



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

ALABAMA PENSION FUND GETS \$111 MILLION OVER WORLDCom SUIT

A recent settlement involving the Retirement Systems of Alabama was good news for a number of reasons. First, it was a good result. It also avoided a lengthy legal battle. The RSA claims, which arose out of the WorldCom bankruptcy, were in the case filed in a Montgomery County Circuit Court. Alabama's pension fund will receive \$111 million from three securities firms and an accounting firm in settlement of the claims. The defendants settling were J.P. Morgan Securities, Citigroup Global Markets, Banc of America Securities, the parent companies of the firms and Arthur Andersen, WorldCom's former auditor. Dr. David Bronner, chief executive of the Retirement Systems of Alabama, made the following observation concerning the settlement: "It's a huge win for public pension funds, and it's a huge win for investors as a whole."

The key to the settlement was an August ruling by the U.S. Court of Appeals for the Second Circuit that allowed RSA to pursue a suit in state court rather than getting drawn into consolidated lawsuits in a federal court over WorldCom's accounting scandal. The settlement came just before jury selection was to start in Montgomery on October 18th. Keeping the case in state court was extremely important. Clearly RSA will get more money than would have been possible had the case been a part of the consolidated case.

Even though the total amount paid is public, the settlement agreement prohibits RSA from disclosing how much each defendant paid. This was because the settling firms have other litigation pending. As you may recall, WorldCom filed for bankruptcy in July 2002. Massive accounting irregularities had allowed the company to claim a profit when it was actually losing money. RSA, the pension fund for state employees and education workers in

Alabama, had sued two former WorldCom executives and the named investment firms. The original suit sought \$275 million in compensatory damages for losses on WorldCom stocks and bonds and \$825 million in punitive damages.

Fortunately, the pension fund was able to recover a fairly good percentage of its actual losses. RSA still has claims pending against Bear Stearns & Co. and former WorldCom executives Bernie Ebbers and Scott Sullivan. The portion of the suit against the former executives is on hold, as is the suit against Bear Stearns. The refusal of Judge Charles Price, who presided over the state court case, to allow the case to be transferred to the consolidated cases was very important. As predicted, the decision by the state court judge, was approved by the federal appeals court. This was a tremendous victory for RSA and its members.

MORE THAN TWO-THIRDS OF ALABAMIANS FAVOR LOTTERY

A recent poll tells us that more than two-thirds of Alabamians support a state lottery to benefit public education. In fact, an overwhelming majority said a lottery is a high priority for them. The telephone poll, conducted by the Center for Governmental Services at Auburn University, found that 55.1% of respondents "strongly support" an education lottery and an additional 13.8% "support" it. This means 68.9% of adult Alabama Citizens appear to be in favor of the lottery. About 24.6% of those polled either "strongly" or "mildly" oppose a lottery. Nearly 80% of the respondents said public education should be an "urgent" or "high priority" for local and state officials. Of those who said they were strong Republicans, 32% strongly opposed the lottery. Only 36% of those who said they were very conservative, whatever that means in today's world, are in strong opposition to a lottery.

Personally, I don't believe a state lottery should be established in Alabama. I have never thought that any form of gambling should be a funding

source for state or local governments. In my opinion a lottery is nothing more than a tax, and the "something-for-nothing" philosophy encourages low-income citizens to spend their paychecks trying to hit the jackpot. I hope that the results of this poll don't put the lottery back into play in our state. However, if I were a **betting** man, I wouldn't bet on it.

THE PROSECUTION OF DON SIEGELMAN

I have avoided writing about the criminal charges brought against

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former Governor Don Siegelman for a number of reasons. But, now that the case out of Tuscaloosa is over, I will briefly discuss it. From the outset, I thought the case brought by the U.S. Attorney's office was pretty weak. I had assumed that there was something that the government prosecutors had, but were holding back for the trial. I will have more to say on this below. As you might imagine, there have been a number of newspaper editorials concerning the outcome of this matter. Let's take a look at what some of our state newspapers have written about this case. I will add a few concluding remarks on this chapter in a politician's cat-like life after you have read what some smarter folks have had to say.

PROSECUTORS WASTED TAXPAYER MONEY

When a case falls apart suddenly, even before the first witness is called, as happened Tuesday in the Medicaid fraud trial of former Governor Don Siegelman, someone has some explaining to do. The U.S. Attorney's Office dropped the charges against Siegelman and a top aide after U.S. District Judge U.W. Clemon ruled that prosecutors did not have enough evidence for the conspiracy charge. The question isn't whether prosecutors mishandled the case—they did—but where their error lies.

Source: Tuscaloosa News

SIEGELMAN CASE TOSSED BECAUSE IT WAS WEAK

Federal prosecutors needed and didn't get a sympathetic judge to sustain their case against former Governor Don Siegelman and his former Chief of Staff Paul Hamrick. When U.S. District Judge U. W. Clemon told the U.S. Attorney's office it lacked enough evidence to support a conspiracy charge against the pair, government prose-

cutors called it quits. Prosecutors then dropped even weaker fraud charges against the pair after the judge's ruling. The ruling in the second day of trial Tuesday wasn't a great surprise to people who watched the proceedings leading up to the high-profile trial. The judge had already dismissed one theft charge and expressed doubt about the others. That was why U.S. Attorney Alice Martin fought desperately to have the judge removed from the case. Sure, the judge could have allowed the trial to continue, but assuming sufficient evidence was lacking, he did the right thing.

With the judge so systematically dismantling the case, the federal prosecutors appear overzealous or guilty of playing high-stakes politics with the public trust. A different judge may have allowed the trial to continue, but the conclusion would have been the same based on evidence made public.

Source: Decatur Daily

DON SIEGELMAN'S DAY IN COURT

The trial of a former governor on charges of conspiracy and health care fraud is no trifle matter. After all, as the state's top elected official, a governor should be above reproach and should set the standard by which all other public officials in Alabama are measured. Tuesday in Tuscaloosa, on just the second day of his trial in federal court on charges stemming from a 1999 Medicaid contract bid, former Governor Don Siegelman saw the case against him disappear in minutes, just after opening statements. Embattled U.S. District Judge U.W. Clemon determined that the prosecution's evidence on the conspiracy charge against Siegelman and his former aide, Paul Hamrick, did not stand up to scrutiny. And with the heart of their case deflated, prosecutors moved quickly to dismiss, saying "there is no point in going

forward." Yet even as Siegelman breathed a sigh of relief, the political tension that had been palpable in this case from the beginning rose to the surface. U.S. Attorney Alice Martin and state Attorney General Troy King were not bashful in their contempt for Clemon's ruling. King, who has shown a propensity to pontificate on a long range of matters despite his relatively short time in office, was particularly vocal. "The losers today are the people of Alabama who have the right to have their public officials serve them honorably," King said. "These proceedings began on a dark day and they sadly conclude on an even darker day, a day without justice."

Maybe the attorney general should save the rhetoric for the campaign trail. Meantime, it's easy to understand the prosecution's bitterness. Martin and her team, after all, had sought to have Clemon, a Carter appointee, removed from the case entirely, alleging "bias." Only the 11th U.S. Circuit Court of Appeals in Atlanta didn't buy the argument, and Clemon was allowed to remain. Despite all the hype, we should remember that the former governor, like anyone else, is innocent until proven guilty, and entitled his day in court. That Siegelman had his day court in a highly partisan climate is no excuse to rush to judgment, or to question the impartiality of a sitting U.S. judge. For when one gets past all the nasty pre-trial politicking and posturing, what remains is the evidence, or lack thereof. In our system of justice, it is incumbent upon the prosecution to prove its case. Judge Clemon didn't think the evidence in this case met the standard. To his credit, he was not cowed by the intimidation tactics of the prosecution. He ruled on the case that was presented before him. And at least one juror who heard the opening statements felt justice was served, calling Clemon's ruling "a wonderful decision."

Anniston Star

Former Governor Don Siegelman was apparently right when he continued to say there was no basis for the charges of conspiracy against him in the Tuscaloosa federal court case. The feds dropped the whole case after the judge had thrown out one charge for lack of evidence. Boy did that make the blood boil in some Alabama citizens who wanted to see political blood! For a day or so it was almost as emotional an issue as Judge Roy Moore and the Ten Commandants. We had thought earlier that something was amiss in this case when the lawyers for the federal government kept getting in trouble with the judge...antics like maybe they had been watching too many TV courtroom scenes and not enough real life court. Now, as always, Don Siegelman is our friend, but we have no idea what went on between those charged in this case. Yet we are now alarmed that these federal "for the people" prosecutors filed charges, talked for months of all the terrible things the trio had done, made "news" statements to the public that prompted the federal judge to hold them in contempt for unfounded comments and then would drop all charges against the former governor and his chief of staff after one charge was dismissed. Now since the two are legally, morally and possibly even politically innocent of those charges, forever and ever, how can the feds even think of trying to convict Dr. Bobo (whom we have never even seen) of conspiring?

Another friend, Elba native and Alabama Attorney General, Troy King, needs some basics explained to him. These were federal cases but Troy jumped in someone else's fight and wound up with political egg on his face. We are far from smart, but even we know that one politician is wise not to get into another politician's fight. Yet Troy helped carry the ball for the federal

prosecutors in the Don Siegelman case. A ball that the feds later turned loose like a hot potato. Troy, just as each of us, has a constitutional right to his opinion on this and any other issue. Yet he is now in a statewide leadership position, one which carries great respect and responsibility. He needs to remember this fact before he opens his mouth publicly. Of course his position of leadership and respect could very well be why the U. S. Attorney pulled him before the TV cameras with her while the indictments against Don Siegelman, Paul Hamrick and Dr. Bobo were being announced. So be it, that is all done now, but we plan to offer Alabama Attorney General Troy King some of the above advice and he would do well politically to heed what we say.

Elba Clipper

These editorials pretty well cover the waterfront. I agree with some of the observations, but have definite views that differ on others. Some of the post-trial comments by the lawyers involved in the case on both sides have been pretty interesting. As most folks in Alabama know, I wasn't a supporter of Don's when he ran for Governor. Neither did I support him when he ran for a second term. Frankly, I have no plans to ever support this politician in the future, and that is not subject to change. However, I do believe Don will run for Governor in 2006, and that is as certain as the sun coming up in the East.

Having made it perfectly clear that I am not a Siegelman fan, I do have some personal thoughts about the federal prosecution. Based on what I have read and heard about the case, I am shocked that the case was ever brought by the U.S. Attorney's office. For the life of me, I never could figure out what criminal offense had occurred. If Don Siegelman has violated the criminal laws, he should be indicted and prosecuted to the fullest extent of the law. On the other hand, no person or their family should be

investigated and indicted for political reasons, and that includes a professional politician. Hopefully, politics played no part in the Tuscaloosa case. No family should have to endure a "political prosecution." There have been all sorts of rumors floating around Montgomery concerning possible indictments coming out of the federal Middle District of Alabama, which sits in Montgomery. Knowing many of the lawyers in the U.S. Attorney's office in the Middle District, I am convinced that politics won't play any part in what—if anything—happens here. I must confess, however, I am not sure that was the case in the Birmingham office.

Finally, I want to comment on the federal judge who handled the case that was to be tried in Tuscaloosa. Judge U.W. Clemon is an outstanding jurist who enjoys an excellent reputation. Lawyers who try cases in his court—on all sides—will tell you that this judge is highly intelligent, completely fair and a no-nonsense judge. Litigants get a fair trial in his court and their lawyers had better be prepared. The criticisms of Judge Clemon in the Siegelman case are not justified. The outcome in the case would have been the same regardless of who the judge may have been. To blame this debacle on the judge is absolute nonsense.

AMSouth To Pay \$50 Million In Penalties Related To Ponzi Scheme

AmSouth Bank will pay \$50 million in penalties for failing to uncover a Ponzi scheme that cheated investors in four states. The Birmingham-based bank will forfeit \$40 million in an agreement with the U.S. Attorney's office in Jackson, Mississippi. As a result, AmSouth won't be prosecuted for one year to see whether the company has addressed problems in reporting suspicious activities. AmSouth also agreed to pay \$10 million in penalties announced by the Federal Reserve and Financial Crimes Enforcement Network, which is under the Treasury Department. The activities in question were related to a Ponzi scheme dating back to 2000. The Ponzi

scheme, in which early investors are paid off with money from later investors to create the illusion of profitability, resulted in 41 investors being cheated out of \$10.2 million.

Federal regulators accused AmSouth of failing to set up an adequate anti-money laundering program and failing to file accurate, complete and timely reports involving suspicious financial transactions. The federal investigation, which included the Internal Revenue Service, “discovered that millions of dollars of fraud proceeds have been passed through AmSouth over the last several years.” This doesn’t sound very good for the bank’s internal controls. AmSouth has branches in Alabama, Georgia, Florida, Louisiana, Mississippi and Tennessee.

Source: *The Birmingham News*

II. LEGISLATIVE HAPPENINGS

THE SPECIAL SESSION

The rumors are still pretty strong on a special session being called. I suspect a session will take place this month. I hope it will be successful and limited to only those issues that are critically important to our state. On second thought, I don’t believe there is enough time to take up all of the critical issues facing our state that have been carried over for years. So, I will leave it to the Governor to decide which ones are the most critical. It appears that the session will be limited to health benefits for public employees.

NATIONAL STUDY LOOKS AT ALABAMA LEGISLATURE

Members of the Alabama Legislature have always been the subject of criticism, and that’s just a fact of political life in Alabama. A new national study released last month, however, says Alabama has one of the best public disclosure laws for legislators in the country. That is good news and it’s

good to see the Legislature getting some favorable publicity. According to the study, there is still room under the law for potential conflicts. The study by the Washington, D.C.-based Center for Public Integrity found that:

- One out of every six legislators drew two government paychecks — one from the Legislature and another from a government agency.
- One out of every four legislators sat on a legislative committee with authority over the legislator’s professional or business interests.
- And one out of every ten legislators had financial ties with a business or organization that lobbies the Legislature.

Interestingly, the Center rated Alabama’s ethics law as the eighth best in the nation for getting legislators to disclose financial information so voters can see potential conflicts. The Center’s study, which looked at every legislative body in America, said the lawmakers were “often uniquely positioned to influence their personal financial fortunes or those of their employers while in office.” It was pointed out that, in Alabama, 16% of the Legislature worked for some part of the federal, state or local governments, including public schools or colleges. That number compares to 10% nationally. While this is all very interesting, I don’t really believe that it means our legislators are bad or that they can’t do a good job.

Frankly, I am much more concerned about the notoriously weak campaign finance laws in Alabama. That weakness, combined with the failure to adequately regulate and control the powerful lobby groups in Alabama, is the real problem when it comes down to how effectively the Legislature operates. The influence over the Legislature by special interests will continue to be a problem until there is meaningful campaign finance reform enacted into law. I am hopeful things will change in Montgomery—for the better—one of these days. In the meanwhile, if anybody really has a problem with legislators holding down a job with some

arm of government, the place to voice that displeasure is in the voting booth.

III. COURT WATCH

BAR ASSOCIATION PRESIDENT APPOINTS COMMITTEE ON STATE’S JUDICIAL SYSTEM

Douglas McElvy, President of the Alabama State Bar, has appointed a committee entitled the Judicial Liaison Committee. This group of judges and lawyers has been given the responsibility of coming up with ways of improving the operation of the court system in our state. My good friend Sam Franklin, who is an excellent lawyer from Birmingham, and I were chosen to serve as co-chairs of the committee. We are most fortunate to have 17 outstanding men and women who will work with us on this committee. I take this responsibility most seriously and see it as an opportunity to do something good for my state. Our first meeting was held in Montgomery on October 13th. The organizational meeting was extremely productive and I believe we got off to a very good start. I am hopeful we can all work together to make sure that we have a court system in Alabama that our citizens can be proud of.

BUSINESSES FILE MORE LAWSUITS THAN PRIVATE CITIZENS

The tort reformers in this country have spent millions of dollars pushing the myth of **tort reform** and of **frivolous lawsuits**. From a recent report, we now find out that American businesses file four times as many lawsuits as do individuals represented by trial lawyers. Significantly, these companies are being penalized by judges much more often for pursuing **frivolous litigation**, according to a report issued by Public Citizen. The survey of case filings in two states (Arkansas and Mississippi) and two local jurisdictions (Cook County, Illinois, and Philadelphia, Pennsylvania) in 2001 found that

businesses were 3.3 to 5.8 times more likely to file lawsuits than were individuals. This comes as Corporate America and a few politicians are campaigning to limit citizens' rights to sue.

By way of comparison, the number of American consumers (281 million) outnumbers the number of businesses in America (7 million) by 40 times. The report also found that businesses and their lawyers were 69% more likely than individual tort plaintiffs and their lawyers to be sanctioned by federal judges for filing frivolous claims or defenses. Corporations say America is too litigious, but that is only when they are on the receiving end of a lawsuit. Our experience has been—and the Public Citizen study confirms it—that businesses are far more likely to take their complaints to court than are American consumers. The four court systems surveyed by Public Citizen, which are geographically diverse and represent urban and rural areas of the nation, appear to be the only jurisdictions that require attorneys to provide sufficient detail to distinguish business-initiated suits from trial attorney-initiated suits. State-specific findings for 2001 include:

- **Mississippi:** In this state that the U.S. Chamber of Commerce has labeled a “judicial hell hole,” businesses were 5.8 times more likely to file suit than were individuals. There were 45,891 business lawsuits filed that year compared to 7,959 individual lawsuits.
- **Philadelphia, Pennsylvania:** Businesses there filed cases at a 3.3-to-1 ratio compared to individuals; there were 64,698 business lawsuits compared with 19,751 individual lawsuits brought by trial attorneys.
- **Arkansas:** Arkansas businesses filed more than four lawsuits for every one lawsuit filed by trial attorneys on behalf of individuals—20,868 vs. 4,786—a ratio of 4.4-to-1.
- **Cook County, Illinois:** Businesses went to the courthouse 5.8 times more often than trial attorneys representing individuals. The number of

business lawsuits filed was 137,890 compared with just 26,938 filed by individuals.

Public Citizen also found that federal judges actually punish lawyers for businesses far more often than trial lawyers representing plaintiffs in tort claims for tying up the court with frivolous claims or defenses. Under Rule 11 of the Federal Rules of Civil Procedure, federal judges can impose sanctions that range from reprimands and denial of fees to fines, dismissal of claims and injunction from further litigation. In a separate national survey of the 100 most recent cases in which federal judges imposed Rule 11 sanctions, 27 were against businesses or their lawyers, while only 16 were against plaintiffs who brought tort cases or their lawyers. Only individuals representing themselves, without being represented by a lawyer, were sanctioned more often than businesses. This happened in 35 cases. The 100 sanctions occurred between 2001 and 2004.

Some of the loudest voices for restricting the legal rights of consumers and patients also are the biggest users of the court system. For example, claiming that it is inundated with class action lawsuits, the insurance industry has led the charge for federal legislation that would restrict the rights of consumers to bring such cases. In Cook County, Illinois, insurance companies filed about 8,000 lawsuits in 2002—35 times the number of class actions filed there by individuals that year, Public Citizen found. In fact, insurers file so many suits -mostly “subrogation” suits designed to recover the expense of covering their own policyholders—that last year they asked to be exempted from a model lawsuit “reform” law that would limit citizen access to the courts and that they otherwise support. There is absolutely nothing wrong with anyone, whether an individual or a corporation, taking a genuine dispute to court when it can't be settled outside between the parties. But, it is most hypocritical for corporations to **demonize** a perfectly good legal system and then **use it** on a regular basis.

The huge corporate campaign against consumer access to the courts is approaching its 25th year. This campaign has targeted trial lawyers who represent consumers in fraud, medical negligence, personal injury and product liability cases on a contingency basis. These lawyers are paid only if their clients win their cases. In addition, trial lawyers pay up front for all the costs and expenses of litigation. This allows any consumer, poor or rich, to secure the services of a lawyer if they have a case with merit. Most consumers can't afford to pay hourly fees for lawyers; corporate clients can.

The harshly negative corporate campaign includes the creation of new trade associations representing corporations, which push for state as well as federal legislation to limit consumer rights and shut down the courthouses to consumers. Thousands of lobbyists put tremendous pressure on Congress and state legislative bodies on a daily basis. The creation of front groups across the country called Citizens Against Lawsuit Abuse (whose members come directly from Corporate America), was designed to give the impression that tort reform is a grass-roots movement. It has no connection to the grass roots in any state. New think tanks, such as the Manhattan Institute, hire authors to write books and reports attacking the civil justice system. Strategic television and radio advertising placed at the state and national level carry the myth of tort reform out to the country. To combat all of this, American consumers have to rely on groups such as Public Citizen to fight their battles. Clearly, the playing fields are very much uneven. The report, *Frequent Filers: Corporate Hypocrisy in Accessing the Courts*, is available at <http://www.citizen.org/congress/civjus/tort/myths/articles.cfm?ID=12369>.

Source: Public Citizen

STUDY REVEALS THAT INSURERS CONTINUE TO PRICE-GOUGE DOCTORS

The issue of medical malpractice and “tort reform” has been an issue during

this election year. Recently, Americans for Insurance Reform (AIR) announced the release of a new study of medical malpractice insurance around the country, based on the insurance industry's own data. First, contrary to what the insurance and medical lobbies have been selling to the public, the years 2002 and 2003 saw no "explosion" in medical malpractice insurer payouts to justify skyrocketing rate hikes. In fact, inflation-adjusted payouts per doctor, rather than exploding, have dropped for the last two years. Payouts (in constant dollars) have been essentially flat or dropping since the mid-1980s. Second, medical malpractice insurance premiums rose much faster in 2002 and 2003 than was justified by insurance payouts. These price hikes were not connected to actual payouts, jury verdicts or the legal system. Rather, they reflect dropping interest rates and losses experienced by the insurance industry's market investments.

According to Joanne Doroshow, executive director of the Center for Justice & Democracy and AIR co-founder, "these findings undermine one of the central claims of interest groups who seek to blame the legal system for doctors' insurance woes." I totally agree with Ms. Doroshow. She says the study reveals clearly that the causes of, and solutions to, this crisis lie not with the legal system, but "with reforming regulation of the insurance industry, which has been unfairly charging doctors excessive rates to make up for their own investment losses."

The study by AIR, a coalition of more than 100 consumer and public interest groups representing more than 50 million people, makes nearly identical findings to those reached in similar AIR studies of national trends released in 2001 and 2002. Specifically, the study, *Stable Losses/Unstable Rates*, reportedly shows that the real reasons medical malpractice insurance rates have risen so dramatically in the last two years are market forces and dropping interest rates—not, as the insurance industry claims, because of a sudden massive increase in medical malpractice jury awards or payouts, which, in constant dollars, have been

decreasing for the last decade. J. Robert Hunter, director of Insurance for the Consumer Federation of America, former Federal Insurance Administrator and Texas Insurance Commissioner, was the author of the study.

Dr. Hunter, who is well-respected around the country, stated: "The current jump in prices doctors pay is a result of a combination of two insurance company practices: (1) the insurers' aggressive under-pricing to gain market share when interest rates were high, coupled with (2) the insurers' classification plan that charges some high-risk doctors (such as OB/GYNs and neurosurgeons) for all of the cost of the high-risk cases referred to them by all other doctors. What is crystal clear is that what did not cause this crisis was an increase in losses. There simply is no evidence of that. There is only one way to solve this problem: reforming the insurance industry. State lawmakers must strengthen state insurance laws in order to end the boom and bust swing from illegal overpricing, such as the rates doctors are being asked to pay today, to illegal and inadequate underpricing, which will be seen when the market softens later in the cycle. Fortunately, the hard market price jump is behind us and we are now entering the softer market so legislators have a decade or so to grapple with how best to do this before the next hard market hits the nation." For more information on the study, visit www.insurance-reform.org. It is rather shocking that a candidate for President would put out bad information on tort reform and the court system when surely his staff had access to this study. Could it be that the massive amount of campaign dollars furnished by the tort reformers has clouded the President's judgment?

U.S. SUPREME COURT TO HEAR TEN COMMANDMENTS CASE

I was very much surprised to learn that the U.S. Supreme Court would take up the constitutionality of Ten Commandments displays on government land and buildings. The justices

have repeatedly refused to revisit issues raised by their 1980 decision that banned the posting of copies of the Ten Commandments in public school classrooms. In the meantime, lower courts have not been very consistent on the cases. There have been rulings that allow displays in some instances, but not in others. The High Court will hear appeals early next year involving displays in Kentucky and Texas. In the Texas case, the justices will decide if a Ten Commandments monument on the State Capitol grounds is an unconstitutional attempt to establish state-sponsored religion. The bid to get the 6-foot tall red granite monument removed was rejected at the lower court level. The Fraternal Order of Eagles, which donated the monument to the state in 1961, had given scores of similar monuments to American towns during the 1950s and 1960s. As expected, many of those have been the subject of multiple court fights.

Separately, the Court will consider whether a lower court wrongly barred the posting of the Ten Commandments in Kentucky courthouses. McCreary and Pulaski County officials hung framed copies of the Ten Commandments in their courthouses and later added other documents, such as the Magna Carta and Declaration of Independence, after the display was challenged.

It is interesting to note that the Court refused to hear Judge Roy Moore's appeal in what certainly appears to be a similar case. The Ten Commandments contain both religious and secular directives. A pastor friend of mine reminded me that the commandments are directives and not merely recommendations. The Bible says God gave the list to Moses, and I believe that to be true. While the Constitution bars any state "establishment" of religion, I believe that means the government cannot promote religion in general or favor one religion over another. It will be interesting to see what the High Court does on this issue.

In the past decade, the justices have refused to get involved in Ten Commandments disputes from around the country. Three justices complained in

2001, when the court declined to rule on the constitutionality of a Ten Commandments display in front of the Elkhart, Indiana Municipal Building. Chief Justice William H. Rehnquist, joined by Justices Antonin Scalia and Clarence Thomas, said the city sought to reflect the cultural, historical and legal significance of the Commandments. The Chief Justice noted that the justices' own chambers include a carving of Moses holding the Ten Commandments. That fact is something the public will eventually pick up on. I have been surprised that the media hasn't already jumped on this and made an issue out of that display.

SUPREME COURT WON'T HEAR ALABAMA TEN COMMANDMENTS CASE

Clearly the case concerning Judge Roy Moore is finally over. On October 4th the U.S. Supreme Court rejected Judge Moore's request for review of his removal from office in his case involving the Ten Commandments monument. After the ruling, Judge Moore told members of the media that he wasn't surprised at the outcome. It might be well to review what all happened in the Moore case. As we all know, a well-respected and experienced federal judge originally ruled that Judge Moore violated the U.S. Constitution's ban on government promotion of religion when he placed the monument in the rotunda of the state's judicial building in 2001. The display was moved last year by the Alabama Supreme Court, and Judge Moore was removed from office. The Alabama Court of the Judiciary ruled that Moore violated canons of judicial ethics when he refused to obey the federal court's order to move the monument.

Lawyers representing the former Chief Justice had called on the U.S. Supreme Court to remedy what they referred to as a "travesty of justice" and give the judge his job back. The High Court declined to take the case, without comment. Now, as stated above, the justices have taken cases that present the constitutional issue squarely to the High Court for a decision. It has been

speculated that Judge Moore may attempt to win back his seat on the Alabama Supreme Court in 2006. In the meanwhile, I understand efforts are still underway to take his license to practice law. Regardless of how you feel about Judge Moore or his stand on the Ten Commandments, I believe taking his license is taking things too far. As far as a political future for the man, only time will tell what direction that will take. I have seen some polls that are most interesting.

