CEI PLANET
ADVANCING LIBERTY FROM THE ECONOMY TO ECOLOGY
COMPETITIVE ENTERPRISE INSTITUTE VOLUME 26, NUMBER 2 MARCH/APRIL 2013

FTC Drug Meddling Would Needlessly Push Pharmaceutical Costs Higher

BY GREGORY CONKO

Four of every five pharmaceutical prescriptions today are filled with a generic drug. That sounds like a big number, but the Federal Trade Commission (FTC) thinks it is too small and wants to do something about it. For over a decade, the agency has tried to use antitrust laws to crack down on business arrangements known as "reverse-payment patent settlements," in which brand manufacturers pay generic competitors to drop patent challenges that could speed generic drugs to market. But a ban on settlements would threaten brand and generic firms alike, and result in higher, not lower, drug prices.

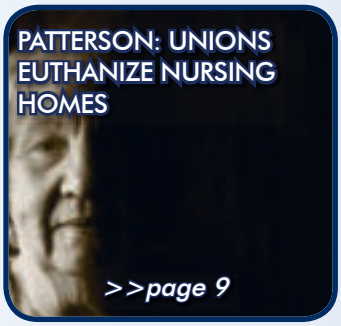
On Monday, March 25, the U.S. Supreme Court heard oral arguments in *Federal Trade Commission v. Actavis*. In the suit, the agency claims reverse payment settlements are anticompetitive because the parties are colluding to delay competition for more expensive brand drugs. In this case, Solvay Pharmaceuticals paid two generic firms tens of millions of dollars each for agreeing not to challenge Solvay's patent on the testosterone replacement drug AndroGel for a period of 10 years.

The 1984 Hatch-Waxman Act gives generic producers a financial incentive to challenge potentially weak drug patents in court, with the expectation that successful challenges will lower drug prices by accelerating the entry of generics into the market. The law has been a boon for consumers, generating hundreds of patent challenges, increased competition, and a 60 percent average price reduction for drugs with generic competitors.

There's only one problem: Even strong patents are often the subject of litigation. Thus, when faced with the uncertainty of patent litigation, brand manufacturers sometimes offer to settle,

(continued on page 3)

FEATURED ARTICLES



ALSO INSIDE:

>>FROM THE FOUNDER AND CHAIRMAN

Marketing CEI's Free Market Message to the World

By Fred L. Smith, Jr.

As you've probably heard, Lawson Bader, CEI's new President, has hit the ground running, allowing the changeover in leadership to go much faster and smoother than even I, at my most optimistic, had anticipated. Power transfer is always disruptive, but the selection of my successor was addressed carefully and Lawson was well prepared for the role. And it has allowed me to accelerate work on my Center for Advancing Capitalism—and its international auxiliary, the World Council for Capitalism. So now, I'm fully employed.

Building the Center, and with it the Council, will not be an easy project. It will require enlisting an intellectual team of the highest caliber and finding a cadre of entrepreneurial capitalists, reform politicians, and media professionals to create the "Thinker/Doer" alliance that is essential for effective reform. It will require a mix of people who can work well together and also want to win. Our aim is to counter the longstanding success that the alliance of progressive politicians, crony capitalists, and leftist so-called non-governmental organizations (NGOs) that has had done so much to slow—if not derail—the world's economic and material progress.

This anti-capitalist alliance has successfully demonized economic development in many areas, using an array of arguments—"human rights" to stop mining and oil exploration in Nigeria and elsewhere, the precautionary principle to block genetically modified crops in the developing world, "pollution" to slow energy development, the "digital divide" to throw up barriers to an expanded information industry, and many others—all while claiming to stand up for the little guy against the ravages of global capitalism. We know it's bunk, but how do we make our case?

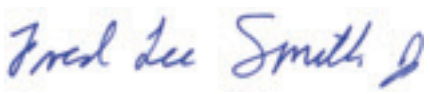
Our job is to re-legitimize entrepreneurial capitalism—to not only defend the free market, but to demonize right back both crony capitalism and the neo-Malthusian, anti-development ideology that sees more people on Earth as a bad thing, while also how they work together to reinforce each other.

Consider the energy industry, where natural gas producer Chesapeake Energy was recently found to help promote the Sierra Club's attacks on the coal industry. You know things are bad when U.S. energy producers, with a few notable exceptions, instead of defending themselves and their industry, focus instead on pushing for regulations to cripple a competing sector of the energy field. I wish that were a rare case, but we find such "Baptist and Bootlegger" alliances—in which an ideological lobby provides moral cover for an economic interest that would benefit from regulation—to be all too common in public policy debates.

This has gone on for too long. Entrepreneurial capitalists cannot afford to be passive bystanders. They are in a cultural war that they are losing steadily. When they do fight, it is often tactically, surrendering somewhat less than initially sought by their foes—only to yield a little more the next round, and the next, and so on. Firms defer to their trade associations, which often defer to their most supine members, and then wonder how much worse it could have been.

