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THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

Merck Plays Hard Ball In Clay County Case

Merck and Co. gave the *New York Times* an exclusive story that was published in its April 13th edition dealing with our case in Clay County, Alabama, against the giant drug company. The article was a vicious personal attack by Merck on our client, the widow of Brad Rogers. We will prove that her husband's death was caused by Vioxx. Questioning the veracity of Cheryl Rogers, whose husband died at age 42 after taking Vioxx, was designed to get nationwide publicity and was an attempt to soften the "bad press" Merck has gotten over the past several months relating to its Vioxx problems. This is a company that spent over $160 million in one year advertising Vioxx and which has made tremendous profits with sales of the painkiller. It is also the same company that has set aside $685 million to defend lawsuits filed over Vioxx. This was a drug that was only supposed to kill pain—not kill the folks who take it!

Merck's claims against our client are unfounded and are simply a desperate attempt to avoid giving a victim's family a day in court. They don't want to have to account for a drug that is responsible for thousands of deaths around the country. In my opinion, Merck either wants to force our firm out of the case by making a most serious accusation against our client or is trying to divert attention from the fact that Vioxx killed Brad Rogers.

Clinical tests have shown Vioxx is and was a dangerous drug. It has killed literally **thousands** of unsuspecting victims who trusted the company and who had no idea that Vioxx caused **heart attacks** and **strokes**. **It is most significant that Food and Drug Administration (FDA) safety officer Dr. David Graham told Congress that taking Vioxx had caused over 40,000 deaths in this country.**

I was surprised that Merck would stoop to the level it has in its attacks on Mrs. Rogers. Merck has lied to the federal government (FDA), medical doctors, and the public, and frankly I wouldn't put anything past the company at this point in time. If Merck would threaten a major university such as Stanford because one of its scientists blew the whistle on Vioxx, they are capable of doing anything to anybody.

We shouldn't lose sight of what the Rogers case is all about. The key issue in the Rogers case is: did Brad Rogers take Vioxx and, if so, did it kill him? We have undisputed evidence to prove **that Brad was taking Vioxx before his death**. An autopsy proved that the drug caused his death. We know from medical records of Mr. Rogers that he was prescribed Vioxx and that he took Vioxx **on a regular basis** before his death. What more do I need to say? We will prove our case in the courtroom and let 12 jurors decide who is telling the truth on Vioxx.

In my opinion, Merck is desperate. Its bosses know that the company could lose billions of dollars as the result of Vioxx lawsuits. With that much at stake, Merck is obviously trying to undermine the Rogers case before we even get to the courthouse in an attempt to affect other cases that follow. Otherwise the company wouldn't have given the *New York Times* a motion with all of the attachments before it was even filed in the Clay County, Alabama courthouse.

Andy Birchfield Appointed Co-Lead Counsel For Multi-District Litigation Re: Vioxx

Andy Birchfield, who heads up our Mass Torts Section and is the lead Vioxx attorney with our firm, was appointed co-lead counsel for Multi-District Litigation in regard to Vioxx cases against Merck. The announcement was made on April 9th by U.S. District Judge Eldon Fallon in New Orleans. This appointment is significant in regard to all Vioxx cases filed in federal courts because the Multi-District Litigation will deal with the largest drug recall in history. As a member of the Plaintiffs Steering Committee (PSC), Andy's appointment as co-lead counsel places him in a leadership position for this massive undertaking. Chris Seeger, a very good lawyer from New Jersey, is the co-lead counsel. There were a tremendous number of very good applicants for the PSC and Judge Fallon selected the members based on criteria he had set up.

The other lawyers on the CSC are: Richard J. Arsenault of Alexandria,

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Louisiana; Elizabeth Cabraser of San Francisco: Thomas R. Kline of Philadelphia; Arnold Levin of Philadelphia; Carlene Rhodes Lewis of Houston; Gerald E. Meunier of New Orleans; Troy A. Rafferty of Pensacola, Florida; Drew Ranier of Lake Charles, Louisiana; Mark P. Robinson Jr. of Newport Beach, California; and Christopher V. Tisi of Washington, D.C. The members of the committee will handle all pretrial activities in the case. Such things as gathering evidence, interviewing witnesses, choosing expert witnesses, planning and carrying out discovery, and developing overall strategy fall to the committee. They also meet with the judge and Merck's lawyers on a regularly scheduled basis. It was quite an honor for Andy to be selected by the judge for this most important position.

Our firm is committed to working on the massive problems caused to hundreds of thousands of people who trusted Merck to put a safe product on the market and who later learned that they had been betrayed. Vioxx should never have been put on the market, and the FDA made a serious mistake when it approved the drug for sale. It will take a team effort on the part of lawyers representing Vioxx victims to make sure that justice is done. This is a monumental undertaking and one that will be a challenge to all of us. I am confident that our team will be up to the challenge. Both Merck—the manufacturer—and the FDA—the regulator—have failed in their responsibilities. My prayer is that we won't fail the victims, and all of us in our firm who are working on Vioxx cases will do our utmost to make sure that doesn't happen.

We are currently evaluating more than 10,000 Vioxx cases and will file hundreds of lawsuits against Merck in the coming months. The first Vioxx case is scheduled to be tried later this month in the Circuit Court of Clay County in Ashland, Alabama. As mentioned above, Merck has accused our client of lying about her deceased husband's taking of Vioxx in this case. This most serious accusation was made even though the decedent's own doctors have verified that he was taking Vioxx prior to his death. Frankly, I was shocked that Merck would take this route in an effort to discredit our client and our firm.

Alabama Loses A Giant

When Senator Howell Heflin died last month, our state and nation lost a true political giant. I lost a very good friend. Howell was a graduate of Birmingham Southern College, where he played football. He was a Marine and a veteran of World War II, earning the Silver Star and a Purple Heart in the Pacific theater. In 1967, Howell was elected president of the Alabama State Bar. He was elected Chief Justice of the Alabama Supreme Court in 1970. The newly elected Chief Justice spearheaded a total constitutional and statutory reform of the Alabama Judicial System, including the revision of Article IV (commonly referred to as the judicial article) of the Alabama Constitution. Howell did not seek re-election. Instead, in 1978, he was elected to the U.S. Senate, where he served with distinction for three terms. As a freshman senator, Howell became chairman of the Senate Ethics Committee. Senator Heflin was one of America's greatest-ever defenders of civil justice and the civil justice system.

My first contact with the Tuscumbia native was when I was a young lawyer practicing in Tuscaloosa during the 1960s. Howell had gotten my name from Eddie Tease and asked me to help him on a case. I was shocked to get that call from one of Alabama's more prominent lawyers. A few years later I had the opportunity to work with Howell when he was Chief Justice. The reform of Alabama's judicial system referred to above was one of the Senator's greatest accomplishments. I was privileged to have been one of the persons he called on to help with that project, and I am extremely proud of what we were able to do. Alabama's court system has been a model for the rest of the country and that has been acknowledged on many occasions.

Howell was a trial lawyer, a judge, and an outstanding member of the U.S. Senate. More importantly, he was a good family man, a devoted Christian, and a person who never forgot "his raising." In Washington, Howell was known everywhere and by everyone simply as "the Judge" from Alabama. His colleagues acknowledged the new Senator's devotion to the law and his vast understanding of it. Mastering the complex Senate rules came easy to Howell, and he became one of the truly outstanding members of that body. Howell was universally respected by all who dealt with him.

Howell believed in the civil jury system and fought tirelessly during his career to preserve it. He understood that the system was really the only thing that offered common folks any protection from those in Corporate America who would take advantage of them. Howell Heflin was a true champion of the people, and I am proud to say that he was my friend. He will be missed!

Johnnie Cochran

Johnnie Cochran and I became friends over the years and, because of this relationship, I knew that his health was failing because of an inoperable brain tumor. But, when I received the call telling me that Johnnie had died, it still came as a real shock. Johnnie Cochran was not only an outstanding lawyer, he was a very good man. In fact, he was a great lawyer long before the case involving O.J. came along. His compassion for people and his love for the law and the pursuit of justice made Johnnie a living legend. This man died much too soon and he will be missed. Nevertheless, Johnnie Cochran accomplished a great deal in his lifetime that his family can look back on with pride. Our prayers go out to the Cochran family and to my very good friends who practiced law with Johnnie.

The Florida Tragedy

I am not going to say very much about the sad story that came out of Florida involving Terri Schiavo and which drew so much attention nationwide. But, I will say that the politicians who got involved to help themselves politically probably hurt themselves in the process. Unfortunately, they did little to help the family. In fact, I truly believe some of the politicians by their actions made things much worse for the family members. To give false hope to a family in that setting is pretty sad, to say the least. If nothing else, this tragic story will make folks realize that a **living will** is a necessity in today's world.

Exxon Mobil To Appeal Louisiana Ruling

Exxon Mobil Corp. plans to appeal an adverse ruling from a Louisiana appeals court. The giant oil company says the court didn't go far enough in reducing a $1 billion jury verdict in an environmental-damages case. The appeals court had reduced punitive damages from $1 billion to $112 million. But, the jury's award of $56 million in compensatory damages was not reduced. In 2001, a jury in Orleans Parish, Louisiana, awarded the verdict to the family of retired Jefferson Parish Judge Joseph Grefer. The family claimed that Exxon's offshore pipe-cleaning operation contaminated the family's property with radioactive waste. It was proved at trial that Exxon knew about radiation on drilling pipes as early as 1981, but didn't tell local residents and workers. Exxon says the case will be appealed to the Louisiana Supreme Court.

The appeals court said the $1 billion punitive award was unreasonable and out of proportion to the harm suffered by the Grefer family. But, it is most significant that the judges criticized Exxon Mobil, saying the oil company **knew** that its oil-drilling pipes posed a **threat** to the people who cleaned them. The lawsuit was filed in 1997 against Exxon and Intracostal Tubular Services, the company that leased the family land and cleaned oil-field pipes for Exxon. Our experience with Exxon tells us that the company actually believes it is so powerful and influential that it is above the law. When you consider that Exxon earned a record $25.33 billion last year and is experiencing record profits so far this year, it is easy to see how the men who run the company believe as they do. The company has a history of keeping cases filed against them tied up in the courts until their opponents finally give up the fight. I hope that trend will end one of these days. No corporation—or person, for that matter—should be above the law.

Exxon Mobil Boss Won't Need To Worry About The Price Of Gasoline

Exxon Mobil Corp. had a record-breaking year in 2004 as a result of the excessively high price of oil and gasoline. Its chairman and chief executive, Lee R. Raymond, shared in the company's success with a $38 million compensation package. Mr. Raymond was paid $7.5 million in salary and bonus plus restricted stock worth $28 million and nearly $2.6 million more in other compensation and incentives. The compensation committee of Exxon's board decided this compensation package was appropriate when compared to pay for CEOs of other U.S. oil companies and major corporations. Raymond's compensation was detailed in a filing by Exxon with the Securities and Exchange Commission. Exxon earned a record $25.33 billion in 2004, which is said to be the highest profit ever for a U.S. company. Exxon's 2004 revenues of $298.03 billion were also a company record. It is difficult to see how the folks who are paying exorbitant prices for gasoline at the time can make it. It is equally hard to justify how the giant oil companies can be bragging about their record profits.

Study Predicts Major Loss In Funding For Alabama Medicaid

A recent study contained some bad news for Alabama citizens concerning Medicaid. The federal government will cover less of Alabama's Medicaid costs in 2007, forcing the state to draw more than $50 million from the General Fund to fill the gap, according to recent projections from the Washington-based study. That fiscal year, the federal government will likely pick up 68.3% of the Medicaid costs in Alabama, compared to the 69.5% in fiscal 2006. The decline translates into a $50.4 million loss. More than 935,000 Alabamians are enrolled in Medicaid, which was established in 1965 to serve as a health care safety net for the poor and medically disabled. Nationwide the program serves about 41 million Americans. Medicaid is the second-largest health care insurance program in the country, behind employer-backed insurance.

Alabama Medicaid's budget costs about $3.9 billion in annual federal and state funding. The agency is seeking an increase from the General Fund for fiscal 2006, from $364.4 million to $429.4 million. Federal Medicaid funding is reflective of a state's per capita personal income compared to the national average. The 2007 projections are based on a three-year average, 2002-2004, of those figures. Preliminary results show Alabama ranks sixth in the nation for that period, with a 12.5% jump in income. That means the state would experience the sixth largest percentage drop for fiscal 2007 in federal Medicaid support. Overall, states would experience the most substantial two-year drop in federal matching support in history, the study revealed. I don't expect Alabama's money woes to get any better until those in control of government come to realize that we must either raise taxes or severely cut services. This report on Medicaid simply reinforces the obvious. We are facing a fiscal disaster unless some source of funding is found or services drastically cut.

Source: *Associated Press*

State Of Mississippi Settles With MCI

The State of Mississippi has settled its claim with MCI, Inc. on a pro tanto

basis. The case will proceed against KPMG, the accounting firm that devised the fraudulent royalty plan for WorldCom in 1997. KPMG failed to tell the state that the plan included payments for "the foresight of top management." This foresight, or expertise, was treated as an asset, and MCI charged its subsidiaries fees for using it. Mississippi officials said they approved the royalty plan for the number two long distance carrier based on the understanding that the royalty payments were only for service marks, trademarks, and other intangibles. This turned out not to be true. A year later, KPMG told WorldCom (now MCI) that to "mitigate" the risk that Mississippi might redefine the royalties and tax them at a significantly higher rate, the company should go back to the state and clarify that the payments included "management foresight." It was obvious that KPMG was becoming concerned over what it had done. While the 1998 memo KPMG wrote for WorldCom, which was called "State Tax Minimization," will be damaging to the accounting firm, there is much more incriminating evidence against them.

I understand that MCI will pay $300 million to settle all but three of the back tax claims by the other states. The other states with large claims are Florida, Georgia, Maryland, Massachusetts, and Pennsylvania. The remaining claims by the State of Mississippi against KPMG will be pursued if that defendant elects not to settle. Jim Hood has proved to be a most effective Attorney General for the people of Mississippi. But for his hard work and persistent efforts, this case would never have been uncovered. Clearly, it wouldn't have resulted in this settlement without General Hood's dedicated efforts. Our firm was pleased to have played a role—along with the other firms—in bringing this settlement about for the State of Mississippi.

II. LEGISLATIVE HAPPENINGS

The Attorney General Pushes Crime Bills

Attorney General Troy King has called on Alabama legislators to pass five bills aimed at strengthening the protection of children from exposure to methamphetamine labs, child pornography, and sex offenders. As we all know, meth labs have spread across the state like an epidemic. One of the bills in the crime package would change the crime of exposing children to meth labs from a misdemeanor to a felony, and make it punishable by up to 10 years in prison and up to a $5,000 fine. The Attorney General was joined by my good friend Miriam Shehane, the state's best-known victims' advocate, in pushing for passage of the bills. I believe they are on the right track.

A bill was introduced in the House of Representatives by Rep. Frank McDaniel that would restrict sales of common cold and allergy medicines that can be used to make meth. The McDaniel bill would bar sales of products containing ephedrine and pseudoephedrine to people under age 18. It would also require the drugs to be placed behind-the-counter. Customers would be required to present a photo identification and sign to buy the medicines.

Another bill in the package backed by the Attorney General would expand the definition of obscene material to include video, digital, and computer materials, not just printed materials. Another would require sex offenders to register with police within seven days, instead of 30 days, when they move into a community. The sex offender bill also would require offenders to report where they work, and would make failure to register a felony punishable by up to 10 years in prison and up to $5,000. Presently, failure to report is only a misdemeanor.

These were the major bills in the package. In my opinion, each should be passed and signed into law. The Legislature has plenty of time to get each of the bills passed. Protecting our children should be a top priority item in the session. I believe that the legislators will agree and promptly pass the entire package.

Source: *Birmingham News*

The Rest Of The Session

Even though the session has been moving slowly, there is still adequate time to pass some badly needed legislation. However, the session will have to end on May 16th, which means time is running out fast. There are a number of good bills in the House and Senate that should be passed. Of course, these include the budget bills. The following are a few of some of the others that should be passed and I believe they are good bills:

- **Alabama Supreme Court** – The bill that would change the way Alabama Supreme Court justices are elected should be passed. It calls for elections by the same district lines as State School Board members. This would make campaigns much less expensive. Less expensive means less fund-raising. Less fund-raising means less inclusion of the special interests and more accountability to the people. Voters would have a new degree of familiarity with the candidates. Many people don't really know the candidate they are voting for in the Supreme Court races.
- **ADEM** – I believe passage of legislation requires the Alabama Department of Environmental Management to publish the demographic information around possible sources of pollution, such as landfills. It also establishes a Department of Environmental Justice within ADEM. This won't cost the taxpayers, because the costs are part of the application process of the business or landfill wanting a permit. Senator Quinton Ross is the author of the bill in the

Senate. Rep. Joseph Mitchell is the sponsor in the House. The bills are Senate Bill 335 and House Bill 505.

- **The Red-Light Camera Bill** – A bill in the house sponsored by Rep. David Grimes should be passed. There is also a companion Senate bill sponsored by Senator Phil Poole. More will be said on this legislation in the Transportation Section of this issue. I believe that this legislation is badly needed.

- **The Landlord-Tenant Bill** – I hope the Legislature will pass a fair landlord-tenant bill. SB 247 is being supported by Appleseed, Alabama Arise, the Southern Poverty Law Center, and Alabama Watch. The bill came out of the Senate Judiciary Committee on March 30th and is waiting to be put on the special order calendar. Senator Myron Penn is the sponsor of the bill.

- **The Crime Package** – The bills referred to above, which are supported by the Attorney General, law enforcement, and victims' advocates, should be passed.

- **The Campaign Finance Reform Bill** – At this writing, the House bill that was before the Senate was being held up by a filibuster. It is difficult to understand how anybody could be against shedding light on political fund-raising by nonprofit groups. In my opinion, any group that spends money trying to influence elections, referendums, and legislation should have to disclose who their donors are. Unless they have something to hide, this information should be given freely by these groups. I hope by the time you read this account, the bill will have passed and been signed into law by Governor Riley.

Reform Of The 1901 Constitution

The long-running debate over whether to rewrite Alabama's 104-year-old constitution appears to have hit another tough roadblock in the Legislature. The Senate Constitution and Elections Committee took up the bill that would allow Alabama residents to vote on whether they want to call a convention to rewrite the constitution. But, the Committee failed to vote on the bill sponsored by Senator Ted Little of Auburn. Senator Little's bill would require a statewide referendum to be held on whether to hold a convention to rewrite the constitution. If Alabama voters approved holding a convention, delegates would be elected from Alabama's 105 House districts and would meet in a convention to write a new constitution. I had hoped that this would be something that might have a chance to pass the Legislature. But, it's now certain that reform is dead for this session.

Lenora Pate of Birmingham, co-chair of Alabama Citizens for Constitutional Reform, appeared before the Senate Committee and told the Senators that the 1901 Constitution was written at a time when blacks and whites were totally segregated in Alabama, adding that "It was framed for illicit purposes to preserve segregation, which taints the entire document." While that might not sit well with some Alabamians, I suspect there is some truth to Lenora's assessment. While it wasn't the sole reason for the document, I do believe that racial motivations played a role in placing some of the provisions in the Constitution. However, there are many other reasons, including the need for Home Rule, that convince me that we must deal with this problem.

I don't believe there is any chance that a bill to reform the Constitution will pass during this session. But, I hope those who are pushing reform won't give up the fight. Interestingly, there hasn't been an outcry of support for constitutional reform around the state. According to the legislators I talked to, they don't hear very much about reform back in their districts. That will have to change if reform is ever to become a reality. I believe we badly need a new Constitution and hope that most Alabama citizens feel the same way even though it doesn't appear to be a top priority at this point. In any event, a convention to write a new document would be my preference, and I would like to see that happen soon.

Alabama Needs A Landlord-Tenant Bill

Alabama and Arkansas are the only states with no law clearly spelling out that landlords must provide livable housing. There are competing bills in the Alabama Legislature that would create a uniform landlord-tenant law for the state. Unfortunately, lobbyists for renters and lobbyists for landlords were far apart on the proposals when we sent this issue to the printer. The chances that either bill will pass this session appear slim. Kimble Forrister, state coordinator of Alabama Arise, a coalition of churches and civic groups that lobbies for poor people, correctly stated: "Tenants in Alabama basically have only the rights that are spelled out in their leases. They lack the protections they would have in other states." Forrister says abuses range from tenants not getting their security deposits back to people living in unheated and unsafe dwellings with leaky roofs and broken plumbing. It's particularly a problem in college towns and poor, rural communities.

Alabama badly needs a law spelling out the responsibilities of landlords and tenants. Landlords should provide basics, such as working plumbing, heating, and a sound roof for their tenants. The tenant-friendly bill would allow a tenant to withhold up to a half-month's rent if minor repairs weren't made after a landlord was notified of the problem. That's needed particularly for poor people who can't afford to take their landlords to court. I am hopeful the Legislature will pass a good bill.

III. COURT WATCH

Chief Justice Orders Review Of Alabama Courthouse Safety

I was on the phone with an Atlanta lawyer at the time when the Atlanta courthouse shooting occurred in Atlanta last month. As we all know, a state judge, court reporter, and Sheriff's deputy were shot and killed by a prisoner awaiting trial. That series of shocking events has caused court officials around the country to take stock of their respective situations concerning security. This has prompted Chief Justice Drayton Nabers to order a statewide review of safety measures in all Alabama state courts. A committee of court officials is presently looking at ways to standardize courthouse security. Randy Helms, who is doing an excellent job as head of the Administrative Office of Courts, stated:

> *We've got attorneys getting concerned now as well as jurors from what happened in Atlanta. It's not just the judges and the court personnel but the general public, particularly jurors, who are concerned.*

There hasn't been a review of court safety in Alabama since Chief Justice Perry Hooper, Sr. requested that courthouses across the state establish and implement security plans. Unfortunately, there are many courthouses today that have virtually no security in place. Chief Justice Nabers has now ordered a new review and the Administrative Office of Courts has formed a committee to create uniform guidelines for courthouse security. Each county should have basic security measures in place. The State of Alabama is looking at using money from the Homeland Security Department to pay for the new measures, but funding is uncertain, according to Randy Helms. All courthouses in our state should be made as safe as possible for persons who are involved as jurors, parties, witnesses, or just folks who come there for any reason. The governor, Legislature, the Administrative Office of Courts, and county governing bodies have a shared responsibility in this area of concern. We can't afford to ignore this problem any longer.

Report Says Federal Judges Can't Find The Frivolous Suits

Frivolous litigation is not a major problem in the federal court system, according to an overwhelming majority of federal judges who participated in a recent survey. The survey, conducted by the Federal Judicial Center, was based on the responses of 278 federal district court judges. Seventy percent (70%) of the respondents called groundless litigation either a "small problem" or a "very small problem," and 15% said it was no problem at all. Only 1% called it a "very large problem," 2% called it a "large problem," and the rest rated it as a "moderate problem" in their courts. This pretty well confirms what I already knew. The frivolous lawsuit claims simply can't be verified.

The survey asked judges their opinion on proposed changes to Rule 11 of the Federal Rules of Civil Procedure, which since 1993 has allowed, but has not required, judges to impose sanctions on attorneys who bring frivolous lawsuits. Eighty-seven percent said they favored retaining Rule 11 in its current form. In addition, 91% of the judges surveyed opposed provisions in the Lawsuit Abuse Reduction Act, which won House approval in the last Congress, that would require judges to impose mandatory sanctions on attorneys who bring frivolous lawsuits. The Washington-based Federal Judicial Center is the research and education agency of the federal court system. "Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure" is available at www.fjc.gov.

Source: *Business Insurance News*

Access To Justice At Risk

For the last decade, the judicial system has been under relentless attack by some politicians and the tort reformers. In fact, there has never been a time when the judicial system in this country has been under a more harsh attack than during the present assaults. The jury system has been especially hard hit. The judges who work in the system have also been targeted, and that is totally unjustified and most unfair. It is most disturbing to hear and read what some of our politicians are saying about what I believe to be a very good and workable system of justice. Unwanted attacks on judges have become standard fare for a few politicians who have been riding the tort reform horse. I believe it is necessary for those of us who believe in the system to speak out and defend it. The following is an op-ed piece written by my friend Arthur Bryant, Executive Director of Trial Lawyers for Public Justice, for the *National Law Journal* that makes the case for saving the system very well.