HIGH COURT WON'T HEAR DO-NOT-CALL CASE

Another case decided by the U.S. Supreme Court early in the new term dealt with telemarketing. The High Court turned away a challenge to the federal do-not-call registry. This ends the telemarketers' bid to invoke free-speech arguments to get the popular ban on unwanted phone solicitations thrown out. The Court, without comment, let stand a decision by the U.S. Court of Appeals for the Tenth Circuit that upheld the registry of more than 64 million phone numbers as a reasonable government attempt to safeguard personal privacy and reduce telemarketing abuse.

Under the 2003 federal law, businesses face fines of up to \$11,000 if they call people who sign up for the registry, unless they have recently done business with them. Charities, pollsters and callers on behalf of politicians, however, are exempt. Telemarketing groups had filed the appeal, arguing in briefs filed with the court that the registry violated First Amendment rights because it singled businesses out while exempting other groups. They claimed that 2 million of their 6.5 million workers will lose their jobs within two years if the do-not-call rules stand.

A federal judge in Denver had agreed with the telemarketers, but the circuit court (the intermediary court) upheld the registry in February 2004, after concluding there was no evidence suggesting that charitable or political callers were as intrusive to consumers' privacy. I believe the High Court made

the correct decision in this case. It is a clear victory for people. American citizens are sick and tired of the barrage of unsolicited marketing calls that come to them on a daily basis. They needed some relief and they got it!

SUPREME COURT UPHOLDS JURY VERDICT FOR WORKER

The Alabama Supreme Court has upheld a \$1.3 million verdict for a Georgia man who suffered brain damage from being struck by a 13-pound steel spacer that fell off a Birmingham company's tractor and trailer rig. A Jefferson County jury awarded the verdict last year to the Georgia resident in a lawsuit that was filed against a Birmingham construction company in 2001. The verdict was to cover medical bills, lost wages and the loss of future earnings. The Georgia resident, who was a contract escort driver, was driving behind a rig owned by the construction company on Interstate 20 in St. Clair County back in October of 1999 when the incident occurred. The spacer, which is shaped like a brick, fell off the rig and crashed through the man's windshield, resulting in some pretty bad injuries to his face. The Supreme Court affirmed the verdict with no opinion.

FEDERAL COURTS COME DOWN HARD ON E-DISCOVERY VIOLATIONS

Pretrial discovery in lawsuits has taken on even greater importance in recent years. There have been some most significant changes over the past 10 years. Perhaps, the greatest challenges to come in the near future will involve computer-generated data and information. Discovery in lawsuits in this high-tech era—like everything else—has to deal with e-mail messages that have been sent by parties to litigation. Lawyers and their clients must be more diligent in compliance with electronic discovery requests in the future. There have been a number of recent court opinions that have really gotten the attention of the trial bar. Harsh sanctions for the deletion of e-mails

have been handed down by the courts. Our firm has had experience with e-discovery and I can tell you there have been a great number of major abuses. Efforts to make sure parties to litigation preserve this type information have been a major problem. Many parties fail to preserve their e-mail messages simply because they don't believe there will be any real consequences if they are caught. Enforcement of the duty to preserve electronic data has been all over the map. But, it really boils down to a question of integrity on the part of the lawyers involved. No lawyer should continue to represent a client who won't respond honestly to discovery requests.

CLAIMS AGAINST ENRON MUST STAY IN NEW YORK BANKRUPTCY COURT

A federal bankruptcy judge in New York has barred California from pursuing its claims in a pending suit against the Enron Corp. arising from that state's energy crisis a few years ago. Judge Arthur Gonzalez, who also presides over the WorldCom bankruptcy, held that California, like most of the other Enron creditors and claimants, must adjudicate its claims in his Southern District bankruptcy court. As you may recall, from May 2000 to June 2001, California's residents suffered from rolling blackouts and unusually high electricity prices. The State of California accused Enron of being the real cause of the crisis at the expense of consumers. California filed its claim, joining a long list of claimants, with the bankruptcy court in October 2002. Earlier this year, that state filed a separate action in a California state court which were virtually identical to the claims filed in the bankruptcy court. The bankruptcy judge ruled that the filing of a bankruptcy petition operates as a **stay** applicable to **all entities** regarding the commencement or continuation of judicial proceedings against Enron.

As you may know, the Bankruptcy Code calls for a broad and mandatory stop to all pending and potential suits against a debtor. The goal is to central-

ize all claims to allow one bankruptcy court to fairly and efficiently distribute the assets among creditors, rather than allowing competing suits to spring up around the country. That is a tool that is often used by corporations that have multiple exposures in several states. It was my thinking that a state could file a separate action to protect consumers or police wrongdoing in its state. Such an action would be a police power exception to stop or prevent fraud in a state. The California attorney general sued because he felt it appropriate for that state's judicial system to adjudicate its state laws. Unfortunately, the bankruptcy judge disagreed. I expect this ruling to be appealed. The bankruptcy laws are used all too often by corporations facing big liability because of their wrongdoing. Quite often, the victims of that wrongdoing are penalized and wind up holding the short end of the stick.

IV. THE NATIONAL SCENE

SIX NATIONAL CONSUMERS GROUPS JOIN FORCES

As we know, consumer rights and protections have been under unprecedented assault during the past three years. We have an Administration in power that is totally anti-consumer. Six of the country's leading public-interest groups have now joined together to develop a pro-consumer agenda. Leaders of the six groups, which include Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Consumer Law Center, Public Citizen, and the U.S. Public Interest Research Group, decided to unite behind an agenda in response to the increasing attacks on consumer rights and protections. While these groups have had different interests in the past and generally each had a particular field where its efforts were focused, there was a common bond and that

was to educate and protect consumers.

We could write a long list of recent attacks on consumer protections. Some of them include: mandatory, binding arbitration; a ban on the federal government negotiating lower prescription drug prices for Medicare recipients; the inability of consumers to prevent the sharing of their personal financial information with potentially thousands of companies; the failure of the government to adequately test for Mad Cow Disease or require mandatory recall of tainted meat; the loss of patients' rights to sue their HMOs; and a number of federal legislative actions that undercut stronger state laws. As a result of these anti-consumer policies, the coalition has developed a six-point agenda to highlight some of the most critical issues facing the American public today. This effort should elevate the consumer voice and help educate American citizens about what's really at stake in the marketplace when it comes to their health, their privacy, their pocketbooks, and their safety. The agenda is a key starting point for consumers and journalists, who should be asking their policymakers right now about how they intend to protect the public interest. The six organizations hope to reach as many as 50 million consumers with the new agenda. The groups want to build an influential consumer movement that will be a powerful force for change. The six-point agenda includes:

- Prohibit Oil and Gasoline Price Gouging and Increase Automobile Fuel Economy: Stop industry mergers that increase oil and gas prices by diminishing competition, and further save consumers money and reduce pollution by raising fuel economy standards on cars, sport utility vehicles (SUVs) and other light trucks.
- Preserve Consumers' Legal Remedies: Oppose efforts undermining consumers' access to justice. Remove limits on HMO accountability to patients and do not impose restrictions on victims of medical malpractice. Ban the use of mandatory arbitration clauses in consumer con-

tracts and oppose limits on consumers' ability to bring class action lawsuits.

- **Protect Consumers from Abusive and Predatory Lending:** Limit unfair mortgage, credit card and personal loan practices that put vulnerable consumers at risk of default and bankruptcy.
- **Make Health Care More Affordable:** Immediately expand health coverage to all children and lower-income adults. Fix the new Medicare law to allow the government to negotiate lower drug prices, and the private sector to import lower-cost drugs from abroad.
- **Protect the Privacy of Sensitive Personal Information:** Require both financial companies and Internet sites to protect our confidential information, while preserving the right of states to enact stronger laws.
- **Ensure Our Food is Safe to Eat.** Require USDA to set and enforce limits on food-borne pathogens. Give USDA authority to mandate recall of tainted meat. Assure controls to protect both human and animal health from "Mad Cow" Disease.

This agenda of essential consumer reforms is intended as a guide for federal policymakers and others concerned about consumer issues. The leaders of the six leading national consumer organizations produced the platform to underscore its importance. Getting these organizations on the same page—with a common agenda—is very important. In my opinion, public officials will have to listen to their views. The issues addressed are quite diverse. The groups are unanimous in their support for pro-consumer action on the issues covered by the agenda. Arbitration is on the list and it will be a major item of concern. This joining of forces by consumer groups is a positive step in the right direction. We should all give them our support.

BUSH'S BRAIN BACK BEFORE GRAND JURY

Karl Rove has now testified on three separate occasions before a federal grand jury, which is investigating the leak of a CIA operative's name by Bush Administration sources. The last appearance by the man, who likes to be referred to as "Bush's Brain," came about on October 15th. I understand Rove was again questioned about his contacts with journalists. The Justice Department is trying to find out who leaked the identity of Valerie Plame, a CIA operative married to former ambassador Joe Wilson, to several journalists in July 2003. Columnist Robert Novak was the first to disclose Plame's name in print. In a July 14, 2003 column in the *Washington Post*, Novak said that two unnamed Administration sources had told him that Plame was involved in the CIA's decision to send her husband to Africa in 2002 to investigate a tip that Iraq had tried to purchase enriched uranium from Niger for its nuclear weapons program. In early July 2003, Wilson wrote an op-ed in the *New York Times* accusing President Bush of relying on discredited intelligence when he cited the Niger-Iraq link in making the case for invading Iraq and ousting Saddam Hussein. Novak, who is known to be a strong Bush supporter, suggested in his column that Plame was trying to hurt the President.

It is a crime under the 1982 Intelligence Identities Protection Act for someone with authorized access to classified information to knowingly disclose the identity of a covert agent. So far, nobody has admitted to being a source for Novak's column. Besides Rove, a number of other White House aides, including counsel Alberto Gonzales, have testified before the grand jury. The government is trying to get the testimony of Time Magazine's Matthew Cooper and Judith Miller of the *New York Times*, who have some involvement in the case. Three days after Novak's column appeared, Cooper and two colleagues wrote an article for Time Magazine's Website saying that "government officials" had told them that Wilson's wife was a CIA

official. Miller was subpoenaed to testify about sources she spoke to while reporting on Wilson. A U.S. District Judge has found Cooper in contempt of court on two occasions for refusing to testify. Miller has also been found in contempt for the same reason. She and Cooper, citing the need for journalists to be able to protect their sources, are appealing the rulings. But, no decision is expected from the appeals court until after the presidential election. The journalists could each face up to 18 months in jail if they lose their appeal on the contempt citations.

Mr. Novak—who is usually quite eager to talk—is laying low like "Brer Rabbit" on this one. Neither he nor his lawyer will talk about their contacts with prosecutors, according to the Associated Press. *The Washington Post* last year, quoting an Administration source, said that two top White House officials disclosed Plame's identity to at least six Washington journalists in retribution for Wilson's comments. As reported in the *Post* story, the official allegedly said that the leak was "meant purely and simply for revenge." Where have we run into that sort of thing before? As I have said, however, I really don't believe Rove is the source of this leak because he is much too smart for that. If Rove was involved, it will be next to impossible to catch him. But, it's obvious that someone leaked the story, and that sort of thing can't be tolerated in this country for obvious reasons—one being it violates the criminal laws.

AMBASSADOR BREMER CRITICAL OF THE WAR EFFORT

Ambassador Paul Bremer, who spent 14 months as head of the U.S. provisional government in Iraq, believes the United States paid a price for not having enough troops in place to secure the country following the brief war. At least that's what he told a group a few weeks ago. He did say that it was necessary to oust Saddam Hussein, and I don't believe many Americans would disagree on that point. Bremer, delivering the keynote

address to the opening session of the 91st annual Insurance Leadership Forum, said when he arrived in Baghdad on May 6, 2003, there was “horrid” looting going on. Bremer told his audience: “We paid a big price for not stopping it because it established an atmosphere of lawlessness. We never had enough troops on the ground.” The Greenbrier conference was sponsored by The Council of Insurance Agents & Brokers. Bremer said later he had thought the remarks were “off the record.”

TAX CODE FAVORS CORPORATE AMERICA

Although U.S. corporations are technically taxed at 35%, a new study found that corporations actually paid about half that for the last two years. According to a report by Citizens for Tax Justice, the 275 top U.S. corporations paid an effective tax rate of just 17.2% in 2002 and 2003. That’s down from 26.5% in 1988, 21.7% in 1998, and 21.4% in 2001. Corporate taxes are now at their lowest level in 20 years as compared with the size of the economy. According to the report in 2002 and 2003, the 275 companies “sheltered more than half of their profits from tax.” These companies told their shareholders “they earned \$739 billion in those two years, but they told the IRS they made less than half of that, only \$363 billion.” Additionally, of the 275 companies analyzed, 82 either paid no taxes or received a tax refund in at least one of the last three years. Forty-six companies paid zero or less in federal income taxes in 2003. These 46 companies—almost one out of six of the companies in the study—reported U.S. pretax profits in 2003 of \$42.6 billion, yet received tax rebates totaling \$5.4 billion.

Between 2001 and 2003, 28 companies paid negative federal income tax rates over the entire three-year period. These companies, whose pretax U.S. profits totaled \$44.9 billion over the three years, included, among others: Pepco Holdings, Prudential Financial, ITT Industries, Boeing, Unisys, Fluor and CSX. Interestingly, one of the com-

panies was at one time headed by current Treasury Secretary John Snow. Robert S. McIntyre, director of Citizens for Tax Justice, had this to say:

The sharp increase in the number of tax-avoiding companies reflects the results of aggressive corporate lobbying and a White House and a Congress eager to do the lobbyists’ bidding. Most of the loopholes and tax dodges that corporations use to slash their taxes may be technically ‘legal’ in the sense that the tax law allows them. But remember that these subsidies got into the tax code because corporations lobbied to put them there. Saying something is ‘legal’ doesn’t mean that it’s right.

The report comes at a time when the federal government continues to sink deeper and deeper into debt. The next President and the new Congress must reform our tax code and make sure the tax burden on ordinary citizens is corrected. The full report can be read by going to: <http://www.ctj.org/corpfed04pr.pdf>

U.S. CORPORATIONS MOVED \$75 BILLION IN PROFITS INTO TAX HAVENS

Over the past few months, we have heard lots of campaign talk by the two candidates for President about taxes and tax cuts. In fact, the Bush campaign sounds like a broken record on the subject. Bush touts the tax cuts, which favored wealthy taxpayers, and tries to paint the Democratic candidate as a lover of taxes and tax increases. Frankly, I don’t believe the real problems with our present system of taxation have been adequately addressed by either candidate. For example, U.S. corporations shifted \$75 billion of their profits into tax havens last year, depriving the IRS of between \$10 billion and \$20 million in expected tax revenue. This information comes from a study in Tax Notes, a tax trade journal, and is most disturbing. Large corporations exploit legal loopholes and tax credits to avoid paying taxes by shifting income into subsidiaries located in no-tax or low-tax countries, such as

Bermuda. Martin A. Sullivan, a former Treasury Department economist, did the study, which was based on Commerce Department data.

Meanwhile, a separate study published earlier by Tax Notes found that the profits U.S. multinational corporations reported from their foreign subsidiaries have grown 68% since 1999, reaching \$149 billion last year. But, the data do not show any commensurate growth of actual economic activity in those tax havens. The implication is that multinational corporations are merely sheltering more income in tax havens. A study by J.P. Morgan Chase, done in June 2003, estimated that U.S. corporations had \$650 billion sheltered offshore, more than 40% of which was in the manufacturing sector.

There was another study released in September that is also worthy of note. That study by Citizens for Tax Justice (CTJ) found that in 2002 and 2003, 275 of the biggest U.S. corporations sheltered more than half of their profits from taxes. These corporations reported \$739 billion in profits to shareholders, but reported only \$363 billion in profits to the IRS. According to CTJ, the 275 corporations paid an effective tax rate of 17.2% in 2002 and 2003, less than half of the effective corporate tax rate of 35%. That’s down from 26.5% in 1988, 21.7% in 1998, and 21.4% in 2001. Individuals are bearing too much of the tax burden in this country. The loopholes that exist in the tax code must be closed. Corporate America—simply put—is not paying its share of taxes. I don’t believe we will get any relief so long as George Bush is President. You can get a list of the U.S. corporations with the most subsidiaries in tax havens by going to <http://www.citizenworks.org/corp/tax/top25.php>

OFFSHORE TAX SHELTERS ARE GROWING FAST

I will say a little more on the sad state of affairs relating to our current tax system. Offshore tax shelters are being used and the tax system in the United States abused at a record pace.

An article in the UK Guardian looks at how offshore tax shelters are continuing to grow, siphoning off resources from governments around the world. As we have learned, U.S. corporations are actively involved in the abuse. According to the article:

- Offshore companies are being formed at the rate of about 150,000 a year. While in the 1970s there were just 25 tax havens, there are at least 63 now, about half of them British protectorates or former colonies. Tax avoidance in Britain alone is estimated at between £25bn and £85bn.
- In 1999, the Economist estimated that African leaders had \$20bn in Swiss bank accounts alone, twice the amount that sub-Saharan Africa spends on servicing debts.
- Tax havens contain only 1.2% of the world's population and 3% of the world's GDP, but 26% of assets and 31% of the profits of US multinationals are held there.
- According to a recent Oxfam report, "the amount secreted in tax havens was equivalent to six times the estimated annual cost of universal primary education and almost three times the cost of universal primary health.

John Christensen, a former economic adviser to the Jersey government, told the Guardian:

Many of the havens were now locked in a desperate competition. They like to suggest that they oil the wheels of global capital but there is no case for that. What has happened is that tax havens transfer the burden of tax away from capital and towards labour and the consumer.

Mr. Christensen is now working as the London coordinator of an international secretariat for the Tax Justice Network, which was formed last year by tax experts and economists concerned about the trend of international tax havens. The group believes that tax evasion and tax avoidance on a large

scale hinder development in poor countries. At the same time, it also has a very bad effect in richer countries. If you want more information, it can be obtained by reading "Havens that have become a tax on the world's poor" by Duncan Campbell of The Guardian: <http://www.guardian.co.uk/international/story/0,3604,1309079,00.html>. You may also want to go <http://www.taxjustice.net/e/about/index.php> to obtain information about the Tax Justice Network.

WE ARE BECOMING A GAMBLING NATION

We are rapidly becoming a gambling nation and I don't believe that's good for our country or for its people. As we know all too well, Indian casinos are popping up in a great number of states. Presently, more than 20 states allow tribes to run gambling businesses, while private companies can't. Many believe the Indians should no longer have a monopoly on legalized gambling in the U.S. Because Indian tribes are sovereigns, however, they can't be taxed in ordinary ways. This makes for a most interesting—but confusing—situation for the states that presently have Indian casinos. The private sector and state governments that are either in the gambling business or want to get in say they are being discriminated against.

The U.S. Supreme Court has sidestepped a dispute over tribal gambling in California. The High Court refused to consider whether states can let tribes operate casinos while barring others from this enterprise. This is a major victory for California Indian tribes and Governor Arnold Schwarzenegger, their new high-profile supporter. The appeal had been filed this past spring by four San Francisco-area card clubs and some charity organizations. They contended that California tribes were wrongly given a monopoly on gambling, which is worth \$6 billion annually. Governor Schwarzenegger is counting on an expansion in Indian gambling to help the state's ailing finances. In August, the California governor announced agreements with five

Indian tribes to add thousands of new slot machines statewide and create one of the world's largest casinos in the heart of the Bay Area.

In 2000, California voters agreed to change the state's constitution to permit tribes to operate casinos. While some gambling is allowed by private companies, American Indians have a monopoly on Las Vegas-style gaming, such as slot machines and blackjack. The San Francisco-based U.S. Court of Appeals for the Ninth Circuit had ruled that giving Indians special gambling rights is not racial discrimination, saying tribes have special privileges because they are regarded as sovereign nations under the law. Obviously, the stakes in the California case were very high. The group challenging Indian gambling in California told justices that Governor Schwarzenegger's compacts with the tribes would give them exclusive rights to unlimited slot machines until the year 2030. The court was asked to intervene "before tribal monopolies become an entrenched feature of American life."

Besides California, other states allowing limited gambling are my state of Alabama, Alaska, Arizona, Connecticut, Florida, Idaho, Kansas, Maine, Minnesota, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Washington, Wisconsin, and Wyoming. The Justice Department had urged the High Court to reject the appeal, arguing that Congress never said that states that allow tribal gambling must open gambling to others as well. I have to wonder where Ralph Reed and the Christian Coalition were in this fight. I guess we will have to follow the **money trail** to find out.

MINE INSPECTOR SETTLES CASE AGAINST MSHA

Jack Spadaro, who challenged the U.S. Mine Health and Safety Administration's bidding and accident investigation practices after a coal sludge disaster in Kentucky, is retiring from federal service. Spadaro, the former head of a federal mine safety academy,

stated that he has been fighting with the Bush Administration for four years, and “didn’t want to fight with this Administration anymore.” The federal agency announced in February it was transferring Spadaro from the Beckley academy to its Pittsburgh office, which was a demotion. Spadaro had been engaged in a running battle with the agency. The veteran employee, who is highly respected, appealed the demotion and transfer. He claimed it was in response to his August 2002 complaint about training contracts MSHA awarded without following proper bidding procedures to friends of MSHA chief Dave Lauriski and a Lauriski aide.

The settlement with MSHA will wind up the battle. In 2001, Spadaro resigned from an MSHA team investigating the October 2000 release in Inez, Kentucky, of 300 million gallons of coal slurry when the bottom of a coal impoundment operated by Martin County Coal collapsed into an abandoned underground mine. The Kentucky coal operator is a Massey Energy subsidiary. Spadaro said he left the team because he felt MSHA was trying to cover up its own role in overlooking previous violations at the impoundment. The agency later dropped six of eight proposed citations against Massey Energy, the Department of Labor’s Inspector General said following an investigation into Spadaro’s complaint. An MSHA internal review confirmed the allegations at the heart of Spadaro’s concerns about Martin County. That review found that, after a 1994 spill at the Massey impoundment, MSHA ignored an agency engineer’s warnings that more safety precautions were needed at the site.

The moral of this story is that under the Bush Administration, if you don’t follow the company line you will be dealt with harshly. It’s sort of like being called unpatriotic if you criticize the President’s foul-ups in Iraq. In this case a dedicated public employee—who knows the difference in right and wrong and cares about it—was forced to leave his job. That’s a modern-day tragedy!

LNG SHIPS ARE BUILT WITH FLAMMABLE MATERIAL

Top federal Homeland Security officials are now admitting that ships designed to carry liquefied natural gas—like those that would operate at terminals proposed for the Alabama coast—are built using tons of highly flammable insulation. The *Mobile Register* broke this story on October 12th. A letter from Homeland Security to a Massachusetts congressman in May said polystyrene insulation “is not used on LNG carriers precisely because it’s susceptible to melting and deformation in a fire.” But after the letter turned up in congressional proceedings and regulatory actions during the summer, a follow-up letter September 13th said the statement was incorrect. Polystyrene is the primary insulation on LNG ships, which carry natural gas that has been chilled to minus 260 degrees, turning it into a liquid that takes up only a fraction of the space of the gas.

Some in the scientific community have expressed alarm that the senior government officials in charge of protecting the nation’s ports did not appear to understand critical facts regarding construction of LNG ships. It is most disturbing that officials have apparently not considered what would happen if all 30 million gallons on board an LNG vessel were ignited. As has been reported, two LNG terminals have been proposed for the Mobile area and a third for federal waters 11 miles off Dauphin Island. Hopefully, the government is doing more to protect the ports than appears to be the case. Clearly, a terrorist group could do great harm and damage—including a tremendous loss of life—if they converted an LNG ship into a weapon of mass destruction.

Source: Mobile Register and Associated Press

V. THE CORPORATE WORLD

FIRST ENRON CRIMINAL TRAIL IS UNDERWAY

As we went to the printer, the first criminal trial involving an Enron executive was well underway in Houston, Texas. Federal prosecutors are accusing four former Enron executives and two former Merrill Lynch executives of disguising a \$7 million loan as a sale of energy-producing Nigerian barges in order to help Enron artificially boost its earnings. The government’s case is against both Enron, a company that claimed it made money on a transaction it did not make, and the company’s Wall Street investment bankers who allegedly helped make it all happen. Defense lawyers are claiming that their clients were not aware that the transactions were illegal and that they were merely following orders from above. The illegal transactions in this case are just a small part of the immense web of sham transactions that made up Enron’s accounting. Many of Enron’s transactions were loans that Enron improperly booked as sales, thereby inflating its revenue. This case also highlights the role that large banks like Merrill Lynch played in both designing and executing these complex transactions. It will be most interesting to see how this criminal case comes out.

LEHMAN BROTHERS TO PAY \$222 MILLION TO SETTLE ENRON SUIT

Lehman Brothers Holdings Inc., the fifth-biggest U.S. securities firm, will pay \$222.5 million to settle a suit filed by investors over the bank’s role as an underwriter for Enron Corp., the bankrupt energy trader. New York-based Lehman was accused of misleading investors in Enron debt offerings all the way back to 1998. Lehman’s board and the University of California Board of Regents, the lead shareholder in the case, must approve the settlement. The settlement—if approved—would be the largest so far stemming from the 2002

investor suit, which named Citigroup Inc., JPMorgan Chase & Co. and others of Enron's investment banks among the defendants. The settlement amount is equal to about half of Lehman's \$505 million net income for its third quarter, which ended August 31st. Lehman issued debt offerings that contained misleading financial statements about Enron. Under the law, as I understand it, the firm's potential liability is limited to the securities it underwrote. Shareholders and bondholders, who are seeking \$30 billion in damages, have accused other banks, including Citigroup and JPMorgan Chase, of helping Enron commit a massive accounting fraud.

The Lehman settlement will bring to \$334.5 million the amount of money lawyers for the California regents have collected to reimburse Enron investors. In July, Bank of America Corp., another underwriter of Enron debt offerings, agreed to pay \$69 million to settle the investor suit. The foreign affiliates of Arthur Andersen LLP, Enron's former auditor, also settled their part of the suit for \$40 million. A federal judge in Houston overseeing all Enron-related litigation approved the agreement in November. But, the Andersen settlement doesn't cover U.S.-based auditors accused of helping Enron executives hide more than \$1 billion in losses. In June, a federal appeals court upheld Andersen's criminal conviction for obstructing the government's investigation of Enron's collapse. The entire Enron scandal is an example of what happens when folks running major corporations have **good** friends in **high** places.

Source: Bloomberg News

GENERAL ELECTRIC GETS A SLAP ON ITS CORPORATE WRIST

After retiring from General Electric in 2001, former CEO Jack Welch received a luxuriant retirement package. Fortunately for Welch—but not so good for GE stockholders—the retired executive received a luxury Manhattan apartment, access to a private aircraft, a chauffeured limousine, court-side seats to the New York Knicks and U.S.

Open, prime seating at Wimbledon, choice box seats at Red Sox and Yankees baseball games, country club fees, security services, payment of restaurant bills and other perks. None of this was disclosed to shareholders - at least until two years ago when divorce papers filed by Welch's ex-wife, Jane Beasley Welch (who happens to be my cousin), made it all public. Jane, a native of Pratt's Station in Barbour County, trusted her husband, who turned out to be a pretty sorry fellow. She had to protect herself in a divorce that she never expected and the rest is history. When reporters got wind of the information on Welch's deal that came from court documents, it stirred up considerable controversy about **stealth compensation** in the form of retirement perks **hidden** from shareholders. For some reason, it took the Federal Securities and Exchange Commission (SEC) two years to take any action, and when it did act, it came in the form of a cease-and-desist order to GE. Unfortunately, the SEC neglected to levy any monetary fine. It appears that all they did was give GE a **gentle slap** on its corporate wrist.

