short and inadequate blocks of sleep in their sleeper-berths. It similarly found the agency's rationales for not requiring long-haul truckers to use electronic onboard recorders to monitor driver compliance to be "of questionable rationality," given drivers' widespread flouting of the rules. The court's decision vacates the new trucking regulation in its entirety, sending FMCSA back to the drawing board to issue a new rule that complies with statutory mandates and is supported by research demonstrating both the limits on the number of hours that truck drivers can drive safely without rest and the need for drivers to obtain sleep of sufficient length and quality. The motoring public owes a dept of gratitude to Public Citizen for its dedication to improving safety on our highways. Their hard work and persistence paid off once again.

Jury Verdict For Family Of Driver

A Texas jury has awarded more than $18 million to the family of a dump truck driver who died after his truck was struck by a train. The jury found that Union Pacific Railroad Co. should pay the driver's family $950,000 in actual damages and $17.25 million in punitive damages. The decedent was driving his truck across the railroad tracks on a County Road on April 19, 2001, when he was struck by a 102-car-long train. A line of trees along the track blocked the driver's view and the crossing was unguarded. After the death, the railroad put up crossing guards at the site.

Hearing-Damage Lawsuit

A Louisiana woman who claimed she lost her hearing in one ear because of a pressurization problem on a Northwest Airlines flight was awarded more than $500,000 in damages against the airline. The passenger had claimed that Northwest was aware of an ongoing pressurization problem with the DC-9 she flew on from the Twin Cities of Minneapolis and St. Paul, Minnesota to Fargo, North Dakota, in 2002. The airline was found to be negligent in failing to properly fix the problem. The plaintiff has a congenital ear condition that makes her ear less resistant to pressure changes. Jurors awarded $75,000 for medical expenses and pain, disability and emotional distress and an additional $475,000 for future medical expenses, pain, disability, distress and loss of earning capacity.

Railroad Crossing Hazards

There are a quarter of a million railroad crossings in the country. Unfortunately, most of them have no warning lights or gates. As a result, we are seeing an average of one death per day at train crossings. Many of those failed crossings are never reported to federal authorities even though the railroads are required to do so. That lack of reporting further compromises safety. There was an excellent two-part series in the *New York Times* last month written by Walt Bogdanich. The Times article featured the story of a 17-year old who was killed by a CSX freight train at a railroad crossing in Tennessee back in 1997. There had been a double fatality four years earlier at the same crossing that had not been reported by CSX as required by federal law. Had the railroad reported the fatalities, as it was required to do, the state of Tennessee would have paid the railroad to install gates at that crossing. Unfortunately, when the second incident occurred resulting in a tragic death, there were no gates available at the crossing.

Cell Phones Are A Distraction To Drivers

A number of studies have shown that driving while talking on a cell phone is just about the same as driving drunk. Using a cell phone can physically distract a driver unless a hands-free type is being used. Even so, all types of cell phones, including hands-free, distract drivers mentally. This can get into the emotional or intellectual realm. Speaking to someone who cannot adjust conversation to the flow of traffic keeps a driver's attention and conversation on matters outside of the vehicle and can lead to greatly impaired driving. I strongly discourage the use of cell phones while driving except for emergency calls or ones so urgent that they can't wait. I believe that businesses should have definite policies for their employees who have access to cell phones while driving company vehicles. There is no doubt that cell phone use for business purposes while driving a motor vehicle is commonplace. It is my opinion that driving and talking on a cell phone simply don't mix.

XIII. ARBITRATION UPDATE

Court Rules HMO Can Arbitrate Claims

An appeals court has ruled that doctors attempting to sue the country's largest HMOs were wrongly granted an injunction against arbitration of certain claims. The U.S. Court of Appeals for the Eleventh Circuit vacated an injunction that had blocked the HMOs from engaging in arbitration. A U.S. District Court in Miami had granted the injunction. The doctors claimed that the HMOs had underpaid them for medical services. The district court ruled that some matters in contention were subject to arbitration, and others were not. Two of the HMOs - United Healthgroup Inc. and Pacificare Health Systems - attempted to begin arbitration of the matters deemed arbitrable. The doctors responded by dropping the claims deemed arbitrable.

The doctors contended that since they voluntarily dismissed their arbitrable claims, the only claims remaining were those the court had ruled non-arbitrable. They claimed the defendants had no right to bring those claims before an arbitrator. The district court ruled in the doctors' favor, saying that the injunction was necessary to protect the court's jurisdiction. The appeals court reversed the ruling, saying that the HMOs were free to arbitrate the matters the district court said could not be arbitrated. The appeals court stated: "By purporting to proceed with the arbitration of non-arbitrable claims anyway, the defendants were not in any way undermining, circumventing or nullifying the court's 2000 arbitration order; they were instead merely engaging in a pointless, fruitless endeavor." I must confess that this decision is most confusing.

Good News From Covington County

Recently, we received word that Jackson J M Buick-Cadillac-Chevrolet Co. Inc., a dealer located in Opp, does not require arbitration. This is good to know and I appreciate my friend John Jones, a lawyer in Andalusia, giving us this information. If there are other dealers around the state who trust their customers and don't want to take advantage of their economic advantage, we will be glad to list them. I really believe that Alabama citizens want to buy their vehicles from Alabama dealers and not have to travel across state lines in order to avoid arbitration.

Good News From Other States

Courts in more and more states are beginning to restrict the use of predispute arbitration agreements in consumer transactions. Folks around the country are learning that arbitration favors the powerful and is grossly unfair to consumers. The confusion over arbitration is slowly being abated. Few people like arbitration once they learn how truly unfair arbitration is.

Once the public demands a change, then the politicians will act. I hope, that time will come very soon.

XIV. NURSING HOME UPDATE

REVIEWS ON ARBITRATION DIFFER

While the State of Alabama now allows mandatory binding arbitration clauses in nursing home admission forms, that is not the case in several other states. We have previously mentioned the state of Tennessee, which takes a contrary position to Alabama. The state of Arkansas has also taken a position that makes good sense—both legally and morally—and I will briefly describe what happened there. Northport Health Services attempted to get approval form the Arkansas Department of Human Services for arbitration clauses in their admission forms. In a well-written opinion the Office of Long-Term Care for the state of Arkansas ruled that the arbitration agreement was a violation of residents' rights. The ruling stated:

> *Persons seeking nursing home admission are by definition unable to care for themselves. … Typically, nursing home admission is sought only after the individual or the individual's family has redundantly decided that the individual's frailty necessitates 24-hour care.…*
>
> *Persons entering nursing homes are in the throes of what may be the biggest crisis of their lives. Most are significantly impaired and in need of immediate assistance and care. These circumstances naturally result in a high level of facility control and relative helplessness of residents.*

The ruling correctly points out that persons are faced with having to either accept arbitration or not be admitted to the nursing home. The ruling goes on to say:

> *This gross inequity of bargaining power of Northport and residents, coupled with the agreement's failure to adequately explain important terms, inhibits meaningful comprehension of the agreement's intended impact. Accordingly, the agreement is unconscionable.…*

The ruling concludes by stating that "it appears that the FAA does not apply to personal injury and tort claims arising in Arkansas nursing homes. Consequently, the agreement is subject to Arkansas's arbitration laws. That law invalidates the agreement's application to tort and personal injury claims." It is sad to see Alabama citizens being subjected to arbitration by the nursing home operators when other states are protecting their folks.

ALABAMA SUPREME COURT REFUSES TO CHANGE NURSING HOME ARBITRATION RULING

A few months ago I reported that the Alabama Supreme Court had ruled in two cases that a nursing home resident, or her estate, could be forced to submit any claim they may have against the nursing home for bad care including for injury or even death, to arbitration, even though the arbitration clause was signed by someone other than the nursing home resident herself. Our firm, along with AARP and several other consumer advocacy organizations, asked the Alabama Supreme Court to change that ruling but they have refused to do so. It won't be very long before it will be impossible to gain admission into an Alabama nursing home without being forced to sign an arbitration agreement because of these rulings.

These opinions will allow the corporations that own Alabama nursing homes to escape the scrutiny and accountability of an Alabama jury regardless of what they have done to residents. Literally, a nursing home resident could be boiled in oil because they failed to pay their bill and the resulting wrongful death lawsuit would be heard by an arbitrator and not an Alabama jury. That is, if someone had signed an arbitration agreement in that resident's admission contract. The law on arbitration in Alabama has become so one-sided in favor of business it actually would be funny if it weren't so sad.

I commend Justices Johnstone and Woodall for dissenting from these patently unfair and legally unjustifiable opinions. Justice Johnstone, who unfortunately is retiring from the Alabama Supreme Court, said it correctly in his dissent:

> *The mistaken main opinions will tend to increase the number of deaths wrongfully caused by those with the power and disposition to impose adequately drawn arbitration agreements directly or indirectly on their future victims as a condition to providing goods or services.*

Put another way, more nursing home residents will suffer and die needlessly as a result of these opinions because the nursing home corporations know an Alabama jury will never again be able to hold them accountable for their wrongdoing. I know that the Alabama Supreme Court is made up of men and women who are decent human beings and who should understand the situation facing a family who are about to put a loved one in a nursing home. They should also understand the imbalance of power between the parties in most cases. In any event, I take issue with the majority's treatment of this issue. I am hopeful that, at some point in the near future, they will recognize the error of their ways and remedy a bad situation that now exists.

