



THE
JERE BEASLEY REPORT

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A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA

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I. CAPITOL OBSERVATIONS

CHANNEL ONE HAS NO PLACE IN OUR SCHOOLS

Although I have written about Channel One in previous issues, I now feel that it is necessary to bring this matter to your attention once again. As I understand it, on each school day in more than 400 Alabama public and private schools, thousands of students—ages 11 to 18—watch a 12-minute newscast designed for children called Channel One News. In return for showing the program in classes, Channel One allows schools to use television sets and other equipment. Actually, Channel One is nothing more than a medium for junk food and movie advertisements that in my opinion are unsuitable for children. Obviously, this takes valuable school time away from children. Advertisements are shown during the daily 12- to 13-minute segments that I don't believe have any place in our schools.

Channel One runs ads for “junk” foods and “junk” movies that influence children in the wrong way. Students aged 11 to 18 have seen ads for such movies as “Dude, Where’s My Car?” and “Starsky and Hutch.” No small child has any business watching this type movie. I certainly don't want my grandchildren watching ads for unsuitable movies. Neither should our schools be pushing fast food chains. I hope I am not in the minority on this matter. My friend, Jim Metrock, who is president and founder of Obligation Inc., has led the fight against Channel One and has done a very good job. He has been ably assisted by several folks who want Channel One out of our classrooms. Mrs. Pat Ellis, who serves as Education Director of Obligation, Inc., has been a stalwart in the fight.

In the event some of our readers aren't familiar with Channel One, I will give a thumbnail sketch. Channel One is the name of both a marketing company

in New York City and the TV show they produce in Hollywood, CA. Interestingly, the New York State Board of Regents has never allowed Channel One in any public school in their state. Channel One was created by Whittle Communications in 1989, with its main purpose being to place commercial messages in classrooms. The company is now owned by Kohlberg Kravis and Roberts, who own it through an investment arm called Primedia. Here is the way the Channel One deal works: school boards are loaned a TV network for each 6-12th grade school, but only if the board agrees to show the 12-13-minute in-school TV show called “Channel One News.” Channel One imposes some pretty strong time requirements for showing the program. In effect, they are guaranteed so much time every day during the entire school year. In Alabama, I believe the requirements equate to 31 hours of school time turned over to this company—or one instructional week of school each year.

Each school is loaned a satellite dish that can only pick up Channel One's signals, two VCRs, and a 19" TV set for each room. The schools receive, by way of satellite, the daily “news” show and also can receive several hours of documentaries that contain no commercials. This is called the Classroom Channel. School boards have to sign a contract before they receive Channel One. The contract is for three years and renews automatically. I am told schools can end a contract at any time without any extra penalty being incurred. Many educational organizations have expressed opposition to the presence of TV commercials in a classroom. Other groups have objected to Channel One from a moral perspective.

Channel One has advertised violent and sexually provocative movies to children on the in-school TV show. Channel One's website, channelone.com, actually put children in danger and at risk of harm. This site was heavily promoted to children during school. The children saw reviews of R-rated movies and sexually explicit CDs. I was shocked to learn children were given

opportunities to post their pictures on the Internet, using a “Personal Ads” section that allowed children to exchange personal information with anonymous Internet users. There was a chat room that was poorly monitored, if at all. Fortunately, the website was cleaned up after Senator Richard Shelby called for U.S. Senate hearings on Channel One in April of 1998.

I strongly believe that Channel One should be taken out of our schools. Unfortunately, few parents even know what Channel One is or what it does. If you agree that Channel One is bad for

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children, please contact Governor Bob Riley, Lt. Governor Lucy Baxley, Attorney General Troy King, State School Superintendent Joe Morton, and your local legislators and tell them how you feel. I can see nothing good that comes from this commercial venture. If you want more information on Channel One, you can go to <http://www.obligation.org/>.

ATTORNEY GENERAL GOES AFTER GAMBLING

Alabama Attorney General Troy King wants to shut down some forms of gambling in Alabama. The Attorney General's announcement, made last month, came after a five-month review of electronic gambling in Alabama. The Attorney General opposes gambling and says it "creates more social ills than can be cured by the revenue it generates." Because I am totally against gambling in any form, I tend to agree with Troy's assessment. I have never felt that gambling should be utilized as a revenue source for government at any level. It would make much more sense to reform our tax structure than to depend on revenue from gambling operations to fund governmental functions.

However, one thing sort of bothered me concerning the gambling issue. I understand that the Christian Coalition took credit for having prompted the Attorney General's investigation of the gambling halls. Interestingly, John Giles, who heads up this political group, made an attack on trial lawyers who he claimed were representing the gambling industry. While I am not sure who Giles was talking about when he referred to trial lawyers, I do know that my firm has never represented or taken any money from any gambling interests. I am not so sure, however, that Giles or his group can make that statement based on news reports.

ANTI-SMOKING CASH NOT SPENT AS EXPECTED

To date, the states are still receiving funds from national tobacco settle-

ments. But, only three states — Maine, Delaware and Mississippi — are spending money on anti-smoking efforts at the minimum levels recommended by federal health officials. This information comes from a report issued by a coalition of public health groups. Altogether, the states have set aside \$538 million for smoking prevention for fiscal 2005, which began in October and runs through September. That is just a third of the \$1.6 billion minimum the Centers for Disease Control and Prevention say should be spent nationwide, according to the report. As I understand it, the CDC's minimum funding recommendations for each state are based on population and other factors. The states are expected to receive an estimated \$7.1 billion this year from the tobacco industry from the settlement reached with cigarette makers. The members of the coalition are the Campaign for Tobacco-Free Kids, American Heart Association, American Cancer Society and American Lung Association. As you may recall, the settlements were meant to help the states recoup the cost of treating sick smokers, and the states pledged to fund tobacco prevention programs.

It appears that more young people are smoking now than ever before. This is a very bad trend and one that must be reversed. Matthew Myers, President of the Campaign for Tobacco-Free Kids, says: "The states are receiving more and more revenue related to tobacco but doing far too little to fund programs to reduce tobacco use, particularly among children. They're using the money to fill short-term budget shortfalls, build roads and every other conceivable political purpose." According to the report, states that have allocated no significant funding for tobacco prevention are Michigan, Missouri, New Hampshire, South Carolina and Tennessee. The District of Columbia also has not set aside money for that purpose, the report stated. Alabama appears to be doing some good things with the money, but not enough in the prevention programs. At least, based

on the report, we weren't the worst of the lot.

ATTORNEY GENERAL ENTERS TEN COMMANDMENTS CASES

Attorney General Troy King has joined Attorneys General from several other states in the Ten Commandments fight. Troy is asking the U.S. Supreme Court to uphold Ten Commandments displays in Kentucky and Texas. You will recall that the Supreme Court agreed to hear cases from those two states. The arguments likely will be heard next month. The Attorney General's brief, which was joined by attorneys general from 14 other states, was filed on December 7th. Their argument is that the Ten Commandments displays in two Kentucky courthouses are legal. Hopefully, this will provide the opportunity for the Supreme Court to allow a public display of the Ten Commandments. You will recall that the displays in Kentucky were surrounded with other documents, including the Declaration of Independence and Mayflower Compact. I believe much of this was done after the American Civil Liberties Union filed suit.

At last count Attorneys General from 18 states, now including Alabama, have asked the nation's Highest Court to uphold Texas' display of a Ten Commandments monument on its Capitol grounds. Because President Bush campaigned on family values and moral issues, I would anticipate that he would get involved in this fight. I suspect most of his supporters expect the President to take a strong stand. So far, there has been no word from the White House.

JUDGE MOORE CONTINUES HIS FIGHT

Judge Roy Moore is lending his support to the Ten Commandments fight, a move that has received mixed reviews. Without a doubt, Judge Moore will go down in history as the Ten Commandments Judge. Although his opponents are very vocal, his support-

ers appear to greatly outnumber the detractors. If nothing else, he has brought the issue relating to the public placement of the Ten Commandments into the spotlight of public opinion. Polls run in Alabama reveal that most Alabamians agree with Judge Moore's position in this fight. However, many still believe that the former chief justice was motivated by politics and that he used the issue to foster a personal political agenda. Frankly, I don't believe that politics or personal gain played any part in Judge Moore's Ten Commandments fight. I am firmly convinced that the man is sincere in his beliefs and that he felt that his actions were both lawful and justified.

In any event, Judge Moore has had a definite impact on the political scene, and I predict we will see his name on the ballot in the future. Many of his supporters are encouraging him to run for governor, while others want the Judge to run for chief justice again. In my opinion, he would be a real factor in either race. According to my sources, however, Judge Moore will likely run for Governor and it could be on a third-party ticket. But, running as a Republican would probably be the easier route. In any event, his involvement will make things much more interesting.

AARP SELECTS RAY WARREN

J. Ray Warren has been named AARP Alabama's new state president. Ray, who resides in Montgomery, replaces Dr. Gloria Walker, who ended a successful six-year term in office on December 31st. As state president, Ray will work in conjunction with the state staff in Montgomery and hundreds of volunteers throughout Alabama. He will provide leadership and guidance, and will work to achieve AARP's mission of improving the lives of seniors in Alabama. Ray brings to the position decades of experience in management and administration, as well as 37 years of military service. He is currently self-employed as a lawyer and

insurance consultant. Prior to that Ray was a claims manager with the Alabama Department of Finance, where he oversaw the resolution of property and other insurance claims filed against the state.

Early in his career, Ray taught social studies at Slocomb High School. Most of his career, however, was spent as an employee of State Farm Insurance Company. At State Farm, he was a claims representative for 10 years. Later, Ray was named claims superintendent, a position he held for 15 years. Ray has had an extensive background of public service. At one point in his career, Ray served as chairman of the State Ethics Commission, and did an outstanding job. He was twice elected to a seat on the state Personnel Board and provided state employees a real voice for a change. Ray spent 33 years as a member of the National Guard, and upon his retirement as a full Colonel, he was awarded the Legion of Merit, the Army's highest peacetime award. The Eclectic native is a graduate of Auburn University, where he earned his B.S. in Economics. Ray holds a masters degree from Troy State University, and was awarded a law degree from Jones School of Law. Ray and his wife JoAnn have three adult children: Neva Webb, Joe Warren and Lee Warren.

I commend AARP for selecting Ray Warren to serve as its state president. In my opinion, Ray will do an outstanding job. In fact, I can't think of a better person to fill this most important position. Alabama consumers will have a real friend in Ray and he will fight to protect their rights. Having Ray on board will give AARP, an organization that really works hard for consumers, an even stronger presence in Alabama.

II. LEGISLATIVE HAPPENINGS

THE REGULAR SESSION

The regular session of the Alabama Legislature, which will begin on February 1st, is expected to be one filled with a combination of problems, opportunity and controversy. The money problems haunting state government and public education, simply put, have been carried over to this session. Unfortunately, that has been our method of handling problems for years and it has finally caught up with us. I am convinced that the fiscal shortfall is real and will have to be dealt with. But, I'm not sure many folks share my views on this.

The governor and legislators will face extremely tough issues in February and have a real challenge waiting for them when the session kicks off. I really don't believe that our state can afford to dodge the money issues any longer. Our state is faced with a situation where we badly need funds for programs people want, but, unfortunately, most folks simply don't want to pay for them. So, we must either raise revenues or cut programs and services. That, in a nutshell, defines our problem. The problems are very easy to spot, but finding permanent solutions has proved to be extremely difficult.

POLITICAL AGENDAS WON'T BE SCARCE

A good number of candidates are already lining up for next year's elections. As a result, this session will be filled with political games and posturing. Even though the session may be unproductive (which I hope won't be the case), at least it should be interesting and highly entertaining. The special interest groups always have a "field day" during a "political" session, and this one won't be any different. Maybe we could broadcast the session's activi-

ties live on public television. That might be a good way to get folks back home more involved. In fact, it might also help solve some of our lingering problems!

III. COURT WATCH

VICTIMS OF WRONGDOING ARE IGNORED BY TORT REFORMERS

The tort reform movement has never exhibited any real feelings for the human suffering that takes place when a person is badly injured and impaired for life because of some type of wrongdoing. It has been very clear that the plight of the victim is totally ignored by the champions of tort reform. But, there is one thing for certain: caps or limits on damages never take into consideration the victim—Instead only the wrongdoer—and that's very sad. Caps are simply unfair, and that shouldn't be subject to serious debate. The logic behind putting limits on the amount that can be received as damages for pain-and-suffering is simple: Caps limit the payouts by insurers, which in turn should enable the companies to reduce what individuals and companies pay for liability insurance. Recent studies have shown only the first part of the theory holds true. A 2003 study by Weiss Ratings, Inc., which monitors the insurance industry's financial health, is a good source of information on this subject. Weiss analyzed medical malpractice premiums and payouts from 1991 to 2002 and found that not only did caps fail to reduce malpractice premiums, they had the opposite effect. Among the study's findings which surprised many were:

- Insurers in states with caps raised their premiums at a significantly faster pace than those in states without caps—48% compared with 36%.
- Despite the imposition of caps, insurers in nearly nine of 10 states contin-

ued to raise rates, while insurers in states without caps were actually more likely to hold or cut their premiums.

- In states with caps, insurers are more likely to charge premiums exceeding the national median than those in states without caps.

Let's take a look at California, which was the first state to impose a liability limit and the one that tort reformers like to feature as a model for a proposed federal cap on damages. For more than a decade after the California law took effect, liability insurance premiums continued to rise faster than the inflation rate. It wasn't until 1988, however, when voters passed a corresponding cap on insurance rates that rates leveled off. In fact, the steepest hike in premiums occurred the year after the Supreme Court ruled that the caps were constitutional. As is usually the case, the tort reformers use medical malpractice as the "gasoline" to fuel the "**tort reform fire.**" The authors of the Weiss study observed:

These counterintuitive findings can lead to only one conclusion. There are other, far more important factors driving the rise in med mal premiums than caps or med mal payouts - factors that have more to do with the ups and downs of the economy and the cyclical nature of the insurance industry.

As we wrote last month, even the nation's largest medical malpractice insurer, GE Medical Protective, admitted in a Texas regulatory filing that "noneconomic damages are a small percentage of total losses paid," and that capping them would save the company only 1%. The experience with premiums for doctors holds true for other fields of liability insurance. Caps simply don't work!

RSA SUIT ENDS IN MISTRIAL

A mistrial was declared in the lawsuit brought by the Retirement Systems of

Alabama against Bear Stearns Cos. The Montgomery County jury deliberated three days before telling Circuit Judge Charles Price that it could not agree on a verdict. The judge finally had to declare a mistrial, but promptly ordered a new trial to start on January 10th. I understand that the jury was split six for RSA and seven for Bear Stearns, which came as a surprise to most observers. As you may recall from last month, RSA, the pension fund for state employees and education workers, had sued two former WorldCom executives, four investment firms, and WorldCom's accountant, alleging that they were responsible for \$124.7 million in losses from WorldCom securities. Three securities firms and Arthur Andersen settled and agreed to pay \$111 million to RSA to cover part of its losses. However, Bear Stearns refused to settle, which led to this trial. RSA claimed that the New York investment firm knew about financial concerns at WorldCom when Bear Stearns sold WorldCom bonds to the retirement systems in October 2001, but failed to disclose that information.

ABUSE CASES SETTLED

The Roman Catholic Diocese of Orange, which is located in California, has agreed to settle claims by 87 victims who were sexually abused by priests and other church employees over the years. The total settlement will exceed the \$85 million record payment by an American diocese. The specifics of the settlement can't be disclosed under the terms of a court-imposed gag order. In fact, some details relating to the settlement must still be worked out. This settlement resolves allegations of molestation against 30 clergymen and about a dozen other church employees, with some of the cases dating back as far as the 1930s. The previous record amount was paid in 2003 by the Archdiocese of Boston to settle more than 500 abuse cases. The amount of that settlement was restricted by a Massachusetts law that strictly limits the amount of

damages a charitable organization, such as a church, can be required to pay in a lawsuit. There is no similar limit in California.

The California cases were filed last year under a special state law that opened the way for litigation against the Catholic Church and other institutions that allegedly had failed to protect children from those they had reason to believe were predators. The law gave alleged victims of childhood sexual abuse one year to sue no matter how old the case. Under the terms of the settlement, the Diocese of Orange will share the cost of the settlement with eight insurance companies. Individual awards to the victims were determined based on the facts of each case. Interestingly, according to its financial statements the diocese in California had a \$171-million investment portfolio and \$23.4 million in cash reserves at the end of the 2003 fiscal year.

It is shocking that conduct of this sort within any church organization could have existed at all. The nature and duration of the misconduct in these cases is even more shocking. When you consider the numbers of victims and wrongdoers involved it is a tragedy of monumental proportions. I hope the entire book on this most serious matter will soon be closed and will never be opened again. The mistreatment of children can never be tolerated in any society. In my opinion, sexual predators, who operate inside the church, must be dealt with as harshly as the law allows. Precautions must be put in place so that this type activity is stopped once and for all.

HALLIBURTON ASBESTOS SETTLEMENT APPROVED

The settlement agreements involving asbestos claims against Halliburton were approved recently in two separate November orders by the bankruptcy court overseeing the Halliburton bankruptcy case. The settlement concerns asbestos related claims against DII Industries, Kellogg Brown & Root, and other affected Halliburton sub-

sidiaries and all appealing insurance carriers. These settlements, together with other previously announced insurance settlements, provide a global resolution to the debtors' insurance disputes. This will result in the payment of over \$1.5 billion in cash and winds up a successful conclusion of the bankruptcy proceedings for it.

The agreements also involved settlements with over one hundred solvent and insolvent London-based insurance companies, over fifty domestic insurance companies and other companies with which DII Industries shares insurance coverage. Two of the settlement agreements involve matters relevant to Harbison-Walker Refractories Company and Federal-Mogul Products, Inc., both debtors in their own bankruptcy proceedings. The bankruptcy courts in those proceedings also have entered orders approving these settlements. The Halliburton court's approval orders are now final and the settling insurers are obligated immediately to dismiss their appeals to the bankruptcy court's confirmation order and their motion to vacate the district court's affirmation order. It was projected that the bankruptcy would be over by the end of this year. Funding of the trusts should be done by the end of this month.

Source: *The Insurance Journal*

\$156 MILLION AWARDED IN DEATH CASE

Three Islamic charities and an alleged fund-raiser for the Palestinian militant group Hamas have been ordered to pay \$156 million to the parents of an American teenager who was shot and killed by terrorists on Israel's West Bank. A federal jury awarded \$52 million in damages to the parents of a teenager, shot down at a bus stop outside Jerusalem eight years ago. A U.S. magistrate judge then tripled the damages. Before the trial started, the judge had found the Texas-based Holy Land Foundation for Relief and Development, the Islamic Association for Palestine and alleged Hamas fund-raiser Mohammed Salah legally

responsible for the death. The jury found that the Quranic Literacy Institute of suburban Oak Lawn, a group that translates Islamic religious texts, was also responsible for the shooting. The family, Americans who moved to Israel in 1985, sued under a U.S. law that allows victims of terrorism abroad to collect damages in American courts from organizations that furnish money to terrorist groups.

SUPREME COURT LIMITS POLLUTION CLEANUP LAWSUITS

In a recent decision, the U.S. Supreme Court put restrictions on companies that want to voluntarily clean up their polluted land and sue former owners to share the costs. The Court ruled 7-2 against a company that bought Texas land and later filed suit in an effort to recover some of the \$5 million it spent cleaning up pollution on the property. The Justices said the company's attempted use of the Superfund law was improper. But, the Court left open the possibility that another part of the Superfund law could permit such lawsuits. It will be interesting to see what develops on that point.

A NEEDED CORRECTION

We mentioned a case last month that was tried by the Prince Law Firm in Tuscaloosa. I made the mistake of saying that Josh Wright tried the case with Bob Prince, and that was not correct. Actually, Matt Glover was the lawyer involved, and I understand he did an outstanding job. I apologize for this mistake and wanted to set the record straight.

IV. THE NATIONAL SCENE

PRESIDENT BUSH ATTACKS THE U.S. LEGAL SYSTEM

President Bush—at the direction of Karl Rove and his key financial supporters from Corporate America—is determined to destroy the legal system in this country. The president wants to take away or severely restrict the legal rights of victims of corporate wrongdoing. The Rove agenda was established years ago and comes as no surprise. Consumers have never had a seat at the Rove table and never will. Certainly, the scheme to undermine consumers' legal rights didn't just come about overnight. The planning and execution has been a model of timing and efficacy. Terms such as "frivolous lawsuits," "jack pot justice" and "lawsuit abuse" were coined to propel the tort reform movement. These terms had no factual basis but caught on with the media and have been largely accepted by the public. The president's agenda was revealed during a two-day "economic" conference last month, which was carefully orchestrated and designed to give the appearance of solidarity in the business community.

