THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

The State's Case Against ExxonMobil

Mediation is over in the $3.6 billion legal dispute involving the State of Alabama and ExxonMobil, without a settlement being reached. After weeks of negotiations, the case will now go back to the Alabama Supreme Court for a decision. The Supreme Court justices had ordered us to mediate the case after ExxonMobil appealed the jury verdict that we had won on behalf of the State against the giant oil company. In reaching its verdict, a Montgomery County Circuit Court jury agreed that the oil company was guilty of fraud and had intentionally underpaid royalties from natural gas wells drilled in state-owned waters along the Alabama coast. This was the second time that a jury had found ExxonMobil guilty of fraud. The first verdict was reversed by the Supreme Court on a technicality and sent back for a second trial.

We proved at trial that ExxonMobil had intentionally underpaid royalties from natural gas wells drilled in state-owned waters along the Alabama coast. The jury returned a $11.9 billion verdict in November 2003, but Circuit Judge Tracy McCooey reduced the verdict to $3.6 billion. ExxonMobil then appealed to the Alabama Supreme Court and the mediation order followed. Legal scholars who have read the trial transcript say that there will never be a stronger case of fraud to ever go to the Alabama Supreme Court. Having been involved in the trial, I totally agree with their assessment. As I have written previously, the fraud in this case was committed at the highest levels of the company. This was not a case of mistake or even fraud committed by a low level employee. This misconduct went all the way to the very top and was carefully planned by company executives. The internal documents from ExxonMobil prove the fraudulent conduct beyond a shadow of any doubt. The bottom line is that ExxonMobil believed that it would never be caught because of the complexity of its scheme and that if they were caught, the company could simply pay the amount it had cheated the state out of plus 12% interest. That is all documented in the record of the trial. In any event, we are confident that this case will now be affirmed by the Alabama Supreme Court.

Top Alabama Democrats Wants To Replace Party Chairman

Almost all of Alabama's top Democratic leaders have called on state Democratic Party Chairman Redding Pitt to step down. These leaders want to replace their chairman with someone who would be a stronger voice for the party in the 2006 elections. Lt. Governor Lucy Baxley, Agriculture Commissioner Ron Sparks, House Speaker Seth Hammett and Senate President Pro Tem Lowell Barron signed a joint statement calling for the move. The content of the statement read in part: "As the Democratic elected officials who will place our names on the ballot in two years, we do not believe the current leadership of the Alabama Democratic Party serves our interests, and we call on the State Democratic Executive Committee to call for an election in early December for a new State Party Chair." Subsequently, all of the Democratic state senators signed a similar letter calling for Redding to step down. Court of Criminal Appeals Judge Sue Bell Cobb had been the first Democrat to call for a new chairman, having done so soon after the general election. Redding responded to the requests by saying that he won't step down and plans to serve out the remainder of his term, which runs through January 2007. Redding was elected state party chairman in March 2001 with the active backing of Don Siegelman, who was Governor at the time. He was re-elected to a four-year term in January 2003 without opposition.

To say November 2nd was a bad day for Democrats in Alabama is an understatement. It is felt by many observers that Redding spent too much time focusing on the Kerry presidential campaign this fall and too little helping Democratic candidates on the state and local levels. Redding was a law school classmate of Kerry's and probably was in line for a move to Washington if he had won. Frankly, I don't believe any one person was responsible for what happened this time to Democratic candidates in Alabama. The national party wrote Alabama off as it did all of the southern states. As I have said on numerous occasions, I don't believe a party can ignore the South and win the presidency. I believe that now more than ever. Our state candidates have suffered in presidential election years as a result of this misguided strategy. Personally, I would like to see a change in

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the state Democratic Party leadership. But, we need much more than that to regain the ground lost in recent years. Democrats need to go back to their political roots and become the party of the people once again. If that doesn't happen, you may see a strong third party emerge in our state.

Will Roger, the American humorist, who is one of my all-time favorite people, made this observation on political parties: "I'm not a member of an organized public party, I am a Democrat." While he obviously was not talking about the Alabama Democratic Party at that time, his wit and wisdom certainly apply to our current situation in Alabama. If there has ever been an organization that is totally unorganized, and also largely ineffective, it has to be the Alabama Democratic Party. For the good of our state, I sincerely hope that we can rescue and rebuild the Democratic Party.

Defeating Amendment Two Was A Mistake

Unofficial returns from the election show Amendment Two losing 690,241 to 687,747—a margin of 2,494 votes out of more than 1.37 million cast. Amendment Two, if passed, would have removed segregation-era language from Alabama's constitution requiring separate schools, levying poll taxes, and saying that there is no right to an education at public expense in Alabama. I believe rejecting Amendment Two was a major mistake. There is no way that this Amendment could have been used to increase taxes. I have talked to a number of tax lawyers about the measure. None of them felt that taxes should have been an issue on this vote. Our state badly needs to move forward on the race issue and get away from the negative image that has badly hurt our state. We made a mistake on this vote, and I feel that the voters were misled on the tax implications.

It now appears, however, that there will have to be a recount of the vote on Amendment Two. Alabama law provides for a recount when a constitutional amendment loses by one-half percent. In the case of Amendment Two, one-half percent of the vote is 6,889 ballots. An attorney in the Secretary of State's office told the Associated Press that the 2003 recount law allows a losing candidate to call off a recount, but there is no similar provision for canceling a recount on a constitutional amendment. This would mean that a recount is automatic where an amendment is involved. The recount law makes the state responsible for the cost of a statewide recount. That is an expense we don't need because of the money problems facing our state. Maybe John Giles and the Christian Coalition will furnish some of the leftover gambling money to help the state out of a bind.

Alabama Scores High In Attracting Small Business

It may come as a shock to the tort reformers, who have tried their best to sell the story that our state is bad for business, that Alabama is actually considered to be one of the best states in the nation for small business. As we all know, this has been the case for years and it is good to see the truth being told nationally. There are many features that make the state attractive. Our colleges and universities, and especially the research facilities at these facilities, an improving public school system in most counties, and the climate and business atmosphere are a few of them. The State of Alabama ranked 8th in the Small Business Survival Index for 2004. The Small Business & Entrepreneurship Council, a nonpartisan Washington group, studied how public policy affected small businesses and entrepreneurs in each state. Alabama did extremely well in all categories that were evaluated. Alabama's strong showing wasn't a surprise to public officials in the state and to those in government who have the job of selling our state to industrial and business prospects. Actually, we should be selling Alabama to the world, and the media attention given our state's excellent business climate is certainly welcomed.

ADEM Director Removed

I am sure all of our readers are aware by now that the Alabama Environmental Management Commission has fired Jim Warr as Director of the Alabama Department of Environmental Management. While I hate to see any person lose a job, this presents Alabama with a unique opportunity to move ahead in some critical areas. Jim has, either in fact or in name, directed ADEM since it was formed in 1982. Many who are concerned about the environment have been critical of the role that ADEM has played in carrying out its duty to protect citizens from the polluters. Being ranked dead last in the nation in environmental protection, Alabama desperately needs strong leadership in this area.

It appears that the Commission will be able to conduct a nationwide and fully public search for the best possible person to lead ADEM. There will be a 10-person committee appointed to carry out the search. We definitely need a person who will put Alabama's environment and citizens on an equal footing with corporate interests. In my opinion, we certainly don't need someone who will pay lip service to public health and then do whatever the large corporations and other polluters want. It would actually be worse for Alabama to get someone who talks a good game, but still continues to follow the failed policies of ADEM's past. It is critical that we have a real public servant who is dedicated to protecting the environment to lead ADEM. Responsible businesses, as well as ordinary citizens, should recognize and benefit from that type of leadership

In an interesting development, two former state officials filed a lawsuit on October 16th to remove one of the members of the Alabama Environmental Management Commission who voted to fire Warr. Dewey White of Birmingham and Leigh Pegues of Montgomery filed the suit against Scott Phillips of Birmingham in Montgomery County Circuit Court. They contend Phillips was illegally appointed to a position on the Commission. Phillips was on the winning side of the vote by the commission to fire the director. I have to wonder who all is financing this lawsuit.

Finally, even if a good leader is selected to head ADEM, the Commission and the Legislature have much work to do. ADEM currently operates under the weakest environmental laws and rules in the nation, and, if my information is correct, has the smallest state budget. Selecting the right leader for ADEM would be the first step in a long journey to give Alabama the vision and direction it needs and deserves. We must do a better job in our state of protecting the environment. I am convinced that striking a balance between business needs and protecting the environment is not impossible. In any event, it's certainly worth a try.

Alabama Is The Winner On The ExxonMobil Terminal Decision

ExxonMobil has withdrawn its plan for a liquefied natural gas terminal in Mobile. This move comes after a $1.75 million investment in the property by the giant oil company and a great deal of local criticism and concern relating to safety. Company officials notified the Docks Director in late October that the company would not be renewing its extension on the state property. ExxonMobil says it has made progress on several other LNG terminal sites and no longer has any interest in the Mobile site. Company officials have said that it was on a tight schedule to build Gulf Coast LNG terminals that will offload superchilled gas from tankers, rewarm it and inject it into the nation's pipeline system. Apparently, the company is considering putting its natural gas facilities on the Texas Gulf Coast.

ExxonMobil had paid $1.75 million—a signing deposit and one option payment—on the $38 million purchase of the old Navy base on Mobile Bay. The company had a three-year option on the land, which now goes back to the Port Authority. LNG safety became a volatile issue, which I believe became too much for ExxonMobil to handle. Opponents claimed 2,000 people living near Mobile Bay would be at risk of an accident or terrorist attack at the terminal. You may recall that the $600 million terminal was proposed to be located near a residential area and an elementary school about two miles south of Mobile's city limits. In my opinion Texas' gain is not Alabama's loss. I just hope and pray that the safety concerns never become a reality.

II. LEGISLATIVE HAPPENINGS

Alabama Legislature Has A Most Successful Special Session

The Alabama Legislature should be commended for getting down to work and for passing the Governor's bills in record time. The Legislature went into special session on Monday, November 8th to consider a plan designed to control rapidly rising health insurance costs for public employees and passed the bills on November 16th. The bill shave now been signed by Governor Riley and are law. Alabama's costs for providing health insurance coverage to state workers and education employees have risen from $320 million to $970 million in six years. The Governor first tried to address the issue in the last regular session of the Legislature, but failed to get anything done. The new plan passed in this session with virtually no opposition.

The special session will impact citizens in every county because 340,000 public employees, retirees and family members—or nearly 8% of Alabama's population—are covered by the state's health insurance programs. The Governor's five bills won't immediately affect the pocketbooks of most active and retired public employees, but smokers and some future retirees will pay more. Interestingly, the two boards that oversee the health insurance programs for public employees will now have the authority to raise rates on all participants.

State health insurance experts predict the changes will save $50 million in the first year and $300 million over five years. Public employees' last cost-of-living raise was 3% in October 2002. Traditionally, the Legislature gives public employees a cost-of-living raise in the second and fourth years of a four-year term, but the traditional second-year raise didn't happen this year because of the state's financial concerns. It will be interesting to see whether state employees and public school teachers will receive badly needed pay increases in 2005. Hopefully, there will be enough money available to get this done.

Silver-Haired Legislature Comes To Town

The Silver-Haired Legislature, which includes citizens over 60 elected from senior citizen centers around the state, held its annual session in Montgomery in late October. This group always works hard to make some excellent suggestions for our state. The organization recommended that the Alabama Legislature pass a bill that would allow Medicaid to fund home health care for patients who otherwise would have to be in a nursing home. Bill Harrison of Huntsville, speaker pro tem of the Silver Haired Legislature, told the Associated Press: "This would allow them to remain in familiar surroundings. We should give them that choice." He said the cost of home health care would be about one-third what it costs to keep an elderly patient in a nursing home. Silver-Haired Legislature leaders discussed their priorities at a news conference at the State House after meeting for three days in the House chamber. The organization's speaker, Bill Adams of Ardmore, said the recommendations would be presented to members of the real Legislature to be considered during next year's regular session. The Silver-Haired Legislature also:

- Recommended that the Legislature continue to fund a program that makes free prescription drugs available to some low-income senior citizens;
- Asked the Legislature to pass a bill that would prohibit nursing homes

from requiring families of patients to sign agreements promising to take any grievances to arbitration instead of going to court; and

- Urged lawmakers to remove the sales tax on food and nonprescription drugs from Alabama residents 65 or older.

Our legislators would do well to consider these recommendations. It is most significant that nursing homes and arbitration were considered major areas of concern. Maybe some of the group's members should run for the real Legislature. If so, they might just add a great deal to the legislative process. Perhaps, this group set a good example for the elected legislators to get the job done in the recently completed special session.

ALABAMA REPUBLICANS SET 2005 AGENDA

Republicans in the Alabama Legislature have set a legislative agenda for 2005 without waiting for the Governor to present his proposals for next year's legislative session. In a well-attended news conference, the House and Senate Republican Caucuses announced their priorities for the Legislature's 2005 regular session, which starts on February 1st. It is sort of unusual for the GOP caucuses to be pushing their own agendas rather than waiting to see what Governor Riley, a Republican, proposes. In any event, the bills on the Republican caucuses' agenda for 2005 are:

- Banning of same sex marriages;
- Stopping annual property reappraisals;
- Combining the two boards that oversee the health insurance programs for state workers and education employees and no longer allowing active and retired employees to control a majority of the seats on the board;
- Giving new power to the Alabama Commission on Higher Education to close colleges;
- Setting a cap on how much the Legislature can appropriate each year by not letting it exceed the average of the revenue estimates by the Executive Budget Office and the Legislative Fiscal Office;
- A ban on "pass-through pork" projects;
- Banning the transfer of money between political action committees;
- Strengthening the state's open meetings law and increase the fines for a violation; and
- Placing public school administrators and assistant administrators on contracts rather than being given tenure.

While I support most all of the items on the agenda, I wish my Republican friends had included a few more things for ordinary people to their list. For example, I would like to have seen more emphasis placed on public education's needs, something for Alabama consumers, and a more comprehensive and meaningful campaign finance reform package. In any event, it is good to see that legislators are "thinking, planning and working." Maybe this will spur the Democrats in the Legislature to come up with their agenda in advance of the session. We are know that the powerful special interests will have their own agenda and that's what should really concern all Alabama citizens. With the 2006 elections already being discussed, I predict the 2005 regular session will be most interesting and entertaining.

III. COURT WATCH

CAPS ON DAMAGES HAVE NO EFFECT ON PREMIUMS

Putting caps on the amount of damages that juries can award has been promoted very hard by the "tort reformers." The "reformers" made promises that with caps in place, insurance premiums would go down. That simply isn't true and must have known it. The argument that capping damages in medical malpractice cases will lower premiums for doctors and, in turn, make health care more affordable for consumers has just gotten a great deal weaker. GE Medical Protective, the nation's largest medical malpractice insurer, recently was forced to admit that medical malpractice caps would not result in lower premiums for physicians. This admission from Medical Protective was contained in a regulatory filing with the Texas Department of Insurance. The company submitted a document to the department in October of 2003 explaining why the insurer planned to increase physician premiums by 19%. The Medical Protective rate increase requested was submitted just six months after Texas enacted caps on medical malpractice awards. Instead of reducing premiums, the insurance company asked for a huge increase. That has been the history of caps and insurance premiums in all states in which tort reform has been enacted.

Earlier in 2003, the Texas Legislature passed a $250,000 cap on non-economic damages for victims of medical malpractice, which was the result of insurance companies, including Medical Protective, lobbying hard for the change and spending a pile of money. However, according to documents that Medical Protective submitted to the Texas Department of Insurance, "Non-economic damages are a small percentage of total losses paid." Medical Protective further stated that "Capping non-economic damages will show loss savings of 1.0%." Compare this with a paper dated March 2004 that was posted on Medical Protective Company's website, arguing that capping non-economic damages is a "critical element of tort reform because in recent years we have seen non-economic damages spiraling out of control."

As Douglas Heller, the executive director of the Foundation for Taxpayer and Consumer Rights (FTCR), stated, "When the largest malpractice insurer in the nation tells a regulator that caps on damages don't work, every legislator, regulator and voter in the nation should listen." Heller further stated that Medical Protective's rate increase shows that insurance companies obviously can't be trusted when it comes to the issue of caps on medical malpractice. This isn't the first time that Medical Protective has sought rate increases in a state that also has caps on damages, nor is it the first admission by the insurance industry that caps fail to alleviate the problem of increasing premiums. In California, a state that also has caps set at $250,000 for non-economic damages, Medical Protective sought a 29.2% rate increase. However, due to the regulation system in place in California, the FTCR was successful in challenging the rate increase and getting the increase reduced by 60% of what Medical Protective was requesting. Unlike Texas, the California Insurance Commissioner has the regulatory authority to block inappropriate insurance increases. As a result, the California Department of Insurance and FTCR have been able to stop $50 million in proposed rate hikes since 2003. It is clear that regulations such as this are the key to keeping medical malpractice premiums from increasing, not the abrogation of someone's right to recover adequate damages for injuries sustained as a result of physician error. Incidentally, Medical Protective Co. is an arm of General Electric Co. The recent revelations are compelling evidence that caps simply don't work to lower insurance rates. This is a prime example of what happens when the news media buys the "tort reform" myth that caps will reduce insurance premiums.

Source: *The Wall Street Journal*

Judge Relaxes Gag Order In Death Suit Against Coal Giant

We wrote recently about the gag order that had been entered in the Drummond case. Since that time the federal judge in charge of the case has relaxed the gag order aimed at lawyers in the wrongful-death lawsuit against Alabama's largest coal company. U.S. District Judge Karon Bowdre ruled that her order "went further than necessary," noting that the original order was issued partly because of misconduct by the plaintiffs' lawyer. Two Tuscaloosa professors, who challenged the gag order, called the recent court order a victory for the First Amendment. One of the professors has covered the involvement of Drummond Co. in Colombia for years. The effect of the change in the court order is to allow public discussion about parts of the case by others. Judge Bowdre's order now applies only to the lawyers in the case.

The 2002 civil suit against Birmingham-based Drummond Co. stems from the shooting deaths of three union organizers in Drummond's Colombia coal mine. The suit alleges the Drummond Co. supported anti-union fighters who pulled three union leaders from a bus and shot them to death in 2001. The slain men had ties to a Colombian union representing Drummond workers. The company has denied any involvement in killings or anti-union activities.

New Standard Set In Libel Suits

An Alabama Supreme Court ruling in a Brewton defamation suit has added a new element for determining malice when a falsehood about an individual appears in a newspaper report. The Supreme Court, in a unanimous decision, ruled that a jury must decide a defamation suit against a former Brewton newspaper editor and the Brewton police chief over an erroneous report in *The Brewton Standard* about a drug arrest. A former candidate for the Escambia County Commission had filed suit after the newspaper published an erroneous story in August 2000, reporting that the candidate had been arrested and charged with possession of marijuana and drug paraphernalia. In fact, the candidate had never been arrested or charged. At issue was what was said during a telephone call between the chief and the editor. The chief claims he told the editor that the person arrested was "Clinton Keith Wiggins." The editor claimed, however, that the chief had said it was "Raymond Wiggins." Obviously, there was a misunderstanding. The court concluded that the case includes "substantial evidence of a deliberate falsehood" by one of these defendants since both of them knew "Raymond Wiggins well."

The lower court had thrown out the case, saying both defendants had **qualified immunity** from such libel suits. But the Supreme Court in its ruling said the question is "whether evidence of a deliberate lie constitutes substantial evidence of common-law malice." This precise issue had never been directly addressed in prior cases by the Alabama court. Up until this case, plaintiffs in libel cases had to prove that published statements were false, that the false information was knowingly published with malice, and that the plaintiff's reputation was damaged as a result. This decision appears to change that rule. It should now be easier for persons to sue newspapers when there are errors made in information supplied to the papers.

Some public officials in certain situations enjoy protection from being sued for defamation. This is a defense referred to as an **absolute privilege**. Newspapers have **qualified privilege**, a defense that can be lessened by how reporters present and research stories. The justices in the Brewton case ruled that ordinarily a trial judge would decide whether a statement is "privileged." The court ruled, however, that application of privilege in this case hinged on the **credibility** of the defendants. The court stated: "If a jury were to believe Chief Mallard, it must necessarily disbelieve Wallace (the editor)." In such a case, the court now says the newspaper report will not be privileged. I must confess that this decision appears to drastically change the libel laws in Alabama. I am not sure that this is a **good** change in the law. It will certainly make newspapers much more careful in dealing with their sources when the subject is a matter of controversy. It will also cause some good stories—that should be written—not to make the papers.

Supreme Court Issues Standard for Class Action Settlements

An order from a trial judge giving final approval to a class action settlement was reversed and remanded by the Alabama Supreme Court recently. The issue before the court was whether the trial judge had conducted a sufficient "rigorous analysis" in determining whether to certify the class. The high court concluded that the requirement for conducting a "rigorous analysis" of the elements of certification, as required by Alabama law, extends to conditional certifications for settlement purposes. The Alabama court declined to follow language from older federal appellate decisions and Professor's Newburg leading treatise on class actions suggesting that a "relaxed standard" should apply to the elements of certification in a settlement context. It should also be noted that the United States Supreme Court held almost directly to the contrary in a 1997 opinion. My assessment of this opinion is that our Supreme Court simply doesn't like class action lawsuits very much.

Supreme Court Declines To Hear Drug Maker's Appeal In Fen-Phen Case

The U.S. Supreme Court has refused to hear an appeal from a drug manufacturer that sought to limit evidence that fen-phen users want to present in their lawsuits claiming heart valve damage. This appears to have been a defeat for Wyeth, the maker of the drug. The Court let stand a lower ruling that a federal judge went too far when he issued an order restricting the evidence. The lower court judge reasoned that the diet drug users had violated a $3.75 billion settlement agreement with the Madison, New Jersey-based company. Wyeth argued that former users of its Pondimin and Redux pills violated the agreement not to seek punitive damages when they chose to "opt out" of the federal class action settlement to pursue their own lawsuits. The company wanted to keep the plaintiffs from using evidence in state court such as evidence suggesting Wyeth placed marketing ahead of health and safety concerns.

The U.S. Court of Appeals for the Third Circuit disagreed, ruling that the judge's order improperly limited evidence that could help plaintiffs prove their injury. The intermediate appeals court said the federal judge's action also didn't properly consider the rights of state courts because the lawsuits were being heard there. Wyeth pulled Pondimin and Redux, the fenfluramine half of fen-phen, from the market in September 1997. This came after reports some users had heart valve damage and a few had a deadly lung condition. Fen-phen was never an FDA-approved combination. The phentermine half is still being sold. The Supreme Court's action means that plaintiffs will now be able to present evidence previously barred, but they still may not be able to use those matters that are relevant only to a claim for punitive damages.

Supreme Court won't Review Securities-Related Cases

The United States Supreme Court has declined to hear four securities-related cases involving federal jurisdiction, arbitration, and timeliness issues. In the first case, the Supreme Court refused to review the Alabama Supreme Court's conclusion that certain notes issued by Bruno's, Inc. were "covered securities" under the 1998 Securities Litigation Uniform Standards Act (SLUSA) at the time they were sold, even though by then, Bruno's had been delisted from the NASDAQ stock market. The buyer had argued that, while the notes were once covered securities, they were not at the time it bought them because Bruno's had been delisted from a national exchange. According to the state high court, the relevant time for the determination of whether a security is a covered security is the time of the alleged wrongful conduct. If that is the case, the court said the wrongful conduct did not occur at the time of purchase, but on the date of the note's prospectus, which contained the alleged misrepresentations.

The second case that the U.S. Supreme Court refused to hear also addressed SLUSA retroactivity. The court let stand a ruling by the U.S. Court of Appeals for the Fifth Circuit, which affirmed the dismissal of a state law class securities suit by Enron Corporation investors. The decision was reached even though the conduct complained of occurred before SLUSA was enacted. The Fifth Circuit had said retroactive application was permitted because SLUSA governs only secondary conduct—procedural requirements for filing certain state law securities claims—and not the primary conduct that is the subject of those claims. Lawyers for the investors had argued that the Supreme Court should address the important question of whether a statute (SLUSA) that impairs a plaintiff's ability to recover for pre-enactment conduct has an impermissible retroactive effect. The plaintiffs' lawyers argued that applying SLUSA retroactively would deny her clients and similarly situated investors of any meaningful opportunity to seek compensation for the fraud perpetrated by Enron officers, directors and accountants.

The third case involved the settlement of a class securities fraud case. The High Court chose not to review a ruling by the U.S. Court of Appeals for the Third Circuit that affirmed a lower court's approval of a $10 million dollar cash settlement of litigation against Nice Systems, Ltd. The appeals court had ruled that the district court correctly concluded that the settlement appeared fair, reasonable and adequate in light of the attendant risks of litigation.

The fourth case involved an employment dispute between a brokerage firm and two of its former stockbrokers. The Supreme Court let stand a ruling by the U.S. Court of Appeals for the Sixth Circuit concerning the time period for moving to vacate an arbitration award. The defendants in the case moved the district court to vacate an arbitration award almost seven months after the award was filed. The lower court had denied their motion as untimely because there was a three-month period set out in the Federal Arbitration Act.

Chamber Brags About Its Successful Campaigns

The U.S. Chamber of Commerce is bragging to anybody who will listen about their overwhelming wins in the November judicial races around the country. In 15 Supreme Court races in a dozen states—including the two most vigorously contested races in Illinois and West Virginia—the Chamber conducted what it referred to as "voter education" programs at a tremendous cost. A Chamber spokesman said they "won every race in which they were involved." It now appears that the Chamber spent millions of dollars in a number of states and were up to their necks in politics. I have never believed that Chambers of Commerce should be involved in partisan politics, but they are now without a doubt.

Voters don't even seem to care that the Chamber's judicial campaigns are funded by the insurance, tobacco, drug and chemical industries. These industries have spent literally billions of dollars over the past 30 years in a concerted effort to take away the constitutional rights of American families. Their goal is to close the courthouse door to ordinary citizens, and that is extremely dangerous to our nation's future. A strong court system is absolutely essential for any country that claims to be a republic. It is rather ironic that Adolph Hitler's cleverly planned take over in Germany required the absolute destruction of that country's judicial system. Lawyers became the target of the Nazi party and were labeled as the "bad guys" and placed on the "hit list."

IV. THE NATIONAL SCENE

9/11 Victims Receive $38.1 Billion In Payments

A recent report sets out how the victims of the September 11th terrorists' attacks have been compensated. This includes individuals killed or seriously injured and individuals and businesses impacted by the strikes. Thus far, the victims have received $38.1 billion in compensation, with insurance companies picking up the largest portion of the tab, according to the study released last month. The report by the Rand Institute for Social Justice found that civilians killed or injured have received an average of $3.1 million per person from the government, charities and insurance companies.

In such a large-scale disaster, even the secondary assistance added up to billions of dollars in compensation. About $3.5 billion was paid to displaced residents, workers who lost their jobs, and those who suffered emotional problems or were exposed to environmental dangers. Results of the study raise questions about the future role of insurance companies in the response to any attack. A federal guarantee protecting companies against major financial losses in the event of another attack is set to expire at the end of 2005. Some in Congress are already pushing for an extension of that deadline. The report notes that some lawsuits, filed by individuals and companies, are still pending. The outcomes of these cases will change the final compensation figures. One such case is the ongoing court battle between World Trade Center leaseholder Larry Silverstein and his insurers. Researchers did not include the billions in federal dollars allotted for rebuilding lower Manhattan's infrastructure because their study focused on payments made to people or companies.