STUDY REVEALS RACIAL DISPARITY IN NURSING HOME CARE

African Americans are four times as likely as white Americans to reside in understaffed and poorly funded nursing homes that offer substandard care, according to a study recently published in the Milbank Quarterly, a health policy journal. The study also describes a two-tier nursing home system with widespread racial and socioeconomic disparities. Nationwide, 40% of African American nursing home residents live in lower-tier nursing homes, compared with just 9% of all white nursing home residents.

A "lower-tier" facility is defined as having a high concentration of Medicaid residents (85% or more) and very limited resources. Many of these facilities are located in southern states, including Louisiana, Mississippi and Georgia, but also operate in economically distressed communities elsewhere across the country. African American nursing home residents are much more likely to live in a lower-tier nursing facility in nearly every state, the study said. In Missouri, for example, 33% of African American nursing home residents are in lower-tier facilities, while only 5% of whites are in lower-tier facilities. According to the study, lower-tier nursing homes have trouble retaining staff and attracting proactive administrators, and often are too financially strapped or ill-equipped to try new programs. Such facilities are also more likely to restrain patients.

The study, funded by the Robert Wood Johnson Foundation, reviewed more than 140,000 non-hospital-based Medicare- and Medicaid-certified nursing homes. The study outlines some broad recommendations for reducing the inequities. On the federal level, the government should work more closely toward improving conditions at nursing homes that receive low CMS quality ratings. At the state level, monitoring at nursing homes with the highest concentrations of Medicaid patients should be more proactive rather than responding to violations that surface on annual inspections. Before a nursing home is shut down for providing substandard care, leaving poor elderly citizens without a local facility, the government should intervene to find other management to keep the facility operating and improving.

Sex Offenders In Nursing Homes

A story out of Texas should alarm all of us. Two sex offenders were paroled and actually moved into nursing homes. Their living arrangements don't appear to be unique: across Texas and the nation, medical necessity and circumstance have pushed registered sex offenders into sanctuaries that most folks in Americans might never have suspected. In a study released last month, an Oklahoma-based advocacy group for the elderly found 70 released sex offenders living at state-regulated nursing homes throughout Texas, the most in any state. Overall, the group, A Perfect Cause, located 380 sex offenders living at nursing homes in 32 states. The organization matched the addresses of sex offenders in state-mandated registries with those of nursing homes recognized by the government. The Dallas Morning News obtained the Texas data exclusively and verified most of the cases, which included 14 in the Dallas-Fort Worth area. The News found two other sex offenders living in Texas nursing homes who were not identified by the Oklahoma group. State and local officials in Texas expressed surprise at the findings and said they couldn't say how much of a threat the offenders might pose to nursing home residents. Advocates fear that some of the nation's most isolated citizens, already vulnerable because of age or infirmity, may be in danger from a previously unknown risk. Many of the sex offenders identified by the analysis were living in general population nursing homes. I don't believe any sex offender should be allowed to live or work in a nursing home. To allow it would be asking for serious problems. The advocacy group's analysis found that 45% of the registered sex offenders living in nursing homes are younger than 60 years old. The study located offenders at 289 facilities in 32 states. Five states had no offenders living at nursing homes, and 13 states, including California, couldn't be analyzed because they either don't maintain on-line databases of sex offenders or don't list their addresses.

Federal report calls for changes in nursing home guidelines

Recently, a scathing report from the federal government was released relating to nursing homes. The topic was fire safety for nursing homes. As you may recall, the deadly fire at a Nashville, Tennessee, facility last year prompted the federal investigation. The report blasted both federal and state laws concerning nursing home fire safety. It included accusations that states are not doing enough to monitor facilities like the NHC Nursing Home in West Nashville, where 15 people died in a fire last September. In that fire, investigators said that sprinklers would have saved most, if not all, of the 15 people killed. Unfortunately, federal standards do not require older nursing homes to have sprinklers or even smoke detectors in resident's rooms. According the General Accounting Office report, the reason is cost. Our seniors and children are the most vulnerable people in our society and we must do everything in our power to ensure they are protected.

The federal government has reevaluated its sprinkler exemption for older nursing homes. The GAO cites other potential problems, including:

- Some unsprinklered homes are not required to meet all federal fire standards, if they obtain a waiver....or demonstrate they have "comparable" safety features.
- State surveyors who inspect facilities either miss or fail to cite all fire safety deficiencies.

The report finds the NHC deaths were part of a much bigger problem nationwide. In 2003, a total of 31 residents died in the fire at the Nashville facility and another nursing home in Hartford, Connecticut. But even if the federal government mandates older nursing homes be retrofitted with sprinklers, it would take several years to even begin that process. Officials at NHC could not comment due to pending lawsuits, but all of the nursing home facilities owned by that company are in the process of installing sprinklers. The project is two-thirds complete. You will recall that we reported last month on the steps taken in Alabama and that was certainly a good move.

Victims Should Not Be Blamed For Rising Insurance Rates

For more than 30 years, the Senate Special Committee on Aging has held hearings and issued reports on the negligent treatment of the elderly in nursing homes. Countless men and women have been invited to testify about how their mothers, fathers, spouses, or other loved ones were callously neglected or deliberately abused by those in whose care they had been entrusted. As the Committee's hearings have documented, the maltreatment of the individuals is often compounded by the failure of the state regulatory agency and the federal government to protect residents and penalize the perpetrators. The National Citizens' Coalition for Nursing Home Reform has called attention to the fact that the Committee is now calling witnesses for hearing who blame the victims who seek redress in civil courts for the rising cost of liability insurance. They failed to call any witnesses who put the blame where it should go, and that's with the providers who neglected and abused the victims.

The recent dedication of the World War II Memorial has resurrected eloquent tributes to our nation's "Greatest Generation." But in truth, many of those men and women reside today in long-term care facilities in which they are treated without dignity and without respect for their decades of sacrifice to make this a great country. Of all adult Americans, the disabled and dependent elderly would be hurt most by the tort reform proposals that have been considered by this Congress. These proposals would severely cap awards for noneconomic damages—the pain and suffering of those whose work lives are over. Tort reform would effectively end the Greatest Generation's access to the courts, and that would be a tragedy.

I would like to hear an explanation for why there were no witnesses for the elderly victims of nursing home abuse at this hearing. NCCNHR has requested that the Committee insert in the record a copy of Faces of Neglect, a report they published in conjunction with Texas Advocates for Nursing Home Residents in 2003. This report provides graphic case studies of elderly and disabled Texans who suffered serious injury and even death because of the negligence of nursing home personnel who repeatedly violated standard nursing practices and doctors' orders. It also demonstrates the failure of state agencies to take effective action against the operators and individuals who were responsible, and the high cost borne by American taxpayers to treat the victims of neglect.

The nursing home industry's claim that rising insurance rates are taking away from quality care is absurd. This industry has never provided real quality care to residents who were victims of abuse and neglect. That's the issue that the Committee should address. The chairman of the Committee, Senator Larry Craig, is sending out daily reports on the Committee's work, and he sounds like an insurance defense lawyer making a closing argument to the jury on behalf of a guilty nursing home.

XV. HEALTHCARE ISSUES

Blue Cross/Blue Shield Makes Shocking Decision

I received a letter last month from Blue Cross/Blue Shield of Alabama concerning our firm's health insurance policy. I was informed that the insurer had placed Crestor on its preferred drug list. Blue Cross says that the recommendation for change had been made by the company's pharmacy and therapeutics committee and was based on clinical and cost-effective outcome reviews. Crestor in my opinion is very dangerous. We wrote on Crestor in last month's issue and did a follow-up in the current issue. I am shocked beyond belief that an insurance company would place Crestor on any approved drug list at this point. I am hopeful, this decision will be reversed if a good number of concerned citizens contact the company. In the meanwhile, I suggest that anybody taking Crestor contact their personal doctor and ask about this drug. I can say—without reservation—I would not take it.

Real Impact Of HMO Ruling

As we reported last month, the United States Supreme Court dismissed negligence lawsuits filed against Aetna and Cigna Corp. by two Texas patients who claimed the HMOs had wrongly denied them coverage for necessary medical care, which led to additional complications. The suits were filed under a Texas law allowing patients to bring actions directly against their HMO. As you have probably read, the Court ruled that state lawsuits such as these are "completely pre-empted" by the Federal Employee Retirement Income Security Act of 1974. That Act restricts actions against employer-sponsored health plans to federal court, where plaintiffs can recover only the value of the benefit that was denied—oftentimes no more than a few thousand dollars. If the Act (ERISA) were not in place, courts could award plaintiffs rightful damages for their pain, suffering, lost wages and other costs.

