SEPTEMBER 2005

THE JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

Successful Litigation Saves Lives

Over the years I have learned the one thing that will cause a large corporation to do right and make needed safety changes is one or more jury verdicts. Some may ask—why do the courts have to be involved since we regulate Corporate America? Unfortunately, the federal regulatory system—because of politics—has failed to do its job. The court system has had to become involved and actually has been the driving force for change in several industries. Most notable are the automobile and pharmaceutical industries. We have seen many examples of how these forced changes have saved lives. One specific example deals with cab guards on trucks.

Our firm has represented a number of heavy truck drivers who lost their lives in accidents that involved shifting cargo. In each case, a safety device known as a "cab guard" or "headache rack" had been placed on the truck to protect the cab and driver from shifting cargo. In each case the cab guard manufacturer designed and manufactured a cab guard made of welded heat-treated aluminum. Manufacturers universally selected welded heat-treated aluminum because of its light weight and ease of maintenance. But, none of the manufacturers, in the cases we have seen, performed dynamic testing on the cab guards to determine the actual loads the cab guard would resist in the event of a collision. In fact, most manufacturers have stated that the cab guards were not designed to protect the occupants of the cab during an accident. But, cab guards contain no warning related to potential failures during an accident. Instead, the manufacturers performed only simple static tests that did not replicate real world impacts. Therefore, drivers and occupants of heavy trucks have been left with the impression that cab guards will perform their intended function during a dynamic accident.

Most of our cases have involved accidents involving log trucks where the cargo shifted forward and impacted a cab guard. In each case, the dynamic movement of the logs crushed the cab guard, allowing the cab to crush, pinning the driver inside. We have shown through experts that the selection of welded heat-treated aluminum for cab guards is inappropriate for use on log trucks and real world crashes, especially during a dynamic event such as an accident. Welding of heat-treated aluminum is known to diminish the strength of the aluminum in the welded areas, especially in those points receiving high stresses during a real world collision. Our experts have also shown that aluminum and the welds needed to fabricate the cab guards suffer from fatigue cracks due to the simple movement of the cab guard on the back of the truck during normal use. This fatigue substantially reduces the ability of the cab guard to resist impacts from shifting cargo.

The claims we have raised against cab guard manufacturers have sought to improve the design and manufacturing process related to these safety devices. The litigation process has also sought to push manufacturers to include appropriate warnings and establish guidelines for usage for each type of cab guard so that it is used in a reasonably appropriate manner. One manufacturer has already informed an Alabama trial court that it has changed its testing and design review process to mirror the process proposed by our expert. More recently, a manufacturer involved in litigation with one of our clients has now included additional warnings and instructions in its sales literature. The manufacturer now specifically states that its cab guard is not appropriate for use on log trucks. These type changes in the design and manufacturing process, brought on by litigation, will save lives and improve the quality of the products used by truck drivers.

The Vioxx Verdict In Texas

As everybody in the United States knows, the first Vioxx-related civil trial resulted in a $253 million verdict against Merck & Co. The case involved the death of Robert Ernst, who died in May of 2001, after having taken the drug Vioxx for 8 months to alleviate pain in his hands. The primary question for the jury in the Texas trial, the first Vioxx case to be tried, was whether Vioxx caused Robert Ernst's death. Clearly it did! Merck knew as far back as 1997 that the use of Vioxx would sig-

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nificantly increase the risk of heart attack or stroke. Top officials at Merck knew years before they took Vioxx off the market that it posed real heart dangers, but they intentionally failed to disclose those dangers to the public. Instead, the company focused on aggressive marketing of the drug that helped turn it into a $2.5 billion seller. The jury, after hearing how bad Merck's conduct had been, responded appropriately. $229 million of the jury's verdict was punitive in nature. It is most significant that before the verdict came in all of the so-called jury consultants had considered the Texas jury to be very conservative. Interestingly, eleven of the jurors are Republicans and relatively young. Merck was extremely confident that this jury would never return a punitive award against the company and we are told their lawyers really expected a defense verdict.

Based on what our firm has known since early 1999, Merck put its profits over the safety and well-being of the public. In my opinion, this company is morally corrupt. Merck, by design, lied to the FDA, lied to the medical community, and lied to the public. The type conduct exhibited by Merck will never be tolerated by the American people. Corporations whose conduct is found to be as bad as that of Merck deserve to be punished severely. Hopefully, the Texas verdict will get the attention of the folks who run Merck. It should also make the FDA realize that it will have to do a better job of regulation in the future. Many believe that the FDA has been little more than an extension of the powerful pharmaceutical industry. I agree with that assessment. But, that doesn't excuse companies like Merck for their conduct.

Federal Trial Over Vioxx To Start November 28th

Our firm will try the first Vioxx case in federal court in New Orleans. The trial, which will start on November 28th, is expected to last for about two weeks. We are representing the family of Richard Irvin Jr., a 53-year-old Florida man, who died after taking Vioxx. U.S. District Judge Eldon Fallon selected our case as the first federal case to go to trial. As previously reported, Judge Fallon is handling the pretrial proceedings for all of the federal cases. As expected, he has kept all of us very busy. Thus far, thousands of lawsuits have been filed against Merck & Co. Our firm has already reviewed well over 10,000 individual cases and has more coming in each day. We have certain criteria for taking cases and are only taking claims where there is a death or a serious disability directly caused by taking Vioxx.

The surviving widow in the Irvin case filed the suit against Merck after her husband died of a heart attack in May of 2001. Mr. Irvin, who had no history of heart problems, was in "very good health" when he started taking Vioxx for back pain. This is clearly a case where we can prove without a doubt that Vioxx caused this man's heart attack and death. An autopsy was performed that verified our contention that Vioxx had caused the heart attack. Merck will not be able to question the cause of the death in our case—the result of an autopsy settles that issue. We don't expect Merck to make any effort to settle the case. We look forward to trying this case and hope that justice will again be done.

Alabama's Case Against The Pharmaceutical Industry Sent Back To State Court

We are representing the State of Alabama in a civil lawsuit against a number of pharmaceutical companies. The case was properly filed in Montgomery County against 79 defendants. We were shocked when all of these defendants joined in a request to remove the case to federal court. U.S. District Judge Myron Thompson promptly entered an order on August 11th 2005 remanding the case to state court where it belonged. The removal was clearly wrong and in our opinion constitutes a "frivolous" filing. It caused us a slight delay in our preparation of the case. In any event, we can now get down to the business of getting the case ready for trial. The State of Alabama's Medicaid program has been cheated out of a tremendous amount of money. I am hopeful we can successfully prosecute this case and get a good recovery for the state. We are working with the Mobile firm of Hand Arendall on this most important case.

Florida Sues Pharmaceutical Companies

The State of Florida has joined the growing ranks of states suing the powerful pharmaceutical industry. Attorney General Charlie Crist has sued three pharmaceutical manufacturers on behalf of the State for defrauding Florida's Medicaid program. The scheme allegedly cost Florida taxpayers at least $25 million. The lawsuit alleges that the companies wrongfully inflated prices in a manner that let pharmacies receive excessive reimbursement for filling prescriptions for Medicaid patients who bought generic drugs for certain specified illnesses. The companies sued include Mylan Pharmaceuticals, Inc., Teva Pharmaceutical Industries, Ltd., Watson Pharmaceuticals, Inc., and various parent and subsidiary companies. The fraudulent practices began as early as 1994 and allegedly resulted in hundreds of thousands of false claims being filed.

Advertiser On Target In A Recent Editorial

Government at every level should do everything possible to help prevent deaths, and that responsibility certainly includes deaths of children. The August 12th issue of the Montgomery Advertiser contained an excellent editorial concerning a state program for the reporting of fatalities involving children. The

data compiled, if used correctly by government agencies, can help prevent future deaths. Prevention of deaths should be the goal of government and this reporting system will provide needed data for evaluation. This excellent and timely editorial is set out below.

While it is difficult to assess the effectiveness of the work of the Alabama Child Death Review System, it still is comforting to know that there are local and state groups that look at situations surrounding child deaths that appear to be preventable with an eye toward preventing similar deaths in the future. The latest annual report of the review system identified a total of 896 children under the age of 18 who died in the state during 2002, the most recent year covered by the report. Of this number, 335 deaths were considered preventable, or 37%. It is good news that the preventable death percentage is down slightly from 2001 and 2000. In 2001, 380 of the 911 child deaths statewide, or 42%, were considered preventable, and in 2000, 386 of the 915 child fatalities, or 42%, were deemed preventable.

The Alabama Child Death Review System was created by law in 1997 to review all unexplained or unexpected child deaths in the state. While the system has failed to meet the challenge of full review, the annual report did specify that about 82% of preventable deaths 2002 had been reviewed by the time the annual report was put together. Not surprisingly, traffic accidents remained the leading cause of preventable deaths to children in Alabama, which was also the case in most states. Of those traffic accidents, the reviews found 26% were caused by drivers 16 years old and another 11% to drivers under 16. Twenty-eight percent of the 18 and under traffic deaths reviewed involved reckless driving and 19% involved speeding. In 33% of the cases, a contributing factor was not wearing seat belts and 5% involved restraints not being used properly.

Suffocation was the second most reviewed cause of death in 2002 with 26 cases, followed by Sudden Infant Death Syndrome with 25 cases. Other causes, in descending order, were drowning, firearms, fires, suicide and assault. Behind the dry statistics in the annual report are at least 335 true tragedies. Some observations spurred by those statistics:

- More needs to be done to ensure that young drivers who display reckless tendencies lose their driving privileges. While the report did not suggest this, we would suggest that this should include both drivers and passengers under 18 losing their drivers licenses for at least six months if they are caught not wearing a seat belt. Perhaps it wouldn't be a bad idea to suspend the license of all adult drivers who have children in their vehicles who are not wearing proper safety restraints.

- State and local officials need a much higher profile public awareness program on ways to prevent Sudden Infant Death Syndrome, including more publicity on the "Babies Sleep Safest on Their Backs" program.

- One surprising statistic was 38% of deaths from suffocation that apparently resulted from "roll overs" while an adult was sharing a bed with an infant.

Not only does there need to be a better public education campaign on the danger this imposes, but the state should study whether private sector public service agencies in communities need to consider making proper cribs available at nominal charges to poor families who cannot afford them. Again, it is difficult to tell whether the review process is having a direct impact on lowering the number of preventable child deaths. But the suggestions coming out of the process should be taken into account by the Alabama Legislature and state and local agencies. One preventable child death is too many, and the state needs to take every reasonable step to bring those numbers down.

Source: *The Montgomery Advertiser*

The American Bar Association Meeting

I had the privilege of participating in a segment of the American Bar Association's annual meeting held in Chicago last month. I appeared—along with 13 other lawyers—in an excellent program on alternate dispute resolution, commonly referred to as "mediation." The program, planned and carried out by Eric Green, one of the best known mediators in the country, was highly successful. Eric, who is from Boston, has mediated a number of high profile cases around the country that resulted in substantial settlements. One of these cases was the Monsanto PCB case in Anniston that our firm handled. Other lawyers appearing on the panel were: Kenneth M. Roberts, Katherine L. Adams, Stephen V. Bomse, Steven J. Comen, Loring A. Cook, III, Lloyd Constantine, Patrick J. Coughlin, Brackett B. Denniston, III, Parker C. Folse, R. Bruce Holcomb, Alan R. Miller, Donald J. Rosenberg, Charles F. Rule, Jan Schlictmann, and Christina M. Tchen.

With the exception of your writer, this really was a blue-ribbon panel. Each of the lawyers had been involved in some very important cases. Some of these cases included the Microsoft, Visa-MasterCard, Enron, and Toms River cases. Our Monsanto case was also featured. Four of the participants currently serve as general counsel for large corporations such as General Electric and Honeywell. One case handled by Mr. Schlictmann was made into the movie "A Civil Action" featuring John Travolta. I learned a great deal from the panel

members about how these high profile civil cases can be successfully mediated. I hope our audience felt that the program was helpful. I commend Eric Green and his staff for putting together an excellent presentation.

We Should All Read The Bill Of Rights

We all "talk" a great deal about the Bill of Rights, but I have to wonder how many folks have ever taken the time to actually "read" the 10 Amendments that make up this part of our U.S. Constitution. I must confess that I had to read them again so that I could make sure I remembered each one. Nobody can deny that the Bill of Rights has been very important to all of us. For this reason, I decided to set out each of the 10 amendments making up the Bill of Rights below. You will recall from your study of American history that the amendments that constitute the Bill of Rights were actually Articles three through 12. Each of these were ratified by the states. Interestingly, Articles one and two were never ratified. These 10 amendments outline the basic freedoms that make our country such a great and wonderful place in which to live. We can all thank God that we live in the United States and can enjoy these basic freedoms that are guaranteed to all of us.

Amendment I – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II – A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III – No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII – In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII – Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX – The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X – The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

These rights guaranteed to all American citizens were important when the amendments were approved in the 18th Century and they are equally important to us today. I only wish our political leaders in Washington would pay more attention to each of the 10 amendments. For example, the right to a trial by jury in both criminal and civil cases is critical to the existence of a free society. The framers of our constitution believed trial by jury was essential to preserving freedom. That's why this fundamental right was written into our constitution. The individual rights of people—as guaranteed to us by The Bill of Rights—are worth defending!

Jury System Is Worth Saving

The jury system in this country—as we all know—is under a relentless attack and has been for the last 15 years. This system is worth saving in my opinion. The framers of the U.S. Constitution believed the right to trial by jury was extremely important. In fact, they believed it was essential to preserving freedom. Thomas Jefferson wrote:

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

The public needs to be wakened to what is happening in this country. Those who would tear down and literally destroy the jury system are "up to no good." Their goal is to protect the "bad guys" in Corporate America and to destroy the system that protects individual citizens. The would take away the right to a jury trial. Hopefully, that will never happen. If it does, our country will be in deep trouble.

Appeals Court Rules In Favor Of ADEM's Water Rules

A recent state appeals court ruling will allow the Alabama Department of Environmental Management to keep its current water-quality rules for businesses seeking permits. Environmental advocacy groups believe these rules are too lenient and arbitrary. The Alabama Court of Civil Appeals, in its order, reversed a ruling by a Montgomery circuit court and found that the ADEM's water quality "antidegradation policy" fits federal regulations.

Water quality standards under the federal Clean Water Act require states to avoid water pollution or at least hold it to an absolute minimum when some level of it is necessary for economic development. In principal, some 75,000 miles of Alabama's rivers and streams are protected by the standards. Some observers question whether the rules are adequate to do the job. The Legal Environmental Assistance Foundation (LEAF) filed a 2002 lawsuit against ADEM. LEAF says the agency's permit process easily allows too many businesses to pollute Alabama's waterways. Since the lawsuit was filed by LEAF in 2002, more than 200 wastewater permits have been issued under the agency's antidegradation policy.

LEAF challenged ADEM's cost-based rule on determining whether alternative wastewater methods are required. The group called the rule arbitrary and unconstitutional. The rule says that if the cost of a nonpolluting alternative is 10% or more than the cost of the current method, the alternative is not required. In its ruling, the appeals court said the U.S. Environmental Protection Agency had approved ADEM's cost threshold and that the trial court "erred in invalidating the '110% rule.'" ADEM adopted its current rules after the Alabama Supreme Court declared the old ones invalid in an earlier LEAF lawsuit. ADEM should strengthen its rules that deal with air and water pollution in our state. We can't afford to let industry dictate the standards and ADEM has had an obligation to do its job and that is to protect the environment in our state.

Source: *Associated Press*

Disturbing News From DYS

Some disturbing revelations have surfaced arising out of a lawsuit against the State Department of Youth Services. It was revealed in the case that supervisors knew of allegations of sexual abuse of teenagers by DYS employees for years before any significant actions were taken. Documents involving the allegations surfaced in the lawsuit filed by several girls at the DYS Chalkville campus. Four years ago, a dozen girls, who has been sentenced to the facility claimed that male staff members had raped and sexually harassed them. These allegations received some public attention at the time. There were also claims of consensual sex between teenage girls and staff members. Once the girls went public with their claims, the department promptly suspended staff members and eventually more than a dozen of them were either dismissed or allowed to resign.

The newly released documents indicate, however, that there were detailed allegations made to Chalkville supervisors about some of these same employees as far back as seven years before any action was taken. According to the Birmingham News, U.S. District Judge Scott Coogler wrote in an opinion, that allowed a lawsuit against former Chalkville Superintendent James Caldwell to continue, that "Caldwell had notice of alleged sexual abuse by employees at the Chalkville campus through complaint forms, notes, letters, internal memoranda, and reports, which are dated as early as 1994 and continue through 2001." It should be noted that Caldwell was not personally accused of any abusive acts himself. His responsibility comes from not properly disciplining employees or for failing to follow up on specific complaints.

Another problem for DYS involves whether the agency's officials were hiding such allegations from monitors who were overseeing the system under a court order. The disclosures from this case show that DYS needs to take a very close look at its procedures for following up on claims of abuse by the youngsters in its charge. Clearly such conduct must be prevented. This situation simply can't be tolerated. If DYS could have prevented problems of this sort with proper oversight, it should be made to pay the price. DYS must do everything within its power to ensure conduct like this never happens again.

Source: *Birmingham News*

II. LEGISLATIVE HAPPENINGS

A Look Back At The Special Session

The recent special session, by most any standard, has to be considered a success. The legislators came in—knew what had to be done—and did it. Hopefully, that type performance will carry over into future sessions. Our state has so many serious problems demanding solutions that we can no longer afford to take the "ostrich approach" to addressing them. Two of the most obvious problems that will have to be dealt with soon are those concerning the prison system and the Department

of Public Safety. Overcrowded and under funded prisons are a ticking time-bomb. The lack of state troopers on our roads is well-known and ignored.

The Need For Another Special Session

I believe that Governor Riley should call the Alabama Legislature back into special session to tackle an area of concern that badly needs reform. Campaign finance reform in Alabama is badly needed and is long overdue. Senator Myron Penn has a plan which would put a stop to control by the powerful special interests over the affairs of state government. I believe that he has tremendous support from ordinary folks for passage of his reform package. The fact that the special interests oppose it means that the Penn proposal is a good thing. Campaign finance reform is an issue that would have little chance of success in a crowded regular session. Limiting the call for a special session to one issue—and that being a total reform of Alabama's weak and ineffective campaign laws—would assure that legislators would have to take sides on this important issue. If you agree that people should be the beneficiaries of state government and instead of the special interests, call or write Governor Riley and ask him to call a special session in early November to address the issue of campaign finance reform. The Governor's mailing address is State Capitol; 600 Dexter Avenue; Montgomery, Alabama 36130 and his phone number is 334-242-7100. Let him know how you feel on this issue.

Lobbyists Still Run The Show

Lobbyists outnumber legislators at the State House in Alabama and that's not good news for ordinary folks in our state. There are 140 legislators and currently there are 564 registered lobbyists. Anybody who doubts the power exerted by this army of well-paid lobbyists should spend a few days around the State House during the next session of the legislature. Each lobby group has its own special agenda for the legislative sessions. Unfortunately, consumers don't have the political clout to overcome those odds. Maybe one of these days, that will change. For the good of our state I hope and pray that it will.

III. COURT WATCH

Alabama Bar Association Recommends That Judges Be Appointed

The Alabama Bar Association has recommended that appellate judges in Alabama be appointed rather than elected. This recommendation came after a careful study and is significant for a number of reasons. Alabama is one of only seven states to select all of its judges by partisan elections, according to a 2004 study by the American Judicature Society. The ABA leadership believes that gubernatorial appointments of judges would eliminate the partisanship that presently exists. Of course, it will take a constitutional amendment for the proposal to become law. The Legislature would first have to pass a bill authorizing the amendment. It would then go to a vote of the people. Amendments to the state constitution need approval by three-fifths of the members of each legislative chamber and majority support by state voters. The Governor doesn't have to sign or reject the bill. If passed, the change would take effect after the 2006 elections.

Bobby Segall, President of the Alabama Bar Association, worked with a number of lawyers to draft the amendment. A team of lawyers and business people has been organized to help convince lawmakers that changes are needed. Former Alabama Supreme Court Justice Gorman Houston, who now works with the Birmingham firm of Lightfoot, Franklin and White, will work on this project. President Segall made this statement relating to the Association's recommendation:

> *The key is that both people who are served by the judiciary—that's all of us—and lawyers need to believe that judges are objective. We do believe that they are objective. But having special elections where groups take sides and give money makes judges vulnerable to people questioning their objectivity, and that's not fair to them.*

Twenty-two judges serve on Alabama's three appellate courts, which consist of the Supreme Court and the separate courts of civil and criminal appeals. In its present form, the ABA proposal wouldn't affect the selection for Alabama's lower courts. Circuit and district court judges would remain subject to being selected by the voters. Those judges are closer to the people who elect them and that makes the system work much better. I don't believe we should change that process of selecting these judges.

I do have mixed emotions, however, about the appointment of appellate judges. I do know that the cost of elections in Alabama—including statewide judicial races—has gotten totally out-of-hand. As a result, something has to be done and soon to bring things under control. Perhaps, the ABA recommendation is the proper way to go. Clearly, the "big money" in judicial races is the real problem. Under Alabama's Canon's of Judicial Ethics, judicial candidates may not personally solicit campaign contributions. Instead, the candidates establish campaign committees to solicit and manage campaign funds. The American Judicature Society's study found that Alabama Supreme Court campaign expenditures increased by 776% between 1986 and 1996. Nobody can dispute that judicial campaigns are far too expensive. An additional problem exists and that's the spending by groups such as Citizens for a Sound Economy that spend "big bucks" in judicial elections. Those groups spend as much or

more than do the candidates themselves. There are no controls over the acceptance of funds or the spending of what these groups take in. No voter knows where the money comes from or how much is spent by these secretive groups.

Currently, judicial candidates have to run as either Republicans or Democrats to have a chance of being elected. It is most unfortunate that partisan elections cause the public to focus on candidates' "political affiliations," rather than their qualifications. It is also unfortunate that excessive spending gives the false impression that "justice" "is for sale" in Alabama. Under our current system, the result can be that persons who are totally unqualified may be elected to high judicial offices.

The first step in the ABA's proposal is to form a nine-member judicial nominating commission, including lawyers, nonlawyers, and one judge, to develop a list of three nominees to give to the governor. The governor would then select from the list. The governor's choice under the proposal would be final, because the plan doesn't call for legislative confirmation. When the judges appointed by the governor completed their respective terms, an 11-member evaluation commission, constructed sort of like the nominating commission, would assess their performance and make reports. These reports would be made available to the public. Sitting judges would then stand for an uncontested "retention election." Voters would decide whether they wanted each judge to continue serving. The plan was approved by the ABA's board of bar commissioners several months ago. It is most significant that the ABA is made up of all sorts of lawyers.

While I do have mixed emotions on the ABA proposal, I believe that it should be considered and fully debated. Personally, I favor the election of all judges, but only if strong campaign finance laws are enacted to protect the public. Nobody can justify the wild spending that presently takes place. We can all agree that the system needs some corrective action when it comes to the financing of judicial campaigns, and maybe the ABA proposal is the proper way to solve the problem.

Sources: *The Mobile Register* and *Associated Press*

Judge Approves Tenet Settlement

A state court judge in California has approved the proposed settlement between Tenet Healthcare Corporation and uninsured patients who received care at Tenet facilities nationwide. The suit was originally filed in 2002 and alleged that uninsured patients were charged an excessive "gross charge" at 114 hospitals owned and operated by Tenet Healthcare in 16 states. The suit claimed that Tenet took advantage of the uninsured and working poor who don't have the economic leverage to negotiate lower rates, while giving discounts to HMOs and large payers.

According to the terms of the settlement, Tenet will refund amounts paid in excess of certain pricing thresholds. The specific percentage of reimbursement varies depending on the year the patient was treated. Tenet Healthcare also agreed to offer uninsured patients the same rate that it offers its managed care clients, for a period of four years. The settlement class includes all uninsured patients who received medically necessary services at any of Tenet Healthcare's hospitals between June 15, 1999 and December 31, 2004, and paid for services based on the "gross charge." We had written on the settlement in more detail in the August issue.

Source: *The Insurance Journal*

Jury Awards $20 Million To Fired State Farm Agents

Five former State Farm Insurance agents have been awarded $20 million by a Kansas City, Missouri jury. The jurors found that the agents were improperly terminated for criticizing the way the company treated its policyholders. The agents, whose contracts were terminated in January 2000, were awarded $9 million in actual damages and $11 million in punitive damages. This case was about whether State Farm could terminate an agent in retaliation for speaking out publicly in an effort to protect policyholder interests. As you may know, State Farm's agents, who number about 17,000, are independent contractors. The employees had reported that State Farm was treating its policyholders badly. Specifically State Farm was said to have:

- overcharged for homeowner's insurance;
- engaged in sales discrimination;
- attempted to defraud accident victims of the full amount they were due; and
- specified the use of substandard replacement auto parts (an issue that prompted a class action lawsuit in Illinois in 1999 and a $1.18 billion verdict against the company).

It is most interesting that an insurance company would terminate an agent who simply wanted policyholders treated fairly and in an honest and forthright manner. Instead of firing, they should have been rewarded.

Source: *The Insurance Journal*

High-Low Agreements Don't Always Work Out

On a number of occasions, we have utilized a "tool" in our practice commonly called a "high-low agreement." Sometimes they work as planned and sometimes they don't. In a recent case a high-low agreement worked well—but unfortunately for the defendants. The jury awarded $164 million to a severely brain-damaged Florida man who was hit by a car while walking on a bridge where construction was underway. But, because of a high-low agreement entered into by the parties before the

verdict was returned, the defendants in the case will only have to pay $5 million. The victim and his family had agreed to the high-low settlement agreement, which guaranteed $5 million to the plaintiff regardless of the jury's verdict.

