THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

More On The Hypocrisy Of The Christian Coalition

I have felt for a long time that the Christian Coalition was really a political organization using the term "Christian" in its name for obvious reasons. Now that the gambling connections have surfaced, I am totally convinced that the group is purely political. We wrote last month about how Washington lobbyist Jack Abramoff had solicited money from the Choctaw Indians and routed it to the Christian Coalition of Alabama. Documents released recently by a U.S. Senate Committee reveal that the Mississippi tribe that operates the Pearl River casino resort actually funded anti-gambling activities in Alabama. This was obviously done to keep down the competition in the gambling industry. The Senate Indian Affairs Committee released the documents as part of a hearing on alleged wrongdoing by Abramoff, the tribal casino lobbyist. In an exchange of e-mails, Abramoff had asked a tribal official for $300,000 and then directed the money to the Christian Coalition of Alabama. The money was sent through a group called Americans for Tax Reform (ATR), which is headed by Grover Norquist.

ATR is a Washington nonprofit, 501c(4) lobbying organization, so named for a section of the tax code. You will recall that John Giles has confirmed that his organization did in fact receive $850,000 from ATR. That money amounted to most of the $1.05 million John raised that year. It was used to fight a 2000 bill in the Alabama Legislature aimed at legalizing video poker in Alabama. Being against the gambling legislation is good, but secretly taking gambling money for the fight is both bad and hypocritical.

The e-mails were released as part of an investigation into allegations that Abramoff and associate Michael Scanlon scammed their Indian clients by overcharging them and pocketing the proceeds. The e-mails mentioning Alabama by name were posted on the website of the Committee and had less information blacked out than the hard copies that were distributed publicly in Washington. The hard copies had all references to Alabama and the Alabama Christian Coalition blacked out for some unknown reason. John Giles has an obligation to disclose all of the donors to his group. If he is taking gambling money, I have to wonder what other special interest groups are financing the group's political efforts. I have always liked John and have to say that he is a very smart man who has a real ability to communicate his message. But, the more he tries to justify taking the gambling money, the deeper John's "hole" gets. I understand there is more coming from Washington on this story—stay tuned! Without a doubt, the group's credibility has been damaged by taking gambling money. Lots of folks who listen to the Christian Coalition on Alabama politics may have learned a good lesson.

Road Construction Site Death Case Settled

Our firm recently settled a wrongful death case involving the tragic death of a 15-year-old young man in Montgomery County. The death was the result of injuries received in a one vehicle accident that took place on September 6, 2003 in a highway construction zone on U.S. Highway 80 near the Montgomery airport. The car in which the victim was a passenger was traveling through a temporary detour that had two lanes of travel. The driver suddenly encountered a standing pool of water that covered nearly the entire width of his eastbound lane of travel. The water caused the vehicle to hydroplane, crash into a temporary barrier wall, and then overturn.

Evidence showed that the construction company, doing work under contract with of the State of Alabama, had failed to properly maintain a drainage culvert, which caused water to pool and back out onto the highway. This created a highly dangerous hazard for eastbound traffic that had to use the detour. Although the State was responsible for designing the construction project, the general contractor had the sole responsibility under state specifications for providing continuous maintenance and

IN THIS ISSUE

upkeep of the construction site to provide for the safety of the traveling public. The case, which was before the Honorable Charles Price, Presiding Judge of the 15th Judicial Circuit, settled on the second day of trial.

The general contractor in this case had a duty to make the detour lanes safe for the traveling public. There were a number of specific safety violations including:

- The general contractor failed to maintain the detour in a safe condition.
- The general contractor failed to install proper erosion control devices.
- The general contractor failed to provide continuous surveillance, of the construction zone as required.
- The general contractor failed to place warning signs in place on the date of the accident.

The Montgomery Police Department did an excellent job of investigating this accident. The three officers who were involved found that the driver of the vehicle had done nothing wrong and that the standing water caused the driver to lose control of his vehicle. We would have been able to prove that the accident could easily have been prevented had the safety rules been followed.

One of our expert witnesses, Tom DeStafney, addressed the negligence of the contractor. Mr. Destafney, a retired Navy Commander who supervised the design and construction of roads for the military during Desert Storm/Shield, offered the following opinions related to the contractor's failure to provide for the public safety:

The contractor failed to maintain the drainage culvert area in order to prevent buildup of water on the roadway.

The contractor failed to adhere to known construction standards and contract documents, which require proper maintenance of the drainage culvert area.

The contractor failed to monitor its work in order to identify and remove known hazards to the traveling public.

State's Brief Filed In Exxon Case

The State of Alabama has filed its brief asking the Alabama Supreme Court to uphold the $3.5 billion judgment against ExxonMobil. As two separate juries have determined, the giant oil company was clearly guilty of fraud and intentionally cheated the state out of its bargained-for royalties. The State will ask the Court, based on the law and evidence, to uphold the verdict with no reduction. In order for the jury verdict to have the desired effect, the amount of the award must be very large. A lesser verdict would have no real effect on ExxonMobil because of the enormous financial wealth of the company. A massive fraud was committed by ExxonMobil, and for that reason this judgment in its entirety is due to be upheld. ExxonMobil says that it wants the Supreme Court to literally throw out the verdict. Based on the overwhelming amount of evidence presented at trial, they should have no chance of that happening.

An experienced and highly respected Montgomery circuit judge correctly determined that a $3.5 billion punitive damage judgment was proper. As you may recall, the jury verdict from the first trial was reversed by the Alabama Supreme Court on a very close evidentiary issue. That issue was not a part of the second trial. On retrial, the second jury to hear the case also found that ExxonMobil was guilty of fraud, finding that the company cheated the state out of royalties from natural gas wells drilled in state-owned waters along the Alabama coast. Had there been no fraud, the Supreme Court would have simply reversed and rendered the case in favor of ExxonMobil on the first appeal. Significantly, that didn't happen!

For those who may not be familiar with this case, I will give a brief summary of what has transpired. In November 2003, a Montgomery Circuit Court jury awarded the State $102.8 million in compensatory damages and $11.8 billion in punitive damages in the royalties' dispute with ExxonMobil. Circuit Judge Tracy McCooey, who presided over the case, reduced the punitive damage award to $3.5 billion. Significantly, the judge left the compensatory damages untouched. The two basic issues in the appeal are: (1) whether ExxonMobil committed fraud, which is necessary to collect punitive damages; and (2) whether the State relied on the false representations made in determining the amount of money due the state.

The sordid and highly secret scheme to cheat the State out of its bargained-for royalties is established in the record of this case and is written largely by Exxon's own hand. A series of damaging internal documents shows clearly that ExxonMobil knew exactly what it was doing and carefully planned and carried out its fraudulent scheme. It was evident that the company's bosses believed they would never get caught. ExxonMobil, which has a history of committing fraudulent acts, won't be able to hide from its own documents in this case, which clearly show the fraudulent scheme to have been approved at the highest level of the company. This fraud against the State of Alabama was carried out even though the company's manager over the Mobile Bay project said it was illegal to do what the company wanted to do and ultimately did.

Tremendous Support For The State's Position

Usually when cases go before the Supreme Court the only participants are the parties to the appeal. In this appeal that is certainly not the case. It is most significant that separate amicus briefs were filed in support of the State's position by the Retirement Systems of

Alabama, the Alabama Securities Commission, the Alabama State Employees Association, the National Association of Royalty Owners, and 11 state Attorneys General. In the RSA and Security Commission briefs it was argued that if the Supreme Court sides with ExxonMobil, it will be harder "to police fraudulent conduct in a wide variety of circumstances." The fact that Dr. David Bronner and Commissioner Joe Borg, after reviewing the facts, believe that ExxonMobil committed fraud is extremely important. These are two of the most knowledgeable and highly respected men in the country in their respective fields. In addition, the very strong briefs filed by attorneys general from 11 states in support of Alabama's position is also extremely important. If Exxon's conduct in this case is allowed to stand unpunished, every state government in America is at risk, an argument the filings by these State Attorneys General make very well. The states supporting Alabama are South Carolina, Louisiana, Florida, Mississippi, Massachusetts, Oklahoma, New Mexico, West Virginia, Delaware, Illinois, and Alaska.

The National Association of Royalty Owners also filed a real strong brief supporting Alabama's position. The information quoted below comes directly from the Association's brief. This is highly significant because the organization is made up of royalty owners who are most familiar with oil and gas leases and are directly involved with the industry. The Association and its members are also familiar with how ExxonMobil operates. Even though the following is rather lengthy, I hope you will take the time to read it.

> *It is clear that the State of Alabama deliberately used the phrase "gross proceeds" and deliberately deleted any "at the well" language in order to avoid any ambiguity about deductions or point of valuation, and Exxon knew that. Even setting aside how glaringly apparent Exxon's understanding and the parties' intent were based on factual evidence and witness demeanor at trial, case law and secondary law make it clear that "gross proceeds" means no deductions are allowed to the point of sale. Exxon knew that meaning and deliberately disregarded it in calculating its royalty payments to the State. Exxon must not now be allowed to "net" all of its "gross proceeds" and, thus, circumvent the plain language of its leases. Exxon, like all lessees, must be held to the four corners of the contract that it chose to enter.*
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> *This is an all-important case for royalty owners. Exxon has developed a business and litigation strategy of obfuscation and deception which most royalty owners do not have the resources to fight. Exxon's enormous wealth make continued violation of the law, even violation of court orders, a profitable strategy when pitted against royalty owners and practically anyone else with whom they do business. Courts need to say "enough is enough." The nature of Exxon's business and its rate of return are such that it makes money every day it violates the law or thumbs its nose at a court order. Exxon has a history of pursuing a policy of deeply callous conduct in business relationships and litigation tactics, because it can afford it; in fact, it profits by it. It is up to courts to allow justice to be done for entities like the State of Alabama, other states, federal agencies, other royalty owners, and all the other businesses who have been trampled deliberately by Exxon. One need only really read the Post-Judgment Order in this case to understand the disgust Exxon's tactics evoked in the two juries who heard the evidence. This court should not disturb the jury's verdict.*
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> *Other well-respected courts have recognized Exxon's strategy. In Allapattah Services, Inc. v. Exxon Corp., 2005 U.S. Dist. LEXIS 10257 (S.D. Fla. 2005), the court granted Rule 11 and other sanctions against Exxon for its dilatory tactics, which included filing over 9,000 "answers" in a claims process challenging issues that had already been decided by the district court, upheld by the Eleventh Circuit, and for which certiorari had been denied by the United States Supreme Court. The Court stated:*
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>> *Exxon argues that its "good will" is proven by its cooperation before the Special Master in attempting to expedite the process. Its argument is a sham, and its litigation strategy is transparent. While…, on one hand, it offers to move the process forward, …on the other hand, [it] lays the ground work to improperly delay the just payment of claims by re-litigating its frivolous defenses on appeal to make use of its money at a higher internal rate of return.*
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>> *Plaintiffs counsel persuasively argues that Exxon's bad faith conduct is in its own self-interest in order to delay payment of the money it owes the dealers. As stated by counsel: "This is because, notwithstanding the continued running of prejudgment interest, Exxon ['s] publicly reported internal rate of return on its funds is more than double the average state law prejudgment interest rate …Exxon can continue to 'earn' as much as an additional $100 million per year*

on the dealers' money by not timely paying the claims that are due."

The State of Alabama demonstrated in the post-judgment Hammond hearing that Exxon makes money by delaying payment of judgment entered in this case too. R. HG2 0364-68, Ex. 19(a-1), Ex. 19(a-2). The fact that Exxon disputes the meaning of "gross proceeds" in the carefully drafted oil and gas leases herein evidences its lack of good faith. Even Hunt Petroleum didn't dispute the fact that no deductions are allowed under the "gross proceeds" leases that were subject of that litigation. Exxon's arguments merely served to cloud the issues and are clearly desperate attempts to explain their actions as innocent. These arguments should be transparent from the fact that their excuses have changed through two trials and two appeals.

In Grefer v. Alpha Technical, 2005 WL 896416, 2002-1237 (La. App. 4 Cir. Mar. 31, 2005), the court reviewed a punitive damages award against Exxon in a case in which "the jury heard that Exxon is the largest corporation in the world and had assets of $251 billion; that its revenue for the year 2000 was $228.439 billion; and that its total net worth in 2000 was $173 billion." The court reduced the punitive damages award to twice the compensatory award but refused to reduce it further, citing Exxon's "callous, calculated, despicable and reprehensible conduct," showing "no regard for ITCO's workers, i.e., no concern for human safety." This, the court stated, "demonstrates that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct."

The reprehensibility of Exxon's conduct toward the State of Alabama in this case reflects its habitual practice in business and litigation and in the execution of much of its activity. Most royalty owners cannot fight Exxon at this level, which makes cases like this one so important—it is one of the few cases that will actually be fought out in court, and it is up to the courts alone to deal with corporations like Exxon, for which callousness and even blatant violation of the law is, in the absence of punitive damages, the most profitable course of business.

Obviously, the conduct of ExxonMobil in the State of Alabama's case was very bad. The fact that two separate juries—after hearing the evidence and being instructed on the law by an experienced and widely-respected judge—found that the company committed a massive fraud should make it impossible for the company to prevail on its arguments on the punitive damages issues. The fact that 11 state Attorneys General and two of the most respected men in Alabama—Dr. David Bronner and Commissioner Joe Borg—agree with the juries and Judge McCooey is most significant. The fraud case against ExxonMobil was made out in a clear and convincing manner. While the State's witnesses were very strong, the use of internal documents and testimony of the company's own top officials proved to be extremely damaging to the giant oil company. In my opinion, there will never be a stronger case of fraud tried in Alabama or heard by the Alabama Supreme Court. That is basically what all of those filing briefs in support of the State of Alabama's position learned after reading the transcript from the trial. ExxonMobil has to know it goes before the Alabama Supreme Court with a very weak position. But, the history of this corporate giant, as pointed out by the Royalty Owners' amicus brief mentioned above, is that it has no fear of abusing the legal system when it has done wrong. We expect this company to fight this battle as long as it possibly can. The fact that the verdict is drawing interest at 12%, amounting to more than $1 million per day, would bother most defendants. But, it's like a "bee" on an elephant's "rear-end" to this defendant.

Exxon To Pay $1.3 Billion Under Ruling By U.S. Supreme Court

The U.S. Supreme Court's ruling against ExxonMobil will finally force the giant oil company to finally pay as much as $1.3 billion to gas station owners who were cheated and did not receive promised fuel discounts. The damages will be the largest to date that ExxonMobil has ever paid as a result of a jury verdict. When you consider that this company would intentionally cheat its own station owners, there is little doubt how it would treat others who deal with them. ExxonMobil had told the dealer representatives for years that the company was still providing a program to them that actually had been secretly taken away without notice. This fraud involved 10,000 station owners in 34 states and the District of Columbia. Even though ExxonMobil has a history of fraudulent activity, it still denies that it has ever committed fraud. It is most significant that the trial judge in this case sanctioned the giant oil company for filing frivolous appeals and ordered that any further appeals of that nature would bear interest at the rate of 23.3%.

Environmental Groups Want A Boycott

Some of the nation's largest environmental and progressive groups have launched a campaign urging consumers and investors to stop doing business with ExxonMobil. This is a new strategy for the environmental movement based partly on the recognition that their lobbyists don't have much of a voice in

Washington. A dozen of these groups object to the oil giant's efforts to cast doubt on the science of global warming and to expand oil drilling in Alaska. The groups held a series of news conferences last month and launched a website to ask consumers and investors to join in the boycott against the giant oil company. The groups, which include the Sierra Club and Greenpeace, contend that ExxonMobil has put profits ahead of a clean environment. They said Exxon contributed more than $15 million over six years to groups that challenge widespread beliefs about global warming. They also complained about ExxonMobil's lobbying to open the Arctic National Wildlife Refuge in Alaska to oil drilling and its appeals against a $4.5 billion verdict stemming from the 1989 Exxon Valdez oil spill. The groups want the company to support mandatory limits on greenhouse emissions and invest more in renewable energy.

There Was A Backlash To The Eminent Domain Ruling

Alabama has joined a backlash around the country against the U.S. Supreme Court's recent eminent domain decision. A number of governors and state legislatures are up in arms over the Court's ruling. The Alabama Legislature passed a bill in the special session that appears to solve the problem for Alabama citizens. Governor Bob Riley pushed the bill—with tremendous bipartisan support in both the House and Senate—that will prohibit city and county governments from using eminent domain to take property for commercial, retail, office, or residential development. The bill will still allow property to be taken for traditional eminent domain projects such as public roads and schools. The Supreme Court's ruling said cities have broad powers to condemn people's homes through eminent domain to make way for shopping centers or other private development to generate tax money for the cities. With the passage of this bill, some say Alabama now has the strongest private property rights in the nation. Other states are taking similar action. There is one lesson to learn from this, and that is folks still feel strongly over "property rights." I hope one of these days "consumer rights" will be considered equally important by our political leaders.

Alabama Sheriff Elected Head Of National Association

Tuscaloosa County Sheriff Ted Sexton has been elected president of the National Sheriff's Association, which is quite an honor for the four-term sheriff. Sheriff Sexton is the first law enforcement officer from our state to hold this prestigious office. The Association represents more 3,000 sheriffs and has 24,000 members across the nation. Sheriff Sexton was elected at the Association's national convention, which was held this year in Louisville, Kentucky. The Sheriff's top priority is securing federal dollars for local law enforcement agencies. As you already know, the Bush Administration's 2006 budget would drastically cut funding for local agencies. It is estimated that the cuts will be more than $1.4 billion dollars. Obviously, this will be a major blow to law enforcement agencies nationwide.

II. LEGISLATIVE HAPPENINGS

The Special Session

As expected, Governor Bob Riley called the Alabama Legislature into special session last month. The special session became necessary when time ran out on the Legislature's efforts to pass a state General Fund budget during the regular session. Disputes over the amount of a pay raise to be given to state employees, as well as a lengthy filibuster against needed campaign finance disclosure legislation, caused the regular session to expire without the Legislature fulfilling its constitutional responsibility to pass the General Fund budget, which should not happen. After the events of the regular session, some observers predicted that such divisions would continue into the special session. To the credit of the Governor and legislators in both houses, that did not turn out to be the case.

The Governor's call for the special session included several items in addition to the General Fund Budget. At the time this issue went to press, the House and Senate had passed a $1.55 billion General Fund Budget, including a 6% pay raise for state employees, and the Governor had indicated he likely would sign off on the deal. The Legislature also had passed a bill that increased the mandatory minimum sentences for convicted sex offenders. Certain offenders also would be required to wear electronic monitoring devices for a minimum of 10 years upon release. The bill had been championed by Alabama Attorney General Troy King, who had vowed to wear such a device until the Legislature passed the measure. Lawmakers in both houses also approved a bill that would require all Alabama counties to collect a minimum of 10 mills of property tax for education, a measure that would increase property taxes in 30 counties. Although nowhere near enough to solve the funding woes that afflict primary and secondary public education in the state, the bill is a needed first step. Each of these bills too is likely to be signed by Governor Riley, although the tax bill must be approved by the voters statewide before becoming law. Also on the legislative agenda was a measure to restrict the use in Alabama of "eminent domain" to bar governments in the state from taking private property for commercial development, one of many measures pushed nationwide in response to a June decision from the U.S. Supreme Court that allowed expansive use of the eminent domain power.

One item not included in the Governor's call for the special session is the comprehensive campaign finance reform package proposed by Senator Myron Penn of Union Springs, discussed in detail in last month's issue of this Report. Many believe that a great number of our state's problems are related directly to the flow of campaign dollars from the special interest groups to the politicians, a view I share. Although I am disappointed the issue was not addressed during the special session, I am hopeful the Legislature will make Senator Penn's proposal a priority during the next session. Limiting the effect of special interest money in politics is critical to making democracy work for consumers and other average Alabamians!

Senator Penn's Campaign Finance Reform Package

Senator Myron Penn tried hard to get support for his campaign finance reform legislation, but he was unable to get it passed in the special session. The fact that Governor Riley didn't consider the issue important enough to include campaign finance reform in the call for the session, combined with the awesome power of the special interest groups opposing the bill, were too much to overcome. In the Governor's defense, I am sure that he was afraid the bill's inclusion could have hindered prompt passage of the budget. But, there were a number of other matters—all important—included in the call.

The following is an editorial from the July 6th edition of The Montgomery Advertiser that pretty well puts the Penn legislation in its proper perspective. While I agree with most all of what was written, I disagree on a few things—mainly the timing issue. But, the writer clearly understands the critical need for campaign finance reform.

> *State Senator Myron Penn is on the right track with several of the election reform proposals he says he will offer in the special session of the Legislature. His timing, however, is poor. This special session needs to be devoted to passing the General Fund budget, a critical piece of business that didn't get done in the regular session. The new fiscal year begins October 1st, so it is crucial to have the budget in place soon. "I don't want to have more in the call than we can pass in a week's time," Governor Bob Riley said. Items not included in the governor's call for a special session require a two-thirds vote for passage. Penn, D-Union Springs, should refine his proposals and introduce them in next year's regular session, when there will be ample time for their debate. He's got some good ideas. One is a limit on campaign contributions. Penn proposes limiting individual contributions to a candidate to $1,000 and contributions from political action committees to $5,000. There are no limits in Alabama now. The details of the legislation would be critical, of course, but contribution limits could help curb the unhealthy influence of money in state campaigns. Another of Penn's proposals is well-intentioned, but would be sure to fail the legal challenge it would just as surely face. He proposes spending limits on campaigns of $1 million for candidates for statewide offices, $50,000 in state Senate races and $17,500 in state House races. Contribution limits have been found constitutional and have long been imposed in campaigns for federal offices, but spending limits have been deemed unconstitutional prohibitions on free speech. That's how candidates such as Ross Perot, Steve Forbes and Jon Corzine have been able to spend millions of dollars of their own money in campaigns. (It worked for Corzine, it didn't for Perot and Forbes.) Nevertheless, Penn is right to try to push meaningful election reforms in a state that sorely needs them—just not in this tightly focused special session.*

I sincerely hope that Senator Penn and others in the Legislature who favor campaign finance reform won't give up. One disagreement I have with the editorial concerns Senator Penn's timing. Perhaps the bill could have been filed in the regular session, but it wasn't. Because of the importance of the issue and the critical need to address the issue, I don't believe we can afford to wait for an election year session for the Penn package. The special interests, with all their campaign dollars, would have no difficulty killing the bill during a regular session. The 2006 elections badly need the reform measures in place before the big money starts flowing. In my opinion, passage of the Penn package would be the very best thing to have happened in Alabama in the past 100 years. It would do a great deal toward "cleaning up Alabama politics." If you want corruption in elections and Alabama politics to come to an end, contact the Governor, Lt. Governor and members of the House and Senate and ask them to support the Penn package. In fact, Governor Riley should call a special session in the fall and restrict it to one issue—campaign finance reform in Alabama. Such a session would separate the "sheep" from the "goats," and I believe it would force the Legislature to face up to the issues of campaign finance reform. I believe they would have to pass the Penn package or face the wrath of folks back home.

A Living Legend

I have had the opportunity over the past 40 years to meet and work with a tremendous number of public figures. There are a few along the way who were head and shoulders above the rest. One of those few is my good friend McDowell Lee. Mac has served as Secretary of the Senate in Alabama for over 40 years, having been first elected to that position in 1963. He is truly one of the best in every respect. Mac is one of the "few" who really made a lasting impression on me. The Barbour County native has had a most interesting and colorful career. The following, which are just a few of his accomplishments, will give you an idea of his background:

- Mac served in the Navy during World War II;
- he served in the FBI;
- he was a highly successful high school football coach;
- he served as mayor of Clio, which is his hometown;
- he was a two-term member of the Alabama Legislature from Barbour County; and
- he now serves as Secretary of the Senate.

McDowell Lee is truly a living legend. Mac has more knowledge of Alabama history and specifically state politics than any person I know. He is fiercely loyal to his friends, and that may be a gross understatement. Mac has been my friend for a number of years and I consider him to be one of the best folks around. It is good to know that Mac is still in charge of the Senate, and I hope that he will be for many more years. We need more like him in state government. I can say without reservation that McDowell Lee is an outstanding citizen and a great Alabamian.

III. COURT WATCH

The New Supreme Court Justice

As you already know, the President has nominated John G. Roberts to fill the vacancy on the U.S. Supreme Court. His appointment was somewhat of a surprise to many in Washington. Judge Roberts currently serves on the U.S. Court of Appeals for the District of Columbia Circuit. He was appointed by the President in 2003 to that position. The Harvard graduate is known as a "Washington insider" who has worked over the years at the White House, Justice Department, and in private practice. I predict that Judge Roberts will be confirmed by the Senate. I can see nothing in his background that should be a major problem.

The Ten Commandments Decisions

The U.S. Supreme Court lost a great opportunity to take a stand for morality in this country when it considered the two appeals relating to the Ten Commandments. Unfortunately, the Court took the easy way out—it literally "split the baby"—and that is most disappointing. The Court failed to clear up the law in this important area of concern, and I find that hard to understand. Instead of clearing up the confusion, it has merely added to it. Even after studying the two opinions, it is still not clear when it might be permissible for a governmental entity to display the Ten Commandments. President Bush has appointed a justice to the Supreme Court who could be the deciding vote in future appeals concerning this important issue. I am hopeful his vote will be on the right side of the issue. Based on his history and the importance of the issue, I hope and pray that will be the case.