And the statist onslaught continues. Now, as the United States and European Union prepare to negotiate the creation of a Transatlantic Free Trade Area, the NGO/crony capitalist alliance will be back, demanding the addition of burdensome, anticompetitive regulatory provisions in the form of environmental and labor side agreements. Trade agreements may not be perfect, but they'd be much better if they actually focused on trade, rather than regulatory appeasement.

Since its early days, the leftist NGO movement has had very substantial financial support from guilt-ridden trust-funders, naïve but sympathetic citizens, and economic interests who see it as a tool to wield against competitors. My challenge? Finding a few contrarian investors to assist my Center for Advancing Capitalism. Do drop me a note; I'd love to discuss this project. And I hope for your support.



CEI PLANET

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The CEI Planet is produced by the Competitive Enterprise Institute, a pro-market public interest group dedicated to free enterprise and limited government.

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ISSN#: 1086-3036

FTC, *continued from page 1*

paying challengers to drop the suit and letting generic manufacturers sell their products a few years before the patents expire.

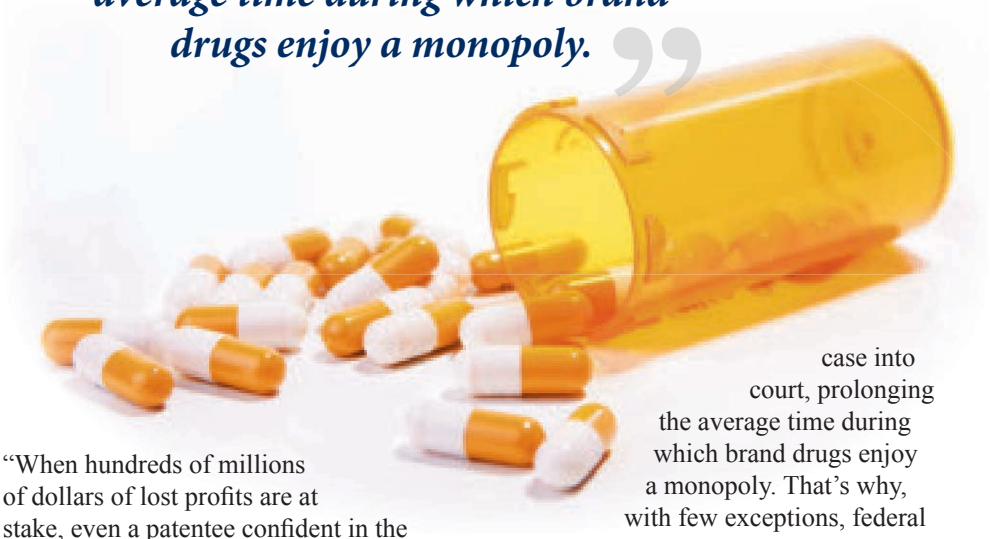
Critics call the practice "pay-for-delay" because overturning patents would get generics to market sooner still. They claim the parties to reverse payment settlements illegally collude to prolong the branded drugs' monopoly and share in the ill-gotten gains.

The FTC already has authority under antitrust laws to block settlements where evidence indicates consumers would be harmed by higher prices. And, since 2002, federal law has required that any such settlement be reported to the FTC for review. The agency has challenged dozens of these cases in court, almost invariably losing because most settlements are found to be pro-competitive.

Every one of the patents challenged in these cases was deemed valid by the U.S. Patent and Trademark Office. Of the cases that have made it all the way to a court decision, slightly more than half affirmed the patent's validity. And despite the FTC's claims to the contrary, there is no evidence that settled cases would have been more likely to result in patent invalidation. In the handful of cases where the FTC succeeded in blocking a settlement and forcing the litigation to go forward, courts more often upheld the patents than overturned them.

In the Eleventh Circuit Appeals Court decision being challenged in *FTC v. Actavis*, the court unanimously rejected the agency's claim that a brand manufacturer's willingness to settle is evidence that the patent was likely to fail.

> ***"Banning settlements would force every case into court, prolonging the average time during which brand drugs enjoy a monopoly."***



"When hundreds of millions of dollars of lost profits are at stake, even a patentee confident in the validity of its patent might pay a potential infringer a substantial sum in settlement," said the court. "A party likely to win might not want to play the odds for the same reason that one likely to survive a game of Russian roulette might not want to take a turn."

There is one important difference between cases that go to trial and those that are settled, however. As part of a settlement agreement, a brand manufacturer almost always agrees to let the generic product come to market before the patent's expiration. In the Actavis case, generic versions of AndroGel could be sold five years before the patent expired. But fewer than half of fully litigated cases result in early entry by the generic. Banning settlements would force every case into court, prolonging the average time during which brand drugs enjoy a monopoly. That's why, with few exceptions, federal courts have rejected FTC attempts to make reverse-payment settlements presumptively unlawful restraints of trade.