These agreements are fairly common, but can't happen in trials unless all parties agree to use them. Clearly, the Florida case is an example of where the prevailing party would have done much better by waiting for the jury's verdict. But, there may have been good reasons why the arrangement was agreed to by the plaintiff.

When an agreement of this sort is used, it normally works like this: the parties agree on a low number and a high number and agree that there will be no post-verdict motions or appeals by either party. For example, assume that the low number is $1 million, the high number is $5 million, and the jury returns a verdict for $6 million. Under that agreement, the defendant only pays $5 million, but that amount is guaranteed. If the jury returns a defense verdict or a verdict for less then $1 million, the defendant will have to pay $1 million. The jury is not made aware of the agreement and is never told that it was in place.

In the Florida case, the plaintiff was left in a coma for five months. He is now 96% disabled, is confined to a wheelchair, and has the mind of a 7-year-old. The suit for damages was filed on behalf of the plaintiff and his mother against the barricade company, the Florida Department of Transportation, and the Redland Co. (the Homestead-based general contractor on the road project). It was claimed that the companies should have erected warning signs for pedestrians and should have provided a pedestrian pathway on the bridge. Redland and the State settled last year for undisclosed amounts.

The jury awarded $1.4 million for past medical expenses, $13 million for future medical expenses, $4.2 million for 60 years of lost earnings, $5 million for past pain and suffering and $90 million for future pain and suffering. Jurors also awarded the mother $50 million. Jurors assigned 30% liability to Bob's Barricades, 25% of Delgado, 20% to FDOT, and 25% to Redland. A suit is still pending against Fortune Insurance Co., which represented the owner of the car driven by Delgado. The Miami woman who caused the accident pleaded guilty to reckless driving. Traces of cocaine and marijuana were found in her system, but the lab lost her urine sample. She only had to pay a $300 fine in the criminal case. Clearly, this appears to be a case where it would have been better for the plaintiff not to have agreed to a high-low agreement.

Appeals Court In Indiana Upholds $39 Million Judgment

The Indiana Court of Appeals has upheld the $39 million judgment against Outback Steakhouse Inc. in an Indiana couple's lawsuit alleging they were severely injured in a crash caused by a drunk driver who got drunk at a restaurant's grand opening. In June 2003, a circuit court jury found in favor of David and Lisa Markley, whose motorcycle was struck by a drunk driver on July 21, 1997. The couple alleged the motorist became intoxicated at an Outback Steakhouse in Muncie, Indiana. Witnesses testified that alcoholic beverages were served free of charge or for as little as a dime at the eatery's grand opening party.

Insurers Want Immunity From Lawsuits

Reportedly a coalition of insurance companies is attempting to gut consumer protections that would require them to refund potentially tens of millions of dollars to motorists and to stop violating state laws. Safeco Insurance Company filed an urgent petition with the California Court of Appeals in Los Angeles asking it to dismiss a citizen group lawsuit, now pending in Los Angeles Superior Court, that would apparently force the company to refund potentially millions of dollars in auto insurance surcharges alleged to be illegal. Another company, Farmers Insurance, has filed an identical petition. The two companies have asked the appellate court to rule that consumers have no right to sue when an insurance company overcharges them or violates other provisions of Insurance Reform Proposition 103.

In a response, the Foundation for Taxpayer and Consumer Rights (FTCR), which sued Safeco in 2002, has asked the Court of Appeal to immediately reject the insurance industry's latest assault. In its suit against Safeco, FTCR charges that the company surcharged motorists for the sole reason that they were previously uninsured. That would be illegal under Proposition 103, which, in order to reduce the number of uninsured motorists, forbids insurers from surcharging or refusing to insure motorists just because they previously did not have insurance. The suit also charges that Safeco failed to disclose its practices to the Insurance Commissioner—a separate violation of the California law. Similar suits are pending against several other insurers, including the Auto Club of Southern California, for similar surcharge violations, most of which occurred during the tenure of Insurance Commissioner Chuck Quackenbush. You may recall that Commissioner Quackenbush was forced to resign his post in 2000 amid reports that he abused his office to favor insurance companies in exchange for kickbacks.

The unusual appeals filed by Safeco and Farmers mark the third time in as many years that insurance companies have asked the Court of Appeal to judicially repeal a provision of Proposition 103, which allows "any person" to take an insurance company in California directly to court to challenge violations of its reforms. Last year, in two identical cases that drew amicus briefs from many insurance companies, two different judicial panels in the same Court of

Appeal issued separate decisions upholding the Proposition 103 authority and rejecting the arguments made by Mercury Insurance and State Farm in those cases. The insurance industry is now trying to get yet another judicial panel to come to a different decision.

Safeco's latest legal attack is reportedly but one aspect of the insurance industry's attempt to evade accountability for ripping off consumers. This is not the first time that the insurance industry has taken an aggressive stand. Insurance companies fought a rule, proposed by FTCR and issued by the Insurance Commissioner in 2001, ordering insurers not to engage in practices designed to circumvent the anti-surcharge law. Having lost before the Insurance Commissioner, Mercury Insurance Company one of the insurance companies that has been sued for surcharging the previously uninsured, launched a campaign to legalize such surcharges by repealing Proposition 103's ban. After making nearly $1 million in campaign donations to lawmakers, the Legislature passed the bill proposed by Mercury and Governor Gray Davis signed it into law. Mercury then claimed that the act was retroactive. But, the California State Constitution forbids legislators from tampering with voter-approved measures, and a Los Angeles Superior Court judge has invalidated the law. Mercury has appealed that decision, and that case is now before the Los Angeles Court of Appeal.

Source: *The Insurance Journal*

A Retail Giant Should Be Ashamed For What It Has Done

Some recent conduct by Wal-Mart is one of the best examples of what happens when a corporation allows greed to take over and serve as a motivation for its dealings with people. A recent article in the Post-Dispatch on August 15th tells one of the most shocking examples of corporate greed that I have ever seen. Wal-Mart went after a poor lady in a way that should shock even our most conservative readers. What Wal-Mart did can't be justified and the company should hang its corporate head in shame. I am reprinting this article in full for your edification. I believe that if you read this account, you will be shocked at what you learn.

Debbie Shank stocked shelves at a Wal-Mart store in Cape Girardeau, Mo., until five years ago, when her minivan was hit by a tractor-trailer. Her Wal-Mart health insurance paid the medical bills. Proceeds from a lawsuit helped finance her care in a nursing home. Brain damage forces her to use a wheelchair and limits her upper body movement to one arm and two fingers. It stole her memory and her ability to talk to her husband and three sons. "She'll ask about the boys, she'll ask about the cat," said her husband, Jim Shank. "Whenever I'm there, she thinks it must be a mealtime. We don't really hold a conversation."

Now the Shanks face a new obstacle. Her Wal-Mart health insurance plan wants the lawsuit money to repay its costs. Last week, the health plan sued Debbie Shank in federal court in St. Louis, demanding the full $417,000 she got in the civil suit—plus at least $51,000 more from the share that already went to lawyers and costs. A suit such as this is not uncommon, and is a way for self-financed health plans—employer and union-funded plans—to recoup medical expenses, say lawyers who handle health and insurance law. A Wal-Mart spokesman said the health plan has made no decision on whether to pursue this case; the suit puts a legal foot in the door before the deadline to file it passes. "This is kind of a standard procedure, and it just preserves our options," Marty Hires said.

It has the potential to hit Debbie Shank, 50, particularly hard. "I can't believe that they've done this," said Maurice Graham, one of her lawyers. "The cost to care for her in the future is going to be literally millions," Graham said. "She is confined to a nursing home, has a normal life expectancy and requires full-time care." Shank and her husband sued G.E.M. Transportation Inc. and Texas truck driver James David Shivers in federal court in September 2000 after Shank was hit by the tractor-trailer while making a U-turn on Highway 177 near Cape Girardeau, according to the original lawsuit. Shank suffered injuries to her brain stem and other body parts and was in a coma after the accident, the suit says. The Shanks settled in August 2002 for $900,000. After attorneys' fees and expenses, an irrevocable trust set up for Debbie Shank got $417,477 and her husband got $119,280, according to court documents.

Jim Shank, 52, who does maintenance and risk management work at Southeast Missouri State University and also is a real estate agent, is not named in the health plan's lawsuit. Lawyers familiar with employment law said that while state law generally bars a health insurance company from trying to get a piece of a settlement, self-funded health plans are allowed under federal law to recover their costs. In this case, Shank's total medical expenses exceed $469,216, the suit says. Wal-Mart's health plan explicitly states that it gets reimbursed first out of any settlement or judgment, up to 100% of the total amount of the medical expenses, according to the lawsuit filed by the Administrative Committee of the Wal-Mart Stores Inc. Associates' Health and Welfare Plan. The plan also explicitly states

that, "All attorney's fees and court costs are the responsibility of the participant, not the plan," the suit says. For Shank, that would mean coming up with at least $51,000 more than she received.

The suit also seeks attorneys' fees, costs and interest for the expense of suing Shank to recover the money. Graham said the settlement money was placed in a trust created by the federal court, "so this money never came into the hands of Debbie Shank or her husband ... and is only to be used for her support." Only a portion of the settlement was for medical bills, Graham said. The health plan's suit says it was never notified of the settlement or the creation of the trust, and Shank and her lawyers were repeatedly told that the health plan expected "100% repayment." An attorney for the plan, Christopher Hedican, said he was "not authorized" to talk about the case. Wal-Mart spokesman Hires would not comment further, citing federal health privacy law and the lack of a final decision about whether to pursue the case. St. Louis lawyer Sheldon Weinhaus, who has handled similar suits, said it is not unusual for employer-sponsored health plans to try to recover money from lawsuits. "Wal-Mart has certainly been one of the more aggressive and assertive in doing this," he added. He said courts are becoming more critical of suits filed by health plans. "They recognize the unfairness of this, and they're looking for reasons to stop Wal-Mart and others from doing this ... in my opinion," he said.

Jim Singer, who battled Weinhaus on a case involving a union-funded health plan, disagreed about a change of attitudes in the court system. "I don't know that that's true. I haven't seen that." Singer said that using lawsuits prevents cuts in benefits or increases in worker contributions to the plan. "You need to put the money back in the trust so it will be available for other people," he said. Jim Shank said his wife bounced from job to job until she found the night shift stocking shelves at Wal-Mart, which allowed her to be home for her sons during the day—to be a better mother, he said. "It's all she ever wanted to be," he said. Now, although she knows her middle son is in the Army, she doesn't know that the 17-year-old is scheduled to head to Iraq next year, or even that there is a war. Jim Shank has dreaded something like this since he got a letter two weeks after the accident, while his wife was still in intensive care, "clinging to life." He recalls the letter saying he had to sign over any right to lawsuit proceeds or the health plan would not pay for his wife's care. He said that if the Wal-Mart health plan pursues the case, and wins, his wife would likely lose the caretaker who "stays with her and works with her and helps her and tries to keep her in good spirits," he said. And they might have to sell the van they bought to accommodate her wheelchair. He also said that a lawyer who specializes in elder law said several years ago that if the money runs out, he might have to divorce his wife to make her eligible for Medicaid. Their 30th anniversary is in October.

Sources: *The Post-Dispatch*

We Are Getting A Distorted View Of The Legal System

The reporting of jury verdicts by the news media can sometimes give a distorted view of what is actually happening in our courts. The media reports it when a large verdict is returned against a corporation that has committed a terrible wrong. Usually, it is the size of the verdict that gets the headline, instead of the defendant's extreme wrongdoing. Many people—including potential jurors—have been led to believe that juries are out of control and are returning excessive verdicts on a regular basis. While that is the view held by many, it simply isn't true. The real large verdicts are actually the exception rather than the rule. Legal experts and media observers say media coverage gives a distorted picture of the civil justice system, while lending credence to fears of irrational jury awards.

The popular view that there are more lawsuits and larger damage awards than ever before is not supported by the well-documented evidence. A 35-state survey by the National Center for State Courts found that the number of tort filings declined 4% from 1993 through 2002 despite population growth. In the nation's 75 largest counties, the median award to victorious plaintiffs was $37,000 in 2001—much less than the inflation-adjusted median of $63,000 in 1992, according to the Bureau of Justice Statistics, a branch of the U.S. Department of Justice. The following information developed and reported by the *Los Angeles Times* pretty well tells the story.

- A 1999 survey by Rand Corp.'s Institute for Civil Justice found auto liability cases were 12 times more likely to draw news coverage when plaintiffs won than when defendants did, a difference the study called "very stark." In its review of 351 trials conducted during the 1980s and '90s, the institute found that 38 of 92 plaintiff verdicts, or 41%, were featured in news reports, versus 9 of 259 verdicts for the defense — or about 3%.

  A plaintiff win "is perceived to be more newsworthy than a headline that says 'jury rejects arguments that a product is unsafe,' " said Theodore Boutros Jr. of law firm Gibson, Dunn

& Crutcher, who has represented Ford Motor Co., Wal-Mart Stores Inc. and various news organizations, including The Times.

Reflecting the pattern was news coverage of a June 2004 verdict in which a San Diego jury ordered Ford to pay $367 million to Benetta Buell-Wilson, who was paralyzed when her Explorer SUV rolled over and its roof collapsed. Ford previously had won a dozen similar Explorer cases but the media hardly batted an eye. Ford's victories received a smattering of coverage, mainly in business and legal publications, whereas the Buell-Wilson verdict was widely reported by the mainstream news media.

- A 1995 article in the Hofstra Law Review showed that personal injury verdicts reported in the New York Times and Newsday were dramatically higher than typical awards in the New York courts. According to the survey, awards covered by the New York-based papers over a five-year period were 13 times and 9 times higher than average, respectively.

- A 1996 survey of leading magazines such as Time, Newsweek and Fortune showed that plaintiff verdicts were "considerably overrepresented" in reports on civil litigation. The examination of 249 articles by Daniel S. Bailis and UC Berkeley's MacCoun found that plaintiffs were victorious in 85% of cases cited in the articles, compared with a real-world average of no more than 50%. Damage awards cited in the articles were also several times above the norm, leaving "little doubt that the selective reporting practices…provide a tremendously distorted picture of the jury award distribution," the study said.

A review of some recent high-profile cases by The Times showed newspapers that extensively covered huge damage verdicts seemed to lose interest when the awards were slashed or overturned. The review involved a computer database survey of articles about the cases and follow-up queries to newspaper librarians.

One such story was the $5 billion punitive damage award in the Exxon Valdez oil spill case. At the time of the verdict in September 1994, front-page reports appeared in such major dailies as *The Times, New York Times, Chicago Tribune, Philadelphia Inquirer, San Francisco Chronicle, Houston Chronicle, Detroit Free Press, Dallas Morning News, Seattle Times* and *St. Petersburg Times*.

When a federal appeals court overturned the award in November 2001, three of the 10 papers reported it on the front page.

When a Los Angeles jury in July 1999 ordered General Motors to pay a then-record $4.9 billion in compensatory and punitive damages to six people burned when the gas tank of their Chevrolet Malibu exploded after a rear-end collision, the story made the front page of leading U.S. papers — including the *Washington Post, Chicago Tribune, Chicago Sun Times, Boston Globe, Philadelphia Inquirer, Detroit Free Press, San Francisco Chronicle, Ft. Worth Star Telegram, San Jose Mercury News* and *The Times*.

Coverage was sparser a few weeks later when the trial judge trimmed the punitive damages to a still-huge $1.2 billion. Two of the 10 papers ran the story on the front page.

Then in July 2003, while the case was on appeal, it was settled for an undisclosed sum. Brief items appeared in four of the papers, while no mention could be found in the other six.

When a Florida jury socked top cigarette makers with a $144.8 billion punitive damage award, it was the lead story for many print and broadcast outlets. Front-page reports on the July 2000, verdict appeared in *The Times, New York Times, Washington Post, Chicago Tribune, Boston Globe, Miami Herald, Dallas Morning News, San Francisco Chronicle, Houston Chronicle* and *Indianapolis Star*, among others.

When a Florida appeals court overturned the award in May 2003, two of the 10 papers ran front-page reports.

Other cases reviewed by The Times showed a similar pattern.

"Journalists, by and large, are not as good as they should be in keeping up with what happens after a large verdict—even though they know full well from experience that the verdict will most likely be cut dramatically," said Tom Goldstein, a professor of journalism and mass communications at UC Berkeley. "There surely is less of an attention span than there should be."

I can't blame the media for reporting jury verdicts. I only wish they would report all of the news. If that were to happen, I believe folks would realize the court system isn't out of control.

Source: *Los Angeles Times*

Judge Lets SEC File New Suit Over HealthSouth Fraud

U.S. District Judge Inge Johnson has ruled that the Securities and Exchange Commission can proceed with its lawsuit against Richard Scrushy. Under the ruling, the government will be allowed to revise its complaint. The judge gave the SEC until the 7th of this month to file an amended suit against Scrushy and proceed with its case. Thus far many folks consider Scrushy to be the "luckiest man" on this planet. The fired HealthSouth chief executive is denying any wrongdoing in the case. But, his "luck" may soon run out. In this case, the SEC is seeking $785 million in civil fines and restitution to shareholders plus interest from Scrushy. As previously reported, HealthSouth agreed to pay $100 million to settle its portion of

the suit, originally filed in March 2003. It will be interesting to see how this case develops.

Illinois Supreme Court Reverses $1.06 Billion State Farm Auto Repair Parts Case

The Illinois Supreme Court has reversed the $1.06 billion judgment in a class action lawsuit against State Farm Insurance Company over the use of so-called aftermarket auto parts for repairs. The high court decision, overturning the lower court ruling, held that the national class was improperly certified in 48 states. The court threw out all of the monetary damages awarded by lower courts and ruled that the use of aftermarket auto parts did not breach the insurance company's contract with its policyholders. The nationwide class action lawsuit was originally filed in Illinois state court during 1998 on behalf of all automobile insurance policyholders. The class members were from Illinois and nearly every other state. The complaint involved insurer use of generic auto collision repair parts, which are also known as "aftermarket" or "non-OEM" (original equipment manufacturer) parts.

The lower court had awarded a total of $1.18 billion in damages broken down as follows: $456 million for breach of contract; $600 million for punitive damages under the consumer fraud law; and $130 million for disgorgement damages, representing direct savings realized by State Farm from use of non-OEM parts. An intermediate appellate court later reversed the award of disgorgement damages, but upheld the rest. This left a total judgment of $1.06 billion. The class claims were based on the allegation that the insurers specified non-OEM parts in preparing estimates for repairs, even though other states in which the insurers issued auto policies permitted or even required the use of non-OEM parts. This was a tremendous victory for State Farm.

Source: *The Insurance Journal*

U.S. Judge Sends Blackwater Suit To State Court

A federal judge has ruled that a North Carolina state court should hear a wrongful death lawsuit against a security firm doing business in Iraq. The North Carolina-based firm was allegedly responsible for the death of four guards in Iraq. The guards were employed under contract with Blackwater Security Consulting. Under North Carolina law, financial compensation is allowed in wrongful death lawsuits. The killings in March 2004 made worldwide headlines. Frenzied crowds dragged the men's charred bodies through the streets of Fallujah and strung two of them up from a bridge. Subsequently, the guards' families sued the company in a North Carolina state court, alleging Blackwater cut corners that led to the men's deaths. The suit said the workers were sent into Fallujah without proper equipment and personnel to defend the supply convoy they were guarding. The company tried to have the case heard in federal court.

Blackwater argued the federal courts had jurisdiction because of the Defense Base Act, a federal law limiting death benefits for contractors working overseas. The company's lawyers also argued that there was a "unique federal interest" in deciding the remedies available to contract workers in war zones. In the ruling, the U.S. District Judge declined to keep the lawsuit in federal court, and sent it back to state court. The judge did agreed that the case raised "novel and complex" issues. This case is important because a number of civilian contractors have been killed or seriously wounded in Iraq under like circumstances.

Source: *Associated Press*

IV. THE NATIONAL SCENE

The Approval Of The New SEC Boss Could Mean Disaster For Investors

The Senate's approval of Christopher Cox to chair the Securities and Exchange Commission hasn't been received well by consumer advocates. In my opinion, investors across the country have a legitimate right to be concerned. The approval of Cox is a clear signal to Big Business that fighting corporate fraud is not a priority of the Bush Administration. Despite claims by Cox that he would vigorously enforce U.S. securities laws and the Sarbanes-Oxley Act (passed in the wake of widespread corporate accounting fraud), the former congressman's record of protecting corporate interests over investors is clear as a bell. During his more than 16 years as a member of the U.S. House of Representatives, Cox led the charge to make it more difficult for investors to seek redress for fraud.

Cox has consistently sided with Big Business over investors during votes on investor protection legislation such as Sarbanes-Oxley and the Private Securities Litigation Reform Act. On major legislation addressing corporate and accounting reform, investor legal rights, and protection of retirement investments, the new chairman cast only one vote out of 22 in support of investors. Despite having seven chances, Cox failed to cast a single pro-investor vote on retirement investment protection bills that moved through the U.S. House of Representatives. Cox was sill favoring Big Business in the aftermath of the corporate scandals starting with the Enron debacle. This came after employees of a number of companies, including Enron, saw their retirement savings wiped out. The following are a few of Cox's anti-investor votes:

• He voted to ease conflict-of-interest

standards for financial advisors;

- he voted against giving employees a seat on the board of directors of their retirement plans; and,
- he voted against allowing employees to freely sell company stock held in their retirement plans.

The SEC was created to represent the interests of investors, not the interests of the large corporations the agency oversees. Even after the revelations of widespread corporate fraud, Cox continued to vote against investor interests. I agree with Joan Claybrook, President of Public Citizen, that Cox's record should disqualify him from serving as the boss at the SEC.

Source: Public Citizen

CIBC Agrees to Settle Enron Suit

Canadian Imperial Bank of Commerce has agreed to pay Enron Corp. $274 million to settle CIBC's portion of a lawsuit filed by Enron against 10 financial institutions. Under the settlement, the Toronto bank will pay Enron $250 million and will forgo $42 million of claims against the Enron bankruptcy estate. CIBC will pay Enron an additional $24 million to permit third parties to collect distributions related to $81 million in creditor claims transferred by CIBC to the third parties. The settlement follows CIBC's earlier agreement to pay $2.4 billion to settle class action claims by investors who lost money in Enron. You will recall that Enron sought bankruptcy law protection from creditors in late 2001.

CIBC is the third bank to settle its portion of the Enron lawsuit, which includes claims that the banks aided and abetted breaches of fiduciary duties and aided and abetted fraud. Royal Bank of Scotland and Royal Bank of Canada had settled with Enron earlier. The CIBC agreement, which resolves all issues between Enron and CIBC, remains subject to approval by the U.S. Bankruptcy Court for the Southern District of New York.

Source: *Wall Street Journal*

The GOP Sues An Insurance Company

I almost fell out of my chair when I learned that the Republican Party in Virginia had filed a lawsuit against Union Insurance Co. seeking nearly $1 million in damages. It appears that the insurance company had refused to cover the GOP when Democrats in Virginia sued the party over partisan eavesdropping. Interestingly, the insurance company says this is a "frivolous lawsuit." The insurance company has now asked the U.S. District Court in Richmond to dismiss the Republican Party's lawsuit and order the party to pay the insurer's costs and lawyers' fees.

The original lawsuit was filed by Democrats and involved charges of illegal political espionage by the GOP. That activity resulted in criminal convictions against the state GOP's two former top officers. Using a phone number and pass code a former state Democratic Party staffer provided him, the executive director of the GOP secretly monitored two private conference calls in late March 2002 between Democratic legislators and, for a time, Governor Mark R. Warner. It was alleged that the state GOP chairman also listened to a portion of one of the calls. The Democrats had been discussing a legal challenge to the 2001 Republican-drawn reapportionment plan. Each of the two GOP officials pleaded guilty to a single count in federal court in the scandal. Apparently, the scandal has badly damaged the GOP in Virginia.

The Democrats sued the Republicans in federal court on March 19, 2004, alleging their privacy rights had been violated. Exactly two weeks later, the insurance company told the GOP officials that its policy did not cover the misdeeds alleged in the Democrats' suit and denied the party's claim. In December, the GOP paid a $750,000 settlement to the Democrats. Now the GOP—even with its record of tort reform—has filed a million dollar lawsuit. I guess the party leaders believe that the courts should remain open for business—but only when they are the victims.

Judge Throws Out JetBlue Passenger List Suit

There has been a great deal of attention to privacy rights of individuals. Most folks believe those rights are important and should be protected. Of course, there are limits and some exceptions because of the threats of terrorist activities in the U.S. A federal judge has ruled that JetBlue Airways Corp. violated customers' privacy by turning over passenger lists to the government but the affected people are not entitled to damages. The class action lawsuit was dismissed. U.S. District Court Judge Carol Bagley Amon in New York City found that JetBlue had violated its agreement not to share passenger data by sharing the information at the request of the Transportation Security Administration. But, Judge Amon said the passengers could not prove damages. In her order Judge Amon also rejected a claim that JetBlue unjustly enriched itself.

New York-based JetBlue had given the information to Torch Concepts of Huntsville, Alabama, a Department of Defense subcontractor. Torch Concepts was a co-defendant in the suit, along with Little Rock-based data broker Acxiom Corp. and SRS Technologies of Newport Beach, California, the main DOD contractor in the case. The plaintiffs sued after learning that in July 2002, TSA sent JetBlue a written request asking that it supply passenger data for a database being compiled by Department of Defense contractors.