Barbara Roper, investor advocate for the Consumer Federation of America, told Reuters: "It certainly does seem like a missed opportunity for the SEC to make a strong statement about executive pay and the right of shareholders to know about it. The whole scandal surrounding Welch's retirement package exposed a flaw in SEC disclosure requirements on executives' retirement benefits." I agree with that assessment and believe that the SEC dropped the ball on this one.

Source: Reuters News Service

MISLEADING FINANCIAL STATEMENTS STILL A PROBLEM

With all of the recent revelations of corporations committing massive frauds relating to accounting practices, one would think that bad accounting would no longer be a problem. Recently, there was an excellent report on the state of corporate accounting in Business Week. Despite a number of

reforms, fuzzy accounting continues, according to the report. The following are some of the highlights from the report:

The problem with today's fuzzy earnings...is that investors, analysts, and money managers are having an increasingly hard time figuring out what judgments companies make to come up with those accruals, or estimates. The scandals at Enron, WorldCom, Adelphia Communications (ADELQ), and other companies are forceful reminders that investors could lose billions by not paying attention to how companies arrive at their earnings. The hazards were underscored again September 22nd when mortgage-finance giant Fannie Mae said its primary regulator had found that it had made accounting adjustments to dress-up its earnings and, in at least one case, achieve bonus compensation targets. The company said it is cooperating with government investigators. The broader concern is that corporate financial statements are often incomplete, inconsistent, or just plain unclear, making it a nightmare to sort out fact from fantasy. Says Trevor S. Harris, chief accounting analyst at Morgan Stanley (MWD): "The financial reporting system is completely broken."

"Indeed, today's financial reports are more difficult to understand than ever. They're riddled with jargon that's hard to fathom and numbers that don't track. They're muddled, with inconsistent categories, vague entries, and hidden adjustments that disguise how much various estimates change a company's earnings from quarter to quarter," says Donn Vickrey, a former accounting professor and co-founder of Camelback Research Alliance Inc., a Scottsdale (Arizona) firm hired by institutional investors to detect inflated earnings.

Aware that executives have tremendous opportunity to manip-

ulate the numbers through their estimates, the market is on alert, delving more vigorously than ever into the estimates that go into compiling earnings. Over the past two years, investment banks have beefed up their already complex computer programs to screen thousands of companies to find the cheerleaders who make very aggressive estimates. As analysts and investors drill deeper into these financials, they're finding some nasty surprises. Accounting games are spreading beyond earnings reports as some companies start to play fast and loose with the way they account for cash flows.

In a Duke University survey of 401 corporate financial executives in November 2003, two out of five said they would use legal ways to book revenues early if that would help them meet earnings targets. More than one in five would adjust certain estimates or sell investments to book higher income. Faulty accounting estimates by execs caused at least half of the 323 restatements of financial reports last year, according to Huron Consulting Group.

Despite the reforms, it appears that corporate profits are still, in large part, as distorted and confusing as ever. I hope things will get better soon. The public, and especially those who invest their funds, expects Corporate America to straighten up and fly right!

Source: *Business Week*

BAYER UNIT TO PAY \$33 MILLION FINE AND PLEAD TO PRICE FIXING

Bayer AG's U.S. unit will plead guilty and pay a \$33 million fine for conspiring to fix prices of a chemical used to make plastic grocery bags, shoe soles and other consumer products. The guilty plea by Bayer Corp. would be the first in a U.S. government investigation into price fixing for the chemical additive used in a variety of products. In July, Bayer AG, which is based in Germany, agreed to pay a \$66 million

fine to settle a U.S. charge it conspired to fix the price of chemicals used to make rubber products. The latest scheme took place between 1998 and 2002 with another producer of aliphatic polyester polyols made from adipic acid. The other chemicals are used to keep plastic bags from sticking. They are used to make automotive coatings, filters, belts, seals, gaskets, textiles, adhesives and soundproofing material.

The investigation of the plastics-additive cartel is apparently an outgrowth of Justice Department investigations into collusion by makers of other chemicals. Besides Bayer AG's plea-bargain, the Justice Department's rubber chemicals investigation has received a guilty plea from Crompton Corp., which was fined \$50 million. Both Bayer and Crompton are cooperating in the Justice Department's investigation of the global cartel to fix prices of chemicals used to improve the durability, elasticity and strength of tires, outdoor furniture, hoses, belts and shoes. The European Commission and authorities in Canada are conducting separate investigations.

The criminal probes have also exposed Bayer, Crompton and other companies to the threat of triple monetary damages sought by companies that used the companies to make rubber products. U.S. antitrust law allows customers to collect three times the amount they were overcharged by a price-fixing conspiracy. At least 13 suits filed in U.S. courts accuse BASF AG, the world's largest chemical maker, Crompton and Bayer of fixing the price of urethane, a component of plastics and synthetic rubber. Goodyear Tire & Rubber Co., the largest North American tire maker, accused Crompton, Bayer and other companies of conspiring to overcharge for synthetic rubber called ethylene propylene diene monomer, or EPDM. DuPont Dow Elastomers LLC, a joint venture of DuPont Co. and Dow Chemical Co., the two largest U.S. chemical companies, agreed in June to pay a \$36 million fine to settle civil claims it overcharged customers for neoprene, a synthetic rubber.

Source: *Bloomberg News*

STOCK OPTIONS STILL A PROBLEM

As time ran out on this year's Congress, high-tech lobbyists were still desperately trying to get the Senate to pass a bill that would block a proposal by the Financial Accounting Standards Board (FASB) to require companies to count stock options as an expense. The bill in question is The Stock Options Accounting Reform Act (S. 1890), which would do just that. A similar bill (HR 3574) passed in the House in July by a 312 to 111 vote. In an interview with *National Journal's Technology Daily*, a former member of the House, Nick White (R-WA), and current president and CEO of Tech Net, said that Senate supporters will try to add the bill to an omnibus appropriations bill during a lame-duck Congressional session expected later this month. SEC Chairman William Donaldson, who has publicly expressed his opposition to Congress interfering on the options issue, and Federal Reserve Chairman Alan Greenspan have urged Congress not to interfere on the issue. Dr. Bill Frist (R-TN), who does whatever Corporate America wants, may eventually figure out a way to help his buddies.

Fortunately, Senator Richard Shelby (R-AL), who is Senate Banking Committee Chairman, is opposed to the bill. He has called it "political interference" into accounting standards setting. In addition to Senator Shelby, Senator Peter Fitzgerald (R-IL) is also a vocal opponent of the bill. The Financial Accounting Standards Board has promulgated a common-sense measure to require publicly traded companies to expense stock option compensation. Some high tech companies don't like the new FASB rule because it would lessen - and in some cases eliminate - those companies' reported earnings. Senator Fitzgerald has joined other senators, including John McCain (R-AZ), Carl Levin (D-MI) and Richard Durbin (D-IL), in sending a letter urging President Bush to oppose any efforts to block FASB from enacting a rule to expense options. If the bill is not passed this year, FASB is expected to enact a rule to require companies to expense stock options early next year.

Hopefully, the heavy lobbying in the Senate will fail and take down with it a very bad bill.

SEC COMMISSIONER PUSHES FOR CORPORATE GOVERNANCE REFORM

SEC Commissioner Harvey Goldschmid is trying to push a corporate governance reform proposal through before the 2005 corporate proxy season. He has criticized his colleagues for not acting on a proposal to give shareholders more rights to nominate board members. The Commission hasn't finalized the proxy access proposal that is still pending. Goldschmid made these comments to a group:

The commission's inaction to this point has made it a safer world for a small minority of lazy, inefficient, grossly overpaid and wrong-headed CEOs. So far, in my view, the worst instincts of the CEO community have triumphed.

The proposed rule would set up a two-step process for gaining access to the proxy statements. First, shareholders representing one percent of company stock would be able to call for a shareholder vote on whether they can nominate directors. Then, if a majority of shareholders agree, the next year the shareholder group would be allowed to nominate up to three directors, depending on the size of the board. Alternately, if at least 35% of shareholders withhold votes for one or more directors, investors would be allowed to nominate directors. Although SEC Chairman William Donaldson has been a strong supporter of the proposal to democratize shareholder elections by giving large minority shareholders limited rights to nominate directors for the proxy statements, he has yet to schedule a vote on the issue. Corporate executives, led by the Business Roundtable and the Chamber of Commerce, have lobbied heavily against the proposal, even threatening to file suit if the proposal gets enacted.

INDICTMENTS IN PEREGRINE ACCOUNTING FRAUD

Federal prosecutors have indicted 11 people, including former CEO and chairman Stephen P. Gardner, for their role in an alleged accounting fraud at Peregrine, the software company. The indictment charges these defendants with a massive conspiracy that had at its core a most corrupt goal—to hit the numbers quarter after quarter, no matter what. The Securities and Exchange Commission has also filed a lawsuit of its own against the company, the fifth enforcement action it has taken against Peregrine. This was a significant accounting fraud that permeated Peregrine and was carried out at the highest levels of the company. Peregrine last year acknowledged that it had overstated its revenue by \$509 million between 1999 and 2001. It restated losses as \$4.1 billion, up from \$1.3 billion. Shareholders lost an estimated \$4 billion from the ensuing decline in Peregrine's stock. This is just another example of corporate fraud that has hurt lots of folks.

SEC INVESTIGATES HOLES IN KRISPY KREME'S ACCOUNTING

Surely, donut makers would never cook their books. But, the Securities and Exchange Commission (SEC) has opened a formal probe of accounting practices at Krispy Kreme Doughnuts Inc. At issue is how Krispy Kreme booked its franchise repurchases, which it has been doing a lot of lately. Some of those franchises were owned by company executives and insiders, raising questions about whether they were valued fairly. For example, Krispy Kreme paid \$33 million to buy back franchises in Kansas and Missouri from former executive vice-president Philip Waugh. The company also spent \$67.5 million to buy back franchises in Dallas and Shreveport, Louisiana that were owned by Director Joseph McAleer and former director Steven Smith. Some experts say that Krispy Kreme did not properly reduce the value of its repurchased franchises over time.

CRIMINAL PROBE OPENED IN FANNIE MAE CASE

Federal prosecutors have opened a probe into alleged improprieties at mortgage giant Fannie Mae. This came just days after the Office of Federal Housing Enterprise Oversight (OFHEO)—which regulates Fannie Mae—released a report that was extremely critical of the company's accounting practices. The report suggests that Fannie Mae may have cooked its books and abused its reserves in order to meet earnings targets so that executives could receive \$27 million in bonuses in the late 1990s. The report also criticized the company for poor internal controls and a corporate culture obsessed with keeping earnings growth stable. Fannie Mae, with assets of \$1 trillion, is the second largest financial institution in the U.S., behind Citigroup.

Prosecutors are also looking into whether company executives, including CEO Franklin D. Raines, knew of the accounting improprieties and whether they intentionally misled regulators. Raines publicly defended the company's accounting on repeated occasions, including last summer, when mortgage competitor Freddie Mac revealed that it had understated profits by \$4.5 billion from 2000-2002 in order to stabilize earnings. The Securities and Exchange Commission and the House Financial Services Subcommittee are also investigating Fannie Mae's alleged accounting improprieties. An official inquiry has been started by the SEC.

As private companies with a government charter, Fannie and Freddie have long played a major role in the housing market. Both pump tremendous sums of money into the housing industry by buying mortgages from lenders. This gives the lenders fresh funds to make additional home loans. At present, Fannie and Freddie own or guarantee payments on about half of the nation's \$7.9 trillion of residential mortgages outstanding. Holding such large amounts of mortgages carries with it tremendous risk. Because the interest-rate risk concentrated at Fannie and Freddie is so large, their critics say American taxpayers actually carry a

giant “contingent liability.” The possibility that some day one of the companies might go bust, resulting in the government becoming obliged to bail it out rather than risk an international financial crisis, is a scary thought.

VI. CAMPAIGN FINANCE REFORM

FEC DOESN'T LIKE CAMPAIGN FINANCE DECISION

I wasn't surprised to learn that federal election officials asked a judge to stay the ruling striking down several government regulations on political fund raising. The Federal Election Commission (SEC) contends that rules interpreting the nation's campaign finance law are crucial as the election approaches. The FEC also asked U.S. District Judge Colleen Kollar-Kotelly to make it clear that the rules she overturned will remain in effect while the FEC appeals her September decision. At issue are FEC rules spelling out how the Commission interprets a 2002 campaign finance law that bars national party committees and federal candidates from raising corporate, union and unlimited donations and broadly bans the use of such “soft money” in federal elections. The Commission opened loopholes in the law that Congress never intended to create. It is quite clear that the FEC wants to overturn the new rules.

Campaign finance watchdogs supporting the Shays-Meehan lawsuit against the FEC argue that the law is clear and political consultants and campaign managers can simply look to it when planning their activities. The Commission notified Judge Kollar-Kotelly that it would appeal her ruling, which directs the Commission to write new rules interpreting key sections of the law, such as the extent of the soft money ban and how far candidates and outside groups can go in coordinating political activities. I hope the court will stand fast and not yield to the FEC.

Source: *Associated Press*

THERE MAY BE A SILVER LINING IN THIS MESS

The wild spending that we have seen over the past year in the presidential campaign may be the final impetus needed to get campaign finance reform through the Congress. I have to believe that the American people realize the record amount of money spent in elections has to be curbed. The candidates' official campaign spending is bad enough, but when you consider the vast amounts spent by the 527 Committees and groups such as the U.S. Chamber of Commerce are outside the existing campaign spending laws, it makes you realize that ordinary citizens have little influence in elections. That has to be changed. Hopefully, folks will be so turned off by what they have seen during this lengthy campaign that they will demand action. If so, there will have been a silver lining hidden somewhere in the very dark clouds that threaten to spoil this election.

VII. CONGRESSIONAL UPDATE

CONGRESS DIDN'T GET MUCH DONE FOR ORDINARY FOLKS

Congress has finished its work for now—in a manner of speaking—and has left much unfinished business. Democrats and Republicans disagree on the accomplishments of the 108th Congress. Hundreds of good programs—from highway building to welfare reform—were virtually ignored. Temporary measures kept them alive because lawmakers failed to meet all of the deadlines for renewing them. Because they control both houses, Republican lawmakers want this unproductive session to look good. It didn't take long for them to get back home so they could try to make the session look good to their constituents. Democrats, on the other hand, are pointing out the many failures of this session.

The GOP-led Congress failed to carry

out its most essential function, and that is passing the spending bills that keep the federal government running. The Senate will have a lame-duck session later this month to take up the spending bills. Congress will have to reconvene at some point after the November 2nd elections to deal with legislation that would create a post of national intelligence director. On one major issue Congress did address, I find it hard to believe that the Republican leadership believes the Medicare prescription drug measure enacted last year is good for folks in this country and especially for seniors. Perhaps the biggest failures were Congress' inability to pass a six-year, \$300 billion highway and mass transit bill that could have created hundreds of thousands of jobs, an energy bill to make America less dependent on foreign oil, and legislation enabling Americans to buy cheaper prescription drugs from abroad.

The following are some of the bills that did pass during the 108th Congress:

- Legislation making it a double crime to injure a pregnant woman and her fetus;
- A \$417.5 billion defense bill for the 2005 budget year;
- A \$5.6 billion bill for developing and stockpiling antidotes for chemical and germ attacks;
- A pensions relief package that could save employers some \$80 billion;
- A \$146 billion package to extend three popular middle-class tax breaks;
- A popular do-not-call registry to bar unwanted telemarketer contacts;
- A bill banning the so-called partial birth abortion; and
- A \$136 billion tax break passage.

\$143 BILLION IN CORPORATE TAX BENEFITS

At the tail-end of the session, the House and the Senate passed a \$143

billion in corporate tax cuts and giveaways over 10 years, including 276 different special interest tax breaks, and sent the bill to the President for his signature. The bill marks the biggest revision to the tax code in almost 20 years. The passage came after House and Senate negotiators agreed on a compromise between competing House and Senate corporate tax bills. Keith Ashdown of Taxpayers for Common Sense, a watchdog group, made this observation:

The passage of this legislation is proof that fiscal conservatives are an endangered species in Congress. The bill is a bonanza of bailouts to the nation's biggest companies that are already not paying their fair share.

The bill began almost two years ago as an attempt to fix a \$5 billion export tax break for corporations that had been declared illegal. Smelling the money, it didn't take the corporate lobbyists very long to go to work. Lawmakers, eager as usual to please corporations and special interests, did as requested and added billions to the giveaways. According to Taxpayers for Common Sense, the big winners include Starbucks, Carnival Cruise Lines, shipbuilders, Home Depot and numerous other large corporations. Christmas came early for these corporate "fat cats." Some of the early gifts include:

- A \$44 million tax break for importing ceiling fans;
- A \$27 million tax break for horse and dog racing establishments;
- \$9 million for the archery industry;
- \$11 million for manufacturers of tackle boxes; and
- A big write off for NASCAR track owners (not for their fans).

The bill reduces the top tax rate for U.S. manufacturing companies from 35% to 32%. The bill also includes a \$10 billion buyout for tobacco farmers, which will help tobacco companies. But, the bill discards a provision in the

Senate version of the bill that would have subjected cigarette companies to Food and Drug Administration regulation. Senator John McCain, a supporter of the FDA regulation, calling that a disgrace, stated: "They have removed the linchpin in the passage of this legislation in a complete sellout to the tobacco companies." Another boon to corporations is a one-year tax holiday for profits earned overseas and still held overseas. Instead of paying the normal 35% on these earnings, corporations would only have to pay 5.25% to bring this money back to the United States. This would save companies an estimated \$20 billion. Big winners include Hewlett Packard and Eli Lilly.

On the bright side, this bill does contain a minor tightening of some rules regarding tax shelters. This is estimated to increase revenue by about \$50 billion over ten years. Unfortunately, the version of the bill that passed rejects a group of provisions in the Senate version of the bill that would have strengthened the ability of the IRS to crack down on tax shelters, which would have increased revenue by about another \$40 billion. The Senate version also would have closed the loophole that allows corporations to reincorporate in Bermuda to avoid paying taxes, which would have generated another \$3.1 billion in revenue. I guess we should never have expected that provision to make it through a Bush-controlled Congress. I haven't actually read the bill that passed, but I will predict that nobody outside of Washington knows the extent of all the corporate gifts that were included in the final version. Ordinary folks will get little benefit from this legislation. I hope that I am wrong, but seriously doubt it!

THE DRUG GIANTS HAVE A REAL FRIEND IN WASHINGTON

It should come as no surprise that Dr. Bill Frist (R-TN), the Senate majority leader, is a great friend of the pharmaceutical industry. To say that he has been working hard in Washington for his buddies is a gross understatement.

Dr. Frist has been bottling up the drug reimportation bill for the benefit of President Bush and the drug companies. Most observers say the bill would easily pass the Senate if it ever comes up for a vote. It is interesting that older voters, who have been clamoring for lower-priced Canadian drugs, are putting pressure on the Bush White House to back off and let the bill pass. American consumers are increasingly aware that their average drug prices are 67% higher than what Canadians pay for comparable prescriptions.

Fortunately, it appears that bipartisan Senate pressure is growing on Dr. Frist. We may have the sort of floor rebellion that saw the Republican House of Representatives rise up last year to pass a drug reimportation plan over President Bush's strong opposition. It makes no sense for the people in this country to subsidize the rest of the world in the prescription drug business. If the drug companies can make a profit in Canada, at the prices charged there, they can do so here at "Canadian prices." If something isn't done soon, in my opinion, we will witness a voter rebellion against members of Congress. The President's backing of the pharmaceutical industry should certainly hurt his reelection bid.

CONGRESS MUST INCREASE PROTECTIONS FOR WHISTLE-BLOWERS

In previous issues we have mentioned the urgent need to protect whistle-blowers. For the first time in a decade, Congress now appears ready to strengthen protections for federal employees who risk their jobs when they blow the whistle on criminal activities, gross mismanagement and dangers to public health and safety. The House Government Reform Committee recently approved, on a voice vote, a bill sponsored by Representative **Todd R. Platts** (R-PA) that would clarify congressional intent in cases where agencies take reprisals against whistle-blowers. A Senate version, sponsored by Senators **Daniel K. Akaka** (D-HI), **Susan Collins** (R-ME), **Charles E. Grassley** (R-IA) and others,

has been approved by the Governmental Affairs Committee. Congress tightened whistle-blower protections in 1994, but Platts and Akaka said that effort has been undermined by loopholes and exceptions created by the Court of Appeals for the Federal Circuit, which has monopoly jurisdiction over whistle-blower appeals.

Since the 1994 amendments, 75 whistle-blower cases have come before the Federal Circuit Court. But, only one whistle-blower has prevailed. The court, for example, has decided that whistle-blower protections do not apply if the federal employee brings an allegation of wrongdoing to the attention of a co-worker, or discloses information in the course of ordinary job duties, or raises issues already disclosed by someone else. That makes absolutely no sense. The court has also ruled that federal employees must come up with “irrefragable proof” in order to show the government has engaged in waste, fraud or abuse. I am not sure what this means, but I believe it means “impossible to refute.” In other words, the agency pretty much has to admit to waste, fraud and abuse. The Platts bill would replace the “irrefragable” standard with a more sensible one that requires “substantial evidence” in cases where whistle-blowers must rebut the presumption that the government was acting in accordance with law.

The Senate bill would provide more expansive protections to whistle-blowers. For instance, it would allow federal employees to have their cases heard by courts other than the Federal Circuit, would clarify that federal employees can bring classified information to Congress, and would make it more difficult for agencies to get rid of whistle-blowers by yanking their security clearances. Senator Akaka would allow the Merit Systems Protection Board, which handles federal employee complaints about disciplinary actions, to review cases in which whistle-blowers lost their clearance because of retaliation. If the government acted improperly, the MSPB could call for a remedy, such as awarding back pay, legal fees or other relief

to the employee who suffered reprisal. The Senate bill clearly appears to be the better of the two pieces of legislation. I hope it or a similar version will be passed and signed into law.

HOUSE MAJORITY LEADER TOM DELAY SHOULD RESIGN

Public Citizen has called on Representative Tom DeLay (R-TX) to resign his position as House Majority Leader. This request came following DeLay's third admonishment by the House Ethics Committee for failing to conduct official business in a forthright and ethical manner. Several other ethics complaints against DeLay are still pending before the House Ethics Committee, the Department of Justice (DOJ), the Federal Election Commission and an Austin, Texas, grand jury. The admonishments issued unanimously by the Ethics Committee—made up equally of Republicans and Democrats—of the House's second-ranking Republican have been worded sternly - chastising DeLay for offering rewards to a colleague in exchange for a vote on the Medicare prescription drug bill, using his position to divert Federal Aviation Administration resources from monitoring safety in the skies to tracking Democratic state legislators who left Texas to prevent a quorum over a redistricting bill, and appearing to accept campaign contributions from Westar Energy Corp. in exchange for a legislative favor. But the Committee shied away from conducting a formal investigation that could lead to harsher penalties. The Ethics Committee did note that other agencies, particularly the Texas grand jury, may yet weigh in on additional ethics charges against DeLay.

More than 15 months ago, Public Citizen filed civil and criminal complaints against DeLay with both the House Ethics Committee and the DOJ regarding the Westar scandal. The DOJ complaint is still pending. In the complaints, internal e-mails among Westar executives suggested that DeLay and other House Republicans wanted a series of campaign contributions from

the executives and the company itself so they could win “a seat at the table” to secure legislation that Westar favored. Central to this scheme was having Westar contribute \$25,000 in 2002 to TRMPAC, DeLay's leadership political action committee, which he used to fund candidates for Texas state legislative offices. Westar executives gave an additional \$2,400 directly to DeLay's campaign and contributed thousands of dollars more to, as e-mails document, “a group of candidates associated with Tom DeLay.” The contributions were made and the favored legislation—an exemption for Kansas-based Westar from a regulation—was delivered in the energy bill by the legislators in conference committee with the Senate. The special interest provision was later removed after the company became the focus of a grand jury investigation into federal securities violations. The company's e-mails described why a Kansas company would give money to a Texas member of the House: “DeLay is the House Majority Leader. His agreement is necessary before the House Conferees can push the language we have in place in the House bill.”

It does not appear that DeLay has the integrity to lead the House of Representatives. He has a record of extraordinary admonishments for unethical behavior. The powerful Republican congressman is in the middle of ongoing civil and criminal investigations for corruption. It seems like wherever there is a scandal involving money in politics, the trail leads to Tom DeLay. Congress is too heavily influenced by special interest groups, large corporations and rich folks who donate to members' campaigns. Lawmakers must assure the American public that legislation cannot be bought by wealthy special interests. DeLay's reputation and behavior reveal an attitude of dishonesty and lack of integrity. Public Citizen believes that Congress and the Republican Party should end the taint of corruption that comes with having Tom DeLay as their leader. I agree! DeLay should recognize the damage he has brought to the institution. He should immediately resign his leadership post. If the powerful

Congressman doesn't respect the integrity of the House and step down on his own, his colleagues should force him to do so. I really believe that a man who operates as DeLay has done has no business in any public office and certainly not in a leadership role.

VIII. PRODUCT LIABILITY UPDATE

OCCUPANT PROTECTION DURING ROLLOVER EVENTS

Several of our readers have requested a little more detailed information on restraint system failures. Accordingly, I will discuss in this issue some of the "real world" restraint system failures resulting in death and injury during rollover crashes involving the Ford Ranger and Explorer. For years while marketing the Rangers and Explorers, Ford ignored the need to test its restraint system's performance during a rollover crash. Automobile manufacturers, such as Ford, should be required to make safety their "job one." All they would have to do is look at the statistics that their management and engineers study. For example, 2002 Alabama Traffic Crash Facts, published by the Alabama Department of Public Safety, reveals that there were 140,437 reported crashes in Alabama in 2001. One traffic crash was reported in our state every 224 seconds. These crashes resulted in 1,038 deaths and 44,414 persons injured during that year. One person was killed every 8 hours and 26 minutes in a traffic crash. Approximately 2,715 of the people injured or killed in Alabama traffic accidents in 2001 were not wearing their seat belts. But, the National Highway Traffic Safety Administration (NHTSA) reports that 20% of the 10,376 people in the United States killed last year in rollover crashes were wearing seat belts.

Based on the 2002 statistics, if you are a typical driver in Alabama, there is a 54% probability that you will be involved in an injury or fatal crash

while driving a motor vehicle during your lifetime! Those odds are not good and crashes are going to happen. The vehicles we drive should be designed and manufactured with occupant safety as the highest priority. The crashworthiness of our vehicles should be up to the test in "real world" crashes. Consumers have a right to reasonably expect safety components that really work to protect them in the field where life-threatening crashes are foreseeable to manufacturers. While there can be no guarantee that all injuries and deaths can be prevented, everything reasonably practicable should be done by the automakers to make their vehicles safe. Unfortunately, we know that the automobile industry has not done this in the case of occupant safety in rollover crashes.

The most prevalent types of crashes involving all kinds of vehicles are frontal, side and rear impacts. But, statistics reveal that the popular SUVs are three times more likely to be involved in fatal rollover accidents than are passenger cars. This is because of SUVs' higher center of gravity and narrow track width. Many deaths and injuries have been caused as a result of a failure of Ford's restraint system to reasonably protect occupants from ejection, injury and death during rollover crashes. In the broadest sense, the concept of a restraint system includes all components necessary to contain occupants in the vehicle during any type of crash, including rollovers. The safe containment of an occupant is dependant upon the integrated performance of roof structure, windshield and window glazing, seat belts, airbags, seatbacks, knee bolsters, the steering column and the steering wheel. The object of the restraint system is to keep an occupant contained in the vehicle during a crash and maintain the integrity of the occupant space to keep the occupant safe from injury.