In a 2003 case, Seventh Circuit Judge Richard Posner wrote that "a ban on reverse-payment settlements would reduce the incentive to challenge patents by reducing the challenger's settlement options." Posner argued it was a ban on settlements, not the settlements themselves, "that might well be thought anticompetitive." The Supreme Court Justices would do well to keep that in mind as they ponder this case.

Gregory Conko (gconko@cei.org) *is a Senior Fellow at CEI's Center for Technology and Innovation. A version of this article originally appeared on Forbes.com.*

CEI Remembers Margaret Thatcher

CEI Founder and Chairman Fred Smith and CEI Board Member Fran Smith with Baroness Margaret Thatcher at a reception during the London meeting of the European Resource Bank in 2010. When introduced, Fred mentioned that he knew her first economic advisor, Sir Alan Walters. He recounted his question to Sir Alan when Thatcher first became prime minister: "Does she know economics?" Sir Alan replied, "Anyone can learn economics. Margaret Thatcher has that rare trait—courage." She enjoyed that and laughed heartily.

Jean-Claude Gruffat Spreads the Gospel of CEI

BY BRIAN MCNICOLL

Jean-Claude Gruffat has seen the pattern so many times he even has a name for it.

A crisis emerges in the financial sector. Government responds with legislation designed to fight the last war. "It's divergence, not convergence," says Gruffat. "It's the same framework, only more regulations and more regulators. I call it regulatory arbitrage."

He talked about regulatory arbitrage in reference to Dodd-Frank, the legislation passed in 2010 that has spawned lawsuits—including one involving CEI—and hampered the financial industry in countless ways. But as a managing director at Citigroup with decades of experience in international banking, he knows the problems of excessive regulation are not limited to the United States.

That's why he has gotten involved with CEI. He has worked all over the world—Asia, Africa, the Middle East, Europe—and he has seen a variety of approaches to various financial situations. He has noted the business community can be quite "ambiguous" in how it fights regulatory overreach. "They fight to some degree, but there is concern to be on good terms with the government," he says.

But CEI "will lead on these issues. Many think tanks deal with a lot of issues, but CEI is much more focused on regulatory overkill. It has a better way to talk about the issues that matter. We have to be extremely specific to get people to understand our views, and CEI does that."

Gruffat found out about CEI while in France. He met its founder, Fred Smith, through a common contact in Paris. A dinner was arranged, and further meetings took place with top economists in Europe. When Gruffat moved back to the United States in April 2011, he increased his involvement with CEI.

He now helps recruit attendees for CEI's Annual Dinner and even attended a recent meeting of CEI's Board of Directors. He explains to his colleagues in the financial services industry how important it is for them to stand up to regulatory overreach. He talks about CEI's singular focus on the regulatory environment and the billions upon billions in hidden costs it imposes on the economy. He points out, as does Wayne Crews, CEI's Vice President for Policy, that regulations impose more costs on Americans than even direct government spending.

"Jean-Claude is a real evangelist for CEI," says Smith. "He understands the true cost of regulations, the true reach this has throughout the world and the true threat it poses to prosperity everywhere."

As enthusiastic as Gruffat is about spreading the word for CEI, he does have one suggestion. "Today, CEI's agenda is extremely U.S.-specific," he says. "Given what is happening elsewhere in the world and the interconnectedness of our economies, this has to evolve over time," to tackle challenges to economic freedom around the world.

Brian McNicoll (bmac@cei.org) *is Senior Director of Communications at CEI.*

Let's Lose LOST

BY IAIN MURRAY AND
H. STERLING BURNETT

When U.S. Secretary of State John Kerry gave a speech at the Ross Sea Conservation Reception on March 19, he suggested that we should have called our planet Ocean rather than Earth. He went on to outline an international environmental agenda centered around the oceans that we can expect to be the hallmark of his time in office. Saving the oceans will be the new rallying cry of the green movement and their political and corporate allies. We can therefore expect a new attempt soon to ratify the United Nations Convention on the Law of the Sea (UNCLOS). This would be a disaster for America.

Kerry was forthright in his argument:

> [I]t is clear that we have an enormous challenge ahead of us as we face the extraordinary excess that we see with respect to each of those issues that I talked about: energy policy that results in acidification, the bleaching of coral, the destruction of species, the change in the Arctic because of the ice melt, and the change in the krill, the population of whales. The entire system is interdependent, and we toy with that at our peril.

A recent study that one of us—Iain Murray—wrote for the National Center for Policy Analysis, "LOST at Sea," notes that UNCLOS—also known as the Law of the Sea Treaty, or LOST—has been advanced at different times as the solution to all of these issues. This is because the convention includes provisions that require governments to take measures to "minimize to the fullest possible extent" the release of substances "harmful" to the oceans. It also establishes a tribunal—a permanent court—to police the treaty.

Anyone who knows the tactics of the environmental movement should realize that this would be manna from heaven for global warming alarmists. The release of carbon dioxide from fossil fuels has been blamed for ocean acidification, coral bleaching, species loss, ice melt and virtually every other ill that greens have claimed is befalling the oceans.