Government Should Go Forward With The Civil Fraud Case Against Scrushy

The Securities and Exchange Commission will proceed with its civil fraud case against Richard Scrushy despite his acquittal on criminal charges. In my opinion, this is the proper course to follow. Scrushy is accused in the civil case of orchestrating a $2.7 billion accounting fraud. The SEC's case, seeking nearly $800 million from Scrushy, has been on hold for two years because of the Justice Department's criminal prosecutions. A civil case has a lower burden of proof for the government, and for that reason I believe the SEC lawyers should certainly proceed with this case.

The SEC is seeking $785 million in civil fines and restitution to shareholders plus interest from Scrushy. They are also seeking to have him barred from serving as an officer or director of any publicly traded company. U.S. District Judge Inge Johnson, who in 2003 correctly halted the SEC's case until the Justice Department completed its criminal probe of Scrushy, will preside over the civil trial. The SEC, which originally filed charges against Scrushy in March 2003, is accusing him of accounting fraud and making a false declaration to the agency by signing the company's inaccurate financial statements. My advice to the SEC lawyers is to keep the case as simple as possible and to put their case on in the minimum time required to prove a solid case.

SEC Adds Lawyer In Civil Case Against Scrushy

The Securities and Exchange Commission has named Alan Lieberman, the assistant chief litigation counsel in its Washington office, to the team handling its civil case against Richard Scrushy. Alex Rue and Will Hicks, two Atlanta SEC lawyers, are also on the case. The SEC civil case charges Scrushy with violating securities laws, as the criminal case did. It also includes insider trading allegations that were not part of the criminal case. The SEC faces a lower burden of proof in the civil case than federal prosecutors did in their criminal case. I hope this team of lawyers will get the job done. At least, after the debacle in the criminal case, the government's lawyers shouldn't be over-confident in the civil case. I haven't been asked for any advice, but if asked, I would recommend that the government put together a trial team that knows how to "try a case!"

Shareholders Going After Scrushy Bonuses

In another post-criminal trial development, a revised shareholder lawsuit was filed in Birmingham, which asks a state court judge to order Scrushy to repay $46.7 million in bonuses that were based on company profits that never existed. The lawsuit is now relying on audited financial statements filed by HealthSouth and damaging information from Scrushy's criminal trial to argue the former chief executive isn't entitled to keep bonus payments. The revised complaint, filed in a Jefferson County Circuit Court, alleges:

> *It is manifestly unjust for Scrushy to benefit from the falsity of his own financial statements, even if he successfully depicts himself as naive to such falsity, a Gomer Pyle among evil geniuses in green eyeshades.*
>
> *Even if he did not know that there was a massive fraud raging under his nose and under his supervision, Scrushy should not be able to retain the benefits of that fraud to the detriment of his corporation.*

The revised suit says Scrushy was not entitled to bonuses in 2000, 2001, and 2002 because HealthSouth didn't make a profit, as shown in documents filed with regulators. The suit says HealthSouth repeatedly said bonuses were paid only when the company earned a net profit. Scrushy collected $11.2 million in total bonus payments in 2002, a year when the company actually lost $467 million. In 2001, when revised figures show HealthSouth lost $191 million, Scrushy collected $8.9 million in bonus payments. The suit points out that Scrushy collected a $10 million annual bonus payment for 2002 in April that year, long before the company's results were known for the entire year. The bonus payment was apparently never disclosed to investors.

Oil Company Hit With $7.5 Million Judgment

An Oklahoma state jury has awarded more than $7.5 million in actual and punitive damages to seven plaintiffs in a lawsuit against Capstone Oil and Gas Co. The plaintiffs sued Capstone alleging fraud, breach of contract, breach of fiduciary duty, and violation of production revenue. The plaintiffs and Capstone each own a share of the rights to an oil well located in Kingfisher, Oklahoma. The plaintiffs alleged that they were not paid production royalties on the well from June 2001 through July 2004.

Federal Judge Throws Out Thousands Of Silica Diagnoses

A federal judge has recommended throwing out all but one of about 10,000 diagnoses of the lung ailment silicosis that were used in lawsuits against industrial companies, ruling that doctors "manufactured" findings of the disease. U.S. District Judge Janis Graham Jack's scathing 249-page opinion finds that the diagnoses are inadmissible in court. The bulk of the cases originated in Mississippi. Judge Jack sent those cases back to the state courts along with her report. In addition, she threw out approximately 100 Texas cases. A doctor testifying before Judge Jack in December withdrew thousands of his diagnoses, saying he only briefly scanned X-rays to give what he thought was a second opinion on the degenerative disease caused by inhaling quartz dust. His withdrawal, made during consolidated pretrial proceedings for lawsuits from several states, prompted Judge Jack to order every doctor and "screening company" to back up the diagnoses in the lawsuits. More doctors withdrew their diagnoses, and after hearings in February the judge said she sensed "red flags of fraud" in the way clients were recruited. Now the hammer has come down and it's not good news for the lawyers handling these cases or their clients.

Mother Sues City Over Child's Brain Damage

A woman who lost custody of her children while in a city witness protection program has filed a $34 million lawsuit against the Baltimore Department of Social Services. It is alleged that the woman's small child suffered a fractured skull when he was slammed onto concrete steps while staying with a foster family. The lawsuit, filed in Baltimore City Circuit Court, alleges that the 2? year old boy now suffers from severe brain damage and requires constant medical care. The 15-year-old daughter of the foster care provider was arrested in October of last year and charged with child abuse, reckless endangerment, and second-degree assault. The social services system in Maryland serves more than 10,000 foster care children every year, most of them in Baltimore.

The child's mother had agreed to testify for the prosecution in a case involving the attempted murder of a city police officer in 2002. According to the lawsuit, the mother lost custody of her son and his three siblings last year after she was hospitalized for sickle cell anemia. Before placing children with a foster family, caseworkers usually review a prospective home as well as the people who live there, including running criminal background checks on anyone 18 years or older. It is alleged that DSS officials failed to do a thorough background check on the foster parent in this case. It is also alleged that DSS failed to regularly monitor the children once they were placed in the home.

According to court documents, DSS case workers allowed the children to be placed with the foster parent despite the fact that she was living with a man who has a criminal record, including assault and drug possession charges. Those types of charges would typically bar a family from participating in the foster program, but in this case that didn't happen. The complaint alleges that Baltimore County DSS officials, who investigated the abuse charges, found "credible evidence that abuse occurred."

Judge Fines KPMG Over Discovery Abuse

A California Superior-Court judge has sanctioned KPMG LLP for withholding documents in an accounting malpractice lawsuit brought by a small private computer-case maker. This is the third time the accounting firm has been criticized by a judge for its legal tactics in recent months. Orange County Superior Court Judge Geoffrey Glass has ordered KPMG to pay $30,000 for "its abuse of the discovery process" and directed the jury to consider the defendant's behavior as it weighs the case brought by Targus Group International Inc. Judge Glass wrote that KPMG "deliberately or recklessly withheld or delayed in producing many responsive documents," adding that "the court warned KPMG-US at least twice about gamesmanship in discovery."

In 2001, a former chief financial officer at Targus pleaded guilty to 15 counts of wire fraud in connection with alleged embezzlement and served jail time. In January 2003, Targus sued KPMG, alleging professional malpractice, contending that the company suffered about $50 million in embezzlement-related losses as a result of KPMG's negligence.

During the past year, two other judges have criticized KPMG for its conduct in civil cases over sales of allegedly abusive tax shelters. Last May, Thomas Hogan, a federal district judge in Washington, ordered KPMG to turn over documents to the Internal Revenue Service as it examined the firm's sales of certain tax shelters. Judge Hogan called a KPMG document log "inaccurate, incomplete and even misleading" and cited more than 30 instances of documents the firm had improperly claimed were privileged.

In March, a federal district judge in Orlando, Florida, rejected KPMG's attempt to force software entrepreneur Joseph Jacoboni into arbitration to resolve his fraud claims stemming from the purchase of a tax shelter. In the order, the judge noted that KPMG for three years had "invoked the litigation process, with a vengeance ... in conduct that was flatly inconsistent with any desire to pursue arbitration." The judge granted Mr. Jacoboni's motion to remand and move the case back to state court.

As reported, the Justice Department is debating whether to indict KPMG for selling allegedly abusive tax shelters. KPMG is cooperating with authorities. KPMG has acknowledged "unlawful conduct by former KPMG partners" during a 1996-2002 sales push. This company seems to believe—like many others do—that it is above the law. Conduct such as that mentioned above simply can't be tolerated. It is good to see judges coming down hard on the offenders.

Farmers Lose Irrigation Case

The U.S. Supreme Court ruled recently that individual farmers couldn't sue the federal government to enforce their irrigation district's water contracts. Two dozen farmers from the Central Valley of California had sought $32 million as compensation for water they were due under a contract between the government and the Westlands Water District, which consists of 600,000 acres, making it the nations largest. Instead of giving the promised water to the farmers, the federal Bureau of Reclamation diverted it to protect fish under requirements of the Endangered Species Act. The government argued that its contract with the district allowed lawsuits only by the district itself, not by individual landowners who are its members. The district agreed with the government's position. Writing for the Court, Justice Clarence Thomas said the Reclamation Reform Act of 1982 "does not permit a plaintiff to sue the United States alone." While this decision is rather limited in application, it is a significant one.

IV. THE NATIONAL SCENE

Poll Shows More Folks Have Doubts About The President

According to a recent national survey, Americans have growing doubts about President Bush's "honesty" and his "effectiveness." Of course, this poll was taken at a time when folks have become much more uneasy about the war in Iraq, uncertain about the sagging economy, and nervous about the growing terrorist threat. The survey revealed that:

- Only forty-nine (49%) percent of the American people believe the President to be trustworthy.
- Forty-six (46%) percent don't believe that he is.
- Only five (5%) were undecided.

That's a big drop in a most important area for this President. He was at 62% on this same question in a September 2003 Pew Research Center poll and at 56% in a Gallup poll in April. I have always felt that one of the President's strong suits was that people really believed him to be honest and trustworthy. That was true even with those who didn't like him very much politically. The slide in trust in Bush comes at a time when the White House is dealing with serious questions about Karl Rove's involvement in the public leak of the identity of a CIA operative. Incidentally, I suspect that's why the President acted so quickly to nominate a Supreme Court replacement. That definitely got the media attention off Rove. In any event, the poll results aren't good news for the President, as he tries to deal with some critically important issues. I will have to admit that the poll results really surprised me. I have always believed that the President was basically honest and I still do. These results may be just a "bump in the road" for President Bush.

Source: *Associated Press*

KARL ROVE IS TOO SMART TO EVER GET CAUGHT RED-HANDED

As we all know now, a special prosecutor has been investigating the leak of an undercover CIA agent's identity. That investigation is now over two years old. But, until recently few people around the country even knew of its existence. Time Magazine has turned over documents to the grand jury. The issue involves the story of a CIA-sponsored trip taken by former ambassador and vocal White House critic, Joseph Wilson, to investigate reports that Iraq was seeking to buy uranium from the African country of Niger. It was disclosed that Wilson's wife, Valerie Plame, was an undercover CIA official who was monitoring the proliferation of weapons of mass destruction. This was reported in a July 2003 Time online article. The e-mails surrendered by Time Inc., show that one of the Time reporter's sources was none other than Karl Rove. It is now quite apparent that Rove was the source of the leak. The only question remaining is whether he actually committed a crime. Rove's lawyer has confirmed that Rove had been interviewed for the Time article, but says he did nothing illegal.

You may recall that three days before the Time article appeared, columnist Robert Novak, writing about Wilson's trip, reported that Wilson had been sent at the suggestion of his wife, who was identified by name as a CIA operative. The leak to Novak was apparently intended to discredit Wilson's mission, which at the time was dealing with a most sensitive matter. It is a crime to **knowingly** reveal the identity of an undercover CIA official. The special prosecutor will have to determine whether what Rove did amounts to a criminal offense.

It is evident that the Rove problem is causing "concern" in the White House, and it doesn't appear that the problem was handled very well internally. White House spokesman Scott McClellan has had to dance around his previous statements that Rove wasn't involved at all. That story proved to be totally false. I have said before—and I will say again—Karl Rove is too smart to knowingly violate a criminal statute. For this reason, I don't believe he will ever be charged with a crime. Is Rove capable of political tactics known as dirty tricks? Has he been an active player in that arena during his entire political career? Does he mind hurting political opponents? What do you think?

A TRIBUTE TO PUBLIC CITIZEN

To say that I am a big fan of Public Citizen is an understatement. For almost 35 years Public Citizen has challenged Corporate America when it was wrong and has represented the public interest in the halls of power. Under the leadership of Joan Claybrook, this organization has long been the strongest consumer advocacy group in this country. Many of the advances in product safety have come about because of Public Citizen's efforts. They have also been responsible for keeping the public advised on "consumer issues," and have fought their battles both in Congress and in the courts. Some of Public Citizen's ongoing battles include:

- Advocating strong safety and health standards for motor vehicles, food, drugs, and medical devices;
- Opposing federal preemption of state liability claims;
- Challenging limits on compensation to victims of corporate wrongdoing;
- Fighting for the victims of asbestos exposure;
- Spearheading opposition to mandatory pre-dispute arbitration clauses;
- Fighting to restore integrity and fairness in Congress;
- Democratizing global trade;
- Pushing for fair energy prices and cutting nuclear and fossil fuel subsidies;

All American citizens who believe that consumers have rights and that those rights should be preserved and protected owe a debt of gratitude to Public Citizen. If you want more information on Public Citizen, go to its website, which is www.citizen.org.

THE AFTERMATH OF THE SCRUSHY VERDICT

I am including comments on the not-guilty verdict in the government's case against Richard Scrushy in this section because of the national attention the case received and its nationwide ramifications. The Alabama federal court jury deliberated for weeks before returning a not-guilty verdict on all counts. The trial had been going on since January 21st. Clearly, the case lasted much too long and it was made too complicated. To be bluntly frank, the defense lawyers were much better than the government's team in lots of ways. The government allowed the case to be tried largely outside the court house and that was a major mistake. The jury finally decided that the government hadn't proved its case beyond a reasonable doubt.

Nobody will dispute that Scrushy is "slick as a button" and was "smart" not to take the stand. Actually, he performed very well outside the courtroom without having to be put under oath. His legal team did a masterful job of planning and carrying out a skillful defense. Some say they did the "impossible!" I don't believe for a minute that the jury system failed in this case. I believe what happened is that the government simply dropped the ball and lost a case that many believe could have been won. The defense lawyers deserve a tremendous amount of credit, and whatever they were paid—it wasn't enough!

EPA Nominee Linked To Grace

President Bush has nominated Granta Nakayama as chief of enforcement for the Environmental Protection Agency (EPA). Nakayama is a partner in Kirkland & Ellis. That law firm is currently defending W.R. Grace & Co. against criminal charges in a major environmental case. Obviously, it would be very good for companies such as Grace to have a "good friend" heading up the Office of Enforcement and Compliance Assurance. Fortunately, the U.S. Senate must approve this appointment. I hope the senators will carefully check out any potential conflict of interest. Nakayama, a specialist in environmental law, is a full partner in Kirkland & Ellis. The multiple criminal charges against Grace allege that the Columbia, Maryland-based company and seven of its current or former executives knowingly put their workers and the public in danger through exposure to vermiculite ore contaminated with asbestos from the company's mine in Libby, Montana. Incidentally, Nakayama's firm is also representing Grace in its bankruptcy. There the EPA is trying to recover millions of dollars for environmental cleanup. It is very clear that the government believed its case against Grace was very important when the charges against Grace were filed. Lori Hanson, special agent in charge of the EPA's environmental crime section in Denver, said at that time: "This is one of the most significant criminal indictments for environmental crime in our history."

The law firm says that Nakayama has had no involvement in Grace's bankruptcy or indictment during his tenure at the firm. Kirkland & Ellis' websites list page after page of environmental battles fought, often against the EPA, on behalf of companies that use toxic materials and chemicals. The firm enjoys a very good reputation as a firm that **protects** companies such as Grace. The appearance of a conflict of interest involving EPA's top enforcement official is likely to have a chilling effect on pursuing investigations and actions involving Grace and any other companies represented by Nakayama's firm. Since 1999, the EPA and Grace, a worldwide chemical company, have been fighting over a variety of environmental problems stemming from the company's asbestos-contaminated vermiculite ore from its Montana mine. Several of the EPA's regional offices continue to work with state officials and other federal agencies to determine how many of the hundreds of abandoned sites in more than 40 states where Grace shipped the tainted ore for processing into consumer products remain contaminated and a risk to people living nearby.

It is difficult to justify picking a lawyer from any firm that is currently engaged in major litigation with the EPA to head up the agency's enforcement activities. Kirkland & Ellis led the successful appellate court battle to scuttle the EPA's 10-year effort to ban the mining, importation, use, and sale of asbestos and asbestos-containing products. The EPA introduced the ban in 1989, and two years later the U.S. Court of Appeals for the Fifth Circuit threw it out.

Senator Clinton Is On The Right Side Of An Important Fight

Senator Hillary Rodham Clinton, who has consistently attacked violent video games as "a silent epidemic" among children, is now pushing for a federal investigation into "Grand Theft Auto: San Andreas," one of the most popular of these games. Senator Clinton is asking the Federal Trade Commission to probe how users of the game can access "graphic pornographic and violent content" for the game from the Internet. In a letter dated July 14th to FTC chairwoman Deborah Platt Majoras, the senator also urged the agency to examine whether the game's rating of "M" for mature should be changed to an "Adults Only" rating. The Entertainment Software Ratings Board, a self-regulatory ratings arm of the game software industry, is already investigating the issue. I agree with Senator Clinton that it's high time for the federal government to step in. The fact is that the widespread availability of sexually explicit and graphically violent video games makes the challenging job of parenting much harder. I believe that the FTC should take strong and prompt action in this matter.

Senator Clinton is also pushing legislation that would make it harder for young children to get access to such content. Even before her election to the U.S. Senate, Hillary Clinton spoke out against the amount of sexual and violent content available to children. In a speech to the Kaiser Family Foundation the Senator called media sex and violence "a silent epidemic" among children. She has sought federal research into how exposure to such graphic content affects young minds. In that speech to media experts and child advocates, she singled out "Grand Theft Auto" as particularly harmful, saying it "has so many demeaning messages about women and so encourages violent imagination and activities and it scares parents.... They're playing a game that encourages them to have sex with prostitutes and then murder them. You know, that's kind of hard to digest." Regardless of how you feel about Hillary Clinton, I believe you will agree she is on the right side of this issue. Hopefully, her fight will not get bogged down in partisan politics. This is an issue that all American citizens should feel strongly about. I believe the overwhelming majority of them do, and it's time they let our politicians know exactly how they feel.

Dr. Runge To Leave NHTSA

I was greatly surprised to learn that Dr. Jeffrey W. Runge was going to resign his position as Administrator of the National Highway Traffic Safety Administration (NHTSA). He is joining the Department of Homeland Security as its new Chief Medical Officer. Dr. Runge, a former emergency room physician, has headed NHTSA since August 2001. He is credited with focusing NHTSA on issues with the greatest potential for increasing highway safety. I have to wonder whether the powerful automobile industry had anything to do with this development. I do know that, as boss at NHTSA, Dr. Runge wasn't too popular with the automobile companies' bosses. It will be interesting to see where his replacement comes from. Personally, I would like to see Joan Claybrook, a real consumer advocate, return to this post. Joan served with distinction during the Carter Administration.

Plants Storing Lethal Chemicals

The recent terrorist attacks in London should force us to do a better job of preventing similar attacks in the U.S. It is quite evident that public transportation is a prime target in the U.S. for terrorists. Much of our attention has been aimed at security in the airlines industry. Unfortunately, there are other targets. Plants in 23 states that store lung-melting or otherwise lethal chemicals are in some of the nation's most populous communities and could each endanger more than one million people in a worst-case disaster. These plants are also prime targets for terrorists. Officials are concerned that the more than 100 chemical plants are "tempting targets for terror attacks." The tally of plants possessing large amounts of 140 toxic and flammable chemicals was compiled by the Congressional Research Service. This compilation represents one of the first public state-by-state breakdowns of how close potentially deadly facilities are located to the nation's largest population centers. Representative Edward J. Markey (D-MA), who was responsible for this survey by congressional researchers, stated:

> *Chemical facilities are at the top of the terrorists' target list, and I thought it would be helpful for the full picture to be presented.*

The Homeland Security Department is considering tougher federal regulation of the chemical industry, which has largely policed its own security procedures. Homeland Security Acting Undersecretary Robert Stephan told congressional committees recently that "it has become clear that the entirely voluntary efforts of these companies alone will not sufficiently address security for the entire sector." Stephan also estimated that fewer than 10,000 people would be killed and 40,000 sickened in a worst-case chemical release. Homeland Security officials have said only a small number of facilities—perhaps as few as a handful—have the capacity to cause widespread damage.

The report estimates at least 106, and as many as 111 plants, are located near population centers of one million people or more. The congressional researchers couldn't provide a definite number of facilities in question because they lack updated information in some cases, such as the types and volumes of chemicals produced, and that's why more exact numbers are not given. Up to 29 of the plants were located in Texas—more than twice as many as in any other state. Illinois and California each had up to 13 such plants, Ohio had eight, and Florida and New Jersey had seven apiece. We had best get a better handle on the exposure in these states for terrorist attacks.

According to Representative Markey, the industry still has not gone far enough to seek safer alternatives, test its security measures, and protect employee whistleblowers. The Congressman also believes that the Bush Administration hasn't pushed hard enough to demand those precautions. The Administration "still has refused to put its money where its mouth is and commit to any meaningful upgrades," Representative Markey asserts. Protecting the American people from terrorist attacks must be a non-partisan effort. It must also be a top priority in Washington and around the country. We can't afford to ignore any of the areas where terrorist attacks would result in a tremendous number of causalities and damage. It certainly appears that chemical plants need more attention.

Source: *Washington Post*

Firms Accused In Porn E-Mail Scheme

Federal regulators have accused seven companies of hiring others to send illegal e-mails with pornographic messages to tempt consumers to visit adult Internet sites. The government said four of the firms already agreed to pay nearly

$1.2 million to settle the charges, making it among the most aggressive government crackdowns on pornographic e-mail operations. The Federal Trade Commission (FTC) described the practice as "electronic flashing" and said at least some of the unwanted e-mails were sent to children. The threat of children unwittingly receiving smut in their inboxes helped drive the U.S. government to impose restrictions on sending commercial e-mails last year.

The messages were not prominently marked "sexually explicit," did not include instructions for consumers to block future e-mails, and did not include a postal address, all required under the FTC federal law. The FTC has a special e-mail address set up where people can report this type activity. The FTC has received thousands of messages on the pornographic e-mails. The FTC said the seven companies did not send e-mails directly to consumers, but operated affiliate programs, paying others to send unwanted messages to drive Internet traffic to adult websites. The FTC said under the "Can Spam" law, defendants in such cases are legally responsible because they paid others to send e-mails on their behalf. The FTC directed the Justice Department to file civil lawsuits against three of the companies: T.J. Web Productions LLC of Henderson, Nevada; Cyberheat Inc. of Tucson, Arizona; and Impulse Media Group Inc. of Seattle. The lawsuits seek unspecified payment to the government for "every violation" of the federal anti-spam law.

The FTC said four of the companies agreed to settle cases against them. BangBros.com Inc. of Miami agreed to pay $650,000; MD Media of Bingham Farms, Michigan, agreed to pay $238,743; APC Entertainment Inc. of Davie, Florida, will pay $220,000; and Pure Marketing Solutions LLC of Miami and Internet Matrix Technology of New Orleans will together pay $50,000. In my opinion, the FTC should find a way to prosecute criminally any person who is engaged in pornography, especially when it affects children.

Source: *Associated Press*

Agency Toughens Stance Against Consumer Fraud

It appears that the Federal Trade Commission (FTC) has become increasingly aggressive in punishing consumer fraud. For years, not too many scam artists feared the FTC, whose job it is to enforce laws against practices deemed anti-competitive, deceptive, or unfair to consumers. While the agency has done some good over the years, most of that work didn't involve criminal prosecutions. In fact, seldom did the FTC work closely with federal criminal authorities to investigate, prosecute, and imprison wrongdoers. White-collar criminals once seemed to regard their dealings with civil enforcement agencies such as the FTC as merely a cost of doing business. Today that cost may include a prison term, and that has changed their thinking. Many attribute the FTC's newly combative stance toward crime to its chairman, Deborah Platt Majoras, who took over that post in August. Although the FTC itself can file only civil lawsuits, the new chair has made cooperation with criminal prosecution of fraud a top priority. She has been pushing agency attorneys to refer more cases to the Justice Department for criminal prosecution. In late 2003, the FTC opened a new criminal-liaison office that works closely with the FBI, U.S. Attorneys' offices, and Postal Service inspectors. Apparently, all of this is paying off. In May, the FTC announced the biggest enforcement sweep in its history—200 cases of business-opportunity fraud. At the same time, the U.S. Attorney's office in Miami announced 14 related indictments.