The crashes of passenger planes into the World Trade Center, the Pentagon, and a field in Pennsylvania together made up the largest terrorist strikes in U.S. history, killing 2,551 civilians and seriously injuring another 215. The attacks also killed or seriously injured 460 emergency responders. Lloyd Dixon, a RAND senior economist and lead author of the report, stated: "The compensation paid to the victims of the attacks on the World Trade Center, the Pentagon and in Pennsylvania was unprecedented both in its scope and in the mix of programs used to make payments." Questions about equity and fairness were raised, but have no obvious answers. By addressing these issues, the nation might be better prepared for future terrorist attacks. It certainly appears that a great deal of work went into the study. Evidence came from many sources so that the amount of compensation paid out by insurance companies, government agencies and charities following the attacks could be estimated. Some of the findings include:

- Insurance companies expect to make at least $19.6 billion in payments, comprising 51% of the money paid in compensation.
- Government payments total nearly $15.8 billion (42% of the total). This includes payments from local, state and federal governments, plus payments from the September 11th Victim Compensation Fund of 2001 that was established by the federal government to compensate those killed or physically injured in the attacks. The total does not include payments to clean up the World Trade Center site or rebuild public infrastructure in New York City.
- Payments by charitable groups comprise just 7% of the total, despite the fact that charities distributed an unprecedented $2.7 billion to victims of the attacks. Because of concerns that liability claims would clog the courts and create further economic harm, the federal government limited the liability of airlines, airports and certain government bodies. The government established the Victim Compensation Fund to make payments to families for the deaths and injuries of victims. In addition, the government funded a major economic revitalization program for New York City.

RAND researchers found that businesses hurt by the attacks have received most of the compensation that the study was able to quantify. The families of civilians killed and the civilians who were injured received the second-highest payments. The study found that:

- Businesses in New York City, particularly in lower Manhattan near the World Trade Center, have received $23.3 billion in compensation for property damage, disrupted operations, and economic incentives. About 75% of that came from insurance companies. More than $4.9 billion went to revitalize the economy of Lower Manhattan.
- Civilians killed or seriously injured received a total of $8.7 billion, averaging about $3.1 million per recipient. Most of this came from the Victim Compensation Fund, but payments also came from insurance

companies, employers and charities.

- About $3.5 billion was paid to displaced residents, workers who lost their jobs, or others who suffered emotional trauma or were exposed to environmental hazards.
- Emergency responders killed or injured received a total of $1.9 billion, with most of that coming from the government. Payments averaged about $1.1 million more per person than for civilians with similar economic losses, with most of the higher amount due to payments from charities.

Clearly, while insurance companies provided the majority of compensation, according to the RAND researchers, there may be less insurance in future domestic terrorist attacks. Before the 2001 attacks terrorism was automatically covered in insurance policies. Since 2001, however, insurance for terrorist attacks is being sold as a separate type of coverage. Many businesses have not purchased that coverage, according to the report. In addition, chemical, biological, and nuclear attacks are now typically excluded from the policies. Researchers say that deciding now what mechanisms should be used to compensate terrorist victims in the future could lead to better use of resources and less duplication of efforts. All of this is a learning process, and unfortunately the lessons came with a very large price tag.

Source: *The Insurance Journal* and *The Wall Street Journal*

An Aggressive Attorney General Makes A Very Big Difference

I really believed that corporate corruption would be a major issue in the presidential race this year—how wrong I was! All Americans should be fed up with all of the corruption and fraudulent conduct that has been exposed in Corporate America over the past two years, and I really believe they are. For some reason, however, their feelings were pretty much ignored by both parties this fall. Corporate corruption never became an issue in the race even though all opinion polls showed that corporate corruption was on the minds of most potential voters. In my opinion, the Democratic Party missed the boat on this issue and it may very well have lost Kerry the election. The Democratic ticket—for reasons unknown to me—never got into this issue in any meaningful manner. Could corporate money put into the Kerry campaign have played a role?

Now that the elections are over, however, we are seeing some change in how Corporate America operates in a few areas. All of the political talk about government being too big has resulted in very poor regulation of corporate America. We are now witnessing a national change in policy concerning financial regulation and it's pretty clear why that is happening. Had not New York State Attorney General Eliot Spitzer gotten involved, I doubt seriously that we would be witnessing this policy shift. Although the collapse of Enron and succeeding scandals resulted in Congress passing some significant legislation, the aggressive work of the New York Attorney General has been the real key to what is happening.

We are finally witnessing a cleanup of some of the corporate corruption, and that's good. For example, lawsuits brought recently by General Spitzer have revealed conflicts of interest at the investment banks that sell equities as well as massive cheating by mutual fund companies. I am convinced that the New York Attorney General's attacks on conflicts of interest in the insurance industry will bring also about needed reforms in that sector. Unfortunately, I suspect you will see some serious attempts to put roadblocks to slow the progress that is being made. We can't let that happen. I hope now that the elections are over, folks will have time to get more involved. We need more politicians like Elliot Spitzer who are not joined at the hip to the big donors representing Corporate America and who aren't afraid to take on the **big boys**.

A Shift Could Be In Store At The SEC

Even with the pressure being brought by the New York Attorney General, things may change drastically at the Securities and Exchange Commission (SEC) now that the elections are over. With the reelection of President Bush, we may see the aggressive rulemaking at the SEC over how companies should be governed come to a drastic halt. For months, business lobbyists have resisted the activist agenda of the SEC's Chairman, William H. Donaldson, who by the way is a strong Republican. Donaldson, who is now 73 years old, will likely retire in the next year or two. Some observers say it may be much sooner. President Bush is being urged to name a replacement more clearly aligned with corporate America. In my opinion, that will happen, and if so it will be a crying shame because we were finally seeing the SEC take a stand.

For two years, the SEC had finally started to move in the right direction, pursuing an array of rules largely designed to prevent another wave of Enron-style scandals. The agency has moved against conflicts of interest affecting board members and auditors, and demanded broader financial disclosures, greater accountability for senior executives, and tougher reporting requirements by corporations. In the process, Chairman Donaldson has irritated business interests while gaining the support of shareholder activists. Although appointed by President Bush, Donaldson has on several occasions voted with the commission's two Democrats, thereby tipping the balance of power. That's not to say that the SEC under Donaldson or Donaldson's watch has given shareholders' rights groups everything they wanted. Most notably, a proposal to give shareholders a greater voice over who serves on corporate boards has been stalled.

A handful of matters pending before the SEC are being closely watched. These include recommendations on governance and disclosure requirements for stock exchanges, clearer disclosures to investors at the time they purchase securities and new fees that might be imposed to discourage investors from abusive, rapid-fire trading in mutual funds. After the Enron debacle and the ensuring corporate scandals, I really thought that the corporate scandals would be a major issue in the presidential campaign. That didn't happen, as pointed out above. Hopefully, that won't give the new Bush Administration justification to retreat on issues before the SEC.

Cost Of Bribery Put At $400 Billion Per Year

We have all read the sordid tales of how bribery in many countries is a way of political life. It is being said that bribery in government procurement now costs $400 billion per year worldwide. This is the amount estimated by Transparency International, the leading non-governmental organization fighting corruption worldwide, and it may prove to be most conservative. Transparency International Chairman Peter Eigen recently stated:

> *Corruption in large-scale public projects is a daunting obstacle to sustainable development, and results in a major loss of public funds needed for education, healthcare and poverty alleviation, both in developed and developing countries. If we hope to halve the number of people living in extreme poverty by 2015, governments need to seriously tackle corruption in public contracting.*

A total of 106 out of 146 countries score less than 5 against a clean score of 10, according to a new index released by Transparency International. Sixty countries score less than 3 out of 10, which indicates rampant corruption. Corruption is perceived to be most acute in Bangladesh, Haiti, Nigeria, Chad, Myanmar, Azerbaijan and Paraguay, all of which have a score of less than 2. Clearly, corruption robs poor countries of their potential. Unfortunately, it's not confined just to those countries. Chairman Eigen also had this to say:

> *As the Corruption Perceptions Index 2004 shows, oil-rich Angola, Azerbaijan, Chad, Ecuador, Indonesia, Iran, Iraq, Kazakhstan, Libya, Nigeria, Russia, Sudan, Venezuela and Yeman all have extremely low scores. In these countries, public contracting in the oil sector is plagued by revenues vanishing into the pockets of western oil executives, middlemen and local officials.*

Strict anti-bribery measures must be enacted in countries worldwide. Western governments should require their oil companies to publish what they pay in fees, royalties and other payments to host governments and state oil companies. Access to this vital information will minimize opportunities for hiding the payment of kickbacks to secure oil tenders, a practice that has plagued the oil industry in transition and post-war economies, according to a recent report. Many believe that the future of Iraq depends on "transparency in the oil sector." There will be billions made in postwar construction, which makes stringent transparency requirements in all procurement contracts even more critical. Chairman Eigen, who is concerned about Iraq, stated: "Without strict anti-bribery measures, the reconstruction of Iraq will be wrecked by a wasteful diversion of resources to corrupt elites."

I believe that No-bribery clauses should be included in all major projects. This would be a positive step in the right direction. Tough sanctions are needed against companies caught bribing. This should include forfeit of the contract and blacklisting from future bidding. Tenders should include objective award criteria and public disclosure of the entire process. Exceptions to open competitive bidding must be kept to a minimum, and explained and recorded, because limited bidding and direct contracting are particularly prone to manipulation and corruption. Public contracting must be monitored by independent oversight agencies and civil society. Companies from OECD (Organization for Economic Cooperation and Development) countries must fulfill their obligations under the OECD Anti-Bribery Convention and stop paying bribes at home and abroad. With the spread of anti-bribery legislation, corporate governance and anti-corruption compliance codes, managers have no excuse for paying bribes. This sort of thing simply can't be tolerated.

The Corruption Perceptions Index is a poll of polls that reflects the perceptions of business people and country analysts, both resident and non-resident. This year's Corruption Perceptions Index draws on 18 surveys provided to Transparency International between 2002 and 2004, conducted by 12 independent institutions. Countries with a score of higher than 9, with very low levels of perceived corruption, included Bahrain, Belize, Cyprus, Dominican Republic, Jamaica, Kuwait, Luxembourg, Mauritius, Oman, Poland, Saudi Arabia, Senegal, and Trinidad and Tobago. On the same basis, a fall in corruption was perceived in Australia, Botswana, Czech Republic, El Salvador, France, Gambia, Germany, Jordan, Switzerland, Tanzania, Thailand, Uganda, United Arab Emirates and Uruguay.

Source: *Corporate Crime Reporter*

Halliburton Shouldn't Be Allowed To Keep Funds From Disputed Bills

Apparently, the U.S. Army has been laying the groundwork to let Halliburton Co. keep several billion dollars paid for work in Iraq that Pentagon auditors say is questionable or is unsupported by proper documentation. Press reports of Pentagon documents and internal memorandum are believed to provide the groundwork for an "equitable settlement" later this year under which the Pentagon could drop many of the claims its auditors have made against the company's Kellogg, Brown & Root (KBR) Unit, which has done the company's Iraq work. Some disgruntled Pentagon officials describe this effort to broker a settlement with KBR as unusual in a contract of this magnitude. The company continues to take heavy criticism from inside the Defense Department and from Congress for its accounting practices in Iraq. However, I suspect that the election cured most of the Halliburton problems.

Records reveal that KBR has billed about $12 billion dollars in Iraq, with about $3 billion of that still in dispute. Pentagon records show that $650 million in Halliburton billings is deemed “questionable,” a term government auditors use when they see strong evidence of overcharges or contracting irregularities. According to reports, another $2 billion is considered “unsupported,” meaning that KBR remains unable to provide sufficient paperwork. KBR moved into Iraq in the summer of 2003 to feed, house and look after U.S. troops and to repair Iraq’s infrastructure. Within months, Pentagon officials began telling Defense Secretary Donald Rumsfeld that the company was responsible for cost overruns and sloppy billing.

Army officials have repeatedly backed down from their own threats to withhold up to 15% of KBR’s billings for its services to troops. Under federal rules, the government generally demands such withholding to minimize its exposure if costs are later determined to be unjustified. To lead the effort to reach a settlement, the Army early in October hired Resource Consulting, Inc. It has been reported that the Army has also assembled a “special cost analysis team” made up of Army contracting and financial officials to work with the consultants. It seems that the saga of Halliburton will continue. This seems to be an unusual, to say the least, way for the U.S. government to deal with a company that, up to this point, has not been able to justify much of its billing in Iraq.

Source: *The Wall Street Journal*

FBI Investigating Halliburton Contracts

The FBI is now investigating whether U.S. officials improperly awarded Halliburton lucrative contract work without competition. The probe was the result of a top Army contract officer raising the issue of favoritism. The investigation expands an existing probe of whether Halliburton Co. overcharged for fuel deliveries in Iraq. The probe now includes the no-bid work awarded the company in Iraq, including restoration of the country’s oil industry at a cost of $2.5 billion. The expanded investigation is converging with statements made last weekend by Bunnatine Greenhouse, the chief contracting officer for the U.S. Army Corps of Engineers. Ms. Greenhouse says her agency unfairly awarded the Iraq work to KBR, a Halliburton subsidiary.

In a formal whistle-blower complaint, Ms. Greenhouse alleged the award of contracts without competition to KBR puts at risk “the integrity of the federal contracting program as it relates to a major defense contractor.” The contracts were to restore Iraq’s oil industry. The Army referred Ms. Greenhouse’s allegations to the Defense Department’s inspector general. It should be noted that the federal government awarded the Iraq business to KBR in February 2003, a month before the war began. The work was then extended for several years. The oil restoration work was given to KBR without competitive bidding through 10 separate work assignments called “task orders.” The orders were issued under an existing contract between Halliburton and the U.S. military that was awarded competitively in December 2001. While the Corps was authorized to spend up to $7 billion for the oil restoration work, the actual cost so far has been $2.5 billion. Halliburton is still working on the oil facilities, but I understand that it is now operating under a new, competitively awarded contract.

Source: *Forbes News*

ExxonMobil’s Profit Increases

I was not surprised to see where rising oil and natural gas prices has sent ExxonMobil Corp.’s third-quarter profit soaring. The giant oil company reports that its third-quarter net income jumped 56% to $5.68 billion, or 88 cents a share, from $3.65 billion, or 55 cents a share from the same quarter the year before. ExxonMobil took a $550 million charge to cover its exposure in a lawsuit brought by thousands of gas-station operators. The company’s earnings—excluding the charge-off—would have been $6.23 billion, or 96 cents a share. Revenue jumped 28% to $76.38 billion from $59.84 billion. ExxonMobil’s results reflected extremely good times throughout the oil industry and that shouldn’t be a surprise to anybody. For example, Royal Dutch/Shell Group said its quarterly net income more than doubled to $5.4 billion. BP PLC said this week its third-quarter net income nearly doubled to $4.48 billion. While consumers are suffering with high gas prices, the oil industry is making record profits.

Source: *The Wall Street Journal*

The Tiger Goes To Court

Even the super rich find it necessary to use the courts on occasion. In fact, those folks file lawsuits at a pretty good pace. Tiger Woods has sued the builder of his luxury yacht, the Privacy, accusing the shipyard of using his name and photograph for financial gain without permission. The suit was filed in federal court on October 29th, claiming Woods’ contract with Christensen Shipyards, Ltd., barred the boat manufacturer from using the golfer to promote the company. Apparently, they did so anyway. The lawsuit accuses the Vancouver, Washington-based shipyard of starting a “widespread national campaign” using Woods’ name and photos of the 155-foot yacht. It also says the company used the golfer’s name and the pictures in a display at the Fort Lauderdale Boat Show.

The lawsuit claims more than $75,000 in damages for Woods because he believes his privacy was violated. Because of the golfer’s celebrity status and the tremendous clout he carries in the advertising world, compensatory damages could reach $50 million. The yacht was intended to be a private respite for Woods and his family to relax and get away from the public, according to the lawsuit. Woods is asking a judge to stop the use of his name and photo by Christensen. Interestingly, a jury trial is being sought. As everybody in the world knows, Tiger Woods and Swedish model Elin Nordegren were married October 5th at a luxury resort in Barbados and later set out on the Privacy for an extended honeymoon. I am sort of surprised that the shipyards didn’t make Tiger sign an arbitration agreement like all other “consumers” have to do when they deal with large companies.

Source: *Associated Press*

V. THE CORPORATE WORLD

MARSH & MCLENNAN DROPS FEES

The lawsuits filed by New York's very aggressive Attorney General are already paying off in several areas. For example, Marsh & McLennan Cos. Inc. stopped accepting fees because of one lawsuit that accused the world's largest insurance broker of rigging prices and kickbacks. As previously reported, Marsh was accused of rigging bids and colluding with American International Group Inc. and other insurers to fix prices. The decision on fees came after the board of the nation's largest insurance brokerage accepted the resignation of Jeffrey Greenberg from the posts of chairman and chief executive. Marsh announced the permanent elimination of "any form of contingent compensation from insurers." Contingent commissions — also known as marketing service agreements or placement service agreements — are fees paid to brokers by insurance companies in exchange for getting more business. General Spitzer called the incentive fees "kickbacks" and said they were a factor in businesses being forced to pay more than necessary for property and casualty insurance. The Attorney General also accused Marsh of bid rigging and price fixing and announced that he wouldn't deal with the current management, which resulted in Greenberg's ouster.

Marsh also adopted other changes, including submission of quarterly "state of compliance" reports to the audit committee, annual compliance and ethics training for employees, and establishment of an internal compliance and ethics hotline. Marsh said in its announcement that "all revenue streams will be 100% transparent to clients." The company said it would outline for the clients all fees, retail commissions, wholesale commissions and premium finance compensation. It added that the company "will insist that insurance companies show commission rates on all policies." Marsh also has formed a global compliance organization that will report to Michael Cherkasky, formerly heard of Marsh's Kroll, Inc investigations and crisis management division, who was elevated to positions as Marsh's president and CEO. All Americans owe the New York Attorney General a tremendous debt of gratitude. He is truly a champion for consumers and that's a rare commodity these days!

Source: *USA Today*

INSURANCE BROKER WILL FACE EXTENSIVE LITIGATION

Marsh & McLennan Cos. Inc. faces another serious threat, and that's lawsuits filed by unhappy customers and by the company's own shareholders. Civil lawsuits against Marsh, some of which seek class action status, have taken numerous forms. Thus far a good number of federal and state lawsuits have been filed, with potential litigants numbering in the tens of thousands. Because lots of folks, including corporations, were damaged as a result of the wrongdoing, there will be more suits filed. We believe that what the public knows thus far is just the tip of the iceberg when it comes to the magnitude of what this company and others such as AIG were doing.

FUND SET UP FOR POSSIBLE SETTLEMENTS

Marsh & McLennan Cos. Inc. is looking to collect about $230 million in incentive fees at the heart of the bid-rigging probe as a way to help fund a possible settlement over the questioned fees. The company said in a news release that it will put the market service agreement fees into a separate account to be used as part of any restitution agreement it may reach with the New York Attorney General. Marsh said its clients owed about $230 million in incentive fees as of September 30th. General Spitzer has accused Marsh & McLennan of bid rigging and using the incentive fees—also known as contingent commissions—to manipulate the sales of corporate property and casualty policies. As a result, businesses have paid more than necessary for their coverage. There appears to have been a widespread kick-back scheme involved, which I understand is a part of the probe.

A day after Spitzer's civil suit was filed, Marsh & McLennan said it would stop collecting these fees. Marsh has said it collected about $1.2 billion in fees since January 2003. The incentive fees are over and above ordinary commissions and have prompted the insurance industry to commence a widespread reevaluation of their propriety, with several companies joining Marsh in no longer collecting them. Several lawsuits have been filed on behalf of insurance customers and shareholders. There is no telling how far-reaching this sordid mess will reach. Clearly, there has been some lax regulation of this industry and the consequences are now becoming quite evident.

ENRON CRIMINAL CONVICTIONS

A federal jury in Houston has convicted four former Merrill Lynch executives and one former Enron executive last month for a 1999 fraud that helped Enron improve the earnings picture it presented to investors. It was the first jury trial arising from the massive fraud that led to Enron's spectacular rise and ultimate collapse. This case was an opportunity for U.S. prosecutors to try out evidence and strategies that may be used in later Enron prosecutions. Some of the guilty parties in this case were once high-ranking executives at Merrill. Daniel Bayly was the former head of global investment banking. James A. Brown was the former head of the firm's project and lease finance group. Dan Boyle a former executive in Enron's finance division, was also convicted.

An Enron accountant, Sheila Kahanek was acquitted, apparently on the strength of evidence that she actually questioned the legality of the transaction, only to be ignored by her bosses. Those convicted join a growing list of Enron felons, who have entered guilty pleas. On March 1, 2005, jury selection will begin in the Enron broadband unit conspiracy trial, which will be followed by the fraud prosecutions of ex-Enron chief executives Jeffrey Skilling and Kenneth Lay, assuming there are no guilty pleas between now and then. If I were a betting man—which thankfully I am not,—I would bet that "Kenny Boy" is never tried.

A Look At White-Collar Prosecutions

Even with the massive wave of corporate scandals, the general level of white-collar criminal prosecutions is said to be no higher than it was in 2001, the year the Enron scandal came to light. That really makes no sense at all. While certain high-profile criminal prosecutions have garnered a lot of attention, and there have been some changes in the laws governing financial disclosure, statistics published by the Administrative Office of U.S. Courts indicate no real change in the rate of criminal prosecution of financial fraud. For fiscal year 2001, there were 7,677 federal prosecutions for fraud of all types in the U.S. along with 99 prosecutions for securities and exchange fraud, one of the least prosecuted varieties, according to Administrative Office data. The total fell in 2002 and rose in 2003. But for fiscal year 2004, which ended on March 31st, there were 7,770 criminal fraud prosecutions and 97 for securities and exchange violations. At the same time, the total number of federal criminal prosecutions increased from 62,870 to 70,132.

Interestingly, the biggest increase in federal prosecutions was in immigration and weapons and firearms prosecutions. Of course, it is impossible to know the overall level of white-collar or corporate crime, so there is no way to compare the number of prosecutions to the number of offenses. It is also possible that the publicity attached to a few cases will have a large deterrent effect on would-be offenders. But judging from the number of cases actually brought by the Justice Department, there is no more reason to fear criminal charges now than there was three years ago when Enron fell.

Source: Forbes News

KPMG Settles Lawsuit

The accounting firm KPMG and a Belgian affiliate will pay $115 million to settle a shareholders suit claiming that the companies failed in their audit of a company that later collapsed. During the 1990s, Lernout & Hauspie was recognized as a world leader in software that recognizes human speech and turns it into computer text. The Belgian company, with U.S. operations in Burlington, Massachusetts, collapsed. The company admitted fraud, including fabrication of over 70% of the sales in its largest unit.

Source: *The National Law Journal*

SEC Looks At Stock Pricing by Big Brokers

The Securities and Exchange Commission is investigating about a dozen brokerage firms, including Morgan Stanley, Merrill Lynch, Ameritrade, Charles Schwab and E*Trade Financial, on suspicion that they failed to secure the best available price for stocks they were trading for their customers. This is according to a comprehensive report in the New York Times. The investigation centers on the way the companies executed trades of NASDAQ-listed securities when the markets opened in the morning. This is always a period of intense trading activity resulting from the backlog of orders since the markets' close the previous day. After examining trading data from the last four years, the SEC investigation found evidence that trades were often processed in ways that favored the firms over their clients, according to the Times.

The investigation opens another possible conflict of interest involving the big firms on Wall Street. In the last few years, the financial industry has been jolted by a series of scandals over practices that rewarded company insiders at the expense of ordinary investors. Brokers have a "best execution" obligation, defined by a combination of the common law, fraud provisions of the securities acts, and market rules, to get the best possible price for investors. The investigation—the first to look at this aspect of trading—can be expected to put executives and traders on notice that regulators are monitoring best-execution practices and could reignite the debate over how trades should be carried out.

Source: *The New York Times*

Smaller Firms Were Also Engaged In Marketing Timing

R.S. Investment Management, L.P. (R.S.), a San Francisco Bay-based investment advisor to ten mutual funds, and two of its officials, have agreed to pay more than $30 million dollars to settle charges by the Securities and Exchange Commission (SEC) and New York Attorney General Elliott Spitzer over their alleged roles in allowing "market timing" by certain favored mutual fund investors. It was alleged that R.S. entered into secret agreements that permitted select investors to generate millions of dollars in trading profits at the potential expense of other shareholders. This allowed R.S. to reap substantial advisory fees.

In the SEC action, R.S. agreed to pay $25 million dollars—$11.5 million in disgorgement and $13.5 million as a civil penalty,—all of which is to be distributed to investors in the mutual funds affected. RS is also to undertake compliance reforms and can have no future violations. In the New York settlement, R.S. will reduce its fees by $5 million over a five-year period. The market timing abuses apparently involved relatively small boutique firms like R.S. The firm's arrangements for market timers were contrary to claims made in the R.S. prospectus and were harmful to long-term investors. Despite this knowledge, company officials allowed and facilitated market timing of funds because it proved to be a very good source of fee revenues.

Source: *Securities Regulation & Law*

Healthcare Providers Settle Fraud Claims

Winter Park, Florida-based Adventist Health System Sunbelt Healthcare Corporation, three affiliated hospitals and a management company that administered ambulance operations at the three hospitals have agreed to pay the U.S. government $20.3 million to settle allegations that they overcharged Medicare. The government alleged that the charges were for ambulance transports for patients that were not medically necessary. The government further alleged that Regional Emergency Services and the hospitals created false physician certifications regarding the medical necessity of ambulance transports operated by the hospitals and submitted or caused to be submitted false claims to Medicare.

The suit alleges that the false claims were submitted during 1993 through 2000 in the case of Florida Hospital Waterman and Metroplex Adventist Hospital, and 1993 through 1997 in the case of Huguley Memorial Medical Center. The settlement resolves claims brought under the qui tam or whistleblower provisions of the False Claims Act. It is hard to understand why any healthcare provider would cheat anybody and especially the federal government. It appears that greed will overcome good intentions even in the healthcare industry.

Source: *Corporate Crime Reporter*

VI. CAMPAIGN FINANCE REFORM

Need For Reform Is Critically Important Now

Now that the most expensive election in our nation's history is finally over, the American people should demand a total reform of our badly broken system that is used in the financing of presidential campaigns. If this isn't done very soon, people in this country will suffer greatly for years to come. Because there will be a number of newly elected senators and members of Congress, it may be that more meaningful reform in Congress can finally be achieved. Perhaps, some of the new members will have heard the complaints about all of the wild political spending we have witnessed over the past year. If they haven't, it's because they simply haven't been listening. In any event, let your senator and House members know how you feel on this issue. I sincerely believe our country is worth saving and I believe most of you agree. A good place to start is with our system of funding political campaigns, and that will include the wild and uncontrolled spending by the 527 Committees.

2004 Elections Cost $4 Billion And Counting

Perhaps we should all take a look at how much this election actually cost us. At last count, the price of democracy in 2004 was at $4 billion and still climbing. That's doesn't count the costs of all the ballots, poll workers and election lawyers. You can also add the expenses borne by states and local governments — to be determined later — and the price tag soars to something in the neighborhood of $5 billion. Even with our staggering national debt, $5 billion is still a great deal of money. Congressional and presidential candidates alone spent at least $1.8 billion for their primary and general election campaigns, with about one-third of that spent by Bush and Kerry. As you might suspect, ad firms consumed much of the money. The Democratic and Republican Parties, and their host committees, spent about $162 million on their nominating convention. This includes about $29 million in taxpayer money. The cost of the conventions alone is shocking. All told, the two political parties spent at least $957 million this election cycle and that is equally shocking.

However, much of the money poured into partisan politics this election cycle came from outside groups. I really thought this had been fixed by the campaign reform measure passed by Congress—was I ever wrong! Organizations collecting the unlimited donations the national parties are now barred from raising spent at least $436 million in 2003 and '04, figures compiled by the Political Money Line campaign finance tracking service show. Taxpayers are kicking in hundreds of millions of dollars more. The National Association of Secretaries of State estimates the elections will cost an average of $33 million per state. The costliest is California, which stands at roughly $66 million. The least expensive is Wyoming, at about $500,000. All of the cost figures are not yet in. The Justice Department sent out more than 1,000 election observers and poll monitors. That cost will add to the total. The estimated $4 billion that candidates, party committees and interest groups devoted to the congressional and presidential races is about $1 billion more than in the 1999-2000 cycle, according to the Center for Responsive Politics, a nonpartisan campaign finance watchdog group. If all of this doesn't spur the average citizen in this country to demand some real reform, nothing will.