If LOST is ratified, it has the force of law under the U.S. Constitution. The environmental movement would thus be able to use the treaty, U.S. courts, and the UNCLOS tribunal to force the U.S. to minimize carbon dioxide emissions.

Since the treaty does not take economic costs into account, and the U.S. is the world's second largest emitter of carbon dioxide (despite rapid emissions decreases caused by technological advances such as the development of fracking), such a requirement could amount to the forced deindustrialization of the United States. Economic disaster, mass unemployment, and vastly increased poverty would result.

We should not be sanguine about the prospect of the tribunal being presided by impartial or even competent justices. As Doug Bandow of the Cato Institute notes, appointment to the tribunal seems to have been used as a "dumping ground" for "frustrated politicos," many of them from undemocratic regimes where political power is often achieved by unsavory means.

This should not be surprising given the convention's history. It was drafted during the Cold War, and was intended by the Soviet Union to be used as a means of support for its satellite states in the developing world. By declaring the world's oceans "the common heritage of mankind," it provided a mechanism by which any development of subsea resources outside a nation's 200-mile zone would help subsidize those regimes.

Indeed, the purpose of the treaty was so transparent that President Reagan refused to sign the treaty. It has failed to garner enough support to make it to the Senate floor every time it has been suggested since, even after the Clinton administration negotiated some amendments in 1994.

The treaty, however, contains other provisions relating to international navigation and more traditional "freedom of the seas" principles. That is why many current and former naval officers support the ratification of the treaty. Many corporations do as well, falsely believing the treaty will give them more certainty in planning exploration in areas such as the Arctic Ocean.

In short, there is no economic case for the United States to ratify LOST. It uses the failed socialist economic theory to govern the ocean floors, it has proven unable to resolve disputes, it subsidizes dangerous regimes, it does not establish meaningful property rights and thus fails to provide certainty for developers, and because it requires technology transfers, it suppresses research and development. Indeed, it amounts to a scheme for transferring wealth from the poor in developed countries with ocean coastlines to wealthy oligarchs in developing countries with no ready access to the world's oceans.

It is, however, the threat of environmental extremism given new teeth that provides the biggest reason to reject the treaty. We rejected the Kyoto Protocol for good reason. This is Kyoto with a court attached. Secretary Kerry has told us what he wants. We may choose to call our planet Ocean, but we should not let our people drown in a tidal wave of foolishness.

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Internet Sales Tax Bill a Bad Idea

BY JESSICA MELUGIN

If less complexity, fewer loopholes, and lower rates are the signposts of meaningful tax reform, the dubiously named Marketplace Fairness Act embodies the exact opposite.

The Act, introduced in both houses of Congress in February, would empower states to collect sales tax from companies with no physical presence within their borders. The bill, sponsored by Sens. Mike Enzi (R-Wyo.) and Richard Durbin (D-Ill.), and in the House by Rep. Steve Womack (R-Ark.), among others, would greatly expand state tax collectors' reach, resulting in a huge tax hike on many online and catalog purchases.

Currently, under the *Quill Corp. v. North Dakota* Supreme Court decision, a business must have a "nexus" in a state before it can be subject to its tax regime. For example, if a resident of Oklahoma buys something online from a retailer in Virginia, Oklahoma can collect tax only if that retailer has a store, warehouse, or some other facility in the Sooner State. Because it's the retailer, not the consumer, that remits the sales tax, this arrangement prevents taxation without representation. That safeguard will disappear, and a messy new tax regime will emerge if Congress blesses this unprecedented state tax cartel.

The plan violates each of the tenets of good tax reform.

First, it would create a system of burdensome complexity, as it would turn small online businesses into tax collectors for the 9,600 distinct taxing jurisdictions across the country. Businesses with a single location—perhaps even in one of the five states with no sales tax at all—will become responsible for calculating, collecting, and remitting tax obligations to all of those jurisdictions with their unique rates, definitions, and exemptions.

This also would impose taxation without representation. Presumably, these businesses could become subject to audits and penalties from states where they have no political voice and do not benefit from the services that their taxes fund. Many small online businesses will not survive these compliance costs.

Second, instead of doing away with loopholes, the legislation contains an exemption for businesses with gross annual sales of less than $1 million. That might sound like a welcome relief from the plan's business-killing compliance costs, but many small businesses have annual sales above that threshold. (In fact, the Small Business Administration defines a small business as one making $30 million or less.) So this exemption won't do nearly enough to protect smaller retailers online.

Most politicians won't be able to resist squeezing a little more tax revenue from out-of state businesses because there won't be any incentive not to.

Moreover, the $1 million threshold is for the company's total annual gross sales, not sales in any one state. In practice, this means that an entrepreneur will be subject to a remote state's tax regime even if he sells $1 million in merchandise through walk-in business to his storefront and only makes one remote online sale. For the lawyers out there, that's a due process problem. Having a website someone is able to access in another state doesn't qualify as purposefully availing your business to that state's tax regime, as Supreme Court jurisprudence requires.