The following September, JetBlue delivered some 5 million passenger name records to Torch Concepts. A passenger name record includes addresses, telephone numbers, and itineraries. The following month, Torch Concepts

bought additional data from Acxiom, one of the nation's largest consumer data brokers. Torch Concepts sought the information from JetBlue and Acxiom in an effort to identify people who might be a **risk** to military installations. A most interesting database was built by Torch Concepts. This information included details on whether JetBlue passengers owned or rented their home, how long they had lived at that residence, the number of immediate family members, Social Security numbers, and whether they owned or leased their car.

Government interest in passenger list data grew after the terror attacks on September 11th. When airlines turned over passenger lists for government research, a number of class action lawsuits were filed. Federal law prohibits the government from keeping a secret database. The Department of Homeland Security has questioned whether it broke the law by failing to disclose its past use of commercial databases in its passenger screening program. In my opinion, there will be a great deal of litigation over the improper use of information that should be deemed private.

The Bush Economic Policies Are Hard To Understand

I have never really understood the Bush Administration's economic policies. Their stand on such things as the out-sourcing of jobs and foreign trade are prime examples of why the politicians seem out-of-touch with reality. We now learn that the U.S. trade deficit had grown to $58.8 billion in June, which was a dramatic jump from the $55.3 billion reported in May. Import prices jumped 1.1% in July on high oil prices. Excluding oil, import prices fell 0.1% less during the month of July. Export prices rose 0.1%. I must admit that I still have difficulty in understanding the Bush economic policies. Sometimes I wonder whether anybody with a grain of common sense is involved in some of the decision-making. I would like for somebody to explain to me how a trade deficit of $58.8 billion is good for our nation's economy. I suspect working men and women would probably like to hear that explanation.

In addition to our trade problems, the Bush Administration is currently running a budget deficit of $331 billion. The interest paid on our national debt is staggering and can't be considered good economic policy in my opinion. While some are saying the economy is "booming," I really can't see it. The high gas prices being paid at the pump have to be causing big problems for future growth. Ordinary citizens are already hurting and the greed of the oil companies is making matters worse for them. While the President is explaining his economic policies, he might just tell us what his Administration is doing about the gas prices.

Recommended Reading

William Britain-Catlin has written an unusual book about "Corporate Crime." The book—*Offshore: The Dark Side of the Global Economy* (FSG, 2005),—deals with offshore tax havens, with a strong focus on the Cayman Islands. In the book, we are told that a third of the world's wealth is held "offshore," that 80% of international banking transactions take place "offshore," and that half of the capital of the world's stock exchanges is parked "offshore" at some point in time. We are also told that multinational corporations are increasingly creating their own offshore economies across the world—separate, hidden and virtually detached from national economies—with enough combined financial power to match the very biggest nations/states. Interestingly, we learn that ExxonMobil alone has eight holding companies in the Bahamas and the Caymans. This appears to be a common practice for many large U.S. corporations.

While I recommend that you read this book, I also urge you to check out the author and his sources of information. Obviously, the author, who has a background of dealing in the offshore industry, did a great deal of homework. In any event, the book is good reading and at the very least it will get your attention and make you think.

Congress Should Reform Farm Subsidies

I believe that Congress should reform the current farm subsidy programs. In my opinion a substantial reduction in farm subsidies is long overdue. Our national politicians would do well to consider an independent watchdog group's new study on subsidies. The study, which looked at the subsidies received by California growers, reveals that some of the state's **largest farms** receive billion of subsidy dollars each year by "double dipping." According to the study, conducted by the Environmental Working Group, more than one-fifth of the California farms surveyed collected water subsidies worth $122 million and crop subsidies worth another $122 million in 2002, the last year in which both figures are available. Some dairy farmers "triple dipped," according to the study—receiving "subsidized water" to grow "subsidized corn" to feed cows that produce "subsidized dairy products." Bill Walker, vice-president of the study group's West Coast office, stated: "What was intended to be a support program for small family farmers has turned out to be a corporate welfare program for big agribusiness operations."

None of this should come as a big surprise to members of Congress. A wealth of research exists showing that most subsidy dollars are paid to the biggest and richest agricultural interests. Actually, some of the wealthiest members of Congress have received subsidies from farm programs they voted for. An Associated Press review of Agriculture Department records for 2000 found that:

- Almost two-thirds of the $27 billion in

farm subsidies offered that year went to just 10% of the nation's farmers. Of the 1.6 million farm aid recipients nationwide in 2000, the average recipient got about $16,000. Some 57,500 aid recipients got more than $100,000, and around 150 recipients got more than $1 million.

- At least 20 Fortune 500 companies were among the top recipients.

All of this results, in part, because of rules that base subsidy payments on farm acreage, rather than financial need. Loopholes that allow some of the biggest growers to collect several times the maximum annual subsidy, while cutting all farm payments by 5%, should be eliminated. The small, struggling growers that these subsidies are supposed to target are not the "farmers" who are reaping the benefits of the subsidiary programs. A reform of what has become a hugely wasteful program is clearly needed. We need to protect family farms and help them survive. If there is to be a subsidy program, those folks should be the beneficiaries.

MADD Needs Help

Glynn Birch, whose son, Courtney, was killed by a drunk driver, is the new president of Mothers Against Drunk Drivers (MADD). He is starting a three-year term as president. Courtney was killed when a drunk driver with a blood alcohol level of .26 ran over him at 70 mph in a residential area. The drunk driver had a revoked license and three prior DUI convictions at the time. An ice cream truck was in the neighborhood and a number of children were out to meet it when this tragedy occurred.

MADD needs help at this time to keep a most valuable program going. MADD's Victim's Services Program is in real trouble. Most of MADD's services for victim are funded by Victim of Crimes Act (VOCA) funding. This is federal money paid by offenders of all crimes, and it is used to help support services for victims of those crimes. Unfortunately, the Bush Administration's budget eliminates funding for VOCA. MADD's Victim's Services Program provides the following services:

- They provide emotional support and guidance for the families of victims.
- They work with victims to guide them through the confusing and often frustrating legal process, which can on occasion be somewhat frustrating to victims of crime.
- They cooperate with prosecutors and law enforcement to make sure victims' families receive all of the benefits available to them.

I hope that you agree that MADD does great work in a number of areas. We must do everything possible to eliminate the hazards caused by drunk drivers on our highways. This means somebody has to work with Congress, state legislators, and in the court system. MADD has done all of this. I hope that you will now do the following:

- Contact President Bush and ask him to restore the funding to VOCA.
- Contact your U.S. Senators and members of Congress and ask them to help restore the funding for VOCA.
- Send a personal check to MADD at P.O. Box 10165, De Moines, Iowa 50340-0165 in whatever amount you can afford.

A Good Reason To Help MADD

While this is primarily for our Alabama readers, I suspect the message applies to some degree for all of our readers. While drunken driving deaths declined in 32 states last year, the numbers actually rose in Alabama. Federal traffic safety officials say there were 341 such deaths in Alabama two years ago and 367 last year. That's an 8% increase and certainly not good news. The National Highway Traffic Safety Administration says there was a 2% decrease in fatal crashes in 2004 involving at least a driver or a motorcycle rider with an illegal blood-alcohol level of .08% or higher. The deaths in Alabama are way too high and we must do everything possible to bring these numbers down. In addition to letting our political leaders know we expect something to be done, helping MADD is another way you can assist in getting drunk drivers off the road.

Source: *Associated Press*

Drug Makers Spend Millions To Influence California Vote

The pharmaceutical industry has spent $72 million to try to defeat a California ballot initiative to extend drug discounts to more uninsured people. The vote on the measures could influence other states' efforts to reduce drug costs for uninsured residents. The drug industry will spend whatever it takes to win this battle in the November 8th special election.

Pfizer, GlaxoSmithKline, Merck, and Johnson & Johnson have each given almost $10 million to the cause, state records show. Proposition 79 would pressure drug makers to discount drugs for an estimated 10 million Californians who make less than $38,000 a year if single or less than $77,000 if a family of four. Under the proposal, if drug makers don't provide those discounts, California could discourage use of their drugs in the state's $4-billion-a-year Medicaid program for low-income residents.

Proposition 79 would allow "any person" to sue drug makers for charging "unconscionable" prices. That seems to be a good thing. Drug companies are making record profits and are increasing prices on a regular basis. Anthony Wright, head of consumer group Health Access California, which proposed Proposition 79, told the *USA Today* that the industry is trying to scare voters. He stated further: "The amount of money

they've raised is an admission that our proposal is popular and workable."

Source: *USA Today*

V. THE CORPORATE WORLD

The Courtrooms Are Full Of Corporate Fraud Cases

Anybody who doesn't realize that corporate crime has become a most serious problem in the United States has been on another planet for the past three years. During that time there have been literally hundreds of corporate fraud cases pursued around the country. The 2001 collapse of Enron Corp. brought a new emphasis on corporate wrongdoing. Because of the volume, it has actually been most difficult to keep up with all of the individual cases. Only those involving high level individuals as defendants got the media's attention once the cases were filed. Unfortunately, most of the cases flew under the radar and were not known to very many people.

A recent report from the FBI revealed 405 corporate fraud cases now being pursued across the country. This is double the number of cases pending at the end of 2003, which should be extremely alarming. The report said another three to six cases are added to the list each month. The Justice Department created a federal Corporate Fraud Task Force about three years ago. Since that time the Justice Department has netted about 700 convictions or guilty pleas through December of last year. Thus far about 1,300 defendants have been charged. It is most unfortunate that corporate fraud is so common today that much of what's going on goes largely unreported. The big scandals get all of the "ink," and that means the public doesn't really know just how bad things really are. According to the Justice Department, corporate fraud prosecutions will continue. I believe we can all agree that Corporate America must be cleaned up for the good of our country and the well-being of all citizens.

Source: *Associated Press*

Wal-Mart Sues Its Former Vice Chairman

Wal-Mart Stores Inc. has filed a civil lawsuit against former Vice-Chairman Thomas Coughlin alleging fraud. The retail giant says that Coughlin misappropriated as much as $500,000 through bogus expenses and the unauthorized use of company gift cards. The suit, filed in Benton County Circuit Court in Arkansas, seeks reimbursement of the money Coughlin allegedly misappropriated from the company, plus about $6.5 million the company paid him in bonuses in the approximately seven years during which the fraud was to have occurred. The company previously rescinded Mr. Coughlin's retirement agreement, which included about $14 million in forfeited restricted stock and salary. Mr. Coughlin retired in January as the company's number two executive and was forced to resign from the board in March. The high-profile case is being investigated by the U.S. attorney for the Western District of Arkansas.

In a related development, Jared Bowen, a former **Wal-Mart Stores** Inc. vice-president fired in April for alleged involvement in the expense account scandal, has sued the retailer for defamation. Wal-Mart fired Bowen for allegedly approving bogus expense reports filed by Coughlin and others in his department. Mr. Bowen filed a complaint in May under the Sarbanes-Oxley Act with the U.S. Department of Labor, arguing that Wal-Mart retaliated against him as a whistleblower who notified superiors of Coughlin's wrongdoing.

Source: *The Wall Street Journal*

Healthsouth Settles Class Action Over Retirement Fund Losses

HealthSouth Corporation and its insurers have agreed to pay $25 million to settle lawsuits brought by employees over losses in their company retirement fund. The agreement provides that HealthSouth, the largest U.S. provider of rehabilitation medicine services, would pay $7 million and the company's insurers would pay $18 million to workers. But, a judge must still approve the settlement.

The class action was filed against HealthSouth and former executives, including former CEO Richard Scrushy, over losses in the company's retirement plan caused by declining prices for its shares. HealthSouth's stock plummeted in value after the Securities and Exchange Commission (SEC) filed suit in March 2003 alleging a massive accounting fraud. HealthSouth agreed in June 2005 to pay $100 million to settle the SEC suit alleging that the company committed accounting fraud under the company's former chief executive, Richard Scrushy. The settlement for employee retirement losses does not cover Scrushy and other executives named in the lawsuit. Since Scrushy was acquitted of the $2.7 billion accounting fraud that began in 1996 and lasted until 2002, his problems are now in civil courts. It isn't unusual for the civil jury system to have to do work when the criminal courts don't rectify the problem.

Questionable Payments By Electronic Data Systems Being Investigated

The Securities and Exchange Commission (SEC) is looking into some problems at Electronic Data Systems Corp. (EDS). The company disclosed last month that the SEC is investigating allegations that a former employee made what the company called "questionable payments" in India. The systems-consulting company, which is based in Texas, said in a quarterly report filed with the SEC that it "self-reported to the SEC staff and other relevant governmental authorities." The payments were first

reported to the SEC in early 2004, but weren't publicly disclosed until the August announcement. The belated disclosure follows a recent SEC request for documents. The SEC is currently conducting formal investigations of several other matters, including EDS's disclosure to investors prior to a 2002 earnings warning and contract terms involving a U.S. Navy computer modernization pact.

Source: *The Wall Street Journal*

Lucent Still Under The Gun

At one time Lucent Technologies Inc. was a high-flying operator and its shares were trading at an excessively high level. Things have changed for the company and the changes haven't been good for its shareholders or employees. To make matters worse, Lucent has now been subpoenaed in a federal investigation. The first subpoena involves the E-Rate program. The telecommunications equipment maker disclosed in a regular filing with the Securities and Exchange Commission that the Justice Department has requested documents relating to the federal program to bring schools and libraries into the digital age. The Justice Department is investigating potential antitrust violations, among other things. The E-Rate program was set up by Congress in 1996 and included huge subsidies. The government had requested information from a number of other companies on the matter in the past, including SBC Communications Inc. and International Business Machines Corp. On the second matter, the Office of Inspector General requested information from Lucent on certain sales to the government of telecom equipment, as well as maintenance services. Lucent has had its share of problems and it appears the problems aren't over.

Source: *The Wall Street Journal*

U.S. Probes Allegations Of Bribery At DaimlerChrysler

The Justice Department is pursuing a criminal investigation of allegations that DaimlerChrysler AG's Mercedes unit paid bribes in at least a dozen countries and that senior executives may have been aware of the practice. The investigation is an escalation of a civil inquiry by the Securities and Exchange Commission that was disclosed late last year. All of this came about as a result of a whistleblower complaint. A former Chrysler accountant in Detroit had claimed in a lawsuit that the company kept dozens of secret bank accounts to bribe foreign officials. DaimlerChrysler operations in Latin America and Africa are among those under scrutiny, according to the Wall Street Journal. In financial disclosures on July 28th, DaimlerChrysler reported it has identified "accounts, transactions and related payments that are subject to special scrutiny." If those include bribery in foreign countries, it is a most serious matter.

Historically, there has been recurring tension between the U.S. and foreign companies over enforcement of United States anti-corruption laws. Foreign bribes by companies or individuals were outlawed by the 1977 Foreign Corrupt Practices Act. In recent years, the U.S. has pushed other countries to adopt similar laws. According to the *Wall Street Journal*, bribery remains common in parts of Africa and Latin America, and in many oil-producing nations. Bribery is illegal across the European Union. But, before passage of the Organization for Economic Cooperation and Development Anti-Bribery Convention in 1997, several European governments, including Germany's, openly allowed tax deductions for bribery overseas. This is according to Transparency International, a Berlin-based nonprofit group dedicated to fighting corruption. Germany's parliament ratified the convention in 1999.

Based on what we have learned from handling cases against some in Corporate America, it is evident that in recent years, the United States has stepped up enforcement of its antibribery law. This was verified in the *Wall Street Journal* article, where it was stated that a growing number of companies have been disclosing possible foreign bribery in the wake of the 2002 Sarbanes-Oxley corporate-accountability law. As mentioned above, the DaimlerChrysler inquiry stems from a wrongful dismissal lawsuit filed in U.S. District Court in Detroit last year, which was settled last month. DaimlerBenz AG and Chrysler Corp. merged in 1998 and the company is now subject to U.S. bribery law because its shares are listed on the New York Stock Exchange.

Source: *Wall Street Journal*

Artemis Hit With Punitive Damage Verdict

It seems like the Executive Life Insurance Company litigation has been going on for an eternity. Recently, a federal court jury in Los Angeles returned a $700 million punitive damage award against Artemis SA. The trial involved Artemis' participation in a conspiracy to commit fraud relating to Executive Life Insurance Co. We reported on the scandal involving Executive Life Insurance Co. in the June issue. The jury found by clear and convincing evidence that Artemis SA was guilty of fraud, oppression or malice against the Executive Life estate. John Garamendi, California Insurance Commissioner, had this to say about the jury's verdict:

> *We have said all along that wrongdoers should not profit from fraud. Today the jury agreed with us by ordering Artemis to pay $700 million in punitive damages to ELIC policyholders, validating our longstanding claims against the French consortium that defrauded the state and the policyholders of the former Executive Life Insurance Company. This award of $700 million will be a*

great help to policyholders as they attempt to recover from the financial damage caused by this fraud. I thank the jury for its decision.

Previously, the California Department of Insurance had received $715 million in settlements paid by other members of the conspiracy. The conspirators included Aurora, Credit Lyonnais, and CDR Enterprises. This has been a long fight, and I hope policy holders of Executive Life will come out of this in reasonably good shape.

Harvard Employees Get Caught

When greed takes over, you never know who all it affects or who will get caught with their "hand in the cookie jar." Harvard University, an economics professor at the university, and a former Harvard employee will pay $31 million to resolve federal charges that they fraudulently billed the U.S. Agency for International Development (USAID). The employee was fired after an internal investigation, but interestingly the professor continues to teach at the prestigious university. The two individuals were paid under a USAID grant to lead a project to provide advice to Russia on privatization following the fall of communism.

The two individuals allegedly used their positions and influence over Russian officials to advance their own and their spouse's private financial interests. Under the terms of the settlement, Harvard University will pay $26.5 million and the two individuals will pay the balance. A company owned by the professor's wife paid an additional $1.5 million to settle the charges against it. Both the individual defendants were debarred by USAID. Who would have ever believed that Harvard University would be settling a "fraud case?"

Banks Settle Enron 'Megaclaims' Suit

Two banks have agreed to pay at least $420 million to settle their parts of the "Megaclaims" lawsuit filed by Enron against 10 banks. It was alleged that the banks "aided and abetted fraud" and could have prevented the energy trader's collapse. JPMorgan Chase & Co. agreed to pay $350 million in cash to Enron Corp. In addition, Toronto Dominion Bank agreed to pay $70 million. The companies also will forgo certain claims in Enron's bankruptcy proceedings, while agreeing to pay more money to Enron for the ability to pursue others. Enron said the bankruptcy claims that are part of the JPMorgan settlement have a value of $660 million. The settlement with JPMorgan could actually reach up to $1 billion. Toronto Dominion agreed to forgo claims valued at almost $56 million, while paying $60 million to allow claims valued at $320 million that the company transferred to third parties.

JPMorgan agreed in June to pay $2.2 billion to Enron shareholders to settle its part of a class action lawsuit. In August, Canadian Imperial Bank of Commerce agreed to pay $250 million in the Megaclaims suit, while also agreeing to a $2.4 billion settlement the largest so far in the class action lawsuit. The recent settlements bring payments in the Megaclaims case to $735 million. In addition, banks have agreed to forgo or pay to pursue claims valued at around $3 billion. The financial institutions that are still a party to the Megaclaims suit include Barclays PLC, Citigroup Inc., Credit Suisse First Boston Inc., Deutsche Bank AG, and Merrill Lynch & Co.

Source: *Associated Press*

VI. CONGRESSIONAL UPDATE

The Revolving Door System For Members Of Congress Must Be Shut

In my opinion, members of Congress should be prohibited from becoming paid lobbyists after they leave office. According to a new Public Citizen report, 43% of members of Congress who left office since 1998, and were eligible to lobby, have become lobbyists. This indicates that Congress has increasingly become a way station on the path to the lucrative influence-peddling industry. The report, *Congressional Revolving Doors: The Journey from Congress to K Street*, examines in depth the case of one former member who has done particularly well after going through the revolving door.

Just days after he left Congress in 1999 (amid allegations of an extramarital affair), former U.S. Representative Bob Livingston (R-LA) became a lobbyist. In the first year, Livingston pulled in $1.1 million, even though he was restricted from personally lobbying his former colleagues for a year. Interestingly, former members often skirt the lobby prohibition rules by supervising other lobbyists for the first year after leaving Congress. The next year, after the cooling-off period was lifted, the firm's lobbying revenues received by his firm more than quadrupled to $4.8 million. The report, based on hundreds of lobbyist registration documents as well as industry and news media reports, is available at http://www.LobbyingInfo.org, a new Public Citizen website designed to track the influence of special interests in Washington. The website contains a searchable database of former federal officials and staff who have passed through the revolving door, Public Citizen investigative reports on lobbying battles waged by industry, detailed summaries of influence-peddling laws, and recommendations for reforming the system. Concerning the revolving door, Public Citizen President Joan Claybrook made this observation:

People used to run for Congress to serve the greater good and help the public. Now Congress has become a way station to wealth. Members use it for job training and networking so they can leave

office and cash in on the connections they forged as elected officials. No wonder the public is cynical about whose interests lawmakers are protecting in Washington. Lobbying has become the top career choice for departing members of Congress.

The following information coming from the Public Citizen report, will give you an idea as to the magnitude of the problem:

- Forty-three percent of the 198 members who have left Congress since 1998 and were eligible to lobby have become registered lobbyists.
- Fifty percent of eligible departing members of the U.S. Senate have become lobbyists (18 of 36) while 42% of eligible departing members of the U.S. House of Representatives have become lobbyists (68 of 162).
- Almost 52% of the Republican members of Congress who left Capitol Hill since 1998 registered to lobby (58 of 112) compared to 33% of the departing Democrats (28 of 86). This could reflect the fact that after George W. Bush became president, Washington became a hostile place for lobbyists whose contacts were Democratic. As part of the "K Street Project" pushed by Republicans, including House Majority Leader Tom DeLay (R-TX), lobbying firms that hired former Democratic members of Congress were to be denied access and business by the Republican majority.
- Of the 2000 departing class, the ratio was even more lopsided when Republicans won the White House and retained control of Congress. More than 62% of Republicans (23 of 37) who left that year became lobbyists, compared to only 15% of Democrats (2 of 13).

Bob Livingston exemplifies how a member-turned-lobbyist interacts with his former colleagues. In six years, the former congressman built his business into the 12th largest non-law lobbying firm in Washington and took in almost $40 million from 1999 through 2004. Among his clients are Turkey, Morocco, and the Cayman Islands, which collectively paid his firm $11 million from 2000 to 2004, with $9 million of that coming from Turkey. Without a doubt, Livingston delivered—he helped ensure that a $1 billion supplemental appropriation for Turkey remained intact through the legislative process, despite that country's refusal to allow U.S. troops to use its soil as a staging area for the Iraq invasion. He also helped kill an amendment that would have formally recognized the Armenian genocide that occurred between 1915 and 1923. Turkey has always opposed this recognition. Livingston, along with his wife Bonnie and his two political action committees, also contributed $503,449 to various candidates or their PACs from 2000 through 2004. Some of that money went to people Livingston later lobbied.

It is high time for Congress to change the system. Most Americans have no clue that the revolving door even exists—and those who do, don't realize how bad things are. In light of the findings, Public Citizen recommends the following reforms:

- Extend the former members' cooling-off period (the time during which they are not allowed to lobby) to two years and include the supervision of lobbyists as a prohibited activity.
- Require members of Congress to disclose their employment negotiations while they are in office if they pose a conflict of interest, similar to the requirement for the executive branch.
- Repeal the privileges that give former members of Congress special access to former colleagues, access to the House and Senate floor, and access to members-only gymnasiums and restaurants) if they register to lobby.
- Prohibit registered lobbyists from making, soliciting, or arranging campaign contributions to elected officials in the branches of government they lobby. This would include Congress and the executive branch.

Source: Public Citizen

Senate Passes Liability Shield For Gun Makers

I have always believed in the right of a citizen to own and possess firearms. However, I believe there have to be some reasonable restrictions on the manufacturers of guns. I have owned handguns, rifles and shot guns for all of my adult life and will continue to do so. Over the years, the National Rifle Association (NRA)has been one of the most powerful lobby groups in our nation's capitol. Most recently, the NRA was successful in getting the U.S. Senate to pass a bill that would block most civil lawsuits against gun makers and dealers whose weapons are used to commit crimes. The bipartisan vote underscored the changing politics of gun control. Fourteen Democrats—most from rural or heavily Republican states—joined all but two Republicans in the 65-31 vote. It is rather interesting that gun makers have never faced a lawsuit crisis and neither is there one on the surface at present. One shocking part of the bill is that it requires any pending lawsuits to be dismissed. That is absolutely a step in the wrong direction by Congress. If the cases have no merit, the current system would "kick them out." But, if there is merit, no case should be summarily dismissed.

When Congress returns from its summer recess early this month, the bill is expected to easily pass the House, where it enjoys broad bipartisan support. President Bush will certainly sign the bill into law when the House passes it. There have been many efforts to control the illegal use of guns. From a political perspective, however, the political cost of supporting gun control proposals is very heavy. The Senate's vote

was clearly a measure of the political clout of the NRA, and the result was that the NRA is stronger than ever.

The Senate bill would bar lawsuits against gun manufacturers, dealers, and trade associations brought by individuals or communities seeking to sue them for damages caused by the illegal use of guns. Opponents argued that would rob victims of gun crimes of the right to sue, even if manufacturers or dealers were grossly negligent. According to Dennis Henigan, legal director of the Brady Center to Prevent Gun Violence (a nonprofit organization that advocates gun control), cities and counties across the country began filing suits against the gun industry in 1998, seeking to hold them partially responsible for the damages caused by urban gun violence. Alarmed by the filing of the few suits that were actually filed, the firearms industry lobbied effectively in 33 states for state laws providing some protection to manufacturers and dealers. The law passed by the Senate would preempt those laws and provide even broader protection from nearly all civil lawsuits.

