



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

THE POLITICIAN SCENE

Most political pollsters tell us that George W. Bush will carry Alabama easily and perhaps by as much as 17 to 20 points. Based on my conversations with folks around the state, however, I believe that if the election were today, it would be much closer. I have also learned over the years that things can change rapidly in politics. I believe that such issues as the war in Iraq, the record deficit, the failing economy, corporate corruption and the extremely high cost of prescription drugs all tend to fall in Senator John Kerry's favor. In my opinion, the presence of John Edwards on the ticket has to help in all of the southern states, including Alabama. Frankly, I don't believe that either candidate can totally ignore the South and win the presidency. I find it rather interesting that no southern state is designated as a battleground state by the so-called political experts.

It would be a major upset, but I believe the Kerry-Edwards ticket has a chance to do better than expected in Alabama. Citizens in our state don't like **dirty tricks** and that's where the Democrats may have a real advantage. Karl Rove and his band of operatives are masters in the art of negative campaigning and the use of dirty tricks. That's the Rove style, and I have seen nothing to make me believe anything has changed. Rove is clearly calling all of the shots for the Bush campaign. That may make a difference in Alabama—we will see!

THE NEED FOR REFORM

The tort reformers have done a very good job of convincing editorial writers and a good number of politicians that it's fine for candidates to take millions of dollars from Corporate America, but

wrong to take contributions from lawyers who represent consumers. They have especially done a good selling job concerning contributions in judicial races. I believe it's safe to say that few injured parties or victims of corporate wrongdoing have ever contributed to political candidates. On the other hand, major corporations and their officers consistently give big bucks to politicians, including candidates for judicial office. I have always considered it my obligation to be actively involved in politics on behalf of my clients. I know most of the folks I represent don't have the financial ability to contribute money. I believe strongly that it's my duty to represent their interests in the political arena, and I have tried to do so. I will never apologize for that involvement.

I will say that it has always bothered me to see corporations contribute money to judges who are sitting on courts that will actually hear their cases. Oftentimes, trade associations and groups such as the Business Council of Alabama—through political action committees—contribute large sums to sitting judges when they are running for reelection. In fact, there have been occasions where a defendant, a party to a pending lawsuit, makes a contribution through a political action committee to a justice on the Alabama Supreme Court. In my opinion, that is wrong and can't be justified.

I am firmly convinced that we badly need campaign finance reform for judicial races. I have been on record for years as having favored limits on contributions and expenditures in judicial races. Unfortunately, Corporate America will never agree to any type of meaningful reform. They have fought every effort to bring about reform. My proposal for judicial candidates is very simple, and here it is:

- A limit of \$1,000 on contributions by individuals and corporations;
- No contributions by a political action committee would be allowed;

- No contributions by political parties would be allowed;
- No spending relating to judges or judicial races would be allowed;
- No contributions would be allowed—directly or indirectly—to a judicial candidate when the “giver” has a case pending in court;
- Full disclosure of all contributions would be required to be made by a judicial candidate's campaign committee;
- A limit of \$500,000 that can be spent

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by a judicial candidate's campaign committee during an election cycle;

- All expenditures on behalf of a judicial candidate must be made by the candidate's campaign committee; and
- Stiff penalties in place that would apply to any violation of the new law.

I challenge the leadership of both the Alabama Democratic Party and the Alabama Republican Party to jointly sponsor a bill to be introduced in the next session of the Alabama Legislature that includes, as a minimum, the above proposals. In my opinion, passage of such a bill would insure that **justice** could no longer be **bought** in Alabama—if that has ever happened in the past. If the editorial writers in Alabama are serious about campaign finance reform, they will endorse my proposal or one that's much stronger and help get a bill passed in the next legislative session. It was encouraging to read the Editorial in the *Birmingham News* entitled "Alabama Justice Still Too Costly" on September 22nd. While I don't agree with all they said, at least they recognize the problem.

A MOST INTERESTING REVELATION

A few weeks ago, reports of money from gambling interests coming into Alabama appeared in all of the local news media outlets. The real story was not just the amounts coming in, but the group getting the money. An editorial in the *Birmingham News* took the Christian Coalition of Alabama to task for its involvement. The *News* wrote:

You see, it turns out the Christian Coalition, a long leader of the fight against gambling in Alabama, has been fueled in part by money from out-of-state Indian casinos. Not directly, of course. As reported by the Washington Post, the Montgomery Advertiser and Roll Call, the Indian casino money was filtered through Washington, D.C.,

lobbyists, to Ralph Reed's consulting firms, to various anti-gambling fights in the South, including Alabama.

It appears that Mr. Reed—a former national leader of the Christian Coalition and now a top campaign advisor to President Bush—acknowledged getting as much as \$4 million from the Indian casinos. I have felt all along that the Christian Coalition of Alabama was nothing more than a political organization. The recent revelations on gambling money seem to confirm it. I agree with the *Birmingham News* that the Christian Coalition should reveal all of its contributions—including the amounts of money received from gambling interests—on a regular basis. I suspect lots of folks who practice their Christian faith on a daily basis were shocked to find out the truth on the gambling fight in Alabama. Credibility can be lost very easily when it appears you don't practice what you preach!

THE EXXON MEDIATION

The next round of mediation sessions will involve the Chief Executive Officer of ExxonMobil Corp. and Governor Riley. Eric Green, the mediator, will meet with CEO Lee Raymond on October 4th in Houston and then with Governor Riley at the State Capitol on October 8th. I hope these sessions will prove to be productive. The negotiations during mediation sessions are confidential and for that reason I can't discuss anything that has happened thus far. However, my opinion as to the strength of the case hasn't changed.

II. COURT WATCH

ATTACKS ON THE JUDICIARY

For the past several years, the Republican Party has been waging war against what they have labeled activist

federal judges. In my opinion, this has to be hypocrisy at the highest level. Surely the party leaders know that most of the federal judges now serving in this country were appointed for life by Republican Presidents. The current make-up of the U.S. Supreme Court is a prime example. I have to believe that the GOP political bosses know better. Alabama citizens won't buy this sort of thing, and any political candidate who participates in this brand of politics may live to regret it.

A recent poll in Alabama revealed that Alabama citizens strongly support the judiciary as an institution and have very strong feelings about the right to trial by jury. In fact, a recent poll revealed that in our state only 10.6% of Alabama citizens favor mandatory, binding arbitration. The fact that 78.1% felt arbitration was wrong in any type consumer dispute is most significant. Maybe judges who **favor** arbitration when the U.S. Constitution says the right to trial by jury is **guaranteed** are really the **activists** in our judicial ranks. In any event, when almost 80% of the people are against arbitration it makes you wonder why the politicians aren't listening—could it be the campaign contributions?

DEFENDANTS DO VERY WELL IN THE COURTS

The tort reform message that has been spread by Corporate America is that Alabama is **Tort Hell**. It appears that some folks—especially editors of large newspapers—actually believe this myth. I have always heard that if you tell a lie enough times, it will eventually be believed by a good number of folks. The truth of the matter is that the Alabama Supreme Court has been very hard on ordinary citizens who have had their cases heard before the high court. Lawyers who have to appear before the Court know that full well. But, I never thought I would actually see the court's record set out in writing by a lawyer who represents corporate defendants in litigation. In June of this

year, a letter was written by a defense lawyer that is most revealing. It was a response to a settlement request by a victim's lawyer in a pending case. This is the defense lawyer's assessment of Tort Hell:

*We think it would be wise for your client to keep in mind that of the last 25 jury trials which have resulted in a Plaintiff's verdict and have been appealed, 23 of those have been **reversed** by the Alabama Supreme Court. (Emphasis supplied.)*

That assessment surely doesn't sound like a description of Tort Hell to me. In fact, consumers have had a very hard time in our state's appellate courts for years. We have had very good cases reversed. On occasion, after having a case reversed, I didn't even recognize the rendition of the facts as written in the court's opinion. There are some very good justices on our Supreme Court, but there have been a very small number on the court over the years who certainly appeared to have had an anti-consumer agenda. I always wondered if corporate campaign donations—with or without strings attached—may have had an influence on those justices. I surely hope not. In any event, campaign finance reform would solve that problem.

IMPACT OF STATE FARM DECISION ON PUNITIVES REMAINS UNCERTAIN

More than a year after the U.S. Supreme Court ruled on punitive damages awards, the widespread impact of the decision remains uncertain. Advocates of limiting tort recoveries and consumer advocates are pretty well split on the effect of the high court's ruling. After the passage of almost two years, the fallout from *State Farm v. Campbell* has been somewhat more muted than many predicted. The accepted ratio of compensatory damages to punitive damages has been all over the board.

Simply put, *State Farm* just hasn't been the "big deal" that many tort reformers predicted it would be. There have been many cases with punitive damage awards well above single-digit ratios. Many legal scholars say that until a verdict exceeds the 9:1 ratio, the constitutional analysis doesn't even apply. In the post *State Farm* cases, the courts go through the constitutional review and analysis to determine whether the ratio is appropriate and then decide whether there is a problem with the amount.

The Supreme Court in *State Farm* didn't establish a requirement that the injured party provide specific types of evidence to show that there is a sufficient nexus between the wrongful actions of the defendant and the specific harm to the plaintiff. The High Court clearly appears to have entrusted the lower courts with the job of determining how to prevent juries from punishing defendants for unrelated prior transgressions. Clearly, the full effects of *State Farm* remain to be seen. There will be continued development over the next several years. The only thing that is certain at present is there isn't a hard and fast rule on punitive damages. The *State Farm* case is back before the U.S. Supreme Court and that will be discussed below.

TOP FIVE CASES OF CORPORATE LAWSUIT ABUSE UNCOVERED

The Foundation for Taxpayer and Consumer Rights (FTCR) has announced its list of the top five cases of corporate lawsuit abuse. This was in response to GOP Congress members who have declared a "Lawsuit Abuse Week" and have targeted only cases brought by consumers for reform. FTCR president Jamie Court stated:

For all big business's talk about frivolous litigation, Congress should look at industries' own litigiousness. The American public should realize big corporations waste more time and money on

frivolous litigation than any other group in America. The only reason reforming corporations' frivolous litigation practices is not on the table on Capitol Hill is because big business is the unofficial sponsor of 'lawsuit abuse week' and of similar propaganda aimed at limiting the ability of injured individuals to hold big corporations accountable.

The following are FTCR's Top Five Cases of Corporate Lawsuit Abuse:

- **Allstate** sued Kraft Foods, the maker of the Toastette toaster pastry, and Pop-Tart creator Kellogg to avoid having to pay homeowners' fire claims. Allstate claimed Kraft and Kellogg were responsible for the fires by making dangerous, flammable toaster pastries.
- **Caterpillar** sued the Walt Disney Company for portraying bulldozers in a bad light. Caterpillar tried to block the release of "George of the Jungle 2," claiming that the film gave the company a bad name because its machines are used to attack the jungle. A judge found that "even the most credulous viewer" would understand that the people operating the machinery, and not the machinery itself, intended to destroy the jungle.
- **Mattel** sued artist Tom Forsythe for his photographs of Barbie in poses the toy maker claimed defamed her character. The toy maker also sued recording label MCA when musical group Aqua released the song "Barbie Girl" that the company claimed defamed the doll with sexual innuendo. Both suits were dismissed, and Mattel had to pay \$1.8 million to the artist in attorney fees, for trying to intimidate him into not using Barbie's image in his art.
- **Kellogg's** sued the owners of **Toucan Golf** for trademark infringement. The cereal maker claimed that its Toucan Sam logo for the Froot Loops cereal would be damaged by

Toucan Golf's golf-playing bird. A court found that no one could possibly confuse breakfast cereal and golfing.

- **Amway and Proctor & Gamble** are engaged in an ongoing fight—which has encompassed 20 years and has stretched to the courts—over rumors that P&G is in league with Satan. P&G claims that Amway is accusing it of ties to Lucifer. A judge dismissed the fight's most recent incarnation in court, and expressed her hope that the corporate giants would continue their fight at the commercial level, and stop wasting judicial resources.

These are all cases brought by corporations, and you might agree they border on being “frivolous.” To learn more about corporations that file lawsuits, you might want to read *Corporateering: How Corporate Power Steals Your Personal Freedom And What You Can Do About it* (Tarcher/Penguin/2004).

INSURERS URGE U.S. SUPREME COURT TO CHANGE LANDMARK PUNITIVE DAMAGES CASE

The National Association of Mutual Insurance Companies (NAMIC) and the Property Casualty Insurers Association of America (PCI) have filed an amicus brief urging the U.S. Supreme Court to consider a remand of a second Utah Supreme Court judgment in the *State Farm* case. On the first remand to the Utah Supreme Court, the Utah court upheld punitive damages of \$9 million to the plaintiffs. The issue of whether the U.S. Supreme Court's decision was correctly followed by the Utah court was raised and will be decided on the latest appeal. I am sure there will be more interested parties who will file friend-of-the-court briefs in this case.

THE BIG MULES SKIP ENDORSEMENT IN ONE IMPORTANT RACE

In an interesting move, the political action committee of the Alabama Farmers Federation made no endorse-

ment in the Supreme Court race between Republican Tom Parker and Democrat Robert H. Smith. I was rather surprised to learn of Alfa's decision because Tom's father was legal counsel for the Federation when it was known as the “Alabama Farm Bureau.” Of course most folks in Alabama don't even know about that connection. Apparently, it didn't register with the current bosses at Alfa. In any event, I suspect Tom's connections with Roy Moore may have been the real reason for his not getting Alfa's endorsement. Regardless of why it happened, this turn of events is most significant and it definitely will have an effect on the outcome of this race.

The Business Council of Alabama took the same course in the Parker race and said its refusal to support the Republican candidate was due to his receiving campaign help from lawyers who represent victims in lawsuits. I guess it's fine to take millions from Corporate America, but wrong for a judicial candidate to take any campaign money from consumer advocates. In any event, a Republican candidate who has extremely close ties to a pretty popular man in Alabama is left to **row** his own boat. At least Tom won't have to worry about the stigma of taking money from Corporate America. I will say more on the flow of corporate money into judicial races later in this Report.

I BELIEVE CHRISTIANS ALSO HAVE RIGHTS

Our firm has filed a lawsuit in federal court in Montgomery against Hager Hinge Company on behalf of an employee who was unlawfully fired from his job. The basis for the suit is religious discrimination by the corporation's bosses. John Perdue, who filed the lawsuit against his former employer of twenty-three years, has been harassed, ridiculed and ultimately terminated solely because of his religious beliefs. The terminated employee had left a voice-mail message to an outside

party in which he shared his Christian faith by stating: “Jesus loves you; Jesus is the Messiah and I hope you come to know the saving knowledge of Jesus Christ.” One month after that call Mr. Perdue was called to the front office of Hager Hinge and suspended. Subsequently, he received a letter of termination. The reason stated for the termination was that Mr. Perdue had left “an insulting, offensive and harassing phone call” on a customer's voice-mail.

Mr. Perdue was terminated simply because he shared and expressed his Christian faith while on the job. What Hager did amounts to a basic violation of our client's constitutional rights. At a time when we should be encouraging morality and justice in the workplace, a major corporation can't be allowed to punish an otherwise good employee simply because he expressed his Christian faith. The law in this country clearly prohibits such actions and it can't be tolerated. We intend on helping a **good** man who needs our help, and that's why this suit was filed. Larry Golston and I will be the primary lawyers working on this case.

TWO PROFESSORS CHALLENGE DRUMMOND GAG ORDER

You may recall that a civil lawsuit was filed in 2002 accusing Drummond Co. of backing fighters in Colombia who are alleged to have killed union organizers. Now two professors have challenged a federal court order that prevents some public discussion. U.S. District Judge Karon Bowdre, who is a widely respected federal judge, granted the gag order sought by Drummond's lawyers on July 27th. Later, the order was challenged. A University of Alabama law professor joined in the challenge. The issue is whether the gag order threatens the free flow of information guaranteed by the First Amendment.

Judge Bowdre's order prevents those in the case from talking about evidence, expected testimony, the character of

witnesses or other matters that are usually inadmissible in court. It also required the Colombian union and families to remove from Web sites information about the case, and links to other Web sites that contain the same. One of the protestors has written about Drummond's coal mining in Colombia for South American and U.S. news outlets.

Two years ago, a Colombian labor union and relatives of murdered miners sued Drummond in Birmingham federal court under the 1789 Alien Tort Claims Act, saying the company supports anti-union fighters. This law is being used to police overseas behavior of U.S. firms. For example, Exxon Mobil Corp. and Coca-Cola Corp. are defendants in similar lawsuits. The Alabama suit against Drummond stems from the deaths of company workers in Colombia. The union leaders were pulled from Drummond buses by armed men and shot. Thus far there have been no arrests. Drummond has denied any involvement in the killings or in any anti-union activities.

COURT VACATES \$15 MILLION AWARD AGAINST FORD

The Kentucky Supreme Court has vacated a \$15 million judgment against Ford Motor Co. in the case of a man who was crushed by his pickup. The justices ordered the case back to the trial court for a new trial on punitive damages. The Supreme Court said that the jury should not try to "punish" Ford for its conduct outside Kentucky. Because Ford had paid nearly \$5.6 million in compensatory damages, plus interest, compensatory damages were not at issue in the court's ruling. The victim in the case, a coal miner for Sand Hill Energy Inc., was killed in 1993 when a parked Ford pickup slipped into reverse and crushed him. The jury heard testimony at trial that Ford sold as many as seven million vehicles with defective transmissions and had 23,000 reports of vehicles slipping from park into reverse. In addi-

tion, jurors were told that hundreds of people had been killed.

The jury set punitive damages at \$20 million in the first trial. The state Supreme Court had reduced the award to \$15 million in 2002. Subsequently, the U.S. Supreme Court ordered the award to be reconsidered. Writing for the majority, Justice James Keller of the Kentucky Supreme Court said it was clear "that the jury was encouraged to punish Ford for its conduct throughout the country." The justice said further that in a new trial, the jury must be instructed about limitations on "extra-territorial punishment." In a dissenting opinion, two Justice's said \$20 million was not an unreasonable award. It was stated in the dissent:

The case is an action for wrongful death. It is clearly in the interest of the commonwealth to protect its citizens from such harm and could be considered as distinct from the interest of protecting citizens from mere economic damages. Another trial does no service to anyone and merely blurs the line between compensatory and punitive damages.

The final outcome of this case will be watched closely. This is another example where the evidence used in cases warranting punitive damages will be carefully scrutinized.

ONE JUDGE SAYS SARBANES-OXLEY CAN'T REACH OLDER CLAIMS

I certainly thought that the Sarbanes-Oxley Act of 2002 established more generous time limits for filing securities claims. But a federal judge has ruled that the law cannot be used to revive claims for which the previous, shorter time limits had already expired. In a case styled *L-3 Communications Corp. v. Clevenger*, U.S. District Judge Anita B. Brody found that none of the federal appellate courts has yet tackled the question, but that numerous district court judges have shown a strong trend—with just one exception—

against allowing Sarbanes-Oxley to revive previously expired claims. The legislative history of the law seems to clearly show that Congress intended the new time limits to apply to any case filed after the statute was passed. Judge Brody refused to buy this argument, saying "such an inquiry would be inappropriate." Judge Brody felt that the text of Sarbanes-Oxley is ambiguous. It will be interesting to see how the appellate courts handle this issue. Maybe this decision is another example of what the GOP means when it talks about **activist** judges who make law. I really thought Congress had made its intent very clear.

OIL COMPANY TO APPEAL SUNBURST RULING

A Montana jury ordered ChevronTexaco Corp., the number two oil company in this country, to pay \$41.1 million for environmental damage from a gasoline pipeline leak in 1955. This case should get the attention of energy companies that under the 1980s-era Superfund law have been held responsible for leftover contamination at defunct refineries. The case involved underground contamination at an old refinery in Sunburst, Mont. Seventy-five residents of Sunburst and the farming community's school district sued in 2001, claiming ChevronTexaco failed to adequately clean up the oil spill and that leftover toxins were harming public health and property values. The jury first awarded compensatory damages and also found that punitive damages were warranted. State law in Montana requires an immediate hearing when punitive damages are awarded. Accordingly, after hearing arguments from both sides, jurors were sent back by the judge to deliberate that issue. After further deliberating, the jury awarded \$25 million in punitive damages for a total verdict of about \$41.1 million.

The jury award of compensatory damages will be used to remove underground chemicals left over from a

1955 gasoline pipeline leak at the Sunburst Works Refinery site. The remnant toxins, including the carcinogen benzene, exist in a 19-acre plume under the town. The class action suit was filed in 2001 by residents who say that monitored natural attenuation is inadequate because it takes too long to work—anywhere from 20 to 100 years or more—and that they were damaged as a result. In the meantime, they're afraid for their health and unwilling or unable to sell their property. The plaintiffs want the chemicals removed with a variety of active remediation techniques, including vapor extraction and pump and treat, in which pumps are used to bring groundwater to the surface, where it can be cleaned more easily. The residents hired an environmental cleanup expert who estimated that such active forms of cleanup could be done for \$8.6 million to \$15 million. Texaco puts the cost as high as \$35 million. ChevronTexaco is asking for a new trial. If the trial judge denies the request, the company says it will appeal the verdict to the state Supreme Court. I predict that this verdict will lead to lawsuits in other locations with 200 Superfund sites.

NEW YORK JUDGE CHARTS A COURSE ON ELECTRONIC DISCOVERY

A state court judge in New York has tackled a growing, but largely uncharted area of the law in New York. The issue, one that courts are facing in other states, deals with electronic discovery in lawsuits: Who bears the cost of electronic discovery? That's a tough legal question because it's not only new, but expensive. In a pending case, Justice Leonard Austin used the rule that has been applied to paper document production: The extraction of information from an old computer will be borne by the side requesting it. There is very little existing law on this issue. The judge said he was ruling in what appeared to be an absence of precedent that specifically dealt with electronic discovery. It's important to

note that some material on computers is buried, but can still be retrieved. Does a party need to search for it when equivalent paper records are available? And who pays for what in a costly retrieval when data stored in an obsolete system requires a computer archeologist to dig it out?

The case involved litigation between parties in the electrical contracting business. Lipco Electrical Corp. and Action Electrical Contracting Co. formed an electrical contracting joint venture, Lipco/Action, and hired ASG Consulting Corp. to prepare estimates and bids for public works projects and to maintain bookkeeping records of ongoing projects. At first, Lipco/Action paid ASG on an hourly basis. That changed in 1993. The terms of the new arrangement are at the center of the dispute. ASG claimed that under the new agreement, it would receive a flat monthly amount. Lipco/Action countered that it agreed to pay a flat fee only to simplify billing procedures but that the parties would adjust the final bill upward or downward after ASG computed its actual hours of service upon completion of a project. Among a number of discovery disputes, the thorniest involved Lipco/Action's demands for electronic files, including back-up tapes, accounting records and a cash disbursement book. The Judge said in his ruling:

Electronic discovery raises a series of issues that were never envisioned by the drafters of the [Civil Practice Law and Rules]. Neither the parties nor the Court have been able to find any cases decided by New York State Courts dealing with the issue of electronic discovery. With electronic discovery, totally different issues arise. Some of the questions presented include: are the documents still on the hard drive or are they on some form of back-up; have the documents been deleted; what software was used to create and store the documents; and is that software commercially available or

was the software created and/or licensed specifically for the user.

ASG did not dispute the materiality of the requested information. Interestingly, the company argued that it had turned over printed copies of the same material. Their argument was that extracting it electronically would be difficult and costly because its current software could not retrieve data stored from 1993 to 1997. New software would be needed to extract the data and manipulate it to a presentable form. On the other side, Lipco/Action claimed the software used by ASG was common to the construction industry and that retrieving it should present no special problem. Lipco/Action contended that ASG should pay the cost of retrieval.