Source: *Associated Press*

A Look At 527 Groups' spending

In the final three weeks of the campaign, independent "527" groups backing President Bush bought nearly $30 million worth of television and radio ads, three times what their Democratic counterparts spent, according to a study by the Center for Public Integrity. At the end, Republican 527s reversed an earlier trend and jumped well ahead of the Democrats. This definitely appears to have made a difference for Bush, particularly in Ohio. In addition, two Republican 527 groups, the Swift Boat Veterans for Truth and Progress for America, ran ads that, according to all surveys, made the strongest impressions on voters in key states. Other than the moral issues, I believe that Kerry's losing the Vietnam War issue was the major factor in his loss. In my opinion, this took about 6 weeks away from the campaign and I don't believe Kerry ever recovered from the damage inflicted by the misleading ad campaign.

Insurance Industry Political Giving Favors Republican Candidates

As we know—all too well, money speaks loudly in our nation's capitol. Records reveal that large national insurance companies and insurance PACs are among the leaders in furnishing this political money each year. In fact, for an industry that is largely regulated at the state rather than federal level, the insurance industry pumps a substantial amount of money into national politics—consistently ranking within the top 10 in industries giving to federal races for president and Congress. As of August 2, 2004, total insurance industry giving had already reached $25 million for this year. This is the combined insurance PAC and individual giving to federal candidates for president, House and Senate, according to the Center for Responsive Politics (CPR), which analyzes the federal reports. Individual and PAC monies for the property/casualty, life and health segments combined are included in CPR's tallies. That $25 million is enough to rank the insurance industry seventh out of 80 industries studied by CPR. The final reports will show that the insurance industry pumped a great deal more into the federal campaigns in the time frame after August 3rd. The final tally will certainly be an all time record.

The partisan preference of industry giving for 2004 is already clear. Not too long ago, the insurance industry donated about evenly to "Blue" Democrats and "Red" Republicans in federal races, but the current trend is clearly more in favor of the reds. For 2004, Republicans ($16.8 million) have already received more than twice the amount sent to Democrats ($8.2 million). In 1990, the insurance industry actually favored Democrats in its federal contributions, 51 to 49 percent. In 1992, the strategy was still mostly bipartisan, with 54% going to Republicans and 46% to Democrats. Since the Republicans took control of Congress in 1994, there has been a big swing towards the GOP. In 1996, the industry favored Republicans over Democrats 68% to 32%, and that party pattern has become the norm. In 1998, the giving was 70 to 30 percent in favor of Republicans; in 2000, 65 to 34 percent; and in 2002, 69 to 31 percent. The conventional wisdom has been that votes follow the money, and I see nothing to change that.

In addition to weighing voting records, insurance interests are more likely to donate to politicians who sit on key committees for insurance legislation such as the House Financial Services or Senate Banking panels, whether they are Republicans or Democrats, over politicians on committees without insurance jurisdiction. Some observers contend that the industry's sizable political purse reflects its growing interest in federal issues, including terrorism insurance renewal, class action and tort reform, and streamlining how the industry is regulated. On the health side, one of the larger issues for insurance companies has been Medicare legislation, passed by Congress last year, and the drive to permit small businesses to form association health plans. The PAC and individual contributions are not the entire story of what the industry spends to influence Washington politics. These funds are in addition to the $87 million that CPR estimates insurance companies and groups spend annually on lobbying in Washington, D.C. More on political contributions can be found at www.opensecrets.org.

Source: The Insurance Journal

VII. CONGRESSIONAL UPDATE

High-Flying Executives Grounded

When writing about the mammoth corporate welfare bill passed by Congress last month, I didn't realize that "high flying corporate executives" had finally been grounded. A little-noticed provision in the bill severely limits the deduction a business can claim when a company plane is used by officers, directors or owners (10% or more) for personal travel. Reportedly, the restriction will save the U.S. Treasury $2.2 billion over the next decade, according to estimates by Congress' Joint Tax Committee, and that may be conservative. Simply put, a company won't be allowed to deduct any more in expenses than it reports as income to these vacation travelers. Before the new law, a business could legally deduct the full cost of operating an airplane, even one used primarily for executives' vacations, so long as it reported a much smaller amount, known as the Standard Industry Fare Level (SIFL), as income to the junketeers. As you may know already, the SIFL is about the cost of a first-class ticket on a commercial flight.

For years the IRS had asserted that companies could only deduct the amount that was included in an executive's income when he or she used a company plan for personal jaunts. The congressional crackdown apparently came as a surprise to the General Aviation Manufacturers Association, whose members include **Boeing**, **Raytheon**, **Honeywell**, the **Cessna** unit of **Textron**, and the **Gulfstream Aerospace** unit of **General Dynamics**. The House-passed version of the bill hadn't included any such provision. The Senate version applied the restriction only to publicly traded companies and only until the end of 2005, raising just $190 million. The final version, produced by a House-Senate conference committee, however, applies to private companies too and isn't temporary. The General Aviation Manufacturers Association tried to persuade Congress to allow an exception if a plane was used only 5% or 10% of the time for personal trips by executives. But with executive-compensation excesses under attack, and Congress on the hunt for loophole closers to make the tax bill "revenue neutral," it was a lost cause for the lobby groups and that's about as rare as "hen's teeth!"

GAMA didn't totally strike out since it was able to get its top priority into the new tax law. Congress agreed that businesses could claim "bonus depreciation" for new planes they order this year but don't receive or place in service until 2005. The break would otherwise have applied only to planes delivered before the end of 2004. GAMA credits bonus depreciation, which allows a company to immediately write off up to 50% of a new plane's cost in the first year (in addition to the normal first-year depreciation write-off), with helping to revive its industry. The moral of this story is that it helps to have high-powered lobby groups working for you. Unfortunately, ordinary folks don't enjoy that luxury.

Source: *Forbes News*

Congress Should Take A Look At Tax Shelters

The U.S. government has lost a series of important tax shelter cases lately. In one, a federal judge concluded that a deal that saved a company large sums of taxes had a legitimate business purpose and as a result, was not an illegal tax shelter. In two of the multi-million-dollar cases, the judges specifically told the Internal Revenue Service that if it has a problem with the outcomes in the cases, the solution lies with Congress, not the courts.

In the most recent case, a U.S. district judge in Connecticut determined last month that an arrangement by which General Electric Co., through subsidiaries and partnerships, shifted $310 million in income to two Dutch banks that don't pay U.S. taxes was not a sham and, as a result, GE was entitled to a $62 million tax refund. GE, which through its GE Capital subsidiary owned a large number of commercial airplanes that it leased to airlines, contributed those planes, along with some cash, to a partnership in which the Dutch banks participated. The banks got a large share of the rental income that would have been taxable to GE, and GE, the judge noted, got to "re-depreciate" the planes for tax purposes. However, the judge held that the arrangement was a real business deal, since it helped GE accelerate income from the leases on the planes, as well as save on taxes. The judge in the GE case wrote: "In short, the transaction, though it sheltered a great deal of income from taxes, was legally permissible. Under such circumstances, the IRS should address its concerns to those who write the laws."

The G.E. case came on the heels of an $82 million defeat for the IRS in the U.S. Court of Federal Claims. In that case, a federal judge ruled valid an arrangement under which a company called Coltec Industries Inc. transferred contingent liabilities associated with asbestos claims against a subsidiary to an entity it created and then sold at a loss. The judge in that case wrote: "The court has determined that where a taxpayer has satisfied all the statutory requirements established by Congress, as Coltec did in this case, the use of the 'economic substance' doctrine to trump 'mere compliance with the code' would violate the separation of powers."

A U.S. district judge in Maryland had awarded Black & Decker Corp. a $57 million refund in a case in which the IRS accused the company of a sham transaction involving transfer of its employee health insurance claims to a new entity. This was the third case in the series of setbacks for the IRS. Most observers seemed to have been most surprised at the outcome in this case.

The IRS can appeal these cases. However, Congress should make it a top priority to clear up any questions about tax shelters. All of us should pay our fair share of taxes and that certainly includes large and powerful corporations. The time has come for Congress to reform our tax code, and any reform would have to deal with tax shelters. Most citizens believe the wealthy get tax breaks from provisions in the tax code that only apply to them.

Source: *The Washington Post*

VIII. PRODUCT LIABILITY UPDATE

The Smart Cars Are Coming

The new technology that is now available for new car systems is getting lots of media attention. For example, Continental's new Electronic Brake Systems (EBS) for model year 2005 vehicles is said to mark a milestone in the organization's movement toward a completely integrated active vehicle safety system. The system known as the smart car helps anticipate crashes and mitigate injuries. Many believe that active safety systems are increasingly more important in today's vehicles. I hope technologies available today and those anticipated in the near future will make vehicles much safer. It is believed by many safety experts that this new technology will help prevent crashes and will reduce the risk of injury.

I understand that the new systems are smaller, lighter, more powerful and more cost-effective to produce than their predecessors. First launched by Continental Teves in 1984, electronic brake systems have achieved 80% weight reduction and nearly 90% cost reduction over the past two decades. They build upon antilock brake systems (ABS) and electronic stability control (ESC), and contain newly designed, integrated circuits for higher levels of integration. This allows additional functions to be incorporated into the vehicle, providing a platform for the integration of both active and passive safety systems to create an "anticipatory" vehicle. New EBS generations also include valves with analog control that are infinitely variable, replacing digital hydraulic valves. This allows shorter stopping distances, minimized pedal vibrations and finely tuned pressure build-up for the adaptive cruise control (ACC) braking function.

In combination with the analog valves, the ABS hydraulic systems brake booster function also helps when the engine fails to generate enough vacuum to ensure reliable brake boosting. This is most important after a cold start, as well as with direct-injection engines optimized for high efficiency. Further potential for improving stopping distances and stability is created by adding brake pressure sensors on all wheels. Some additional highlights of increased functionality of Continental's new EBS systems include:

- **Active Rollover Protection (ARP).** Excessive lateral force, generated by aggressive maneuvers, may result in a rollover in a high-center-of-gravity vehicle. ARP automatically responds whenever it detects a potential rollover, and rapidly applies the brakes with a high burst of pressure to the appropriate wheels to help avoid a rollover. ARP counteracts critical body roll before it starts to cause the kind of dynamic changes in wheel load that lead to rollover.
- **Brake Assist** recognizes a driver's intent to perform a sudden stop by monitoring the rate of the brake application and initiates full braking within a fraction of a second, reducing the car's braking distance by as much as 20%.

- **Electronic Stability Control II (ESC II)** combines the brake control unit with Electric Steer Assisted Steering (ESAS). ESC II automatically optimizes the driver's steering inputs to further stabilize the vehicle when ESC is activated. When braking on surfaces with different grip on either side of the vehicle, ESC II also makes for much shorter stopping distances with minimum steering intervention and optimized directional stability.
- **The Electric Parking Brake** can be activated either automatically or at the touch of a button, reliably holding the vehicle in position when parked. The system prevents rolling back on hill starts, and also acts as a theft-deterrent device because it is a highly efficient immobilizer.
- **Hill Start Assist** keeps the vehicle stationary, with no drift-back, on an uphill grade, when the driver shifts the car into gear.
- **Trailer Stability Assist** recognizes when a trailer being towed starts to oscillate, or move from side to side. Trailer Stability Assist engages to help keep the trailer on its intended course and in line with the vehicle.
- **The Rain Brake Support (RBS)** recognizes when the brake components are wet, and induces just enough brake drag to slightly heat the brakes to dry them off.

Additional innovations in development that many safety advocates believe will revolutionize active vehicle safety include:

- **Adaptive Cruise Control (ACC)** uses either a radar sensor or an infrared laser (LIDAR) on the front of the vehicle to measure the distance and the relative velocity from the vehicle ahead and, using that information, automatically adapts the speed set by the driver to ensure a safe distance between the vehicles. If necessary, a feature called Stop and Go is enabled, which causes the ACC to slow the vehicle to a standstill. After coming to a standstill—in which a brake system will be engaged, if necessary, to hold the vehicle on a hill—this new system will also detect any movement by the vehicle ahead, and will give the driver an acoustic signal. After the driver acknowledges the signal by pressing a button, the ACC will accelerate the vehicle automatically to the speed set by the driver, or to the maximum speed possible under the actual traffic conditions ahead.
- **Brake Assist Plus** helps reduce stopping distance by building brake pressure faster.
- **Ready Alert Brakes (RAB)** pre-charges the brake system to improve the responsiveness of the brakes. The Ready Alert function uses the ACC sensors to reduce stopping distances even if the ACC itself is switched off. As soon as the sensors detect a vehicle at a critical distance ahead, the system prepares the brake system by reducing the air gap between the brake pads and disk so that full braking power can be developed much faster, when required. This function may serve to prevent an accident or at least reduce the impact energy if a collision is unavoidable.
- **Traffic Sign Recognition** uses cameras in the front of the vehicle to recognize and read road signs, such as stop signs and speed limit signs, and then alerts the driver to any dangerous situations.
- **The Lane Departure Warning (LDW)** uses a camera to detect unintentional deviation from the selected lane. The system warns the driver by means of an audible alarm or steering wheel vibrations.
- **The Lane Keeping Support (LKS)** system incorporates the Intelligent Power Assisted Steering to include steering wheel vibrations, and a tugging force on the steering wheel to issue a clear recommendation to the driver to steer back into his lane.
- **Smart Airbag** - Preconditioning of non-reversible restraint systems.

According to information furnished by the company, Continental's goal is to apply technology to help prevent crashes from happening and to mitigate injuries when they do. This is said to be part of an integrated, comprehensive assistance and occupant protection system that will provide drivers and occupants with the best possible support. As you may know, Continental AG is a major supplier of brake systems, chassis components, vehicle electronics, tires and technical rubber products. Nothing written here is intended as an endorsement of Continental AG, but is included to let our readers know what is available to car manufacturers. For additional information, visit these websites: http://www.conti-online.com and http://www.contitevesna.com.

Study Lauds Driver Stability Systems

Rollover accidents continue to be a source of concern to citizens in the U.S. For years consumers who have purchased SUVs have been exposed to an unreasonable risk of severe injury or death in single-vehicle rollover crashes. Despite ever-increasing knowledge of how to design a reasonably safe SUV, the automotive industry has refused to make simple and technologically available advances in their designs to protect these consumers.

Electronic Stability Control (ESC) systems appear to be effective in reducing the number of single-vehicle crashes, including rollovers, according to a preliminary study by the National Highway Traffic Safety Administration (NHTSA). The study found that the technology has proved particularly effective for sport utility vehicles. In 2003, 7.4% of the light vehicle fleet was sold with some form of ESC. The systems can improve a vehicle's stability by electronically assisting drivers in dangerous situations. In most vehicles, the ESC system improves the vehicle's lateral stability and, at the same time, electronically combines the attributes of anti-lock brakes and traction control systems to help a driver avoid a potentially dangerous situation.

Among vehicles in the NHTSA study, ESC reduced single vehicle crashes in passenger cars by 35% when compared to the same models sold in prior years without the technology. The preliminary results were even more dramatic for the much smaller sample of SUVs in the study. Single vehicle crashes were reduced by 67% in models with ESC. Evaluating fatal crashes only, ESC was associated with a 30% reduction for passenger cars, 63% for SUVs. The study concluded that "This technology appears to provide safety benefits by reducing the number of crashes due to driver error and loss of control because it has the potential to anticipate situations leading up to some crashes before they occur and automatically intervene to assist the driver." NHTSA evaluated the technology by studying fatal and non-fatal crashes from 1997 to 2003. The study examined crash statistics only for vehicles equipped with ESC as standard equipment. The agency emphasized that the results are preliminary and that it will have more confidence in the effectiveness of ESC when studies can evaluate a larger cross-section of the vehicle fleet. In 2003, 15,621 people died in single vehicle passenger crashes on the nation's highways. Summaries of the study are available on the NHTSA website at: http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/809790.html

A recent study performed by the Insurance Institute for Highway Safety, a group funded by the insurance industry and dedicated to automobile safety, shows that SUVs equipped with Electronic Stability Control (ESC) are capable of reducing the risk of involvement in fatal crashes by 50%. The study has also found that all single vehicle crashes including fatal and non-fatal crashes can be reduced by up to 40% with ESC. Electronic Stability Control helps a driver maintain control of the vehicle by using sensors to independently activate braking for each wheel. Additional sensors also monitor the drivers steering input and how the vehicle is responding to those inputs. These sensors can determine if the vehicle is straying from the drivers intended line of travel, which usually occurs in evasive emergency maneuvers or maneuvers made on slippery roads. The sensors not only monitor tire rotation and a drivers steering inputs but also brake pressure. If the computer determines that the driver is losing control, it will apply brake pressure to individual wheels to restore control of the vehicle. In some instances, the computer can also reduce the power being provided to the wheels by the engine.

Studies have shown that SUVs typically have very high single-vehicle rollover rates and very high single-vehicle fatality rates resulting from rollovers. Despite this knowledge, the automotive industry had been slow to implement designs that could reduce the fatality and injury rate associated with SUV rollovers. ESC technology has been available for a number of years; however, very few vehicles include Electronic Stability Control. Even more egregious is the fact that many manufacturers offer ESC as optional equipment on vehicles such as SUVs. Since ESC is a safety device, which is likely to substantially reduce a known hazard associated with SUVs, manufacturers have a duty to make the equipment available on all models as standard equipment rather than optional equipment. The only reason a manufacturer would choose not to make such equipment standard on their vehicles would be to maintain a competitive edge in the SUV market. A manufacturer's failure to equip SUVs with ESC as standard equipment is best described as choosing profits over human safety. Hopefully, the Insurance Institute's recent study showing the effectiveness of ESC in reducing single-vehicle accidents and rollovers as well as the fatality rate will force manufacturers to begin providing such technology as standard equipment on vehicles that are known to have a high rollover rate.

Currently, luxury models such as Porsche, BMW, Mercedes and Infiniti include the technology as standard equipment. Domestic manufacturers like General Motors and Ford include the equipment as a standard option in their higher end vehicles such as Cadillac and Lincoln SUVs. Ford provides ESC as optional equipment on the 2005 Expedition but now includes it as standard equipment on the Explorer, one of the most litigated SUVs in history. However, General Motors only offers ESC as optional equipment on the popular Suburban and Tahoe SUVs and the Uplander minivan.

Ford Rollover Verdicts Reversed On Appeal

A federal appeals court has reversed a 2003 jury verdict that found Ford Motor Co. not legally responsible for the death of a mother and daughter in an Explorer rollover accident. The federal appeals court ordered a new trial for the family of the two persons killed. The case arose out of an accident in 2000 involving a Ford Explorer. The appellate court ruled that the trial judge shouldn't have let Ford introduce evidence on other rollover accidents. This is a most significant ruling and one that is absolutely correct from a legal perspective.

The reversal is the second by a federal appellate court of a Ford trial win in an Explorer case. The appellate decisions were both over **statistical evidence** about other accidents. Ford will now have to defend the Explorers, rather than putting into evidence hundreds of **statistics** to say basically that all SUVs are bad. Hopefully, the day where **statistics** can be used to support a bad design of an SUV is over. If so, it will be good for safety and for people who drive or ride in SUVs.

A 35-year-old mother was killed when her Explorer rolled over after she swerved to avoid hitting a deer. One 5-year-old was also killed in the accident and two other children were injured. The family sued Ford, alleging design defects left the Explorer unstable and prone to rolling over during evasive driving maneuvers. In March 2003, a Tacoma, Washington, jury rejected the family's claim, finding no defects. During the trial, Ford's lawyers were allowed to admit statistical evidence on thousands of rollover accidents involving passenger cars, trucks and sport utility vehicles. The data came from rollovers involving all sorts of vehicles and all sorts of crashes. The appeals court correctly said in its decision that the evidence of rollovers of other vehicles was irrelevant and prejudicial to the family. The issue should relate to how the Explorers have performed and not how they compare to other vehicles. It is difficult to compare the Explorer to other SUVs. It is impossible to compare an SUV to pickup and passenger cars.

The theory in the case was that the Explorer was not reasonably safe as designed because the vehicle had a high center of gravity and a narrow wheel base that caused it to roll over on smooth, dry pavement. To be relevant, Ford's comparative accident statistics would have to be based on accidents that occurred under circumstances similar to this specific accident. The court agreed and held that Ford experts' rollover statistics "were irrelevant to the design defect at issue in this case." The evidence "may have unduly prejudiced the jury's view of whether the Explorer was not reasonably safe as designed." This is a most important victory for victims and for safety generally.

A second Ford defense win in an Explorer case was reversed in August, when a panel of the 11th Circuit ordered a new trial for the family of a woman who was killed in a January 2000 rollover. In June 2003, an Atlanta jury rejected the claim brought by the family of Denise Hockensmith. The appellate court reversed the decision, finding that the trial judge improperly admitted statistical evidence of other rollover accidents. No new trial date has been set for the Washington case. The reputation of the Explorer, the best-selling sport-utility vehicle, was hurt by a U.S. government investigation into at least 271 highway deaths involving tread separation by Bridgestone Corp.'s Firestone tires, mostly on Explorers. Ford settled hundreds of lawsuits over rollovers related to tire failures.

Source: *Bloomberg News*

Focus And Ranger Have Rollover Risk

Ford Motor Co. didn't fare very well in new government crash and rollover tests. Two 2005 Ford vehicles, the two-door Focus and the Ranger 4x4 pickup, were the worst performers in the tests, according to results released by the National Highway Traffic Safety Administration. The rear passenger was at risk of serious head injury when the Focus was hit in the side in a 38.5 mph test. It should be noted that the Focus was tested without side airbags, which a Ford Motor Co. website lists as a $350 option on the vehicle. NHTSA gave the Focus three out of five stars for driver's side protection and four out of five stars for rear passenger protection. This was the lowest rating among cars tested. Those ratings didn't reflect the potential for head injury because NHTSA's side-impact ratings consider only chest injuries. A five-star rating means the likelihood of serious injury in a similar crash is 5% or less. For three stars the likelihood is 11 to 20 percent. The Ranger 4x4 and the Mazda B-Series 4x4 (its corporate twins), earned two stars in NHTSA's rollover ratings, the lowest of the ten 2005 pickups tested. According to NHTSA, the Ranger and the B-Series have a 30.6% chance of rolling over in a crash. The ratings consider the vehicle's height and weight and its performance in a 35 to 50 mph test with a sharp turn.

NHTSA released crash test results for seven passenger cars, one pickup and one sport utility vehicle, and rollover ratings for one crossover vehicle and ten pickups. The agency chooses vehicles to test based on popularity and other factors. The 2005 Subaru Outback, which NHTSA classifies as an SUV, was the only vehicle that earned five stars on all front and side-impact tests. The Outback was tested with its side airbags since they are standard. The 2005 Chrysler 300 and its corporate twin, the Dodge Magnum, also were high performers, earning five stars on the 35 mph frontal crash test and the rear passenger side-impact test. Neither vehicle was tested with side airbags. The side airbags are a $590 option on the Chrysler 300 and a $390 option on the Dodge Magnum. Two-wheel and four-wheel-drive versions of the Chevrolet Colorado, GMC Canyon and Dodge Ram pickups each earned four stars in the rollover tests. NHTSA said their percent chance of rollover was between 17.9 and 19.8 percent. The Ford Ranger 4x2 and Mazda B-Series 4x2 fared better than the four-wheel-drive version, earning three stars and a 21.9% chance of rolling over. The Ford Freestar crossover earned four stars and has a 14.7% chance of rolling over.

As expected, Ford tries to "spin" away the effect of the bad test results. Ford contends that NHTSA is using faulty methods to predict chance of rollover and is based on a model that includes "outdated information" and is not capable of "producing real-world results." I strongly disagree with Ford's assessment of what NHTSA is doing and hope the agency will continue to push for safer cars.

Source: *Associated Press*

Mistrial In Acura Airbag Lawsuit

A mistrial was declared in a civil lawsuit filed by a Miami family against Honda Motor Co. The mistrial came after the judge learned that one of the jurors had conducted her own Internet research on the case. In 1998, 7-year-old Ashley Moore suffered spinal cord injuries after a front-passenger-side airbag went off inside the family's 1996 Acura during a low-speed car accident in Tallahassee. The child, now a quadriplegic, lost all feeling below her ears. It was contended by the family that Honda failed to adequately warn consumers of the dangers of airbags for children "even though Honda very well knew since 1980 that an airbag could kill them." The Moores leased the car in June 1995, before the federal government ordered automobile manufacturers to issue warning labels saying that children 12 and under should not sit in the front seat of a vehicle equipped with an airbag.

Honda denied that the car was to blame for the child's injuries. In a typical statement, the company spokesman stated: "Honda has always had a relentless commitment to safety, and is extremely proud of the safety of its products, and the integrity of the engineering behind them. If this case needs to be re-tried, Honda is again prepared to defend the integrity and design of our occupant restraint system." A jury of four women and two men had deadlocked on the case and the judge ordered them to resume deliberations. The judge learned of a juror's independent research. That juror had argued against awarding any damages in the case. The court correctly declared a mistrial. We are told that the jurors were leaning in favor of the family when the mistrial occurred.

NHTSA Crackdown on Illegal Lighting Equipment

Continuing its crackdown against manufacturers and suppliers of illegal lighting equipment, the National Highway Traffic Safety Administration (NHTSA) recently announced its decision that high intensity discharge (HID) conversion kits produced by a Texas company don't comply with federal safety standards. The owner of ASTEX USA, a supplier of aftermarket HID kits, was ordered to conduct a recall campaign and provide a no-cost solution to the customer. When installed in a motor vehicle, the HID kits "can be expected to produce excessive glare to oncoming motorists and others," NHTSA said in its decision. To date, NHTSA has investigated 24 HID conversion kit suppliers. Each of the investigations has resulted in recalls or termination of sales. Obviously, these illegal lights are a potential hazard to those who share the road. Companies that sell, import or manufacture non-compliant equipment could face substantial civil penalties.

NHTSA Looks At Seat Belts

Ford Motor Co. faces a U.S. safety review of front-seat-belt failures on F-series pickups and other models that were part of a 2001 recall of 1.4 million vehicles. The National Highway Traffic Safety Administration (NHTSA) has asked Ford for more information after receiving 20 complaints since the recall, including reports of two crashes with injuries. In 11 cases, the belts failed after Ford dealers followed recall procedures and found no defects. Nine complaints didn't indicate whether recall steps were followed. The belts were made by the former TRW Inc., whose automotive safety unit is now TRW Automotive Holdings Corp. of Livonia. In addition to the 2001 F-series, the review includes 2001 Ford Crown Victoria sedans, Ford Windstar minivans, and Ford Expedition and Lincoln Navigator sport-utility vehicles. NHTSA's request could lead to a second recall. The regulatory agency has asked automakers for more information to follow an earlier recall on 11 separate occasions this year.

Chrysler Being Sued Over Baby's Van Death

As this issue went to the printer this month, an important trial involving the wrongful death of a baby had started in Nashville, Tennessee. An eight-month-old infant died after a driver rear-ended his grandparents' minivan three years ago. The family contends that the van's automaker, DaimlerChrysler, is to blame for the infant's death because of a faulty seat design. DaimlerChrysler had to know that the seats in its vans were prone to collapse during rear-impact accidents. While the company knew the seat design had killed and hurt a good number of other people around the country, it never warned anyone, especially parents of small children. The line of minivans put out by the company from 1984 to 2000—the Dodge Grand Caravan, Plymouth Voyager and the Chrysler Town and Country—all have the "collapsing" seats.

The accident happened in Nashville back in June of 2001, as the infant's grandfather pulled his 1998 Dodge Grand Caravan out of a driveway. The driver of a 1969 Ford F-100 pickup struck the minivan from behind. The van's seats collapsed on impact, causing a front-seat passenger in the van to go backward. The passenger's head struck the infant's, causing a massive head injury and brain damage. Significantly, everyone else in the accident walked away from the crash. The infant, who had been restrained in a car seat, died the next day. The family is seeking compensatory and punitive damages. DaimlerChrysler knew it had problems with the seats, but marketed the vans to people with children and failed to warn the public. This is a case that should be won based on the law and facts. The history of the seats and the string of deaths and injuries that have been caused by the bad design will be heard by the jury.