Interestingly, healthcare providers were very quick to criticize the ruling, arguing that health plans will now have very little incentive to approve costly but medically necessary treatments.

The President of the Texas Medical Association even said, "This decision puts a shield around managed-care companies, thereby leaving physicians as the only ones now subject to tort actions resulting from bad treatment decisions—decisions that the physicians didn't even make." Consumer groups and legislators have criticized the ruling as a major setback in states' efforts to establish rights laws at a time when Congress has stalled over the issue. It is interesting to note that many "conservatives" have been strong state's rights advocates on other issues, but have been strangely silent on this issue. In fact, it is hard for me to understand how true "conservatives" could so quickly embrace federal control of what is clearly a state issue.

The issue of patient's rights is back on the front burner. Congress should clean up its own mess. If they don't, the public will respond in a political way in my opinion to Congress' failure to act. The Federal Patients Rights Bill, passed by the Senate in 2001, but defeated in the House, will be reintroduced. The bill would have allowed patients to sue health insurers for their negligence. It is clearly time for either Congress to act or for the public to respond to this great injustice. HMOs are now virtually untouchable and they can make whatever decision they wish regarding a patient's treatment without any real fear of recourse. Doctors should be leading the fight for their patients and for the public generally. Their right to practice real medicine is being taken away from them, and people are being hurt in the process.

Hospital To Settle Lawsuits

Tenet Healthcare Corp. will pay more than $1 billion to settle federal probes and hundreds of claims that doctors at its Redding, California, hospital performed unnecessary heart surgeries. Tenet, the nation's second-largest for-profit hospital chain, has been under investigation for some time. Tenet's practices, including its handling of Medicare billing, have been scrutinized for 18 months. The company had already agreed to pay $54 million to settle government allegations that two doctors at its hospital in Redding performed unnecessary heart surgeries. The Santa Barbara, California—based company had agreed in March to pay $30.75 million to settle an investigation involving a Tenet-owned hospital in Florida and a second nationwide probe. This recent settlement may finally get the attention of this corporation. This is another example of a corrupt corporate mentality.

IBM Cancer Paper Blocked

Thirteen occupational health scientists have withdrawn their papers from an international journal after its owners blocked publication of a paper claiming large numbers of IBM workers have died prematurely of cancers and other diseases. IBM claims that the paper is flawed, but denies putting pressure on the publishing group Elsevier to stop the paper's publication. Dr. Joe LaDou, of the University of California at San Francisco, who tried to publish the paper, said the study was an important work that reveals the serious health risks facing workers in the computing industry. He has bitterly attacked the decision to block the paper and has been backed by all other contributors to *Clinics in Occupational and Environmental Medicine*. The heavy-handed tactics that industry employs to prevent the publication of important scientific discovery simply shouldn't be tolerated. Hundreds of former employees are suing silicon-chip makers and computer manufacturers over the diseases they have suffered after working with acids and solvents in fabrication plants. There are presently about 250 lawsuits pending against IBM, that were filed by former employees.

The controversy was triggered when Dr. Richard Clapp, of Boston University, and his colleague Rebecca Johnson, were asked to examine cancer records of IBM employees. Their analysis showed IBM employees suffered significantly more deaths from several kinds of cancer than would be expected from the general population. They found that cases of brain and kidney cancers and non-Hodgkin's lymphoma were more than double than that found in the population at large, according to reports. IBM said that the Clapp/Johnson study was confidential, but Dr. LaDou wants it included in the journal. He was told by the owners of the journal, Reed Elsevier, that the paper was not suitable for publication. You can draw your own conclusions. Should the public know about what was discovered?

Medicare Bill Costs Kept Secret

The Medicare bill was pushed though Congress by the powerful insurance and HMO lobby, with direct involvement from the Bush White House. An internal Bush Administration investigation into this new law confirms there was a coordinated effort to keep its true costs from Congress and the public. The Health and Human Services Department Inspector General said in a report released last month that Administration officials broke no laws in withholding the cost estimates from Congress. But, the report describes the aggressive tactics that were used to keep lawmakers from learning that the Administration had estimates of the legislation's cost that were $100 billion more than the President and other officials were acknowledging. Thomas Scully, the Administration's Medicare chief until December 2003, threatened to fire chief Medicare actuary Richard Foster to prevent him from giving information to lawmakers. Interestingly, the report says Scully, then the administrator of the federal Centers for Medicare and Medicaid Services, "has the final authority to determine the flow of information to Congress."

It certainly appears that Congress and the American people were intentionally misled. The true costs of the

Medicare bill were well known to the Republican leadership, but not disclosed. Some members of Congress believe the Inspector General's inquiry was narrowly tailored and believe that an independent investigation is needed. That Inspector General's conclusion contradicted the findings of the nonpartisan Congressional Research Service, which said in May that threats against Foster designed to keep him from giving Democratic lawmakers his projections of the bill's cost probably broke the law. The Justice Department, in an opinion attached to the recent report, said CRS was wrong, which is most interesting. The General Accounting Office, Congress' investigative arm, is currently looking into whether the gag order on Foster violated federal law. The acting HHS Inspector General, is also continuing to investigate the ethics waiver that HHS Secretary Tommy Thompson granted Scully, allowing Scully to continue work on Medicare legislation while Scully was looking for work with law and investment firms that have clients affected by the legislation.

The *Associated Press* reported a year ago that Scully threatened to fire Foster if Foster released his calculations to Democrats. Scully now tells *Associated Press* his comments were "heated rhetoric in the middle of the night." It is no coincidence that the Administration projected in the budget it submitted to Congress in January - after passage of the Medicare bill—that the 10-year cost of the bill would be $534 billion, instead of $395 billion estimate used in writing the legislation. Foster's estimates, written during consideration of the bill, still have yet to be made public or turned over to members of Congress who have requested them. Even though Secretary Thompson promised in March to release the documents in question, he now refuses to do so. I don't suppose election year politics have anything to do with that. The American taxpayers and elderly citizens in this country are the losers in this sordid mess, and that's most unfortunate.

Drug Prices Rise After Medicare Law

According to AARP, prices for medicines most used by older Americans rose steadily after the Bush Administration enacted the new Medicare law late last year. AARP, the nation's largest group representing the elderly, said brand-name drug prices have climbed 3.4%—or three times the rate of inflation—since December. The jump was one of the sharpest quarterly spikes since 2000, the report said. The findings follow another AARP report this year that showed prices for drugs used most by the elderly grew 6.9% in 2003. But the increase since President Bush signed the Medicare bill into law was even sharper, according to the AARP. Drug companies say higher prices reflect growing research and development costs, which topped $33.2 billion industry-wide in 2003. They also argue spending money on medicine can prevent more expensive hospitalization and other treatments. AARP researchers looked at the wholesale price of 197 brand-name prescription drugs most used by older adults. When manufacturers charge wholesalers more, "this added cost is generally passed on as a similar percent change in the retail price to most prescription purchasers," the report stated.

The law also prevents the U.S. government from directly negotiating drug prices. Until I am convinced to the contrary, I will continue to believe the new law is bad for people and very good for the drug companies and the pharmacy benefit managers (PBMs). The new law is estimated to cost as much as $534 billion over 10 years and I suspect that number is low. Much of this is directed to prescription drug purchases by older and disabled Americans that the government has not previously paid for. AARP gave crucial backing to the new Medicare law, but has been a vocal critic of pharmaceutical manufacturers and their congressional allies who have resisted legalizing drug imports. The seniors group, which has done great work for their members and consumers generally, also has urged drug makers to limit price increases to the rate of inflation. Their plea fell on deaf ears and was to no avail.

Drug Companies Should Be Put On A Short Leash

Folks around the country are starting to rebel against the spiraling prescription drug costs and the government programs that claim to make new, more effective drugs available and affordable, but do just the opposite. The highly profitable pharmaceutical industry is starting to get the message. They know folks are mad as the dickens. Unfortunately, instead of doing something to help consumers, the big companies are spending more on lobbying, campaign contributions, advertising and legal fees to persuade the government to continue to give them unfair breaks that add to their tremendous profit margin. The pharmaceutical industry has had its way for decades now. They have been more successful than any other industry group at getting their way and making it pay. That's really not subject to debate and the public is beginning to figure it out.

The following are a few of the benefits the lobbying and campaign contributions by the drug companies have gotten them from the federal government:

- The Medicare reform bill's prescription drug benefit, passed last fall, made no attempt to control prices or encourage competition. And, as noted above, according to a study released last week by AARP, prices for prescription drugs most used by seniors have risen at three times the rate of inflation over 2003, and by 3.4% so far this year. AARP, which ironically threw its support behind the drug benefit, is now fussing that discounts offered by the new program will be more than offset by price increases. Drug companies don't care. They bought and paid for the freedom to raise prices with $40 million in campaign cash over the past two years to members of Congress, most of it to Republicans.