Judge Austin ruled that the information held in the electronic files was discoverable. Addressing the cost issue, the judge noted that in federal courts the party holding the discoverable information generally pays the costs of extracting it, so long as the process is not unduly expensive and burdensome. In limited circumstances, federal courts shift the costs in accordance with federal rules. The Judge held that the costs fall upon the party demanding the materials and stated further: "Therefore, the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in federal courts. The court need only determine whether the material is discoverable and whether the party seeking discovery is willing to bear the cost of production of the electronic material." The judge declined to order the production of the electronic evidence, however, until Lipco/Action agreed to pay the bulk of the costs. He also demanded that the parties present the court with detailed cost estimates of the process. This case is important because it sets some guidelines for discovery in an area that is relatively new and undeveloped. But, the law in this important area will develop rather quickly as a matter of necessity.

Source: *New York Law Journal*

III.

THE NATIONAL SCENE

GOOD CONNECTIONS IN HIGH PLACES PAY OFF

I doubt that many American citizens could tell you who Pete Alridge is or what he does. For the uninformed, you should know that Pete has made a career of working both sides of the street. He has been in a revolving door between the Pentagon and military contractors. Pete was Secretary of the Air Force—then he was President of McDonnell Douglas (a government contractor)—then he joined the Bush Administration and was in charge of all Pentagon purchases—then he quit and became a highly paid board member at Lockheed (just after he approved a \$3 billion contract for Lockheed to furnish jet-fighters to the government)—then he was made chairman of a space exploration commission—which wants to privatize NASA (which would be a great thing for his boss—Lockheed). Well, I guess this is a prime example of how it pays to be a Bush-buddy!

SWIFT BOAT VETERAN GOT \$40 MILLION CONTRACT FROM BUSH

The attack ads on Senator Kerry's Vietnam service by the 527 committee were carefully planned and carried out. The group that has aired the factually unsupportable smear ads against Kerry's war record was obviously well financed. The Bush White House has denied any connection to the Swift Boat Veterans for Truth. However, a new report reveals that one of the key accusers in the smear ads was a lobbyist for a company that recently received a rather large federal contract from the Bush Administration. As the *Washington Post* reports, Rear Admiral William L. Schachte Jr., the man who claims Kerry was not under fire when he received his first Purple Heart, is a top lobbyist for a defense contractor that

recently won a \$40 million grant from the Bush Administration. According to a March 18th legal filing by his firm, Blank Rome, Schachte was one of the lobbyists working for FastShip's effort to secure federal contracts. On February 2nd, FastShip announced the Bush Administration had awarded the company a \$40 million contract.

Schachte also has other connections to the Bush Administration. *The Washington Post* notes David Norcross, Schachte's colleague in the Washington office of Blank Rome, was chairman of the Republican Convention in New York. Records show that Schachte was a contributor to Bush's 2000 and 2004 campaigns. Additionally, Schachte helped organize veterans' efforts against Senator John McCain and for Bush in the 2000 South Carolina primary. Actually, Schachte wasn't the first member of the Swift Boat Veterans for Truth to be closely connected to the President. The Bush-Cheney campaign's top outside lawyer was forced to resign from the campaign after he admitted providing legal services to the veterans' group. The Bush-Cheney campaign's adviser on veteran's affairs was also featured in one of the smear ads. I don't believe anybody really doubts that Karl Rove was the architect of the smear campaign against Senator Kerry. It was clearly vintage Rove at his best or worst—based on one's perspective. It is rather ironic for a man with Rove's lack of a military background to devise an attack on a war hero's record.

TORT REFORM MYTH EXPOSED

Sometimes politicians make things so complicated the average citizen feels left out of all decision-making. A legislator in Ohio recently took an unusual approach when dealing with a tort reform bill. He simply asked judges what they thought about it. Scott Oelslager, a Republican Representative, sent surveys out to judges seeking their thoughts on tort reform. The result was not something Karl Rove or the U.S.

Chamber of Commerce would like to hear. Of the 234 judges surveyed, 94 responded and the response was overwhelming: nearly all of the judges indicated that reform of the judicial system is unnecessary. Representative Oelslager told the *National Law Journal*: "Based on the results of the survey ... there is obviously no systemic runaway juries. We want to be sure of what is really happening in the courts if we're going to be analyzing and changing the legal rights of the people of Ohio."

According to the results of the survey, 99% of the judges responded that, in their courtroom, jury awards were disproportionately high only significantly less than 10% of the time. Seventy-seven percent replied that there was no need for legislation capping punitive damage awards, and 73% said that the current rules to limit frivolous lawsuits are sufficient. I am not at all surprised at the outcome of this poll of judges. These are the men and women who hear the cases at the trial level. They are in a pretty good position to know what's going on in their courtrooms.

CHAMBER OF COMMERCE ATTACKS JOHN EDWARDS

We learned a few weeks ago that the United States Chamber of Commerce and other business groups planned to spend over \$10 million attacking Senator John Edwards. A new organization, the November Fund, was formed to run television and mail advertisements in critical swing states in the presidential election. The new organization was created in an effort to paint the North Carolina Senator as being bad for business. Persons involved with the group include co-chairmen Craig L. Fuller, who was an aide to President Ronald Reagan and chief of staff to his vice-president, George H. W. Bush, and Bill Brock, former Senator, labor secretary and Republican national chairman. As we all know, before entering the U.S. Senate in 1999, John Edwards was a

successful lawyer in his home state of North Carolina. He has long defended his work as a lawyer by simply pointing out that he represented ordinary people who had been mistreated by big companies and insurance interests. The Chamber of Commerce attack, devised by Karl Rove, will target John Bush's Brain believes this will help the Bush campaign. He may find out that it is backfiring around the country.

The November Fund began its undertaking at a time when Corporate America is under siege for massive fraud and corruption. This new group is trying to deflect attention from the problems in Corporate America by attacking trial lawyers. It's sort of like the attacks on John Kerry's war record. The Swift boat group was set up by individuals closely connected to the Bush campaign. I thought that was illegal under campaign finance laws, but maybe it isn't. In any event, the November Fund's activities are simply more of the same type stuff that the 527 committees have been doing for months. The Bush-Cheney campaign has allowed front groups to do its dirty work, which is typical of a Karl Rove-designed political game plan.

The new group is currently running television advertisements and sending direct mail to voters in what are referred to as battleground states. Officials of the Chamber of Commerce and of the November Fund should have to say precisely which special interest groups are financing their new campaign. Actually, the November Fund is just another addition to the Chamber's usual array of questionable political activities. The Chamber runs a political action committee that contributes big bucks to candidates, and it hasn't tried to hide its political motivation. The Chamber also finances advertisements like the barrage currently attacking Senator Tom Daschle, who is up for reelection in South Dakota. As we all know, the Chamber has also poured millions into judicial races in states around the country.

The Rove political machine obvi-

ously thought they had a real hot issue. Karl Rove has made his political living attacking and maligning lawyers like John Edwards, who represent **ordinary Americans** and take on **corporate wrongdoing** and corruption. While Rove obviously believes that's a good thing for his candidates to do. I predict he will find out that it won't work in this era of corporate corruption. Folks have caught on to the Rove brand of dirty trick politics and don't appear to like it. They have also learned how truly corrupt some in Corporate America have become. Attacking those who take on corporate wrongdoing and corruption may expose how truly bad Karl Rove has become. Senator Edwards should be very proud of his record of standing up for children and families who otherwise wouldn't have had a voice. I hope that he will continue to stand up for ordinary citizens as he takes his fight across the country. As vice-president, he will be in a much better position to carry on that fight.

GOVERNMENT GUTS ITS ENVIRONMENTAL JUSTICE POLICY

Ignoring the expressed concerns of citizens' groups, including Public Citizen and the Washington, D.C.-based Nuclear Information and Resource Service (NIRS), the U.S. Nuclear Regulatory Commission published in the Federal Register its final policy statement on the issue of "environmental justice." This is the phenomenon of disproportionate adverse environmental impacts of federal projects on minority and/or low-income populations. The agency gutted the just and progressive executive order issued by President Bill Clinton in 1994 calling on agencies to incorporate environmental justice programs into their respective missions. Instead of carrying out a good order, the NRC has bowed to industry pressure to inexorably weaken its ability to ensure that its licensing actions are fair, just and free of economic and racial discrimination.

The new policy appears to be a nod to the Nuclear Energy Institute, which is the lobbying arm of the nuclear industry and which submitted a letter to the NRC in December 2002 sharply criticizing the agency for its handling of environmental justice issues in licensing hearings. There is a need for a strong, enforceable policy on environmental justice. Instead, the NRC is eviscerating its policy. The NRC appears extremely willing to violate its regulatory duty by undoing what has been done, when the only beneficiary of their actions is the very industry it is supposed to regulate.

GOP REFUSES TO ADOPT PLANK ON TEN COMMANDMENTS

I was surprised that the Republican National Convention refused to take a stand on the Ten Commandments. The League of Christian Voters, an Alabama group, submitted proposed language for the party's platform that would advocate reining in what supporters call activist federal courts. One of the group's leaders, Mobile lawyer Jim Zeigler, acknowledged that he never really expected the suggested language to be adopted by the GOP. You will recall that U.S. Senator Richard Shelby introduced legislation that is designed to make it impossible for an acknowledgment of God, such as the Ten Commandments monument, to be unconstitutional. I really thought the Republican Party agreed with that position, but it now appears they don't.

In any event, a position on the Ten Commandments issue was not put in the platform, which was accepted on the convention's opening day. I believe that the platform did have a "generic statement" about activist federal courts and the need to restrict their jurisdiction. The Zeigler group wanted the following language:

Activist federal courts have assumed jurisdiction over broad areas of life never intended by the framers of our Constitution. We

support S. 2082, by Senator Richard Shelby (R-AL) and Senator Zell Miller (D-GA) to remove federal court jurisdiction over cases brought against government agencies or officers for acknowledging God. The acknowledgment of God is not and has never been a violation of the first amendment.

The League of Christian Voters had endorsed delegate candidates in 41 races on the June primary ballot and I understand 21 of the group's candidates won. Maybe they needed to try to little harder next time or maybe the leadership of the GOP should **practice** what it **preaches!** In any event, lots of folks who support the Ten Commandments would like to know where the Republican Party stands.

OUTSOURCE FIRM SUES IN INDIA

In my opinion, companies that outsource in some foreign countries may be taking some pretty big legal risks in those countries. In a relatively insignificant case that exposes the intellectual-property risks of outsourcing in India, a small American software company has sued Mumbai police for refusing to investigate the alleged theft of a proprietary source code by an employee at its Indian subsidiary. While this case won't make the first page of any major newspaper, it does carry an important message. U.S. technology companies should beware of the legal risks of doing business in India. Many domestic companies are taking advantage of the cost savings of offshoring and are entrusting sensitive software development and testing work to Indian contractors. Protection of intellectual property is still a new concept for lawmakers, police and prosecutors in many foreign countries, including India. The U.S. company involved in this case was formed in 2002 to develop bar-code software. The trouble started when the corporation opened a small research-and-development facility earlier this year in Mumbai, formerly

Bombay, and hired a half-dozen employees.

The U.S. corporation contacted the Cyber Crime unit of the Mumbai Police Force and asked police to question a former employee. It was feared that the former employee would sell the stolen code to competitors, compromising customer security and ruining the company's business. Attempts to get help from the National Association of Software and Service Companies (NASSCOM), the New Delhi-based IT industry group that promotes the country's offshoring sector, were also unsuccessful. Many software companies in India aren't prepared for Intellectual property (IP) theft and don't even have a security policy. It should be noted that India doesn't have criminal laws prohibiting trade theft.

Several other cases of software IP violations have come to light in recent years, including incidents in Bangalore Mumbai, Kolkata (formerly Calcutta), Hyderabad and Chennai (formerly Madras). Apparently, the legal system in many of these countries, including India, is far less responsive than it would be in the United States, and that is trouble for companies doing business in those countries.

FEDERAL BAN ON ASSAULT WEAPONS EXPIRES

The expiration on September 13th of a 10-year federal ban on assault weapons means firearms like AK-47s, Uzis and TEC-9s can now be legally bought — a development that has critics upset and gun store owners pleased. The 1994 ban outlawed 19 types of military-style assault weapons. As previously reported, a clause directed that the ban expire unless Congress specifically reauthorized it. I understand that loopholes in the law allowed manufacturers to keep many weapons on the market simply by changing their names or altering some of their features or accessories.

Many states — including California, Massachusetts, New York and Hawaii—

have passed their own laws curbing the use of assault weapons. I understand some of those are more stringent than the federal ban. But advocates for the ban, including the Brady Campaign to Prevent Gun Violence, point to some particularly vicious shootings in which military-style weapons were used — including the 10 killings in the sniper shooting spree that terrorized residents in Maryland, Virginia and Washington, D.C., in 2002. National police organizations such as the International Association of Chiefs of Police, the International Brotherhood of Police Officers and the Fraternal Order of Police all support the renewal of the ban. The expiration of the assault weapons ban does not mean the end of federal background checks. The 1993 Brady Handgun Violence Prevention Act is separate legislation from the assault weapons ban.

I fully realize that the gun issue is a hot one in this country. It puts anybody who speaks out on the sale of assault weapons on the defensive. I probably own more shotguns, rifles and pistols than anybody I know. I have hunted since I was in high school, but have never thought I needed an assault rifle. Politics and the fact that the NRA was involved resulted in Congress failing to act. I have always felt we should listen to law enforcement officials on the assault weapons ban, but I guess that makes too much sense. In any event, I hope some realistic restrictions on the sale and use of assault weapons will take place soon.

NEARLY 36 MILLION AMERICANS LIVE IN POVERTY

It is hard to believe that in the 21st Century, some 1.3 million Americans live in poverty. In 2003, the ranks of the poor had risen 4% to 35.9 million. It doesn't come as a surprise that a recent report from the government shows children and blacks are worse off than most. The percentage of the population in this country living in poverty rose for the third straight year

to 12.5% from 12.1% in 2002. This increase was the highest since 1998. The information is reported by the Census Bureau in its annual poverty report. The widely cited score card on the nation's economy showed one-third of those in poverty were children. The number of U.S. residents in this country without health-care coverage rose 1.4 million to 45 million last year. At the same time incomes were stagnant. The poverty line is set at an annual income of \$9,573 or less for an individual, or \$18,660 for a family of four with two children. Under that measure, a family would spend about a third of its income on food.

It is troubling to report that America's families are falling further behind. Analysts have said the poverty rate typically tracks the broad economy, rising during a recession and falling in boom times. Since President Bush took office in January 2001, 1.1 million jobs have been lost. In 2000, the poverty rate was 11.3%. It has risen each year starting in 2001. Children and most racial minorities fared much worse in 2003 than the overall population, according to the Census report. The rate of child poverty rose to 17.6% from 16.7% in 2002, boosting the number of poor children to 12.9 million, the most since 1998. The poverty rate of African-Americans remained nearly twice the national rate, with 24.4% of blacks living below the poverty line in 2003, nearly unchanged from 24.1% a year earlier. The poverty rate for Hispanics was 22.5%, up from 21.8%. Non-Hispanic whites fared best, with a poverty rate of 8.2%, nearly unchanged from 8% a year earlier. The report showed real median income for all races was unchanged at \$43,318 in 2003. Incomes have fallen nearly 4% since 1999.

It is most significant that the federal government normally releases this important report in September. However, this time it was released in mid-August. I have to wonder why the highly anticipated report was released at a time when many people in the U.S. are on vacation, rather than stick-

ing to the usual September release date. There was also another interesting aspect of the release of the report. Normally health insurance and poverty statistics are released in **separate** reports. The decision to release the health insurance and poverty statistics in the same report has the effect of **minimizing media coverage** of the worsening lives of the poor as we approach the November election.

Source: Reuters News Service

IV. THE CORPORATE WORLD

CORPORATE CRIMINAL UPDATE

With so many high-ranking executives swept up in the corporate scandals, it is difficult to keep up with where they are in the criminal judicial system at any point in time. News accounts of corporate bosses violating the law have become so commonplace that folks are no longer shocked when more criminal indictments are announced. One of the more notables who has been indicted and is awaiting trial is former Enron Chairman and Bush advisor, Ken Lay (Kenny Boy), who has been indicted on conspiracy and securities and wire fraud. Another of Enron's chief executives, Jeffrey K. Skilling was also indicted on conspiracy, securities fraud and insider trading. Former chairman and chief executive of WorldCom, Inc., Bernard J. Ebbers has been indicted on charges of directing and accounting fraud. Closer to home, Richard M. Scruschy of HealthSouth has been charged with orchestrating a large accounting fraud.

Those who have already entered guilty pleas include Samuel D. Waksal, a former executive of ImClone Systems, who is serving seven years for securities fraud and insider trading. Martin L. Grass of Rite-Aid is serving eight years for conspiracy and obstruction of justice. Scott Sullivan of World-

Com has pleaded guilty to accounting fraud and at press time was awaiting sentencing. Another Enron executive, Andrew S. Fastow, has pleaded guilty to two counts of fraud and also awaits sentencing.

Those convicted thus far include Frank P. Quattrone, an investment banker with Credit Suisse First Boston, who was convicted of obstructing justice and received jail time last month. As reported in August, John J. Rigas, and his son Timothy, were convicted of conspiracy and securities, wire and bank fraud. Two mistrials have occurred, including Tyco International's former Chief Executive, Dennis Kozlowski and the company's former Chief Financial Officer, Mark H. Swartz, who were tried for fraud and insider trading. These men will be tried again.

I suspect all of the bad publicity relating to the criminal activity involving corporate bosses may be the real motivation for the Rove attacks on trial lawyers. That strategy not only makes the big money donors in Corporate America feel good, it diverts attention from a real good issue for the Kerry-Edwards ticket. I really don't believe many American citizens believe it is improper for lawyers to represent consumers or persons injured or damaged by wrongdoing in Corporate America. Most folks understand that lawyers provide a valuable service in such cases. They also recognize that criminal activity—even that of the corporate variety—is bad.

CHINA EXECUTES BANK STAFF FOR FRAUD

I certainly believe that we should get much tougher on corporate criminals, but I don't recommend following China's lead. Recently, China **executed** four people, including employees of two of its Big Four state-owned banks, for fraud totaling \$15 million. The executions occurred in the midst of a high-profile government campaign against financial crime. They followed a string of arrests in white-collar crime as China

prepares to sell shares publicly in its big banks. The latest cases involved China Construction Bank and Bank of China. The people executed had committed fraudulent acts that benefited them financially. I am not sure how the four were killed. China, which executes more criminals than the rest of the world combined, usually puts inmates to death with a gunshot to the back of the head but has recently experimented with lethal injections.

The debt-laden state-owned banks in China have been involved in other fraud scandals as Beijing tries to clean them up ahead of 2007, when the sector begins to privatize and opens fully to foreign rivals as part of pledges made to the World Trade Organization. The government injected a combined \$45 billion into the Construction Bank and Bank of China last year as part of a pilot scheme to reform the sector and prepare for the Initial Public Offerings (IPOs). The precise number of people executed for all crimes in China is a state secret. Reports range from 5,000 to 10,000 a year, many for murder, but they have also been killed for corruption and crimes as minor as bottom pinching. Legal experts have proposed what they call a “kill fewer, kill carefully” policy for nonviolent crimes. If you would like to learn more, go to the website of the state Xinhua news agency, which is www.xinhuanet.com.

LOOTING A COMPANY FROM THE INSIDE CAN'T BE ALLOWED

An internal investigation has found that Conrad Black, the former CEO of Hollinger International Inc., conspired with associates to systematically loot the newspaper publishing company of more than \$400 million. This amounts to nearly all of the company's profits over the past seven years. The report, which was filed with the Securities and Exchange Commission, was prepared by a special committee of Hollinger's board that was formed last year to examine concerns from shareholders about payments made to Black and

others. Black has since been forced out as CEO and chairman of Hollinger International following initial findings from the committee that he and others improperly received millions in fees and payments that should have gone to the company. This is a prime example of what happens when CEOs start treating corporate money and other assets as their own personal.

The committee's 500-page report accuses Black and a senior associate, former chief operating officer David Radler, of milking the company to satisfy their “ravenous appetite for cash.” In an introduction to their report, the three-member committee wrote: “This story is about how Hollinger was systematically manipulated and used by its controlling shareholders for their sole benefit, and in a manner that violated every concept of fiduciary duty.” The report was disclosed only after Hollinger International's parent company, Toronto-based Hollinger Inc., disclosed that the SEC's Midwest regional office planned to recommend civil charges be filed against it for alleged violations of the Securities Exchange Act.

Hollinger International's special committee is also suing Black, Radler and others in federal court in Chicago, seeking \$1.25 billion in damages and accusing the group of racketeering. The committee has submitted its final report to that court. The report was also critical of the company's audit committee, which was chaired by former Illinois Governor James Thompson, saying that the committee's performance was “ineffective and careless over a prolonged period of time.” But, the investigators also found that the committee was frequently misled by Black, Radler and other insiders, who withheld important information from them on a regular basis. The committee criticized Richard Perle, a former defense adviser and a member of Hollinger International's board, saying that he “repeatedly breached his fiduciary duties” as a member of the board's executive committee. They found that

Perle repeatedly signed papers without reading them, including several that cleared the way for several payments to insiders in a way that allowed Black and Radler to avoid disclosing the payments to the board or to its audit committee. The report describes extensive abuses of power by Black and his associates, concluding that Hollinger International “went from being an expanding business to becoming a company whose sole preoccupation was generating current cash for the controlling shareholders, with no concern for building future enterprise value or wealth for all shareholders.”

The investigators found that: “Behind a constant stream of bombast regarding their accomplishments as self-described ‘proprietors,’ Black and Radler made it their business to line their pockets at the expense of Hollinger almost every day, in almost every way they could devise.” The report concluded that the amount of money looted from Hollinger by Black and others—over the period of 1997-2003—represented just over 95% of the company's entire earnings during that period. That should shock even the most **conservative** amongst us.

Black has already lost two legal battles against Hollinger in a Delaware court. The last defeat blocked his effort to call a shareholder vote on the company's move to sell one of its main assets, *The Daily Telegraph* of London, to the Barclay Brothers of the United Kingdom. An earlier ruling found that Black “persistently and seriously” breached his obligations to the company. Despite his removal from executive posts, Black retains voting control of Hollinger International through Hollinger Inc., the Toronto-based holding company. Following the sale of the *Telegraph*, Hollinger International retains the *Chicago Sun-Times*, several other newspapers in the Chicago area, where the company is based, and *The Jerusalem Post*.

Source: *Forbes.com*

BANK OF AMERICA SETTLES LAWSUITS OVER ENRON

Bank of America will pay approximately \$69 million dollars to settle class securities fraud charges over its role in helping Enron Corporation devise the Special Purpose Entities (SPEs) that figured prominently in the former energy trading giant's collapse. As everybody on this planet knows, in late 2001 Enron became the subject of the then-largest U. S. bankruptcy in our history. This came after it was revealed that its profits had been overstated by \$586 million dollars since 1997—caused largely by problems with off-balance sheet accounting for the SPEs. Shareholders filed a class action lawsuit seeking to recover the billions of dollars lost in the firm's collapse. In late 2002, the United States District Court for the Southern District of Texas allowed the suit to proceed against all but two of the law firms, broker-dealers and financial institutions charged in the controversy. In permitting the suit to go forward, the Court said it agreed with the Securities and Exchange Commission's broad approach to the 1934 Securities Exchange Act §10(b) Liability.

MORGAN STANLEY FINED

The National Association of Securities Dealers has announced a censure and fine against Morgan Stanley D. W. Inc., of \$2.2 million dollars for more than 1,800 late disclosures of reportable information about its brokers. The late reports concerned, among other things, customer complaints and disciplinary actions by regulators. NASD also charged Morgan Stanley for supervisory failures related to the late filings. Additionally, NASD prohibited Morgan Stanley from registering any new brokers for one week, requiring it to hire an independent consultant to assess the firm's supervisory systems and procedures in the reporting area, and imposed specific ongoing reporting obligations.