Safety Advocates Warn Of Collapsing Front Car Seats

I believe it will be helpful to take a closer look at the seatback problems. A number of people are killed each year by faulty front car seats that give way in car accidents. Front seat occupants are thrown into the rear and strike persons who are sitting in the back seats. Young children, who are placed in back seats, are oftentimes the victims. Automakers have long known about the issue. A decade ago, one GM engineer estimated stronger seats in all U.S. vehicles could save more than 400 lives a year. That memo prompted GM to begin designing safer seats. Safety advocates say automakers and the government need to strengthen automobile seatbacks. As we have pointed out in prior issues, the federal standard is more than 30 years old. However, back seat occupants are not the only ones at risk. Those in the collapsing seats can slide out of their seat belt. The injuries can be most severe. Many die and a good number have been left paralyzed as a result. Automakers insist seats must yield to help absorb the crash energy. They say a stiffer seat would lead to more injuries for those in front. But safety engineers point to seat designs such as those used by Volvo, which flex to absorb energy but don't collapse backwards. Mark Pozzi of Sandia Safety Sciences, a noted safety advocate, says: "There's no downside to having the strong, crashworthy seats, and there's no advantage to having the weak collapsing seats."

Clarence Ditlow, executive director of the Center for Auto Safety, a most effective consumer group, says "The government standard for seatbacks is "woefully out of date" and "far too weak." It is impossible to justify the governement's inaction. An empty promise was made to upgrade the standard 12 years ago. But the government now says any solution must involve head-rest and seat belt improvements. Most consumers don't even realize that seatback strength is a serious problem. Lots of folks have heard of exploding gas tanks and SUV rollovers by now, but most American's don't know about the problem with seats. Safety advocates say it may take a major court verdict to force more automakers to install safer seats. In the meantime, the best consumers can do is try to buy vehicles with the stronger seats. Seats with seat belts installed right on the seat, not on the car frame, are usually stronger. Some safety advocates urge parents to put children behind an empty passenger seat, if possible. For obvious reasons, there is less chance of a seat collapsing if it is unoccupied.

Safety Group Seeks Tire Expiration Date

A consumer safety group has asked the National Highway Traffic Safety Administration (NHTSA) to require "born-on" dates for car and truck tires. SRS Inc., a Massachusetts auto-safety research firm, sent a petition to NHTSA and provided an analysis from 50 crashes resulting in 37 deaths that involved different makes of tires by most leading manufacturers. According to Sean Kane, president of SRS, tire performance can begin to degrade after six years because of the rubber's age, even if the tires have not been used. Kane, calling this an invisible hazard, stated: "The industry knows a lot about it, and they have recommendations that they've hidden from the public for years. Just about every other product, from food to paint, has an expiration date on it."

There have been a tremendous number of fatal crashes linked to older tires with little wear and tear. The tire industry is studying tire aging, according to Donald Shea, president of the Rubber Manufacturers Association, a Washington lobbying group. Shea claims there is no data to suggest any specific age makes a tire less strong. Kane urged NHTSA administrator Jeffrey Runge to issue an advisory to consumers as the agency considers the SRS petition. Frankly, I don't expect NHTSA to take any immediate action on the petition. By law, NHTSA has 120 days to reject or accept it. Historical performance by the government regulatory agency on similar requests doesn't give us any reason to believe an advisory will be issued. Perhaps the publicity generated by the petition and tire problems generally, however, will result in public awareness and the need for action on the petition.

Some Tips On Tire Safety

Most folks don't realize that tires on our vehicles need to be checked on a regular schedule. We should all perform a routine inspection of the tires on our cars and trucks each month. Protection against avoidable breakdowns and crashes, improved vehicle handling, better fuel economy and increased tire life are just a few of the reasons to take five minutes every month to check your tires. The checklist below is simple and easy to use:

SAFETY CHECKLIST

- Check tire pressure regularly (at least once a month), including the spare.
- Check tire pressure before going on a long trip.
- Inspect tires for uneven wear patterns on the tread, cracks, foreign objects, or other signs of wear or trauma. Remove bits of glass and other foreign objects wedged in the tread.
- Make sure your tire valves have valve caps.
- Do not overload your vehicle. Check the tire information placard or owner's manual for the maximum recommended load for the vehicle.
- If you are towing a trailer, remember that some of the weight of the loaded trailer is transferred to the towing vehicle.

You can find the numbers for recommended tire pressure and vehicle load limit on the tire information placard and in the vehicle owner's manual. Tire placards are permanent labels attached to the vehicle door edge, doorpost, glovebox door, or inside of the trunk lid. Once you've located this information, use it to check your tire pressure and to make sure your vehicle is not overloaded, especially when you head out on a trip or for vacation.

Because tires may naturally lose air over time, it is important to check your tire pressure at least once a month. For convenience, purchase a tire pressure gauge to keep in your vehicle. Gauges can be purchased at tire dealerships, auto supply stores, and other retail outlets. Remember, the tire inflation number that vehicle manufacturers provide reflects the proper pounds per square inch (psi) when a tire is cold. To get an accurate tire pressure reading, measure tire pressure when the car has been unused for at least three hours. The following is a good and simple way to check pressure for your tires:

- Locate the correct tire pressure on the tire information placard or in the owner's manual.
- Record the tire pressure of all tires.
- If the tire pressure is too high in any of the tires, slowly release air by gently pressing on the tire valve with the edge of your tire gauge until you get to the correct pressure.
- If the tire pressure is too low, note the difference between the measured tire pressure and the correct tire pressure. These "missing" pounds of pressure are what you will need to add.
- At a service station, add the missing pounds of air pressure to each tire that is underinflated.
- Check all the tires to make sure they have the same air pressure (except in cases in which the front and rear tires are supposed to have different amounts of pressure).

Tires have built-in treadwear indicators that let you know when it is time to replace them. These indicators are raised sections spaced intermittently in the bottom of the tread grooves. When they appear even with the outside of the tread, it is time to replace your tires. You can also test your tread with a Lincoln penny. Simply turn the penny so Lincoln's head is pointing down and insert it into the tread. If the tread doesn't cover Lincoln's head, it's time to replace your tires. For a free brochure visit www.nhtsa.dot.gov or call 1-888-327-4236.

New Dynamic Tests Of Seats & Head Restraints In Cars

Using a new dynamic test and a dummy designed especially for rear impact testing, the Insurance Institute for Highway Safety has rated 73 seat/head restraint combinations available in 63 car models sold in the U.S. market. The ratings of good, acceptable, marginal, or poor indicate the range of occupant protection from whiplash injury in rear-end crashes at low to moderate speeds. Starting points for the ratings are the evaluations of head restraint geometry the Institute has been conducting since 1995. Now seats with head restraints that have good or acceptable geometry are being tested dynamically to compare their protection against neck injury in rear impacts. These seat/head restraint combinations earn overall ratings based on both geometry and dynamic test results. The Institute isn't testing seats with head restraints rated marginal or poor for geometry because such seats won't protect taller people. These seat/head restraint combinations are rated poor overall, based on geometry.

Only 8 of the 73 seat/head restraints that were dynamically tested earned overall ratings of good. Sixteen are acceptable, and 19 are rated marginal. The other 30 seat/head restraint combinations that were tested are rated poor, as are 24 seats that weren't tested because of inadequate geometry. The seat/head restraints that were dynamically tested together with those that weren't represent available seats in current car models the Institute has evaluated in its high-speed frontal offset crash test program. The Institute's ratings of seats and head restraints in cars sold in the U.S. market are part of an international program that includes ratings of additional seat/head restraints sold in the Canadian, Australian, and European markets. Results of these ratings were also released. Adrian Lund, the Institute's chief operating officer, stated: "Consumers in markets worldwide can use the new ratings to buy cars that provide better protection in rear-end crashes." The following will give our readers a pretty good overview of the problem and what is being done to make things better from a safety perspective.

- **Winners and losers:** Among the seat/head restraints that were tested dynamically, the winners are the ones in Volvos (all models) and Saab 9-2X and 9-3 models. These are rated good. So are the seat/head restraints in the Jaguar S-Type, Subaru Impreza, and some Volkswagen New Beetles. The dynamic test performance of the 2004 Toyota Corolla's seat/head restraint also was good, but this car's overall rating is acceptable because the head restraint's geometry is rated acceptable. A total of 54 seat/head restraint combinations are rated poor overall. "It's obvious that some automakers are doing a better job than others of designing seats and head restraints to protect their customers' necks in rear crashes," Lund says. "Especially disappointing is that so many car models still have head restraints with poor or marginal geometry. Good geometry is a simple and necessary first step toward adequate protection, and seats with bad geometry cannot begin to protect many taller occupants." Neck injuries sustained in rear-end crashes seldom are life threatening, but they can be painful. They occur frequently and are expensive. In the United States alone, they cost at least $7 billion in insurance claims per year.

- **Importance of a good seat/head restraint:** When a vehicle is struck in the rear and driven forward, the vehicle seats accelerate occupants' torsos forward. Unsupported, the occupants' heads will lag behind the forward movement of their torsos. This differential motion causes the neck to bend back and stretch. The higher the torso acceleration the more sudden the motion, the higher the forces on the neck, and the more likely a neck injury is to occur. "The key to reducing whiplash injury risk is to keep the head and torso moving together," Lund explains. "To ensure they move together, a seat and head restraint have to work in concert to support an occupant's neck and head, accelerating them with the torso as the vehicle is driven forward following a rear impact. To accomplish this, the geometry of the head restraint has to be adequate, and so do the stiffness characteristics of the vehicle seat." A head restraint should extend at least as high as the center of gravity of the head of the tallest expected occupant. A restraint also should be positioned close to the back of an occupant's head so it can contact the head and support it early in a rear-end crash. "If a head restraint isn't positioned behind an occupant's head, it cannot support the head in a rear impact," Lund adds. "But good head restraint geometry by itself isn't sufficient. A seat also has to be designed so it doesn't rotate backward in a rear impact because this would move the head restraint away from the head. At the same time, a vehicle seat cannot be too stiff. It has to 'give' so an occupant will sink into it, moving the head closer to the restraint. The new evaluation criteria take into account both static restraint geometry and the dynamic performance of seats and head restraints together in tests."

- **New seat/head restraint ratings differ from previous ratings of restraint geometry:** Since 1995 the Institute has been rating the geometry of head restraints in passenger vehicles based on how close the restraints are to the back of the head of an average-size man. In publishing the first ratings, the Institute explained that "good geometry is necessary but not sufficient for good protection. The relative stiffness of the seatbacks also helps determine effectiveness." Assessing seatback stiffness and other characteristics of whiplash injury prevention requires crash testing or other dynamic assessments that weren't practical in the mid- to late-1990s. Very few head restraints back then had geometry sufficient to warrant dynamic testing. The geometry of most head restraints was marginal or poor. Such restraints cannot provide adequate protection because they cannot be positioned to support many people's heads during crashes. Another reason dynamic tests weren't conducted is that there wasn't a test dummy with a realistic spine and neck configuration designed for testing in rear-end crashes at low to moderate speeds. Existing dummies in the mid- to late-1990s had rigid spines and necks that weren't designed to produce human-like responses to rear crash forces. Since then a new test dummy (BioRID) has been developed that's designed specifically for rear crash testing. This dummy, representing an average-size man, is beginning to be widely used. Plus automakers have improved head restraint geometry. The Institute's first evaluations (1995 models) found only 5 seats with good geometry. In contrast, 80% of the head restraints in 2004 models have good or acceptable geometry. Some models also are being equipped with new head restraints that are designed to move closer to the backs of people's heads during rear impacts. Dynamic testing is required to evaluate these "active" restraints and seatbacks that are specially designed to reduce acceleration forces.

- **International release of seat/head restraint ratings:** Recognizing the improvements in head restraint geometry and the need to move beyond ratings based solely on geometry, the Institute joined with other whiplash injury prevention experts in late 2000 to organize the International Insurance Whiplash Prevention Group (IIWPG). In addition to the Institute, IIWPG members include the following research organizations supported by automobile insurers: Thatcham in the United Kingdom; Allianz Centre for Technology in Germany and the German Insurance Institute for Traffic Engineering; Folksam Insurance in Sweden; ICBC in Canada; Insurance Australia Group; and CESVIMap in Spain. IIWPG conducted extensive research and testing to develop the procedures for the dynamic test and evaluation criteria that have been used by member research groups, including the Institute, to rate the performance of more than 200 seat/head restraint combinations in vehicles sold in a number of world markets. These ratings are being released simultaneously by IIWPG partners in Australia, Canada, Germany, and the United Kingdom, as well as by the Institute in the United States.

- **IIWPG procedures for rating seat/head restraints:** Overall seat/head restraint ratings are based on a two-step evaluation. In the first step restraint geometry is rated, using the same procedures as before. Seats with good or acceptable geometric ratings then are subjected to a dynamic test conducted on a sled that simulates the forces in a stationary vehicle that's rear-ended by another vehicle of the same weight going 20 mph. The dynamic test ratings of good, acceptable, marginal, or poor are derived from two seat design parameters (peak acceleration of the dummy's torso and time from impact initiation to head restraint contact with the dummy's head) plus neck tension and shear forces recorded on BioRID during the test. The sooner a restraint contacts the dummy's head and the lower the acceleration of the torso and the forces on the neck, the better the dynamic rating. A seat/head restraint's dynamic rating is combined with its geometric rating to produce an overall rating. The 73 overall ratings represent more seat/head restraint combinations than are listed. When the ratings for a car model's seat options are the same, these ratings are combined. Procedures for rating seat/head restraints provide a more detailed description of how head restraint geometry is measured, how seat/head restraints are tested dynamically, the crash test dummy BioRID, and the crash simulation sled (including photos) on which the dynamic tests are conducted.

- **Sled test sets tougher standard to earn good or acceptable rating:** Nine seat/head restraints rated good for geometry and another 21 with acceptable geometry turned in poor performances in the dynamic test. "The principal reason for the failing dynamic performances of these seats was that the seatbacks rotated backward in the test," Lund says. "This moved the head restraint farther from the dummy's head, so initial contact with the head restraint took longer. The result was that the dummy's head wasn't supported in time to reduce the differential motion of the head and torso that leads to neck injury. So, although the auto manufacturers have been improving the geometry of the head restraints in their cars, in many cases they need to make further improvements to their seats and head restraints."

- **Saabs and Volvos are winners:** The seat/head restraint combinations in two Saab models and three Volvos are rated good, but the designs of these systems aren't the same. As an occupant's torso sinks into a Saab seat during a rear crash, a mechanism in the seatback is designed to push the head restraint up and toward the back of the head. Volvo took a different approach, designing seatbacks with a special hinge to reduce the forward acceleration of an occupant's torso. "The designs are different, but the result is the same," Lund points out. "Both Volvo and Saab have found a way to reduce the differential motion of an occupant's head and torso that causes neck injury in rear crashes. This is what we want every automaker to do." Institute research released in 2002 indicated that fewer neck injury claims are filed for Volvos and Saabs with the advanced seat/head restraint systems, compared with older models of the same cars without such systems.

Source: NHTSA News Release

Global Auto-Safety Standards On Way

Auto regulators from the United States and other nations met on November 18th in Geneva to sign off on the first-ever global safety standard for vehicles. This first standard covers door-latch safety at a time of heightened interest in preventing deaths and injuries in rollover crashes. As we have reported on numerous occasions, keeping people inside vehicles in all crashes has been a top priority of safety engineers. The global standard will lead to stronger car door latches and require a secondary latch for sliding minivan doors and a warning if they're open. Based on the standard, it's my understanding that NHTSA will propose stricter U.S. rules on latches within a month. As we have learned over the years, the current door-latch standard is more than 30 years old and is extremely weak.

The new standard is the first byproduct of a 1998 accord among 22 nations to create uniform auto-safety standards. Rules will be proposed by the 22 nations that mirror the global standard. But, countries can modify the rules based on their individual needs. This joint effort should raise the safety bar in most nations, including in this country. A prime example is a badly needed change for the door-latch standard in the U.S. I hope the new standard won't weaken rules in some safety areas. Steve Oesch of the Insurance Institute for Highway Safety told the USA Today that global standards will lead to "some improvements and some setbacks." He complains that the tests of auto latches will still not simulate what really happens in a crash. It will be interesting to see what develops on the international stage. I understand that the next issues to be considered are lighting, such as where to place interior lights in cars, and braking, including how to test and rate brake systems. Hopefully, this will lead to safer cars on our highways.

Source: *USA Today*

IX. MASS TORTS UPDATE

Mass Tort Cases Currently Under Investigation Or In Litigation

The lawyers and other employees in our Mass Torts Section have been very busy. We are representing a tremendous number of people against companies that manufacture and market defective pharmaceutical products and defective medical devices. Much activity has from the recent influx of cases resulting from Merck's withdrawal of Vioxx from the market. Much more will be written on the Vioxx problems separately because of its magnitude and seriousness. However, the Section is also investigating and litigating claims involving other defective drugs and products, including:

ARAVA

This drug is prescribed to treat rheumatoid arthritis. A consumer group recently asked that this arthritis drug be withdrawn from the market due to reported adverse reactions, such as liver problems, skin diseases, lymphoma, blood disorders and death.

BAYCOL

This cholesterol-lowering prescription drug was pulled off the market on August 8, 2001. It has been linked to the sometimes fatal condition of rhabdomyolysis, a painful disorder that destroys muscle tissue and can lead to kidney failure.

CRESTOR

Crestor is a member of a class of drugs commonly referred to as "statins" and is used to lower cholesterol. AstraZeneca originally filed its application for Crestor with the Food and Drug Administration (FDA) in June of 2001. This application was delayed because of safety concerns revealed during clinical trials, which included reports of kidney damage and rhabdomyolysis.

EPHEDRA

Ephedra is an extremely popular and common "herbal" element that, until recently, was found in many items marketed as diet and sports enhancing products in vitamin shops, health food stores and gyms. The FDA recently ordered the removal of Ephedra-containing products from the market, based upon mounting evidence of its relationship to heart attacks, heart arrythmias, strokes and death.

GUIDANT ANCURE ENDOGRAFT SYSTEM

This device was manufactured and introduced by EndoVascular Technologies (EVT), a subsidiary of the Guidant Corporation, and was used to repair abdominal aortic aneurysms. EVT received approval by the FDA for Ancure® in September 1999 and first recalled the product in March 2001, several months after seven anonymous employees reported the failures and problems with the Ancure® system to the FDA. EVT reported last year that they would no longer be manufacturing the device after pleading guilty to 10 felony counts and paying more than $90 million in federal penalties surrounding their failure to report more than 2,600 incidents of problems with the device, including deaths and serious injuries.

HORMONE REPLACEMENT THERAPY (HRT)

For years, women have taken Hormone Replacement Therapy (HRT) to reduce the symptoms of menopause. Studies now show that HRT medications can increase the risk of breast cancer, ovarian cancer, stroke and heart disease.

NEURONTIN

Neurontin was approved by the FDA in 1993 as an anti-seizure treatment used in epilepsy patients. But, recent statistics have shown that the vast majority of Neurontin prescriptions are for off-label uses. We are currently investigating claims on behalf of patients who have taken Neurontin and attempted suicide or have committed suicide.

PHENYLPROPANOLAMINE (PPA)

PPA is an active ingredient that was found in many over-the-counter cold, cough, allergy and diet aids. PPA was removed from the market on November 6, 2000, after an industry-funded study performed at the Yale University Medical School demonstrated that products containing PPA increased the user's risk of suffering hemorrhagic strokes. Prior research supports claims of non-hemorrhagic strokes being related to this active ingredient as well.

SERZONE

Serzone is an anti-depressant drug manufactured by Bristol-Myers Squibb Company. This drug was approved by the Food and Drug Administration for use in the United States in December

1994. The FDA had instructed the manufacturer to include a black-box on its label because of serious adverse events related to the liver. Bristol-Myers discontinued sales of Serzone in the United States earlier this year.

SMITH & NEPHEW KNEE REPLACEMENTS

In September 2003, Smith & Nephew announced a voluntary recall from the U.S. market of two of their knee replacements products. The products included in the recall are the cement-less versions of the Oxinium Genesis II and Profix II. The complications stem from the products not bonding properly.

VIOXX

While the recent withdrawal of this drug from the market may make it seem like new litigation, our firm has been working on these cases for over three years. In fact, we filed our first Vioxx case in November 2001. Since then, we have filed about sixty other cases. Discovery efforts in our lawsuits have allowed us to review hundreds of thousands of documents and take approximately 30 depositions. Moreover, we have retained leading Vioxx experts and are set for the first Vioxx trial in the country later this month. We are interested in investigating and litigating claims involving heart attacks, strokes and temporary ischemic attacks (TIAs). We will set out the Vioxx story in more detail below.

WELDING RODS

A recent study suggests that industrial exposure to welding fumes may be associated with the early onset of Parkinson's disease. Welding rods, electrodes and wire contain numerous substances including manganese, copper, lead and cadmium that release toxic fumes when used during welding. We are currently investigating potential claims against the manufacturers of welding for damages caused by exposure to manganese fumes.

ZYPREXA

Zyprexa is a prescription drug designed to manage symptoms of schizophrenia and other psychotic conditions. In September of 2003, the FDA instructed all manufacturers of this type of drug to add a warning to the product label due to a link between usage and the serious side effects of diabetes mellitus and blood sugar disorders such as hyperglycemia, diabetic ketoacidosis and pancreatitis.

For additional information on any of these areas of litigation, please visit our website at www.beasleyallen.com. We have attempted to provide some good information for our readers. I hope it will prove to be helpful. Our Mass Torts Section will be very busy over the next several months. We sincerely believe that litigation against the powerful pharmaceutical industry is some of the most important service that lawyers can perform.

MERCK KNEW VIOXX WAS DANGEROUS

When Merck pulled Vioxx from the market on September 30th, the company attempted to convince folks that the drug was pulled as soon as the company discovered information tending to indicate a potential connection between an increase in patient heart attacks and strokes among Vioxx users. That is simply not true and Merck knew it. Merck officials announced that a clinical study, which had been ongoing for nearly three years, showed an increase in Vioxx user rates of heart attacks and strokes after an 18-month usage duration. Merck also announced that the study had been concluded early because of this significant finding and that the data would not be available for some time.

The study, which Merck referred to in its initial press conference, was the APPROVe study. This is an acronym for Adenomatous Polyp Prevention on Vioxx study. This study, which lasted over 3 years, was an attempt by Merck to show that Vioxx would have a beneficial affect on the prevention of colon polyps. Unfortunately, however, the study merely reinforced information that had been available to Merck for several years, about the deadly tendencies of Vioxx. On September 18, 2004, the initial results of the APPROVe study were released to the public at the American College of Rheumatology convention in San Antonio, Texas. In this press conference, Dr. Alise Reicin, a Merck representative, represented that the APPROVe study was the first indication by Merck that there was any problem with Vioxx or specifically that Vioxx increased the rates of heart attacks and strokes among users. Moreover, Dr. Reicin reported to the doctors and news media representatives in attendance that, according to the APPROVe study, Vioxx increased the rates of heart attack and stroke among users by approximately 250%. Paul Sizemore, a lawyer in our firm, attended this press conference and was shocked by the representation made by Merck. I will set out our reasons for not buying Merck's spin on Vioxx:

- Those of us who have been litigating against Merck on Vioxx cases for some time know that the representation that Merck first discovered the deadly tendencies of Vioxx in September 2004 is absolutely false.
- We have received documentation in discovery in actual cases that shows unequivocally that Merck knew that Vioxx would increase the rates of heart attacks and strokes among users back in the mid 1990s.
- In depositions, Merck doctors in charge of the development of Vioxx, have admitted that Merck was aware of the possibility of Vioxx increasing the rates of heart attacks and strokes back in the mid 1990s.
- Merck conducted a clinical study (called VIGOR) that revealed to the company as early as 1999 that Vioxx did in fact increase the rates of heart attack and stroke among users.
- Depositions of internal Merck doctors associated with both Vioxx and the VIGOR trial reveal that Merck was well aware of the increased incidents of heart attacks and strokes among Vioxx users after the VIGOR results were released in early 2001.

Paul tells me he was infuriated as he sat in the audience and listened to these misrepresentations from Merck representatives, clearly designed to portray Merck as a professionally responsible corporation. Paul knew the information put out was absolutely false. All of the lawyers in our firm who have been involved with this litigation for the past three years are well aware that Merck was more concerned with making profits than with patient safety. We have a room full of documents that clearly show Merck was fully aware of the dangers associated with Vioxx, yet decided to ignore the hazards associated with the drug in an effort to increase the company's profits. We are working diligently in all of our pending cases to remove confidentiality provisions that bar us from revealing these documents to the public. It is simply incomprehensible that Merck claims to be a responsible corporation, while at the same time, battling endlessly in court proceedings to hide the truth from the public. We are confident that once the public has an opportunity to hear the truth, Merck's true nature will be revealed and it won't be a pretty picture. This is a classic example of a large corporation putting its profits over the health and safety of the consumers who trust tem and buy their drugs.

The inappropriate actions of Merck have spurred a congressional investigation by a committee headed by Senator Charles Grassley (R-IA). Simply put—the committee is investigating what Merck knew and when the company knew it. They will also be investigating whether Merck withheld information from the Food and Drug Administration FDA and the public in an effort to hide the dangers of Vioxx. Because we fully support Senator Grassley's efforts and recognize how important the mission is, we have cooperated fully with the committee. We sincerely hope and pray that Senator Grassley will be successful in revealing to the public the true nature of Merck's actions and the company's efforts to hide the long-known dangers associated with Vioxx from the public.

You may have seen Dr. Eric Topol of the Cleveland Clinic on *60 Minutes*. According to Dr. Topol, as many as 160,000 heart attacks have been caused by Vioxx since its introduction into the market in 1999. It is shocking to hear Merck contend that it had no knowledge of the dangerous nature of Vioxx until late September 2004. All of us associated with this massive litigation know that this is absolutely false and we are looking forward to the day when the public will have access to the information we have had available to us because of the lawsuits we have filed.

Lessons Learned From Vioxx

The withdrawal of Vioxx from the market came as a real surprise for most Americans. This is because the vast majority of folks expect the FDA to protect them from bad drugs. However, the pulling of Vioxx came as no surprise to Public Citizen and folks who subscribed to the organization's Worst Pills, Best Pills newsletter. Their readers were warned of the hazards relating to Vioxx long before any action was taken. In fact, Public Citizen had warned consumers in 2001 not to take the drug because of adverse effects and evidence of a higher risk of heart attack among users.

Public Citizen has been after the FDA to do a better job for years. Vioxx is the ninth prescription drug to be taken off the market in the past seven years that Public Citizen warned Worst Pills subscribers not to use. In some cases, Public Citizen listed the drugs as "do not use" drugs months or years before the drugs were finally pulled from the market because of safety concerns. Unfortunately, the average time between Public Citizen's warning and a drug's removal from the market was one year and eight months. For four of the drugs—Vioxx, Baycol, Rezulin and Serzone—Public Citizen issued warnings more than two years before the drugs' removal from the market. So the obvious question is, "where was the FDA during those times?" It would certainly appear that a government agency with the responsibility of protecting the public would have had knowledge at least equal to that of Public Citizen. Could it be that the FDA is overly protective of the drug companies?

I encourage all of our readers to take advantage of Worst Pills, Best Pills, the monthly newsletter available electronically through Public Citizen's website, www.worstpills.org. The site also has searchable information about the uses, risks and adverse effects associated with prescription medications. Folks can subscribe to the website, www.worstpills.org for a modest $15 fee, which includes a monthly newsletter with additional electronic updates and news on dangerous prescription drugs. A subscription could save your life or that of a loved one!

The Litigation Picture For Merck

Things have been breaking very fast on the Vioxx front. There have already been hundreds of lawsuits filed around the country against Merck & Co. Our firm was filing claims against the company long before Merck pulled Vioxx from the market on September 30th. In fact, our first cases were filed in 2001. We knew then Vioxx was dangerous for use. A new analysis by Merrill Lynch concludes Merck's liability could be as high as $18 billion over the next decade or so. In my opinion, that may prove to be a most conservative estimate. We know that there have been at least 1,000 Vioxx-related lawsuits filed against Merck so far. Our firm has filed about 100 cases at last count. Currently we are investigating and evaluating around 10,000 individual claims. We will file all that meet our criteria and we find to have merit.