- In much of their advertising and lobbying, drug companies tout "research and development" as a major reason why they charge the prices they do for new drugs. Without high prices, they claim, there would be less money to invest in new life-saving pharmaceuticals. But, according to a new book on the topic, research and development budgets for drug companies are much smaller than their marketing expenditures, and considerably less than their profit margins.
- Marcia Angell, senior lecturer in social medicine at Harvard Medical School and author of "The Truth About the Drug Companies: How They Deceive Us and What to Do About It," points out that most new drugs developed in the United States come out of government or academic research labs and are merely marketed by big drug companies. That is made easier by a series of laws passed in the 1980s that enabled universities and other tax-supported institutions to patent discoveries and license them exclusively to drug companies.
- Once the drug company has the license, it can get exclusive marketing rights from the Food and Drug Administration for 14 years, enabling it to raise the price at will. After that expires and a generic form comes on the market, the price of the drug generally falls to about 20% of what it was. So the incentive, Angell says, is to change the drug slightly and repatent it, getting another decade or so of exclusivity in the deal. Very few really new, more effective and innovative drugs come on the market as a result.
- Even when the big drug companies look as if they might be doing some good—say, by offering discounted drugs to nonprofit clinics that serve the poor, they aren't. Investigators at the Health and Human Services Department revealed last week that drug companies overcharged tax-payer-supported health care providers by $41.1 million in one month, The *New York Times* reported.

There were no penalties for such overcharges, nor was there a means for the clinics and hospitals to demand a refund of drug charges above the legal limits set by Congress. Yet the federal agency in charge of the discount program, the Health Resources and Services Administration, declined to ask Congress for the authority to assess penalties. A spokeswoman said the agency preferred "to continue exploring its options." Consumers—and voters—should explore their options as well. It's time the nation's drug cartel was busted up.

Source: *Atlanta Journal Constitutional.*

The Drug Cards Do Help – But Who?

Many seniors and retirees are obviously confused and disappointed with the Medicare discount drug card that began on June 1st. Clearly, there is intense competition by the companies offering these cards. Dozens of companies are scrambling to get a foothold in this new business created by Congress when it passed the Medicare Prescription Drug Law last year. More than seventy government-approved cards have been presented by the companies, as they aim for seniors' business. The main players are insurance companies, drug makers and distribution middlemen called pharmacy benefit managers (PBMs). The interesting thing is that their goal does not appear to be a short-term profit. It appears many could lose money by offering a card that will go out of existence in just 18 months. They seem to be focused on 2006, when the card, which provides only limited discounts that companies decide to offer, is due to expire. At that point, it will be replaced by the potentially more lucrative drug insurance that Congress agreed to fund, which will pay a set proportion of seniors' drug costs. The Non-Profit Center for Medicare Advocacy has said that "the key is for card sponsors to position themselves for 2006."

Unfortunately, it appears the biggest winners in this battle will be the insurance companies and their PBMs. It is becoming abundantly clear that these companies are using the cards to build a roster of customers they can then switch to drug insurance in 2006. The biggest losers are going to be the pharmacies. Most of the discounts will come out of their profit margins. Especially hard hit will be small pharmacies because they will not be able to afford the cut into their already small margins. This rush to offer cards is one of the most confusing things I have seen in some time. The Congressional Budget Office expects only seven million of the nation's 44 million seniors will buy a card. That means the number won't be very many to divide up amongst over seventy different cards. In an effort to hedge their risks, the partnerships that are emerging are very difficult to understand. Take for instance the PMBs, which negotiate prices directly with manufacturers. I, along with many others, would like to know more about the prices these PBMs negotiate with manufacturers. Thus far, the deals the PBMs strike are being kept shielded from public disclosure. Companies such as Express Scripts, Caremark RX and Medco Health Solutions already offer non-Medicare drug discount cards through employers and insurers. But for the Medicare cards, they want to publicize their own brands. Medco is one of the larger PBMs. It has its own Medicare card, although it handles price negotiations for several managed-care companies, including the giant United Health Group, Inc. Interestingly, United Healthcare has a Medicare card of its own. This does not make any sense to most people.

United, a large health insurer based in Minneapolis, is putting out its own card. To hedge its bets, however, it is also partnering with others such as the AARP. For example, United has yet another card called U-Share, which is a venture with Pfizer, Eli Lilly and other drug makers. It's little wonder that seniors aren't able to make informed decisions, considering all of this confusion. Unfortunately, the companies with the fewest options and most to lose would appear to be the pharmacies. This is especially true of the independent "Mom and Pop" drug stores that were once commonplace in our country, but are now becoming shut out in this money grab. It would probably surprise most folks that these "Mom and Pop" drug stores still sell 44% of all prescription drugs in this country. Until now, many retirees were buying medications from the small pharmacies at retail. Now, drug stores have had to negotiate the lower prices with card sponsors or risk losing those customers entirely. It saddens me to think that many customers in rural parts of our state may lose their small local drug store because of the greed and manipulative nature of the large insurance companies and PBMs.

Another way that the large insurance companies and PBMs are hurting the pharmacies is through the mail. These cards also make it easier for seniors to order drugs through the mail. This fattens the bottom line for PBMs, but drives customers out of the local drug stores. Not only do small pharmacies lose drug sales, they also lose purchases of other products that customers would buy while in their stores. If things continue on this path, the small drug store that many Alabamians have used all their lives will no longer exist.

Even the giant drug store chains are being forced to bow down before the powerful insurance companies and PBMs. Walgreen Company is a 4,397-store chain and offers its own card. Interestingly, this card is not just for its stores, but is also for 36,000 other pharmacies around the country. You may wonder why independent pharmacies would accept a card from a giant rival. It appears many may have little choice but to take nearly any card a senior carries. They may have to accept the lower price set by Walgreen or another large pharmacy, because if they don't, seniors and especially retirees will likely take their business elsewhere. It's not going to get any better for pharmacists, large or small, in my opinion. The large insurance companies and PBMs will continue to squeeze out the independent/retail pharmacists. It is a sad day indeed for the owners of the mom & pop drug stores, and I believe in the long run, for their customers.

The Feeble Drug Industry – You Have To Be Kidding!

Top pharmaceutical executives attended a June conference in Boston concerning the sale and illegal marketing of drugs for "off-label" uses not approved by the FDA. The executives were told at the conference, sponsored by Foley Hoag, a Boston-based law firm specializing in corporate law, that prosecutors and regulators are circling and would-be whistle blowers are collecting promotional materials, saving e-mails, and taping phone calls. A slide that was viewed by the executives during one of the presentations at the conference showed a kitten (apparently the helpless drug industry) in front of a row of vicious German Shepherds (the mighty federal regulators), with the dogs ready to pounce. But, the perception of the pharmaceutical industry trembling before federal regulators is a hard pill to swallow, like many of its prescription drugs because of the exorbitant cost. According to a report issued in June by Public Citizen, the pharmaceutical industry has a total of 526 lobbyists in Washington, which is approximately one lobbyist for every member of Congress. Furthermore, despite the defeatist mood at the recent conference, the pharmaceutical industry remains one of America's more powerful and influential industries. When it comes to getting what it wants, it is clearly one of the most powerful of all time.

As evidence of the industry's current economic state, pharmaceutical drug sales grew more than 11% last year to $216 billion, with the top 10 pharmaceutical companies netting a combined income of $50 billion, and the drug companies collectively registering an average profit margin of 14%. As a result of the litigation involving off-label uses, such as the Neurontin suit, we are now seeing what we have known all along, that the drug makers are realizing profits at the expense and health of unsuspecting and trustworthy consumers. It is staggering to consider that since 2001, drug companies have paid more than $2 billion to the U.S. government in order to settle charges involving fraudulent sales and marketing tactics. Even more disturbing is the fact that the number of off-label prescriptions has nearly doubled to approximately 115 million since 1998 and continues to increase. It is painfully obvious, as evidenced in the Neurontin situation, that off-label prescriptions will not decrease until a dramatic overhaul within the drug industry changes the way the companies market their products to physicians.

An example of a company that appears to be attempting an overhaul is Schering-Plough, which is currently under investigation by the Justice Department for off-label marketing. This is encouraging because the new CEO has stated that the FDA standards regarding off-label marketing will take place. Some measures by the company to clamp down on unethical sales pitches are good news. Bit, it still remains to be seen whether the billions of dollars in penalties levied against the drug companies or the implementation of new procedures within the companies will effectuate any positive change within this profit-driven industry. If something isn't done and soon to help folks who can't afford to get the medicines they need, a political revolution against those who give aid and comfort to the giant drug companies will take place.

XVI. ENVIRONMENTAL CONCERNS

EPA Investigating DuPont

The Environmental Protection Agency is investigating DuPont for withholding critically important health studies on a toxic ingredient of Teflon (known as C-8 or PFOA). DuPont's failure for decades to disclose critical data allowed the company to pollute the blood of virtually every American with a Teflon chemical that company documents show the company knew was toxic. That is bad news and one would expect that the EPA would have really gotten after DuPont—especially when you consider what the company knew and when they knew it.