In the mid-1990s, the FTC began tracking everyone who had settled FTC charges, to see whether they were abiding by their settlements. In 1997, it started turning violators over to criminal authorities at the Justice Department as part of "Project Scofflaw." Since then, the FTC has helped send about 30 people to prison, and others are awaiting trial. The Justice Department has supported the agency's referral of cases to authorities that can bring criminal charges. That's been true since shortly after the FTC opened its criminal liaison office 18 months ago. Although the Justice Department has a number of different types of crimes to prosecute, consumer fraud has become more of a priority. I believe the current trend is a good one. I hope Mr. Rove and the Bush White House will allow it to continue.

Source: *USA Today*

V. THE CORPORATE WORLD

What Is The Future Of Sarbanes-Oxley?

Does the Scrushy acquittal signal the end for the Sarbanes-Oxley Act? This law, passed to combat corporate fraud, definitely took a major hit. The Scrushy case was the first test in a criminal trial for Sarbanes-Oxley, which requires CEOs to personally certify their company's financial statements as accurate, and the result was pretty bad for the government. As you know, this badly-needed law was passed by Congress in 2002 after the collapses of Enron Corp. and WorldCom Inc. Personally, I believe that in competent hands Sarbanes-Oxley remains a valuable tool that federal prosecutors should continue to use. In my opinion, the defense lawyers in the Scrushy case clearly took the government's lawyers to the woodshed! Donald Watkins put together a very good team of lawyers and was the mastermind of a carefully planned defense. Many say that he did the "impossible."

I learned long ago never to second-guess a jury's decision. In almost every case that I have been involved in, the decision reached by the jurors was the correct one. I totally trust the jury system and the Scrushy case loss did nothing to shake that trust. While criminal law is something I know very little about, I do know about juries in civil cases. Based on my experience, I am convinced that the system works. Congress intended the new law to bring the CEOs into the mix to attest to their companies' statements to the regulators and to the public as being true and correct. In my opinion, that was a proper purpose. Properly used, the Sarbanes-Oxley law is an effective tool to deter criminal behavior in the corporate world. Prosecutors owe it to jurors to present their cases properly and especially, in a manner that can be clearly understood.

As for the Scrushy verdict, it was more of a commentary on the prosecutor's case being too complicated and the jurors not believing the government's witnesses who had pled guilty to criminal acts. It was also a mismatch of legal talent, and that combination of factors really explains the outcome. I sincerely hope that the good lawyers in the Justice Department don't get discouraged and yield to the strong political pressure not to prosecute corporate crime. If that were to happen, then the American people would be the real losers.

Ebbers Not So Fortunate As Mr. Scrushy

Bernard J. Ebbers, the founder and former chief executive of WorldCom, was sentenced to 25 years in prison on July 13th. In addition, Ebbers will surrender nearly all of his personal fortune—about $40 million—to investors who lost billions when the company spiraled into bankruptcy almost three years ago. MCI, the successor company to WorldCom after it emerged from bankruptcy in April 2004, will also share in the proceeds from the sale of Mr. Ebbers's assets. MCI says it is owed $338 million by the former chief executive. The reparations deal was agreed to with David N. Kelley, the United States attorney for the Southern District of New York, and representatives of Alan G. Hevesi, the New York State Comptroller and head of the state's Common Retirement Fund. As reported last month, Mr. Hevesi is the lead plaintiff in the WorldCom securities litigation and has collected more than $6.1 billion from a handful of the company's former investment banks and its former auditor, Arthur Andersen. Mr. Hevesi also set a precedent in a securities fraud lawsuit by getting almost $25 million from the personal holdings of WorldCom's 12 former directors.

The deal with Mr. Ebbers, who was clearly guilty of a massive fraud, was concluded in advance of his sentencing in the criminal case. The $11 billion WorldCom fraud was the largest in United States corporate history. Judge Barbara S. Jones, the judge in the case, has given preliminary approval to the settlement. If it is finally approved, prosecutors won't seek restitution beyond the sale of his assets. The assets that Mr. Ebbers will turn over include $5.5 million in cash, a prospective "multimillion dollar" tax refund, his mansion and 800 acres; another 300,000 acres of timberland in Mississippi, as well as interests in a major trucking business, a marina and 18-hole golf course, a crop and crawfish farm and grain elevator; a hotel and other real estate ventures. He and his wife will also be required to vacate their multimillion-dollar home in Clinton, Mississippi, by October. The home will be put up for sale.

In addition, Mr. Ebbers has agreed to pay $450,000 to former WorldCom employees who sued him over losses they incurred in their retirement accounts, which were heavily invested in WorldCom stock. Mr. Ebbers will be allowed to keep some money to pay his legal bills. At the height of the telecommunications boom about five years ago, Mr. Ebbers was worth $1 billion on paper. This man has paid a heavy price for getting caught up in the fantasy world of corporate greed. His case proves without a doubt that crime doesn't pay!

Source: *The New York Times*

Status Of High-Profile Corporate Scandals

Obviously, the not-guilty verdict in the Scrushy case has caused some to question whether the prosecution of white collar crime will suffer as a result. I sincerely hope that won't be the case. In my opinion, the Scrushy verdict shouldn't stop legitimate investigations and prosecutions. Now that we are finally making some real progress in taking on corporate criminals in this country, we don't need to slip backwards. There have been a very large number of cases that have gotten a great deal of attention over the past few years. Let's take a look at some of the high-profile corporate scandals of recent years and check the status of legal action in each case.

- HEALTHSOUTH CORP. — As everybody in the country now knows, former CEO Richard Scrushy was acquitted on all counts of conspiracy, false reporting, fraud, and money laundering in an alleged $2.7 billion earnings overstatement at the rehabilitation and medical services chain over seven years beginning in 1996. Scrushy's lawyers skillfully blamed the fraud on 15 former HealthSouth executives who pleaded guilty. The federal jury began deliberating the case May 19 and started over June 22 when an ill juror was replaced by an alternate. This case lasted much too long and was a total disaster for the government.
- TYCO INTERNATIONAL LTD. — Former Chief Executive L. Dennis

Kozlowski and Chief Financial Officer Mark H. Swartz were convicted June 17 on 22 of 23 counts of grand larceny, conspiracy, securities fraud, and falsifying business records. Prosecutors accused the two of conspiring to defraud Tyco of millions of dollars to fund extravagant lifestyles. The two each face up to 30 years in prison.

- WORLDCOM INC. — Bernard Ebbers, former chief of the one-time telecom giant, was found guilty of fraud, conspiracy, and making false regulatory filings in WorldCom's $11 billion accounting scandal. The case against him was largely based on the testimony of former CFO Scott Sullivan, who agreed to testify against his boss as part of a plea deal. Ebbers was sentenced to 25 years in prison.

- ENRON CORP. — Enron founder Kenneth Lay, former CEO Jeffrey Skilling, and former top accountant Richard Causey are scheduled to go to trial in January on federal fraud and conspiracy charges. Former CFO Andrew Fastow pleaded guilty in January 2004 to two counts of conspiracy, admitting to orchestrating schemes to hide the company's debt and inflate profits while pocketing millions of dollars. He agreed to serve the maximum 10-year sentence, which will begin in July 2006, after he testifies against his former bosses. In addition, Fastow's wife will complete a year-long sentence soon on a misdemeanor tax charge for failing to report her husband's kickbacks. Former Enron treasurer Ben Glisan Jr. is serving a five-year sentence for his role in the scandal. And two former Merrill Lynch & Co. executives were sentenced to short prison terms for their roles in a bogus Enron sale of power barges.

- ADELPHIA COMMUNICATIONS CORP. — Founder John Rigas and his son Timothy were convicted in federal court last year of conspiracy, bank fraud, and securities fraud. On June 20th, John Rigas was sentenced to 15 years in prison and Timothy Rigas to 20 years. Another Rigas son, Michael, was acquitted of conspiracy charges before the case ended in a mistrial with jurors deadlocked on 17 counts against him. A fourth executive, Michael Mulcahey, was found not guilty of conspiracy and securities fraud.

- CREDIT SUISSE FIRST BOSTON — The company's former investment banking star, Frank Quattrone, was convicted in May of 2004 on federal charges of obstruction of justice, after his first trial ended in a hung jury. Quattrone, who made a fortune taking Internet companies public during the dot-com stock boom, was sentenced to 18 months in prison. He is free on bail, appealing the conviction.

- IMCLONE – Sam Waksal, the former CEO of ImClone, got 87 months in prison. He had tried to sell shares of ImClone before the public found out that the FDA wasn't going to approve the company's cancer-fighting drug, Erloitux.

- MARTHA STEWART – The founder of the homemaking empire was released on March 4th, after serving five months in prison, and is serving an additional five months of home confinement. She was convicted in federal court last year of conspiracy, obstruction of justice, and making false statements related to a personal sale of ImClone Systems Inc. stock. Her former broker at Merrill Lynch, Peter Bacanovic, served a five-month sentence and was released on June 16th. He still faces five months of home confinement. It should be noted that the conviction was not related to the company she founded, Martha Stewart Living Omnimedia Inc. Of all of the federal prosecutions, the Stewart case is the only one I really question. While she was probably guilty, there are worse corporate criminals—some of them still running free.

Reduced Penalties For Some Real Big Folks

Dozens of executives and over 30 corporations have agreed to take advantage of an Internal Revenue Service (IRS) program offering reduced penalties to those accused of trying to hide income through an abusive tax shelter. According to a story reported by *Associated Press*, the executives could have their taxable income adjusted upward by $500 million. Another 19 executives who did not participate in the program face audits or criminal tax investigations into whether they underreported income by $400 million. IRS Commissioner Mark Everson told Associated Press that "the compliance attests to a changed atmosphere in Corporate America following recent company collapses and executive prosecutions."

Executives had until May 23rd to report their involvement in the shelter and participate in the settlement program, which requires them to pay a 10% penalty—half the 20% penalty that could have been applied. Companies who participated faced no penalties, but they had to disclose the names of all executives who participated in the tax shelter. The IRS contacted the senior management of corporations known to have used the shelter and recommended that the matter be reviewed by the board of directors' audit committee. The use of stock options by large corporations as part of the scheme to avoid taxes by top executives appears to be rather common.

All told, 124 executives were targeted by the IRS. It determined 10 of them had not participated in the abusive transaction, leaving 114 as targets. Of those, 80 agreed to participate under the terms of the settlement offer. The agency also identified 46 corporations for investigation. Executives who did not participate face paying the 20% penalty. Corporations face paying penalties and losing deductions for underreporting income, failing to pay employment and income taxes, and issuing incorrect W-2 statements. The tax shelter was marketed during the late 1990s and early 2000s. It is good to see the IRS going after those who abuse our tax laws. Nobody should be able to avoid paying their fair share of taxes by taking advantage of bogus tax shelters.

Source: *Associated Press*

Defrauded Investors Have To Wait For Payment Of Money

As we all know, all too well, the corporate scandals of a few years ago badly hurt millions of investors. Plans for retirement were virtually wiped out in many cases. In an attempt to help the victims, Congress mandated in 2002 that the Securities and Exchange Commission (SEC) was to return fines it collects from wrongdoers to defrauded investors instead of sending the money to the federal Treasury. That sounded like really good news for the victims. Over the past three years, the SEC has won a series of record settlements from corporate offenders—$750 million from WorldCom, $250 million from Qwest Communications International Inc., and more than $400 million from banks accused of aiding fraud at Enron Corp. All told, the SEC has imposed $5.5 billion in penalties through its "Fair Funds" program. That sounded like even more good news. But actually getting the money back to investors has proved to be a massive and unwieldy undertaking. So far, just $82 million, or two cents of every dollar collected, has been returned to investors.

Under the terms of the SEC settlements, the government has to find investors who were harmed. This is quite different than in most all class action suits. Finding investors is a time-consuming task that requires going through brokerage firms and tracking down shareholders whose addresses have changed. All investor claims must be thoroughly investigated to ensure that money was actually lost, and, if so, how much. Plans to distribute funds have yet to be set up in some high-profile cases, such as Enron, Qwest, and Xerox Corp. Some critics have complained about the amount of money being eaten up by administrative costs. The *Times* reports that a former SEC chairman is getting paid $800 an hour for his services and a former SEC commissioner has received as much as $20,000 per month. Those fees come out of returns being generated by the fund as it awaits distribution. The government also takes its share of the money. In most cases, restitution funds are placed in an interest-bearing account until distribution with gains taxed at a rate of 35%. The SEC, which doesn't have the resources to run such a program, often farms out oversight of these funds to "distribution administrators"—lawyers, academics, and others paid to help find investors, process claims and distribute the money. The administrators are usually overseen by the federal judge in charge of the case.

Hard To Justify This Golden Parachute

We read lots about how Corporate America takes care of its own—or at least those at the top levels. For example, Morgan Stanley has awarded Philip J. Purcell a real "golden parachute" following his retirement as Chairman and Chief Executive. As you may recall, Purcell left after a rather bitter struggle for control of the firm. In effect, he was forced out. His "exit package" was worth an estimated $113.7 million. It appears that Morgan Stanley put a real premium on this man leaving the company. Even some of Purcell's lieutenants who left did very well. For example, Steve Crawford left with a $32 million payout by the company. Interestingly, Purcell's successor, John J. Mack, signed a contract worth as much as $25 million per year. Apparently, the deals with Purcell and others were made before Mack took over. Now Mack's deal is being restructured, but I don't believe his total pay will change.

Richard Bove, an analyst at Punk, Ziegel & Co., told the *Wall Street Journal* that shareholders are "frustrated that this much money is being handed out without [the executives] having to perform to get it." Other top Purcell deputies who received special pay packages included David Sidwell, chief financial officer; John Schaefer, head of the company's retail brokerage operation serving individual investors; and Mitchell Merin, who oversees asset management. This whole thing just doesn't meet the "smell test!"

Source: *Wall Street Journal*

Labor Department Settles Lawsuit Against Enron

A settlement has been reached between the Labor Department and Enron Corp. Employees of Enron, whose retirement plans vanished when the company imploded, may be getting some compensation. The suit was filed in 2003 on behalf of the company's employees. About $356 million will be set aside out of proceeds from the sale of Enron's assets to cover some of the lost retirement and pension plan benefits. The settlement resolves the lawsuit, which alleged Enron mismanaged its retirement and pension plans by relying on its stocks to support them and did nothing to protect workers from losses. The Labor Department said the agreement is subject to approval from the New York bankruptcy and Texas district courts and does not settle separate Labor Department claims against Enron founder Kenneth "Kenny Boy" Lay and former CEO Jeffrey Skilling.

Source: *Associated Press*

Enron And 3 Western States Reach Settlement

Enron Corp. has agreed to pay $47.5 million in a settlement that could reach $1.5 billion to resolve claims it gouged California, Oregon, and Washington during the 2000-2001 energy crisis. California Attorney General Bill Lockyer reports that the settlement will end market-manipulation and price-gouging claims against the energy company. The agreement requires approval by the bankruptcy court, because Enron is still in bankruptcy, as well as the Federal Energy Regulatory Commission. The final payment amounts will depend on what is left after Enron's secured creditors are repaid as part of bankruptcy proceedings.

Cornell University To Pay $4.3 Million To Settle Charges

The Weill Medical College of Cornell University has agreed to pay $4.3 million to settle civil charges that the school defrauded the government with money it received for research. The grant from the National Institutes of Health was meant to support a Children's Clinical Research Center where medical college physicians-investigators provided pediatric clinical care and conducted research, prosecutors and the FBI said in a joint release. But, the college cheated the government by letting a single physician-investigator and a lone division of the college have all the federal money when it was supposed to support research in a broad array of scientific disciplines. This may not bother some folks, but it does me. It is shocking to have a well-respected university cheat the government. If this "fine" school is cheating, it is a safe bet that they aren't the only ones.

An Update On KPMG Problems

At press time federal prosecutors and KPMG's lawyers were engaged in high-level negotiations that could decide the fate of the accounting firm. Federal prosecutors have built what appears to be a strong criminal case against KPMG LLP for obstruction of justice and the sale of abusive tax-shelters. KPMG, one of the four remaining big accounting firms, has taken "full responsibility for the unlawful conduct by former KPMG partners." KPMG has stated publicly that it has taken actions "to ensure this type of conduct does not occur again." It appears that KPMG has in fact excluded the questionable services from its firm.

In May 2004 a federal judge constructed KPMG to respond to a series of IRS inquiries. The IRS told the court that KPMG "falsely asserts that it is never developed, sold or promoted a tax-shelter." The IRS stated further that KPMG had attempted for years to delay or conceal evidence behind misleading and false claims over legal privilege. The federal judge found in favor of the IRS and ordered documents released, stating that KPMG had "taken steps since the IRS investigation began … designed to hide its tax-shelter activities."

I believe that KPMG will face substantial financial penalties and attempt to obtain something like a deferred-prosecution agreement or other type settlement with the government. Avoiding a criminal indictment could prevent serious damage to the accounting firm that would virtually destroy the company. But, the government shouldn't let KPMG off the hook simply because it is a very large accounting firm. Corporate criminals, if that proves to be the case, should be treated like other criminals.

Turner Construction Company To Pay

Turner Construction Company will pay $6.6 million to settle allegations that it submitted false claims to the federal government. Federal officials had claimed that Turner received credit for bonds on dozens of federal contracts without passing the credits along to the federal government. The construction company was required by its government contracts to reduce the amount it sought for bond payments or to refund to the government the credits it received from its bonding company. As part of the settlement, Turner will also forfeit claims valued at $2.8 million under contracts with the Department of Veterans Affairs and the Department of the Navy. While the amount of this settlement is relatively small in the scheme of things, it is still worthy of note. Fraud—whether large or small—simply can't be tolerated by the government and the public needs to be made aware of the extent of the wrongdoing.

DaimlerChrysler Settles Whistleblower Case

A former DaimlerChrysler AG executive, who said his firing was a reprisal for complaining that the German-American automaker used secret bank accounts to bribe officials of foreign governments, has settled his lawsuit against the company. A U.S. District Judge in Detroit has approved the settlement between DaimlerChrysler and David Bazzetta. Terms of the settlement were not released. Bazzetta, a former executive in DaimlerChrysler's corporate auditing department, claimed he was fired in January 2004 after complaining to higher-ups about the existence of secret bank accounts used in bribing foreign governments. He learned of the accounts in 2001 during a corporate audit committee meeting in Stuttgart, Germany, where DaimlerChrysler is headquartered, according to a media report. The company claims that it fired Bazzetta because he falsified internal financial information and directed subordinates to do the same. The district judge eventually dismissed Bazzetta's whistleblower allegations, leaving age and unspecified handicap discrimination allegations.

Report Questions Over $1.4 Billion Of Halliburton Bills

I had hoped that my mentioning of Halliburton in this Report would have become totally unnecessary by now. I believe that the Bush Administration has wanted this bad news to go away. But, we now learn that Halliburton, the company formerly headed up by Vice-President Dick Cheney, has billed taxpayers more than $1.4 billion in questionable and unsupported charges for logistics and other services in Iraq. This info comes from a congressional report released recently. The report cited newly released government audits that can't be good news for Halliburton. Whistle-blower testimony and a previously undisclosed Army audit found Halliburton and its subsidiary Kellogg Brown & Root (KBR) inflated cost estimates, billed for unnecessary equipment and personnel, submitted millions of dollars in duplicate charges, and were repeatedly given preferential treatment over other contractors. The report cited these specific examples of inflated costs:

- $617,000 for double-billed soft drinks.
- $1 million in excessive laundry charges.
- More than $560,000 for unneeded heavy equipment, including tractors and trailers.
- $2.2 million for cargo aircraft and $7.6 million for freight costs that "appeared to be duplicate."
- $1.4 million to pay 146 workers at a facility that had only 62 workers.

It is quite clear that Halliburton knew how to "work" the system. The Army audit blamed lax Defense Department oversight, saying Pentagon officials often ignored lower government cost estimates in favor of the contractor's inflated ones. A few of the examples are:

- While the government estimated it would take $1.9 million to run Baghdad's airport, Halliburton charged $12.8 million.
- A contract to run Camp Arifjan in Kuwait cost $10.8 million instead of the government $2.8 million estimate.
- A separate Defense Contract Audit Agency review revealed $219 million in questioned charges related to fuel imports by Halliburton.
- Rory Mayberry, a former KBR food manager at Camp Anaconda in Iraq, testified by way of videotape from Baghdad that the company charged for twice the number of meals it provided and served food beyond its expiration date. Mayberry said managers ordered workers to pick bullets and shrapnel out of food shipments that had been damaged by gunfire or bombings and serve it to troops. He said further that managers threatened to send workers who talked to auditors to more dangerous parts of Iraq.

When Halliburton cleans up its act, I will quit writing about the politically-connected company. Hopefully, that will be very soon! Until that happens, however, this is something that should concern all American citizens who pay taxes. I just hope there are enough prosecutors and government officials who aren't afraid to take on a powerful company like Halliburton.

Source: *USA Today*

VI. CAMPAIGN FINANCE REFORM

Record 2004 Lobbying Outlays Exceed $2.1 Billion

Most folks would be shocked if they knew how much money is being spent lobbying the federal government. During the last six months of 2004 the final total shows $1.08 billion spent on lobbying the Executive Branch and the Congress. This was an average of $179.9 million in spending per month. The spending in the first six months of 2004 was $1.06 billion, making the total spending for 2004 a whopping $2.139 billion. This was a 7% increase over 2003. When are the American people going to realize that the average citizen doesn't benefit very much—if at all—from all of this money being spent by the special interest groups?

Health care was the number one issue for lobbying. About $162 million was spent in the last six months of 2004, with pharmaceutical companies again leading the way with expenditures of $41.2 million. The Pharmaceutical Research & Manufacturers of America spent $7.5 million, Bristol-Meyers Squibb spent $2.9 million, and Wyeth Ayerst and Glaxosmithkline each spent $2.6 million. In second place was the communication & technology sector, which spent $144.1 million. In this group, telephone companies led the way with expenditures of $32.2 million. The finance and insurance sector was third, with spending of $143.9 million. Insurance carriers spent $48.2 million, including $4 million by AIG. The top organizational spenders were led by the U.S. Chamber of Commerce Institute for Legal Reform at $14.5 million and the U.S. Chamber of Commerce in its own right at $8.8 million.

There are many loopholes in the federal laws that govern lobbyists. These firms are often paid for other contract work. Those expenditures don't have to be included in the lobbying expenditure totals. The federal lobby laws don't require all types of spending to be disclosed. For example, *public relations programs, grassroots activity, and strategic planning are often excluded*. Campaign contributions of individuals and political committees, as well as in-kind payments for fundraising events, are required to be reported to the

Federal Election Commission and not under the lobby laws.

Unless Congress gets serious about some real campaign finance reform and tackles a comprehensive reform of the federal laws dealing with lobbying, the special interest groups will continue to literally run the government. I hope there will be enough politicians who will take on the powerful lobby groups—rather than simply taking their money. That is our only hope for a return to "good government" in this country.

Source: *Political Money Line*

VII. CONGRESSIONAL UPDATE

A Brief Update On Congressional Action

Activity on Capitol Hill was largely obscured in the national press by two main Washington stories: the nomination of Judge John Roberts to fill the vacancy on the U.S. Supreme Court, and the increasing woes facing presidential advisor and "Bush's brain" Karl Rove over his possible involvement in the "outing" of CIA operative Valerie Plame. The disclosure of Ms. Plame's identity was in apparent retaliation for the debunking by her husband, Ambassador Joseph Wilson, of one of the Bush Administration's stated rationales for waging war on Iraq. Congress did pass some controversial bills, with bad implications for consumers and average citizens generally, as it headed into its summer recess.

CAFTA Squeaks Through

In a legislative campaign marked by direct White House pressure on wavering members of Congress, months of GOP leadership threats, House leadership's holding open of the floor vote for over an hour to gain an additional handful of votes, and last-minute side deals with individual House members, the Central American Free Trade Agreement (CAFTA) passed the House during the last week in July by a 217-215 vote. The Senate had previously approved the agreement. Of Alabama's House delegation, only Democratic Congressmen Artur Davis and Bud Cramer voted against the agreement, while all of Alabama's Republican Congressmen voted for the pact. Representative Bob Aderholt, who previously had opposed the agreement, voted to support it at the last minute after being promised protection for the American sock industry by the Bush Administration's U.S. Trade Representative. On the Senate side, Senator Richard Shelby voted against CAFTA, while Senator Jeff Sessions voted for it.

Various labor organizations, development organizations, religious groups, and certain private sector manufacturing lobbies had spoken out against CAFTA. After passage of the measure, Lori Wallach, director of Public Citizen's Global Trade Watch division, noted that "[w]ith only 15 Democrats supporting CAFTA, the Bush Administration and the Republican Party have now officially adopted NFTA's record of an unsustainable deficit, downward pressure on wages and economic instability as their own." Public Citizen had previously criticized CAFTA for not requiring compliance with international labor standards, instead requiring only that participating countries enforce their domestic labor laws, which are grossly inadequate in Central America. Numerous groups also had warned of the likelihood that passage of CAFTA would cause loss of jobs in the U.S. Environmental groups likewise criticized CAFTA's passage. Margrete Strand of the Sierra Club noted:

> *CAFTA is a flawed model that expands the privileges of global corporations at the expense of working families and the environment.…*
>
> *CAFTA's environmental protections are weak, unenforceable, full of loopholes, and a step backwards from previous trade agreements. They do not mandate any improvement of environmental standards in Central America, and even the United States Trade Representative has agreed that countries like Guatemala and Honduras lack even basic environmental protections.*
>
> *CAFTA follows the failed path of NAFTA and allows multinational corporations to challenge environmental and public health measures in secret trade tribunals if they interfere with profits. Under NAFTA, Mexico was forced to pay almost $16 million to a U.S. corporation after a community blocked the building of a toxic waste facility that would have threatened local drinking water supplies. Additionally, a Canadian mining company recently sued the U.S. for $50 million over the cleanup and restoration requirements of an open-pit mine in California.*
>
> *The laws that are already being attacked by NAFTA's corporate lawsuits protect the health and safety of our children and communities, and should not be undermined by global trade rules.*

The agreement now goes to the White House for the President's signature.