The NASD concluded that the late filings by Morgan Stanley had delayed several NASD investigations. It also most likely hampered the investing public's ability to accurately assess the background of certain brokers through NASD's public disclosure program, known as Broker Check. NASD rules require that after a securities firm hires a broker, it must insure that information disclosed on the broker's application for registration (known as a Form U4) is kept current in the Central Registration Depository (CRD). The firm is then required to file amendments with the NASD promptly to update the information on the form when significant events occur, such as regulatory actions against a broker, customer complaints and settlements involving the broker, and criminal charges and convictions. Normally, the amendments must be filed within thirty-days. But, if the reportable event involves a statutory disqualification, the event must be disclosed within ten days. Additionally, firms must notify NASD within thirty days of learning that information disclosed on a termination notice (Form U5) filed for a broker has become inaccurate or is incomplete.

Morgan Stanley has a pretty bad record from January 2002 to March 2004, the NASD found that Morgan Stanley failed to file in a timely manner almost 67% of the required Form U4 and Form U5 updates that were the subject of NASD's review. The updates were filed from one to several hundred days late. Approximately 52% of all late filings were more than ninety days late. NASD also found that Morgan Stanley failed to mention and enforce effective supervisory systems and procedures to achieve compliance with its reporting obligations. The following are some of the differences found: Morgan Stanley failed to assign clear responsibilities and tasks to its management and employees; the firm failed to ensure that employees were accountable for the performance of their assigned tasks within clearly defined time periods; and it did not allocate sufficient

resources, including personnel to insure timely filings.

Morgan Stanley has been the subject of four other New York Stock Exchange disciplinary actions for similar reporting violations. State securities regulators in Maryland, Florida and Vermont have also previously filed charges against the firm for failing to update reportable information pertaining to its representatives. As I have said on numerous occasions, without the ability to level the playing field by bringing claims against brokers in a court of law, the valuable incentive for the brokerage firms to comply with regulations is lost. If you are interested in obtaining information and the disciplinary record of any NASD-registered broker or brokerage firm it is available through NASD's Broker Check. Investors can link directly to the program by going online to <http://www.nasdbrokercheck.com>.

LAWSUIT SAYS ITT INFLATING ENROLLMENT

A lawsuit was filed recently against ITT Educational Services Inc. that I believe is worth discussing. I don't guess we should be surprised to learn that the company is accused of inflating its numbers to impress Wall Street. It appears merely expressing an interest in taking a class at ITT was enough to be counted as a student by the company. The shareholder suit, filed in federal court, quotes former employees who claim grades were changed to keep students eligible for financial aid. It is also claimed that ITT institutes in California and Memphis destroyed documents that may have been of interest to government investigators. It has been confirmed that ITT is being investigated by federal prosecutors and securities regulators over its record-keeping on graduation rates, attendance and grades. The lead plaintiff in the lawsuit is the Austin, Texas police retirement system. It is alleged that executives reaped millions of dollars in insider trading profits by failing to dis-

close the company's true financial health. Former ITT employees furnished a great deal of information concerning how the company does business.

ADELPHIA WANTS RIGAS FAMILY TO REPAY \$3.2 BILLION

Adelphia Communications is trying to recover more than \$3.2 billion from the Rigas family. As you should recall, John Rigas' family founded the company. It is alleged that John Rigas and his three sons, Timothy, Michael and James, in addition to private companies they started, are responsible for paying back years of debt created by taking funds from the cable provider's operations. Adelphia also wants the court to create a constructive trust that would confiscate any money or property, including cable systems, that the Rigases obtained from the use of Adelphia funds or credits, and make them property of the company's estate. A hearing on Adelphia's repayment demands has been scheduled for October 22nd in the U.S. Bankruptcy Court in New York. Sources familiar with the case told Dow Jones Newswires that the basis for the lawsuit comes from statements made by the family during the criminal trial. It has been reported that the family intended to pay the company back.

You will recall that a jury convicted Adelphia founder John Rigas and his son Timothy in July on criminal charges that they looted the cable company and deceived investors about its finances. Another executive was acquitted, and the case against Michael Rigas was declared a mistrial on numerous counts, while he was acquitted on others. During the criminal trial, testimony revealed that from December 31, 1998, to April 30, 2002, the Rigases recognized about \$3.2 billion in debt as their own. In court papers filed on Adelphia's behalf, the company alleges the Rigases were unjustly enriched through the purchase of securities, the acquisition of cable companies, cash

disbursements to Rigas-owned entities such as the family's privately held cable companies and other financial transactions performed with Adelphia funds. Dow Jones Newswires reported that the Rigases' principal assets comprise family-owned cable companies that list a few hundred thousand subscribers, Adelphia securities and property valued as high as \$20 million. In defending the criminal charges, the family claimed that any debt or funds used from the company were "borrowed" and not stolen, "and they intended to fully repay the amounts." Now Adelphia wants the Rigases to make good on their promises. It certainly appears that the Rigases have been unjustly enriched, while Adelphia has suffered tremendous losses. Adelphia is the nation's fifth-largest cable provider.

Source: *USA Today*

WHAT YOU MAY NOT KNOW ABOUT CORPORATE MERGERS

As we all know, corporate mergers are fairly common in this country. Unfortunately, the mergers are not always fully understood by persons owning stock in the companies. Most shareholders like it when their companies are acquired, and that's because their stocks usually increase in value. I believe that you will also find that chief executives of the involved corporations also like it. That's because their severance agreements usually kick in, and when that happens the payments can be astronomical. Here are some of the recent examples:

- Under Wachovia's proposed acquisition of SouthTrust Corporation in June, Equilar, Inc., a compensation analysis firm in California, said the terms of the deal would give Wallace D. Malone, Jr., the Chief Executive of SouthTrust \$59 million dollars in termination awards, stock awards and options over the next five years if he leaves the bank.

- Wallace Barr, Chief Executive of Caesar's Entertainment, stands to receive almost \$20 million under change-of-control provisions in his contract when Harrah's announced it would acquire Caesar's for \$5.2 billion dollars.

The theory behind change of control provisions makes sense on the surface. They encourage executives to act in the best interest of shareholders in transactions that they anticipate will increase shareholder value, which at the same time may harm their own careers. Much empirical research, however, seems to indicate that most companies underperform relative to the market after a merger while executives benefit from these large, one-time payouts. Very few shareholders have voiced a lot of concern about these change-of-control provisions. Unfortunately, few people owning stock in companies know how costly these deals can be. Even with increased scrutiny of corporations in recent years, a full report on what executives will earn in retirement or under a change of control is usually not disclosed.

One might think that the downside to these enormous payments is that they generate stunning tax bills for executives. Apparently, they have thought of that as well because their contracts almost always require the company—not the executive—to pay the taxes. The tax consequences for the company, according to my accountant friends, can be huge. One pay expert has reported that a major merger was not completed recently because the cost to cover executives' tax bills exceeded \$100 million dollars. Experts in the executive compensation field say it's not uncommon for payouts to management to reach 8% of a merger's total cost.

A recent article in the Corporate Counsel, a newsletter covering corporate and securities law issues, provides steps that compensation committees must take to ensure that they meet fiduciary duties to shareholders in the

area of executive pay. The article is at www.compensationstandards.com.

Experts believe that once these numbers are put together in one place, it is going to open lots of eyes. If stockholders—especially institutional investors—start to check things out in more detail, there may well be very significant changes in compensation packages.

V. CAMPAIGN FINANCE REFORM

JUDGE STRIKES DOWN CAMPAIGN FINANCE RULES

In what may prove to be a most important ruling, a federal judge has struck down several federal government rules on campaign fund raising, ordering tougher restrictions on big political money in the long-term. The ruling creates some uncertainty about how candidates, parties and special interest groups should proceed in the final weeks of the current election. A question arises as to how political spenders should act in the absence of the rules, which spell out how the Federal Election Commission (FEC) interprets the nation's campaign finance law. The current regulations may remain in effect while new rules are being written. I understand that the judge declined to issue an order blocking the FEC from enforcing the regulations while it worked on new ones.

The court ruled that some of the regulations the FEC adopted after the law was passed in 2002 would “create an immense loophole” that Congress never intended. The decision appears to be a victory for the lawmakers who sponsored the 2002 law and have accused the FEC of weakening some of the restrictions on big donations. The judge ordered the FEC to write new rules governing key aspects of fund raising and spending, including when candidates and outside parties can coordinate activities and how far the

law goes in banning corporate, union and unlimited “soft money” donations. The judge also ordered the Commission to take a step it had resisted: regulating at least some political activity conducted over the Internet. It is probable that the FEC will appeal. The federal judge, in the ruling, overturned several FEC rules, including those that:

- Imposed a narrow test to determine whether a lawmaker was violating the soft money solicitation ban. Under the FEC rules, the only way a federal candidate or officeholder could violate the solicitation ban was by explicitly asking for soft money.
- Exempted Internet ads from rules on coordination among interest groups, federal candidates and national party committees.
- Exempted an entire class of tax-exempt organizations from a ban on the use of corporate or union money for ads mentioning presidential or congressional candidates within a month before a primary or two months before a general election.
- Defined coordination only as agreement between a spender and candidate or party.
- Excluded coordinated ads aired more than 120 days before an election.

Personally, I am glad to see a court following the intent of Congress. I hope, if the ruling is appealed, the appellate courts will uphold the decision. For the time being, at least we have a court decision that makes good sense. That is a step in the right direction.

A SYSTEM THAT'S OUT OF CONTROL NEEDS FIXING

I sincerely believe that the political system in this country—especially on the national level—is totally out of control. There is no way to justify the huge amounts of money being spent by the two presidential candidates through their official campaigns. In

addition to the amounts spent by the campaigns, which have some limits, the emergence of the 527 committees has intensified the problem, making it much more serious. The combination of spending by the candidates' campaigns, the political parties and the 527s gives the special interest groups total control over the political process.

Ordinary folks, who are largely left out, should be demanding reform of a broken system. That reform is long overdue and badly needed. Many believe the survival of our Republic is at stake. Fortunately, politicians such as Senator John McCain and a few others recognize this and have worked hard to bring some sanity to the system. Unfortunately, these dedicated public officials have had very little help in Congress and none from the White House. The recent federal court decision referred to above may get the attention of those in Corporate America and the White House who have fought reform. Until the folks back home demand reform, however, we will see more of the same sorry mess during every election cycle and especially in presidential election years.

PRESIDENTIAL CANDIDATES SHOULD DEMAND THAT 527 ACTIVITIES BE HALTED

I really thought Section 527 “independent” groups were already under campaign contribution limits and disclosure requirements. But, it appears I was dead wrong. Both John Kerry and George W. Bush should ask their supporters to discontinue all 527 activities, including the massive ad campaigns. It is much too late in the campaign season to legally stop the activities of these groups. Both candidates say they don't like what the 527s are doing. However, the true test of whether the candidates' statements concerning the 527s are serious commitments or mere campaign hypocrisy will be whether they ask their supporters to discontinue 527 activity now. Kerry and Bush should pledge that next year they will support real legal action, regulatory

reform and any needed legislation to rein in the 527s. No matter who is in the White House next year, these groups must be brought under the rule of law. I agree with John McCain who says the 527s are violating the law because they are neck deep in politics and are clearly pushing their candidates.

Section 527 groups may have taken advantage of a loophole in federal election law regulating unlimited soft money contributions. The Federal Election Commission (FEC) could handle this issue and apply fundraising and stricter disclosure requirements to these shadow campaign groups and strengthen rules prohibiting coordination between 527s and candidate campaigns. Unfortunately, the FEC hasn't lifted a finger to help remedy an already bad situation. Groups dedicated to the election or defeat of candidates, including Section 527 groups, have to be considered political committees subject to federal election law. The term 'coordination' should be defined to include the sharing of senior-level consultants, attorneys and advisors between campaigns and outside groups. This would take care of the Swift Boat Group. If you want to learn more, there is some excellent information available at <http://www.whitehouseforsale.org>. Public Citizen has done a great job in its fight for campaign finance reform. The consumer advocacy group is one of the few to be critical of the 527s. To read Public Citizen's comments on Section 527 groups and the coordination regulations of the FEC, go to www.citizen.org/congress/campaign/issues/nonprofit/.

VI. CONGRESSIONAL UPDATE

POLITICS AS USUAL

It is a safe assumption that nothing that can be considered good—if politics is remotely involved—will happen

in Congress until the next President and Congress are sworn in next year. At present, nothing of consequence is happening in either the House or Senate that doesn't come under the label of "politics as usual." In fairness to the group currently in control, this is not unusual. That's just the way the system works. We may not like it, but that's the way it is. The lobbyists who virtually control what happens in Congress haven't loosened their grip on the system. If anything, that grip is tighter now than ever, and I don't believe that's good for American citizens.

THE MEDICARE DRUG BILL

The Medicare prescription drug bill will go down in history as one of the worst pieces of legislation passed by Congress in decades. The drug plan passed the House of Representatives by one vote. The President and the Republican leadership pushed the bill through and badly misled members of their own party. The cost will be in excess of \$534 billion. Thomas Scully, who worked hard to head up the Medicare agency, helped pass the bill. He now works for the pharmaceutical industry, and that's difficult to understand. The fact that he lied to Congress about the bill's costs hasn't gone unnoticed. The monthly Medicare premiums paid by seniors for non-hospital care will increase a record \$11.60—a 17% increase—as a direct result of this bill's passage. Rising prescription drug costs are literally killing seniors and that's a real tragedy. Also, the discount drug cards are a cruel joke. The worst feature of this bill may well be the provision in the new law that says the federal government can't negotiate with drug companies for lower drug prices. That has to be the most difficult feature of the new law for the President to explain to the voters. Anybody who believed the President and voted for this bill should be ashamed!

VII. PRODUCT LIABILITY UPDATE

A CASE INVOLVING A DEFECTIVE FUEL TANK

DaimlerChrysler has agreed to settle a case involving the deaths of Cynthia Berkley and Rebekah Berkley and the injury to Samantha Beck. A fire erupted after a collision between a 1983 Jeep Wagoneer, in which the victims were riding and a Ford F-150 truck. The Wagoneer rolled over into a ditch and caught fire. Cynthia Berkley and Rebekah Berkley died from injuries caused by the fire and Samantha Beck was burned as she escaped the vehicle. During the development of the case, we discovered that a fuel tank ruptured during the American Motors frontal barrier testing of the vehicle for compliance with federal motor vehicle safety standards. The Jeep Wagoneer is equipped with a plastic fuel tank mounted midship. The evidence indicates that the surrounding metal structures punctured the tank, allowing gasoline to escape. The top part of the tank was not shielded. The plaintiff's experts were William R. Bush, Gilbert Kurop, Joseph A. Burton, Bryant Buchner, Glen King, Marie A. Herrmann. The case was settled for a confidential amount. Greg Allen and Mike Andrews from our firm, along with Mark Andrews and Joey Morris from Dothan, handled the case for the family.

SENATORS URGE PASSAGE OF CRITICAL HIGHWAY SAFETY PROVISIONS

Forty-four U.S. Senators have signed a letter urging the passage of critical motor vehicle safety provisions contained in the pending highway bill. The group is remarkable both for its size and its bipartisanship. In a letter to Senators John McCain (R-Ariz.) and Fritz Hollings (D-S.C.), who are bill authors and members of the House-Senate conference committee consider-

ing the legislation, the Senators expressed strong support for provisions contained in Title IV of S. 1072, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2003 (SAFETEA). The safety provisions include: vehicle rollover prevention, side impact crash protection, occupant ejection prevention, vehicle-to-vehicle crash compatibility, 15-passenger van safety, child safety measures and improved consumer access to safety information.

The provisions were reported out of the Senate Committee on Commerce, Science, and Transportation with overwhelming bipartisan support and later incorporated into S. 1072 during floor debate. They have been under consideration by the National Highway Traffic Safety Administration for years, but have not been implemented. There is tremendous support in the U.S. Senate for passage of this legislation. I understand well over half the Senate is in favor of this bill. Those Senators have heard from families who have experienced the horror and sadness associated with fatal auto crashes. The families know how critical this legislation is to making our roads safer. Obviously the Senators signing the letter agree. This bill sets the agenda for safety for the next decade and must be passed.

During 2003, 42,643 people lost their lives and 2.89 million more were injured on U.S. highways. Some NHTSA forecasts indicate that this death toll could rise to as high as 50,000 annually by 2008. Tragically, traffic fatalities remain the leading cause of death for Americans age 4 to 34. These death and injury rates are, simply put, unacceptable. The carefully crafted safety provisions in Title IV can help reverse this alarming trend. If passed, the provisions will save countless lives in the years ahead. In rollover crashes alone last year, more than 10,000 people died and 229,000 more were injured.

Jackie Gillan, vice-president of Advocates for Highway and Auto Safety

made the following observations that are quite timely and very true:

A Lou Harris poll released in July shows that 84% of the public supports government action to make vehicles more stable and less prone to rollover, and 44 Senators agree it's time to act. We cannot afford to delay while the death toll climbs. It is time to pass the safety provisions in S.1072 and stop the highway carnage.

Sally Greenberg, senior product safety counsel for Consumers Union, who noted that last year 91 children were killed by drivers who didn't see them while backing up, made the following comments in support of the safety measures:

Americans want cars that are safer for their families that include such things as backover warning devices, which this bill would address. The overwhelming support for this legislation should send a strong signal to Congress that the time has come to enact these forward-looking safety provisions.

GOVERNMENT REQUIRES SAFER WINDOW SWITCHES

The National Highway Transportation Safety Administration (NHTSA) is finally requiring automakers to install safer switches on power windows, even though it won't happen until the 2009 models come out in 2008. Kids and Cars, a Kansas-based advocacy group, estimates power window switches have killed at least 23 children, mostly 3 years old and younger, since 1993. Thousands more have been injured. Faulty window switch designs and the absence of auto reverse systems that stop the window from moving when it encounters pressure have needlessly endangered children by allowing accidentally depressed rocker or toggle switches to cause the windows to rise rapidly, strangling children in a matter of seconds. Interest-

ingly, it will only cost U.S. auto manufacturers pennies per vehicle to install new switches to fix this hazard—as a one-time expense on factory assembly lines—yet for years the companies have refused to install safer window switches in American vehicles. This is true even though they are used in their European-sold models. European and Japanese manufacturers have installed safer switches for vehicles sold in the United States since the early 1990s.

For approximately \$8, manufacturers could install auto reverse systems, which now are in about 80% of European models, but only about 10% of vehicles made by Detroit-based companies. NHTSA should have made this mandatory in its standard.

While NHTSA's latest action is long awaited, it still allows far too much delay for this simple and inexpensive fix. It gives the manufacturers four years, which is two years longer than the deadlines contained in the NHTSA reauthorization bill passed by the full Senate last spring. As a result, the most helpless among us—our very own children—will remain at risk for a decade or more until the current models are off the road. Families will continue to suffer from these terrible incidents until the fix occurs. NHTSA should require all manufacturers of vehicles with these dangerous switches to immediately notify owners of the hazard.

As NHTSA Administrator Dr. Jeffrey Runge says in the press release put out by the agency, consumer and parent organizations were very important in getting NHTSA to address this issue. Media attention on these totally unnecessary deaths also helped greatly. Safety advocates, including Kids and Cars and Public Citizen, brought these hazards to light at the beginning of the Bush Administration. A petition was filed a year ago asking for to prompt action. The groups worked closely with U.S. Senator Mike DeWine (R-Ohio) to pass the Senate bill. That bill contains many other crucial measures with firm deadlines to assist NHTSA, including

requirements for specific data collection on incidents involving children in and around non-moving vehicles, rollover safety standards, vehicle compatibility measures and other important safeguards.

Unfortunately, NHTSA denied a request by Kids and Cars and other safety groups to require windows that would automatically open if they struck something as they were going up, like the systems on elevator doors. The agency said the cost of such windows would be at least \$50 per vehicle. NHTSA also was concerned that some systems wouldn't be able to detect a weight as light as a child's finger. I believe that \$50 a vehicle—if that top number is the correct one—is a small price to pay even if just one child's life would be saved. I hope NHTSA will reconsider its decision on that request.

Senator DeWine told the Associated Press: "This regulation will prevent the tragedy of a child's head or limb being caught in a power window. A simple, inexpensive remedy is available and should be standard practice." As pointed out, the rule will outlaw toggle switches, which rock back and forth, in all vehicles sold in the United States by October 1, 2008. Automakers can replace them with several different designs, including switches that are flush with the armrest and require the occupant to lift up to close the window. NHTSA reviewed death certificates and found that approximately two children die every three years because they hit a power window switch with their arms or legs and accidentally strangle themselves. NHTSA is to be commended for taking action—even though it's long overdue—and children in cars will be safer as a result. Unfortunately, the agency just didn't go far enough. Safety advocates must keep the heat on the government—both in Congress and at NHTSA—since that's the only way to get results when it comes to safety.

RESISTANCE TO THE EARLY WARNING AUTO SYSTEM

On another front, the automobile manufacturers—as many of us expected—have geared up for a fight over requirements imposed by Congress on the companies. The federal law designed to prevent such tragedies as the deadly crashes involving Ford Explorers equipped with Firestone tires is already coming under attack by the industry. Data on crashes, injuries, deaths and warranty claims have been coming into the National Highway Traffic Safety Administration (NHTSA) over the past year. But, manufacturers now claim they have seen little benefit from the government's new "early warning" database. To its credit, NHTSA has defended the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act. The data collected under the legislation led to a recall of up to 490,000 Firestone Steeltex tires in February. The defect in those tires—without the reports—would have gone undetected much longer. That would have very likely resulted in the kind of disastrous results that forced Bridgestone/Firestone to recall millions of tires in 2000 and 2001.

Congress intended for NHTSA to use the data on a daily basis and it appears that such use has been tremendously helpful. Since Congress is scheduled to review the TREAD Act next year, the attacks from the industry were to be expected. About a year after the deadline for compliance, roughly 550 manufacturers are in compliance. NHTSA has been sending reminder letters those who haven't complied. I hope Congress will be able to withstand the onslaught from the automobile industry and won't weaken the TREAD act. I encourage our readers to contact members of Congress and encourage them to back safety and support the TREAD act.

CARMAKERS CAN'T AGREE ON ROLLOVER PROTECTION

Many safety advocates were hopeful that by now there would have been tremendous improvement in preventing rollover deaths and injuries. It now appears that was all wishful thinking. The reality is that the automobile manufacturers have been unable to voluntarily reach agreement on how to reduce deaths and injuries in rollover crashes. Dr. Jeffrey Runge, who heads up NHTSA, told Congress in February 2003 that the Alliance of Automobile Manufacturers planned to develop voluntary standards. Unfortunately, the Alliance, which represents all major automakers except Honda, is not expected to make any announcement this year on rollover protection. In fact, no timetable has even been set.

The lack of agreement will most likely limit widespread availability of safety equipment designed to protect occupants in a rollover. You may recall that in January 2003, Dr. Runge asked automakers to install technology to protect occupants in rollovers. He apparently felt the industry could come up with "credible, scientific" standards faster than NHTSA could. While his statement was true at the time in the sense that NHTSA does move at a snail's pace, I never really expected voluntary compliance by the industry. Safety improvements are badly needed and will only come when Congress forces NHTSA and the industry to act. The technology is readily available to help prevent rollover deaths and injuries. The American people deserve much better than they are getting.

Source: *USA Today*

INVESTIGATION INTO TUNDRA CONTINUES

The U.S. National Highway Traffic Safety Administration (NHTSA) has upgraded its investigation into ball joint failures on 2002 Tundra pickup trucks. NHTSA opened its original investigation on Toyota Motor Corp.'s 2002 Tundra pickup trucks based on three

reports of ball joint failure in the front suspension, which caused the suspension to collapse and resulted in a loss of control of the vehicle. Some drivers lost the ability to use their front brakes after the suspension collapsed. NHTSA said Toyota had 28 warranty claims for lower ball joint wear, and 15 complaints of separation of the joint. One separation resulted in a crash. The majority of the problems occurred on four-wheel drive versions of the pickup truck. Four-wheel drive models make up 40% of the 2002 Toyota Tundras on the road, according to NHTSA. An upgraded investigation could result in a recall. NHTSA said it is assessing the safety-related issues and attempting to determine the number of affected trucks.