Interestingly, the people who most take advantage of the legal system are the business interests who are now lobbying to curtail the legal rights of citizens. U.S. businesses file lawsuits four times more often than individuals. This is according to an analysis of states and counties that keep such data. Moreover, as has been well documented, businesses are 69% more likely to be sanctioned by federal judges for filing frivolous lawsuits than are tort plaintiffs and their lawyers, according to an analysis of the 100 most recent cases in which such sanctions were imposed. Tort lawsuit filings have decreased 9% overall from 1992 through 2001, according to information from a joint tracking project of the Conference of State Court Administra-

tors, the Bureau of Justice Statistics, and the National Center for State Courts. The filing data from 30 states represent a total of 74% of the U.S. population. When adjusted for population growth, tort filings declined by 15%, from 269 to 228 per 100,000 over that period.

Joan Claybrook, President of Public Citizen, made this observation concerning the White House's agenda: "President Bush doesn't let facts get in the way when it comes to his political goal of dismantling the legal system. He prefers to coddle campaign contributors, rather than protect consumers and patients." It is significant that there has never been a serious debate among reasonable people over the legal system. Instead, we have seen a massive campaign of distortions carried out by the Bush Administration in league with its business allies. Were there to be a debate over the legal system in this country, the tort reformers would lose and they know that to be a fact. That's why there has been no public discussion where each side has the opportunity to lay out their respective positions and where the true facts can be ascertained.

Source: Public Citizen

SOME INTERESTING POLL RESULTS

To say that Merck & Co. has had a series of bad weeks in the media may be a gross understatement. Not only have a number of lawsuits been filed in the wake of Merck's recall of Vioxx, the company's reputation has been tarnished and its credit rating impaired. It has been estimated in news stories that Merck's liability relating to Vioxx could be over \$38 billion. This bad news for the pharmaceutical giant comes at a time when Americans already had a very low opinion of the prescription drug industry. A Gallup survey, conducted August 9th-11th, measured public perceptions of 25 industries. The survey found that the pharmaceutical industry ranked next to last. Interestingly, only the oil and gas industry

rated lower. It should be pointed out that these ratings came well before the announcement of the Vioxx recall and the problems with Celebrex and Bextra. It was considerably lower than last year's rating of the pharmaceutical industry. At that time, 43% of Americans gave the industry a positive rating and 38% a negative rating.

It should also be pointed out that the Federal Food and Drug Administration didn't issue the recall of Vioxx. This prompted many critics to suggest that the FDA was at fault for not taking a more aggressive strategy in dealing with the potential dangers of prescription drugs. On November 5th, the FDA announced that it would hire a top scientific review body to determine whether its drug safety system is adequate. Interestingly, a more recent Gallup survey found that Americans still feel fairly positive about the FDA. However, more people indicate their confidence has declined over the past several years than say it has increased. The poll, conducted November 19th-21st, reflected a belief by the public that the FDA works to "make sure prescription drugs for sale in the United States are safe." The poll findings lead me to conclude that most folks really didn't have a clue what the FDA was actually doing, but assumed that FDA-approved drugs had to be safe. How wrong they were! I believe a poll today would indicate that the FDA has been ineffective as a protector of the public.

MERCK TAKES CARE OF IT'S OWN

Everybody in this country who has watched any TV news programs or even read a daily newspaper is well aware of the Vioxx debacle. Now it appears that Merck, the company responsible for putting a very bad drug on the market, has much more concern for its top executives than it has shown for its customers thus far. The company has adopted a plan that could give its top executives big bonuses if the company is taken over. Clearly, and with justification, Merck has really been under the gun since it withdrew Vioxx,

and most of the focus has been on folks who have taken Vioxx. Merck said, in a federal security filing, that its board has decided to give its top 230 managers the opportunity for a one-time payment of up to three years of salary and bonus if another company bought Merck—or even merely bought over 20% of the company's shares—and that came as a shock to many observers. Interestingly, any executive who is fired or resigns for “good cause” will be eligible to receive the payment.

Although many large corporations have golden parachute plans to protect executives in the event of takeovers and to keep them from leaving if a takeover is on the horizon, this one is quite different. It clearly appears that Merck's decision to adopt their plan could not have come at a worse time. The public perception is that Merck's board is rewarding company executives for Vioxx problems and for the company's present inability to bring new drugs to market. Merck didn't disclose how much the executive payment plan would cost, but I suspect payments could total hundreds of millions of dollars based on the number of persons involved and their present salary structure.

To say the least, the plan devised by Merck's board is rather unusual. Merck has structured the compensation plan so that executives can receive the payments as soon as another company buys 20% of Merck's stock. This means the payments will take place even if the stock purchase doesn't actually complete a takeover. That provision creates the possibility that executives could receive a windfall by leaving even if Merck remained independent. I only wish Merck had the same concern for the families who have been hurt because of Vioxx.

NEW WORRIES ABOUT DRUG SAFETY

An internal survey conducted by the Food and Drug Administration indicates that 66% of FDA scientists lacked confidence that the agency adequately monitors the safety of prescription

drugs that are already on the market. The survey was obtained by two non-profit advocacy groups, the Union of Concerned Scientists and Public Employees for Environmental Responsibility, under the Freedom of Information Act. The survey definitely helps the case. **Dr. David Graham**, the FDA whistleblower, has warned about the current system for insuring drug safety. As previously reported, Dr. Graham, a proponent of drug safety, told a U.S. Senate committee that the current drug safety monitoring system could not prevent another case like the withdrawal of Vioxx. Interestingly, while that drug had been on the market for five years, and even with all the available information, the FDA had done absolutely nothing. Dr. Graham said in his testimony: “Vioxx is a terrible tragedy and a profound regulatory failure. I would argue that the FDA, as currently configured, is incapable of protecting America against another Vioxx. We are virtually defenseless.”

Dr. Graham has been involved in the decision to pull ten drugs from the market, including **Abbott Laboratories' Omniflox**, **Wyeth's Fen-Phen** and **Redux**, and **Pfizer's Rezulin**. In previous interviews, Dr. Graham had outlined a number of problems with the system. For example, doctors report side effects voluntarily, and the FDA only finds out about a small fraction—at most one-tenth—of these side effect cases. Obviously, this makes it incredibly difficult to figure out how often a problem is occurring. With Vioxx, there was an added problem. Because heart attacks and strokes are common in the same arthritis patients who took the drug for pain, it's highly probable a good number could have slipped under the radar entirely and were missed.

It is undisputed that the issue of drug safety has become increasingly prominent. We now know that the FDA's safety reporting system hasn't worked very well. The concerns of Dr. Graham and of public advocacy organizations and medical journals that called into question the safety of a number of drugs are now being given added cred-

ibility. The debate on drug safety in the U.S. is getting hotter. It is becoming increasingly clear that the FDA hasn't done its job very well and for the first time the public is demanding answers. The survey can be found at http://www.peer.org/12_14_04_FDA_survey.pdf. An internal report regarding the results from the Department of Health and Human Services, the U.S. government agency under which the FDA falls, can be found at <http://www.oig.hhs.gov/oei/reports/oei-01-01-00590.pdf>.

ACCESS STILL HAS ITS PRICE

It appears the inauguration of Bush II will be another costly affair. In fact, the total costs will set a new record. Tickets for all official inaugural events, including an “elegant” candlelight dinner with a special appearance by President Bush, are going for \$100,000. If you really want to be involved, however, try this on for size: Tickets to all official inaugural events, two additional tickets to an “exclusive” lunch with Mr. Bush and Vice-President Cheney, plus an all-access pass to any inaugural ball will cost you \$250,000. Mr. Bush's inaugural committee will raise more than \$40 million. At a time of war, with more than 138,000 American troops serving in Iraq, it would seem to be a bad time for wild spending and party-going. The inaugural celebration this year will go down in history as the most lavish and costly. The war certainly had no noticeable effect on those who planned the festivities.

You shouldn't be surprised to learn that corporations will account for most of the \$250,000 contributions. Unlike campaign contributions, there are no legal limits on the amount that an individual or corporation can donate to the inauguration. For example, in 2001, the Enron Corporation furnished \$100,000 for the Bush inauguration. Interestingly, the company's chairman at the time, Kenneth (“Kenny Boy”) Lay, gave an additional \$100,000. I wouldn't expect either Enron or Mr. Lay to contribute much this time. But, there will

be plenty of others eager to take their place.

VIDEO GAMES CITED FOR VIOLENCE AND SEX

Some of the video games that our young children are watching these days are a source of concern to many consumer groups. Unfortunately, I doubt some parents even know what their children have access to from this industry. Sexual content and violence have certainly been a part of the video game culture, and it is getting worse. For example, some of the games feature players shooting rival gang members. Others feature half-naked women and other activities that are certainly unsavory. Now even the assassination of President John Kennedy is on a video game.

Advocacy groups are taking the position that these video games, at the very least, should be kept away from children. In issuing its annual report card on video games, The National Institute on Media and the Family has urged the industry to educate parents better about ratings and asked retailers not to sell such games to younger teenagers. David Walsh, the Institute's president, stated at a recent news conference:

This segment of games keeps getting more realistic, and they keep pushing the envelope. The problem is that these games are the ones that are particularly popular with kids, particularly teenagers.

The Interfaith Center on Corporate Responsibility, a group of church and civic leaders, has also urged video game makers to place tighter restrictions on the sale of violent video games to children, including having retailers place them in locations less accessible to children. As expected, the video game trade association claims that its games carry appropriate ratings. They recommend that parents police the activities of their children.

Among those listed as the worst video games of the year was "Grand Theft Auto: San Andreas." This is a

game in which the hero vows to avenge his mother's murder and restore glory to his neighborhood gang. Players rack up points by gunning down police, committing car-jackings, burglarizing homes and dealing in other underworld activities. The game came to the market in October and instantly became the year's bestseller. This was part of a series of "Grand Theft Auto" games that has sold more than \$32 million over the past few years. The Institute's list of bad games also includes "The Guy Game," which features video of women exposing their breasts. Like others on the group's list, the games are rated "M" for mature, which means retailers are not supposed to sell them to people under 17. Advocacy groups want the games to be rated "AO" or "adults only," which would limit purchase to those 18 and over. Many stores will not carry games with that rating, which means the "M" rating will continue to be used by the industry.

A recent survey found that half of underage boys and 8% of girls were able to buy M-rated games. The Interactive Entertainment Merchants Association, a trade group, had pledged to create tougher standards by December to forbid the sale of mature games to children. These were to have gone into effect this month, but I am not sure they did. How a corporation could come out with a video game that features the assassination of a President of the United States is impossible to justify. How this could ever become the subject of a video game is beyond comprehension. American citizens had better wake up and demand that our political leaders address this problem and others of a like nature. If we fail to get involved, our society will continue to sink further into a sea of immorality. Actually, our churches should be leading the charge to protect our children and grandchildren. I hope they are and I just don't know it. If all of the churches nationwide got involved in this fight, I believe that we would see some positive changes and soon from this industry. If there is anything they

understand, it is money and profits. Only when those are affected in the wrong economic direction, will the industry respond.

VIACOM TO PAY \$3.5 MILLION OVER INDECENCY

Viacom, Inc., has agreed to pay a record \$3.5 million to settle complaints that it broadcast indecent material on its radio stations. The U.S. Federal Communications Commission announced the settlement on November 23rd, but it received only scant media attention. The agreement covers several incidents dating as far back as 1999, in which radio personalities, including Howard Stern and Opie & Anthony, discussed sexual and scatological topics on stations owned by Viacom's Infinity Broadcasting radio network. It's not surprising that Viacom's 20 CBS stations have challenged the FCC's proposed \$550,000 fine. In addition to paying \$3.5 million, a record in indecency settlements, Viacom admitted that some of the material in question was obscene or indecent. The company now says it will use tape delays and take other steps to make sure that such incidents do not occur in the future.

Interestingly, in return, the FCC will not take these incidents into account when considering whether to renew licenses for Infinity radio stations in the future. Frankly, I find that difficult to understand. It seems to me that a review of the broadcaster's record should be considered, when a renewal comes up. In the wake of the Janet Jackson incident, which was not a part of this settlement, Congress has been considering measures that would increase the maximum fine from \$27,500 to as much as \$500,000. However, no action is likely this year. Personally, I believe the government has a strong duty to protect children. Parents also have an obligation to keep the objectionable materials out of the hands of their children. However, that is extremely difficult in these times. All churches and even the political groups,

such as The Christian Coalition, should also be actively involved. If folks such as Dr. James Dobson, Pat Robertson and Jerry Falwell would make this fight part of their political agenda, maybe we would get some help from the Bush White House.

INTERESTING LAWSUIT IN MASSACHUSETTS

Most of us have heard of the public works project in Boston referred to as “Big Dig.” The Massachusetts Turnpike Authority, the independent agency charged with overseeing the \$14.6 billion highway project, has filed suit against the consortium that managed the venture. The agency will try to recover as much as \$100 million in costs for design errors and construction mistakes. A team uncovered project-wide errors by Bechtel/Parsons Brinckerhoff that is the basis of the lawsuit. A cost recovery team has been reviewing all Big Dig construction contracts for evidence of mismanagement. To date, the cost recovery team has recouped \$3.5 million from contractors.

Actually, this lawsuit is the second to be brought by the State of Massachusetts against Bechtel/Parsons Brinckerhoff. The first, filed in March of 2003, accused the firm of concealing the Big Dig’s spiraling price tag from lawmakers. This project — the most expensive highway project in U.S. history — buried Interstate 93 in tunnels underneath downtown Boston, and connected the Massachusetts Turnpike to Logan Airport. It appears to have been a financial nightmare for taxpayers.

THE BUSH WHITEHOUSE MUST SUPPORT OUR TROOPS

Several months ago, I wrote about the plight of our soldiers and marines who were not being properly equipped for battle in Iraq. My information came from having talked to a number of Alabama soldiers returning from Iraq. I felt at the time that if that information was correct, we weren’t really supporting our troops very well. It now appears

that to have been the case. Rep. Mike Rogers recently has now asked military leaders to explain why armor manufactured at Anniston Army Depot wasn’t being installed on M113 personnel carriers in Iraq. It has become very clear that the armor was needed and hadn’t been made available. Rep. Rogers delivered a letter, cosigned by Representative Duncan Hunter of California (who chairs the House Armed Services Committee), to Army Chief of Staff General Peter Schoomaker. The controversy surfaced when a Tennessee National Guardsman asked Defense Secretary Donald Rumsfeld about the lack of armor on military vehicles in Iraq. Rep. Rogers says armor produced at the depot is ready for installation. Regardless of where the armor comes from, it is inexcusable to put our troops in vehicles that have no armor in a war zone.

The more we learn about how poorly this war was planned the more apparent it becomes that all of the talk from the Bush White House about supporting our troops has been largely that—just talk. After the lack of armor story broke, we see that \$4 billion is now being spent to send armored vehicles to Iraq. This belated move comes only after a tremendous loss of life and a public outcry against the Secretary of Defense. How many of these deaths could have been avoided had the armor been available may never be known. Nevertheless, men such as Donald Rumsfeld should have to account for their actions and their obvious failures. The American people are demanding that our government fully support the troops who are fighting a very tough and confusing war in Iraq. We need some real action from the Secretary of Defense and not just talk!

V. THE CORPORATE WORLD

HEALTHSOUTH SETTLES U.S. CIVIL CHARGES

HealthSouth Corp. will pay \$325 million over the next two years under a

settlement of False Claims Act charges with the U.S. Justice Department and HHS’ inspector general’s office. The global settlement resolves civil charges stemming from several whistleblower lawsuits against the company. However, it does not resolve a Securities and Exchange Commission investigation into securities fraud at HealthSouth or criminal charges against HealthSouth personnel. The charges against founder and former Chief Executive Officer Richard Scrushy are still pending. There are also a number of civil actions pending that aren’t affected by this settlement.

The civil allegations against HealthSouth include billing for unnecessary services, for services provided by uncredentialed providers and for individual physical therapy when group therapy was provided. HealthSouth also allegedly failed to report a \$19.3 million gain from a 2001 sale of Caremark stock and allegedly falsified Medicare cost reports. The SEC, meanwhile, has accused HealthSouth of inflating earnings by \$2.7 billion. Scrushy is scheduled to go to trial this month on a 58-count criminal indictment alleging that he directed the fraud. Scrushy pleaded not guilty and has hired a battery of criminal defense lawyers in an attempt to stay out of jail.

TIME WARNER, AOL SETTLE FRAUD CHARGES WITH THE SEC

Time Warner, Inc., the world’s biggest media company, will pay a \$510 million fine to settle securities fraud charges brought by the Securities and Exchange Commission. The company’s America Online unit was charged with improperly inflating its advertising revenue and engaging in other accounting tricks. New York-based Time Warner’s operations include magazines, books, cable TV systems, the WB television network and the Warner Bros. film studios. The company also faces several shareholder lawsuits that contend Time Warner shareholders were cheated in the company’s 2001 merger because of

AOL's accounting practices and inflated revenue claims. The alleged accounting irregularities occurred before and after the companies' 2001 merger. The company has since ousted former AOL Chairman Steve Case from his executive role at the merged company and erased AOL from its corporate name.

Under terms of the settlement with the Justice Department, prosecution on charges of aiding and abetting securities fraud will be deferred provided that AOL and Time Warner cooperate in an ongoing investigation into whether AOL improperly helped smaller Internet companies artificially inflate their earnings. An independent monitor will be chosen to oversee AOL's compliance, and the company must agree to a number of changes in its internal practices. The Securities and Exchange Commission continues to investigate accounting irregularities at AOL. The SEC probe involves the manner in which Time Warner accounted for a \$400 million payment from the German media company Bertelsmann AG and whether that was used to inflate America Online profits. Time Warner had set aside \$500 million to cover the cost of settling the SEC and Justice Department investigations. Of the \$210 million called for in the Justice Department settlement, \$60 million will go to the federal government in fines and about \$150 million will go into a compensation fund to pay for settlements of civil lawsuits or other government actions arising from the alleged fraud. The criminal case has already resulted in guilty pleas from executives at two companies that are now defunct, namely, Purchasepro.com of Las Vegas and Homestore, Inc., of Westlake Village, California.

FORMER BOEING EXECUTIVE PLEADS GUILTY

Former Boeing CFO Michael Sears has entered a guilty plea to illegally hiring Darleen Druyun, a top Air Force procurement officer who has admitted she gave the company preferential treatment on a \$23 billion refueling tanker deal and other contracts. Sears

pled guilty to one count of aiding and abetting illegal employment negotiations. It appears that Mr. Sears is getting off easy with one count. I have to assume that Sears agreed to provide prosecutors with useful information regarding Boeing's conduct over the years. Druyun's improper financial ties to Boeing were first exposed by the National Legal and Policy Center (NLPC), which filed a complaint with the Defense Department Inspector General in October 2003.

It was alleged by NLPC that Druyun had improperly sought a Boeing job for her daughter and sold her house to a Boeing executive while she was negotiating billions of dollars worth of contracts for the Air Force by Boeing. The complaint also specifically asked whether Sears and Druyun had negotiated employment before Druyun left the government. Boeing launched an internal investigation and concluded that the two had. Sears and Druyun were fired in November 2003. Druyun was sentenced to nine months in prison on October 1st. This is the sort of conduct that can't be tolerated. Taxpayers should be able to believe that the corporate world will be honest and upright in dealings with the federal government. Unfortunately, that doesn't appear to have been the case in all too many instances. We have been much too soft on this type crime and the wrongdoers know that to be factual. I suspect we have only seen the tip of this iceberg!

Source: Corporate Crime Reporter

SEC FILES MORE FRAUD CHARGES

Federal regulators have filed civil fraud charges against three former Kmart Corp. executives and five current and former managers of big vendor companies. The claim is that these folks engineered a \$24 million accounting fraud by the retailing giant. The Securities and Exchange Commission, which has been investigating Kmart's decline into bankruptcy, contends that the retailer inflated earnings

by improperly booking millions of dollars of payments from the vendors - Eastman Kodak Co., Coca Cola Enterprises, Inc., and PepsiCo, Inc., and its Frito-Lay division. Five of the former Kmart and vendor company executives settled the SEC's charges by agreeing to pay civil fines totaling \$160,000 and to refrain from future violations of securities laws. In one case, a former Kmart vice president was prohibited for five years from serving as an officer or director of a public company.

Cases are still pending against three other executives. It should be noted that neither Kmart nor the vendor companies have been charged in either criminal or civil courts. Last year, federal prosecutors dropped their fraud case against two other former Kmart executives in the middle of their trial on charges they conspired to inflate the retail giant's earnings. In a civil lawsuit filed in federal court in Detroit, the SEC accused the eight Kmart and vendor executives of causing Kmart to issue false financial statements by improperly accounting for millions of dollars worth of vendor "allowances" prior to the company's bankruptcy in January 2002. According to the SEC, the vendors paid Kmart the fees for promotional and marketing activities. Kmart came out of bankruptcy in 2003 as Kmart Holding Corp. The deceptive scheme caused Kmart to significantly overstate its earnings. According to the SEC, the executives caused Kmart to prematurely book the vendor payments on the basis of false information provided to the company's accounting department. It said several vendor company managers took part in the fraud by signing false and misleading accounting documents.