> *This is a unique time in our nation's history. America was founded by people who understood that power unchecked is power abused. That's why we have, among other things, separation of powers, the Bill of Rights and the right to a day in court. At this moment, however, many of those with power-in both the public and private sectors-have few restraints. They can only be held accountable in the courts. So they're trying to do to many Americans what the Bush Administration tried to do to "enemy combatants"—eliminate their access to the courts. Take a look around. Throughout America, corporate wrongdoers are being held liable for injuring, discriminating against and cheating their customers, employees and investors. What's their solution to this problem? Eliminate access to the courts. They're amending their consumer, employment and investors'*

contracts explicitly to ban individual and class action litigation. They're expanding federal preemption, the use of binding mandatory arbitration and court secrecy to preclude many suits and bury the rest....Nearly a century ago, the Supreme Court said, 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.' Chambers v. Ohio Railroad Co., 207 U.S. 142, 148 (1907)....In America, the courts are the one place where even the poorest, most powerless person can hold the richest, most powerful person or corporation accountable. Extremely emotional and heated disputes are resolved nonviolently in the courts every day. If they can't be, they'll be resolved in the streets—because our nation is violating the principles on which it's based. In the United States of America, we don't pledge allegiance to liberty and justice 'for some.' We must keep the courthouse doors open-and preserve access to justice-for all.

Sources: *The National Law Journal* and Trial Lawyers For Public Justice

Attacking A Free Judiciary Can Do Great Harm

There was a great deal of self-serving grandstanding recently on an issue that affected a most unfortunate woman and her family. Perhaps the low point in the politicking over the tragic Terri Schiavo story came when the House Majority Leader, Tom DeLay (R-TX), actually threatened the judges who ruled in her case. Rep. DeLay announced to the nation that "the time will come for the men responsible for this to answer for their behavior, but not today." (Senate Majority Leader Bill Frist (R-TN) made similar statements.) Perhaps, DeLay should consider what he says before he speaks out on such a sensitive issue. We have just experienced the fatal shooting of one judge in a Georgia courtroom and the killing of two family members of a federal judge in another state. At best, DeLay's words were an appalling example of irresponsibility in pursuit of raw political gain. Unfortunately, his absurd statements were a calculated part of a growing assault on the judiciary. The time has come for a stop of the public attacks. Groups who claim to be conservative are trying to bully judges into following their political line. Their motives are not only suspect, they are just flat wrong. The claims that "activist judges" are running the government are a part of the tort reform movement.

The Schiavo case was tragic because it dealt with a family dealing with highly personal issues of a medical nature. The medical and legal communities were certainly a part of the story. The judiciary was required to decide the legal issues. Doctors who were familiar with their patient should have been allowed to deal with Mrs. Schiavo's medical problems and her condition. Rushing a bill through Congress that authorized the federal courts to rule on the case was a first in history. I believe they were wrong to get involved. There were time-honored legal doctrines that should have led them to stay out as applied to the case. Congress attempted to require the courts to ignore the law. When the federal courts took the case but ended up agreeing with Florida's state courts, federal judges became the next target. Rep. DeLay issued a veiled threat, which was totally irresponsible, saying:

Congress for many years has shirked its responsibility to hold the judiciary accountable. No longer.

Impeachment charges against the judges involved were also mentioned as a possibility. A lot has been said and written about the courts and the Florida tragedy. Much of it was unwarranted and unfounded. Let's take a look at what the courts actually had to say about the issues they dealt with. Judge Stanley Birch Jr., a conservative and highly respected member of the Atlanta-based United States Court of Appeals for the Eleventh Circuit, declared in the Schiavo case:

The legislative and executive branches of our government have acted in a manner demonstrably at odds with our founding fathers' blueprint for the governance of a free people—our Constitution.

Does this language sound like it's coming from a judge who wasn't following the law? I think not! Our forefathers established a system of government in which the three branches—legislative, executive and judicial—were designed to act as checks and balances for one another. If we ever get to the point in this country where the judicial branch becomes so weak that it is ineffective, our country will be in even deeper trouble than it is today. If the Congress were successful in curtailing the judiciary's ability to act as a check on the other two branches, the nation we all love would be far less free. Our founding fathers never intended the legislative branch to be superior to the judicial branch. I have to believe most members of Congress would have to agree with that assessment. In any event, I don't believe any of us want what took place in Florida to happen again.

Whistleblowers Protected

An Alabama case has resulted in a noteworthy decision coming down from the U.S. Supreme Court. A landmark gender-equity law will now protect whistleblowers who accuse academic institutions of sex discrimination, according to the High Court. The result is that coaches and teachers may sue for retaliation if they are fired for complaining of sex discrimination on behalf of others. An Alabama high school coach, Roderick Jackson, who said his girls' basketball team received worse treatment than the boys' team, brought the case. He lost both at the trial court level and then in the U.S. Court of Appeals for the Eleventh Circuit. But, the U.S. Supreme Court

changed all of that. This is being called a victory for women's advocates who say the legal protection will prompt reports of bias that would otherwise go either unsaid or unheeded. The justices said that Congress intended to allow whistleblower suits when it passed the Title IX law. Justice Sandra Day O'Connor wrote for the majority:

> *The text of Title IX prohibits a funding recipient from retaliation against a person who speaks out against sex discrimination, because such retaliation is intentional discrimination on the basis of sex.*

Justice O'Connor further stated that in order for the coach to prevail on the merits, the coach will have "to prove that the board retaliated against him because he complained of sex discrimination." Joining in the majority opinion were Justices Stevens, Souter, Ginsburg and Breyer. The 1972 law, best known for promoting equity in women's athletics, bars sex discrimination in any educational program receiving federal funds. Students or others could already sue if they thought they were shortchanged based on their sex. The federal act was silent as to the rights of whistleblowers—regardless of gender—who aren't direct victims of discrimination, but who claim retaliation. Since 1975, the federal Department of Education (and its predecessors) have interpreted Title IX to cover retaliation claims.

The thing that resulted in Mr. Jackson losing his coaching job in 2001 wasn't that big of a deal. He repeatedly asked Birmingham school officials to provide his team a regulation-size gym with basketball rims that weren't bent—just like the boys' team had. He then sued under Title IX, claiming wrongful termination. The lower courts disagreed and threw out his lawsuit, ruling that Title IX did not authorize retaliation claims. The Supreme Court's ruling now allows Mr. Jackson to proceed to trial to try to prove he was suspended because of his complaints.

There were four dissenters, including Justice Clarence Thomas, who said that whistleblowers shouldn't be given protection unless Congress explicitly says so. In the dissent, it was noted that other civil rights laws have specific provisions addressing retaliation. Justice Thomas wrote:

> *We require Congress to speak unambiguously in imposing conditions on funding recipients through its spending power.*

Support for the Jackson case came from a coalition of 180 civil rights groups, including the NAACP, the American Civil Liberties Union, and the American Federation of Teachers. A large number of women's advocacy groups supported Coach Jackson's position on behalf of women. I understand that the Southern Poverty Law Center helped Mr. Jackson on his appeal and was a tremendous asset to the case. Alabama was among 9 states in opposition. The others were: Delaware, Hawaii, Nevada, Oregon, South Dakota, Tennessee, Utah, and Virginia. Those states—along with the National School Boards Association—argued that allowing retaliation claims would unfairly open the door to a flood of litigation. Mr. Jackson, who remained on the payroll as a teacher, was rehired as coach in 2003 on an interim basis. The old gym now has two new, regulation-sized hoops. You have to wonder why the hoops weren't put up at the outset.

Source: *Associated Press*

A Case That Could Have A Chilling Effect On The News Media

In a late March decision, the U.S. Supreme Court refused to shield the news media from being sued for **accurately** reporting a politician's **false** charges against a political rival. In allowing a Pennsylvania Supreme Court ruling to stand, the High Court may have made the news media less likely to report on political activities. In the reported case the Pennsylvania court held that a newspaper can be forced to pay damages for having reported that a city councilman called the mayor and the council president "liars," "queers," and "child molesters." The case turned on whether the First Amendment's protection of the freedom of the press includes a "neutral reporting privilege." Many courts around the nation have said the press does not enjoy this privilege.

Lawyers for more than two dozen of the nation's largest press organizations had urged the U.S. Supreme Court to take up the Pennsylvania case and to rule that **truthful** news reports on **public figures** deserved to be **shielded**. It was pointed out that politicians have been "hurling false and damaging charges at their rivals throughout American history." The papers argued that the press cannot do its duty to inform the public if it is not free to report what public figures say. From my perspective, that seemed to make sense. Politicians should have to follow ethical standards, and when they cross the line and deliberately lie, and their lies hurt an innocent party, they should have to pay the consequences. But, the victims of a political figure's lies should have some recourse when a newspaper prints what would appear to be an obvious lie couched in a political attack. There has to be a balance of the equities if that is possible. The media is actually caught in the middle, and the courts have to decide what will be allowed and what is improper when it comes to reporting the news.

The Pennsylvania Supreme Court said the press has never "enjoyed a blanket immunity" from being sued over stories that print falsehoods that damage a person's reputation. The media was said to have a burden—even though very small—"to refrain from publishing reports that they know to be false." How does a media outlet determine what is false? That seems to be the crux of the issue and there is no easy answer in my opinion. It should be noted that the U.S. Supreme Court's refusal to take up the case sets no legal precedent. But, the Court's action, or better put, inaction, will make folks in charge of newspapers leery of allowing reporters to write about political happenings.

Source: *The Los Angeles Times*

Court Issues Important Age Discrimination Ruling

The Supreme Court had already established that so-called "disparate impact" claims are allowed under Title VII of the 1964 Civil Rights Act, which bans discrimination based on sex, religion or race. Now such "disparate impact" claims can be brought under the Federal Age Discrimination in Employment Act as well. At issue were workplace policies that appear neutral but actually disproportionately hurt older workers. The Supreme Court has now made it easier for any worker over 40 to allege age discrimination, ruling that employers can be held liable for the discriminatory effects of such policies even if the employers they never intended any harm. About 75 million people—roughly half the nation's workforce—are covered by the Court's decision. But, the ruling makes it clear that older workers will have a high threshold to prove their claims. Justice John Paul Stevens wrote that in some cases employers are within their rights to treat workers differently because of age: "Age...not uncommonly has relevance to an individual's capacity to engage in certain types of employment."

The Court's ruling sides with older police officers in Jackson, Mississippi, in saying they do not have to prove that the city deliberately tried to discriminate against them, just that the policies disproportionately harmed them. It should be noted that the High Court actually dismissed this case, saying the officers failed to demonstrate that the city was guilty of discrimination. The effect of the ruling is that older workers now have less of a burden to raise their claim in court when suing under federal law, although ultimately it may still be hard for them to win. Advocates for older workers such as the AARP were most happy with the ruling. Laurie McCann, senior attorney for AARP, stated:

> *This is a major boost for the fight to eliminate age discrimination in the workplace. Evidence that an employer is intentionally out to get older workers is very hard to come by.*

I don't believe, however, that this ruling is the final word on the subject of age discrimination. There will be more cases and the guidelines will be made more clear by the U.S. Supreme Court in future decisions.

Source: Associated Press

Ford Loses Appeal On Engine Part Class Action Suit

A federal appeals court has ruled that a legal claim against Ford Motor Co. over allegedly defective engine parts can proceed as a class action lawsuit. The suit focuses on plastic intake manifolds in some Ford cars. It was alleged that Ford knew the plastic intake manifold could crack as early as 1995. The use of the part was discontinued in 2002. The U.S. Court of Appeals for the Ninth Circuit denied Ford's appeal of a lower court decision granting class action certification. In the ruling, a three-judge panel said:

> *Ford claims that it is being forced into the prospect of an "all or nothing" class trial in which well over 100,000 class members will be collectively seeking an award approaching or exceeding $100 million dollars in damages and attorneys' fees. Ford has made no showing that it lacks the resources to defend this case to a conclusion and appeal if necessary or that doing so would "run the risk of ruinous liability." Although the instant lawsuit is definitely more than a mere unpleasantry, the impact of the class certification alone does not support an appeal. Further, the district court did not abuse its discretion in finding that, absent a class action, class plaintiffs would have no meaningful redress against Ford.*

There are claims that are properly pursued in the form of a class action lawsuit. This case clearly appears to be one that would be best handled as a class. As pointed out by the lower court when it certified a class, none of the class plaintiffs could afford to pursue their individual claims as separate cases. My friends Richard Dorman and Greg Breedlove of Mobile were members of the litigation team handling the plaintiffs' case. It appears that they achieved a significant victory in this ruling. I suspect that Ford will settle this case in the near future.

Bo Jackson Sues Newspaper That Reported He Took Steroids

Former Auburn star Bo Jackson has filed a defamation lawsuit in Cook County, Illinois, against a California newspaper. The paper had quoted a dietary expert who said the former two-sport star at Auburn University used steroids. The lawsuit was filed against the Inland Valley Daily Bulletin, MediaNews Group Inc., MediaNews Group Interactive, Inc., the sports editor, and three other employees of the newspaper. Bo is suing for both compensatory and punitive damages, and it appears that he has a very good case. I would never believe that Bo took steroids or even considered doing so. I met him when he was a freshman at Auburn and Bo was a gifted athlete who had no need for artificial help. He was a "natural" and that should be undisputed.

Bo, now a businessman who lives in suburban Chicago, talks to children about health and nutrition issues. He denied ever using or even seeing steroids in any form. His statement to the media was direct and to the point. He says: "I'm not going to sit here and say, 'Maybe I did or maybe I didn't,'" Jackson said. "I didn't. Never did. Never had to do." The newspaper was asked to print a retraction. The paper issued an apology after the lawsuit was filed. But, the damage was done when it wrote the article. The story was picked up and spread throughout the sports world. In my opinion, it will take more than a belated apology to correct this situation. No person or corporation—even a newspaper—should

be allowed to destroy a person's reputation by reckless actions.

Verdict Against Pensacola Newspaper

An $18.28 million jury verdict was recently upheld by a Florida state court in a case against the *Pensacola News Journal*. These were compensatory damages for actual harm to a businessman by the newspaper's casting him in a "false light." A jury in December 2003 ruled for Joe Anderson Jr., founder of the Anderson Columbia Road Paving Company in Lake City, Florida. Anderson alleged the newspaper's use of the term "shot and killed" in a story falsely implied he had murdered his wife, although the article later noted that authorities determined it had been a hunting accident. The *News Journal* referred to the shooting, which occurred several years earlier, in a series on Anderson and his company that the newspaper published in 1998 and 1999. The jury was unable to agree on punitive damages, so the trial judge ordered a second trial on that issue.

Source: *Associated Press*

Asbestos Exposure Of Owens Corning Is Set At $7 Billion

A federal judge has determined that building-materials maker Owens Corning is exposed to $7 billion in potential liabilities for asbestos damages. The ruling signed by U.S. District Judge John Fullam of Philadelphia is a key decision in Owens Corning's long-running bankruptcy case. Financial creditors of the Toledo, Ohio, company argued that the company's asbestos liabilities should be pegged at between $2 billion and $3 billion. Lawyers for asbestos claimants had asked the judge for an estimate of $11 billion. The effect of this ruling is that it sets a baseline for negotiations on a reorganization plan under Chapter 11. Owens Corning expects to appease both financial and personal-injury creditors with shares of equity in its still-successful business operations. The higher the amount estimated for asbestos liability, the more equity Owens Corning would set aside for people with claims for disease and death caused by asbestos. A trust will be created under the company's Chapter 11 plan to pay present and future asbestos claims. Owens filed for bankruptcy protection in October 2000 as a result of asbestos personal injury claims against the company. In his opinion, the judge indicated that punitive damage awards are unlikely because Owens Corning and other companies quit producing asbestos products 20 years ago.

Source: *The Wall Street Journal*

Judge Approves $21.9 Million Holocaust Award

A federal judge has approved a $21.9 million award to heirs of two wealthy families victimized by the Holocaust, more than 65 years after a Swiss bank turned over their fortune to the Nazis. The award was by far the largest single claim paid thus far in a case against Swiss banks accused of betraying their Holocaust-era clients to gain favor with the Nazis. The previous high for an award was in the $4 million range. A federal judge in New York City approved the payment based on the recommendation of a court-appointed tribunal that disburses funds set aside under a settlement between Holocaust survivors and the banks.

In its report, the tribunal called the award "unique in its size" and "a striking example of the widespread betrayal of Jewish clients by the Swiss banks." Holocaust survivors and their families sued Credit Suisse Group, UBS AG, and other Swiss banks, accusing them of stealing, concealing from the owners, or sending to the Nazis hundreds of millions of dollars worth of Jewish holdings and destroying bank records to cover the paper trail. A $1.25 billion settlement was approved in 1998 and appointed the tribunal to process thousands of claims. Thus far, Holocaust survivors and their heirs have received more than $254 million in awards.

Source: *Associated Press*

The Public Doesn't Need Confidential Settlements

We constantly read where a settlement in a lawsuit has been reached, but the amount paid or some other aspect of the settlement is made confidential. A good number of people have asked, "Are confidential settlements good or bad?" Confidential settlement agreements are on occasion referred to as "secrecy agreements." As a plaintiff's lawyer, I have been involved in many cases in which a corporate defendant has offered to settle the case, but only if my client agrees to keep the matter confidential. I take the position these "secrecy agreements" are always bad in cases where a product severely injures or kills a person. That's because secrecy agreements in product liability cases allow corporate defendants to conceal information about serious defects in their products.

But, certain factors in many product cases make confidential settlements unavoidable for the injured party. These cases are complex cases that generally require a substantial amount of time and money on the part of the law firms handling such cases. In a case of this sort, normally one or more persons have been catastrophically injured or killed. In many cases, the financial and emotional stress is overwhelming because the injured person is paralyzed or has suffered a traumatic brain injury, robbing him or her of the ability to work and earn a living. That injured person is normally dependent on family members and medical providers for his or her daily living activities. Their medical bills are usually astronomical. As a result, in such cases, the spouse or caretaker is also put under an enormous financial and emotional strain. The financial strain can be so great that the caretakers aren't able to provide adequate medical care for the injured person. Even with the law firm bearing the expenses associated with the litigation, the families have medical bills and loss of income to deal with.

Assuming a defective product is

involved and the injury is significant, defendants will normally attempt to settle the case at some point. Often, a significant settlement offer will be made to our client. Once the sum has been offered and our client realizes they can now provide necessary medical care for the catastrophically injured person, the client will accept the defendant's demand for confidentiality and secrecy. That's because they generally have no choice at that point. As a lawyer, it is easy for me to oppose any confidential settlement, but it is much more difficult for the family who has been financially wiped out by the medical costs and other expenses to reject such an offer. Corporate defendants know that they have the leverage in such cases to obtain secrecy in the settlements.

Although the individual's circumstances surrounding the case may suggest that confidentiality is the only reasonable option for the client, confidential settlements are generally bad for the public. Confidentiality agreements allow a corporate defendant to hide its wrongful conduct. These agreements generally forbid the injured person and lawyers from publicly discussing the information they obtained about a defective product. In other words, a corporate defendant could know that a product is highly dangerous, agree to settlements in a series of individual death or serious injury cases around the country on a confidential basis, and then continue selling the product to an unsuspecting public.

This situation occurs even more frequently when the product is a high revenue item. The defendant will almost always require a confidentiality agreement before it settles a case. The confidentiality agreement generally requires the lawyer and client to agree not to discuss in any fashion the amount of the settlement or any technical data that prove the product was dangerous. These agreements usually forbid the lawyer from disclosing any statistical data showing the number of people who were seriously injured or killed as a result of the defective product. The right to free speech is one of our greatest freedoms in America. Unfortunately, manufacturers of defective products can stifle the free flow of information by the use of confidentiality agreements.

There is at least one state (South Carolina) that prohibits confidentiality in settlement agreements. I am hopeful that Alabama's judicial or legislative bodies will one day enact a similar law to prohibit secret settlements. I am convinced that confidentiality in settlements is bad for public safety. Someone reading this article might own a product that is defective and not even know it. No manufacturer should be able to conceal this type information by use of "secrecy agreements." Ending the practice of secrecy would increase the free flow of safety information. In my opinion, this would help to avoid future harm caused to unsuspecting consumers. If you believe that confidentiality agreements should be prohibited, please contact your U.S. Senator or member of Congress and urge them to back legislation that would ban secret settlements. You should also contact legislators in your state and encourage them to back this type legislation on the local level.

The University Of Colorado Dismissed From Lawsuit

A federal judge has dismissed a lawsuit against the University of Colorado filed by two women whose allegations of sexual abuse sparked a scandal last year over the football team's recruiting practices. The plaintiffs claimed they were raped by football players or recruits. The judge said the plaintiffs failed to meet two key criteria necessary to their claim that the school violated federal Title IX law by fostering an atmosphere that led to their alleged assaults. The judge said the two women failed to prove the university had actual knowledge of sexual harassment, and the women didn't show the school was deliberately indifferent to any known sexual harassment. The judge, in his order, stated:

> *There is no dispute that the sexual assaults described by the plaintiffs constitute severe and objectively offensive sexual harassment. How - ever, I conclude that…no rational trier of fact could conclude that the plaintiffs have established the first and second elements listed above.*

The women had filed separate suits that later were combined. Under the judge's ruling, the case cannot be refiled by the rape victims. Even though the lawsuit failed, the publicity surrounding the recruiting scandal has gotten the attention of college administrators around the country. Recruiting of high school athletes by colleges has to be controlled. I hope we have seen the last of episodes such as those occurring at the University of Colorado. In the final analysis, it is up to the coaches, athletic directors, and universities to make sure that the recruiting of athletes is handled properly.

High Court Rules In Securities Fraud Case

The U.S. Supreme Court ruled last month in a securities fraud case that investors must show a clear link between the alleged fraud and a drop in stock price to proceed with their individual lawsuits. I have not had an opportunity to read the opinion in that case at press time, but will do so immediately due to its apparent importance.

This was a class action lawsuit by investors in Dura Pharmaceuticals. The plaintiffs had claimed the company made false statements concerning its drug profits and relating to FDA approval of a new drug. There had been a terrific drop in the market value of the company's shares.

The High Court reversed the U.S. Court of Appeals for the Ninth Circuit, which had ruled in favor of the plaintiff investor. Basically, the U.S. Supreme Court held that the law or standard required that a plaintiff prove that the defendant's misrepresentation caused the investor's economic loss.

Source: *USA Today*

IV. THE NATIONAL SCENE

The Indians Know How And Where To Spend Their Money

We are learning more and more about how some of the Indian tribes are spending "big bucks" to buy influence in government both at the national and state levels. It has become most evident that it pays to have friends in high places in Washington. For example, a prominent lobbyist is now under investigation for billing Indian tribes tens of millions of dollars. Jack Abramoff, a lobbyist who has very close ties to President Bush and House Majority Leader Tom DeLay, is currently being investigated. Abramoff, who is no stranger to investigations, was the lead lobbyist for Seattle-based Preston Gates & Ellis when that firm worked on behalf of the Northern Mariana Islands. The objective of the lobby group was to keep the U.S. territorial islands free from certain federal labor and immigration laws during the last half of the 1990s. An audit concluded by the Pacific islands' public auditors found that about $1.2 million in government payments to Preston Gates was "not adequately supported." The charges questioned included travel, telephone, photocopy, computer research, and outside-professional fees. The auditors said documents show that some payments to Abramoff's firm were made illegally.

The tiny commonwealth with a population of about 80,000, located in the northern Pacific Ocean near Guam, used the lobbyist to keep them free from new U.S. regulations. The audits showed that between October 1993 and September 2001 the Preston Gates firm reaped about $6.7 million from the commonwealth's government, about 72% of the government's overall lobbying payments. The Mariana Islands government was one of the firm's biggest clients.

Abramoff's new firm had the job to lobby the U.S. government "to preserve the commonwealth's current independence from certain aspects of United States immigration, customs, and labor laws, to provide representation of commonwealth's issues during the transition to the new Bush Administration, and to advance other commonwealth interests." The firm told the commonwealth government its 2001 lobbying included fighting proposals to apply a minimum wage to the Mariana Islands and to change immigration rules, working on legislation on "Made in the USA" clothing labeling rules, and educating the incoming Bush Administration about Mariana Islands issues.

But, t audit referred to above isn't the big news concerning the politically-connected lobbyist. Abramoff, a major Bush fund-raiser, currently is under investigation by a federal grand jury for deals under which he and an associate received at least $66 million from six Indian tribes to lobby for their casinos and other issues. The tribes question whether some of the charges were excessive. Abramoff's ties to Rep. DeLay have also come under fire. Foreign trips DeLay took that were arranged by Abramoff have been a topic of inquiry. Questions are being asked about whether the Texas congressman made legislative decisions based on the relationship with the lobbyist. As expected, DeLay has denied any wrongdoing. Regardless of how the investigations wind up, I have to wonder how Indian tribes can afford to pay this sort of money on lobbying activities. I don't have to wonder why they picked a man with such strong political ties to the President and to DeLay, who is, as my Uncle Buddy Hurst used to say, "a dirt-road sport!"