FAMILY SUES OVER AIRBAG

Most folks correctly believe airbags in their cars are needed for safety. On the other hand, they definitely don't expect airbags to become safety hazards. Let's take a look at a real world case. An airbag, on a 1996 Explorer XLT, opened with such force during a minor accident in Texas that it fatally injured a woman. A lawsuit was filed by her family against the Ford Motor Co. Relatives of Kathryn L. Sigurdson, who died in 2002 at age 51, allege that Ford knew the airbag was defective on the Explorer. In discussing the lawsuit, Joan Claybrook, president of Public Citizen and a former head of the National Highway Traffic Safety Administration, stated that most automakers installed inadequately designed airbags before 1998.

Here's what happened to Ms. Sigurdson. She was leaving the property of a friend on July 2, 2002, when the Explorer veered off the driveway and struck a tree. The vehicle was traveling at between 12 and 20 mph, so the impact should have caused no more than minor bruising. Unfortunately, Ms. Sigurdson was killed when the airbag struck her with tremendous force. We clearly don't expect an airbag to be

deployed with enough force to kill a person in a low impact collision.

CLASS ACTION STATUS GRANTED IN SUIT AGAINST FORD INTERCEPTORS

A judge has ruled that police agencies in Florida can join a lawsuit filed by the Okaloosa County Sheriff over Ford Motor Co.'s Crown Victoria Police Interceptors. The Sheriff claims the police cars are unsafe because a number have exploded in flames when hit from behind. The judge granted class action certification to the suit, which means city and county police agencies and other Florida "political subdivisions" that buy or lease Police Interceptors can join the lawsuit. The case will apply to Police Interceptor models from 1992 to the current model year. Law enforcement strongly supports this litigation.

The lawsuit claims the cars' fuel tanks are dangerous because they're placed behind the rear axle. As a result, many police cars have burst into flames when struck from behind, sometimes killing the officers inside them. There have been 14 accidents nationwide in which Interceptors caught fire after being rear-ended. Ford has had actual knowledge of the problems and has done very little about it. Maybe this lawsuit will get their attention and bring about the needed changes.

LAWSUIT INVOLVES FAULTY GAS PEDALS

A judge ruled that thousands of Ohio citizens can join a class action case against Ford Motor Co. The suit claims the automaker knowingly made defective throttle-body assemblies on Mercury Villagers in 1999 and 2000, causing the gas pedals to stick in the up position. A U.S. District Judge had ruled against national class action certification in 2002, but has now agreed that the estimated 7,000 to 8,000 Ohioans who bought or leased the vehicles can join the case. The lawsuit

started in 1999, when a woman named Pat Daffin said she found she couldn't always get the gas pedal on her 1999 Mercury Villager to work without stomping on it. Ms. Daffin said she felt unsafe pulling into traffic because she didn't know whether the car would respond in time. It will be up to a jury to decide what economic loss the class suffered.

Ford plans to appeal the class certification to the U.S. Court of Appeals for the Sixth Circuit. Company documents filed in the case indicate that Ford knew about the sticking gas pedals and was well aware of the hazards created. One internal document from the company's Critical Concerns Review Group said the problem was caused by excessive heat from exhaust gases "causing a sludge buildup in the throttle body." The 2001 document also said there was a "very low" incident rate and that the problem "does not pose an unreasonable risk to motor vehicle safety as condition occurs while vehicle is stopped and does not negatively affect vehicle control."

It is interesting to note that Nissan Motor Co. made the powerplant for both the 1999 and 2000 Villager and Nissan Quest minivans. Nissan was also sued and the company settled out of court in July 2003. The Japanese automaker agreed to reimburse all Quest buyers for the full cost of replacing the throttle assemblies. Ford should follow suit and resolve its litigation.

FORD SUED OVER DOOR LATCH SAFETY ISSUES

A lawsuit has been filed in Canada alleging that door latches on Ford F-Series trucks made between 1997 and 2000 are defective. The class action lawsuit is seeking more than \$400 million in damages. The complaint says Ford knew or should have known that the door handles have a design defect that causes them to fly open when the vehicles are in slow speed, side impact or rollover crashes. Ford was well aware of the problem as far back as

1997. A crash test video made in 1997 by Transport Canada, the Canadian equivalent of the U.S. National Highway Traffic Safety Administration, shows the door opposite a side impact crash popping open. In that video, the head of a crash dummy is shown being partially ejected from the truck. Ford got that video from the agency. In 1997, the company was getting complaints from customers about doors opening in Ford vehicles. Ford's defense to the claims concerning defective door latches is its customary denial. The company says: "This latch complies with all applicable federal standards and is safe and appropriate for use."

METAL CONCENTRATION HIGH FOR WOMEN WITH BREAST IMPLANTS

A report made to the American Chemical Society in Philadelphia recently gives reason for some women to be concerned. Researchers have found high concentrations of platinum in women who got silicone breast implants and in the children they bore and breast-fed afterward. The type of platinum found in the women's blood and urine was different than the traces of regular platinum not uncommon in people's bodies. It was a highly reactive platinum, used to help turn silicon oil into the honey-like gel that lends a more natural feel to a breast implant. Concentrations were up to three times higher than in women who didn't have breast implants, according to findings by S.V.M. Maharaj, a chemist at American University. The findings were presented at the Philadelphia meeting.

Women who had implants the longest recorded the highest platinum concentrations. The heavy metal was also found in bone marrow, where blood cells are made. Distinct from platinum released by catalytic converters in cars, platinum in implants is treated with nitric and hydrochloric acids and becomes very reactive. The heavy metal readily binds in the human body, especially to nerve endings,

short-circuiting communication with the brain. There were a number of significant problems according to the study. Some women developed nervous tics, had faulty perception, and impaired hearing and eyesight. Children born to women with implants had problems with eyesight and hearing. But, it was noted that those nervous system disorders could have other causing agents.

In January, the Food and Drug Administration (FDA), contradicting the advice of its expert panel, rejected Inamed's bid to reintroduce silicone breast implants. After safety concerns rose, the FDA banned such implants in 1992 for most patients. In January, the drug regulatory agency asked Inamed for more details about what happens when silicone seeps from the implant. At the FDA's October 2003 advisory board meeting, the company briefly discussed platinum dispersion and concentration in implant patients. The company has tracked those patients for three years. The FDA in 2002 surveyed scientific literature that indicated platinum leaks from implants into surrounding breast tissue. Researchers said they didn't find anything suggesting women had allergic responses to leached platinum. It's been suspected for at least a decade that heavy metals used in manufacturing might cause problems for women who receive implants.

Sources: *USA Today* and *Associated Press*

VIII. MASS TORTS UPDATE

ANTIDEPRESSANTS KILL 500 PEOPLE A YEAR

Some rather shocking information was revealed recently concerning risks associated with antidepressant drugs. Almost 5,000 people have died in a decade from poisoning related to these drugs. The Office for National Statistics (ONS) reports that between 1993 and

2002 there were 4,767 deaths in England and Wales involving antidepressant overdoses. Apparently, according to figures published in *Health Statistics Quarterly*, about 80% of these deaths were recorded as suicides.

As we have reported in prior issues, prescriptions for antidepressants have risen rapidly in recent years. In 1993 there were 10.8 million antidepressant prescriptions handed out by doctors in England and Wales. By 2002, however, this figure had more than doubled to 26.3 million prescriptions. Over the same period, deaths from antidepressant poisoning fluctuated, peaking at 540 deaths in 1996, after which deaths started to fall. This drop came as the older type of drugs, known as tricyclic antidepressants, were increasingly replaced by the newer selective serotonin re-uptake inhibitors (SSRIs). Research has shown that tricyclic drugs are more toxic in overdose, with two (dothiepin and amitriptyline) accounting for 75% of antidepressant-related poisoning deaths. Until 1998, tricyclic antidepressants were most commonly prescribed by general practitioners to treat depression. Since that time the newer SSRIs, such as Prozac and Seroxat, have become more popular because they have fewer side effects and lower toxicity.

The Office for National Statistics also found that tricyclic antidepressants were involved in the largest proportion of deaths—some 89%. Deaths involving tricyclic drugs peaked at 506 in 1996, compared with just 18 involving SSRIs and six with other types of antidepressant. Studies reveal that depression is an important public health problem, with five to ten percent of the population estimated to be affected. ONS reports that there were around 400 to 500 deaths a year from antidepressant-related poisoning, with rates declining overall between 1993 and 2002. The report concluded that the increase in death rates from other types of antidepressant suggested they might be more toxic than SSRIs. It will be

extremely important to monitor the safety of these drugs in the future.

DRUG MAKERS ACCUSED OF AIDING IN DEATHS

A psychiatrist has filed a lawsuit in a Pennsylvania federal court 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.” Patient confidentiality rules prevented Dr. Kruszewski from giving specific examples of patients who have died as a result of the alleged practices.

Defendants in the suit include the Public Welfare Secretary, Columbus Medical Services (the consulting company Kruszewski worked for), 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, which is now pending in federal court, 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. The doctor, who alleges fraud, defamation and conspiracy, seeks damages for future lost wages and for allegedly being deprived

of his right to speak out on matters of public concern without retaliation.

MOST DRUG MAKERS SKIP STUDY LISTINGS

As we reported previously, ClinicalTrials.gov, which is an Internet-based database, opened in 2000. While I am told that the database is not meant to be a comprehensive list, it would appear that 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 guidelines. Unfortunately, the drug industry has pretty much been ignoring this law. I would certainly like to hear a good reason why any significant results of medical studies shouldn’t be listed on a government database. But, the reason that the industry is getting away with ignoring the federal law is quite obvious. It doesn’t appear that the law includes any penalties for database violations. At present, it’s unclear under the existing law what can be done to spur compliance.

While this database lists only the existence of certain studies, doctor groups are debating whether a more comprehensive registry would make sure 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. It’s interesting to note that drug companies conduct the vast majority of the nation’s treatment studies. In any event, the industry owes the consuming public a duty to fully disclose the results of drug studies—good and bad.

GLAXO SETTLES PAXIL SUIT

The hard work of New York Attorney General Eliot Spitzer is again paying dividends for consumers. As a result of a lawsuit he filed, GlaxoSmithKline Plc has agreed to disclose information on all clinical studies of its drugs. Most

folks are most surprised to learn that the FDA doesn’t actually test the drugs, but depends on the drug companies to do that. This disclosure was part of the settlement of a lawsuit that accused the company of withholding negative information about the antidepressant Paxil. The suit struck at drug companies’ responsibility to show whether antidepressants increase suicidal tendencies in children and whether the companies skew information on their products by not publicizing all the studies conducted on medicines or editing information on published trials. GlaxoSmithKline has agreed to pay \$2.5 million and will register the results of clinical trials, detailing safety and drug effectiveness, for all studies done after December 27, 2000 and relevant earlier studies. The New York Attorney General had accused GlaxoSmithKline of concealing studies that showed Paxil may not work when used to treat children and could lead to suicidal behavior. The Attorney General’s lawsuit said GlaxoSmithKline had conducted at least five studies on the use of Paxil, in children and adolescents, but released only one of the studies. Now, summaries of the clinical studies are expected to be posted online between now and December 31, 2005.

As we have reported, the drug industry has concealed the negative results from clinical trials for years. Obviously, they didn’t want any bad publicity in this litigation because that would make product marketing more difficult. The immediate impact is sending a signal to the other pharmaceutical manufacturers that this is the new standard with regard to disclosure of clinical studies. Additional investigations of other drug firms continue. The work should continue until the drug industry stops this practice. It is sad that the drug companies have to be forced to do the right thing. Fortunately, there are Attorneys General who aren’t afraid to take on the powerful drug industry and hold them responsible. The public interest should always override any special interest—regardless of how powerful

and politically influential that interest may be—but unfortunately that doesn't happen very often these days. That's why the work of an Attorney General like Eliot Spitzer is so important for American consumers.

Glaxo conducted at least five studies on the use of Paxil in children and adolescents, but released one that showed mixed results on its effectiveness. The firm hid the negative results that failed to show Paxil was effective and showed it might increase the risk of suicidal thoughts and acts in some youths. The firm was accused of omitting the negative data from "Medical Information Letters" to physicians, according to the settlement filed in U.S. District Court in Manhattan. A key to Spitzer's case was an internal 1999 Glaxo document showed that the company intended to "manage the dissemination of data in order to minimize any potential negative commercial impact."

Only Prozac, made by Eli Lilly & Co., had been approved to treat depression in children. But doctors can prescribe drugs as they see fit and routinely recommend such medicines for children suffering from depression and other psychological disorders. In May, a Journal of the American Medical Association article that reviewed 102 clinical trials found that 50% of efficacy outcomes and 65% of harm outcomes were incompletely reported. The article concluded that trial outcomes are frequently incomplete, biased and inconsistent with protocols. That should be shocking to most folks who trust drug manufacturers to protect the consuming public.

WARNING ISSUED ON REMICADE

The Food and Drug Administration (FDA) and Centocor, the manufacturer of Remicade, are warning doctors that some patients receiving the drug to treat rheumatoid arthritis and Crohn's disease have suffered sometimes-fatal blood and central nervous system disorders. As a result of the adverse effects, the Malvern, Pennsylvania-

based company has revised the drug's label. Centocor is a subsidiary of Johnson & Johnson, one of the leading healthcare product manufacturers. Centocor told the FDA of 580 adverse-reaction reports among 509,000 worldwide patients. Forty-four reports involved significant blood disorders, which is most serious. Lawyers in our Mass Torts Section are watching this development closely.

A REPORT ON THE MARKETING OF NEURONTIN

We reported last month that Warner Lambert (now owned by Pfizer) had entered a guilty plea to a felony for marketing Neurontin off-label. Interestingly, one of the off-label uses for which the drug was prescribed was for bipolar disorder and schizophrenia. Neither Warner Lambert or Pfizer had performed any studies that support a conclusion that Neurontin is safe and effective for treatment of those conditions. Some bipolar disorder and schizophrenia sufferers have attempted suicide—some of which were successful—while taking Neurontin for that condition. Could the patients' attempt or completed suicide be caused as a result of not taking a medicine that actually treats their condition? This is an issue that may have to be answered in the courthouses of our country. Our law firm, as well as others, are investigating these types of claims.

Sales of Neurontin do not appear to have been affected by the guilty plea. Although fines were paid, no letter has been sent by the company to physicians advising them of the guilty plea and of the fact that there are no studies to support that prescribing this drug for particular health conditions. The company argues that their label clearly states that the drug is approved only for one use and it is the doctors who are prescribing it off-label. This argument flies in the face of their guilty plea, where the company admitted they had been telling doctors the drug was safe and effective to prescribe for

many off-label uses. Given that the company paid a \$460 million fine in damages and continues to sell over \$2 billion of this drug a year, appears to be an example of a situation where crime does pay.

CLINICAL STUDY SHOWS VIOXX INCREASES THE RISK OF HEART ATTACKS BY 315%

On August 25, 2004, an FDA-sponsored study entitled Risk of Acute Myocardial Infarction and Sudden Cardiac Death with Use of Cox-2 Selective and Non-selective NSAID was released for publication. This study, led by Dr. D. J. Graham of the Office Of Drug Safety for the US Food and Drug Administration, examined the medical records of six million Kaiser Permanente insured's in California. The focus of the study was to examine whether there was an increased rate of occurrence of heart attacks or sudden cardiac death associated with the use of Cox-2 selective NSAIDs as compared to patients utilizing non-selective NSAIDs.

To thoroughly understand the study results, a bit of medical background is necessary. Non-selective NSAIDs (non-steroidal anti-inflammatory drugs) have been around for several decades. They are used by literally millions of people each year and are more commonly known by names such as ibuprofen, naproxen, Aleve, etc. These non-selective NSAIDs provide pain relief and anti-inflammatory properties by inhibiting the body's production of both the Cox-1 and Cox-2 iso-enzyme. But, the body needs the production of the Cox-1 enzyme to protect the gastrointestinal tract. Thus, long-term use of non-selective NSAIDs can result in serious gastrointestinal side effects such as perforations, ulcerations and bleeds.

Scientists therefore theorize that if they could develop a drug that selectively inhibited the body's production of the Cox-2 enzyme (which is associated with pain and inflammation) while still allowing the body to produce the Cox-1 enzyme (necessary to protect the

gastrointestinal tract), then a drug with no apparent side effects would be the result. In theory, this drug would have the benefit of ridding a person of pain and inflammation, while not upsetting his or her stomach. Unfortunately, inhibiting the body's production of the Cox-2 iso-enzyme without a concurrent inhibition of the Cox-1 enzyme throws off the body's ability to effectively control its blood clotting mechanism. In short, when the Cox-2 iso-enzyme is inhibited but the Cox-1 iso-enzyme is not inhibited, a pro-thrombotic state is induced in the body. In layman's terms, this means that the body is induced into a state, that unavoidably produces blood clots.

The authors of the Graham study, based upon numerous research and clinical studies that have been conducted in the past, were aware of the pro-thrombotic state induced by Cox-2 selective NSAIDs such as Vioxx. They therefore examined the medical records of the six million California insureds to see if an increased incidence of blood clot-instigated heart attacks and sudden cardiac deaths were evidenced. There shocking findings revealed that Vioxx "use at doses greater than or equal to 25 mg per day increased the risk of an acute cardiac event 3.15 fold." What this means is that an individual taking Vioxx at a 25 mg per day dosage or higher increases his or her risk of having a heart attack on an annual basis by 315%. The study also went on to find that "risk was also increased at lower [Vioxx] doses, but not significantly so. Naproxen [Aleve] use did not decrease risk; rather, it increased risk by 18%." These statistics are significant in that they clearly reveal that Vioxx poses a significant threat of blood clot-induced heart attacks and sudden cardiac death at any dosage.

This new, FDA-sponsored study, along with numerous past clinical studies, shows that the danger of Vioxx is both clear and evident. It is past time now that the FDA pulled this dangerous drug off the market. A documented

315% increase in the risk of sustaining heart attack in any given year is unacceptable. For purposes of illustration, the average elderly person for whom Vioxx is prescribed as an arthritic medication has a substantial chance of having a heart attack in any given year. If a particular individual has a 25% chance of having a heart attack in any given year, and that person is allowed to take Vioxx, their chances of having a heart attack in that year is 79%. These odds are simply unacceptable and prove that Vioxx is an unreasonably dangerous drug.

Pfizer Adds Warning To Geodon Medication

Pfizer Pharmaceuticals has sent letters to medical doctors notifying them it has added a warning to the labeling for its antipsychotic medication Geodon. The warning stated hyperglycemia or elevated blood sugar levels and diabetes have been reported in some patients treated with Geodon and similar drugs. In some cases, in patients treated with other medications, but not Geodon, the hyperglycemia has been so extreme it has led to coma or death, according to the warning. The warning stated: "It is not known if Geodon is associated with this increased risk."

Pfizer officials reported that they have not received any reports of high blood sugar or diabetes in patients taking Geodon. Apparently, the Food and Drug Administration has received what they describe as "very few" reports of these side effects. Even though no comas or deaths have been associated with Geodon, the warning should be headed. Patients should be monitored for signs of diabetes and high blood sugar when they are initially started on Geodon, according to the letter sent to the doctors. The FDA asked all manufacturers of atypical antipsychotic medications, including Pfizer, to add such a warning statement to the labeling of their drugs.

Lilly Defends Its Top Seller

The market for schizophrenia drugs is big business. I understand it's worth \$12 billion globally, and growing at the rate of 30% per year. Because of concerns of diabetes risks tied to the drug, sales of Zyprexa, the market's top seller, have fallen off. To be expected, Eli Lilly, the manufacturer, is defending Zyprexa with great zeal. The diabetes concerns by people around the U.S are not likely to subside. With Zyprexa sales totaling \$4.3 billion annually, the drug is Lilly's bestseller, and the company obviously wants to keep it that way.

In a letter from Eli Lilly to doctors, the drug company says it will help physicians who have been targeted by personal injury lawyers defend themselves. The letter says: "We plan to vigorously defend Zyprexa against any and all lawsuits. Lilly will also provide selected resources to any party named as a co-defendant, including scientific expertise, assistance in finding experts, and coordination with counsel." Interestingly, a Lilly spokeswoman told Forbes the company "would have liked to go further and offer indemnity to doctors who prescribed Zyprexa." The company took that approach with lawsuits brought against Prozac, but guidelines from the American Medical Association prevent Lilly from doing so.

The issue in the lawsuits filed is why Zyprexa's package insert did not warn of the risk of high blood sugar until relatively recently. If included, such warnings would likely have led doctors to measure the blood sugar of patients on Zyprexa regularly, preventing at least some deaths. For this reason, Lilly is the focus of the cases—not the doctors who are prescribing the drugs. Many doctors focus on the diabetes risk of schizophrenia medicines. There is no evidence that any one antipsychotic is more effective than another, but Zyprexa and Clozaril (made by **Novartis**) caused more weight gain and more risk of diabetes, according to an opinion paper from the American Dia-

betes Association. The Food and Drug Administration has added similar warning language regarding diabetes to all schizophrenia drugs, on the assumption that all these medicines are part of the same class.

Source: *Forbes.com*

IX. BUSINESS LITIGATION

WELLS FARGO SETTLES LAWSUIT

Wells Fargo will pay \$6.7 million to settle a class action lawsuit that accused the banking giant of illegally selling customers' financial information to telemarketers. The settlement calls for the bank to pay \$3.2 million to 81 charities and provide \$3.5 million worth of online services to customers. In approving the agreement, a California state court judge rejected complaints from individuals and consumer groups who said that most of the settlement money would go to groups that have nothing to do with consumer privacy. In 1999, Wells Fargo was sued in the massive class action suit that charged it with invading the privacy of millions of its customers by selling personal account information to telemarketers for a piece of the profits. Under the settlement agreement, current and former Wells Fargo customers who had checking or savings accounts between September 1995 and July 2001 will be eligible for free online bill paying service for a month. It is estimated that of the six million class members, about 500,000 are expected to take advantage of the free services.

Wells Fargo claimed that it couldn't pay a specific amount of money to class members because it did not have a list of the account holders whose information was sold to telemarketers. In approving the settlement, the judge said: "This is a unique claim and a unique situation," and that "many of the Wells Fargo customers who

received notice of the settlement had no idea their account information was sold without their permission." One of the challenges in the negotiations leading up to the settlement was in calculating the "amorphous" harm to customers who had their dinners interrupted by calls from telemarketers. The class was made up of an unusually diverse group of people.

A lawyer with the First Amendment Project in Oakland, which represents consumer groups and individuals, objected to the settlement. It was questioned whether members of the class will actually benefit from the settlement. There were serious objections to the 81 charities that were included in the settlement. The primary objection was that none of the charities advance consumer privacy rights. That appeared to be a legitimate complaint, but the court approved the settlement and that is what counts.

RECENT DEVELOPMENTS IN STARLINK CORN SETTLEMENT

We reported several months back on a lawsuit involving Starlink corn. The lawsuit involved makers and distributors of genetically altered corn that was mistakenly introduced into the food supply. Several farmers sued StarLink creator Aventis SA, Starlink maker StarLink Logistics Inc. and Avanta USA, which owns StarLink distributor Garst Seed Co. The case was settled a few years back. Now farmers nationwide will be paid interest on the \$110 million settlement. Interest at 4% started accruing on September 24, 2002. Payments are expected to start after a court hearing on the 2nd of this month. Farmers had complained about the delay in receiving payments, and hopefully this should speed things up.

The settlement could mean up to \$2 per acre for farmers who did not grow StarLink corn, but suffered from a consumer backlash when it was revealed that it had gotten into the food supply. The StarLink corn was engineered with a bacterium's gene that's deadly to the

corn borer pest. StarLink seed had been approved in 1998 by the Environmental Protection Agency for use in animal feed, but it had not been approved for human consumption because of unresolved questions about whether a protein it contains can cause allergic reactions. Some Starlink was mixed with other varieties of corn in 1999 and 2000. Some was mistakenly mixed with corn intended for food or export. This occurrence forced several food companies to recall products and caused a worldwide drop in corn prices.