Over the past decade-and-a-half, automakers have saturated the market with SUVs. They are extremely popular, and the Ford Explorer leads the pack. Complaints against the Explorer are that it is too high and too narrow to provide for safe handling

and stability in emergency maneuvers or during a tire failure at normal highway speeds. The absence of safe handling and stability places these vehicles at a much greater risk of rollover crashes than passenger cars. Ford's marketing efforts have resulted in millions of SUVs being received by consumers as alternatives to passenger cars. Most folks will tell you that they feel safer in SUVs. One might agree that in frontal, side and rear collisions, the SUV does provide a margin of safety. Ford knows that SUVs, including the Explorer, are prone to rollovers. But in a vehicle prone to rollover, how safe is the occupant from injury or death? What are some of the risks? What has Ford done about occupant safety during a rollover?

Accident data reveals that the greatest risk of serious injury or death occurs when an occupant is ejected from the vehicle. For decades, the industry has broadly recognized that vehicles should be designed to increase the level of protection afforded the occupants by maintaining passenger compartment integrity during collision conditions. As early as 1968, Ford, in reports to NHTSA, noted that safety improvements in the industry have evolved toward a focus on retaining occupants within the vehicle by improving the door hinges and latching devices, improving the windshield resistance to penetration and providing restraint systems.

Ford's Advanced Safety Testing Methods Department acknowledged in 1969, from available crash studies of passenger car rollovers without impact, that ejection is the major cause of fatalities. Before the age of the SUV, documents at Ford reveal a "rollover protection plan" in their Car and Body Systems Engineering Department. In documents dated May 28, 1969, Ford recognized that "The first requirement is to protect against ejection, the major cause of fatalities, five times that of non-ejected passengers, in rollover accidents." Ford observed the following objective of rollover testing to be developed:

*When excessive conditions do exist and vehicle rollover occurs, then our aim becomes one of occupant protection. Road accident studies have shown that occupant ejection is the predominant cause of serious injuries and fatalities. If the occupant remains in the vehicle throughout the roll cycle, he stands an excellent chance that any injuries that he sustains will be of a minor nature. **Our testing technique should demonstrate, therefore, that should a rollover occur an occupant would not be ejected.** (Emphasis added.)*

Therefore, one would expect the Ford Safety Laboratories Department to have developed such a testing technique to demonstrate that should a rollover occur, an occupant would not be ejected. But, it doesn't appear that such a test was ever developed. A Ford corporate representative, who was a former safety engineer in the Safety Laboratories Department at Ford Motor Company, testified under oath recently that no rollover testing was ever done at Ford. The only rollover testing he was aware of was outsourced during 2000-2001 time frame to Autoliv, related to development of the side canopy and seat belt improvements on the new generation 2002 Explorer. When confronted with the issue, Ford explains that a rollover event is a series of unpredictable crashes and that there is no repeatable test technique suitable for vehicle design. Thus, no rollover testing was done on millions of Rangers and Explorers to determine real world crash performance of the restraint systems during a rollover. From a safety perspective, that is unacceptable.

In fact, nothing was done by Ford during design and development of these rollover-prone SUVs in the 1980s or 1990s to demonstrate that should a rollover occur the occupant would not be ejected. Ford's corporate representative summed up the testing like this:

We did for the development of this vehicle, the subject vehicle (Ranger), and its restraint system, we did frontal testing, crash testing, we did

offset crash testing, we did side crash testing, we did rear crash testing; but we did not do any rollover testing of the subject vehicle.

The sole reason for Ford not doing any rollover testing was simply that the federal government didn't make them do it. That is a very bad reason when you consider the consequences.

The *Detroit News* reported on October 8, 2004, that NHTSA is now under pressure to reduce deaths and injuries during rollover accidents. The agency believes that improving vehicle roof strength and seat belts will help make occupants safer and reduce death and injuries from rollovers. It is finally pledging to update a 33-year-old vehicle roof standard this year. Seat belt improvement is needed because—as pointed out—about 20% of the 10,376 people killed last year in rollover crashes were wearing seat belts. Some of the improvements under consideration include:

- Pretensioners that activate within a millisecond of the beginning of a rollover, eliminating slack and holding occupants more securely in the seat.
- Seat belts that are integrated into the seat, rather than anchored to the side or pillar behind the seat.
- Designs akin to what a racecar driver would wear, such as "four-point" belts that cover and secure both shoulders and hips.
- Retractors with enough force to pull passengers back to the seat but not so much force as to cause chest or neck injuries.

NHTSA has recently done some crash tests to determine seat belt performance in rollover events. The study showed test dummies shifted out of seats as the cab of a truck was turned. The agency is in the process of building a new rollover-testing device using recent research on the kinds of forces that occur during a crash. The government is now learning what product liability lawyers have known for years: is seat belts are failing to prevent ejection

during rollovers, and roofs are crushing and killing many of those who do remain in the vehicles during rollover. These risks have been well known to Ford and other manufacturers, with little effort directed toward a solution until recently. So, literally millions of early model Rangers, Explorers and other vehicles are on the highway with untested and inadequate restraint systems for a foreseeable rollover event. Ford corporate representatives tell us in lawsuits that:

A rollover event, whether it's in a laboratory setting or in a real world setting is a very unpredictable series of different types of impacts and events. The restraint system, which includes the seat belt, is designed to keep the occupant contained in the vehicle during an impact event, which would include those impact events experiencing a rollover. The entire vehicle, including the restraint system, is designed to minimize the risk of ejection of an occupant during a rollover crash event, which again is not a specific crash. It is an unpredictable series of events. That's why there are no specific test to test the vehicle in a rollover situation because that test could not be repeatable or reproducible.

Ironically, engineers for Volvo, which is now owned by Ford, utilized "unrepeatable" rollover testing in developing the Volvo XC90 SUV. The design approach met objectives of occupant safety by maintaining the integrity of the occupant space and providing a restraint system that was tested to work during a rollover event to prevent ejection. Many of the design options, such as strengthening the roof structure, use of seat belt pretensioners, and installation of roll sensors, were implemented to make the vehicle safer during rollover. This technology used by Volvo has been available for some time, but it has simply been left on the shelf by a resistant industry. Unfortunately, it has taken way too many deaths, brain injuries and persons left paralyzed to get the attention of the public and federal regulators. Hope-

fully, the government has finally been pressured to act. Reasonable design attention must be paid to these important and needed safety concerns. We believe that our work in product liability cases, and that of other law firms, has helped to bring about this pressure on NHTSA. Improvement to safety is the thing that makes us proud of our firm's motto, which is "Helping those who need it most for over twenty-five years."

COURTS TO DETERMINE RELEASE OF VEHICLE SAFETY DATA

The National Highway Traffic Safety Administration (NHTSA), which we all know is the government's so-called auto safety agency, has backed off a plan to make public information on vehicle-related deaths and injuries, pending a court ruling on exactly what data should be disclosed. NHTSA had said it would complete its early warning system by October 1st and release much of the data to the public. The system, demanded by Congress following the 2000 recall of Firestone tires, requires automakers and others to submit data on deaths, injuries, consumer complaints, property damage and warranty claims. NHTSA agreed to keep warranty claims and consumer complaints confidential after automakers said releasing that data could harm competition. Public Citizen filed suit in March to get access to that information. The Rubber Manufacturers Association, which represents tire makers, asked to intervene in the case because it wants to keep information on deaths, injuries and property damage confidential. A judge agreed and has ordered the U.S. Department of Transportation to respond to the Rubber Manufacturers' claims.

A NHTSA spokesman says the agency, which is currently collecting the data, will wait until the courts decide what information should be public. You will recall that the system led to a recall of 490,000 Bridgestone/Firestone tires earlier this year. Sally Greenberg, senior product safety counsel for Consumers Union, which publishes Consumer Reports, believes

NHTSA is going too far. She said in a news release: "I think it's hard to understand why the government is holding back information. The spirit of the (law) was really to get information out there so that both the government and individuals can have access to safety information to keep them safer." It makes no sense to keep safety information from the public, and NHTSA should be required to release the information it has compiled.

NEW SAFETY REGULATIONS BADLY NEEDED

The National Highway Traffic Safety Administration is considering rules to update the 33-year-old roof strength standard. NHTSA is under tremendous pressure from safety groups because of the large number of severe injuries and deaths that are occurring in rollover accidents involving SUVs. The agency is also looking at updating seat belt requirements because in SUV rollovers, both the roof collapse and seat belt slack contribute to severe neck and head injuries. Also, in rollovers occupants tend to be thrown out of the vehicle window by centrifugal forces, which are made worse by slack in the seat belts.

Part of the possible new design options include requiring seat belt pretensioners that activate during a rollover. Pretensioners take the slack out of the seat belt when the forces on the person's chest hit a certain level in a frontal crash. The seat belts could be designed to have a similar function in rollover crashes. Another possible redesign is to require that seat belts be imbedded in the seat, which allows a better fit and requires a stronger seat-back. Another design that is being considered is the design akin to what racecar drivers use in their cars, and that is a 4-point seat belt to secure both the shoulders and the hips. That really makes good sense both from a design and cost perspective.

The current seat belt designs are grossly inadequate. About 20% of the 10,376 people killed last year in rollover crashes were wearing their seat belts. Many deaths result from "partial" ejection. For example, in many

cases, only the victim's head was outside the vehicle when a rollover occurred. Because car manufacturers have been reluctant to design their SUVs to prevent rollover, it is necessary for the government to intervene and require that these rollover-prone vehicles at the very least be designed to provide a greater level of safety when the vehicle does roll over. I suspect that the car manufacturers will use their best efforts to resist the passage of the new rules. If you agree that there are too many rollovers involving top heavy and too narrow SUVs, with too many resulting in deaths and disabling injuries, contact your U.S. Senator and House member while they are home on recess and ask them to get involved on the side of consumers.

FORD PENALIZES LAW ENFORCEMENT AGENCIES

A Florida judge has ruled that Ford Motor Co. can refuse to sell police cars to Florida law enforcement agencies that join a lawsuit against the automaker over fuel tank fires. Circuit Judge G. Robert Barron denied Okaloosa County Sheriff Charlie Morris' request that the court order Ford to resume selling cars to his department. Ford had refused to sell any more Crown Victoria Police Interceptors to Morris since July 2003, a year after he filed suit against the company. The suit claims the full-size, V-8 powered, four-door sedans have exploded in flames when struck from behind at high speed because of poor design. There have been a number of police officers killed in the fires. There have been 14 accidents nationwide in which Police Interceptors caught fire after being rear-ended. Class action status had been granted in the lawsuit, permitting hundreds of Florida law enforcement agencies to join the lawsuit. No deadline for potential plaintiffs to join or opt-out has been set. Ford says it will refuse to sell the cars to any other agency that participates in the suit. Judge Barron ruled that a company has the right to refuse to do business with any customer.

Source: *Associated Press*

PROTECTING CHILDREN FROM DEFECTIVE MACHINERY

Thousands of children sustain injuries each year within the confines of their own homes. Most of these injuries result from normal adolescent activities like running and jumping. But, a large number of reported injuries to children occur from interaction with defective machinery. Most parents would be surprised that common household machines can pose a serious threat to their children. There have been numerous reported cases of small children sustaining serious injuries after their hands got stuck in the belts of treadmills. Hundreds of children have either died or sustained serious burn injuries from tipping ranges. Other household machines responsible for injuring children are dishwashers, washing machines and trampolines. More often than not, lawsuits are the only incentive for product manufacturers to adopt safer designs.

Pursuing a lawsuit against a product manufacturer for injuries sustained by a child is a very difficult undertaking. Product manufacturers defend their defectively designed machine by blaming the parent for lack of supervision. It is accepted that parents are responsible for supervising their children. However, a parent's responsibility for supervising his or her children does not excuse a product manufacturer from putting a safe product into the stream of commerce. The "blame the parents defense" is the same defense product manufacturers utilize when defending claims against adults in the workplace. In workplace injury scenarios involving adults, manufacturers always claim the employee caused their own injury, even in the face of overwhelming evidence that their machine failed to meet minimum safety standards.

Our firm is currently pursuing a case on behalf of a family suffering through an injury to a small child. The machinery involved in this case is a meat grinder. While using the meat grinder, the child sustained a debilitating injury to her hand. As expected, the product manufacturer's primary defense is to

blame the incident on the parents. During the exchange of evidence, we discovered that this particular manufacturer sold a similar meat grinder with a guard that would have eliminated any child's exposure to injury. As in most guarding cases, the safety device was readily available, but the manufacturer failed to use it. We expect this case to go to trial next year.

It is difficult to prevent injuries to children, but, it is very easy to protect children from defective machinery. More often than not, simple guarding techniques can eliminate all hazards posed by household machinery. It is not the parent's duty to identify these hazards. That is the duty of the product manufacturers. Parents should closely scrutinize the products they buy for the home and question the manufacturer when suspected hazards are found. Of course, while any product purchased for the home should be safe for adults, children have to be protected even more because of their age and lack of maturity.

HONDA CR-Vs ARE STILL CATCHING FIRE

There have been reports of at least 60 new Honda CR-V sport utility vehicles catching fire nationwide. The vehicles catch fire suddenly while on the road. In most cases, it is reported that the vehicles had just been serviced for their first oil changes. While no injuries have been reported to date, the National Highway Traffic Safety Administration (NHTSA) has reopened and upgraded an investigation into the CR-V to determine what is making some of them suddenly burst into flames, in many cases destroying the vehicles. The expanded inquiry covers about 280,000 CR-V's in the 2003 and 2004 model years. So far, during the investigation Honda has blamed dealerships for mishandling oil changes. Consumer groups, on the other hand, claim that the automaker is dodging its responsibility. Improper installation of the oil filter was thought to be the problem. NHTSA is now looking beyond the oil filter to see what other factors could be contributing to the CR-V fires. Both

NHTSA and Honda initially thought it was merely a problem with not executing the oil change properly. The manufacturing and design of the CR-V are two of several subjects investigators are now studying.

NHTSA and Honda thought they had resolved the CR-V fires problem this summer. In July, the agency closed a preliminary investigation into fires involving 2003 model CR-V's after Honda said the problem was a result of faulty oil changes. According to documents from NHTSA, Honda said that in many of the vehicles that caught fire, mechanics had either not properly installed a new oil filter seal or had failed to remove the factory-installed seal before putting in the new one. With the two seals in place at one time, the new oil filter could not create enough suction to prevent oil from leaking out and spilling onto the car's hot exhaust system. With an improperly installed seal, oil could also seep out onto the exhaust system and cause a fire. The documents show that the agency agreed that the problem originated at dealerships and service stations and had nothing to do with the CR-V's design. Honda then sent letters to its dealers warning them of the potential fire hazard, and the agency stopped its inquiry. But, the fires did not stop.

From July 1st to September 9th, the date NHTSA reopened its investigation into the CR-V, the agency received reports of 18 more fires. The new investigation, known as an engineering analysis, is the most exhaustive of the agency's safety inquiries. It is also looking at model year 2004 CR-V because drivers have begun reporting fires in those models as well. The investigation could have several outcomes, ranging from no action to a recall. Honda still insists the fires are the fault of mechanics and says it is not considering a voluntary recall.

The question is why are the fires occurring only in 2003 and 2004 models. Apparently, there were no fundamental changes in the vehicle design from 2002 to 2003. The last significant redesign to the CR-V was in 2001. Fires have now become a problem. Some

experts have argued that if the fault lies with mechanics, as Honda contends, any vehicle would be prone to the same problems as the CR-V. Clarence Ditlow, executive director of the Center for Auto Safety says: "There's something Honda isn't telling the government about this vehicle. This is an open-and-shut case, so the only question for us is, why haven't they done a safety recall?" Mr. Ditlow said the safety agency should order a recall if Honda refused to do one voluntarily. The CR-V problem appears to be a result of Honda's design. The CR-V's oil filter, like those in models from many other automakers, is near the exhaust system, which increases the likelihood of a fire if the filter leaks.

NISSAN BEING SUED FOR BRAKE DEFECT

A nationwide class action suit has been filed in California against Nissan North America, Inc. over a brake defect in the Infinity G35. According to the lawsuit, the defect devalues the vehicle on resale. The lawsuit asks that Infinity reimburse owners for the cost of repairing the defect, which causes the brake pads and rotors to wear out much faster than normal. I understand that on some of the vehicles the brakes have required annual replacement.

FORD AND GOODYEAR SETTLE LAWSUIT

Shortly before a scheduled trial was ready to start, Goodyear and Ford Motor Co. settled a lawsuit that arose out of a 2001 accident that killed two U.S. Marines and injured 11 others. Terms of the settlement are confidential and cannot be disclosed. The case arose out of an accident involving a Ford E-350 15-passenger van. The suit claimed the 1996 van rolled over after the tread came off a rear tire. The tire was Goodyear's Load Range E tire. This is a very bad combination—a dangerous van and a bad tire—and as a result, the event leading up to the accident was predictable.

IX. MASS TORTS UPDATE

MERCK HALTS WORLDWIDE SALES OF VIOXX

The pharmaceutical giant Merck & Co. shocked the nation when it pulled the arthritis drug Vioxx from the market. However, in my opinion had the FDA done its job, this drug would have been pulled months ago. Our firm has a number of lawsuits pending against Merck that involve Vioxx. The first case was filed in 2001. Merck has halted worldwide sales of Vioxx, and the reason for pulling the drug is very simple. There is an increased risk of heart attack and stroke associated with the use of Vioxx. Merck announced on September 30th that data from a clinical trial showed the increased risk of heart attack and other cardiovascular complications began 18 months after patients started taking Vioxx. It is believed that about 2 million people worldwide are currently taking Vioxx. A total of 84 million have taken the drug since it came on the world market in 1999. The three-year study referred to was trying to show that the drug at a 25-milligram dose would prevent recurrence of polyps in the colon and rectum. The trial was stopped after Merck discovered study participants had double the risk of a heart attack compared to other participants taking dummy pills. Vioxx was pulled on September 30th.

Vioxx is one of Merck's most important drugs, with \$2.5 billion in sales in 2003 —about 11% of the company's \$22.49 billion in revenue that year. Sales dipped 18% in the second quarter of this year to \$653 million, partly because of to increasing concerns about the drug's safety. The FDA admits now that there were early signs of potential problems with Vioxx. A Merck study had led to warnings about heart risks being placed on the drug's label in 2001. The FDA has been monitoring problems reported to the agency since that time. The FDA should have taken action a long time ago and there can be no excuse for its inaction. There

is no way that the serious problems with Vioxx could have come as a surprise to the FDA. Our lawyers in the Mass Torts Section have known for several years that Vioxx was causing heart and cardiovascular problems, with our first lawsuit being filed in 2001. The FDA had the same information that we had and probably had it even sooner. If we knew Vioxx caused heart attacks and strokes in 2001, why did it take the FDA so long to figure this one out?

Vioxx and a successor drug called Arcoxia, approved in some foreign countries and awaiting FDA approval in this country, are part of a class of anti-inflammatory drugs heavily touted by the pharmaceutical industry as being more effective and having fewer side effects, particularly on the gastrointestinal system, than older drugs. Drugs in this class are called COX-2 inhibitors. All COX-2 inhibitors can raise blood pressure, but Vioxx appears to be the only one that's been linked to higher risk of heart attacks and strokes.

SOME BACKGROUND ON THE OVERALL PROBLEM

Merck withdrew Vioxx globally following indications from a colon cancer trial that confirmed long-standing concerns the drug raises the risk of heart attack and stroke. A recent study by the U.S. Food and Drug Administration suggested patients taking Vioxx faced a 50% greater risk of heart attacks and sudden cardiac death than those taking Pfizer Inc.'s rival Celebrex treatment. The announcement by Merck is the latest evidence that this family of drugs, the COX-2 inhibitors, once referred to as "super aspirins," are turning out to be more like super disasters. As discussed below, there are safety problems with Celebrex as well as Bextra, the two other big-selling COX-2 inhibitors that are the most-prescribed alternatives to Vioxx. Merck has had a checkered history with Vioxx. After an earlier randomized trial, the VIGOR study, published almost four years ago (November 2000), that found Vioxx

caused a four- to five-fold increase in heart attacks, Merck received a warning letter, dated September 17, 2001, from the U.S. Food and Drug Administration because the company's ads for the drug failed to mention this increased risk of heart attacks. In the eight-page warning letter addressed to Merck President and CEO Raymond V. Gilmartin, the FDA stated:

You have engaged in a promotional campaign for Vioxx that minimizes the potentially serious cardiovascular findings that were observed in the Vioxx Gastrointestinal Outcomes Research (VIGOR) study, and thus, misrepresents the safety profile for Vioxx. Specifically, your promotional campaign discounts the fact that in the VIGOR study, patients on Vioxx were observed to have a four to five fold increase in myocardial infarctions (MIs) compared to patients on the comparator nonsteroidal anti-inflammatory drug (NSAID), Naprosyn (naproxen).

In Merck's VIGOR study, comparing rofecoxib to naproxen, there was a highly statistically significant five-fold increase in heart attacks in the overall rofecoxib group (0.5%) compared to the naproxen group (0.1%). This amounted to 20 heart attacks with rofecoxib compared with four with naproxen. This increased number of heart attacks was also accompanied by an increase in other thrombotic (blood clotting) adverse effects such as strokes and blood clots in the legs, as well as problems with hypertension in the rofecoxib group compared with the naproxen group. Clearly, both the FDA and Merck knew over four years ago that there were significant problems with Vioxx.

THE FDA WAS WARNED SEVERAL YEARS AGO

In an article published three and a half years ago in its monthly newsletter, *Worst Pills, Best Pills News*, Public Citizen warned readers that both Vioxx and Celebrex were DO NOT USE drugs

—the consumer group's designation for drugs that are not safe and effective enough to use. Although Merck's withdrawal of Vioxx "solves" the serious safety problems with this drug, the most-prescribed alternatives, Celebrex and Bextra, also have some concerns about their cardiac toxicity. In a study published in the August 29, 2000, Proceedings of the National Academy of Sciences, the ability of rabbits to withstand temporary experimental coronary artery occlusion (experimental heart attack) was significantly impaired by treatment with celecoxib (Celebrex), which completely blocked the cardioprotective effects of the COX-2 enzyme. The authors of that study concluded that COX-2 enzyme is a "cardioprotective protein." Drugs that block this cardioprotective enzyme, such as COX-2 inhibitors, may neutralize its protective effects.

Although a CLASS study involving Celebrex did not find a significantly elevated number of heart attacks in those using celecoxib compared to those using the older NSAIDs (ibuprofen or diclofenac), there was also cause for concern about heart toxicity with celecoxib. An expert from the FDA's Division of Cardio-Renal Drug Products, Dr. Douglas Throckmorton, found that "the incidence of adverse events related to cardiac ischemia (decreased blood flow to the heart) was higher in the celecoxib [Celebrex] group ... and was most pronounced in the group of patients not taking ASA (aspirin)" as a cardiovascular protective drug. In these patients, the rate of heart attack was also highest in the celecoxib group (0.2%) compared with users of the other two drugs (0.1%). For all patients, on and off aspirin, there was a higher incidence of atrial fibrillation, a type of heart rhythm disturbance, in the celecoxib group compared to those taking ibuprofen or diclofenac. Again this was more pronounced in the group not taking aspirin. Dr. Throckmorton concluded by stating that "the data do not exclude a less apparent pro-thrombotic [blood clot-forming] effect of celecoxib, reflected in the relative rates of cardiac adverse events related to ischemia."

Readers of *Worst Pills, Best Pills News*

were also warned by Public Citizen not to use Bextra. Because the FDA and Bextra's manufacturer, Pfizer, refused to give Public Citizen unpublished data concerning the drug, the consumer group filed suit against the agency. The FDA had originally redacted all information in its reviews concerning valdecoxib and acute pain. In the course of the litigation, Public Citizen received most of what they had requested in the lawsuit, including the unredacted FDA Medical Officer's conclusions and recommendations about the use of the drug for acute pain. In the unredacted review the Medical Officer recommended:

Nonapproval [for the treatment] of the acute pain, including opioid-sparing and prevention of operative pain. The only substantial multidose safety database is found in the Coronary Artery Bypass Graft (CABG) Surgery study 035. This study demonstrated an excess of serious adverse events including death in association with the use of paracoxib and valdecoxib 40 mg bid [twice daily] when added to ad lib [as needed] parenteral [injectable] narcotic analgesia...These finding[s] warrants further investigation before valdecoxib can be considered safe and effective for the treatment of pain, particularly multidose therapy in the perioperative setting.

In summarizing the safety of valdecoxib, the FDA Medical Officer stated:

*With two notable exceptions—edema [swelling] and hypertension—valdecoxib (Bextra) was comparable to the standard non-steroidal agents [ibuprofen, naproxen, diclofenac] used as active controls in the trials. ... The finding of a greater incidence of edema and hypertension at doses above 20 mg/day, almost uniformly in the databases and clearly when prospectively addressed in formal safety Trials 47 and 62, is of concern....**The excess of serious cardiovascular thromboembolic [blood clots] in the valdecoxib arm of the CABG***

[Coronary Artery Bypass Graft] trial is of note as the entire study population received prophylactic low dose aspirin as part of the standard of care in this setting to minimize just such events. Given the emerging concern over a possible pro-thrombotic action of certain agents in the COX2 class, these data are of concern. (Emphasis added.)

Public Citizen has advised that people should not use any of these “super aspirin” COX-2 inhibitors. Instead, the consumer group believes folks should rely on the older drugs in the NSAID family such as ibuprofen and naproxen. This appears to be very good advice. I would recommend that any persons taking one of the COX-2 inhibitors consult with their personal physician immediately and get a professional opinion. It is a sad state of affairs in this country when folks can't trust the drug companies and the FDA to protect them from bad drugs.

THE FDA DROPPED THE BALL

It now appears that The Food and Drug Administration silenced one of its drug experts who raised safety concerns weeks before Merck & Co. pulled Vioxx from the market. Dr. David J. Graham, associate director for science in the FDA Drug Center's Office of Drug Safety, told Senate investigators that he faced stiff resistance within the regulatory agency to his findings. Senator Chuck Grassley, (R-IA), chairman of the Senate Finance Committee, said in a statement after Committee investigators interviewed the researcher: “Dr. Graham described an environment where he was ‘ostracized,’ ‘subjected to veiled threats’ and ‘intimidation.’” Dr. Graham told the Associated Press that the Iowa Senator's characterization was accurate. It was shocking to learn that raising safety concerns within the FDA is “extremely difficult.” At least, that's how the 20-year employee described his experience to the Associated Press.

Dr. Graham was lead author on a research project that studied the records

of 1,390,000 Kaiser Permanente patients, including 40,405 treated with Pfizer's Celebrex and 26,748 treated with Vioxx. The study found that high doses of Vioxx tripled risks of heart attacks and sudden cardiac death. The research team's original conclusion said that high doses of Vioxx should not be prescribed or used. Dr. Graham, who was scheduled to present those findings in late August during an epidemiology conference in France, said he ran into resistance when the FDA reviewed his abstract. An internal FDA e-mail exchange, released by Senator Grassley, is extremely damaging to the federal agency. The deputy director of the FDA's Office of Drug Safety suggested that Dr. Graham defer his presentation in favor of a journal article so dissenting scientists—including those within the FDA—could comment. It also said Merck should be alerted before the findings became public “so they can be prepared for extensive media attention that this will likely provoke.” It appears that the FDA was more concerned with helping Merck than it was in doing its duty to protect the public.