Should There Be A Timeline For Getting Out Of Iraq?

Congress has barely debated the war in Iraq or its aftermath since it voted to authorize the use of military force in the fall of 2002. Now, the Bush Administration is by-passing the normal budget process to ask for an additional $82 billion to fund our country's military presence in Iraq. A $600 million embassy and some 14 "enduring" bases are included in the big-ticket items. Those bases, which are permanent in duration, coupled with the absence of an exit strategy won't help to improve the situation in Iraq. I wonder how many taxpayers know how the last $87 billion Congress authorized for the war was spent. For example, it has been reported that $9 billion of this money is missing because of corrupt contracting. The corporate corruption that has undercut the rebuilding efforts and lost billions of taxpayers' money must be fully investigated and then dealt with in the courts. Some believe that as it considers another $82 billion for Iraq, Congress should insist that America develop an exit strategy from Iraq with a timeline. I am not so sure that a timeline can be established at this juncture. Do we need permanent bases in Iraq? Can we ever justify war profiteering by corporations? All I know about this issue is what I read in the newspapers and hear on the nightly news. If this is factual, those who participated should be dealt with in a harsh manner.

As of this printing, our government has spent at least $200 billion in the Iraq war. There are more than 150,000 U.S. troops in Iraq, and those troops are in constant danger. In February there was an average of 70 attacks per day by insurgents. According to news reports, the number of insurgents has more than tripled over the last year. I understand that unemployment in Iraq is between 28 and 40%. More than 700,000 children have dropped out of school and malnutrition rates among children in Iraq have nearly doubled since the war was started. In January the National Intelligence Council confirmed that Iraq is now a breeding ground for terrorists, which wasn't the case before the war started. It appears that we are now in Iraq for the long haul. Few Americans, at the outset, ever expected a permanent presence in Iraq. Lack of an exit strategy has put our nation in an occupation situation that doesn't appear to have been a part of our "war plan."

Eventually, the American people will demand an exit strategy in Iraq. But, I don't believe we have reached that point, and actually that's a good thing. We in America support our military and that's essential for the well-being of the men and women in uniform. While this war was poorly planned, our troops can't be blamed. They were told to carry out a mission and they did, and did it extremely well. Getting rid of Saddam was relatively easy. The occupation, on the other hand, has been most difficult. We must do everything in our power to bring the current occupation of Iraq to an honorable and lasting conclusion. But, it appears that will take more time. We must always support our military, and so long as our troops are on the ground in Iraq, we must support them in every way possible.

Some Hope For Decency At The FCC

I am hopeful the television and radio industries are about to come under renewed attacks over sex, violence, and profanity in their programming. Both Congress and the Federal Communications Commission (FCC) appear to be more interested in taking action at this juncture. That is coming about in my opinion because of public pressure. Good people all over the country are fed up with all of the filth that is being put out by the industry. Leading lawmakers and the new leader of the FCC have proposed a broad expansion of indecency rules, which were made a little stronger last year. They are also looking for significant increases in the size of fines and new procedures that could jeopardize the licenses of stations that repeatedly violate the rules. Both Senator Ted Stevens (R-AK), head of the Senate Commerce Committee and Kevin J. Martin, the new chairman of the FCC, have indicated that it is time to extend the indecency and profanity rules to cable and satellite television providers. Interestingly, those providers now account for viewership in 85% of the nation's homes.

Organizations opposing what they consider indecent programming have joined forces with consumer groups in this fight. The consumer groups have been trying to tighten regulation over the cable industry and force it to offer consumers less expensive packages of fewer stations. These are known as à la carte services. Some of the anti-indecency groups see à la carte services as a way of helping consumers block out programming they consider indecent. The Council has been very active in its fight to clean up the broadcasters' programming. Brent Bozell, president of the Parents Television Council, a leading advocacy organization, stated:

> *We are at a rare moment when there seems to be bipartisan energy on both sides of the political aisle and both sides of the ideological divide.*

Mr. Martin and the senior Democrat on the commission, Michael J. Copps, have consistently been among the most aggressive members of the agency on indecency issues. President Bush will now have an opportunity to make a real difference in this fight. He will appoint two new members to the five-person Commission very soon. Those appointments will determine whether the views of Mr. Martin and Mr. Copps on indecency issues will prevail at the agency. Predictably, lawyers for cable companies say any effort to impose indecency standards on paid programming would violate the First Amendment.

Last year, the agency proposed fines of nearly $8 million in 12 cases involving television or radio stations. By contrast, in 2003, the agency proposed about $440,000 in three radio cases. The number of complaints has also risen sharply, to more than 1.4 million last year, compared with 111 in 2000. You will recall that Michael K. Powell, the former chairman of the Commission, came under heavy criticism by broadcasters, civil liberties groups, and producers for taking a hard line on indecency cases. I applaud Mr. Powell for his stand. It is most encouraging that Mr. Martin and Mr. Copps have now taken an even harder line. Nobody would dispute that broadcasters and cable operators have significant First Amendment rights. But, it is equally clear that these rights are not without boundaries.

There has also been a good deal of activity in Congress. For example, the House of Representatives overwhelmingly approved a bill that would raise the amount the FCC could fine a station to $500,000, from $32,500. The bill, proposed by Representative Fred Upton (R-MI), who is chairman of the Energy and Commerce Subcommittee on Telecommunications and the Internet, was adopted by a vote of 389 to 38. The legislation also requires the Commission to hold a hearing to consider revoking the broadcast license of any station that has three indecency violations. In the Senate, meanwhile, a number of similar measures have been introduced. One bill introduced recently would increase the maximum fine to $500,000 and permit the Commission to double fines for egregious incidents, such as when the indecent material was scripted. The legislation would also require the Commission to study the V-chip, which some senators say has not been effective in blocking undesired programs, and would force the broadcasters to double the amount of children's programming they offer, to six hours rather than three. The Senate bill is sponsored by Senators John D. Rockefeller IV (D-WV) and Kay Bailey Hutchison (R-TX). Senator Rockefeller had this to say about the need for legislation:

> *I would welcome voluntary actions by the industry to address both indecency and gratuitous violence, but they aren't stepping up to the plate, and that's why Congress cannot wait any longer to protect our communities and our families. If the industry won't protect our children from gratuitous violence and indecency, then we must act.*

I take all of the above as encouraging signs that we may be seeing a real change in our nation's capitol on this important issue. I hope this is just the beginning. However, pressure must be

maintained on the politicians to make this a reality.

Source: *The New York Times*

Prozac Is A Suspect In School Shootings

We are experiencing more and more acts of violence in our schools. The recent killings in Minnesota—as senseless as they were—are a prime example of this sort of thing. Nobody in America would have ever dreamed that mass killings in our schools would have become a national problem. While the killings in Minnesota shocked the nation, unfortunately, this wasn't an isolated incident. The experts are busy trying to figure out why these shootings are taking place and what would prompt a teenager to go off the deep end and commit such a horrible crime. The family of Jeff Weise, the teenager who killed nine people in Minnesota before killing himself, is concerned that the drugs he was prescribed for his depression may have contributed to his actions. Reportedly, the teenage began taking the antidepressant Prozac after a failed suicide attempt. It was said that the youngster was taking three 20-milligram pills a day.

According to the Weise family, the medication for the teenager had been increased a few weeks before the shootings. I certainly have no way to know whether Prozac played a role in this tragic occurrence. But, it is very clear that something is causing these incidents on a recurring basis. I do believe strongly that the use of prescription drugs for teenagers who are suffering from depression is much too **widespread today**. The effects of antidepressants on young people has been a topic of debate among scientists and doctors, and that debate has intensified. Last year, a federal panel of drug experts said antidepressants could cause children and teenagers to become suicidal.

The Food and Drug Administration has required the makers of antidepressants to warn of that danger on their labels for the medications. It appears that the suicide risk is particularly acute when therapy starts or a dosage changes. Although some studies link the drugs to an increased suicide risk, none of the research thus far suggests such a connection to violence like the Minnesota teenager's shooting rampage through his high school. Without knowing Jeff Weise's medical history or his precise diagnosis, it is virtually impossible to speculate on what factors may have affected him and caused him to commit mass murders. There are a number of factors to consider, including, but not limited to, the drugs, his underlying depression, rejection, and a tough childhood involving personal tragedy. But, it could be something else entirely that caused the youngster to do what he did. Did Prozac play a role in the Minnesota case? I wish the answer was readily available.

Sources: *The New York Times* and *Associated Press*

A Look At Some Other Incidents Around The Nation

To my knowledge, the scientific and clinical research to date has zeroed in on the effect on antidepressants on individuals and suicide. Although this research has not linked antidepressants to acts of violence against others, several incidents have occurred that received a great deal of nationwide attention. In 1989, Joseph Wesbecker walked into a printing plant in Louisville, Kentucky, with a bag of guns and killed eight co-workers and himself. He was taking Prozac, which had recently been approved. In 1999, a student involved in the Columbine High School shootings in Colorado had reportedly taken Luvox, an antidepressant similar to Prozac. In 2001, Christopher Pittman killed his grandparents while taking Zoloft, another antidepressant similar to Prozac. Pittman's lawyers tried to prove that the drug was the culprit. But, a jury in Charleston, South Carolina, convicted him of murder in February.

Katherine S. Newman, a professor at Princeton University who has studied school killings, says just a small percentage of the crimes appeared to have possibly involved psychiatric drugs. Of 27 such killings from 1974 to 2001, fewer than one-fifth of the suspects had been diagnosed with a mental health disorder before the shootings, Professor Newman reports. Dr. Frank Ochberg, a former associate director of the National Institute of Mental Health, said he once dismissed any links between antidepressants and suicides or homicidal acts. Because of the recent research, Dr. Ochberg has now changed his mind. In that regard he told the *New York Times*:

> *If your intention is shooting the place up and dying as you do it, you can put the fantasy together. Suicidal and homicidal intentions together could theoretically follow the same path.*

Frankly, at this point, based on the state of the science, I am not ready to place blame on prescription drugs. I can say, however, that a constant diet of violence of TV and in the movies, combined with other factors such as drugs and rejection, have to be considered. We shouldn't have to worry or be concerned with violence in the workplace or in our schools. Nevertheless, we are confronted with this mounting problem and had best find out what is causing it.

Source: The New York Times

V. THE CORPORATE WORLD

Dueling Lawsuits Involving HealthSouth

Ernst & Young filed a lawsuit In late March against HealthSouth Corp., which I felt was most interesting. The accounting firm says that the HealthSouth's long-running fraud exposed Ernst & Young to lawsuits and tarnished its reputation. The accounting firm had served as HealthSouth's auditors between 1996 and 2002. Federal prosecutors in Birmingham say that

during that time frame the company fraudulently showed $2.6 billion in profits. Ernst & Young filed the lawsuit in Jefferson County Circuit Court. It alleges in its complaint that during that period of time HealthSouth employees provided Ernst & Young with fake invoices, bogus bank reconciliations, and fraudulent journal entries designed to hide the fraud. HealthSouth officers, including former Chief Executive Richard Scrushy, also signed letters sent to Ernst & Young verifying that information in HealthSouth's financial records was accurate, according to the suit. It was stated in the complaint: "The purpose—and the effect—of the company's deception was to conceal the fraud from Ernst & Young and to frustrate the performance of its work."

The accounting firm says it has lost business because of its association with HealthSouth and will incur "significant litigation expenses" defending itself against claims filed by shareholders and others. Ernst & Young's claims that testimony in Scrushy's criminal trial in Birmingham federal court backs up its claims that the accounting firm was duped. HealthSouth is being asked to reimburse any settlements, litigation costs, and other expenses that Ernst & Young pays in lawsuits associated with the HealthSouth fraud. It also seeks damages for lost business and damage to the accounting firm's reputation. It should be noted that it was alleged in a lawsuit filed a year ago in Birmingham federal court by HealthSouth shareholders and bondholders that an Ernst & Young auditor knew about fraudulent activity at the Birmingham company as early as 1994. Ernst & Young, which collected more than $3 million in fees from HealthSouth in 2000 and 2001, claims to have had no knowledge of the fraud.

Now, HealthSouth Corp. has filed suit accusing Ernst & Young of intentionally or negligently failing to uncover the massive accounting fraud at the company. This suit was also filed in Jefferson County Circuit Court. HealthSouth, which is now run by a new team of corporate executives, contends Ernst & Young's failure to uncover elements of the fraud represents a breach of contract, negligence, or a conspiracy to defraud. This suit seeks damages including the legal costs and business losses caused by the fraud. "E&Y either intentionally and knowingly turned a blind eye to the accounting fraud, manipulation and misconduct perpetrated by Scrushy and the pleading officers and employees, or E&Y negligently, recklessly, wantonly breached its agreements and duties implied in law in failing to discover the accounting fraud and to report the fraud to HealthSouth's board of directors and audit committee," the suit says.

The Birmingham News, which reported on the last suit's filing, said Donald Watkins, one of Scrushy's main lawyers, took issue with HealthSouth's claim that his client was to blame for the fraud. Donald told the *News* that it was a "reckless allegation" that has not been made by HealthSouth in court before. The Birmingham lawyer was quoted further as having said:

> *You have to assume that they either have evidence of such a claim which they have not provided to the prosecutors or defense counsel or they have not been paying attention to the turn of events in Richard Scrushy's favor in the criminal trial.*

The HealthSouth debacle has now really turned into a 3-ring circus. The criminal trial of Scrushy is apparently far from over. With all of the "dueling lawsuits" now pending, lots of lawyers will be real busy for a long time before all of this mess is sorted out. You have to really feel for the employees and stockholders of HealthSouth. They have to be wondering, "What in the world is going on?"

Sources: *Associated Press* and *The Birmingham News*

J.P. Morgan Settles Investors' Suit

J.P. Morgan Chase & Co. has agreed to pay $120 million to settle a class action lawsuit filed by investors in connection with the 1998 merger of predecessor banks Bank One Corp. and First Chicago NBD Corp. The lawsuit was pending in the Eastern Division of the U.S. District Court for the Northern District of Illinois. This appears to be another step by J.P. Morgan to get rid of its pending litigation. Bank One, which was acquired by J.P. Morgan last year, had been facing multiple investor lawsuits over the financial condition of its credit card operations at the time of the merger with First Chicago. Shareholders of First Chicago contended documents filed in connection with the merger of then-called Banc One and First Chicago failed to address problems facing the credit card unit, which was called First USA. The bank is the nation's second-largest bank after Citigroup Inc. Bank One settled a similar investor lawsuit in 2001 for $45 million. There are two other related lawsuits that are still pending. In addition, the company still has to deal with a massive investor lawsuit related to its work for Enron Corp.

Source: *Wall Street Journal*

Tyler Pipe Company Pleads Guilty

Tyler Pipe Company, a division of McWane, Inc., has pleaded guilty to two felony counts and will pay a criminal fine of $4.5 million. The company will also undertake extensive upgrades at its iron foundry facility, which is located near the city of Tyler, Texas. The case arose from Tyler Pipe's illegal construction and operation of the facility's South Plant Cupola. This was the first criminal prosecution of its kind according to the EPA. Tyler Pipe failed to secure required air permits when it undertook construction, according to the EPA. In addition, I understand that the company attempted to conceal its actions from the government.

The Cupolas generate substantial air pollution, including significant emissions of particulate matter, carbon monixide, and lead. Tyler Pipe was replacing its old South Plant Cupola, and the company concealed construction of the new Cupola from the Texas

Commission on Environmental Quality. The company connected its new Cupola to its existing pollution control device. Tyler Pipe will be subject to probation for a period of 5 years and will be required to upgrade the number of structures regulated under the Clean Air Act. The upgrade cost will be approximately $12 million. McWane has had constant problems with all of its operations, including those at the Birmingham, Alabama facility.

Dollar General Settles SEC Charges

Dollar General Corporation, the Tennessee-based discount retailer, has settled fraud charges brought by the Securities and Exchange Commission (SEC). Under the terms of the settlement, the company will pay $10 million to settle the charges brought by the SEC. It was alleged that between 1998 and 2001, Dollar General engaged in fraudulent or improper accounting practices. This sort of thing has gotten so routine that many people don't even get shocked when a major corporation is caught and charged with fraudulent conduct. In fact, I guess it has come to be an accepted fact of corporate life in the U.S., and that's most unfortunate.

KPMG To Pay For Its Accounting Fraud

KPMG LLP, the U.S. unit of KPMG International, has agreed to pay $22.4 million to settle charges brought by the SEC that the accounting firm allowed Xerox Corp. to manipulate its accounting. The suit was filed by the SEC in 2003 against KPMG and several of its partners. The alleged fraud took place in connection with the audits of Xerox from 1997 through 2000. Xerox had already settled the charges brought against them by the government.

Source: *Associated Press*

VI. CAMPAIGN FINANCE REFORM

Two Prominent Men To Work On Election Reform

Two prominent faces from the past are taking on a most important task. Former President Jimmy Carter and former Secretary of State James A. Baker III will head up a study commission that will recommend improvements to the nation's federal election system. The bipartisan panel, which was put together by American University's Center for Democracy and Election Management, is charged with examining such matters as the disputed 2000 presidential election. In accepting his role, President Carter stated: "I am concerned about the state of our electoral system and believe we need to improve it. There is much we could learn from other democracies and from our own citizens." Mr. Baker added: "America's democracy is the backbone of our society, and only through fair elections can we guarantee that our system remains healthy." Baker, a Republican, was the top U.S. diplomat under President George H. W. Bush. The Carter Center in Atlanta has monitored dozens of elections around the world. It will be interesting to follow the panel's work*. But, any recommendations—regardless of how good they may be—must be implemented by Congress. That will be a tough nut to crack. I am hopeful some good will come from the panel's work. I applaud the effort and pray it will be successful.

Source: *Associated Press*

**Former Secretary Baker's role in the bipartisan panel has already received some criticism because of his role as leading strategist for the Bush-Cheney campaign in the 2000 post-election legal battle over the decisive Florida results.*

VII. CONGRESSIONAL UPDATE

Senate Committee Approval Of Highway Bill Will Save Lives

On April 15th, a Senate Committee approved key auto and truck safety provisions contained in the highway bill. This is a major accomplishment and the lawmakers who made it possible should be commended. I hope this indicates auto safety has become a bipartisan issue. The Senate Commerce, Science and Transportation Committee unanimously approved measures that require the National Highway Traffic Safety Administration (NHTSA) to issue a minimum rollover propensity standard. If the Senate version passes, the bill will:

- Help to ensure that vehicles are less prone to tipping over.
- Provide an ejection mitigation standard, which will protect people from being tossed out of their vehicles during crashes.
- Mandate a stronger roof crush standard, which will help prevent deaths and spinal cord injuries caused when roofs collapse during rollovers.
- Require NHTSA to complete a rule requiring side impact airbags to be installed in vehicles. They are optional equipment at present.
- Require 15-passenger vans—which are often used to transport children and community groups—to adhere to the same standards as school buses.
- Require crash test ratings to be provided on the window sticker for vehicle buyers when they are making their purchase. Currently, the information is available only on NHTSA's Website.
- Lead to the elimination of rocker power window switches, which enable children to trap their necks in windows.

Senators Trent Lott (R-MS), Ted Stevens (R-AK), and Daniel Inouye (D-HI) led the effort on these critical measures. Their bill is built on legislation passed last year in the Senate and authored by Senator John McCain (R-AZ), and former Senator Ernest Hollings (D-SC), who retired after a long and distinguished career last year. The bill requires action by NHTSA concerning the biggest sources of vehicle-related deaths on the road. Safety on our nation's highways should never be a Democratic or Republican issue. When passed by the full Senate, the bill will go to a conference committee with the House version, which does not contain these requirements. House lawmakers should follow the lead of their Senate counterparts and adopt the measures passed by the Senate. If they do this, it will save lives and prevent injuries nationwide. Please contact the member of the U.S. House of Representatives in your district and ask for their help on this bill when it goes to conference. This is one of the most important matters that Congress will consider this year.

Nothing Else Of Importance To Report

At this writing there was very little else of consequence happening in Congress to report. Both the House and Senate are plodding along with almost nothing of a constructive nature happening in either House. The leadership in both parties is so tied to Corporate America that consumers have little hope of much good happening that will benefit them. That is why the action referred to above on the highway bill is so significant. It is very clear that the Republication leadership is more interested in protecting corporate wrongdoers than anything else. Their commitment is as strong as I have ever seen in my years of keeping up with legislative issues. I suspect mid-term elections will prove to be most interesting. People around the country appear to be more aware of what is happening in Washington than ever before. I attribute this to all of the scandals in Corporate America and to the spotlight being put on federal regulatory agencies such as the FDA and NHTSA.

Legislation For Asbestos Victims Fund Still Alive

Legislation aimed at ending asbestos liability lawsuits in exchange for a $140 billion victim trust fund is still alive, according to Senate Judiciary Committee Chairman Arlen Specter (R-PA). As you know, the Senate has been hung up for years on how much money insurers and business groups should put into a trust fund in exchange for ending the lawsuits. In exchange for the fund, asbestos victims would give up their right to sue. Senator Specter seems to believe a compromise will get moving soon that could get enough support from Democrats and Republican to allow for passage.

The claimants would have to prove that the problem they have is caused by asbestos. While there will be $140 billion available for compensating victims, there are a tremendous number of claimants. A trust fund would speed money to the claimants and assure companies they would not be put out of business, supporters of the plan say. People in opposition, on the other hand, are concerned with the plight of the claimants and their families and worry the funding will not be adequate. In any event, this appears to be the time for a reasonable compromise.

House Ethics Crisis Is Not Helping Anybody

The ethics crisis in the U.S. House of Representatives - created to a large degree by the actions of House Majority Leader Tom DeLay (R-TX) - continues to escalate daily. Leaders in both the Republican and Democratic Parties seem to be getting fed up with DeLay and his mounting problems. In fact, DeLay is now being criticized by none other than former House Speaker Newt Gingrich. *The Washington Post* recently contained an unprecedented bipartisan challenge to the ethics process delivered in the form of an op-ed, co-written by the ranking Democratic member of the House ethics committee, Rep. Alan Mollohan (D-WV), and Rep. Joel Hefley (R-CO), the former Republican chair of the House ethics committee, who was forced from his position after his committee admonished DeLay this past fall for three separate incidents. The op-ed could not be clearer:

> *There should be no misunderstanding of what is at stake here, for members and for the House as an institution. In the days and weeks to come, all members will need to decide whether they wish to continue to have a credible, effective ethics process, and to then consider the actions and conditions necessary for such a process to exist. We believe that an essential first step is to repeal the rules changes made at the start of this Congress.*

The CBS website reports that: Speaker Newt Gingrich says "it's time for DeLay to stop blaming a left-wing conspiracy for his ethics controversy and to lay out his case for the American people to judge." DeLay's problem isn't with the Democrats; DeLay's problem is with the country. And so DeLay has a challenge: to lay out a case that the country comes to believe, that the country decides is legitimate. The American people are entitled to have elected representatives in our nation's capitol and in the halls of Congress who know the difference in right and wrong. They also expect those who know what's right to do right. In my opinion, that's not too much to expect.

VIII. PRODUCT LIABILITY UPDATE

Automakers Misled NHTSA And The Public

Documents and data received from the automobile industry reveal that automakers have misled government regulators and the public for years by claiming that roof strength and injuries in rollover crashes are unrelated. A new report, written by Martha Bidez, Ph.D. of Bidez Associates, who is a professor of biomedical engineering at the University of Alabama at Birmingham, challenges what some auto manufacturers have said for years. Dr. John Cochran and Dottie King also worked with Dr. Bidez on this project and did an excellent job. The companies have claimed that in rollover crashes, people sustain head and neck injuries when they dive into the roofs of their vehicles, not when the roofs crush into the people's heads. Automakers have made this claim to argue against government requirements for stronger roofs on vehicles and to shield themselves from liability in lawsuits brought by families of rollover crash victims. This new report, "Roof Crush as a Source of Injury in Rollover Crashes," analyzes Ford's own tests to show that roof crush does, in fact, occur prior to injurious neck loads during rollovers. Thus, improving a vehicle's resistance to roof crush would prevent catastrophic head and spinal cord injuries and deaths.