Congress Finally Passes Energy Bill

After more than four years of partisan wrangling and legislature failures, both the House and the Senate in late July passed an energy bill, long a Bush Administration priority. The final bill dropped most of the controversial provisions that blocked passage of previous versions, including authorizing oil drilling in the

Arctic National Wildlife Refuge and immunizing the petroleum industry of liability for water pollution and other damages caused by the gasoline additive known as MBTE. But, "eco-friendly" measures to tighten fuel-efficiency standards for automobiles and take a stand against global warming were deleted too.

What's left is a smorgasbord of provisions benefiting the petroleum industry and other big corporate energy producers who are key elements of the Administration's corporate constituency—as if these highly profitable industries need such help. The bill includes an estimated $85 billion worth of subsidies and tax breaks for most forms of energy, including oil and gas, "clean coal," ethanol, electricity, and solar and wind power. The petroleum industry got new incentives to drill in the Gulf of Mexico, although you'd think that $60-a-barrel oil would be incentive enough. The already-subsidized ethanol industry received a federal mandate that will nearly double its output by 2012, as well as new subsidies to develop ethanol from other sources. Possibly the bill's biggest winner is the nuclear industry, which received billions of dollars in subsidies covering almost every facet of operations, from research and construction to waste reprocessing and even decommissioning of nuclear plants.

The bill appears to run roughshod over certain environmental protections. It exempts oil and gas companies from Safe Drinking Water Act requirements when they inject fluids—including some carcinogens—into the earth at high pressure, known as hydraulic fracturing. Residents in Alabama, Virginia, West Virginia, and other states have complained that this process has polluted groundwater in their communities. The bill authorized seismic blasting in sensitive marine areas to gauge offshore oil reserves, notwithstanding a moratorium on drilling in many of those areas. It also removes petroleum well pads from storm-water regulations under the Clean Water Act, although critics question why the oil and gas industry, which has enjoyed record profits in recent months as U.S. gas prices have soared over $2 per gallon, should be exempt from any aspect of environmental law. Notwithstanding a recent House resolution denouncing the U.S. Supreme Court's recent decision expanding the power of local governments to seize private homes through the power of eminent domain, the bill gave the federal government new eminent-domain powers to clear paths for power lines—long on the wish list of the nation's electric utilities. The legislation also limits the power of state and local governments to have adequate say in how proposed liquefied natural gas (LNG) facilities are built, shifting that power to the federal government. Governor Riley has criticized that provision, which could allow the construction and operation of Exxon-Mobil's LNG facilities in the Gulf of Mexico over state and local objections. All this is from an Administration that claims to want to return power to state and local governments, except apparently when its business buddies want otherwise.

Analysts from across the political spectrum have said the bill will do little to reduce U.S. oil imports, lower gasoline or electricity prices for consumers, address climate change, or deal with other energy issues facing the nation. It also ignores tighter fuel economy standards or other needed energy conservation measures. These analysts say the billions of dollars in tax breaks and other incentives will do little more than send money to energy companies, some of which already are reaping huge profits.

Possibly the most significant provision in the bill is the repeal of the little-known Public Utility Holding Company Act of 1935, which has barred the owners of utilities from owning other utilities and has prevented mergers in the electricity industry. Consumer advocates warn that the repeal will trigger a flurry of mergers and acquisitions, leading to increased rates and Enron-style frauds. As my good friend Joan Claybrook, president of Public Citizen, has observed:

> *Not only does this bill hand over billions in taxpayer subsidies to mature industries that should not need—and certainly don't deserve—government handouts, it rolls back the clock to the 1920s in terms of electric utility regulation. The bill's repeal of the Public Utility Holding Company Act will set the stage for utility mergers that could very well destabilize an industry that for the past 70 years has brought us the world's most reliable electricity grid. Under this legislation, banks, oil companies, and even foreign companies could purchase electric utilities, further removing them from local control and state oversight.*

It should not be surprising that an energy policy largely written by the "big dogs" in the energy industry and its Administration and Congressional boosters, such as Vice-President Dick Cheney and House Majority Leader Tom DeLay (R-TX), winds up shoveling billions of dollars of taxpayer-financed "pork" to those corporations. It is also a blow to democracy that the federal appellate courts have killed efforts by groups on both sides of the political spectrum to open to public scrutiny the membership and workings of the Vice-President's energy task force that resulted in such an industry-friendly and misguided "national" policy. Both the energy bill and CAFTA reflect the Administration's overall strategy to transform our government to be "by Big Business, for Big Business, and of Big Business"—otherwise known as the President's "base."

Lawmakers Should Keep Life-Saving Auto Safety Improvements in Highway Bill

Public safety groups and people who have lost loved ones in vehicle-related tragedies have called on lawmakers to make sure that provisions key to curbing vehicle-related deaths and injuries are included in the congressional highway bill. At press time, a House-Senate conference committee was working on the bill. The Senate-passed version of H.R. 3, the "Transportation Equity Act: A Legacy for Users," includes provisions to ensure that future vehicles have life-saving improvements such as stronger roofs, electronic stability control, side window glazing and side head airbags. The bill also calls for the National Highway Traffic Safety Administration (NHTSA) to study the problems of children being backed over inadvertently and being injured by power windows.

The U.S. House of Representatives highway bill, however, contains none of these provisions because it does not have a commerce title. Thousands of deaths and severe injuries caused annually by rollovers, ejections, side impact crashes, backovers, and power windows could be avoided with the installation in every vehicle of critical safeguards called for in the legislation by specific dates.

The last time lawmakers passed auto safety legislation was in 2000, when the House and Senate Commerce committees took a leadership role in quickly passing legislation to address the Firestone tragedies, in which defective tires and rollover-prone vehicles caused hundreds of deaths and injuries, with 25% of the deaths occurring in Texas. The pending safety provisions deal with problems that lawmakers didn't have time to address in 2000 and would alleviate the dangers that caused the Firestone situation, including rollover-prone vehicles, people being ejected too easily from vehicles, and weak roofs that crush in rollovers.

A number of safety groups including Public Citizen, Advocates for Highway and Auto Safety, and Consumers Union pushed hard to get the needed items put in the final version of the bill. Congress should pass this bipartisan bill. The latest figures available from NHTSA project that 42,800 people were killed in vehicle crashes in 2004, a year that saw a 6.9% jump in sport utility vehicle rollover fatalities over the previous year. At the current level of fatalities, an estimated 212,500 lives will be lost on the nation's highways and 15 million will be injured, costing society more than $1 trillion over the life of the five-year bill.

Every safety issue included in the bill is supported by strong data and proven research, and technologies are available to address the problems. Rollover and side impact deaths represent more than 40% of all highway deaths each year. There is an urgent need for NHTSA to issue rules to solve these long-pending safety problems, and this legislation will compel the agency to act. The bill calls for:

- Rollover prevention: Studies estimate that electronic stability control or rollover stability control reduces deaths and injuries by as much as one-third by preventing crashes from occurring and could save as many as 2,100 lives a year in rollover crashes alone. NHTSA and automakers have acknowledged the overwhelming benefits of some of these technologies.

- A new roof crush resistance standard: At least 1,400 deaths and 2,300 severe injuries, including paraplegia and quadriplegia, could be prevented each year by improving the weak standard, which has not been updated since 1971. Additional lives could be saved in rollover crashes with rollover sensors to trigger side impact airbags and seat belt pretensioners.

- Occupant ejection prevention: The bill includes a requirement to issue performance standards to reduce complete or partial ejection of vehicle occupants. This includes an upgrade to the door locks and latches standard, which could help prevent hundreds of the 2,500 door-related ejection deaths each year.

- Improved side impact crash protection: An estimated 1,200 lives could be saved and 975 serious head injuries could be prevented each year by requiring technology already used in high-end vehicles to be used in all cars and light trucks, and even more if also equipped with rollover sensors.

- Backover technology study: The bill requires NHTSA to evaluate backover prevention technology.

- Non-traffic data collection: The bill requires data collection on vehicle-related non-traffic incidents.

- Effective safety belt use reminders in all seats: Increasing the effectiveness of belt reminders, already mandatory in all vehicles, could save up to 900 lives each year.

The safety measures have bipartisan support. U.S. Senators Ted Stevens (R-AK), Trent Lott (R-MS), Daniel Inouye (D-HI), Olympia Snowe (R-ME) and John Rockefeller (D-WV) have been notable champions of the safety provisions in their leadership roles on the Senate Commerce, Science and Transportation Committee, as has Senator Mike DeWine (R-OH), who is not on the committee. Senator Richard Shelby, the senior senator from Alabama, has always been a friend of consumers and in favor of strong safety measures. The Committee unanimously approved the auto safety section of the legislation on April 14th. The full Senate approved H.R. 3 on May 17th. Hopefully, the transportation bill conferees will include the critical safety standards in the final version of H.R. 3.

VIII. PRODUCT LIABILITY UPDATE

Construction Site Hazard: Excavator Quick Couplers

We recently settled a case against a manufacturer and supplier of hydraulic quick couplers used on heavy earth excavators. Tragically, a construction worker was crushed and trapped, his leg was amputated, and he suffered other permanent injuries when an excavator bucket on a large excavator fell off the articulated boom arm. During our investigation and preparation of this case, we learned that this was not an isolated incident. In fact, we uncovered 15 other incidents in the past 5 years—13 of which involved crushing death from a falling excavator bucket.

On most construction sites where trenching activities are taking place, construction laborers are usually working within the trench to install water or other pipelines. Another worker typically operates the excavator to dig the trench and also to lower large sections of pipe into the pit or to deposit crushed stone base or backfill underneath and around the pipe. The excavator operator routinely changes the boom attachments from the bucket to a crane lifting-eye, rock crusher or some other attachment in order to complete the various lifting tasks. Historically the operator is required to get out of the excavator cab to manually install heavy retaining pins to hold the attachment in place. Usually, if the trench is prepared properly and the equipment and operator function properly, no one is injured.

In recent years, various companies have begun manufacturing and supplying devices known as a "quick couplers" for use on excavating equipment. The purpose of such devices, which vary in configuration but are usually hydraulically operated from within the excavator cab, is to reduce the time required to change excavator attachments. In order to change attachments, the operator simply hydraulically releases the coupler from one attachment and then grasps another. One of the primary problems with most "quick" couplers is that they fail to include manual safety pins to ensure that the attachment remains attached. If the coupler is only partially engaged (because the full attachment point is obscured from the cab of most excavators), then the attachment may fall onto an unsuspecting worker when the boom arm is moved. In response to such an obvious safety defect and the resulting string of injuries and deaths, OSHA now requires all excavator quick couplers to be attached with manual safety pins. Unfortunately, many of the original designs are still out there on jobsites across the country, and countless workers face injury or death from these dangerous devices.

Florida Jury Awards $10 Million Awarded For Heater Deaths

A Florida jury has awarded $10 million to the family of an electrician and his stepson, who died more than five years ago when a Coleman heater filled their camping tent with carbon monoxide. The 41-year-old man and his 16-year-old stepson were camping in north Florida over Thanksgiving weekend in 1999. They had an airtight 9-by-7-foot tent and a Coleman Focus 5 heater. Authorities said the heater was defective and emitted lethal levels of carbon monoxide, which as you know is an odorless, colorless gas. Tragically, the campers died in their sleep. A lawsuit was filed against the company in 2000.

The suit claimed that the heater's fuel lines could not be cleaned and that the company didn't include a warning against using the heater indoors or a safety switch to shut the heater off in the presence of excess carbon monoxide, as newer models have. Coleman stopped making Focus heaters in 1996. The heaters have been linked to more than 60 deaths nationwide and a tremendous number of injuries. Cases are pending against the company in Michigan, Washington, Montana and Wisconsin. Coleman will appeal the verdict.

Source: *St. Petersburg Times*

Family Files Suit In School Bus Crash

The family of a 9-year-old who was a passenger on a school bus that crashed on May 9th has filed a lawsuit. The little girl is now paralyzed as a result of life-threatening head and spinal cord injuries. The fourth-grade student was in her assigned seat in the back row of the bus when it crashed through an intersection and slammed into two vehicles, killing their drivers and injuring dozens. The child, who suffered a traumatic separation of her skull from her spinal column, is now unable to speak or move. She is expected to suffer permanent neurological deficiencies. The child also experienced respiratory arrest at the scene, which resulted in brain injury. She has undergone surgeries to treat her fractured spine and reduce pressure on the brain.

The complaint names eight defendants: Bendix Commercial Vehicle Systems, which recalled the original air-brake system on the bus; Thomas Built Buses, the bus manufacturer; its parent company, Freightliner LLC; Cummins Mid-America, which sold and serviced the electrical system on the bus; Liberty Public School District; Midway Ford Truck Center and Midwest Bus Sales, which did repair work on the bus; and the bus driver. The lawsuit states that the bus had brake problems and no seat belts, and that the interior of the area where the child was assigned to sit in the last row had large sections of exposed unpadded metal. Plaintiffs in the lawsuit are the parents and a 10-

year-old brother who was also injured. There were other lawsuits filed by other students who were injured in the accident. Wrongful death lawsuits have also been filed on behalf of the two motorists who were killed in the crash.

Guidant: A Pattern Of Reckless Conduct

On July 18, 2005, Guidant Corporation warned physicians that replacements might be needed for nine pacemaker models made between 1997 and 2000, of which some 28,000 remain implanted in patients worldwide. The company released a warning that says a sealing component in the pacemakers has degraded in some cases, resulting in higher-than-normal moisture in the devices and possible malfunction. About 78,000 of the pacemakers were distributed, with about 18,000 remaining in U.S. patients, according to the company's statement. Guidant now says it has identified 69 failures among the pacemakers—all after they had been used for at least 44 months. The models include: Pulsar Max, Pulsar, Discovery, Meridian, Pulsar Max II, Discovery II, Virtus Plus II, Intelis II, and Contak TR. The company told physicians they should consider replacing the devices for patients who are dependent on the devices. The Federal Food and Drug Administration (FDA) says it is evaluating Guidant's warning. The FDA may classify the warning as a recall.

Over the past two months, I have written of a separate Guidant product defect, that being the implantable defibrillator recall and Guidant's reckless conduct with respect to safety issues. The FDA has confirmed that potential electrical flaws in these heart devices made by Guidant, including one flaw the company did not tell doctors about for years, pose a risk of serious injury or death to patients. Amazingly, the company continued to sell these potentially defective units even after it began producing improved versions of the same model.

Since the last edition of this report, the FDA has designated three models recently recalled by Guidant as "Class I" actions, the highest risk level. The models affected include the Prizm 2 DRs manufactured on or before April 16, 2002, and the Contak Renewal Model H135 and Contak Renewal 2 Model H155, manufactured on or before August 26, 2004. It also designated eight other models as "Class II" recalls, or those posing a less serious risk. The models affected by that action are Ventak Prizm AVT, the Vitality AVT, the Renewal AVT, the Contak Renewal 3, the Contak Renewal 4, the Renewal 3 AVT, the Renewal 4 AVT, and the Renewal RF. The FDA is continuing its investigation into how the company assessed and disclosed those product dangers. The FDA decision is clearly a rebuke to Guidant. The agency did not issue recommendations about whether heart patients should undergo surgery to have the defibrillators replaced, but urged all patients who have not yet done so to contact their doctors to discuss the benefits and risks.

Given the news surrounding the defibrillator debacle, one might think the following quote is of recent vintage:

> *Guidant's EVT division violated the fundamental trust that exists between the medical device industry, doctors, patients, and the public at large. Because of the company's conduct, thousands of patients underwent surgeries without knowing the risks they faced, and their doctors-through no fault of their own-were unprepared to deal with those risks. These actions were criminal…*
>
> *- U.S. Attorney Kevin V. Ryan*

Shockingly, this is a quote from two years ago when Guidant pled guilty to ten federal felonies, including one for knowingly and willfully making false statements to the FDA regarding malfunctions of a medical device used to repair bulges (aneurysms) in the body's main artery. Sadly, Guidant's conduct resulted in numerous deaths and serious injuries. While the company paid a $92.4 million fine for this crime, the punishment must not have been sufficient to change their ways, for now we learn that Guidant has, once again, refused to alert doctors of life-threatening problems—this time, with their Defibrillators.

In addition to representing a number of Guidant heart device victims, we currently represent a Mississippi family whose husband and father died as a result of the aneurysm device, which was implanted just two weeks before being pulled off the market and months, if not years, after the company knew of the problems. It will be interesting to see what a jury thinks about a company that continues with such reckless behavior.

Source: *The New York Times*

DuPont Settles With Rhode Island On Lead Paint Lawsuit

DuPont has reached a multimillion dollar settlement in a landmark lawsuit brought by the State of Rhode Island against the makers of lead paint. The lawsuit accused the lead paint industry of creating a public health threat that poisons thousands of children each year. Rhode Island Attorney General Patrick Lynch says the settlement will cost DuPont $10 million or more, depending on the cost of remediating lead hazards in 600 homes. DuPont said it expects to pay up to $12.5 million. The company will also pay several million dollars to the nonprofit group Children's Health Forum to remove lead paint and educate the public in Rhode Island. In addition, DuPont will pay $1 million to Brown University Medical School for research into solutions to the problem and will donate money to the Dana-Farber/Brigham and Women's Cancer Center in Boston.

Lead paint was banned in the United

States in 1978 after studies showed flaking paint or dust can cause brain damage in children who eat or inhale it. Rhode Island sued the industry in 1999 in the first attempt by a state to hold the industry responsible for the dangers of lead paint in old buildings. A trial ended in 2002 with a hung jury. A new trial, set for September, apparently will go forward against the remaining six defendants. The state has said tens of thousands of children in Rhode Island have been poisoned since 1993. The remaining companies in the lawsuit are Atlantic Richfield Co., Millennium Holdings LLC, NL Industries Inc., Sherwin Williams Co., American Cyanamid Co. and ConAgra Inc.

Ford Has More Problems

A federal investigation of Ford vehicle fires became public earlier this year. Millions of Ford pickups and SUVs are now under scrutiny for dangerous fires. There are several cases pending that are bringing more attention to the problem. A wrongful death suit was filed in a Georgia state court against Ford Motor Co., alleging that a defective cruise-control deactivation switch in a F-150 pickup caused the house fire that killed a 4 year old child. An Iowa man has sued Ford claiming the death of his 74-year-old wife on May 2nd was caused by a fire in their F-150. These two suits—as well as numerous property damage cases in Texas, Florida, California and elsewhere—come at a time when Ford and the National Highway Traffic Safety Administration (NHTSA) are conducting wide-ranging probes into reports of more than 500 fires in Ford pickups and sport utility vehicles. You will recall that in January of this year, Ford announced a recall of 738,000 F-150 pickups, Ford Expeditions, and Lincoln Navigators to disconnect cruise-control switches that could cause fires in the engine compartment. Three months later, NHTSA opened a broader investigation into the switches in 3.7 million Ford pickups and SUVs.

In May 1999, Ford announced that it was recalling 262,000 full-size sedans because of a defect in pressurized switches used to turn off cruise-control systems. The action followed reports of dozens of under-hood fires in Lincoln Town Cars, Ford Crown Victorias and Mercury Grand Marquis. According to Ford, the cars, built in 1991 and 1992, could experience "a fire originating in the left front under hood area as a result of electrical overheating of the speed control deactivation switch." Moreover, the fires seemed random, nearly all of them occurring when the vehicles had been parked and the engine turned off. Yet Ford continued to install a similar switch—also manufactured by Texas Instruments—in its biggest-selling vehicle, the F-series pickup, as well as its full-size Expedition and Navigator sport utilities.

FDA Investigates 120 Deaths That May Be Tied To Use Of Pain Patch

The Food and Drug Administration (FDA) is investigating 120 reports of deaths possibly linked to overdoses from fentanyl narcotic pain patches. The FDA said in a statement: "The agency has been examining the circumstances of product use to determine if the reported adverse events may be related to inappropriate use of the patch or factors related to the quality of the product." The patches are attached to patients' skin to deliver the medication fentanyl, a powerful narcotic designed to treat chronic pain. They are sold under the brand name Duragesic by a unit of **Johnson & Johnson** and have been available as a generic since earlier this year. Fentanyl is in a class of drugs known as opioids, which are used to treat pain.

The FDA also issued a public health advisory telling patients and health-care professionals how to properly use and dispose of the pain patches. J&J has updated Duragesic's label to include new warnings about proper use of the medication and the potential for interaction with alcohol and a variety of other prescription drugs. In a letter to health-care professionals, J&J said that the changes reflected "a heightened awareness of safety issues associated with opioids in general, such as misuse, abuse and diversion."

The FDA has also asked Purdue Pharma LP to remove its painkiller Palladone from the market over concerns that small amounts of alcohol may cause fatal reactions with the drug. In its alert to health-care professionals, the FDA said it recently conducted a review of adverse event reports for Duragesic. The FDA said sorting out unintentional overdoses was difficult because many patients had underlying diseases such as cancer that could have contributed to their deaths. In other cases, the agency said, more than one patch was used and sometimes in combination with other drugs. Some patients reportedly injected or ingested the contents of the patch and added a heat source, which possibly can increase the amount of fentanyl absorbed into the skin. The FDA said there were also reports of leaking patches.

The FDA said fentanyl patches should be used only in patients who have successfully used opioids in the past and shouldn't be a patient's first experience with an opioid. The patch is intended for long-term pain management and shouldn't be used for short-term pain such as that after surgery or an injury.

Government Sues Maker Of Defective Police Body Armor

The U.S. government has sued the top U.S. supplier of bullet-resistant police vests and the Japanese manufacturer of the vests' protective synthetic fiber, contending they conspired to hide evidence that the body armor could be defective. The lawsuit alleges that Second Chance Body Armor Inc. of Central Lake, Michigan, and Toyobo Co. knew that the vests' ability to stop bullets was overstated, but Second Chance sold them anyway to local, state, and federal police. In the lawsuit, filed in U.S. District Court in Washington, the government alleged that the companies kept silent for nearly three years in the face of mounting evidence that the Zylon fabric degraded faster than they acknowledged when it was exposed to light, heat and humidity. Second Chance and Toyobo have been blaming each other for problems with the vests. Second Chance says it has been working closely with the Justice Department and expects to be vindicated. The company says Toyobo "is ultimately responsible for the problems with Zylon."

Questions about the vests, initially praised for their strength and light weight, were first raised by a whistleblower, Second Chance's former director of research and development. Second Chance is now facing more than a dozen lawsuits by states, police agencies, and individuals. The company has acknowledged that the Zylon vests may not be safe and has urged its customers to replace nearly 100,000 vests that had not previously been recalled. The company, now going through reorganization in federal bankruptcy court, earlier recalled more than 130,000 vests. Second Chance also is suing Toyobo. Toyobo has acknowledged that the fiber loses up to 20% of its durability within two years of manufacture. But the company has said Zylon works well in body armor that is properly constructed, and it contends it is not to blame for any problems with Second Chance vests. It will be interesting to see how all of this develops as the various cases progress through the judicial system. One of these cases was settled last month.

Toyobo Settles Class Action Suit

Toyobo Co. will pay $29 million to settle the class action lawsuit in the United States involving the bulletproof vests mentioned above. Toyobo received a preliminary approval for the settlement from the Oklahoma District Court, although at press time a final approval had not yet been granted. The case involved some 150,000 bullet-resistant vests. Other lawsuits are still pending against Toyobo and Second Chance Body Armor Inc. In addition to Oklahoma, this settlement covers class action lawsuits in West Virginia, Missouri, Louisiana, New Jersey, California, and Michigan.

Source: *Associated Press*

IX. MASS TORTS UPDATE

First Vioxx Trial Going Well

The Vioxx trial in Texas against Merck & Co. appears to be going very well in its early stages. As we all know, this is the first Vioxx case to be tried and it has received a great deal of media attention. Mark Lanier, who represents the victim's widow, is a very good lawyer and is well prepared. He will do an excellent job for his client. Merck's internal documents paint a very bad picture for the giant drug company, and the jurors are seeing how truly bad Merck's conduct has been. There has been a great deal of speculation as to how the outcome in this case will affect other Vioxx trials around the country.

Frankly, I do not believe that the outcome in Texas will make a great deal of difference. Obviously, I would prefer that justice be done and the widow of this Vioxx victim be adequately compensated. Based on what we know, Merck should also be punished in this case for its unbelievably bad conduct. In any event, I do not expect the outcome to put a halt to the Vioxx litigation regardless of which side wins. If the plaintiff prevails, Merck will continue to defend cases aggressively. If the drug company wins, I don't believe it will make that much difference in the overall litigation. Our firm will continue to move forward, and the cases we are handling will be pursued vigorously. We will prepare our cases and will deal with each one as it is set for trial.