As we reported last month, the Government Accountability Office, an investigative arm of Congress, has been asked to look into whether the FDA muzzled another staffer who linked antidepressants to raising the odds of children suffering suicidal tendencies. When Merck voluntarily pulled Vioxx from the market on September 30th, the GAO was asked to include the FDA's handling of that controversy in its inquiry. But, that report is not expected for months. Senator Grassley's committee is one of three in Congress presently scrutinizing the regulatory agency's actions. The FDA has a duty to act as a public watchdog, and I don't believe it has done that job very well. Frankly, I don't believe the FDA can justify its actions. We will see how Congress and the President respond to this most serious problem.

NEW RULES LIMIT MEDICAL INDUSTRY'S INFLUENCE

On September 28, 2004, the Accreditation Council for Continuing Medical

Education (ACCME) issued new rules that limit what doctors who receive drug company funding can teach other physicians. The Council's seven members, including the American Medical Association, endorsed these new changes. The Chicago-based ACCME gives its stamp of approval for continuing medical education courses. American doctors are required to participate in thousands of continuing education activities per year. In the past, a presenting doctor would disclose his/her financial relationship with a drug company, and then could give any anecdotal experience with that company's drugs.

Pharmaceutical companies are prohibited by law from promoting “off-label” uses for their drugs. Doctors, however, are not under the same restrictions. Dr. Norm Fost, a member of the Food and Drug Administration's Pediatric Ethics Subcommittee, is of the opinion that many doctors are learning about off-label prescription uses during continuing medical education activities. A Pharmaceutical Research and Manufacturers of America (PhRMA) attorney dismissed this notion of “stealth marketing” by drug companies. That shouldn't come as a big surprise since PhRMA has a vested interest in off-label drug sales. Under the new rules, an impartial third party tells the presenting doctor what kind of recommendations he/she can make during their presentation. Clinical trial results will replace anecdotal observations. Any review of journal literature would have to include both positive as well as negative studies. Any doctor who does not agree with the new ACCME rules will be barred from presenting or teaching at continuing medical education conferences. This clearly appears to be a step in the right direction.

REMICADE MAKER WARNS OF BLOOD CANCER RISK

Johnson & Johnson has warned medical doctors that patients taking its rheumatoid arthritis drug Remicade may have a higher risk of lymphoma, a blood cancer. As you may know, Remi-

cade is not related to the arthritis drug Vioxx. Remicade's label will be revised to warn of a three-fold increase in the risk of lymphoma for rheumatoid arthritis patients taking the drug. The change means the drug's safety profile will be more closely aligned with that of rival drugs in the same class: Amgen Inc.'s Enbrel and Abbott Laboratories Inc.'s Humira. All three drugs block an inflammation-causing protein called tumor necrosis factor, or TNF. The TNF-blockers have been very successful, from a financial perspective, with combined sales of \$4.1 billion in 2003. Some analysts say the revised label for Remicade casts an additional shadow over a class that is already attracting a small, but growing amount of concern. We will watch this drug closely and will monitor how folks taking it are affected.

MERIDIA UPDATE

Earlier this year, I reported that Public Citizen had supplemented its petition to the Food and Drug Administration (FDA) to ban the diet drug Meridia. This renewed effort came as a result of new adverse event data that bolster its original petition filed on March 19, 2002. While acutely aware of the ever-increasing number of cardiovascular deaths in people using this drug, the FDA has nevertheless failed to set a hearing or otherwise respond. After the original Public Citizen petition was filed, the FDA began an additional review comparing adverse event reports for Meridia and for Xenical, another major weight-loss drug that doesn't have amphetamine-like components. So far, the FDA has not published results. Abbott Laboratories, the manufacturer of Meridia, claims the drug is safe. To the contrary, Dr. Sidney Wolfe of Public Citizen believes this drug increases the risk of death. Based on recent history, I would believe Dr. Wolfe and trust his opinions on drug issues. Moreover, Public Citizen's petition says the average weight loss announced at the drug's approval was only 6-1/2 pounds after a year of taking 10 milligrams daily. This would

hardly be an effective drug, certainly not effective enough to justify the risk of death.

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

Since the filing of the original Public Citizen petition, a number of lawyers have been litigating on behalf of injured Meridia users. Recently, a federal judge in Ohio dismissed a number of cases on grounds that they failed to present adequate scientific proof that Meridia causes injury. I understand this result is being appealed. Nevertheless, I am sure those victims and their lawyers would have appreciated the FDA revealing the results of the Xenical study or at least having a public hearing relating to the petition filed by Public Citizen, which is now two and a half years old. Such information would have likely been helpful to them in avoiding their cases being dismissed.

In the meantime, our firm is preparing for what is expected to be the **first** Meridia trial in the country. We filed that lawsuit in Corpus Christi, Texas, on behalf of a woman who is paralyzed as a result of a stroke that occurred while she was taking Meridia. Her case will go to trial in February of 2005. We also have another case that was filed on behalf of the daughter of a woman who died of a heart attack while taking Meridia. That case is set for trial in May of 2005 in Birmingham, Alabama. We are also involved in another case involving death resulting from a heart attack, which is set for trial in Illinois in July of 2005. These filings have allowed us to gather and analyze internal corporate information revealing what has gone on behind the

scenes between the FDA and the drug company, Abbott. Even before it approved the drug, the FDA was concerned about the safety of Meridia. An FDA advisory committee in 1997 voted 5-4 that the benefits of the drug did not outweigh its risks. I have previously written of my concern regarding the cozy relationship between the current FDA and the powerful pharmaceutical industry. Because the Bush Administration has no interest in protecting the public, the importance of watchdog groups like Public Citizen takes on greater significance. Furthermore, the civil jury system is absolutely critical in forcing pharmaceutical companies to do the right thing and to hold them accountable when they don't. This is why the drug companies are pumping so much money into the Bush campaign and in the campaign coffers of key Senators and members of Congress. I am hopeful the voters will figure this out by Election Day.

THE FDA FINALLY REQUIRES A BLACK BOX WARNING FOR ANTI-DEPRESSANTS

In a most significant move, the Food and Drug Administration is now requiring all antidepressants to carry the government's "black box" warning. This safety alert is to warn that the drugs are linked to increased suicidal thoughts and behavior among children and teens. This will mean Pfizer's Zoloft, GlaxoSmithKline's Paxil, Wellbutrin and Zyban, Forest Laboratories' Celexa and Lexapro, Eli Lilly's Prozac and Cymbalta, Wyeth's Effexor, Bristol-Myers Squibb's Serzone and a host of other antidepressants, even those in somewhat different chemical classes, will come under this new regulation. The labels will also have to include details of pediatric studies relating to the antidepressants. The mandated warning is particularly bad news for Glaxo, the manufacturer of Paxil. You will recall that New York State Attorney General Eliot Spitzer filed a lawsuit this summer against that company over unpublished data on Paxil. In any event, the FDA did the right thing on the antidepressants and should be commended for

their belated action. But, I have to ask: why did it take them so long?

X. BUSINESS LITIGATION

THE U.S. CHAMBER OF COMMERCE LIKES THE COURTS WHEN IT HELPS THEM

In September, the U.S. Chamber of Commerce filed a lawsuit in the U.S. District Court for the District of Columbia seeking to overturn the new Securities and Exchange Commission (SEC) rule requiring that 75% of a mutual fund's directors be independent of the fund's management company and that its chairman be independent. After filing the lawsuit, the SEC's General Counsel rejected the U.S. Chamber's request for a stay of the effective date of the rule pending completion of the litigation. The new rules became effective September 7th. Funds will have to comply with this new rule by January 16, 2006.

In what surely will be an interesting "spin job," given their recent arguments to federalize tort reform, the Chamber in this complaint argues that each of the new governance requirements exceeds the SEC's federal statutory mandate and infringes on state law. In particular, the complaint alleges that each requirement "upsets the balance" in the 1940 Investment Company Act for the governance of mutual funds and "improperly usurps" the state's role as the primary authority on matters of corporate governance.

It is extremely difficult for me to understand how the U.S. Chamber of Commerce, which has consistently claimed that lawyers are to blame for most everything and that the courts should be shut down for consumers, could run to the courts for relief. They now argue that a rule requiring that 75% of a mutual fund's directors be independent of the fund's management company and that its chairman be independent, would "usurp" the authority of the states. I have to wonder if the Chamber officials have

been reading about the same mutual fund scandals the public knows about. You would think that the U.S. Chamber would welcome any rule that makes it more fair for investors and that makes mutual fund directors more independent from the fund's management company. It seems clear that a mutual fund chairman who is also the chief executive officer or other officer of the fund's management company is caught in a conflict of interest that could only be cured by the "independent chairman rule." It is most interesting to note that all seven living former SEC chairmen expressed support for the independent chairman proposal before it was adopted. Once again, it seems the U.S. Chamber of Commerce is looking out for "big business" and ignoring investors, who should be able to believe the chairmen and directors running the mutual funds are truly independent and trust them to do the right thing.

INVESCO AND AIM SETTLE MARKET-TIMING CHARGES

Invesco Funds Group, Inc. and its sister company, AIM Advisors, Inc., have recently agreed to pay \$451 million to resolve charges they permitted excess market-timing activity in a number of their mutual funds. Under the terms of the agreement, Invesco will pay \$325 million to settle allegations it violated Colorado's consumer protection laws by failing to disclose the extent of market-timing activities in the funds, which included trading in international and foreign securities. Of the \$325 million, \$215 million is for restitution and disgorgement to injured investors and \$110 million is assessed as civil penalties. AIM, the investments distributor of Invesco's mutual funds, will pay \$20 million in restitution and disgorgement and \$30 million in civil penalties.

The companies also will be responsible for bringing about \$75 million in reduced fees charged to investors over a five-year period. The companies will also pay Colorado \$1.5 million to be held in trust for reimbursement of

attorney's fees and costs, consumer and investor education, and future enforcement activities. Ken Salazar, the Attorney General of Colorado, who did a great job for Colorado investors, says,

This case represents one of the largest settlements with a mutual fund company over this market-timing scandal. I believe this sends the strongest message yet that mutual fund companies will be held accountable for behavior that harms consumers and average shareholders.

XI. INSURANCE AND FINANCE UPDATE

NON-PROFIT HOSPITAL LITIGATION

A group of lawyers from around the country have filed 51 lawsuits in several states accusing over 370 non-profit hospitals of overcharging uninsured patients. A well-known lawyer from Mississippi, Richard Scruggs, heads up the effort. Not only do the suits allege overcharging uninsured patients for care, medicine, and other materials, the non-profit hospitals are accused of overly aggressive collection methods on poor patients. The cases are filed as class actions for the uninsured patients. The suits allege violations of the Internal Revenue Service Code, which requires non-profit hospitals to meet certain conditions and standards in order to receive tax-exempt treatment. If the non-profit hospitals are not living up to IRS requirements, then their tax-exempt status can be revoked.

The suits allege there is a type of **brutality contest** going on between various hospitals in the same communities. In other words, hospitals attempt to see who can be the more **brutal** in collection efforts against uninsured patients so the next time that a poor patient has to visit the hospital, they will go to another emergency room. This allows the hospital to avoid the hassle of a collection agency in the

event of non-payment. It is alleged that the hospitals spend much more money on collection efforts than they actually collect from the uninsured patients. The suits also claim that non-profit hospitals routinely report bad debt as charity care. The hospitals try all measures to collect on the uninsured debt, and when it cannot be collected, it is considered charity care and written off the hospitals' books.

There is a striking difference in the prices listed by a hospital's "chargemaster" and the prices paid by huge private insurers and/or Medicare. These hospitals provide Medicare and large insurers discounts for their policyholders and members, while the uninsured are charged the prices normally listed in the hospital's chargemaster, which are inflated. For example, a Medicare patient may be charged \$5,000.00 for a particular surgery, while an uninsured patient at the same hospital may be charged \$20,000.00 for the exact same procedure.

The primary goal of the litigation is to protect low-income citizens who have no insurance. It will prevent liens on uninsured patients' homes, stop the garnishing of their wages, and in particular prevent the collection of more than 10% of an uninsured's annual income in a given year. It should be noted that the suits don't seek to provide free care for all persons who are uninsured, but rather it seeks to establish more reasonable models for providing and charging the uninsured population for medical care.

INSURERS DID A BAD THING TO FOLKS FOR A LONG TIME

For a century, it was standard practice at many American insurance companies to charge black folks more than whites for the same coverage on burial insurance policies. The policies were small, paying out just enough for a modest funeral, but millions of them were sold, many to poor black families in the South. Now, the industry is being called to account. Insurance regulators in many states have filed complaints. Many companies, unwilling to

defend what is now viewed by society as indefensible racial discrimination, are settling cases out of court.

Between 2000 and 2004, 16 major cases were settled, involving about 14.8 million policies sold by 90 insurance companies between 1900 and the 1980s. Together, the settlements require the companies to pay more than \$556 million - most of it in restitution to policyholders or their survivors. A portion of the total will go to fines, legal costs and charitable contributions. The two biggest settlements involved American General Life and Accident Insurance Co. and Metropolitan Life Insurance Co. of New York. American General agreed in 2000 to pay \$250 million in a case involving 9.1 million policies. In 2002, Metropolitan Life agreed to pay \$157 million for 1.9 million policies.

ALLSTATE WINS TEXAS LAWSUIT

A Dallas jury has ruled that Texas' largest chiropractic chain, Accident & Injury Pain Center Inc., reportedly conspired in a statewide scheme designed to defraud Allstate Insurance Company and Encompass Insurance, a subsidiary of Allstate. Accident & Injury Pain Center Inc., its related entities and various chiropractors, osteopaths, and medical doctors were found to have conspired to commit common law fraud by over treatment and unnecessary referrals. The Texas jury ordered the defendants to pay \$2.8 million in actual damages and \$3 million in punitive damages. Allstate says it was taking a stand to fight insurance fraud and to punish the defrauders. A spokesman for Allstate says the company is "exposing insurance fraud and putting fraudulent enterprises out of business."

Allstate and Encompass had alleged that the vast majority of X-rays for auto accident patients of Accident & Injury Pain Center were referred to "Lone Star Radiology," located within Accident & Injury Pain Center's corporate office in Dallas. Patients were routinely referred for MRIs on their first visit to one of four facilities that were owned by Robert Smith, the owner of Accident & Injury Pain Center. The medical doctors

to whom patients were referred conducted the "second opinion examinations" at Accident & Injury Pain Centers. They reportedly had an arrangement with Receivable Finance Company to sell or kick back to Receivable Finance their medical bills for the examinations for a small percentage or flat fee. Receivable Finance Company, which is also owned by Robert Smith, is located within the Accident & Injury Pain Center corporate office. Further, Allstate and Encompass had reportedly developed evidence that the wife of one of the medical doctor defendants was receiving up to \$10,000 a month for "marketing services" from a pharmacy where the vast majority of the Accident & Injury patients were receiving prescriptions. If all of this is true, it surely sounds like fraud and Allstate did the right thing. We can't tolerate fraud that hurts others and this is true regardless who the guilty party happens to be.

HURRICANE VICTIMS LOSE INSURANCE

After going through four hurricanes, it appears that some Florida residents now are being dropped by their insurance company. Under Florida law, before an insurance company can drop or change a person's policy, there are legal steps the company must take. It's not against the law in Florida for an insurance company to drop someone or change their homeowner's policy, but there must be a valid written reason for the cancellation. The reason has to be more than just extensive hurricane damage from multiple storms. Some insurance companies are reportedly trying to cancel or change policies for people who live in what they consider high-risk areas. The companies can't do that unless they have a clearly stated and valid reason. Florida law states that claims on property insurance that are the result of an act of God may not be used as a cause for cancellation or non-renewal. All insurance companies in Florida must also give individuals 45 days written notice in order to cancel any policy that is 90 days or older.

Source: *The Insurance Journal*

IMPACT OF SPITZER BROKER FRAUD CHARGES FELT AT MARSH AND BEYOND

New York Attorney General Eliot Spitzer filed charges against giant insurance broker Marsh and McLennan Cos., the world's largest insurance broker, last month for alleged commercial account steering and bid rigging. This action by America's real Attorney General, which alleges a massive price-fixing scheme, has already had a significant impact on Marsh and is expected to reach into the insurance brokerage community at large. Many observers expect the impact to deepen as General Spitzer expands his probe to other companies and lines of insurance and as other courts and states get involved. AIG, ACE and Hartford Financial Services Group are three of the carriers cited in the bid-rigging aspect of the complaint. The charges have already brought about several internal changes at Marsh. In some interesting moves:

- The brokerage firm named a former trial lawyer, Michael G. Cherkasky, as its new chief executive;
- Its board of directors ordered an independent internal investigation; and
- It suspended all contingency contracts of the type that have gotten it in trouble.

A class action lawsuit on behalf of shareholders has also been filed against Marsh. The complaint alleges that the defendants violated federal securities laws by failing to disclose that hundreds of millions of dollars of the company's profits derive from illegal activities, namely "contingent commissions." Marsh is not alone in being targeted in a class action suit. A Chicago judge in late July approved a class action lawsuit against Aon Corp. alleging that the insurance brokerage breached its fiduciary duty by taking contingent commissions from insurers without disclosing them to policyholders. Observers are predicting that there will be additional lawsuits against brokers on behalf of shareholders and customers. According to industry insid-

ers and security analysts who follow insurance, the charges initiated by General Spitzer are expected to affect the revenue and profitability structure of the broker sector over the long-term. Cochran, Caronia Securities LLC, out of Chicago, notes that contingent commissions comprise 5% of revenues and 15% of earnings for publicly traded brokers. The analysts noted in a report that: "Reduction or elimination of revenues related to these arrangements would have an obvious negative effect on profitability."

J.P. Morgan Chase & Co. analysts predicted the Spitzer effort would produce to a "seismic shift" in property casualty business practices. It is predicted by industry insiders that the lawsuit could lead to changes in the way brokers are paid. We have learned that AIG will stop agreeing to brokers' contingent commissions. The impact was also felt beyond property and casualty lines. MetLife says that it received four subpoenas from the Attorney General's office, including ones pertaining to possible inflated bids. National Financial Partners Corp., which sells investments and insurance, also has received subpoenas.

Source: *Insurance Journal*

XII. PREMISES LIABILITY UPDATE

CHEVRON PHILLIPS LIABLE FOR PLANT EXPLOSIONS

Chevron Phillips Chemical Co. has agreed to pay a \$1.8 million civil penalty for Clean Air Act violations that led to releases of chemicals from a manufacturing plant in Pasadena in 1999 and 2000, resulting in two explosions and three deaths. The penalty, the largest ever assessed for such a case, was announced last month after the Houston-based company reached the agreement with the Justice Department and the Environmental Protection Agency. Federal officials accused Chevron Phillips and its predecessor,

Phillips Chemical Co., of failing to do enough to prevent accidental chemical releases at the plastic resin and specialty chemical manufacturing facility in the Houston suburb of Pasadena. This resulted in two accidental explosions, in June 1999 and March 2000, that released 1,3-butadiene, a carcinogen, and other chemicals into the air, caused three deaths and injured almost 100 workers.

Chevron Phillips acquired the facility from Phillips Chemical Co. shortly after the second explosion. Thomas Sansonetti, assistant attorney general for the Justice Department's Environment and Natural Resources Division stated: "This is a great result for public health, the environment and worker safety." Chevron Phillips had denied the allegations made by the federal government. The settlement, filed in Houston federal court, requires Chevron Phillips to follow extensive work practice requirements designed to ensure that the facility is operated in a manner that prevents accidental releases of chemicals. In 2002, Phillips Chemical Co. agreed to pay more than \$2.1 million in federal penalties for safety and health violations discovered at the complex. Chevron Phillips will also perform two environmental projects in the community that will cost at least \$1.2 million.

DISNEYLAND ACCIDENT RESULTS IN DEATH

The parents of a 22-year-old man killed in a Disneyland roller coaster accident have filed a wrongful death lawsuit against The Walt Disney Co. The young man suffered severe blunt force trauma and died of extensive internal bleeding in the 2003 accident that also injured 10 others. The incident occurred when the Big Thunder Mountain Railroad roller coaster's locomotive struck a tunnel roof. The ride's first car then ran under the locomotive. The body of the decedent had to be extricated by paramedics. The lawsuit named Walt Disney World and The Walt Disney Co. as defendants, seeks unspecified compensatory and punitive damages.

Lawsuits were also filed on behalf of

the others who were injured and who alleged physical and emotional injuries suffered in the accident. The Big Thunder Mountain Railroad reopened in March, but was closed for several weeks following another incident in July that sent three members of a Canadian family to the hospital. Since mid-2001, more than 24 people have claimed injuries from the ride. The popular ride simulates a runaway mining train in the Old West. Obviously, there must be better regulation of amusement park rides—including more inspections—and stiff penalties for repeat violators.

WARNINGS ON AMUSEMENT PARK RIDES

The federal government has advised owners and operators of spinning amusement park rides to stop using them until further inspections are done. This came following an accident that killed a 38-year-old man in Massachusetts. The Consumer Product Safety Commission said it is investigating the September 19th accident that occurred at a church fair in Shrewsbury, Massachusetts, on a ride called the Sizzler. The Sizzler and Deluxe Sizzler rides, made by Wisdom Industries Ltd. of Sterling, Colorado, rotate clockwise while three four-seat sections turn counterclockwise. Hopefully, the CPSC will clamp down on the owners and operators of these and similar “rides.” Many of them can be very dangerous, especially if inspections aren’t done on a regular basis.

XIII. WORKPLACE HAZARDS

PROPOSED RULES FOR HEXAVALENT CHROMIUM EXPOSURE DON’T GO FAR ENOUGH

The Occupational Safety and Health Administration has published in the Federal Register three proposed rules designed to reduce worker exposure to hexavalent chromium. This is the car-

cinogenic chemical featured in the film Erin Brockovich. The proposed new Permissible Exposure Limit (PEL) is 50 times lower than the existing standard, but is still four times higher than requested in 1993 in a petition filed by Public Citizen. OSHA’s years of delay in tightening its standard led to a lawsuit by Public Citizen and the Paper, Allied-Industrial, Chemical and Energy Workers International Union (PACE), which resulted in a court order requiring OSHA to move forward with a new rule. Peter Lurie, deputy director of Public Citizen’s Health Research Group, stated:

Hundreds of thousands of workers have been exposed to inordinately high levels of hexavalent chromium while the agency continued on its path of reckless inaction. Even the new proposal will not adequately protect American workers from lung cancer and the other health risks of this toxic chemical.

OSHA has estimated that approximately 1 million workers are exposed to hexavalent chromium, which is used in chrome plating, stainless steel welding and the production of chromate pigments and dyes. In 1994, OSHA acknowledged that hexavalent chromium causes lung cancer and promised to commence rulemaking to reduce exposure in 1995. The agency didn’t keep that promise. As a result, Public Citizen and PACE had to file suit. They sued OSHA in the U.S. Court of Appeals for the Third Circuit in Philadelphia in 1997, but lost because the agency promised to issue a proposed rule by 1999. When that didn’t happen, the two organizations sued again in 2002, seeking to compel the agency to act. In December 2002, the court, decrying OSHA’s “indefinite delay and recalcitrance in the face of an admittedly grave risk to public health,” held that “OSHA’s delay in promulgating a lower permissible exposure limit for hexavalent chromium has exceeded the bounds of reasonableness.” The court set a schedule for OSHA to come up with a new standard, and the proposed rules referred to above are the result.

The agency is now proposing three rules, one for general industry, one for construction and one for shipyards. All three would lower the PEL from 52 micrograms per cubic meter of chromium (100 micrograms per cubic meter of chromic acid) to 1 microgram per cubic meter of chromium (2 micrograms per cubic meter of chromic acid). Public Citizen’s 1993 petition had sought a PEL of .5 micrograms per cubic meter of chromic acid. OSHA’s proposal is four times weaker than the PEL sought by Public Citizen. OSHA is going to require exposure monitoring only in its proposed “general industry” standard for hexavalent chromium. Exposure monitoring won’t be required under the proposal shipyard or construction standards. Engineering and work practice controls—as opposed to the less-desirable approach of personal protective equipment—would be required for all three industries if the PEL were exceeded for more than 30 days a year, but because exposure monitoring would not be required in shipyards or construction, it wouldn’t be known if this threshold was met. Personal protective equipment would be required in most cases if the PEL were exceeded at all in the three industries. However, exposure would not be measured in two of them. Public Citizen considers this to be OSHA’s equivalent of a “don’t ask, don’t tell policy.” It appears that the agency would rather not know about exposures than have to compel a recalcitrant industry to take action to protect its workers.

OSHA also has succumbed to the entreaties of industry to exempt Portland cement (a widely used type of cement) from regulation entirely. This is true even though skin exposures to hexavalent chromium, which are likely to result from handling cement, have been clearly shown to cause skin irritation. Whatever its inadequacies, the new standard for hexavalent chromium, which by court order must be complete by January 2006, would be the first improvement in worker protection against a specific industrial chemical that OSHA has proposed in more than a decade. It should be noted

that the agency acknowledged in the early 1990s that dozens of its standards were out of date. Had Public Citizen not sued OSHA, these proposed rules would never have been promulgated at all in my opinion. OSHA has a duty to modify its proposal to protect workers more comprehensively. I hope that will be the end result of the litigation. In any event, Public Citizen must be applauded for its diligence in pursuing this matter.

Source: Public Citizen

JURY RULES AGAINST CSX

A jury in North Carolina has returned a \$7.5 million verdict for a retired railroad worker suffering from a rare form of asbestos cancer. The verdict returned was one of the largest single mesothelioma verdicts in North Carolina. CSX says it will review the decision and consider its appellate options. The employee had been with CSX for 38 years. He retired in 1999 after holding several different positions such as utility clerk, freight clerk and train master.

The jury saw documents from the 1930s that demonstrated CSX knew asbestos was toxic and hazardous to employees. The documents also showed that CSX knew precautions could be taken to protect railroad workers exposed to asbestos dust in boilers, pipes and construction materials. The jury hearing the case also learned how in the 1950s CSX knew asbestos could cause lung cancer, and how in the 1960s, the railroad company learned that asbestos could cause mesothelioma. But, CSX didn't take measures to protect or warn its employees about asbestos until the late 1980s.

In 2002, the employee was diagnosed with malignant pleural mesothelioma, an illness commonly caused by occupational asbestos exposure. He underwent surgery to remove his entire left lung and his stomach, which had migrated into his chest cavity after his cancerous lung was removed. Despite three separate courses of chemotherapy, the cancer metastasized into his lymph nodes. The employee had been a loyal employee, loved working at the

railroad and was dedicated to his job. He now feels betrayed by his employer of 38 years.

XIV. TRANSPORTATION

1997 MEMO CITED IN 2001 QUEENS AIRLINER CRASH

Perhaps, you will recall the November 2001 crash of an American Airlines plane in Belle Harbor, Queens. Now we have learned that an airplane manufacturer's memo written in June 1997, explicitly describes the hazards of the maneuver that caused the crash. But, the memo was kept within the company. The pilot was never warned about the procedure. American Airlines obtained the memo a few months ago from the manufacturer, Airbus, as part of its suit over how the companies will share the payments to the families of the 265 people killed in the crash of Flight 587. The memo is now being cited by American and the pilots' union in an effort to put part of the blame on Airbus. The maneuver involved swinging the rudder from side to side, and the memo, written after a 1997 episode with a different American Airlines flight in the same kind of plane, an A300, warns that it could cause the tail to break off. That is what happened to Flight 587.