One of the basic tenets of auto safety is that to prevent injuries, there can be little or no intrusion into the passenger compartment. It is essential to prevent parts of the vehicle from closing in and coming into contact with occupants in the vehicle. Other key injury prevention techniques involve padding and adequate restraint systems. So by strengthening roofs and ensuring that they stay intact during rollover crashes—and installing side head airbags, safety glass in side windows and pre-tensioned belts, which keep occupants in their seats—many of the deaths and injuries that occur in rollover crashes can be prevented. It should concern all of us that far too many auto manufacturers put their profits over the safety of people who use their products. Joan Claybrook, who served as head of the National Highway Traffic Safety Administration (NHTSA) during the Carter Administration, correctly points out that:

> *The auto industry has misled NHTSA and the public solely to protect its bottom line. But in doing so, it has jeopardized the lives of thousands of motorists every year. NHTSA should not allow itself to be hoodwinked any longer. Automakers know how to increase survivability in rollover crashes, as the documents show. NHTSA needs to require all manufacturers to follow suit.*

Consumer groups, who have long lobbied for tougher rollover standards, say that roof collapse is the leading cause of death in rollovers. Unfortunately, NHTSA has sided with Ford and the other two major domestic automakers, General Motors and Daimler-Chrysler, on the cause of injuries from rollovers. NHTSA takes a position that defies all logic and that is totally indefensible. Now that it appears Congress will require NHTSA to act, I have to be hopeful that real help is on the way. Dr. Bidez is submitting her report to the pending docket at NHTSA. I hope all of the attention this issue has gotten will cause the federal government to look more closely at what has been proposed. There can be no excuse for not having a strong safety standard. A copy of the Bidez report is available by going to http://www.citizen.org/autosafety/rollover/crashwrth_/.

Source: Public Citizen

NHTSA Must Make Sure The New Rule Is A Strong One

Now that Congress appears to be on the verge of passing the highway bill with the strong auto safety features referred to above, the National Highway Traffic Safety Administration (NHTSA) should pass a strong rule regarding vehicle roof strength. The pending rule, however, won't protect the public because it won't take into account the dynamics of rollover crashes. As pointed out above, deaths and injuries in rollover crashes are usually caused by the roof crushing in on the trailing side in the rollover crash. If a vehicle rolls first onto the driver's side, for instance, the passenger is far more likely to be killed or injured than the driver. But NHTSA's proposed roof strength rule will offer no protection for occupants sitting in the second side of the vehicle to roll over (the trailing side) because the test will measure the strength of just one side of the roof.

NHTSA is expected to require automakers to apply pressure to one side of the roof to measure the strength of the roof. But that method is inadequate because it doesn't take into account real world crash factors, such as the fact that windows and windshields often break in the first quarter turn, weakening the roof by a third. By the time the trailing side of the roof hits the ground, the roof has been substantially weakened, and the far-side A-pillar (a supporting beam beside the windshield) collapses. Statistics reveal that a majority percent of occupants killed in rollover crashes were sitting in the trailing side of the vehicle. Furthermore, crash tests show a strong link between roof strength and whether an occupant is ejected. A good standard would require roofs strong enough to keep windows intact and thereby prevent ejection. Such a standard would reduce ejections by at least 50% and significantly reduce roof intrusion, preventing 200 deaths and serious injuries every week, according to information supplied by Public Citizen. Every year, 10,400 people are killed and another 17,000 are seriously injured in rollover crashes. Between 6,000 to 7,000 deaths a year are related to roof collapse and roof crush. The

current roof crush standard was enacted in 1971 and took effect in 1973. It has not been updated since.

There are two major problems with NHTSA's likely roof crush test. First, as noted, the test ignores the trailing side impact in rollover crashes. The second is that the test permits vehicles to have extremely weak A-pillars, which are essential to protecting occupants' heads and necks. SUVs and pickups roll at a more severe pitch angle than the test applies, putting more force on the A-pillars than the test accounts for. Furthermore, in an actual rollover, the person's head falls farther forward and closer to the A-pillar than NHTSA's test dummy does. Finally, the NHTSA test does not measure the speed of the roof collapse, which can exceed 22 miles per hour. The speed at which a roof collapses is related to the severity of injuries.

Public Citizen has released a compendium of industry documents dating to the 1960s showing that General Motors' own tests demonstrated a clear link between roof crush and injury. When GM tested the second side of vehicles' roofs in 1970, the second side of the roofs on six of seven vehicles failed. And a 1982 GM study agreed that ejection, window breakage, and roof strength were related. Even so, NHTSA rulemaking documents ignore ejection risks when calculating the benefits of a roof strength standard.

For years, the auto industry has maintained that roof strength is unrelated to injuries in rollover. Industry officials claim that people sustain head and neck injuries when they "dive" or are thrown into the roofs of their vehicles, not when the roofs crush into their heads. Documents that were released recently bolster findings in the report released by Public Citizen showing that automakers have misled government regulators and the public for years by claiming that roof strength and injuries in rollover crashes are unrelated. The current roof crush standard calls for a one-sided static test (not a simulated real-world [dynamic] crash test) that requires one section of a vehicle's roof to withstand 1.5 times the vehicle's weight. It was expected that the agency's new rule would essentially be the same, except that it would require a roof to withstand 2.5 times the vehicle's weight before contacting the head of a seated dummy. In addition to preventing roofs from crushing in, padding and adequate restraint systems—such as side head airbags, safety glass in side windows and pre-tensioned belts—are key to making rollover crashes survivable. To access the released documents go to http://www.citizen.org/autosafety/rollover/crashwrth_/.

Finally, you can rest assured the powerful lobby from the auto industry will be working hard to derail the highway safety bill discussed above. That is why it is so important to contact your member of Congress and ask for support of the Senate bill.

Source: Public Citizen

Consumer Union Reports On The Child Car Seat Safety System

Four models of child car seats performed poorly in crash tests when used with a new federally required safety system, according to a study conducted by the publisher of *Consumer Reports*. The safety system, known as LATCH (for lower anchors and tethers for children), is intended to make it easier to attach child car seats to vehicles. Under the system, which has been required since September 2002, the child seat is anchored directly to the rear seat using a hook-and-latch system instead of a seat belt. All vehicles built in the 2003 model year and afterward are equipped with metal anchors in the rear seats that attach to hooks on child car seats.

Consumers Union, the publisher of *Consumer Reports*, tested 17 child car seats and found that four of the seats did not adequately safeguard children in crashes when the seats were attached using the LATCH system. When the seats were secured using a seat belt, however, the crash tests found no significant safety risks. The test results will be published in the May issue of *Consumer Reports*.

In two cases, rear-facing seats attached with the LATCH method broke free and were ejected from the test apparatus during simulated crashes. The Combi Avatar child seat, receiving a rating of "not acceptable" after it detached from the seat anchors at a speed below the federal requirement, fared the worst. Donald Mays, the senior director for product safety at Consumers Union, stated: "It failed the crash test by essentially lunging off the car's seat itself." Combi USA, the maker of the Avatar, said in a statement that it was "shocked" by the results of the Consumers Union tests. The company urged owners of the Avatar to secure it with a seat belt rather than the LATCH system. The company said it was retesting the Avatar and promised to disclose the results as soon as they were complete.

The other child seat that came unhooked during the crash tests was the Evenflo PortAbout 5. Unlike the Avatar, the PortAbout 5 stayed in place until it was tested in a crash at more than 30 miles an hour. It should be noted that the government does not require car seat manufacturers to meet safety standards in crashes at speeds above 30 mph. The PortAbout 5 received a rating of "poor" in the study. You won't be surprised to learn that Evenflo didn't like the Consumers Union results. The company claims its own testing, which showed the PortAbout to be safe in crashes above 30 mph, was more reliable.

Two other seats didn't fare well in the Consumers Union testing. The testing found fault with the Tyro (which is another Combi model), and the Britax Marathon. Crash tests showed those seats moving forward too much upon impact. To test the car seats, Consumers Union used methods that exceeded the federal safety requirements. Evaluators tested the seats at their maximum weight allowance, alternately using the LATCH system and a seat belt to hold the seats in place. During the testing, Consumers Union also attached the

child seats to a more modern vehicle seat than the one the government uses for its testing, which is modeled after a Chevrolet Impala from the 1970s. Consumer advocates have criticized the testing conditions used by the National Highway Traffic Safety Administration (NHTSA) as outdated. NHTSA doesn't test seats attached with the LATCH method and doesn't use dummies that test at the seats' maximum weight capacity. That is rather difficult to justify.

In August, NHTSA is scheduled to upgrade its testing standards for child car seats by using crash test dummies with more sophisticated injury sensing instruments and a more modern, LATCH-capable seat. A spokesman for NHTSA responded to the Consumer Union report in an expected fashion. The agency said, despite the test results, that the LATCH system is highly effective and safe. The statement from NHTSA was:

> *It is much easier now for parents to properly install the seat without having a Ph.D. in engineering. We haven't seen anything in the real world that would indicate there is a performance problem with any of these seats.*

Frankly, I have much more confidence in the testing done by Consumers Union. At the very least, it should make the manufacturers upgrade their testing. It should also cause NHTSA to bring testing up to date.

Workers Sue Automaker Over Accident

A lawsuit filed against Daimler-Chyrsler Corp., formerly known as Chrysler, has once again brought the Jeep Grand Cherokee's safety record to the attention of public. I will give you a brief view of the facts giving rise to the lawsuit. Three persons were walking along a city street when they were struck by a 2003 Jeep Cherokee back in February 2004. These men and two of their spouses are now suing the manufacturer of the SUV. The plaintiffs, who were employed by a local newspaper, allege the corporation sold the vehicle involved despite knowing of numerous prior instances in which Jeep Grand Cherokees suddenly went into "runaway condition" or "accelerated out of control."

On the day of the accident, the three plaintiffs were walking on a sidewalk along the side of a city street. The Jeep Cherokee suddenly accelerated, crossing a street, jumped the sidewalk, and smashed into the plaintiffs. As a result, one plaintiff's left leg had to be amputated and a second plaintiff's right leg was crushed. After the initial incident, the driver got out of the SUV. There was an attempt to put the Jeep in reverse by the third plaintiff in order to unpin the two plaintiffs. As the Jeep was placed in reverse, it again began rapidly accelerating, knocking the third plaintiff to the ground and running over him. He was also injured. This suit will be most interesting and will be followed closely by auto safety groups.

Ford Settles Lawsuit Over Car Door Latches

A lawsuit in federal court against Ford Motor Co. involving a defective door latch on a F-150 pickup truck has been settled. The occupant of the truck was ejected during the 1997 accident giving rise to the suit, leaving him a quadriplegic. An order signed by a U.S. District Court judge said if the settlement is not completed within two months, either side may ask that the case be put back on the active court docket. The amount of the settlement was confidential. The trial of the case had started on March 7th and several weeks of testimony was heard before the settlement was finally reached. The plaintiff, then 18, was injured when he was ejected from his F-150 pickup during an accident. It was alleged that the door handle on the new pickup truck unlatched during the crash. The lawsuit claimed breach of an implied warranty and defective design. Ford claims that the outside door handles and latch assemblies on its vehicles are safe and comply with all government and industry standards. But, as we all know, compliance with standards—especially weak and ineffective ones—is no defense to a product liability action.

NHTSA Finally Requires Automakers To Install Tire Pressure Monitoring Systems

The federal government has finally issued a rule requiring automakers to install tire pressure monitoring systems that are effective in alerting motorists if any tire on the vehicle is underinflated. It shouldn't have taken this long for the National Highway Traffic Safety Administration (NHTSA) to act. It is well documented that underinflated tires lead to death and injury. It is estimated that the rule will save 120 lives and prevent 8,400 injuries annually. With the passage of the TREAD Act in the fall of 2000, Congress required NHTSA to set guidelines for tire pressure monitoring systems within a year. The agency in the spring of 2002 issued a weak rule allowing for a system that wouldn't function when two tires on the same side of the vehicle were underinflated. The system had other weaknesses and would have been of little help to motorists.

Public Citizen, the New York Public Interest Research Group, and the Center for Auto Safety filed suit in June 2002 to force the agency to revise the rule to ensure that motorists would be adequately alerted when their tire pressure dropped to dangerous levels. In 2003, a three-judge panel of the U.S. Court of Appeals for the Second Circuit ordered the government to strengthen the rule to cover each tire on the vehicle. Even then, the agency dragged its feet for nearly a year. The safety groups returned to the court in July 2004, asking it to order the recalcitrant agency to act. NHTSA has now issued a rule requiring automakers to install systems in all new passenger cars and trucks by the 2008 model year, beginning a phase-in with 2006 model year vehicles. The systems are to alert motorists if any tire falls 25% below the recommended inflation pressure.

Although it is an important first step, the rule is not perfect:

- The rule doesn't require the systems to fully operate with replacement tires—a potentially dangerous omission, given that tires wear out and inevitably are replaced. Under the rule, a malfunction light will come on to alert motorists that the system is not working with the tires.
- Safety groups asked for the agency to require tire pressure to be measured after the first 10 minutes of driving and alert motorists if a tire is 20% underinflated; the agency requires no less than 20 minutes and 25% underinflation.
- The systems need not measure tire pressure until a motorist has driven between 30 and 60 miles per hour continuously for 20 minutes.
- The rule allows for a phase-in schedule, with systems required to be installed in only 20% of model year 2006 vehicles, 70% of model year 2007 vehicles, and all model year 2008 vehicles.
- The system will cost manufacturers roughly $48-$70 per vehicle to install but will save consumers $30-$35 total because properly inflated tires lead to better fuel efficiency, longer tread life and fewer crashes.

While the rule is long overdue, it is a bit of good news. The new rule would have been issued earlier had it not been for the auto industry lobbying the Bush Administration. It is incomprehensible that it required five years and litigation to force the federal regulatory agency to do its job. NHTSA should promulgate rules much faster and should craft them in a fashion that best protects motorists. Instead, the agency seems to look out for the automakers' bottom lines.

Source: Public Citizen

Older Airbags Could Increase Risk

Children wearing safety belts who are exposed to older airbags in frontal crashes face a higher risk of serious injury than those in vehicles with newer versions of the safety devices, according to a study released recently. The study, published in the April edition of the Archives of Pediatrics and Adolescent Medicine, reports that children wearing seat belts in the right front seat had a 14.9% risk of serious injury when an older airbag was deployed in a crash. Children in a similar situation exposed to second-generation airbags, or those built after federal regulators amended airbag rules in 1997, had a 9.9% risk of serious injury. The National Highway Traffic Safety Administration recommends all children ages 12 and under be placed in rear seats. But researchers note many children continue to sit in the right front seat of passenger vehicles. This is a real life condition that I hope will change when the public is adequately informed as to the risk of injury to children riding in the front seat of vehicles. Of course, there are times when children have to be placed in the front seat.

The report evaluated first-generation airbags from 1994-1997 model years, while the second-generation devices reviewed were from 1998-2001 model years. Airbags have been credited with saving more than 15,000 lives since the Department of Transportation required all vehicles to have driver's side airbags or automatic seat belts by 1989 and passenger-side bags soon after. Automakers initially opposed the rule because of costs and warned the devices could harm people, especially children, because the airbags were deployed with forces that frequently surpassed 100 mph. Deaths peaked in 1997, when 53 people, including 31 children, were killed. The amended regulations led to the redesign of frontal airbags to reduce the force. From April 1993 through July 2003, the government estimates 134 children were killed and 30 were seriously injured in crashes where they were not placed in rear-facing child safety seats and the airbag deployed. In most of the fatalities, seat belts were either not worn or possibly misused.

Researchers said most air-bag studies have focused on the reduction of fatality risks for children, but have not reviewed how the new designs affected serious injuries. Lead researcher Kristy Arbogast, a research assistant professor at The Children's Hospital of Philadelphia, said the report shows that technological advances in the new airbags have reduced the injuries to child occupants. Professor Arbogast stated: "What we hope to do with this study is to give positive feedback to the auto industry that the direction they're going in is the right one." Without question, the back seat is the best place for children under age 13. The study, based on insurance claims from State Farm Insurance Co., involved 1,781 children and teenagers between the ages of 3 and 15 who had been wearing seat belts in the right front seat. The children were exposed to deployed airbags in frontal crashes between December 1998 and November 2002.

Source: *Associated Press*

Appliance Maker Settles Case

Hamilton Beach/Proctor-Silex Inc., a leading appliance maker, has agreed to pay a $1.2 million penalty to settle allegations it belatedly reported defects in three kitchen products linked to fires and injuries such as cuts and burns. The civil penalty is the fourth largest from the Consumer Product Safety Commission. In March the CPSC announced a record $4 million settlement with a popular maker of baby products—part of what the agency says is a renewed effort to hold companies accountable. The CPSC announced the penalty against the Glen Allen, Virginia-based appliance company. The company allegedly failed to immediately report problems with its countertop toasters, juice extractors and slow cookers, which were on store shelves at various times from 1992 to 2002 and—following revelations of defects—recalled by the millions.

Federal law requires companies to

inform the commission of known defects that pose risks of injury or violate federal safety standards immediately, a timeframe typically interpreted as 24 hours. But Hamilton Beach/Proctor-Silex waited several years in some instances to report consumer complaints. The company's reporting irregularities surfaced several years ago. I am not sure why the CPSC waited so long to announce the penalties. The company denied knowingly violating reporting requirements for the products, all manufactured in China. These are some of the violations cited by the CPSC:

- The company waited until 1999 to report more than 200 complaints it had received involving toasters that didn't properly shut off, including three cases of fire damage.
- The company also allegedly failed to promptly report nine instances of consumers suffering eye injuries or requiring stitches for cuts caused by metal or plastic pieces breaking off juice extractors, which were sold through the 1990s.
- Slow cookers with weak handles elicited more than 2,000 complaints, including two burn injuries, over about three years before the CPSC says it was notified in 2002.

Topping this penalty, Graco Children's Products Inc. recently agreed to pay $4 million for reporting violations, bike maker Dynacraft BSC Inc. settled for $1.4 million in 2004, and Cosco and Safety 1st jointly paid $1.75 million in 2001. More recall information is available by calling HB/PS at 800-672-5872, weekdays 8 a.m. to 4:30 p.m. EST.

Former Mitsubishi Executives Face Lawsuit

Mitsubishi Motors is seeking $12 million in damages from seven former executives for their roles in a 20-year cover-up of manufacturing defects. Mitsubishi, which is based in Japan, blames the executives, including three presidents who successively led the company in the 1990s, for cover-ups by the automaker. The figure for damages represents the total severance payouts the executives received when they retired. Legal action against former executives is unusual in Japan. The suit comes as Mitsubishi tries to piece back together a brand image shattered by revelations that it hid vehicle defects from safety authorities for years.

The executives to be sued include Katsuhiko Kawasoe, who was president when the recall scandal came to light in 2000, and two of his predecessors, Hirokazu Nakamura and Takemune Kimura. The company also named Takashi Usami, former chief of its truck division, in its suit. Kawasoe and Usami are also among more than a half-dozen former Mitsubishi executives now facing criminal prosecution over the cover-ups. Both have pleaded not guilty to charges of negligence and falsifying safety reports. The company will also ask 10 other former high-ranking executives to return severance pay totaling $3.25 million. Mitsubishi made its announcements in a report to Japanese transportation authorities on its investigation into the causes of the recall scandal.

Source: *New York Times*

IX. MASS TORTS UPDATE

Judge Selects Vioxx Suits Steering Panel

As mentioned in the Capitol Section, the federal Vioxx cases took a major step forward when U.S. District Judge Eldon E. Fallon selected a plaintiffs steering committee that will help direct what is expected to be lengthy and complex litigation. Judge Fallon will handle all pretrial proceedings and then the cases will be returned to their original jurisdictions for trial. Our firm is most fortunate to have a prominent role in this litigation, and we look forward to the challenges that lie ahead.

FDA Issues Drug-Safety Guidelines

The public has finally gotten the attention of the federal Food and Drug Administration (FDA), and that's good. At least, we are finally witnessing some movement by the agency. In fact, we are now seeing a flurry of activity from the agency. For example, new guidelines have been issued by the FDA laying out when and how drug makers should go beyond label warnings and incorporate other restrictions on the use of a drug. The document, which came with two related regulatory guidance's on how pharmaceutical companies should detect safety issues during clinical trials and after medicines are on the market, comes as the result of intense pressure being put on the FDA. As we all know, the regulatory agency is under congressional scrutiny as the result of high-profile drug withdrawals. The fact that its acting commissioner, Dr. Lester Crawford, is seeking Senate confirmation has also played a role. Paul Seligman, director of the FDA's office of pharmacoepidemiology and statistical science says the agency's goal is "closer and earlier discussions and collaboration between the agency and industry on safety issues." Safety should have been the top priority at the FDA, and it shouldn't have taken being called on the carpet to wake the FDA up and spur it to action.

Still, the new guidelines aren't likely to dispel all concerns raised by members of Congress. For one thing, the guidelines say that if a drug maker feels it needs a risk-minimization plan for a drug with known side effects, it should go first to the FDA division that reviewed the drug for approval, which will work with other parts of the agency such as the drug-safety office. This is the current practice, but some lawmakers have argued that safety matters should be handled more independently. Clearly, the drug companies have refused to recognize the FDA's authority to impose limits on how

medicines are promoted and sold. But, the regulators have come under extreme pressure to impose more limits on drugs with known side effects because of all of the recent problems caused by the withdrawals. The FDA tends to work out such agreements as conditions of a drug's approval. Once a drug is on the market, however, the agency is less able to demand restrictions, and that presents real problems for the public.

In the new guidelines, which in many cases codify practices already in place, the FDA is taking an overall cautious line. The agency says that while it hopes that drug companies will determine when special measures are needed, it "may recommend" a plan "based on the agency's own interpretation of risk information." The FDA intends to bring questions about risk programs to public meetings of its advisory committees, which are made up of outside experts, and hopes that satisfies the public's concerns. But, potential conflicts of interest by committee members have made this approach subject to serious question.

The agency's examples of types of drugs likely to require special risk measures include those that cause birth defects and powerful addictive painkillers. The FDA believes that some drugs may need restrictions because "safe and effective use call for specialized health-care skills, training, or facilities to manage" the side effects. The FDA lists measures that drug makers might consider for very risky drugs, such as limiting distribution to certain pharmacies, allowing prescriptions only by specially certified doctors, or dispensing drugs only to patients with certain lab-test results. The FDA currently doesn't have the authority to regulate the practice of medicine. But, at least it can require the drug companies to adequately disclose needed information on the drugs it puts on the market to the doctors who will be prescribing these medications to patients. Some drugs already have such restrictions, such as the powerful acne medicine Accutane, which causes birth defects when taken by pregnant women.

Source: *The Wall Street Journal*

FDA Issues New Guidelines

Last month, the Food and Drug Administration (FDA) issued three guidance documents as part of its efforts to minimize risks of pharmaceutical products. The guidelines are entitled:

- Premarketing Risk Assessment;
- Development and Use of Risk Minimization Action Plans; and
- Good Pharmacovigilance Practices and Pharmacoepidemiologic Assessment.

The premarket risk assessment guidelines provide specific recommendations to pharmaceutical companies for all stages of the clinical development of products, including improving the assessment and reporting of safety during clinical trials. The guidelines for risk minimization action plans recommend a variety of tools to reduce the risks of pharmaceutical products. The pharmacovigilance guidelines recommend various reporting and analytical practices to monitor safety concerns and risk of pharmaceutical products in general use.

In a recent interview discussing the guidelines, Dr. Steven Galson, Acting Director of the FDA's Center for Drug Evaluation and Research, stated "Continuing to improve the way safety is assessed and monitored will lead to the earlier identification of safety problems and enable a more proactive approach to minimizing these risks." The effectiveness of these guidelines remains to be seen. Prescription drug sales in 2004 totaled $235 billion, up 8.3% from 2003. At the same time, the number of side effects and other related health problems reported to the FDA increased by approximately 14% and reached an all-time high. In 2004, approximately 422,000 adverse event reports were submitted to the FDA by healthcare professionals, pharmaceutical companies and patients. The guidelines can be viewed at the following addresses: www.fda.gov/cder/guidance/6357fnl.htm; www.fda.gov/cder/guidance/6358fnl.htm; and www.fda.gov/cder/guidance/6359OCC.htm.

FDA Report Criticizes Oversight Of Medical Device Makers

The Food and Drug Administration (FDA) released an internal report last month that was critical of its oversight of medical device makers. Interestingly, the report is based on a review that took place nearly two years ago. It concluded that the agency had little idea whether device manufacturers were fulfilling their obligations to conduct studies on the safety of products once they were on the market. Medical specialists serving on FDA advisory panels often urge the agency to require such studies for critical medical devices so that doctors will have more data about their safety and effectiveness. The FDA review concluded that the agency could not find evidence for more than half the manufacturers that the required studies had been performed. It also found that the FDA's oversight of postmarketing studies of medical devices was hindered by sloppy record-keeping. For 26 of the 45 new products approved between 1998 and 2000, the FDA could find no information to indicate whether required studies had been done, the report concluded. Where information could be found, 6 of 11 studies were overdue and 2 had not been started. This would be shocking, but for the fact that the FDA appears to have been in the dark on a number of other important regulatory issues. This sort of thing can't be justified.