Source: Associated Press

MORE BRIBE PROBES BY THE SEC

The Securities and Exchange Commission has opened corrupt practices investigations into three multinational corporations—Bristol-Myers Squibb, DaimlerChrysler, and Lucent Technologies. Recently, Bristol-Myers Squibb

revealed that the SEC and a Munich state prosecutor were looking at possible bribes paid by a German unit. Lucent said the SEC is investigating former CEO Richard McGinn and two ex-employees for their alleged role in a bribery scheme to win contracts for the company in Saudi Arabia. Lucent said the SEC sent Wells notices to McGinn, John Heindel, the former head of Lucent's Saudi Arabian operation, and an unnamed third person. Wells notices outline potential charges and allow recipients to respond before a suit is filed. DaimlerChrysler reported that the SEC was looking at secret bank accounts it allegedly maintained to pay bribes. The investigation apparently has focused on allegations raised by former Chrysler auditor David Bazzetta who charges in a lawsuit that he learned of the bank accounts during a July 2001 meeting in Stuttgart, Germany, where DaimlerChrysler is headquartered. Bazzetta said that the company was aware that the accounts violated U.S. securities laws but continued to maintain them.

Source: *Corporate Crime Reporter*

CARLYLE GROUP PROFITS FROM GOVERNMENT AND CONFLICT

The Carlyle Group, a Washington, D.C.-based private equity firm that employs numerous former high-ranking government officials with ties to both political parties, was the ninth largest Pentagon contractor between 1998 and 2003, an ongoing Center for Public Integrity investigation into Department of Defense contracts found. A dozen companies in which Carlyle had a controlling interest netted more than \$9.3 billion in contracts. Overall, six private investment firms, including Carlyle, received nearly \$14 billion in Pentagon deals between 1998 and 2003. From its founding in 1987, the Carlyle Group has pioneered investing in the defense and national security markets, and through its takeover of companies with billions of dollars in defense contracts became

one of the U.S. military's top vendors, ranking among better known defense firms like Lockheed Martin, Boeing Co., Raytheon Co., Northrop Grumman and General Dynamics.

Unlike those firms, however, the Carlyle Group itself is not a manufacturer. It offers no services directly to the Pentagon, and has no defense contracts. Carlyle manages investments—some \$18.4 billion from 600 individuals and entities in 55 countries, according to its website. The firm's business is making money for these investors, the vast majority of whose identities are not disclosed to the Securities and Exchange Commission or other government bodies. Even though Carlyle itself has won no contracts, the companies it has owned or controlled have done billions of dollars worth of business with the Pentagon. The report found that the Carlyle unit that brought in the largest share—\$5.8 billion—was United Defense Inc., which manufactures combat vehicles, artillery, naval guns, missile launchers and precision munitions. United Defense also owns United States Marine Repair Inc., the country's largest non-nuclear ship repair, modernization, overhaul and conversion company.

The report found that United Defense brought in more than 60% of Carlyle's defense business. Carlyle took United Defense public in 2001, by April 2004 it had sold all its shares in the company. Lear Siegler Services, a leading contractor in aircraft logistics support, maintenance, pilot training and ground support, received contracts worth more than \$1 billion. Carlyle sold the company in August 2002. Southwest Marine Inc. also received contracts worth more than \$1 billion since 1998, and Norfolk Shipbuilding & Drydock received contracts worth \$827 million. In 1998, Carlyle merged these two companies into United States Marine Repair.

Vought Aircraft Industries, a large subcontractor doing work for military cargo planes, bombers, and fighters, received contracts worth \$85 million. Vought is among the few defense con-

tractors that the Carlyle Group has not sold. Among other private equity firms, New York-based Veritas Capital Management firm, which employs many former high-ranking military officials, received Pentagon contracts to the tune of more than \$2.2 billion. It appears that Veritas is the 41st ranked defense contractor. Companies under the ownership of Vectura Holding Co., another New York-based group, got deals to the tune of \$1 billion, while companies controlled by Berkshire Hathaway, led by billionaire investor Warren Buffett, won contracts worth \$688 million.

Source: *Corporate Crime Reporter*

29 SECURITIES FIRMS FINED BY NASD

The NASD has fined 29 securities firms a total of \$9.2 million for late disclosure of required broker information. The NASD, formerly the National Association of Securities Dealers, suspended two of the firms, Merrill Lynch and Wachovia Securities, from registering new brokers for five business days because of excessive violations and prior regulatory filing problems. Merrill Lynch, the largest U.S. brokerage, was hit with the biggest fine, \$1.6 million. American Express Financial Advisors was fined \$700,000, Wachovia \$650,000 and Prudential Equity Group \$550,000. The NASD said the firms failed to make at least 25% of required disclosures on time between January 2002 and March 2004. ING Financial Partners had the highest failure rate at 77% and was fined \$200,000. In July, Morgan Stanley was fined \$2.2 million and banned from registering brokers for five days in a settlement from the same probe. All firms will conduct internal audits to monitor reporting and ensure timely disclosures.

SECURITIES PROBE WIDENS

Around a dozen major brokerage firms are being investigated by the SEC for failing to obtain the best price for stocks they traded for customers. Brokers have a "best execution" obliga-

tion under the law, which requires them to secure the best price for investors. Among the firms implicated are Morgan Stanley, Merrill Lynch, Ameritrade, Charles Schwab and E*Trade. The issue centers on how companies executed trades of Nasdaq-listed securities at market open in the morning. Every morning there is heavy trading from the backlog of orders from market close the previous day. The investigation has found that trades were often processed in a manner that favored the firms over their clients. If the investigation concludes that these trading practices were widespread, the cost to individual investors would be minimal—perhaps no more than pennies a share traded—but that could represent major profit to the brokers.

TENET TO PAY \$395 MILLION

Tenet Healthcare will pay \$395 million to settle lawsuits filed by former patients who had received unnecessary heart surgeries. The settlement fund was established for more than 750 people who filed lawsuits over heart bypass operations and cardiac cauterizations at Redding Medical Center in California. Individual payments will vary based on the scope of the injuries or medical complications suffered by each former patient. It is extremely difficult to understand how anybody in the healthcare field could have so little regard for human beings.

Separate lawsuits against the doctors who performed the surgeries weren't included in the settlements. The agreement is subject to approval by individual plaintiffs and procedural court requirements. Tenet has sold the Redding Medical Center to Hospital Partners of America, which is located in North Carolina. Tenet had agreed in August to pay a \$54 million settlement of federal and state investigations into the heart surgeries. As we went to the printer, Tenet was on trial in a case pending in California. The company's executives were accused there of paying millions of dollars in bribes to doctors to steer patients to a Tenet hospital in San Diego.

VI. CAMPAIGN FINANCE REFORM

HIGH COURT DODGES CAMPAIGN SPENDING CASE

The U.S. Supreme Court has passed up a real chance to deal with the constitutionality of campaign spending limits. In a closely watched case from New Mexico, the justices, without comment, let stand a lower ruling striking down the City of Albuquerque's spending limits as a violation of free speech rights. The High Court declined to consider whether a 28-year-old landmark decision barring caps should be reassessed due to skyrocketing campaign costs that critics say promotes corruption. Without question, the unlimited spending in political campaigns over the years has led to the total dominance of special interests. Two candidates for city council and mayor had challenged the spending limits on First Amendment grounds.

The spending limits at issue were passed in 1974—two years before the Supreme Court ruling that struck down caps in congressional campaigns. Albuquerque capped spending in the mayoral race at twice the salary of the mayor—\$174,720 for the 2001 election, \$17,056 in a council race—twice a councilor's salary. Albuquerque officials argued that the Supreme Court has not prohibited all spending limits, just those that are unreasonable. The city felt their caps were justified by important governmental reasons. But the U.S. Court of Appeals for the Tenth Circuit disagreed. That court cited the High Court's 1976 ruling and declared the spending limits unconstitutional.

The city's appeal had drawn the support of 11 states, eight U.S. senators, 15 current and former judges, and several civil rights groups who pointed to what they called a troubling trend of increasingly expensive campaigns and a need for laws to stem the pernicious influence of money in elections. From 1986 to 2000, the average cost of a U.S.

House race jumped 151% from \$359,577 to \$848,296 and a Senate race increased 154% from \$3.07 million to \$7.39 million, according to a friend-of-the-court filing from former Senators Bill Bradley (D-N.J.) and Alan Simpson (R-Wyo.). The High Court could have done our country a great favor by upholding this law. Unfortunately, they dodged the issue!

CAMPAIGNS LEFT WITH MILLIONS

Both the Bush and Kerry campaigns raised record amounts of campaign money and interestingly, each campaign wound up with large amounts on hand when the race was over. President Bush and the Republican National Committee spent a combined \$707 million this election cycle. The president's campaign finished the November 2nd election with \$4.4 million left in his general election campaign fund. Bush also had \$15 million in a legal compliance fund that he could have tapped in the event of a recount fight, according to reports filed with the Federal Election Commission. The president also detailed the money raised and spent by his record-breaking primary campaign fund. He ended his private fund raising with \$273 million collected, close to triple the then-record \$106 million he raised for his 2000 primary campaign. The cost of television ads consumed much of Bush's money. Bush was not allowed to use private contributions on his campaign after he was nominated September 2nd at the Republican National Convention in New York. That account had \$2 million left as of late November after Bush gave nearly \$11.3 million to the RNC and \$1,680 to the White House Historical Association. The RNC raised \$385 million this election cycle and spent \$369 million, according to figures it released. Obviously, its top priority was Bush's re-election. John Kerry's campaign had over \$15 million leftover after the race.

Source: *Associated Press*

VII. CONGRESSIONAL UPDATE

REPRESENTATIVE TAUZIN FINDS A NEW HOME

Billy Tauzin, who is retiring from Congress after 24 years of service, is going to work for the drug industry. The Louisiana Republican will become head of the industry's top lobbying group this month. If you wonder why Tauzin is going to work for the drug industry, maybe it would be good to consider his role while in Congress. Tauzin led the House committee that regulated drug makers. Now he will be president of the Pharmaceutical Research and Manufacturers of America. For obvious reasons, this move just doesn't meet the "smell test." Any political leader who does favors for an industry while in office shouldn't be allowed to work for that same industry when he or she leaves office.

SHAME ON CONGRESS FOR SNEAKING IN SOME BAD LANGUAGE

In a behind-closed-doors move during recent budget negotiations, congressional conferees inserted language into the massive appropriations bill stating that the Federal Energy Regulatory Commission can now preempt states on the permitting and siting of liquefied natural gas (LNG) facilities. This will restrict the ability of states and local communities to have adequate control over these controversial projects. The new language in the bill clearly states that the federal act preempts the states on matters of approving and siting natural gas infrastructure.

The LNG projects are particularly controversial because liquefied natural gas is extremely volatile and dangerous. The new language is also troubling because companies are proposing to build 19 new LNG marine terminal facilities throughout the United States in the next few years. Currently there are just four LNG marine terminals in the United States.

Communities are leery of LNG facilities because of security reasons. LNG tankers and marine terminals make significant terrorist targets because of the enormous quantities of fuel carried by the tankers, the risk of fires, and the hazards associated with the heating of the LNG at the marine terminals. States' officials have raised serious questions about the adequacy of FERC's security assessments. You will recall the situation in Mobile where Exxon had proposed a facility.

Liquefied natural gas is not environmentally sustainable and that creates problems. Natural gas used as fuel for electricity pollutes, and the exploration and drilling for natural gas can cause environmental damage. More alarming is the way in which this language was inserted into the conference committee report. Rather than hold public hearings where the public and other lawmakers have an opportunity to comment, this provision - which was in neither the House nor Senate bill - was slipped into a massive appropriations bill at the last minute. Many senators were surprised to learn later that it had been added. By executing this shady maneuver, Congress has created a culture of unaccountability that robs the public—and in this case, whole states—of the notion that our laws and America's policies are deliberated in a fair and open manner.

Source: Public Citizen

REPUBLICAN CONGRESS SET TO RAISE DEBT LIMIT

By the time this issue is received, Congress will have passed an \$800 billion dollar increase in the federal debt limit. The debt increase is the third in successive years, and establishes a new debt ceiling of \$8.34 trillion dollars. I have to wonder how my Republican friends can feel good about a debt limit that exceeds \$8 trillion dollars. Some people, myself included, have trouble putting that figure into perspective. To even begin to get a handle on this figure, one must con-

sider that it takes 1,000 million dollars to equal \$1 billion dollars. The U.S. Treasury hit the current ceiling over a month ago, and has been forced to take extraordinary steps to manage the nation's balances. Republicans hope that the expanded borrowing authority will carry the government at least through September 30th, the end of this fiscal year. The rapid escalation of the federal debt should be alarming to everyone. The debt limit has increased 37% since President Bush took office in 2001. I am told that the new federal borrowing related to Social Security will be in the trillions. Estimates as high as \$2 trillion are circulating in Congress. I believe that our government must reverse the debt trends as soon as possible. Failure in this area, in my opinion, will greatly weaken our nation for years to come.

Source: *The Wall Street Journal*

VIII. PRODUCT LIABILITY UPDATE

UNDERRIDE CRASH CASE SETTLED

Our firm recently settled a tragic case where three generations were wiped out in a single crash that occurred on an Alabama interstate highway. Greg Allen was the lead lawyer in this case. The case was settled, with the amount being confidential, after a mediation session in which retired circuit judge Claude Neilson served as mediator. Greg did his usual good job in this case. Actually, the pretrial discovery was the key to getting the case settled. Our clients' vehicle was traveling north on Interstate 65 in a Cadillac Escalade. There was a car stalled in the median and a wrecker was attempting to wench the car out of the median. The wrecker driver parked his rollback wrecker at an angle on the edge of the interstate with part of the rollback hanging into the traveled portion of the road by approximately thirty inches. The accident happened right at dark,

which, according to many experts, is the worst time for human vision. The husband of one of our clients, who was driving the vehicle, apparently saw the wrecker, but believed that it was off the road. As the driver approached the wrecker in the left-hand lane, he looked back over his right shoulder to see whether the right lane was clear. Unfortunately, at about the time the driver checked the right lane, the edge of the rollback became visible. He attempted to avoid the crash by steering hard to the right. Unfortunately, the front of the Cadillac underrode the rear of the wrecker and the sharp rollback portion of the wrecker intruded into the Escalade and clipped the A, B and C pillar on the driver's side of the vehicle. All three people on the driver's side of the Escalade were killed instantly. Our client lost her husband of 36 years, her only son, and her mother in that crash. She and the other occupant in the Escalade survived, but were injured.

Claims were brought against Nissan Diesel Motor Company of Japan and Nissan Diesel America for putting a chassis cab on the market without any form of underride protection or reflective tape. During discovery, it was determined that in Japan, chassis cabs were shipped by Nissan with temporary underride guards so that the body builders could install underride guards if necessary. For vehicles destined for the United States no such safety devices were supplied. There was no information provided to the body builders or anyone else of the need for these safety devices. The studies are clear that reflective tape is especially effective at the time of day that this crash occurred. Had the vehicle been sold in Japan it would have been equipped with reflective plates from the Nissan factory. Again, U.S. bound vehicles have no such protection. One of the more interesting aspects of the case is that during discovery we learned that one of the accident reconstructionists hired by Nissan as an expert witness charged \$288,000.00 for his accident reconstruction. Obviously, an expert who charges this much for

one case loses credibility.

Truck manufacturers have lobbied for years against rules and regulations that will provide underride guards for straight-line trucks. Unfortunately, this is the third major underride guarding case with tragic consequences that our firm has handled in the last several years. It is time that this simple device be mandated on all commercial vehicles in this country. The truck manufacturers will not do it voluntarily. We previously represented a family where a young pregnant lady was involved in an underride collision. Her child was born, but unfortunately suffered severe brain damage as a result of the underride crash. He will suffer severe disability for the rest of his life. Even more tragic, his mother died from her injuries. That case was settled before trial for a confidential amount.

Underride guard cases go back many years. A most famous underride case involved the death of actress Jane Wyman in the 1950s. The primary danger involved in underride crashes is that the fronts of automobiles are designed with a crush zone that protects the occupants by absorbing energy in a frontal crash and slowing the vehicle down over the length of the crash pulse. Unfortunately, in an underride case, the crush zone is bypassed and the vehicle that is struck, usually a large truck, moves into the passenger compartment, causing very severe injury or death. That is exactly what happened in this case. Underride guards are designed to make contact with the crush zone and allow the vehicle to slow over the duration of the crash pulse and, hopefully, preventing passenger compartment intrusion. Underride guards are very effective when designed properly.

LAWSUIT FILED AGAINST FORD AND TIRE MANUFACTURER

Our firm has filed a lawsuit on behalf ofCarolyn Thorne, a Montgomery business owner, against Ford Motor Company and Continental-General Tire of North America. In April 2004, our

client was driving her 2000 Ford Expedition on an interstate highway, when the left rear tire, which appeared to be in excellent condition, detreaded. This caused the driver to lose control of the vehicle. The Expedition began to roll over, crossed the median and went into the opposite lanes of travel. Ms. Thorne suffered severe, lifethreatening and permanent injuries that have left her paralyzed. As a result, she is now permanently and totally disabled. We will prove at trial that the Expedition's roof, restraint system and windows were all defectively designed and manufactured by Ford.

The proof will be that the 2000 Expedition is uncrashworthy and unreasonably dangerous and defective by design. The vehicle has an unreasonably high center of gravity and a narrow track width, which in combination predispose the vehicle to instability and an unreasonable risk of rollover. Significantly, the Continental General Grabber tire that detreaded had been recalled. We believe each company has legal responsibility for what happened to our client. Greg Allen and LaBarron Boone will handle our client's case.

2005 CRASH TEST RESULTS ARE IN

The National Highway Traffic Safety Administration is testing 2005 models as they come on the market. The 2005 Acura RL was the only one of 18 vehicles tested to earn the government's highest rating, five stars, for front and side-impact crash tests and rollover prevention. The Jeep Grand Cherokee 4x2, Ford Explorer 4x2, Mercury Mountaineer 4x2, Chevrolet Tahoe 4x4 and GMC Yukon 4x4 were the worst performers in the rollover test, earning three stars. That rating means the chance of rollover in a single-vehicle crash is 20 to 30 percent. The Ford Mustang had the lowest chance of rollover, at 8.7%. The best-performing sport utility vehicles in the rollover test were the Lincoln Navigator and the Toyota Highlander, which earned four stars and had a 17% chance of rolling

over. The Nissan Altima, Pontiac G6, Pontiac Vibe and Toyota Matrix were the worst performers in the driver's side-impact test, earning three stars. That means there is an 11 to 20 percent chance of serious injury in a similar, 38.5 mph crash. No vehicle got fewer than four stars in the frontal crash test, which is a 35 mph test.

Source: NHTSA

FRONTAL CRASH TEST RESULTS NOT GOOD FOR SOME COMPANIES

The Kia Spectra is the first vehicle since 2001 to get the insurance industry's worst safety rating in a frontal crash test. The Spectra, a small, four-door sedan, got the Insurance Institute for Highway Safety's lowest rating of poor after a crash test dummy's head, chest and legs were injured in the 40 mph crash test. Vehicles can be designed to do a good job protecting people in frontal crashes. Kia Motors America, Inc., has met with Institute officials to determine how to improve the vehicle's performance.

Only two small cars—the Mazda 3 and the Hyundai Elantra—earned the Institute's highest rating of good in this round of testing. The Suzuki Forenza and the Saturn ION were rated acceptable, the Institute's second highest rating. The Institute tests vehicles in a 40 mph crash and rates them based on three criteria: the amount the vehicle crumples into the driver's space, injuries to the crash test dummy and a slow-motion analysis of how well the seat belt worked.

A good rating means a driver wearing a seat belt probably would suffer only minor injuries in a similar crash. A poor rating means a risk of severe injury exists. Besides the Mazda 3 and the Hyundai Elantra, the Volkswagen New Beetle and Jetta, the Subaru Impreza, the Suzuki Aerio, the Mini Cooper, the Toyota Corolla, the Ford Focus, the Mitsubishi Lancer and the Honda Civic received good ratings in the test. Most of those cars were tested earlier by the Insurance Institute,

which tests vehicles as they are redesigned. Consumers should take a look at the crash test performance of the vehicles before purchasing a new car. This is especially true for small cars. Those are at a disadvantage because the vehicle doesn't weigh as much and is not as large as other vehicles. It is important to make sure that your new car performs as well as possible in a frontal crash. For additional information on test results go to <http://www.iihs.org/>.