Victims suing Merck must prove two primary assertions: (1) the company understood Vioxx's risks and downplayed them; and, (2) that the drug played a role in causing heart attacks or strokes. A new analysis published online last month by the British journal The Lancet will be a real benefit to our firm in representing the Vioxx victims. Swiss researchers led by Dr. Peter Juni of the University of Bern pooled results from 29 studies of Vioxx and found that people who took it had more than double the risk of heart attack than those given dummy pills or other painkillers.

The researchers have concluded that the drug "should have been withdrawn from the market several years earlier. The unacceptable cardiovascular risks of Vioxx were evident as early as 2000," Lancet editor Dr. Richard Horton wrote in a commentary. He faulted Merck for "astonishing failures" in monitoring the safety of its drugs and the U.S. Food and Drug Administration for "lethal weaknesses" in oversight. This study backs up what we have known for over three years. We will be able to prove that Merck knew Vioxx could cause heart attacks and strokes, but minimized the drug's side effects while aggressively marketing it. We can support our clients' cases from Merck's own internal documents. Documents in our possession prove that Merck knew about Vioxx's problems long before they became public and that the company engaged in a carefully planned campaign to mute the risks once they began emerging. Documents obtained through discovery in our cases show that Merck understood Vioxx's dangers at an early stage. For example, in an e-mail dated February 25, 1997, Merck official Briggs Morrison said patients taking Vioxx in a clinical trial should also take aspirin, which has cardioprotective powers, because otherwise "you will get more thrombotic events," i.e., blood clots. In another e-mail, Merck's research chief Edward Schonick wrote to colleagues on March 9, 2000, saying the cardiovascular events "are clearly there."

Another key piece of evidence is a 2001 warning letter the FDA wrote to Merck, which said a promotional campaign for Vioxx "minimizes the potentially serious cardiovascular findings" observed in the VIGOR study and that it "misrepresents the safety profile for Vioxx." The letter said Merck failed to disclose that its explanation about naproxen was a hypothesis with no adequate studies to support it and that another reasonable explanation for the increased heart attacks is that Vioxx may help cause blood clots. The FDA has released another study that said Vioxx may have contributed to an additional 27,785 heart attacks or deaths from 1999 to 2003 that might have been avoided if patients were taking Pfizer Inc.'s Celebrex. The study analyzed medical records of 1.4 million adult members of Kaiser Permanente, the nation's largest HMO. Preliminary findings were released in August. The report also found that naproxen had no cardioprotective effects, disputing Merck's contention.

Some Typical Cases Involving Vioxx

We have a client who is a retired mortgage banker, married with two children and who had been in good health generally. Incidentally, his daughter is a nurse practitioner. In February 2004, our client suffered a heart attack and underwent CABG (coronary artery bypass grafting) for 5 vessels. He suffered another heart attack, described as minor, in March 2004. Our client was found to have elevated cholesterol and triglycerides and started taking medication during this time. He took Vioxx, beginning in 1999 and continued to take the drug until August 30, 2004, when he stopped taking Vioxx. This was approximately 7 to 10 days prior to having total knee replacement surgery on August 26th. He was put back on Vioxx while in the hospital. Our client received daily doses of Vioxx from August 26th to August 30th. Following surgery, on August 27, 2004, the unfortunate victim, who had no idea that Vioxx was dangerous, suffered an acute stroke and is now totally disabled. This man's ordeal is typical of what we are seeing in other victims. It is indeed a sad state of affairs. None of our clients had any idea that Vioxx was dangerous and took the drug as prescribed for pain.

For those of you who saw the CBS' *60 Minutes* report already know about the second case, I will briefly discuss. That case involves a young lady who died after taking Vioxx. Her husband, who is our client, appeared along with Andy Birchfield, on *60 Minutes*. This lady was healthy, with no history of heart attacks or cardiovascular problems and was very active and happy. Our client's wife would be alive today if she had not taken Vioxx. Her death was a tragic event that leaves a grieving family who want Merck to answer for what it has done. The facts of this case, which we have filed in Tennessee, are typical of what we are seeing—healthy people who took Vioxx to deal with pain—and who died or suffered a disabling stroke as a result. .

The 60 Minutes Report

Andy Birchfield, head of our Mass Torts Section, was the only lawyer featured on the excellent report on Vioxx that aired on CBS' *60 Minutes* on November 14th. One of our clients was interviewed and told the tragic story of how Vioxx killed his 39-year-old wife who had been healthy and quite active. Merck's problems—as set out by *60 Minutes*—are just beginning. This company has caused tens of thousands of deaths by its actions. It is estimated that more than 160,000 persons suffered heart attacks after taking Vioxx. The company's explanations for its actions are very weak and simply won't sell to the public. Any of our readers who didn't see the *60 Minutes* show can watch it by going to our website, www.beasleyallen.com.

Doctors Were Victims Too

Doctors all over the country are complaining that Merck tried to squelch negative opinions on Vioxx's safety and downplayed the drug's health risks. Stanford University medical professor Dr. James Fries said a high-ranking Merck official, Dr. Louis Sherwood, tried to intimidate several doctors who expressed concerns about Vioxx's safety. Dr. Fries said Sherwood made charges to these doctors' superiors that the physicians were biased against the drug. Dr. Fries said he received such a call about one of his doctors and learned it was part of a pattern. He wrote Merck chairman Raymond Gilmartin protesting the company's attempt to suppress academic discussions. Dr. Fries said: "I think Merck went over the line. Their approach was to try to get people fired for saying things they (Merck) didn't agree with." The calls to Dr. Fries stopped after his letter, which was sent in 2000 or 2001. Physicians, including Dr. Eric Matteson of the Mayo Clinic, said Merck should have acted more swiftly to determine Vioxx's cardiovascular safety profile after VIGOR.

Vioxx's label was changed in 2002 to reflect the VIGOR study, but it wasn't strong enough; Merck continued to downplay the drug's risks. Merck had at least three programs to train sales representatives "to misstate and misrepresent the truly dangerous nature of Vioxx to prescribing physicians." These materials were under a protective order and a court-ordered seal, but now are free to be viewed by the public. We were able to get the stay lifted by a federal judge in Tampa, Florida, on November 2nd. Merck's sales force clearly downplayed the risks of Vioxx. Salespeople would discuss Vioxx's other side effects such as high blood pressure, but when it came to heart attack risks, they would switch to talking about how the 2000 data were analyzed. It was a carefully structured plan to misled doctors who trusted Merck.

Merck And FDA Take Congressional Heat Over Vioxx Safety

Senator Grassley's committee took a full day of testimony on the Vioxx debacle on November 18th. The American public is "virtually defenseless" if another medication such as Vioxx proves to be unsafe after it is approved for sale, a government drug safety reviewer told the committee during the testimony. "I would argue that the FDA as currently configured is incapable of protecting America against another Vioxx," said Dr. David Graham, who warned that the arthritis drug had been linked to an increased risk of heart attack and stroke. All consumers should be shocked to learn that Dr. Graham told the Senate Finance Committee there are at least five other drugs on the market today that should be looked at seriously to see whether they should remain there. The Food and Drug Administration has defended its actions regarding Vioxx. In a written statement issued on the eve of the Senate committee hearing, the agency cited its "well-documented and long-standing commitment to openness and transparency in its review of marketed drugs."

Senator Grassley, who chaired the committee hearing, suggested that an independent board of drug safety might be needed to ensure the safety of medications after they're approved for the market. He made this astute observation: "Consumers should not have to second-guess the safety of what's in their medicine cabinet." Dr. Graham told the committee that research indicated that Vioxx caused up to 160,000 heart attacks and strokes. Dr. Graham, who said his research helped to coax the FDA to withdraw a number of drugs including Fen-phen, a weight loss drug, Lotronex, Baycol and Rezulin, told the committee: "During my career I have recommended the market withdrawal of 12 drugs. Only two of these remain on the market today." Dr. Graham questioned the FDA's commitment to removing unsafe drugs from the market, since it would call into question their earlier approval.

The FDA, simply put, hasn't done a very good job of protecting the public from unsafe drugs. The agency has dropped the ball on too many drug approvals and has left unsafe drugs on the market after receiving information on their being dangerous. Andy Birchfield, who has been cooperating with Senator Grassley's committee, attended the November 18th hearing. Andy, who was interview by several media outlets while in Washington, stated: "How can they see that type of problem and look back and say 'We did everything right'? When they're not willing to recognize mistakes, we have no hope for them voluntarily taking measures to correct the situation."

Dr. Graham was lead author on a research project that studied the records of almost 1.4 million 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. Vioxx was responsible for an additional 27,785 deaths from heart ailments from 1999 to 2003, Dr. Graham concluded. We were shocked to learn that his superiors pressured Dr. Graham to soften his conclusions on several drugs.

New Study Links Pfizer's Bextra To Heart Attacks

The Pfizer painkiller Bextra appears to be linked to problems similar to those caused by Vioxx. The incidence of heart attacks and strokes among patients given Bextra was more than double that of those given placebos, according to preliminary results of a study presented in October at the American Heart Association meeting in New Orleans. The study, which pooled data from 5,930 patients taking part in 12 trials, found 2.19 times the number of heart attacks or strokes among patients given Bextra, compared with those given placebos. Bextra is a drug similar to Vioxx. Dr. Garret A. FitzGerald, a cardiologist and pharmacologist at the University of Pennsylvania, stated in an interview with the New York Times: "The magnitude of the signal with Bextra is even higher than what we saw in Vioxx. This is a time bomb waiting to go off." Dr. FitzGerald is one of the world's leading experts in COX-2 drugs, a class of medicine that includes Vioxx, Bextra and Celebrex, which is also made by Pfizer.

For comparison, Vioxx had sales of \$2.5 billion last year, while Celebrex had sales of \$1.8 billion and Bextra \$687 million. Celebrex and Bextra have been on their way to larger sales this year. In previous studies, Dr. FitzGerald was among the first to explain why COX-2 inhibitor drugs, which were developed to cure pain without causing ulcers, might create heart troubles. Dr. Curt Furberg, professor of public health sciences at Wake Forest University School of Medicine, helped conduct the study that Dr. FitzGerald announced at the meeting. Dr. Furberg says that "Bextra is no different than Vioxx, and Pfizer is trying to suppress that information."

Pfizer Inc. is currently in talks with the FDA over a likely change to Bextra's label to carry a strict warning alerting doctors of the risk of a potentially deadly skin reaction. This is according to statements in a regulatory filing by the company. The warning on Bextra, which we have reported is in the same class of drugs as Celebrex and Merck's Vioxx, suggests the commercial future of Bextra is at risk. Pfizer is talking to the FDA about carrying a "black box" warning that Bextra might result in a rare but sometimes fatal skin disorder called Stevens-Johnson syndrome.

Source: *The New York Times* and *Reuters News*

CELEBREX HAS BEEN LINKED TO 14 DEATHS

Documents from Canadian health authorities show that Pfizer Inc.'s painkiller Celebrex is suspected of contributing to at least 14 deaths and other heart and brain side effects, according to the National Post newspaper in Toronto. Celebrex has been touted as a safer alternative to Vioxx. New York-based Pfizer will now conduct a long-term study of Celebrex to see if it actually helps the heart. But, questions remain about the safety of the whole class of Cox-2 inhibitors drugs, which also includes the drug Bextra, which is also manufactured and sold by Pfizer. The documents include more than 100 adverse-reaction reports on Celebrex over the past five years, including five strokes and 19 cases of heart attack, cardiac arrest or heart failure, according to the National Post.

Canadian pharmacists filled about 3 million prescriptions for Celebrex last year. Dr. Patrice Roy, Pfizer Canada's Director of Scientific Affairs, told the National Post that the Health Canada adverse reaction information is important, but far from conclusive. Dr. Roy did say, however, that Celebrex hasn't posed a threat to cardiovascular safety in clinical studies. In this regard, he stated: "You have to look at the data accumulated over time. This drug has been studied in 30,000 patients, has been prescribed to over 40 million patients worldwide, there are studies actually sponsored by the FDA... and basically we haven't seen anything." Health Canada collects adverse reaction reports from doctors, drug manufacturers and others as a sort of early warning system for safety problems.

Source: *Associated Press*

FDA WILL BE MORE CAREFUL ON NEW MERCK DRUG

Merck is now attempting to market Arcoxia as a successor drug to Vioxx. The Food and Drug Administration (FDA) has now informed Merck that it needs further safety and efficacy data before it will approve this drug. The FDA's actions really shouldn't have come as a surprise to the company. Most analysts and doctors were expecting the FDA to seek additional information before approving Arcoxia because of Merck's problems with Vioxx. As most folks now know, the two products are in the same class of drugs known as Cox-2 inhibitors. Clearly, the FDA should require more tests. To do otherwise is unthinkable. Arcoxia shouldn't be put on the U.S. market until the drug can be proven to be safe. But, Arcoxia is already being sold in 48 countries throughout the world.

Merck had released positive study results for the Arcoxia, which found that there was no statistical difference in adverse cardiovascular events between it and diclofenac, an older pain reliever. But, the average length of time a patient was in the trial was only nine months. As everybody now knows, Vioxx's dangers didn't manifest themselves until 18 months into the trial. Merck is scheduled to finish a 23,500 patient study in early 2006 that was designed to study cardiovascular safety. Many analysts and doctors believe Arcoxia would only be approved after that study is completed and it demonstrates the drug doesn't increase the risk of heart attacks and strokes. We expect the FDA to take a much slower approach on the new drug because of the very bad publicity it has received on Vioxx.

CRESTOR MAY HARM KIDNEYS

Consumer advocate Dr. Sidney Wolfe of Public Citizen has renewed his efforts to get the anti-cholesterol drug Crestor removed from the market. Dr. Wolfe sent a letter to the Food and Drug Administration (FDA) citing 29 cases of serious kidney problems—18 of kidney failure and 11 of kidney insufficiency—out of some 4.5 million prescriptions for the drug between January 1, 2001 and September 30, 2003. According to Dr. Wolfe, that is more kidney problems than reported by all other statin-type anti-cholesterol drugs. Data provided by AstraZeneca indicates that kidney failure made up 3.5% of adverse events for Crestor— known by the generic name rosuvastatin—compared to 5.7% for lovastatin, 4.0% for simvastatin and fluvastatin, 3.0% for pravastatin and 2.2% for atorvastatin.

The rate of reports of kidney failure or damage among patients taking Crestor is 75 times higher than in all patients taking all other statins, according to a Public Citizen analysis of government data. Public Citizen sent this information to the U.S. Food and Drug Administration when it renewed its call for the drug to be taken off the market. Dr. Wolfe, director of Public Citizen's Health Research Group stated in his letter to the FDA: "It becomes clearer by the day that this drug is uniquely toxic but offers no unique benefit, and must be removed from the market." The FDA had evidence before approving Crestor that it caused an increased incidence of rhabdomyolysis (severe muscle deterioration), yet the agency approved it anyway, erroneously believing that this toxicity was limited to an 80-milligram dose that was not ultimately approved. The drug went on the market in September 2003.

In March 2004, Public Citizen petitioned the FDA to remove Crestor from the market because it had been linked to muscle damage and kidney failure. There have been 29 reported U.S. cases of acute renal failure or renal insufficiency out of 4.5 million Crestor prescriptions filled between September 2003 and the end of August 2004. For all other statins, including Lipitor, Zocor, Lescol, Pravachol and Mevacor, there have been 27 cases of acute renal failure or renal insufficiency reported from January 1, 2001, through September 30, 2003, out of 316 million prescriptions filled. This is a rate of .085 cases reported per million prescriptions filled. Thus, the rate of reports of acute renal failure or renal insufficiency for Crestor is 6.4/.085, or 75 times higher than that of all of the other statins combined. In addition, as of August 26, 2004, there had been 65 reports of rhabdomyolysis among U.S. patients taking Crestor, a rate of reports approaching that of Baycol, a cholesterol drug that was taken off the market because of rhabdomyolysis. To read Dr. Wolfe's letter, go to http://www.worstpills.org.

Source: *Public Citizen*

Report Faults Bayer On Baycol Withdrawal

New reports accuse another major drug company of being too slow to pull a dangerous medication from the market and question the ability of the federal Food and Drug Administration to protect the public from such risks. The drug in question is Baycol, the cholesterol-lowering statin withdrawn by Bayer AG in 2001. A new study has found that the risks were far greater than had been believed. The study concludes that today's top-selling statins are very safe, but could be risky when taken with other drugs called fibrates by older people with diabetes. It also reveals that fibrates alone can be dangerous. These drugs lower triglycerides and often are taken by diabetics. Six papers on the issue were released late last month and were published this month in the Journal of the American Medical Association. Its editors called for a new, independent office separate from the FDA to monitor drugs after they're on the market. The editors made this observation: "It is unreasonable to expect that the same agency that was responsible for approval of drug licensing and labeling would also be committed to actively seek evidence to prove itself wrong."

The FDA has been accused of moving too slowly to stop sales of Vioxx. The new study that Graham and nine other government and private scientists published because the drug was only approved in August 2003 and their study started in 2001, just after Bayer withdrew Baycol. They checked records from 11 large health insurance companies on more than 250,000 statin-users from 1998 to 2001. Statins lower LDL or "bad" cholesterol, and fibrates lower a different kind of fat in the blood, triglycerides. People often are prescribed both. Those taking the top-selling statins Lipitor, Pravachol and Zocor had an extremely low risk of the muscle disorder. But it was five times more common in people taking a fibrate, and an additional two-fold greater in people taking both types of drugs. The risk with Baycol was 10 times higher than for other statins, and astronomical when it was combined with a fibrate: one out of 10 patients taking these for a year would have developed the dangerous side effect. Dr. Graham told the Associated Press: "I can't think of another drug safety combination where the level of risk is this high."

Some popular brand names of fibrates are Abitrate, Atromid, Lopid and TriCor. As for Crestor, the newest statin on the market, its label already warns that people over 65 and those with diabetes or kidney problems are at greater risk of the muscle disorder. Bayer added a similar warning to Baycol's label but not for more than a year and a half after it had evidence of the risk, Dr. Bruce Psaty of the University of Washington in Seattle and three other drug safety experts write in another article in the medical journal. As proof, they cited published studies on Baycol and internal company documents that have become public as part of a lawsuit in Texas against Bayer over the drug. These experts stated that there is a "striking asymmetry" between what the company knew within three months of putting Baycol on the market and what it told the public and physicians. They also wrote that companies have financial motives to keep such damaging information quiet, and should not be in charge of monitoring the safety of their own drugs. Instead, an independent group needs to do this, they write.

Source: *Associated Press*

X. BUSINESS LITIGATION

U.S. Judge Approves Citigroup Settlement

A federal judge has approved Citigroup Inc.'s $2.6 billion settlement with WorldCom Inc. investors who lost billions when an accounting scandal sent the telecommunications company into bankruptcy protection. The settlement resolved one of the largest class action lawsuits resulting from the string of corporate scandals over recent years. Citigroup, the world's largest financial services company, had set aside adequate reserves for the settlement. The settlement initially called for Citigroup to pay $2.65 billion to WorldCom stockholders and bondholders, but the amount was later cut to $2.575 billion. This was equal to just less than half of Citigroup's profit in the third quarter. Investors will also receive $51 million in interest. This is an excellent settlement.

While the settlement is the second largest ever in a securities class action case, litigation by WorldCom investors is far from over. WorldCom, which emerged from bankruptcy protection earlier this year, is now known as MCI. The class action lawsuit, which includes hundreds of thousands of investors, accused Citigroup and other investment banks that underwrote WorldCom bonds of failing to conduct due diligence before bringing the securities to market. The lawsuit also concentrated on the role played by Jack Grubman, once a star telecommunications analyst at Citigroup's Salomon Smith Barney unit. Investors accused Grubman of touting WorldCom publicly while knowing his statements were inaccurate. U.S. District Judge Denise Cote hailed the Citigroup settlement as "historic," but noted that "this litigation is far from over." Indeed, more than a dozen other banks involved in the litigation—including J.P. Morgan Chase & Co and Deutsche Bank AG—have not settled and are set to begin trial in February.

Source: *Reuters News*

Bayer/Baycol Securities Litigation

Investors in Bayer, AG and its U.S. subsidiary, Bayer Co., are preceding with their securities claims in a New York court against these companies, which allegedly made fraudulent misstatements about the introduction, marketing and eventual withdrawal of Baycol, the cholesterol-lowering drug mentioned in a preceding section. The judge in the New York case noted that the plaintiffs had adequately pleaded most of the alleged misstatements as material, and that all but two of the defendants recklessly disregarded information concerning problems with the drug. Allegedly, in early August 2000, senior Bayer executives met with Wolfgang Plischke, then an executive vice-president of Bayer Co. and president of its North America pharmaceutical division, to discuss the accumulation of adverse event reports. A consensus emerged that the data concerning Baycol's dangers "was putting the brand at risk." When that conclusion was communicated to a Bayer executive the reservations of the safety experts were allegedly dismissed. This executive told his marketing team to "promote the hell out of this product," according to the lawsuit.

The court noted that by the fall of 2000, Bayer had received 482 adverse event reports of rhabdomyolosis among Baycol users, including some deaths. In April 2001, the FDA again told Bayer to amend its warning labels. In response, the company reiterated its warning about the danger of taking Baycol and another drug, Gemfibrozil, together. The FDA had urged Bayer to withdraw Baycol from the market and Bayer did so on August 8, 2001. The stock price fell by 17%. However, the investing public was reassured by Bayer, which said certain product liability litigation concerning Baycol was "unfounded." The company concluded there was no need to establish reserves for potential losses. Nevertheless, four months later, Bayer disclosed in an SEC filing that if the product liability litigation were successful, the damages would be material to its results of operation and cash flows.

The complaint in the securities lawsuit essentially contends that the defendant's pre-withdrawal statements about Baycol's safety were materially misleading because they did not disclose the following adverse event reports:

- Smith Kline Beecham's warning about adverse drug interactions;
- Evidence suggesting that Baycol caused rhabdomyolosis at higher rates than other statins; and
- Internal concerns over the safety of Baycol and the adequacy of its risk warnings.

In addition, earning reports in other statements regarding Baycol's growth were materially misleading because of such safety concerns, and because of the lack of reserves for potential losses associated with Baycol. Finally, it is alleged that several press releases, Securities and Exchange Commission registration statements, and annual reports did not take into account reserves for loss contingencies and did not disclose the defendant's knowledge of the risks associated with the drug.

The New York court ruled that on August 2, 2000, when Bayer's global drug safety executives met to address "mounting concerns" over Baycol, a consensus emerged with respect to the adverse event reports "that the potential dangers were putting the brand at risk." At this point, the court found that the defendants were under a duty to disclose the adverse event data, and their failure to do so after August 2000 gives a legal cause of action under Section 10(b) of the Securities and Exchange Act of 1934. For similar reasons, the court said that defendants were under a duty to update their pre-withdrawal statements that Baycol would produce a sustained increase in Baycol's operating margin and "provide strong potential for future growth." By August 2000, the court noted, the defendants believed the brand was at risk, but failed to disclose the information that led them to that conclusion. As such, the court found that the plaintiffs adequately alleged in their lawsuit that Bayer's forward-looking statements needed to be updated.

Regarding the defendants' alleged misrepresentations following the withdrawal of Baycol from the market, the court concluded that the statements Bayer acted in the interest of patients' safety constituted non-actionable puffery. The court did, however, find that a post-withdrawal statement by a company executive that Bayer took action as soon as it had anomalous accumulation of negative data about Baycol, was specific and fact-based and thus was actionable. Similarly, the court allowed the plaintiffs to proceed with claims based on the defendant's assertion regarding the merits of pending product liability litigation, as well as their statements that there was no need to establish litigation reserves because the lawsuits were groundless. The court also concluded that for more than one year, Plischke and David Ebsworth, then head of Bayer's worldwide pharmaceutical business group, knew of data that Bayer executives believed was significant enough to threaten Baycol's viability. That knowledge, according to the court, renders defendants' post-August 2000 silence actionable. It will be very interesting to see how this case unfolds.

Source: *Securities Regulation & Law*

MEDTRONIC ORDERED TO PAY PUNITIVE DAMAGES

A federal court jury in Memphis, Tennessee has awarded $400 million in punitive damages to Dr. Gary Michelson, a spinal surgeon, in a patent infringement lawsuit against Medtronic Inc. The doctor had accused the medical technology company of infringing on his patents for a surgical device to treat spinal injuries. The punitive damages awarded against the company are in addition to the $110 million in compensatory damages that the jury awarded to the doctor.

CLASS ACTION LAWSUITS AGAINST WINN-DIXIE CONSOLIDATED

Several class action lawsuits alleging that Winn-Dixie Stores Inc. management made "false and misleading statements" about its financial and competitive status have been consolidated into one complaint. The civil lawsuits were consolidated August 31st in the U.S. District Court for the Middle District of Florida, Jacksonville division. The complaints began with a February 3rd lawsuit, which alleges that Winn-Dixie executives failed to manage cash properly, develop a strategic plan or have adequate self-insurance reserves. Other lawsuits filed in the coming months included similar accusations, with two filed in March that allege Winn-Dixie's management did not fulfill its duties to the employee profit-sharing plan, whose participants and beneficiaries hold Winn-Dixie stock shares. The lawsuits came after the grocery chain's $79.5 million loss last year in its second fiscal quarter, and the subsequent announcement of new strategic plans, including a $100 million cost-cutting effort.

Agreement Reached In Jiffy Lube Class Action Suit

An agreement has been reached in class action lawsuits by drivers claiming they were cheated when Jiffy Lube International tacked on environmental surcharges to their oil-change bills. If an Oklahoma judge approves the settlement, it would close at least nine pending cases in several states from California to New Jersey. A similar accord has been reached in a New York case. Some customers will get $5 off their next oil change, which doesn't sound like much relief. There is a good deal of opposition to the settlement and there is a chance it won't be approved. Critics say Jiffy Lube called the fee an environmental surcharge to make customers believe it was a tax. The fee, which ranged from 80 cents to $1.25, was added to the price of an oil change at 400 company-owned stores from late 1999 until April of this year. Some of the 1,800 Jiffy Lubes owned by franchisees, rather than the company, also charged fees. Jiffy Lube claimed this is a pretty common fee that was being charged by most of the companies in the quick-lube industry and had been for a long time. But, under the settlement the company will have to stop charging this fee. This year, only about one-third of the nation's oil-change garages add an environmental charge. The average is $1.62, according to trade publication *National Oil & Lube News*.

American Express Is Suing Visa And MasterCard

American Express Co., the travel and financial services giant, has filed suit against Visa and MasterCard over anti-competitive business practices. The U.S. Supreme Court had issued a ruling back in October in an antitrust case brought by the Justice Department that gave legal standing for the suit. The two biggest card associations in America, Visa USA Inc. and MasterCard International Inc., had been accused by the government of restraining competition. The High Court's decision let stand a lower court ruling requiring Visa and MasterCard to allow their member banks to issue competing cards. That cleared the way for American Express of New York and Discover Financial Services Inc., a division of the New York-based Morgan Stanley, to begin partnering with U.S. financial institutions. Immediately after the Supreme Court ruling was announced, Discover Financial Services filed an antitrust suit against MasterCard and Visa in U.S. District Court in New York seeking unspecified damages for alleged anticompetitive behavior that kept it out of the lucrative bank market. Triple damages can be recovered in suits filed under antitrust law.

Source: *Yahoo News* and *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

Hidden Loans Are A Problem In The Insurance Industry

For years, insurance companies have been buying insurance policies for themselves that are akin to the product at the center of a criminal investigation into whether American International Group Inc. (AIG) helped a cell phone distributor manipulate its earnings. Critics say the policies are sometimes insurance in name only. That is because the premiums or other payments are so large that the seller assumes little or no risk. This makes them like loans that help buyers smooth their earnings and shore up their stock price. The reason is that insurance proceeds count as income and offset losses, while a loan must be counted as a liability—a debt that must be paid off over time. In the AIG case, securities regulators claim that cell phone company Brightpoint Inc. agreed in 1999 to pay $15 million in premiums to AIG in monthly installments in return for an upfront payment of policy proceeds from AIG of $11.9 million. That helped the company offset a higher-than-expected loss in a trading unit.