In an interview with *The New York Times*, Dr. Daniel G. Schultz, the director of the FDA's Center for Devices and Radiological Health, defended the agency's handling of the report, including its decision not to previously release the names of companies cited in the two-year-old study. I was shocked to learn that Dr. Schultz didn't know

whether the agency had followed up to see whether any device makers had since supplied missing studies. The episode is raising questions about the discretion that FDA officials exercise in determining what information they choose to make public. *The New York Times* obtained a copy of the device report in response to a Freedom of Information Act request. That report, which was termed "final," was dated March 18th. It differs from the 2003 study only in that it contains agency plans to improve surveillance of mandated postmarketing studies. I have to wonder why the FDA sat on the report for 2 years. If you are interested, the agency has now released the report and you can go to the FDA Website to see it. The report recommends changes to the agency's oversight of the mandatory study process, including using a computerized tracking system. Several companies cited in the report maintained that they had done the required studies or were in the process of doing so. They say that any shortcomings must lie with the FDA's administration of the program.

Source: *The New York Times*

Bextra Pulled From The Market

As most of you will already know, Bextra was pulled from the market last month. The Food and Drug Administration (FDA) requested that Pfizer Inc. withdraw the painkiller from the market because it increases the risk of heart attack and stroke. Regulators also want all other anti-inflammatory drugs in the same class to carry the strongest safety warning possible. As we all know, the FDA has been studying the safety of the so-called Cox-2 inhibitors since Merck & Co. pulled Vioxx from the market on September 30th. In addition to the prescription drugs, the FDA asked manufacturers of over-the-counter nonsteroidal anti-inflammatory drugs to revise their labels to include information about the risks of cardiovascular incident and gastrointestinal bleeding. Our firm has been investigating Bextra and evaluating potential claims for at least two years. We have currently filed 46 cases to date and expect to file many more. We are evaluating several hundred potential cases at this time.

You will recall that in January of this year, Public Citizen petitioned to have Bextra and Celebrex removed from the market because they increase the risk of heart attacks. The FDA finally got Bextra off the market and has asked for a stronger warning on Celebrex. While it's good that the FDA has taken Bextra off the market, it continues to allow Celebrex to be sold. An unpublished study finished in 2000 indicated increased cardiac risks associated with Celebrex. Last year, almost twice as many prescriptions were written for Celebrex as for Bextra—23.9 million prescriptions compared to 12.9 million. Neither Bextra nor Celebrex protects the gastrointestinal tract as drug makers claim. Given that neither drug has any unique benefits, but both carry unique cardiac risks, it is unconscionable to leave Celebrex on the market.

In addition, the FDA is sowing dangerous confusion by requiring all nonsteroidal anti-inflammatory drugs (NSAIDs)—both Celebrex and all non-aspirin NSAIDs—to warn about increased cardiac risks, even though the risks of Celebrex are clearly higher than at least one NSAID, naproxen. The FDA says that it took its actions "based on the available scientific data, including data accumulated since the drugs were approved." But the agency's job is to ensure that drugs with risks that outweigh the benefits are taken off the market. Congress, which is finally looking closely at the FDA's operations, should investigate fully why the agency is not also pulling the equally dangerous Celebrex from the shelves.

The public must be reminded that Bextra is the **tenth** prescription drug to be taken off the market in the past seven years that Public Citizen had previously warned consumers not to use. For four of the drugs—Vioxx, Baycol, Rezulin and Serzone—Public Citizen issued **warnings** more than **two years** before their removal from the market. In April 2001, Public Citizen warned patients not to use Celebrex. I recommend that you take a look at the comprehensive prescription drug database maintained by Public Citizen at www.WorstPills.org.

Source: Public Citizen

Chronology Surrounding Painkillers

With all of the news on the group of painkillers known as Cox-2 Inhibitors, I believe it would be helpful to take a brief look at a chronology of events. Some of the key events involving the safety of Bextra, Vioxx, Celebrex, and other painkillers follow:

- **December 1998:** Food and Drug Administration approves Celebrex, the first cyclooxygenase-2 (COX-2) inhibitor, to treat rheumatoid arthritis and osteoarthritis. It is in the nonsteroidal anti-inflammatory (NSAID) drug category. Manufactured by Pfizer Inc.
- **May 1999:** FDA approves Vioxx, another Cox-2 inhibitor, for treatment of osteoarthritis, menstrual pain and acute pain management for adults. Manufactured by Merck & Co. Inc.
- **June 2000:** Merck releases results of VIGOR study to FDA, which shows Vioxx increases risk of heart attack and other cardiovascular problems.
- **November 2001:** Bextra, also a Cox-2 inhibitor, was approved by FDA. This drug is manufactured by Pfizer.
- **April 2002:** FDA changes the warning label on Vioxx to reflect an increased risk of heart attacks and strokes.
- **September 2004:** Merck stops APPROVe study early, saying Vioxx shows increased risk of heart attacks and strokes. Merck then withdraws Vioxx from the market.
- **February:** An FDA panel concludes Vioxx, Celebrex and Bextra all pose heart risks, but should be available to consumers.

- **April 7, 2005:** Pfizer withdraws Bextra from the market at the request of the FDA, which said that in addition to risk of heart attack and stroke, it carries risk of serious, sometimes fatal skin reactions. The FDA also says not just Cox-2 inhibitors, but all other prescription NSAID drugs, should carry a "black box" warning label about cardiovascular risks.

These are by no means all of the significant dates or happenings. But, it will give you a brief overview of the situation.

Public Citizen Wants Pemoline Taken Off The Market

Public Citizen has petitioned the U.S. Food and Drug Administration (FDA) to remove, a 30-year-old central nervous system stimulant used in the treatment of attention deficit hyperactivity disorder (ADHD), from the market. Abbott Laboratories, Inc. sells the drug under the brand name Cylert, and generic companies sell a copycate version known as pemoline. The reason for Public Citizen's petition is that pemoline (Cylert) is known to have caused at least 21 cases of liver failure, including 13 resulting in liver transplantation or death. In its petition, Public Citizen noted that the drug's unfavorable risk-to-benefit ratio has led to its withdrawal in the United Kingdom and Canada while the FDA instead opted for two separate "black box" warning labels that a 2002 FDA study shows were ineffective in reducing the drug's risks. It was stated in the petition: "In light of this evidence of unique liver toxicity without evidence of unique therapeutic benefit, we contend that the only responsible course of action is to remove this dangerous drug from the market."

Pemoline originally appealed to clinicians because it allowed once-a-day dosing, as opposed to multiple daily doses that might raise logistical problems, especially for children in school during the day. But, since the development of long-acting formulations of other stimulant medications, this is no longer a unique characteristic, Public Citizen's petition says. In 2004, approximately 117,000 pemoline prescriptions were filled in the United States. Reports of liver abnormalities appeared in U.S. clinical trials even before the drug was approved by the FDA in 1975. Between the 1975 approval and 1996, 193 adverse drug reactions in patients under the age of 20 involving the liver and ascribed to pemoline were reported to the FDA. As of May 1996, there were 13 cases of acute liver failure due to pemoline, 11 of which resulted in death or liver transplantation. An FDA analysis by Dr. David Graham, who testified at congressional hearings about Vioxx safety concerns, estimated a 16.8-fold increased risk of acute liver failure because of pemoline compared to the general population, assuming no underreporting. Given that adverse events are reported to the FDA about 10% of the time, the relative risk for acute liver failure could be closer to 168-fold.

The maker of pemoline, Abbott Laboratories, challenged the FDA's conclusion in 1996 that pemoline had "an unfavorable risk to benefit ratio" and should be withdrawn from the market. Abbott was allowed to continue marketing the drug by adding a "black box" warning and by sending a letter to all U.S. physicians warning about pemoline's liver toxicity and recommending that it should no longer be considered a first-line therapy for ADHD. The FDA also directed the company to start a patient registry to evaluate serious side effects, but there is no evidence Abbott ever established the registry. In June 1999 a stronger black box warning urging periodic liver tests was issued as liver failure cases continued to accumulate. An FDA study demonstrated that most physicians were not doing the recommended testing. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, stated:

> *The Food and Drug Administration should immediately ban the sale of pemoline. Relatively safe and effective drug treatments exist for ADHD, and since there are no data that demonstrate pemoline has any unique benefit over other drugs, there is no responsible basis for keeping this unacceptably dangerous drug on the market.*

Public Citizen is joined in its petition to the FDA by Dr. Fredric Solomon, clinical professor of psychiatry and behavioral sciences at the George Washington University School of Medicine. In the course of 42 years of clinical experience, Dr. Solomon has evaluated and cared for hundreds of patients with ADHD. Public Citizen's Health Research Group recently launched a new website, www.worstpills.org, that provides consumers with comprehensive information about 538 drugs and warns of 182 medications that should not be used because they are either unsafe or ineffective. The petition filed by Public Citizen can be seen at http://www.citizen.org/publications/release.cfm?ID=7372.

Source: Public Citizen

Panel Calls For "Demedicalization" Of Menopause

In March, the National Institutes of Health (NIH) sponsored a State-of-the-Science Conference to discuss the Management of Menopause-Related Symptoms. The 3-day conference included testimony of several experts who appeared before the 12 member independent panel. The experts presented information on the biology of the menopause transition, the nature of the symptoms women experience, and strategies for relieving the common problems associated with the menopause transition. At the end of the conference, the panel released a report answering the key questions of the conference. The focus of the report was the management of menopausal symptoms, such as hot flashes, night sweats, problems with sleeping, loss of sexual desire, or urinary and bleeding problems.

The report stated that estrogen, either by itself or with progestins, has been the therapy of choice for decades in attempting to relieve menopause-related symptoms. But, findings from the Women's Health Initiative (WHI), which was a large clinical trial designed to see whether estrogen could prevent chronic conditions, such as heart disease and dementia, raised serious questions about the safety of estrogen use for treating symptoms of menopause. Consequently, the report states that "women and their health care providers need to know the safest and most effective medical and non-medical treatments for menopausal symptoms."

According to the conclusions reached by the panel, several misconceptions about menopause and the treatments for menopause are prevalent. The first conclusion that the panel reached is that not all women who experience menopause need medical treatment, which is contra to the message of those pharmaceutical companies marketing Hormone Therapy drugs. The panel concluded that many women have few or no symptoms. But, there are some women that do experience "bothersome and even disabling symptoms," usually women who have menopause induced by surgery, chemotherapy, or radiation, and these women "deserve safe and effective treatment." Additionally, it is difficult to determine which symptoms are truly associated with menopause as opposed to aging.

In its conclusions, the panel also suggested several necessary steps that need to be taken to adequately research the available treatment for symptoms of menopause:

- First, the effectiveness and long-term safety of the many potential alternatives to estrogen need to be studied in rigorous clinical trials in diverse populations of women.
- Next, "much more research" is need to clearly define the natural history of menopause, associated symptoms, and effective and safe treatments for bothersome symptoms.
- "Natural histories are important for both science and policy." It is essential to know how many women go through menopause with few symptoms, and how many manage menopause on their own. This information can lead to "public health information that empowers women and increases their self-reliance."
- Finally, medical care and future trials should be focused on women with the most severe and prolonged symptoms.

The panel ultimately stated that menopause is "medicalized" in contemporary American society, and that there is need "to develop and disseminate information that emphasizes menopause as a normal, healthy phase of women's lives." The panel's conclusion is consistent with what we've been saying all along about Hormone Therapy and that is, the pharmaceutical companies, and Wyeth-Ayerst in particular, have basically created a disease in order to increase profits. As early as 1942, with the approval of Premarin, Wyeth was attempting to medicalize menopause. Wyeth's efforts were bolstered with the release of the 1966 bestseller by Dr. Robert Wilson, Feminine Forever. In his book, Dr. Wilson painted women who experience menopause as unpleasant and unattractive. Specifically, the doctor stated that with hormone medications, "breasts and genital organs will not shrivel. Such women will be much more pleasant to live with and will not become dull and unattractive." He further indicated that the menopausal woman is a focus of bitterness and discontent in the whole fabric of our civilization. "To watch a pleasant energetic woman turn into a dull-minded but sharp-tongued caricature of her former self is one of the saddest of human spectacles," he wrote.

After the release of *Feminine Forever*, Wyeth capitalized on the information provided in the book, utilized the information to stage a successful advertising campaign, and tripled the sales of Premarin by 1970. In fact, by the mid-1970s, more than 30 million prescriptions for Premarin were written each year. Wyeth ran ads in medical journals urging physicians to "Treat her with Premarin. Keep her on Premarin." In addition, in 1975, Wyeth ran an advertisement in the *Journal of the American Medical Association*, claiming that Premarin would relieve "tension, irritability, headaches, undue fatigue, depression and insomnia" caused by declining hormone levels. In bold large letters, Wyeth advised doctors, "Almost any tranquilizer will calm her down...but at her age, estrogen may be what she really needs."

It is now known that Wyeth paid all of the expenses for the writing and publishing of Dr. Wilson's book. In addition, Wyeth paid Dr. Wilson to lecture to women's groups about his book. Wyeth actually purchased so many copies of the book that it made the bestseller list. Since that time, America has been continuously fed the lie that menopause is a disease, with "medicine" being the only cure. With the advent of recent studies and findings, such as the report released in March by NIH and several earlier studies, we now know that this is not the truth and that the medicalization of menopause has actually been more harmful than helpful. Sadly, an epidemic of hormone therapy-induced breast cancer has been a result of this tragic occurrence.

Judge Certifies Nationwide Class Of Baycol Third-Party Payors

A Philadelphia judge has certified as a nationwide class all third-party payors that had to refund beneficiaries or insureds for purchases of the cholesterol reducer Baycol. You will recall that Bayer Corp. voluntarily removed this drug from the market in 2001. The health funds from three area union locals—Philadelphia Firefighters Local 22, AFL-CIO District Council 47, and the National Conference of Firemen and Oilers Local 1201—were named as class representatives. There are at least 10,000 third-party payors across the

country who could eventually become members of the class. The class will also include insurers and employer benefits plans, in addition to union local health funds. I understand this is one of the first class actions that has been certified for third-party payors, such as health and welfare funds, in the United States.

To refresh your memory, Baycol, also known as Cerivastatin, was approved for sale by the FDA in June 1997 and used by roughly 700,000 consumers before being taken off the market in August 2001. The class representatives have filed claims for breach of warranty and unjust enrichment. In his opinion certifying the class, the judge wrote:

> *Defendant has refused and continues to refuse to refund [third-party payors] the purchase price paid for Baycol rendered unusable by defendant's voluntary actions and advice. Defendant has refused and continues to refuse to refund [third-party payors] for increased costs rendered medically necessary in order to safely switch patients to a different medication.*

It is expected that Bayer will appeal this ruling. The outcome on appeal will be watched with great interest. The case obviously will have highly significant consequences for Bayer around the country if the ruling is upheld on appeal.

$5 Million Awarded In Fen-Phen Suit Taken Away

In a bizarre term of events, the $5 million award to a Utah woman was taken away by the very same jury that made the award in the first place. A Philadelphia jury had awarded tentative damages to the woman, who claimed the diet drug compound fen-phen damaged her aortic heart valve, in the first phase of her trial. If it had stood, the verdict would have been the largest for a fen-phen plaintiff alleging heart-valve damage since the national multibillion-dollar class action settlement of fen-phen litigation in 1999. The award was reached during the damages portion of a two-step process. In the second or liability phase, the jury had to decide whether Wyeth would actually be liable to pay the damages. As we reported last month, this is a most unusual way for a trial to be conducted. Normally, liability is determined before reaching the damages issue. This suit is one of thousands of individual cases pending in state court in Philadelphia against Wyeth. Ms. Vega, who resides in Utah, took the diet drug Pondimin for 13 months starting in 1996, and echocardiograms have shown that the 54-year-old's "mild" heart-valve condition had progressed to a "moderate" one over time. An expert for the plaintiffs testified that Vega's condition would ultimately necessitate surgery to replace her valve, although she hasn't yet progressed that far.

The same Philadelphia jury awarded $500,000 to another Utah woman, Camille Olsen, but gave nothing to two other plaintiffs who took the diet drug for less than two months. The jury awarded $500,000 to Olsen, of Brigham City, Utah, who took Pondimin for a year starting in 1996. Ms. Olsen also has moderate valve damage. A medical expert said the 50-year-old would probably require surgery, although he was less confident about that prediction. Two other plaintiffs, Stephen Schultz of La Sal, Utah, and Marilyn Lyman of Blanding, Utah, were not awarded damages. Mr. Schultz took Pondimin for two months and Ms. Lyman took Pondimin for one month. The jurors probably decided not to award Schultz and Lyman compensation because they believed the short period of usage was insufficient to establish causation, according to their lawyers.

In any event, the final result in the Vega case was a huge victory for Wyeth. A unanimous jury found that the pharmaceutical manufacturer won't have to pay the $5.5 million in potential damages in that case. Obviously, the verdict is a most discouraging result for the thousands of fen-phen plaintiffs with cases still pending in state court in Philadelphia. In the second phase, the jury found that Wyeth was negligent in that it failed to provide reasonable information concerning the risk of heart-valve damage to the doctors who prescribed the diet drug. But, they found this failure did not cause the doctors to prescribe the drug. I am not sure how this result will affect the rest of the cases. I would have to believe that each case would stand on its own merits on the causation issue.

X. BUSINESS LITIGATION

Goodyear Settles Insurance Claim

The Goodyear Tire & Rubber Company will receive $22 million in a settlement with two insurance companies. The settlement is for asbestos and pollution related claims previously filed by the tiremaker. Lloyd's Underwriters reinsured by Equitas Limited will pay the $22 million. In addition, Equitas will place $39 million into a trust fund that can be used to reimburse Goodyear for costs it incurs in the future to resolve certain asbestos claims.

Lexar Media Wins Trade-Secrets Case Against Toshiba

A California jury has found Japan's Toshiba Corp. guilty of stealing trade secrets from Lexar Media Inc. The lawsuit was over a popular variety of computer chip known as "flash memory." The jury also found that Toshiba—described by Lexar as a onetime partner and investor that once held a seat on the smaller company's board—violated its fiduciary obligation to Lexar. The jury awarded $381 million in damages to Lexar. In addition, the company could win more damages associated with other phases of this case and a separate patent-

infringement case in federal court. Lexar plans to ask for an injunction that could bar U.S. imports of flash chips from Toshiba.

Flash chips are widely used in portable gadgets because they retain data when electric current is turned off. The litigation centered on a variety of flash memory used for removable storage cards in digital cameras and other products. But if Lexar is successful in obtaining an injunction, the judge could also choose to enjoin storage products from SanDisk Corp., which uses Toshiba chips. It is recognized that Toshiba invented flash memory, although South Korea's Samsung Electronics Co. is now the largest supplier. Lexar, a spinoff from Cirrus Logic Inc., specializes in controller technology that determines how data is written and read by memory chips.

During a six-week trial, Lexar asserted that Toshiba approached Lexar in 1996 to seek a collaboration under which Toshiba received information about Lexar's controller technology. Shortly thereafter, however, Toshiba had reached a secret deal to share technology with SanDisk, Lexar's competitor. Toshiba internal documents were viewed at trial. Toshiba contended at trial that it independently developed technology at issue in the case. Obviously, the jury disagreed, finding that Toshiba and a U.S. subsidiary engaged in conduct that was "oppressive, fraudulent or malicious." The ruling is said to potentially have broad repercussions in the flash memory market, where a series of battles over patents is being fought. This type litigation goes virtually unnoticed, but is very much a part of what happens in our nation's judicial system.

Source: *Wall Street Journal*

Court Orders Sony To Pay $90.7 Million In Game Suit

A federal judge has ordered Sony Corp. to pay $90.7 million to a company that develops technology that enhances video-game realism. But, the court stayed an order that would halt sales of Sony's popular PlayStation consoles in the United States. San Jose-based Immersion Corp. sued Sony in 2002, saying the Tokyo-based company violated two of its patents, using them to create tactile feedback features. A jury in Oakland, California, decided in favor of Immersion in September and ordered Sony to pay $82 million in damages. On March 28th a U.S. District Court judge affirmed the jury's ruling and added interest in the amount of $8.7 million. The judge also ordered the sales injunction, but granted Sony an immediate stay pending the company's expected appeal of the verdict.

Sony already has paid Immersion $7 million in compulsory license payments ordered by the court and will continue to do so each quarter, based on sales of infringing products, until there is a reversal or settlement. The suit was brought against Sony Computer Entertainment and Sony Computer Entertainment America. Immersion claimed Sony's PlayStation products infringed on patents related to "vibro-tactile" technologies that simulate the sense of touch in video game play. The suit specifically identifies the PlayStation consoles, Dual Shock controllers, and 47 games. Sony claims to have sold more than 27 million PlayStation2 consoles in the United States, making it the number one video game machine.

In 2003, Immersion settled another patent dispute with Microsoft Corp., the maker of the Xbox video game console. In the settlement, the software giant paid $26 million, including $6 million for a roughly 10% stake in the company. Immersion, founded in 1993, holds more than 270 worldwide patents and has more than 280 applications pending related to software and hardware that use so-called haptic technology. The company also develops touch technology for use in medicine, automobiles and mobile phones.

Class Action Against Wal-Mart Picks Up Steam

Wal-Mart Stores Inc. has agreed to pay $11 million to settle the federal government's probe into the hiring of illegal aliens. The settlement will affect a national class action pending in a federal court in Newark, New Jersey. Wal-Mart escaped criminal charges by entering into a consent agreement with federal prosecutors and the Department of Homeland Security's Immigration and Enforcement Division. While the $11 million fine is a record in a civil immigration case, it is a drop in the ocean for the world's largest company. The Arkansas-based retailer, with 4,750 stores worldwide, including 3,556 in the United States, had annual sales of $300 billion and profits nearing $11 billion.

It is significant that neither the company nor its executives or employees will be charged criminally. Wal-Mart received a target letter from a grand jury in Pennsylvania followed by an October 23, 2003, raid of 61 stores in 21 states. About 245 illegal aliens hired to clean the floors at night were arrested. A class action civil lawsuit was filed in Monmouth County, New Jersey, Superior Court on behalf of nine Mexicans who were nighttime janitors in stores in Piscataway and Old Bridge. Wal-Mart was accused of a number of labor and tax law violations, along with charges of discrimination and exploitation.

Another civil action was filed in federal court in Newark in November 2003. Counts of civil racketeering, civil rights violations, and false imprisonment were added in that case. It is alleged that Wal-Mart executives and managers knew of the use of illegal aliens, many of whom were from Eastern Europe. Wal-Mart denies that it knew of the workers' illegal status nor that the janitors were being denied a minimum wage and overtime. Whether Wal-Mart officials knew and encouraged or went along with the contractors is critical to the complaint's civil Racketeering Influenced and Corrupt

Organizations Act (RICO) count, which alleges that Wal-Mart, contractors, and sometimes subcontractors engaged in conspiracy. A RICO judgment not only leads to the top of the corporation, but it carries treble damages. The plaintiffs filed an amended complaint in February 2004, dropping all 11 of the named contractor defendants.

The plaintiffs also charge that, in violation of the Fair Labor Standards Act of 1934, janitors often worked up to 60 hours a week, seven days a week, with no overtime pay, vacation time, or minimum wage. They further accused Wal-Mart of locking them in overnight, and of sometimes not paying them at all, exploiting their status as illegal aliens. Interestingly, the Wal-Mart defense team argues that it was local store managers who decided whether to outsource the janitorial services, noting that at the most, only about 1,000 stores out of more than 3,500 in the nation used contractors. A dozen of the contractors pleaded guilty to criminal immigration charges in mid-March and will pay $4 million in fines. This is in addition to the $11 million to be paid by Wal-Mart. Thus far, U.S. District Judge Joseph Greenaway has issued only one significant order (December 29, 2004), which appears to offer something to each side.

- For the defense, the judge eliminated Wal-Mart's 538 Sam's Club outlets from the action. He also has shortened the period of the alleged wrongdoing, beginning in January 2000 instead of 1996, which is when the plaintiffs allege the use of illegals began. Judge Greenaway also rejected a request that no Wal-Mart lawyers interview potential plaintiffs in the absence of plaintiffs' lawyers.

- For the plaintiffs, the judge granted their request for a court-approved notice to be posted in janitor workstations within the stores to alert possible plaintiffs of the suit. New plaintiffs will have six months to sign on to the suit. Wal-Mart must produce the names, addresses and nationalities of all former and current janitors since January 2000, as well as all the contracts with outside contractors.