The lawsuit was elevated to class action status, which means every farmer who didn't grow StarLink was eligible for a share of the settlement - an estimated \$70 million after expenses are paid. In 2001, Aventis agreed to compensate farmers and grain elevators across the country. That agreement, between Aventis, Nebraska and 16 other states, called for the company to pay up to 25 cents per bushel for tainted corn and also covered other losses. It covered farmers who grew StarLink corn, had fields adjacent to StarLink cornfields or had StarLink corn commingled with theirs at grain elevators. Some \$130 million has been paid so far. A third settlement called for \$9 million to be paid to consumers who said they suffered allergic reactions from eating food products that contained the genetically modified corn.

INVESTORS SUE CITIGROUP

A lawsuit was filed against Citigroup recently by a group of institutional investors contending the bank defrauded them in selling \$2.4 billion of notes linked to the creditworthiness of the Enron Corporation. The suit was filed in a New York state court by the Bank of New York Company, acting on behalf of investor groups that include Angelo, Gordon & Company. The investors contend that the Citibank unit of Citigroup aided Enron in artificially maintaining the company's creditworthiness from 1999 until it sought bank-

ruptcy protection in December 2001. The suit follows others filed against Citigroup and rival investment banks over their dealings with Enron and WorldCom Inc. As you will recall, those companies filed the two biggest bankruptcies in United States history. Citigroup set aside \$6.7 billion to pay for legal costs, and in May the company paid \$2.65 billion to settle a WorldCom investor suit. The latest investor lawsuit contended that Enron used phony "prepay" transactions for the sale of commodities like natural gas and oil to hide debt.

Source: *Bloomberg News* and *Associated Press*

DALLAS DOCTOR AWARDED \$366 MILLION IN DAMAGES

A federal district court jury in Dallas, Texas, has awarded a cardiologist more than \$366 million in damages against Presbyterian Hospital of Dallas and three doctors who helped suspend his right to perform heart catheterizations there. Dr. Lawrence Poliner filed the suit in 2000, two years after the chairman of Presbyterian's department of internal medicine demanded that he voluntarily stop performing cardiac catheterizations or face termination. The jury agreed that the hospital and the three doctors were liable on several grounds, including breach of contract, defamation, interference with contractual relations and intentional infliction of emotional distress. Interestingly, the doctor said that his verdict will be beneficial to promote the quality of patient care and the integrity of the peer review process. Presbyterian officials are still saying the hospital's actions regarding Dr. Poliner's staff privileges there were proper. The hospital said it would appeal the verdict.

Dr. Poliner's lawsuit alleges that doctors who were competing with Dr. Poliner for patients accused him of poor patient care, and that the hospital relied on the competitors rather than independent reviews to conclude that Dr. Poliner's right to perform catheteri-

zations and echocardiograms should be suspended. A peer review committee of doctors, most of who competed for patients with Dr. Poliner, summarily suspended his "cath" and "echo" privileges at Presbyterian. In November 1998, the hospital's medical board voted to restore Dr. Poliner's privileges after a number of nationally recognized cardiologists in a hearing stoutly defended the quality of Dr. Poliner's work. But, the medical board also upheld the earlier decision to suspend Dr. Poliner's privileges. It was alleged that the actions severely damaged Dr. Poliner's practice because doctors quit referring patients to him and another hospital declined to give him privileges to practice there. Dr. Poliner, who graduated from Cornell University's medical school in 1969, formerly taught at the University of Texas Southwestern Medical School and Baylor College of Medicine in Houston and had been director of internal medicine at Reese Air Force Base in Lubbock.

A RATHER WEIRD DEFENSE TO A LAWSUIT

A new and unusual defense has surfaced in the mammoth WorldCom litigation. There were 17 bank defendants that underwrote the 2000 and 2001 bond issuances. None of these banks have settled with the plaintiffs in the WorldCom class action. According to the *Wall Street Journal*, these defendants, collectively referred to as the Underwriter defendants, are denying that the WorldCom financial reports were false. The basis of the WorldCom class claims against the Underwriter defendants is that they did not do due diligence, in underwriting the bonds. The class alleges that if they had done due diligence they would have discovered WorldCom's fraudulent accounting much earlier. Uncovering the fraud at that time would have saved investors billions of dollars,

The banks have hedged their position, saying that they believe some of WorldCom filings may be false, but that

they must determine which ones may have been false and how the financials were misstated. When the Citigroup defendants settled with the class plaintiffs in May, the class offered to settle with the Underwriter defendants on the same pro rata basis as the Citigroup settlement. The Underwriter defendants rejected this offer, which would have amounted to \$2.8 billion. This may prove to have been a major mistake for these defendants.

HMOs LIKELY TO PAY MORE AFTER COURT RULING

A U.S. appeals court has upheld the class action status in a lawsuit brought by doctors suing HMOs over claims that the HMOs conspired to cheat the doctors out of their rightful reimbursement. You may recall that Aetna Inc. and Cigna Corp. had settled with thousands of U.S. doctors over claims the insurer shortchanged the doctors on payments. That settlement left a majority of the other health insurers as defendants in the class action suit. As a result of this ruling, the remaining HMOs will very likely have to pay much more than had they settled with the doctors. Losing their appeal to deny the class action status was a major blow. The lawsuit combines a number of suits around the country against most of the big HMOs, including UnitedHealth Group Inc., WellPoint Health Networks Inc., Anthem Inc., PacifiCare Health Systems Inc., Health Net Inc., Humana Inc. and Coventry Health Care. In the earlier settlement, Cigna agreed to pay the doctors at least \$85 million in cash and to spend \$400 million to change business practices, while Aetna agreed to pay \$100 million in cash and spend about \$370 million.

The opinion by the 11th Circuit Court of Appeals affirmed the doctors' right to go forward as a class on federal grounds. I expect that the defendants will now try to settle the cases. The appellate judges in their ruling said it would be impractical for thousands of doctors to prove their claims individu-

ally. This appears to be a sound decision and one that is totally justified.

X. INSURANCE AND FINANCE UPDATE

MINNESOTA ATTORNEY GENERAL SEEKS TO STOP STATE FARM RATE INCREASE

Minnesota Attorney General Mike Hatch has intervened in a lawsuit that seeks to stop a State Farm rate increase approved by Minnesota's Department of Commerce earlier this year. At that time, the agency granted State Farm's request to increase home owner insurance rates for some owners of older houses by as much as 6%. Minnesota's Governor had previously ordered the Commerce Department to suspend the rate increase pending the outcome of a lawsuit. The Attorney General is seeking a ruling that State Farm's rate plan violates a Minnesota law designed to prevent discrimination against minorities, the elderly and the poor.

The Attorney General also is intervening in a related class action lawsuit that seeks \$22 million in damages on behalf of 172,000 State Farm customers who claim they were illegally assessed surcharges from 1997 to 2002. State Farm claims that the condition of a home, not the age of a home, determines rate increases. Other large insurers in Minnesota use a rating plan based on the age of a home's utilities. These insurers include American Family Insurance, Economy Premier Assurance Company, Illinois Farmers, Allstate and Auto-Owners. These companies have about 66% of the homeowners insurance business in Minnesota. It is good to see powerful public officials standing up for consumers.

Source: *The Insurance Journal*

CLASS ACTION SUIT FILED AGAINST ST. PAUL TRAVELERS

You will recall that St. Paul insurance Company and Travelers merged. Former St. Paul Travelers Cos. shareholders have now filed suit against the company relating to the \$1.6 billion reserve charge the company took in July to bring St. Paul's accounting standards into line with those of Travelers'. The suit alleges that statements filed with the SEC were misleading because they left the impression that the St. Paul Travelers transaction was a "merger of equals." The suit alleges that it was more of a "bailout" of St. Paul. The suit also alleges that executives with both firms knew before the merger was announced that a reserve charge would be necessary because of St. Paul's less conservative reserving philosophy. The complaint formally charges St. Paul Travelers and several officials with violations of the Securities Act of 1933 and the Securities Exchange Act of 1934.

Source: *The Insurance Journal*

FAIRNESS OF AMS CLASS CONSIDERED

Last month, Montgomery County Circuit Court Judge Johnny Hardwick conducted a fairness hearing on a settlement reached in a case our firm handled. The purpose of the hearing was to decide whether the class settlement involving American Medical Services (AMS) is fair to the class members. While fairness hearings are routine procedures for class action settlements, the judge in this case exercised great care and diligence in allowing objectors to be heard on objections. The court conducted a most thorough fairness hearing. In the lengthy hearing, the court heard expert testimony, an in-depth argument on both Alabama and Georgia law (the class covered only residents of Alabama and Georgia), an in-depth analysis on tier rating and block rating, and evidence regarding investigations by the Alabama Insurance Department,

as well as investigations by the Georgia Insurance Department.

While all objectors were allowed to intervene in the case for the limited purpose of having their objections heard, not all objectors will be allowed to remain in the case, because of standing issues. But, the Court had not, as of the date of this publication, issued a final ruling. There was substantial evidence placed before the Court that can only be characterized as a collateral attack on the case as a result of a competing class action that has been filed in the State of Georgia. However, after hearing arguments on these collateral attack issues, the judge made it clear that the Alabama court was concerned only with the fairness to all members of the pending class. The success or failure of the competing class filed in Georgia shouldn't be a factor in our case. The court's dedication and focus on the issue of fairness to the class members was appreciated by all of the lawyers present. We look forward to getting the court's ruling on this matter very soon. Hopefully, the settlement will be approved.

HEALTH CARE PRICING FOR THE UNINSURED

Our firm has recently joined a national consortium of law firms pursuing the healthcare issue of hospitals overpricing uninsured patients who are treated in their facilities. Thus far the consortium has filed eight state class action lawsuits in Alabama, Texas, Florida, Pennsylvania and Tennessee alleging that hospitals in the business of providing healthcare for a profit are charging hospital patients who are not covered by insurance prices that are three to seven times higher than the charges an insured person would receive. According to several studies concerning this issue, there is no justification for charging these inflated prices for uninsured patients for the same treatment that insured patients are receiving at a lower charge.

While the uninsured category of

patients consists primarily of indigent patients who cannot afford health insurance, there is still a large portion of the uninsured population that is not indigent. Those are persons who are without a health insurance plan for one reason or another. Nonetheless, charging indigent and uninsured patients prices that are three to seven times higher than an insured patient receiving the same treatment is yet another healthcare crisis that begs for some type of reform, whether it be in the courtroom or in the legislative halls. Because it is apparent that the legislative branches, which are lobbied so heavily by this special interest group, won't do anything about this healthcare crisis, that leaves only the court system as a place for relief. A real healthcare crisis has been created by the hospital industry. Our firm, in conjunction with this national consortium, is committed to bringing about some meaningful change that will make our health care system fair for all persons who are in need of medical treatment. We will keep our readers posted on the progress being made in this new area of litigation.

GEN RE LITIGATION UPDATE

As we have previously reported, our law firm is representing State of Tennessee Insurance Commissioner Paula Flowers, who in her role as receiver of three insurance companies has filed a most significant lawsuit. These companies were caused to suffer financial failure as a result of fraudulent conduct involving certain corporate officers and some thirteen other defendants. The litigation has been sent to a United States District Court in Memphis, Tennessee, under the Multi District Litigation (MDL) rules of litigation. The purpose of an MDL proceeding is to centrally locate all litigation that has been filed in the country in a single forum to serve the purpose of judicial economy.

As part of that process, our law firm has been named as co-lead counsel for

all of the plaintiffs in the Multi-District Litigation, a role that will allow our firm to be in charge of the direction of the case and see it to what we believe will be a successful conclusion. The MDL, which was recently formed, is just now beginning the very complex discovery process involved in this complicated litigation. We have lots of work to do in this complicated and complex litigation. The case is believed to have the potential for a recovery in the range of \$1 billion and perhaps much more. In addition to the compensatory damages, it is probable that significant punitive damages will be awarded in the case. We will continue to update our readers on any new developments that might occur with this very significant litigation.

CHARTER COMMUNICATIONS SETTLEMENT

Recently Charter Communications settled a national class action that was pending in a Georgia court. The class action involves those cable television subscribers in the United States who have or had Charter cable prior to July 8, 2004. The class was restricted to subscribers who had either paid a wire maintenance fee in Charter's wire maintenance plan or paid a converter box fee to rent an analogue or digital converter box from Charter while subscribing to either basic or expanded basic cable only. A subscriber could fall into both categories.

The class action in Georgia alleges that Charter wrongfully and improperly charged class members converter box fees when such boxes had no value and served no purpose for the customers, and/or charged customers for wire maintenance fees without the customer's permission and when the wire maintenance plan being charged to the customer was worthless. The class action involves several million cable customers in the United States. It is interesting to note that this case was originally filed as only a state class, but was later expanded by the parties to include cus-

tomers nationwide. This class action was filed in 2002 and has settled in approximately 18 months, which must be a record time frame for settling a national class action of any sort.

Interestingly, no subscriber will be awarded any cash payments from the settlement. Customers, who are members of the class, and elect to stay in the case, can choose from a laundry list of temporary free services to be provided by Charter. Some of these are free movie channels, free high speed Internet service, and upgrades from basic to expanded cable service. Members of the class can request to exclude themselves from the class and the relief offered if they notify the court on or before October 28, 2004 pursuant to the specific requirements in the notice or settlement.

As you may have previously read in a prior issue of this Report, our firm has filed a separate national class action against Charter for misrepresenting digital cable services that were purchased by millions of Charter customers all over the United States. It will be interesting to see how Charter deals with the claims we have brought against the company in Alabama. It will also be interesting to see whether the court in charge of the class action in Georgia approves the settlement.

XI. PREMISES LIABILITY UPDATE

JURY AWARDS \$5.4 MILLION FOR MINE-INJURY

After a seven-day trial, a federal jury in Denver, Colorado, awarded \$5.4 million to a man who suffered permanent brain injuries from an accident that occurred at a Colorado coal mine. Faulty equipment, built by Winfield, Alabama-based Continental Conveyor & Equipment Co., led to an accident in which Kyle Webb fell 35 feet and was hit by falling rocks while he was

working in the Twentymile coal mine. The jury found that Continental Conveyor was responsible for 71% of the damages with the man's former employer, Twentymile Coal Co., responsible for the rest. But, only Continental Conveyor was named as a defendant in this lawsuit.

PARENTS ACCUSE SCHOOL OF EXCESSIVE EXERCISE IN CHILD'S DEATH

A lawsuit has been filed by the parents of a teenager who died after running laps at Texas high school, against the local school district. School officials are accused of forcing "excessive exercise" on student athletes and not acting soon enough to help a 14-year-old girl who was in obvious distress and who died in August 2002. The student had been running laps with the basketball team when she told a coach she was feeling lightheaded. She collapsed in the field house and died later at a local hospital. The Dallas County medical examiner ruled the student died of a heart attack caused by exertion and sickle cell trait, a blood condition. The federal lawsuit names the basketball coach, the school district, the former superintendent and the school board as defendants. The lawsuit alleges time was wasted in trying to help the student and that a system existed that tolerated "excessive exercise." The parents say they want the lawsuit to bring about reform on school campuses and thus make the schools more accountable for their actions.

FAMILY OF MAN KILLED IN COASTER ACCIDENT SUES SIX FLAGS PARK

The family of a disabled man who was hurled to his death from a roller coaster at Six Flags New England last spring has filed a lawsuit in U.S. District Court in Hartford, Connecticut, against the Agawam amusement park and the ride manufacturer. Stanley Mordarsky, who had cerebral palsy, slipped out of a lap restraint on the

Superman Ride of Steel roller coaster and plunged to the ground on May 1st. and was killed instantly. The defendant failed to make sure that the passenger was properly restrained in the roller coaster. There have been similar accidents where passengers were ejected from roller coasters.

The lawsuit is based in part on a report by the state Department of Public Safety released a week after the accident that faulted the lap bar on the roller coaster and a design that allowed some riders to float out of the restraint during sudden rises and dips. The state also found that park operators failed to notice that the restraint was "inadequately applied." At 5 feet, 2 inches tall and about 230 pounds, the victim didn't fit easily under the lap bar and that prevented it from engaging properly, according to the report. The lawsuit names as defendants Riverside Park Enterprises, the corporation that runs Six Flags New England, Six Flags, and Intamin Ltd. of Glen Burnie, Md., the US representative of the company that manufactured the ride. After the death, the amusement park closed the ride and reopened it a month later after improvements were installed.

CITY AND OTHERS SUED OVER DEATHS AT PARK

The families of four tourists who drowned in the Fort Worth Water Gardens have filed a lawsuit against the City of Fort Worth, Texas, and 21 companies and individuals, claiming they showed "utter indifference" to the safety of visitors, particularly children. The following are named as defendants in the lawsuit:

- City of Fort Worth
- Amon G. Carter Foundation, which designed and funded the park.
- Original architects and affiliated architects: Philip Johnson/Alan Ritchie Architects; Philip Johnson, Ritchie & Fiore Architects; Philip Johnson; Alan Ritchie; David Fiore.

- Contractors: Thos. S. Byrne, Inc.; Thos. S. Byrne, Ltd.; Linbeck Construction.
- Consultants: Hellmuth Obata & Kassabaum; Huitt-Zollars; Elizabeth Barlow Rogers; Steve Brubaker; Barbara Faga; Edaw Inc.; Emile Keller; Fred Kent; Karen Whitman.
- Architectural/engineering firm: Carter & Burgess, Inc.
- Downtown Fort Worth Inc., which was involved in designing and building a plaza in 2001 that connects the Water Gardens and the Fort Worth Convention Center.

The wrongful-death suit, filed in state court in Tarrant County, Texas, stems from the June drownings of four out-of-town visitors who had gone to the Water Gardens in Ft. Worth. A 39-year-old man, two of his children and a family friend all drowned. Witnesses confirm that one of the little girls slipped and the others died trying to rescue her. The water in the pool—designed to be 3 1/2 feet deep—was nearly 9 feet deep at the time of the incident.

The architect's original design for the Water Gardens' Active Pool, where the drownings occurred, is said to be defective. The architect said he wanted visitors to feel a sense of "pseudo-danger" as they descended 38 feet below street level into a pit surrounded by cascading water. The lawsuit charges that the architect should have known that the design had "intrinsic, unnatural and hidden dangers, which were not apparent to the public." The pool's inverted pyramid design meant that the water level rose quickly during heavy rains, making it more difficult to escape. The design of the drain at the bottom led to frequent blockages, which increased the current in the pool, according to allegations in the suit. Moreover, the design did not include handrails, steps or holds inside the pool or an automatic system to regulate water depth, the complaint states.

The suit accuses the city—under

pressure from the Carter Foundation—of ignoring repeated warnings of danger from a host of city officials and consultants. A former city attorney and a parks director had warned that the design was dangerous and that the City could be held liable if anyone were hurt. An employee in the city's risk Management Department wrote in 1991 that the Active Pool needed larger warning signs and possibly handrails. It is alleged that the Carter Foundation pressured city officials to keep the park's design intact for decades, even when the park was renovated in 1994 and 2001. In late April 1997, a representative of the Carter Foundation specifically threatened that the city should not pursue any modifications to the Water Gardens without approval, the suit says. A study of the gardens in 1999 should have alerted officials that the water level in the pool was higher than normal and that the park was being operated without written instructions.

FATAL ANIMAL ATTACK RAISES ISSUE OF CHILD'S LEGAL RIGHTS

In a case with potential ramifications for the travel and recreation industries, the Florida Supreme Court recently heard oral arguments in a wrongful-death case involving an 11-year-old boy who was fatally mauled by hyenas while on safari with his mother in Botswana. The case, *Global Travel Marketing v. Shea*, involves a release form that the mother signed on behalf of her 11-year-old son. The child had been dragged from his tent by hyenas and killed during an African vacation in July 2000. In the waiver, the mother agreed to **arbitrate** all potential legal claims with the Florida-based safari company, Global Marketing Travel Inc. The issue in the case is whether a parent can bind a child to arbitration when signing release forms allowing minor children to participate in commercial travel activities. The court's ruling will determine where to draw the line between activities that parents can authorize on their own and those

that require court approval. Following the child's tragic death, his father, who was divorced from the mother, filed a wrongful-death suit against Global Travel in a Florida state court.

The suit claimed the tour group had been negligent in allowing the child to sleep alone in a tent in the outer perimeter of the campsite. The plaintiff also argued that his claim was not bound by the **arbitration** agreement signed by his ex-wife because Florida law did not permit parents to sign away a child's legal rights. In February 2002, the trial court judge ruled that the **arbitration** agreement that Jacobs signed on behalf of her son was **binding** on all parties, including the father. The court held that as a personal representative of the boy's estate, the father essentially "stood in the shoes" of his dead son, who was **bound** by the agreement to **arbitrate**. Business groups that contend that encouraging arbitration is good public policy applauded the trial court's ruling. But in May 2003, the state's 4th District Court of Appeal unanimously overturned the trial judge's order. The appellate panel ruled that a parent could not sign **arbitration** agreements on behalf of their children in cases involving commercial companies. It was held that parents can only waive these rights in limited circumstances, such as securing health insurance for their children or signing them up to play sports such as soccer.

The appellate court panel stated that state courts long have exercised power to protect children under the common-law rule of **parens patriae**. Under that rule, the state is the ultimate guardian of children who live within its jurisdiction. The panel expressly stated that its ruling did not apply to waivers that parents sign for their children's medical care or for participation in "commonplace child-oriented community or school-supported activities." Global Travel appealed the appeals court's decision to the state Supreme Court. Florida law appears to be that a parent can't bind a child to arbitration unless

there is a compelling public policy interest to do so. Such public policy interests could include getting access to health care or participating in team sports that teach children sportsmanship. The judicial analysis should start with the presumption that a parent doesn't have the right to **waive** the substantive rights of a child. Clearly, the constitutional right to a jury trial should come into play. In my opinion, courts have a duty to protect the rights of a minor. It will be interesting to see how this case comes out. The Florida Supreme Court—in my opinion—will affirm the appeals court's decision. It's probable, however, that it may be a split decision based on questions asked by justices during oral arguments.

XII. WORKPLACE HAZARDS

WORKPLACE DEATHS ON THE RISE

Over the past few years, we have seen a significant increase in on-the-job injuries in Alabama and that's not good. In fact, the number of work-related fatalities in the state rose 18.6% in 2003, according to a government report released last month. At the same time, the rate of workplace deaths across the nation remained virtually unchanged. The U.S. Bureau of Labor Statistics reports that 121 Alabamians died on the job last year, compared to 102 in 2002. The increase in Alabama workplace deaths was the highest among Southern states, ahead of Virginia and North Carolina with an increase of 13 fatalities each. Across the nation, 5,559 people died in work-related incidents in 2003, an increase of just .005 percent from the year before. Among Southern states, Alabama's increased workplace fatality rate was exceeded in percentage terms only by West Virginia's 28% gain.

It is significant that transportation accidents accounted for the bulk of

Alabama's 2003 work-related fatalities. The number of fatalities involving truck drivers, workers driving company cars or personal vehicles on the job rose to 62 last year from 36 in 2002. According to our information, OSHA has investigated 24 work-related deaths during the current year, compared to 15 at this time a year ago. Twenty-five states had fewer fatal work incidents in 2003 than the previous year, while 24 states and the District of Columbia reported higher numbers. There was a single state with no change. It is quite obvious that safety has to receive a higher priority in the workplace in our state. Hopefully, the release of this information will get things moving in the right direction.

GOD-FEARING FOLKS SHOULD ALSO HAVE SOME RIGHTS

We mentioned a lawsuit our firm has filed that deals with a person's right to proclaim personal religious beliefs. A similar case was filed in Massachusetts. There, an employee of MIT has filed a lawsuit against his employer claiming that he was harassed and ridiculed because of his religious beliefs. The employee says co-workers wore phony clerical collars, called him **Jesus** and blasted the Rolling Stones' "Sympathy for the Devil" during a 15-year campaign of harassment and ridicule against him. The discrimination lawsuit is pending in federal court. Mark A. Peterson, who is a machinist, contends supervisors at the school's Lincoln Lab joined the harassment, "openly telling jokes about God." Mr. Peterson, who began work in the lab in 1982, is now on disability leave. He alleges in his complaint: "Employees and/or supervisors at MIT Lincoln Lab have harassed Peterson because of his religious beliefs, including assaulting him with a chemical, vandalizing and stealing his property, tampering with the machines he was working on and making verbal threats."