Source: The Institute for Highway Safety

A DEFECTIVE SUV STAYS ON THE MARKET

The Saturn Vue, a small sport utility vehicle, has been in the news lately and the news isn't good for consumers. A rather unusual event occurred during NHTSA testing of the Vue. The car's suspension system collapsed during the rollover testing. Obviously, this was not a good development for General Motors and certainly not good for consumers. The company promptly said it would voluntarily recall all of the roughly 250,000 Saturn Vues on the road in the United States and Canada. Everybody applauded the swift action by GM, which, by the way, was in August, and expected the vehicles to be recalled. However, the recall never took place and the automaker has continued to sell 2004 models of the Vue from its dealer lots. The New York Times reports that more than 10,000 units had been sold through November of 2004. Unfortunately for consumers, most of these SUVs were not fixed before they were sold. To date, according to the Times' report, GM has fixed only a few thousand of the quarter-million existing Vue models because it takes time to procure new suspension parts for so many vehicles. Reporters indicate that the 2005 models were fixed before they left the factories.

Unfortunately, that's not the end of this story. For some reason, the federal government has permitted GM to continue selling the defective Vues. NHTSA has determined that the highly

unusual failure during its new rollover test didn't rise to the level of a safety defect. It should be noted that the Vue is not actually the subject of a **formal recall**, but a less-stringent voluntary measure known as a **service campaign** that permits GM to keep selling the vehicle without fixing it. Consumer groups say the government's decision raises questions about how seriously NHTSA takes their own rollover tests. Consumers have been buying vehicles that have not been fixed without being told about the problem. Also, there doesn't appear to have been any directive from GM to its dealers requiring them to discuss the problem with potential buyers. A spokesman for NHTSA told the Times that there is no safety risk. However, Clarence Ditlow, director of the Center for Auto Safety, a well-respected consumer group, says, "It's preposterous they're still selling the vehicle. It's even more dismaying to learn that the government is permitting GM to sell the vehicle by not doing a safety recall."

As you may know, rollover testing of new vehicles was forced on NHTSA by Congress after nearly 300 rollover deaths occurred in the late 1990s in Ford Explorers equipped with Firestone tires. Consumer groups have become increasingly concerned that regulators are not giving the results of the tests enough weight in computing the star ratings they assign vehicles for rollover performance. For example, even an SUV that tips up on two wheels during the testing can earn as many as three out of five stars. How NHTSA could allow GM to continue to sell a vehicle that actually broke during the government's test is difficult to explain. Joan Claybrook, the president of Public Citizen, made this astute observation: "I think it's irresponsible. For NHTSA not to recall these vehicles on something as serious as this is entirely wrong and completely undercuts the agency's authority. How can they say it's not serious when it fails their own test?" Joan served as head of NHTSA during the Carter Administration and has been a real champion for

consumers over the past two decades.

NHTSA says there is no safety defect. Let's take a look at what actually took place. The left rear wheel of both the two- and four-wheel-drive versions of the Vue collapsed during separate rollover tests. In the tests, the vehicles are driven through as many as 10 maneuvers known as fishhooks that include unusually sharp turns. The failures occurred at 45 mph, which is certainly not a high or excessive rate of speed. The testing was halted. Mr. Ditlow, at the Center for Auto Safety, who believes the tests deal with real world driving experiences, told the *Times*:

This maneuver was designed to replicate what a consumer might do in an emergency situation. Is this an ordinary maneuver? No. But it's an emergency avoidance maneuver that might happen in real life. How many other vehicles that ran through this test had their suspension fail? Zero.

During the last decade, NHTSA has allowed automakers to use service campaigns instead of recalls to resolve some safety-related issues. In the case of the Vue the regulatory agency determined after its own investigation that there was no defect presenting a safety risk and claims no additional action was needed beyond GM's commitment to fix all of the vehicles, free of charge, as parts become available over several months. I hope this type response by NHTSA will prompt consumers to demand that Congress get involved and **fix** the real problem—the weak regulatory system itself.

Sources: *The New York Times*, *Public Citizen* and the Center for Auto Safety

DAIMLER TO APPEAL \$101.75 MILLION VERDICT

Last month we reported on an extremely important trial taking place in Nashville, Tennessee. The plaintiff won that case and received a \$101.75 million verdict. Now DaimlerChrysler says it will appeal. The Tennessee jury

correctly ruled against the company for a seat design that was cited in the death of an 8-month-old child. The jury awarded the parents of the child \$98 million in punitive damages and \$7.5 million in compensation for wrongful death and emotional distress. The verdict broke down as follows: \$101.75 million against DaimlerChrysler and \$3.75 million against the driver of the pickup truck, for a total of \$105.5 million.

As previously reported, the 8-month-old child was riding in the back seat of a 1998 Dodge Caravan in Nashville in 2001 when the vehicle was rear-ended, causing the front passenger seat to collapse and the infant passenger to strike it, fracturing the infant's skull. While Daimler has known for over 20 years that these seats are extremely dangerous, it has never seen fit to warn the public. The company to this day claims there's nothing wrong with the seats. The public should be shocked to learn that the company has concealed hundreds of accidents in which the faulty seats played a role in serious injuries and deaths. Although consumer advocates, such as Public Citizen, have tried to get DaimlerChrysler to improve its seats, their efforts have largely been ignored. Hopefully, this verdict will get the automaker's attention. It should also get the attention of the federal government and specifically NHTSA.

THE AUTOMOBILE INDUSTRY PUTS COMFORT OVER SAFETY

How many times have you, as a front seat passenger of a car, reclined your seat while wearing your seat belt to take a short nap? I suspect each of you have done this more than once. Although this is a very common practice, it is also extremely dangerous. If a seatback is reclined, the common seat belt becomes much less effective—if not completely useless—because the shoulder harness of the belt moves away from the body. Folks don't realize or understand that the more space between the seat belt and an occupant's chest, the greater risk of

death or serious injury in an accident.

Automobile manufacturers have been well aware of the dangers of reclining seats for nearly four decades. At a 1964 Stapp Car Crash Conference, two safety-equipment engineers presented a report analyzing the effect lap belts have on reclined-seat occupants. The report discussed sled testing in which the seatback was reclined almost fully. When the sled stopped suddenly, the test dummy submarined under the lap belt almost 10 inches, driving the belt into the dummy's abdominal cavity. In 1988, the National Transportation Safety Board (NTSB) conducted a safety study where one of the issues was the effect of reclining seatbacks. The NTSB examined 167 collisions involving passengers who had worn three-point restraints. The result showed that three-point restraints offered good protection only if worn properly. An occupant who wears a seat belt while his seat is reclined is not "centered" in the belt, rendering the belt ineffective for spreading crash forces over the body. The NTSB stated that the protection offered by any type of seat belt is compromised when the seat is reclined, presenting a "potentially dangerous combination in a moving vehicle." The NTSB noted that, "since vehicles had been marketed with reclining seats, most adults and children were tempted to combine belt use with a reclined seat." The study concluded that, "at best, lap/shoulder belts, indeed, any type of seat belt, offered reduced effectiveness when used with a reclined seat. At worst, a lap/shoulder belt in a reclined seat may be a potentially dangerous combination in a moving vehicle—proper fit is impossible." Although some vehicle owner's manuals warn of the dangers of reclined seatbacks in moving vehicles, the warnings do not state specifically what degree of recline is dangerous. Further, the NTSB pointed out that, before the manufacturers advertised their cars by showing a passenger in a reclined seat, while wearing a seat belt, these advertisements undermine the already limited

effectiveness of owner's manuals warnings. This is especially true if the warnings are unclear, as in advertising not to recline the seat "any more than as needed for comfort.

The NTSB submitted safety recommendations to NHTSA based on the findings in the study. The report recommended that manufacturers limit the angle of inclination allowable in a reclining seat to no greater than the maximum angle that can safely be used in combination with a seat belt. The report further requested that NHTSA determine to what degree a seatback can be reclined and still allow an occupant to be properly and safely restrained by a lap/shoulder belt combination. In March 1989, the NTSB stated that:

- Warnings and owner's manuals are not effective for preventing passengers from misusing lap/shoulder belts and reclining seats;
- It is not known at what point the lap/shoulder belt becomes dangerous with reclined seats; and
- Testing is required to determine the safe limits of reclined seats.

NHTSA also noted that "it is likely that most people who ride with the seatback reclined are not aware of the associated risks; they are simply using the added comfort the reclining seatback affords." In response to NHTSA's initial position and NTSB's findings, the auto manufacturers claim that the owner's manuals effectively "discourage" the use of reclined seats while a vehicle is in motion, and that "common sense" indicates that an upright seat is safer than a reclined one. Clearly, the industry's response was to blame the motoring public and ignore the problem.

It is shameful that the automobile industry has taken this position. There are ways for the industry to address this dangerous problem. A simple warning that points out the danger of reclining seats can be inexpensively incorporated into a vehicle design, and yet, it would convey the needed infor-

mation to alert the passengers of the danger. A warning label can be the first step towards educating the public. However, a warning would be unnecessary if the industry would start designing its restraint system in such a manner as to alleviate the problem. For example, GM has incorporated into some of its current vehicles, such as the Trailblazer, a seat design that mounts the seat belt system within the seat itself. Known as the "all belts to seat" method, this design allows the shoulder harness to stay in position even when the occupant reclines the seat. Another design incorporates an interlock within a vehicle's gearshift, preventing the driver from putting the car in gear if a seatback is reclined. Interlocks are not yet used in any vehicles. Automakers could also add a device that would warn the vehicle passengers of the hazards of reclined seats. In fact, years ago, a major manufacturer of seat belts patented a device that would give a visual or audible warning if a passenger were to recline his seat to a dangerous degree. Emison, Kent J., "Reclining Seats Trade Safety for Comfort," TRIAL, Vol. 39 No. 2 (February 2003).

People are being needlessly injured and killed as a result of the automobile industry's inaction on this subject. The industry knows full well that the motoring public does not understand or recognize the danger of reclining the seat while a vehicle is in motion. The industry knows that millions of families drive millions of miles on the road every year. The industry knows that the occupants in their vehicles will recline their seats to take naps, and by doing so, the occupants will all face great risk of serious injury or death in an accident. Yet, even with this knowledge, the automobile manufacturers turn a blind eye to this danger even though there are simple approaches they could take to educate the public and prevent such needless injuries and deaths each year.

CARGO—THE OVERLOOKED HAZARD—IS A SERIOUS PROBLEM

We are currently investigating an automobile collision in which the right rear occupant in a Ford vehicle was fatally injured when the rear seat and seat belt system failed. Although the exact cause of the belt system's failure is unknown at this time, one potential cause of the failure of the belt system and definitely the seat's failure was shifting cargo. In this case, the cargo was groceries, weighing approximately one hundred pounds, that were stored in the trunk of the vehicle. As a result of the collision, the groceries shifted forward into the seat causing the rear seat to break. We believe this led to the passenger's death. All the groceries that broke the rear seat completely entered the occupant compartment of the vehicle. Had there been a steel partition or structure between the seat and trunk, which was once provided in most passenger vehicles, the groceries would have been retained and the seat and seat belt system would have been secure. Had that been the case, the Ford passenger would most likely be with us today.

The auto industry, for the better part, continues to ignore its responsibility to protect occupants from potential cargo related injuries despite the industry's knowledge of and ability to prevent cargo-caused injuries. In the late 1960s, the automobile manufacturers began to provide and test a steel divider between the trunk and rear seat of most of their passenger vehicles. The manufacturers tested the steel divider to make sure it was an adequate cargo barrier to prevent items that the industry could foresee people placing in their trunk from penetrating the passenger area in frontal collisions. In fact, one manufacturer called the cargo barrier, "safety features." In addition, this domestic manufacturer provided securing devices in some of these trunks, to which people could secure cargo as well. Between 1968 and 1974, the manufacturer tested almost every passenger vehicle it sold to assure that

the cargo barrier and steel partition between the trunk and rear seat would retain items, such as spare tires, in 30 mph collisions.

During the late 1980s and early 1990s, auto manufacturers in cost-cutting efforts began to eliminate the steel barrier between the trunk and rear seat, leaving the seatback completely exposed. They justified this action by claiming that the injuries caused by cargo were insignificant. However, according to the National Highway Transportation Safety Administration (NHTSA), there are over 250 cargo related injuries and fatalities every year. Items stored in vehicle trunks are not the only cargo hazard. Vehicles in which the occupant and the cargo share the same space, such as hatchbacks, SUVs and vans, pose increased cargo hazards. Items such as coolers, recreational equipment and tools become dangerous projectiles in collisions. This is especially so in cargo vans.

Cargo vans are used by plumbers, painters, and delivery companies to carry tools and other items. They are manufactured and sold as a complete vehicle with just a driver seat, front passenger seat, and a large payload area. As acknowledged by the industry, cargo vans are designed, manufactured, and sold with one primary purpose: to transport cargo. In fact, most utility vans are designed to carry between 1,500 and 3,000 pounds of cargo in the cargo area, which is directly behind the driver and front passenger seat. Remarkably, these vans are designed and manufactured without any means to retain cargo so as to protect occupants from moving or shifting cargo in a foreseeable collision or sudden stop. The only protection provided for the driver of a cargo van transporting an item such as a refrigerator in a frontal collision is the seat itself. However, even manufacturers will admit that the seats in cargo vans are inadequate to act as a guard or to prevent serious and fatal injuries to occupants in very minor frontal collisions caused by the forces from a 200-pound object, such as a refrigerator,

much less the entire payload. Anticipated cargo loads shifting or moving forward in collisions can crush an occupant between their seat and steering wheel, even in collisions from which one should walk away. In cargo vans, it's the "second collision" that can be more dangerous than the first.

In accidents in which cargo van occupants are seriously or fatally injured by moving or shifting cargo, the automobile industry has been aware of alternative designs to protect occupants from cargo-related injuries for years. Since the 1960s, cargo partitions have been designed and manufactured by various companies, termed by the industry as "upfitters," to divide the occupant area from the cargo area and to prevent cargo-related injuries in cargo vans. In fact, one automobile manufacturer even designed and tested partitions in the 1960s and 1970s in their vans to ensure they would retain anticipated cargo loads from entering the occupant area and injuring the occupants. Nevertheless, for no reason other than cost, that automobile manufacturer chose not to provide partitions as safety features or options.

In the mid-1980s, GM's European Opel engineers noted, "Cargo-related injuries ... are one of the major contributors to total harm in traffic accidents" and began designing and testing steel partitions and anchor tie-downs to retain cargo in accidents to protect occupants. By 1990, GM's Opel began manufacturing its delivery vans with a cargo retention system, which included a cargo partition and cargo tie-downs. Another means to retain cargo are cargo tie-downs. Tie-downs are simply fixed anchor points to which a consumer can secure cargo. While cargo tie-downs are not incorporated into the design of cargo vans, several passenger vehicles have been equipped with cargo tie-downs since the early 1980s. In addition, some of General Motors' safety engineers recommended in the mid-90s that GM provide, at a minimum, cargo tie-downs in cargo vans because no cargo barrier was provided to protect occupants from cargo

that might shift and injure occupants in frontal collisions.

We handled a case a few years back in which a gentleman from southeast Alabama lost his wife in a survivable collision, when flea market material she was transporting in a Chevrolet cargo van shifted, fatally injuring her. During our investigation and prosecution of that case, we were surprised to discover how, in this country, the hazard posed by unrestrained cargo and the means to eliminate that hazard through known safety devices have, for the better part, been ignored by the automobile manufacturers. This is particularly true with vans, which are intended to haul cargo. In fact, most lawyers we spoke with while investigating other claims often overlooked holding the automobile manufacturers responsible for cargo-related injuries and deaths. There is no justification for the driver, particularly of a cargo van, to ever suffer a cargo-related injury or fatality. The industry continues to ignore its responsibility to make safe a vehicle that is hauling cargo in a rear compartment. Until the industry begins to accept its responsibility and protect occupants from cargo-related injuries, drivers and occupants will remain to be at risk.

SIGNIFICANT RESULT IN ROLLOVER CASE

An appellate court in Florida has ruled that a mother and two children, who were involved in a blowout-rollover accident caused by the failure of their Bridgestone/Firestone tires, has the legal right to sue the company for punitive damages. The court ruled evidence offered by the plaintiffs showed that Firestone knew about defects in its tires but delayed warning the public in order to protect its own financial interests. Florida law limits punitive damage awards for each claimant to three times compensatory damages or \$500,000, whichever is greater. If the injury results from wrongful conduct motivated by economic gain, the award can be four times compensatory damages or \$2 million, whichever is greater. There is no cap, however, where a

defendant is found to have acted with intent to harm. There have been hundreds of cases brought against the company in state and federal courts that have been settled for confidential amounts. There are still an unknown number of cases around the country presently being litigated in state courts.

Firestone delayed recall of the tires, covered up the defects, and endangered or killed a host of people whose lives might have been saved. In the 1990s there were numerous rollover incidents involving three types of Firestone tires—the Wilderness AT, ATX and ATX2—on Ford Explorers. The rollover accidents, which resulted in death and severe injuries in some cases, sparked a public outrage that resulted in Firestone recalling the tires in August 2000. It was the second-largest tire recall in U.S. history. Firestone has argued that its tires are not defective and that the recall in 2000 was for public safety purposes because there had been so many accidents. Firestone has attributed the rollovers to the design of the Ford Explorer sport utility vehicle rather than its tires.

The evidence in the Florida case consisted of information from the website of Washington, D.C.-based consumer advocate Public Citizen. It consisted largely of extracts from memos and letters from Firestone and Ford Motor Co., as well as government documents, showing clearly that Firestone knew of its tires' defects long before they were recalled in August 2000. Public Citizen's president, Joan Claybrook, stated, when commenting on the case: "Our evidence left no doubt Firestone was in reckless disregard of public safety. Punitive damages were definitely warranted."

U.S. TO REQUIRE LAP BELTS IN REAR SEAT

All passenger vehicles sold in the United States must have shoulder and lap belts in the rear center seat by the 2008 model year under a new federal rule issued on December 8th. Three out of four new passenger cars already have these seat belts, but only half of

pickups and sport utility vehicles do. The new rule from the National Highway Traffic Safety Administration (NHTSA) requires 80% of vehicles to have shoulder belts by the 2007 model year with all vehicles to have them by 2008. NHTSA estimates the rule will save up to 23 lives and prevent up to 495 injuries each year. Interestingly, automakers now say they support the rule. I have to wonder why it took them so long to recognize this need. Vehicles have been required to have shoulder belts in rear window seats since 1989. A law passed by Congress in 2002 required NHTSA to issue a rule requiring shoulder and lap belts in the middle back seat, where small children often ride. NHTSA Administrator Dr. Jeffrey Runge says that because shoulder and lap belts can be used with booster seats, the new rule will make the rear center seat "the safest place for children." It will be 6 years from the date Congress mandated this safety change for the change to take place. Safety advocates had been calling for action even further back.

JURY ORDERS FORD TO PAY \$8.7 MILLION

A federal jury in San Antonio awarded more than \$8.7 million last month to a former Army major left paraplegic after a 1999 rollover crash in Saudi Arabia. The jury determined Ford Motor Co. was responsible for a defect in the roof design of a 1996 Ford Crown Victoria. The jury further found that the bad design contributed to spinal injuries sustained by the plaintiff, who was a front-seat passenger in a Crown Victoria. The vehicle hit a concrete median divider, straddled it, and then fell into the opposite lanes and ended up on its roof. The jury saw the vehicle, which was towed to the parking lot of the federal courthouse, and were able to understand the testimony on the defect. The roof crumpled 12 inches, slamming into the plaintiff's head. Experts for the plaintiff said adding safety improvements that cost \$9 to \$31 would have significantly reduced how much the roof caved in

and would have saved the plaintiff from serious injury. Ford denied the car was defective, saying it met federal safety guidelines. For a minimum of \$9 or \$31, the roof could have been made safe. This is a good example of how weak federal guidelines and a company putting profits over safety, in combination, allow a vehicle with a defective roof to be put on the market.

IX. MASS TORTS UPDATE

CELEBREX HAS HEART ATTACK RISK

An increased risk of heart attacks with patients taking Celebrex, which is the top-selling painkiller for Pfizer Inc., was being reported as we went to the printer with this issue. Celebrex is a drug that is in the same class as Vioxx. At this point, it doesn't appear that Pfizer has any plans to remove Celebrex from the market. The increased risk of heart attacks was found in one of two long-term cancer prevention trials. The National Cancer Institute, which was conducting the study for Pfizer, suspended the use of Celebrex after discovering that patients taking 400mg to 800mg of the drug daily had a 2.5 times greater risk of experiencing major heart problems than those who were not. However, a separate cancer study found no increased heart risk with patients taking 400mg of Celebrex per day. Pfizer was conducting the trials as part of an effort to find a new use for the drug.