Source: *Los Angeles Times*

VII. PRODUCT LIABILITY UPDATE

Congress Comes Through On Auto Safety

The motor vehicle safety measures contained in H.R. 3, the final highway bill, will literally save thousands of lives and prevent untold suffering. For a change, Congress worked in a bipartisan manner and put safety first in its consideration of this legislation, and that's very good news. Americans will be much safer on the highways once these changes take effect. The biggest impact will come from addressing the two most lethal types of crashes—rollovers and side impacts. As previously reported, rollover crashes kill more than 10,000 people each year and permanently injure more than 17,000. These are staggering numbers. This legislation will require the National Highway Traffic Safety Administration (NHTSA) to create, for the first time, a **stability standard** designed to prevent rollovers by April 2009. In addition, it will require NHTSA to update its 34-year-old **roof strength standard** so that occupants will have more protection when vehicles do roll over. It will further prevent rollover deaths and injuries from ejection by requiring new standards, including a standard for door locks.

Side impact crashes kill more than 9,000 people per year—and they are getting more deadly because of the growing number of high-riding SUVs on the road. This legislation requires NHTSA to write new rules to protect occupants in these crashes by July 2008. The legislation also requires updated power window switches to protect children from being accidentally choked. It calls for research on tire aging and ways to prevent back-over deaths and improve the safety of 15-passenger vans. It would also require the posting of crash test results on new car price window stickers. Inclusion of these important safety measures is a big win for people. This will benefit consumers immensely and could produce the most significant safety enhancement since airbags were required in all vehicles in the 1991 highway legislation. Let those who supported these safety measures know you appreciate their work and courage. It does take tremendous courage to take on the powerful auto manufacturers. We should all thank the members of Congress who helped keep these measures in the legislation.

Source: Public Citizen

Proposed Roof Crush Rule Fails To Comply With New Safety Mandates

While bragging on the recent Congressional action, I must now report that the National Highway Traffic Safety Administration (NHTSA) has dropped the ball. When it received the mandate from the Congress to take action. I really thought we would see NHTSA get down to business. Instead, it did just the opposite in several areas. For example, the federal government missed a golden opportunity to save thousands of lives and mitigate thousands of injuries inflicted when vehicles roll over. It has been more than 30 years since the government upgraded its rules for roof strength, but what NHTSA issued on August 12th falls tragically short of what is needed to fix the problem of roof collapse in rollovers. NHTSA is merely "rolled over" for the industry when people need its help the most. The long-delayed roof crush rule proposed by NHTSA clearly fails to comply with new safety mandates issued recently by Congress as mentioned above. The highway funding bill requires roof strength be tested both on the driver and passenger sides of a vehicle. However, the proposed rule tests roof strength only on one side.

Most auto manufacturers already produce vehicles that can pass this very weak test, which requires a roof to withstand 2.5 times its weight. It's not enough because forces in a rollover crash exceed that amount. Rollover crashes are responsible for about one-fourth of all traffic fatalities and about one-third of all occupant fatalities each year. In 2004, 10,553 people died in rollover crashes. It should be noted that about one-fourth of all rollover crashes. It is quite significant that SUV rollover deaths are up nearly 7%. It is feasible to make much stronger roofs. In fact, the Volvo XC 90 has a roof that can withstand at least 3.5 times its weight. NHTSA still has no plans to require any dynamic testing, which are real world crash tests, to gauge roof strength. This type test is the only way to learn what actually happens in a rollover crash to the roof, its supporting structures, the windows and the belt system, and most importantly, to the occupants. Ensuring

that occupants can survive when vehicles roll over is probably the single most effective step that the automotive industry and NHTSA can take to reduce the unacceptable carnage on our highways. What the agency has done with the proposed rule simply won't do. It is a weak response to the congressional mandate. NHTSA should go back to the drawing board and develop a far more stringent test. We will likely have more to say on this next month.

Source: Public Citizen

New Rule Requires Auto Manufacturers To Notify Dealers Of The Most Dangerous Defects

A National Highway Traffic Safety Administration rule dated July 6th, revising a final rule issued last year, requires auto manufacturers to notify dealers within three days after the company tells NHTSA of its plans to conduct a recall when the defect poses an immediate and substantial threat to safety. The July decision altered the final rule issued last year in response to a petition for reconsideration filed by Public Citizen and the Center for Auto Safety (CAS). The new three-day rule addressing the most perilous defects is a victory for auto safety advocates. Public Citizen and CAS pointed out in the petition last year that NHTSA's previous final rule would allow auto manufacturers to notify dealers of defects long after the agency had been told by the manufacturer that a defect exists. During that period, dealers could continue to sell vehicles containing identified safety defects, both endangering consumers and adding to consumers' hassle, as they would have to return to the showroom soon after purchase to remedy the defect. The former rule saved manufacturers money by reducing the number of vehicles that would likely be remedied and reduced the pressure on manufacturers from dealers to quickly remedy defects so that vehicles could be sold.

In 1993, NHTSA had proposed that auto manufacturers notify dealers within five days of finding a serious defect. Automakers and dealers both objected, and action on the rule was postponed. In 1999, NHTSA proposed a notification scheme that required notification of dealers only "within a reasonable time" but did not adopt it in final form until 2004, when auto safety groups objected. The 2005 changes to the final rule will prevent dealers from selling vehicles with identified dangerous safety defects—those considered an "immediate and substantial threat" to safety.

Public Citizen is watching to see whether implementation of this rule is fair and does indeed address all defects that pose a threat to safety. At the same time, however, NHTSA declined to extend this basic protection to all safety defects, as asked for by Public Citizen and CAS. Public Citizen President Joan Claybrook observed:

> *After more than a decade of delay, the rule means that consumers can now expect serious defects to be fixed before they drive a new vehicle off of the lot. It helps to preserve a baseline for safety when there is a known and dangerous safety defect. The changes to the rule were common sense, and the very least that consumers should be able to expect.*

Source: Public Citizen

Sudden Acceleration: True defect or myth?

A sudden acceleration is defined as a rapid, unintended acceleration that occurs any time after the ignition is engaged. Sudden accelerations can occur when the car is placed in either drive or reverse. Unfortunately, when sudden acceleration events occur, even the brakes cannot prevent a collision. Under certain circumstances, sudden accelerations can cause the operator to lose control of the vehicle, leading to serious bodily injury or death. Although sudden acceleration events are not heavily reported, they occur often enough to catch the attention of safety groups, the National Highway Traffic Safety Administration (NHTSA), and automobile manufacturers.

It is difficult to document complaints of sudden acceleration. The difficulty arises because of NHTSA's overly restrictive definition of sudden acceleration. NHTSA's definition of sudden acceleration excludes events when the vehicle was in motion or events that did not result in an accident. Given these exclusions it is easy to see why these events may be underreported. However, from 1987 to 2000, NHTSA documented no less 756 sudden or unintended acceleration events. The average number of sudden accelerations for that same span is 1,617 per year.

The first generation of sudden acceleration events often occurred because the throttle return spring failed. NHTSA solved that problem by passing FMVSS 124, which required a redundant throttle return mechanism. Ironically, the current sudden accelerations are most likely caused by advances in automotive technology. Electronic engine control modules and electronic speed or cruise controls are today's culprits. Additionally, electronic throttles employed by Toyota in the 2002-03 Camry, Solaras and Lexus models are under investigation as potential causes of sudden acceleration. Our firm has handled a number of these cases and is investigating a potential sudden acceleration involving a Toyota Camry.

Unfortunately, NHTSA has joined with the industry and dismissed cruise control and other electronic factors. Each has concluded that sudden acceleration events, except in rare cases, were caused by driver error or hitting the accelerator instead of the brake. Despite NHTSA's failure to recognize this defect and the industry's customary position of blaming the driver, there have been successful lawsuits against automobile manufacturers. In 2002, the U.S. Court of Appeals for the Second Circuit reinstated a $1.1 million judg-

ment against Ford Motor Co. The jury found that the crash was caused partly by a negligently designed cruise control system. In 2003, a Missouri jury ordered General Motors to pay a couple $80 million for a crash blamed on sudden acceleration induced by cruise control. Although such litigation is still in its infancy, injured parties have found some success against the industry despite little or no help from NHTSA. As usual, injured victims pursuing litigation will have to take the lead in ensuring the public's safety.

Source: *Sudden Acceleration, The Myth of Driver Error; Automotive News; A Note on Automobile Cruise Control Faults and Sudden Acceleration*

Class Action Status To Be Decided In GM Engine Lawsuits

A federal judge in Oklahoma will decide whether to grant class action status in lawsuits that claim General Motors Corp. sold pickups and sport utility vehicles with defective engines. The lawsuits claim that GM produced as many as 800,000 pickups and SUVs between 1999 and 2002 with a noisy defect referred to as "piston slap." As you may know, piston slap occurs when the piston isn't the right size for the engine cylinder, causing it to knock against the side of the cylinder. Although piston slap may not be a safety defect, it causes excessive engine wear and increased carbon emissions. This makes the vehicles less fuel-efficient and harder to sell.

General Motors has asked a U.S. district judge to dismiss nine cases pending in federal court, saying the plaintiffs are still able to drive their vehicles and haven't complained of personal injury or property damage. The company claims that owners don't claim that GM has refused to repair the vehicles. Plaintiffs from various states have filed nine lawsuits against GM in federal court in Oklahoma. The judge dismissed some of the claims against the automaker, but allowed others to stand. The court will allow the plaintiffs to pursue their claim that GM breached their warranty agreements.

If class action status is granted, it will widen the number of people who could seek damages from General Motors. An Oklahoma state judge has already granted class action status to plaintiffs suing GM over piston slap, but GM has appealed that decision to the Oklahoma Supreme Court. The federal case will likely override the state case if the judge grants class action status.

Source: *Detroit Free Press*

Volvos Eyed For Possible Engine Problems

Our firm has handled a number of plaintiff lawsuits that arose out of vehicles "stalling' while being operated. We found that in each case there was a defect. Several models of Volvo sedans and station wagons are under investigation because of complaints that the vehicles can lose speed or the engine can stall without warning. The National Highway Traffic Safety Administration has received 136 complaints about the unit that regulates the amount of air into the vehicle's engine. NHTSA has heard of several concerns, including a sudden loss of speed and power steering while driving in highway traffic and the stalling of the engine without warning. An estimated 266,000 Volvos from the 1999 through 2001 model years are covered in the probe. It includes the C70 and C70 convertible, the S60 sports sedan, the S80 luxury sedan, the V70 station wagon, and the V70XC crossover vehicle.

The inquiry, which is in its early stage, also involves the S70 sedan from the 1999-2000 model years. There have been two injuries connected to the alleged defect, NHTSA said. Volvo is cooperating with the government's investigation, which will try to determine the scope, frequency and safety consequences of the alleged defect. Volvo is part of Ford Motor Co.'s Premier Automotive Group. Vehicle owners who reported the problems told NHTSA that in some cases, their vehicles would restart and in other instances the vehicles had to be towed. Some owners said they replaced the engine component but it later failed in a similar manner. The inquiry involves the electronic throttle control module, which the company said regulates air into the engine.

Source: *Associated Press*

FAA To Order Textron Unit To Recall More Engines

Three years ago Textron Inc.'s Lycoming unit was caught supplying dangerously defective engines in a wide array of general aviation aircraft. Now the company is recalling about 1,100 additional engines for the very same problem. The Federal Aviation Administration (FAA) released a proposed rule mandating the Textron unit to disassemble the engine and replace a key part in certain engines installed in small, propeller-driven planes and helicopters from early 1999 to early 2002. The FAA cited improperly heat-treated crankshafts that are prone to fracture during flight. Failure of the crankshaft results in an immediate loss of power. The agency proposes the engines be replaced within six months or after 50 more hours of operation.

According to a story in the *Wall Street Journal*, the previous engine problems and recalls in 2002 cost the company about $173 million. This included replacement crankshafts, manufacturing changes for future engines, stepped-up factory inspections, and assistance to owners of affected aircraft. It also included amounts paid in settlement of an unspecified number of lawsuits stemming from roughly 20 crankshaft failures and more than a dozen fatalities. According to the company, however, a substantial portion of the settlement was covered by insurance.

The FAA estimates the latest safety recall—focused on engines under 300 horsepower, instead of larger engines

with turbochargers that were covered in earlier rounds—will cost at least $18.5 million. The FAA said in 2002 that there was a fundamental quality-control breakdown at the Textron facility. The Williamsport, Pennsylvania, unit is the world's largest maker of small-plane engines in terms of revenue and units. This recent action will again put in question the quality controls in place at the facility.

Interstate Southwest Ltd., the subcontractor that made forgings for the suspect crankshafts, stopped supplying forgings after the initial recalls. Ronald Wojnar, a senior FAA official overseeing the recall, told the *Wall Street Journal* that the engines currently being recalled "have potentially the same quality defects" stemming from improper heat treatment, and could "potentially cause the same failures" as the earlier engines. According to the *Wall Street Journal*, the FAA and the company have identified 12 cases of crankshaft failure in these smaller engines. Apparently, they haven't resulted in any injuries or deaths to date. But the failure rate prompted an 18-month FAA investigation and resulted in the new action.

After the FAA ordered the initial recalls, company and agency officials claimed that only Lycoming's turbocharged engines—which are subjected to greater operating stresses— posed any flight-safety risks. Lycoming voluntarily issued a safety bulletin informing aircraft owners that the same metallurgical problem "could be adversely affecting the performance of" smaller engines without turbochargers. It may be highly significant that the FAA statements about improper heat treatment of forgings as the "root cause" of the latest problems came about just a few months after a Texas state court jury ordered Lycoming to pay Interstate $96 million in damages. As part of its verdict, which is being appealed by Textron, the jury determined that Lycoming's defective design was the "sole cause" of the earlier crankshaft failures.

Source: *Wall Street Journal*

VIII. MASS TORTS UPDATE

Our Strategy Hasn't Changed On Vioxx

The tremendous verdict returned in the Vioxx case against Merck in Texas won't change our firm's strategy in any significant manner. Prior to that verdict, our strategy concerning the Vioxx cases we are handling had been to prepare our cases and then be ready to try them when they come up. That strategy was not to be affected by how the Texas case came out and it won't be now. We didn't believe that Merck would start settling cases even if it lost in Texas. Neither did we believe the company's defense strategy would change if an unlikely defense verdict resulted in that case.

Frankly, I don't believe Merck saw a big verdict coming in Texas because of the perceived causation problem in the case-combined with what they believed to be a very conservative jury. But, the company's conduct relating to the history of Vioxx was so bad, the plaintiff won and won big. Additionally, the causation issue was resolved at trial in the plaintiff's favor. This is really a win for all Americans who had trusted the drug industry to do right and now find that trust to have been misplaced. In our firm, we have either reviewed or are in the process of reviewing over 10,000 individual cases. We have set very high standards for taking Vioxx cases—and that hasn't changed. Neither has our trial strategy changed. We will play by the rules set by Merck and try our cases unless Merck does the right thing and starts to put the welfare of its victims as a top priority. But, knowing the corporate mentality that has existed at Merck, and apparently still does, I don't see that happening.

Judges Allows Vioxx Cases To Be Pursued As A Class Action

A New Jersey state judge has ruled health plans that paid for members' Vioxx prescriptions can sue Merck & Co. as a class to recover billions of dollars they spent on the recalled painkiller. A Superior Court judge in Atlantic City granted a motion filed by a labor union health plan to allow a nationwide class action lawsuit to proceed under the New Jersey Consumer Fraud Act. Merck had opposed the motion, which was filed by the International Union of Operating Engineers Local 68 Welfare Fund in the New Jersey state court. The union had sued Merck in early 2003, arguing that its health plan would not have covered Vioxx prescriptions but for Merck's deception about the risks of the drug, which cost several times as much as older, traditional anti-inflammatory medicines.

A very large percentage of Vioxx prescriptions were paid for by third parties, such as health insurers, unions, and large employers. Besides seeking reimbursement of the billions third parties paid for patients to take Vioxx, the third-party payers would be eligible for triple damages, as provided under the state's consumer fraud act. Under the judge's ruling, the union will represent all third-party payers across the country—except for government agencies—although a procedure will be established for third parties to opt out if they wish. The judge's ruling stated:

> *There are significant factual and legal issues common to all class members to make adjudication through class action fair and efficient. Having each individual class member attempt to litigate their claims (separately) would result in needless duplicative discovery, undue expense to the parties as well as an undue burden on judicial economy.*

The judge also wrote that, while the 50 states have differences in their con-

sumer fraud laws, New Jersey has a stronger consumer protection policy than most states. Meanwhile, the U.S. government also may seek to recover money it spent paying for Vioxx. On July 13th, the Department of Justice filed a statement expressing interest in "discussing global settlement possibilities" in U.S. District Court in the Eastern District of Louisiana on behalf of several government agencies that pay for medical care, such as Medicare, the Department of Defense, and the Department of Veterans' Affairs.

Source: *Associated Press*

Drug Companies Adopting New Advertising Guidelines

New advertising guidelines being adopted by the pharmaceutical industry will include a requirement that televised commercials clearly present drug risks and promote conversations with doctors. While this sounds good, it doesn't appear that the new rules go far enough. I am convinced that drug advertising leads people to take medicines they don't really need or shouldn't even take. A prime example is Merck and Vioxx. The new industry code doesn't include specific measures some critics have requested such as a moratorium on ads following a product's approval and limits on when sensitive medicines such as erectile dysfunction drugs could be advertised.

Instead, the guidelines say that to foster communication between patients and health care professionals, companies should spend an "appropriate time to educate health professionals" about new treatments before beginning direct-to-consumer campaigns. It also said ads should be targeted to avoid audiences that are not age-appropriate for the commercial. The guidelines also say that companies should submit all new televisions ads to the Food and Drug Administration (FDA) for review before they are broadcast. Companies have always had the option of clearing ads with the FDA and many choose to do so when they first introduce products. But, it is not mandatory, and typically by the time the FDA determines an ad is misleading, the ad has already stopped running.

I believe that all direct-to-consumer advertising by pharmaceutical companies should be banned by the FDA. There is really no way to justify these ads except as a way for the companies to make more money. I prefer to leave the selection of medicines to be prescribed to doctors with the assistance—when needed—of trained pharmacists.

Source: *Associated Press*

Pfizer Says That It Is Changing Its Marketing Tactics

Pfizer, the world's largest drug maker, says it is changing the way it promotes medicine to consumers. Obviously, this is the result of the increased scrutiny by regulators and federal lawmakers. By the end of the year, it is reported that Pfizer will provide more detail on risks, involve doctors at least six months before marketing begins, and suggest alternative treatments in some cases. You will recall that the company was warned by the Food and Drug Administration (FDA) in April about problems in ads for its allergy drug Zyrtec. In a statement, the company said it would submit consumer ads to the FDA for comment before they were made public. The company also said it would invest a "meaningful amount" to create more awareness about diseases with advertising that did not mention a product, and would address public health issues. Pfizer spent some $668 million on consumer advertising last year, compared with $348 million by Merck and $335 million by Johnson & Johnson, according to data compiled by TNS Media Intelligence.

As mentioned above, the Pharmaceutical Research and Manufacturers of America announced last month that 23 drug makers had agreed that direct-to-consumer ads must clearly "describe risks" and that television ads should be "age-appropriate" for the time of day they are shown. Other large drug makers, not in the original group, including Roche, Novartis, and GlaxoSmithKline, have now endorsed the trade group's rules.

Source: *The New York Times*

Florida Attorney General Investigating Zyprexa

The Medicaid Fraud Control Unit of the Florida Attorney General's office has subpoenaed Medicaid-related sales documents from Eli Lilly regarding Zyprexa, which is the company's blockbuster drug marketed to treat schizophrenia. Eli Lilly received the subpoena in June, but the press wasn't told until early last month. Lilly reported the probe could extend to other products and could ultimately lead to fines, penalties, or criminal charges against the company.

In June, Eli Lilly agreed to pay as much as $690 million dollars to settle Zyprexa lawsuits. Thousands of Zyprexa users have sued Eli Lilly for failing to disclose that Zyprexa can cause diabetes. A similar investigation into Eli Lilly's marketing of Zyprexa and its popular antidepressant, Prozac, by the U.S. Attorney for the Eastern District of Pennsylvania was announced in March 2004. It will be interesting to see where the Florida probe will lead.

FDA Denial Of Public Citizen's Petition To Ban Meridia Is Misguided

I was greatly surprised to learn that the FDA had denied Public Citizen's petition to ban Meridia. But, based on its history, I don't guess it should have been too surprising. Maybe, I just expected the agency to do the right thing—for a change—and grant the relief requested. The following is a statement by Dr. Sidney M. Wolf relating to the shocking denial of the petition which pretty well tells the whole story.

For a drug such as Meridia to be approved or for it to stay on the market, there must be evidence

that its benefits outweigh its risks. Evidence prior to its approval and more than 50 cardiovascular deaths, many in young people (see chart below), since its approval confirm that its benefits do not outweigh its risks and that it should be removed from the market despite efforts by the FDA/Abbott duo to keep the drug alive. Although there was a 60% decrease in prescriptions filled for this drug in the United States between 2001 (1.7 million prescriptions filled) and 2004 (670,000 prescriptions filled), many people are still getting this dangerous but not very effective drug that we have warned people not to use since 2001 and petitioned the FDA to ban in 2002.

In one of the only independent reviews of this drug by researchers from the University of Washington, published a year ago but predictably not mentioned by either the FDA or by Abbott in their responses to our petition, the authors concluded that: "Weight loss with sibutramine was associated with modest increases in heart rate and blood pressure. … There was no direct evidence that sibutramine reduces obesity-associated morbidity or mortality. … Thus, we conclude that there is insufficient evidence to accurately determine the risk-benefit profile for sibutramine."[1]

Prior to sibutramine's approval in 1997, an FDA advisory committee voted 5-4 that the benefits of sibutramine did not outweigh the risks. The FDA medical officer who reviewed the drug wrote that "sibutramine has an unsatisfactory risk-benefit ratio and therefore this Reviewer recommends non-approval of the original submission." The concern of both the advisory committee and the FDA medical officer was based on the fact that sibutramine significantly increases blood pressure and heart rate in many people. In the clinical trials, compared to patients receiving a placebo, an excess of 10% of Meridia users had a sustained increase in diastolic blood pressure of 10 mm Hg (millimeters of mercury) or more and 4% had a sustained increase in systolic pressure of 15 mm Hg or more at the commonly used 15 milligram dosage. When announcing its seriously mistaken approval of sibutramine in November 1997, the FDA stated that the average weight loss in obese people taking the drug for one year—beyond the weight loss in those getting a placebo—was only 6 1/2 pounds in the group taking 10 mg of the drug.

It is especially ironic that Abbott, caught hiding information about Meridia deaths by the FDA, claims that our efforts to ban Meridia are "not based on valid scientific analyses." A 3/21/02-4/03/02 FDA inspection report of the Abbott Laboratories plant in Abbott Park, Ill., found that "[one] death associated with Meridia was not reported and several records [involving seven other deaths] reviewed showed that the adverse drug information reported to FDA was either not accurate, not supported by source data, or was missing additional information found in the source data." Cardiovascular deaths reported to the FDA as of 3/03 in people under the age of 50:

Age/sex	Adverse Event
28/F	Cardiac arrest
30/F	Myocardial Infarction
37/F	Cardio-respiratory arrest
37/F	Cardio-respiratory arrest
37/F	Cardiac arrest
39/F	Cardiac arrest; tachycardia
39/F	Cardiac arrest
40/F	Myocardial Infarction
40/M	Myocardial Infarction
42/F	Myocardial Infarction
43/M	Myocardial Infarction
43/M	Sudden death unexplained
45/M	Myocardial Infarction
47/M	Chest pain
48/M	Cardiomyopathy
48/M	Myocardial Infarction; palpitations

Once again, the FDA is siding with a large drug company, much as the agency did several years ago with Merck concerning Vioxx, when it failed to demand a black box warning on that drug. How many more dangerously flawed decisions will the FDA make before the Congress repeals the Prescription Drug User Fee Act, which brings the agency ever closer to—and makes the agency less vigilant over—the companies that give it almost $200 million a year in funding?

Source: Public Citizen News Release

Insurance Companies Pay $35 Million In Breast Implant Settlement

Another significant event has occurred concerning the breast implant litigation. 3M Co. has received $35 million from four insurance companies to settle breast implant lawsuits. The claims stem from a 2003 Minnesota Supreme Court ruling that 29 insurance companies must reimburse 3M for settlement costs. Including this most recent settlement, 10 of the 29 insurers have settled with 3M. The Maplewood, Minnesota-based technology company expects to receive an additional $16 million in connection with the settlements. From 1977 to 1984, a California-based 3M subsidiary, McGhan Medical Corp., made silicone breast implants. The company has since faced more than 27,000 claims from women alleging that leaking breast implants injured them.

Source: *The Insurance Journal*

DuPont Loses Legal Battle

A ruling by the Mississippi state judge presiding over lawsuits involving DuPont's DeLisle plant is extremely important. The judge's ruling involving defense witnesses, as the first of nearly 2,000 lawsuits filed against the company was about to begin, was a blow to DuPont. DuPont attorneys face the likelihood of having to defend the DeLisle facility without most of their expert testimony. The case of Glen Strong, who claims dioxins released from DuPont gave him cancer, is pending in Jones County Circuit Court in Laurel, Mississippi. The lawsuit was filed on behalf of Strong and 1,995 other plaintiffs, local residents, and former DuPont employees, alleging pollutants from the titanium dioxide plant have caused a variety of illnesses. DuPont claims there is no connection between activities at the DeLisle facility and the health issues alleged by the plaintiffs.