The third principle of sound tax reform is that rates should go down. The Marketplace Fairness Act will likely make them go up. If state lawmakers can raise tax rates on a group with no political recourse against them, it's a safe bet that they will. Taxes on hotel rooms, rental cars, and airports all illustrate politicians' propensity to raise taxes on those who cannot vote them out of office. Most politicians won't be able to resist squeezing a little more tax revenue from out-of state businesses because there won't be any incentive not to. Downward pressure on these taxes will be lessened, and, accordingly, rates will rise.

This legislation will mean more burdensome complexity, more loopholes, and higher tax rates. If this is what Congress thinks state tax law needs, let's hope it doesn't get around to working on the federal tax code anytime soon.

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The Third Side of the Immigration Debate

BY DAVID BIER

Viewed from afar, America's immigration debate appears to center on two groups: liberals whose primary concern is the welfare of immigrants and conservatives whose primary concern is ending illegal immigration.

But there is a third element that has inserted itself into the conversation: those who oppose immigration—legal and illegal.

This group is led by three major anti-immigration organizations: Federation for American Immigration Reform (FAIR), NumbersUSA, and Center for Immigration Studies (CIS). Their work on immigration has led major news media to often label them "conservative." Yet the reality is that these groups do not share conservatives' interest in ending illegal immigration, if doing so might mean more legal immigration.

CIS Executive Director Mark Krikorian openly admits that illegal entries are not the main issue for him. "For too long the Republican story line has been 'Too Much Lawbreaking,' when instead the real problem is 'Too Much Immigration,'" Krikorian wrote in a 2009 *National Review* article that explained his strategy for GOP immigration reform.

The other organizations agree. According to its website, NumbersUSA President Roy Beck's "greatest concern" is population growth—that his "grandchildren's grandchildren" will "live packed in a highly-regimented country approaching a billion people." In his book *The Case Against Immigration*, he wrote that America has become "a nation of too many immigrants."

"Legal immigration could be stopped with a simple majority vote of Congress and a stroke of the president's pen," Beck argued. But that argument cuts both ways. Illegal immigration could end just as easily and these groups know it. As Krikorian put it in his 2009 article, "You just legalize the whole thing and the issue goes away—no illegals, no problem."

But FAIR, CIS, and NumbersUSA don't want this because their interest is not fewer illegal crossings, but fewer people. Like NumbersUSA, FAIR argues, as it did in a 2009 report, that "the United States is already overpopulated." In his book, *The New Case Against Immigration: Both Legal and Illegal*, Krikorian called immigration "a government-administered population policy," that is "just like Communist China and the Soviet Union" (p. 188).

By contrast, the bipartisan Senate principles on reform, endorsed by Tea Party Senators Marco Rubio (R-Fla.) and Jeff Flake (R-Ariz.), recognize that "to prevent future waves of illegal immigration, a humane and effective system needs to be created for these immigrant workers to enter."

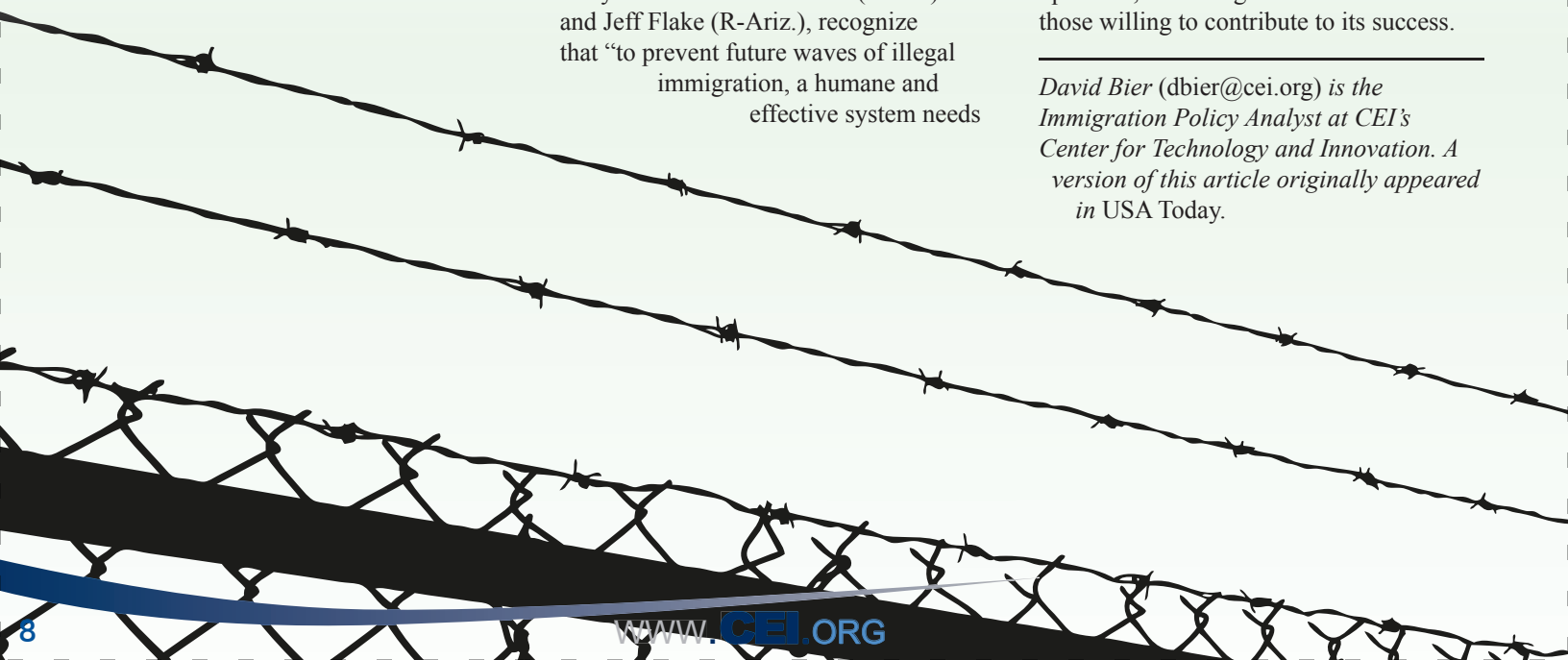
History proves that, indeed, if legal entry is not obstructed, illegal entry disappears. Before Congress enacted immigration quotas in the 1920s, illegal immigration was a non-issue. Likewise, during the 1960s, Mexican work visas were uncapped and illegal entries virtually ceased. If illegal immigration was to disappear, CIS would have to argue against immigration on its merits alone—without the word "illegal."