It is rather interesting to see how Merck is defending the Texas case. I don't really see how its lawyers can get around all of the bad internal documents that reveal clearly that Merck misled the FDA, and lied to the medical community, and the public. The marketing of Vioxx will definitely be something that Merck will have to defend.

Federal Vioxx Trial Set For November

The first federal trial over Vioxx against Merck & Co. has been set for November 28th, although U.S. District Judge Eldon Fallon has not decided which case will be heard. Judge Fallon set the trial date during a July 19th hearing in New Orleans that largely centered on procedural matters. We knew beforehand, however, that he was leaning in that direction. Judge Fallon will preside over the first federal case himself. There are now about 2,000 federal cases. I believe the first case will deal with a heart attack victim.

Analysts have estimated Merck's liability could be as high as $18 billion. As we have reported, Merck has set aside $685 million to pay for defense costs. That tells us how little Merck cares about its Vioxx victims. Not one dime was set aside in a fund to pay claims. Most of the federal hearings before Judge Fallon thus far have focused on issues covering what evidence must be turned over to the opposing sides for lawyers' review. We want records concerning Merck's 3000-person-strong sales force. We believe this will be extremely revealing and damaging to Merck's position.

Texas Sues Merck Over Safety Of Vioxx

In a most interesting development, the State of Texas has filed suit against Merck & Co., alleging that the drug company falsely touted the safety of Vioxx. State Attorney General Greg Abbott, who is a well-respected prosecutor and political conservative, says that Merck willfully misrepresented its studies and physicians' concerns that the drug increases the risk of heart problems and strokes and pushed to have it on the state's list of approved medicine covered under Medicaid. Texas will seek damages that could exceed $250 million. When he filed the suit, General Abbott said: "This is a prime example of a company's drive for profit steamrolling its duty to be safe." While Texas is the first state to sue Merck for Vioxx prescriptions covered by Medicaid, it may not be the last.

Texas pharmacists filled more than 700,000 Vioxx prescriptions for 178,000 patients under the Medicaid program, at a cost of $56 million. Because state law allows the Attorney General to seek triple damages for acts of fraud, Texas will seek to recover $168 million related directly to the cost of covering the prescriptions. The figure could reach more than $250 million if the company is forced to pay additional civil penalties. According to General Abbott, "the people of Texas have been cheated and defrauded by Merck." Unfortunately, they aren't the only folks who have been cheated. Merck has misled the FDA, and deliberately lied to the medical community, and the public at large.

Merck Facing Another Interesting Lawsuit

The Physicians Committee for Responsible Medicine has filed a lawsuit against Merck and Co. The suit charges Merck wrongfully relied on animal tests showing Vioxx is safe, while setting aside evidence that the painkiller increased the risk of heart attacks in humans. Previously undisclosed Merck test results are at the heart of the lawsuit, according to a statement by the nonprofit doctors' group based in Washington, D.C. A Minneapolis woman who claims she developed congestive heart failure after taking Vioxx is also part of the lawsuit. The testing data cited by the Physicians Committee for Responsible Medicine are the latest in a series of company studies that have surfaced in recent weeks.

Source: *Associated Press*

Canadian Panel Recommends Sale Of Vioxx

In a rather shocking development, an expert panel is recommending that Health Canada allow Vioxx back onto the market. Panel members concluded, by a 12-1 vote, that benefits of Vioxx in providing pain relief outweigh the increased risks of heart attack and stroke. Earlier this year, a panel of outside experts—many of whom had financial ties to the drug industry—narrowly voted to recommend to the U.S. Food and Drug Administration that it allow Vioxx back on the U.S. market. The Canadian panel unanimously recommended that Celebrex continue to be sold, but when considering Bextra, a third drug in the same class, the panel gave thumbs down to returning it to the market. Celebrex and Bextra are made by Pfizer. The recommendation of both panels is not only inconsistent, but is mind-boggling, considering all we know about these drugs. It's now up to Health Canada to decide whether it will accept the recommendations. I will be greatly surprised if Vioxx makes it back to the market in Canada or in the United States. I will be even more surprised—or better put, shocked—if any doctors not connected financially in some manner to Merck would prescribe Vioxx to a patient.

Drug Makers Cut Back On Television Ad Spending

Drug makers cut spending on network TV advertising by 10% in the first quarter of this year from the year before. This is the sharpest quarterly fall-off in two years. The industry spent $388.5 million on consumer drug ads on network TV in the first quarter, down about $44 million from last year. Interestingly, the 10% drop in network drug ad spending contrasts with a 4.2% first-quarter rise for network TV ad sales overall. Much of the spending decline came from several big ad campaigns, including:

- **Viagra.** Pfizer pulled TV ads for this drug after the Food and Drug Administration (FDA) in November said they were misleading. In the first quarter of last year, Viagra network TV spending approached $11 million.

- **Prevacid.** TAP Pharmaceutical spent nothing on TV ads for the heartburn drug in the first quarter. It spent $18 million last year.

- **Celebrex.** Pfizer spent nothing pitching the popular painkiller. As previously reported, in December, the company pulled Celebrex consumer ads after a study showed increased cardiovascular risks for some users. Pfizer spent $12 million on Celebrex TV ads in last year's first quarter.

- **Crestor.** AstraZeneca spent $1.1 million on TV ads for anti-cholesterol drug Crestor in the first quarter, down from $9.4 million last year. The new Crestor TV ad — launched in April — puts more focus on the drug's risks.

While these cutbacks are encouraging, they are far from adequate. I believe strongly that all direct-to-consumer advertising for prescription drugs should be prohibited—either by the FDA or Congress—and anything else is unacceptable. There is absolutely no way to justify this type advertising. The selection of appropriate prescription drugs for patients should be the responsibility of trained medical doctors, with assistance when needed by pharmacists.

Source: *USA Today*

Drug Companies Rely on Doctors to Sell Their Drugs

Because of the media scrutiny relating to direct-to-consumer advertising, as noted above, many drug companies have cut back on their television ad spending. Now some needed attention is being paid to the marketing of drugs to doctors by teams of sales representatives. The salespeople have also faced some resistance from doctors, who are now complaining about being bombarded by the sales representatives in their offices. Drug companies are increasingly relying on doctors to communicate their message to other doctors. Thousands of doctors, many of whom have earned considerable fees, lecture part-time for drug companies each year. These doctors are trained by the companies and are paid a fee for speaking at company-sponsored meetings. At these meetings, I understand that the doctors discuss a particular disease and the drugs that treat them. Although the companies and doctors claim the meetings are educational, critics believe the meetings are merely sales talks.

Critics are skeptical of the training sessions. They believe that some drug companies send more doctors to training than necessary and that the meetings are more about marketing than education. An internal study conducted by Merck suggests that the meetings are highly effective and that the "return on investment" is almost double the return from meetings led by sales representatives.

In 2004, overall prescription drug sales were up 169% from 1996, totaling approximately \$229.4 billion. During the same year, according to media reports, doctors spoke at 237,000 meetings sponsored by drug companies. I can see no reason for the drug companies to cut back on the number of company-sponsored meetings. The reason being—they work!

Sources: *The Wall Street Journal* and *USA Today*

Companies To Pay Nearly \$1 Million In Ephedra Case

The makers of a weight-loss product implicated in the death of a Baltimore Orioles pitcher will pay the State of New Jersey nearly \$1 million to settle claims that it exaggerated the benefits and understated the risks of some products. The settlement announced by the Attorney General Peter Harvey on behalf of the State of New Jersey involves Nutraquest Inc. and three related companies that have agreed not to make unsubstantiated claims in advertising. Nutraquest is a successor of Cytodyne Technologies, which made Xenadrine RFA-1, an ephedra-based product found to have contributed to the February 2003 spring training death of Orioles pitcher Steve Bechler.

A medical examiner determined ephedra contributed to the 23-year-old's heatstroke; his body temperature had reached 108 degrees. The company says it stopped selling ephedra-based products in 2003 because they were no longer profitable. New Jersey sued the companies in 2003 over their marketing. In amending the settlement, General Peter Harvey said: "They had targeted vulnerable consumers with false promises of dramatic weight loss with little to no effort. The fact is, there is no miracle weight loss product." Nutraquest filed for bankruptcy in October 2003, citing, among other things, lawsuits filed against it. Bechler's widow filed a \$600 million wrongful death suit that is currently in mediation talks.

Source: *Associated Press*

Bextra's Return To The Market Rejected In Europe

Pfizer, the world's largest drug maker, suspended sales of Bextra in April after United States and European regulators said the risk of serious side effects, including a potentially fatal skin allergy, outweighed the benefits. As you already know, Bextra is part of a class of drugs known as COX-2 inhibitors that also include Pfizer's drug, Celebrex, and Merck's drug, Vioxx. The Food and Drug Administration has said that Bextra has no added advantages as a pain killer and can cause a potentially life-threatening skin condition called Stevens-Johnson Syndrome, an allergic reaction that usually begins as blistering of the mouth and lips and can spread to the rest of the body.

The London-based European Medicines Agency said that it would review the withdrawal of Bextra, which was first suspended in Europe and the United States, within one year. Consistent with its promise, Europe's drug agency conducted a review of the COX-2 painkillers, and concluded that the drug Bextra should remain off the market. The agency also confirmed its warning about the cardiovascular risks associated with Bextra and other COX-2 drugs and the rare serious skin reactions they can cause.

The agency's conclusions on COX-2 drugs confirm interim findings issued in February, which advised COX-2 drugs should not be given to people with cardiovascular disease, and that the lowest dose and shortest duration should be prescribed for the only remaining COX-2 drug still on the market, Celebrex. Pfizer has consistently noted its intent for Bextra to return to the market. But, unless Pfizer can show Bextra's safety as it relates to cardiovascular risks and life-threatening skin conditions, it will be unlikely for any regulatory agency to reinstate this drug for consumer use. I hope Bextra will never get back to the market in any country.

2005 SENTINAL AWARD WINNER

The Association of Certified Fraud Examiners (ACFE), the world's leading provider of anti-fraud training and education, has announced Dr. David Graham, Safety Officer for the Food and Drug Administration, as its 2005 Cliff Robertson Sentinel Award recipient. In my opinion, Dr. Graham is a worthy recipient of this prestigious award. Here is what ACFE had to say when making the announcement:

> *Graham's ongoing crusade for drug safety, speaking out despite intense pressure from supervisors and drug manufacturers, earned him this prestigious award. As an FDA safety reviewer, Graham has called for the removal of 12 drugs from the FDA approved list since 1988, leading to 10 recalls that may have saved thousands of lives. He has faced enormous conflict within the FDA during the last 17 years, as nearly half of the center's $400 million budget has been paid for by drug companies. With funding creating grounds for potential bias in favor of the pharmaceutical industry, the makeup and structure of FDA's Center for Drug Evaluation and Research (CDER) has been called into question and its responsibility to protect the public is at risk.*

The ACFE's Cliff Robertson Sentinel Award is given in honor of those who are brave enough to come forward and expose wrongdoing, even though they are frequently vilified. Through the creation of the award, the ACFE highlights to governments and corporations the value of sentinels in creating a workplace environment of integrity. The award was named for Oscar-wining actor Cliff Robertson, who first exposed corruption in Hollywood during the 1960s and carries the inscription "For Choosing Truth Over Self." Robertson was the first recipient of the award, which was established by the ACFE in 2003.

X. BUSINESS LITIGATION

WELLPOINT AGREES TO PAY $198 MILLION TO SETTLE DISPUTE WITH PHYSICIANS

WellPoint Inc. has agreed to pay $198 million to settle a dispute with physicians and medical societies that will give doctors more leeway in determining the types of treatment required and whether or not a given procedure will be covered by medical insurance. The agreement was submitted for approval to a federal court in Miami. The proposed payment calls for WellPoint, which has about 29 million customers, to pay $198 million in cash and invest $250 million in information technology and procedural changes to resolve disputes with doctors and pay claims more promptly, The Washington Post reported. If accepted by the court, the proposal will result in payments to some 700,000 doctors and significant changes in the way the managed care company pays medical claims in the future.

As part of the agreement, WellPoint would adopt a patient-friendly definition of "medical necessity" that mirrors the American and California medical associations. It would allow cheaper treatment only when it was at least as effective as what a doctor recommended. The settlement calls for WellPoint to spend about $198 million to settle two class action lawsuits by more than 700,000 physicians who charged the company with systematically underpaying them and putting its financial interests ahead of patient care.

WellPoint also would make notable changes in the way it reimburses physicians and considers their treatment recommendations at a minimum cost over several years of $250 million, according to the agreement. It includes a ban on WellPoint's use of computer programs to systemically deny and underpay purportedly legitimate patient claims. WellPoint operates mainly under the Blue Cross banner and has 28.5 million members nationwide. The company says the settlement would be paid out of cash on hand and would not increase premiums paid by WellPoint members. Interestingly, WellPoint posted a net profit of $960.1 million on revenue of $20.8 billion in 2004. The landmark litigation began as a series of suits filed by the California Medical Association and its sister groups in 1999 and 2000 against 10 of the biggest managed care companies. The doctors alleged that the HMOs' heavy-handed business practices amounted to extortion and fraud-violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO). WellPoint has about 7,000 California members. The suits were eventually consolidated in U.S. District Court in Miami, where lawsuits were pending between the nation's physicians and every major health plan.

Source: *Insurance Journal*

CLASS ACTION SUITS OVER DRUG DISCOUNTS SETTLED FOR $17.5 MILLION

Rhode Island's largest health insurer, Blue Cross & Blue Shield of Rhode Island, has agreed to pay $17.5 million to settle two class action lawsuits affecting thousands of customers. Under the settlement, Blue Cross payments ranging from $10 to $1,400 will be distributed by summer's end to 116,200 current and former Blue Cross subscribers, said Wood Foster Jr., a plaintiffs' lawyer. Legal fees taken out of the settlement total $5.7 million. The agreement ends legal battles that began nine years ago. Plaintiffs had accused Blue Cross of cheating subscribers by not passing along discounts negotiated for prescription drugs and health services.

Blue Cross admits no wrongdoing in the settlements, approved by a state judge and a federal judge. Blue Cross attorney Steven Snow said the company settled because it faced at least one lengthy trial and appeal. "This is a very good deal for members of the class, because not only is Blue Cross denying wrongdoing, we believe there is a substantial probability that Blue Cross would have prevailed" in a trial, Snow said. The case was launched after Margie and Paul Caranci, of North Providence, went to a lawyer in 1995 with complaints about their Blue Cross claims. The state and federal lawsuits were filed in 1996 and consolidated in 2003.

The complaints alleged Blue Cross secretly negotiated discounts for drugs and services but billed patients for copayments based on undiscounted prices. The state lawsuit included three other claims. One was an allegation that people covered by "Classic Blue" were billed at higher rates applied to nonparticipating doctors even when they went to participating doctors. Blue Cross agreed to the settlement in January. U.S. District Judge William Smith and state Superior Court Judge Michael Silverstein then approved the settlement.

Idaho County Suing To Curb Cost Of Illegal Immigration

Faced with the costs of coping with illegal immigrants, one Idaho county is looking to the courts for help. A racketeering lawsuit was filed against the businesses that hire such workers. The legal theory is that a pattern of immigration violations is costing Canyon County, Idaho, millions for law enforcement, education and social services. The county's attempt to recoup its expenses was filed under the federal Racketeering Influenced and Corrupt Organizations Act, commonly called RICO. This law traditionally has been used against targets ranging from organized crime to Internet spammers. To my knowledge, this is the first time that a government has sued a business under RICO, which has enacted by Congress in 1970.

At least one legal expert believes the case has merit. G. Robert Blakey, one of the authors of the RICO Act and a law professor at the University of Notre Dame, says that "If people are knowingly bringing in and exploiting undocumented immigrants, they are creating a federal crime." However, the fact that it may be a crime doesn't automatically mean that a civil lawsuit for damages can be filed. In this regard, Blakey stated: "What this suit raises is just whether the government units—federal, state and local—can sue for the damages they suffer." Some federal courts have already ruled that governments can't try to recover the cost of simply being a government carrying out its functions.

Judge Increases Perelman Verdict

A Florida judge has increased the damages awarded against Morgan Stanley to $1.58 billion in the fraud suit brought by billionaire investor Ronald Perelman. As we reported last month, the jury awarded $1.45 billion in compensatory and punitive damages in the lawsuit against the investment bank over its role in advising appliance maker Sunbeam Corp. in its 1998 purchase of the Coleman Co, Perelman's camping goods company. In a written ruling, the trial judge awarded Morgan Stanley about $84 million in credits related to past Sunbeam-related payments made by other parties to Perelman. But, the judge then awarded more than $200 million in interest to Perelman tacked on to the damages. Together, the rulings increased Perelman's award by a net $130 million, making the total to approximately $1.58 billion. The jury had awarded Perelman $604 million in compensatory damages and $850 million in punitive damages. The court's ruling left the punitive damages component of the award unchanged. Morgan Stanley has filed an appeal.

Source: *Reuters News*

DaimlerChrysler Settles Lending Bias Cases

DaimlerChrysler AG's North American financing arm has tentatively settled class action lawsuits brought by minority customers in Chicago and New Jersey who alleged racial bias in the automaker's lending policies. DaimlerChrysler Services North America, based in Michigan, agreed to spend $1.7 million in the Chicago case and $1.8 million in the New Jersey case. That money would be used to provide DaimlerChrysler employees with antidiscrimination training and sponsor consumer financial literacy programs in minority communities. The New Jersey settlement also limits the amount by which dealers can mark up interest rates on car loans through DaimlerChrysler Services. The pending settlements, confirmed Tuesday by the automaker, are subject to approval by federal judges.

The Chicago settlement comes more than two years after a group of black and Hispanic customers filed a lawsuit alleging DaimlerChrysler discriminated against their credit applications. The suit led in turn to a boycott of the automaker's products. The New Jersey settlement requires DaimlerChrysler to limit markups on car loans to 2.5 percentage points over what customers qualify for, given their credit history. DaimlerChrysler previously capped loan markups at 3 percentage points.

Still pending is a lawsuit filed against DaimlerChrysler Services by former Chicago car dealer Gerald Gorman, who claims the company wouldn't give loans or fair interest rates to customers at his two dealerships because they were located in neighborhoods with many minorities. Interestingly, a federal magistrate said in a recent report to a Chicago

U.S. district judge that Gorman had lied under oath, and recommended that his lawsuit should be thrown out.

Sources: *Detroit Free Press* and *Associated Press*

Hartford Financial Services Subpoenaed By New York Attorney General

Hartford Financial Services Group, the nation's largest variable annuities seller, was subpoenaed a few weeks ago by the New York Attorney General's Office. This company is being asked to provide records on its sale of variable annuities to New York's senior citizens. State and federal regulators are considering whether to increase disclosure requirements to prevent sales abuses. The variable annuity, a retirement product that combines life insurance with the market performance of mutual funds, has grown in popularity. Americans now own $1.1 trillion dollars of the long-term investment. Regulators are growing increasingly concerned that investment advisors are marketing variable annuities to elderly and unsophisticated clients who are not aware of how these investments really work. For example:

- the investment ties up their money for several years;
- it has high commissions compared to other investments; and
- it subjects them to stock market losses.

Hartford, with variable annuity sales of $15.2 billion dollars last year, topped the industry for the thirteenth consecutive year, according to Vards/Morningstar. Last year, the National Association of Securities Dealers, which regulates stock brokerages, proposed a rule that would require greater supervision of brokers who market variable annuities to senior citizens. The Securities & Exchange Commission is considering a related rule that would require greater sales disclosures. The National Association of Insurance Commissioners is promoting its own "sales to seniors" rule that would place greater responsibility on state regulators. Joe Borg, Commissioner of the Alabama Securities Commission, has been telling Alabama seniors for years to be wary of where they invest their money. Now, it appears that others are joining in and trying to do something about the problems that exist.

Source: *USA Today*

Royal Dutch/Shell Agrees To Settle Suit

A settlement has been reached in a U.S. lawsuit related to the writedown by the Royal Dutch/Shell Group of Cos of its oil and gas reserves last year. The company will pay $90 million to settle the case. About $25 million of the class action settlement, brought by employees participating in some retirement savings plans, will be covered by insurance. The Anglo-Dutch oil company confessed last year that its oil and gas reserves were around 25% lower than previously stated. Obviously, oil and gas reserves are an oil company's most valuable asset. The scandal cost the company almost $150 million in fines imposed by U.S. and British regulators and led to the firing of three senior executives. The company's reserves were restated five times during the year. Each time, the company's share price fell sharply.

The company still faces other shareholder class actions on the issue. This settlement has to receive final approval from the U.S. federal court in New Jersey. Shell has also agreed to pay up to $1 million toward the cost of the employees' legal costs and the cost of providing notice of the settlement to employees. U.S. federal authorities say that Shell wouldn't face criminal charges over the reserves restatement. The government's position is that the fines imposed on the company and its willingness to cooperate with the investigation meant a prosecution would not be in the public interest. The reserves fiasco led Shell to propose ending its twin-board structure in the biggest shake-up in its almost 100-year history, a move that won the backing of investors at recent meetings in London and the Hague. The merged company, to be named Royal Dutch Shell PLC, will be based in London, although its physical headquarters and tax home will be in The Hague.

Source: *Associated Press*

American Express Unit Settles Mutual-Fund Probe

American Express Co.'s financial-advisory unit will pay $7.4 million to settle allegations by the New Hampshire securities regulator that it steered clients into the company's own lackluster mutual funds instead of better-performing products from others. The state regulator claimed that American Express Financial Advisors routinely sold plans loaded with American Express funds, (or funds from partners) and didn't adequately disclose that conflict to its customers. American Express, as an investment adviser, had a fiduciary obligation to design the best financial plans for its customers—an interest that should have come ahead of selling proprietary funds. That is pretty basic in the industry.

Firms generally receive commissions from selling both in-house and outside funds, but the in-house funds can yield more profit because they bring a stream of management fees to the company. American Express will pay:

- $5 million in fines and penalties;
- as much as $2 million in restitution to New Hampshire investors; and
- $375,000 to reimburse the state for the costs of its investigation.

The $7.4 million settlement was the largest securities action in state history.

The New Hampshire investigation covered a period between 1999 and 2003.

Source: *Wall Street Journal*

$5 Billion Suit Filed Against DuPont Over Teflon

A $5 billion class action lawsuit is being filed against DuPont Co. saying the chemical giant has failed over the years to warn consumers on the dangers of a Teflon chemical. Two Florida law firms are filing the suit in federal courts in eight states on behalf of 14 people who bought and used cookware with the nonstick Teflon. It is made using **perfluorooctanoic acid** and its salts, known as PFOA, or C-8. The plaintiffs want DuPont to spend $5 billion to replace the cookware, impose a **Teflon** warning label and create two funds to pay for medical monitoring and more scientific research. PFOA also is used in many other of the company's most popular products, such as auto fuel systems, firefighting foam, phone cables, computer chips and clothing.

The suits are being filed initially in Florida, California, New York, Texas, Illinois, Ohio, Pennsylvania and Michigan. A scientific review panel advised the **Environmental Protection Agency** the chemical is "likely" to be carcinogenic to humans, but DuPont officials disputed the draft report. The panel agreed to include more opposing viewpoints before submitting it to EPA this month. EPA concluded that DuPont failed to meet federal reporting requirements on PFOA between 1981 and 2001, claims the company disputed in legal proceedings. To date, no agreement has been reached. The Environmental Working Group, an advocacy organization, brought DuPont's record on PFOA to EPA's attention.

DuPont settled another class action suit over PFOA filed in 2001 by residents around the company's Washington Works plant, situated along the Ohio River near Parkersburg, West Virginia. In February, DuPont set aside $70 million to pay for medical screenings for many of the 80,000 Ohio and West Virginia residents near the plant, in addition to approximately $110 million in cash earmarked for payments to the residents and their attorneys' fees. The residents get their water from six public water districts or from private wells within those districts where PFOA concentrations were found. Depending on the findings of an independent three-member science panel appointed by the trial court, DuPont may be required to pay up to an additional $235 million for medical monitoring, preventative care, and treatment of those residents.

As reported below, our firm is suing 3M in Minnesota state court on behalf of a class of Washington County residents over contamination arising out of releases of PFOA and numerous other perfluorochemicals from the 3M's Cottage Grove, Minnesota manufacturing plant and related waste disposal sites. We are working closely with a team of experienced Minnesota lawyers and the Ohio and West Virginia class counsel from the West Virginia class-action. Our Minnesota case is ongoing.

Source: *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

Reciprocal Of America Executives Sentenced In Virginia

As we have previously reported, our firm is representing Commissioner Paula Flowers as Receiver of three Tennessee malpractice insurance carriers. Collectively, these three companies are known as the "RRGs." These three Tennessee insurance companies, which insure doctors, hospitals, and lawyers, went belly-up in early 2003 because of a scam of fraudulent reinsurance practices committed by several of the companies that were involved in providing reinsurance to the RRGs. Reinsurance is where typically a larger insurance company insures a smaller insurance company for the risk taken on by the smaller insurance company in insuring policyholders. Our suit alleges General Reinsurance, a company controlled by Warren Buffet's Berkshire Hathaway conglomerate, was the main culprit in claiming to provide sound reinsurance to Reciprocal of America (ROA) and the RRGs, when in reality it wasn't doing so. This fact was hidden from policyholders and regulators for a number of years and ultimately caused the financial collapse of the RRGs, leaving thousands of doctors, hospitals, and lawyers without coverage. This further resulted in leaving thousands of clients and patients of those doctors, hospitals, and lawyers financially exposed in malpractice situations.