Both Celebrex and Vioxx are a type of drug called Cox-2 inhibitors. The new findings on Celebrex have to cause concern in the medical community. It now appears that all these Cox-2 drugs have similar risks. Celebrex is the most-prescribed drug for treating arthritis. In the nine months ending in September, worldwide sales of Celebrex more than doubled from the same period a year earlier to \$2.29 billion. This accounts for 6% of Pfizer's total

sales of \$37.59 billion. At least three times since Merck recalled Vioxx, Pfizer issued statements affirming the cardiovascular safety of Celebrex in an apparent attempt to assure patients it was not like Vioxx. When our firm started filing Vioxx cases back in 2000, we also were taking Celebrex cases. We are currently involved in about 60 Celebrex cases that are filed and pending against Pfizer. We will continue to investigate claims involving serious injury and death involving Celebrex, as well as other drugs and see that as an important part of our firm's mission.

Andy Birchfield, head of our firm's Mass Torts Section, has called on Pfizer to recall Celebrex. We have been watching the Celebrex situation unfold over the past four years. In light of recent findings, which undeniably link Celebrex to greater heart attack risks, it is time for Pfizer to act responsibly and pull the drug from the market. In our opinion, there can be no justification for keeping Celebrex on the market since the findings on Celebrex are quite similar to the recent results from the Vioxx study. The Food and Drug Administration says that it is considering regulatory measures that could include severe label warnings or even requiring that the drug be withdrawn in the United States. I believe Pfizer will inevitably have to recall Celebrex. The company has pulled all of its advertising on the drug. The company is making a reckless decision in failing to pull the drug immediately.

PUBLIC CITIZEN CALLS ON THE FDA TO BAN BOTH CELEBREX AND BEXTRA

Public Citizen's Health Research Group has filed a petition with the U.S. Food and Drug Administration (FDA) asking that both Celebrex and Bextra be banned. As far back as 2001, Public Citizen was telling the FDA about the cardiac risks associated with Celebrex and Vioxx. Public Citizen demanded a black box warning for both drugs. In the April 2001 issue of the newsletter *Worst Pills, Best Pills News*, Public

Citizen urged patients not to use either drug because there are safer alternatives. Public Citizen now has asked the FDA to immediately remove Celebrex and Bextra from the market. That, in my opinion, is the proper course of action for the government to take. On December 24th, the FDA finally ordered reviews of the ongoing patient studies of both Celebrex and Bextra. The agency also issued an advisory on over-the-counter anti-inflammatory pain medications. The advisory "urged" doctors to be highly selective in prescribing Celebrex and Bextra. This belated action by the FDA falls far short of the mark. Hopefully, the agency will ban both drugs as requested by Public Citizen.

THE FDA MUST DO ITS JOB

Most folks are now asking how could the Food and Drug Administration (FDA) have done such a poor job of regulating the drug industry? We know that the FDA is underfunded and understaffed and that's a major part of the problem. We also know that the drug industry has tremendous political clout, which makes for a bad situation for any government agency charged with protecting consumers, and that's an even greater concern. But, there is another factor to consider. Twelve years ago, the White House and Congress made an agreement with the pharmaceutical industry that seemed to be a good idea at the time. The industry would supply substantial sums—reaching \$200 million a year at latest count—to help the FDA hire more reviewers to speed the approval process for new drugs that might otherwise be held up solely by administrative logjams. The government was having to meet tight deadlines for reviewing drugs at that time. The agency also had to keep steady its own financing for new-drug reviews, adjusted for inflation. The agreement, at that time, seemed to be a reasonable way to ensure that the government didn't have to cut back on its own funds. Instead, it would the industry money to pay for reviewers already

on the staff.

This 1992 deal—negotiated under the first President George Bush and updated under President Bill Clinton and again under the current President Bush—has grievously distorted the agency's drug safety programs in unforeseen ways. Even though the current Administration is very friendly to the drug industry, the blame actually has to go back to successive Administrations and Congresses that failed to provide funds to the FDA for pharmaceutical programs. As a result, the agency has had to take money from programs designed to monitor the safety of drugs after they are on the market so as to keep up its reviews of new drugs before they are allowed on the market. This is referred to as "cannibalizing" the monitoring program to make up a shortfall in another important area of responsibility.

Clearly, there has been a marked shift in emphasis at the FDA. In 1993, the agency's Center for Drug Evaluation and Research spent 53% of its budget on new-drug reviews, with most of the rest used for programs to ensure that drugs already on the market were safe. By 2003, 79% of the agency's budget went for new-drug reviews. Almost everything else has been cut back. Half of the scientists in the drug center's labs are gone, reducing the agency's ability to conduct independent testing of suspect drugs. Collaborations with respected academic groups that assess drug side effects have ended. Needed money was diverted to maintain a computerized listing of side-effect reports. This has become the FDA's main tool to detect post-marketing problems. Virtually all experts say it has serious shortcomings. A Republican-dominated Congress and an Administration beholden to drug industry campaign contributions are not likely to change a system that works to the industry's advantage. In my opinion, corporate money should never be used to support initial drug reviews. Congress must provide better support for the FDA. Funding must be significantly increased. Safety monitoring must be adequately financed and the drug industry

try's influence proportionately reduced. Regardless of the cost, this has to be done. It will be a price worth paying.

Source: *New York Times*

MERCK APPOINTS COMMITTEE TO REVIEW VIOXX

In a move that reminds me of the story where the “fox” guards the “henhouse,” Merck & Co. has appointed a committee of board members and a retired federal judge to review the company's actions relating to the pulling of Vioxx from the market. Merck says the committee will act for the company's board of directors in handling shareholder litigation over the Vioxx withdrawal and would advise the board on any action to be taken after the review. Merck says the committee's purpose is “to ensure that the company acted appropriately and ethically.” Merck's action “raises more questions than answers,” according to knowledgeable experts. About 2 million people worldwide were taking Vioxx, which had been Merck's number two drug with 2004 global sales of \$2.5 billion. The special committee will be chaired by William G. Bowen, chair of the Merck board of directors' committee on corporate governance and president of The Andrew W. Mellon Foundation. The board will be advised by John S. Martin Jr., a former U.S. attorney who served as U.S. district judge for New York's Southern District for 13 years before going into private practice in 2003.

In the meanwhile, Merck has been spending a great deal of money and resources trying to repair the damages to its image as a result of the Vioxx problems. The above referenced committee is just one example. The company has also assembled a team of defense lawyers from all over the country to handle the Vioxx litigation. Merck says it will mount an aggressive defense. Nobody should expect Merck to make things easy for their victims. We expect the company to play hard ball.

STATE OF NEW YORK SUES MERCK OVER VIOXX

New York State Comptroller Alan Hevesi has filed a lawsuit against Merck & Co. over pension fund losses. The New York State Pension Fund has lost \$171 million dollars on Merck stock depreciation. Merck has lost \$38 billion in market value since Vioxx's withdrawal from the market. The lawsuit, which was filed in Federal Court in Trenton, New Jersey, seeks class action status for people who bought shares between May 21, 1999, and October 21, 2004. The lawsuit also accuses several executives of insider trading in selling Merck shares while possessing material, nonpublic information. The suit alleges that CEO Raymond Gilmartin sold \$30.37 million in shares; CFO Judy Lewent sold \$16.57 million in shares; General Counsel Kenneth Frazier sold \$1.97 million in shares; and Controller Richard Henriques sold \$1.88 million in shares.

We reported in last month's issue that a judge in New York had ruled in favor of shareholders and against Bayer in a similar case. That court ruled that Bayer should have informed shareholders about problems related to Baycol, their statin medication. Similar evidence has already been produced in the case filed by New York. *The Lancet*, a highly respected medical journal, has conducted an analysis of scientific evidence available to Merck. The Lancet article's author concluded that Merck executives had enough data available to them that Vioxx should have been withdrawn from the market as early as the year 2000. This will be extremely damaging evidence in a shareholder case.

MORE ON SOME DANGEROUS DRUGS

We reported last month that congressional hearings on issues surrounding the Vioxx withdrawal were underway. As previously stated, Dr. David Graham, the FDA drug safety reviewer, testified during those hearing and revealed some disturbing information.

In addition to his testimony concerning Vioxx, Dr. Graham discussed five other medications that he considers dangerous. These medications—Accutane, an acne medication; Meridia, a weight loss agent; Bextra, a pain reliever in the same class of Vioxx; Crestor, an anti-cholesterol medication; and Serevent, an asthma drug—are all currently on the market. Dr. Graham specifically called Accutane a twenty-year regulatory problem. Our law firm has been contacted by clients who were taking these medications over the past years. We are actively involved at this time in investigating their claims.

Dr. Graham testified that he had recommended withdrawal of twelve different drugs in his twenty-year career at the FDA and that ten of those had been withdrawn. One drug that he recommended for withdrawal, but which was not withdrawn, was a rheumatoid arthritis drug manufactured by Aventis called Arava (Leflunomide). In making his recommendation regarding Arava, Dr. Graham cited in his report the serious liver injuries caused by this drug and not caused by the other medications used to treat rheumatoid arthritis. Dr. Graham also cited studies that indicated patients did not stay on Arava long-term. His assessment was that either Arava didn't work or the patients didn't like its side effects. After Dr. Graham issued his report on Arava recommending its withdrawal from the market, the FDA conducted an advisory committee meeting several months later. It was unfortunate that Dr. Graham was not allowed to testify before the advisory committee meeting regarding his findings. Dr. Graham testified that when he completed his studies on Vioxx he was pressured into changing his findings by his superiors at the FDA. Perhaps Dr. Graham should be questioned about Arava to see if his superiors pressured him into not testifying before the advisory committee so that Arava could remain on the market.

CRESTOR ADS MUST BE PULLED

I have never believed that the Food and Drug Administration (FDA) should allow a drug company to advertise any drug. Recent events have strengthened my beliefs. In my opinion, a recent ad relating to Crestor really crosses the line. I believe the FDA should crack down on the maker of this cholesterol-lowering drug Crestor for the misleading advertising on the company's website and in national newspapers. As you know, Crestor was one of five drugs named as potentially hazardous by Dr. David Graham in his recent congressional testimony. In an apparent response to Dr. Graham, AstraZeneca, which manufactures and markets Crestor, responded with full-page advertisements in national and regional publications, including *The Wall Street Journal*, *The Washington Post*, *The New York Times*, and *USA Today*. The ads said, "The FDA has confidence in the safety and efficacy of CRESTOR."

Obviously, AstraZeneca's advertising conflicts with the FDA's public statements about the drug. The FDA should review the company's statements and order them to post a correction if the statements are incorrect. The drug company's statement on its website that it had been assured that senior-level FDA officials have "no concern in relation to Crestor's safety" is clearly in conflict with FDA statements. Many groups, including Public Citizen, believe that Crestor is unsafe and should be banned from the market. On December 23rd the FDA told AstraZeneca to stop marketing the "false and misleading" claims in its advertisements. Crestor is said to be the only statin that causes acute kidney failure and carries a higher risk of rhabdomyolysis. However, AstraZeneca is standing by its advertising and says it is consistent with what has been communicated to the company by the FDA. This is totally false and the FDA has called the company to task on the issue.

As you probably know, Crestor, approved in August 2003, is a "statin" drug prescribed to lower cholesterol

levels. The FDA issued a health advisory last year after AstraZeneca changed the label on Crestor for the European Union to include a warning about the risk of developing a muscle problem called rhabdomyolysis. Although the U.S. label already noted the risk, the FDA said it would alert physicians to be especially careful when prescribing the drug.

Sources: *USA Today* and Public Citizen

BEXTRA FOUND TO POSE RISKS AFTER HEART BYPASS SURGERY

In an earlier section, it was pointed out that Public Citizen was calling on the Food and Drug Administration to ban Bextra. Now the FDA is warning of potential heart problems associated with the use of Bextra, which is another Cox-2 Inhibitor painkiller. This concerns people who have recently had heart bypass surgery. The FDA is adding the warning to the label of Bextra, which is made by Pfizer. The FDA issued a statement saying that "results from a new study of more than 1,500 patients who had just had cardiac surgery show that patients treated with Bextra for pain were more likely to have heart and blood clotting problems than other patients who did not receive any drug." The problems included heart attack, stroke and blood clots in the legs and the lungs, according to the FDA. The new label will indicate that Bextra was not suggested for treatment of pain immediately after coronary bypass graft surgery. In a letter published in the *New England Journal of Medicine* it was stated that doctors should not prescribe Bextra "except in extraordinary circumstances." Bextra came on the market after Celebrex was introduced. Both drugs are manufactured by Pfizer.

PFIZER TO TURN OVER ZOLOFT RESEARCH

Pfizer Inc. will turn over some internal research documents on its anti-depressant drug Zoloft to lawyers defending a 15-year-old South Carolina

boy accused of murdering his grandparents. The drug company will comply with a South Carolina judge's order requiring the drug maker to hand over the documents, which contain medical information from clinical trials. The teenager was charged with shooting his grandparents as they slept in their beds. The defense lawyers believe the documents will help them prove Zoloft led the boy to commit the killings. The ruling may also pave the way to make public some reports of adverse reactions to Zoloft that have remained confidential under settlements of civil cases. The boy in the case had been prescribed Zoloft off-label—meaning for a condition not indicated on the drug's label - by a family doctor weeks before the killings, and his dose was boosted only days before.

A state forensics psychiatrist has testified she believes the Zoloft caused to become psychotic and hear voices telling him to kill. Pfizer claims the information subpoenaed by defense attorneys in the criminal case was confidential medical information on patients, and shouldn't be relevant to the criminal trial. Zoloft is not specifically approved by the FDA for use in depressed children and adolescents, but it and other antidepressants, including GlaxoSmithKline PLC's Paxil and Wyeth's Effexor, have been prescribed for children "off-label." An FDA advisory committee in September called for the labels of all antidepressants to get a tough "black box" warning about the risk of increased suicidal tendencies in young people.

DRUG MAKER REFUSED CALL TO MONITOR USERS

A lawsuit has been filed in Florida against Hoffmann-La Roche, the maker of Accutane, the controversial acne medication that has brought to light some disturbing information. The company, according to allegations in a federal court case, disregarded a company doctor's recommendation that users of the drug be monitored for

signs of depression and that a warning to that effect be added to the drug's U.S. label. The Florida lawsuit against the drug maker charges that the Swiss drug giant omitted the warning after its marketing officials argued that such an alert could cost the firm sales or prompt lawsuits. To my knowledge, the doctor's recommendation and the marketing debate had not been previously publicized.

It should be noted that, although there has been no official finding that links Accutane to depression or other psychiatric illnesses, there is plenty of reason to believe it does. Roche says the drug is effective when used properly. Nonetheless, a senior Roche official, testifying in a pretrial deposition for the Florida case, said the firm's internal analysis showed Accutane "probably caused" depression and other psychiatric illnesses in some patients. Roche is a defendant in about 70 pending lawsuits for alleged adverse reactions that include suicides, depression, birth defects and gastrointestinal injuries. Accutane made its U.S. debut in 1982 as a prescription drug that provided relief to many who have a severe form of acne that fails to respond to other treatments. Although still widely used, the drug has been the focus of more than 20 years of medical and regulatory controversy.

Motivated by concern about birth defects and other medical problems reported with Accutane, Public Citizen petitioned the FDA in 1988 for a ban on the drug. The agency failed to grant the petition or even act on the recommendations that Accutane be pulled. Instead, the FDA, over a period of several years, considered establishing a mandatory registry for doctors who prescribe Accutane, pharmacists who dispense the drug, and patients who take it. The registry proposal was aimed at strengthening efforts to keep pregnant women from taking Accutane. Regulators also considered using the registry for adverse psychiatric problems associated with the drug. But, the FDA didn't take final action until November of last year, when it

announced formal plans for an Accutane pregnancy registry.

Internal Roche documents uncovered by congressional investigators for the 2002 House subcommittee hearing show the company officials listed the absence of immediate FDA action on the proposed Accutane registry on an internal list of corporate "successes." Records found by the investigators include an October 2001 e-mail written by a Roche vice president of drug regulatory affairs and sent to Roche U.S. CEO and other company officials. The message said the firm should "CELEBRATE" the FDA's non-action at the time. Noting that a registry might have "alienated" dermatologists who prescribe Accutane, the vice-president wrote that "the outcome could have been drastically different" but for Roche's efforts. This wasn't the only time a drug company celebrated a failure by the FDA to regulate the pharmaceutical industry. In fact, things that once shocked this writer are now so common I am no longer shocked. In fact, lawyers in our Mass Torts Section have come to expect this sort of thing from the drug companies.

Source: USA Today

FDA STAFF MEMBERS HAD DRUG SAFETY CONCERNS

We have known for a good while that the powerful drug industry has had tremendous influence in our nation's capitol. It now appears that a number of U.S. Food and Drug Administration scientists were under tremendous pressure to act in a certain manner. Nearly 20% of these scientists surveyed in late 2002 said they were pressured to approve or recommend approval of a medicine despite their reservations about the drug's risks or effectiveness. Documents from the study were made public last month. It is highly significant that two-thirds of the scientists questioned by the Department of Health and Human Services' inspector general said they lacked full confidence in the FDA's ability to monitor side effects of prescription

drugs after they hit the market. The survey shows at least some government scientists backed accusations last month by FDA safety officer Dr. David Graham, who told a Senate hearing he was pressured to water down safety concerns about Vioxx. We all know what happened subsequently—the drug was pulled from the market—and that is now the subject of a most serious debate.

Dr. Graham, associate director for science in the FDA's Office of Drug Safety, also told Congress he felt the FDA was incapable of protecting the public from other dangerous drugs. The survey of nearly 400 FDA scientists was obtained through the Freedom of Information Act by the Union of Concerned Scientists and Public Employees for Environmental Responsibility, which are two environmental activist groups. Kathleen Rest, executive director of the Union of Concerned Scientists, which has Nobel-prize winning researchers as members, says: "The scientists' concerns warrant further investigation as Congress reviews drug approval practices at FDA."

Among other findings, 36% of the FDA scientists said they were "not at all" or only "somewhat" confident that "final decisions adequately assess the safety of a drug." Portions of the survey were published in a March 2003 inspector general's report about the FDA's review process. It appears that the negative opinions were downplayed in favor of a focus on positive findings. It doesn't take a survey, however, to figure out that the drug industry exercises tremendous political clout. That clout has been quite apparent in influencing FDA decisions.

Sources: Reuters and Forbes

ANOTHER BAYER CRIMINAL INVESTIGATION

Anyone involved in the Baycol litigation against Bayer Pharmaceuticals became well acquainted with allegations of wrongdoing involving Bayer corporate entities. It was reported on November 26, 2004, that the federal

government is checking records to determine whether drug maker Bayer AG was forthcoming about safety concerns with its cholesterol lowering medication. If the evidence shows that the company knew, but was slow to inform the government, that its drug was riskier than comparable drugs, the Food and Drug Administration (FDA) could begin a criminal investigation. A recent JAMA article stated that “before the agency (FDA) was aware of the data, the company knew that the drug was more dangerous than others.” During a C-Span appearance, Dr. Stephen Galson stated: “If this allegation is correct, the FDA takes it extremely seriously and we are going to have our criminal investigators look into this.” Galson is acting director of the FDA Center for Drug Evaluation and Research. Based on all of the available evidence, it certainly appears that the FDA should take the strongest action possible against Bayer AG.

THE FDA MUST BE CHANGED AND SOON

With all of the information now available concerning the vast number of dangerous drugs on the market, not even the most conservative person in the U.S. could make a good case in defense of the FDA’s failure to protect the public. The American people clearly deserve much better from the federal government when it comes to drug safety than they have received. We shouldn’t have to worry that drugs we take in the prescribed manner can kill us. In my opinion, the FDA should be fully investigated by Congress and prompt remedial action taken. The FDA has failed miserably to regulate the powerful pharmaceutical industry and in the process protect the public from a safety perspective. The FDA has lost credibility with the public and surely that has been noticed by our political leaders.

It is a sad commentary when you consider that none of the revelations about the dangers of the Cox-2 Inhibitors (Vioxx-Celebrex-Bextra) came about because of anything the FDA

did. Had the agency monitored the long-term effects of these drugs properly, surely they would have discovered the problems much earlier. Something must be done to correct the situation without further delay. Rather than protecting the drug industry by passing tort reform laws, the President and Congress should reform the FDA and curb the influence of the drug manufacturers. But, considering all of the campaign money that came from the drug industry last year—much of it to President Bush—it will be most difficult to accomplish anything of consequence. Hopefully, people—rather than money—will rule the day!