The judge's rulings excluded eight expert witnesses and one corroborating employee witness for DuPont's defense in the Strong case. The judge ruled that DuPont "deliberately avoided" the depositions of its witnesses, meaning Strong's lawyers weren't given an opportunity to question them under oath before the trial. These are strong sanctions, but appear to have been appropriate. Kathleen Smiley, the lead attorney for the plaintiffs, says:

This punishment is so severe because they stalled and stonewalled us for so long and refused to produce their experts for depositions. When you don't allow the other side to depose your witnesses, then you don't get to call them at trial.

DuPont's attorneys filed an immediate appeal with the state Supreme Court, requesting the ruling be reversed. DuPont is asking the state's high court to reverse the lower court sanctions, and immediately issue a "stay order," which would delay the trial until witnesses can be deposed. Initially scheduled for March 30th, DuPont lawyers filed a motion to remove the lawsuits from state court and into the federal system, delaying the Strong case for several weeks. The case was delayed a second time on April 4th, and another motion filed four days later was DuPont's third effort to have the suits relocated to federal court.

Source: *Associated Press*

Welding-Disease Link Testimony Allowed

Persons who have lawsuits against welding companies will be allowed to offer medical expert testimony to prove that welding fumes can cause Parkinson's disease, according to a recent decision. A U.S. district judge in Ohio denied a motion by the welding industry companies seeking to bar testimony linking fumes from welding and neurological problems. Some 4,500 welding-related lawsuits have been combined in this judge's court. There are about 5,000 similar actions pending in state courts around the country. The industry knew of dangers from fumes associated with welding, but failed to warn workers of hazards. Welding fumes include manganese, which has been linked to neurological disorders. Our firm is representing 1,860 persons who have claims arising out of the use of welding rods on the job.

Source: *Wall Street Journal*

VIII. BUSINESS LITIGATION

Time Warner Puts Aside $3 Billion For Settlements

Time Warner Inc., the world's largest media company, has set aside $3 billion in reserves to settle shareholder lawsuits filed against the company. This arises out of the company's disastrous merger with AOL. Time Warner reached a tentative settlement with the lead group of shareholder plaintiffs, who claimed they were cheated in the merger by inflated revenue claims and improper accounting at AOL. The company also said it had authorized a program to buy back $5 billion of its own shares over the next two years, which is something shareholders had been after. The settlement, which amounts to $2.4 billion, will benefit shareholders who bought shares of AOL or Time Warner between January 27, 1999 and August 27, 2002. The accounting firm Ernst & Young has also agreed to pay $100 million. The settlement agreement must still be approved in court.

The company also set aside another $600 million to settle other remaining shareholder litigation. The agreement marks the latest milestone in Time Warner's efforts to put the devastating effects of the AOL merger behind it. Time Warner has already reached settlements with federal regulators over charges of improper accounting at its AOL unit. Most of the folks who put together the deal with AOL, which was announced at the height of the Internet bubble in early 2000, have long since left the company. To further distance the company from this "bad experience," Time Warner even removed "AOL" from the beginning of its name.

Source: *Associated Press*

Federal Jury Award In Billboard Case

A federal court jury in Kansas City, Missouri, recently awarded $10,399,000 to three small billboard companies in a case against Viacom Outdoor Inc, the world's largest billboard company. The case arose out the claim that Viacom had cheated the companies out of premium billboard sites. The three companies claimed that Viacom, built its own signs on sites the smaller firms had identified as being potentially successful and should have been leased to them. The jury found Viacom and two of its executives liable for federal racketeering violations. The award consisted

$990,000 in compensatory damages and $9.4 million in punitive damages.

Wells Fargo Settles Card Lawsuit

Wells Fargo & Co., the fifth largest U.S. bank, has agreed to pay as much as $34 million to settle a California lawsuit accusing it of charging excessive credit card processing fees to businesses. The class action settlement resolves allegations that some 96,000 California businesses were overcharged from March 1999 and March 2003. It calls for Wells Fargo to pay between $19 million and $34 million. In addition, the bank agreed to improve employee training and disclosures. Merchants accused San Francisco-based Wells Fargo of extracting a variety of fees it never disclosed, and failing to explain the fees when asked. Merchants were charged extra when they punched in card numbers by hand rather than submitting them electronically. They were also charged for such things as not providing customer addresses, filing paperwork too slowly, or not transmitting transactions in bulk. This is a clear example of the credit card industry overreaching.

The bank admitted charging about $100 million of the fees at issue. The settlement agreement was approved by a California state court judge. Interestingly, New York Attorney General Eliot Spitzer says that Wells Fargo, which is the Number Two U.S. mortgage lender, was the only one of several banks that did not cooperate at all with his examination this year into lending rates. This case was handled for the plaintiffs by Howard Jafee of Los Angeles and Niall McCarthy of Burlingame, California.

Judge Allows Shell Stock Holder Suit To Continue

A federal judge has allowed a stock fraud lawsuit against Royal Dutch Shell to continue, finding that the shareholders had "adequately" shown reason for the court to examine their allegations concerning the company's restatements of its oil reserves. The class action lawsuit questions whether the company's statements on its reserves, an important measure of future performance, purposely omitted or twisted important facts. Royal Dutch Shell PLC will appeal the ruling. The company is questioning whether the court has jurisdiction "over non-U.S. purchasers who bought their securities on non-U.S. markets." The company is based in the Hague, Netherlands. Restatements of the reserves last year led to stock declines, prompting shareholders to sue the oil company, some executives, and its accounting firms, PricewaterhouseCoopers and KPMG.

As a result of the ruling, the plaintiffs and defendants will begin exchanging information under the discovery process, which could include scheduling depositions. The reduced projections cost Shell almost $150 million in fines imposed by U.S. and British regulators and led to the dismissal of three senior executives. The U.S. Department of Justice has also started a criminal investigation. The judge said that the company's global footprint does not prevent it from being sued in New Jersey. Plaintiffs filed in New Jersey because Shell has gasoline distribution terminals in the state. The Anglo-Dutch oil company, formally unified in July, resulted from the combination of Royal Dutch Petroleum Co. of the Netherlands, and Shell Transport & Trading Co., of London.

Source: *Associated Press*

IX. INSURANCE AND FINANCE UPDATE

Insurance Companies Doing Very Well

It appears that the nation's property and casualty insurers are doing very well financially. These companies reported profits of $41.3 billion in 2004, representing a 28% increase over the $32.3 billion earned in 2003. This is according to Weiss Ratings Inc., an independent provider of ratings and analyses of financial services companies, mutual funds, and stocks. Melissa Gannon, vice president of Weiss Ratings Inc., told *The Insurance Journal*:

Property and casualty insurers continue to post impressive results. The ability to withstand such a horrific hurricane season is an indicator of the industry's long-term financial strength.

Source: *The Insurance Journal*

Hurricane Dennis And Its Aftermath

Hurricane Dennis made landfall on July 10, 2005, as a Category 3 hurricane just west of Pensacola, Florida, and then moved further inland to Alabama, Georgia, and Mississippi. Official estimates of damages stemming from Hurricane Dennis have been compiled based upon actual claims processed by adjusters out in the field. Casualty insurers are expected to pay policyholders approximately $900 million on claims for insured property losses. Florida suffered $640 million in losses, followed by Alabama ($115 million), Georgia ($85 million), and Mississippi ($60 million).

Florida has been devastated by hurricanes within the past 12 months. Hurricane Charley (484,000 claims and $7.5 billions in damages), Hurricane Frances (540,000 claims and $5.3 billion in damages), Hurricane Ivan (212,000 claims and $2.9 billion in damages), and Hurricane Jeanne (430,000 claims and ($4.1 billion in damages). Hurricane Dennis made landfall near where Hurricane Ivan had made landfall 10 months before, but did not cause as much damage as Ivan.

Source: Florida Insurance Council

Reinsurers Sue AIG Alleging Claims Fraud

A group of 18 insurers has sued American International Group and bankrupt fronting company Trenwick America Reinsurance Corp. in a Massachusetts

state court for allegedly scheming to collect as much as $73 million in what the insurers claim are "grossly inflated" workers compensation and other reinsurance claims. The suit alleges that only about $15 million of the $73 million in claims for which AIG has demanded payment appear to be legitimate paid losses eligible for reinsurance coverage. The remaining amount reflects "highly suspect" estimates of future (incurred but not reported) losses, according to the complaint, which was filed in Suffolk County Superior Court in Boston on July 6th. AIG had originally demanded $130 million in payment, with $116 million of that labeled as projections of future claims.

The insurers, who are plaintiffs in the case, are members of a reinsurance facility managed by LDG Facilities in Wakefield, Massachusetts. LDG in turn hired Trenwick and its predecessor, Chartwell Reinsurance, to issue policies on behalf of the consortium and to verify and manage claims from insureds, including AIG. According to the plaintiffs, AIG's claims figures were "highly suspicious" and defied actuarial sense. Also, they say AIG never provided satisfactory proof or explanations. Instead, AIG and Trenwick jointly engaged in a pattern of "evasive and obstructionist conduct" in response to attempts by LDG to obtain proof of losses, the complaint contends. Plaintiffs maintain that AIG took advantage of Trenwick's tenuous financial situation and manipulated Trenwick to participate in the scheme to pass through millions of dollars in claims to the reinsurers without verifying their legitimacy. Trenwick acquired Chartwell in 2002. On August 20, 2003, Trenwick filed for Chapter 11 protection and seven days later, according to the plaintiffs, AIG exercised its option to demand arbitration with Trenwick to settle its claims. The plaintiffs claim that AIG subsequently induced Trenwick into a settlement by offering the favorable promissory note financing.

The court documents allege that in exchange for agreeing to pass through the invalid claims to the reinsurers, AIG extended financing to Trenwick in the form of a promissory note with favorable terms for a financially strapped firm. This note made it appear Trenwick had commuted the claims as legitimate. AIG subsequently demanded that the reinsurers make good on that promissory note. Trenwick paid AIG $4 million in cash for the commutation agreement, a sum that Trenwick later demanded LDG pay back, the documents add. The suit was filed after years of arbitration and secret negotiations between AIG and Trenwick. According to AIG, it commenced arbitration as required under the reinsurance agreements. AIG says it asserted its "right to recover funds from the reinsurance pools as the result of a negotiated agreement with Trenwick" and noted that the reinsurers have paid AIG nothing to date.

The complaint charges AIG and Trenwick with fraud, civil conspiracy, and aiding a breach of fiduciary duty, among other charges. It also invokes Massachusetts law Chapter 93A, which allows treble damages, for unfair and deceptive practices. Plaintiffs are asking for compensatory and punitive damages and an injunction against paying any of the AIG claims. Among the insurers bringing the suit are First Allmerica, Dorinco, Hartford Life, HCC Holdings, John Hancock, Sun Life, Insurance of Hannover, Phoenix Life, Clarica, and Swiss Re.

Sources: *Associated Press* and *Insurance Journal*

Ransom Insurance Appears To Be A Common Practice

A lawsuit in Texas filed by the family of a foreign worker against a Houston oilfield services company is shedding rare light on a highly secretive aspect of international business. Few folks—including employees of the companies—have ever heard of "ranson insurance." But, insurance policies purchased by corporations against kidnapping and ransom plots overseas are apparently quite common. In a lawsuit filed late last year against Hanover, its insurer, and a security consultant, the family contends that the worker was murdered because the companies botched what, in that part of the world, should have been a routine ransom negotiation and payment. Then, the lawsuit alleges, Hanover collected a $250,000 death benefit plus reimbursement of its expenses, while the employee's father, mother, and widow got nothing. The family demands compensation in a wrongful death suit for unspecified damages above $100,000. The family contends that Hanover put the employee "in a dangerous situation and, when he was kidnapped, did everything wrong." After the employee was murdered, the company allegedly profited from his death. Hanover is the world's largest supplier of oilfield compressors.

Company court filings haven't fully answered the charges, focusing instead on whether the suit should have been filed in Texas. The company generally denies the accusations and claims it has tried to treat the family fairly. Experts say such insurance is a routine part of doing business overseas. More than half of Hanover's 6,000 employees are overseas. And there are thousands of others working for numerous companies in all parts of the world. Information about these so-called K&R insurance policies is closely held—kept secret even from most employees—and that's interesting to say the least.

The lawsuit was filed in state District Court in Houston in October. A motion to dismiss for lack of jurisdiction is pending. The insurer, National Union Fire Insurance Co. of Pittsburgh, a unit of giant AIG, has filed suit in a New York federal court demanding enforcement of a clause in the insurance requiring settlement of all disputes in that state. That suit is also pending. It is said that kidnapping for ransom is a "cottage industry" in certain areas of South America. The companies employing

people in those areas counter the risk by taking out insurance policies on the lives of their employees. The usual package includes both insurance to cover the costs of a kidnapping and a security team provided by the insurance company to negotiate a ransom and free the victim. Typically, a ransom is paid. This type thing may be legal but it doesn't meet the "smell test!"

Source: *The Dallas Morning News*

X. PREDATORY LENDING

Car Title Loans Trap Borrowers

Title loans have become a real problem in the consumer lending industry. Cash-strapped families risk losing their cars in this latest form of high-cost small-lending, which is spreading across America like kudzu. A report released recently by the Consumer Federation of America (CFA) and the Center for Responsible Lending indicates that this type lending has become a national problem. To get a title loan, borrowers sign over the title to a paid-for car. In some states, the borrower actually provides the lender with a spare set of keys to the car. The loan, typically for a fraction of the value of the car, is usually due within a month in a lump-sum payment. CFA Consumer Protection Director Jean Ann Fox stated:

> *Borrowers who put their cars on the line to borrow a few hundred dollars for one month become trapped into a cycle of repeated loans with interest rate often around 300%. Borrowers often find themselves 'rolling' over these loans repeatedly, paying huge amounts in interest and fees while barely touching the principal.*

In many cases, the lender repossesses the car after the borrower has made substantial payments. In some states, title lenders are allowed to keep the surplus from the sale of the car, allowing the title lender to reap a windfall from the borrower's default. The above-referenced report, which is titled "For Car Title Lending: Driving Borrowers To Financial Ruin," describes the title loan product and industry. It illustrates predatory aspects of the over-secured small loans and makes recommendations for strong protections for borrowers. In Alabama the title loan operators are under the Pawn Shop Act, which is rather interesting to say the least. You can get more information on the overall problem by going to http://www.responsiblelending.org/practices/cartitle.cfm.

Source: Consumer Federation of America

XI. PREMISES LIABILITY UPDATE

Mother Of Child Killed In Washer Files Suit

A lawsuit has been filed by the mother of a 5-year-old girl who died in a coin-operated washing machine. The suit is against the Louisiana manufacturer and the laundry where the child was found dead. The child was asphyxiated June 17th after the 30-pound girl became trapped inside the triple-load washer after the machine's wash cycle had begun. The mother could not turn off the machine and had to use a rock to smash the door and pull her daughter out.

The suit claims the Pellerin Milnor Corp. of Kenner, Louisiana, has had to replace more than 1,500 of the "failure-prone" electronic coin counters because they allowed the washer to begin the wash cycle when the front door was slammed shut, even without the insertion of coins. The suit also names as defendants the owners of the Chilhowie Laundromat. According to the suit, five children had become trapped in Milnor's machines since 1986. One of the children was scalded to death, while rescuers were able to save the other children.

Source: *Associated Press*

Sunoco to Pay $3.6 Million Over 2000 Spill

Sunoco will pay the federal government about $3.6 million to settle a lawsuit over a massive oil spill that fouled plants and animals at a wildlife refuge. The spill, caused by a crack in a pipeline, leaked 192,000 gallons of crude oil into a pond and surrounding wetlands in February 2000 at the John Heinz National Wildlife Refuge. The 1,000-acre refuge, which straddles Philadelphia and Delaware County, is home to numerous wildlife species, including the threatened red-bellied turtle and southern leopard frog. Sunoco agreed to a penalty of more than $2.7 million for violating the Clean Water Act and $865,000 for damaging natural resources, according to a consent decree filed in federal district court. I wish the federal government put the same value on human life and the safety of people as it did for the plants and wildlife in this case. But, I do commend the government for doing its job in the case. I do believe strongly that government has a duty to protect our environment.

Source: *Associated Press*

Safety Procedures Ignored In Oklahoma Water Park Death

The "Final Investigatory Report" of a recent fatality that occurred at Sun & Fun Water Park in Ponca City, Oklahoma, has now been released. In that incident, a 17-year-old park employee died from injuries he sustained after falling from a water slide during an after-hours party. The employee fell over the side of the park's popular Twister water slide as he and other employees rode it in a manner that violated posted safety signs, according to the report.

On the morning after the employee's

death, the Oklahoma Commissioner of Labor ordered a review of safety standards at all known Oklahoma water parks. The agency began its review on August 1st. Eyewitnesses reported the employee was standing as the inner tube train was impacted by 942 pounds of water, empty inner tubes, and riders. The investigatory report concludes with six recommendations, including that violations of posted rules, industry standards, insurance requirements, and applicable laws "should never be allowed to occur again." Cooperation between management and owners at the park "should be brought to a level which provides for a safe operation" at all times. The Labor Department also said safety signs for water-related rides "should be brought up to accepted industry standards" and put in compliance with the Oklahoma Amusement Ride Safety Law.

Other recommendations include a requirement that "all park personnel should be trained that safe behavior" on rides is mandatory "at all times." Records of "all training, pre-opening inspections, maintenance logs and all other documentation as required" by law "must be maintained and placed on file at the park offices at all times." Finally, the agency said maintenance issues raised in its investigation "should be addressed, remedied, and proof of remediation should be documented with all deliberate speed." Amusement parks, including water rides, must be required to follow all available safety rules and standards. It is up to government to provide the needed rules and standards.

Source: *The Insurance Journal*

Parents Sue Daycare Over Death Of 4-Month-Old Boy

The parents of a 4-month-old boy who died at a daycare center in February, have filed suit alleging that negligence by center employees led to their son's death. The lawsuit was filed in a Kentucky state court against the daycare center and its owners. The lawsuit alleges that workers failed to properly supervise the child, who was found unresponsive in a crib at the center on February 16th. The child was pronounced dead after being taken to a local hospital. A report from the state agency that investigated the center after the death revealed that a postmortem examination showed it to be consistent with sudden infant death syndrome, or SIDS. According to that report, the child arrived at the daycare center about 1:20 p.m. on February 16th. He fell asleep and was placed in a crib on his back at about 1:45 p.m., the report said. A worker in the infant room noticed him not breathing about 2:45 p.m. Emergency Medical Services was called. The worker gave the boy cardiopulmonary resuscitation until a crew arrived. In the suit, the parents will be entitled to "compensation for lost earning capacity, medical and funeral expenses, and damages for pain and suffering."

Investigators with the Kentucky Cabinet for Health and Family Services' inspector general's office, who investigated the daycare center after the child's death, found several violations, according to their report. One involved staff not having proper CPR and first-aid certification. No one with proper certification had been on staff since June 2004, according to the report. Another violation involved not having enough staff. Investigators said that on the afternoon of the death, one staff member was caring for six children in the infant room. State law requires one staff member to care for no more than five infants. Other violations involved exposed light bulbs, chipping paint, and staff not having appropriate tuberculin skin test results on file. The report contains plans for rectifying all of the violations.

Source: *The Courier-Journal*

XII. WORKPLACE HAZARDS

OSHA Reports Targeted Inspection Plan for 2005

The Federal Occupational Safety and Health Administration (OSHA) announced that its 2005 site-specific targeting (SST) plan will focus on approximately 4,400 high-hazard worksites for unannounced comprehensive inspections over the coming year. Jonathan Snare, Deputy Assistant Decretary of Labor for OSHA, made this observation:

> *Our targeted inspection program maximizes the effectiveness of our inspection resources to those workplaces with the highest safety and health hazards. This program gives us the opportunity to focus our enforcement efforts where it will have the most benefit for workers and employers.*

Over the past seven years, OSHA has used a site-specific targeting inspection program based on injury and illness data. This year's program (SST-05) stems from the agency's Data Initiative for 2004, which surveyed approximately 80,000 employers to obtain their injury and illness numbers for 2003. The program will initially cover about 4,400 individual worksites on the primary list that reported 12 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time workers (known as the DART rate). The primary list will also include sites based on a "Days Away from Work Injury and Illness" (DAFWII) rate of 9 or higher (9 or more cases that involve days away from work per 100 full-time employees). Employers not on the primary list who reported DART rates of between 7.0 and 12.0, or DAFWII rates of between 5.0 and 9.0, will be placed on a secondary list for possible inspection. The national incident DART rate in 2003 for private

industry was 2.6, while the national incident DAFWII rate was 1.5.

OSHA will again inspect nursing homes and personal care facilities. However, only the highest 50% rated establishments will be included on the Primary List. Inspections will focus primarily on ergonomic hazards relating to resident handling; exposure to blood and other potentially infectious materials; exposure to tuberculosis; and slips, trips, and falls. The agency will also randomly select and inspect about 400 workplaces (with 75 or more employees) across the nation that reported low injury and illness rates for the purpose of reviewing the actual degree of compliance with OSHA requirements. These establishments are selected from those industries with above the national incident DART and DAFWII rates. Finally, OSHA will include on the primary list some establishments that did not respond to the 2004 data survey.

Source: *The Insurance Journal*

OSHA And ISSA Form Safety Alliance

A new Alliance was entered into recently between the Occupational Safety and Health Administration (OSHA) and ISSA, (formerly known as the International Sanitary Supply Association). Through the OSHA and ISSA Alliance, the organizations will develop training and education programs for ISSA members and others, including small businesses, on slips, trips and falls, and address hazard communication issues. Fostering safer and more healthful working environments for workers in the cleaning industry is the goal. Deputy Assistant Secretary of Labor for OSHA Jonathan Snare stated:

> *This is a great opportunity to further a culture of injury and illness prevention among workers in the cleaning and maintenance industry. Our Alliance is the beginning of what we hope will be a continuing relationship in which we can utilize our joint resources and expertise to help make this industry as safe and healthy as possible.*

It makes sense for ISSA to work more closely with OSHA to help protect the safety and health of the cleaning industry's most valuable asset—its workforce. Working side-by-side with OSHA will allow ISSA to provide crucial information to employers in the most efficient and cost-effective manner. OSHA and ISSA will provide expertise in developing information on recognizing and preventing workplace hazards and on ways of communicating such information to employers and employees in the industry.

The Alliance also calls for ISSA to share information with OSHA personnel as well as industry safety and health professionals about ISSA's best practices and to publicize results through outreach by ISSA and through OSHA, or ISSA-developed materials, training programs, workshops, seminars and lectures. In addition, Alliance members will promote the national dialogue on workplace safety and health by participating in forums, roundtable discussions and stakeholder meetings to forge innovative solutions to hazards in the cleaning and maintenance industry. ISSA represents more than 5,000 companies worldwide that distribute cleaning and maintenance products, equipment and related services to hospitals and other health care facilities, schools, factories, food service establishments, corporate complexes and commercial businesses.

Source: *The Insurance Journal*

Widow Receives $19 Million Award Against Railroads

The wife of an NJ Transit employee who died in 2002 of a job-related lung disease was awarded $19.2 million last month by a New Jersey Superior Court jury. The widow of the worker will be compensated by NJ Transit, Central Railroad of New Jersey, and Consolidated Rail Inc. The decedent was a railroad car repairman for NJ Transit for 18 years. Before that time, he was employed by Central Railroad of New Jersey for about 18 months. In the course of his duties, the worker engaged in welding, sanding, painting and repairing brakes, using asbestos and silica products in addition to breathing metal dust and welding fumes. This exposed him to materials that caused him to develop pulmonary fibrosis, which was diagnosed in June 2000. The employee was the father of four grown children, including a 23-year-old autistic son. He died in 2002 of pulmonary fibrosis. During the last two years of his life, the decedent had to be put on an oxygen supply and he spent his last six months on a respirator.

Wal-Mart To Appeal Status Of Class Action Bias Suit

Wal-Mart Stores Inc. has asked a federal appeals court to overturn a ruling that would allow up to 1.6 million female workers, as a class, to seek compensation for discrimination. The lawsuit, which would be the nation's largest private civil rights case, claims that Wal-Mart's female employees receive lower pay and fewer promotions than male employees. Wal-Mart claims that there is no pattern of discrimination and that certifying the suit as a class action would allow women who have not suffered from discrimination to benefit.

This year, Wal-Mart agreed to pay $11 million to settle a federal investigation that found hundreds of illegal immigrants were hired to clean its stores. Wal-Mart is appealing a decision by U.S. District Judge Martin J. Jenkins last summer that the six named plaintiffs presented "largely uncontested descriptive statistics which show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management posi-

tions, and that the higher one looks in the organization, the lower the percentage of women."

Richard Drogin, a statistician at California State University at East Bay hired by the plaintiffs, found that it took women an average of 4.38 years from the date of hire to be promoted to assistant manager, while it took men 2.86 years. It took 10.12 years, on average, for women to become managers compared with 8.64 years for men. He also found that female managers made an average salary of $89,280 a year, while men in the same position earned an average of $105,682 a year. The results for hourly workers show that women were paid 6.7% less than men in comparable positions.