The memo, from a German member of the Airbus consortium, Daimler-Benz Aerospace, said that "rudder movements from left limit to right limit will produce loads on the fin/rear fuselage above ultimate design load" - the amount of force that a part is designed to handle without breaking. After the crash, the National Transportation Safety Board issued a recommendation against the maneuver. Airbus clearly should have shown the memo to the Board before the crash. Instead, Airbus concealed it from the Board. Airbus claims that at the time the memo was written, the company was not a party to the investigation, and that when it did join, it was involved with crew performance, not structural issues.

The memo's main point was that the tail of the plane in the 1997 event should be inspected. That was done, but no damage was found. But it was reinspected more thoroughly after the 2001 crash. At that time, some problems were found. In the Flight 587 crash, the co-pilot, flying the plane, moved the rudder back and forth when it encountered the wake of a plane that had taken off 140 seconds earlier from Kennedy International Airport. Pilots are warned not to use the rudder above a certain speed, which varies by airplane, but Flight 587 was still below that speed. They were not warned until after the crash never to use the rudder in alternating directions. The Safety Board warning went to all jet airliner pilots, and some experts say that the A300 is no more vulnerable to this maneuver than many other planes. Separately, however, the airline is arguing that a system called the "rudder limiter," which keeps a pilot from moving the rudder farther than is safe at the airplane's speed, does not work well on the A300.

The Safety Board had a meeting on October 26th to establish the probable cause of the crash. Under its charter from Congress, the Board finds probable cause, not fault. But, its findings are relevant in the litigation between the airline and the plane manufacturer. The union and the airline are contending that in an era of very few passenger airline crashes, reducing the accident rate further will require that all elements of the industry volunteer any information they have on any potential safety problem.

In the 1997 episode, the crew of an American airlines plane near West Palm Beach, Florida, mismanaged the controls and allowed airspeed to fall too low. When the plane slowed down to the point that it could not stay in the air, the crew performed a sloppy recovery but averted a crash. It is significant that the investigation focused on the initial error and the poor recovery and not the rudder issue. Airbus claims it had stressed to American after the 1997 event that pilots should not use the rudder in recovering stability.

SETTLEMENT REACHED IN BUS CRASH THAT KILLED FOUR STUDENTS

The families of four schoolchildren killed in a 2001 bus crash during a band trip to Canada have settled their wrongful death lawsuit for \$15 million. The families had sued two Boston companies, Crystal Transport and Kristine Travel and Tour, and the bus drivers. The settlement came on the eve of trial. Van Hool, the Belgian manufacturer of the bus, also contributed to the settlement. The families of five survivors had also filed suit and two of them had already settled their lawsuits—one for \$275,000 and another for \$130,000. The other two cases are pending.

I believe that a comment after the settlement by the mother of one of the victims (a 12-year-old son) is well worth repeating. The mother said “the trial would have been traumatic for the families. I don’t think people realize the pain of losing a loved one doesn’t go away and doesn’t become a victory in a lawsuit.” The tour bus was carrying 42 children from a school in Massachusetts to a band concert in Halifax, Nova Scotia, when it flipped on its side while trying to negotiate a turn before dawn on April 27, 2001. The driver lost control on a highway exit after he sped into a hairpin turn, according to investigators who investigated the crash.

DRIVER IN ARKANSAS BUS CRASH DROVE ALL NIGHT

A federal investigation reveals that the driver of a tour bus involved in a deadly crash on an Arkansas interstate apparently had been driving all night without backup. An investigator with the National Transportation Safety Board (NTSB) stated: “We need to look at hours of service. What he did during the daytime hours would be of great interest to us so we could evaluate any possible fatigue that he might have had.” The crash killed the driver and 13 Chicago-area passengers who were on their semiannual trek to a Mississippi casino. The wreck occurred just before dawn in a light mist. The bus failed to follow a left-hand curve, left the

roadway and flipped over. Sixteen of the occupants survived the crash. The federal investigators are examining the bus to ascertain if there were any defects or mechanical problems. Reconstruction of the accident could take as long as three months. The investigators are trying to determine whether the 67-year-old driver lost control of the vehicle or whether some mechanical failure caused it to go off the road, because there were no signs of skidding or braking.

The NTSB said the roof of the bus, which came off during the accident, is an area of concern. Past NTSB investigations of bus accidents have raised questions about bus integrity. Design documents reveal that roof supports are getting smaller as bus windows get larger. Other motorists on the highway put the speed of the bus at about 70 mph. The Federal Motor Coach Safety Administration also is looking at the company, the driver’s history and whether the driver had ever submitted to a required random drug test. The investigations are concerned with bus safety as well as the record of the driver and bus company. Similar probes of past crashes have yielded safety recommendations that ended up ignored or rejected. The NTSB recommended seat belts on buses several times, as far back as 1968, but the National Highway Traffic Safety Administration and the Federal Highway Administration have decided repeatedly not to implement the recommendations. The Safety Board contends that most fatalities in rollovers have occurred when the passenger was ejected from a seat or out of a window. But studies also found lap belts alone could cause internal injuries. Bus structures don’t easily lend themselves to the shoulder strap models now required in cars and trucks. There were no seat belts for the passengers on the tour bus that resulted in this accident. The only seat belt that’s currently required is for the driver.

ILLINOIS HIGHWAY BUS CRASH INJURES DONENS

We are currently seeing a great number of accidents involving tour buses. Recently, a tour bus taking people home from a charity event in Chicago ran off a highway and overturned, injuring dozens of passengers. The bus, with 42 people on board, was en route from Chicago to a small town in Mississippi, when it ran off the pavement of an Interstate highway and overturned. The bus passengers were residents of Tennessee and Mississippi who were returning home after participating in a prostate cancer fund-raiser in Chicago. State troopers hadn’t completed their investigation of the accident at press time. An accident reconstruction team is currently working on the investigation. It appears that about 40 folks were injured in the crash. A similar accident involving a Chicago-based charter bus killed 14 people and injured 16 others last month. That bus overturned on an Interstate highway in northeastern Arkansas. It was heading to the casinos of Tunica, Mississippi.

MOST IN ALABAMA FAVOR SAFETY INSPECTIONS

A recent survey conducted by the Mobile Register—University of South Alabama revealed that three-quarters of Alabamians believe the state should require yearly safety inspections for all vehicles. Nearly an equal percentage support emissions testing for vehicles. A law requiring vehicle inspections has been discussed for years, but thus far no bill has made it through the Legislature. I don’t see that changing any time soon.

During the last decade, Alabama’s annual traffic fatality total has hovered around a thousand. According to information from the state Department of Public Safety, as of late September, 568 lives have been lost in traffic accidents this year. At that pace 2004 will record a five-year high. In the last decade, traffic fatalities in Alabama hit their lowest point in 2000. A total of 986 people died on state roadways that

year. There is some question as to whether safety inspections are the best approach to reducing the number of folks dying on our roadways. According to information from the Automotive Service Association, 18 states, plus the District of Columbia, require vehicle safety inspections annually or biennially. The Texas-based association is a trade group for collision, mechanical and transmission automotive repair shops

States are under pressure from the federal government to reduce traffic fatalities. As a result, Alabama officials are developing a plan to address the problem. It doesn't appear mandatory inspections of passenger vehicles are on the agenda. Waymon Benfield, safety administrator for the Alabama Department of Transportation, confirms that fact. Benfield, who is heading up a committee focusing on legislative issues, told the Register that proposals having a chance of getting passed are getting top priority. That makes sense from a pragmatic perspective.

David Brown, a University of Alabama computer science professor with the Critical Analysis Reporting Environment Research and Development Laboratory, is a leading analyst of Alabama's highway safety system. According to Brown, vehicle defects were involved in 36 traffic fatalities in Alabama last year, which amounted to 4% of total deaths. Some of those crashes involved out-of-state vehicles, which would not be screened under an Alabama inspection law. It doesn't appear that vehicle defects are a major cause of Alabama's traffic fatalities. Clearly, no inspection program could eliminate all defects. Factors linked to far greater numbers of deaths include lack of seat belt usage, speeding, and driving under the influence of alcohol. Obviously, spending money on even one of these problems could save far more lives than would vehicle inspections. While vehicle inspections would be a good thing, I believe other safety programs are the way to go at this time. Our practice involves handling a good number of motor vehicle accidents, and we find that speeding is perhaps the one area where progress

can be made. Of course, it will require more police and state troopers patrolling our streets and highways.

Source: *Mobile Register*

XV. ARBITRATION UPDATE

ARBITRATION IN NURSING HOME ADMISSIONS UNFAIR TO FOLKS

We are seeing more and more disputes with nursing homes being sent to arbitration. A growing number of nursing home patients and relatives are being made to sign arbitration clauses as part of admission to a nursing home. This practice is spreading like kudzu. Many people have no understanding of what they're signing. It is typical for relatives to learn only after the fact that they have unwittingly waived their right to litigate for negligent care or death of a loved one. Elder law lawyers and consumer groups criticize the arbitration agreements as self-serving industry weapons that strip hapless nursing home residents and their families of their constitutional right to a jury trial. Nevertheless, nursing home arbitration agreements are on the rise.

Admitting someone to a nursing home is an emotionally difficult event, and patients and as a general rule relatives aren't aware of the legal ramifications of signing an arbitration clause. In some cases, the person signing the arbitration provision may not even have legal standing to make such decisions on behalf of a patient. Many times, because of the conditions causing the need for a nursing home, families are distraught. Many don't understand what they're signing. In most cases a family member has no authority to sign away a person's constitutional rights. There's no rational reason why any individual entering a nursing home would ever sign such an agreement at the time of admission. There is no way that a future dispute is even considered. Patients and family

members shouldn't be required—or even asked—to sign an arbitration agreement until a problem has occurred. Then both sides can agree that arbitration is the best way to resolve that particular dispute if that's mutually agreeable. What we are seeing is a method designed specifically by the nursing facilities to take options away from residents and their family members and in the process to take away a valuable constitutional right.

Arbitrators who are chosen by people who drive the medical industry shouldn't be allowed to sit in judgment on a nursing home and a resident. Arbitration takes away a constitutional right—the right to a jury trial—and that can never be justified. Arbitrators are biased in favor of the industry that hires them, resulting in a no-win situation for residents. There have been court decisions in a number of states rejecting nursing home arbitration agreements. The majority of challenges to arbitration in nursing home litigation have centered on disputes over:

- How the agreement was presented to the resident or family member;
- Whether the nursing home administrator or other representative clearly explained the agreement;
- Whether the patient signed the arbitration agreement;
- Whether the arbitration agreement was buried deep within the admission packet; and
- Whether a family member could properly sign for the resident.

Many of the challenges to arbitration agreements have been based on two legal arguments, claiming that the agreement is either:

- A contract of adhesion, which is essentially a standardized contract form offered to a consumer on a take-it-or-leave-it basis, so that the consumer doesn't have a choice to accept or refuse it.
- Unconscionable under state contract law. Elder law attorneys cite the

unequal bargaining power of the parties or the inability of the person who signs it to understand the terms of the agreement.

Arbitration clauses are not only being used as prerequisites to admission, but as a thinly veiled attack on the civil justice system. Arbitration is really the most effective form of tort reform, designed to eliminate or limit accountability for harm caused by a wrongdoer. It's a blatant assault on the civil justice system. It is especially unfair in the nursing home setting.

Source: *Lawyers Weekly*

CITIGROUP SHOULD END MANDATORY ARBITRATION

Citigroup Corp. has recently announced that from now on it is going to be much more consumer-friendly. While that was welcome news, some groups believe the company needs to go lots further. After the pronouncement a few weeks ago, a broad coalition of civil rights and consumer groups called on Citigroup to end the abusive practice of requiring borrowers to submit complaints on home loans to mandatory arbitration. Citigroup is just one of many corporations that loan money and that use arbitration against their borrowers. We believe that arbitration being forced on consumers is wrong and can't be justified in loan transactions. The groups calling on Citigroup to eliminate mandatory arbitration in subprime mortgage loans include:

- AARP
- Leadership Conference on Civil Rights
- NAACP
- Consumer Federation of America
- National Association of Consumer Advocates
- National Consumer Law Center
- Consumers Union
- US Public Interest Research Group

• Center for Responsible Lending

Homeownership represents a large percentage of the wealth held by minority families in the United States. There will be disputes arising between lenders and borrowers from time-to-time. No lender should be allowed to prohibit borrowers from protecting their homes and family wealth in an open and accessible court of law. Chris Hansen, associate executive director of AARP, stated:

Access to the courts has been essential to securing civil rights in this country and mortgage contracts that force homeowners into a second-class justice system are unacceptable. Mandatory arbitration clauses undermine hard won consumer protections by barring homeowners from obtaining judicial scrutiny of their loans.

Hilary Shelton, director of the Washington Bureau of the NAACP, said,

If predatory terms like discriminatory prepayment penalties and unnecessary fees are the bricks of the predatory lender's house, mandatory arbitration is the cement that holds it together. We ask that Citigroup show real courage as it has done in the past in standing up for the rights of African-Americans and all borrowers in demanding this practice be stopped.

In the American justice system, companies such as Citigroup can't be allowed to deny consumers the ability to enforce the promises made by the corporations. Neither should these companies be allowed to hide their fraudulent practices behind the wall of arbitration. Lenders must be held accountable for their wrongful acts. Travis Plunkett, legislative director of Consumer Federation of America made this observation: "From mortgage loans, to mobile homes to managed care, mandatory arbitration has become an ever-present and unfortunate fact of life for American consumers." He is certainly right and all consumers are finding that out to their dismay when a

dispute that arbitration is grossly unfair arises in any type consumer transaction.

Citigroup's failure to stop requiring mandatory arbitration in its subprime loans is wrong and is very much anti-consumer. Many of the largest mortgage lenders in the country, including Ameriquest, New Century, Option One, Washington Mutual, and Bank of America have backed off arbitration. So have Freddie Mac and Fannie Mae, the largest buyers of home loans in the country. Citigroup purchased The Associates, one of the nation's worst predatory mortgage lenders, in 1999. Citigroup has greatly reduced the number of abusive home loans that were being generated by unscrupulous mortgage brokers. Citigroup announced that it will not charge borrowers more than 3% in upfront fees and will limit prepayment penalties. But, Citigroup's failure to end forced arbitration in its subprime mortgage loans makes this a rather hollow move. Margot Saunders of the National Consumer Law Center stated: "If Citigroup wants to be considered a responsible lender, it cannot continue to insist on a private justice system that renders legal protections meaningless."

Each day, Americans unknowingly sign loan contracts containing mandatory arbitration clauses that deny them access to justice, and that can't be tolerated. The following are some of the results of forcing consumers to sign arbitration agreements:

- Imposing high costs on the consumer, in terms of filing fees and the additional expense of arbitration proceedings;
- Allowing arbitrators, who may not have proper training and are often selected by or have repeated financial connections with the lender, to decide complicated financial cases without allowing the borrower a right to appeal;
- Limiting the availability of legal counsel and other traditional procedural protections; and
- Benefiting unscrupulous lenders that have used arbitration to handle dis-

putes in secret, avoiding an open and public day in court that would expose unfair lending practices to the public at large.

Inclusion of mandatory arbitration clauses in subprime home loans has been especially pernicious where it disproportionately puts homes at risk for elderly, low-income, and minority families. Homeowners who are in the subprime market must be protected. So long as arbitration is part of the equation, there will be no real protection available to these homeowners.

FEDERAL COURT BACKS ARBITRATOR

A federal Appeals Court has upheld an arbitrator's decision to make EMC Mortgage Corp. pay \$6 million in punitive damages for subjecting a family to "outrageous" debt collection practices. The Irving, Texas, mortgage company insisted on arbitration and EMC "got exactly what it bargained for," the 8th Circuit of Appeals said in the August 26th opinion. EMC argued that the \$6 million is excessive and violated the company's constitutional right to due process. However, the circuit judges pointed out that companies and consumers give up most of their rights to due process and judicial review when they enter arbitration. The court stated in its opinion: "In the arbitration setting, we have almost none of the protections that fundamental fairness and due process require for the imposition of this form of punishment." In addition, the courts have to show an "extraordinary level of deference" to the award so long as the arbitrator is "acting within his scope of authority," the opinion said.

Bear Stearns & Co. owns EMC. Some believe the punitive damages award and the circuit court's decision demonstrate how unfair the arbitration process can be. No person or company should have to put our cases in the hands of a system where decision makers can evade the law in favor of either party, with little legal recourse. Arbitrators can set their own rules and standards, ignore the facts, and ignore the law—that is wrong and can't be tolerated.

The arbitrator found in this case that EMC's representatives violated the Fair Debt Collection Practices Act in trying to foreclose on the home of Mr. and Mrs. Stanley Stark. Even though the Stark's were represented by a lawyer, EMC collectors repeatedly made contact with them at home and at work in violation of the FDCPA. At one point they even broke into the family's house. The arbitrator found EMC's forcible entry "reprehensible and outrageous" and awarded \$6 million in punitive damages. A U.S. District Court vacated the award. But the 8th Circuit Court in St. Louis reversed the lower court and confirmed the arbitrator's award.

XVI. NURSING HOME UPDATE

VIOLENCE IN OUR NURSING HOMES REMAINS A PROBLEM

A growing problem at nursing homes across the country involves violence among residents. While the debate on conditions in nursing homes has traditionally focused on complaints of staff abuse, resident-on-resident violence is sparking a growing number of complaints, studies and conferences. Nationwide, more than 3,700 complaints about such abuse were lodged with state ombudsman programs in 2002, up from about 2,500 in 1997. Janet Wells, director of public policy for the National Citizens Coalition for Nursing Home Reform states: "There's so many situations occurring now where there is resident-on-resident abuse, including cases where people are killed occasionally."

One major reason given for the violence is that nursing homes are caring for greater numbers of older patients suffering from Alzheimer's and other forms of dementia. Such patients can be both aggressors and victims. It is well known that people with dementia can be more prone to aggressive behavior. Also, such patients are likely to wander around the place or berate

others—behavior that can scare fellow residents and cause them to respond with violence, according to experts. In recent years there have been reports in several states of patients at nursing homes being killed by fellow residents suffering from dementia. More staff and better training would allow nursing homes to recognize the warning signs and defuse dangerous situations. Better screening of patients for mental illness or criminal backgrounds also is needed, according to patients' rights advocates.

According to the Alzheimer's Association, patients often become agitated by change—a new caregiver, for example, or new living arrangements. The group recommends avoiding confrontations and instead redirecting the person's attention, creating a calm environment, and being sensitive to fears, misperceived threats and frustration. Records reveal that nursing homes, in an attempt to fill beds, have admitted criminals, including sex offenders. In some states violent criminals and sex offenders are being warehoused in nursing homes. Many of the nursing homes don't have staff trained to take care of the residents. There is a problem with violence in the nursing homes and that must be addressed.

NURSING HOME POLITICAL COALITION INDICTED IN TEXAS

The Alliance for Quality Nursing Home Care, a coalition of the fourteen largest national nursing home chains, has been indicted in Texas on charges that it illegally contributed money to U.S. House Majority Leader Tom DeLay's political action committee to influence the 2002 Texas State Legislative elections. Newspaper reports indicate that a chief executive for one of Texas' largest nursing home chains passed a \$100,000.00 corporate check to State House Speaker candidate Tom Craddick just days before the 2002 election. The check from the Alliance was made out to "Texans for a Republican Majority", which is a political action committee that is at the center of several felony indictments in Travis County, Texas.

Among other activities, the Alliance for Quality Nursing Home Care runs television ads in Washington, D.C. and ads in the Capitol Hill publication, Roll Call, opposing cuts in Medicare aid for nursing homes and other types of funding. Reportedly the topic of conversation at the time the \$100,000 check was passed was limiting lawsuits against nursing homes. Steve Guillard, the Chairman of the Alliance, has said that the \$100,000.00 contribution was made less than three weeks before the election because of interest in a pending legislative debate in Texas over limiting the legal liability of companies, including nursing homes.

The indictments focus on how the DeLay-founded Texans for a Republican Majority political action committee raised corporate money to help Republicans take control of the Texas House for the first time since reconstruction. Travis County District Attorney Ronnie Earle said this of his investigation: "What has emerged is the outline of an effort to use corporate contributions to control representative democracy in Texas." The nursing home industry is constantly complaining that they do not have enough money to take care of the residents, but it appears there is plenty for politicians.

TORT REFORM DRIVES SENATE COMMITTEE HEARING

On July 15th, the U.S. Senate Special Committee on Aging held a hearing on the subject of Nursing Home Tort Reform. Testimony was offered by numerous nursing home industry witnesses. But, as previously reported, not a single witness was allowed to testify on behalf of the nursing home residents. The National Consumer Coalition for Nursing Home Reform, a Washington based advocacy group, asked to be allowed to present witnesses, but their request was refused. It was to be a day of testimony that appears to have been "bought and paid for" by the nursing home owners.

Norman Estes, who owns a large Alabama-based chain of nursing homes and also has a number of homes in

other states, testified on behalf of the American Health Care Association, which is the professional association for nursing home owners. Estes, who was a big backer of the recent unsuccessful attempts to enact nursing home tort reform in Alabama, made some very interesting comments to the committee. He based his testimony on information provided by AON Risk Consultants, the same company that provided information for the Alabama Nursing Home Association in the legislative battles in Alabama. AON Risk Consultants is a consulting firm that for years has done extensive work for the nursing home industry. When the nursing home industry needs information to help them claim that nursing home litigation is out of control, they can count on AON Risk Consultants to come to their aid.

Mr. Estes told the committee that "elder patients are being victimized by the crowding-out and diversion of funds away from improved patient care to pay for the higher cost of lawsuits." This is an interesting way to view the bad situation faced by many nursing home residents. In our experience, the "victimization" of nursing home residents has never come from lawsuits. Instead, it results from inadequate and inappropriate care and treatment. Mr. Estes failed to address the problems that have been extensively documented by the Government Accounting Office and others relating to the neglect and abuse of nursing home residents throughout the country. To hear Mr. Estes and his industry cohorts tell it, every lawsuit is frivolous. The nursing home industry should stop pointing fingers and blaming others for the problems, and take a good hard look at how the industry operates. Is it so difficult to realize that if good care were being provided, and nursing home residents not being injured and killed because of neglect and abuse, that the need for lawsuits would diminish proportionately?

XVII. HEALTHCARE ISSUES

DRUG COMPANY ADVERTISING CAN'T BE JUSTIFIED

The pharmaceutical companies are spending over \$3.8 billion each year on television and other mass-media advertising aimed at American consumers. The issue of drug advertising directly aimed at consumers was thrust into the news recently when Merck withdrew its top-selling arthritis painkiller Vioxx from the market. As everybody in the U.S. now knows, this was because of the significant risk of heart attacks or strokes caused by taking Vioxx. Critics noted the role that advertising and marketing played in the drug's being widely prescribed to patients who might have done just as well with ibuprofen or other inexpensive over-the-counter remedies. Vioxx was hardly unique as a prescription drug that became a best seller on the strength of advertising aimed directly at consumers. In the seven years since the FDA lifted long-standing strictures against such ads, prescription drug advertising has grown into a multi-billion dollar a year business. Shockingly, the FDA still says that, despite the controversy accompanying the withdrawal of Vioxx, it has no plans to place new curbs on advertising by the drug companies.

During the debate between the vice-presidential candidates, Senator John Edwards, the Democratic nominee, re-emphasized his criticism of drug advertising. Senator Edwards said that if he and John Kerry were elected, they would "do something about these drug-company ads on television, which are out of control." The Kerry-Edwards campaign blames the ad-driven demand for pushing up spending on pricey drugs, which contributes to double-digit inflation in the nation's health care costs. There can be no justification for allowing any advertising to the public relating to prescription drugs. The decision of what medicines to prescribe should be left to doctors.

The multi-billion per year ad campaigns and the fast-track approach used by the FDA to approve new drugs is a deadly combination. The next President and the new Congress must get involved and correct this bad situation.

THE FLU SHOT SHORTAGE IS A NATIONAL DISGRACE

The major flu shot shortages in this country resulting when British health officials pulled the license of the maker of half the U.S. vaccine supply is a national disgrace. The United States is facing "a significant shortage," according to Dr. Anthony Fauci, the National Institutes of Health's infectious disease chief. The long lines of elderly citizens waiting for a chance at the limited supply available is sad indeed. We are already experiencing the shortage according to news reports. British authorities suspended the license of Chiron Corp. for three months because of problems at its vaccine manufacturing plant in Liverpool, England. The action means the company can't supply any flu vaccines to any market during that time. Chiron says it would provide no vaccine this year.

Chiron had planned to ship 46 million to 48 million doses, but that already had been delayed by a contamination problem discovered in August in the English factory where the vaccine is made. At the time, the company said only 4 million doses were tainted, but the entire supply would be held up and re-tested. According to reports, in an average year, flu kills 36,000 people and hospitalizes another 114,000, mostly the elderly. In late September, top U.S. health officials assured the public that close FDA monitoring of the rest of Chiron's supply suggested it was fine and that there would be plenty of supplies. It appears the FDA has dropped the ball again.

FDA RED-FLAGGED FACTORY BUT FAILED TO FOLLOW UP

In June of 2003, the FDA found quality-control problems at the flu

vaccine factory in Liverpool, England, but did not begin a full inspection until five days after British authorities had pulled the company's license because of tainted vaccines. The FDA had done an inspection of the plant in 2003 and found batches of flu vaccine that contain bacteria and had been reprocessed. The company's license did not allow reprocessing. The company told the FDA that it was fixing the problem and apparently the FDA took them at their word. But, in August, Chiron notified the FDA that it had found bacteria in another batch of vaccines. Congressional representatives are right to question how the FDA could be so inept. From all accounts, the U.S. government was taken completely by surprise on a most critical matter. That is hard to understand and impossible to justify. How in the world could the federal government depend on a foreign country to furnish flu vaccines for our citizens? It is also difficult to understand how President Bush could say, let's go to Canada and see if they will sell us a vaccine supply. I thought the President really believed Canadian drugs were not safe when he made that claim earlier. In any event, the FDA clearly dropped the ball again and millions of U.S. citizens are now at risk as a result.

RELEASE OF PRESCRIPTION INFORMATION TRIGGERS LAWSUIT

A lawsuit filed against the Albertsons food and drug chain in California has brought to the public's attention a serious problem. Consumers who buy prescription drugs at some chain drug-stores, may wonder at mailings soliciting them to try a different brand of medicine. Personal medical information should never be shared or sold without permission. The Privacy Rights Clearinghouse, a national consumer group based in California, says that some pharmacies that fill consumers' prescriptions make this information available to pharmaceutical companies for profitable marketing purposes. The pharmacies share this information because they can make more money

selling the expensive drugs the pharmaceutical companies recommend.

In the Albertsons lawsuit, the consumer group contends this type of chain-store practice "violates the laws of many states where medical information is supposed to be held in confidence and not used for marketing purposes." Albertsons denies that either the company or any of its subsidiaries have breached any customer's privacy. I don't believe any person wants a healthcare provider or pharmacy to sell their medical history or other personal information to a drug company. It shouldn't be tolerated. Information about the lawsuit is available at www.privacyrights.org/ar/PharmacyAlert.htm.