Telfon and related C-8 sales presently net DuPont $200 million in annual profit. The Washington, D.C.–based Environmental Working Group (EWG) discovered company documents showing DuPont's deliberate withholding of the health toxicity studies as well as evidence of widespread drinking water contamination. EWG filed a petition in April 2003 that prompted the EPA investigation. EWG's President, Ken Cook, is not overly impressed with the slow action taken by the EPA. Cook says that DuPont has been caught in three serious violations of federal pollution laws with little action being taken by the EPA. As I understand it, EPA could have fined DuPont up to $27,500 per day for the entire period of two specific violations found by the EPA. This would have resulted in a fine of over $300 million. But, so far only threats of fines have come from the EPA.

Most of us are familiar with Teflon. For those who are not, I will give a brief explanation. The chemical known as C8 or PFOA is used to make Teflon and a host of popular consumer products including cookware, clothing, carpet treatments, food packaging, outdoor gear and more. This chemical and the family of related and widely-used perflourinated chemicals did not exist seventy years ago. However, these chemicals are now in the blood of nearly every American and pollute air, water and wildlife as far away as the North Pole. One important thing to remember is that the chemical never breaks down in the environment and is known to cause numerous cancers and other health problems in lab animals. This appears to be a most serious matter and one that should prompt the EPA to take strong enforcement action. I hope, that will happen and soon. Unfortunately, since President Bush has been in office, the EPA has become much more less likely to get after the corporations that support the President financially.

IBM Settles 50 Lawsuits By Former Plant Workers

IBM has settled 50 toxic chemical lawsuits brought by former employees at its San Jose, California, manufacturing plant. The terms of the settlement are confidential. In February, a jury rejected two former IBM workers' claims IBM knowingly caused them to suffer systemic chemical poisoning in their work at IBM's disk drive manufacturing plant between the 1960s and 1980s. The plaintiffs in the case contended that exposure to acetone, benzene, trichloroethylene and other chemicals used in manufacturing clean rooms caused them to develop cancer. One plaintiff suffered from breast cancer and the other has non-Hodgkin's lymphoma. The former IBM workers alleged that IBM knew they were sick and concealed information of the hazards and the causes of sickness from them.

Their case was the first of some 50 similar cases to go to trial. In March, the trial jJudge put the remaining cases on hold and ordered both parties to meet with a mediator. The cases subsequently were settled. But, the settlement does not affect 110 cases filed against the company by workers in New York. IBM previously settled two birth-defect cases in New York. In March, IBM settled a birth-defects lawsuit with the daughter of a former semiconductor plant worker in East Fishkill, N.Y., just before jury selection was to begin. Terms of that settlement were also confidential. In January 2001, IBM settled another birth-defect lawsuit with the family of a child who was born blind. Both his parents worked at the East Fishkill plant in the 1980s.

Toxic Pollution Rising

The Environmental Protection Agency has reported that toxic chemicals released into the environment rose 5% in 2002. This is most interesting as it marks only the second such increase in nearly two decades, and the first since 1997. Approximately 4.79 billion pounds were released in 2002. This is the latest year for which figures are available, and it does not include releases from metal mining. The EPA stopped including that data due to a recent court decision in an industry challenge.

Two environmental groups have said that the EPA is under-reporting the air pollution portion of releases of chemicals and emissions by approximately 330 million pounds per year. They claim that the EPA is especially soft on refineries and chemical plants, thus keeping as much as 16% of the nation's air pollution "off the books." Senator Jim Jeffords (I-VT), a senior member of the Senate Environment and Public Works Committee, says the 2002 increase "proves that the policies of the Bush Administration have moved us backward, not forward, on the environment."

Six Alabama Counties Fail To Meet New Air Pollution Standards

Six Alabama counties have failed to meet new federal standards for air quality. The counties are Jefferson, Shelby, Walker, Lee, Russell and Jackson. If, after four months of appeals, the U.S. Environmental Protection Agency adopts the designations for failing particle pollution standards, polluting industries would be blocked from locating in those counties without reductions in smog-causing soot. The areas would also be required to work on a solution to the pollution. Ron Gore, air director for the Alabama Department of Environmental Management, told the *Associated Press* that Alabama will fight the designations and request that only Jefferson and Russell counties be placed in the "nonattainment" category. Those are the only two counties where air monitors fail the standard for small sooty particles, which is based on a three-year average.

Apparently, the other counties are included because they contribute to pollution problems or lie in metro areas with particle pollution problems. Jackson County was included because it is part of the Chattanooga area, while Lee County is included because it is near the Phenix City-Columbus, Georgia area and contributes to air pollution there, according to the EPA. The state agency believes federal rules designed to reduce pollution will be adequate to help counties meet the standards. Federal rules will allow counties to count those national measures when they write their pollution reduction plans, according to the EPA. Health officials have said the hazy pollution caused by small particles is the worst threat in the Birmingham area's air. The Birmingham area has been in violation of the U.S. Clean Air Act's ozone standards almost continuously since 1978.

ADEM Should Beef Up Enforcement Of Its Regulations

For years I have believed that the Alabama Department of Environmental Management, the state's environmental management agency, was extremely weak on enforcement. It is pretty clear that ADEM is not spending enough time enforcing its own regulations. Mobile Bay Watch, an environmental watchdog group, has been extremely critical of ADEM's performance. ADEM must be forced by the Governor and Legislature to do a better job of enforcement. The agency has good people on board who badly want to do a good job—I am convinced of that. They are tired of being called an extension of the polluters. Enforcement by ADEM is critically important if we are to protect Alabama's environment including its water, fish, game and other natural resources, for present and future generations. Our leaders who have the power to make things happen should step up to the plate and require ADEM to do its job. Of course, that means giving the agency the funding necessary for them to do their job. Alabama will be better for it—if that ever happens!

XVII. PREDATORY LENDING UPDATE

OCC Preemption Of State Consumer Protections Must Be Stopped

Earlier this year, with surprisingly little fanfare, the Office of the Comptroller of the Currency gutted the ability of the states to protect their citizens from financial scams. The National Association of Consumer Advocates and other consumer groups were adamantly opposed to the predictable effects of what happened. Predatory lending is a cancer on the consuming public and especially to the elderly, working folks, and anybody else who is struggling to make ends meet in this day-and-time.

Abusive credit card, mortgage, and consumer lenders are a serious threat to the families of working folks and retirees. Struggling or even desperate families can be deceived and exploited by unscrupulous lenders that charge exorbitant interest and fees. Predatory home loans are a real problem. There are mortgage lenders that cheat people, plain and simple, and that's a sad state of affairs. Excessive fees are being charged in many cases. There have been many elderly citizens, with equity in their homes, who have lost their homes because of the predatory lending practices.

About half of sub-prime borrowers are paying extra interest and fees, when in fact most of them—if not all—would qualify for better rates. That's hundreds of thousands of Americans, each of whom is paying thousands of dollars more than they should for their homes. Even worse, some families see their homes refinanced again and again, their equity diminished time and again, until one day they are in trouble and lose their home. All told, predatory lending costs homeowners an estimated $9 billion a year. But the Office of the Comptroller of the Currency is blind to the straits of millions of American families. The new regulations exempt national banks and even their state-licensed subsidiaries from state consumer protection laws. These rules, known as the Preemption and Visitorial Powers Regulations, gut state legislative and enforcement capabilities.

Strong consumer protection laws have been the responsibility of the states for more than a century. Most states have done a good job on the local level. Some have done better than others. States such as Georgia and North Carolina have been leaders in the fight against predatory lending. Unfortunately, Alabama has done very little to help consumers in any respect, and nothing on the predatory lending issue. A very strong law passed in North Carolina in 1999 is saving consumers $100 million a year, while mortgage credit remains widely available. The new OCC rules have created a safe haven for abusive financial practices in national banking law. The rules are not just a threat to customers of national banks, they also create an incentive for state-chartered banks to escape tough laws by converting to a national bank or forming a business relationship with an existing national bank. The rules also prohibit the 50 state attorneys general from enforcing consumer protection laws. Under longstanding precedent, national banks would be exempted from state false advertising statutes, do-not-call registries, and other consumer protections.

Senator John Edwards has always been a champion for ordinary folks. While in the U.S. Senate, John introduced legislation designed to strike down the two rules referred to above. His legislation would use the accelerated process under the Congressional Review Act to rein in runaway agencies. These rules would restore states' ability to protect their citizens from predatory lending, false advertising, and other abuses. We need a strong national law to fight predatory lending, but we certainly don't need to replace strong state laws with weak national ones. It's wrong to allow financial scams and rip-offs of struggling families. Instead, we should reward and help families who are working hard and building a better future. The folks who are being victimized by the predatory lenders have received little help from the Bush Administration. In fact, I can't think of one thing of substance that this Administration has done to curtail the immoral practices of the predatory lenders.