An analysis by labor economist Marc Bendick Jr., who compared hiring practices at Wal-Mart with those at 20 other retailers, found that 56.5% of the in-store managers at the competitors' stores were female, compared with 34.5% at Wal-Mart. Most large discrimination cases are settled out of court. Home Depot Inc. settled a sex-discrimination class action suit in 1997 for $104 million. In 1996, Texaco Inc. paid a $176.1 million settlement on behalf of black employees who sued for racial discrimination. And Coca-Cola Co. paid $192.5 million in 2000 to employees who sued for discrimination. Publix Super Markets paid $81.5 million in 1997 for discriminating against female workers.

Source: *Washington Post*

Morgan Stanley Pays $40 Million In Sex Bias Case

Sixty-seven women from Morgan Stanley, the world's largest securities firm, have settled their sex discrimination claims. The plaintiffs have received a total of $40 million from a fund the company established in settling the case. Last year the firm agreed to pay $54 million to settle a suit brought jointly by a former bond saleswoman and the U.S. Equal Employment Opportunity Commission. Under the agreement, $12 million went to that plaintiff, $2 million was spent by the company on diversity efforts and $40 million was earmarked for as many as other 300 women covered by the suit.

The EEOC accused Morgan Stanley of systematically denying women the same pay and job opportunities afforded to men between 1995 and 2004. The Morgan Stanley case, which settled on the day the trial was to begin in a New York federal court, was the second-biggest EEOC settlement of a sex discrimination suit. The largest was the 1997 settlement with Publix Super Markets Inc. for $81.5 million.

Source: *Bloomberg News*

Settlement OK'd In Football Player's Death

A judge has approved the settlement of a lawsuit involving the death of a college football player who collapsed and died during practice four years ago. Northwestern University will pay the family a total of $16 million. The 22-year-old player collapsed in August 2001, after participating in a conditioning drill. His parents sued the school, claiming officials did not give their son, an asthmatic, timely or adequate medical treatment. The judge approved the settlement "to protect the interests" of the player's three half brothers, all of whom are minors. In an interesting twist, the player's mother objected to the settlement and has appealed. The judge ruled that if the mother had been the only plaintiff in the case, she would have had the right to reject any settlement. In any event, the settlement can't be considered final until the appeal is heard and decided.

Source: *Associated Press*

Appeals Court Affirms Damages Awarded For Mower Accident

An appeals court has affirmed a verdict awarding $1.18 million in damages from a mowing accident that occurred almost 20 years ago. The plaintiff, who was a 5-year-old boy at the time, lost part of his foot in the 1985 accident. A riding mower driven by his father, who worked for the Church of Jesus Christ of Latter-day Saints, backed over his son's foot. The accident happened on the grounds of a church in Kansas City. The son filed suit against the Mormon Church in 2002, claiming that, as his father's employer, the church was liable. The church was also accused of negligence in maintaining the mower and in training and supervising its employees. The church contended that the father's parental immunity from suit by his son also shielded it from liability. Parental immunity has since been eliminated by the Missouri Supreme Court, but it continues to apply to events which took place before December 19, 1991.

A federal court jury had awarded the damages in February 2004. The verdict consisted of $420,000 for pain and suffering, nearly $81,000 for past medical expenses and nearly $683,000 for future medical expenses. The damage award was upheld by the U.S. Court of Appeals for the Eighth Circuit. The church had agreed to pay medical expenses and did so for the first 15 years after the accident. But, suit was filed after the payments stopped and when the parties couldn't reach a settlement.

The plaintiff, who is now married with children, works in light construction, but still suffers from the effects of the injury. Doctors have recommended additional surgery. Amputating the foot above the ankle would enable him to use newer types of prosthetic devices that would reduce his pain and make his leg more functional. The appeals court said it believed that the Missouri Supreme Court, if facing an appeal in this case, would adopt the majority view it took in its 1991 decision that parental immunity is personal and therefore does not protect a third party from liability. The court said the father's negligence resulted from the church's "negligent failure to train or supervise

him properly." The court said that the jury verdict "establishes not only the negligence and causation, but the forseeability of the failure to train and supervise leading directly to the injury."

Source: *Associated Press*

XIII. TRANSPORTATION

Proposed Hours Of Service Rule will Put Tired Truckers On Road

Last month, the Federal Motor Carrier Safety Administration (FMCSA) issued a proposed rule regarding the number of hours truckers can drive consecutively. The agency was responding to a July 2004 court ruling finding that an earlier (April 2003) rule issued by the agency failed to consider the health of truck drivers, as was required by law. The court ruling came as the result of a lawsuit filed by Public Citizen, Parents Against Tired Truckers, and Citizens for Reliable and Safe Highways.

The proposed rule issued by the FMCSA regarding the number of hours truckers can drive has to be considered a disappointment. It is virtually unchanged from the 2003 rule that the U.S. Court of Appeals for the District of Columbia Circuit struck down last year. That court found that the agency did not consider the health of drivers when writing its rule. The danger that big rigs pose to America's drivers is growing. The Bush Administration's own data show that fatalities stemming from large truck crashes are up 3.1% from 2003 to 2004. It is well-known that fatigue plays an important role in causing big rig crashes. Like the 2003 rule, this recently proposed rule makes permanent a dramatic increase in the allowable weekly driving time and on-duty hours for truckers. It reduces weekly off-duty time for the most exhausted drivers (truckers who drive the maximum number of allowable hours) and significantly weakens safety requirements for short-haul drivers.

The portion of the rule that no longer allows drivers to split the time they spend in sleeper berths is good. But, the overall increased driving and working time is not supported by the vast body of scientific literature that exists about fatigue and driver safety. Nor does this proposal help drivers get on a 24-hour circadian schedule. Our firm is seeing an increase in the number of motor vehicle crashes caused by the operators of an 18-wheeler. I believe that increase is symptomatic of a growing problem. The agency should reconsider this issue and redraft the rule. If they fail to do so, lives will be lost as a result.

Source: Public Citizen

Alabama Has Nation's Biggest Increase In Traffic Deaths

A new federal report contains some real bad news for Alabama residents. It shows that Alabama had the biggest increase in traffic fatalities of any state in 2004, with 150 more deaths than the year before. The report from the National Highway Traffic Safety Administration (NHTSA) revealed that traffic fatalities in Alabama rose from 1,004 in 2003 to 1,154 in 2004—an increase of 150 deaths. Indiana was second with 114 more deaths, according to NHTSA. Nationwide, the total deaths fell by 248 from 42,884 in 2003 to 42,636 in 2004. While Alabama led all states in the total increase in deaths from 2003 to 2004, it didn't lead in the percentage increase in deaths. Vermont led at 42%, followed by New Hampshire at 35%, New Mexico at 19%, and Oklahoma and Alabama at 15%.

The following list shows the states with the largest increase in traffic fatalities from 2003 to 2004:

- Alabama 150
- Indiana 114
- Oklahoma 103
- Tennessee 95
- New Mexico 82

States with the biggest decrease in traffic fatalities from 2003 to 2004 were:

- Texas 238
- Michigan 124
- California 104
- Missouri 102
- Illinois 98

The fact that Alabama state government has refused to properly fund the Department of Public Safety is largely responsible for Alabama's terrible showing. We only have about 300 state troopers at present, when at least three times that many—as a bare minimum—are needed. In fact, a study in the 1970s found that 900 troopers were needed in Alabama at that time. It is inexcusable for state government to refuse to fund a necessary state service such as the Department of Public Safety. Hopefully, the Governor, Lt. Governor and other legislative leaders will make this a top priority for the next legislative session.

Source: National Highway Traffic Safety Administration

A Closer Look At The Nation's Highway Fatality Rate

The data released by NHTSA contains some interesting information. The following information from NHTSA's Fatality Analysis Reporting System (FARS) shows that between 2003 and 2004:

- Motorcycle fatalities increased from 3,714 to 4,008, an 8% rise.
- Alcohol-related fatalities dropped from 17,105 to 16,694, a 2.4% decline.
- Rollover deaths among passenger vehicle occupants increased 1.1% from 10,442 to 10,553.
- Total fatalities in sport utility vehicles (SUVs) increased 5.6%, from 4,483 to 4735, while fatalities in passenger cars, pickup trucks and vans decreased a total of 834.
- Twenty-seven states, the District of Columbia, and Puerto Rico had

decreases in the total number of fatalities. The highest percentage decreases were in the District of Columbia (-36%), Rhode Island (-20%), and Minnesota, Montana, and Nebraska (-13%). The highest percentage increases were in Vermont (+42%), New Hampshire (+35%), New Mexico (+19%), and Alabama and Oklahoma (+15%).

- Passenger vehicle occupant fatalities dropped to 31,693—the lowest since 1992. Declining fatalities in passenger cars are consistent with more crashworthy vehicles in the fleet and increases in safety belt use.
- Pedestrian deaths declined 2.8% from 4,774 in 2003 to 4,641.
- Fatalities from large truck crashes increased slightly from 5,036 to 5,190.
- In 2004, 55% (down from 56% in 2003) of those killed in passenger vehicles were not wearing safety belts. This reportedly underscores the value of the need for states to adopt primary safety belt laws.

NHTSA earlier estimated that highway crashes cost society $230.6 billion a year, about $820 per person. Safety should be a top priority for both the federal government—including Congress—as well as with the states. Each state has a responsibility to do its part to make our highways safer. However, Congress has to set the standard for the states to follow because of the flow of federal money into the states for highway construction and the like.

Source: National Highway Traffic Safety Administration

An Alarming Trend In The Number Of Alabama Teens Killed In Accidents

A study by Kids Count, a children's advocacy group has revealed that the number of teens who died in accidents in Alabama—mainly traffic crashes—rose 9% between 2000 and 2002. Alabama has the nation's fourth-highest rate of deaths in that group. The study looked at accidental deaths of those ages 14 to 19 and looked at the number of deaths per 100,000 in population to achieve its rankings. The study, the 2005 Kids Count Data Book, is used to show the status of children and teenagers in all 50 states. It measures a variety of factors besides health, including poverty. The study showed 183 Alabama teens, or 57% of state teens who died in 2002, died in accidents. In 2002, 316 state teens died of all causes, including natural causes, accidents, homicides, and suicides. That was up from 299 in 2000.

Janie Applegate, associate director of Alabama Safe Kids at Children's Hospital in Birmingham, told the Associated Press that a majority of those deaths were in traffic accidents. In 2000, more than 30,000 Alabama teenage drivers were involved in auto accidents, and 149 of those drivers died, according to Voices for America's Children, a national child advocacy group. Almost 25% of the 30,000 accidents involved a 16-year-old driver, according to the organization.

Aprielle Hartsfield, director of policies and programs for the Montgomery-based Voices for Alabama's Children, says the state's new graduated license should decrease teen deaths. In 2002, the state legislature passed a bill that prohibits 16-year-olds from driving between midnight and 6 a.m. Neither can they drive with more than four people in the car, excluding a parent or legal guardian. Seventeen-year-olds had the same restrictions as 16-year-olds if they have less than six months of driving experience. In my opinion, this will prove to be helpful from a safety perspective.

Source: *Associated Press*

Low-Cost Road Changes Can Reduce Crashes

A study by the insurance industry has revealed some useful safety information that—if utilized—can save lives. Making low-cost changes to busy roadways in cities, such as adding left-turn signals and extending the length of merger lanes, can reduce the number of crashes, according to the study. The Insurance Institute for Highway Safety studied the changes to a busy thoroughfare in Fairfax County, Virginia, which is just outside Washington, and said it found that the alterations reduced crashes. Richard Retting, a senior transportation engineer at the Institute, stated:

> *Many of these urban roads weren't built to accommodate today's heavy traffic. They've evolved as traffic has increased, and they haven't always evolved in the best way to enhance safety and ensure a smooth flow of traffic.*

Although the majority of traffic fatalities happen on rural roads, safety experts say urban arteries remain dangerous. About 8,000 traffic fatalities and more than one million injuries occur annually on urban roads. The government reported in 2003 that the New York metropolitan area had the largest number of traffic fatalities with nearly 1,200, followed by Los Angeles with 1,021. About 70% of the fatalities occurred on urban streets in the two cities. A government report found traffic deaths declined on U.S. highways for a second straight year, with 42,636 fatalities in 2004, a reduction of 248 from the previous year.

Of course, the costs associated with making these changes are a roadblock to their being put into place. For example, the cost of implementing a left-turn signal can run from $30,000 to $50,000. Extending a merger lane can be completed for about $10,000 without any land acquisition. Adding a left-turn lane can be costlier, depending on whether the state needs to acquire land. The extra lane can cost between $150,000 to $250,000 with a right-of-way acquisition. Every site is different and has to be evaluated on an individual basis. This adds to the costs. Nevertheless, all of the studies indicate the changes would save lives and reduce property damage.

Source: *Associated Press*

U.S. Government Can't Be Sued Over Crash

Based on a recent court decision, the families of people killed in the collision of two private planes near a Chicago-area airport can't sue the FAA. Wrongful death plaintiffs couldn't recover damages from the federal government for the alleged negligence of a private contractor hired by the FAA to provide air traffic control services at a regional airport where the mid-air collision occurred. The United States Court of Appeals for the Seventh Circuit made the ruling in the case of *Alinsky v. U.S.*, decided on July 13th. The plaintiffs alleged that the collision was the result of the negligence of an air traffic controller employed by a private contractor hired by the FAA to provide air traffic control services. The suit was filed against the government under the Federal Tort Claims Act. The government claimed that the plaintiffs couldn't sue because the controller was not a federal employee and the Act only imposes liability for the negligence or wrongful conduct of an "employee of the government."

The plaintiffs argued that the Act's limitation of liability did not apply in this case because the FAA lacks the authority to subcontract air traffic control services. But the court disagreed, holding that federal law "clearly authorizes the FAA to enter into contracts as necessary, including for services to operate the air traffic control facilities."

In addition, the court found that the claim was barred by the "discretionary function exception." The court wrote in its opinion:

> *In this case, the government's decision to contract out air traffic control services was based on budgetary concerns, as well as a desire to reopen smaller air traffic control locations—both of which are clearly policy decisions. Thus, the discretionary function exemption protects the government from liability for claims premised on the lack of training, oversight, or qualifications of air traffic controllers, since the government acted within its discretion to contract those responsibilities out to [the private contractor]," the court said.*

Frankly, this opinion will do nothing to foster safety. To the contrary, it will encourage "contractees" to be more lax in carrying out their duties. I hope Congress will remedy this situation at the earliest opportunity.

Source: *Lawyers Weekly*

Safety And Fitness Electronic Records

Over the years, our firm has handled a number of cases involving highway crashes involving 18-wheelers. In recent months we are seeing more interstate crashes involving deaths than ever before. We have learned by experience that these cases must be investigated thoroughly and properly prepared. There is a great deal of good information available from a number of sources concerning trucking companies. For example, the Safety and Fitness Electronic Records (SAFER) System provides company safety data by way of the Internet. Access is provided free of charge to the Company Snapshot, which is a concise electronic record of a company's identification, size, commodity information, and safety record, including the safety rating (if any), a roadside out-of-service inspection summary, and crash information. The company snapshot is readily available and contains useful information.

The Company Profile service provides access to the Company Safety Profile for a fee. A Company Profile Subscription service is available for pre-ordering profiles in advance. Other functions may be available for a fee at a later date. SAFER is developed, maintained, and hosted by the John A. Volpe National Transportation Systems Center. SAFER uses carrier information from existing government motor carrier safety data bases. Presently, it consists of interstate carrier data and several states' intrastate data, and interstate vehicle registration data. Operational data such as inspections and crashes are generally only presented for interstate carriers. I believe that plans are to include them for the intrastate carriers at a later time. The SAFER system is a component of the Department of Transportation's Intelligent Transportation System (ITS), which is designed, among other things, to increase roadway safety through the use of advanced technology.

Air Ambulance Firms Warned

Several Issues back we discussed the safety issues related to air ambulance companies. The Federal Aviation Administration (FAA) has now required these companies to adopt better safety practices to curb a deadly surge in rescue helicopter crashes that have killed 60 people since 2000. An FAA notice sent to all of the nation's air ambulance companies urges — but does not require — the companies to set up safety programs that would help pilots decide whether or not to lift off in risky conditions. The notice aims to halt fatal mistakes that have beset the industry, such as pilots flying into the ground during ill-advised rescue missions or dispatchers sending out inexperienced crews in darkness and bad weather. "Inadequate risk assessment and management deficiencies may have contributed to many recent fatal accidents," the notice says.

A *USA Today* investigation, which took place in July found that 84 air ambulances have crashed since 2000, more than double the number of crashes during the previous five years. The newspaper's investigation, which included an analysis of 275 air ambulance accidents since 1978, found that government inspections of the industry have been haphazard and inadequate. Linda Goodrich, vice president of the union that represents FAA inspectors, criticized the FAA notice for having "no teeth" and failing to require companies

to adopt the guidelines. Presently, inspectors can't force air ambulance firms to implement the safety steps or hold them accountable if they ignore the notice.

It is difficult to understand why the FAA didn't take stronger action. USA Today reported that rules may be drafted later that require air ambulance companies to adopt the guidelines. Unfortunately, federal aviation rules usually take years to draft. Hopefully, the operators will see fit to act now. The FAA sends hundreds of advisories to the airline industry each year, but this notice is different because it provides some of the most specific safety guidelines the FAA has ever provided to the air ambulance industry. The notice asks managers to help pilots make the tough decisions, using checklists that weigh everything from weather conditions to maintenance. Few people even consider safety when the need for air transport relating to health is concerned. Nevertheless, the need for improvement in the industry's safety practices is evident. The FAA's actions, while somewhat weak, may prompt the industry to take the necessary steps.

Source: *USA Today*

Attack On Bus Driver Results In A $8 Million Verdict For Passenger

A federal court jury has returned an $8 million damage verdict against Greyhound Lines in a lawsuit filed by a Michigan woman after a fatal crash caused when a passenger slashed the driver's throat with a box cutter. Six passengers, including the attacker, were killed in the 2001 crash on Interstate 24 in Tennessee at a location between Nashville and Chattanooga. A seventh passenger died later at a hospital. Also, 34 others on board were injured. The bus was traveling from Chicago to Orlando, Florida, when a 29-year-old Croatian passenger attacked the driver around 4 a.m. The attack prompted Greyhound to briefly shut down all bus service.

The plaintiff in the lawsuit, who was traveling to visit relatives in Atlanta, stayed in a hospital longer than a month and is permanently disabled and will never walk again. Her medical costs have totaled about $1.6 million. In the four years before the crash, Greyhound had at least 43 incidents of a passenger attempting to assault a driver or grab the steering wheel of a moving bus.

Despite the prevalence of attacks, Greyhound never did anything to protect its drivers, which is inexcusable. After the accident, Greyhound officials said they were expanding use of metal detectors to screen passengers. The company has received government funding for barriers to be placed between passengers and drivers. It took a lawsuit to get the company's attention, and the result was corrective action. Otherwise, in my opinion, drivers and passengers would still be at risk for similar incidents. Once again, litigation was necessary to bring about needed safety changes where companies and regulators failed to "step up to the plate."

Source: *Associated Press*

New Report Shows Placing Children In Back Seat Of Vehicle Results In Major Fatality Reductions

A new study shows that a dramatic shift in behavior by parents toward playing children in a back seat of vehicles, coupled with increased use of child safety seats and safety belts, has resulted in an 18% reduction in overall fatalities among children 12-years-old and younger. Front seat fatalities declined by 46%. The study of child fatality trends appears in the N*ational Safety Council's Journal of Safety Research* (Volume 36, Number 4). Phil Haseltine, executive director of the Airbag & Seat Belt Safety Campaign of the National Safety Council stated:

> *This is the clearest evidence we've seen that the national public health campaigns begun in 1996 to get children properly restrained in a back seat are working, and paying off. More children are surviving in motor vehicle crashes because of these efforts.*

The study examined fatality trends between 1992 and 2003 using the National Highway Traffic Safety Administration's Fatality Analysis Reporting System (FARS) data, police-reported crash data, the NHTSA National Occupant Protection Use Surveys (NOPUS), and earlier NHTSA child fatality studies. In response to increases in child fatalities from traffic crashes, including deaths associated with passenger airbags, the automobile and insurance industries, government, and safety advocates undertook major campaigns to get children ages 12 and under moved from the front seat, and to increase child safety seat and safety belt use. The study's authors credit these collective public health actions for the reduction in front seat deaths, and the resulting decline in fatalities overall.

Source: *The Insurance Journal*

XIV. ARBITRATION UPDATE

Public Needs More Information

It is extremely discouraging to realize how little folks really know about the "evils of arbitration." It never ceases to amaze me, in conversations with friends, how few of them even realize that mandatory, binding arbitration can be a problem for them. When they learn that arbitration clauses are contained in their own credit cards, bank accounts, home purchases, and routine consumer purchases, most all of them are shocked. Even a family member in a nursing home will have an arbitration clause in their admission form. About the only time that most folks have ever had any pre-dispute experience with arbitration is when they buy a car or truck. Then, they say it's a bad thing and that arbitra-

tion is totally unfair. Unfortunately, most will find out about the real "evils of arbitration" when a dispute arises that involves them. All of this being said, it is very clear that consumer groups must do a better job of educating the public on arbitration. Until that happens, most folks will remain in the dark on a most important consumer issue.

Republican Senators Want To Amend The FAA

Two Senate Republicans are trying to give livestock growers more freedom to chose the way they settle disputes under farm contracts. Senator Arlen Specter and Iowa Senator Charles Grassley are handling a bill that would amend the Federal Arbitration Act to ensure that agreements to arbitrate can only be made after a dispute has arisen. A bill to deal broadly with agricultural terrorism includes a small provision that would add new language to the FAA specifically requiring that any agreement to use binding arbitration to resolve poultry or livestock contract disputes would have to occur post-dispute, and be in writing and signed by both parties. The bill, S. 1532, also would require arbitrators to provide the parties a written award with an explanation of its factual and legal basis. This is certainly a step in the right direction and I hope the bill will pass with that language included.

Most contracts between livestock growers and packers and sellers now contain mandatory arbitration clauses. Many growers are unaware of the clauses or are unfamiliar with the process. The Senators' bill would give them a choice of dispute resolution methods after they are aware of what is actually in dispute. Similar language has been introduced in the past and was included in a broader farm bill approved by Congress in 2002, but the provision was dropped from the bill before being sent to President Bush for his signature. The current bill reads:

> *[i]f a livestock or poultry contract provides for the use of arbitration to resolve a controversy under the livestock or poultry contract, arbitration may be used to settle the controversy only if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy. Livestock and poultry contracts are defined as any growout contract, marketing agreement, or other arrangement under which a livestock or poultry grower raises and cares for livestock or poultry.*

Eldon McAfee, a lawyer for the Iowa Pork Producers Association, said "while arbitration is something a producer may want to use," many enter into contracts without an understanding of what the impact of agreeing to arbitration may be. Producers "should be free to select a dispute resolution method after a dispute arises" and with a fuller understanding of the nature of the dispute, he suggested. One key problem with mandatory arbitration is that agreements often force growers to arbitrate out of state, which can lead to expenses for the producer that are higher than going to court. I don't believe anybody—at least in good faith—can justify forcing a consumer to sign a predispute arbitration agreement contained in a contract of any kind.

Source: *ADRWorld.com*

XV. NURSING HOME UPDATE

Virginia Nursing Homes' Settlements Kept Secret

In April 2004, the U.S. Attorney's office for Eastern Virginia agreed to what it calls an innovative settlement with a 177-bed nursing home in Fredericksburg, Virginia. Instead of slapping Beverly Healthcare with a large fine for providing poor care, the government required the owners to invest that money in nursing home improvements, including hiring more employees and a consultant. Interestingly, as part of their settlement, government lawyers agreed not to publicize the case. According to media reports, this wasn't the first time the government participated in a secret arrangement. In the past four years, the U.S. Attorney's office in Alexandria has settled federal allegations of poor care with the owners of seven Virginia nursing homes and two management companies. In each case, the government agreed to keep the settlements confidential. Apparently, the nursing home operators wouldn't agree to the settlements unless they got a promise of confidentiality.

Frankly, I don't see how the government can justify withholding information about nursing home quality when it is substandard. The public is entitled to full disclosure on settlements involving care and treatment of residents at nursing homes. Public policy should demand that confidentiality in such cases be prohibited. In fact, the Virginia settlements appear to run counter to a recent federal effort to make nursing home care more transparent. Since 2003, Medicare has published online information about staffing levels and deficiencies at http://www.medicare.gov/NHCompare

Alice H. Hedt, Executive Director of the National Citizens' Coalition on Nursing Home Reform, told the Washington Post:

> *The public has a right to know if a facility has been sanctioned, what the sanction was and what it was for…To me, a fine is one of the few things in our system that is a very clear indicator that the facility has experienced very serious problems.*

Source: Washington Post

Lax Nursing Home Regulations In Louisiana

Consumer advocates say that Louisiana is not enforcing federal regula-

tions for nursing homes. Now a group has been set up to find out how to remedy that problem. Department of Health and Hospitals Secretary Fred Cerise says about 20 people, both in and out of state government, will compare Louisiana's regulatory system to those of other states. The latest statistics show Louisiana nursing homes are far less likely to be fined for violations than nursing homes in other Southern states. This is disturbing when you consider that the state's homes often rank at or near the bottom on key national quality indicators. Unlike the vast majority of states, where health departments leave the job of punishing problem homes up to the federal government, Louisiana regulators typically impose their own penalties for violations. Since 1999, at least 33 nursing home deaths in Louisiana have been linked to poor care.

The average fine in Louisiana for nursing homes that caused or contributed to a resident's death was $1,970, well below the state's legal maximum of $10,000. Nine deaths drew no fines or sanctions even though inspectors said the homes contributed to the fatal outcomes through significant mistakes in caring for the residents. If nursing homes in Louisiana are worse than those in Alabama, they have to be very bad. All states should do everything possible to make sure residents in nursing homes receive good care and are protected from neglect and acts of violence.