Two of the top executives at ROA were indicted by U.S. Attorney David McGuire in Richmond, Virginia, for fraud, conspiracy, and other claims. Eventually, Ken Patterson, President of ROA, and Carolyn Hudgins, Vice-President of ROA, pled guilty to the charges in the indictments brought by the U.S. Attorney. Recently, Mr. Patterson and Ms. Hudgins were sentenced by the federal court in Richmond, Virginia, with each getting a jail term of 12-1/2 years. They are to report to the authorities in October 2005.

As we continue to push the litigation against General Reinsurance and the other defendants, we expect there will be other indictments handed down against other ROA and possibly General Reinsurance executives involved in the scheme to defraud the RRGs and the policyholders who were insured. The further we get into this case, the worse it looks for the defendants.

MassMutual Fires Its CEO

The board of directors of the Massachusetts Mutual Life Insurance

Company located in Springfield, Massachusetts, in late June terminated Robert J. O'Connell's employment as the company's chairman, president, and chief executive officer, effective immediately. On June 2, 2005, the company gave O'Connell notice of its intent to terminate his employment. This notice was required under the terms of his employment agreement. The reasons for the firing are more interesting. In taking this action, the board announced that it unanimously determined that O'Connell had engaged in "a systematic and pervasive pattern of willful abuse of authority, violations of the company's code of conduct, and other acts of willful gross misconduct." Among the specific reasons the board cited for its action:

- O'Connell engaged in willful malfeasance with respect to company procedures related to his supplemental compensation account, directly resulting in over a $30 million improper obligation to him and a comparable recorded expense to the company;
- O'Connell caused the company to sell him a condominium at the company's Marco Island, Florida development, an asset of the company, without the knowledge or approval of the board, for an amount substantially below the market price at which the company expected to sell the unit;
- O'Connell interfered with the investigation and reprimand of two of his family members concerning the improper disclosure of confidential information of OppenheimerFunds, a MassMutual subsidiary;
- O'Connell took or diverted company non-financial assets for his personal ends, including use of company aircraft for the personal use of his family and friends;
- O'Connell caused payment of unwarranted and excessive separation payments to be made to company personnel in connection with personally motivated and retaliatory terminations of employment;
- O'Connell engaged in abusive and improper management of the company, including retaliatory behavior against employees who tried to act in the company's best interests; and
- O'Connell inhibited or prevented communication between company officers and employees and members of the board, and attempted to restrict the board's ability to obtain information from company officers and employees.

O'Connell has denied any wrongdoing. In fact, a lawyer for O'Connell told the *Associated Press* that two reports that were released after the company investigated his client "clear him of wrongdoing." It will be most interesting to see how all of this comes out and also what other revelations may come forth.

Florida Jury Awards $22 Million For Fraud

A Florida jury awarded a $22 million verdict after finding a fraudulent scheme of intentional misrepresentation and the illegal hiding of key financial information in connection with the October 2000 purchase of HIP of Florida, now Vista Health Plans of Florida. The jury also decided that the plaintiff did not have to repay a $16 million note to the defendant, resulting in an effective verdict of $38 million. The jury also found against the defendants on several other theories: negligent misrepresentation, breach of contract, unjust enrichment, and breach of good faith and fair dealing. At press time, the jury was considering punitive damages. The jury's decision also has important implications for the public. HIP of Florida almost collapsed after the 2000 closing of the sale when the hidden costs started coming to light, according to trial testimony. It would have been a catastrophe for over 200,000 HMO members but for the fact that Dr. Steven Scott, CEO for the plaintiff company, stepped up and poured in tens of millions of unexpected dollars to rescue it. The verdict is considered a victory for the company's healthcare providers and members.

The verdict was against HIP of New York, which is one of the largest HMOs in that state. In October 2000, Scott's company purchased HIP of Florida, now VISTA Health Plans of Florida, for $40 million. The purchase was approved by the Florida Department of Insurance. HMOs have a duty to carefully protect their members in America. Had the true financial condition of the HIP of Florida—the fifth largest HMO in Florida with 220,000 members—been known, that could have caused a major disruption of healthcare service throughout the state.

$9.9 Million Bad Faith Judgment Against Farmers Insurance Exchange

A Los Angeles jury has awarded $9.9 million to two policyholders of Farmers Insurance Exchange who were forced to borrow money to settle a lawsuit that should have been covered by the insurance company. Two individuals, who live in a Los Angeles condominium, were sued in Los Angeles Superior Court by an 86-year-old neighbor who was injured after being hit by their garage door. The neighbor claimed the door was unsafe. In the lawsuit, Farmers defended the homeowners association, which was also named as a defendant. But the insurer, a subsidiary of Farmers Group Inc., did not defend the two individuals who belonged to the association and claimed that they were also covered by the policy individually. These two defendants borrowed money from friends and used their credit cards to settle with the neighbor just before trial. The two individuals then sued Farmers in March of 2004 for breach of contract. The jury award includes $51,900 in contract damages, $1.5 million in emotional distress, and $8.3 million in punitive damages.

Source: *Los Angeles Business Journal*

XII. PREDATORY LENDING

Military Personnel Warned On Payday Loans

The Defense Department has launched an effort to warn service members about the dangers of payday loans, citing new reports that suggest these lenders are targeting them. John Molino, deputy undersecretary of defense for military community and family policy, said the Department would begin teaching service members how payday loans can lead to an endless cycle of debt. A study released recently by two professors at the University of Florida and California State University found "irrefutable geographic evidence demonstrating payday lenders are actively and aggressively targeting U.S. military personnel." In 12 of 19 states surveyed, the study found the single greatest concentration of payday loan stores in a county with a military base. Those states are Arizona, California, Colorado, Delaware, Florida, Kentucky, North Carolina, South Carolina, South Dakota, Texas, Virginia and Washington. Christopher Peterson, a law professor at the University of Florida and co-author of the study, stated: "Military folks tend to be young, they often come from financially vulnerable backgrounds and tend to have less education. All of these are reasons the military make particularly enticing targets for this type of loan."

Growth in the payday loan sector has exploded since the early 1990s, from about 300 stores in 1992 to more than 20,000 today, according to industry estimates. Consumer groups have correctly criticized payday lenders for preying on poor and minority communities. Loan stores often encourage customers to "roll over" debts after the two-week loan period is up, which only compounds the fees. While it is difficult to know exactly how many service members get payday loans, Defense Department surveys indicate the number is between 9% and 12%. Congress' investigative arm, the Government Accountability Office, concluded in a report that the Defense Department was not using the tools it has in place to curb the effects of predatory lending practices.

The GAO report said some junior enlisted members were not receiving the financial management training required by service regulations, despite warnings from top defense officials that debt problems can affect performance and unit readiness. Military personnel are often reluctant to get debt management counseling because service members with severe financial problems risk losing security clearances, incurring penalties or facing discharge. Some states have limited interest charges or restricted how often customers can get the loans. In Congress, Representative Sam Graves (R-MO), has introduced legislation to cap payday loans at 36% interest for military personnel and their spouses.

K. B. Home Settles Federal Claims Over Lending Practices

K. B. Home, one of the nation's largest home builders, has agreed to pay over $3 million to settle federal claims that its mortgage unit engaged in improper lending practices. The U.S. Department of Housing and Urban Development (HUD) had charged that K. B. Home Mortgage Company, a unit of K. B. Home, made it possible for ineligible borrowers to get mortgages guaranteed by the Federal Housing Administration (FHA). HUD further alleged that K. B. Home Mortgage approved homes based on overstated or incorrect income, failed to include all of the borrower's debts, and failed to properly verify sources of funds. For those unfamiliar, the FHA is an agency within HUD that is responsible for making mortgages more affordable for first-time and lower-income homebuyers.

HUD began reviewing K. B. Home Mortgage in mid-2004 after it became apparent that FHA-backed mortgages issued by K. B. Home had higher-than-average default rates in the western region. Federal Housing Commissioner Bryant Montgomery was quoted as noting that the settlement "sends a strong message that FHA will not tolerate violations of its requirements, especially when they can cause homeowners to default on their mortgages." Interestingly, K. B. Home has announced that it will sell most of its mortgage unit assets to Countrywide Financial Corp. Many public homebuilders have financial service units, which offer mortgages, homeowner's insurance, and other services. Those who track this market say these units have typically been a big part of homebuilders' overall business.

Source: *Wall Street Journal*

XIII. PREMISES LIABILITY UPDATE

A Report On Residential Fires

Two new federal government reports show that 2,500 children and 2,300 seniors were injured or killed in residential fires in the United States in 2002. The reports, issued by the United States Fire Administration (USFA), a division of the Federal Emergency Management Agency (FEMA), examine the causes and characteristics of residential fires involving children and older adult casualties. According to the reports, an estimated 2,500 children age 14 or younger were injured or killed in residential fires. Of these fire casualties, almost half were under the age of five and 70% were under the age of 10. An estimated 2,300 adults age 65 or older were injured or killed in residential fires. Over 80% of older adult fire casualties were between the ages of 65 and 84.

The two reports, Residential Fires and Child Casualties and Residential Fires and Older Adult Casualties, were developed by the National Fire Data Center, which is part of USFA. The reports explore factors that influence residential fires resulting in deaths or injuries of younger and older adult populations, and are based on 2002 data from the National Fire Incident Reporting System (NFIRS), the National Center for Health Statistics (NCHS), and U.S. Census Bureau data. The USFA has developed fire safety campaigns specifically targeted at these high risk populations. I hope through these campaigns, parents and caregivers will have access to important information that will help to reduce the risk of fire death and injury. Clearly, a good percentage of residential fires are preventable. The public should take all of the precautions recommended by USFA.

Source: *The Insurance Journal*

$65 Million Awarded In Shelter Death

A Florida state court jury has awarded $65.1 million to the father of a 12-year old boy who was electrocuted at a bus stop shelter. The jury found that the wrongful conduct of the shelter owner in hiring unlicensed electricians caused the boy's death. The jury found that Eller Media Co., an outdoor advertising company, was negligent in the construction, installation, and maintenance of the shelter, resulting in the boy's death. The boy's father was awarded $4.1 million in compensatory damages and $61 million in punitive damages. Interestingly, most Miami-Dade shelters are now solar-powered. A key factor leading to the jury verdict was that a number of "unlicensed electricians" testified about their work on the shelters. Eller Media Co. is a subsidiary of Clear Channel Communications, Inc.

Unlicensed electricians installed an incorrect transformer, failed to install a fuse that would prevent a short circuit, and cut grounding rods meant to divert electricity deep underground. A transformer used for the shelter was not designed for the waterproof housing on the shelter. Legs were used to keep it from touching the bottom of the box, but the transformer was actually leaning against the back of the metallic housing. The insulation wore down after rubbing against the housing, sending 480 volts of power through the bus shelter. The youngster was electrocuted as he ran by on the stormy night when the death occurred. The defendant said lightning killed the boy after striking a nearby light post and then hitting him. Lawyers for the defendant claim that science showed the bus shelter did not cause the death of the boy. It was significant that state and county code compliance officials stated that individuals and businesses on occasion hire unlicensed electricians and contractors in order to cut costs. Those who hire unlicensed electricians or contractors run a big risk. They won't find out that a hazardous condition exists many times until it's too late. The risk of causing the death of innocent persons by electrocution is much too great for any contractor to run.

More On Amusement Park Rides

Disney World has been in the news lately and some of the news hasn't been good. There have been a number of deaths involving some of the so-called thrill rides at Disney World. One of the thrill rides was closed because a 16-year-old British girl almost died of cardiac arrest after riding it. Disney invited an official from the Florida Bureau of Fair Rides and Exhibitions to monitor an inspection of the "Twilight Zone Tower of Terror," which the park doesn't typically do. As we have previously reported, Florida's major theme parks are not directly regulated by the state. Instead, they have their own inspectors. The British girl suffered cardiac arrest minutes after exiting the attraction, which depicts a haunted elevator ride that plunges more than 100 feet.

A month earlier a 4-year-old Pennsylvania boy died after riding Epcot's "Mission: Space," which is another Disney World attraction. That ride is so intense that it has motion sickness bags available. Several riders have been treated for chest pain. An elderly, diabetic woman also died in February after riding the Magic Kingdom's "Pirates of the Caribbean," but the medical examiner said her death "was not unexpected." There have been reports of other problems, not only at Disney World but at other amusement parks as well. On the Tower of Terror, decorated as a haunted hotel, riders are placed in an elevator that shoots up 13 stories and then plummets back twice. Disney warns riders that they should be "in good health and free from high blood pressure, heart, back or neck problems, motion sickness, or other conditions that could be aggravated by this adventure." Pregnant women are advised not to ride.

It is quite clear that we need government regulation over the amusement parks—including the larger facilities such as Disneyland and Disney World—in order to assure safe rides for the public. Many of the newer rides push the envelope and are much too dangerous for small children and for many adults. Attempts to regulate this industry in most states, including Alabama, have failed. I believe prompt action is required, and while I personally favor state control, that is probably wishful thinking.

A Jury Verdict In An Alcohol-Related Motor Vehicle Accident

Alabama has a law called the Dram Shop Act that makes it a civil wrong for a bar to sell liquor to a person who is visibly intoxicated. While a good number of other states have similar statutes, some don't. Mississippi happens to fall in the latter category. But, a Jones County circuit court jury has ordered Applebee's, a restaurant that served alcohol to a man who ran over two people, to pay the majority of a $3.5 million judgment jury verdict. Even in the absence of a specific statute, Mississippi has allowed such actions based on established case law.

Separate lawsuits were filed by two individuals naming the drunk driver and Quality Restaurant Concepts, the operator of Applebee's Neighborhood Grill & Bar in Laurel, Mississippi, as defendants. A motorcycle ridden by the plaintiffs stalled about a half mile from the restaurant. As the couple got off the bike, a car driven by the drunk driver slammed into them, crushing their legs and causing other injuries. The two plaintiffs claimed that Applebee's served the man liquor even though he appeared to be intoxicated. After a four-day trial, the jury awarded a total of $3.5 million to the plaintiffs. The jury decided that Applebee's is responsible for 90% of the damages and the drunk driver 10%. The drunk driver, who was never charged criminally in the accident, did not answer the civil court complaint filed against him and did not appear at the trial.

There haven't been many cases of this sort in Mississippi. In this regard, the Mississippi chapter of Mothers Against Drunk Driving says that these two lawsuits are among the few successful civil cases within the last decade in Mississippi against a bar for serving alcohol to a customer. Under Mississippi case law, the person served has to be visibly intoxicated before the law comes into play. Jurors sent a message in these two cases, which were combined for trial, that businesses serving alcohol must follow the law. Interestingly, it came out at the trial of this case that the business had the number of a taxi service taped to the telephone at the bar and an internal policy that spelled out who not to serve. Unfortunately, the management failed to follow this policy.

For those of you who may not be familiar with the Dram Shop Laws, the "dram shop" name comes from 18th century England when thousands of so-called "gin shops" sold homemade gin by the dram (about a spoonful). When the king of England decided to tax the sale of gin, these dram shops quickly went underground in an effort to avoid paying taxes. Today's legal system considers any establishment selling liquor illegally as a modern day equivalent of the dram shops of the 1700s. Besides bars and liquor stores, the dram shop laws also can apply in some states to restaurants, social clubs, and even private events where liquor is sold. You should look to the law in your state to see exactly what responsibilities are set out for serving alcohol to persons who have been drinking. For example, in many states there is very limited liability where the alcohol is served in a social setting such as the home.

Retailer Settles Suit For Better Wheelchair Access

Electronics retailer RadioShack Corp. will now make sure that more than 5,000 of its stores will make it easier for wheelchair users to access its interactive electronic displays. A settlement was reached a few weeks ago in a pending lawsuit. Wheelchair users alleged that RadioShack stores in the Washington area had barriers that denied them access to entrances, aisles, and sales counters. Although the lawsuit, filed in District of Columbia federal court under the Americans With Disabilities Act, involved 49 stores in the Washington area, all 5,000 company-owned RadioShacks nationwide are subject to the changes. This is a good result in my opinion and will help make wheelchair access a reality in the RadioShack stores. That is good news!

XVI. WORKPLACE HAZARDS

BP Will Settle Texas Blast Claims

BP has worked very hard to quickly settle as many of the cases arising out of the deadly Texas City refinery explosion as possible. Most of the families are accepting the company's offers to settle their wrongful death and personal injury claims. Confidentiality agreements with BP prohibit discussing the amounts of the settlements. Thus far, a good number of claims have been settled with BP. As reported, fifteen people were killed in the March 23rd blast and more than 170 injured, dozens of them seriously. This was the worst United States refinery accident in recent memory. The settlements come as the London-based company continues to deal with mounting allegations that managers at the Texas City refinery for years ignored the safety concerns of union workers and others. Interestingly, the company first tried to place the blame for the blast on low- and mid-level operators and supervisors. This simply won't fly. In any event, BP should be commended for moving quickly to settle the claims.

The explosion occurred as workers were attempting to start up a section of the refinery's isomerization unit after a maintenance turnaround. Too much hydrocarbon was fed into the unit's raffinate splitter—which makes chemicals used to boost the octane of gasoline—and then heated too fast. That caused an overpressurization, triggering the materials to flow into a tank called a blow-down drum. These materials then spewed out the top of the drum's 113-foot vent stack and were ignited on the ground, causing at least five explosions heard and felt up to five miles away. Workers, who had no prior warming, scrambled for their lives. Many of them were injured by the fireball or pressure wave that resulted. Most of the workers killed were in the construction trailer, which union officials and others have said should not have been parked so close to an operating unit.

Federal investigators with the U.S. Chemical Safety and Hazard Investigation Board have said that had BP equipped the blowdown system with a flare, as is standard in the industry, the hydrocarbons might have been burned safely away and the accident might have been prevented. The Occupational Safety and Health Administration had warned BP 13 years ago that the lack of flares on a vent stack at the refinery was hazardous to the environment and to workers. BP admits that its own internal investigation of the March 23rd incident found that workers erred by not following proper startup procedures. Hopefully, the settlement will help the families who lost loved ones to get on with their lives. The injured workers will also receive badly needed compensation. It is rather refreshing to see a company—and its insurance carriers—take a responsible position when faced with claims. Here, the liability was clear and aggravated. Some companies would string out the process, hoping some of the claimants would become weary and surrender at some point along the way.

OSHA Cites Contractor In Crane Collapse

Our firm has handled a number of accidents that involved cranes on work sites. These cranes are very widespread. The Occupational Safety and Health Administration (OSHA), the federal agency that oversees workplace safety, has now determined that a contractor is at fault for a shipyard crane accident that killed two workers in January. OSHA cited Testa Corp. for 15 alleged violations of safety and health standards at the former Fore River Shipyard in Braintree, Massachusetts, where two workers died when a crane collapsed January 26th. Brenda Gordon, OSHA's area director for Boston and southeastern Massachusetts, said: "Had proper procedures been followed and required safeguards adhered to, this fatal accident could have been avoided." The workers were removing asbestos inside a building at the shipyard when a piece of the giant metal frame that once held up to 22 shipbuilding cranes collapsed onto the structure. They were killed and several other workers were injured.

OSHA said it found that Testa, which was the general contractor for demolition of the 190-foot craneway, did not perform an engineering survey to determine whether the craneway was stable before allowing workers inside the adjacent building. The federal agency said in its report that "several of the steel craneway's members had been cut through by torches and cross-bracing supports had been removed, leaving the structure overstressed." OSHA proposed penalties totaling $60,400. The workers in the building at the time of the collapse were from A-Best Abatement Inc., a Salem, New Hampshire, asbestos removal company. The Fore River Shipyard built Navy ships before it closed in 1987.

Texas Supreme Court Rules That A Refinery Was Not At Fault In Death Case

The Texas Supreme Court has denied a motion for rehearing in a lawsuit brought by the widow of a man who died after a 1996 explosion at a refinery owned by a San Antonio company. The appellate court had in January overturned a jury's finding that Diamond Shamrock—now part of Valero Energy Corp.—was negligent in the accident. A lower court had ruled against Diamond Shamrock in the death of the worker, who died of the burns he suffered in an explosion at the Texas refinery. A jury had awarded his widow $42.5 million. In the January opinion, the Supreme Court found that there was no evidence the company was "consciously indifferent" to the risk of explosion and that the worker wasn't entitled to recover. This latest ruling confirms the earlier decision. This winds up the case since the widow has no further recourse in the courts.

Jury Awards Injured Worker $5.4 Million

A Louisiana jury has awarded $5.4 million to a brain-damaged man for injuries he suffered while on the job. The 52-year old man was working at the Air Liquide Process and Construction Inc. plant on September 22, 1999. A test by ITEQ Tank Services on a 3-inch PVC pipe caused an explosion. When the pipe and a metal spigot exploded, pieces of debris were sent flying. Some of the flying debris hit the worker in the left forehead, fracturing some bones in his face and causing his brain to bleed. Brain cells in the area of the injury also died, leaving behind a hole in the man's brain. During trial, doctors who had evaluated the worker testified that he is severely injured and the injuries are permanent. The doctors testified that the worker will never work again and will need someone to care for him for the rest of his life. Because of his injury, he will have the mental and emotional capacity of a 10-year-old boy.

Before the trial began, ITEQ admitted it was negligent in the way it tested the pipe and because it did not clear away all people while the tests were being performed. The only thing for the jury to determine was the extent of injuries and then to award damages. ITEQ was covered by a liability insurance policy issued by National Union Fire Insurance Co. of Pittsburgh. The jury's award was allocated as follows:

- $3 million to cover future medical and personal care expenses;
- $325,000 for physical pain and suffering;
- $325,000 for mental pain and anguish;
- $71,000 for past medical expenses;
- $325,000 for disability and impairment;
- $685,390 for lost earnings; and
- $325,000 for loss of enjoyment of life.

In addition to the award to the worker, the jury also awarded $300,000 to his wife for loss of consortium. While this award to the widow may seem high for a claim of this sort, it really isn't. The wife will suffer a tremendous loss in a case like this. Of course, that claim is independent of the husband's personal claim.

PANEL AFFIRMS RADIATION LINK TO CANCER

A National Academy of Sciences panel has concluded that even very low doses of radiation pose a risk of cancer over a person's lifetime. The study shows that even low doses of ionizing radiation—such as gamma rays and x-rays—are likely to pose some risk of adverse health effects. The panel rejected some scientists' arguments that small doses are harmless or may in fact be beneficial. The findings, disclosed in a recently released 710-page report, could influence the maximum radiation levels that are allowed at abandoned reactors and other nuclear sites, and raises warnings about excessive exposure to radiation for medical purposes such as repeated whole-body CT scans. The report concluded that it is unlikely there is a threshold of radiation exposure below which cancers are not induced. While at low doses "the number of radiation-induced cancers will be small ... as the overall lifetime exposure increases, so does the risk," the scientists said. The academy is a private organization chartered by Congress to advise the government on scientific matters.

This development is being hailed as a victory for the group of independent scientists and public health officials who for years have warned of the dangers of low-level radiation. But, it's too early to see exactly what effect their findings will have. The panel did say there was not enough information available to accurately estimate the cancer risk from X-rays. Nevertheless, the report said, there is evidence that per unit of absorbed radiation, X-rays may be more dangerous than other radiation. The panel also said that approximately one person out of 1,000 would develop cancer from exposure to the amount of radiation from a single, average whole body CT-scan.

Source: *Associated Press*

WAL-MART EMPLOYEES IN OKLAHOMA FILE LAWSUIT

Two employees of Wal-Mart Stores Inc. and a former worker have filed a lawsuit alleging the retailer retaliated against workers who file workers' compensation claims. In their lawsuit filed in state court, the Wal-Mart employees allege that after filing claims for on-the-job injuries, the company either reduced their hours, cut their pay, or demoted them. A former employee claims she was forced to resign as a condition of her settlement of a workers' compensation claim. The women are seeking class action status for their suit. They claim many Wal-Mart employees are afraid to file workers' compensation claims for fear of retaliation. They also allege in the suit that understaffing at the stores creates an environment "where workplace injuries are inevitable." It is believed that this is a companywide policy that potentially affects thousands of people. There are over 30,000 people employed by Wal-Mart in Oklahoma and 1.6 million nationwide.

POPCORN PLANT WORKER AWARDED $3 MILLION IN HEALTH SUIT

A former popcorn plant worker in Missouri has been awarded nearly $3 million as a result of lung damage allegedly caused from a harmful chemical used to make butter flavoring. The worker is one of 30 current and former workers at the Jasper Popcorn Co. who have sued the owners. They contend the manufacturers should have known a chemical used to make the popcorn's butter flavoring causes lung damage. This employee worked in the flavoring room at the Jasper plant from 1993 through 1995. Doctors testified he has a rare, progressive lung disease that eventually could require him to get a lung transplant.

