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MYTHBUSTER!

THE TRUTH ABOUT CLASS ACTION LAWSUITS

Class actions are a critical tool used by individual citizens to deter violations of individual rights and corporate misconduct involving product defects, financial fraud, toxic pollution, civil rights violations, and other abuses. They are vital for permitting consumers to gain access to the courts where a company may have profited by defrauding large numbers of people. They also streamline the litigation process, avoiding the filing of many different lawsuits where the same kinds of issues are presented. With corporate fraud and abuse at all-time high, perhaps at no moment in history have class actions been more important than they are now.

CLASS ACTIONS SAVE LIVES AND PROTECT OUR RIGHTS

Class actions have historically been among the most powerful tools to secure justice in America. This country would be a very different place without them. *Brown vs. Board of Education*, which outlawed school segregation and set the stage for the entire civil rights movement, was a class action lawsuit. So are the cases by shareholders against Enron and WorldCom over corporate fraud. The cases portrayed in the movies "Erin Brockovich," involving toxic pollution, and "North Country," dealing with sexual harassment in the workplace, were class actions. The President of the United States was a recent beneficiary of a class action lawsuit over defective bulletproof vests used by the secret service and purchased for use by President and Laura Bush. That case was brought by police departments after the fatal shooting of a California police officer.¹

The following are a few other examples of the types of class actions that have been brought in state courts, resulting in major improvements benefiting many people:

- Beginning in the mid-1920s, residents of Globeville, Colorado were subjected to cadmium and arsenic exposure from the nearby Asarco Inc. refinery and smelter placing citizens at a higher risk for contracting cancer and other life-threatening illnesses. In 1991, nearly 600 homeowners filed a class action lawsuit. The jury awarded over \$28 million in compensatory damages. Three months later, Asarco agreed to spend an additional \$11 million to clean up the contaminated soil.²
- Robert Strom contracted leukemia after continual exposure to high doses of electromagnetic pulse (EMP) radiation from 1982 to 1985 while working for the Boeing Corporation. In June 1988, Strom filed a \$7 million class action suit against Boeing and other companies. Evidence revealed that Boeing had known since the 1970s that pro-longed EMP exposure was lethal and used Strom and other employees in EMP radiation research for the Defense Department. In August 1990, Boeing settled, agreeing to pay over \$500,000 to Strom and provide annual medical examinations to Strom's 700 co-workers while also minimizing EMP radiation exposure.³

- From July 1996 to May 1997, approximately 58,000 people were illegally strip-searched by New York City jail guards after being arrested for minor or first time offenses. In May 1997, Danni Tyson filed a class action lawsuit against the city for violating privacy rights. Correction officials rescinded the strip-search policy on May 27, 1997, less than a week after Tyson filed the class action lawsuit.⁴

CLASS ACTION LAWSUITS AND THE MYTH OF EXCESSIVE ATTORNEYS' FEES

Some try to argue that class action cases normally result in excessive fees for attorneys. This notion was disputed by an extremely comprehensive study by professors Theodore Eisenberg, Cornell Law School and Geoffrey P. Miller, New York University School of Law, who looked at 370 class action lawsuits that settled between 1993 and 2002.⁵ Below are some of the major findings of that Report, as compiled by consumer group Public Citizen⁶:

- Median attorneys' fees were only 21.9 percent of the recovery in the studied cases – less than the typical one-third fee in personal injury cases.
- Attorneys' fees (as a percentage of recoveries) were higher in federal court than in state court, contrary to claims of critics of the state class action system.
- Median attorneys' fees in consumer class action suits, the kind often attacked by “tort reformers,” were only 13 percent.
- Attorneys' fees have a strong correlation with the risk of pursuing a case.
- Client recovery and fee amount are strongly correlated. But as client recovery increases, the fee percentage for attorneys actually decreases, which provides more money for the clients.

THE IMPACT OF THE FEDERAL “CLASS ACTION FAIRNESS ACT OF 2005” (CAFA)

In 2005, Congress enacted legislation that provides reckless corporations with the authority to decide, in most cases, which court will hear a class action case that accuses them of wrongdoing.⁷

- **General Impact.**
 - As opponents of this law predicted, preliminary data shows that CAFA is causing complex state class actions to be thrown into the already overburdened federal courts. On September 20, 2006, the Federal Judicial Center issued a study of the impact of CAFA.⁸ The study, as noted by Brian Wolfman of Public Citizens' Litigation Group, found that CAFA “is generally having its intended effect of moving state-law-based class actions from state to federal court.”⁹ Wolfman wrote:

“Class action filings in or removals to federal district courts post-CAFA brought class action activity to its highest level during the four-year period. Class actions were filed at a rate of 10.48 cases per filing day before CAFA (July 1, 2001, through February 17, 2005) and 11.96 cases per filing day after CAFA went into effect. This difference in filing rates is statistically significant. Increases in [federal] class action activity during the post-CAFA period occurred primarily in the nature-of-suit categories likely to include state-law claims: contracts, torts (almost entirely in property damage and not in personal injury cases), and “other fraud” cases (about half of which were based on diversity jurisdiction; many were filed originally in state courts). Increases in the contracts and fraud cases were statistically significant; the increase in property damage cases was not statistically significant.”
- **Civil Rights cases.**
 - Civil rights groups fought CAFA because, among other things, the law would cause federal courts to be overburdened with consumer class actions normally brought in the larger state court system, inevitably pushing out federal civil rights cases that should be heard in federal courts.¹⁰