The lawsuit also names Peterson's union, the Research Development and

Technical Employees' Union, claiming leaders took part in the harassment and did not represent him properly in grievance procedures in 2003. Mr. Peterson claims his troubles began in 1987 when he and another Christian employee began meeting during breaks to read and discuss the Bible. Instructions were given by his supervisors that he was not to bring his Bible to work again.

SILICOSIS PATIENTS GO TO THE COURTS

I predict that there will be a wave of workplace lawsuits over silicosis. As you may know, silicosis, a lung inflammation caused by exposure to silica dust, is a most serious medical problem. Crystalline silica, more commonly called quartz, is used in sand-blasting, concrete demolition and the production of paint and fiberglass. One major lawsuit, in which several people are suing industrial sand suppliers, blasting equipment manufacturers and dust mask manufacturers, is now pending. It is clear that the companies knew about the dangers of silica, but still allowed workers to work within the clouds of dust with poor protection. The employees were left virtually unprotected.

There are thousands of plaintiffs across the country involved in silica litigation. A massive class action is pending in federal court in Corpus Christi, Texas. Pretrial issues are being worked out at present. The trials for the roughly 10,000 claims are not likely to start until at least 2006. There are about 40 states represented in the Texas federal court case. However, most of them come from Mississippi. I understand that after the pretrial details are worked out most of the cases will return to Mississippi for trial.

I believe that the silica litigation will be very large, with the number of silicosis cases eventually equaling the number of asbestos cases. Companies have paid an estimated \$70 billion on about 730,000 asbestos personal injury

claims, according to the RAND Institute for Civil Justice. While there are lots of similarities between silicosis and asbestos cases, it is too early to know if silicosis litigation will actually reach the level of the asbestos cases in total payout. Some of the lawyers defending the cases say that the companies will handle silicosis differently. I guess that means the companies will take a harder line defending on silicosis and will not be voluntarily paying the kind of money paid in asbestos litigation.

Some of the companies that have been defendants thus far in the silicosis cases include: Ingersoll-Rand, Lockheed Martin, U.S. Silica Company, Briggs-Weaver, Pulmosan Safety Equipment Corp., Vulcan Materials and 3M. The Coalition for Litigation Justice, an insurance industry-lobbying group, reports that silica claims are on the increase. The group's literature says that one company has seen more than 30,000 claimants in 28 states. It has had a tenfold increase in claims since August 2002. Since silicosis can only come from one source, it appears that the hard line approach may prove to be a costly mistake for the industry. Folks who have to work around silica dust are at risk for getting silicosis. There is a definite hazard and that will be impossible to deny. Companies that send their workers to areas with silica dust are taking a liability risk. Better working conditions, more advanced protection and clear warnings to workers are a must, and dangerous work environments must be eliminated. When government regulation is ignored, bad things happen.

SETTLEMENT IN BORDER KILLING AFTER A JURY VERDICT

Many American businesses are importing workers from Mexico. Many Mexican nationals are crossing the border on their own looking for work. The family of an undocumented immigrant who crossed the Rio Grande for employment will receive \$15 million under a settlement reached with the

men a jury found responsible for killing him. The agreement came a day after a jury awarded the family of the 24-year-old immigrant \$20 million in a jury verdict against a Texas businessman John R. Hurd and one of his ranch hands. The illiterate mother of the decedent signed the court settlement documents with an "X." The partial owner of San Antonio-based Hurd Enterprises, a natural gas company, was found to be responsible for 75% of the payment because the killing happened on his Hurd-Villegas Ranch near the U.S. border on June 1, 2003. The company drills dozens of natural gas wells a year in South Texas and along the Gulf Coast. The civil jury, which was about to begin discussing additional punitive damages before the settlement ended the trial, found that the defendant had mismanaged the ranch.

The ranch hand, who was found responsible for 25% of the settlement, testified at trial that he mistook the immigrant for a wild hog. Insurance coverage will pay for the settlement. According to testimony in the trial, personnel at the ranch waited up to two hours before calling 911 to let authorities know a man had been shot. During that time, other calls were made before calling police, according to telephone records. The Mexican deputy consul in Laredo said:

This case sets a legal precedent for border communities. We are looking to protect the human rights of Mexican nationals. The owners of ranches along the border — with this precedent — will have to have their people prepared to avoid these kinds of incidents in the future.

This was a tragic incident. The widow, who lives in a rural town in central Mexico, will use part of the money to help educate her two children. It is sort of hard to believe that a man could be mistaken for a wild pig, but mistakes happen, I guess. In any event, justice was served in this case.

HOME DEPOT SETTLES SUIT FOR \$5.5 MILLION

Atlanta-based Home Depot Inc. has agreed to pay \$5.5 million to current and former employees in Colorado to settle an Equal Employment Opportunity Commission (EEOC) lawsuit. The lawsuit, brought on behalf of employees in the company's Colorado stores, alleges a hostile work environment at the Colorado locations based on gender, race and national origin. It also claims the company retaliated against employees who complained about discrimination. Home Depot, which was started in 1978, is one of the world's biggest home-improvement retailers. The company, with more than 1,700 stores in the United States, Canada and Mexico, reported \$64.8 billion in sales last year. The settlement has to be approved by a U.S. District Court for the District of Colorado in Denver. The settlement requires Home Depot to pay \$3 million to resolve discrimination claims filed by 38 employees, according to the EEOC. Those payments range from \$5,000 to \$215,000. The retailer would pay another \$2.5 million to others harmed by the alleged unlawful conduct.

The settlement goes into effect once the court approves it. Home Depot denied the allegations in the EEOC complaint but must have had some problems. Otherwise, it would have tried the case. In addition to paying money, Home Depot has agreed to provide training for employees on anti-discrimination laws, and appoint an EEOC coordinator to make sure it complies with the settlement. The company also will submit quarterly reports to the EEOC and be monitored by the federal agency for two and a half years. The EEOC expects its settlement fund will be ready to accept claims by November 1st.

XIII. TRANSPORTATION

SURVIVORS OF BUS CRASH WIN THEIR LAWSUIT

A jury in Texas has found against a company that was negligent by dispatching a fatigued driver with cocaine and Valium in his bloodstream to help transport a church youth group from Texas to a Bible camp in Louisiana. The driver, Ernest Carter, and four children on the bus died in the crash. Forensic evidence showed Carter, who had drugs in his body, was exhausted from having just completed a 20-hour trip from Florida just two days before the crash. While in route, the bus driver lost control of the bus, veered off an Interstate highway and crashed into a highway pillar. In addition to the deaths, most of the other children suffered shattered bones and lacerations. Several were scalded by diesel fuel and some suffered serious brain injuries.

The wreck happened over two years ago. A number of families had already settled claims arising out of the crash. A prior trial had resulted in a jury verdict of \$10 million awarded to parents of one of the young girls who died in the crash. The current trial addressed all of the unresolved claims against the owner of the company, Discovery Tours, and Green's Transportation, the company that subcontracted with Discovery Tours to provide a second bus for the trip. Interestingly, Court TV covered the trial, which will be shown on one of its programs at a later date.

The jury awarded a total of \$71 million as damages to the 17 children injured in the bus crash who were involved in this case. One child lost an ear, nearly lost his right leg and was so severely brain-damaged that he has the mental ability of a third-grader. The family, on his behalf, received \$36 million in damages. Jurors awarded a 16-year-old girl the second-largest damage amount, nearly \$18 million. Doctors

have said her fractured hip probably will have to be replaced as many as three times in her lifetime. Another girl, now 16, who suffered injuries to her brain, left leg and vertebrae, was awarded nearly \$13 million in damages.

Evidence presented at the three-week trial indicated that the owner hired Carter, an untested driver, at the last minute even though the 51-year-old man had no sleep the night before, had not undergone drug testing before taking the job and had an altered medical certificate. Cell phone records indicated Carter had been up the night before the owner asked him to drive the children to the camp.

The owner's insurance company, Republic Western, claims that a \$5 million policy was not in effect at the time of the crash and wouldn't cover any part of the verdict. The dispute over whether the policy was in force is the subject of a federal lawsuit. It should be noted, however, that the insurance carrier paid \$5 million to the other plaintiffs who settled their claims earlier. This doesn't bode well for the insurance company. Hopefully, there may be more than the \$5 million limits available for the victims of some pretty awful conduct.

HEADSETS FOR PHONES IN CARS CAN BE DANGEROUS

The states of New York, New Jersey and Washington, D.C. now require drivers to use headsets or other so-called hands-free devices when they talk on cell phones. The nation's cell phone carriers fought these laws, but now are joining with carmakers to promote the voluntary use of headsets to address concerns about the safety of talking on the phone while driving. Other states and towns across the country are considering ways to legislate the practice. Research conducted by the National Highway Traffic Safety Administration (NHTSA) and others now suggests that hands-free devices may actually add to the overall risk. American drivers spend roughly a

billion minutes a day talking on their cell phones, an estimated 40% of all cellular minutes. Dr. Jeffrey Runge, NHTSA's administrator, doesn't believe that states and local municipalities should make rules that basically give hands-free phones a free pass as being safe. He doesn't believe giving the indication that they are safe is good policy.

A sizable body of research concludes that headsets and speakerphones don't improve safety because it's the mental distraction of talking on the phone, not just holding it, that causes the danger while driving. Recent research suggests the devices could actually increase risk by encouraging people to spend more time on their cell phones and drive faster while doing so. According to a new study by NHTSA, people spent more time on the distracting task of dialing when they use headsets and voice-activated dialing systems. The new voice-activated dialing method took nearly twice as long as punching the buttons on the phone the old-fashioned way, according to the study. Last year NHTSA officials drafted a letter to be sent to all of the U.S. Governors in this country. The letter purportedly said laws prohibiting hand-held cell phones while giving the green light to using headsets "will not address the problem" and "may erroneously imply that hands-free phones are safe to use while driving." It recommended that drivers not use cell phones at all, except in an emergency. Interestingly, while the letter was to be signed by the Transportation Secretary, it was never sent. *The Wall Street Journal* reported that Dr. Runge didn't forward the letter to the Secretary's office because he felt the case had to be "airtight" first and thought NHTSA had bigger priorities such as combating drunk driving and promoting seat belts. That may be true, but how long would it have taken to deliver a letter that was ready to go?

It would appear that the evidence so far is pretty close to being "airtight." Studies in Norway and Sweden indicate that hands-free use of phones put drivers at more risk. The safety research

is little known among nonspecialists. Interestingly, the federal government's General Services Administration issued guidelines in early 2002 calling on agencies to provide federal employees hands-free equipment while driving. If it's dangerous to drive with a hands-free cell phone—as Dr. Runge believes—the GSA is giving the wrong signal. Private companies have stepped up promotions of the devices. General Motors Corp. and Verizon Wireless are teaming up to sell OnStar, a communications system that features hands-free phone service at the press of a button. The service is now available on nearly 90% of GM's new models, including all Cadillac models.

Recent research by the Virginia Tech Center for Transportation Research suggests cell phones actually play an important role in accidents. The Center, with NHTSA funding, videotaped 100 drivers for a year to study cell phone safety. The Center's director says a preliminary review of the results has found that cell phones were a distracting agent. It is abundantly clear that the use of cell phones while driving is unsafe, and based on the above, it doesn't seem like hands-free units do much to lessen the hazard.

Source: *The Wall Street Journal*

AIRLINES AT FAULT IN WOMAN'S DEATH

The U.S. Court of Appeals has upheld a lower federal court's award against American Airlines. The airline forced an elderly woman to check her bag along with her medical devices. The airline lost her bag, which doesn't come as a shock. The court found the defendants responsible for her subsequent death after losing the bag. The lower court had ruled in 2002 that Americans Airlines, parent company AMR and BWIA International Airways should pay \$226,238.81 to the relatives of Ms. Caroline Neischer's because she died soon after her bag was lost. To my knowledge, this was the first case of its kind. I don't believe that an airline has ever

been held liable for the death of a passenger caused by delayed or missing baggage. The lady, who spent most of her life in her native Guyana, died at age 75 after flying from Los Angeles to Guyana in 1997. After she transferred from an American Airlines flight in New York, a ground agent who worked for American forced the lady to check a bag that contained a breathing device to treat her respiratory problems. This meant she was on the flight without a needed medical device. The agent promised she would be given the bag immediately upon arriving in Guyana. However, the bag was lost and Ms. Neischer died days later.

Ms. Neischer's five children sued AMR and BWIA Airways, which had proposed paying the \$2,000 maximum for lost baggage set by international standards. The lower court ruled the airlines were responsible for a "willful misconduct" death. As a result, the Warsaw Convention limit of \$75,000 for an airline death didn't apply. The U.S. Court of Appeals for the Ninth Circuit ruled that "the seizure of Neischer's bag meets the standard of willful misconduct." The district court therefore properly concluded that the seizure of Neischer's bag proximately caused her death. A three-judge panel sent the matter back to a lower court for additional review as to whether the woman was also partially responsible for her death since replacement medication may have been available in Guyana. This is a most significant decision and one that may require the airlines to be much more careful in dealing with passenger's bags.

FEDERAL INQUIRY TO REVIEW REGULATION OF RAILROAD GRADE CROSSINGS

The Inspector General of the Transportation Department has announced that his office would open a sweeping investigation to determine whether federal regulators adequately oversee the safety of railroad grade crossings, where on average one person dies each day. In a memorandum to the

Acting Administrator of the Federal Railroad Administration, the Inspector General said investigators would assess the Railroad Administration's oversight of grade-crossing inspections, accident reporting and accident investigations. The inquiry is in response to a series of articles in *The New York Times* in July that examined grade-crossing accidents. The articles reported that railroads had broken federal rules by failing to report properly hundreds of fatal grade-crossing accidents, federal officials rarely investigated such accidents, and railroads had destroyed evidence from some crashes. Three members of Congress who oversee transportation asked the inspector general on July 22nd to investigate the findings.

After the articles were published, the agency announced that it was instituting new procedures to identify railroads that failed to report grade-crossing accidents properly. Two of the biggest railroads, the Union Pacific and CSX, said they had new measures to ensure prompt accident reporting. Since 2000, more than 1,600 people have died in grade-crossing accidents, more than twice as many as killed in crashes of commercial airplanes. In the first five months this year, grade-crossing deaths increased 17% compared with the same period in 2003. In its memorandum, the Inspector General's office said that because of the many problems to be examined, it planned to issue a series of reports in a quest for quicker action.

Source: *The New York Times*

XIV. ARBITRATION UPDATE

RESULTS OF A RECENT POLL

We referred in a prior section to the results of a recent poll that was run recently in Alabama by a reputable national polling firm. The findings on

how Alabama citizens feel about a number of issues was most interesting. The results on the issue of arbitration were significant. That an overwhelming majority of Alabama citizens favor the right to trial by jury was certainly no surprise. But, the very strong opposition to mandatory, binding arbitration was the thing that got my attention. Interestingly, poll results were broken down by age, race, gender, location in the state and political parties. There was very little difference in the opinions, however, regardless of designation on the arbitration issue.

It is very clear that Alabama citizens don't like arbitration. The results of this poll found that only 10.6% of the people in this state favor arbitration as a means of settling their disputes. A most significant thing about the result is that persons who call themselves Republicans or Independents feel just as strongly as do Democrats on this issue. The two issues that polled the highest in this survey were arbitration and corporate corruption. The latter issue actually went off the chart and that really came as no surprise. We have seen that very same result in other polls—by different companies—on that issue. Frankly, I didn't have to see a poll to know that folks don't trust large corporations very much. This is obviously because of all of the corporate corruption that has been uncovered.

ATTORNEY GENERAL GIVES ARBITRATION WARNING

Arkansas Attorney General Mike Beebe issued a consumer alert last month warning citizens of his state to be careful negotiating contracts that may contain arbitration agreements that remove access to the state's court system. The consumer advisory comes about a month-and-a-half after Arkansas Advocates for Nursing Home Residents, a citizens' group, expressed concern to General Beebe that nursing homes across the state are increasingly including arbitration clauses in admission paperwork. The group opposes

such agreements, and its leaders say they are worried some families do not realize what they are signing. Beebe's warning urges caution with clauses that say a third-party arbitrator will decide disputes. The Attorney General advises consumers to be very careful when negotiating contracts, stating that, buried in the fine print of many form contracts - for employment, rental, credit, phone service, insurance and nursing homes—are **mandatory arbitration** clauses that waive the right to access to the courts. According to the advisory the arbitration clauses “force individuals to argue their cases through private arbitration, a costly private legal system that can be binding on the parties, and may preclude access to a court ruling.”

XV. NURSING HOME UPDATE

AN OUTRAGE IN THE INDUSTRY

Nursing home owners in Alabama are now routinely utilizing arbitration and the use of shell corporations without assets to shield themselves from personal liability. Many of these owners, some of whom own jets, luxury ships, mansions and even off-shore islands, are taking advantage of an Alabama Supreme Court decision that says it's OK for them to force folks to sign arbitration agreements before admitting family members to a nursing home. As a result, if the nursing home injures or kills the resident, the courts are effectively closed to the family. The Federal Arbitration Act (FAA) was never intended to be used in this manner. In fact, the FAA wasn't even intended to be applicable to consumer disputes and certainly not to personal injury or wrongful death cases. I have not talked to a single person who believes mandatory, binding arbitration should be used by nursing home owners. When there is no fear of being sued—regardless of

how bad conduct may be—you can rest assured that the level of care and attention for residents will suffer. The only reason that the public isn't outraged over what the Supreme Court has allowed is simply that most folks don't know what's happened.

ELDER JUSTICE ACT MOVES FORWARD IN THE UNITED STATES SENATE

Senator John Breaux is retiring from the United States Senate this year. As some of you may know, the Louisiana senator is the author of the Elder Justice Act, a bill pending in the Senate at the present time. The Elder Justice Act is the first comprehensive federal legislation to address the problem of elder abuse on a nationwide scale. As a courtesy to Senator Breaux, some of the leaders in the Senate have decided to accelerate the Senate's consideration of the bill. The Senate Finance Committee is expected to take it up in September and forward it to the Senate floor to be voted upon. The Elder Justice Act, as originally written, would improve training and coordination among federal, local and state agencies whose job it is now to provide protection to the elderly. It would also sanction those who do not report abuse in long-term care facilities. Among other things, the bill—if passed—would establish a federal Office of Elder Abuse.

Interestingly, the nursing home industry pledged that it would support the bill as it was introduced into the Senate. But, the industry reneged on that pledge and was successful in removing two of the strongest parts of the bill that would have increased the federal government's ability to prosecute abuse and neglect in nursing homes. This is an unfortunate development. Why in the world would the industry charged with the duty of protecting our frail and delicate elders object to strengthening the laws against abuse and neglect in nursing homes? The bill would provide significant federal resources needed to deal with

elder abuse. Most citizens would support the bill if they knew about it. Call your Senator's office and tell them that you want to support the Elder Justice Act. It is badly needed!

SENATOR GRASSLEY TELLS IT LIKE IT IS

Back in July, Senator Charles Grassley (R-IA), who previously served as Chairman of the United States Senate Committee on Aging, sent a very strongly worded letter to Mark McClellan, the Centers for Medicaid and Medicare Services Administrator, on July 9, 2004. Senator Grassley states in his letter that the certification process, which regulates and enforces federal and state legislation in our nursing homes, is “seriously corrupted” and “just plain broke.” As you may have read in a prior issue of this Report, the Government Accounting Office recently issued a report showing the downgrading of deficiencies that should have been cited as actual harm to nursing home residents, among other problems with the survey and certification process. Senator Grassley in response to the GAO report, authorized members of his staff to interview surveyors and former surveyors of long-term care facilities.

The Iowa senator further stated in his letter to Administrator McClellan “that the surveyors themselves are demoralized when blatant quality of care deficiencies and findings are watered down, substantively altered, and/or blatantly ignored or dismissed. These surveyors have raised enormously disturbing issues for anyone who cares a whit about the very health and safety of frail nursing home residents.” As you may recall, the GAO report reflected government statistics showing a significant decline in the penalties imposed on nursing homes for violation of federal health and safety standards over a period of four years, even though federal officials and independent experts all agree that long-term care in this country still has serious

problems with quality of care. The Bush Administration has placed less emphasis on enforcement of standards of care. The basic approach has been to collaborate with the industry and give information to consumers. In effect, they are letting market forces produce improvements and quality. Clearly, the Bush Administration officials haven't been very active in enforcing standards.

The state and federal agencies that regulate our long-term care facilities need to be objective and unbiased in their survey process of facilities. This is critical and absolutely necessary to the care and well-being of the elderly who are forced to live out the remainder of their lives in long-term care facilities. Unfortunately, some of our elected officials responsible for ensuring the protection of the elderly seem to be more concerned with keeping the bosses in the long-term care industry happy. Recently, the United States Committee on Aging held a hearing on the issue of nursing home tort reform and the escalation of litigation against nursing homes for abuse and neglect of their residents. The hearing featured many witnesses from the nursing home industry, including the owner of a large Alabama-owned nursing home chain. It was significant and most unfortunate that not one witness was allowed to speak on behalf of nursing home residents. That is both unbelievable and totally wrong.

PENNSYLVANIA NURSING HOME ADMINISTRATOR INDICTED

The head of a suburban Pittsburgh nursing home, where an Alzheimer's patient died after wandering outside in the cold, has been indicted on federal fraud charges. The indictment also charges the former Ronald Reagan Atrium I Nursing and Rehabilitation Center with health care fraud and false statements relating to health care matters. The fraud charges against the former administrator and the now-closed nursing home are in addition to

state involuntary manslaughter charges filed last year. The 88-year-old resident died October 26, 2001, after she was locked out in 40-degree temperatures. According to the indictment, the administrator and the nursing home **altered** nurses' records to **hide** bruises and sores, forged doctors' signatures on medical records, **altered** doctors' orders and were understaffed. Federal prosecutors claim the facility also defrauded Medicare and Medicaid from 1999 to 2003 by **forging** records and **inflating** care. The administrator also is accused of skimming money by having the nursing home make payments to three nonprofit organizations she ran.

The administrator is awaiting trial on charges of involuntary manslaughter, neglect of a care-dependent person, conspiracy and reckless endangerment in the resident's death. Prosecutors allege the administrator and a supervisor conspired to cover up the elderly resident's death. The supervisor is awaiting trial on perjury, conspiracy and tampering with evidence charges. Investigators believe the resident either walked out a door that was propped open, or one where the alarm was deactivated so workers could go outside and smoke. The lady fell and died of a combination of heart failure and exposure. Prosecutors claim the administrator ordered the supervisor to have the dead body carried back into the home and to **alter** records to **make it appear** the resident died in her sleep.

XVI. HEALTHCARE ISSUES

PHARMACISTS ALSO BELIEVE DRUG MAKERS CHARGE TOO MUCH

A most significant lawsuit has been filed in California and it is one that seems to have gone virtually unnoticed. A group of 14 independent phar-

macists in that state filed the lawsuit in Oakland against the world's largest pharmaceutical companies, accusing them of conspiring to inflate drug prices in the United States as part of an illegal price-fixing scheme. The lawsuit accused the companies of constructing an "artificial trade barrier and wall around the United States for the purpose of preventing the importation of any lower-priced drugs into the United States, including California." The companies are charged with violating California's antitrust and unfair business practices laws through "intimidation, coercion and bribery."

Retailers in the country are charged drug prices that are as much as 400% higher than those offered to foreign businesses for the same drugs. As we all know now, the prices of drugs sold in Canada are substantially lower than the prices of the same drugs in the United States. This means American citizens are subsidiary citizens in Canada and other foreign countries when we buy our prescription drugs here. The companies named in the lawsuit include Pfizer Inc., Johnson & Johnson, Bristol-Myers Squibb Co., AstraZeneca Inc. and Eli Lilly and Co.