Judge Greenaway's key call will be whether to grant Wal-Mart's motion to dismiss, which is pending, and if not, then decide whether to certify the class. In his December order, he certified the matter as a collective action for the labor counts, meaning that plaintiffs must opt in rather than having to affirmatively opt out of the action. That is significant.

Source: *New Jersey Law Journal*

Equitable Life Proceeds With Its $7 Billion-Plus Lawsuit

Equitable Life is asking for over $7 billion in its lawsuit against former directors and auditors of the insurance company, which at press time was being tried in an English court. Equitable is claiming negligence on the part of both groups before the insurance company nearly collapsed in 2000. Equitable, Britain's oldest mutually owned insurance company, almost failed in 2000 under the weight of liabilities of 1.1 billion pounds (then worth $1.6 billion) amassed as a result of selling pension policies that guaranteed annuity payments of up to 11.5%. The payments turned out to be too expensive for the company to honor, and Equitable was forced to close to new business and slash the value of members' policies. A two-and-a-half-year inquiry by the House of Lords, Britain's highest court, found that Equitable Life was the "author of its own misfortunes."

But Equitable is now suing Ernst & Young for 2.05 billion pounds ($3.9 billion), claiming that the accounting firm was negligent and breached its duty to the company when it signed off on the company's accounts without warning Equitable of the problems that led to the crisis. Equitable claims that had it known of its true position, it would have put the company up for sale in 1998. Equitable is also suing six former non-executive directors of the company for 1.7 billion pounds ($3.2 billion), on the grounds of negligence and breach of fiduciary duty.

Source: *Associated Press*

Weyerhaeuser Faces $458 Million Judgment

A federal bankruptcy judge in Atlanta has handed down a $457.8 million judgment against Weyerhaeuser Co., one of the world's largest forest products companies. The court levied the judgment against the Washington State-based company for violating contract warranties when it spun off its disposable diaper division as a "liability-laden subsidiary." The division, Paragon Trade Brands Inc., was taken public in a 1993 initial public offering. The court's ruling left little doubt that Weyerhaeuser had breached warranties in its sales agreement for the diaper division by failing to have licenses for patents. The judge chastised Weyerhaeuser for producing a generic disposable diaper that infringed on diaper design patents held by competitors Procter & Gamble and Kimberly-Clark. As you may already know, P&G manufactures Pampers and Luvs disposable diapers, and Kimberly-Clark makes Huggies.

Source: *Fulton County Daily Reporter*

XI. INSURANCE AND FINANCE UPDATE

Deadline Set By Alabama Insurance Commissioner Passes

From our firm's experiences, we know that property owners along the Gulf Coast of Alabama and Florida have had a most difficult time getting their insurance claims paid. On February 23rd, the Alabama Insurance Department issued an order for all insurers to settle Hurricane Ivan claims within 30 days. The directive came in response to a spike of policyholder complaints and a settlement rate that had stagnated at about 95%, according to the Insurance Department. But, I would be greatly

surprised if the settlement rate in Alabama wasn't significantly lower.

The March 25th deadline set by the Alabama Department of Insurance for insurers to settle Hurricane Ivan-related claims or report to the department why they have not been settled, has passed. The Department has now given insurers with unsettled claims 30 days in which to pay the claims. According to the department, insurers that hadn't paid policyholders by April 25th were to face fines of up to $1,000 per violation. Ragan Ingram, an assistant commissioner with the Department, stated that the licenses of companies that failed to comply will be in jeopardy. Insurers with unresolved claims were to have filed reports with the Insurance Department by April 11th. The reports are confidential and will only be given publicly in a summary format that gives no information about specific companies. Insurance Commissioner Walter Bell spearheaded this attempt to get relief for Alabama policyholders. Before the deadline, the Insurance Department estimated there were 7,000 of about 200,000 claims unsettled. The Insurance Department allowed policyholders with complaints to file them online at the agency's website or by mail. (P.O. Box 303351, Montgomery, AL 36150-3351). The Insurance Department can be reached at (334) 269-3550.

Source: *Mobile Register*

UNUM Found Guilty Of Fraud In Arbitration

Our law firm represents approximately 1000 teachers in various counties throughout the state of Alabama with claims against UNUM/Provident Life Insurance Company concerning salary replacement policies that, we allege, provide little or no benefit to the teachers who purchased the policies. We filed these cases initially in the circuit courts in the various counties in the state of Alabama. The cases were eventually sent to arbitration by virtue of an arbitration clause that was placed into the insurance contract by UNUM. On behalf of the plaintiffs, we accepted arbitration and filed the teachers' complaints with the arbitrator.

The arbitration process has carried on for approximately two years. During that two year period, UNUM at some point decided that arbitration wasn't going well for them, and they filed a motion with the Alabama Supreme Court in an attempt to declare the arbitration clause void. The Alabama Supreme Court disagreed with UNUM and sent the cases back to the arbitrator.

On April 8, 2005 the arbitrator handed down his decision in the first 80 of the 1000 cases filed and awarded in excess of $1,000,000 to the Plaintiffs, plus the $80,000 thus far spent on the arbitration proceedings. The result of this good decision was that the average award for each teacher was approximately $17,000. The arbitrator found that UNUM/Provident was guilty of misrepresentation in the sale of the salary replacement policies to these Alabama teachers. He further stated that "Defendants have not presented any evidence in defense to Plaintiffs' claims." UNUM wanted arbitration, UNUM got their arbitration, UNUM then tried to have the Alabama Supreme Court void their arbitration clause in their contract, and now UNUM has failed to provide a defense to any of the Plaintiffs' claims of misrepresentation.

Needless to say, we are anxious to move forward with the remaining approximately 920 claims by these Alabama teachers against UNUM for the same or similar allegations made in these first 80 cases. We will update you on any new progress that is made in these cases.

Insurers File Lawsuit To Stop Ban On Credit Scoring

The State of Michigan has taken the correct stand on the practice in the insurance industry known as "scoring." But, the insurance industry has now filed a lawsuit trying to prevent the State of Michigan from banning the use of credit scores to set home and automobile insurance rates. The industry argued in the suit that the state insurance commissioner overstepped her authority when she filed new rules reducing base rates and barring insurance companies from providing discounts to policyholders with good credit ratings. The rules are set to take effect July 1st. Insurers were required to present new rate calculations by May 1st. The suit was filed by the Insurance Institute of Michigan—a group representing various Michigan insurers—and four insurers that use credit history to set rates: Farm Bureau General, Frankenmuth Casualty, Hastings Mutual and Progressive Michigan. A ratepayer is also a plaintiff in the suit. The insurance group claims the commissioner does not have the authority to set rates. They also contend that state law does not preclude credit history from being used to set rates.

I understand that most large insurers in Michigan use some form of credit scoring. Generally, the better one's credit score, the lower a customer's insurance premium will be. A person with a worse score will usually pay a higher rate. The state Office of Financial and Insurance Services says the practice of setting rates based on credit scores should end because it is unfair, inaccurate, illegal—and disproportionately affects minorities, younger insurance holders without any credit history, and the poor. Clearly, insurance needs to be more affordable, particularly in urban areas. Michigan Governor Jennifer Granholm's administration and the insurance industry have disagreed over the rules' effects on customers' insurance premiums. The industry contends a majority of those receiving discounts for good credit scores will pay higher premiums when the ban takes effect. The state insurance office says a small number of people will experience higher rates because their base rate reduction will be less than whatever discount they were receiving. The Insurance Department maintains a list revealing those insurers that use credit scores and those that do not. The list can be found on the department's website.

AIG Admits Rewriting The Books And Lying To Regulators

There is so much to write about American International Group, Inc., this month that I don't know exactly where to start. The world's largest business insurance company has now admitted a broad range of improper accounting that could possibly reduce its net worth by $1.7 billion dollars. AIG has outlined transactions that "appear to have been structured for the sole or primary purpose of accomplishing a desired accounting result." A wide-ranging and still continuing internal review has identified serious accounting problems that will cause the company lots of legal problems. Both state and federal investigators continue to investigate AIG. The most recent announcements don't cover the full extent of AIG's accounting problems over the past decade. Apparently, a pattern of "serious hoodwinking" has been uncovered and may prompt consideration of criminal prosecutions against the individuals responsible.

Among the numerous damaging admissions thus far is that AIG used insurers in Bermuda and Barbados that were secretly under its control to artificially lift net income and net worth. Maurice "Hank" Greenberg, who ran AIG for almost four decades, was forced out by these problems. He has now taken the 5th Amendment and is refusing to answer questions. Investigators are said to be examining the actions of Mr. Greenberg as well as other top AIG officials who have resigned or been ousted. Current AIG officials are also under scrutiny. AIG officials have admitted the company gave intentionally misleading information to state insurance regulators.

AIG's main customers are business, but it also sells life and property insurance to individuals in the U.S. and many other countries. In 2004, it reported net income of $11.05 billion on revenue of $98.61 billion. AIG has been one of the leading sellers worldwide of property casualty insurance covering risks that ranged from toxic waste accidents to hurricanes and medical malpractice. It also is a leading trader of volatile commodities and currencies. Now, unfortunately, it turns out that AIG's books were not all they were represented to be. AIG's current disclosures go far beyond a deal that several months ago attracted the attention of the Securities and Exchange Commission (SEC), New York Attorney General Elliott Spitzer, and state insurance regulators. Mr. Greenberg personally arranged that deal with General Re Corp., a unit of Berkshire Hathaway.

AIG has now admitted that the 2000-2001 transaction with General Re was improperly recorded as a reinsurance deal. At the time, some AIG shareholders were questioning whether the insurance company had enough money set aside to cover potential claims, also known as reserves. Under the transaction, AIG shifted $500 million dollars of expected claims to itself from General Re, along with $500 million of premiums. AIG booked the premiums as revenue, and then added $500 million to its reserves to reflect its obligation to pay the claims. If AIG was receiving premiums to ensure that it did not lose anything in the deal, then it faced no risk. In that case, it wasn't really insuring anything and the $500 million should not have been treated as premium revenue. General Re received a $5 million dollar commission for the deal. The transaction appeared to require AIG to make an additional $100 million dollars of claim payments should new losses develop. But, AIG said recently that it has concluded that the accounting was wrong "in light of the lack of evidence of risk transfer."

While the General Re deal had been receiving a great deal of scrutiny for several weeks, AIG's most recent statement has identified several other problems and potential problems. The following are a few of them:

- **Offshore reinsurance deals** – AIG is planning to fold into its own financial statements the operations of reinsurance companies to which AIG has transferred hundreds of millions of dollars in liabilities in recent years.
- **Underwriting losses** – AIG has admitted that it improperly characterized losses on insurance policies—known as underwriting losses—as another type of loss.
- **Investment income** – Through a string of transactions with unnamed outside companies, AIG says it has booked net investment income by taking credit for unrealized capital gains on its bond portfolio. Accounting rules do not permit booking of unrealized gains as income.
- **Bad debts** – AIG suggested that money owed to it by other companies for property-casualty insurance policies might not be collectable.
- **Commission costs** – Potential problems with AIG's accounting for the upfront commissions it pays to insurance agents in similar items might force it to take an after tax charge of up to $370 million dollars.
- **Commission costs** – AIG will also begin recording an expense on its books for compensation paid to its employees by a private company run by current and former executives. This company has been tens of millions of dollars on a deferred-compensation program for a hand picked group of AIG employees in recent years.

The Securities and Exchange Commission, the New York Attorney General's office, the New York State Insurance Department, and the U.S. Justice Department are all looking at various ways the company might have manipulated its financial condition. The issues under inquiry are:

- Whether reinsurance companies controlled by AIG were treated as separate entities in order to help hide AIG's exposure to risk.
- Whether reinsurance transactions are tantamount to loans that should have been so listed.
- Whether assets and liabilities were swapped to smooth earnings.

- Whether AIG used finite reinsurance to smooth earnings.

Sources: *Wall Street Journal*, *Associated Press*, and *The New York Times*

Finite Insurance Can Mislead Investors

We mentioned the use of "finite insurance" by AIG. This is a type of insurance typically sold to insurance companies that want to spread large losses over time. Many companies legitimately carry this form of insurance. As the name implies, finite insurance limits the potential exposure of an insurance company to liabilities or other payouts, such as those arising from a class action lawsuit, a fire, or other accident. I am sure some of our readers will ask: "Why would a company sell an insurance policy to a buyer to cover a liability both it and the buyer already know exists?" The answer is that the premiums are usually very large. The seller is betting it can make more money by investing those premiums, as well as fees it gets, than it will have to pay out when it is finally called upon to make good on the policy. For example, AIG has bought and sold finite insurance. General Re Corp., a unit of Berkshire Hathaway Inc., has mostly sold it. The buyer's benefit is that such insurance payouts offset the expense of maintaining reserves against losses, which regulators require and count as a cost against earnings. In contrast, if the same buyer borrows the money, the loan should show up on the books as a liability. According to experts, accounting rules allow a finite product to be considered bona fide insurance—and accounted for as such—only if a policy writer has at least a 10% chance of sustaining at least a 10% loss. If not, it should be booked as a loan. Regulators say there is a legitimate use for finite insurance—limiting losses on changes in interest rates, for instance—as long as the company buying it accounts for it properly.

J. Robert Hunter, director of insurance at the Consumer Federation of America, says that "disguising a loan as insurance enables a purchaser to obscure its liabilities." Dr. Hunter, a former insurance commissioner for the state of Texas, is well-known and a highly respected expert in the field of insurance. An insurer facing a loss, or more generally wishing to make its balance sheet look better, might buy a finite insurance product that appears to shift a liability or liabilities off its books, according to Dr. Hunter. Spreading the premium payments, which would have to be subtracted from profit, would allow the company to "smooth" its earnings, rather than take a big hit all at once. A sharp drop in profit often hurts stock prices. Such a deal might also improve a company's balance sheet and allow it to tell regulators that because it has reinsurance, it does not need to hold extra money in reserve. Dr. Hunter says if insurers did that, "they in effect hid their reserves by this reinsurance that wasn't really transferring risk," making them seem financially stronger to shareholders and regulators.

Source: *The Washington Post*

XII. PREMISES LIABILITY UPDATE

Fraternity Lawsuits Becoming More Common

In recent years, there has been a rash of cases filed around the country involving college fraternities. Most of these cases involve injuries or deaths resulting from some form of "hazing." While initiations and hazings have been a part of fraternity life for years, it appears things on some campuses have gotten totally out of hand. With all of the reality shows on TV and the increase in alcohol consumption on campus, the problems have increasingly grown in recent months to a new level. The local chapter of the fraternity and the members involved are usually made defendants in lawsuits. The national fraternity can be brought into the case when the facts justify their inclusion. In order to hold a national fraternity legally responsible, however, you have to show control by the national entity to a significant extent over its local chapter. Additionally, you also have to show control by the local chapter over its members in order to obtain a verdict against the local unit. That is usually a much easier task. It should be noted that some national fraternities provide liability insurance for their local affiliates and their members.

Some states have laws that protect either the national or local fraternity, or both, barring suits against them for actions by members or subsidiaries. For example, in Florida, a local fraternity can't be sued because that state's law considers fraternities unincorporated associations, which can't be sued.

Largely, the determination of whether the national fraternity organization can be sued revolves around common law agency principles. The agency principles are similar to any other case involving a business. It is always an issue of control. Normally the national organization gives the local fraternity a license to use a name and a symbol and usually supplies specific guidelines. They are careful to avoid an appearance of control. In many of the fraternities, however, there is no such thing as membership solely in the local chapter. The national entity usually has some oversight over what's going on at the local level. The following are two examples of cases involving fraternities that were reported in *Lawyers Weekly USA*:

> *Chad Meredith was a freshman at the University of Miami when he drowned while attempting to please the leaders of a fraternity he wanted to join. There was drinking, a pre-dawn swim across the campus lake, panic halfway across the lake and, when the fraternity president finally reached the other side—no Chad. Rescue workers eventually found the 18-year-old's body 11 yards from shore. The Meredith*

family won a $12.6 million verdict last year against the two fraternity brothers who initiated the swim and the case settled for a confidential amount in January.

In another recent case, a fraternity pledge at the University of Maryland died after drinking so much whiskey that his blood alcohol level was five times the legal limit for driving. The boy passed out and his fraternity brothers left him for four hours before calling an ambulance. That case also settled for a confidential amount. These incidents are two in a growing number of lawsuits concerning underage students—often a fraternity pledge or member—who engage in "binge drinking" as part of a fraternity ritual or other social gathering. These suits often focus on the fact that members of the fraternity have not taken sufficient action to protect the injured party, experts said. Even though fraternity chapters can lose their local charter licenses if they fail to comply with school policies and state laws, violations typically slip through the cracks unless there is a lawsuit.

Source: *The National Law Journal*

XIII. WORKPLACE HAZARDS

Inquiry Turns To Leak As Probable Cause Of Texas Blast

The refinery blast in March at BP's massive Texas City, Texas facility that killed 15 people and injured 100 more was probably caused by a leak of two flammable chemicals that are found in crude oil and reworked at the refinery to make ingredients of gasoline. This comes from preliminary findings from the ongoing investigation. While the cause of the leak is unknown, investigators are hard at work looking for the source. They are also highly concerned about the unusually high death toll from the explosion. The United States Chemical Safety and Hazard Investigation Board is concerned that a temporary office trailer, in which several people died, was too close to the danger zone. The type structure is also being questioned. Eleven of the people killed worked for a company that was servicing a different part of the refinery. Many of the victims did not fit the typical profile of refinery workers. More than half were in their 50s and 60s. Four of those killed were women. The office trailers were used for safety briefings, progress meetings, and consultation among supervisors on the 12-hour shifts. The trailer was about 50 yards from the blast site.

BP and other private companies were told by court order not to alter or destroy evidence. But, the court order allows for steps necessary for safety in the blast zone. The Occupational Safety and Health Administration (OSHA) and the Chemical Safety and Hazard Investigation Board, an advisory agency chartered by the federal government, are investigating the incident. OSHA is trying to determine what violations there were that could have caused this accident. Once determined, OSHA will issue fines for those violations. The chemical safety board will do a "root cause" analysis from which it will develop recommendations it can make to other refineries and similar plants.

The explosion took place in a part of the refinery that was in the late stages of a three-week shutdown for maintenance and refurbishment. This was the first in approximately two years. It is recognized by safety experts that refineries are safer when they are running than when they are shut down or just starting up. Some parts of refineries may run nonstop for three to five years, and when they shut down, workers are brought in to do intensive servicing. The shutdown periods are kept as brief as possible, especially in the past few years, when the difference between the cost of crude oil and the value of gasoline and other products has been large, making profits strong. While the pressure to complete the work is intense, with planning often taking months, refinery experts said there are also good reasons not to cut corners.

The area of the Texas City refinery where the explosion occurred took naphtha, a natural component of crude oil that is isolated by distillation, and converted it to other chemicals in pressurized vessels under high temperature. For the past 15 years, federal officials have been trying to make refineries safer. In 1992, OSHA established a Process Safety Management Rule, which requires systematic assessments of hazards, and training of employees and contractors, among other steps. But, the success of the rule is not clear. The agency tracks the number of violations of the rule that it records, by year, but for the last few years there is no pattern; for the fiscal year that ended last September 30th, there were 46 violations, compared with 36 in the prior year and 83 in the year before that.

BP's U.S. facilities have had more than 3,565 accidents since 1990, ranking first in the nation, according to a 2004 report by the Texas Public Interest Group (TexPIRG). In the wake of the accident at a BP refinery in Texas City last week, TexPIRG called on oil refineries and chemical plants to switch to safer chemicals and processes to reduce these kinds of accidents.

Source: *Wall Street Journal*

Refineries Under Stricter Rules Overseas

U.S. laws do much less to protect workers than those in Britain, where multinational oil giant BP is based and where workplace safety violations can lead to criminal complaints and unlimited fines. BP wholly owns 12 refineries worldwide, including those in Texas City, Texas; Grangemouth, Scotland; and elsewhere in the United States, Europe, and Australia. It also has interests in eight other refineries and owns petrochemical plants, gas stations and other installations worldwide.

The March 23rd fatal explosion and fire at BP's Texas City refinery, which took the lives of 15 people and injured 100, is by far the most serious recent BP refinery accident. Authorities in the United Kingdom didn't wait for anyone to die in Scotland before taking action. The government filed criminal charges against BP after the accidents in 2000. Eventually a Scottish sheriff, equivalent to a U.S. judge, imposed a record fine for a noninjury industrial accident of £750,000 or about $1.4 million, based on current exchange rates. BP, a British multinational oil giant with refineries around the world and $285 billion in annual profits, also reacted quickly with major improvements in safety, and has since celebrated an accident-free five years at the Scottish refinery. The lessons learned from the Grangemouth 2000 incidents were shared with other BP sites throughout the world.

In the United States, employers must inform the Occupational Safety and Health Administration (OSHA) only if someone is killed or three or more people are hospitalized in a job-related accident. And typically, even when someone dies, OSHA both recommends and imposes much smaller fines. The maximum fine for each willful violation is $70,000. After two refinery workers were killed in a September 2004 incident at BP's Texas City refinery, OSHA proposed total fines of only $109,500 — $54,250 per life lost. That incident remains under review. Fines are often reduced. Before the March explosion killed 15 in Texas, there had been at least seven other fatalities at BP refineries worldwide since 2000, including four previous deaths in Texas City. Even the large fines imposed in Scotland were nothing more than fleabites to multinational petrochemical companies like BP, among the world's largest players in big oil.

What makes for meaningful safety improvements in volatile refineries and other potentially dangerous petrochemical installations, many argued, is constant vigilance on the part of citizens, workers, companies and the government—especially in an era when oil prices and ownership interests are changing rapidly. The UK laws give their government workplace safety agency much more power than OSHA has in the U.S. In Texas City, local and federal investigators stayed off the accident site for a week for safety reasons.

Jury Returns Verdict In Flavor Maker Case

A Missouri jury has awarded a former popcorn plant worker and his wife $15 million after finding that exposure to butter-flavoring fumes led to his severe lung problems. The jury found International Flavors & Fragrances Inc. liable and awarded $12 million to the 51-year-old worker, and $3 million to his wife. The worker was an employee at the Gilster-Mary Lee Corp. microwave popcorn plant in Jasper, Missouri, from October 1984 to September 2001. He developed a rare and irreversible lung disease known as bronchiolitis obliterans, which was caused by exposure to diacetyl, a chemical in the butter flavoring. The worker's breathing problems started in 1993. New York-based International Flavors, the world's largest flavoring manufacturer, made the popcorn's butter flavoring.

The worker was one of 30 current and former plant employees who sued over lung disorders that they said were caused by exposure to a chemical in the flavoring. So far, six cases have gone to trial. The first, which ended a year ago, resulted in a $20 million verdict against International Flavors and in favor of Eric Peoples, then 32, and his wife. Three other cases resulted in confidential settlements. A fifth case, involving four plaintiffs, ended in a verdict for International Flavors. That verdict was reversed on appeal, resulting in the plaintiffs being granted a new trial.

Source: *Associated Press*

XIV. TRANSPORTATION

Red Light Running Is A Major Problem

According to the Federal Highway Administration, approximately 106,000 highway crashes, 89,000 injuries, and 1,036 deaths in the United States were attributable to red-light running in 2000. Crashes from vehicles running red lights tend to be more severe than other crashes because the vehicles hit at right angles and vehicles offer little protection to occupants during side impacts. Alabama ranked 5th of all states in red light running fatalities for the years 1992 to 1998. 5,951 deaths were documented, for a rate of 2.3 per 100,000 people for the nation, while Alabama had 3.4 traffic deaths per 100,000 people. Red light running crashes in Alabama account for 21% of total crashes from 1993 through 2001. The 5 highest crash rate cities (Birmingham, Montgomery, Huntsville, Mobile, and Tuscaloosa) accounted for 48.3% of the 47,501 red light running related crashes.

Red light running camera enforcement systems are now used in more than 100 jurisdictions in 18 states and the District of Columbia. Jurisdictions throughout the country that have implemented red light camera technology reported reductions in violations ranging from 20% to 87%. That is most significant. Surveys indicate that the public strongly supports cameras as safety devices. A 2003 survey by AAA-Alabama found that 77.3% of Alabama citizens favor the use of cameras to assist in the enforcement of red light violations. Surveys across the United States support the Alabama percentages. Legislation is pending in the Alabama Legislature that would, if passed, assist law enforcement in cutting down on the number of incidents involving running red lights. The bills are being handled by Senator Phil Poole and Rep. David Grimes. I encourage all of our Alabama readers to contact your legislators and ask them to support this legislation.