- In little more than a year since CAFA's enactment, evidence suggests that these grim predictions have already started to materialize. The Federal Judicial Center report shows that before CAFA, civil rights cases represented 13 percent of all class actions, and in just a year's time after CAFA, civil rights cases dropped to 11 percent of class action filings.¹¹
- A similar result may be happening in workplace discrimination cases. Although many employment discrimination lawsuits are filed under Title VII, and therefore already in federal court, filings of employment discrimination cases dropped by 14.3 percent between 2004 and 2005 in the federal courts.¹² It is entirely possible that this decline is attributable to circumstances other than CAFA, but it must be noted that since the passage of CAFA, filings of these types of cases has gone down noticeably.¹³

Securities fraud class action case filings are at an all-time low. According to a 2007 report by the Stanford Law School Securities Class Action Clearinghouse, a joint project between Stanford Law School and Cornerstone Research, "The number of securities fraud class actions filed in 2006 was the lowest ever recorded in a calendar year since the adoption of the Public Securities Litigation Reform Act (PSLRA) of 1995.... The study reports securities fraud class actions decreased by 38 percent since 2005, plunging from 178 filings to just 110, making [2006] numbers nearly 43 percent lower than the ten-year historical average of 193."¹⁴

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NOTES

¹ See, Barbara Polletta, "Faulty police vest lawsuit goes national," *The Rockingham News*, November 21, 2003, found at <http://www.seacoastonline.com/2003news/rock/11212003/news/61956.htm> and John Solomon, "Federal prosecutors investigating Second Chance vest maker," *The Associated Press*, September 26, 2005.

² *Escamilla v. Asarco Inc.*, No. 91-CV-5716 (Denver County Dist. Ct., Colo., verdict March 12, 1993). See also, "Some Big Judgments Were Settled After Trial," *National Law Journal*, January 17, 1994.

³ *Strom v. Boeing*, No. 88-2-10752-1 (King County Super. Ct., Wash., settlement August 15, 1990). See also, Conklin, Ellis, "His Last Ounce Of Courage," *Seattle Post-Intelligencer*, September 6, 1990.

⁴ Weiser, Benjamin, "New York Will Pay \$50 Million in 50,000 Illegal Strip-Searches," *New York Times*, January 10, 2001; Barrett, Wayne, "Beating The Cops," *Village Voice*, December 23, 1997.

⁵ Theodore Eisenberg, Cornell Law School and Geoffrey P. Miller, New York University School of Law, "Attorney Fees in Class Action Settlements: An Empirical Study," *Journal of Empirical Legal Studies*, Vol. 1, Issue 1 (March 2004).

⁶ Public Citizen, "Attorneys' Fees and Plaintiffs' Recoveries in Class Action Cases: Myths Obscure Facts," found at <http://209.85.165.104/search?q=cache:sPTJ9NA6COgJ:www.citizen.org/documents/AttorneyFeesinClassActionCases1-28-05.pdf+public+citizen+attorneys+fees+and+plaintiffs+recoveries&hl=en&gl=us&ct=clnk&cd=1&client=firefox-a>

⁷ Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005).

⁸ Thomas E. Willging, "The Impact of the Class Action Fairness Act of 2005," Second Interim Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center, September, 2006, http://www.fjc.gov/library/fjc_catalog.nsf.

⁹ See, http://pubcit.typepad.com/clpblog/2006/09/federal_judicia.html

¹⁰ Thomas Henderson, Chief Counsel and Senior Deputy for the Lawyers' Committee for Civil Rights, testified against CAFA noting it "would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation." Testimony of Thomas Henderson, Chief Counsel and Senior Deputy, Lawyers' Committee for Civil Rights Testimony, Class Action Litigation, United States Senate Committee on the Judiciary, July 31, 2002.

¹¹ Thomas E. Willging, "The Impact of the Class Action Fairness Act of 2005," Second Interim Report to the Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center, September, 2006 (available on-line at http://www.fjc.gov/library/fjc_catalog.nsf).

¹² United States Courts, Judicial Business of the United States Courts 2005, available online at <http://www.uscourts.gov/judbus2005/contents.html>

¹³ In 2001, there were 21,157 employment discrimination cases filed in federal courts; in 2002, that number dropped a bit to 20,955; in 2003, another small drop to 20,507; in 2004, another small drop to 19,746. Then, a much larger drop in 2005 to 16,930 cases. These statistics do not separate class actions from single actions. This is in spite of many studies showing workplace discrimination is still very much a part of American jobs. See, e.g., David Wessel, "Racial Discrimination is Still at Work in U.S.," *Wall Street Journal*, September 4, 2003.

¹⁴ News Release, "Securities Fraud Class Actions Tumbled to an All-Time Low in 2006, Finds New Study by Stanford Law School and Cornerstone Research; Strong Federal Enforcement Activity and Stable Stock Market Contribute to Decline," January 2, 2007. <http://securities.stanford.edu/> ("The study attributes the record low numbers of securities fraud class action filings in 2006 to three primary factors. First, the strengthened federal enforcement environment reflected in the pressure that the SEC and Department of Justice now bring to bear on corporations to conduct internal investigations that implicate the individual executives responsible for the fraud, may be reducing the amount of fraud in the market. Second, a strong stock market combined with lower stock price volatility typically reduces the number of cases filed. Third, the overwhelming majority of securities fraud class actions that were filed in the late 1990s to the early 2000s are now behind us. While the boom and bust cycle of this era may have contributed to the peak, the numbers in 2006 are low even when compared to pre-peak activity.")