The Pharmaceutical Research and Manufacturers of America, the Washington trade group representing the pharmaceutical industry, was named as a co-conspirator in the lawsuit for allegedly aiding and abetting the offenses listed in the suit. The pharmacists claim they paid substantially more for the companies' pharmaceuticals than they otherwise would. They are looking for the ability to buy drugs from the major manufacturers at the same price as they sell those same drugs to the government, HMOs and insurance companies, and that makes good sense. Purchases in Canada have become a huge problem for retail drugstores. They are losing business to their competitors in Canada and around the world and that's because their customers can buy cheaper drugs outside the U.S. Nobody can blame the American public for going to Canada. Neither

should the retailers be blamed. Instead, the blame lies squarely at the doorstep of the Bush White House and in the halls of Congress. The giant drug industry, which is much too powerful, must be controlled and soon. It makes no sense for the major pharmaceutical companies to be making record profits, retail drug stores operating on very low profit margins, and consumers not being able to afford to pay for their prescriptions. That simply doesn't meet the **smell** test!

HMOs DOUBLED THEIR NET PROFITS IN 2003

Not only are HMOs making a great number of medical decisions on a daily basis, they are also pulling in some "big bucks" in the process. In fact, the nation's HMOs nearly doubled their net profits last year, earning \$10.2 billion in 2003 up from \$5.5 billion in 2002, according to a new report by Weiss Ratings, a financial ratings firm. California and Illinois HMOs reported the highest aggregate earnings at \$773.6 million and \$624.6 million, respectively. One HMO, Kaiser Permanente, located in Oakland, California, accounted for a full fifth of the industry's profit gains. This HMO reported a year-over-year earnings increase of \$1.1 billion, resulting largely from regulatory changes that required the company to consolidate its year-end financial statements for all its businesses, including hospitals and provider groups.

Meanwhile, the study found that the nation's Blue Cross and Blue Shield plans saw their combined profits jump 63% last year, to \$5.4 billion from \$3.3 billion in 2002. The industry's soaring profits are bad news for both consumers and businesses who are being hit with skyrocketing healthcare costs without any perceived improvement in benefits. I predict there will be a wave of consumer backlash against how the HMOs are operating. Too many people are being hurt by their tactics. But, even that backlash may not cause the HMOs to change the way they do busi-

ness because of their tremendous power and influence in Washington and especially in the White House. I have talked to a number of medical doctors who are most concerned over the HMOs' entry into the medical field. Combining the discontent that is evident among both doctors and their patients may be enough to get the attention of our political leaders.

MERCK SAYS FDA APPROVES VIOXX FOR CHILDREN

The U.S. Food and Drug Administration has approved Vioxx for use by children with rheumatoid arthritis. The approval comes on the heels of an FDA-financed study that showed adult patients taking Vioxx had a 50% greater risk of heart attacks and sudden cardiac death than those taking Pfizer's Celebrex, another arthritis treatment. (This was mentioned a great deal in the Mass Torts Section.) The manufacturer Merck says in a press release that the FDA had approved a once-daily dose of the drug for relief of arthritis symptoms in children two years and older who weigh at least 22 pounds. Merck claims clinical research has established the drug's safety and effectiveness in children. As you may know, the drug is designed to reduce swelling in joints and relieve pain. I really believe that the FDA made a mistake on this one. I hope time will prove me wrong. Nevertheless, because the safety and well being of children are involved, I am greatly concerned about the use of this drug for children.

NEW STUDY SUGGESTS HIGH DOSE OF ZOCOR HAS NO BENEFIT

It appears that some people may be taking higher doses of Zocor than necessary. A new study, which included approximately 4,500 patients, set out to determine whether the high dose (80 mg) of Zocor worked better than the lower doses of the drug at preventing death and cardiovascular complications

in people who had suffered heart attacks. The results found there was little or no benefit from the higher dose given to people who recently had a heart attack. People who took the high dose (80 mg per day) experienced increased risk of muscle related complications. The study, which was paid for by Merck (the maker of Zocor), was published in the September 15th issue of the Journal of the American Medical Association.

Before prescribing a medication, physicians attempt to determine whether the benefit of the drug to the patient outweighs its risk. The Zocor findings raise concerns about the risk/benefit analysis related to the 80 mg dose of Zocor. Why would a doctor prescribe the 80 mg dose if it provides no more benefits than the more commonly used 40 mg dose? The higher dose carries the risk of more side effects, including muscle injuries, and that's well documented. After evaluating the results of this study, Merck should question the continued marketing of the 80 mg dose of Zocor. Of course, removing the higher dose from the market could potentially hurt the sales of Zocor.

Zocor is the second best selling member of the class of drugs known as statins. I suspect most Americans—because of President Clinton's heart surgery—know that statins are used to lower cholesterol. Six statin medications are currently sold in the United States and about 11 million Americans take them. Lipitor, manufactured by Pfizer, is the largest selling drug in the world in terms of gross revenue. Merck sells several billion of dollars worth of Zocor each year. Merck should be commended for continuing to study its medication and its effects on people taking it. The issue on the table at this point is: what will Merck do with this new information? It is important for pharmaceutical companies to conduct research on the long-term effects of these types of medicine. It is equally important for the companies to act on the results of their studies.

Statins are prescribed in an effort to help lower the risk of death from strokes and heart disease. Studies have suggested that lowering cholesterol with statins can offer increased protection from heart disease. Interestingly, studies involving animals given statins in pre-marketing studies indicated statins could cause deterioration of the animal's heart muscle. It would be most ironic if medicines prescribed to patients in an effort to assist in helping to prevent heart disease are somehow slowly causing heart muscle deterioration in humans as shown in animal studies. Are the pharmaceutical companies investigating this issue? Would investigation of that issue help sales of their products? Let's hope that the pharmaceutical companies look for answers to questions related to patient health, not just the health of their balance sheets. The long-term use of statins and the effect of certain doses is certainly worth studying. In any event, Merck is to be commended for its work in this instance.

XVII. ENVIRONMENTAL CONCERNS

DUPONT SETTLES TEFLON SUIT

Recently, we discussed the problems caused by perfluorooctanoic acid (PFOA), a chemical found in Teflon, pointing out the most serious hazards created. Recently, West Virginia residents and Dupont settled a lawsuit alleging that the company contaminated local water supplies with PFOA. The settlement calls for payments of \$108 million. The amount to be paid by Dupont could reach \$345 million if a panel finds the chemical is hazardous to human health, which I believe they will. Some 60,000 residents of Ohio and West Virginia whose drinking water was contaminated by a chemical used in making Teflon are beneficiaries of the settlement. Residents of the towns filed a class action lawsuit in

2001 over PFOA releases from DuPont's Washington Works plant near Parkersburg, W.Va., which is located on the Ohio River.

DuPont also faces as much as \$300 million in fines from the Environmental Protection Agency over charges that it withheld information about PFOA three times in 20 years. The EPA says PFOA may pose "substantial risk of injury to human health or the environment." The fines, announced in July, are separate and not affected by this settlement. Health and environmental experts have raised red flags about PFOA, also used in the manufacture of Gore-Tex, in part because of its pervasiveness. As pointed out, 92% of Americans tested have traces in their blood.

While studies of animals have shown PFOA can cause developmental problems, few studies have been done on the human impact. Pending approval by a West Virginia judge, this settlement requires DuPont to pay \$70 million in cash to the affected communities, build water treatment plants and form an expert panel to evaluate whether there are links between PFOA exposure and disease or birth defects. If the panel determines that PFOA can cause human disease and birth defects, DuPont will also pay as much as \$235 million for a medical monitoring program. Six area water districts will have the option of installing state-of-the-art water treatment systems to reduce PFOA to the lowest practicable levels, at an estimated cost of \$10 million. There is also a fix for residents whose water comes from private wells. In those instances, DuPont will make equivalent technology available. This is a most important settlement and one that will be looked at closely by environmental and safety groups.

Source: *USA Today*

OUTDOORSMEN QUESTION BUSH ADMINISTRATION

The Bush Administration has gutted so many environmental regulations that

one more really shouldn't come as a surprise. But, it still makes me wonder why the White House would choose an election year to dismantle one of the most important and popular land preservation initiatives of the last thirty-years. A Clinton Administration rule that placed 58.5 million acres of national forests off-limits to new road building and development was the victim this time. There appears to be no compelling reason to rollback this rule and no obvious beneficiaries other than timber, oil and gas interests that have long regarded the national forests as some sort of profit center. Recent polls reveal that many people who enjoy hunting, fishing and outdoor activities and who voted for Bush in 2000 are no longer with him. This is because of his poor record on environmental issues.

Source: *The New York Times* and *Wildlaw*

EVEN THE EPA WILL DO THE RIGHT THING— SOMETIMES—AND THAT'S GOOD

As we reported in an earlier report, the Environmental Protection Agency had considered approving a very controversial "wet method" for demolition of a hotel that was filled with asbestos. Responding to mounting community opposition to this asbestos removal "experiment" planned in Ft. Worth, Texas, the EPA has now announced that it will not approve the test. It is important to remember that the test would have involved bulldozing a building while spraying it with a fire hose to keep the asbestos dust down. The many problems that were lurking with this "experiment" were detailed in the previous report. I am pleased to report that the EPA has now announced that they wouldn't approve this method. This came one day after meeting with lawyers from Trial Lawyers for Public Justice and the Natural Resources Defense Counsel, two national public interest law firms. Also involved was the Handley Community for Environmental Justice, a grassroots organization located in Ft.

Worth. These groups are to be commended for their work on this project.

Many are correctly noting that this is a huge victory for folks who really care about public health. Scientists agree that there is no safe level of exposure to asbestos, and the experimental asbestos removal method known as the “wet method” provides less protection that is required by federal law. Accordingly, this is a very good decision by the EPA. The agency has indicated that it would contact the U. S. Department of Defense to request assistance in finding a suitable location to conduct the “wet method” testing at a military installation far removed and remote from residential neighborhoods. Jim Hecker, TLPJ’s Environmental Enforcement Director, stated in a news release:

We are encouraged that EPA agreed with our position that a military base in a remote location would serve as a better test location than a family neighborhood with houses, churches and schools nearby. However, we will hold EPA to its pledge to ensure that wherever the experiment is conducted, there will be meaningful opportunity for public comment on, and scientific peer review of, the test plans and test results.

Internal EPA documents, obtained by TLPJ and the NRDC, revealed the EPA employees’ anger over the proposal to use the controversial building demolition method. The documents, made public in May on TLPJ’s website, www.tlpj.org, described this method as a potentially dangerous human health experiment. It is well known that exposure to asbestos by way of inhalation can lead to an often-fatal form of lung cancer called Mesothelioma, as well as other asbestos-related illnesses. The EPA should be commended for doing the right thing.

Source: Trial Lawyers For Public Justice

MERCURY IN MANY LAKES AND RIVERS

One-third of the nation’s lake waters and one-quarter of its riverways are contaminated with mercury and other pollutants that could cause health problems for children and pregnant women who eat too much fish, according to the Environmental Protection Agency. In 2003, states issued warnings for mercury and other pollutants for nearly 850,000 miles of U.S. rivers — a 65% increase over 2002 — and 14 million acres of lakes. We may be finding out for the first time how bad things really are. The levels reported are the highest ever reported by the EPA. The warnings don’t apply to fish caught in the deep seas that are sold in stores and restaurants. An extremely small percentage of commercially sold fish come from inland lakes and rivers.

It should be pointed out that the health of pregnant mothers and small children is critically important. Fortunately, it is reported that adults seldom suffer health problems from eating fish laden with mercury. On the other hand, it has been shown that a diet rich in mercury-tainted fish can severely damage the nervous systems of children and fetuses. That’s why states issue fish warnings, not only to children, but also to women young enough to have children. Many states advise that women and children eat no fish at all from the most heavily contaminated lakes and rivers, which are listed in state Web sites. Recommended consumption limits on fish from other water bodies range from once a week to once every two months. As has been reported, mercury has been a problem in Alabama waters.

Eighteen states have issued warnings on eating fish caught from all lakes and rivers. Another 23 states warn that fish caught in some lakes and rivers could be contaminated. Mercury is emitted primarily by incinerators and power plants that burn coal. The EPA plans to publish rules restricting mercury from power plants by mid-2005. Environmentalists say the preliminary draft of

those rules does not go far enough. The statistics are based on data the EPA collected from states for 2003. The states that are responsible have issued warnings about fish caught in local streams and lakes and that’s progress.

Source: *USA Today*

WILDLAW WORKS TO PROTECT OUR ENVIRONMENT

WildLaw is an environmental law firm with offices in Alabama, Florida, North Carolina, Utah and Virginia. WildLaw has filed the only lawsuit in the nation against the three main sets of regulations issued by the United States Forest Service as parts of the Bush Administration’s deceptively-named “Healthy Forests Initiative.” The attack by the Bush Administration on our national forests and our laws for managing those public lands is now in full force. In the summer of 2003, the Administration issued three new sets of regulations gutting environmental protections and citizen involvement, all in order to increase the logging on the National Forests. WildLaw filed suit over the new sets of regulations on behalf of 18 client organizations from all over the country. This lawsuit challenges the lack of an environmental analysis under the National Environmental Policy Act for these new regulations. It also has a facial challenge to the new rules based on non-compliance with the National Forest Management Act and the Appeals Reform Act. So far, this is the only lawsuit in the nation to be filed against all these new anti-environmental regulations.

Ray Vaughan, who is Executive Director of WildLaw, is the lead attorney for all the organizations filing the case. In a conversation with Ray, he stated:

The Bush Administration is trying to use people’s fear of forest fires to gut environmental laws and eliminate public participation in the management of the public’s lands. By lying to the public about the

past mismanagement that has caused unhealthy forest conditions and by lying about the agency's inability to comply with the law, the Administration hopes to fool people into allowing its timber industry contributors to plunder our public forests. We intend to keep our national forests independent of partisan political pay-backs and keep the public in our public lands.

The Administration knows that there are legal and scientifically sound ways to reduce fire hazards and to improve the health of our forests. But instead, they want to use the situation to scare and scam people into letting the large, healthy and fire-resistant trees be logged without laws or good science, all to benefit a handful of multinational corporate special interests.

LUNG FUNCTION TIED TO POLLUTION LEVEL

In the first long-term study of the effects of air pollution on children, researchers have reported that children and teenagers in Southern California communities with higher levels of air pollution were more likely to have diminished lung function. In their study, published in *The New England Journal of Medicine*, researchers at the University of Southern California followed 1,759 children ages 10 to 18 in a dozen southern California communities. The pollutants they considered came primarily from car exhaust. The investigators found that 7.9% of the 18-year-olds in the highest pollution areas had lung capacities that were less than 80% of what they should have been. Significantly, among those subjected to the least-polluted air, 1.6% had underperforming lungs.

The investigators added that the lung effects were similar to those that occur when children live in the home of a parent who smokes. The study came up with convincing evidence that air

pollution has chronic effects. Effects were found in all of the children, and that exposure is unavoidable. But, the cause of the pollution is certainly preventable.

Source: Reuters and The New York Times

XVIII. TOBACCO LITIGATION UPDATE

THE FEDERAL GOVERNMENT TAKES THE TOBACCO INDUSTRY TO TRIAL

The federal government's lawsuit against the country's leading cigarette companies is finally going to trial. The case will be tried before a judge, without a jury, in a United States District Court. The government is seeking to strip the companies—referred to in legal terms as disgorgement—of \$280 billion that Justice Department lawyers say was earned through **fraud**. This is the largest civil case ever prosecuted under the federal Racketeer Influenced and Corruption Organizations Act. After five years of preparation, at a cost to the government of \$135 million, the trial is scheduled to last for at least six months. Some 100 witnesses are expected to testify in person, with 200 others to be presented through depositions or testimony from other trials.

A 1953 meeting held in New York is said to be the birthplace of the conspiracy. The government's lawyers say that meeting led to a widespread conspiracy of deception that remains in effect, reflecting a carefully built strategy to misrepresent the addictive nature of cigarettes, lie about the health risks of secondhand smoke and direct marketing efforts at young people to sustain a large population of smokers. The defendant companies are: Philip Morris USA; its parent, the Altria Group; the R.J. Reynolds Tobacco Company; the Brown & Williamson Tobacco Corporation, which merged over the summer with Reynolds; the Lorillard Tobacco

Company, a subsidiary of the Loews Corporation; British American Tobacco; and the Liggett Group. All of the defendants say that the government's case is groundless. They deny engaging in a conspiracy and accuse the government of distorting history to drive them into bankruptcy. They also say that under the terms of the 1998 settlement with 46 states, referred to as the national settlement, the companies have already complied with orders that the government is seeking in the lawsuit. I almost fell out of my chair when I heard them say that.

The case, which was filed in 1999, originally included charges to recover federal health care costs due to smoking. The Judge dismissed those charges, leaving two counts under the racketeering act. The Justice Department has aggressively pursued those charges despite several efforts by Congress to block financing for the case. As we went to the printer, the trial had started. The best thing that could happen, from a public health perspective, is for the government to be totally successful in this case.

COURT APPROVES CLASS ACTION OVER 'LIGHT' CIGARETTES

An important court decision in Massachusetts will also have a good effect in the fight to curb tobacco use. The Massachusetts Supreme Court ruled in a 4-3 decision that a class of plaintiffs can sue a tobacco company for deceptive advertising and trade practices related to the marketing of so-called "light" cigarettes. Interpreting the Massachusetts consumer protection statute, the court's majority said the plaintiffs only had to prove a reasonable person would conclude the defendant falsely advertised the potential health benefits of light cigarettes. The court rejected Phillip Morris' argument that the plaintiffs would have to prove the business practices in question harmed individual members of the class. This is the first time a state's highest court has ruled on the certification of a class of smokers

suing a tobacco company over the marketing of light cigarettes. The ruling has to be viewed as a major blow to the tobacco industry. It will result in more consumer protection class action lawsuits against cigarette manufacturers around the country. It will also result in a greater number of personal injury suits being filed by individuals who smoke light cigarettes.

It is not surprising that light cigarettes account for over half of the cigarette market in this country. In March 2003, an Illinois trial court judge awarded \$10.1 billion to a class of smokers of light cigarettes who had sued Philip Morris, the nation's largest tobacco company, under the Illinois consumer protection law for false advertising and marketing fraud. That verdict, along with the class certification issue, is on appeal to the Illinois Supreme Court. Folks smoke light cigarettes believing they are better for their health, when in fact they are not. These smokers will benefit by this decision. The decision in Massachusetts is also significant because it doesn't require plaintiffs to prove individual reliance on conduct by the defendant in persuading class members to buy light cigarettes. Neither will the plaintiffs have to prove that the tobacco company intentionally misled consumers. The plaintiffs in the Massachusetts suit allege that since 1971 Philip Morris has included the words "lowered tar and nicotine" on every package of Marlboro Lights sold in Massachusetts, even though it has known for years that most smokers likely receive as much or more tar and nicotine from Marlboro Lights as they would from regular Marlboro cigarettes. I understand that Philip Morris designed Marlboro Lights to produce results on federal tests that would enable it to promote the cigarettes to consumers as containing "lower tar and nicotine." It was alleged in the Massachusetts lawsuit that Philip Morris purposely manipulated the design and content of the cigarettes to provide more tar and nicotine than registered by the federal test.

Source: *Lawyers Weekly*

XIX. THE CONSUMER CORNER

FOLKS SHOULD BE CAREFUL AROUND GAS PUMPS

Most of the gas pumped these days takes place at self-service pumps. It is extremely important to be careful around these pumps. One of the hazards that exists is fire caused by static electricity. Some experts say the number of fires being sparked at gas stations is increasing, and that's bad news. As a result, all of us could be in harm's way and not even realize it. A very good report that aired on The Early Show (CBS) discussed how these fires start and explained what people can do to stay safe. Many unsuspecting drivers are becoming victims of static fires at gas stations all over the country. For example, at a gas station near Tulsa, Oklahoma, a woman lost her life while pumping gas. Static electricity sparked a blaze that quickly went out of control. Another incident occurred while a man was pumping gas at a station just outside Spartanburg, South Carolina. The unsuspecting man grabbed the nozzle and felt a shock. A spark ignited the fumes and his whole car was engulfed in flames. The man's 4-year-old daughter was buckled up inside his truck that was on fire. Fortunately, he was able to get his daughter out of the vehicle. Both escaped without harm, but his truck and a portion of the gas station were destroyed.

Static fires are a growing problem, and not enough is being done to warn the public. Most of these fires are caused by drivers who get back into their cars while the gas is still pumping. By getting into their seats, they are building up static electricity. This is just like rubbing your feet on the carpet and touching a doorknob. The same thing can happen in a car, and when it does, a high voltage potential is created. That static can turn dangerous

when the person goes back to the nozzle. As vapors come out, just touching the nozzle can spark a fire. Interestingly, statistics reveal that a total of 78% of these fires happen to women. It is believed that women will get back into their cars more often than do men. When a fire occurs, the thing to do is get away from the car. If there are people in the car, get them out. Don't touch the nozzle and never pull it out. If the nozzle is removed, flames will spread quickly and the fire feeding off the fuel will become even worse.

To combat the problem, the major nozzle makers in the United States are now putting static fire warnings on all new nozzles and hose attachments. In addition, some gas stations are now using warning pads. These pads not only warn you of the static danger, but you can touch them to discharge your static, eliminating the risk of sparks at the nozzle. If a gas station you use doesn't have one of these pads, you can simply touch the door of your car to get rid of your static. Safety experts say if you have passengers in your car when you stop for gas, make sure everyone unbuckles their seat belts while you are filling up. If there is a fire, they will be able to escape more quickly if unbuckled. If children are unbuckled, it will be easier to rescue them.

CYBER SCAM ON RISE IN ALABAMA

According to law enforcement agencies, scammers are increasing their use of fake e-mails and hijacked Web sites to get consumers in states, including Alabama, to reveal personal information so they can raid their bank accounts or use their credit cards. The practice, which is becoming widespread, is known as "phishing." A number of Alabama businesses and individuals have become victims of phishing attacks, which is being called the fastest growing and largest fraud scheme in history. Statistics show phishing scams are successful 28% of the time, with 65% of the attacks

against financial institutions. In the second quarter of this year, the number of phishing attacks reported to the Anti-Phishing Working Group rose to 4,711 from 1,084, an increase of 335%.

Computer attackers are now going after individuals and businesses. It is pretty obvious that the cyber crooks can make big bucks by defrauding individuals and businesses. A survey by researcher Gartner Inc. revealed that about 3% of 5,000 adult Internet users admitted they gave up financial or personal information after being drawn into a phishing scam. These scams typically use e-mail messages and Web pages designed to look like they are from legitimate businesses. The survey shows that 79% of the respondents are greatly concerned about their privacy while online. Even though they are concerned, however, many are careless and don't protect their personal and private data. Businesses and consumers need to know that e-mail requests for private data such as passwords, Social Security numbers and credit card information are flags for identifying a phishing attack. These attacks are really just a sophisticated form of identity theft. It should be noted that eighty-five percent of phishing attacks originate from other countries, with Russia among the leaders. Typically, phishing Web sites are open about four days, according to the Secret Service.

ALABAMA TO RECEIVE OVER \$400,000 IN SETTLEMENT

Under the terms of settlements between securities regulators and Deutsche Bank Securities Inc. and Thomas Weisel Partners LLC, the State of Alabama will receive more than \$400,000. This is subject to final acceptance of the terms of the settlement agreement. Joseph P. Borg, who is doing an excellent job as Director of the Alabama Securities Commission, reports that the settlements result from allegations of conflicts of interest at brokerage houses where analysts recommended stocks because of improper

influence from their investment banking colleagues. Director Borg made the announcement following investigations of the two firms by the California Department of Corporations, the U.S. Securities and Exchange Commission, NASD, Inc., and the New York Stock Exchange. The settlements are related to the April 2003 global settlement that 10 other investment banks reached with state, federal and industry regulators.

Deutsche Bank will pay to all states and the SEC a total of \$87.5 million: \$25 million in disgorgement; \$25 million as a penalty for various conflicts of interest; \$25 million to fund independent research; \$5 million to fund and promote investor education; and \$7.5 million for failing to promptly produce e-mail and thereby delaying by over a year the investigation as to Deutsche Bank. Thomas Weisel Partners will pay a total of \$12.5 million: \$5 million in disgorgement; \$5 million as a penalty for various conflicts of interest; and \$2.5 million to fund independent research.