These groups stand alone advocating for making legal avenues more difficult to access for future immigrant workers and families—no guest worker visas and half as many green cards. This proposal might keep a few more immigrants out, but it will radically increase illegal entries.

Again, the main issue for these groups is not ending illegal immigration—it is ending immigration of all types. Conservatives should reject input on how to fix illegal immigration from people who don't care if their policies encourage it.

Conservatism is not an anti-immigration, anti-population growth ideology. "Immigration is not a problem to be solved," said President George W. Bush in 2001. "It is the sign of a successful nation." But it is a problem for those who want to turn our back on our tradition of openness, slamming the nation's doors on those willing to contribute to its success.

David Bier (dbier@cei.org) *is the Immigration Policy Analyst at CEI's Center for Technology and Innovation. A version of this article originally appeared in* USA Today.



Unions Euthanize Nursing Homes

BY MATT PATTERSON

Once upon a time, a group of health care workers walked off the job, abandoning the aged and infirm under their care. Others—according to reports—actively sabotaged their patients' medical care—though thankfully, no one was irreparably hurt.

This is no fairy tale, but a real-life horror show that unfolded recently in New England. Last July, HealthBridge Management, which operates 32 nursing care facilities, was confronted with an employee walkout at five of its Connecticut nursing homes.

The striking workers were members of New England Health Care Employees Union, an affiliate of the Service Employees International Union. They were objecting to a new contract advocated by HealthBridge that would have required employees to pay more for their health coverage. Union reps wanted the previous contract, which had expired in 2011, to remain essentially unchanged.

HealthBridge balked, and for good reason. The nursing care industry, even under the best of conditions, operates on thin profit margins. HealthBridge claimed that the union's demands would make its costs unsustainable. But the union was unmoved, and so its members walked off the job en masse.

They remained on strike for eight months, while the dispute worked its way through the courts. Then, on December 11, 2012, a federal district court judge in Connecticut ruled that HealthBridge had acted illegally by imposing a new contract unilaterally, and ordered the company to bring the striking workers back under the original labor agreement. On March 3, the striking workers returned, displacing dozens of replacement workers whom HealthBridge had hired to keep operations running.

The replacement workers, many of whom had moved from out of state to take their positions, are now out of luck. Also out of luck are the patients, many of whom had reported that the replacement workers were far superior, according to one inside source who spoke to this columnist on condition of anonymity.

Unfortunately, the long and costly dispute (merely bringing in the replacement workers cost HealthBridge $12.5 million in relocation and administrative costs) has pushed the company to the very point it was hoping desperately to avoid. On February 24, five of the facilities it manages succumbed to the icy grip of bankruptcy. Unsurprisingly, those five fiscally comatose operations were also the epicenters of the union miscreancy.

What are we to make of these events? Union supporters will suggest that the striking workers were merely fighting for an equitable contract as is their right under U.S. labor law. Perhaps. But how then do they explain the reported acts of sabotage on the part of union workers as they prepared to abandon those in their care way back in July? Tales of union activists switching patient identification wristbands and name tags on patient doors—potentially risking wrong medicines being administered—surfaced in police reports as the strike unfolded.

If true, such acts move union behavior from a sin of omission—walking out and refusing to give the care they were contracted to give—to a sin of commission—outright seeking to harm those whose safety they were entrusted with.