New York-based AIG, one of the world's biggest financial-services companies, is the target of a criminal grand jury probe focused on the Brightpoint policy and similar products. The investigation concerns products "that would appear to be insurance and accounted for as insurance, but did not involve any actual risk transfer." AIG is trying to settle with authorities and says that the one-of-a-kind policy earned it less than $100,000. This investigation is the latest example of the government targeting financial-services firms that aid corporations in manipulating earnings or balance sheets. Last year, AIG had settled Securities and Exchange Commission civil charges over Brightpoint.

While this appears to be a complicated matter, it is really rather simple. Normally, an insurer is paid a specific amount of premiums to take on a risk of uncertain size and timing. With policies like that involving Brightpoint, and more complex variations that insurance companies themselves have bought for nearly two decades, the risk of a loss is limited, and sometimes even eliminated all together. That transforms an "insurance" transaction into one more resembling "financing." The policies bought by insurers are sold by reinsurance companies, which historically have contracted with insurers to take on some of the risk for policies covering lawsuits of all sorts. To some degree, reinsurance is by nature an earnings-smoothing product. Simply put, insurers buy it to cap their exposure to claims.

Over the past three years, insurance regulators have raised serious concerns about policies that seem to do little more than dress up the policyholder's financial statements. Only if the reinsurer issuing the policy faces the risk of a significant loss under the arrangement can the policyholder use the more-favorable accounting treatment of reinsurance. Certain of the reinsurance policies, known as finite-risk or financial reinsurance, "are more like window-dressing transactions" for insurers. In those cases, "the economics over time favor the reinsurer." However, while the concept is simple, a loan carrying future payment obligations that is wrongly labeled as insurance proceeds isn't always easy to spot. It sometimes takes a financial meltdown for the most questionable policies to ultimately surface.

A good example is a case we are now involved in that is currently pending in a Memphis federal court. Virginia and Tennessee regulators are suing General Reinsurance Corp., a unit of Berkshire Hathaway Inc. and one of the world's biggest reinsurers, for selling "sham" policies to a professional-liability insurer in Richmond, Virginia, that is in insolvency proceedings. The suit alleges the policies were designed to fool regulators into believing the carrier was financially sound when it wasn't. For years, starting in the early 1990s, insurer Reciprocal of America reassured regulators that its units had access to millions of dollars in reinsurance through General Re. In fact those assets were debilitating loans, thanks to secret side agreements that required Reciprocal to repay the losses General Re incurred, with interest. Regulators are seeking recovery of those payments and rightfully so.

Separately, an Australian judicial panel last year labeled the use of reinsurance contracts by HIH Insurance, whose collapse in March 2001 was that country's biggest-ever bankruptcy, as "audacious." The contracts "were structured in such a way as to give the appearance of a transfer of risk when in fact there was none," the HIH Royal Commission concluded. Some documents were backdated, while side agreements were used to negate risk transfer, the panel said in its final report. Interestingly, the reinsurers included General Re.

Source: *The Wall Street Journal*

NAIC Task Force To Lead Broker Investigations

The National Association of Insurance Commissioners (NAIC) has recently formed the NAIC Executive Task Force on Broker Activities to gather facts and coordinate activities to address alleged criminal misconduct and violations of existing insurance laws involving insurance companies and insurance brokers. The task force is comprised of 13 member states: California, Connecticut, Georgia, Illinois, Maine, Missouri, Montana, New Jersey, New York, Oregon, Pennsylvania, South Carolina and Texas. The Executive Task Force on Broker Activities is "working to develop the facts and coordinate the efforts of state regulators on this critical issue," according to Diane Koken, the Pennsylvania Insurance Commissioner who serves as NAIC President. The new Task Force will pursue a three-pronged action plan designed to coordinate multi-state interest and inquiries, leverage state expertise and resources, and engage consumers. The NAIC members adopted the following plan:

- **Greater Transparency on Broker Compensation:** The Task Force will develop a model act for brokers' disclosure of compensation.
- **Full Inquiry and Coordination:** The Task Force will develop and coordinate implementation of a uniform inquiry "template" for states to use to query their significant domestic insurers and top brokers doing business in their respective state. Relying on market analysis tools, NAIC members will gather the facts in standardized fashion, analyze the issues, and determine next steps, which could include a variety of regulatory intervention techniques from insurer and broker interviews to targeted on-site examinations.
- **Fraud Reporting:** As an immediate means to empower consumers, the NAIC will launch an online fraud reporting mechanism that will allow for the anonymous reporting of "tips" of unscrupulous business practices for investigation by the states.

Commissioner Koken stated: "The idea that any insurance consumer, whether corporate or personal, was misled, defrauded, or abused simply reinforces the need for a strong system of coordinated state insurance regulation. This Task Force and three-pronged approach is evidence of our commitment, and it's just one step in an ongoing process to ensure a safer marketplace where consumers at all levels are protected." I hope this task force will take its work seriously and tackle a most serious problem. I'm sure there is a good reason for Alabama not being involved in this effort.

Source: *The Insurance Journal*

Alabama May Take Some Action

The Alabama Department of Insurance has become involved in probing bid-rigging and price-fixing problems in commercial insurance. The Department says it will interview brokers and companies that are connected to entities that have garnered the attention of prosecutors in New York and other states. Reportedly, several companies and brokerage firms that specialize in commercial insurance are believed to have engaged in bid rigging and price-fixing. I understand that the states' insurance commissioners met by way of conference call to formulate strategies to deal with the situation, which primarily involves commercial insurance lines. Alabama Insurance Commissioner Walter A. Bell, in announcing the state's move, said:

> *There have been serious allegations of criminal conduct involving some of the nation's largest insurance companies and brokerage firms. We are engaging in a fact-finding mission to see if similar behavior has been conducted in Alabama. To that end, we have coordinated with the Governor's office, Attorney General Troy King, and other state insurance departments. We have no evidence at this point of any wrongdoing in Alabama. But if any company or broker has abused the system for personal gain, rest assured we will pursue appropriate charges…the coordination between the states is an important one because we can share information. Our first priority at the Department is consumer protection. No one—an individual, a family, a small business or a large company—should be taken advantage of. We will investigate to*

what extent, if any, these practices have occurred in Alabama, and we will determine the proper course of action

It is good to hear that Commissioner Bell considers **consumer protection** to be his department's **top priority**. I hope those **words** will carry over into some real action by the department. Over the years the Alabama Insurance Department has been underfunded and understaffed and consumers have suffered as a result. If consumer protection is really a top priority, all of that will change. If so, Alabama citizens will be the beneficiaries.

Hurricane Ivan Wasn't Only Problems For Many Home Owner's

In the wake of Hurricane Ivan, many people with damage to their homes have contacted our firm with complaints about how their homeowner's insurance companies were handling their valid claims for benefits. Not surprisingly, many of the complaints were very similar. Most involved the insurance companies sending out their own adjusters to provide "low ball" repair estimates, which were nowhere near the amount necessary to properly repair the damages to the homes. Then, the insurance companies would only offer the insureds, on a "take it or leave it" basis, the amount stated in the "low ball" repair estimates, even if the insureds provided two or three estimates that were substantially higher. In other words, the only options left the insureds were to either take the "low ball" offers and pay the difference in the repair estimates themselves, take nothing and pay for all of the repairs themselves, or contact an attorney and seek redress with the court system.

The insurance companies' conduct is totally inexcusable and improper. If an insured submits a claim to their insurance company for damages caused to their home, then the insurance company has an obligation to pay the amount necessary to properly repair the damage. I hope insurance companies will begin to do the right thing and pay to properly repair the damages to their insureds' homes. After all, this is the reason we all buy homeowner's insurance. The Alabama Insurance Department should get actively involved in this matter. If they fail to do so, it will be left to the courts to come to the rescue of some very unhappy policyholders.

Doctors Who Won't Join Network Are Sued

BlueCross BlueShield of Montana has filed a lawsuit against a physician group that has the medical community greatly upset. Organized medicine has contended for months that health plans exert an overwhelming amount of market power over physicians. The federal antitrust lawsuit brought against the physician group claims that doctors are actually the real problem. The doctors say the action by Blue Cross is more evidence of plans' willingness to bully doctors to accept their meager terms. Antitrust lawyers around the country are watching the progress of the lawsuit by Blue Cross against Missoula Radiology, the only radiology practice in Missoula, Montana. The Blue Cross plan says the suit, which seeks to break up a 12-physician group it calls a "predatory monopoly," is about market competition, not the group's refusal to be part of the plan's network.

But many doctors say if the Blues plan is successful in its case, it could result in other plans suing doctors who refuse to sign a contract. In fact, after the lawsuit was filed September 14th, a seven-physician neurology group and a six-physician surgery group announced they would drop their Blues contracts, in part to show solidarity with Missoula Radiology. The Blues is by far the largest managed care plan in the state, with about 93% of Montana doctors in its networks. It also has roughly two-thirds of the state's patients, according to *Competition in Health Insurance: A Comprehensive Study of U.S. Markets*, published by the AMA. Under guidelines set by the U.S. Dept. of Justice, the state's health insurance market easily qualifies as highly concentrated, thanks to the Blues' dominance.

But the plan is arguing that it's the radiology group, which dropped out of the Blues network in June 2003, that is wielding too much power. BlueCross, along with four employers and five individuals, argue in their suit that Missoula Radiology exerts monopoly power by, for example, having exclusive contracts to provide radiology services at both of Missoula's hospitals. The plaintiffs also argue that the radiologists' establishment of Advanced Imaging, a scanning center owned jointly by the doctors and Community Medical Center in Missoula, has facilitated price fixing. Advanced Imaging also is a defendant in the lawsuit, filed in U.S. District Court in Butte, Montana. The suit alleges that Blues members have paid $1.3 million in out-of-pocket rates as a result of Missoula Radiology not being in the Blues network.

Antitrust lawyers say the case probably won't hinge on Missoula Radiology's status as the only such group in town. A group is not an unlawful monopoly just because it has all the radiologists. The outcome will likely turn on how courts interpret the group's hospital contracts. The case could be an important step in attempting to draw lines on exclusive doctor-hospital contracts. I have to wonder how much longer it will take doctors in this country to realize that insurance companies aren't their friends. Because of the suit's uniqueness, doctors and health plans—and antitrust lawyers—will be watching this case very closely.

Source: *American Medical News*

IRS Cracks Down On Non-Profit Hospitals

As we reported previously, our firm is currently involved in litigation involving non-profit hospitals. The Internal Revenue Service has now launched an investigation into whether executives at various non-profits, including hospitals, are being paid too much in violation of the nonprofits' tax-exempt status. The lawsuits that have been filed allege that non-profit hospitals have overcharged their uninsured patients. It will be interesting to see what the IRS does in this area.

UnumProvident Reaches Settlements

UnumProvident Corp., the giant disability insurer, has reached settlement agreements with state and federal regulators. Under the settlement, the company agreed to reassess 215,000 past cases and pay $15 million in fines. The company will set aside $85 million to pay benefits in reassessed cases. The agreement was reached with a group of state regulators led by Maine, Massachusetts and Tennessee. The pact requires approval by two-thirds of the regulators in 47 states and in the District of Columbia and American Samoa, which all coordinated their inquiries. The U.S. Labor Department, also a party to the settlement, and the New York attorney general's office and insurance commissioner endorsed the settlement, which would close their own Unum probes. The fines will be divided among the states.

The regulators were investigating allegations that Unum, the largest U.S. disability-income insurer, and five subsidiaries improperly denied claims for group and individual long-term disability policies, which typically pay policyholders a regular sum if they are unable to work for protracted periods. The policies were sold to individuals and to employers as part of their employee benefit programs. The subsidiaries are Provident Life & Casualty Insurance Co., Provident Life & Accident Insurance Co., Unum Life Insurance Co., Paul Revere Life Insurance Co. and First Unum Life Insurance Co. Unum has agreed to review 215,000 long-term disability claims that were denied or closed since the beginning of 2000. Unum is also required to restructure its claims-handling procedures. If Unum doesn't reverse its past decision on enough claims to satisfy regulators, it will be subject to up to $145 million in additional penalties, regulators said.

The following will outline the key features of the settlement:

- reassess the claims of approximately 200,000 individuals whose claims for group or individual long-term disability benefits were denied;
- restructure their claim handling procedures to ensure that all future claims are reviewed in a fair and objective manner, including an agreement to:
  - select medical examiners based solely on merit, and ensure that those examiners review all relevant records before reaching a determination;
  - require personnel making impairment determinations to certify that their determinations were based upon a review of all the relevant evidence;
  - prohibit company personnel from trying to influence the outcome of disability claim appeals; and
  - grant significant weight to findings of disability by the United States Social Security Administration;
- improve employee training;
- create a new Regulatory Compliance Unit to monitor the companies' compliance with applicable laws and regulations;
- conduct periodic audits of the new claim reassessment process, to ensure compliance with the terms of the settlement;
- create a toll-free confidential hotline through which company employees can report concerns about claims handling processes;
- appoint three new independent members to the Board of Directors of UnumProvident, add one new independent member to the Audit Committee, and create a new Regulatory Compliance Committee of the board;
- permit enhanced monitoring and examinations by state insurance regulators, paid for by the companies; and
- pay a $15 million fine to be divided among participating states.

Source: News Release from New York Attorney General and *Wall Street Journal*

XII. PREMISES LIABILITY UPDATE

Bonfire Lawsuit Settled

A partial settlement of the Texas A&M University bonfire lawsuit has been reached between the families of 7 victims and 25 of the student leaders who oversaw the construction of the massive stack of logs that collapsed five years ago, killing 12 and injuring 27. The families, four of whom had children die in the collapse and three others whose children were injured, will receive a total of $4.25 million. This is the first settlement of any of the claims that came out of the 1999 accident. The lawsuit still has 36 other defendants, including 10 other bonfire leaders, known as "red pots," as well as a former Texas A&M President, the Texas Aggie Bonfire Committee and Zachry Construction Corp., which provided cranes and crane operators to help build the bonfire. Texas A&M is no longer a defendant in the lawsuit. Current mediation is ongoing between those not named in the settlement. If the remaining defendants don't settle, the case will be tried on March 28th in Texas.

The "red pots," who wore red helmets, were student leaders who oversaw construction of the bonfire, which was staged before A&M's annual football game against the University of Texas. The $4.25 million settlement came from the homeowner's insurance policies of the defendants' parents. Homeowners' policies in some instances cover negligence outside of the home if the wrongful act or omission didn't occur on the job or in an automobile. Since the defendants were all students, they were still covered by their parents' insurance policies even though they weren't living at home at the time of the accident.

There have been no bonfires at Texas A&M since this tragedy. The families of the victims have filed a request for a permanent injunction "that requires TAMU to design, construct and burn any future bonfire structures and related activities on the

TAMU campus and/or TAMU properties in such a way to prevent errors, promote safety and protect all persons, including TAMU students." It should be noted that there had been a safe design for the bonfire available for about a decade. The lack of any real oversight and the failure to use a professional design were part of the overall problem. A structural engineering professor from the University of Wisconsin, who served as an expert for the families, gave an affidavit saying that "the absence of a written design, the absence of professional oversight and the absence of appropriate construction methods and techniques" were causes of the collapse.

XIII. WORKPLACE HAZARDS

Southern California Edison Safety Tests Rigged

Southern California Edison Co. used faulty workplace safety data—and in some cases may have suppressed reports of on-the-job injuries—over the last seven years to win performance-related bonuses from the state, according to a report by the *Los Angeles Times*. Edison told the California Public Utilities Commission staff that it would forego or return to the agency $35 million in payments that the company said were based on flawed safety ratings. Many of the ratings were distorted by inadvertent omissions, and others by what Edison called "inappropriate" efforts by managers to hide reportable incidents. In some cases, Edison found evidence that supervisors contacted outside medical personnel to influence treatment, change medical records or downgrade the seriousness of an injury. Other times, Edison said, its managers encouraged employees to dodge safety reporting requirements by undergoing physical therapy or using vacation days during recovery. This appears to be an incentive to underreport injuries.

The injury statistics are part of a 1997 PUC program that rewards—or fines—utilities based on customer satisfaction, employee safety, service reliability and financial results. The information is collected and submitted by the utilities, the Times reported. The admission by Edison, a subsidiary of Rosemead, California-based Edison International, marks the second time this year that the utility has found problems with data it gave regulators to win ratepayer-funded bonuses. In June, Edison pledged to return $14.4 million because employees and managers rigged customer satisfaction surveys. In that episode, managers and lower-level employees in Edison's service planning department systematically erased or changed the phone numbers of unhappy customers to make sure that they couldn't be reached for the surveys.

Some employees substituted their own phone numbers or those of friends and relatives to assure themselves of high ratings, the Times reported. Edison said the glitches in its safety reporting stemmed mostly from its failure to record or report minor first-aid matters, such as requests for bandages or ice packs. It described the more egregious behavior involving supervisors as limited to about 50 "random instances." The $35 million includes $20 million in safety awards already paid to Edison, plus $15 million pending for 2001 through 2003. Regulators are likely to return the money to Edison customers by offsetting other utility charges rather than through direct funds.

Edison said it has found evidence that company incentives to reward good safety practices—including financial compensation and recognition lunches—"may have discouraged the reporting of some incidents" and may have produced "pressure to not report injuries." In some instances, employees delayed reporting injuries to keep them out of year-end results, Edison told the PUC. It appears that a number of incidents should have been reported to the California Division of Occupational Safety and Health, but were not. The company is filing amended logs with the agency.

Source: *Corporate Crime Reporter*

Jury Verdict In Wrongful Death Lawsuit

A California jury awarded the family of a 35-year-old concrete laborer killed in an accident $6.8 million. The worker, who was employed by Casey Fogli Concrete Contractors, was killed in 2001 at an apartment development project. An outrigger stabilizing a 100,000-pound concrete-pumping truck sank into the ground, causing the truck's boom to fall forward and strike the worker in the head. The decedent was controlling the hose and directing a concrete pour on the main floor of one of the apartment buildings when the boom, a four-piece steel arm, hit him with 60,000 pounds of force. Jurors divided responsibility for the accident under that state's law among three defendants as follows: RJS & Associates, the concrete contractor, was determined to be 70% at fault for the accident; JPI West Coast Construction, the general contractor, was determined to be 20% at fault; and CF&T Available Concrete Pumping, the pumping-truck provider, was determined to be 10% at fault.

The award included the worker's estimated lifetime wage loss and $5 million in general damages. It should be noted that under Alabama law the damages would have been totally punitive since our Legislature has said that compensatory damages can't be recovered in a wrongful death case in Alabama. The widow stated after the verdict: "I know that the money will never replace my husband, but it will allow me the opportunity to provide my daughters the education he would have wanted them to have."

XIV. TRANSPORTATION

FAA Falls Short On Safety

According to a recent Governmental Accountability Office (GAO) report, the federal government provides weak oversight of 13,000 private contractors it uses to inspect and certify airlines, planes and aircraft repairs. The report recommends that the Federal Aviation Administration (FAA) evaluate all certification programs involving its contractors or "designees." It also recommends that management be improved. As we previously reported, the FAA relies on contractors perform about 90% of its certification work. The GAO report points out a number of weaknesses of the FAA's oversight of contractors, including:

- Inadequate surveillance and inconsistent interpretations of safety rules;
- Lack of computer databases that reveal whether FAA staff are carrying out their oversight responsibilities;
- Lack of refresher training for FAA staff; and
- Failure to quickly remove inactive, unqualified or poorly performing designees.

One of the most shocking revelations from the GAO report is that some aviation experts say contractors were chosen on the basis of connections to FAA officials. An FAA spokesperson told the USA Today that it "will carefully examine the expert opinions cited by the GAO." The agency also said that it was taking steps to improve oversight and provide more training.

Source: *USA Today*

PILOT ERROR BLAMED FOR FLIGHT 587 CRASH

The co-pilot of American Airlines Flight 587 caused the November 2001 crash that claimed the lives of 265 people, the staff of the nation's airline safety agency reported recently. Investigator Robert Benzon of the National Transportation Safety Board (NTSB) said the copilot's response to turbulence, just seconds after the Airbus A300-600 plane took off from New York's John F. Kennedy International Airport, was "unnecessary and aggressive." Benzon also said that investigators found that American Airlines improperly trained its pilots to use the aircraft's rudder while recovering from upsets and said the problem could have been exacerbated by the airline's simulator training. Benzon also said that the rudder control system on the aircraft is sensitive at higher air speeds, which is potentially hazardous. The safety board itself was expected to rule later on the staff's findings.

On November 12, 2001, First Officer Sten Molin, the co-pilot, moved the plane's rudder back and forth after takeoff, trying to control the climbing aircraft, not realizing he was sealing the grim fate of those on board. Molin was at the controls when the plane hit turbulence almost immediately after taking off for the Dominican Republic. "Hang onto it, hang onto it," Capt. Edward States implored. "Let's go for power, please," Molin said. A second later came a loud bang, which investigators believe was the tail breaking off. Then came the roar of air rushing against the aircraft and alarms sounding in the cockpit. "What the hell are we into (inaudible)?" Molin said. "We're stuck in it." States' last recorded words came five seconds later: "Get out of it! Get out of it!"

Both Airbus Industrie, which manufactured the jetliner, and American Airlines, which trained Molin, agree that if he had taken his foot off the rudder pedal, the tail wouldn't have broken off and the plane wouldn't have plunged into a New York City neighborhood. It was the second deadliest plane crash on U.S. soil. But Molin didn't know he was putting more pressure on the tail than it could bear. Why he didn't—and who's to blame for that—is the subject of a bitter fight between Airbus and American. According to investigators, Molin tried to steady the aircraft using pedals that control the rudder, a large flap on a plane's tail. When his initial movement failed, Molin tried again and again. His actions placed enormous stress on the tail.

American, the only U.S. airline to use that type of Airbus plane for passenger service, claims Airbus didn't alert it to the danger of sharp rudder movements until after the crash. The airline also contends the Airbus A300-600 has uniquely sensitive flight controls that can cause more severe rudder movements than the pilot intends. "Airbus had the ability to truly red-flag the issue," American spokesman Bruce Hicks said. Airbus says it told American a number of times and in a number of ways that the airline was improperly training pilots about how to use the rudder. An Airbus spokesman declined to comment on the investigation before the hearing. However, the company has provided the NTSB with a number of documents to support its claim. For example, a letter dated August 20, 1997, warned American chief pilot Cecil Ewing that rudders should not be moved abruptly to right a jetliner or when a plane is flown at a sharp angle. The letter was signed by representatives from the Boeing Co., the Federal Aviation Administration and Airbus.

Airbus contends that even people within American Airlines were concerned about how the airline was training its pilots. A letter to Airbus dated May 22, 1997, from American technical pilot David Tribout expressed concern about the airline's then-new training course on advanced maneuvers. "I am very concerned that one aspect of the course is inaccurate and potentially hazardous," Tribout wrote. His concern: Pilots were being taught that the rudder should be used to control a plane's rolling motion. Hicks countered that Airbus didn't share important safety information about the rudder after a problem with American Flight 903 in May 1997. During that incident, pilots used the rudder to steady an Airbus A300-600 plane on approach to West Palm Beach airport. The plane nearly crashed and one person was seriously injured. Afterward, Airbus told the NTSB that it included a warning that abrupt rudder movement in some circumstances "can lead to rapid loss of controlled flight," and, in others, could break off the tail. Hicks said Airbus' comments didn't specifically say the rudder movements on Flight 903 had exposed the tail to so much pressure that it could have been ripped off.

Immediately after the Flight 903 incident, an inspection found no damage to the tail. But five years later, the plane was inspected more closely because of concerns aroused by the crash of Flight 587. Cracks were found and the tail was replaced. According to John David, a spokesman for American Airlines' pilots union involved in the investigation of Flight 587's crash, pilots had always thought that they could use rudders to the full extent without hurting the airplane. David also believes Airbus didn't properly communicate what it knew. American now gives its pilots specialized training on the rudder control system based on information learned during the current investigation.

Source: *Associated Press*

Plane Lacked Cockpit Safety Device

A commuter plane that crashed in unfavorable weather conditions in Missouri recently, killing 13 people, was not equipped with a cockpit safety device that could have warned the pilots they were flying dangerously low. In 2001, Federal Aviation Administration (FAA) officials required that "terrain avoidance warning systems" be installed by March of next year on all airline planes with six or more seats. It appears that Corporate Airlines, the operator of the Jetstream 32 plane in the Missouri crash, had not completed installing the warning devices on its fleet. The warning system has a computerized map of the world's terrain that lists every hill, radio tower and skyscraper. If pilots stray too low, a computerized voice automatically calls out: "Terrain! Terrain!" If pilots don't respond, it orders: "Pull up! Pull up!" Officials with the National Transportation Safety Board (NTSB) have not yet said why the Corporate Airlines plane crashed into a wooded area about two miles from the airport. Information released by investigators, however, is consistent with dozens of other crashes around the world in which pilots flying in poor visibility accidentally get too low as they approach an airport and hit the ground. A crash of that type has never occurred on a plane equipped with the terrain warning system, which costs $25,000-$35,000 on small aircraft. The devices are considered to be real breakthroughs in aviation safety, and all airplanes carrying passengers are supposed to have them.

Corporate Airlines leased 17 of the 19-seat Jetstream 32 planes and flew under contract with American Airlines. The airline planned to install the devices on all its planes before the March 29th deadline set by the FAA. Preliminary information from the plane's black box recorders indicates that nothing was wrong with the plane. The pilots descended as if they had no idea how close they were to crashing, according to the NTSB. Flying a plane into the ground during low-visibility conditions is the single biggest killer in aviation, according to accident statistics. An older version of the terrain warning system, which was installed on the Corporate plane, switches off when a pilot readies the plane for landing.

The pilots in this accident apparently received no warning. Thirteen seconds before impact, the pilot who was flying the plane, said "field in sight" to indicate he could see the runway. Then the cockpit recorder captured the sounds of the plane hitting treetops. The tape stopped three seconds later. The pilot and co-pilot had been on duty for 14 hours and 41 minutes. The investigation will examine whether fatigue contributed to the accident. Low clouds hovering 300 feet above the airport would have made it difficult to land the plane. The pilots were required to stay at least 356 feet above the ground until they could see the runway.

Source: *USA Today*

A Needed Crackdown On Speeders

Alabama State Troopers will soon begin another statewide crackdown on speeders. A campaign that started in late August was suspended because a number of troopers were deployed for three weeks in south Alabama when Hurricane Ivan struck the Alabama coast. Troopers also spent several days providing additional security at the Talladega Superspeedway in October. Public Safety Director Colonel Mike Coppage has been studying the latest data on wrecks to determine where troopers should concentrate their enforcement blitz. The crackdown comes after a federal study found that speeding surpassed driving under the influence as the leading killer on Alabama's highways. Last year, troopers gave out 17,403 speeding tickets from August 26th to October 18th, according to statistics compiled by the Alabama Department of Public Safety. This year, state troopers gave out 7,527 in the same period during the crackdown on speeders.

Alabama ranks fifth nationally, at 47%, in deaths where speed was the leading cause of a highway wreck, according to the National Highway Traffic Safety Administration. That is more than twice the percentage in 2003 for neighboring states Georgia, 20%; Florida, 17%; Mississippi, 20%; and Tennessee, 23%. It is quite obvious that we have a most serious problem in Alabama. During blitzes, groups of troopers and local law enforcement agents focus on a stretch of highway where there have been a high number of fatalities. Our state is on its way to setting a record this year for the number of highway fatalities. The blitzes, which include personnel from some police and sheriff's departments, will continue until the size of the state trooper force doubles. Unfortunately, that could take two years. Presently 800 troopers are needed, but the state only has 360 state troopers on the roads. We must take all steps necessary to make our highways as safe as possible. With automobiles capable of tremendous speeds, it isn't too surprising that speeding has become a major problem. The Governor and Legislature must make the required funds available so that an adequate number of troopers can be hired. This is an absolute necessity.