XVI. HEALTHCARE ISSUES

Texas Jury Finds Humana HMO Liable In Wrongful Death Lawsuit

Recently, a jury in San Antonio, Texas, awarded $7.4 million in actual damages in a wrongful death lawsuit against the health maintenance organization Humana Health Plan of Texas Inc., a physician, and his physicians group under contract to provide health care services. Jurors were about to consider punitive damages in the second phase of the trial, when Humana and the plaintiffs reached an out-of-court agreement that capped the punitive damages at $1.6 million. This brought the total amount of damages to $9 million. Humana will be liable for 35% of the $7.4 million in actual damages and the entire $1.6 million in punitive damages after all appeals are exhausted.

In the lawsuit, Humana and the other defendants were accused of negligence in the 2001 death of Mrs. Joan Smelik. Dr. Linda Peeno, the internationally recognized patients' rights activist and former Humana Medical Reviewer, testified as an expert witness for the plaintiff in this case. Mrs. Smelik was a "complex patient," who according to Humana, never hit the "triggers" to qualify for case management. Humana's own computer records for Mrs. Smelik showed that Humana knew of her diseases even down to the size of each of her small kidneys, which were indicative of "chronic" kidney disease. Mrs. Smelik had a documented episode of acute renal failure attributed in part to the effects on her kidneys of a combination of three drugs. These drugs included a NSAID agent (non-steroidal anti-inflammatory drug), a diuretic, and an ACE inhibitor in September 2000. Humana subsequently approved Vioxx in January 2001. Later the HMO approved the purchases of the exact same three-drug toxic cocktail of prescription drugs that had put Mrs. Smelik into renal failure five months earlier. Tragically, Mrs. Smelik died from complications of renal failure requiring emergency dialysis in May 2001.

The jury found that Humana was among three of the named defendants who bore responsibility for the death. It was alleged that Mrs. Smelik failed to receive the health care promised by Humana's own written policies and standards. Specifically, the plaintiffs demonstrated through trial testimony that Mrs. Smelik was suffering from emphysema, kidney disease, and a circulatory condition that affected the kidneys and should have been closely monitored in the months before her death. Along with Humana, the lawsuit had originally named as defendants two doctors, the medical group which was the employer of one of the doctors, and the corporate health care provider under contract to Humana. The second doctor cared for Mrs. Smelik under another health insurance provider.

Before the trial, all the defendants, with the exception of Humana, had agreed to out-of-court settlements in the amount of $602,000 with the Smelik family. Under Texas law, jurors in their verdict were required by law to attribute blame for the negligence among all the defendants. Specifically, the jury found that Humana was 35% responsible, the first doctor 50% responsible, and the medical group 15% responsible. The second doctor was not assessed any blame by the jury.

A U.S. Supreme Court decision *(Aetna vs. Davila)* decided in 2004 made it more difficult for patients to sue HMOs, such as Humana, in cases in which plaintiffs who receive their health plans from employers are claiming a **denial** of medical care. The High Court ruled those cases fall under the Federal Employee Retirement Income Security Act (ERISA), which applies to most of the millions who receive HMO care through their employers and limits the amount of damages that can be recovered in a negligence lawsuit to actual losses.

The Texas case was pleaded as a **mismanaged managed care case**. I am hopeful, the Smelik verdict will give new hope to HMO enrollees who are under ERISA and believe that Aetna v. Davila pre-empts their ability to sue their HMOs when they demonstrate negligence, fraud, substandard care, or denial of benefits. The Smelik family alleged that the care delivered by Humana and the doctors to Mrs. Smelik was substandard. Testimony at trial showed that Mrs. Smelik had been

under case management when Humana had outsourced that service to another health care provider. But when that contract ended and Humana began handling case management on its own, Mrs. Smelik's case reportedly was not given the necessary extra oversight. Previously, it was believed that employer-based HMOs' denial of health care benefits had been largely shielded from regulation by state legislatures because of the Supreme Court decision in *Aetna v. Davila*. Now, the Smelik verdict will give individuals the right to fight against HMOs when the HMOs are focused more on saving dollars than on saving lives. The medical community—as individuals—should be united in their opposition to the taking over of the practice of medicine by HMOs.

Source: *The Insurance Journal*

CareSouth Clinic Pleads Guilty To Fraud

Recently, in U.S. District Court, Jackson, Tennessee-based CareSouth Clinic entered a guilty plea to a two-count "information" that charges healthcare fraud and money laundering. As you probably know, an "information" is an accusation against a person or an entity for some criminal offense without a grand jury indictment. According to reports, federal and state agents raided the offices of CareSouth in February of 2000 to examine records. At the time, law enforcement officials also obtained copies of contracts from other clinics for which CareSouth billed patients.

According to court documents, between October 1998 and August 1999, CareSouth committed healthcare fraud by "ordering and performing" medical tests under a license that "had been acquired by false and fraudulent misrepresentation." The documents claim the clinic used the name of a medical doctor from Nashville as an authorized user of specific equipment. The unnamed doctor was unaware his name was used, had not given consent, and "was not supervising the staff in the nuclear lab of CareSouth Clinic." Performing such tests under the license allowed the clinic to receive approximately $650,000 from Medicare and BlueCross. The records show that CareSouth also knowingly submitted false and fraudulent billing to Medicare.

As a result of the guilty plea, CareSouth has been excluded from participating in the Medicare and Medicaid programs. Now known as MedNorth, the clinic has also agreed to pay both a $500,000 fine and $1.2 million settlement in a separate civil suit.

Source: *The Jackson Sun*

Many Children Have No Health Insurance

The lack of health insurance for many Americans is a big-time problem. It is especially tragic when those who have no insurance are children. Sadly, there are millions of children in this country who are not covered by any type health insurance. Many of them are African-American and Latino. Presently, one in three goes an entire year without seeing a doctor, according to a report released by the Robert Wood Johnson Foundation. U.S. Surgeon General Richard H. Carmona observed:

> *The number of uninsured children continues to be in the millions. No child should go without health care.*

According to the study, 33% of uninsured children did not see a doctor for a year. Predictably, the numbers are more concentrated in minority populations. Over 41% of uninsured Hispanic children and 29% of uninsured African-American children went a year without a doctor visit, said Risa Lavizzo-Mourey, president and chief executive of the Robert Wood Johnson Foundation. The foundation's program strives to make health insurance enrollment a back-to-school priority. Availability of health insurance should be a major issue in the congressional races next year. I believe that it will be.

FDA Places Restrictions On Accutane

Accutane has been a popular drug for a number of years. Its use has been known to cause serious health problems. Now everyone who uses the drug will have to enroll in a national registry, along with every doctor who prescribes it and every drugstore that sells it. These are tough new restrictions aimed at preventing women from becoming pregnant while taking this birth defect-causing drug. The Federal Food and Drug Administration (FDA) announced the long-anticipated program last month, more than a year after the agency's scientific advisers urged the extra curbs because repeated safety warnings have failed to stop Accutane-damaged pregnancies. Both male and female patients will have to enroll in the registry, called iPLEDGE, by December 31st or they can no longer receive Accutane. There will be more restrictions for women of childbearing age. They will be required to take some additional steps before their initial Accutane prescription. They're supposed to use two forms of birth control and get two negative pregnancy tests. In addition this group must show proof of another negative pregnancy test before each monthly refill.

Actually, women already were supposed to be taking those steps—but using the computerized registry system, doctors and pharmacists are to ensure that that happens. All patients must sign a document informing them of Accutane's risks, including the possibility that it contributes to depression or suicidal thoughts—a warning that the FDA has strengthened. Birth defects are the biggest concern with Accutane and its generic version, isotretinoin, medicine that is supposed to be prescribed only for severe acne but that critics say too frequently is given for more minor cases.

Since the drug began selling in 1982, the FDA has reports of well over 2,000 pregnancies among users. The vast majority ended in abortion, but the FDA counts more than 160 babies born with drug-caused defects. Critics note there likely were many more pregnancies

because doctors haven't been required to report Accutane-linked pregnancies. The new rules mandate that doctors have to report. If a woman becomes pregnant while taking the acne drug, her baby can suffer severe brain and heart defects, mental retardation, and other abnormalities, even if the mother took only a small dose for a short period. Also, there is a risk of Accutane-related deaths for 30 days after stopping the drug. The FDA says that if a woman does get pregnant while taking the drug, she should stop the pills right away and notify her doctor. The registry opened on August 22nd, which will give time for doctors, patients, and pharmacies to understand how it will work before the provisions become mandatory. Wholesalers and pharmacies will have to register starting October 31st or the drug's manufacturers can no longer ship them supplies of the pills.

Source: *Associated Press*

Study Links Acetaminophen And High Blood Pressure In Women

A recent study reveals that women taking daily doses of non-aspirin painkillers such as an extra-strength Tylenol are more likely to develop high blood pressure than those who don't. While many popular over-the-counter painkillers have been linked before to high blood pressure, acetaminophen, sometimes sold as Tylenol, has been considered relatively safe. It is the only one that is not a non-steroidal anti-inflammatory drug, or NSAID, a class of medications recently required by the federal government to carry stricter warning labels because of the risk for heart-related problems. Those include ibuprofen and naproxen.

The study found that women taking acetaminophen were about twice as likely to develop blood pressure problems. Risk also rose for women taking NSAIDS other than aspirin. Dr. Christie Ballantyne, a cardiologist at the Methodist DeBakey Heart Center in Houston who had no role in the study, made this observation: "If you're taking these over-the-counter medications at high dosages on a regular basis, make sure that you report it to your doctor and that you're checking your blood pressure." The research found that aspirin remains the safest medicine for pain relief. It has long been known to reduce the risk of cardiovascular problems. The study involved 5,123 women participating in the Nurses Health Study at Harvard Medical School and Brigham and Women's Hospital in Boston.

Source: *Tribune News Services*

XVII. ENVIRONMENTAL CONCERNS

Cleanup Company Brings Interesting Claim

A small California firm, Eastern Materials, Inc., is suing an international cement company, Heidelberger Zement Group, claiming that Heidelberger asked them to do complex environmental cleanup planning that it never paid for. Eastern alleges that Heidelberger hired its firm solely to appease environmental regulators. The suit, which is filed in U.S. District Court in Maryland, seeks $290 million dollars in compensatory damages, alleging fraud and breach of contract.

Eastern claims it was hired in 1999 to develop plans to remove, and carry out the removal, of twenty million tons of environmentally sensitive materials for Heidelberger. The plants where the removal was to take place included locations in Maryland, Pennsylvania, Texas, Indiana, and Iowa. Instead of allowing Eastern to do the work, Heidelberger reneged on the contracts and used Eastern's cleanup plans to do the work itself, according to the lawsuit. The suit claims Eastern was hired "for the purpose" of showing the Environmental Protection Agency in Maryland, which was scrutinizing Lehigh's plants, that a cleanup plan was in place. It will be interesting to see how this case proceeds.

Source: *Associated Press*

EPA Devises Rules On The Use Of Data From Pesticide Tests On Humans

Most likely, by the time this issue is received, the Environmental Protection Agency will have released the first-ever federal standards governing use of data from tests that expose human subjects to toxic pesticides. However, a number of lawmakers and some medical experts believe these rules will fail to adequately protect children and pregnant women. The standard will limit the instances in which pesticide manufacturers could expose children and pregnant women to toxic chemicals. Also, they will establish an independent board to gauge whether such human experiments meet established ethical standards. But the new rules, which will be subject to public comment before taking effect in about six months, allow some tests on vulnerable subjects and don't apply to studies conducted before the guidelines become law.

Much of the controversy centers on whether it is acceptable to expose children and pregnant women to pesticides under any circumstances. For months, lawmakers have been in a fight with Bush Administration officials over how drastically they should curb tests that expose humans to toxic chemicals. Recently, Congress prohibited the EPA from considering data culled from such experiments until the government enacts stricter national standards. For years, federal officials allowed manufacturers to conduct human studies on the grounds that they provided a clearer picture of how pesticides could affect the environment and public health. In 1998, President Bill Clinton imposed a moratorium out of concern that such tests harmed volunteers. Although President Bush claimed to back the moratorium, his Administration predictably abandoned it in 2003. Before the new standard, EPA officials would consider data from human experiments

on a case-by-case basis when judging whether to approve pesticides.

Many believe that the new standard, if finally put into effect, has too many loopholes. For example, Dr. Leo Trasande, assistant director of the Mount Sinai Center for Children's Health and the Environment, said after reviewing the proposal, that the agency is on "a dangerous slippery slope" that could allow pesticide makers to conduct questionable studies as long as they said they were not aimed at gauging their products' toxicity. Dr. Trasande stated:

EPA is again failing in its duty to protect children from pesticides and other toxic exposures.

The EPA should make sure that the new standard is made sufficiently tough to protect the public and especially children. The public comment period will give the public—and especially consumer safety advocates—a chance to convince the EPA to strengthen the new standard.

Source: *Washington Post*

The EWG Provides Some Helpful Information

The Environmental Working Group (EWG) has put together some information relating to problems caused by some everyday-use products that should prove useful to our readers. For years, polluting industries have spent millions trying to convince the public and policy-makers in government not to worry about "low-level" contamination of water, air, food, and land with toxic chemicals and industrial wastes. For 12 years, research by the EWG has played a leading role in shifting the terms of the debate to explain how all Americans, and our children in particular, are bombarded with a vast array of industrial chemicals and pollutants. Many of these are slow-acting long-term poisons linked to cancer, nervous system damage, and other health problems. The following are some of the findings by the EWG:

- **Cosmetics**—Most Americans use personal care products every day, but neither government nor industry adequately test them for safety. EWG found that 89% of ingredients in personal care products have not been tested, and EWG's searchable database inspired citizens to press the FDA for change.
- **Rocket Fuel In Milk** – After EWG research showed that over 20 million people had a toxic rocket fuel chemical in their tap water, EWG tested and found alarming levels in California lettuce and milk. EWG is leading the push for clean-up and regulation of this chemical, which has been found in more than 20 states.
- **Flame Retardants** – Toxic flame retardants (PBDEs) were little-known until EWG's groundbreaking research on fish and breast milk. In response, industry quickly phased out two chemicals and legislatures from Maine to California banned them. However, EWG's follow-up report documenting high levels of flame retardants in household dust shows that more of these chemicals must be banned to protect Americans from exposure linked to neurological damage.
- **Teflon Chemicals** – In a David vs. Goliath battle, EWG is battling DuPont over the health risks of Teflon chemicals. These super-persistent, unregulated compounds are found in over 95% of American's blood. EWG's research forced the EPA to sue DuPont for covering up evidence of Teflon's health risks.
- **Mercury In Children** – Building on five years of research, an EWG investigation suggested that autistic children are more susceptible to mercury and other toxins. These findings raised concerns about children's exposure to mercury, which is toxic to the developing nervous system.

Source: EWG

EPA Plan Draws Criticism

An EPA plan to store contaminated soil at a toxic waste site in northwest Florida is being criticized by local environmentalists. The clean-up plan involves over 300,000 tons of toxic soil, which has been kept in mounds covered by plastic sheeting for the past dozen years or so. The clean-up project would be performed to meet commercial and industrial reuse standards. Environmental groups had hoped the cleanup would meet a residential standard, but officials in Pensacola and Escambia County, Florida have joined with the EPA to endorse the less stringent criteria. The current proposal is to rebury the contaminated dirt inside a protective clay liner capped with clean soil at the former Escambia Wood Treating Company site. Arguments for this proposal are that it would be cheaper than other solutions, such as off-site disposal or incineration.

Approximately 350 families from neighborhoods surrounding the site have been relocated, and soil has been excavated extensively around the area. The site, which has been called "Mount Dioxin," is EPA's third-largest relocation effort, surpassed only by a site in Missouri and Love Canal at Niagara Falls, New York. All three of the sites were contaminated with dioxin, which has been linked to cancer and other illnesses.

Source: *Associated Press*

XVIII. TOBACCO LITIGATION UPDATE

Ten States Sue Cigarette-Maker R.J. Reynolds Over Advertising

Ten states have sued R.J. Reynolds (RJR), accusing the cigarette-maker, of making misleading claims that its Eclipse brand of cigarette may carry less risk of cancer and other health ailments. The claim by the states targets a unique

product that aims to deliver smokers the taste of tobacco without actually burning it. Reynolds claims that smokers' risk of contracting cancer, chronic bronchitis, and possibly emphysema are reduced compared to conventional cigarettes because the Eclipse cigarettes heat the tobacco without burning it. Vermont Attorney General William Sorrell contends in the lawsuit that there's no definitive proof to support that claim or two others made by Reynolds:

- Eclipse "responds to concerns about certain smoking-related illnesses... including cancer."
- "The best choice for smokers who worry about their health is to quit. The next best choice is Eclipse."

General Sorrell stated that there is no evidence that Eclipse is any less harmful than any other brand of cigarettes available on the market. He contends that by suggesting that Eclipse is a safer cigarette, "R.J. Reynolds is misleading smokers, former smokers and nonsmokers about the health consequences of smoking Eclipse." R.J. Reynolds has been marketing these cigarettes for seven years and has been making its claims that they're safer than a conventional cigarette for five years. Unlike traditional cigarettes, consumers do not light tobacco with Eclipse. Here's the way it works: they light a carbon tip that heats air that, as it is inhaled, passes over tobacco in a cylinder that's identical to a standard cigarette. The flavors of tobacco and nicotine are inhaled and then exhaled by the smoker.

Thirty-seven states, the District of Columbia, and Puerto Rico informed RJR in March that one or more of them would sue if the marketing continued. Vermont became the first to sue, claiming the advertising violates both the state's consumer fraud laws and the master settlement of lawsuits with the tobacco industry. Nine jurisdictions besides Vermont—California, Connecticut, the District of Columbia, Idaho, Illinois, Iowa, Maine, New York, and Tennessee—have participated in the investigations and are supporting Vermont's lawsuit. I must confess that I had never even heard of Eclipse before this suit was filed. I don't know what the market is for this brand in our area. In any event, it is good to see folks taking on the "Evil Empire."

Source: *Associated Press*

Seniors Group Sues Big Tobacco To Recover Money For Medicare

A conservative seniors group has filed suit against U.S. tobacco companies, seeking to recover billions of dollars spent on smoking-related diseases by Medicare. As you know, Medicare is the federal health-insurance program for the elderly. The case relies on a little-known but recently strengthened provision of Medicare law that allows a person to sue on behalf of Medicare when it pays medical expenses that another party had a legal obligation to cover. This would come into play when a corporate health plan has agreed to cover the expenses. It would also apply when any party injured the Medicare beneficiary and is legally liable. If such a suit is successful, Medicare collects the damages and the party bringing the suit is eligible for an equal amount. One reason for the provision is that the government doesn't have the resources to prosecute every case.

The lawsuit is the first national action since the Medicare as Second Payer statute was strengthened in 2003. The statute was passed in the 1980s by the Reagan Administration. The 2003 amendment clarified that if a business or other group injures a Medicare beneficiary, it must be the first payer for medical expenses. Medicare picks up the tab as second payer only if the first payer can't cover the full expense. Although the law seemed to expand the criteria for proving liability for an injury, that has been disputed. United Seniors Association Inc. may be the first of a flood of suits against the tobacco industry. The group says it would like to reclaim at least $60 billion it estimates Medicare has spent on treatment for smoking-related diseases in the past five years. There is a five year statute of limitations that applies.

The suit, filed in U.S. District Court in Boston, draws a link between nicotine addiction and smoking-related diseases such as lung cancer and emphysema. In the complaint, it is alleged that "addiction is the key. [to] the prolonged use of cigarettes that commonly causes these diseases," and that the defendants hid the addictive nature of their products and sought to enhance their addictiveness. The suit concludes: "The Medicare beneficiaries who have suffered from or are suffering from diseases attributable to smoking the defendants' cigarettes did not consent to being exposed to the addictive properties of the defendants' cigarettes." The suit names Philip Morris USA, a subsidiary of Altria Group; Lorillard Tobacco Co.; Liggett Group Inc.; and R.J. Reynolds Tobacco Co. and two of its subsidiaries. The states' settlement with the tobacco industry in 1998 related to Medicaid, the health-insurance program for the poor and disabled. That settlement will have no effect on the current suit that deals with Medicare.

Although the suits goal of forcing Big Tobacco to reimburse the federal government for smoking-related Medicare costs is a worthy one, I find it odd to see the United Seniors Association leading the charge. United Seniors was formed in the early 1990s by conservative direct mail fundraiser Richard Viguene. It touts itself as "a conservative alternative to AARP," and is perhaps AARP's harshest critic, going so far as to sponsor an online ad earlier this year accusing AARP of opposing U.S. troops in Iraq and favoring gay marriage. United Seniors helped create a coalition to undermine former President Bill Clinton's health care reform proposal early in his first term. Among other things, United Seniors has endorsed privatizing Medicare and privating Social Security in the 1990s and

joined an Enron-backed energy industry effort in 2001 to promote the Bush Administration's pro-industry energy plan (which finally passed Congress in July of this year).

Perhaps most notably, United Seniors operated as a virtual front for the pharmaceutical industry in running issue advertising, mainly supporting Republican candidates, during the 2002 federal election cycle, and in running ads—through 2003 under the guise of being a grass-roots seniors group—supporting President Bush's prescription drug benefit and opposing reimportation of prescription medicines from Canada, accepting millions of dollars from the Pharmaceutical Research and Manufacturers of America to find their activities. (More information about the United Seniors has been compiled by Public Citizen and a 2002 report on United Seniors activities can be found at a Public Citizen website, www.stealthpacs.org.)

One of the United Seniors' former board members is Washington lobbyist Jack Abramoff, a close friend of House Majority Leader Tom DeLay (R-TX). As you may know, Abramoff recently was indicted on federal fraud charges arising from a 2000 deal to buy casino boats and still under federal investigation by a grand jury examining whether he and a lobbying partner overcharged Indian tribes of millions of dollars for their work. A current board member is Washington lawyer James Wootton, a founder and former head of the U.S. Chamber of Commerce Institute for Legal Reform, created to push Corporate America's radical "tort reform" agenda. Wootton is a principal author of several "tort reform" bills, including the recently-enacted, so-called Class Action Fairness Act. With that background, it is ironic to see United Seniors use the courts to target Big Tobacco, although a successful suit would certainly fund United Seniors' right-wing, pro-Big Business agenda for a long time. In any event, I find it rather interesting to see United Seniors turn on one of its own. But, I guess corporate greed has no bounds and little loyalty.

Source: *Wall Street Journal*

Tobacco Companies Will Have To Pay Millions To Growers

The Supreme Court of North Carolina has ruled that cigarette makers must pay $424 million to tobacco growers in 14 states as part of an agreement reached in the wake of the 1998 national settlement with the states. The ruling reversed a decision by a lower court judge who has ruled for the cigarette companies. The lower court found that the tobacco quota buyout approved by Congress last year ended the companies' obligation to make the payments. The four cigarette-makers involved—Philip Morris USA, RJ Reynolds, Lorillard, and Brown and Williamson—will now be required to make the payments. As pointed out above, the payments stem from the settlement of lawsuits filed by 46 states against the cigarette-makers.

Source: *Associated Press*

XIX. THE CONSUMER CORNER

Safety Codes Require Sprinklers

Fire sprinklers will soon be required in all nursing homes, in new construction of one- and two-family dwellings, and in all new construction of nightclubs and like facilities, as well as for existing nightclubs and like facilities with capacities over 100, under new national building safety codes. The codes were developed by the standards council of the National Fire Protection Association (NFPA) and endorsed by the NFPA World Safety Conference & Exposition in early June. The provisions apply to the 2006 editions of NFPA 101, Life Safety Code and NFPA 5000, Building Construction and Safety Code. They went into effect on August 18th. James M. Shannon, NFPA president, observed:

> *The code provision for sprinklers in new one- and two-family dwellings is a milestone in fire protection. It is a significant step in reducing the rate of fire death and injury in the place where people are at most risk for fire—their own homes.*

The nightclub provision for sprinklers, which mandates sprinklers for new nightclubs, generally applicable to more than 50-occupant capacities, was first added to NFPA 101 and NFPA 5000, after the NFPA's standards council had approved a tentative interim amendment in 2003. A similar interim amendment was issued for existing nightclubs with capacities over 100. These came in the aftermath of the February 2003 Station Nightclub fire in West Warwick, Rhode Island, where 100 people died. Also in 2003, horrific nursing home fires in Hartford and Nashville forced the health care industry, as well as NFPA, to respond with a push for better fire protection in these facilities. This resulted in a call for enhancing the current requirement in NFPA 101 for sprinklers in all new nursing homes by also requiring sprinklers in all existing nursing homes. We must do more to keep our elderly and disabled safe from fire in facilities such as nursing homes, and this recent action is certainly a step in the right direction.

Source: *The Insurance Journal*

Pesticide Exposure Is A Problem For Children

Schoolchildren and school employees are at significant risk of illness from the use of pesticides in and around schools, according to federal investigators. From 1998 to 2002, rates of pesticide-related illnesses in children rose significantly, although the majority of cases (89%)

were considered to be of low severity. The National Institute of Occupational Safety and Health (NIOSH) and other federal and state health agencies participated in the investigation. Yearly incidences among school employees were higher than those among children, but declined on a yearly basis over the same period, according to an analysis of data drawn from three national databases on pesticide-related illnesses.