Phoenix Diocese Ordered To Pay $2.4 Million In Van Crash

A jury has awarded $2.4 million to six women in their early 20s who were returning from a religious retreat in 2003 when the van they were riding in flipped after a tire failure. The jury found that the driver of the 15-passenger van, who was working for the Roman Catholic Diocese of Phoenix, acted improperly in reacting to the failure of the van's left rear tire. Ford Motor Co., which made the van and was a defendant in the case, reached a confidential settlement in 2003 with the plaintiffs. The jury reached its verdict last month after a three-month trial. The jury cleared defendant Michelin North America Inc., finding that the tire that failed was not defective. The case had an Alabama connection since the tire was produced at the company's Dothan, Alabama, plant. The jury ordered the Diocese of Phoenix to pay total damages to the six defendants of $2,376,189.

The plaintiffs don't plan to appeal the adverse verdict involving Michelin. The plaintiffs had charged that the driver was driving too fast for the conditions and received improper training. The van was returning from a retreat on an interstate highway, when the tread on the left rear tire separated. The van went off the road and rolled three times, ejecting one of the women. The passengers, all Arizona residents, received a number of serious injuries. This is another example of why churches,

Deadly Wrecks In Work Zones Must Be Reduced

Speeding remains a major hazard for workers repairing highways. In 2003, 39 people were killed in Alabama in work zone related accidents. Across the nation, the figure exceeds one thousand fatalities. According to safety experts, about four out of five people killed in the crashes are either drivers or passengers. The primary reasons for work zone related accidents, according to DOT Director Joe McInnes, are inattention, tailgating, and speeding. Alabama was among dozens of states boosting strict enforcement in work zones this year as part of National Work Zone Safety Week. In Alabama, work zone awareness brochures and posters were distributed at the eight Welcome Centers and 25 highway rest areas across the state. Twenty states, including Alabama, have doubled the fines if motorists are caught speeding in a work zone. This is a problem that must be addressed and it is good to see something being done about it.

Groups Target Impaired-Driving Crashes

Impaired driving is one of the nation's deadliest problems. Nationally, more than 17,000 people died in alcohol-related highway crashes during 2003, which equals a fatality every 30 minutes, or nearly 50 life-ending crashes a day. Another 275,000 individuals suffered non-fatal-injuries at a cost of nearly $51 billion dollars each year. Impaired driving is often a symptom of the larger problem of alcohol misuse, and medical research reportedly shows that screening and brief intervention are effective in changing drinking and driving patterns among these high-risk individuals.

A transportation and health care coalition has joined forces to facilitate thousands of patient screenings for alcohol-related problems across the Southeast. The National Highway Traffic Safety Administration, the National Institute on Alcohol Abuse and Alcoholism, and the Substance Abuse and Mental Health Services Administration, acting in concert, supported the 2005 National Alcohol Screening Day (NASD), which was held on April 7th. Patients were screened for alcohol use problems.

The impact of alcohol abuse on the workplace was a special focus of this year's NASD. Currently, alcohol abuse is reportedly to be one of the top 10 conditions affecting employee productivity. It is said that the average employee engaged in hazardous drinking behavior adds $3,700 to his/her employer's health care costs annually. More than 200,000 people attended an NASD-sponsored screening at one of nearly 5,400 sites across the country in 2004. This record turnout led to more than 126,000 patient screenings. The Southeast Region reportedly saw a significant increase in participation, boasting nearly 900 sites, a 100% increase from 2003. More than 33,500 individuals visited these sites - up from 16,000 in 2003 - and nearly 21,000 were screened, up from just below 10,000 in 2003. Event sites are located in community, college, primary health care, military, and employment settings. The program is designed to provide outreach, screening, and education about alcohol's effects on health for the general public. It makes sense for employers to support screening and intervention. Not only will they have more productive workers, they will also save money in the future because of the high price associated with drinking and driving in this country that directly affects employers. It is also important for employers to support this program for another reason—it will save lives and could keep them from being sued.

Utility Company Will Have To Pay $10 Million To Family

Florida Power & Light Co. (FPL) will have to pay $10 million to the parents of a 12-year-old girl killed in a traffic accident after the company shut off a signal at an intersection in a Miami-Dade suburb. The Florida Supreme Court overturned an appeals court ruling that the drivers involved in the crash that killed the little girl were responsible in the death, not the power company. The work crew even told a police officer they didn't need his help before turning off the signal. There were six trucks and seven men on the scene and the bottom line is "they just didn't do what they had to, which was to direct traffic and put out flares." The high court said FPL should have realized it was causing a hazard when it

cut electricity to a traffic light while fixing a power line at a home about 150 feet away. The court wrote:

> *FPL should have and could have taken any of several minimal steps prior to deactivating the traffic signal, including simply notifying the local police department, placing cones or flares on the road, or notifying the public works department of the need for portable stop signs.*

The family originally won a $37 million jury verdict against FPL, but a three-judge panel of the 3rd District Court of Appeals cut it to $10 million last year. The full appeals court later overturned the jury's verdict in its entirety, citing a state law that requires drivers to treat intersections as four-way stops if a signal is out. The victim was riding home from school and shopping with her mother on a rainy day back in 1997 when the accident occurred. Her mother was in a line of traffic moving through the intersection when her car was clipped and spun sideways into the path of a Chevrolet Suburban, which slammed into the passenger side. The action by the Florida Supreme Court seems to be justified based on the facts set out by the court in its opinion.

Replacing Jet Insulation Will Cut Fire Risk

It doesn't take a safety engineer to figure out that **fire** and **airplanes** are a bad mix. That is especially true when the aircraft happens to be a commercial jet liner. Few passengers boarding commercial flights have any real understanding of how serious the potential fire problem for jets is when they board. One factor that should concern the public is that hundreds of U.S. airline jets contain flammable insulation that poses a safety risk and must be removed. The insulation, which lines the outer walls of jets, can burn if it touches sparks or flame. The insulation was installed in Boeing jets built in the 1980s when fire-resistance standards were less stringent than they are now.

The recommendation to remove this insulation is the latest step to improve fire safety after flames erupted on Swissair Flight 111 and it plunged into the Atlantic Ocean off Nova Scotia in 1998. As you will recall, the crash killed all 229 people aboard the flight. One conclusion from the investigation of the crash was that the plastic covers of insulation blankets on the McDonnell Douglas MD-11 had ignited. The material was supposed to snuff out fires. That investigation prompted regulators to order the material removed from about 700 McDonnell Douglas jets. Boeing bought McDonnell Douglas in 1997. A series of more recent fires aboard Boeing models convinced regulators that another material also posed a risk. In one case, insulation aboard an Air Canada 767 caught fire during a flight on May 13, 2002, according to the Canadian Transportation Safety Board. The U.S. Federal Aviation Administration (FAA) decided to act because material covering the Boeing insulation does not meet more rigorous fire-prevention standards imposed in 2000.

A total of 831 jets flown by U.S. airlines will have to have flammable insulation replaced by 2011, according to a proposed FAA action. It will become final after the public has a chance to comment for 60 days. The six-year deadline allows airlines to perform the complex replacement during previously scheduled maintenance. The work will cost an estimated $330 million but it has to be done. I understand that an additional 800 jets around the world also will be affected. The insulation was installed on Boeing 727, 737, 747, 757 and 767 models. The company has agreed that the insulation burns too easily and Boeing—to its credit—has been working with the FAA. Boeing is developing a fire retardant that can be sprayed on the insulation. Boeing hopes airlines will not have to actually replace the insulation if they use the spray and it works. If so, using the spray could cut the cost by more than one-third. The discovery of the flammable insulation highlights how little regulators know about the properties of dozens of materials used in insulation. The FAA says it is not aware of any other material that poses a risk, but the agency will continue to investigate the matter. The FAA has an obligation to make sure that the airlines respond properly and promptly.

Source: *USA Today*

XV. ARBITRATION UPDATE

Blind Nursing Home Resident's Case Goes To Arbitration

Ms. Helen Etting went into the Regents Park nursing home in Miami, Florida, in early 2000. At some point after she entered the nursing home, the facility claims Ms. Etting signed an agreement containing a binding arbitration clause. This contract took away her legal right to a jury trial against the nursing home, even in the event that the home caused her severe harm and regardless of how bad the conduct may have been. In the years following her admittance into the nursing home, Ms. Etting was hospitalized several times for a number of injuries, including malnutrition, dehydration, bedsores, and poor hygiene.

One month after being admitted to the hospital in March of 2001, she died as a result of these injuries. After her death, the family found that they could not file suit and hold the nursing home accountable in court because of the arbitration clause, which was mandatory. Despite the fact that Ms. Etting was legally blind and her signature appeared nowhere near the signature line on the contract, the clause was upheld by a court, and the family was forced into binding arbitration. The members of Congress who voted the Federal Arbitration Act into law years ago would turn over in their graves if they found out that the act was being abused in such a manner. How in the world any court could find that a blind lady under these facts could be held to

an arbitration agreement that she couldn't read—even if she had signed a document containing such a clause—is beyond me.

XVI. NURSING HOME UPDATE

Nursing Home Resident Fights Arbitration

A nursing home resident in Pennsylvania is appealing a judge's decision dismissing her lawsuit against the facility because she signed an arbitration agreement at the time she was admitted. Ms. Hermoine Bruno admitted herself into the Beverly Healthcare Center in Oakmont for rehabilitation after hip replacement surgery. During her residency at the Beverly facility, she claims a Beverly Healthcare worker caused two injuries to her hip. She filed a lawsuit because of the injuries, but it was dismissed because in her admission contract she agreed that any complaint that she had against the facility would proceed through arbitration. Ms. Bruno does not remember signing the arbitration agreement and it doesn't appear that it was ever mentioned to her.

Ms. Bruno said she was given a large stack of documents to sign at the time she was admitted. The arbitration agreement was just one of many documents that she had to sign, which she claims was not explained to her. Here is what this lady says about her arbitration agreement:

> *I was in such pain…I signed everything. I had no idea I was signing away all my rights. Had they told me that, I would have said, 'no way', because there is always something that can happen to you. What I can't understand is why do they do this on the day you are brought in. I had just been in for an operation. When you are in for an operation, you come out in a lot of pain…so I signed whatever they gave me.*

Beverly Enterprises operates 372 nursing homes and assisted living centers nationwide. According to the company, slightly more than half of its residents sign arbitration agreements. Some states, including judges in Tennessee and regulators in Beverly's home state of Arkansas, have held that the practice of asking potential residents to sign away their constitutional rights is "unconscionable" and unconstitutional. Unfortunately, In Alabama our Supreme Court recently issued opinions in two cases indicating that an arbitration agreement signed by a member of the nursing home resident's family is valid and will be upheld.

AARP is on the right side of this issue and is against arbitration in nursing homes. Dorothy Siemon, lead attorney for AARP in Washington, D.C., stated:

> *Our position is consistent. We oppose arbitration agreements for nursing home residents but it is happening more and more. We're hearing about nursing homes trying to impose these agreements all the time to avoid potential liability if they do anything wrong.*

Sadly, the federal Center for Medicare and Medicaid Services has side-stepped the issue. In 2003, the agency circulated a memorandum saying the federal government would leave it up to the states to decide whether the controversial contracts were legal. I applaud Ms. Bruno for her efforts. The practice of including arbitration agreements in nursing home admission contracts is reprehensible, particularly in light of the fact that it is done in situations where families must place their loved one in a nursing home immediately. I am aware that nursing homes all over Alabama are now including arbitration agreements in their admission contracts. I would urge anyone involved in the process of having their loved one admitted into a nursing home to read the documents closely that they are being asked to sign. Remember the words of Ms. Bruno:

Even if I lose, I want seniors to understand that they are signing away their lives and they might not even know it.

All of us should let our elected officials know how we feel about arbitration. Public opinion is the only thing that will make them do the right thing in this issue.

"Granny Cams" In Arkansas Nursing Homes

A House of Representatives panel in Arkansas has recommended a bill that would put video surveillance cameras in nursing homes. Their use would be limited to abuse cases. The bill would prevent any abuse caught on tape from being used in a lawsuit against the nursing home, but allow its use for criminal prosecution by the Arkansas agency that oversees the licensing of nursing homes. The bill would allow video cameras into a resident's room after the patient and his or her roommate sign a waiver. There was no word at the time we went to the printer with this issue on the status of this bill. I would like to see the Alabama Legislature enact a similar law.

Smoke Detectors Required In Nursing Homes

The Centers for Medicare and Medicaid Services recently announced that nursing homes that do not have sprinkler systems or hard-wired smoke detectors will be required to install battery-operated smoke detectors in patients' rooms and public areas. CMS took this unprecedented action after two tragic nursing home fires in Connecticut and Tennessee in 2003. Neither facility had smoke detectors in the patient rooms where the fires originated. Newly constructed nursing facilities are required to have sprinkler systems, but some older facilities are not. This action by CMS will be a definite improvement to the safety of resi-

dents who live in the over 4,000 nursing homes in this country that do not have sprinkler systems.

Nursing Home Fines Going Uncollected

The federal government collected only 42% of the civil penalty fines levied against the nursing home industry for quality-of-care problems during a two-year period, according to a recent government report. Discounts offered to the nursing homes for agreeing not to appeal—and delays in collecting payments—were pinpointed as the main causes, the report from the Office of the Inspector General (OIG) for the Department of Health and Human Services says. The report is one in a series now underway by the OIG's office. It reviewed civil monetary penalties levied in more than 4,000 cases in 2000 and 2001. By the end of 2002, only $34.6 million of the $81.7 million levied had been collected. Civil monetary penalties can be imposed when health inspectors find quality-of-care problems. Fines range from $50 to $10,000, depending on the severity of the problem. The report found:

- An automatic 35% reduction in the amount of the fine is allowed when nursing homes agree not to appeal. That accounted for $11.8 million, or 14%, of the total amount of the fines imposed.
- Another 14% of fines remained uncollected at the end of the period, with bankruptcies and inconsistencies in the collection process the primary causes.
- The median per-day fine imposed for the most serious problems, which include injuries or death, was about $4,000, well below the $10,000 maximum. For less-severe problems, the median per-day fine was $250 out of a possible range of $50 to $3,000.

Senator Charles Grassley (R-IA) chairman of the Senate Finance Committee, told the USA Today that the report exposed "another shortcoming" in nursing home oversight. He said: "Civil monetary penalties should be more than the cost of doing business. And the government needs to both impose and collect the penalties in order to deter future bad behavior."

Source: *USA Today*

XVII. HEALTHCARE ISSUES

FDA Issues Warning On Drug Use By Elderly

Elderly patients with dementia were significantly more likely to die prematurely if taking certain anti-psychotic drugs, the federal government said in an advisory to health care workers and patients. The Food and Drug Administration (FDA) is asking manufacturers of atypical anti-psychotic drugs to add to their labeling a **boxed warning** noting the risks and that the drugs were **not approved** to treat symptoms of dementia in the elderly. Elderly patients taking the drugs for dementia-related symptoms should consult with their doctors. The drugs were approved for treating schizophrenia and mania, and include such medications as Abilify, Zyprexa, Seroquel, Risperdal, Clozaril, and Geodon. Symbyax, which is approved for the treatment of depression associated with bipolar disorder, is also included in the advisory. An analysis of 17 studies covering four drugs showed the rate of death for the elderly patients taking them was about 1.6 to 1.7 times the rate of death for placebo users. The causes of death varied, but most seemed to be either heart-related or from infection. Interestingly, the FDA doesn't have data to indicate how many elderly patients take this class of drugs. But, agency officials believe that such prescriptions are common.

Eli Lilly and Co., the maker of Zyprexa, contacted doctors last year to alert them to the higher risk of mortality cited Monday by the FDA. The company also changed the drug's label last year to reiterate those higher risks. It was reported that the company will review the FDA's advisory to determine whether further changes were needed. Bristol-Myers Squibb and Otsuka America Pharmaceutical, Inc., which market Abilify, announced that they would respond to the FDA's request within 30 days. The companies also said a warning was added in February to the package insert accompanying Abilify, which noted a risk of stroke and similar events associated with its use by elderly patients with dementia.

Source: *Associated Press*

FDA Panel Rejects Wider Sales Of Silicone Breast Implants

I am going to take as a good sign the action taken by a Food and Drug Administration (FDA) advisory panel on silicone breast implants. The panel voted to reject an application to sell the implants more widely. A majority of panel members said that Inamed Corporation, the maker of the implants, had not provided enough information about how quickly its implants ruptured. A minority of panel members argued that women should have a choice between silicone implants and saline ones. I hope this action means the FDA is getting serious about its role as a protector of health and safety.

Judge Strikes Down FDA Ban On Ephedra

A federal judge has struck down the Food and Drug Administration (FDA) ban on ephedra, the weight-loss aid that was pulled from the market after it was linked to a number of deaths. The judge ruled in favor of a Utah company that challenged the FDA's ban. Utah-based Nutraceutical claimed in its lawsuit that ephedra "has been safely consumed" for hundreds of years. Supplements that included ephedra have been widely used for weight loss and bodybuilding, but have linked to 155 deaths. The FDA ordered the substance

off the market in April 2004. The court's ruling sends the matter back to the FDA "for further rulemaking consistent with the court's opinion." It also keeps the agency from taking enforcement action against the companies. At press time, I had not had an opportunity to read this opinion. But, I must say that it came as a shock.

The New HMOs On The Scene

There are some significant changes taking place in health care in this country and many of them are not good. One change is rather unusual. Millions of consumers are being linked by their financial services companies to accounts. These new accounts will allow them to manage their full range of medical benefits in the same fashion that they direct their 401(k)s. This change is made possible by a provision hidden in the new Medicare law. The new law now enables a health plan and drug plan to be offered by any well-capitalized entity adept at marketing and able to take on some financial risk. Specific language was obviously put in the bill to allow this. Medicare's new drug benefits plans can now be offered by financial service firms.

There is virtually no financial risk when doing drug business with Medicare because of the risk-sharing scheme the legislation allows with would-be drug plans. In fact, there is nothing to stop any financial services firm with an e-mail marketing list from offering one of Medicare's new prescription drug plans. These drug plans will become active in 2006. Thousands of financial services firms that have grown up by managing the retirement benefits of seniors in the form of IRAs and 401(k)s will jump into this new line of work. There is no telling what else the lobbyists have put in the Medicare law. It's a crying shame that the politicians didn't do more to look after seniors in this bill.

Source: *Reuters News Service*

XVIII. ENVIRONMENTAL CONCERNS

EPA Updates Cancer-Risk Guidelines

Last month, the Environmental Protection Agency announced a new set of guidelines for assessing chemicals that might cause cancer. The guidelines are intended to replace an earlier version that is nearly 20 years old. Cancer guidelines assist federal and state agency regulators in evaluating a particular substance might cause cancer in humans. The first risk assessments adopted in 1986 primarily relied on laboratory animal research as an indication of whether those substances would also cause cancer in humans. In recent years, however, a growing number of studies have refined efforts to analyze the impact of chemicals on humans. In some studies, scientists have determined that substances that may not be harmful to animals could in fact be quite harmful to humans. Several new human studies have also shown that some substances may be more harmful than once thought. For instance, the new research suggests that benzene, a known carcinogenic chemical found in a variety of products and materials, is a threat to cause cancer in humans at lower levels than previous studies indicated.

The new guidelines also reflect a growing body of studies that distinguish between the effect of cancer-causing chemicals in adults and their effects in young children. Essentially, the new guidelines recognize that young children are usually at much greater risk of contracting cancer when exposed to certain chemicals than adults. Many environmental groups have praised the EPA for finally updating their antiquated cancer-risk guidelines. But, some groups have expressed concerns over language that was inserted by the Office of Management and Budget that allows outside groups to challenge the scientific conclusions of these reports before they become part of the new guidelines. Essentially, some environmental groups fear this provides an open invitation to the chemical industry to try to weaken the guidelines and delay their implementation.

My personal opinion is that EPA scientists are trying to move forward and use the best science available to influence regulations on chemicals found in our air, soil, and water. But, I am concerned that the chemical industry will apply great pressure on the EPA in an effort to weaken these guidelines or keep them from taking effect all together. I hope that will not happen.

Nine States File Lawsuit Challenging New EPA Mercury Regulations

Nine states have filed a lawsuit against the federal government, challenging new regulations they say fail to protect children and expectant mothers from dangers posed by mercury emissions from power plants. The lawsuit, filed in federal court in Washington, D.C., said the reductions announced in March by the Environmental Protection Agency (EPA), do not go far enough to satisfy federal Clear Air Act requirements. The reductions aim to cut mercury emissions from coal-burning power plants by nearly half within 15 years, but opponents say the plan provides an out for the worst polluters by allowing them to trade "pollution credits" with cleaner plants. Attorney General Peter Harvey of New Jersey, lead plaintiff in the case, stated:

> *EPA's emissions trading plan will allow some power plants to actually increase mercury emissions, creating hot spots of mercury deposition and threatening communities. It's an anti-human health position. The EPA is putting private profit ahead of public health, and it's a mistake.*

As has been widely reported, mercury from smokestacks can wind up in waterways and ultimately be consumed by humans who eat tainted fish. The toxic metal causes nerve damage,

and can be harmful to children and fetuses even at low levels of exposure. Under the EPA's plan, the government allocates a pollution limit to each state, which then places a cap on its plants. Plants that exceed the limit can buy pollution credits from plants emitting less mercury pollution than they are allowed. The program starts in 2010. Until then, utilities do not have to do anything specifically to control mercury. The lawsuit challenges the deadline given to power plants for compliance, and assails the EPA for exempting power plants from having to install the strictest emissions control technology available. That technology would cut mercury pollution by 90%, according to the New Jersey Attorney General's office. The eight other states involved in the suit are California, Connecticut, Maine, Massachusetts, New Hampshire, New Mexico, New York, and Vermont.

Source: *Associated Press*

XIX. TOBACCO LITIGATION UPDATE

NY Jury Awards $17.1 Million Verdict Against Tobacco Companies

A New York jury has ordered Philip Morris to pay $17.1 million in punitive damages to a woman who accused the company of failing to warn her about the dangers of smoking. The award came one week after the same jury ordered Philip Morris and American Tobacco—now a subsidiary of Reynolds American Inc.—to pay $3.42 million to Norma Rose in compensatory damages. Ms. Rose, 72, sued Altria Group's Philip Morris and American Tobacco in 1996, charging that smoking caused her lung cancer and that the companies failed to warn her of the dangers of cigarettes. The lady, who started smoking before warning labels went on cigarettes in the 1960s, also accused the tobacco companies of manufacturing a defective product.

Source: *Reuters News Service*

Punitives Set Again At $50 Million In Tobacco Case

A case in California has been in the courts for several years. For the second time in less than seven months, the California Court of Appeals has determined that tobacco giant Philip Morris should pay $50 million in punitive damages in a case brought by an individual smoker. This amount is instead of the $100 million imposed by the trial court. A jury had originally awarded $3 billion in 2001 and that had been reduced by the judge who presided over the trial. The figure for punitives represents a 9-1 ratio over compensatory damages, an amount the appellate court found justified by the "extreme reprehensibility" of the company's actions.

The appellate court also found there was substantial evidence that the plaintiff detrimentally relied on the tobacco company's misrepresentations concerning whether smoking really causes lung cancer. The court then addressed the punitive damages issue. It cited the U.S. Supreme Court's 2003 decision on punitive damages, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, with regard to the applicable factors to take into account the degree of reprehensible conduct of a defendant:

- Whether the harm caused was physical as opposed to economic.
- Whether the tortuous conduct showed an indifference to or reckless disregard for the health of others.
- Whether the target was financially vulnerable.
- Whether the conduct was part of a pattern of repeated conduct or an isolated incident.
- Whether the harm was the result of intentional malice, trickery or deceit or mere accident.

Source: *ABA Journal*

XX. THE CONSUMER CORNER

Soldiers And Their Families Shouldn't Have To Fight Predatory Lenders

In our country, we have consumer protection laws that are supposed to help our military personnel while they are overseas fighting for our freedom. When men and women serving in the Reserves and National Guard were called to duty in Iraq, they were forced to leave both their families and their jobs. Many of those called to serve were the primary "bread winners" in their home. In most situations, the loss of this stable income, even with substitute military pay, caused a tremendous burden to those dependent family members left behind. One law that is supposed to help ease this burden is the Soldiers' and Sailors' Civil Relief Act ("SSCRA").