X. BUSINESS LITIGATION

FEDERAL JUDGE UPHOLDS SARBANES-OXLEY LAW

A federal judge in Birmingham recently rejected a constitutional challenge by Richard Scrushy, the former HealthSouth chief executive, to the new corporate fraud law aimed at top executives. This law was adopted after a series of major accounting scandals. This was the first court test of the Sarbanes-Oxley Act — which requires top executives of public corporations to vouch for the financial reports of their companies — and received national attention. U.S. District Judge Karon O. Bowdre disagreed with the argument by Scrushy that the act is unconstitutionally vague and should not be part of the indictment accusing Scrushy of a massive fraud at HealthSouth. The judge in her ruling said jurors, not a judge, should decide key questions raised in Scrushy’s case.

When Scrushy was charged last year, he became the first CEO charged under Sarbanes-Oxley. Scrushy is now free on \$10 million bond. He is accused of heading a scheme to overstate HealthSouth earnings by some \$2.7 billion. Judge Bowdre wrote:

If the jury finds that the reports did not fairly present, in all material aspects, the financial condition and results of operations of HealthSouth, the jury must then determine whether Mr. Scrushy willingly certified these reports knowing that the reports did not comport with the statute’s accuracy requirements.

Jury selection in this case is set to begin January 5th.

RETAILERS FIGHT FOR FOREIGN IMPORTS

America’s leading retailers have filed a lawsuit to stop the Bush Administration from imposing curbs on imports of popular Chinese-made apparel and textiles. The Administration has to decide between retailers and consumer advocates seeking access to less expensive goods on the one hand, and domestic manufacturers who fear the loss of market share and jobs on the other. The uncertainty about future access to their Chinese suppliers is causing the importers concern. The importers group filing the lawsuit includes such prominent retailers as Gap, Inc., J.C. Penney, Co., Federated Department Stores, Inc. and Liz Claiborne, Inc. Domestic textile manufacturers allege that China’s low-cost producers would cripple the U.S. industry if left unrestrained.

The case is triggered by the year-end expiration of global textile and apparel quotas, which is expected to result in huge gains for China and India and lower prices for consumers. Of course this comes at the expense of textile and apparel manufacturers in America and elsewhere. The Commerce Department, under extreme pressure from domestic textile makers, says that it will consider their petitions seeking curbs on Chinese-made apparel and textiles based on the threat of a surge in imports when the quotas disappear January 1st. The Commerce Department takes the position that the U.S. government has “ample authority under U.S. law” to accept a petition

based on “market disruption or the threat of market disruption.”

In its lawsuit, filed with the U.S. Court of International Trade, the U.S. Association of Importers of Textiles and Apparel said the Bush Administration violated its own rules when it accepted the textile makers’ petitions after it had “repeatedly assured the import and retail community that no petitions would be accepted based on some future threat.” The lawsuit seeks to force the Committee for the Implementation of Textile Agreements to give importers greater participation in its decision-making process, which is not open to public scrutiny. The Committee was created in 1972 to oversee U.S. textile trade. With the quota deadline nearing, the importers have requested an injunction to stop the government from acting on the textile makers’ petitions.

XI. INSURANCE AND FINANCE UPDATE

WTC ATTACKS WERE TWO EVENTS

Several months ago, we wrote on the dispute concerning the World Trade Center’s twin towers. The second of three scheduled trials to determine the amount of the recovery for the destruction of the towers ended in a victory for master leaseholder Silverstein Properties and its head, Larry Silverstein. You may recall that in the first trial, which ended last April, jurors had determined that the attacks, although carried out by two hijacked airplanes, constituted a single “occurrence.” As a result Swiss Re, a number of Lloyd’s insurers, Chubb and several other companies were held responsible for one payment, rather than two.

The second trial determined the responsibility of those insurers, who could not prove that they relied on the wording of the WilProp form prepared by Willis. The defendants were: Allianz Global Risks (with part of the risk reinsured by France’s SCOR Group - see

article in international section), St. Paul /Travelers (Gulf Insurance), Industrial Risk Insurers (a unit of General Electric), Royal & SunAlliance (Royal Indemnity), TIG Insurance (a unit of Canada’s Fairfax Financial), Tokio Marine & Fire (Millea Group), Zurich Financial (Zurich American) and Twin City Fire Insurance (a unit of The Hartford). The question of liability ultimately turned on the interpretation of the wording contained in a binding form prepared by Travelers, which did not contain the restrictive definition of an occurrence, as was the case with the WilProp form. The jury therefore found that the insurance binders should be interpreted to encompass two separate attacks. It should be noted that no formal written policies had been executed on September 11, 2001.

The original claim of approximately \$1.1 billion may therefore be doubled to \$2.2 billion. However, there are still a number of additional considerations that could influence the amount of any final payment. St. Paul Travelers has stated that the impact of the decision, “taking into account the Company’s reserve position and reinsurance, will be immaterial to the Company,” which is most interesting. Some of the companies, however, who lost in court may appeal the jury’s verdict, which could extend the case for several years. Silverstein has already appealed the first verdict.

The actual amount of loss is also in dispute, with a specially appointed arbitration panel engaged in trying to determine the exact amount. Swiss Re has not joined in those proceedings. There is a third trial scheduled to determine the amount of damages, but no date has yet been set. As a result of the jury verdict, an additional billion dollars of insurance proceeds will be available. This should result in timely and complete rebuilding of the World Trade Center. I strongly felt, and the jury agreed, that the destruction of the Twin Towers by two separate airplanes at two separate times had to be two separate occurrences and that these insurers had an obligation to pay.

Source: *The Insurance Journal*

TERMINATED INDEPENDENT INSURANCE AGENT WINS CASE

A federal court jury in Connecticut has awarded \$2.3 million in compensatory damages to an independent insurance agent. This verdict is expected to have serious ramifications on the relationship between insurance companies and their independent agents all across the country. The case marked the first time an independent contract agent had been held to be a franchisee, who would be covered under franchise law. Alex Charts, who had been one of the most successful and respected agents for Nationwide Insurance, sued Nationwide after the company terminated his contract in January 1996. The jury found that Nationwide terminated Charts without good cause. It also found that Nationwide violated the implied covenant of good faith and fair dealing and, more significantly, violated the Connecticut Franchise Act and the Connecticut Unfair Trade Practices Act.

Nationwide never informed Charts in writing why it terminated the agent. The company contended that Charts had violated unidentified state law and unwritten company policy. Nationwide says that it did not have to show it had good cause to terminate the agent. It also contends that it was not required to inform Charts in writing of the reasons for his termination. Nationwide says it presented evidence to show that Charts violated Connecticut state law by “unfairly providing benefits to individuals when these same benefits were not available to all.” The typical industry contract with an independent contract agent contains a clause that says it can be terminated at any time “with or without cause.” Nationwide argued that Mr. Charts’ agreement had such a clause.

This jury decision is said to break **new ground** since it is the first in the United States to apply **franchise rules** to the **insurance business**. Several of the major insurance companies such as Nationwide, Allstate and Prudential operate through networks of independ-

ent agents. The jury's decision means that independent agents, acting as stand-alone businesses, fall under the purview of **franchise law** and therefore have far more protection against some actions taken by insurance companies. This may well open up the possibility of future class action suits against major insurance companies from independent agents terminated in the last few years without cause. Nationwide claimed that it could terminate Mr. Charts regardless of cause and that it acted in good faith after conducting an investigation. The jury also disagreed.

Source: *The Insurance Journal*

MULTISTATE UNUMPROVIDENT SETTLEMENT APPROVED

At least 40 states have approved a settlement relating to the investigation of UnumProvident Corp. Under the settlement, the disability giant will have to reconsider about 200,000 claims and pay a \$15 million fine. Approval of the settlement in the claims-handling investigation required the nation's largest disability insurer to notify affected policyholders within 15 days. Paula Flowers, Tennessee's Commissioner of Commerce and Insurance was one of the real leader in this effort. The settlement provides for a \$145 million fine if the company fails to meet the terms. Insurance regulators in Tennessee, Maine and Massachusetts, the lead states in the investigation, signed the agreement in November, as did officials in New York and with the U.S. Department of Labor. Unum Life Insurance Co. of America, Paul Revere Life Insurance Co., Unum National Insurance Co., and Provident Life and Accident Insurance Co. will have to notify affected customers that their denied or closed claims can be reassessed.

Those claims were denied or closed since January 1, 2000, for reasons other than settlement, death or reaching maximum benefits. Insurance officials in Virginia, Missouri and Wisconsin received requested extensions, officials

said. While regulators in California and Montana chose to not approve the deal, individual policyholders are not affected by whether their states agree and are eligible to have claims re-examined. UnumProvident insures more than 25 million people. The investigation began in 2003 in response to customer complaints. Commissioner Flowers says that investigators saw a "lack of diligence in the claims personnel" and insufficient training. Regulators will re-examine the company's claims handling after two years. The company has to hire an additional 75 employees as part of the settlement. We had reported on this settlement, which at that time was in the works, in our December issue. Our firm is currently representing a tremendous number of Unum policyholders in pending lawsuits against the company. These cases will continue and will be unaffected by this settlement. However, we believe the settlement will have a positive effect on our cases.

XII. PREMISES LIABILITY UPDATE

UTILITY WILL PAY \$7.2 MILLION IN ELECTROCUTION

Nearly a year after a woman was electrocuted while walking her dogs on a wet East Greenwich Village street in New York City, Consolidated Edison has agreed to pay her family more than \$6.2 million and to set up a \$1 million scholarship fund in her name at Columbia University, where she was a doctoral student. The settlement came after months of negotiations between Con Edison and the family of the woman who died the night of January 16th after stepping on an electrified metal plate near a bakery on East 11th Street. This death set off a firestorm of criticism of the utility that led to aggressive new safety rules and citywide inspections of electrical equipment that turned up hundreds of locations where the public

was exposed to stray voltage.

Under the terms of the settlement, Con Edison will provide a \$1 million fund at the Teachers College for scholarships and research in the clinical psychology department, where the 30-year old victim was completing her degree. The fund, which will receive five annual installments of \$200,000 each, will be established early next year. Con Edison will form a panel consisting of three electrical safety experts - two chosen by a foundation the victim's family will create, and one by the utility - who will meet periodically to review the company's safety performance. It was the family's idea that the settlement include an education aspect.

The family will use part of the money to create the Jodie S. Lane Public Safety Foundation, which will pursue efforts to improve public safety in New York. The metal plate the victim stepped on had become electrified by a wire inside a utility box that had not been properly insulated. The shock killed her, though her dogs survived. The victim's father, who is an engineer, did a great deal of study on electrical systems. He pushed Con Ed to overhaul its safety policies. His efforts resulted in a part of the settlement. The panel of electrical experts will monitor the utility's efforts to expand training for first responders in handling electrical emergencies. It will also oversee the utility's efforts to detect and repair stray-voltage problems, and produce reports that it will release to the public and the victim's family. Of the \$6.25 million to be paid to the family, \$5.27 million is for the claim of wrongful death and \$975,000 is for the victim's pain and suffering. Under the terms of the settlement, the company will pay a total of \$7.25 million, including the scholarship.

As a result of this lawsuit, state and city officials imposed strict new rules on how the utility guards against electrical hazards. The City Council has passed a law requiring Con Edison to inspect almost all of its equipment annually to protect against stray voltage, and it required the utility to

publish the results of these inspections. State regulators also passed similar inspection rules, while also requiring all utilities in the state to report cases in which people are injured by stray voltage within an hour of the incident. Con Ed has begun a comprehensive program of research and development targeted at eliminating stray voltage incidents. The result in this case will not only provide compensation for the family, but will result in improved safety and educational funds for leading students in honor of the victim who tragically lost her life.

Source: The New York Times

ALARM COMPANY FOUND LIABLE IN ROBBERY-MURDER

With all of the national emphasis on security, the security industry is growing by leaps and bounds. Legal obligations on the part of companies offering security services will continue to be defined. The results are in from a civil trial in Indiana where a security company was being sued that are most significant. The company had provided alarm service for a liquor store. A clerk was tortured and killed following a robbery at that store. The jury awarded the 10-year-old child of the victim \$1 million in damages to be paid by Sonitrol Security Systems of Muncie, Indiana. The security company had a set of procedures it was to follow with all of its customers.

Sonitrol failed to phone the store, as it was supposed to do when the clerk did not set the alarm as scheduled when he closed the store. The clerk, who worked alone, was required to set the alarm at midnight when he closed the store. If the alarm was not activated, Sonitrol, under its procedures, was to phone the store within 30 minutes and call the store manager if no one answered. On the night the clerk was murdered, however, the alarm company did not phone the store's manager until 3:15 a.m. When the manager arrived 15 minutes later, he found the store had been robbed

and the clerk missing.

Police found the clerk taped to a tree in a city park hours later after he was reported missing. The clerk died later in a hospital. A store customer pleaded guilty to murder and was sentenced to 155 years in prison. It was learned that the clerk had been robbed at gunpoint, abducted, and subsequently taped to a tree. The robber then beat and tortured the clerk. A medical expert testified that the victim likely would have survived if he had been found sooner. Jurors did not accept Sonitrol's argument that the clerk should have pushed the "panic button" alarm, because they felt he might have been shot immediately.

XIII. WORKPLACE HAZARDS

DUPONT SUPPRESSED TEFLON BLOOD STUDY

It clearly appears that Teflon maker DuPont has violated federal law requiring chemical companies to report new data on the dangers of their products. The Environmental Working Group has provided the Environmental Protection Agency with documents showing that the Teflon maker failed to report new evidence that neighbors of the Teflon plant, which is located in West Virginia, have Teflon chemicals in their blood at rates many times higher than the American public. The EPA currently has ongoing litigation against Dupont for hiding similar health and tap water pollution studies from the Agency for 20 years. Richard Wiles, senior vice-president at EWG stated:

Once again, Teflon maker DuPont has ignored its most basic legal responsibilities to the American public. DuPont is already defending itself in court against EPA charges that it suppressed critical safety information from the communities surrounding its plants. What will it take for DuPont to tell

the public everything it knows about the extraordinary dangers of Teflon chemicals?

The new study, conducted by Exygen, a DuPont consulting firm, shows that people living near the Teflon plant have amounts of the Teflon chemical known as C8 or PFOA in their blood that are several times the amounts currently found in the American public. Over 95% of the American public has the Teflon chemical in their blood. Decades' worth of peer-reviewed research shows that Teflon chemicals cause cancer, birth defects and developmental problems in laboratory animals. They never break down and are found in consumer products such as Teflon and other coated cookware, clothing, household cleaners, carpets and other textiles, fast food packaging and more.

In addition to suing DuPont for hiding a critical health study and data showing the company had polluted the drinking water of thousands of neighbors of its Teflon plant in West Virginia, the EPA is in the middle of an investigation to find out how the Teflon chemical has gotten into nearly every American's blood. This second investigation could lead to a limit in use or a ban of this Teflon chemical. EPA officials took EWG's advice in a petition requesting the government to prosecute DuPont for breaking pollution laws by hiding damaging data for over 20 years. The first hearing in the resulting lawsuit took place on December 16th in Washington, D.C. The EPA could levy a fine of \$313 million against DuPont.

Source: Corporate Crime Reporter

SELMA PLANT CITED FOR SAFETY HAZARDS

OSHA, a federal job safety agency, has proposed \$40,500 in fines for Globe Metallurgical, Inc. after a worker died from injuries suffered at its Selma plant in June. The 38-year-old employee died on June 6th from severe burns after being exposed to temperatures above 3,000 degrees

when an electric arc furnace erupted on May 28th. Globe was cited for two violations by OSHA, totaling \$10,000 in fines, for failing to require furnace operators to wear aluminized jackets and failing to automatically charge furnaces. The company also received 11 more citations, totaling \$30,500, that include fall hazards and unsafe electrical equipment.

WAL-MART WORKERS' SUIT WILL BE NARROWED

Florida employees who say Wal-Mart Stores, Inc., failed to pay them for working during breaks and after hours have been allowed to proceed with a lawsuit against the retail giant. However, a state appellate court refused to grant class action status to the suit. The case had been filed on behalf of about 230,000 Wal-Mart workers. The three-judge appellate panel ruled that the class was too broad. The court panel suggested narrowing the class to only those who have worked off the clock instead of all current and former hourly wage earners who had been employed on or after July 13, 1997. The plaintiffs' lawyers will follow that recommendation. Even so, tens of thousands of Florida workers would still be covered by the narrower suit.

\$4 MILLION SETTLEMENT IN ASBESTOS LAWSUIT

A Chicago-area man has settled his asbestos-related lung cancer lawsuit for almost \$4 million. The 78-year-old developed mesothelioma, which is always fatal, from exposure to asbestos in joint compound when he worked as a painter and drywall supervisor. The defendants, Georgia-Pacific and Bondex, agreed to the settlement. Several other companies had settled with the retired worker prior to the date the current case was supposed to go to trial. Testimony at trial revealed that doctors have given the plaintiff less than a year to live.

XIV. TRANSPORTATION

RAILROAD COMPANY LITIGATION

Burlington Northern & Santa Fe Railway Co. has settled 40 lawsuits and its lawyers are trying hard to resolve 84 others filed on behalf of passengers who were killed or injured in a collision that happened back in 2002. The incident involved a Burlington North freight train and a Metrolink commuter train. The settlement came shortly after a jury in the first case to go to trial had awarded an injured passenger \$8.9 million as damages. That lawsuit was one of 100 consolidated cases and the first to go to trial. The injured passengers and relatives of the three people killed were allowed to sue Burlington Northern & Santa Fe after a Superior Court judge in July ruled they can seek punitive damages. Terms of the settled cases are confidential.

There are currently 84 cases in mediation. Four cases are set for trial. Some 20 others are scheduled for settlement negotiations within the next two months. Burlington Northern admitted responsibility before the trial that prompted the settlement. The only issue for the jury was the extent of her injuries and the damages. The victim was awarded \$7.5 million for pain and suffering, \$900,000 for past and future wage losses, and \$500,000 for medical bills. The verdict was said to send a message to Burlington about safety and accountability. If nothing else, it did set additional settlement talks in motion.

More than 150 claims were originally filed by passengers or their relatives after a mile-long train of 167 Burlington freight cars crashed head-on into a double-decker Metrolink train during morning rush hour. Three people were killed, and 162 were injured. Federal investigators concluded that the accident was caused by an inattentive Burlington Northern crew that missed a warning signal and the lack of an automatic braking system on the freight train. The lawsuits allege that the

braking system, long sought by the Federal Railroad Administration, could have prevented the collision. The lawsuits also allege that the crew was fatigued from overwork and that the conductor had a history of losing track of signals.

SETTLEMENT IN BARGE ACCIDENT CASES

A Jacksonville, Florida, construction company has been ordered to pay more than \$19 million dollars to eight people who were injured in a boat crash that occurred three years ago. Eight people on the boat were thrown into the water. A judge ordered the construction company, Superior Construction, to pay more than \$19 million dollars to the 8 victims. The judge ruled the barge was not adequately lit and it was improperly placed in a channel beneath a bridge in the city.

XV. ARBITRATION UPDATE

JUDICIAL REVIEW OF AN ARBITRATION AWARD

The Alabama Supreme Court has affirmed a trial court's entry of judgment on an arbitration award of \$500,000 to the plaintiff. The claims that led to the arbitration award included fraudulent conduct in a new mobile home purchase. H&S Homes, the defendant in the case, claimed that the arbitrator manifestly disregarded the law. Both the trial court and the Supreme Court rejected this argument. This is a most interesting and highly significant opinion. The Court accepted the arbitration award including punitive damages based on the fraudulent conduct. As to the excessiveness of the amount of punitive damages, the Supreme Court stated that it "cannot determine how much of the arbitrator's award of \$500,000 was for compensatory damages, including damages for mental anguish. Therefore, this Court

cannot hold that the arbitrator showed a manifest disregard of the law in awarding punitive damages.” This ruling by the Supreme Court may cause the tort reformers a bit of concern.

XVI. NURSING HOME UPDATE

STAFF SHORTAGE ENDANGERS RESIDENTS

A recent analysis by the Detroit News of nursing home staffing thresholds nationwide indicates that four out of every five nursing home residents live in facilities with not enough aides or nurses to provide them with the best possible care. About 292,000 residents nationwide, or about one in five, are in a nursing home with so few staff that it jeopardizes their health. These are employees who get the residents out of bed in the morning, help them to the bathroom, get them showered and dressed, and make sure they get their medications and are fed. When the facility is short-staffed, all of those things are less likely to be completed. Resident advocates point to that as a key reason for widespread dehydration and malnutrition, which take the lives of many residents and injure many more.

Scientific studies have continually found clear links between low staffing levels and dehydration and malnutrition. In 2001, a study by the Centers for Medicare and Medicaid Services, the federal agency ultimately responsible for overseeing most nursing home care, found residents were more likely to suffer severe weight loss in facilities with low staffing levels. The study also found that facilities without enough employees to give each patient three hours of care every day risk causing them serious harm. According to the Detroit News analysis, facilities caring for about 20% of the nation’s nursing home residents did not meet that threshold as of October of this year.