COALITION SAYS A SECOND LOOK AT STATIN USE NEEDED

A consumer group and 35 doctors and scientists have asked the National Institutes of Health to oversee an independent review of the science that led to new guidelines urging wider use of cholesterol-lowering statin drugs. The Center for Science in the Public Interest and the doctors and scientists said in a letter to NIH that there wasn't enough evidence to justify the recommendations, especially for women, older people and diabetics. The guidelines were issued in July by a panel convened by the American Heart Association, the American College of Cardiology and the government. About 36 million Americans are presently being prescribed statins.

XVIII. ENVIRONMENTAL CONCERNS

HIGH COURT DEBATES POLLUTION LAWSUITS

The U.S. Supreme Court considered last month whether companies that voluntarily seek to clean up their polluted land can sue former owners to get help with the costs. The case could have important ramifications for com-

munities with abandoned toxic plants, landfills and mines. Federal law allows the Environmental Protection Agency (EPA) to designate as "Superfund" sites areas that are highly polluted. Officials can seek money from current and former owners for the cleanup costs. The case before the High Court asks whether the Superfund law can be used by the owners of the many thousands of properties in which the government has not gotten involved and demanded cleanup. During oral argument, Justice Ruth Bader Ginsburg, who was the only justice who appeared troubled about preventing such lawsuits, stated in open court: "You might be sitting around waiting forever until EPA comes after you. It seems like EPA has higher priorities."

The case has pitted the Bush Administration against 23 states that argue the Superfund law, passed in 1980, allows lawsuits when companies on their own initiative seek to clean their properties. Those efforts often are very expensive, and can involve multiple former owners. The Bush Administration says that companies can still purge land, but they have to work with the government in advance to make sure it's done properly. Major corporations are closely watching the case. With all of their well-documented power and influence, these corporations simply don't want to be the responsible corporate citizen and clean up their properties. Many communities have sites that have been designated as polluted or potentially contaminated by the government.

Justice Sandra Day O'Connor said that the part of the law at issue in the case didn't seem to allow such lawsuits. The other justices appeared to be in agreement. Nevertheless, this fight might be far from over, because another part of the Superfund law could be interpreted to allow lawsuits. The states that asked the High Court to uphold the lower court decision were: Arizona, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Massachusetts, Michigan, Missouri, Montana, Nevada, North Dakota, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Ten-

nessee, Washington, Wisconsin and Wyoming. The U.S. Court of Appeals for the Fifth Circuit in New Orleans had ruled that Aviall could sue. The court pointed out that "reasonable minds can differ over" the Superfund law because of its inexact grammar.

Source: *The Insurance Journal*

REPORT SAYS LEAD CONTAMINATION A PROBLEM

A report by the *Washington Post* reveals that there may be serious problems with some of the nation's public water supplies. According to the *Post*, dozens of the nation's largest drinking water utilities have tried to hide lead contamination and have failed to correct problems. An examination of 65 of the 3,000 largest utilities found cities such as Philadelphia, Boston, New York City, Providence, Rhode Island, and Portland, Oregon, are "manipulating the results of tests used to detect lead in water, violating federal law and putting millions of Americans at risk." Apparently, state and federal regulators helped utilities avoid expensive ways of reducing lead in drinking water. Pregnant women and infants are the most vulnerable to lead, which can cause kidney and brain damage. In some cases it can cause death. The Environmental Protection Agency has required drinking water utilities since 1991 to reduce contamination if lead concentrations exceed 15 parts per billion in more than 10% of taps sampled.

About 54,000 community water systems supply water to 268 million Americans, or about 90% of the U.S. population, according to American Water Works Association, a trade group. The *Post* said its analysis of EPA data identified 274 water systems, serving 11.5 million people, that had reported unsafe lead levels since 2000. Problems with lead in drinking water surfaced in 2002 for thousands of residents in Washington, D.C., but only gained widespread attention this year. Residents complained that the District of Columbia Water and Sewer Authority did little to alert them. The EPA said

only four large water systems, Washington, D.C.; St. Paul, Minnesota; Port St. Lucie, Florida, and Ridgewood, New Jersey, that serve 1.1 million people had unsafe lead levels in the past three years.

Source: *Washington Post*

CITGO SETTLES POLLUTION CLAIMS

Citgo Petroleum Corp. will install pollution controls at six refineries to settle federal claims alleging Clean Air Act violations. Citgo has reached an \$8.5 million settlement with the U.S. Environmental Protection Agency and four states over charges that it violated clean air laws at refineries in those states. The Justice Department, representing the EPA along with the states of Georgia, Illinois, Louisiana and New Jersey, had filed a lawsuit in Houston federal court accusing Citgo of failing to obtain permits for improvements at refineries in those states and Texas, and surpassing the legally allowed amount of pollution emissions. A consent agreement was announced shortly after the suit was filed. Citgo agreed to pay \$3.5 million in fines and spend \$5 million on a supplemental undetermined environmental project. Citgo will also be required to spend about \$320 million to install state-of-the-art pollution control technology.

The Citgo refineries included in this settlement are in Corpus Christi, Texas, Lemont, Illinois, Lake Charles, Louisiana, Paulsboro, New Jersey and Savannah, Georgia. As usual, Citgo did not admit to Clean Air Act violations in the agreement, but the company is implementing pollution controls beginning next year. The settlement also requires Citgo, the nation's number four gas retailer, to reduce yearly emissions of nitrogen oxide by 7,184 tons and sulfur dioxide by 23,250 tons. Both can cause serious respiratory ailments and worsen cases of childhood asthma.

U.S. REFUSES TO RATIFY KYOTO PROTOCOL

The Bush Administration has a poor environmental record and it's getting

worse. Last month, Russia joined the United Kingdom, Germany, Italy, Japan and the European Union in ratifying the Kyoto Protocol. Under the terms of this agreement, participating industrialized countries will have until the year 2012 to cut their collective emissions of six key greenhouse gases to 5.2% below their 1990 level. However, the United States, which accounted for 36% of the world's carbon dioxide emissions in 1990, has flatly rejected the treaty. The Bush Administration has given no indication that it intends to change its mind regarding the Kyoto Protocol and its plan for a worldwide reduction in dangerous greenhouse gas emissions anytime soon. Germana Canzi, a Climate Policy expert with the Worldwide Fund for Nature observed:

The Kyoto Protocol undoubtedly sets very low targets compared to what scientists say is necessary in order to keep climate change under control. However, it has always been considered a first step rather than the solution to the problem.

One of the more striking features of the Kyoto Protocol is that it provides substantial incentives to countries that are willing to modernize their technologies. Countries that miss their emission targets, however, would be excluded from "emission trading" (buying and selling the right to pollute), while a panel to be set up by member governments would address alleged violations. Profit motives are expected to drive efforts in technology and bring substantial cuts in emissions in carbon dioxide, which make up 80% of greenhouse gases.

Currently, the next round of international climate talks are scheduled for December in Buenos Aires, Argentina, and negotiations on greenhouse gas emissions after 2012 are due to start next year. Presidential candidate John Kerry has expressed support for the Kyoto Protocol and its plan to significantly reduce the damage that greenhouse gases are causing the earth's fragile ozone layer. If John Kerry is elected President in November, I believe that the United States will finally do its part to reduce this ever-

increasing threat. We can't afford to ignore this most serious worldwide problem any longer.

XIX. TOBACCO LITIGATION UPDATE

TOBACCO INDUSTRY ADMITS MISTAKES

The federal government's lawsuit against the tobacco industry was still going on when this issue went to the printer. The industry says it never purposely lied to the American public about the dangers of smoking. Their defense is that individual tobacco company officials made mistakes and showed poor judgment in dismissing evidence of health risks. This is the largest civil racketeering trial in U.S. history. Tobacco industry lawyers are claiming that government claims of a massive, industry-devised fraud rely almost entirely on events of the distant past. The trial is expected to go for 12 weeks. The government says that the industry plotted to deceive Americans that smoking caused cancer and other diseases and is certain to mislead the public again. At stake is \$280 billion in tobacco profits, which the government calls "ill-gotten gains" from industry fraud. Government lawyers introduced internal industry documents dating back decades that are pretty convincing evidence that tobacco officials were lying to the public even as they acknowledged the dangers of smoking to each other.

A MONTGOMERY LEGISLATOR SUPPLIES SOME INTERESTING INFORMATION

Dick Brewbaker, who is a hard-working and highly respected member of the Alabama Legislature from Montgomery, contacted us recently concerning the national tobacco settlement. Dick said he was surprised that we have never commented in depth on the actions of the Alabama legislature in its last regular session relating to

tobacco. I must confess that my knowledge of what happened is very limited. I have decided to print part of Dick's letter so that our readers will have the benefit of this information.

The Governor proposed (HB 390) increasing the tobacco tax by 40 cents/pack and allowing companies participating in the MSA [Master Settlement Agreement] to take a credit of 20 cents/pack against their settlement payments. His purpose was three fold: 1. raise revenue for the general fund; 2. stop the increase of market share of the non-participating generic brands; and 3. protect the state against withdrawal from the MSA by participating tobacco companies.

When the MSA was reached in the late 90s so-called generic brand cigarettes had about 1% of the Alabama market. After the MSA, participating brands became more expensive due to the 20 cents/pack levied by the MSA. Dozens of new generic brands entered the market and because of their price advantage as non-participants in the MSA were able to gain considerable market share. As of now, generics account for over 10% of Alabama cigarette sales. As the state only gains revenue from participating tobacco companies, the governor thought it in the public interest to remove the price advantage given to non-participants.

There are two ways tobacco companies can get out of the MSA, by going out of business and by moving "off shore." Now that the federal government has ended all tobacco subsidies, both are a real possibility. Under the Governor's bill, if a tobacco company reorganized or went offshore they would lose their credit against the MSA and Alabama would still get the 40 cents/pack from anyone selling cigarettes in our state. Given the fact that we depend on MSA money to funds critical state services, the importance of protecting the MSA cannot be overstated.

The tobacco lobby was determined to kill the governor's bill. In my view, their objection to it was mainly that it would insure that the state maintained its tobacco tax revenue if MSA remained intact or not. They were even willing to agree to a higher tax per pack as long as the long-term protections to the MSA were not in place. In the end, the Legislature caved in and passed a bill supported by the tobacco lobby (HB 716) that while raising a lot of money, did nothing to protect the MSA. The tobacco lobby was even able to include a provision to forbid local governments from passing any future increases in tobacco taxes. As many rural counties depend on tobacco taxes to fund services like their Volunteer Fire Departments, this is problematic to say the least. If there was ever an instance where lawmakers looked after a powerful lobby instead of their constituents, the passage of HB 716 is it.

I appreciate very much Rep. Brewbaker bringing this information to our attention. I hope this will give our readers some insight into the legislative process and how it works, or in some instances, fails to work. I realize that powerful lobbyists have far too much influence over what happens in our Legislature and believe most folks agree with me. Maybe one of these days' things will change—and for the good of our state, I certainly hope and pray it will!

XX. THE CONSUMER CORNER

UNSAFE PRODUCTS REACHING RETAIL SHELVES

An investigation by Consumer Reports magazine revealed some shocking news. Apparently, dozens of dangerous products that violate federal safety standards are finding their way onto retail shelves. Hundreds of other

recalled items banned for sale in the United States are being shipped to shoppers abroad. After an in-depth study of a decade of government product safety records, and shopping at more than a dozen stores, the magazine concluded that weak laws and lax enforcement are allowing some manufacturers and importers to ignore federal and voluntary industry safety standards. It found that when agencies discovered unsafe goods, their actions could be contradictory. For example, U.S. Customs seized a shipment of 10,000 illegal switchblade knives disguised as cigarette lighters that were being imported in 2002. A year later, a shipment of knife-lighters was barred from entering U.S. ports, but was allowed to be rerouted and shipped to the United Arab Emirates.

The magazine faulted the U.S. Consumer Product Safety Commission (CPSC) for the continued sale of unsafe products both here and abroad. Citing steep erosion in the agency's budget and staff, it said the CPSC was inadequately and inconsistently enforcing federal safety laws and policing store shelves. The result, Consumer Reports concluded, is that consumers are buying many "potentially lethal products." Some of these products are:

- Defective extension cords and electrical items that can overheat and burn;
- Fake ground-fault circuit interrupter plugs that don't always trip when there is an electrical overload;
- Toys that can choke, cut or poison young children;
- Counterfeit batteries that leak acid, overheat or spark; and
- Disposable lighters that leak fuel or explode.

Many of these goods are fraudulently labeled counterfeits to well-known and well-regarded brand-name items. The magazine said that the CPSC's number of recalls, detained shipments and other enforcement actions was down 35% in 2003 from 2001. The magazine, owned by the nonprofit Consumers

Union, called on Congress to increase the agency's budget and enact new laws to ban the export of recalled products and give the agency more power to publicize unsafe products. These findings are not good for consumers. The CPSC's budget has shrunk to about half what it was 30 years ago, adjusted for inflation. The agency's staff has been cut almost in half during that same time. Consumers Union has requested the CPSC to increase its factory and store inspections, beef up enforcement of repeat violators and seek additional funding from Congress. R. David Pittle, Consumer Reports' senior vice-president for technical policy, who was one of the original members of the CPSC when it was created in 1973, stated: "The CPSC is all that stands between consumers and dangerous products in the marketplace."

The CPSC defended its actions, pointing out that the number of recalls, fines and seizures increased significantly for the fiscal year that ended September 30th. The agency said it has conducted numerous samplings at a variety of mass merchandise and dollar stores. In a prepared statement the CPSC said:

We are now conducting more inspections of imported products in an effort to find violative products before they enter the U.S. Clearly, we have made an impact on the safety of regulated products such as toys, fireworks and lighters since every year it becomes more difficult to uncover violations.

The magazine's staff visited dollar stores, drugstores, closeout centers and other discount stores and bought suspect products. Tested in Consumer Reports' labs, the magazine found 48 toys—about 33% of the total purchased—that violated either mandatory federal or voluntary industry safety standards. The magazine said that the government's inspection of stores and factories has dropped from 1,130 in 1999 to about 500 in 2004. At the same time, detained shipments of imports have dropped 49% in the past two years. It should be noted, however,

that the CPSC's chief partner in port inspections, U.S. Customs, has been more preoccupied with searching for bomb materials and other terrorism-related items. That has been a definite influence on its other responsibilities.

Source: *The Washington Post*

NATIONAL WINDOW COVERING SAFETY MONTH

The safety of our children is a top priority with the U.S. Consumer Product Safety Commission and that's good. October was National Window Covering Safety Month and I doubt that many of us ever knew it. All homeowners should repair or replace window coverings that have cords purchased before 2001 with safer products that are now available. Since 1991, more than 175 infants and children have died from accidentally strangling in window cords. Children are especially at risk and must be kept safe from potential window-cord hazards. Parents and caregivers should check all windowed areas of the home for potential window-cord hazards. All of us should follow these important cord-safety rules:

- Move all cribs, beds, furniture and toys away from windows and window cords, preferably to another wall.
- Keep all window cords out of the reach of children. Make sure that tasseled pull cords are short, and that continuous-loop cords are permanently anchored to the floor or wall.
- Lock cords into position whenever horizontal blinds or shades are lowered, including when they come to rest on a windowsill.
- Repair window blinds, corded shades and draperies manufactured before 2001 with retrofit cord-repair devices, or replace them with today's safer products.
- Consider installing cordless window coverings in children's bedrooms and play areas.

CREDIT CARD WAR MAY ACTUALLY HELP CONSUMERS

Banks in this country that offer Visa or MasterCard can begin offering competing credit cards now that the U.S. Supreme Court has refused to hear an appeal of a lawsuit in a case we reported on months ago. The High Court's action is expected to increase competition among credit cards, which I hope will be good for consumers. If my information is correct, however, I doubt that we will see lower interest rates as a result. The Justice Department had sued Visa USA and MasterCard International in 1998, saying that prohibiting member banks from offering other credit cards violated antitrust law and hurt consumers. The practice had been in effect since 1974.

Consumer-lending consultant Stuart Feldstein of SMR Research doesn't see much benefit in so far as greater consumer choice is concerned. Feldstein says: "There's just a blizzard of choices for consumers who want cards that have different features. For consumers, it's just kind of nice to see there's someone out there looking to prevent coercion against competition." In an interesting development, shortly after the Supreme Court's ruling, Discover Financial Services sued Visa and MasterCard, seeking damages for being shut out of the bankcard market. Other companies, including American Express, are expected to follow suit. In the meanwhile, it will be interesting to see how additional choices of credit card companies will affect U.S. consumers.

CHILDREN FACE DANGERS ON-LINE

Use of the Internet has become commonplace in homes and businesses all over the country. While there is much good to be found on-line, there is also the dark side. Many adults don't realize how dangerous the Internet can be for children. Many believe that instant messaging on the computer has become like a telephone for children in this country. We know that children spend hours chatting on-line with their friends. Unfortunately, strangers are

often the other participants. A recent study found that one in five children on-line is approached by a sexual predator. In many instances a predator will try to set up a face-to-face meeting.

In a Dateline NBC hidden camera investigation, a correspondent captured some of these predators in the act. To follow the trail of an Internet predator prowling for children, from seduction in a chat room to a face-to-face meeting, Dateline rented a house, wired it with hidden cameras, and enlisted the help of an on-line vigilante group called "Perverted Justice." Volunteers from the group posed as teens in chat rooms, saying they were home alone and interested in sex. Within hours there were men literally lining up at their door. One of the men who turned up in Dateline's investigation had a history of mental illness and a criminal record. Just about every man who came to the house claimed it was the first time he had done something like that. Most claimed they really had no intention of having sex with a minor. In two-and-a-half days, 18 men showed up at the house after making a date on the Internet to commit statutory rape. None of the men had any idea NBC's hidden cameras would expose them before a national audience.

The moral of this story is that adults must take steps to protect children who understand and use the Internet. That means adults must gain some needed knowledge about the Internet and then start putting their acquired knowledge to good use. Protecting children starts at home, and all of us who have children and grandchildren had better wake up and get involved.

Source: *NBC News*

CONSUMER RIGHTS UNDER ASSAULT

Both candidates for President should be talking about rising fuel and health-care costs, predatory lenders and threats to privacy and food safety, and other consumer issues. Consumer rights are under unprecedented assault, and the next President will have a long hill to climb to regain the ground lost

over the past four years. At least one of the candidates is discussing issues that affect U.S. consumers. The President can't do this because of his very bad record on all consumer issues. As I have heard said; "He can run—but he can't hide," and that really applies to the President's record on consumers issues. Now, six national consumer groups have branched together to make sure issues that hit Americans in their wallets are given the attention they deserve. The coalition, which includes Consumers Union, the Consumer Federation of America, the National Consumer Law Center, Public Citizen and the U.S. Public Interest Research Group say special-interest groups have gutted the Truth in Lending Act, blocked tougher food safety laws and kept consumers from having access to affordable health care. The coalition outlined the following threats to consumers at a press conference:

- **Rising oil and gasoline prices.** Citing a Government Accounting Office report that found that industry mergers have increased the price at the pump, the coalition said the government should encourage competition to lower the cost of fuel. Additionally, it says, Congress should raise fuel economy standards, particularly on light trucks and SUVs, to save consumers money and reduce pollution.
- **Restrictions on consumers' access to the courts.** The group said **mandatory arbitration** clauses in contracts and bans on class action suits are preventing consumers from pursuing justice through the courts. Of particular concern, the group said, are limits on consumers' rights to sue HMOs that wrongfully deny them coverage.
- **Abusive and predatory lending.** Congress has allowed credit card companies, payday lenders and predatory mortgage companies to operate in a largely unregulated atmosphere, the group says, making consumers more vulnerable to default and bankruptcy. The group

wants the government to regulate those industries and to make it clear that states can enact even stricter laws to protect citizens.

- **Skyrocketing health insurance costs.** The group wants Congress to assure that all Americans have access to affordable health care coverage. It wants coverage immediately extended to all children and lower-income adults. It says that the new Medicare law does consumers a disservice by barring the federal government from negotiating lower prices for drugs, and it argues that the government should allow reimporting cheaper prescription drugs from Canada and Europe.
- **Threats to privacy.** Piecemeal privacy laws and offshoring have left consumers vulnerable to having financial and medical information exposed. The group says Congress should give consumers more control over how their information is used, require financial companies and Internet vendors to protect consumers' private information, and allow states to enact stronger laws concerning information-sharing between companies.
- **Food safety threats.** The group says archaic meat safety laws are not up to the task of protecting consumers from salmonella, let alone Mad Cow Disease. The group wants the government to require the U.S. Department of Agriculture (USDA) to set and enforce limits on food-borne pathogens and to give the agency the authority to mandate recalls of tainted meat—a power it does not currently possess. Additionally, the consumers group said, the government must put stricter restrictions on ingredients in animal feed to prevent the spread of Mad Cow Disease and other pathogens.

Because of the incredible rollback of consumer rights and protections during the last four years, the six-point agenda of essential reforms should serve as a guide for federal policymakers and

others concerned about consumer issues. Their unified voice should send a clear message about the important issues confronted by consumers and a strong signal to political leaders both in Washington and state capitols that these problems must be addressed. Problems such as mandatory arbitration and the plague of predatory lending will also be addressed. With a growing awareness of the essential nature of these concerns, issues of fundamental consumer justice will be put in focus. You can get more information on the group's agenda by going to: <http://ga4.org/consumerlaw/Agenda.html>

STATE OF ALABAMA TAKES ACTION

The Alabama Securities Commission has issued Cease and Desist Orders against multiple Alabama individuals, in a coordinated effort with the United States Securities and Exchange Commission and other regulatory and law enforcement agencies, to halt a 24.5 million dollar "Prime Bank" Ponzi scheme. As the Securities and Exchange Commission filed emergency action to halt an ongoing fraudulent Securities Ponzi scheme operated by Learn Waterhouse, Inc., a Texas corporation based in Jacksonville, Florida and Tyler, Texas, the Alabama Securities Commission simultaneously issued its Cease and Desist Order and multiple subpoenas to 10 respondents believed to be connected with or operating as representatives of Learn Waterhouse, Inc. The Alabama Securities Commission Cease and Desist Order names 10 Alabama citizens in its orders. The investigation of Learn Waterhouse conducted by the Alabama Securities Commission, United States Attorney's Office, Federal Bureau of Investigation, Florida Department of Financial Services, Texas State Securities Board, Arizona Corporation Commission, and the Iowa Insurance Division's Securities Bureau, determined that from December, 2003 through August, 2004, Learn Waterhouse, Inc, and 4 individuals, through a multi-level series of representatives and agents, raised at least 24.5 million dollars from 1700 investors

nationwide by conducting a fraudulent Prime Bank scheme. The allegations are that Learn Waterhouse pooled investor funds to engage in “buy/sell” transactions in a “secret” “invitation only” bank trading program that promised investor returns ranging from 5 to 50% per month.

The coordinated state and federal actions have resulted in search warrants, freezing of assets, employment of a temporary receiver, and other actions designed to prevent removal of assets and destruction of documents. Alabama Securities Commission Director Joe Borg stated, “By combining our resources with other state and federal agencies, we multiplied the effectiveness of our resources against those who would swindle the hard earned money from our citizens.” The Alabama Securities Commission advised that, in addition to Cease and Desist Orders against the named individuals, a separate Cease and Desist Order had previously been issued against Learn Waterhouse. Multiple subpoenas were simultaneously delivered to protect documents and records of transactions with Alabama citizens. Again, all Alabamians should be proud of the work done by Joe Borg and his staff. For further information, contact the Alabama Securities Commission at 1-800-222-1253. Copies of the Cease and Desist Orders and Show Cause Orders can be found on the Alabama Securities Commission website at www.asc.state.al.us.

GOVERNMENT SAYS TOO FEW USE BOOSTER SEATS

Only one in five young children ride in injury-reducing booster seats, according to the National Highway Traffic Safety Administration (NHTSA). The agency recommends the seats for children ages 4 to 8 who are under 4 feet, 9 inches tall. Booster seats fit children better than seat belts and that’s important from a safety perspective. A telephone survey found that 21% of children use boosters “at least on occasion,” and another 19% use child safety seats. NHTSA says children are at

unnecessary risk of being injured in crashes because they are either in the wrong restraint for their size or, worse, totally unrestrained. About one-fifth of parents questioned said they believed booster seats were unstable and wouldn’t protect the child. NHTSA doesn’t believe that’s a problem as long as the boosters are properly attached to the back seat. According to the survey, 85% of the parents and caregivers of young children had heard of booster seats. Oftentimes parents don’t use the booster seats because their trips are short or their children simply don’t like the seats. Booster seats should be used for children that fall in the range of 4 to 8 years and are under 4 feet, 9 inches in height.

MOST CONSUMERS DON’T UNDERSTAND CREDIT SCORING

According to a new survey conducted by the Consumer Federation of America (CFA) and Providian Financial, most Americans don’t understand credit scores. This is true even when they think their knowledge of credit is good. That really doesn’t come as a surprise. The bulletin noted that “as companies and organizations increasingly utilize credit scores to evaluate individuals as prospective customers, employees or tenants, it is essential that consumers know their credit score, understand what it means, and learn how to raise it.” But, the survey found that “most consumers do not understand what credit scores measure, what good and bad scores are, and how scores can be improved.” The survey of 1027 representative adult Americans was administered by the Opinion Research Corporation International for CFA and Providian in late July. CFA Executive Director Stephen Brobeck observed:

Now that credit scores are increasingly used by utilities, insurers, and employers, as well as creditors, it is essential for consumers to learn their score and what it means. The cost of not knowing your score and its significance could be not only denial of credit

but also difficulty obtaining needed services and even a job.

Most consumers surveyed correctly understand that lenders use credit scores, but only a minority know that electric utilities (30%), home insurers (47%), and landlords (48%) often use credit scores to decide whether to sell a service and at what price. The survey’s good news is that 59% of all consumers recognize that their knowledge of credit scores is only poor or fair. I feel certain that most folks don’t know how scores affect the availability and price of credit. I doubt whether few have ever even thought about it. The CFA/Providian survey found that most consumers do not understand the meaning of credit scores, their importance, how to obtain them, and how to improve them. Other conclusions reached by the survey included the following:

- Only about one-third (34%) correctly understand that credit scores indicate the risk of not repaying a loan, not factors like financial resources to pay back loans or knowledge of consumer credit.
- More than one-half (52%) incorrectly believe that a married couple has a combined credit score.
- Few consumers know what constitutes a good score. Only 12% correctly identified the low 600s as the level below which they would be denied credit or have to pay a higher, subprime rate. And, only 13% correctly understand that scores above the low 700s usually qualify them for the lowest rates.
- Many consumers do not have a clear idea how to improve their credit score. Two-fifths (40%) don’t understand that paying off a large balance on a credit card will improve one’s credit score.
- Many who try to learn their credit score in the future will be surprised to learn that there is often a charge. Nearly three-quarters (72%) incorrectly believe that they can obtain

their credit score for free once a year. (That right was recently established for free access to one's credit report but not for free access to one's score except when applying for a mortgage loan).

There are two websites that will help consumers find out more about credit scores. These are: <http://www.consumerfed.org/092104creditscores.pdf> and <http://www.consumerfed.org/score>.