Highway Fatalities On The Increase

The number of fatalities and accidents in Alabama for 2004 has already passed the number for all of last year, according to a report from the Department of Public Safety. The number of highway deaths in Alabama last year was 576, which was a very large number. But, as of November 8th, the number for this year is 657. Most of the fatalities—275 deaths—occurred on county roads rather than state or federal highways. Because the month of December is historically a bad time for highway accidents, this year's fatality rate is likely to increase greatly.

Federal Jury Awards $15.5 Million In Truck-Crash Injury Case

After hearing testimony about a truck driver's lengthy accident record, a federal court jury in Tuscaloosa, Alabama, awarded $15.5 million to an Atlanta teacher who suffered a leg injury in a head-on collision on an interstate highway. The verdict was against Yellow Roadway Corp., of Overland Park, Kansas, in a suit filed by first-grade teacher Olivia Nix, who was hospitalized as a result of the collision that occurred in 2002. The jury awarded $500,000 in compensatory damages and $15 million in punitive damages to the plaintiff. The trucking company is expected to appeal the ruling.

The truck driver's accident record, while working for Roadway Express, which became part of Yellow Roadway last year, was very bad. He had been involved in nine wrecks while driving for Roadway and had received four motorist complaints. In the accident, giving rise to the suit in Tuscaloosa, a tractor-trailer driven by the bad driver went off the northbound lanes, across the median, and struck the Nissan Altima driven by the plaintiff head-on. Interestingly, Roadway had a lawyer, insurance adjuster and accident investigator at the accident scene within hours of the crash. It is also most interesting that this driver still works for Roadway.

This was a good result and points out how some trucking companies put bad drivers on the road and how innocent victims are injured and damaged as a result. These companies have a duty to the public to make sure drivers with bad records aren't put behind the wheels of their trucks. This case was handled by the Tuscaloosa law firm headed by my good friend Bob Prince, who is a very good lawyer. Bob was ably assisted in the trial by Josh Wright. They did an excellent job for the family of the victim.

ATV Deaths On The Increase

Adult-sized All-Terrain Vehicles (ATVs) can be very dangerous for children. The Consumer Products Safety Commission (CPSC) should take action to protect children from the dangers posed by adult-sized all-train vehicles (ATVs). Unfortunately, the CPSC has failed to take action that is badly needed. In August of 2002, a number of safety groups submitted a petition to CPSC requesting that it initiate a rule-making process to develop and issue national safety standards that would bar the sale of adult-sized ATVs for use by children under 16 years of age. The Commission has held three separate field hearings on the issue. However, it has failed to move aggressively to address this most serious problem or to respond to the petition in a substantial matter.

Tragically, children continue to be killed by ATVs in large numbers. The CPSC has not released fatality information for the last two years. In 2002, at least 99 children under 16 years of age were killed by ATVs, according to the last CPSC report. It should also be noted that children under 16 suffered 28% of all ATV-related fatalities that year. The CPSC data indicated that the safety crisis concerning ATVs has become increasingly severe over the past decade. Currently, ATV manufacturers voluntarily agree to follow certain guidelines. Primarily, these guidelines rely on warnings against the sale of adult-size ATVs for use by children, warning labels and offers of training to purchasers of new ATVs. But, both CPSC's own analysis and investigations by safety groups and others, demonstrate that "this approach is failing" in almost every respect. Rachel Weintraub, who is Assistant General Counsel for the Consumer Federation of America, has been actively involved in the movement to bring about some needed changes in the regulation of ATVs. Ms. Weintraub recently stated:

> *Children being killed and injured by ATVs is a serious public health crisis with a solution. However, the government agency with the authority to solve the problem has let America's children and adolescent's down. The CPSC has neglected to take action to implement a solution that will save children's lives.*

I hope the CPSC will take the action needed to help reduce the number of deaths and injuries involving children and ATVs. I don't believe any further delay can be justified. It would help if you would take the time to contact your U.S. Senators and members of Congress and ask them to urge the CPSC to take the steps necessary to protect our children.

XV. ARBITRATION UPDATE

JAMS Opposes Bans On Class Actions

One national alternative dispute resolution provider now says it will no longer enforce clauses in arbitration agreements that restrict class action options. Others are reviewing their own policies and anticipating more guidance from courts as litigation over the issue mounts. California-based JAMS on November 12th announced that it will not administer cases under arbitration clauses that bar class actions unless the prohibition is waived, citing among other things a number of court rulings against class action limitations. Many courts are "consistently holding that class action preclusion clauses are unenforceable." JAMS decided it was "appropriate to take this action to add to other standards to enhance the fairness of consumer arbitration." The company hopes that in most individual cases, plaintiffs will agree to a waiver in order to get their case heard in arbitration, according to a company spokesperson.

JAMS is winning strong praise from consumer advocates and lawyers who have campaigned for more consumer rights under arbitration clauses. Paul Bland, staff attorney at Trial Lawyers for Public Justice, who has worked hard on the arbitration issue, said JAMS' move is a "terrific principled decision and they deserve a lot of credit for making it." Bland said "a lot of consumer and employment lawyers admire what they have done," noting that the company "did not have to take this position." In my opinion, the decision by JAMS was the right one and is a good sign for consumers.

XVI. NURSING HOME UPDATE

Arkansas Auditors Find Staffing Errors

Auditors for the Arkansas Office of Long-Term Care, which licenses and inspects the states 239 nursing facilities, have found that 90% of 299 staffing records that were reported by the nursing homes from October 2000 to September 2004, are inaccurate. Nursing homes in the State of Arkansas are required by state law to have a certain number of nurses and aides working each shift, depending on the number of residents in the facility. These standards were put into place in an effort to ensure that nursing home residents receive adequate care. The nursing homes themselves must submit a report each month on staffing so the state may determine whether they are meeting these standards. If a facility falls below the mandated standards, they are fined by the state. Carol Shockley, Director of the Office of Long-Term Care, says: "We're dependent upon the facilities to provide us with accurate information…someone's care is being compromised for the amount of time [the facility is] not meeting the minimum."

Charlene Harrington, professor of nursing at the University of California at San Francisco and the co-author of an annual national report that compiles state nursing home data, stated "all the facilities have been paid the Medicaid rate based on what their staffing is supposed to be….facilities save money by not staffing properly." Unfortunately, this may be a widespread problem. Janet Wells, director of public policy for the National Citizens Coalition for Nursing Home Reform, a non-profit consumer/advocacy organization for nursing home residents, stated: "So much of the self-reported data by nursing homes is never audited. Neither government agencies, nor consumers, know how many nursing staff a facility actually has if the data is reported incorrectly. One of the most important factors in choosing a nursing home is the level of staffing." Without question, staffing continues to be a major problem in the nursing home industry.

Nursing Homes Have No Business Being Under Tort Reform

A recent study reported in The Gerontologist makes the case that nursing home litigation should be treated differently than medical malpractice litigation in the wave of tort reform that has been sweeping the country. One of the authors of this study, David Stevenson of Harvard University, had previously authored an article that alleged that lawsuits were one of the things taking money away from quality care. But, in this most recent study, "Nursing Home Litigation and Tort Reform: A Case For Exceptionalism", Mr. Stevenson and his co-author argue that nursing home litigation should be carved out of the tort reform movement. The article states "nursing home litigation has a number of distinctive features that raise serious questions about the wisdom of implementing a generic set of reforms across the care continuum." The authors note that nursing home claims are different from typical medical malpractice claims.

Personal injury claims against nursing homes are rarely initiated by the injured residents themselves. Almost 65% of these claims are initiated by the resident's children. Another 20% are brought by residents' spouses. The allegations in most cases tend to center on abuse and neglect, rather than procedural mistakes and errors. The authors state that most awards in nursing home cases are for non-economic damages (approximately 80%). These types of damages are usually capped in the typical tort reform legislation, which makes it very difficult to obtain an adequate recovery in a nursing home case alleging abuse and neglect. Punitive damages are rarely awarded in medical malpractice cases, but in the nursing home arena one in five cases involve an award of punitive damages. The authors correctly note that punitive awards serve the purpose of punishing the wrongdoers and also to deter repetition of the conduct in question. Likewise, the study notes that more than half of nursing home cases involve deaths, compared to less than one-fifth of malpractice claims. For all of these reasons, Mr. Stevenson believes nursing homes should not be included in generic medical malpractice legislation. I wholeheartedly agree!

XVII. HEALTHCARE ISSUES

FDA's Drug Safety System Will Get Outside Review

The Food and Drug Administration (FDA) has found itself under fire from a number of sources over the past few months, and for good reason. Obviously, critics of the FDA have lots to talk about. Amid intense criticism that it is slow to raise the alarm about unsafe medicines, the FDA is hiring the nation's top scientific review body to figure out whether the drug safety system is adequate. Had the FDA bosses asked, we could have saved the government lots of money because it is well known in our firm that the system in place at the FDA hasn't worked very well.

Dr. Steve Galson, director of the agency's Center for Drug Evaluation and Research ,made this rather shocking statement: "Our current drug approval system has demonstrated that we don't always understand the full magnitude of drug risks prior to approval of drug products." While, I believe the statement is true, I am very much surprised that Dr. Galson would admit it. If the FDA doesn't have the ability to understand the drugs approved for the market, consumers are in worse shape than we all thought they actually were.

In another step, after the shocking disclosures that the views of its own drug safety officials had been suppressed, the FDA now says it will set up an internal appeals process. If someone inside the agency feels that superiors have made a mistake by approving a drug or, after approval, refusing to order its recall, that person will be able to make a case before a committee of experts, from inside and outside the agency, who were not involved in the decision.

The two moves follow the FDA's handling of safety issues in two highly publicized cases. After receiving studies indicating that antidepressants could cause children and teenagers to become suicidal, the FDA took nearly a year to decide to require the strongest possible warning to that effect in those drugs' packaging. The delay, which agency officials said they had needed to be sure of the data, upset patient advocates to no end. The FDA's problems heightened when *The San Francisco Chronicle* reported that the agency's own safety reviewer had concluded that there was a risk, but that his views had been suppressed by top FDA officials. That further enraged patient advocates and the medical community generally. and rightfully so.

In one of the moves announced, the agency will hire the Institute of Medicine—a part of the congressionally-chartered National Academy of Sciences, the government's top scientific reviewer—to study how well the FDA assesses the dangers of unexpected side effects of marketed drugs. In a third step, the FDA will accelerate its search for a new director of its Office of Drug Safety. The post has been vacant since October 2003. One problem in finding someone qualified to fill it has apparently been competition from pharmaceutical companies, which can afford to pay far more than the salary that comes with the government job, which I believe is in the $125,000 range. In yet another initiative, the FDA plans, by the end of the year, to publish guidelines to help drug companies manage the risks inherent in their products.

After Vioxx was pulled from the market by Merck & Co, folks began to wonder how that drug ever made it to the market. After the recall, it was revealed that one of the agency's safety reviewers had decided well beforehand that Vioxx created a health risk. The stinging editorial in The Lancet, a British medical journal, condemned the FDA's entire system of drug safety review and said the agency had acted out of "ruthless, shortsighted and irresponsible self-interest" in failing to demand the removal of Vioxx earlier.

Source: *The New York Times*

A Good Recommendation That May Just Work

One physician who has long been an observer of the FDA, Dr. Raymond Woosley, vice-president of the University of Arizona, wants the experts from the Institute of Medicine to consider an idea that he has pushed for some time. Dr. Woosley recommends a permanent, independent review group that would play a role in pharmaceutical cases similar to the role the National Transportation Safety Board plays in plane crashes. Dr. Woosley said, "Any time there is a significant event with a drug, there should be an independent panel that looks to see if the right decisions were made and what should happen in the future." Obviously an independent agency of this sort would be expensive to create. But, I believe that the cost would be well worth it if such a move resulted in helping to clean up the pharmaceutical industry.

Source: *The Washington Post*

Americans Not Satisfied With Quality of Health Care

A new survey gives us some insight into how American Citizens feel about problems in our healthcare system. Five years after the release of a landmark report revealing the human toll that medical errors exact at U.S. hospitals, American citizens don't believe the nation's quality of health care has improved. According to the recent survey, forty percent said health-care quality has gotten worse, while only 17% said it has improved. That negative sentiment exists despite public and private efforts to reduce medical mistakes since the Institute of Medicine (IOM) first focused attention on the problem. Overall, 55% are dissatisfied with the quality of care in this country, the survey revealed. When a similar question was posed in a 2000 Gallup poll, only 44% said they felt that way. Forty-eight percent of people in the new survey said they were somewhat or very worried about the safety of medical care they and their family receive, whether from hospitals or any health care provider. A majority (74%) cited health care providers' workloads, stress and fatigue as a very important cause of medical errors.

The survey is the first broad assessment of public perceptions of quality since the IOM, the nation's independent scientific adviser on health matters, issued its watershed 1999 report, *To Err is Human: Building a Safer Health System*. That report concluded that hospital-based medical errors, if considered a cause of death in America, would rank as the nation's eighth leading killer overall. At least 44,000 people and as many as 98,000 die in hospitals each year due to preventable medical errors, the report concluded. The IOM's stunning assessment sent shock waves through the U.S. health-care system, prompting the Clinton Administration to convene an advisory panel on health quality. The panel's recommendations led to the establishment of a task force charged with coordinating quality improvement activities in federal health programs. There was a concerted effort to correct things. Providers, payers and insurers, reacting to the IOM's wake-up call, began putting in systems and strategies to avoid harmful or deadly mistakes.

Overall, 34% of adults said they or a family member have experienced a preventable medical error. Of those people, 70% said their provider did not tell them a mistake was made. It is interesting to note that a vast majority agreed providers should let them know what happened. In fact, 88% said it should be a requirement. Hospital and doctor groups oppose a mandatory reporting system, saying it would foster a punitive environment in which providers would be loathe to admit their mistakes. That could well be true, but the public's desire for greater disclosure could sway the debate.

Source: *Forbes News*

Lawsuits Against Health Plans Suffer Because Of Supreme Court Ruling

When the U.S. Supreme Court ruled that patients couldn't sue their HMO's, many believed that at the time it would hurt doctors too. The concerns that the ruling would undermine patients' ability to sue their health plans are starting to become reality. Two federal appeals courts recently reversed decisions that originally gave subscribers the right to go forward with their cases. Each of those rulings take into consideration the high court's decision that Texas patients couldn't proceed with their HMO lawsuits. You will recall that the Supreme Court in Aetna Health Inc. v. Davila said the federal Employee Retirement Income Security Act of 1974 pre-empted the Texas law allowing health plan liability cases.

Now, as expected, lower courts are following suit. It should be noted that ten other states have laws similar to that in Texas. Donald J. Palmisano, MD, American Medical Association immediate past president stated: "The fallout is that patients only have limited remedies when these companies make negligent decisions to deny necessary care. It's a loss for patients." I have to wonder why the AMA has allowed the insurance industry and HMO's to make doctors the stalking horse in the tort reform movement and especially in Congress. The result of the Supreme Court's decision is a prime example of who tort reform actually helps and who all it really hurts. It puts doctors and their patients in the same boat.

XVIII. ENVIRONMENTAL CONCERNS

Chemical Industry Funds EPA Study

The Environmental Protection Agency has agreed to accept $2 million from the American Chemistry Council to help fund a study exploring the impact of pesticides and household chemicals on young children. To be expected, this prompted an outcry from environmentalists. The Children's Environmental Exposure Research Study—known by its acronym CHEERS—is the subject of the controversy. This isn't the first time the agency has accepted chemical industry money to conduct research, but it does represent the most money the chemical trade group has given the EPA. The chemical industry council represents about 135 manufacturers and spends $20 million a year on research. The study will do work on how chemicals are absorbed by infants and children as old as three. That's a worthy cause, but the fact that chemical companies will fund the project creates a potential conflict.

Environmental Working Group President Kenneth A. Cook questioned why an agency with a $572 million research budget needed to accept industry contributions to conduct scientific research. Mr. Cook observed: "It simply is not credible that a $7.8 billion agency that employs almost 18,000 people has to go to the chemical industry to get $2 million for a crucial study to see if chemicals hurt kids. This is a government function; we should be investing government funds to be absolutely sure it's independent." I guess that makes too much common sense to be understood in our nation's capitol.

The study will survey 60 children over the next two years in Duval County, Florida, and collect information on their exposure to pesticides and household chemicals, such as flame-retardants and perfluorinated chemicals, a family of substances in products such as Teflon and Scotchgard. Some of these chemicals have come under scrutiny for possible links to health problems. This type study is good because children at young ages are rarely the subject of studies. While the information that can be obtained will be most valuable, it doesn't seem wise to accept money from the affected industry to do the work.

Linda Sheldon, acting director for the EPA's human exposure and atmospheric sciences division, says the agency has "very little information about how children may be exposed to chemicals in household products, whether it's through the air they breathe, food they eat or the surfaces they touch." Although true, that misses the point that's causing the flap. While I understand that the chemical manufacturers say they imposed no conditions on their contribution, I must admit those type statements are difficult to believe given industry's track record. Mr. Cook, who is concerned that industry officials could still influence the study that could lay the groundwork for future regulation, said: "To have industry sponsoring the government to do it, to us, doesn't seem like a good idea, to say the least." I tend to agree with that assessment.

Texas Leads The Nation In Mercury Emissions

The state of Texas leads the nation in mercury emissions, according to a report issued in October by the U.S. Public Interest Research Group (U.S. PIRG). The report found that power plants were the largest source of mercury emissions in the country, accounting for more than 41% of all U.S. man-made emissions. According to the study, coal-fired power plants emitted 48 tons of mercury in 1999. Reportedly, thirty-three percent of the mercury deposited in U.S. waterways is from U.S. power plants. U.S. PIRG found that in 2002, the most recent year for which data was available for the study, Texas led the nation in mercury emissions from power plants, with 9,815 pounds. The report also found that five of the top 10 mercury-emitting plants nationwide are in Texas.

When power plants or other facilities burn coal that contains mercury, the mercury is emitted from smokestacks into the air. The mercury deposits in soil and in waterways, where it then bioaccumulates in fish. Mercury exposure to humans typically occurs as a result of eating fish caught in contaminated waters. Exposure to mercury can impact the nervous system and lead to brain damage and learning disabilities, especially in fetuses and young children. In 2004, the EPA indicated that as many as one in six U.S. women has levels of mercury in her blood sufficiently high to pose a risk to a developing fetus. In addition, mercury exposure in adults can adversely affect fertility and blood pressure regulation and contribute to heart-rate changes and cardiovascular disease.

Coal-fired power plants have long been the nation's largest unregulated source of mercury emissions. The Bush Administration and environmental groups have been battling for four years over how to control mercury from power plants. In December 2003, the EPA was set to issue a rule that would have required power plants to install equipment that would achieve the maximum possible reduction of mercury emissions. However, a new plan, which has been called the "cap-and-trade" approach, was substituted instead. The new plan would allow plants to buy mercury pollution credits from facilities located far away, instead of reducing their own emissions. Critics of the plan say that it will increase the risk of creating and exacerbating "toxic hotspots," or areas with high levels of mercury deposition, and take 15 years or more to reach the same clean air standards achievable under maximum achievable control technology.

Wisconsin Court Reinstates Lead Paint Suit

A Wisconsin appeals court has reinstated the City of Milwaukee's lawsuit against two paint companies for damages from lead paint. The city appealed after a lower court judge dismissed the case in July 2003. Milwaukee officials want Mautz Paint and NL Industries to pay for the removal or abatement of lead paint they say has poisoned about 19,000 children since 1995. "There are disputed material facts concerning the extent of both defendants' sales in Milwaukee and whether those sales were a substantial cause of the alleged nuisance," the 1st District Court of Appeals said. The appeals court, which did not judge the merits of the city's claim, said a jury should decide those facts, ordering the lawsuit to trial.

The city sued in 2001, arguing the firms created a public nuisance by producing and selling the lead pigment and lead-based paint. The city is seeking $85 million. Lawyers for the paint companies have argued the city failed to prove paint specifically produced or sold by the defendants caused any harm. Lead poisoning has been associated with many health problems, including learning disabilities. Lead paint was banned from interiors in 1978, but many homes still have it.

North Carolina Attorney General Plans To Sue TVA

By the time you receive this issue, the North Carolina Attorney General will probably have filed suit against the Tennessee Valley Authority (TVA) unless TVA reduces pollutants that enter the state from the public utility's coal-fired power plants. Attorney General Roy Cooper has told the media, "It is critical that we all do what we can to make sure that our air is clean. What we've done now is put the TVA on notice that they need to do the same thing."

The pollution that Attorney General Cooper is complaining of comes from nine coal-fired plants in Tennessee, Alabama and Kentucky. In addition to health issues, Cooper says that the pollution affects the view in the mountains, where tourism is a multi-billion dollar industry. Cooper alleges that the TVA violated the Clean Air Act by modifying several of its coal-fired power plants without determining whether additional emission controls are necessary or installing the best available technology to control dirty air. The U.S. Environmental Protection Agency has been trying since 1999 to require TVA to meet tougher emission standards on nine of its eleven plants. The EPA contends the plants, many built in the 1950s, were so extensively modified between 1982 and 1996 that they should be treated as new plants.

XIX. TOBACCO LITIGATION UPDATE

Supreme Court Issues Stay In Tobacco Suit

The U.S. Supreme Court has issued a stay that allows Philip Morris USA to delay paying $10.5 million in damages to a former smoker in California. The stay will be in effect while the tobacco company contests the amount of the verdict. The company had been sued by Patricia Henley, who started smoking at age 15, smoked for 35 years and in 1997 was diagnosed with lung cancer. In September, the California Supreme Court refused to reduce the $10.5 million award, which Philip Morris claimed was excessive. The Richmond, Virginia-based unit of Altria Group Inc. of New York is appealing to the U.S. Supreme Court. The High Court's order, which prevents Ms. Henley from collecting any money until the matter is resolved by the justices, wasn't a surprise. Most observers expected the stay to be entered. All nine court members participated in the order, including Chief Justice William H. Rehnquist, who had been hospitalized with thyroid cancer. The case will be watched with interest.

Government's Case Creeps Forward

The federal government's lawsuit against the tobacco industry is still being tried. There's not much new to report on that front. The case is expected to be long and drawn out. The government's lawyers appear to be having difficulty getting some key documents into evidence. I hope those problems can be resolved. But, I wouldn't be at all surprised to see the government losing interest in this case now that the elections are over. It will be a shame, if that happens, resulting in a tremendous political victory for the bad guys.

XX. THE CONSUMER CORNER

BB Guns Injure Thousands Each Year

Many of us grow up owning a BB gun and spent lots of time "hunting" with these "toys." Unfortunately, BB guns and other nonpowder guns can be lethal, injuring as many as 21,000 Americans annually. Nonpowder guns kill an average of four Americans yearly. From 1990 to 2000, there were 39 such deaths — 32 of children younger than 15, according to a report in November's issue of Pediatrics. The report came just two weeks after the BB gun death of an 8-year-old South Carolina boy accidentally killed by a 13-year-old friend. A pellet from the BB gun pierced the boy's heart. Lots of adults don't know that today's BB guns are extremely high-powered. Some can shoot with a velocity nearly matching a .22 caliber rifle. Most folks still think of BB guns as "toys" and that's part of the problem.

These new BB guns are not the same kind that many of us older folks grew up with. These guns include powerful air rifles introduced in the 1970s and paintball pistols used in war games. They are sometimes described as fake guns and often given to children as gifts. The Pediatrics report says they can cause internal injuries similar to those from bullets. The gun involved in the October 18th shooting in South Carolina was a present from the older boy's parents. "They're being given as toys without recognition that there may be a serious injury risk," said report author Dr. Danielle Laraque, a New York pediatrician.

Nationally, an estimated 21,840 injuries related to nonpowder guns were treated in emergency departments in 2000 — most in children aged 5 to 14, according to the report prepared by the American Academy of Pediatrics' Committee on Injury, Violence and Prevention. Centers for Disease Control and Prevention data show there were 19,163 nonpowder gun injuries last year. Most states have laws or regulations governing nonpowder guns. According to the Pediatrics report, New York's is one of the strictest, prohibiting the purchase or unsupervised use by someone younger than 16 years. While some models of air guns and BB guns are marketed specifically to youngsters, manufacturers and sellers claim they stress that they should be handled like legitimate firearms. Daisy Outdoor Products, a leading maker of BB guns and air rifles, lists safety instructions on its website and notes the risk of injury or death if the rules aren't followed. That is a step in the right direction, but doesn't go far enough. Warnings must go directly to the adult purchasers at the time of purchase.

Source: *Associated Press*

First Felony Spam Trial In Virginia Is Successful

The nation's first felony spam trial, which was tried in a Virginia court, could be a watershed in the crusade against spam. Criminal convictions were obtained by the prosecutors in the case. This could result in a series of indictments against spammers with operations in Virginia, the epicenter of Internet traffic and home to the country's toughest anti-spam law. Jeremy Jaynes, Richard Rutowski and Jessica DeGroot were accused of pumping thousands of spam e-mails through false return e-mail addresses and false Internet routing information last year. Jaynes, once rated one of the top 10 spammers by watchdog group Spamhaus Project, worked with his sister, DeGroot, and an accomplice, Rutowski. All three face up to 15 years in jail and fines of up to $10,000. Virginia officials pushed hard in their case because several Internet service providers, including No. 1 America Online (AOL), have e-mail servers in the state. About 80% of Internet traffic flows through Virginia. AOL assisted in the investigation that led to the prosecutions.

I hope this case will deter some marketers from clogging computer inboxes with billions of illegally sent e-mail messages. The case was tried under Virginia's tough anti-spam law. The federal law, which took effect this year, does not apply to the case and is considered watered down. Virginia's anti-spam law is one of the nation's toughest. It prohibits falsifying information to mask a bulk mailer's identity. A violation becomes a felony if the volume of spam exceeds 10,000 messages in 24 hours, 100,000 in 30 days or 1 million in a year. The federal Can-Spam law bars individuals and companies from disguising their identities and collecting e-mail addresses from the Web. Commercial messages must include opt-out options. It imposes fines of $250 per e-mail and includes a provision that lets states, such as Virginia, also pursue criminal charges against spammers.

Bail was set at $1 million for Jaynes, who is considered too great a flight risk to be allowed bail. The government says Jaynes has been squirreling away parts of his $24 million fortune in foreign bank accounts and faces up to nine years in prison. The 30-year-old Jaynes, who was jailed following his conviction. Prosecutors have said Jaynes was among the top 10 spammers in the world at the time of his arrest, using the name "Gaven Stubberfield" and other aliases to peddle junk products and pornography.

Under Virginia's law, sending unsolicited bulk e-mail itself is not a crime unless the sender masks his identity. A jury recommended that Jaynes get nine years in prison, a term the judge can either leave in place or reduce at the February 3rd sentencing. Jaynes's sister, Jessica DeGroot, was also convicted, but received only a $7,500 fine. The third defendant, Richard Rutkowski, was acquitted of all charges. The Virginia law will be challenged on constitutional grounds. Hopefully, the law will be upheld.

Source: *USA Today*

Internet Users At Home Aren't Always Safe Online

Internet users at home are not nearly as safe online as they believe they are, according to a nationwide inspection by researchers. They found most consumers have no firewall protection, outdated antivirus software and dozens of spyware programs secretly running on their computers. In fact, some of the findings were rather shocking. For example, one home user in the government-backed study had more than 1,000 spyware programs running on his computer when researchers examined it. Another 3-year-old Dell computer used by a Virginia family was found infected with viruses and more than 600 pieces of spyware surreptitiously monitoring his online activities. The Internet, with increasingly sophisticated threats from hackers, viruses, spam e-mails and spyware, has its share of trouble. Computer users at home are finding that out.

The technology industry is also feeling the pain. Spurred by the high costs of support calls from irritated customers—and fearful that frustrated consumers will stop buying new products—Internet providers, software companies and computer-makers are making efforts to increase awareness of threats and provide customers with new tools to protect themselves. Many computer users are unprepared to cope with the dangers they face. A study released by America Online and the National Cyber Security Alliance found that to be true and that a small percentage were safe from online threats.