WEAKNESS IN OVERSIGHT OF QUALITY OF CARE CONFIRMED

Recently, the United States Government Accountability Office (GAO) was asked to assess the effectiveness of nursing home oversight by considering the effect of a unique Arkansas law that requires county coroners to investigate all nursing home deaths. Under this law, coroners refer cases of suspected neglect to the state survey agency that regulate nursing homes and to law enforcement entities. According to the GAO’s study, the Pulaski County coroner referred 86 cases of suspected resident neglect to the state survey agency during the period of July 1999, when the Arkansas law took effect, to December 2003. The referrals involved 27 facilities, over half of which had at least 3 referrals.

For some reason, however, Arkansas state survey agency officials told the GAO that they received only 36 of the Pulaski County coroner’s referrals. Of the 36 referrals for alleged neglect that it received, the survey agency substantiated 22 and eventually it closed the facility with the largest number of referrals. However, the agency’s investigations often understated serious care problems according to the newspaper reports.

The GAO’s prior work on nursing home quality of care found that weaknesses in federal and state oversight of facilities nationwide contributed to serious, undetected care problems indicative of resident neglect. Their review of the Arkansas survey agency’s investigations of coroner referrals confirmed that serious, systemic weaknesses remain.

NURSING HOME LAWSUIT SETTLED

Managers of a Chicago nursing home have agreed to pay more than \$1.6 million to settle a portion of a whistleblower lawsuit involving allegations of extreme patient abuse and Medicaid fraud. Two former employees revealed that the owners and managers of Maxwell Manor nursing home, which is now closed, billed the federal and state

government for care that was never administered and permitted routine sexual assaults, theft and improper medical care that, in some cases, resulted in death. The whistle-blowers were a former facilities program coordinator and a former psychiatric rehabilitation services coordinator.

The case began in February 2000 when a whistle-blower lawsuit was filed against owners and operators of the home, which the former workers deemed “a house of filth, terror and death.” They alleged that between October 1998 and June 30, 2000, Maxwell Manor residents were “routinely abused, neglected, mistreated, sexually assaulted, medicated as a form of punishment, unsupervised and otherwise untreated for their mental health, physical disability and substance abuse problems.” The lawsuit also alleged that the seven-story, 276-bed facility was operated in a physically hazardous manner. According to the suit, chronic conditions included “bulging ceilings, crumbling walls, rodent and insect infestations, pervasive mildew and hazardous fire alarm and electrical systems.” One of the whistle-blowers was fired in July 1999 after documenting the abuse and alerting the facility’s upper management.

Managers of the nursing home, the lawsuit alleged, engaged in a pattern of fraud that included falsifying patient charts to make it appear they were being treated and medicated, as well as failing to report patient accidents, abuse and assaults. In one case, a woman allegedly fell into a coma for days before medical personnel were called. She died within days. In another, an AIDS patient went without medication and fell gravely ill before dying. Maxwell Manor residents, who were mostly black, ranged from young adults to the elderly. Tragically, most suffered from a physical or mental disability.

Under terms of the agreement, the federal government will receive \$1 million and the state would get \$610,000. The settlement involved ABS Long-Term Care Management Co., Inc.,

and MBA-LTC, Inc., and four individuals. In June 2000, several months after the lawsuit was filed, federal and state authorities closed the nursing home after finding unsafe, unsanitary and hazardous conditions. The facility had a long history of problems, with various owners being fined on several occasions. A beating death was reported in 1992. The lawsuit is still pending against the Brooklyn, New York-based nursing-home owner, Rabbi Efroim Stein, and a company he operates, National Voluntary Health Facility Number 4. Rabbi Stein was convicted in 2002 of bilking hundreds of thousands of dollars from a taxpayer-funded group established to help Jewish World War II survivors.

NURSING AIDE PROSECUTED FOR ABUSE OF ELDERLY PATIENT

A Florence woman has been convicted on a charge that she physically abused an elderly resident of Sunbridge Care and Rehabilitation in Muscle Shoals. The woman, who was employed as a certified nursing assistant at the facility, was found guilty of reckless abuse of a protected person. She was sentenced to 10 days imprisonment, which was suspended, and placed on one year of probation under the condition that she commit no further offenses and pay a fine of \$100 plus court costs and \$25 to the Crime Victims Compensation fund. After the trial, Attorney General King stated:

It is reprehensible that this defendant—who was entrusted as a caretaker for the elderly and vulnerable—manhandled an 83-year-old woman so roughly that a large area of skin was torn on her arm, and then not only failed to administer any care to the injury, but caused such fear in the victim that she was afraid to call anyone else for help until her tormentor had gone. This behavior is not just appalling; it is an intolerable crime. The elderly citizens of Alabama deserve our gratitude, our respect,

and our protection. I pledge anew to the people of Alabama that the protection of our families, from our children to our grandparents, will remain my priority.

The conviction resulted from an investigation by the Attorney General of a complaint referred by the Alabama Department of Public Health. According to the warrant brought by an investigator of the Attorney General's Office, the employee jerked the patient by her right arm and caused a four-inch skin tear. She then failed to provide any care or alert anyone else to take care of the injury. It was reported that the resident was afraid to call for assistance until the employee had left the nursing home. The victim, an 83-year-old resident at the nursing home, is typical of many persons who have been placed in nursing homes. The Medicaid Fraud Control Unit and its prosecution of elder abuse is a part of Attorney General King's Family Protection Unit, which he has committed to the protection and defense of Alabama's families and particularly to the defense of the elderly. Alabamians with concerns about family protection issues may call toll-free to 1-800-230-9485 or visit the unit's web page at www.familyprotection.alabama.gov.

NURSING HOME SUED AFTER WOMAN'S LEGS AMPUTATED

Life Care Center of Omaha, a Nebraska nursing home, has been accused of providing poor care that led to the amputation of an elderly woman's legs. As a result, the 77-year-old resident filed suit. The nursing home is owned by Life Care Centers of America of Cleveland, which owns and manages more than 260 facilities in 28 states. The suit claims the medical staff ordered a bunion removed from her right foot, even though this was not necessary. After the operation the resident developed gangrene, which required the removal of her right leg below the knee. The suit claims her other leg had to be amputated because

of an untreated ulcer that became infected.

XVII. HEALTHCARE ISSUES

WE MUST IMPROVE DRUG SAFETY

We have spent a great deal of space in this issue on the dangerous situation facing people in this country because of the U.S. government's failure to adequately regulate the drug industry. The Food and Drug Administration, which many believed had provided the United States with the safest drug supply in the world, has been under fire over the past few weeks and justifiably so. The attention given to the FDA's performance intensified starting with the Vioxx disclosures and continuing with stories on Celebrex, Bextra, Crestor and several other drugs. You will recall that three years ago, Bayer withdrew Baycol, the cholesterol-lowering drug, which was found to cause a rare muscle disease that was responsible for about 30 deaths and thousands of serious injuries. That disclosure caused folks question the effectiveness of the FDA for the first time. Unfortunately, little has been done by the FDA to address what now has become a major problem. As bad as it is, however, several lessons can be learned from all of the recent drug tragedies:

- Not all drugs are equal. The standards that are appropriate for breakthrough drugs that significantly advance medical care are not appropriate for drugs that have no measurable advantage over products already on the market.
- The FDA should be given not only the legal authority, but also the resources needed to monitor drugs after they enter the marketplace. Typically, new drugs are studied in a population of about 3,000 people. Such a study can detect drug-related injuries that occur at a rate of between one in 500 and one in 1,000. Yet, if the drug is used by

200,000 people (Vioxx was used by 2 million people in the United States), a serious adverse event appearing in as few as one in 10,000 people is very significant, since it would occur 20 times. These rare reactions can be identified only after a drug has been widely used.

The FDA's legal authority under federal law to require companies to conduct post-market studies of approved drugs is unclear. Moreover, the agency has never been given resources that would be necessary to keep careful track of adverse reactions that are reported for drugs. With clear legal authority and additional resources, the FDA could identify drugs causing unexpected adverse reactions sooner.

- The FDA should actively intervene when physicians misuse drugs. It is almost gospel at the FDA that the agency doesn't interfere with the "practice of medicine." This means that once a drug is approved for a single use, physicians are free under federal law to prescribe it for any use. Sometimes these unapproved uses can become widespread and dangerous. In the high-profile case of fen-phen, the diet drug combination that damaged the heart valves of thousands of consumers, the FDA had never approved the drug therapy for long-term weight loss.

In other cases, physicians are ignoring FDA directions and risking the health of their patients. The FDA should be given the legal authority to require drug companies to study popular, unapproved uses and to limit physicians' use of drugs when deviations from FDA-approved uses can lead to severe injuries.

- The FDA should separate the monitoring of drugs after they have been approved from the drug review function. To some extent, the job of the post-market reviewer is to second-guess the decisions of the officials who approved the drug in the first place. Yet today the FDA drug review divisions have primary

responsibility for deciding whether drugs should be withdrawn or their recommended uses limited. The post-market function should be separated from the drug review function.

- Leadership and resources matter. The combination of resources from Congress (in the form of user fees paid by the drug companies) and strong FDA leadership cut the review time of new drugs in half and eliminated the "drug lag." Now is the time for the FDA to turn its attention to drug safety. If its leaders exert the same energy improving the safety of the drug supply as they exerted in eliminating the drug lag, and if Congress gives them adequate legal authority and monetary resources, once again the United States can indisputably have the safest drug supply in the world.

The President and Congress must make reform of the FDA a top priority this year. In my opinion, this is something this President can't afford to leave off of his agenda. People are extremely upset over all the drug problems and will demand that the safety issues be addressed. It will be difficult for the President to substitute tort reform for reform of the FDA and the drug industry in his legislative agenda. However, the large sums of campaign money received by the President could be a problem.

Source: *The Washington Post*

XVIII. ENVIRONMENTAL CONCERNS

SECOND ROUND OF LITIGATION BEGINS— LEGAL FIGHT MOVES TO STATE COURT AS 142 PROPERTY OWNERS CLAIM DAMAGE

Our firm is representing 141 property owners for damages resulting from years of carbon black emissions from the Continental Carbon plant. We will prove that the emissions have damaged their homes, boats and cars, reduced property values and threatened the health of the people in the area. The

case will be tried before veteran Russell County Circuit Judge Al Johnson in Phenix City. The lawsuit had been originally filed in April, but was removed at the defendant's request to federal court in July. The case was correctly sent back to state court by U.S. District Court Judge Myron Thompson. The 141 residents who are plaintiffs reside in south Columbus and Phenix City. The suit alleges the dust from carbon black—a very fine, powder-like product used in production of tires—has for years damaged properties when the wind-carried particles settled on them.

The "fugitive emissions" from the plant have been especially damaging since the plant doubled its production capacity in December 1998, allowing it to make more than 200 million pounds of the product annually. The pollution constitutes trespass on the properties of our clients, nuisance, gross negligence, wanton disregard and, because of continuing denial and other alleged actions, fraudulent concealment. We are asking for unspecified damages for mental anguish, diminished market value of real and personal properties, loss of use and rental value, cleanup costs and punitive awards. The company has refused to admit wrongful conduct or to remedy the defects and deficiencies causing the pollution.

A federal court jury returned a \$20.7 million verdict in an identical case on August 25, 2004. The plaintiffs in that case were the City of Columbus, Action Marine, Inc., John Tharpe and Owen Ditchfield. Our firm also represented the plaintiffs in that case. Post-verdict proceedings in the federal case are being conducted in the case by U.S. District Court Judge Mark Fuller. In addition to Continental Carbon and the former plant manager, the defendants are Kim K.T. Pan and Todd Miller of Houston, Texas; Douglas Emerich, the plant's safety, health and environmental affairs manager; CSRC USA Corp., or China Synthetic Rubber Corp., of Taiwan; and Taiwan Cement Corp. In addition to our firm, lawyers for the plaintiffs include Jeffrey Friedman of Birmingham, Alabama, Edward Jackson

of Jasper, Alabama, and James R. McKoon Jr. of Phenix City.

\$2.3 MILLION JURY VERDICT IN POLLUTION LAWSUIT

A Mobile County, Alabama jury has returned a \$2.3 million verdict against IPSCO Steel Co. in a pollution lawsuit. After the trial of a lawsuit in which neighbors claimed their homes were covered in soot because of the mill, the jury ruled in favor of the homeowners. Neighbors also claimed they were kept up late at night because of noise at the mill. The area around the IPSCO plant was described during the trial as being like “a war zone.” Fourteen residents filed the lawsuit, claiming they were damaged because of “nuisance, negligence and wantonness associated with excessive noise and particulate/soot material” accumulating on their property. IPSCO took the position that there was no evidence the particles residents saw in their yards were coming from their plant and that the noise levels recorded around the plant were no louder than a passing train or a barking dog.

It was agreed by all parties to the suit that the conventional emissions from the plant—the emissions that are run through a filter and a smokestack—were not an issue. Instead, the fallout on neighboring properties was said to have come from pollutants that had not been run through a smokestack. The vibrations and explosions neighbors complained about at the plant were sufficient to shake loose the particles and send them sailing on the wind. Recordings in which IPSCO plant officials, answering calls from irate neighbors, said “Yes, sir, I heard that one. Sounds like dynamite,” were heard by the jury. This made it difficult for the defendants to deny that excessive noise was a problem.

XIX. THE CONSUMER CORNER

CITIZENS STRIPPED OF PROTECTION

The poor regulation of the drug industry is just an example of how the federal government operates in regulating other industries. The public has to be concerned over how the federal government works these days when it comes to its overall regulatory responsibilities. After the U.S. Food and Drug Administration discovered unsanitary conditions at a plant in Great Britain producing flu vaccine for the U.S. market, the agency refused to order a cleanup. In fact, the FDA didn’t even inspect the plant to ensure that a cleanup was actually carried out. Instead, the FDA allowed the plant to “comply voluntarily.” The vaccine later produced by the plant—50 million doses, or half of the expected supply for the U.S.—was so contaminated it was unusable.

The FDA also relies on “voluntary compliance” in asking drug companies to report evidence that their products might be harmful, and to withdraw drugs they believe might cause problems. Tragically, a prime example of how inept the FDA really is comes from the Vioxx debacle. Even when Merck began to see evidence that Vioxx, which was highly profitable, was causing widespread heart problems, it ignored those findings. You now know the story of Dr. David Graham, associate director at the FDA’s Office of Drug Safety, who told Congress that by the time Merck withdrew the drug, Vioxx may have caused as many as 55,000 fatal heart attacks. In comparison, this rate is 18 times the death toll of the attacks of September 11th. Unfortunately, the behavior concerning Vioxx isn’t unique, as we have seen over the past weeks.

There are examples in other industries where the government likewise has failed the public. The Environmental Protection Agency, the Occupa-

tional Health and Safety Administration and every other federal agency charged with protecting consumers, patients, workers, and customers have also become far less aggressive in enforcing existing laws. For example, when the National Highway Traffic Safety Administration (NHTSA) discovered this summer that the suspension system of the Saturn Vue collapsed during rollover testing, as reported in another section of this report, NHTSA did not require a recall. Instead, NHTSA only asked Saturn to conduct a voluntary “service campaign,” thereby allowing the company to continue selling unrepaired Vues. NHTSA didn’t even require Saturn dealers to notify potential buyers and let them know that the problem even existed.

New York Attorney General Eliot Spitzer, who continues to prosecute startling cases of systemic white-collar crime on Wall Street and elsewhere, has been a breath of fresh air. But, we all have to wonder where the SEC and other government agencies have been all this time. General Spitzer has actually had to do the U.S. government’s job and he has done it well, with every charge that he brought proving to be accurate. There is one thing for certain—**voluntary compliance** simply doesn’t work. We have seen the culmination of a conscious, long-term effort by business and its conservative allies to emasculate government protection of its citizens. Except in cases where they’re pressured into it by publicity and lawsuits, federal agencies rarely enforce the law these days. Without any real fear of enforcement, respect for the rules begins to erode and greed takes over. **Voluntary compliance** in theory is a useful concept, but only when companies know that it’s not really voluntary, but mandated, will it work. There has to be a fear of getting caught and being punished for their wrongdoing to make the system work.

The sole remaining restraint on corporate misbehavior today is in the courtroom. The fear that, unless businesses meet their public responsibilities, they will have to justify their

behavior to a jury, is a strong deterrent. But, that last bit of protection is currently under fierce and well-financed attacks by the so-called “tort reform” movement. Corporate America, which finances and directs the tort reform efforts, wants to dramatically limit the financial penalties that juries can impose in cases of gross or even intentional corporate misconduct. Corporate America has made passage of tort reform bills its highest priority at the state and federal levels. With government agencies already weak and largely ineffective, removing the jury system would leave private citizens with no real recourse. Nevertheless, that seems to be where we’re headed in this country. It is high time that private citizens get involved. Only when that happens will the politicians listen and respond.

A WARNING ON TOYS

Now that the Christmas holidays are history, all parents and facilities, such as day care centers and church nurseries, should carefully check all toys to which children have access. They should be on the lookout for recalled toys and children’s products. Any toys with small parts that come off should either be destroyed or the parts removed. The reason being that small children can choke on them. Consumer advocates had issued their annual holiday toy safety warning in late November. During 2003, according to the Consumer Product Safety Commission, 11 children under age 15 died of toy-related injuries—all but one caused by choking on small balls, balloons, pieces of a game and/or toy beads. Also, in 2003, an estimated 155,400 children were treated for toy-related injuries in U.S. hospital emergency rooms, down nearly 23% since 2001. The U.S. Public Interest Research Group, in its 19th annual toy safety survey warned that the greatest danger to children still comes in the form of small balls, uninflated or pieces of balloons, and toys with parts small enough to choke on. Such toys remain

widely available, and often are not labeled as hazardous. Parents can’t assume that all toys on store shelves are safe or adequately labeled. Unfortunately, there are still some dangerous toys on the market. Others—while recalled—are still available for use.

One toy of particular concern, is the “yo-yo water ball”—a water-filled ball on an elastic-like cord that can be bounced, squeezed, or twirled overhead like a lasso. The toy has been the source of nearly 400 injury reports to the CPSC. Suffocation injuries accounted for almost 75% of the injury reports after the cords wrapped around a child’s neck, with other reported injuries to the eyes, face and head. The toy should be banned from sale in the United States, but the CPSC does not yet agree. In September 2003, the federal agency warned of a “low but potential risk” of playing with yo-yo water balls, but stopped short of banning them—an assessment that has not changed. In its warning, the agency said it found no toxicity or flammability concerns with the yo-yos’ liquid centers. Besides monitoring children at play with them, it also advised cutting off the cords or throwing away the toys. Most parents don’t know that the CPSC does not test all toys. Parents should never consider a toy to be safe simply because it’s for sale. Even toys that meet federal requirements may still pose dangers.

Before Christmas, the CPSC put out a Top Ten List of recalled toys. I recommend a review of that list to make sure no recalled children’s toys were purchased. The Commission compiled its annual top 10 list of children’s product safety recalls to coincide with the start of the holiday shopping season. While the toys should all have been off store shelves, it is possible not all were removed. The Commission is concerned that people who did their shopping early might have given recalled gifts. According to the CPSC, all the products on the list were recalled in the past year.

The agency also is launching Neighborhood Safety Network, a Web-based

grass-roots effort to help spread the word about safety recalls to consumers who may be harder to reach. The network will put life-saving information into the hands of people who need it most. These messages are posted and passed on in Boys and Girls Clubs, American Indian reservations, firehouses and housing projects. The list of top recalled children’s toys and products includes:

- Bumble Bee Toys (398,000), distributed by Graco Children’s Products. Graco received 26 reports of the antennae breaking off the bumble bee toys, including five reports of children who started to choke on the broken antennae. One child’s throat was scratched when the child’s mother removed the broken antenna from the child’s mouth. Call Graco at (800) 258-3213 to receive a free replacement toy.
- Nerf® Big Play Football (294,000), distributed by Hasbro. The football contains a hard plastic interior frame that can pose a risk of facial cuts if a child is hit during play. There have been nine reports of facial injuries, including eight requiring stitches or medical attention. Call Hasbro at (866) 637-3244 or visit the firm’s website at www.nerf.com to receive a replacement NERF product of equal value.
- Children’s Mirror Books (225,000), distributed by Kids II Inc. The mirror in the books can crack or break, posing a laceration hazard to young children. Kids II has received 26 reports of the mirror cracking or breaking, including four reports of cuts and one report of a pinched finger. Call Kids II at (877) 325-7056 or visit the firm’s website at www.kidsii.com for instructions on returning the mirror for a refund.
- Radio-Control Toy Trucks (287,000), distributed by Nikko America, Inc. A problem with the circuit board causes the toy truck to overheat, posing a fire and burn hazard. No injuries have been reported. Call

Nikko America at (866) 232-6013 for instructions on returning the product for a free circuit board replacement.