XIII. THE CONSUMER CORNER

The High Cost Of Drugs

I predict the high cost of prescription drugs will be one of the hottest political issues during this fall's elections. Senior citizens vote, and they are being hurt by the high cost of prescription drugs. We have learned that prescription prices have risen at three times the rate of inflation during the past four years. As we stated in other parts of this issue, the Medicare Prescription Drug, Improvement and Modernization Act isn't proving to be the answer. In fact, this Act may go down in history as a fiscal disaster. The drug discount cards that were supposed to be great for seniors have been a great disappointment. As a result, politicians are feeling the heat from consumers. AARP, the association of 35 million retired people, got into deep trouble with its membership when it supported the Medicare reform. At last count, according to media reports, over 60,000 had quit AARP in protest. Now the organization is leaning on Congress and the White House to correct the problems that have been created. AARP thought it was doing the right thing. Unfortunately, the group—like members of Congress—were badly misled. Now the fact that many citizens can't afford to buy their prescription drugs is causing great concern. Something must be done to correct the wrongs done. Only the President and Congress can get that done. The issue will be discussed in-depth between now and the November election date.

Preventing Drowning Of Children

Drowning is the second leading cause of death from unintentional injuries to children under five years of age. The leading cause, as you probably know, is from motor vehicle crashes. The Consumer Products Safety Commission makes drowning prevention one of its primary goals. By 2013, CPSC hopes to reduce drowning of children under five years of age by 10% from recent levels for swimming pools and other at-home incidents. From 1999 to 2001, an average of 242 children under five years of age drowned in swimming pools each year. In 2003, approximately 800 children under five were treated in hospital emergency rooms for near-death drowning injuries related to swimming pools.

CPSC has launched the Neighborhood Safety Network to help get life-saving information out to the public. If you would like to be a part of the Neighborhood Safety Network, you can go to CPSC's home page at www.cpsc.gov and enter your contact information. This is generally for groups, as I understand it. In addition to the obvious dangers with swimming pools, suction drain entrapments are a major problem. These entrapments involve hair or body parts being entangled in a pool or spa drain. The numbers of victims involving hair entanglement and body parts being sucked into a drain are staggering. Baby bath seats are also a source of hazard for small children.

There is a great deal of good information that you can get from CPSC by going to their website. The Consumer Products Safety Review put out by the Commission is also a tremendously good source of information. I encourage all parents to get all of the available information from CPSC. It can save young lives.

Children And ATV's Don't Mix

ATV sales reached $3 billion last year. Many of the sales are to families with small children. Forty percent of all ATV deaths are children under 16. ATV accidents and deaths have been rising for more than a decade. Consumer advocates have been pushing hard for laws to prohibit children under 16 from operating an ATV. One of the many problems is that the ATV industry is in charge of its own safety regulations. The ATV industry was placed in charge of policing itself back in the 1980s after the Consumer Product Safety Commission sued manufacturers, claiming the old three-wheeled ATVs were dangerous. The industry then voluntarily stopped making the three-wheelers and created a four-wheeled version. In exchange the industry was allowed to monitor itself. That does not seem to be working and the issue should be addressed by state legislators.

Recalls Fail To Reach Consumers' Ears

Defective and dangerous products should be recalled by the manufacturers. Some of them are, and that's good. While the number of consumer products recalled by manufacturers has risen sharply in recent years, a large percentage of those potentially dangerous items remain in the home or on the road, according to a Consumer Reports study. The study found almost one-third of all recalled vehicles, more than half of toys, appliances and other household items, and three-quarters of child car seats aren't being repaired or returned to stores. Many recalled products aren't returned or repaired, the study found, because consumers often aren't aware they own a faulty product. Companies are required to make a "good faith" effort to track down people who bought defective products, but that standard is negotiated on a case-by-case basis. While it is generally easy to find owners of faulty automobiles—making those recalls among the most effective—manufacturers aren't always able to notify the owners of smaller problem products.

Those products may have changed hands, and consumers who have discarded packaging and labeling may be unaware they own a recalled product. Anybody who buys a consumer product—other than a motor vehicle—generally fills out warranty information after the purchase. But, the study faulted companies for discouraging consumers from registering products by filling registration forms with burdensome marketing questions. Many consumers don't want to spend the time filling out the forms. Government Web sites, such as www.recalls.gov, should be checked to keep updated on product recalls. Consumer Reports found that nearly 19 million vehicles were recalled in 2002. Last year, recalls of products such as packaged food, drugs and medical devices were up nearly 24% from 1999. More than 5,000 recalls were initiated last year. Under consumer protection laws, makers and sellers of consumer products are obligated to notify the government when they discover a product could be dangerous. But, the study found that in the past five years, 10 companies have paid a total of $6.9 million in fines for failing to do so. R. David Pittle, senior vice-president for technical policy at Consumers Union, and a former commissioner of the U.S. Consumer Product Safety Commission, says that "Consumers depend on manufacturers being as vigorous in recalling a dangerous product as they were in selling it. The safety of the consumer depends on it." Consumer Reports rated the online information provided by 15 manufacturers and retailers. That information is available from the agency.

Two Men Accused Of Multi-Million Dollar Internet Scam

An alleged Internet scam currently being investigated by the FBI appears to be nationwide in scope. According to an *Associated Press* report, the scam has raised $11 million from 1,600 investors around the country during the past 17 months. The scam involved nonexistent products and a bogus Internet business named in documents filed in a U.S. District Court in Portland, Oregon. At press time, federal prosecutors are trying to seize property bought with proceeds from the scam. This involves valuable waterfront property in Gig Harbor, Washington, and property in Shalimar, Florida, The scheme to defraud investors was carried out by two men through a company called Pacific Achievements International. No charges had been filed when we sent this issue to the printer. But, the FBI and the Internal Revenue Service are investigating the two principals and their company, and charges are expected. Investigators claim the men targeted investors through the Internet and quickly raised millions of dollars. The business was incorporated in Nevada in August 2002.

According to *Associated Press*, the men pitched "e-book marketing" and offered expertise and consulting to "emerging business opportunities." Federal investigators concluded that the company "never engaged in income-producing business." In exchange for an initial contribution of $5,859, investors were told they could earn profits up to $1 million a month. The FBI first learned about the scheme in September 2003, after receiving reports from several banks about suspicious activity in the company's accounts. One account with Bank of America was opened in August 2002 with a deposit of $50 and by October 2003 had deposits of more than $6 million. All of the money was coming from wire transfers from people around the country. Instead of selling business-related products, investigators said that the two principals in the business used the money to return money to some investors, buy costly real estate and invest in high-yield scams. Court records say that $2.2 million was returned to investors who thought they were being paid dividends from their original investments. Unfortunately, it was sort of a shell game.

Bank records show that the two owners of the company made large withdrawals, including a wire transfer to a Nassau, Bahama's, bank, a mortgage company and a gold-trading company. In August 2002, one of the two principals used some of the money to make a down payment on a $688,000 house for personal use. The other withdrew large amounts of cash from the PAI account, according to court records. Another house in Florida that was estimated to cost as much as $650,000 was also purchased. A separate business called Destinations and Beyond, which paid young women to pose for a calendar and magazine, was started up. If the two men are guilty, as they appear to be, they should be put behind bars.

AT&T Agrees To Fine In 'Do Not Call' Case

AT&T Corp., which operates the U.S. government's "Do Not Call" registry, has agreed to pay $490,000 to settle charges that it called consumers who had asked to be left alone. This is the largest penalty to be levied thus far for telemarketing violations. The settlement with the Federal Communications Commission (FCC), however, closes investigations that could have led to a fine as high as $55 million for the

"Number 1" long-distance carrier. The FCC proposed a fine of $780,000 last November after it determined that the company had repeatedly called 29 consumers who had asked not to be called back, a violation of telemarketing rules put in place in 1991. That amount was reduced to $490,000 after the company disputed several of the complaints. The FCC also agreed to close a second investigation into AT&T's practices that could have resulted in the company being fined millions of dollars. It appears that AT&T came out "smelling like a rose" in this fight.

Lawsuit Against McDonald's Over French Fries

McDonald's Corp. has been sued in a federal court lawsuit that accuses the fast-food giant of failing to reduce fat in the cooking oil used in its popular french fries and other foods. McDonald's pledged in September 2002 to switch to a lower-fat oil by February 2003. The suit, filed on behalf of a California woman, says McDonald's has not disclosed "to the public in an effective manner that it had not switched to a new, healthier cooking oil." The restaurant chain had announced it planned to cut the trans fat levels in its fried foods. Instead, McDonald's has delayed the plan, citing concerns of product quality and customer satisfaction. My advice to folks is to simply stay away from the fast-food outlets that put out unhealthy food. If you must go there, however, there are a few choices that are fairly healthy. Frankly, I really can't encourage lawsuits of the sort recently filed against McDonald's. However, from a legal perspective it is pretty clear that McDonald's would have some exposure.