Source: *Associated Press*

The Latest Online Scam

Over the past several months, we have written a great deal on identity theft. The reason for this is simply that it is a subject where the public badly needs to be informed. The public is slowly learning that identity theft is the fastest growing crime in the nation. But, we find that many people simply don't grasp the magnitude of the problem and don't take it very seriously. Almost 10 million people had their identities stolen in 2003. Most will probably be shocked to learn that even babies and children are having their identities hijacked. Thieves have realized that their crime can go undetected for a long time if they choose very old or very young victims because these people are not regularly getting or checking credit reports or credit card and other financial statements. Few new parents are going to assume that their newborn is a potential target for identity theft. The crime may not be discovered until the child applies for student loans or a first credit card. While "dumpster diving"—thieves going through the trash and pulling out documents that contained personal information—is still a risk, identity thieves have become much more sophisticated. Online "phishing" is the new weapon in the identity thieves' arsenals.

Phishing means sending cleverly created e-mails to large volumes of e-mail addresses, designed to fool recipients to reply with personal financial data, account numbers, user names and passwords. According to the Anti-Phishing Working Group, phishers are able to get up to 5% of recipients to respond to them. They do so using cleverly designed e-mails and websites that contain messages that appear to be from large and familiar businesses requesting that a consumer reply with personal data about their existing accounts.

Phishers' e-mails notify consumers about bogus "changes to accounts" and "request to reply to protect your account from cyber scams." When replying to the e-mails, consumers are led to official looking, but bogus, websites, where logins to the sites are requested. According to the APWG, recent phishing scams were aimed at customers of eBay, Wells Fargo, Citibank, SunTrust and EarthLink. The scary thing about phishing is that the e-mails look really legitimate. A recent e-mail to Citibank customers said the company was updating its online security. Readers were warned that if they did not resubmit their personal information, they would no longer be able to use the company's online services. Citibank and other financial services have their names hijacked most often. The Anti-Phishing Working Group lists on its website the latest scams. Keep in mind that all of these are scams—the e-mails are not actually from the companies they say they are from. The following are examples of the scams:

- Earthlink and MSN – This e-mail says your billing information is out of date and your membership will be cancelled if you don't update your info immediately.

- eBay – This e-mail claims to have discovered that your account has been "compromised by outside parties" and that you won't be able to use your account until you update your information. Part of the fake eBay e-mail reads: "We have noticed some activities pertaining to your account indicating that other parties may have had access and/or control of information in your account. These parties have in the past been involved with money laundering, illegal drugs, terrorism and various Federal Title 18 violations. In order that you may access your account, verify your identity by clicking here."

These scammers try to scare you into giving up your information. They also make it seem as if the e-mail sender has your best interest in mind. The Anti-Phishing Working Group says these phishing expeditions are successful about 5% of the time. This is a low percentage, but all they have to do is hit a few times to "strike it rich." There is one simple way to make sure you don't become a victim of these scammers: ever respond to any e-mail that requires you to provide a social security number, credit card number, bank routing number or other personal info. If you think the e-mail may actually be valid, contact the institution directly. While you can prevent falling victim to these online scams, it is almost impossible to prevent all identity theft these days. However, we must all learn as much as we can and then be extremely careful with sensitive information.

Many times, the theft of personal records is an inside job where employees in a business with access to customer data are tempted to steal large volumes of customer's records. The temptation can be real: Stolen personal data can bring anywhere from $10 to as much as $60 per record or credit report. The crooks that purchase these records turn them into profits by using the personal information to obtain loans and open credit cards, which are used to purchase large quantities of goods, which are then fenced for cash. These inside jobs are getting harder to prevent, as the outsourcing of call center service jobs overseas puts Americans' personal information abroad, where it can be used fraudulently. The federal government reports that increasing numbers of ID theft schemes that started abroad are now spreading in the United States.

Just as there are new methods of stealing your identity today, there are new services you can use to help protect yourself. Farmers Group, American International Group, Travelers, Chubb, Encompass and several credit card issuers now offer identity theft insurance. The cost of this insurance runs from $25 to $50 a year. It is my understanding that Consumer Reports doesn't recommend this type insurance. There are also other products available that you may want to check out, particularly if you've been a victim in the past. For example, the McAfee Privacy Service software ($34.99 per year) includes special protections on personal computers that warn users before they send their PINs and passwords over the Internet. Other services, such as the myFICO Identity Theft Security ($19.95 per year), include a service that monitors a subscriber's credit reports, sending e-mails when suspicious changes occurs, and also includes identity theft insurance protection.

The single best defense against identity theft is reviewing your credit reports frequently. If you discover that your ID has been stolen, take the following steps at once:

- Call credit bureaus;
- Close fraudulently-opened accounts;
- File a police report;
- Call the Fedferal Trade Commission ID Theft Hotline (877-ID THEFT / 438-4338); and
- Alert all other financial accounts that the theft has occurred.

Sources: *CBS News* and *Associated Press*

Citizens Must Beware Of Internet Offers

The Alabama Securities Commission, the State of Louisiana Office of Financial Institutions Securities Division, and Mississippi Secretary of State's Office, Business Regulation and Enforcement Division, have warned potential investors to watch out for offers from Liberty Assets, Inc. (LAI) and Foreign Shareholder Protection Department (FSPD). Joe Borg, Director of the Alabama Securities Commission, in a joint statement with officials from Louisiana and Mississippi, advised:

> *We have recently received complaints from residents of the United Kingdom, Singapore, Australia and New Zealand who have been solicited by agents of LAI. The complainants state that LAI offered to purchase shares of old stock and shares issued by defunct companies on behalf of groups of investors for as much as four times of the market prices for the securities. However, prior to purchasing the securities LAI requires its participants to deposit what LAI calls a " penalty restriction bond" for 10% of the total purchase price with one of its affiliated companies. Potential investors need to beware of this company. You can easily avoid being a victim of this type of fraud by checking to see if a company is registered to sell securities and the product being offered is registered in your state of residence.*

LAI maintains an Internet website, which is http://www.libertyassets.com. LAI describes itself as a "Venture Capital" company that has been in business since 1999. The four primary LAI officers have "profile" pages on the LAI website. There are no records that indicate that Liberty Assets Incorporated is registered to conduct business in the state of Alabama. Present evidence supports a reasonable suspicion that LAI and its affiliates are engaged in an international securities fraud using the Internet. All available information indicates that LAI is attempting to entice previous victims of "penny stock" and/or "pump and dump" scams into selling their worthless shares for as much as 10 times the market value. The potential victims are told that they must first pay what amounts to an advance fee, which is represented as a penalty restriction bond, allegedly required by the U. S. government. None of the individuals or entities identified in this report are registered to conduct securities transactions. In addition, none of the addresses for the companies can be verified, and they appear to be nothing more than fronts used to give the appearance of a legitimate business in a represented location.

Alabama, Louisiana, and Mississippi state securities regulators caution potential investors to thoroughly check out any investment opportunity. Contact your state regulators for inquiries regarding securities broker-dealers, agents, investment advisors, investment advisor representatives, financial planners, the registration status of securities, to report suspected fraud, or obtain consumer information. If you have questions or require more information, contact: www.asc.state.al.us.

Recording Industry Sues Computer Users

The recording industry has filed another round of copyright infringement lawsuits against people who were allegedly distributing songs illegally over the Internet. This latest wave of federal litigation targeted 750 computer users across the nation, including 25 students at 13 universities, according to the Recording Industry Association of America (RIAA), the trade group for the largest music companies. The RIAA claims the defendants used university computer networks to distribute copyrighted recordings on unauthorized peer-to-peer services, including eDonkey, Kazaa, LimeWire and Grokster. Separately, the RIAA also sued 213 people in 34 states and Washington, D.C., who had already been identified in earlier litigation but failed to settle their cases.

Among the universities attended by students named in the lawsuits were Indiana State, Iowa State, Ohio State and Southern Mississippi. But the individual colleges and universities were not named as defendants. As in previous cases, the new lawsuits were filed against "John Doe" defendants—identified only by their numeric Internet protocol addresses. Music company lawyers must obtain the identity of defendants by issuing subpoenas to Internet access providers. In all, recording companies have sued 6,191 music fans since September 2003, when the industry began waging its legal campaign against online sharing of music files. To date, 1,207 defendants have settled their cases out of court, according to the RIAA. Settlements in previous cases have averaged $3,000 each.

While some surveys have shown the number of people engaging in file-sharing has declined since the RIAA began its legal assault, other data show millions continue to share music, movies and software online. A recent study by researchers at the University of California, Riverside, concluded that traffic on peer-to-peer networks has never declined and is at least comparable to the same levels it was a year ago.

Source: *Associated Press*

Consumer Fraud Awareness Campaign Targets Hispanics

A good number of people in the United States speak Spanish as their primary language. That has caused them obvious problems, including one being the receipt and understanding of warnings and consumer alerts of all sorts. In a positive move, the Federal Trade Commission launched a Spanish language consumer fraud awareness campaign, Mantente alerta contra el fraude. Informate con la FTC ("Be on the alert against fraud. Stay informed with the FTC"). The campaign goal is to encourage Spanish speakers to identify fraudulent and deceptive business practices and to tell the FTC about them when they occur. The outreach campaign complements the agency's enforcement initiative against frauds targeting Hispanic consumers.

The campaign includes a series of radio public service announcements and banner ads on websites that are geared to Latino audiences. A recent survey found that Hispanics are twice as likely to be victims of consumer fraud as non-Hispanic whites. FTC Chairman Deborah Platt Majoras says: "Many consumers do not know where to seek help when they have been defrauded. This campaign lets Spanish speakers know that the FTC is not only a great source of information about spotting a fraud, but also an important place to report it."

The FTC has information about a number of consumer frauds in English and Spanish at www.ftc.gov/bcp/conline/edcams/ojo/s-index.htm. In addition, the agency maintains a toll-free help line at 1-877-FTC-HELP where counselors take complaints in both English and Spanish. Mantente alerta contra el fraude, Informate con la FTC will be a pilot program in 11 cities: New York, Washington, D.C., Atlanta, Miami, Raleigh, Chicago, Phoenix, Dallas, Houston, San Antonio, and Los Angeles.

Purdue Pharma To Pay $10 Million Over Oxycontin

Purdue Pharma LP has agreed to pay $10 million to the State of West Virginia to settle a lawsuit that accused the company of dishonestly marketing the painkiller OxyContin in that state. The settlement funds will be used to pay for programs to educate doctors, law enforcement and communities about the use, abuse and diversion of prescription drugs. Purdue Pharma will make four annual payments of $2.5 million to the Attorney General's consumer education fund. A state court judge approved the settlement last month just before jury selection in the case was scheduled to begin. It was alleged in the 2001 lawsuit that Stamford, Connecticut-based Purdue Pharma did not tell doctors, pharmacists and patients about the morphine-like drug's addictive qualities because it wanted to sell more pills, according to court filings and hearing transcripts.

A New Book From Citizen Works

Citizen Works has announced the release of a new book that gets right at the heart of fighting corporate dominance. **The People's Business** examines the very nature of corporate power, presenting a range of strategies to curtail it, and explains how ordinary people can restore citizen control. Bringing together the recommendations of the Citizen Works Corporate Reform Commission—a coalition of leading authors, activists, scholars, and professionals,—The People's Business is a plan for "strengthening individual rights, transforming corporations into engines of public prosperity, and creating a sustainable, life-respecting society where the people have the power," according to the announcement. In order to restore true citizen democracy in America, we will need to challenge corporate power effectively and directly—to frame the debate around questions of economic justice and corporate accountability. The challenges are great and complex, but The People's Business may help us begin thinking about and planning for the fundamental challenges that lie ahead.

Sears To Pay $500,000 For Not Reporting Mower Defects

Sears, Roebuck and Company has agreed to pay $500,000 to resolve federal allegations that it failed to report known defects on riding lawnmowers made by a Brentwood, Tennessee company. The Craftsman mowers are manufactured by Murray Inc. According to federal safety officials, Sears learned of about 1,600 instances of fuel leakage and fuel tank cracking on some models of Craftsman lawnmowers from April 1999 to September 2001. The company failed to report the problems as required by federal law. About 36,000 of the Craftsman rear-engine riding lawnmowers were recalled in 2003. The manufacturer later paid a $375,000 civil penalty to settle allegations of belatedly notifying the Consumer Product Safety Commission.

XXI. RECALLS UPDATE

GM RECALLS 1.5 MILLION CARS

General Motors is recalling about 1.5 million cars in four separate recalls. The first involves the 2004 Buick Rainier and the 2002 to 2004 Chevrolet TrailBlazer, GMC Envoy and Oldsmobile Bravada. A National Highway Traffic Safety Administration (NHTSA) spokesman said taillights could malfunction. The second involves the 2003-model Chevrolet Cavalier and Pontiac Sunfire for taillight and turn signal malfunctions. The 2003-model Chevrolet Malibu, Pontiac Grand Am and Oldsmobile Alero are also being recalled because their accelerators could stick and not return to idle. The last involves the 2004 to 2005 Cadillac XLR and 2005 Chevrolet Corvette. Field tests suggest a possible brake-fluid leak. This brings the yearly number of recalls to a national record of 24.8 million cars. NHTSA says that GM has recalled almost 10.5 million vehicles in North America this year.

POLARIS UTILITY VEHICLES RECALLED

Polaris Industries, along with the U.S. Consumer Product Safety Commission, have recalled the Polaris “Ranger” 4x4 utility vehicle. The lower steering shaft assembly may have a missing or misplaced weld that connects the steering wheel to the steering gear box assembly. If a weld is missing or misplaced, the lower steering shaft assembly could fail, causing the operator to lose control of the vehicle. There have been 2 reports of the lower steering shaft assembly failing. To date, no injuries have been reported. All model year 2005 “RANGER 4x4” Utility Vehicles with model number R05RD50AA are part of this recall. The model number is located on the upper right frame tube directly under the right side of the seat. The RANGER 4x4 Utility Vehicles have black seats with a green chassis. “RANGER 4x4” is prominently displayed on the right and left side of the rear cargo box. Polaris Industries, Inc., of Medina, Minnesota, manufactured these vehicles. Polaris dealers sold these Utility Vehicles nationwide from June 2004 to September 2004 for about $8,899.

WAL-MART RECALLS LAWN CHAIRS

Wal-Mart has recalled thousands of lawn chairs that were sold at its stores nationwide this year. The plastic armrests on the folding chairs can break off. Wal-Mart says it had received two dozen reports of broken wrists, back injuries, and bruises. The recall involves nearly 21,000 “Rio” brand folding chairs with green or blue plastic arm rests. The chairs were sold between January and March for about $8. Wal-Mart also sold “Rio” lawn chairs with white or beige arm rests, but those chairs are not a part of this recall. People with faulty lawn chairs can return them to Wal-Mart for a refund or call the manufacturer at 1-800-866-8520.

THERMAL SAFETY VALVES RECALLED

Robertshaw Controls Co. has recalled 123,544 gas valves and 37,350 magnet heads used in commercial cooking equipment because of the potential for gas explosions and fires. The U.S. Consumer Product Safety Commission (CPSC) says the gas valve can stick open if the pilot light goes out, allowing gas to continue to flow and posing the risk of fire or explosion. According to the CPSC, there have been 12 reports of flash fires, including nine reports of people being burned. The Robertshaw TS-11 Thermal Safety Control Gas Valves are used in commercial cooking equipment with pilot lights, including fryers and warming trays. The valves and the magnet heads were assembled in Mexico and sold by food service equipment dealers between February 2003 and August 2004 to commercial food service providers, such as restaurants. The recalled products carry date codes 0306 through and including 0432. Consumers should have the appliance examined by the gas company or a qualified technician. The company will arrange for free repair or replacement of the recalled gas valves. Consumers can call Robertshaw at (800) 232-9389 or visit the company’s website (http://www.robertshaw.com/) for more recall information.

GOVERNMENT RECALLS RADIANT HEATERS

A Texas company is recalling about 30,000 radiant heaters sold at Wal-Mart stores nationwide. Aloha Housewares Inc. says the heater’s thermal protector may cause a fire hazard if the heater is covered with a blanket or similar item. These electric radiant heaters are Model 02931. The model number is printed on a silver UL label on the bottom of the heater. The heater is gray, and the name Airtech is printed on the heater. The recalled heaters were sold at Wal-Mart stores nationwide from mid-September 2002 through April 2003 for about $16. Consumers should stop using these recalled heaters and call Aloha Customer Service at (800) 295-4448 to arrange for a free replacement.

BOWFLEX RECALLS NEARLY 800,000 MACHINES

Anybody who watches any commercial TV knows about the popular Bowflex fitness machine. The makers of these machines are recalling nearly 800,000 units after dozens of people reported injuries from mechanical problems. This marks the second large recall of Bowflex equipment this year. In January, the machine’s manufacturer issued a voluntary recall of about 420,000 units after reports of similar mechanical problems. The latest recall affects 680,000 Bowflex Power Pro systems and 102,000 Bowflex Ultimate Fitness Machines, manufactured by The Nautilus Group, of Vancouver, Washington. The Consumer Product Safety Commission says the machine’s seat can unexpectedly break on the Ultimate model and Power Pro with “Lat Tower.” There were 46 reports of such incidents, two of which resulted in serious injuries requiring stitches to the head. Another failure involves the machine’s backboard bench unexpectedly collapsing when it is in the incline position on Power Pro models without the "Lat Tower." There were 42 reports of this failure, causing injuries to the back, neck and head, none of which were serious.

The company issued its recall in January after reports of more than 70 injuries because of the backboard bench failure and problems with the "Lat Tower." That piece, used to strengthen the upper body, can weaken over time and collapse, injuring the user's back, head and shoulder. The recalled machines were sold at fitness stores and through infomercials and direct mail around the nation between 1995 and April of this year. The systems cost between $1,200 and $1,600, depending on the model. Consumers are advised to stop using the backboard bench in the incline position and contact the company to receive a free repair kit. Customers who participated in the recall in January and owners of the Ultimate systems will automatically receive a kit, according to the company. I understand that where owners' names are known for any model, the company will contact them as well. Consumers can call Bowflex at 1-800-820-8604 to receive the repair kit.

XXII. SPECIAL PROJECTS

LEGAL SERVICES OF ALABAMA

I have always felt that Legal Services of Alabama (LSA) does a tremendous service for low-income citizens in our state who quite often find themselves in need of legal advice and help. As you may know, LSA is an independent, non-profit organization that provides qualifying low-income families with legal aid and assistance in civil matters. LSA is a statewide program serving all 67 counties in Alabama. LSA provides a full range of services, including:

- Counsel and advice
- Mediation
- Administrative representation
- Representation in court
- Appeals in appropriate cases
- Legal self-help materials and forms

It is the goal of LSA to help people, families as well as individuals, move toward self-sufficiency by assisting them with their legal needs. Our firm believes that helping this group helps others is a good thing for us to do. Therefore, we are funding the Beasley Allen Consumer Law Fellowship. Hopefully, this gift will allow LSA to receive a badly needed National Consumer Law Fellowship from the National Consumer Law Center. As you may know, LSA has survived years of low pay, layoffs, and office closings while remaining steadfastly committed to the needs of their clients. The low-income communities in Alabama depend heavily on LSA in a number of situations. Access to civil justice for low-income Alabamians is badly needed and we are happy to support efforts of LSA to provide free legal assistance to these deserving Alabamians. I hope many people in need will receive legal services that would otherwise not been available to them. LSA does a tremendous job and we are pleased to be able to help them out.

A SPECIAL REQUEST FOR HELP

Shannon Britt, who is now 27 years old, became ill at age of 17 and by the age of 19 was diagnosed with the most progressive case of Crohn's disease documented in the southeastern United States. The treatments she has undergone have left her with a host of complications and secondary illnesses. Obviously, this has further complicated her condition. Shannon has now exhausted all traditional and experimental treatments the medical field has to offer. Her only option is a transplant being offered through Northwestern University in Chicago. Shannon has been approved for the transplant, but needs to raise $100,000 before March of 2005. Sadly, Shannon is now uninsurable and is left without hope unless the needed funding can be raised.

If you would like to help Shannon, you can make a financial contribution to the Shannon Britt Medical Account at any SouthTrust bank (now Wachovia). In addition—and this is strictly for Auburn University fans—a 1930 model-A Ford has been donated for the benefit of Shannon by a 2-time cancer survivor—and will be available to the lucky winner of a raffle. The vintage automobile will be raffled off at $50 per chance, with only 1,000 tickets in print. If you would like to buy a few raffle tickets, make a check to The Shannon Britt Medical Fund and send it to P.O. Box 307, Smith Station, AL 36877. Your name will go in the box and you will receive a receipt stub. If the raffle does not raise at least the value of the car, which I understand is estimated in the $16,000 range, the raffle will be cancelled and all donations will be refunded. This is a good cause and you can feel good about helping a person in need during the Christmas season. My friend Dr. Bob Story of Tuskegee brought this to my attention, which I very much appreciate. Your prayers and financial support will be appreciated by Shannon and her family.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Our Newest Associate

Chad Cook, who recently became an associate in the firm, is a member of our Mass Torts Section and is currently working primarily on Welding Rod litigation. Chad had previously worked for the firm in a number of administrative capacities. He received a bachelor's degree in Criminal Justice from Auburn University at Montgomery in 1998 and graduated from Thomas Goode Jones School of Law in 2002. Since graduation, Chad has also taught evening classes in the Legal Studies program for Faulkner University. Chad and his wife, Sharon, attend First Baptist Church in Montgomery. Chad is a very hardworking lawyer and does excellent work. He is a definite asset to the firm.

Sandra Walters

Sandra Walters, who has been with the firm for almost thirteen years, is the Section Head Administrator of our Toxic Torts Section. In this position, she assists Rhon Jones with the day-to-day activities of managing that section. Sandra is the mother of three children: Melanie Sullins, who is currently pursuing her Bachelor of Science Degree at AUM; Holly Stroh, who also works for the firm in our Fraud Section; and 13-year-old Hunter Walters. Sandra is also the proud grandmother of Taylor and Drew Stroh. This dedicated and loyal employee is an avid collector of primitive antiques and restores furniture in her spare time. We are most fortunate to have Sandra, who does excellent work, with the firm.

Litigator Of The Year

We are pleased to announce that David B. Byrne, III, has been selected as our "Litigator of the Year" for 2004. We are most fortunate to have David, who is one of our most diligent and hardworking lawyers, as a member of our firm. David began his legal career as a Deputy Attorney General for the State of Alabama. He later served as a law clerk to U.S. District Judge Robert Varner. David then clerked for Alabama Court of Criminal Appeals Judge John M. Patterson. After serving those judges, David entered the private practice of law in Montgomery, as a member of the firm of Beck & Byrne. Practicing law with George Beck, a veteran and well-respected lawyer, had to be a great experience. David joined our firm in March 2001, and has practiced in our Toxic Torts Section, with his primary focus on commercial/business matters and environmental/toxic tort litigation.

In 2003, David was involved in the largest toxic tort settlement in U.S. history involving the PCB contamination in Anniston, Alabama, against Solutia, Monsanto and Pharmacia. David was a primary lawyer for our firm in this landmark settlement. His very good work on that case has continued over into 2004. David was also one of the lead trial attorneys in a $20 million dollar verdict in federal court this year for the City of Columbus and other Georgia businesses, which were affected by carbon black fallout from a nearby plant in Phenix City.

David has been married to his wife, Betty Bobbitt, for eight years and they have two children. He and his family attend Young Meadows Presbyterian Church in Montgomery, where he serves as a deacon. David also serves on the Board of Directors for the Montgomery County Trial Lawyers Association, and is a member of the Board of Governors for the Alabama Trial Lawyers Association. He is a fine lawyer, and a better person. We are most pleased to have David with our firm. He is most deserving of this award, which is given annually. The selection is made by our Board of Directors and Section Heads. I must add that David had some very stiff competition this year. He will be recognized at our annual Christmas Party this month.

XXIV. MY LAST OBSERVATION ON THE ELECTIONS

Now that the elections are over, lots of so-called experts are making all sorts of analysis and conclusions. All I can say is that I voted for the Kerry-Edwards ticket and don't plan on apologizing for that vote. I sincerely believe that was the best choice for America. But, my views were in the minority nationwide and I must accept that as final. In Alabama, the Bush victory was even wider than anticipated. I sincerely hope and pray that George W. Bush will be the President of all citizens in this country and not just for the privileged elite. I will pray daily for the President to be successful. We have tremendous problems facing our country, and we all have an obligation to support this Administration when they are right. Opposition when they are wrong is equally appropriate, and that's what separates our government from most of the world. But, this opposition must be well founded and carried out in the proper manner.

In retrospect, John Kerry never had much of a chance to win. He came out of a state that was labeled the most liberal in the nation. The Massachusetts senator had a voting record that was very easy to cherry-pick and then attack the bad votes, ignoring the many good ones. His very good Vietnam record became a liability, which was totally unjustified and perhaps was the irony of ironies, when you consider the service record of his opponent. Had Karl Rove not been involved, Senator Kerry may have had a fighting chance. While I have no use for his kind, Rove is a political genius and his 3-G's strategy was carried out skillfully to the letter. I didn't vote for George W. Bush, but he is my President and I wish him and my country well.

XXV. SOME PARTING WORDS

We are rapidly approaching the Christmas season, which should be a happy time for all of us, and I find that it's a good time to reflect on things. Thanksgiving has come and gone, and while that holiday is a family time, and is a time when we should be thankful for our many blessings, the Christmas season is a most special time of year. Actually, it has been said that the Christmas season is actually a glorious time of year! I totally agree with that assessment. During the Christmas season, God brings us face-to-face once again with His design for and redemption of mankind. God's intentions toward us are for life lived abundantly. His plans for the Kingdom are total victory! Unfortunately for many people in our country, the holidays can be filled with unrealistic expectations. Old hurts are sometimes revisited and new ones are quite often inflicted. In many instances, our hope can fade and we are left with a heavy heart. This year we also have the war in Iraq and the constant threat of possible terrorist attacks in this country on our minds. In the midst of all the commercialization of the season and the fears that grip all too many, we should all remember what the Christmas season is really about! A good start is to pray for the real spirit of Christmas for your family and friends during the holidays. Daily prayer will help all of us enjoy Christmas this year in a special way. The following are some simple prayers that—when prayed earnestly and with conviction—will help us enjoy the true spirit of Christmas this year.

- **Love** – Lord, help us follow the way of love—allow the love of Christ to enter our hearts and compel us (1 Cor. 14:1; 2 Cor. 5:14).
- **Joy** – Restore the joy of Your salvation to us and let us experience the joy of Your presence in our daily lives (Ps. 51:12; 16:11).
- **Peace** – Let Your peace rule and guard our hearts. Give us more of You since You are our peace (Col. 3:15; Phil. 4:7; Eph. 2:14).
- **Hope** – Enlighten the eyes of our heart so that we may know and enjoy the hope You called us to (Eph. 1:18).
- **Favor** – Let Your favor rest on us and sustain us daily (Lk. 2:52).
- **Life** – Shine Your light of life on us and help us to walk in that light (Job 33:30; Ps. 56:13).
- **Salvation** – Help us to fear You so that we can unlock the treasure of Your salvation (Is. 33:6).
- **Selflessness** – Keep us humble and guard us from self-seeking attitudes that reject truth (Rom. 2:8).
- **Generosity** – Make us rich in ways that result in generosity on our part so You will be honored and praised (2 Cor. 9:11).
- **Receiving** – Help us to receive the fullness of Your Kingdom, Your Spirit, and Your Grace (Dan. 7:18; Jn. 20:22; Rom. 5:17).
- **Seeking** – Encourage us to seek Your face with all our hearts and to do your will (Dt. 4:29; Ps. 27:8).
- **Praise** – We ascribe glory to Your name, Lord. We come before You in worship for You are holy and true (1 Chron. 16:28-29).

I wish for each of our readers and their families a joyous and blessed Christmas. It is my prayer that this holiday season will be the best ever for each of you and your families. Take time to enjoy your family and friends, and reach out to those who are hurting and lonely during what should be a happy time. May God bless each of you during a very special time of year.

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