Source: *Associated Press*

XV. TRANSPORTATION

AIR CONTROLLERS COVER UP ERRORS

Since September 11, 2001, persons flying commercially have been more aware of the need for safe air travel. *The New York Times* had a most interesting article recently that deals with air travel and safety. It deals specifically with controller errors dealing with flying airplanes. It appears that for seven years, air traffic controllers and their managers in Dallas routinely covered up their errors. According to a federal report, as reported by the *Times*, planes in the Dallas area came too close together on numerous occasions. Although such instances are supposed to be reported and investigated, federal investigators found that Federal Aviation Administration (FAA) managers in Dallas had a policy of relying on the word of controllers instead of playing back radar tapes, which document airplanes' positions. Proper separation between planes is critical and that's pretty basic. Controllers who err on aircraft separation are sent for retraining. When the errors get too numerous, the controllers can be fired. The FAA, which operates and regulates the air traffic system, considers error reports a critical index of safety and tracks them year by year, office by office. The problems at the Dallas/Fort Worth Terminal Radar Approach Control, known as a tracon, were disclosed last year by a 21-year veteran employee. It appears from the *Times* article that the government has not treated the employee very well since that time.

According to the *Times*, related problems at the New York tracon were also discovered. It was reported that controllers, who were in a dispute over staffing levels, started sending faxes to an anonymous safety hot line, disclosing violations. The FAA was surprised to discover that the violations had gone on for years. After an investigation, the aviation agency acknowledged that it had a poor understanding of how often controllers violated the rules on how far apart aircraft can fly as they slow for landing. Since then, the FAA has said it will consider rewriting its rules to fit its actual practice on separation. The agency says the problem was largely confined to the tracons, which handle mostly low-altitude traffic. It also says the towers had computers that automatically sensed violations. The FAA does acknowledge, however, that the underreporting appears to be a problem.

Interestingly, the FAA has started using a new system to track planes flying over water, beyond the reach of radar. The system lets the planes report their position every few minutes by satellite link, with an onboard computer talking to an FAA computer. In the current system, pilots read latitude and longitude into a high-frequency radio. A private company on shore relays the information to the FAA as a text message, raising the chance for error. Currently, many planes are kept 100 miles apart because of uncertainty about their precise positions. Planes using the new system could fly within 30 miles of one another, allowing more planes into the regions with the most favorable winds, thereby cutting time and fuel expense. Obviously, safety must be the top priority for the FAA and the industry. Any existing problems must be promptly corrected.

Source: *New York Times*

Jury Finds For Teenager Hit By Train

A Colorado jury has ordered Union Pacific Railroad to pay a teenager more than $11 million for injuries she received in a 2002 train collision. The 19-year-old was left with irreversible brain damage when a Union Pacific train slammed into her car after the car had stalled at a rail crossing. The jury awarded the youngster and her family $6 million for future medical expenses, $350,000 for permanent impairment, $150,000 for pain and suffering, and $600,000 for past medical expenses. In addition, the railroad company must pay $4 million in punitive damages. Jurors found that Union Pacific knew the rail crossing was dangerous and that the train's crew should have stopped long before it reached the intersection. The train engineer testified that the car appeared to be just off the tracks. Since the accident, the teenager has had to go through extensive therapy and rehabilitation. The former high school cheerleader now walks with a cane, and her speech is slurred.

Source: *Denver Post*

Settlement Reached In Causeway Collapse

The families of eight people who were killed when a tow boat caused a portion of the causeway to South Padre Island in Texas to collapse, have settled their claims. The plaintiffs will receive about $9 million from Brown Water Towing Company in a settlement tentatively approved by the judge hearing the case. The bridge collapsed on September 15, 2001, after a tow-boat captain lost control of a string of barges, and currents drove them into a bridge support. The impact caused two 80-foot sections of bridge roadway to fall into the bay. Motorists crossing the bridge in the early morning hours fell into the chasm. A third 80-foot section fell later that morning. Three people whose cars fell off the bridge survived.

This settlement was with Brown Water Towing. It came after a U.S. district judge dismissed American Commercial Barge Lines from the lawsuit. The barge line hired a tow company that it knew had a history of prior problems. The victims claimed that a cause of the accident was inadequate horsepower to control the tow boat in high current. The victims proved that overstating horsepower is a problem for the towing industry. Interestingly, there is only approximately $9 million left in the company's insurance fund to pay the claims. At one time there was a total of $17 million available from the policies. It appears that about $8 million was spent in defense costs. Had the cases settled earlier, there would have been more money available to go to the families of victims who were killed and to those victims who survived the incident. Sometimes insurance companies prefer to pay out money for defense costs—rather than pay the money to victims and victim's families in the case of deaths—and that just doesn't seem right.

Originally, there were 17 plaintiffs in the case. They included the families of the eight who died, three survivors, four fishermen who helped in the rescue, and two children who lost their parents. At one point there were about a dozen lawsuits arising from the collapse.

Alcohol Played A Major Role In Holiday Traffic Deaths

Common sense tells us that drinking and driving doesn't pay. The recent 78-hour July 4th holiday weekend in Alabama resulted in a rash of motor vehicle accidents. It was a very busy weekend for Alabama state troopers patrolling state roads. The Department of Public Safety says that alcohol played a role in at least six of the state's ten traffic deaths. Out of a 360 total accidents on Alabama state roads, at least 34 involved alcohol. According to a department spokeswoman, only one of the motorists killed was wearing a seat belt. Troopers statewide issued more than 2,300 speeding tickets, an average of about 30 speeding tickets per hour. Ninety-six motorists were arrested for driving under the influence. In the area of seat belt enforcement, troopers wrote more than 700 tickets and another 33 drivers were handed tickets for not using child restraints.

Source: *Associated Press*

Widow Of Man Killed In Truck Accident Settles Case

A settlement has been reached by the widow of a man killed in a fiery tractor-trailer crash that occurred in 2003. The suit was filed against the driver and Pacer Cartage, the owner of the tractor and trailer involved. The 34-year old victim died on impact when the tractor and trailer jumped the median and crushed his car on an interstate highway. The trucking company agreed to pay the victim's family more than $9.6 million. This was a case where the driver of the truck should never have been on the road. This truck driver, who had a history of crack cocaine use, fell asleep at the wheel of his tractor and trailer in downtown Jacksonville, Florida on a Sunday afternoon. Records obtained from the trucking company and the driver's previous employer show that the driver clearly had a drug problem. The company never did a background check on the driver, who had been fired from other companies for failing drug tests after accidents. Had a background check been done, this company would have found about his drug addiction and numerous drug problems and would have never hired this man. This is an example of where a driver—with known drug problems—should never have been behind the wheel of a big truck on a public highway. It is a situation where the trucking company simply didn't do some basic checking on this driver, and a death resulted.

Cell Phone Use Quadruples Car Crash Risk

Drivers distracted by cell phone conversations quadruple their risk of a serious accident, according to new research out of Australia. The University of Sydney study also found that hands-free mobile phones are no safer than handheld mobile phones while driving. Researchers analyzed data on 456 drivers who owned or used mobile phones and had been in a traffic crash resulting in injuries requiring hospitalization. As part of the study, they interviewed the drivers and used phone company records to assess their mobile phone use immediately before the crash and during trips occurring at roughly the same time of day 24 hours, three days, and seven days before the crash. This meant, in effect, that researchers could compare crash risks in the same driver at the same time of day, with the only difference being whether or not they were using their cell phone.

Reporting last month in the online edition of the *British Medical Journal*, the researchers found that cell phone use occurring in the 10 minutes prior to a crash was linked to a quadrupled risk of having an accident. They also found similar results for the interval of up to five minutes before a crash. This link between mobile phone use and increased crash risk held true irrespective of driver age, sex, or whether or not he or she was using a hands-free mobile phone, the researchers added in a prepared statement. My recommendation is to never use a cell phone while driving a motor vehicle. Calls that have to be made or taken require getting off the highway and stopping the vehicle in a safe place. Unfortunately, most folks probably won't do that. Employers should address this problem with their employees who are required to drive. The failure to do so will come back to haunt them in the event an employee is involved in a moving vehicle accident while using a cell phone.

Source: *HealthDay News*

Child Passenger Safety Program Needed

The National Automobile Dealers Association (NADA) has proclaimed the month of September as Child Passenger Safety Month. New car dealers across the country will host child safety seat inspections at their dealerships to help save lives. This comes from a program developed in partnership with the National Highway Traffic Safety Administration (NHTSA). The September initiative, called the "Boost for Safety" campaign, is planned to coincide with the back-to-school time frame, when many children will be on the roads each day.

More than 40,000 child passengers under age four are injured or killed in car crashes annually, according to NHTSA. The Aagency reports that more than 50,000 children between four and eight years old are injured or killed riding in cars annually. Approximately 40% of children under the age of 8 who die or suffer serious injuries in fatal car crashes are unrestrained. Parents must learn how to properly secure their children in the car. This program will help parents become educated on how to protect their children.

Source: *Insurance Journal*

XVI. NURSING HOME UPDATE

The NCCHR Needs Help

The National Citizen's Coalition for Nursing Home Reform has done a good job and has made a positive difference in the lives of many nursing home residents across the country. NCCHR has been hard at work—against tremendous odds—for 30 years. Our political leaders, with some exceptions, have pretty much ignored the plight of folks who have to be confined in nursing home facilities. I encourage all of our readers to learn more about NCCHR. Barbara Hengstebeck is President and Alice H. Hedt is serving as Executive Director of the organization. If you really care about the plight of many of our seniors, I believe you will want to help this group. Check them out and find out how you can help. Their website is: www.NCCNHR.org.

Amputee Wins $12 Million Lawsuit

A 62-year-old man who had his leg amputated as a result of an infected bedsore has been awarded more than $12 million in damages. A California jury awarded the resident the money after the jurors determined that Western Convalescent Hospital and its owner were liable for elder abuse, neglect, and fraud. The resident, a paraplegic who suffers from schizophrenia, had his leg amputated below the knee after he developed a bedsore on his right heel in November 2002. The bedsore later became infected, exposing bone. The jurors found the nursing home operator and its owner, Longwood Management Corp., primarily responsible for the resident's injuries. He was awarded about $747,000 in compensatory damages and $12 million in punitive damages.

Source: *Associated Press*

Suit Filed Over Sun-Exposure Death

The daughter of a woman who died last month after sunbathing outside in 90-plus-degree heat at Heartland of Waterville, a nursing home located in Toledo, Ohio, has filed a civil lawsuit against the nursing home and its parent company, HCR Manor Care. It is alleged that the nursing home was negligent in caring for the resident of the facility. The 49-year old, who had multiple sclerosis and could not move on her own, died in June after she had been lying outside for several hours on a concrete patio. The coroner's office said she died from hyperthermia, and her body temperature was recorded at 109 degrees.

The lawsuit, filed in a state court in Ohio, also named unspecified defendants who were employees at the nursing home and alleges they were responsible for the resident's care. The complaint seeks compensatory and punitive damages. The Ohio Department of Health cited Heartland of Waterville for failure to monitor the resident while she was lying in the heat, and failure to develop a plan of care for sunbathing. The report said the nursing staff exercised poor judgment and ignored facility policies by allowing the lady to sunbathe in the extreme heat and humidity. It said the temperature that day ranged from 93 degrees to 99 degrees, with a heat index temperature range from 99 to 100 degrees.

XVII. HEALTHCARE ISSUES

People Shouldn't Get Sick In A hospital

We wrote last month on the very serious infection problems in U.S. hospitals. I found that many of our readers were shocked to learn of how serious this problem is. Pennsylvania has become the first state to publicly report the toll hospital infections take. More than 11,600 patients developed infections while in hospitals in that state last year. Those led to an additional 1,500 deaths and $2 billion in hospital charges. The Pennsylvania Health Care Cost Containment Council, an independent state agency, published the data. Advocates of public reporting of hospital infection rates, such as Consumers Union, say such efforts will spur hospitals to improve efforts to prevent infections, just as reporting of coronary bypass surgery outcomes in New York led to a reduction in the death rate. Infections acquired by patients in hospitals—which can be caused by a number of things, including staff failing to wash their hands—are estimated to affect 2 million patients annually, resulting in 90,000 deaths, according to a review published in the *New England Journal of Medicine*. "Our goal is to get the data out in the public realm as a means of self-improvement in the industry," says Betsy Imholz of Consumers Union.

Four other states—Missouri, Florida, Illinois and Virginia—currently have laws requiring hospitals to publicly disclose infection rates. In July, New York passed a similar bill. Medicare plans to include information about surgical infections on its Hospital Compare website later this year. Initiatives to reduce hospital infections must be put in place. The first step is simply employees washing their hands.

The Pennsylvania report shows infections struck 7.5 patients per 1,000, and likely underestimates the true number because not all of the state's 173 hospitals reported data. Sixteen, including several large hospitals, reported having no infections last year. Hospital-acquired infections can't be tolerated and can be reduced drastically. The public should demand that hospitals "clean up their act!"

Source: *USA Today*

FluMist Ad Draws FDA Scrutiny

On July 21st, the Food and Drug Administration (FDA) warned MedImmune Inc. about promotional fliers involving its FluMist vaccine. In a warning letter, which was posted to the FDA website in late June, the agency said the consumer-directed flier was "misleading because it fails to reveal material facts regarding the risks associated with the use of FluMist." Reportedly, the company is working with the FDA to address the agency's concerns. It should be noted, however, that the flier in question is no longer being used. The FDA said the flier promotes the indication for FluMist "for active immunization for the prevention of disease caused by influenza A and B viruses in healthy children and adolescents, 5 to 17 years of age, and healthy adults, 19 to 49 years of age." The flier also states that there are "risks associated with all vaccines including FluMist. Like any vaccine, FluMist does not protect 100% of individuals vaccinated."

The FDA letter stated that "By failing to include sufficient information on risks and adequate directions for use, you (the company) have encouraged the potentially unsafe use of FluMist." The FDA said that more specific information about the potential risks of the vaccine needed to be stated in the flier, including that it shouldn't be used by pregnant women, patients with chronic underlying medical conditions like asthma, people with egg allergies, and people on aspirin therapy.

FDA Was Told Of Viagra-Blindness Link Months Ago

More than 13 months before a scientific journal reported that Viagra had been linked to a rare form of blindness in some men, a Food and Drug Administration (FDA) safety officer made the same observation from monitoring adverse event reports. The officer told her supervisors that doctors and patients should be warned of the findings. For some reason, nothing was done. The FDA issued no public notice or proposed changes to the Viagra label. Finally, following widespread publicity in June about the journal article and public concerns about the possible blindness-Viagra link, the FDA took some action. The safety officer's experience was outlined in a letter in late June to FDA Acting Commissioner Lester M. Crawford from Senator Charles E. Grassley (R-IA), who said the agency had moved far too slowly on an emerging safety concern.

There has been a great deal of criticism of the FDA's response to potentially harmful drug side effects since Merck & Co. took Vioxx off the market last fall. Since that time, the FDA has sought to tighten its drug safety oversight. But, some critics say the agency is doing too little and still puts more emphasis on reviewing and approving new drugs than on safety concerns. Senator Grassley wrote: "I am troubled by the FDA's action, or lack thereof, relating to the updating of Viagra's product label." The Senator said the agency's Office of New Drugs (OND) had done nothing "despite OND's knowledge of the blindness risks since January 2004 and general agreement among FDA staff last spring that the label should be updated." Senator Grassley also wrote that the safety officer, whose name was not disclosed, explained the agency's inaction by saying the Office of New Drugs "is under such time pressure to approve new drugs, often safety concerns needed to be 'fitted in' where they could."

Researchers remain uncertain whether Viagra and other impotence drugs pose a significant risk of blindness. Pfizer Inc., which makes the drug, says the side effect has not appeared in any of its 103 clinical trials of Viagra—involving 13,000 patients—and that the 23 million users have not reported an increased risk of blindness. In late June, after the possible link was reported in the *Journal of Neuro-Ophthalmology*, an FDA spokeswoman said, "We take this seriously, and the FDA is working with the sponsors to make sure the public is aware of this so they can take it into consideration." The journal study examined seven cases where men suffered an unusual form of sudden blindness within 36 hours of taking Viagra.

Even though Pfizer says that it doesn't believe there is a causal relationship between Viagra and blindness, the company is adding information about the possibility to its label. The FDA has asked the makers of all impotence drugs to do the same. It was reported by CBS News that more than 800 patients and doctors have reported eye problems to the FDA after using Viagra over the past four years, with more than 140 cases of partial or total blindness. While these "adverse event" reports don't prove a causal link between the drugs and sudden blindness, drug safety experts look to them for trends and patterns. This form of sudden blindness, non-arteritic anterior ischemic optic neuropathy, or NAION, is caused by the blockage of blood flow to the optic nerve and is most common in older people, who disproportionately use Viagra. It is estimated that 1,000 to 6,000 Americans suffer an optic blockage each year.

Senator Grassley also questions whether the FDA's adverse event reporting system would be capable of detecting NAION cases that might be associated with Viagra. Until now few doctors who prescribe Viagra would have any reason to ask patients about vision problems. To take it a step further, few ophthalmologists who treat sudden blindness would have known to ask their patients about Viagra use. All three impotence drugs on the market, Viagra, Cialis and Levitra, already warn users that the drug can cause minor vision changes that include blurring, sensitivity to light, and the presence of a bluish hue. The makers of Cialis, Eli Lilly & Co. and Icos Corp., have voluntarily added a notice about the risk of sudden blindness to their label.

Source: *Washington Post*

XVIII. ENVIRONMENTAL CONCERNS

SWEDEN SEEKS GLOBAL C8 BAN

Perfluorooctane sulfonate, a component in the process for manufacturing products like Dupont's Teflon coating, should be banned, according to Sweden's Environment Ministry. The chemical is known by several names including PFOS, C8, and FC-95, and does not biodegrade in the environment. Instead, it accumulates in animals and perhaps in humans. C8 has been linked to birth defects and liver damage. Swedish officials said they would propose an international moratorium on the chemical through the United Nations, citing the Stockholm Convention to Eliminate Persistent Organic Pollutants. Sweden also filed for a national ban on C8 with the European Commission, which is reviewing the matter. The Commission is also reviewing a similar ban by Great Britain.

It has been widely reported that very high rates of PFOS have been found in polar bears, polar foxes, eagles and seals. In animal studies, low doses have shown effects on the liver and disturbed reproductive capabilities. 3M Company, the original manufacturer of PFOS, began studying the effects of the chemical in the mid-1970s and found that it caused cancer in rats. 3M phased out commercial production of PFOS in 2000.

ARE LAWS REALLY MAKING EPA'S JOB HARDER?

A recently released government report finds that the Environmental Protection Agency (EPA) is being hampered by laws that make it difficult and expensive for it to do its job of assessing the health risk of chemicals. The report, released by the General Accountability Office (GAO), raises some interesting questions. The report comes as new research increasingly shows that exposure to even tiny amounts of some widely used chemicals can be harmful to developing fetuses. As more advanced scientific information becomes available, countries are beginning the overhaul of their regulatory policies for toxins. This process is also taking place in this country. Senator Jim Jeffords (I-VT), a member of the Senate Environment & Public Works Committee, made this shocking observation: "The vast majority of chemicals used in consumer products today have never undergone any federal safety review."

In order to restrict or ban dangerous chemicals under the 1976 Toxic Substances Control Act, the EPA must demonstrate they pose unreasonable risks, a standard which is not well defined under the law. According to the report, a court ruling requiring the EPA to do cost-benefit balancing for every possible regulatory approach makes these findings almost impossible to make. It also makes it very difficult to ban chemicals, according to leading law professors and experts on environmental law.

The Director of EPA's Office of Pollution Prevention and Toxic says aspects of the Toxic Substances Control Act (TSCA) have proven challenging, but he believes the law does provide the EPA with adequate authority to protect human health and the environment from unreasonable risks. While I am not quite so confident about the EPA's ability to protect human health and the environment from unreasonable risk, I do believe the information from the recently released report is worthy of further study. The report suggests that Congress should:

- Give EPA explicit legal authority to force companies to test chemicals for toxicity.
- Authorize EPA to share information about potentially toxic chemicals with states and other countries, which is difficult now because more than 60% of the information submitted for new chemicals is declared confidential business information.

With science revealing more about what is in our bodies and the bodies of our children, we should do all we can to protect people from toxic substances. If the EPA has needs in order to do its job, I believe that Congress should meet those needs. In that regard, Senators Jeffords and Frank Lautenberg (D-NJ), have introduced legislation designed to overhaul the rules that govern the EPA. The chemical industry counters that current voluntary EPA-industry programs show that together they protect the public. I simply don't trust the industry to regulate itself, and its track record backs up my belief. Neither do I believe the EPA has all of the authority required to do its job of regulation.

Source: *USA Today*

XIX. TOBACCO LITIGATION UPDATE

HEALTH GROUPS NEED A SAY IN TOBACCO CASE

It was not surprising that public health groups have sought to intervene in the government's tobacco lawsuit. The groups said they lacked confidence in the government's handling of the case, and that's certainly understandable. The six groups contended that prosecutors were no longer representing their interests. The filing in the case before U.S. District Judge Gladys Kessler asked for the chance to weigh in "solely on the issue of the appropriate and necessary remedies." The organizations asking to intervene were the American Cancer Society, the American Heart Association, the American Lung Association, Americans for Nonsmokers' Rights, the National African American Tobacco Prevention Network, and the Tobacco-Free Kids Action Fund. Paul Billings, a vice-president at the American Lung Association, said: "We're no longer confident that the government is going to represent the best interests of the American people in the case." I hope the court will allow these groups to get in this lawsuit. If so, it will bring some life to the case.

Government Requests $14 Billion In Tobacco Case

The federal government has now filed its request for $14 billion from the tobacco companies in the racketeering case and a wide range of restrictions that are largely aimed at ending marketing efforts toward young smokers. The requests, filed in the federal trial court on June 27th, set out how the Justice Department believes the companies should be held financially accountable. But when the government lawyers, in closing arguments, said they would seek only $10 billion for a five-year program, it was obvious that the Justice Department had bowed to pressure from a White House uncomfortable with causing the tobacco industry major financial harm.

The latest monetary request includes the $10 billion, as well as $4 billion for a 10-year antismoking educational program. The Justice Department also seeks additional money for each smoker ages 12 to 20 beyond the annual goals the department set for reducing the overall number of young smokers. The tobacco company lawyers argued that the government's proposals were intended as punishment for past policies and therefore inconsistent with the appeals court ruling that said sanctions must be forward-looking as a way to discourage future misconduct. As a result, the companies will ask Judge Gladys Kessler, who presided over the trial, to rule the government's request inappropriate and end the case. The government also listed prohibitions that it said the court should impose against the companies. The restrictions include bans on words like "low tar" and "light" to suggest that one cigarette may be less harmful than another and requirements that every pack include an insert explaining the health consequences of smoking.

Health advocacy groups contend that the government had a strong case and should have asked for much more than it did. William V. Corr, executive director for the Campaign for Tobacco-Free Kids, an industry opponent, said the reduced request for the stop-smoking program "seriously undercuts" the government's proposal, calling it a capitulation to political pressure.

Government Now Asks For Past Tobacco Profits

In a rather interesting move, the Justice Department has asked the U.S. Supreme Court to allow it to seek $280 billion in past profits from tobacco companies. You will recall that an appeals court had barred the government from seeking that money. This request came at the deadline for the government to decide whether to appeal the ruling by the U.S. Court of Appeals for the District of Columbia Circuit. That court ruled that the government could not use a federal racketeering law to seek the RICO penalty. The government has described the sum as an estimate of money the companies earned illegally through fraudulent activities such as marketing to children and denying doing so. I hope the High Court will see fit to reinstate this part of the government's claim. If so, things may still work out in the case. But, I have to wonder how serious this appeal really is, considering the White House's position in the case.

XX. THE CONSUMER CORNER

No Children Under 16 Should Be Allowed To Ride On ATVs

All-terrain vehicles are reportedly involved in approximately 38,000 injuries and 100 deaths to children ages 16 and under each year. While wearing a helmet can reduce the risk of head injuries, there are reportedly no safety devices that adequately protect against other injuries commonly sustained while riding ATVs. Safe Kids Worldwide recommends that no children under age 16 be allowed to ride an ATV under any circumstances. Martin Eichelberger, M.D., president and CEO of Safe Kids Worldwide, made this observation:

> *Compared to a bike crash, an ATV crash is six times more likely to send a child to the hospital and 12 times more likely to kill a child. A child riding an ATV is four times as likely to be seriously injured as a rider over age 16.*

ATV rollovers, collisions, and ejections reportedly can cause instantly fatal head injuries, as well as serious nonfatal injuries to the head, spinal cord and abdomen. ATVs are inherently difficult to operate, and children do not have the cognitive and physical abilities to drive or ride these vehicles safely. Common sense tells us that if a person isn't old enough to drive a car on a paved road with traffic control devices, that person is certainly not old enough to drive a powerful open-seat vehicle at speeds up to 70 miles per hour over dirt trails and wild terrain. Alan Korn, who is the director of public policy SAFE KIDS, said:

> *Previous efforts to make ATVs safer for kids have proved inadequate. Government efforts and the voluntary standards observed by the industry have not kept chil-*

dren out of the emergency room. On the contrary, the number of kids getting seriously injured on ATVs every year is increasing.