In 1918, during World War I, Congress passed the SSCRA directing courts to take whatever equitable action was reasonable and necessary to protect service members' rights that were subject to a legal dispute. Congress amended the SSCRA and expanded those protections in 1940, just before the beginning of World War II. The Act was amended again in 1942 and in 1991 to strengthen these protections for our men and women of the armed forces. The latest revision of this Act became law on December 19, 2003, when the president signed the Servicemembers Civil Relief Act. Reservists and members of the National Guard are entitled to protection under these laws when activated into federal service. Reservist and Guard members are also entitled to protection when they are activated by the state to assist in federal emergencies or disasters. The SSCRA gives service members the right to extend or delay legal proceedings for a specified length of time, with the ability to request longer periods of time should they continue to be away. Under certain circumstances, the Act

allows service members to stop foreclosures, terminate leases (including automobile leases), stop evictions, and receive a 6% cap on interest rates being charged.

Unfortunately, many of our dedicated men and women in the armed services are being victimized by unscrupulous lenders and finance companies. Recently, the *New York Times* published an article in which they interviewed several military personnel who returned home only to find that they and their spouses had been sued. At Camp Pendleton, California, over a dozen Marines returned from Iraq to find that their cars and possessions being kept in storage had been sold to cover unpaid fees and towing expenses. The *Times* reported that in other parts of the country big lending institutions such as Citigroup and Wells-Fargo are foreclosing on service members' families or not reducing their interest rates, despite being informed of their service overseas. Even in cases in which foreclosures were stopped before the bank took possession of the home, the soldiers' credit history was ruined.

A solider can sue a company who violates the SSCRA. But, there is a very good chance that the soldier signed an arbitration agreement when he or she entered into the credit agreement. In many cases, the soldiers will still lose out because they don't have the time or the money to pursue the case in arbitration. These companies know this and continue to profit from their illegal behavior. It is not uncommon that these so-called "predatory lenders" deliberately focus and profit on society's most vulnerable citizens. It is, however, a new low-point for them to focus on and profit from the very people protecting their freedoms.

Source: *The New York Times*

Investor Alert—"Top 10" Threats To Investors

Joseph P. Borg, Director of the Alabama Securities Commission, has identified the "Top 10" most common ploys being used to cheat investors out of hundreds of millions of dollars. He says: "Investors should keep their guard up anytime anyone offers an investment opportunity. It pays to remember that if an investment sounds too good to be true, it usually is." The ranking of the top 10 threats to investors for 2005 is based on the order of prevalence and seriousness as identified by an annual survey of members of the North American Securities Administrators Association (NASAA). The top 10 threats were said to be:

1. **Ponzi Schemes:** The premise is simple: pay early investors with money raised from later investors. The only people who make money are the promoters who set the Ponzi in motion.

2. **Unlicensed Individuals Selling Securities:** Anyone selling securities without a valid securities license should be a red alert for investors. Remember: No license, no sale.

3. **Unregistered Investment Products:** Con artists bypass stringent state registration requirements to pitch viatical settlements, pay telephone and ATM leasing contracts, and other investment contracts with the promise of "limited or no risk" and high returns.

4. **Promissory Notes:** Empty promises can leave these notes worth less than the paper on which they are printed.

5. **Senior Investment Fraud:** Because of their access to a lifetime of savings, seniors continue to face investment fraud by con artists peddling unsecured promissory notes, viatical settlements, and other investments that are either fraudulent or unsuitable for them based on their particular financial needs.

6. **High-Yield Investment Schemes:** Con artists lure investors with promises of triple-digit returns through access "risk-free guaranteed high-yield instruments" or something equally deceptive.

7. **Internet Fraud:** Stock promoters are using online "boiler rooms," instant messaging, and fake websites to lure investors into "pump-and-dump" stock schemes.

8. **Affinity Fraud:** Con artists are increasingly targeting religious, ethnic, cultural, and professional groups.

9. **Variable Annuity Sales Practices:** Senior investors should beware of the high surrender fees and steep sales commissions agents often earn when they move investors into variable annuities.

10. **Oil and Gas Scams:** With oil topping $50 a barrel and continued Middle East instability, regulators warn that con artists may renew schemes promising quick profits in oil and gas ventures.

Three scams also were cited for "dishonorable mention," including penny stocks, private placements, and investment seminars. Before making any investment, Borg urged investors to ask the following questions:

- Are the seller and investment properly licensed and registered?
- Has the seller given you written information that fully explains the investment?
- Are claims made for the investment realistic?
- Does the investment meet your personal investment goals?

Borg urges investors to contact the Alabama Securities Commission with any questions about an investment product, broker, or adviser before making an investment. Before investing, state securities regulators urge investors to call their offices and ask whether the individual selling the investment is licensed to do so. Regulators say investors can also save themselves a lot of grief by asking a second question—whether the investment itself is registered. To check out an investment or salesperson, contact the Alabama Secu-

rities Commission by calling 242-2984 or 1-800-222-1253 or by visiting their Website at www.asc.state.al.us.

Congress Should Look Hard At The Data Brokers

There has been a series of news stories concerning breaches of security at information brokers. We now know that a breach at LexisNexis, one of the information brokers, has likely exposed personal information of three times more consumers than initially reported. It appears that the U.S. Senate is beginning to hear from folks back home. A group of senators has promised a tough new crackdown on the loosely regulated commercial data-brokering business. Senate Judiciary Committee Chairman Arlen Specter (R-PA), at a hearing where senators questioned top executives of LexisNexis and two other leading data brokers, stated: "There's no federal legislation on the subject ... It is my conclusion that we do need federal legislation, that there needs to be uniformity." Most folks don't even know what a data broker is. Data brokers collect personal information on consumers—from driver's licenses and Social Security numbers to medical records—and sell it to insurance companies, prospective employers, the IRS, law enforcement agencies, and many others. The string of recent breaches, most prominently at LexisNexis and ChoicePoint Inc., has put the personal information of hundreds of thousands of Americans at risk. As previously recorded, ChoicePoint, Inc. disclosed a scam that involved as many as 145,000 Americans. That seemed huge at the time.

Now, London-based Reed Elsevier, which owns LexisNexis, has revealed last month that criminals may have breached computer files containing the personal information of 310,000 people. This is 10 times more than the 32,000 people that the company originally reported as having been put at risk in March. The company said the fraud involved the improper use of IDs and passwords belonging to legitimate customers.

Several members of the Senate have introduced legislation on identity theft. One bill has requirements that consumers are to be notified when their personal information is breached. A similar provision is now in place in California. Interestingly, it was California's 2003 law that brought the ChoicePoint data breach to light. Clearly, something must be done to make sure that "ID Data Theft" is stopped permanently.

Lawsuits Against ChoicePoint Will Be A Certainly

It is certain that there will be a number of lawsuits filed against ChoicePoint Inc., where security breaches exposed thousands of personal data files to identity thieves. In fact, nearly 20 class action suits have already been filed. Many of these cases were brought by shareholders. In these lawsuits against ChoicePoint, it is alleged that executives presented a rosy picture of the company's security even after they knew infiltrators had been able to pose as legitimate businesses to get Social Security numbers, birth dates and other confidential information from its databases. If management knew or should have known about the trouble, but failed to disclose it, that is a legitimate basis for a lawsuit. In such cases, investors would purchase stock at a price that was artificially inflated.

According to Securities and Exchange Commission filings, Chief Executive Derek Smith earned about $12.4 million on stock sales from November through February, and President Douglas Curling took home a profit of about $4.1 million over the same period. It will be interesting to learn what these men knew about the company's problems. ChoicePoint has said the stock sales were planned in advance and had nothing to do with the identity theft case. A 1988 U.S. Supreme Court decision that said plaintiffs need not have been given false statements by a company in order to sue for fraud established the rule for class action securities lawsuits. It's enough that they bought or sold stock in a company that deceived the market. I suspect ChoicePoint will have lots of explaining to do as this story unfolds.

Companies Should Be Liable For ID Data Theft

Hundreds of thousands of consumers have had their personal information either exposed or stolen by third parties that failed to adequately protect it. The breaches raise the question of whether businesses can be and should be held responsible if customer information is stolen from them, and folks become the victim of identity theft or fraud resulting in losses. Credit-card fraud is not a new phenomenon, and card issuers have procedures in place to deal with fraudulent purchases. But as more and more private consumer information is kept online, criminals are increasingly turning to the more serious fraud of identity theft, using consumer data to assume another person's identity and take out new credit cards or loans. The results can be devastating. Insecure databases of online retailers and information brokers are fueling the problem, providing huge batches of potential identities to steal.

Consumers who are damaged will likely ask that businesses be held responsible for failing to secure the personal information they maintain. I believe—even under the present state of the law—there will be liability in such cases. It would appear that common law negligence theories would apply. Certainly, there is a duty and a breach of that duty, resulting in damages.

Blockbuster Settles "No Late Fees" Case

Blockbuster Inc. has reached a settlement in the "No Late Fees" case. The company is changing how it promotes its "No Late Fees" policy to make sure customers know they may incur some charges if they keep videotapes, DVDs, or games seven days beyond their due

dates. In the settlement with 47 states and the District of Columbia, the nation's largest movie-rental chain also said it would offer refunds to aggrieved customers who were charged fees under the policy that went into effect on January 1st. The company will pay the states a total of $630,000 to cover investigative costs, expenses, and legal fees.

Blockbuster called the policy the "biggest and most important customer benefit" the company has ever offered. The company said it will eliminate the biggest source of customer dissatisfaction. The program drew the immediate attention of state Attorneys General even though few complaints were filed. The Attorneys General alleged that the program was misleading because Blockbuster did not adequately disclose that if customers kept rented videos or games for more than seven days after their due dates, they would be charged the sales price for the overdue items. If that happened, that could result in a charge of $8 to $20 to a customer's credit card. The charge could be reversed if the item was returned within 30 days, but then a $1.25 restocking fee would be charged.

In settling with the states, Blockbuster agreed to clarify its program through more in-store signs, more details on receipts, and information on its websites. Customers who were charged restocking fees or the sales price of items will be given refunds as long as the items were returned in good condition. Blockbuster said affected customers should fill out complaint forms at their local stores. Vermont, New Hampshire, and New Jersey did not participate in the settlement. Instead, New Jersey has sued Blockbuster, saying its new policy was deceptive and fraudulent. That suit is still pending.

The Dangers Of Pellet And B-B Guns

We have handled a number of cases in which young children were seriously injured where B-B or pellet guns were the culprit. Recently, a shot from a pellet gun took the life of a young boy in a small Alabama town. The 12-year-old boy died after being shot from close range. Unfortunately, these accidents are fairly common. According to the U.S. Consumer Product Safety Commission, there are about four deaths a year nationally caused by B-B guns or pellet rifles. For the uninformed, these are dangerous weapons that can kill a person. A pellet from a rifle can go through a piece of metal and put a dent in a piece of solid steel. According to a medical study, a pellet can also tear through organs, causing serious and sometimes permanent injuries. The force of a pellet is enough to destroy even an adult's eye beyond any capability of repair. Clearly, a pellet or B-B gun can inflict serious damage to a child, and that shouldn't be subject to debate.

Because these guns are extremely dangerous, it is most important to teach children—if they are allowed to use them—how to use the weapons correctly. Most folks, especially children, don't realize how dangerous they are. Proper education could save a life. But if the education doesn't work, maybe a gunlock will. There should be age limits on those who can use a pellet gun. Small children shouldn't have access to them except with adult supervision. Companies that manufacture or sell these guns also have a responsibility, and that is to adequately warn buyers. Neither should retailers ever sell the guns to minors.

Nautilus To Settle Bowflex Claims

The maker of the popular Bowflex exercise machines has agreed to pay a $950,000 penalty for not immediately reporting safety defects that led to dozens of injuries. Nautilus Inc. recalled about 800,000 Bowflex Power Pro systems and Bowflex Ultimate Fitness Machines last year after receiving reports of injuries over a number of years. Under federal law, manufacturers, importers, distributors, and retailers must immediately report information about potentially hazardous products to the U.S. Consumer Product Safety Commission (CPSC). The Power Pro and Ultimate machines that came with a "Lat Tower" had backboard benches and seat pins that broke and collapsed, injuring some customers. Another version of the Power Pro was manufactured without a "Lat Tower," and the incline support brackets on these models also occasionally failed and resulted in injuries. According to the CPSC, Nautilus did not report 85 injuries between 1995 and 2004. Users suffered chipped teeth, cuts, and back, disc and neck injuries. Nor did the company report design changes on the machines that were supposed to fix the problems. The Power Pro models have been discontinued. Repair kits for Power Pro machines can be obtained through the Bowflex Website, www.bowflex.com.

Source: *Associated Press*

XXI. RECALLS UPDATE

Children's Reebok Jacket And Pant Sets

Reebok Children's Windwear and Fleece Jacket and Pant Sets are being recalled. The zipper slider and pull on the jackets can detach if pulled when the jacket is open. The detached zipper slider and pull can pose a choking hazard to young children. Reebok has received three reports to date of zipper sliders/pulls that detached. Thus far, no injuries have been reported. The recalled jacket/pant sets were sold in royal blue, pink, pink/blue, purple/green, pink, purple, red/blue, and gray/dark gray color combinations in sizes up to children's size 7. "Reebok" is printed across the front of the hooded jackets. The style numbers were printed on the store tag only and end in: 451, 449, 448, 447, 446, 444, 435, 433, 429, 428, 424, 412, 537, 531, 530, and 526.

The recalled jacket/pant sets were sold exclusively at Gordmans, Fred Meyer, Kids R Us, Ross, Gottschalks, and the Reebok Corporate Headquar-

ters retail store in Canton, Massachusetts between August 2004 and February 2005 for between $15 and $20. All other jacket/pant sets purchased at any other retailer are not included in this recall.

Consumers should immediately take the recalled product away from young children and contact Adjmi recall hotline to receive a replacement product. For more information or to receive instructions on receiving a replacement product, contact Adjmi recall hotline at (800) 873-5570, or visit the Reebok Website at www.reebok.com. The recall is being conducted in cooperation with the U.S. Consumer Product Safety Commission.

Arctic Cat ATVs Are Recalled

Arctic Cat FIS and TBX Model ATVs are being recalled, according to the U.S. Consumer Product Safety Commission. The fuel tank used on some all-terrain vehicles could develop a fuel leak. If this occurs, a fire hazard with the possibility of injury and property damage could occur. The recall includes 2005 Arctic Cat 500 and 650 FIS, and 400 and 500 TBX model ATVs. The FIS models affected by this recall have the vehicle identification number (VIN) ranges of 4UF05ATV15T226237 through 4UF05ATV15T242874, and 4UF05ATV55T246510 through 4UF05 ATV55T248189. The TBX models have VIN ranges of 4UF05ATV15T221345 through 4UF05ATV15T223967, and 4UF05ATVX5T251024 through 4UF05 ATV55T251397. The VIN is located on the left rear frame tube of the vehicle near the upper shock mount.

The recalled models were sold by Arctic Cat dealerships nationwide from September 2004 through March 2005 for between $5,500 and $7,500. Consumers should stop using these ATVs immediately. Registered owners have been notified about this recall by mail. Consumers with a recalled ATV should contact their local Arctic Cat ATV dealer to schedule the free repair. If you are unsure whether your ATV is affected, contact Arctic Cat by calling the firm toll-free at (800) 279-6851 between 8 a.m. and 5 p.m. CT Monday through Friday, or go to the firm's Website at www.arctic-cat.com. You should have the vehicle identification number (VIN) of the ATV available when you call. The recall is being conducted in cooperation with the Consumer Product Safety Commission.

Bratz Stylin' Scooter Is Recalled

MGA Entertainment is recalling 297,000 Bratz Stylin' scooters, which are manufactured by Jurong Dumar Bicycle, Inc. of China. This recall does not include Bratz Stylin' Scooters manufactured for MGA by any manufacturer other than Jurong Dumar Bicycle, Inc. The wheels of the scooter can break or become damaged, causing users of the scooters to fall and possibly suffer injuries. MGA has received six reports of cracked wheels on the recalled scooters. All six incidents resulted in cuts, scrapes, and bruises. In one case, a 9-year-old suffered a broken arm. The product is a non-motorized two-wheeled scooter with a folding hinge and an adjustable handlebar. The scooter platform is purple with a bright pink Bratz logo on the top surface.

Scooters containing information identifying the product as Item number 266563, with a date of manufacture before July 2004, and manufactured by Jurong Dumar Bicycle, Inc. are included in this recall. This identification information can be located either in the area directly beneath the scooter platform or at the bottom of the scooter near the rear wheel. The scooters were sold at toy and discount chain stores nationwide from September 2003 through November 2004 for about $30. Consumers should stop using the scooter immediately and contact MGA for a refund or a replacement scooter. For additional information, contact MGA toll-free at (800) 222-4685 anytime. The recall is being conducted in cooperation with the U.S. Consumer Product Safety Commission.

Cookies Recalled Because Of Unlabeled Milk Ingredient

A California company is recalling espresso mocha cookies sold at Target stores in Texas and more than 20 other states. Officials say the treats may contain undeclared milk, which can pose serious health risks to people with milk allergies. Too Good Gourmet of San Lorenzo, California, in December distributed its Archer Farms Espresso Cookies to Target stores in 24 states. The product came in boxes containing a tray of nine cookies and bearing lot code 0805. More information is available by calling the company at 1-877-850-4663 on weekdays.

Tree Stand Safety Harnesses Recalled

An Illinois-based company is recalling about 500,000 safety harnesses sold with tree stands. Hunter's View says the harnesses could fail during use, resulting in consumers falling from tree stands. No injuries have been reported. The 2004 model year harnesses have model number 3333 and Model Year 2004 written on a white label attached to the harness or the tree strap. They were included with every Hunter's View and every Comfort Zone brand tree stand sold under a variety of names and model numbers. The recalled harnesses were sold at hunting and sporting good stores nationwide beginning in January 2004 for between $100 and $300. Consumers should contact Hunter's View to receive a free replacement harness. For a list of product names and model numbers included in the recall, consumers can call Hunter's View at (888) 878-0440.

Sears Recalls Table Saw Rip Fences

Sears Roebuck and Co. is recalling about 41,800 table saw rip fences manufactured by Rexon Industrial Corp. Of East Windsor, Conn. Sears says the rip fence—a metal guide that keeps material being sawed from shifting side to side as it passes through the cutting blade—can come loose. If that

happens, the retailer says the material being sawed can kickback, possibly injuring the operator. The Consumer Product Safety Commission says there have been 230 reports of the rip fence bracket coming loose, but no reports of injuries. The rip fence on the saws is made of silver-extruded aluminum and has an over-locking handle with a black die-cast aluminum head. They were included with Craftsman table saw model number 137.21830. Sears stores nationwide sold the rip fence from August 2002 through November 2004. The cost of the complete table saw is about $399, and the cost of the rip fence is about $40. The company will provide free replacement parts with instructions to consumers. For more information, consumers can call the Sears Craftsman Helpline at (800) 843-1682.

XXII. SPECIAL PROJECTS

Medical Help For Black Belt Counties

The Community Care Network, a special health program, is providing needed health care screening and medical care and treatment to counties in Alabama's Black Belt. This program, created by Dr. Leon N. Davis of Montgomery, is one that is badly needed and will benefit thousands of folks who can't afford healthcare or who simply don't have access to these services. If you would like to learn more about the program, contact Ms. Deborah Huntley at 1629 Forest Avenue, Montgomery, Alabama 36106 or go to the website: www.comcarenetwork.org.

Alabama Watch

In my opinion, Alabama Watch has worked hard and has done an excellent job for consumers in our state. Unfortunately, the group is having to close its Montgomery office after the current legislative session ends. But, the group will reopen at a Black Belt location. Alabama Watch is downsizing their operation—not because they want to, but because there is no choice. Simply put, folks haven't supported Alabama Watch financially. Sustained funding was always very difficult to come by and has now become virtually impossible. Barbara Evans, a dedicated consumer advocate, is determined to keep Alabama Watch alive and functioning and hasn't given up. Nevertheless, it's most discouraging that an organization that has worked so hard for so many is not able to do its job because of a lack of funding. This occurrence points out why consumers have such a hard time and get so little help from government. Experience tells us that government favors those who have strong lobby groups working for them. The fact that these groups have unlimited funds that can be used to curry favor sure doesn't hurt them. Currently, there are over 500 registered lobbyists that actually lobby government—including the Legislature—in Montgomery. I suspect 99% of them represent special interest groups. Their lobbying efforts don't stop with the Legislature. They also work on the executive branch and on department heads.

Alabama Watch has achieved tremendous success in almost all of its endeavors. Barbara Evens and her very small staff have become very well respected by the media, especially the reporters who cover the State House in Montgomery. Alabama Watch has been a real consumer advocate. A group that works for consumers in Montgomery is about as rare as "hen's teeth." I would like to see Alabama Watch not only stay in Montgomery, but be able to increase its number of staff personnel, so that their good work for consumers will continue. If you agree that we need a group that is dedicated to looking out for consumers and protecting their interests, please consider making a generous, tax-deductible donation to Alabama Watch. You can either send a check to Alabama Watch, 278 Harriet Tubman Road, Lowndesboro, Alabama 36752, or make a donation online at www.alabamawatch.org. Alabama Watch is one of the few groups that watch out for the interest of consumers at the Alabama Legislature. If the special interests can have over 500 paid lobbyists, surely consumers can afford to have **one**! Let's don't let the voice of Alabama Watch be quieted!

XXIII. FIRM ACTIVITIES

Ben Locklar Joins Firm

Ben Locklar joined our firm on April 18th and will work in the Mass Torts Section. Ben, who has practiced law for 10 years, was a member of the firm of Jordan, Myers and Locklar until that firm disbanded. Ben then worked as a lawyer for the state judicial system for a short time. But, his plan was to return to the active practice of law. We had a real need for a lawyer with Ben's level of experience and expertise, and things worked out well for all concerned. We are most pleased that Ben, who is an excellent lawyer, chose our firm. Ben is married to Angela Speights Locklar, who is a registered nurse, and they have two children. The family attends Frazer Memorial United Methodist church in Montgomery. Ben has hit the ground running in the Mass Torts Section and will be an asset to the firm. We are really fortunate to have a lawyer with Ben's ability, experience, and character join the firm.

Robert Martin

Robert Martin, who has been with the firm for over three years, started as a mail clerk in November of 2001 and has progressed up the ladder. Since that time, Robert has since served the firm as a runner and staff assistant in the Mass Torts Section. Robert currently serves as Administrative Assistant for

Lisa Harris, who is our Executive Director. In this position, Robert assists Lisa with the daily operations of the firm. He handles human resource issues, meets with vendors to get quotes on products/services, as well as performing various other administrative duties. Robert currently attends AUM where he is majoring in Accounting. Robert enjoys the outdoors and is a member of Morningview Baptist Church. We are pleased to have Robert with the firm. He is doing very good and valuable work for us.

XIV. CLOSING REMARKS

We live in a country where the rule of law has a very special meaning. In my opinion, that's what really separates our nation from most others. Law Day 2005 should be a most important day for all American citizens. The theme for Law Day this year was: "The American Jury: We the people in action." This theme is especially timely since our jury system—at both the federal and state levels—is under constant attack. Every person who really believes that the rights to life, liberty, and the pursuit of happiness are important should be willing to stand up and fight for the American jury system. Without the right to a jury trial in a system that promises fair and equal treatment for all, our country couldn't long survive as a truly free nation. I hope and pray that we will never allow the movement to destroy the jury system to succeed. I don't believe anybody could have said it better than one of our nation's brightest and best, who said it over 200 years ago:

> *I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.*
>
> *Thomas Jefferson 1788*

Finally, we must come to grips with all of the social and moral issues that face us and which pose a real threat to our nation. God has blessed our country from its very beginning, but we have slowly moved away from Him. Clearly, our dependence upon God's divine authority has slipped in a most dramatic fashion. We now witness shocking events that should serve as a wake-up call for all of us. Little children are being kidnapped, abused and murdered—our schools have become battlegrounds –drugs and violence are commonplace in our society—racial division persists—corporate crime and fraud are all too prevalent—the family structure is under attack—many of our churches refuse to face up to and take a stand on moral and social problems—and the list goes on. I sincerely believe that there is but one way to save our country. But, it will take a complete reversal of the way we have attempted to solve our problems. The solution is really very simple—we must call on God to save this nation. This is not the first time that a nation that was favored by God, turned its back on Him, and then found itself in a real bind and desperate for help.

> *If My people who are called by My name will humble themselves, and pray and seek My face, and turn from their wicked ways, then I will hear from heaven, and will forgive their sin and heal their land.*
>
> *2 Chronicles 7:14*

My prayer is that we will wake up before it's too late, put aside our pride, and ask for God's help in healing this nation. I hope most Americans really believe that God will answer our prayers. I am convinced that He will bless our nation and heal our land!

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