XIV. RECALLS UPDATE

Ford Recalls Vehicles

Ford Motor Co. said it has voluntarily recalled more than 170,000 of 2003 and 2004 model vehicles for a variety of defects that could cause fires or loss of power. The largest group includes 92,000 vehicles of the 2003 F-Series Super Duty pickup truck and Excursion sport utility models. There may be a problem with the battery ground connection to the engine block on models with six-liter diesel engines. In the worst case, a smoldering fire could result from a loose ground connection. There have been 35 reports of alleged fires related to the problem, but so far no accidents or injuries. The automaker also has recalled 53,500 of 2003 model Crown Victorias and Lincoln Towncars, which are mainly used as taxis or limousines. A fracture may develop on the rear axle shaft, resulting in a loss of power for the rear-wheel drive vehicles. No accidents or injuries have been reported related to the defect.

Defective Seats In Ford Taurus, Sable And Thunderbird Models

Ford Motor Co. are telling their dealers that they must stop the sale, demonstration and delivery of certain 2004 Ford Taurus, Thunderbird and Mercury Sable models due to potential seat failures. All Taurus and Sable models built at either the Atlanta or Chicago plants assembly from November 2003 through January 2004 with driver's side power seats are involved in the safety recall. In addition, Thunderbird models with a driver's side power seat built from December 2003 through January 2004 are included in the safety recall. This recall is because of a defective welding process in the power seat track between the track recliner bracket and the lower support bracket. According to Ford, this may cause a squeak/rattle and could develop into a seat frame failure that could cause the seat to come loose. Should the vehicle be involved in an accident, the seat failure could lead to an occupant restraint failure, causing serious injury or death. Dealers who sell a vehicle involved in this safety recall can be assessed a $5,000 fine per occurrence.

Ford Recalls 170,500 Vehicles For Various Defects

Ford Motor Co. is recalling 170,500 vehicles in North America over a variety of defects that could lead to rattling seats, squeaky wheels and trouble starting engines. The recall affects 145,500 F-Series Super Duty pickup trucks, Excursion sport utility vehicles, Crown Victoria police vehicles, and Lincoln Town Cars. The 2003 model-year pickup trucks and Excursion SUVs equipped with diesel engines have problems with battery connectors, which could affect the performance of the engine, cause it not to start and potentially melt other vehicle parts due to the high voltage. Both the vehicles were built from December 1, 2002, through March 31, 2003, in Ford's Kentucky truck plant. The Crown Victoria and Lincoln Town Cars have defective axles that could cause wheels to squeak or the vehicles to come to a stop, Ford said. Ford also recalled 25,000 2004 model-year Taurus, Mercury Sable and Thunderbird cars because of problems with the front seats, which could rattle or come loose. Dealers have been asked to stop selling and demonstrating the Taurus and Sable models with driver side power seats built from November 17, 2003, through January 15, 2004. The Thunderbirds with driver-side power seats built from December 15, 2003, through January 20, 2004, are involved in the recall. Ford says no injuries or deaths have been linked to the recall.

Millions Of Toys recalled

Four importers are recalling 150 million pieces of toy jewelry sold in vending machines across the U.S. The Consumer Product Safety Commission says some of the pieces have dangerous levels of lead and pose a poisoning risk to children. The Commission says about half of the 150 million pieces contain lead, but the industry decided to recall all of it, since it's difficult to distinguish lead from non-lead jewelry. No reports of injury or illness have been received for the recalled products. The Commission says parents should throw away recalled jewelry.

Bottled Water Coolers Recalled

An Illinois company is recalling 145,000 bottled water coolers because the company says they can overheat and possibly cause a fire. Elkay Manufacturing says there have been 14 reports of the electric water coolers overheating. Thus far there are no reports of any injuries. The recalled water coolers have both cold and hot water faucets. Most of the coolers are white, but some are granite-colored. The water coolers have the name "Elkay" on the serial number plate on the back of the unit. The five design names are: Classic, Legend, Eclipse, Sentry and Legend Countertop. Consumers should visit www.coolerfix.com and type in their serial number to determine whether their water cooler is recalled. Consumers can also call the company at (800) 788-2499 for more information. The recalled coolers were sold to bottled water companies and other businesses in the United States and Canada from 1997 through 2002. They were also sold at BJ's Wholesale Club and Sam's Club stores nationwide from 1999 through October 2003. Prices ranged from $139 to $149.

A Wider Stent Recalled By Boston Scientific

Boston Scientific (BSX) has expanded its recall of a popular heart device because of a malfunction. The company said the recall would involve about 85,000 Taxus drug-coated stents and 11,000 Express2 drug-coated stent systems after reports of deaths and injuries related to the devices, which are used to clear clogged heart arteries. The Taxus stents have been linked to one death and 18 serious injuries. The Express2 bare metal stent system is linked to two deaths and 25 serious injuries. The problem with Boston Scientific's lucrative heart device may extend beyond the current recall of 200 stent systems.

Brigham & Women's Hospital in Massachusetts, one of the nation's leading hospitals, has pulled Boston Scientific's Taxus stent from its shelves after reports that problems with the system may extend beyond the 200 devices the company recalled two weeks ago. Boston Scientific issued the recall after the U.S. Food and Drug Administration informed it of at least one death and injuries related to the stent, which has been a big money maker. The move by Brigham & Women's, which is affiliated with Harvard Medical School, suggested to some doctors that the recall could have greater ramifications than originally thought. The problem with the recalled stents involves the delivery catheters, which can prevent the balloon used to clear arteries of fatty deposits from deflating, the company said earlier. If the balloon fails to deflate properly, it can cause complications, including death or the need for heart bypass surgery.

XV. FIRM ACTIVITIES

Employee Spotlights

Graham Esdale

Graham Esdale started his law career with the Jefferson County District Attorney's office, where he was involved in over 150 trials. He was a member of the homicide and sex abuse division, which specialized in the prosecution of these complicated and sensitive crimes. Graham left the District Attorney,s office in 1994 to enter civil practice, where he specialized in products liability and workplace litigation. Graham left Birmingham in the fall of 1996 to join our firm. His primary responsibilities with us have been in the area of products liability and workplace injuries. Graham has been involved in the firm's tobacco litigation and other notable cases including a $114.5 million verdict against a bucket truck manufacturer. He recently obtained a $3 million verdict against Alabama Power Company involving an electrical accident. Graham is married to the former Leigh Ann Hibbett of Florence, Alabama. They have two children, Whitney and Robert. The family attends the Episcopal Church of the Ascension. Graham is a very good lawyer and does an outstanding job of representing his clients.

Chad Cook

Chad Cook, who has been with our firm for almost four years, is currently working as Section Head Administrator for the Mass Torts Section. In this position, Chad assists the Section Head with the overall management of the Mass Torts Section. He also supervises the Mass Torts staff and handles all personnel issues for the section. Chad started at Beasley Allen working as a Staff Assistant while attending law school. After graduation and passing the bar, Chad moved into a Staff Attorney role, working under the Mass Tort lawyers and assisting them with litigation. In January of this year, Chad became the Section Head Administrator for the Mass Torts Section.

Chad received his bachelor's degree from Auburn University at Montgomery. He subsequently earned a Paralegal Certificate in 1998. Chad graduated from Thomas Goode Jones School of Law in 2002. He currently teaches evening classes in the Legal Studies program for Faulkner University. Chad and his wife, Sharon, have been married for 5 years. They attend First United Methodist Church in Montgomery. Chad is a most valuable member of the firm.

Kelli Flanagan

Kelli Flanagan came to our firm in April of 2000 as a legal assistant to Larry Golston in what is now known as our Toxic Torts section. She currently works as a legal secretary for Mark Englehart and Kimberly Ward. In this position, Kelli is responsible for keeping files organized and also assists in opening case files for the department. Kelli graduated from Faulkner University with an Associates Degree in Legal Studies in May 1999. She is an active board member/newsletter editor of the Montgomery Area Mothers of Multiples, a support group for mothers of multiples. The past two years, Kelli has headed up the Lee National Denim Day Fundraiser Campaign for the firm, raising funds in the battle against breast cancer. The firm allows those who participate to wear denim on a specified day, in addition to our usual "denim Fridays." Kelli has done a great job organizing this event each year. Kelli and Stephen have been married for almost six years and have three daughters, four-year-old Allisa and two-year-old twins, Emilee and Bailee. Kelli and her family live in Shorter. Kelli does an excellent job for the firm.

Ann Easley

Ann Easley, who has been with the firm for three years, currently works as a legal secretary to Greg Allen in our Personal Injury/Products Liability section. Ann assists Greg in trials by filing all pleadings with the court, organizing and preparing files for trial, and setting up depositions. Her daughter and son-in-law live in Auburn, and she is enjoying her first grandchild born last month. Ann is active in her church, serving as a deacon and Chairman of the Missions and Benevolence Team. We are fortunate to have Ann in the firm. She is a good and hard worker and is a very good person.