In 1998, the U.S. Consumer Product Safety Commission banned the manufacture of three-wheeled ATVs, mandated warning labels, and set standards for the engine size of ATVs intended for children. Years later, the ATV industry adopted policies restricting the sale of adult-sized ATVs (with engines bigger than 90 cc) for use by children under age 16. The number of ATV-related injuries per year doubled between 1993 and 2001, and the injury and death rates are highest among riders under 16. In 2003, children accounted for nearly one third of all ATV-related injuries. There is simply no way to make ATV riding a safe activity for children. For this reason, children under 16 shouldn't be allowed to ride on an ATV.

Source: *Claims Guide*

A Report On Hospital Class Actions

A recent class action settlement involving Tenet Healthcare Corp. may have an effect on more than 100 state and federal lawsuits nationwide alleging that hospitals are gouging the uninsured with dramatically higher rates. The settlement was to go before a California Superior Court judge for approval on the 5th of this month. The health insurer has agreed to refund millions of dollars to uninsured patients and change its pricing policies as part of a class settlement. Some observers believe the settlement with Tenet, one of the largest health care providers in the United States, will have a ripple effect in pending hospital litigation and serve as a model for pricing reform.

In a separate, but related development in Minnesota, more than 60 hospitals have also signed agreements with that state's Attorney General, promising to give the uninsured discounts on their medical bills. Earlier this year, Mike Hatch, the Minnesota Attorney General had threatened to sue hospitals that continued to use two-tier pricing policies. Because, Tenet was a for-profit institution, its main business was to make money. This company has now agreed to charge the "uninsured patients" what it charges the "insured patients." Why shouldn't nonprofits do the same thing? I believe the answer is quite clear.

The most talked-about feature of the Minnesota settlement is a new promise by hospitals not to charge uninsured patients who earn $125,000 or less a higher rate than what they charge their biggest insurance customer. That sets an industry standard and underscores the fact that the uninsured paying two to three times the rate of an insurance company is unconscionable. Minnesota Attorney General Hatch calls it "price gouging at its worst." General Hatch is meeting with attorneys general from around the country to discuss his latest hospital pricing plan. It is believed that a number of other states are considering taking action.

According to published media reports, more than 4,200 of the nation's 5,000 hospitals have confirmed that they have either changed their billing practices—or already had fair ones in place—to comply with new AHA guidelines that call for disclosing charges, developing fair billing policies, and providing financial counseling. There are currently 45 million Americans without health insurance, and hospitals have provided $24 billion in charitable care. In the last year, 110 state lawsuits have been filed against hospitals over billing practices. Another 76 federal cases were filed within the last year, of which 13 are still pending.

In addition to the monetary features of the settlement, Tenet also agreed to the following for a period of four years:

- Provide financial counseling to all uninsured patients.
- Disclose charges for anticipated treatment up-front.
- Offer uninsured patients reasonable payments and payment schedules, with no interest for the first 120 days after discharge.
- If a patient has applied for financial assistance, Tenet will not attempt to collect fees while the application is pending.
- Follow a uniform credit and collection policy, including, among other things, a commitment not to pursue legal action for nonpayment of bills against the unemployed or poor, or place a lien on a patient's home.

Source: *National Law Journal*

One In Five Americans Have Been Victims Of Identity Fraud

With companies reporting data breaches seemingly every week, more people are becoming victims of identity theft, according to a survey of more than 1,850 Americans sponsored by Chubb Group of Insurance Companies. The survey found that 20% of respondents have been a victim of identity fraud or theft. Ninety-five percent of respondents said they are concerned that someone might fraudulently impersonate them to ruin their credit standing and put them in debt, a statistic that rose almost 20% from 2000. Twenty-seven percent of respondents reported that their or a family member's credit card was fraudulently used to charge purchases, up from 19% in 2000. Twenty-seven percent reported that they or a family member experienced the theft of a purse or wallet, while 8% experienced fraudulent checks written on their or a family member's checking account.

Eighty-seven percent of respondents think that companies that fail to adequately protect the confidential information they have on customers and others should be required by law to pay to restore consumers' credit ratings. Sixty-five percent of those surveyed would like to see these companies fined. Interestingly, 63% want these companies charged with a crime. Seventy-eight percent of respondents would give their Social Security number to a credit card company when applying for an account. Fifty-four percent of people surveyed would give their Social Security number to a car dealer when establishing credit, 37% to a phone company when establishing service, and 53% to a college or other educational institution. Sixty-four percent of respondents have disclosed confidential information online or by telephone in the past six months. Folks must be more protective of their personal information. Regarding pre-approved credit card solicitations, 28% of people surveyed throw them away without shredding them or tearing them up. Obviously, these solicitations should be shredded.

Twenty-eight percent of people surveyed believe it would take more than a year to regain their identity and clear their credit. Forty percent of respondents think it would cost $1,000 or more to regain their identity and clear their credit. This survey demonstrates not only the increased threat of identity theft but also the increased concern felt by consumers. People are becoming more aware of the problem. Impulse Research of Los Angeles conducted the survey in May 2005 for Chubb.

Source: *Insurance Journal*

SUBPRIME CREDIT PROVIDER SETTLES WITH WEST VIRGINIA

Applied Card Systems and its parent, a provider of subprime credit, have agreed to pay the State of West Virginia $1.5 million to settle a consumer protection lawsuit against the companies. Applied Card processes credit card accounts, while its parent, Cross Country Bank, based in Wilmington, Delaware, provides credit cards to consumers with bad credit histories. The lawsuit accused Cross Country Bank of deceptive marketing. Applied Card, the bank's collection agency, was accused of using abusive methods in its collective practices. It is good to see state officials going after companies like this who are hurting folks who were already hurting and in need of help.

Source: *National Law Journal*

"CERTIFIED" USED CARS MAY NOT BE ANY BETTER THAN ANY OTHER USED CAR

We have all seen the advertisements for "certified" used cars, or as automobile dealers like to refer to them, certified "pre-owned" vehicles. Certified deals like these typically promise some type of warranty on the vehicle and a thorough inspection prior to the purchase by a new consumer. These programs started in the 1990s as a way for dealerships to sell the large number of leased vehicles they were getting back from the consumers when the lease term expired. The dealerships quickly learned that if they labeled the used cars as "certified" pre-owned vehicles, they could actually sell them for more money. In fact, despite all the recent promotions and financing deals being offered on new cars, used car sales are up 23% over the last two years. According to industry experts, "certified" used cars sell for an average of $951 more than if the car was not considered a "certified" vehicle.

A series of recent lawsuits have shown that at least in some cases, the certification practices of some car dealers don't offer any real benefit to the consumer. In other cases, the "certification" label is simply a tool to mislead the consumer. Unfortunately, there are no industry standards on what it actually means to purchase a "certified" pre-owned vehicle. The definition actually varies significantly among brands and dealerships. For example, Audi, which is made by Volkswagen AG, says that inspectors have a checklist of more than 300 items that must pass inspection before a used car can be sold under its certified program. But, the checklist for a Volkswagen is only 100 items. Some certification programs only consist of a 32 point checklist, which is similar to the checklist used from by national oil change companies.

In order to compete with big auto makers, some individual dealers turn to so-called national warranty companies for a certification program. Some dealerships even create their own "certified" programs. In the lawsuits that have been filed over the various certification programs, it has been shown that the training the inspectors receive on how to properly certify a vehicle consists primarily of a short 20 minute video, followed by an on-line exam. One inspector has testified that it takes about the same length of time to inspect a normal used car as it does a certified used car.

Some certification programs have been shown to certify essentially any type of car. One lawsuit has revealed that some dealerships have even certified vehicles that have had frame damage. *The Wall Street Journal* recently reported that one company, National Auto Care, has stated in an industry trade magazine that it would certify "any vehicle on lots that is not eligible through the manufacturer's certified program." Another lawsuit has revealed that some used cars were being certified and sold to the public without disclosing that they were formerly rental cars. This is an issue because used cars that were formerly rental cars generally have a lower resale value than other used cars.

You can't just always rely on a vehicle's history to list everything important about the car because many of the histories are incomplete. Many consumer advocates suggest that if you decide you want a "certified" used car, you should buy one that is backed by a "factory warranty," because they tend to have more resources to repair vehicles. It is also important to look for programs that expressly ban certification of cars that have had frame or excessive panel damage.

Source: *The Wall Street Journal*

Investor Alert—"Top 10" Threats To Investors

A few months ago, Joseph P. Borg, Director of the Alabama Securities Commission, identified the "Top 10" most common ploys being used to cheat investors out of hundreds of millions of dollars. At that time, Commissioner Borg said: "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." We thought it might be good to remind our readers to check out investment opportunities carefully before putting money in them. For that reason, I am setting out the Commissioner's "Top 10" agenda. The following 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):

- **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.
- **Unlicensed Individuals Selling Securities:** Anyone selling securities without a valid securities license should be a red alert for investors. Remember: No license, no sale.
- **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.
- **Promissory Notes:** Empty promises can leave these notes worth less than the paper on which they are printed.
- **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.
- **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.
- **Internet Fraud:** Stock promoters are using online "boiler rooms," instant messaging, and fake websites to lure investors into "pump-and-dump" stock schemes.
- **Affinity Fraud:** Con artists are increasingly targeting religious, ethnic, cultural, and professional groups.
- **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.
- **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.

Before making any investment, Commissioner 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? If there is any question, investors should contact the Alabama Securities Commission with any questions about an investment product, broker, or adviser before making an investment. To check out an investment or salesperson in Alabama, contact the Alabama Securities Commission by calling (334) 242-2984 or the toll free line 800-222-1253 or visiting their website at www.asc.state.al.us.

XXI. RECALLS UPDATE

Nissan To Recall 140,000 Murano SUVs

Nissan North America Inc. is recalling more than 140,000 Murano sport utility vehicles amid concerns that a broken wire in the alternator could deplete power to the engine and lead to a crash. The National Highway Traffic Safety Administration said in a posting on its website that a wire could break inside the alternator and prevent the battery from charging. The charger warning and brake warning lamps would come on and the battery would start to discharge. After a short time, the engine would go into a condition that limits the vehicle's speed and stop running, creating the potential for a crash.

The recall involves more than 125,000 vehicles from the 2003-2005 model years and more than 15,000 vehicles in Canada. No injuries or crashes linked to the problem have been reported, according to Nissan. The company said in a statement it was "committed to a high level of customer safety, service and satisfaction and is working with its dealers to promptly address this condition." The recall is expected to begin on the 3rd of this month. Dealers will be instructed to inspect and replace the alternator with a new version that has been upgraded to prevent the problem. Owners can contact Nissan at 800-647-7261.

New Jetta Recalled Over Fuel Line Clamp

Volkswagen is recalling thousands of cars because of safety problems. The 2005 Volkswagen Jetta got high marks in crash tests, but federal safety regulators said an improperly positioned clamp on the car's fuel line could cause gas to leak. The recall covers some 40,000 Jetta sedans. Volkswagen will send out notification letters.

Other Recalls

The government has opened defect investigations into two SUVs: the 2002 Jeep Grand Cherokee and the 2001 Acura MDX. The National Highway Traffic Safety Administration is reviewing alleged problems with the fan in the Grand Cherokee's cooling system. Four owners reported that pieces of the broken fan blade cut through a plastic casing around the instrument. The investigation involves about 132,000 Grand Cherokees with 4.0 liter engines. The company is cooperating with the agency and has started its own investigation. In the case of the MDX, NHTSA said it was looking into complaints of the coil spring breaking in the front suspension and coming into contact with a tire. According to NHTSA, there have been no injuries or crashes from the alleged defects.

Target Recalls Children's Toy Trucks

Target Corp. is recalling about 17,400 children's toy trucks because the Minneapolis-based retailer says the trucks have small parts that could pose a choking hazard. To date, no injuries have been reported. The recall includes four-piece "So Hot Way Cool Free Wheel" Truck sets. Various trucks sold in the sets include a combination of fire trucks, oil trucks, vegetable trucks, sanitation trucks, tow trucks, and box trucks. Target stores nationwide from April through May sold the recalled toys for about $5. Consumers should take the toy trucks away from children immediately and return them to the nearest Target store for a gift card in the amount of a full refund. Consumers can contact Target at (800) 440-0680 or log on to the firm's website www.target.com for more recall information.

Graco Recalls Strollers

The U.S. Consumer Product Safety Commission (CPSC) has announced a voluntary recall of some strollers by Graco Children's Products. The recall affects about 1 million Duo Tandem and about 143,000 MetroLite strollers sold between 1994 and 2002. The CPSC and Graco recommend consumers stop using these recalled products until a repair kit has been obtained. Duo Tandem models were sold from January 1994 through December 2000, with model numbers 7950, 7955, 7960, 7965, 7970 and 7980, with serial numbers between 01011994 and 12311999, or model number 7990 with serial numbers between 10111996 and 10311998. The Graco MetroLite Stroller were sold from November 2000 through December 2002, with model numbers 6110DW, 6110F3, 6111FKB, 6114HAV, 6114JAM, 6114NGS, 7410CON, 7413CML and 6413MRN.

These strollers can fail to latch properly and unexpectedly collapse while in use. This can result in serious injuries to young children riding in the stroller, as well as to persons pushing the stroller. Consumers should stop using these strollers immediately and contact Graco to receive a free repair kit. The kit includes a custom-designed latch that consumers should attach to the stroller's frame to ensure it is properly latched. The repair kit should be available by the time you receive this issue.

XXII. FIRM ACTIVITIES

Employee Spotlights

Mike Crow

Mike is a Shareholder in our Personal Injury Section and primarily handles car and truck litigation and premise liability cases. Mike has been with the firm since 1986. He has a special interest in brain injury cases. Mike has been successful in litigating against the "Big Box Stores," such as Wal-Mart, Home Depot and others. He has a wealth of knowledge of their practices and procedures. Mike has tried a tremendous number of jury cases and is well-respected by his fellow lawyers. Judges have learned that Mike is always candid and straight -forward in his presentations to them. That is something to be proud of.

Mike is married to the former Marla Taylor and they have two children. The Crow family attends Frazer United Memorial Methodist Church in Montgomery, where Mike has served on the Administrative Board since 2002. Mike is also on the Board of Directors for the Central Alabama Chapter of the Alabama Lung Association. Mike and Marla are involved with a number of Christian-based groups and are excellent role models for young married couples. We are fortunate to have Mike in the firm.

Ashley Cochran

Ashley Cochran has been with the firm for over 5 years. Ashley, who currently works as a Legal Secretary for Mike Crow, is being trained for Trial Director so she can assist during trials. Ashley started working with us when she was 16 years old as a clerical assistant to Graham Esdale in the Products Liability Section. Three years later, she moved to the Personal Injury Section as Mike Crow's Legal Secretary. Ashley graduated from Chapman Christian Academy in Millbrook, Alabama in 2001. She attended South University where she was pursuing a Paralegal degree. Ashley is currently taking a break from her studies and will finish her degree soon. She enjoys going mud riding, swimming, going to the lake and beach, being with friends, and babysitting. Ashley is a very good employee and we are very pleased to have her with the firm.

Anna Powell

Anna Powell has been with us for over three years and works as a Legal

Secretary for Gibson Vance in our Fraud Section. Anna's position requires a multitude of responsibilities. Keeping up with Gibson's schedule and activities alone is a real challenge. Anna also coordinates the firm's activities with ATLA. Anna graduated from Highland Home High School in 1991. Between her last years in school, she took enhancement classes at ASU. Anna enjoys fishing, rollerblading, going to plays, and spending quality time with her family. She is a very good employee and is a most valuable part of the firm.

XXIII. SPECIAL PROJECTS

A Fitting Tribute For A Fine Young Man

Brad Willis, who tragically died in an automobile accident a few years ago, was the son of Zess and Beth Willis of Montgomery. Brad was a fine young man. He was an exceptional golfer and a nationally ranked junior golfer at the time of his death. Brad's parents, along with his brother Cole, have started an annual charitable golf tournament in Brad's name at Wynlakes Country Club in Montgomery. The Brad Willis Memorial Golf Tournament raises money to support scholarships awarded to members of the golf teams at Central Alabama Community College in Alexander City. Once the scholarships from the golf tournament have been fully funded, the tournament is expected to provide other charitable assistance to the community in Brad's name. We represented Brad's family in a lawsuit and got to know the Willis family very well. They are good folks who suffered a tragic loss. It's real good to see them now being willing and able to help others as a tribute to their son's memory.

Family Law Association Of Alabama

Our firm doesn't do legal work other than civil litigation, and all of that is for the plaintiff's side. Fortunately, there are other firms that do practice in the family law area. Things such as divorce, adoption, child support, and paternity are areas of our judicial system that most directly impact a great number of Alabama citizens in their day-to-day lives. I am told that the laws that govern these areas are antiquated, conflicting, and often do more to frustrate than improve the lives of Alabama citizens who have to be involved.

For example, Alabama law dictates that grandparents of adopted children can have visitation rights to those children. Grandparents of children of divorce don't have those same rights. Alabama statutes don't provide for a biological father to establish his paternity of a child if the biological mother is married to someone else. In an attempt to address these and other issues, a group of family law practitioners organized the Family Law Association of Alabama (FAMLAA). This organization is comprised of lawyers who devote a substantial amount of their professional time to domestic relations matters. The members of the board of directors of FAMLAA were a combined experience of more than 200 years of expertise in this area of law. They come from every corner of the state.

During the 10 months of the organization's existence, it has already had a significant impact on the Alabama Legislature. Already, members of the House and Senate are relying on and seeking out FAMLAA's advice on legislation to change or improve laws dealing with families in Alabama. Before FAMLAA was founded, on many occasions legislation was passed without the input from those who are cognizant of the actual and practical impact that the proposed law would have. FAMLAA monitors legislation and has been quite active in this year's session. Members have asked that legislation be introduced and have spoken at public hearings.

FAMLAA is not just for those lawyers whose practices focus exclusively on domestic relations law. The group is open to any lawyer who occasionally has to handle a domestic relations case. Membership in the organization not only provides a list serve whereby lawyers can exchange ideas and questions, it also allows members to have a voice in the affairs of government in Montgomery. Educational opportunities are also offered to its members. To learn more about FAMLAA, you may visit their website at www.famlaa.org. All of the above information was supplied to me by my good friend Jerry Baxley, who serves as Executive Director of FAMLAA. I wish the organization continued success.

Alabama Public Television Celebrates its 50th Anniversary

Alabama Public Television is celebrating its 50th anniversary this year. We should all be thankful that APT is available in our state. APT has provided 50 years of quality programming, educational outreach, information, and entertainment for Alabama citizens. With all of the fifth and junk that adults and children are exposed to on commercial television channels, including cable, it is imperative that APT remain a viable option for viewers. I hope that you share my belief that supporting APT is a most worthwhile endeavor. If so, make a contribution to Alabama Public Television, 2112 11th Avenue South; Suite 400; Birmingham, AL 35205. If you are interested in additional information, go to the APT website, which is www.aptv.org.

A+ Education Foundation

The A+ Education Foundation is working hard—without a great deal of fanfare—in its attempt to improve public education in Alabama. This group, under the leadership and direction of Caroline Novak, Cathy Gassenheimer, and Bill Smith, has "improving the quality of education in our state" as its primary goal. There are lots of Alabama citizens who share that goal and who support A+. Recently, two major foundations, The Wachovia Foundation and Microsoft, have made grants to A+ that are badly needed. This financial help will allow the organization to expand its work with schools and systems in Alabama. The Wachovia grant will mean $750,000 over three years for the Alabama Best Practices Center's Powerful Conversations project. I hear and am hopeful that the Microsoft grant will be in the neighborhood of $450,000. (At press time the amount had not been disclosed.) Details of the two grants include the following:

- At the request of the Alabama Reading Initiative, the Wachovia grant will enable the Best Practices Center to integrate the Powerful Conversations Project into the Alabama Reading Initiative. It will fund the development of the district-level 2 to be deposited into the Decatur City Schools, Talladega County Schools, and Mobile County Schools. The grant period begins July 1, 2005 and ends June 30, 2008.

- The Alabama Best Practices Center is one of 11 organizations to receive a grant from Microsoft. This grant will fund the development of a "virtual learning platform" for use by schools involved in the Powerful Conversations Projects. It will also integrate discussion about new 21st century learning skills into the Powerful Conversations work. A+ was notified that it is a grant recipient. At press time, the precise amount was not known.

My Brother Receives An Honor In His Profession

Billy Beasley, who is my younger brother, recently was named the 2005 Recipient of the Bowl of Hygeia Award. This is the single most prestigious award that exists for community pharmacy. Billy, who received this award at the Alabama Pharmacy Association summer convention, was recognized for his contributions to the profession of pharmacy and for his many community activities. It's really good to see my brother receive this high honor. In my opinion, receiving nationwide recognition for his years of hard work is an honor that is certainly well-deserved. Being selected by one's peers makes an award even more meaningful.

Billy, who is the senior partner in two community drug stores in Clayton and Clio, is also serving his second term in the Alabama Legislature. He was elected to the House of Representatives in 1998, succeeding House Speaker Jimmy Clark of Eufaula. After receiving a degree in pharmacy from Auburn University in 1962, Billy served on active duty in the U.S. Army and was discharged as a Captain in the Medical Corps. Billy has always been extremely active in community affairs. He is an active member of the Clayton United Methodist Church, where he served as lay leader, and is a past president of the Clayton Rotary Club. Billy has served as past president of the Alabama Pharmacy Association and is now a member of the Alabama Independent Pharmacy Association and the American Pharmacy Association. He has been an outstanding spokesman for his profession. I am extremely proud of Billy's many accomplishments over the years and even prouder to say he's my brother.

XXIV. SOME CLOSING OBSERVATIONS

Our prayers have been with those affected so tragically by the series of terrorist attacks in London. It is impossible for any right-thinking person to understand how terrorists could commit such dastardly acts. But, those occurrences must serve as a needed wake-up call for government at all levels in our own country. As we well know since September 11, 2001, we in the U.S. are not immune from terrorist attacks. But, I fear that we have not been as diligent as we should have been since the tragic events of September 11th. In my opinion, we must do a better job at home of protecting American citizens. There are a number of areas where our domestic security efforts have been less than acceptable. Unfortunately, public transportation is one of these areas of concern. We had best make some major improvements there. Obviously, it is impossible to prevent all acts of terror. We must do everything possible, however, to make our country as safe as possible for its citizens. This includes beefing up security in public transportation.

We are dealing with an enemy that absolutely has no regard for human life. It's most difficult for Americans to comprehend the evil mindset of the terrorists. It is quite evident that we have underestimated this enemy. As a result, we have to play catch-up in too many critical areas of concern. After September 11th our intelligence community had to be retooled, and homeland defense was made a top priority for the first time. Clearly, there is still room for major improvements in each of those areas.

The war in Iraq and the current occupation of that country continue to be a grave area of concern and a tremendous drain on our country's manpower and financial resources. A major segment of our military force has had to deal with a mounting insurgency in Iraq. We have the greatest military in the world, but we can't allow it to be stretched too thin and thus become incapable of meeting modern-day challenges. We must adapt to a new style of warfare coming from a different type of enemy. I believe that we may have to consider reinstating a draft of some sort, and that will not be very popular with our people. But, I am convinced that it is a mistake—in view of worldwide threats of terror—to depend on reserve components to fight wars on foreign soil. We must beef up our regular military forces and make sure they have adequate numbers with superior training and equipment. That will take a bipartisan effort from the White House and in Congress.

In any event, the American people must demand that our political leaders—in a bipartisan effort—deal with our mounting problems caused by the ever-increasing threat of terrorist attacks, both abroad and at home. We can't afford to ignore any aspect of this problem. The threats of attack have become a reality and one that we must deal with on a daily basis. On the other hand, we can't afford to let these threats cause us to become so fearful that we withdraw from our normal activities at home and at work. We must continue to go about our regular activities.

When it appears conditions in our world have gotten so bad that many in our country are saying that there is little hope, it's good to know there is always a place we can go for help. God is still with us and is our ultimate hope and that is absolutely true. He is our "supplier" and "protector" and that hasn't changed and never will. I have to wonder how bad things will have to get, however, before we, as a people in the United States, realize that God is truly our only hope. That shouldn't be our last resort—instead, it must be our first line of defense.

XXV. SOME PARTING WORDS

A few weeks ago, I had to teach a Sunday school class that dealt with how Christians should live and act in the modern-day world. Jesus taught his disciples and gave them what we refer to as "The Sermon on the Mount." That's a pretty good place to go for some basic instruction. What He taught is a pattern of living for us today. Let's take a look at what Jesus told His closest followers:

> *And seeing the multitudes, He went up on a mountain, and when He was seated His disciples came to Him. Then He opened His mouth and taught them, saying: "Blessed are the poor in spirit, for theirs is the kingdom of heaven. Blessed are those who mourn, for they shall be comforted. Blessed are the meek, for they shall inherit the earth. Blessed are those who hunger and thirst for righteousness, for they shall be filled. Blessed are the merciful, for they shall obtain mercy. Blessed are the pure in heart, for they shall see God. Blessed are the peacemakers, for they shall be called sons of God. Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven.*
>
> *Matthew 5: 1-10*

The main problem that many of us have is that we simply don't listen to God, nor do we depend on Him in times of trouble and despair until all else fails. God identified Jesus as His Beloved Son, and told us to "listen" to Him. We must learn to listen and to strive to really understand what Jesus tells us. Once we comprehend His message, then we must act on what we have heard. This definitely requires action on our part. The "Sermon on the Mount" wasn't just for the day of Jesus while He was on this earth—it is for us in 2005.

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