Among cases where the source of exposure could be traced, 69% were tied to the use of bug-killers at school, and 31% were linked to pesticide drift from neighboring farmlands. The investigators' report was included in the July 27th issue of the *Journal of the American Medical Association*. It was reported that the incidence of illness linked to pesticide drift might be a by-product of suburban sprawl, in which new housing developments are carved out of once rural areas. The investigators reported that the pesticide exposures at schools might be associated in part with several factors:

- a lack of federal and state regulations regarding pesticide usage in schools;
- regulatory non-compliance by school management and school employees;
- pesticide applicators in states in which regulations and recommendations have been passed; and
- insufficient involvement of parents, teachers, students, school administrators and pest managers.

The definition of "pesticide" used in the study included insecticides, disinfectants, repellents, herbicides, fungicides, rodenticides, and fumigants. Depending upon the agent, exposure to pesticides can cause respiratory problems, gastrointestinal illness, nervous system problems, and cardiovascular problems, as well as eye and skin problems.

Source: *MedPage Today*

A Federal Judge Criticizes The EPA On Rat Poison Reversal

The Environmental Protection Agency has failed to protect children from rat poison exposure, according to a recent ruling by a federal judge. The judge said chemical manufacturers should add a bittering agent to keep children from ingesting their products. Ruling in favor of two advocacy groups—West Harlem Environmental Action and the Natural Resources Defense Council—a federal judge says that the agency failed to justify its 2001 agreement with pest control companies, which dropped two provisions from a 1998 rule requiring them to include a bittering agent and an indicator dye. The judge, in his order, stated:

> *In short, the EPA lacked even the proverbial 'scintilla of evidence' justifying its reversal of the requirement it had imposed, after extensive study, only a few years before.*

The battle over how to regulate rat poison started in August 1998 when the Clinton Administration approved its use as long as manufacturers added a bittering agent and a dye that made it more obvious if a child ingested the poison. Three years later, Bush Administration officials rescinded the requirements, which came as no surprise, on the grounds that they would make the poison "less attractive to rats and could damage household property." According to U.S. poison-control centers, rat poison accidents are on the rise and that is alarming. These accidents disproportionately involve African-American and Latino children. According to the EPA, 57% of children hospitalized in New York State for ingesting rodenticide from 1990 to 1997 were black, while only 16% of the state's population is African-American. Twenty-six percent were Latino, although Latinos make up just 12% of the state's overall population. Aaron Colangelo, a lawyer for the Natural Resources Defense Council, told the Washington Post:

> *This is a big victory for children's health and environmental justice. Parents now will be able to protect their kids and deal with rodent problems at the same time. There's no reason why any of our kids should be accidentally poisoned because it's relatively easy to protect them.*

Millions of pounds of rat poison, often in the form of pellets that children sometimes mistake for candy, are applied nationwide each year in public housing, public schools, and city parks. The court instructed the EPA to reconsider the rule. Clearly, the safety of children has to be a top priority and hopefully the EPA will act accordingly.

Source: *Washington Post*

Consumer Complaints Relating To Debt Collectors Increase

An increasing number of consumers are complaining of abusive techniques from a new breed of debt collectors. These companies are debt buyers, which acquire unpaid bills from credit card firms and other credit providers for just pennies on the dollar and then try to collect all or a part of the debt. It has been reported that some of these companies go after bills so old the status of limitations has run. This means that consumers can no longer be sued for them in court or punished for them on their credit reports. The number of these firms has increased as the amount of consumer debt has risen over the years. There were about a dozen firms in 1996, and now there are more than 500 today. Industry officials claim the firms provide a benefit to consumers who are in debt, letting them pay off their bills at big discounts. But industry critics—including consumer advocates and regulators—say that for some firms, the demand to make a profit on the debts they purchase has resulted in the increasing use of heavy-handed, and sometimes illegal, tactics.

Over the years, the Federal Trade Commission receives more complaints

about debt collectors than any other industry. But in recent years, these complaints have skyrocketed—rising from 13,950 in 2000 to 58,687 last year. Complaints about third-party debt collectors accounted for close to one in six of all FTC complaints last year, up from 9.5% in 2000.

The consumer debt-buying industry began in earnest in the early 1990s. Between 1995 and 2004, the industry grew from purchasing $12 billion worth of consumer debt to $77.2 billion, according to the Nilson Report, a newsletter that monitors the credit industry. The report said that last year debt buyers paid an average of 5.4 cents for every dollar of unpaid debt. For some firms, returns can run as high as five times the amount they paid for the debt, according to the report by Bethesda-based Kaulkin Ginsberg.

Source: *Washington Post*

Court Approves Blocking Of Unsolicited E-mails

A federal appeals court has ruled that the University of Texas didn't violate the constitutional rights of an online dating service when it blocked thousands of unsolicited e-mails. White Buffalo Ventures, which operates LonghornSingles.com, had appealed to the U.S. Court of Appeals for the Fifth Circuit, saying it had complied with all anti-spam laws. The company argued that the university violated its constitutional rights by filtering out 59,000 e-mails in 2003. White Buffalo also claimed a federal act that allows certain e-mails superseded the university's anti-spam policy. The Fifth Circuit panel found that CAN-SPAM, the federal anti-spam law, doesn't pre-empt the university's policy and that the policy is permissible under the First Amendment. The federal law requires messages to have a title that correctly states the contents of the e-mail, a valid address, and companies must honor requests to unsubscribe.

Students and faculty at the school complained about the e-mails. The court didn't rule on whether the state university e-mail servers are public or private. Interestingly, the Austin-based service had legally obtained the addresses from the university. The university started blocking the e-mail messages saying White Buffalo was part of a larger spam problem that had crashed the computer system. This came only after the complaints started rolling in. The university issued a cease and desist order, but White Buffalo refused to comply. So the school blocked all the e-mail messages from White Buffalo's IP address. The court determined that White Buffalo complied with federal law, that its e-mails were not illegal, but the law applies to the university as it would to an Internet service provider that employs protection measures.

Source: *Associated Press*

Carbon Monoxide Is A Silent Killer

Our firm has handled a number of lawsuits involving deaths caused by carbon monoxide poisoning. As we approach the fall and winter months, I believe that it will be helpful to bring the hazard to your attention. Carbon monoxide is produced whenever any fuel such as gas, kerosene, wood, or charcoal is burned. Heating system installation irregularities and lack of proper maintenance are quite often the causes of carbon monoxide exposure in homes. Many homes in our area are heated using natural or propane gas as the fuel source. When natural or propane gas is burned with air, the by-products of combustion are water and carbon dioxide. The combustion process can be altered by equipment malfunctions or installation deficiencies. If this occurs, carbon monoxide can be produced in levels that may well be harmful to persons in the home or building. The problem is you can't see or smell carbon monoxide and it is a "deadly killer."

Hundreds of people die each year from carbon monoxide poisoning. For this reason, it is very important to know the symptoms. The symptoms to exposure to harmful levels of carbon monoxide include headache, nausea, mental impairment, and confusion. Unless a timely intervention takes place, exposure to carbon monoxide can lead to damage to the central nervous system and most likely death. I recommend that you check the EPA website, www.epa.gov, for some safety tips on how to avoid carbon monoxide poisoning. The recommendations are things you can do that might just save your life or the life of a family member.

XX. RECALLS UPDATE

Honda Recalls Odyssey Minivans

Honda Motor Co. Ltd. is recalling 85,154 Odyssey minivans in the United States to fix potential problems with their frontal airbag systems, federal safety regulators said on Wednesday. The National Highway Traffic Safety Administration (NHTSA) said the problem, affecting minivans from the 2005 model year, stemmed from two external impact sensors that may have been insufficiently sealed during the manufacturing process. If water enters the sensor, corrosion can occur, possibly causing a short circuit, NHTSA said. It added that front impact sensor failure could cause a delay in or loss of frontal airbag deployment, increasing the risk of injury in a crash. The Honda recall began on August 29th.

Source: NHTSA

Kawasaki Recalls More Than 150,000 ATVs

The Consumer Product Safety Commission is recalling more than 150,000 Kawasaki all-terrain vehicles. The CPSC says the 2001 through 2005 Prairie and Brute Force models can develop dangerous steering-control problems. The company has received at least three

reports of injuries. Officials say if either front wheel of the ATV experiences a major jolt while the steering is fully turned to either side, it could cause suspension damage and loss of steering control. Kawasaki has received 42 reports of ball joint separation, which could lead to the steering problem. The specific models affected by the recall are: the Prairie 300, Prairie 300 4x4, Prairie 360, Prairie 360 4x4, Prairie 400, Prairie 400 4x4, Prairie 650 4x4, Prairie 700 4x4 and Brute Force 650 4x4.

The model numbers can be found on the identification label located on the frame of the ATV. The ATVs were sold at Kawasaki dealers nationwide from August 2000 through July for between $4,400 and $7,400. The CPSC says consumers should stop using the vehicles immediately and contact an authorized Kawasaki ATV dealer to arrange for a free repair. Registered owners of the vehicles will be notified directly by Kawasaki about the recall. Consumers can call Kawasaki at (866) 802-9381 or visit the company's website, www.kawasaki.com, for more recall information.

XXI. SPECIAL PROJECTS

The Beasley Allen Race Car

Our firm has sponsored a race car for the past couple of years. Grant Enfinger, who is a student at the University of South Alabama, is the driver of the BeasleyAllen.com Super Late Model stock car. Grant is currently in the top 5 in points at Montgomery Speedway. Bobby Mozingo, one of our investigators, is one of the pit crew members. One of our lawyers, Greg Allen, helps Grant on the radio during the races. Greg's daughter Tracy helps fuel the car during pit stops. Tracy has actually been very popular with all of the "single" drivers on the tour.

Most of Grant's races this year are in Mobile, Pensacola and Montgomery. The car's lettering features the firm's website and the fight against cystic fibrosis, which has afflicted family members of some of our lawyers. The Cystic Fibrosis Foundation funds research that has led to an increase in the median age of survival by persons who have cystic fibrosis. It has been good to help out with this fight against a dreaded disease.

Grant and the race team will end this year with two "long-distance" races, a 250 lap contest at Montgomery Speedway November 12th, and the Snowball Derby December 4th in Pensacola, which is considered the biggest and best short track stock car race in the country. The race team has its own website, www.BeasleyAllenRacing.com, where photos of the race car and team members can be seen, along with the race schedule and newsletters that keep the firm and fans caught up on the team's activities.

XXII. FIRM ACTIVITIES

Shareholder Elected To National ATLA Office

Gibson Vance, one of our shareholders, won his election for the office of Parliamentarian of the American Trial Lawyers Association. The election took place at the ATLA Annual Convention last month. Twenty-five attorneys from our firm and an additional 50 lawyers from Alabama attended the convention in Toronto. Their involvement was most important to Gibson's campaign efforts. He couldn't have won this race without the help of these lawyers.

In my opinion, Gibson will do a fine job and will work within ATLA to help protect the civil justice system. He will work to insure that the rights of every citizen are preserved. Our firm is willing to "lend" Gibson to ATLA, becuase we understand the importance of fighting to preserve the civil justice system and especially the right to trial by jury. The right to a trial by jury has been under attack by many in Corporate America for the last 20 years. Their efforts have intensified since George Bush landed in the White House.

Gibson believes, as I do, that an independent judiciary is the foundation for our great democracy. There is no other system of justice in the world that affords every citizen, no matter what his or her race, religion, age, political persuasion or station in life may be, the same fair consideration in the courts that every wealthy corporate CEO enjoys. We are all well aware of the responsibilities that come with Gibson's election. With God's help, we will meet those responsibilities.

Employee Spotlights

Jerry Taylor

Jerry Taylor came to the firm in April of 2001 from Birmingham. In October of 2001, he organized the Nursing Home Section of the firm. Since that time, Jerry has been involved in numerous cases that have resulted in substantial verdicts and settlements for our clients. Jerry was lead counsel in a case against a Beverly Enterprises nursing home facility in Mobile that resulted in a $7 million verdict. This case was featured in *The National Law Journal*, the *Nursing Home Law Letter*, and the *Andrews Nursing Home Litigation Reporter*, as well as numerous other publications and newspapers. In addition, Jerry has been involved in several cases that resulted in substantial settlements against nursing homes. Recently, Jerry was drafted by Andy Birchfield, who heads up our Mass Torts Section, to assist him with the litigation against drug manufacturers involving Cox-2 painkillers. He is presently representing clients all over the country with claims against Pfizer, the manufacturer of Bextra and Celebrex.

Jerry is a frequent lecturer at legal seminars locally and nationally, and recently spoke in Las Vegas and Albuquerque to lawyers from all over the country. He has authored numerous papers including "Nursing Home Malpractice in Alabama: Pre-Suit Preparation" and "Nursing Home Litigation: Taking a Case to Trial." He is a member of the Executive Committee of the Alabama Trial Lawyers Association and is involved in the Association of Trial Lawyers of America's Nursing Home Litigation Group and the Cox-2 Litigation Group. Jerry is married to the former Lisa Whigham of Louisville, Alabama, and they have three sons, Boyd, Christopher, and Rob.

Lisa Harris

Lisa Harris serves as Executive Director for our firm, which simply means she "runs the place." Lisa, who has been with the firm for 15 years, took over her current duties in 1998 and since then has been in charge of managing all daily activities of the firm. When Lisa is not at work, she keeps busy with her 15 year-old daughter, Haley. She also enjoys traveling, water sports, and mostly the beach.

Bruce Huggins

Bruce Huggins, as Chief Investigator, heads up the firm's Investigative Section. Bruce, who grew up in rural Autauga County, obtained a Criminal Justice Degree from AUM in 1977. He was employed as an Investigator with the Montgomery County Sheriff's Office from 1977 through 1988. Bruce received the Montgomery Officer of the Year award in 1983 and was the first member of the Sheriff's Office to attend the prestigious FBI National Academy in Quantico, Virginia. Bruce is celebrating 29 years of marriage, this month, to his high school sweetheart, Cindy McKinnon Huggins. Cindy is a registered nurse at the Montgomery Surgical Center. They have two children, Amanda, age 23, a student at Southern Union School of Nursing, and Daniel, age 20, a junior at Birmingham Southern University.

Our Investigative Section has been a tremendous asset to the Personal Injury Section and other sections. The section employs six full-time investigators, who are professionally trained law enforcement officers, each having graduated from the police academy. Many of the investigators have served as division heads in local police forces and have attended prestigious academies, such as the FBI National Academy. We believe that having in-house investigators is a definite advantage to our firm and is a great benefit to our clients Bruce has provided excellent leadership for his team.

Jenna Reaves

Jenna Reaves, who has been with the firm for over three years, currently serves as a clerical assistant in the Consumer Fraud Section. Jenna does extremely important work for the Fraud Section and is currently helping with cases involving Norwest/Wells Fargo and Beneficial. Jenna is married to Bobby Reaves and they have two children, a daughter, Paige and a son, Austin. They are expecting another daughter this month. Jenna enjoys pending time with her family, being outside, and reading. We are pleased to have Jenna with us. She is a very good employee and an asset to the firm.

XXIII. SOME PERSONAL OBSERVATIONS

It's Time For America To Wake Up

I believe most folks will agree that our nation is experiencing a moral decline that must be reversed. Things are being accepted as "normal" today by many in our society that literally shock the conscience of most Americans. In my opinion, government should be a protector of morality. Instead, most anything connected with government that has a moral component is now under constant attack. For example, the Pledge of Allegiance is under attack simply because it mentions God. Who would have ever believed that would happen? A friend of mine sent me a quote that comes directly from the legislative history of the Act of Congress passed in 1954 that placed "Under God" in our pledge of allegiance. Consider what Congress was thinking when it made the change in the pledge.

> *At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own.*

Congress, recognizing that these principles are critically important, passed the bill by an overwhelming vote. The Act of Congress emphasized that, "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator." It is a sad commentary that we currently are pretty much ignoring our Creator in so many ways. In this modern era, we are allowing the ungodly to pretty well dictate the agenda for our entire society. If you doubt this, simply spend a few hours watching prime time television programming on any channel (broadcast or cable), watch the commercials on sporting events, or take in a movie. You might even check out a few video games that our young people have virtually unlimited access to and that contain explicit sexual activity and violence. Advertising firms seem to believe that "sex sells" and as a result, we now see "x-rated" commercials on television on a daily basis. Print ads are equally bad, but maybe not as numerous. Our children are being exposed to this type filth on a daily basis. We had better wake up in the United States—before it's too late!

A Current Analysis Of The Separation Of Church And State Issue

Ben Locklar, one of our lawyers and I were discussing the attention which is being given to the debate over the separation of church and state issue recently. We concluded that it would be helpful to put a little bit of history relating to this issue in this report. Ben volunteered to write the following, which I appreciate very much, and it is printed in its entirety. You can decide whether we are on the right or wrong track when we push God totally out-of-the picture when it comes to involvement with government in the United States. Personally, I believe we are "dead long!"

The separation-of-church-and-state doctrine has been in the news a great deal in the past few years. Alabama, of course, has been at the forefront of this debate in the recent past as a result of former Chief Justice Roy Moore's stand to preclude the removal of the Ten Commandments monument from the State Judicial Building. Recently, the United States Supreme Court addressed two cases in which the "offended" parties sought to challenge the display of the Ten Commandments in public buildings. Interestingly, the Court determined that the display of the Ten Commandments in two Kentucky courthouses was improper, yet the display of the same document in the Texas capitol was not.

The separation-of-church-and-state doctrine has become such a mainstay of our current political climate that most people assume that it is part of our Constitution. The Constitution makes no reference to this phrase or to any similar phrase. A section of the First Amendment to the United States Constitution, which has become known as the Establishment Clause, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." The phraseology from which the separation-of-church-and-state doctrine emanates came from a letter written by Thomas Jefferson to the Danbury Baptist Association of Connecticut on January 1, 1802. The Danbury Baptist Association was upset over a rumor they had heard that a national religion was going to be established. To refute this rumor, Thomas Jefferson wrote: "I contemplate with solemn reverence that the act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." It is believed that Jefferson, a politician, took his words from a prominent Baptist preacher, Roger Williams, who in 1644 espoused that the "wall of separation" was to protect the church from influence from the state. In other words, the clear intent of the First Amendment, and Thomas Jefferson's "wall of separation" reference was to affirm that the United States government would not "establish" a national religion, such as existed in England and other parts of Europe and the world from which people immigrated to this country.

Thomas Jefferson's "wall of separation" mentioned in his 1802 letter remained in relative obscurity for almost 150 years until it was referenced by former United States Supreme Court Justice Hugo Black in 1947 in the case of Everson v. Board of Education, 330 U.S. 16 (1947), wherein Justice Black wrote that the First Amendment "was intended to erect a wall of separation between church and State," which "must be kept high and impregnable." Since Justice Black's "wall of separation" comment, Judeo-Christian expressions in public forums have experienced rapid erosion. For example, in 1962, the United States Supreme Court determined that a law that required a public prayer be said in schools was an "establishment" of religion by the State of New York. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." The law permitted students to elect not to participate or to leave the room while the prayer was read if they so choose. Similarly, in 1987, the United States Supreme Court determined that a Louisiana law that required that creationism be taught alongside evolution in public schools was unconstitutionally impermissible because the law lacked a clear secular purpose. In 1992, the United States Supreme Court ruled that a school system in Providence, Rhode Island could not invite members of the clergy, including a rabbi who was asked to give the invocation, at school graduations because such expressions of faith were violative of the Establishment Clause.

Most of us can still recall seeing manger scenes or the Star of David at the public square. Most of us can recall saying prayers in school or at sporting events in public schools. Most of us can recall being able to say the Pledge of Allegiance, which includes the phrase "one nation under God," each morning before we began our school day.

Books have been written about this debate over whether and to what extent government should be involved in religion. Obviously, space precludes an in-depth discus-

sion of this debate, but suffice it to say that a barrage of cases brought by the ACLU and others since 1947 have greatly eroded the expression of faith-based beliefs in the public venues. Most believe that the dissipation of morals in this country is largely attributable to the fact that God has been removed from the forefront of our daily lives. School children are no longer exposed to a prayer at the start of their school day; instead, they have been led to believe that it is wrong, and in some sense evil, to "force" people to acknowledge the presence of a Supreme Being. The court opinions released over the last few decades have effectively led to God being bottled up and placed in a closet, out of the view of the mainstream. Whether this has, in fact, resulted in the increase in crime and moral relativism will continue to be debated. What cannot be disputed, though, is that people in this country no longer have the respect and awe of God that they once had. Hollywood has determined that everything is permissible. If we as Believers find that to be offensive, then we simply can turn off our televisions.

It is time that the United States Supreme Court and the federal courts in this country use some common sense on this issue. What is wrong with displaying the Ten Commandments in the courthouse? They are, ironically, prominently displayed in the United States Supreme Court. What is wrong with having a manger scene in the courthouse square? Who could that possibly offend and how could that ever truly be considered to be an act by the government to "establish" a religion? What is wrong with beginning high school football games with a prayer, asking for God's protection of the participants and the blessing of this nation? Even if you do not believe in God, how could this be offensive?

Clearly, this country in this day and age can use all the help that it can get, especially from a Divine Source such as God. None of us wants to see a church established by the government. We all want to be free to worship as we please, free from interference from the government. On the other hand, our federal courts, and some state courts, have reached the point of saying that any and all references to God are wrong and should be precluded. Such a view is not only inconsistent with our Constitution and the founding principles of this country, but is also harmful to our society as a whole.

We should all be watching closely the person who will become our next United States Supreme Court justice. The votes on the two recent United States Supreme opinions, referenced at the beginning of this article, were split 5-4. Justice Sandra Day O'Connor, who has recently retired from the Court, voted in each case that the display of the Ten Commandments was unconstitutional. There will be at least one new face in the Court in the near future and perhaps two. Clearly, the next justices chosen to serve on the high court will have a profound effect on which direction the Court takes on these important issues in the future. The American people will watch with great anticipation how the high court deals with these moral issues.

Authored by Ben Locklar for publication in this issue.

Sometimes Things Never Change

Many believe that those in Corporate America who commit serious wrongs have received "special treatment" from government when they are "caught." That has always been my belief because of the enormous power and influence that those who run things in Corporate America have over government regulators. On the other hand, when caught, ordinary folks have had to pay the price for their wrongdoing. In discussing my beliefs with a friend about how some corporate executives have come off "pretty light" when caught, it was pointed out by this friend that this is nothing new. Later, my friend send me the following poem which I believe is worth your reading.

They hang the man and flog the woman
That steal the goose from off the common,
But let the greater villain loose
That steals the common from the goose.
The law demands that we atone
When we take things we do not own
But leaves the lords and ladies fine
Who take things that are yours and mine
The poor and wretched don't escape
If they conspire the law to break;
This must be so but they endure
Those who conspire to make the law.

The law locks up the man or woman
Who steals the goose from off the common'
And geese will still a common lack
Till they go and steal it back.

-Old English folk poem, circa 1764

You might say that really nothing has changed since that poem was written in the 18th Century. The more powerful the person—and especially those with good political connections—the less likely it is that person will be dealt with harshly by the federal government if he or she is

caught committing a wrongful act. When a corporation cheats on a government contract and gets caught, it pays a fine and continues to do business with the government. But let a low-level employee of that same corporation steal from the company and see what happens. The recent criminal prosecutions of some corporate criminals, however, may be a sign of "changing times." Hopefully, that will be the case. It will really believe it when Kenny Boy Lay goes to trial.

XXIV. SOME PARTING WORDS

The public display of the Ten Commandments has been widely discussed and debated in the United States over the past few years. It appears that many Christians become somewhat defensive when confronted with how to best handle this issue. in my opinion, the views of Christians concerning this important issue should be made known. Certainly, these "rules" passed down by God are just as applicable today as they were in the days when Moses walked on this earth. Frankly, I believe that the public discussions have been good for a number of reasons. Clearly, the open debate has caused many of us to re-examine our own beliefs. Hopefully, it has caused us to even change some of our own "practices" and to lead a better life.

Considering the public display of the Ten Commandments also may cause us to realize that there are other commandments not on display. Jesus tells us about two of them in the Gospel of Matthew that apply to us today. Sometimes, we tend to forget about those Commandments in our debates over the Ten Commandments. Frankly, many would like for debate over the Ten Commandments debate to simply fade away. But, I have learned over the years that compromise on important matters isn't always the proper course of action. Clearly, some things are much too important to compromise. That is especially true when it comes to God's law. As important as the Ten Commandments are, however, there is much more in God's word that we should consider and attempt to understand.

Let's consider what Jesus had to say when confronted on this issue of the commandments. The Pharisees—who some compare to a few of our modern-day politicians—were trying to test Jesus and to put Him in a box. One of them—who incidentally was a lawyer—asked this probing question: "Teacher, which is the greatest commandment in the law?" Jesus responded to this inquiry:

> *You shall love the Lord your God with all your heart, with all your soul, and with all your mind. This is the first and great commandment. And the second is like it: "You shall love your neighbor as yourself." On these two commandments hang all the Law and the Prophets.*
>
> *Matthew 22: 37-40*

Some of us make "our religion" much too complex and complicated. As a result, most of us have great difficulty in following the mandates of these two commandments that Jesus laid out in powerful terms for his detractors. Actually there are for the edification of all believers. The first of these is obviously a requirement that can't be compromised. It follows that if we truly love God, we will have no problem loving and respecting our fellow man. We will also treat others fairly, honestly, and with understanding and compassion. I was recently told by a person much smarter than I am that "The whole of God's will for humanity actually rests on the exercise of this love." If each of us would practice the "greatest commandment" in our daily lives, and obey the second, most all of the problems facing our nation would fade away or at least we would be able to cope with them. Following these two commandments would also cause us to keep the Ten Commandments on a daily basis without having to be reminded that they are "posted" and "should be followed."

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