The investigations of Deutsche Bank and Thomas Weisel Partners, together with the 2003 global settlement, are part of a comprehensive regulatory effort to reform the relationship between investment banking and research and to manage appropriately conflicts of interest. The settlements represent a significant step in the Commission's continuing efforts to ensure that investors are treated fairly and provided with objective research. The money received for Alabama will be apportioned to the General Fund, investor education, and local law enforcement in accordance with an agreement being finalized by the Alabama Securities Commission and the brokerage houses. Under the terms of the settlement, Deutsche Bank is also required to distribute \$2.5 million to the Investor Protection Trust (IPT), which will use the money to fund investor education initiatives on the state and national levels. The IPT is an established charitable organization with experience handling settlement funds and a history of investor education successes.

The Alabama Securities Commission was one of the lead states in the Wall Street investigation, which previously returned \$5.5 million to Alabama in 2003. The latest settlements were negotiated by California, the District of Columbia and Maryland on behalf of all states and unanimously recommended by the Board of Directors of the North American Securities Administrators Association. It is significant that these continuing enforcement actions, coupled with pending reforms in the mutual fund industry, should help to restore investor confidence. Alabama citizens can contact the Alabama Securities Commission for inquiries regarding securities broker-dealers, agents, investment advisors, investment advisor representatives, financial planners, and the registration status of securities; to report suspected fraud; or obtain consumer information. Call the Alabama Securities Commission at 1-800-222-1253.

CALIFORNIA SUPREME COURT APPROVES WAGE-AND-HOUR SUIT

The California Supreme Court has unanimously ruled that class certification was appropriate for hundreds of wage-and-hour suits. The much-awaited decision says that a trial judge didn't abuse his discretion by certifying a class action for 600 to 1,400 employees of a national drugstore chain who claim they were deliberately mislabeled as salaried managers to exempt them from overtime pay. The appellate court said:

The record contains substantial, if disputed, evidence that deliberate misclassification was defendant's policy and practice. The record also contains substantial evidence that, owing in part to operational standardization, and perhaps contrary to what defendant expected, classification based on job descriptions alone, resulted in widespread de facto misclassification. Either theory is amenable to class treatment.

The “disgruntled employees” argument by Sav-on Drug Stores Inc. was that overtime cases could only be proven on a person-by-person basis. If that had been accepted, you’d never be able to prove an overtime case. This decision gives employees equal footing with their bosses. It’s simply not practical for individual workers to bring cases against large national employers and multinational corporations in many cases.

Two individual employees filed the suit on behalf of themselves and others who had been designated as operating managers or assistant managers. In that capacity, they were exempt from state laws requiring overtime pay for anyone who works more than eight hours a day or 40 hours a week. They claimed they had been “uniformly misclassified” because their jobs required them to perform non-managerial tasks—helping customers at checkouts, stocking shelves and cleaning the stores—for more than 50% of their work hours. Sav-on contended that managerial duties varied significantly from person-to-person and store-to-store and that no meaningful generalizations could be made about the individual employment circumstances. The trial court judge disagreed and declared a class action for the period of April 3, 1996 to June 22, 2001. An intermediate appellate court, in reversing, held in 2002 that the employees’ job descriptions were so different, regardless of their titles, that there could be no class. It was the first time that a California appeals court had ruled that class certification was not appropriate in a wage-and-hour case. Fortunately, the Supreme Court disagreed, saying that a “reasonable court” could conclude that the proper legal classification of the employees’ activities would be handled better in a class action than individually.

XX. RECALLS UPDATE

VOLVO RECALLING 460,000 VEHICLES

Volvo is recalling 460,000 vehicles worldwide because a wiring problem could cause a fan to overheat and burn. The recall involves S80 and S60 sedans and XC70 and V70 wagons from the 1999, 2000 and 2001 model years, including 150,000 vehicles in North America. The recall is the largest in Volvo’s history, company spokesman James Hope said. There have been no injuries related to the defect, which has caused seven reported vehicle fires, Hope said. Hope said a defect in the main cooling fan, which cools the engine, can cause a short circuit and force the fan to keep running. If the fan’s motor overheats, a fire could occur. Volvo will replace the fan for free in all affected vehicles. Volvo is part of Ford Motor Co.’s Premier Automotive Group.

SUZUKI RECALLS SUVs

Suzuki Motor Corp. is recalling more than 172,000 Grand Vitara sport utility vehicles because of a fuel pressure problem that can trigger fires. The National Highway Traffic Safety Administration says the 172,093 SUVs affected were from the 1999-2004 model years. Dealers will replace the fuel pressure regulator on the vehicles, as well as a fuel delivery hose and a hose clamp.

HONDA RECALLS MINIVANS

Honda Motor Co. Ltd. was recalling 69,538 of its Odyssey minivans because of potential engine stalling problems linked to their fuel pumps.

2004 AVEO BEING RECALLED

General Motors is recalling thousands 2004 Aveo’s because the rear seat belts can’t lock, rendering them

useless. The National Highway Transportation Safety Administration says owners of more than 32,000 Aveo cars from the 2004 model year will be notified about the recall this month. For more information visit www.nhtsa.dot.gov.

FORD RECALLING 234,208 ECONOLINE VANS

Ford Motor Co. is recalling 234,208 Econoline vans because fires could start if the anti-lock brake unit overheats. Econolines from the 2003 and 2004 model years are included in the recall. Vans made after November 2003 aren’t affected. The company says there have been no accidents or injuries reported because of the defect. Ford believes the chance that the anti-lock brake unit could overheat and spark a fire is very small and says that even if the anti-lock brakes fail, the regular brakes still will work. Customers are being notified of the recall and can have the defect repaired for free. Ford also has extended the warranty on the anti-lock braking system from three years or 36,000 miles to 10 years or 150,000 miles.

SUZUKI ANNOUNCE RECALL OF FOUR-WHEEL DRIVE EIGER ATVs

Suzuki and the Consumer Product Safety Commission are recalling about 240 Eiger “QuadRunner” ATVs. The ATVs, manufactured by Suzuki, have mislocated welds securing the upper front suspension arm mounting brackets to the frame. The mounting bracket could break off during riding, reducing rider control and resulting in loss of control of the ATV. Loss of control could result in a crash and severe personal injury or death. The manufacturer has reported no injuries. The 2004 model year four-wheel drive Eiger ATVs are affected by this recall. The model numbers are LT-A400FK4 (for automatic transmission) and LT-F400FK4 (for manual transmission). The ATVs with mislocated welds were

produced from May 19 through May 25, 2004. The ATVs are red, yellow, or green and were sold at Suzuki dealers nationwide from May 28 through August 16, 2004 for \$5149 (manual transmission) or \$5299 (automatic transmission). Persons can get a free inspection and repair at a dealership. Suzuki dealers can be called for an appointment to have an Eiger ATV inspected and, if necessary, repaired.

SCHWINN TODDLER BICYCLE HELMETS RECALLED

PTI Sports Inc. has recalled about 9,000 Schwinn toddler bicycle helmets because they don't meet government impact testing requirements. Fortunately, no injuries have been reported by the company. The recalled helmets have Schwinn written on the back and a white label inside that reads "Lot No. 791913" and contains the model number SK103, SK107 or SK108. Wal-Mart, Target, Academy and Mills Fleet & Farms stores sold the helmets from January 2004 through July 2004 for between \$17 and \$20. Any consumers who has a helmet should return it to the store where purchased for replacement or refund. The helmets can also be returned to the manufacturer. For more information, consumers can call PTI Sports at (800) 515-0074.

CHILDREN'S CHAIRS POSE LEAD POISONING RISK

Folding chairs sold as part of a children's furniture set are being recalled because the U.S. Consumer Product Safety Commission says they pose a lead poisoning risk. Tennessee-based Meco Corp. is recalling about 3,800 folding chairs that are painted red. The company says the red paint contains excessive lead levels. No injuries have been reported. The recalled red folding chairs have metal frames and vinyl padded seats. The chairs were sold as a part of a five-piece juvenile table furniture set with a green table, blue chair,

yellow chair, green chair and red chair. Only the red chairs with model numbers 11-88-3E1 and 11-88S3E1 and date codes H3, B4, D4 or E4 printed underneath the seat bottom are included in the recall. "Meco" or "Samsonite" brand names are also printed on the seat label. Furniture and wholesale club stores nationwide sold the chairs from July 2003 through June 2004 for between \$25 and \$40.

Consumers should stop using the recalled chair and contact Meco for instructions on returning the product and receiving a free replacement. Consumers can call Meco at (800) 251-7558 or visit <http://www.meco.net/> for more recall information.

DEVICE IMPLICATED IN DEATHS RECALLED

The U.S. Food and Drug Administration (FDA) has announced a recall of a medical device implicated in the deaths of two patients and life-threatening infections in 11 others at Children's Medical Center Dallas. The CapnoProbe, a device that measures carbon dioxide in tissue, was manufactured by Nellcor Puritan Bennett Inc. at a plant in Tijuana, Mexico. It came packaged in a metal canister filled with saline solution labeled nonsterile and worked like a thermometer, according to the FDA. The statement from the FDA said the patients were infected with Burkholderia cepacia, a bacterium found among intensive-care patients and associated with contaminated hospital equipment and solution. Eight of the children were taking part in a study, sponsored by Nellcor, to test the effectiveness of the medical probe in children. The device is placed under the tongue to detect early signs of shock. The cause of the two deaths remained under investigation.

A statement released by the medical center said an initial investigation suggested that the device was packaged in contaminated solution. The FDA said it was notified of a potential problem by the Texas Department of Health on

August 18th. The next day, the federal agency sent an investigator to Nellcor's headquarters in Pleasanton, California, to conduct an inspection. Nellcor notified its customers that it was recalling the CapnoProbe SLS-1 because the device could pose a hazard to patients with compromised immune systems. At press time, the FDA and Nellcor were continuing investigations into what happened in Dallas. Other health-care facilities that may have deaths or injuries possibly related to the product were asked to contact the FDA.

GE RECALLS RANGES AND WALL OVENS

The Consumer Product Safety Commission is recalling about 28,000 GE, Hotpoint, Kenmore and Americana brand freestanding electric ranges and double wall ovens. The appliances have faulty wiring that can melt, posing a shock hazard to consumers. The ranges sold from April to July 2004 and cost between \$250 and \$1500 depending on model. Consumers should stop using the appliances and contact GE to schedule a no-cost repair. Consumers can get information on this product recall by contacting the CPSC at 1-800-638-2772 or by going to the CPSC website.

REGAL LAGER RECALLS BABY CARRIERS

The Consumer Product Safety Commission (CPSC) reports that Regal Lager Inc. is recalling about 49,000 baby carriers because the back support buckle can detach from the shoulder straps, which can cause the baby to fall. There have been 93 reports to the company of the buckle detaching from the shoulder straps on the Baby Bjorn Carrier Active. According to the CPSC, there have been no reports of injuries. The carriers, made in Sweden, are made of a cotton polyester blend fabric in black with red piping and blue with white piping. "Baby Bjorn" is printed on the front of the carrier and on the black molded-plastic back support

buckle. "Baby Carrier Active" is written on the packaging and above the warning label on the carrier. Model number 1-260 is printed on the care label on the strap of the carrier. The carrier, sold for about \$120, was available in specialty retail stores, from catalogs and online from September 2003 through August 15, 2004. Consumers should stop using the carriers immediately and contact Regal Lager Inc. for instructions on returning the carriers for repair, at 877-962-8400 between 9 a.m. and 5 p.m. EDT Monday through Friday.

XXI. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Ted Meadows

Ted Meadows, who joined our firm in 2001, became a shareholder in 2002. Ted, a native of Prattville, has spent his entire career representing victims who have been injured or defrauded in some manner. Now, he focuses on representing personal injury victims throughout the country in claims against pharmaceuticals. Ted is currently scheduled to try the first Meridia® case ever to go to trial in the country in Corpus Christi, Texas.

Ted is married to the former Carla Musgrove of Eufaula, Alabama. The Meadows have two children, Nathan and Amanda. Ted and his family are members of Saint James United Methodist Church, where he is actively involved in the Music Ministry. Ted and Carla are avid runners and Ted enjoys triathlons as well. Ted is doing an excellent job of representing his clients in a most important part of our firm's practice.

Pam Short

Pam Short, who has been with the firm for almost five years, is a Legal Assistant in the Toxic Torts Section. She assists the lawyers in this section with

investigative research and other special projects. Her duties include monitoring environmental issues for the section. Pam started with the firm as a Law Clerk while attending law school. While in that position, she assisted lawyers in all sections of the firm, with a major emphasis in products and personal injury cases. Following law school, Pam worked in the Nursing Home Section for a short while and then joined the Toxic Tort Section. Pam graduated from Faulkner University with a degree in Business Administration and Accounting. She then received her law degree from Jones School of Law in May 2002 and has passed the Alabama State Bar. Pam is an adjunct instructor in Faulkner's Military Education Program, where she teaches Business Law to adult students. Pam enjoys helping people. Each Monday after work, she visits a special friend who is 96-years-old and legally blind. Pam has been doing this since she was a freshman in college. Pam helps the lady with her bills and correspondence. Pam, a dedicated and hard working employee, does outstanding work.

Julie Doughty

Julie Doughty, who serves as a Law Clerk for the firm, does research and legal writing for the lawyers in the Personal Injury, Nursing Home, and Business Litigation Sections. Julie graduated from the University of South Alabama with a BA in Political Science. She spent seven years in rental management and accounting at Enterprise Rent-A-Car before going back to school. Julie is currently in her third year at Jones School of Law, where she is in the top 10% of her class, an editor on Law Review and serves as a mentor to new students. Julie, who currently lives in Daphne but resides in Montgomery during the week so she can work and attend school, is a dedicated employee and does excellent work.

Debbie Tidmore

Debbie Tidmore, who has been with us for almost four years, is currently working as a Legal Assistant to Larry

Golston in the Fraud Section. In this position, she communicates with clients, assists with pretrial discovery and helps prepare cases for trial. In the past, Debbie mostly worked on cases involving insurance companies. Recently she has been working on employment cases involving discrimination. One of Debbie's main responsibilities now is assisting on a class action lawsuit involving fiber optic companies. Debbie received her Bachelor's Degree in Education in 1994 from AUM and a Master's Degree in Judicial Administration in 2000. She has also earned a legal assistant certificate from AUM in 2000. Debbie, who lives in Montgomery with her two dogs, Aubie and Chanel, is a very good employee.

Kathy Eckermann

Kathy Eckermann has been with us for almost four years. She works as a Relief Receptionist, which means she floats from building to building. Her duties include relieving the receptionists for their breaks and lunches, making the break schedule for the receptionists, routing faxes, and helping to keep the receptionists' case lists and employee chart updated. If this seems difficult, I can assure you it is. Kathy and her husband, Eddie, have been married for nearly 24 years and have two children, Aaron and Leah. Aaron is in his last year of college at Middle Tennessee State University. He is working toward his degree in the recording industry and is the drummer for two different bands in Nashville. Leah is a junior at Robert E. Lee High School in Montgomery. Kathy graduated cum laude from Huntingdon College with a Bachelor of Arts degree in Music Education. The Eckermann family are members of Eastmont Baptist Church. Kathy also serves as the pianist for First Presbyterian Church. She does very good work for the firm and is a most valuable employee.

Tina Nix

Tina Nix is a Legal Assistant for Dana Taunton in our Personal Injury/ Products Liability section. Tina assists with all aspects of trial preparation. She schedules depositions, organizes and indexes documents produced by defendants, and helps get cases ready for trial. Tina received an Associate's Degree in Paralegal Studies from South University in June 2002. She enjoys needlecraft and spending time with her family. We are extremely pleased to have this dedicated person with the firm. Tina does very good work.

Kelli Elam

Kelli Elam has been with us for two years as a Staff Assistant to Melissa Prickett working on Baycol and more recently welding rod litigation. Kelli is also currently acting as a Law Clerk and a member of the newly formed Mass Tort Litigation Team. In this position, she will be part of a research and writing group for cases involved in litigation and settlement proceedings for the Mass Tort section. Kelli graduated from Troy State in 1999 with a degree in Political Science and minors in Criminal Justice and English. She graduated from Jones School of Law in December of 2002, and sat for the Bar in July of 2003. Kelli was admitted to the Alabama State Bar in September of 2003.

XXII. MY PERSPECTIVE ON POLITICS

I have been sort of surprised that so far during the campaign the Kerry-Edwards folks haven't done a better job of discussing the real issues facing the American people. One of the major issues that comes to mind deals with all of the corporate corruption that has helped to wreck the nation's economy. I am convinced that the Bush Administration is highly vulnerable on this issue. Never before has there been

such a pay-back-our-friends policy so clearly evident in the White House. As a result of these paybacks, there has been less regulation of corporate activities by the federal regulatory agencies. We have also witnessed extremely weak enforcement when violations were found. Perhaps the most damaging thing to most citizens, however, is the very strong effort by this Administration to destroy the nation's court system.

Corporate bosses have taken the loud-and-clear message sent out by the Bush Administration to heart, and some in Corporate America have taken lying, cheating and stealing to new heights. We have seen the unfortunate consequences of this new corporate mindset. One has to look no further than the scandals involving Enron, WorldCom, Tyco, HealthSouth and countless other corporations to see how truly bad things have gotten. Employees and shareholders of the scandal-riddled companies have suffered greatly and the nation's economy has also taken a beating in the process.

Frankly, I have to give Karl Rove full credit for directing traffic on the campaign thus far. The Presidential race was bogged down for weeks over arguments relating to Kerry's war record and Bush's military service. I have to reluctantly tip my hat to Bush's Brain, who has—to this point—successfully diverted attention from the real issues and kept Kerry's folks largely on the defensive. In my opinion, this should have never been allowed to happen. Kerry's failure to stay on message was a big time mistake. The real issues, which are ready-made for a Democratic candidate, should have been the center of debate from day one. Fortunately, it's not too late to get things moving in the right direction. It doesn't take a political expert to figure out that the record compiled by the Bush Administration is the reason Rove wants the campaign to be run on Vietnam-era issues. The President and Vice-President should have to answer for their Administra-

tion's allowing a lot of bad stuff to take place during their watch. Let's take a look at their record:

- The massive corporate corruption;
- The taking away of citizens' constitutional right to a jury trial;
- The war and occupation in Iraq;
- The billions being made by corporations such as Halliburton profiting from the war;
- Terrorism at home and abroad;
- The reputation of the United States has been greatly damaged in the world community;
- A very weak domestic economy;
- Attempts to destroy the middle class;
- Massive shifting of the tax burden away from large corporations and the very rich to working and middle class citizens and small businesses;
- Massive redistribution of wealth and assets away from working and middle class Americans to the elite in Corporate America;
- The exporting of American jobs overseas;
- Substantial job loss, especially industry jobs, in this country;
- A record trade imbalance;
- Turning huge budget surpluses into all-time record budget deficits;
- The high cost of prescription drugs;
- All time record profits by the drug companies;
- Turning medical decisions over to HMOs and insurance company clerks;
- Policies that damage the environment and human health, but swell corporate profits;
- Rollback of environmental and occupational safety and health regulation by agencies run by former top officials of the regulated industries;

- Refusing to enforce environmental laws;
- Policies in virtually every department of the federal government are now designed to promote and reward corporate interests;
- A policy of running the most secretive Administration since the Nixon years; and
- A consistent record of misleading the American people about the intent and effect of Administration policies.

During the final weeks of the campaign, the Kerry-Edwards team must zero in on the real issues facing American citizens and not be diverted. Karl Rove knows there is no way that his candidate can successfully defend any of the issues mentioned above. They simply have no legitimate response that voters will accept if the right message is communicated to the public. Hopefully, by the time this issue of the Report is received the campaign will be back on message.

Obviously, Bush loses on the domestic issues. The economy is in shambles. The Bush Administration inherited a \$5.6 trillion **surplus** and now we are projecting a \$2.3 trillion **deficit** in three short years. The deficit for 2004 will be over \$451 billion—an all time record. Our nation has suffered a loss of jobs during the President's watch. The pay of CEOs who run the major corporations in the U.S., is growing at a 27% annual rate—with the average income of all Americans growing at a negative 9.2% annually. There have been 1.2 million jobs lost under Bush. All of this is why the Rove machine wants to talk about Vietnam and avoid at all costs a debate over domestic issues.

It doesn't take a military genius to figure out that the war in Iraq hasn't gone well in recent weeks. Our loss of life is now well over 1000 with the numbers who have been seriously injured over 7,000. Some put the real injury numbers at close to 12,000. All of the experts say we will be in Iraq for

years and that the occupation will be extremely costly in American lives and money. But, even though this is clearly a Bush-Cheney-Rumsfeld-Rove war, and one that has been plagued by mistakes in judgment, we still have a strong obligation to support our troops so long as our occupation of Iraq lasts. The troops have done their job and deserve bipartisan support by the American people.

Having said all of this, it is still my opinion, even with the obvious mistakes by the Kerry campaign, that this race will go down to the wire. Even with all of the President's problems, the Bush campaign has all of the money it wants and the power of the Presidency going for them. But, it is quite evident this President can't win on the real issues. That's why Rove moved the campaign back into the Vietnam era and hopes now that it will allow his real strategy to take over. Only time will tell if he is as smart as he thinks he is.

I am going to vote for the Kerry-Edwards ticket in November. If George W. Bush were a free agent, I would feel better about the welfare of American citizens. Unfortunately, that doesn't appear to be the case. I am convinced that Bush is the most **controlled** President who has served in that office in my lifetime. We simply can't afford four more years of an Administration run by Karl Rove and Dick Cheney. Neither of these men has shown any real concern for ordinary folks and the problems they face. While many potential voters will disagree with me, I don't believe any of us can say that the country is better off today than it was when Bill Clinton left office. This is a compelling reason for Alabama citizens to take another look at this election.

XXIII. SOME PARTING WORDS

The massive destruction and misery caused by the hurricane named Ivan has caused many of us to count our blessings. I know that I take way too much for granted and don't really fully appreciate all that my family enjoys on a daily basis. Such things as electricity, food, drinking water, a working bathroom, gas for my car and truck and even the ability to use the telephone or a computer—when taken away—become much more important. Many folks in Alabama and Florida lost their homes and even a few lost their lives as a result of Ivan's fury and massive destruction. Many farmers lost their crops. Many businesses were destroyed and others shut down. Others suffered losses of a lesser nature. All of this should cause us to rethink what our priorities in life really are. I know it has caused me to take a hard look at what's really important to me and my family. I have to commend the federal, state and local governments for doing the very best they could to make things better for people affected by the storm. The same can be said for public utilities. In retrospect, folks will acknowledge those companies and their personnel did the very best they could under most difficult circumstances. Unfortunately, there is still much to be done. There are a whole lot of folks who are still hurting and need help.

On Saturday—after the storm had passed through Montgomery—I was reading the daily devotion in The Upper Room, which was centered around the book of Romans. The thought for the day was: "As we walk with Christ, we discover the wonderful life God wants for me." I then read Romans 12:2, which tells us:

Do not conform any longer to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test

*and approve what God's will is—
His good, pleasing and perfect will.*

This reminded me that I have to listen closer to God's plan for my life and what He has in store for me. As I sat there, reflecting on what I read, I recalled a passage that Tom Methvin's uncle—who died recently after a long bout with cancer—relied on to get him through the tough times in his life. You might recall—from a prior issue—what the Word of God tells us in the 91st

Psalm is available to us in times of trouble and despair.

You who live in the shelter of the Most High, who abide in the shadow of the Almighty will say to the Lord, "My refuge and my fortress; my God, in Whom I trust."

We know that God never promised us a life without trials, tribulations and difficulties. He did, however, promise us that we would not go through them alone. That assurance gives us comfort

even on the darkest days, because God's power and authority is awesome and readily available. Our prayers go out to all of those who suffered losses because of Ivan. Those of us who came through the storm in reasonably good shape should be extremely grateful. We must not forget that we are morally obligated to help folks who weren't so fortunate. There are many victims who badly need our help and assistance.

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