Dana Jemison

Dana Jemison has been with us for over three years. She works in our Consumer Fraud Section as Dee Miles' legal secretary. In this position she assists Dee with running his office and the section. Dana assists the Section Head Administrator by opening new fraud cases, working on open/close letters and setting up cases in our database. Dana and her husband, Michael, have been married for 10 years and have a six-year-old daughter, Miranda. Dana is a most valuable employee and does very good work. We are pleased to have her with the firm. I learned recently that Dana is a real baseball fan and pulls for the "Biscuits."

Ann Kaufmann

Ann Kaufmann came to the firm in April of 2001 as Ted Meadow's legal assistant in our Mass Torts Section. In this position, she assists with the preparation of pleadings, performs pharmaceutical and corporate research, maintains documents for all filed cases, and does research on corporate documents produced though discovery. She has worked on the firm's settlement of Lotronex and Sulzer cases. Ann also serves as the ATLA Merida Litigation Group Coordinator. Ted Meadows serves as co-chair of this group. Ann graduated from AUM in 1989 with a Bachelor of Arts degree. In 1994, she received a Master of Science in Justice and Public Safety degree from AUM. Ann will sit for the Certified Legal Assistant exam in December. She is married to Tom Kaufmann, an architect who works as a Main Street Designer for the Alabama Historical Commission. Tom helps small Alabama towns preserve and/or restore their downtown storefronts. The Kaufmanns have a four-year-old son, Tommy, and are members of Eastwood Presbyterian Church. Ann is a most valuable employee, and we are very happy to have her with the firm.

A Tribute to Sam and Willa Carpenter

Recently, Sam and Willa Carpenter celebrated their 50th wedding anniversary. Their family held a reception for the couple on July 11th, and a tremendous crowd showed up to pay tribute to a fine and upstanding couple who have their priorities in life in good order. Willa, who serves as Human Resources Liaison Director for the firm, has been with us for 11 years and does an outstanding job. She and Sam are an inspiration to all who know them. We wish for them many more years together. God continues to bless this couple because of their obedience to Him.

XVI. A Personal Perspective

It is difficult to believe that most of the summer is gone. Fall and football will be here before we know it. Schools are now starting in many counties earlier than ever. In fact, by the time this issue is received, many children will already be in school. I guess that is progress of sorts in the important area of education. But, it does seem mighty early for the students and teachers. I would like to hear a good reason for cutting the summer short for our children.

I made reference last month to having studied Shakespeare—in a manner of speaking. For a fellow from the country (Barbour County), quoting or even referring to English Literature and especially Shakespeare is always risky. I am real glad my high school English teacher, Miss Sammie Davis, isn't around to read what I wrote. Fortunately, several of our readers have supplied me with the exact quote from one of the plays written by Mr. Shakespeare. So for those of you who—like me—would have needed help finding things such as this, I decided to give a more accurate account of my remarks. So here goes: "The first thing we do, let's kill all the lawyers," is found in King Henry VI, Part II, (Act IV), Scene 2. Dick the Butcher, an anarchist, observes that the first thing a tyrant must do to eliminate freedom is to "kill all the lawyers." In retrospect, I now have to wonder if Karl Rove didn't see this play at some point in his career as a master political strategist and "King Maker." However, maybe it's best that he not read it!

Now, let's take a look at the political scene. We are just barely into August and already both the Kerry and Bush campaigns are going full blast. What happened to the old days when political campaigns didn't really kick off until Labor Day? One would think, based on the activity level, that Election Day is just around the corner. Actually, there are over 90 days before we cast our votes. I am hopeful, the heavy campaigning, which has been going on for months, means that there is increased interest in this year's elections and that folks will go to the polls in record numbers. If so, that will be good news. In any event, I am convinced that this election is the most important in years. The future of our country, and its direction, are hanging in the balance. Personally, I don't believe we can take four more years of Karl Rove and Dick Cheney running our government. I suspect George W. Bush is probably a decent sort and would be lots of fun at your company picnic, but that doesn't qualify him to serve in the most powerful position in the world. The fact that ordinary folks are hurting across our nation because of the Rove agenda, which effectively shuts them out, bothers me. As John Edwards reminds us, there are two Americas and the division is getting wider. We must bring folks together—not divide them—and that's badly needed.

I feel compelled to state my views on Iraq. I believe that the war in Iraq has been mishandled from the beginning and it seems to have no real prospects of getting better. We have already lost over 900 young men and women who were put in harm's way at great risk with no apparent exit plan. The fact that over 5,000 military personnel have been wounded, with many of them disabled and impaired for life, makes matters even worse. The financial cost of a war that has actually put us at greater risk from the threat of terrorism is already staggering and still growing. All of this is slowly starting to sink in with the public.

I, like most all Americans, support our troops, and that support should be even stronger in a war such as the one being fought in Iraq. Our dedicated military personnel will go wherever they are ordered to go and will eventually get even the most difficult task done. The first war in Iraq was relatively easy to win, but the second war, that of occupation, has proved to be most difficult. It is unfortunate that if one even questions why we went to war in the first place or questions why we had no exit plan, he or she is immediately labeled by Karl Rove's lieutenants as being a liberal who is unpatriotic. I suspect the more we learn about why we went to Iraq, instead of focusing on the terrorist threat, the more the American people will be upset. Clearly, the war will be a major issue in the days leading up to Election Day—as it should be.

It now clearly appears that the Bush Administration was bound and determined to go to war in Iraq regardless of whether or not a valid reason for the invasion existed. That alone makes me question their motives. The fact that corporations with strong political ties—such as Halliburton—will make hundreds of billions rebuilding and occupying Iraq does make one wonder why we went after a country with a most evil leader, but with little capacity to do us harm. That is especially true when there were other countries much more lethal and dangerous to us. I doubt that few knowledgeable persons would rank Iraq anywhere close to North Korea, for example, as a country that could have done us tremendous harm at the time we invaded Iraq. But, the real threat to our country then—as well as now—was from the terrorists.

In any event, going to war in Iraq has accomplished a few things: our allies—with the exception of Great Britain—have pretty well left us; the world-wide terrorist threat has increased greatly; our financial picture at home is badly damaged because of a rapidly growing deficit; and we are occupying a foreign land at a tremendous cost in loss of lives and the unbelievably high expenditure of tax dollars. On the plus side of the ledger, we did get rid of the evil leader of Iraq and to some extent have saved our supply of oil. There may be other good things that go on that side of the ledger, but they are hard to find.

It is interesting to note that more than 150 American companies have already received contracts worth up to $48.7 billion for work in post-war Iraq. This figure—which is very conservative—comes from the Center for Public Integrity's Windfalls of War Project. The final tally will be in the hundreds of billions. Much of the work in Iraq continues to be uncoordinated within federal agencies, and no agency really seems to have a full picture of all of the post-war contracts. There are a number of federal agencies that are awarding the contracts, which makes it extremely difficult to track all of the monies being spent. The lack of resources on the federal level has also resulted in inadequate oversight of the current contacts. Sadly, there appears to have been a tremendous amount of abuse in the contracting process. For example cost-plus contracts that were originally to be in the $15 million range have already seen $91 million in funds allocated by USAID and the amount is still growing. It appears that a number of corporations are profiting over a war that is becoming more than just a little unpopular at home.

Having said all of this, I will now say that the American people will have less than three months to find out all they can about the candidates running under the banner of our two political parties. Not only should folks find out about the candidates, they should check out who is actually making the policy decisions for the campaigns. While few had ever heard of Karl Rove before George W. Bush became President, we now know a great deal about this man, and what we know about him is pretty scary. Rove appears to enjoy hurting folks, and that's something I can't tolerate. This election—in large part—may wind up being sort of a referendum on the Boy Genius who directs both the Bush White House and the Bush-Cheney campaign.

On the subject of politics, I know that the campaigns will get even more heated as the weeks pass. But, I would suggest to both sides that they consider putting in a new rule for politics in America, and that would be The Golden Rule. If that happens, our country will be much better off.

On a personal note, our Managing Shareholder's uncle, Billy Lindsey, died recently after a multi-year bout with cancer. Billy was the only brother of Claudia Methvin (Tom's mother). Claudia and Billy grew up in rural Washington County. I understand that Billy had no fear of dying because of his love for and relationship with Jesus Christ. He became a tremendous inspiration for many people as he dealt with his illness. I am told that his favorite Bible verse was the 91st Psalm, which was also his reminder that God will take care of His people regardless of their circumstance. When reading the 91st Psalm, I can understand why Billy Lindsey had no fear of death. It speaks of the security that believers will find in our God. Complete security is available to those who make God—and not something else—their refuge. I pray that many will come to the conclusion that the choice made by Billy Lindsey will also be their choice, and if that occurs, they too will lose the fear of death and will be able to make it while on this earth. The promise of eternal life is available for all of us, and the great news is that God keeps His promises. Billy Lindsey is now in a better place and free from the pain he suffered on this earth. His family knows that and so do I.

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