Union greed euthanized these nursing homes. Let's be thankful that's all they killed.

Matt Patterson (mpatterson@cei.org) *is a Senior Fellow at CEI's Center for Economic Freedom. A version of this article originally appeared in* The Washington Examiner.

THE GOOD

CEI Lawyer Wins Fight against Class Action Attorney Fees in Merger Challenge

A Texas appeals court ruled in late March that trial lawyers were wrongly awarded several hundred thousand dollars in attorneys' fees. CEI General Counsel Sam Kazman was the appellant in the case, which challenged a lower court ruling. The case arose from a 2011 merger between Frontier Oil and the Holly Corporation. The shareholders were overwhelmingly satisfied with the proposed merger. But, as is the case with more than 95 percent of mergers, several trial lawyers saw this as a moneymaking opportunity and filed class-action challenges to the merger. Plaintiffs and the companies quickly settled, with the companies agreeing to issue a 1,300-word proxy supplement consisting of immaterial tweaks to the original disclosure. In return, the plaintiff class lawyers would receive over $600,000 in fees—nearly $500 per word. Sam Kazman, the objecting shareholder in the lawsuit, stated, "I may only have a handful of shares in HollyFrontier, but I find the Court's ruling to be incredibly rewarding in terms of fairness and justice."

THE BAD

TSA Still Isn't Complying With the Law on Body Scanners

On March 26, the Transportation Security Administration (TSA) issued a notice of proposed rulemaking (NPRM) as required by a court order that found the TSA violated the Administrative Procedure Act by not conducting the required notice-and-comment rulemaking prior to deploying whole-body imaging scanners at airports. CEI, while appreciating the opportunity to finally comment on the use of the scanners, is unimpressed by the TSA's NPRM. "The U.S. Court of Appeals for the District of Columbia Circuit ordered in August 2011 that the TSA must 'promptly' begin a notice-and-comment rulemaking, as required under the Administrative Procedure Act," said CEI Fellow in Land-use and Transportation Studies Marc Scribner. "However, the Court explicitly reasoned that the TSA must propose a legislative rule. Unfortunately, the proposed rule more closely resembles a general statement of policy."

THE UGLY

Administration Continues to Hide McCarthy Communications

Since January, the Environmental Protection Agency has provided about 6,000 emails to CEI as part of a court-ordered plan to comply with Freedom of Information Act requests. Remarkably absent are what should be the dominant class of records covered by our request seeking records: Gina McCarthy discussing her biggest assignment, the Obama administration's "war on coal." McCarthy is the Assistant Administrator for Air, charged with implementing this agenda. She will go before the Senate soon to seek to become EPA administrator. Those emails from her that are not withheld in full by EPA are typically redacted in full. "You would think after having one administrator resign in disgrace over a false identity email account, the administration that claims to the most transparent ever would move quickly to demonstrate something resembling openness on her appointed successor's records," said CEI Senior Fellow Christopher Horner.

MediaMENTIONS

Compiled by Nicole Ciandella

CEI President Lawson Bader explains why CEI hosted a panel on tolerance at the 2013 Conservative Political Action Conference:

Why did we do it? Why did an organization that promotes free markets seemingly venture into social policy? Because we don't see it as social policy. Because the exclusion of the gay conservative group GOProud from CPAC reflects a market failure and a continuing threat to free-market policies—a market failure because the marketplace of ideas is not free if legitimate aspirants are excluded, and a continuing threat because the political leaders most likely to support our policies cannot win unless we find ways to communicate with gays, women, Hispanics, and others. Yes, CEI remains focused on energy and economic issues, but we're also part of the broader center-right movement. And if we're to achieve economic liberty, we need a much bigger tent.

Others at CPAC appeared ready to tackle immigration and women's issues, and we have some history on this—we cosponsored a celebration with GOProud and the late Andrew Breitbart during the 2011 CPAC. Plus, when it comes to discrimination, silence is assent. To accept GOProud's exclusion from CPAC would be to condone it and to turn our backs on reliable allies.

–March 18, *The Daily Caller*

In a letter to the editor, Senior Fellow John Berlau admonishes critics of the JOBS Act for spreading disinformation:

Since President Obama signed the bipartisan bill in April, some very successful initial public offerings by small and midsize firms have taken advantage of the law's provisions. The online travel site Kayak and the discount retailer Five Below went public using the JOBS Act's five-year exemption from the onerous mandates of laws such as Sarbanes-Oxley and Dodd-Frank. These firms are now trading above their initial public offering prices and are expanding their operations.

The JOBS Act certainly factored into the small but significant drop in unemployment the United States saw this fall. More paring of excessive rules burdening startups could improve the jobs picture even further.

–March 10, *The New York Times*

Labor Policy Analyst Trey Kovacs asks why so many government employees are being paid for union work:

When President Carter signed the Civil Service Reform Act in 1978, he said he did so to "promote the general welfare, contribute to the effective conduct of public business and to facilitate and encourage amicable settlements of labor-management disputes." He said nothing about creating dozens of jobs within government devoted solely to the conduct of union business. But that is precisely what has happened.