WEIGHT-LOSS SUPPLEMENT LAWSUIT

U.S. regulators have sued the marketers of the widely advertised "CortiSlim" weight-loss supplement and are seeking to force them to reimburse customers. The U.S. Federal Trade Commission (FTC) filed suit in federal court in Los Angeles against Window Rock Enterprises Inc. and Infinity Advertising Inc., Los Angeles-based companies that tout supplements CortiSlim and CortiStress. According to the FTC, the companies have made deceptive claims about the supplements and falsely suggested that infomercials promoting them were "independent" television programs. The companies began marketing the two products in August and September of last year through television advertisements that claimed they could lower elevated levels of cortisol, which the ads said was a hormone that caused weight gain. The FTC says the companies claimed that virtually all people who used CortiSlim would lose 10 to 50 pounds. The FTC says those claims were false or unsubstantiated. It was alleged in the lawsuit that the companies also made false or unsubstantiated claims about CortiStress—that it reduces the risk of, or prevents, conditions such as osteoporosis, obesity, diabetes, Alzheimer's disease, cancer, and cardiovascular disease. According to the FTC, the marketers of the supplements have agreed to an interim order that would impose restrictions on their advertising. The order must be approved by a federal judge. At press time, the FTC was trying to negotiate a broader settlement that includes consumer redress and a

permanent injunction governing future advertising claims.

ORKIN BACK IN THE NEWS

Pest control company Orkin is back in court over its termite work in Florida. A racketeering investigation by the state attorney general and a lawsuit seeking to represent 65,000 Florida customers are under way. A federal judge recently upheld a multimillion-dollar arbitration judgment in favor of a Florida customer of the company. The complaints against Orkin, as reported in the Orlando Sentinel, include:

- Writing contracts with fine-print disclaimers on repair and retreatment guarantees;
- Not doing adequate treatments and inspections;
- Denying claims as a matter of policy; and
- Forcing subcontractors to make repairs without the required building permits, so the work could not be certified by inspectors.

Orkin, a \$670 million Atlanta-based company with nearly 8,000 employees, says it hasn't done anything wrong and has denied all allegations. A customer in Ponte Vedra, Florida had documented termite repairs to his home over six years in which subcontractors hadn't pulled the required building permits. The homeowner was awarded a \$4.25 million judgment at a 2003 arbitration hearing. This was upheld by a federal judge, but the amount was reduced to \$2 million. The arbitration panel ruled in the victim's favor, saying the practice was "widespread." Hundreds of similar cases in north and central Florida were uncovered. Florida Attorney General Charlie Crist started a racketeering investigation in April against Orkin. He issued a subpoena requesting company records and documents. While Orkin says it is cooperating, the company filed a lawsuit in Orange County seeking to block the state subpoena.

Another lawsuit, which accuses

Orkin of deceptive and unfair trade practices, is seeking class action status in a Florida circuit court. If class action status is granted, the suit would represent 65,000 Orkin customers. Orkin had settled a lawsuit in 2003 over a termite damaged apartment complex in Hillsborough County, but terms of that settlement are confidential. The lawsuits, investigations, and the 15,000 complaints filed in Florida over the last four years against pest control companies are instigating some changes. Next spring the State of Florida plans to issue new rules requiring pest-control contracts to have standardized, easily understandable language. Steve Rutz, director of Florida's Division of Agricultural Environmental Services, says: "We want to make sure information is presented to people so there is not misunderstanding or confusion about what is being provided to them."

XXI. RECALLS UPDATE

CHRYSLER RECALLS 955,000 MINIVANS

Chrysler Group is recalling 955,000 minivans because an electrical problem could cause the driver's side airbag to fail. The vehicles affected are the Dodge Caravan and Grand Caravan, Plymouth Voyager and Grand Voyager, and Chrysler Town and Country from the 1998-2000 model years. Four people have been injured in crashes because of the defect, according to records submitted to the National Highway Traffic Safety Administration (NHTSA). There also have been 782 complaints about the defect to Chrysler and NHTSA. The defect involves a clockspring that supplies current to the driver's side airbag, the horn and the cruise control. If the clockspring is working properly, the airbag warning light will illuminate for a few seconds when the vehicle is started. If the airbag warning light isn't working properly, the clockspring may have failed. Chrysler began notifying customers about the recall last month. Dealers will replace the clockspring for

free on vehicles with less than 70,000 miles. The company will extend the warranty on the clockspring for vehicles with more than 70,000 miles. Chrysler recalled 1996-1998 model year minivans in 2002 because of the same defect, according to NHTSA.

MAZDA RECALL

Mazda Motor Corp. is recalling 42,000 Mazda3 sedans because their airbags might not deploy. The recall involves vehicles from the 2004 model year, which was the first year the Mazda3 was available. Mazda says the company has had no reports of injuries due to the defect. Mazda found that on some vehicles, the housing for the airbag sensor can crack and allow water to seep in. Should that happen, a short circuit would cause the airbag warning light to go on and the airbag might not fire. Mazda will notify customers of the defect very soon. Owners can get their vehicles repaired for free starting next month.

AUDI RECALL

Volkswagen AG is recalling 28,363 of its Audi A6 cars after finding that the throttle can stick because of ice build-up. Audi will replace the throttle body in all 1998 through 1999 model-year A6 cars equipped with a 2.8 liter V-6 five-valve engine and automatic transmission registered in cold-weather states only. Audi will repair the throttle in non-cold-weather states only upon request.

BFGOODRICH RECALLS 46,000 TIRES

BFGoodrich is recalling 46,000 passenger car and light truck tires because of poor ride quality and possible problems with the steel belts. The tire maker says there have been no accidents, injuries or property damage claims filed because of the problems. The recall covers tires made in April at the Fort Wayne plant under such brand names as BFGoodrich, Uniroyal, Liber-

ator, Medalist, Phantom and Prospector. The tires have identification numbers that begin with "DOT BF" and end with 1504 or 1604. All recalled tires will be replaced free. If you have any of these tires on a vehicle, contact your local dealer at once.

POLARIS INDUSTRIES ANNOUNCE RECALL OF ATVs

Polaris has issued a recall of the Polaris "Sportsman 700 EFI" ATVs. The throttle cable may bind when the handlebars are turned full left or full right, resulting in an increase in engine speed and unintended vehicle acceleration. In addition, the fuel line may rub against the vehicle chassis, resulting in a fuel line leak, which could be a fire hazard. There have been 19 reported incidents involving the throttle cable binding that may cause the ATV to accelerate. There have been 31 incidents, involving gasoline leaking from the fuel line rubbing against the chassis. Apparently, there have been no injuries or fires. All model year 2004 "Sportsman 700 EFI" ATVs with model numbers A04CH68CU, A04CH68AU, A04CH68AP, and A04CH68AQ are part of this recall.

The model number is on the rear upper frame tube located directly under the right side of the seat. The ATVs have black seats with a gray, red, and black chassis. "700 Sportsman" is prominently displayed on the right and left side of the chassis, body and fuel tank, and "EFI" is displayed on the instrument/headlight pod. The ATVs were manufactured by Polaris Industries, Inc., of Medina, Minnesota and were sold at Polaris dealers nationwide from March 2003 to August 2004 for between \$7,899 and \$8,899. Contact your Polaris dealer in order to receive a free repair.

BOMBARDIER AND JOHN DEERE RECALL 23,000 ATVs

Bombardier Recreational Products Inc, and Deere & Co., Moline, Illinois, are voluntarily recalling 23,000 all-

terrain vehicles because of a potential for brake failure. The U.S. Consumer Product Safety Commission announced the recall. Bombardier operates an out-board engine plant in Sturtevant, Wisconsin. The recall includes the 2003, 2004 and 2005 model years of the Traxter, Traxter MAX and Quest Bombardier ATVs and the 2005 model year of the Buck and Trail Buck John Deere ATVs. The vehicles were made by Bombardier, from Valcourt, Quebec, Canada, and distributed by Bombardier and John Deere dealers. The front brake hoses on the ATVs can be pulled out of the retaining brackets during use, causing the hose to be damaged by moving parts. The damage can result in a leak that could result in brake failure, leading to injury or death. No injuries have been reported, according to the CPSC. Bombardier-brand vehicles were sold from October 2002 through September 2004 for \$6,199 to \$8,399. John Deere-brand vehicles were sold from March 2004 through September for \$6,499 to \$7,799. Vehicles can be returned to the dealers for a free repair. For more information, call Bombardier at (888) 864-2002 or John Deere at (800) 537-8233.

TV/VCR CARTS RECALLED

Sauder Woodworking Co. is recalling 300,000 TV/VCR carts because they can tip over. This poses a risk of injury if the television set on the top shelf falls on a child. The Consumer Product Safety Commission made the recall announcement. The carts are white, light brown or light-reddish brown and about 29 inches wide, 17 inches deep and 25 inches high. They include a top shelf for a 20-inch or smaller TV, a middle shelf for a VCR and a lower storage area. Models 3355, 6355 and 7755 were sold at department, discount and home electronic stores nationwide from October 1991 through May 1999 for \$80 to \$100. The 9855 and 9755 models were sold only at Target stores. Consumers may contact Sauder Woodworking Co. (www.sauder.com) to receive a free retrofit kit and safe use information.

PLAYKIDS USA RECALL BABY WALKERS

PlayKids USA, Inc. of New York City has recalled 1,600 PlayKids USA baby walkers because they were not designed to stop at the edge of a step. The Consumer Product Safety Commission reported that the walkers fit through a standard doorway, but were not designed to stop at the edge of a step. Babies using these walkers could be seriously injured or killed if they fell down the stairs. No injuries have been reported. These baby walkers sold under the brand name "Playkids USA" at small independent specialty juvenile retailers nationwide from February 2003 through April 2004 for between \$29 and \$39. The walkers have model numbers PLK94STP, PLT95STP, PLK2000RC, PLK95, PLK94, PLK98STP, PLK2000 or PLK300 on the package and on a sewn-in label on the seat-back. Consumers should stop using the recalled walkers immediately and contact PlayKids at 718-332-3450 to receive a full refund.

XXII. SPECIAL PROJECTS

GROUP HOMES FOR CHILDREN

Group Homes for Children (GHFC) is a private non-profit agency whose exclusive mission is to serve the young people of the Central Alabama community. Their purpose is to offer shelter as well as residential and support services to young folks who are in need because of abuse, neglect, family crisis or abandonment. GHFC is committed to providing services and programs of such quality that the young people they work with will share their vision and will become a credit not only to themselves but to society. GHFC was established in 1973. During the past 30 years, the lives of thousands of children from Alabama and across the nation have been positively impacted. GHFC's programs have evolved over the years to meet the needs of youth in a changing society. Fortunately, its

commitment to its mission remains the same.

GHFC provides extensional care for some of Alabama's most vulnerable children. The agency is funded by a combination of contracts with the Alabama Department of Human Resources, government grants, private contributions, and fundraising events. Because of severe cut backs in funding by the state, the agency is badly in need of financial support. If you would like to help a worthwhile case, please make a contribution to GHFC. Contributions are tax deductible and will be greatly appreciated. The address for GHFC is 1426 South Court Street, Montgomery, AL 36104. You can reach them by telephone at 334-834-5512. You may also go to their web page, which is www.grouphomesfc.org.

CHARACTER EDUCATION NEEDED IN ALABAMA

Young people are growing up in an environment in which they are surrounded by all sorts of negative influences. Character Education is a means of combating the negative influences and creating programs that will teach valuable life lessons in character building and simple things such as good manners and respect for others. Character At Heart, Inc. is a 501 (c)(3) non-profit committed to building character in the youth of Alabama. Currently, over 30,000 children in 100 schools in 20 counties are building character today for a better tomorrow in our state. If you want to learn more about Character Education you can visit www.characteratheart.com or www.montgomeryparents.com.

XXIII. FIRM ACTIVITIES

EMPLOYEES SUPPORT NATIONAL FUNDRAISING CAMPAIGN

In honor of Breast Cancer Awareness Month, our firm's employees participated in the ninth annual Lee National Denim Day®. Lee Jeans invites compa-

nies and organizations nationwide to participate each year by allowing their employees and members to wear denim in exchange for a \$5 donation to the Susan G. Komen Breast Cancer Foundation. On October 8th, people all over the country joined together in an effort to raise awareness and funds for the fight against breast cancer. Because the event was held on a Friday and our firm already allows employees to wear denim on all Fridays, we allowed our folks to wear their denim on a Monday. We had a good number of employees who participated, wearing their pink-ribbon pins and their denim. The firm collected a considerable amount for the most worthwhile cause.

EMPLOYEE SPOTLIGHTS

MARK ENGLEHART

Mark Englehart, who joined the firm in January of 1999, currently practices in the firm's Toxic Torts Section. Mark handles complex business cases, environmental and toxic tort matters. In 2003, he was involved in the largest toxic tort settlement in U.S. history. This settlement doubled the previous mark in the case popularized by the film "Erin Brockovich." Mark, a graduate of Harvard University Law School, is admitted to practice in Alabama and Texas. He also serves as a contributing editor for this Report and does an outstanding job. Mark and his wife, Debbie, are the proud parents of Stephanie, who is a graduate student in landscape architecture at Auburn University. They are members of Eastmont Baptist Church in Montgomery. Mark is a most valuable member of the firm. If any of us have a tough legal question and don't know the answer, we all call on Mark to help.

STEVE DRINKARD

Steve Drinkard, who served two consecutive terms as a circuit court judge in the 19th Judicial Circuit for the State of Alabama, joined the firm in 1996. Steve currently practices in the Personal Injury/Product Liability section. A \$3.4 million jury verdict, obtained by Steve for his client in 2002 in a product

liability case, involving a personal watercraft, is the largest in Elmore County history. Steve is currently working on the Ford Explorer—Firestone litigation. Several of these wrongful deaths and severe personal injury cases occurred in Venezuela.

Steve's experience as a judge provided him with a unique insight into Alabama's judicial system. In fact, while on the bench, he was appointed to the Alabama State Bar's Citizen Conference on the Selection of Judges.

LARRY GOLSTON

Larry Golston works in the Consumer Fraud Section of the firm. He graduated from the University of Alabama in 1995 with a Bachelor of Art Degree. While attending Alabama, he was the social chairman of Alpha Phi Alpha Fraternity. Larry attended the University of Alabama School of Law, graduating in 1998. He previously worked for the Circuit Judge James P. Smith of the 23rd Judicial Circuit. He has also worked for Judge Sue Bell Cobb of the Alabama Court of Criminal Appeals. Larry, along with a small group of lawyers with Beasley Allen, frequently volunteer their time to speak to high school and lower grade students about the legal profession, personal development and how to get admitted to college. Larry and his wife, Danielle, have two children. They are members of More Than Conquerors Faith Church in Birmingham.

PAUL SIZEMORE

Paul Sizemore currently practices in the firm's Mass Torts Section. Paul has recently been the focus of numerous newspaper articles in Atlanta because of his representation of several families with nursing home abuse cases in the Atlanta metro area. Paul is now active in cases handled by the firm involving the drug Vioxx. He is also a frequent volunteer lecturer for local senior citizens' groups where he discusses consumer/exploitation issues. Both Paul and his wife, the former Jennifer Trull, are from the Birmingham area. They have three children, Colton, Aubrey, and Jackson, and are members of the Church of the Ascension in Montgomery.

GENIE PRUETT

Genie Pruett works in our Mass Torts Section and is Andy Birchfield's legal secretary. She has been with the firm for six years. Genie has three children, Patti Harrison (who also works in our Mass Torts Section), Micheal Prickett and Jennifer Ayers. Micheal's wife, Melissa, is a lawyer in our Mass Torts Section. Genie is the proud grandmother of seven grandchildren. She lives in Verbena with her husband John and three dogs—Abbie, Happy and Buddy. Genie will be very busy working with the Vioxx litigation. She is a very good employee and we are fortunate to have Genie with us.

KATHY GUNN

Kathy Gunn is a receptionist in the building that houses our Mass Torts Section. Kathy is one of four receptionists who operate the firm's very busy multi-line switchboard. She has a most difficult job due to the tremendous number of daily contacts in her section. Kathy and her husband, Scott, have been happily married for 19 years and have four children: 17-year-old fraternal twin daughters, Anna & Rachel; a 16-year-old-son, Jake; and Abbie, who is 14 years old. Kathy and Scott are active in the music ministry at Harvest Family Church. Kathy does an excellent job and we appreciate her dedication and hard work.

CANDICE GALLUPS

Candice Gallups currently works in our Graphics Department, which is under the Products Liability/Personal Injury Section. The Graphics Department plays an important role in our firm. They do everything from photo editing to video editing, to case management preparation for trial, to setting up equipment and actually going to trial to help present evidence. Candice has two daughters, 5-year-old Kaileigh and Kennedy, who is just 6 weeks old. Candice is a hard worker and we are glad to have her with us.

DORA JOHNSON

Dora Johnson, who has been with us for almost five years, currently serves as a legal assistant to LaBarron Boone

in our Products Liability/Personal Injury Section. LaBarron handles product liability cases, and that keeps Dora very busy. Dora's work is typical of all Legal Assistants in her section. One of the most important and challenging duties relates to the area of discovery, which is critical in product cases. Dora also helps prepare cases for trial and actually assists at trial. She is married to Warren Johnson and has a 26-year-old daughter. Dora is a very good employee and is a valuable part of our litigation team in her section.

XXIV. ONE LAST LOOK AT THE NATIONAL ELECTION

MOST IMPORTANT RACE

I believe the presidential race is the most important in recent years. But, Alabama has been largely ignored by both national campaigns. Neither national campaign has shown any real interest in stirring things up in our state. Bush is obviously taking the southern states—including Alabama—for granted. All of the activity on behalf of the candidates has come strictly from their local followers. The hardest working campaign in Alabama has clearly been that of the Democrats. Most of the Alabama Republicans have worked in Florida. If the election were today, I believe that Bush would carry the state, but not by a real large margin. In fact, if things break right in the last few days, the Kerry-Edwards ticket could pull a major upset in Alabama. Middle class folks are beginning to ask, "why am I supporting this President?" The more they see and learn about this Administration and especially Karl Rove, the more Alabamians are likely to vote for the Democratic ticket this time.

CONSUMER'S LAWYERS

It is no secret that my profession has come under heavy attack by the Rove-led Bush campaign. However, even if I **farmed** for a living like all my forefathers, I still couldn't support this Administration. Since I am a **lawyer** and I have never apologized for that, I have to consider Bush from my perspective. Personally, I consider it a distinct honor and a high privilege to have been able to help folks who were victims of corporate abuse and wrongdoing. It isn't hard to see that the Bush White House has made holding corporate wrongdoers accountable extremely difficult in this country. In fact, corporate wrongdoing has flourished during the last three years, as shown by the disclosures from companies like Enron (Bush's largest campaign contributor), HealthSouth, Adelphia and Halliburton. Many believe that catering to large corporations has been the Administration's top priority. That's due to the tremendous power and influence of Corporate America in Washington, D.C., especially over the Executive and Legislative Branch of government. Nobody can deny that consumers have had the short end of the stick when it comes to obtaining justice in this country over the past three years. I can say from experience that George Bush is the most anti-consumer President since Richard Nixon left the White House in disgrace. If reelected, it's my opinion that Bush will become even worse. What has been difficult in the past will be virtually impossible in the future. I don't believe that's what the American people want.

ROVE RUNS THE SHOW WITH AN IRON FIST

I respect deeply each individual's right to decide what candidate will receive his or her vote. But, I have an obligation to inform our readers about the Karl Rove position on an individual's right to their day in court. George Bush follows Rove's direction to the letter and as a result, Rove's position becomes Bush's policy on this issue. Rove believes large corporations need

total protection from lawsuits filed by individuals who are injured or whose loved ones are injured or killed as a result of corporate wrongdoing. Therefore, the Rove-led White House has done everything in their power to limit an individual's right to recover damages in lawsuits. They are making it much more difficult for victim's to have their case heard by a jury of their peers. All lawsuits are labeled "frivolous" by the tort reformers in Corporate America and they have done a pretty good job of selling that story. Now, we are seeing the legal rights of every American family being placed in further jeopardy by positions taken in the current presidential campaign.

THE NATION'S COURT SYSTEM IS AT STAKE

Bush and Cheney—with the support of the tobacco, pharmaceutical, automobile, and insurance industries—have attempted to make the court system a major issue in the campaign. Karl Rove, acting for Corporate America, is determined to take away an individual's right to trial by jury. Once one of our constitutional rights is abolished, the complete takeover of the entire government will be very easy. In my opinion, that's exactly what the obsessed Karl Rove is after. To reach his goal, Rove will destroy anybody who stands in his way. This President is his willing instrument and that's a sad commentary on our times. No person should be allowed to exercise such power and control over an elected President.

RIGHT TO TRIAL BY JURY IS THE LAST BARRIER OF DEFENSE

In my opinion, the differences between the two candidates for President on the legal system couldn't be greater. George Bush attacks what he refers to as "junk and frivolous lawsuits" because that's what his prepared script says he is to say. With all of the money that the Bush campaign has taken from Corporate America, and with Rove calling all of the shots, it is easy to see why the President talks as

he does. The Bush White House has severely penalized consumers and worked doubly hard to protect corporate wrongdoers. John Kerry and John Edwards have opposed efforts to shut the courthouse door to American consumers, and that's the right thing to do. They have stood up against the powerful corporate structure that is attempting to take over the government in this country. The Kerry-Edwards team has voted against legislation in the U.S. Senate that would protect corporate wrongdoers and penalize ordinary citizens who have become victims. We can't let the Bush-Cheney-Rove team's anti-consumer agenda continue for the next four years. No person who really believes in the constitutional right to trial by jury, a right that is **guaranteed** to every citizen in this country, should **vote** for Bush.

ONLY AN UNDECIDED VOTER SHOULD READ THIS PART

As we approach the final days of the campaign, if any of you are still undecided, I encourage you to read an article on Karl Rove in the November issue of the Atlantic Monthly. (<http://www.theatlantic.com/doc/prem/200411/green>) This scary article tells us a great deal about the man who really runs the Bush White House. The article reveals how truly bad Rove really is and how he will do literally anything to **destroy** an opponent. I can say without reservation that Karl Rove is the **most dangerous political figure** in this country. His power and influence are **bad** for America! That man's power and control over the president is enough for voters to say NO to Bush!

XXV. MY PERSPECTIVE ON STATE POLITICS

This has been a pretty dull election year for all of the state races in

Alabama. It appears that folks have little interest in any of the candidates in the contested races. That is unfortunate because there are some real important races on the ballot. For that reason, I hope that the voter interest gets into a higher gear before Election Day. But, we are rapidly running out of time. I will give you my views on the races, which are strictly my opinions, for what they are worth.

U.S. SENATE

I believe that my long-time friend Richard Shelby will be reelected to another term in the U.S. Senate with no difficulty. Clearly, he is one of the most powerful figures in Washington. I believe that the Senator has done an excellent job and is extremely popular in Alabama. Senator Shelby, who has been a good friend to Alabama consumers, has worked hard in Washington to protect their interests. I will cast my vote for the senior Senator from Alabama and hope that my Democratic friends will understand that we still need Senator Richard Shelby in Washington.

CONGRESSIONAL RACES

There are several important Congressional races this year. Obviously, some are more important than the others. Some of the candidates, including Artur Davis, will have no difficulty in returning to Washington. Artur faces token opposition, and that's good for the people in his district as well as for the entire state. The freshman congressman is one of the truly bright lights on the national political scene. I recommend the following candidates for your consideration in three of the races:

- District One: Democrat Judy Belk
- District Three: Democrat Bill Fuller
- District Five: Democrat Bud Cramer

I sincerely believe that these candidates are the better choices in their respective races. Bud Cramer is the incumbent in his race and should win by a large margin. Yet, because of his

seniority, it is critically important that he be reelected and I hope his people won't take his race for granted. Judy Belk and Bill Fuller are challenging two well-financed incumbents, and that makes their races most difficult. Their opponents are not bad folks, but they are being heavily financed by Corporate America—and that's enough for me and should be for most folks.

COURT RACES IN ALABAMA

I have been really surprised at the lack of interest in the statewide judicial races. Thus far there has been almost no emphasis placed on these races by either political party. That's most unfortunate because the court races are critically important to the people of Alabama. While I realize fully that most folks don't know much about some of the candidates who are running, I hope there is enough time left for the voters to become knowledgeable about their qualifications and background experiences. I know most of the candidates and have had the opportunity to review the records of those I don't know. Accordingly, I believe that I have a pretty good idea of those who are best suited to serve on our appellate courts. I could make specific recommendations in each race, but have elected not to do so. There is a better way to determine whom we should vote for. First, find out where the candidates' money comes from, examine whether their legal background and experience have prepared them to sit on our state's highest court, and then decide who is the best person to serve as a judge.

A few years back a well-known actor in a popular movie observed: "show me the money!" If he had said, "show me the source of the money," that would be a pretty good voter **guide** to be applied in all judicial races. By tracing the money in these races, you will find where the big corporate money lands. The candidates who take the millions of dollars from the large corporations always seem to wind up being very much anti-consumer once they get on the bench.

A FINAL WORD ON POLITICS

I suggest you take a look at where a candidate's money comes from in each race that is on the ballot on November 2nd—not just the judicial races—and then decide which candidate is more likely to be consumer-friendly and which ones will be connected at the hip to Corporate America. If ordinary folks are ever going to have a real voice in government in Washington and in the state houses around the country, the place to start is at the ballot box. When ordinary citizens start turning out in large numbers to vote, we can overcome the big money. Unfortunately, sitting at home on Election Day has become a way of life in the United States for way too many people. That will change when folks come to recognize the urgent need to get involved. Until that change comes about, however, the big money from Corporate America will continue to control our elections. Maybe this year will prove to be the start of a trend in the right direction. I hope that will be the case. In any event, regardless of how you vote, please take the time to vote!

XXVI. SOME PARTING WORDS

A few weeks ago, I was called by a newspaper reporter who works out of the nation's capitol, concerning the presidential race. During the course of a lengthy conversation, this reporter asked a number of questions about political activities in the south and specifically in my home state of Alabama. The thing that got my attention, however, was when this gentleman told me at the end of our conversation that I had the distinction of having made Karl Rove's official enemies list. I must admit that at the time I was not sure this was a list I really wanted to make. Looking back at the conversation, I believe it was to serve as sort of a warning for me. Nevertheless, if I am on a Rove hit list, I

must be doing something right. I have been in total opposition to everything that Karl Rove apparently stands for and that won't change.

In the last few days a Bible verse has come to me from a number of unrelated sources. Several folks have either mailed this particular verse to me or mentioned it during a phone call. One of the persons was a young employee who has worked at the firm while attending Jones School of Law. Before leaving the firm, the young man reminded me that God will always support us and protect us if we will simply put our trust and faith in Him. He referred me to his favorite Bible verse, which is from the Old Testament:

But they that wait upon the Lord shall renew their strength; they shall mount up with wings as eagles; they shall run, and not be weary; and they shall walk, and not faint.

Isaiah 40:31

The next morning, during my quiet time, I was reading The Upper Room and you will never guess what the scripture of the day was. If you said Isaiah 40:31, you would be correct. In addition, the thought for the day was: "Remembering God's past faithfulness helps us to trust God with our present and our future." If I needed any confirmation that God was trying to get my attention, that was it. I am slowly realizing that waiting for the Lord and trusting Him to take care of us in every way, which includes protecting us from our enemies, including Satan, is the **only** way. God is truly the source of all love, power and strength and that's an absolute certainty. My prayer is that all men and women everywhere will soon come to that understanding.

In closing, I will pass on something else that this young man reminded me of. This employee said that he had learned a great deal while working at our firm and wanted me to know that our work and mission was very impor-

tant to folks who need our help and protection. Sometimes, I need to be reminded of why I keep on doing what I do in this very rough and tumble world. As the song in the play "Annie" says, it can be "a hard knock life!" That is so true, but we are equipped to handle what comes our way. It is amazing how God speaks to us even when we really don't want to listen. The fact that these reminders came to me at a time when I needed it is all the evidence that I needed to realize that God is still in control of my life and that I have nothing to fear from any source. That reassurance is all that I need to keep going.

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