- Ride-On Toys (70,000), distributed by Tek Nek Toys International. The screw and nut assembly attaching the steering wheel can come loose, posing a choking and aspiration hazard to young children. Tek Nek Toys has received six reports of the screw and nut coming loose, including the death of an 18-month-old boy who aspirated a screw. Call Tek Nek Toys at (888) 661-0222 to receive free replacement parts.
- BATMAN™ BATMOBILE™ Toy Vehicle (314,000), distributed by Mattel Inc. The rear tail wings of the Batmobile are made of rigid plastic and come to a point, which poses a potential puncture or laceration hazard to young children. Mattel has received 14 reports of injuries consisting of scrapes, scratches, lacerations and punctures. Four of the injuries required medical treatment. Call Mattel at (888) 271-9891 to determine whether the toy is among the recalled models and to order the free replacement wings if needed.
- Children's Athletic Shoes (441,000), distributed by Payless ShoeSource Inc. The metal eyelet lace holder at the top of the shoes can detach, posing a choking hazard to young children. Payless ShoeSource has received one report of a child starting to choke on a detached eyelet from one of these shoes. No injuries have been reported. Call Payless at (800) 654-697 or visit the firm's website at www.payless.com for information on returning these shoes to a Payless ShoeSource store for a cash refund or exchange.
- "Rock 'N Roller" Baby Strollers (300,000), distributed by Dorel Juvenile Group USA. If the stop pins are bent or missing or the seat is not fully attached, the seat can partially detach from the frame during use and the infant occupant can be injured in a fall. There have been 77

reports of problems related to the stroller seats. Injuries included one child who fell and had a slight concussion and another child who cut his forehead and required stitches. Additionally, there were 46 reports of bumps and bruises. Call Dorel Juvenile Group at (800) 711-0402 to determine how to inspect the stroller for possible replacement.

- Metal Toy Jewelry Sold in Vending Machines (150 million pieces), by four toy jewelry importers (AA Global Industries, Inc., Brand Imports, Cardinal Distributing Co. and L.M. Becker & Co., Inc.). Some of the toy jewelry contains dangerous levels of lead. CPSC has received one report of lead poisoning when a child swallowed a piece of toy jewelry containing lead that was previously recalled. No reports of injuries or illnesses have been received relating to products by these companies listed above. Consumers should throw away recalled jewelry.
- Toddler's Athletic Shoes (140,000), distributed by Reebok International. The I-3 logo-tag on the tongue of the shoe can be peeled off, posing a choking hazard to young children. Reebok has received a report of an 8-month-old child mouthing the logo-tag. The tag was removed without injury. Call Reebok at (800) 843-4444 or visit the firm's website at www.reebok.com to receive a refund.

I suggest that our readers go to the website of the Consumer Products Safety Commission (www.cpsc.gov) for additional information on toys and other products that children have access to.

MOTORIZED SCOOTERS ARE DANGEROUS FOR SMALL CHILDREN

Many children will have received a Razor scooter, which was one of the hottest toys on holiday wish lists for children, this Christmas. These scooters can be very dangerous. Razor scooters are made of aluminum. They are

lighter and faster than other scooters and as a result can be more dangerous. Speed is one of the reasons the scooters are so popular. Very young children are riding these scooters. The lightweight aluminum scooters sell for anywhere from \$99 to \$199. Parents must realize that these scooters aren't street vehicles and should never be ridden on streets. If children are allowed to ride these scooters, they should always wear helmets and follow other rules when riding the scooters. According to the American Academy of Pediatrics, there were about 9,000 Razor scooter-related emergency room visits in 2003. Emergency room doctors say many injuries can be avoided on the scooters if the children don't ride in traffic, do wear protective gear and have close adult supervision. My recommendation is to restrict the sale and use of these scooters to older children who must wear helmets when riding.

MANDATORY STANDARD FOR CIGARETTE LIGHTERS

The U.S. Consumer Product Safety Commission (CPSC) has voted unanimously to start development of a mandatory safety standard for cigarette lighters. The mandatory standard could be based on the current voluntary "Standard Consumer Safety Specification for Lighters" (ASTM F-400) to prevent mechanical malfunction of lighters. CPSC Chairman Hal Stratton reports that, "Reducing fire deaths is one of our top priorities. A mandatory standard for cigarette lighters - along with standards for the flammability of mattresses and upholstered furniture - would help reduce fires, deaths, and injuries." There are approximately one billion cigarette lighters sold in the U.S. annually. About 400 million of those are imported from China. From 1997 through 2002, CPSC estimated that 3,015 people went to hospital emergency rooms for injuries resulting from malfunctioning lighters. Most of these injuries involved thermal burns to the face, hands, and fingers. For the same time period, CPSC received 256 incident reports related to

cigarette lighter malfunctions and failures; 65% of these cigarette lighter failures resulted in fires, leading to 3 deaths and 6 serious injuries.

The voluntary standard for lighters addresses the risk of fire, death, and injury associated with mechanical malfunction of lighters. A mandatory standard would apply to imported as well as domestically manufactured products. Fires are a leading cause of consumer product-related deaths. Many lives will be saved if tough standards are imposed for manufacturers. CPSC already has a mandatory standard for child-resistant cigarette lighters, which addresses the hazard of children under 5 years of age starting fires with lighters. That standard for child-resistance applies to imported as well as domestically manufactured disposable and novelty lighters. Fire deaths associated with children playing with lighters dropped dramatically since the mandatory standard for child-resistance became effective in July 1994 - from 230 in 1994 to 130 in 1998. Children under age 5 accounted for 170 of the deaths in 1994 and only 40 of the deaths in 1998. In 1994, there were 10,400 residential fires associated with children playing with lighters. By 1998, that number declined to 5,500 fires. Because even lighters with child-resistant mechanisms are not childproof, all lighters should always be kept out of the reach of children.

ORKIN SUIT GETS CLASS-ACTION STATUS

Tens of thousands of Floridians will be allowed to join a civil lawsuit accusing Orkin pest control of defrauding its customers. A Florida Circuit Court Judge said Floridians who have had a contract with Atlanta-based Orkin since March 1995 can join the suit. The pest control giant is accused of deceiving customers that treatments had been made and then renegeing on guarantees against termite damage. As many as 100-thousand Florida homeowners could seek damages for deceptive and unfair trade practices under the court's ruling. Orkin will appeal the ruling.

The lawsuit claims Orkin never provided re-inspection or re-treatment services although customers were charged for the program.

XX. RECALLS UPDATE

HONDA RECALLS 258,000 ACCORDS

American Honda has recalled nearly 258,000 Accord sedans. The recall was because the driver's airbag may not deploy properly. Accords from the 2004 and 2005 model years are involved. Owners were able to get free repairs beginning December 6th. Any owner can contact the U.S. division of Honda at (800) 999-1099.

RECALL OF DODGE TRUCKS

The U.S. government has asked DaimlerChrysler AG's Dodge division to recall some of its Dodge Durango SUVs and Dodge Dakota pickups because of concerns over their safety. The National Highway Traffic Safety Administration (NHTSA) is investigating Durangos and Dakotas from the 2000 to 2003 model years with four-wheel drive. When we went to the printer there had been no recall of the vehicles. NHTSA began investigating possible premature wear of the trucks' wheel assembly after numerous reports of the wheels suddenly detaching and flying off. If the recall takes place, as many as 600,000 vehicles would be involved. NHTSA found that a third of the nearly 2 million vehicles investigated had defective upper ball joints.

FORD TO RECALL 474,000 ESCAPES, MAZDA TRIBUTES

Ford Motor Co. has recalled more than 474,000 Escape and Mazda Tribute SUVs because the accelerator cable may prevent the engine from returning to the idle position and may increase stopping distance. The vehicles in the

recall are from the 2002-2004 model years. To date, no injuries or accidents have been linked to the recall, according to a Ford spokeswoman.

GAS FURNACES FOR MOBILE HOMES RECALLED

The Unitary Products Group (UPG) of York International Corp., of York, Pennsylvania, recalled about 226,000 gas furnaces for mobile homes in November after reports that they could have been linked to a series of fires. The furnaces can overheat, causing the heat exchanger to crack or burn through, and in extreme cases, can cause the furnace wrapper to burn. The overheating can in turn burn drywall and other combustibles near the furnace, posing a fire and smoke hazard. According to the company, the problem has been traced to differences in installation, application factors and variations in components. The company received 27 reports of fires that could have been related to the furnaces, some of which resulted in extensive property damage. As we went to the printer, there had been no injuries reported. The company warned that the problem, if left unresolved, could lead to personal injury or death.

The furnaces were manufactured in Wichita, Kansas, and sold nationwide between 1995 and 2000 under the brand names Coleman, Coleman Evcon and Red T as original and replacement furnaces in manufactured homes. The furnaces, used only in manufactured housing, are a silver color with white access panels. Model numbers included in the recall are listed on the company's website at <http://www.dgat-program.com>. Consumers can also call UPG toll-free at 1-888-665-4640 between 8 a.m. and 5 p.m. CDT, Monday through Friday, for a referral to a service center where they can schedule a free inspection and repair. Consumers are advised not to use the heating function of these furnaces until they have been inspected and repaired.

LAWN TRACTORS RECALLED BECAUSE OF POSSIBLE FIRE HAZARD

Electrolux Home Products is recalling 5,280 Husqvarna lawn tractors. According to the U.S. Consumer Product Safety Commission, these lawn tractors can develop abrasions on the fuel tank because of the fuel line clamp's location. This can result in a fuel tank leak, which could pose a fire hazard to consumers. Husqvarna has received four reports of fuel tanks leaking. To date there have been no reports of fire or property damage. These Husqvarna 18.5 horsepower, hydrostatic transmission, 42-inch cutting deck, lawn tractors are gasoline-powered and are designed for residential use. The recall involves models LTH18542A and LTH18542B and includes all serial numbers. The model plate with the model number information is found under the seat. The lawn tractors were sold at Husqvarna dealers and distributors nationwide from November 2003 through July 2004 for about \$1,500 each. Consumers who have one of the recalled lawn tractors should contact an authorized Husqvarna service provider in your area, which will provide a free repair. For more information or to locate a Husqvarna dealer, call Husqvarna at (800) 448-7543 between 9 a.m. and 5 p.m. ET Monday through Friday, or visit the firm's website, www.usa.husqvarna.com.

AMERICAN SUZUKI MOTOR RECALLS ATVS

American Suzuki Motor Corp., of Brea, Calif., recalled 27,000 2004-2005 Eiger and Vinson all-terrain vehicles because of a potential fire hazard. The ATVs were assembled with an incorrectly sized mounting bolt under the fuel tank that could result in fuel leakage, presenting a fire safety hazard and risk of injury or death. There have not been any reports of incidents. Suzuki 2004 and 2005 models Eiger ATVs—LT-A400K4, LT-A400FK4, LT-F400K4, LT-F400FK4, Vinson ATVs—KT-A500FK4, LT-F500FK4, Eiger ATVs—LT-A500FK5, LT-F500FK5 are

included in the recall. All are vehicles designed for use by riders age 16 and older. The ATVs were sold at Suzuki motorcycle/ATV dealers from August 2, 2003 to August 26, 2004. Consumers should take their affected ATV to an authorized Suzuki dealership or call 800-444-5077 to replace the fuel petcock-mounting bolt and sealing washers at no charge to the consumer.

XXI. SPECIAL PROJECTS

ALABAMA WATCH NEEDS YOUR HELP

Over the past few years, Alabama Watch, one of the few consumer advocacy groups in Alabama, has led the charge in defending consumers and promoting consumer education. Alabama Watch has stood up to Corporate America on consumer issues, and that's no easy job. The group has been working hard to educate the citizens of Alabama on matters that affect all consumers. As we all know, it takes funding for any group to operate and Alabama Watch is no exception. Funding sources are few in number for consumer advocacy groups. For this reason, individuals must help shoulder the load by contributing to groups that stand up for consumers and fight for their rights.

I hope each of you will consider helping Alabama Watch as we enter the New Year. Please let Alabama Watch know that you will make them one of your top priorities in 2005 and that you will stand by their side with financial and moral support as they take on consumer battles. Alabama Watch needs your checks, your prayers, and your goodwill this year. You can send a contribution to Alabama Watch, 400 S. Union Street, Suite 245, Montgomery, AL 36104. If you want more information, go to their website at www.alabamawatch.org.

BEASLEY ALLEN CHRISTMAS CHARITIES

Our firm believes it is important to reach out to our community and help those who are less fortunate than we are. This Christmas season was no different. Our employees picked four charities our firm to be involved in. I am pleased to report that our efforts were highly successful. We participated in Operation Christmas Child, which is a unique project of Samaritan's Purse. Employees were asked to take "shoeboxes" and fill them full of small gifts for children. The shoeboxes were delivered to children in time for Christmas. Our employees filled 117 boxes and that made 117 children happy on Christmas Day.

Another project involved the local Veteran's Administration. Our employees participated in a friendly Iron Bowl. However, this Iron Bowl didn't have anything to do with football. It was a Nutrition Iron Bowl where employees were asked to donate food items in the name of Alabama or Auburn to help feed the hundreds of homeless veterans in the area. These veterans helped to secure the freedoms that every American enjoys, and we were grateful for the opportunity to give back to those who once wore a military uniform on behalf of our country. We also helped out Aid to Dependent Mothers by collecting "Nearly New" toys and books to give to needy children of incarcerated mothers living in the Montgomery Area. Our last employee charity involved Capitol Hill, a local nursing home. Each Christmas Capitol Hill puts up an Angel Tree for the residents. Each Angel on the tree contains a resident's Christmas wish list. Employees were invited to choose an Angel and purchase something on the resident's wish list. Our employees filled 100 wish lists for the nursing home residents.

Lawyers in our firm were also able to participate in a Sunshine Center project. Each year a list of needs from a number of families from this shelter is given to the lawyers. The needs on the list are met with little difficulty. These

gifts are purchased and wrapped by each participating lawyer, and all of the gifts are taken to the Center in preparation for the Christmas party held for the families. It gives all of us a good feeling to know that we have helped lots of folks during the Christmas season. In my opinion, we have a strong obligation to help folks who have real needs. God has blessed our firm, and He expects us to share our success with those who are less fortunate. It is great to know that our employees step up to the plate each year during the holidays and do good for others.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Elizabeth Kidd

Elizabeth Kidd has been with the firm for almost ten years as a secretary for Julie Beasley in the Personal Injury/Products Liability Section. She has worked up a tremendous number of important cases. Elizabeth has two children: a son, Samuel, is in the 9th grade at Prattville High School; and a daughter, Hope, is a senior at Troy University. Interestingly, Hope is majoring in broadcast journalism and will be filming sports events soon. Elizabeth is a dedicated employee who does excellent work. Her attitude and work ethic are a real plus for her. We are fortunate to have Elizabeth with the firm.

Sherri Markos

Sherri Markos has been with our firm for three years and works in our Accounting Department. In this position she serves as Accountant II and handles disbursement schedules and checks for settlements. Sherri also has a variety of monthly reports, entering data and balancing bank statements that she is responsible for. Sherri is married to Andy Markos and they have two children; Summer who is 14 and Christian who is 5. Andy owns Country Heating & Air and also works a fulltime

job with Edwards Heating & A/C. Sherri is a valuable employee and we are most happy to have her with us.

XXIII. SOME PARTING WORDS

SOLDIERS WITH A MISSION

A great deal had been said and written about the great season enjoyed by the 2004 edition of the Auburn Tigers. A very good case can be made that the Tigers should have been in the Orange Bowl playing for the national championship. As we all know, that didn't happen. In fact, as I write this, we didn't even know how the Sugar Bowl game came out. I do know that Virginia Tech has a very good team and is extremely well coached.

Regardless of how the sugar bowl game turns out, this is a very special group of players and coaches. As an Auburn football fan, I have really enjoyed this season and am extremely proud of the coaches and players. Joe Whitt, who is a good friend and an excellent coach whose responsibilities are, coaches the linebackers, came by the house for a visit after the SEC Championship game. Joe says that the very special nature of this team was evident early in the season. Members of any athletic team—and that's especially true in football—typically form strong bonds that last long after their last game is played. While Joe says this team has been a joy to coach, I can say they have also been a joy to watch over the entire season.

Coach Tommy Tuberville took over a program in 1999 that was in chaos, lacking direction and purpose. Most folks don't know how bad things had actually gotten. At that time, Auburn had players who caused lots of off-field problems and it was reflected in the team's on-the-field performance. Many believed it would take a miracle to rebuild the program. Something happened that really made a difference

early in the Tuberville tenure. Coach Tuberville made Rev. Chette Williams, a former player, the team's chaplain, and that may well be the best move any Auburn coach has ever made. Chette had an immediate impact on the players. Through his guidance, lives were turned around. The spiritual bond that developed helped transform a bunch of individuals into a tight-knit band of brothers. Team prayer meetings quickly grew into a regular part of the team's weekly schedule. If Auburn has had any major discipline problems, I am unaware of them. In fact, Chette says there is not a single problem out of 140 young men playing football at Auburn. That speaks volumes, considering all of the discipline problems that seem to exist at a number of schools.

I sincerely believe that God—through Rev. Chette Williams—had His hand on this team. Carnell Williams, who returned for a great senior season, was quoted in one media report as having said:

Brother Chette has done an outstanding job. We have people on this team that show outstanding faith from top to bottom. From the best player down, we're all in this together and we're all pulling to please the Lord. We feel He is with us and we can do all things through Him. Not to take anything from the other teams I've played on, because I've felt that bond and that chemistry. But this team is special. We're really out there for one another.

I understand Carnell and Ronnie Brown, two great players and even better young men, have met with Chette every Wednesday morning from 5:30—7:00 for prayer and Bible study. In my opinion, that will be more important to these young men than any of their personal accomplishments on the field. I went over to watch a Sugar Bowl practice on December 22nd and was most impressed with what I observed. It was quite evident the young men on this team really like each other and their coaches and were

having a great time during their workday. Coach Eddie Gran closed out the practice—with everybody on their knees—with a stirring prayer. It was the real deal and really got the attention of all observers.

Many of the players have stated on numerous occasions how their routines—both before and after games—include spiritual guidance in some form. Many players on the 2004 Auburn team speak openly of their spiritual beliefs and made use of the powerful use of prayer during games. After the Ole Miss game, Auburn's players followed the traditional Auburn fight song with a rendition of their own spiritual song, "Hard Fighting Soldier." Sophomore tight end Kyle Derozan, who gets credit for this song, first sang it during a Fellowship of Christian Athletes meeting. The spiritual song quickly became a part of the team's official prayer meetings and was actually adopted as the team's official song and rallying cry. The song was also sung at the celebration that took place on December 18th at Toomer's Corner in Auburn. If you haven't heard it, I recommend that you do so. I believe that it will have a profound effect on you.

This team's spiritual faith has had a profound effect on coaches, the media and Auburn fans. Young children are greatly affected by the actions of college athletes on and off the playing field. These athletes become role models whether they intend to be or not. The example set by the 2004 Auburn Tigers will have a tremendous

effect on young men and women—and especially children—in my opinion. I firmly believe that the strong faith in God by members of this team will be the group's real claim to fame. Actually, as we travel down life's path—that's really what it's all about!

A BIT OF ADVICE FROM THE PAST

On occasion, I look at all of the problems facing our country and wonder how this nation will be able to continue its role of leadership in the world. When we see politicians who have no real concern for the plight of ordinary folks and who favor the rich and powerful at every turn, it is most discouraging. Currently, we are engaged in a war in a foreign country with no real end in sight. We are spending billions there and have lost a tremendous number of our troops. This war is far from over and I fear we will be in Iraq for years to come. At home, the economy appears to get weaker by the day. There have been other times—both here and abroad—when things appeared dismal and the future bleak. One such time was the early 1940s in England. The following statement was made by Winston Churchill during those times and I believe it's worth repeating today:

You cannot tell from appearances how things will go. Sometimes imagination makes things out far worse than they are; yet without imagination not much can be

done. Those people who are imaginative see many more dangers than perhaps exist, certainly more than will happen; but then they must also pray to be given that extra courage to carry this far-reaching imagination. But for everyone, surely, what we have gone through in this period...this is the lesson: never give in, never give in, never, never, never - in nothing, great or small, large or petty - never give in except to convictions of honour and good sense. Never yield to force; never yield to the apparently overwhelming might of the enemy. We stood alone a year ago, and to many countries it seemed that our account was closed, we were finished...Very different is the mood today...though we ourselves never doubted it, we now find ourselves in a position where I say that we can be sure that we have only to persevere to conquer.

— Prime Minister Winston Churchill, October 29, 1941, Harrow School.—

Finally, I wish for each of you a happy, healthy and prosperous New Year. We face a lot of challenges as we approach 2005. With God's help we can handle whatever comes our way. I am convinced of that and look forward to the year. May God continue to bless and protect each of you and your family.

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