According to records obtained by Americans for Limited Government through Freedom of Information Act requests, the Department of Transportation had 35 employees who did nothing but union work in 2012, and the Environment Protection Agency had 17. All 52 made at least $72,000 per year, and 37 made more than $100,000.

And the problem is getting worse—so much worse, in fact, that the federal government doesn't even want to discuss it anymore. Two Republican congressmen—Reps. Phil Gingrey of Georgia and Dennis Ross of Florida—have inquired for years about the problem, only to be ignored by the Office of Personnel Management, which tracks use of union official time

–February 28, *U.S. News & World Report*

Fellow in Consumer Policy Studies Michelle Minton slams a proposed Chicago ban on energy drinks:

Whatever the motives of the bureaucrats, lawmakers, and self-styled "public health" advocates who call to ban or restrict certain products, their proposals are bad policy in every context. In effect, they are saying that adults are not smart or responsible enough to make their own decisions over whether and how to consume certain products. Any product can be dangerous depending on each individual's health status and how much they consume. Ultimately, it should be up to each individual person to determine what is best for him or herself. If energy drinks pose any danger to health, allowing government officials to make our choices for us is a far greater threat to liberty.

–February 23, *Human Events*

Senior Fellow Angela Logomasini warns California lawmakers that a proposed "green chemistry" law will do more harm than good:

The California Department of Toxic Substances Control (DTSC) closed its eighth comment period on its proposed green chemistry regulation last October. At the end of January, the agency issued another revision and will take public comments until February 28.

The delays reflect well-justified concerns about high regulatory costs and scant evidence of any benefits. The latest proposal will establish a list of "candidate chemicals" that the DTSC may eventually list as "concern chemicals." The candidates list, which regulators say will exceed an earlier estimate of 1,200, will include substances that fit within certain politically derived categories—not because of any evidence that existing uses are likely to pose significant risks.

It is likely that the mere listing as a "candidate" and/or "concern" can demonize these chemicals even though existing consumer exposures are far too low to pose any real risk. For example, hundreds of useful chemicals will be listed because massive doses produce tumors in rodents.

But it is the dose that makes the poison. Even broccoli, carrots, and other healthy foods cause tumors in rodents exposed to high doses, but we don't need to list them as potentially dangerous.

–February 8, *Investor's Business Daily*

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...END NOTES

Department of Education Touts Mass Murderer

The U.S. Department of Education (DOE) recently featured a quote from mass-murdering dictator Mao Zedong on its website. Mao, the longtime Communist dictator of China, killed up to 60 million people through executions, torture, and the government-created famines of the abortive "Great Leap Forward." The quote was posted on the "Kids' Zone" page of the National Center for Education Statistics' website. Featured as "Quote of the Day," it read: "Our attitude towards ourselves should be 'to be satiable in learning' and towards others 'to be tireless in teaching.'" As George Washington University law professor Jonathan Turley said, "It is highly unnerving that a DOE employee clearly had no idea who Mao was. I consider the quote to be akin to a Hitler quote on the need for living space to achieve true happiness."

New York State of Mind: Gun Control Edition

A new New York State gun control law highlights Empire State politicians' notorious incompetence. After the legislature and governor enthusiastically rammed through a law that set the magazine capacity limit at seven bullets, they discovered a problem: No company manufactures a seven-round magazine and none plan to do so. The law was set to take effect April 15, but embarrassed lawmakers have said they will suspend the law until it can be rewritten. The length of the suspension has not yet been determined. When queried by *The New York Post*, Governor Andrew Cuomo's office had no comment.

Progressives Falsely Credit Obama's Stimulus with ASCE Grade Bump

Every few years, the American Society of Civil Engineers releases a report rating U.S. infrastructure quality and concluding that a lot more government spending is need. This year, ASCE gave America an infrastructure GPA of D+, an improvement over its D grade in 2009. Researchers tend to ignore this extremely biased report due to its lack of methodological rigor. Writing for the Center for American Progress Action Fund's Think Progress website, blogger Travis Waldron claimed the report indicated the Obama stimulus "improved America's infrastructure" since 2009. But the ASCE report never said that. The average grade boost was largely the result of railroad investments, of which approximately 95 percent came from the private freight railroads.

Boston Cops Go Undercover to Bust Punk Rockers

Apparently, having solved all crime in Beantown, Boston police have shifted their focus to a new priority: harassing mostly harmless punk rockers for essentially promoting shows without a license. In March, Boston police officers were discovered impersonating punk rock fans in order to shut down unauthorized music venues. According to *Slate*, "A recently passed nuisance control ordinance has spurred a citywide crackdown on house shows—concerts played in private homes, rather than in clubs." How are Boston's finest going about collecting the intel? By posing as music fans on social media websites and chat services, something reminiscent of law enforcement efforts to ferret out child predators. As a result of this overreaction, the underground Boston music scene has simply moved further underground.