TESTIMONY TO THE U.S. SENATE JUDICIARY COMMITTEE

HEARING ON CLASS ACTION LITIGATION

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INTRODUCTION AND SUMMARY

I would like to thank the Chairman and the Committee for inviting me to testify.

I am a Staff Attorney at Trial Lawyers for Public Justice ("TLPJ"), the only national public interest law firm in America that both regularly prosecutes a wide range of class actions and has a special project devoted to fighting class action abuse. I am here to make three central points. First, class actions are absolutely essential to the achievement of justice in our country. Properly used, class actions can hold wrongdoers accountable for their misconduct and vindicate their victims' rights. Second, class actions can be abused. When that happens, class actions can be perverted into a tool allowing wrongdoers to escape accountability for their misconduct and eliminate their victims' rights. Third, expanding the federal courts' jurisdiction to hear class actions will increase both the frequency and severity of class action abuse.

During my legal career at TLPJ and, before that, in private practice, I have had the opportunity to see class actions in operation from two sides. On the one hand, I have represented consumers who have been cheated or victimized by serious corporate wrongdoing in a number of important class actions. On the other hand, in more than a dozen cases I have represented objectors to abusive class action settlements, where the consumers would receive little if any relief, the corporate defendants would walk away with a complete release for any wrongdoing, and the attorneys would make significant fees. I've had an opportunity to see some of the best and the worst aspects of class action practice, and from that experience I offer the following testimony.

For many millions of Americans, the only chance of obtaining justice for a variety of legal wrongs committed against them is through the class action process. If the opportunity to bring claims on a class action basis is denied or made more difficult, many corporations will effectively enjoy complete immunity from any legal accountability for most wrongs they might commit, even when it is very clear that they have broken the law. I will trace a number of illustrations of extremely serious consumer frauds and other corporate wrongdoing where a large number of individuals received justice only because they were able to use the class action device to vindicate their rights.

At the same time, like other powerful legal devices, class actions can be and sometimes are abused. Within the past decade, several corporate wrongdoers, particularly in mass torts, have recognized that class actions -- when abused -

[1] Much of this testimony is drawn from or informed by the writings, experience and insight of Arthur Bryant, the Executive Director of Trial Lawyers for Public Justice ("TLPJ"), and Leslie Brueckner, a Senior Staff Attorney at TLPJ.

- can be a powerful tool for capping wrongdoers' liability and eliminating victims' rights. The results have been predictable and outrageous. Through class action abuse, companies that harmed millions have avoided accountability and deprived their victims of their day in court. Widespread wrongdoing has gone uncorrected, unpunished, and undeterred. And class actions themselves have been brought into undeserved disrepute. The courts already have the tools, however, to stop class action abuse and I will detail some of our successful efforts to fight it.

I will also address the notion that class action abuse might be decreased or deterred if more class actions could be heard in federal court. Simply put, our experience is that abusive class action settlements are more likely to be reached and approved in courts that are busy and overburdened. And, as this Committee knows, the federal courts are already extremely busy severely overburdened. It should not be surprising, therefore, that many of the worst abusive class action settlements that we have seen have been in federal courts. Moving more class actions to federal court is likely to make the problem of class action abuse worse and harm consumers in a number of other ways.

I. BACKGROUND ON TLPJ.

Before I address the issues before the Committee, please allow me to provide some background on TLPJ. Trial Lawyers for Public Justice is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. Specializing in precedent-setting and socially significant litigation, we have a wide-ranging docket of cases designed to advance consumers' and injury victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the protection of the poor and the powerless, and the preservation and improvement of the civil justice system.

Six years ago, TLPJ became so concerned about the danger posed by class action abuse that we launched a new special project designed to protect class members' rights and the integrity of the class action device -- our Class Action Abuse Prevention Project. As I will set forth below in greater detail, we have represented objectors to at least 20 class action settlements, and our objections have led to dramatic improvements in the relief that a number of these settlements provided to the class members. We also have special projects challenging unnecessary court secrecy, federal preemption of injury victims' claims, and mandatory arbitration abuse.

TLPJ was founded in 1982 and is currently supported by more than 2,700 members around the country. More information on TLPJ and its activities is available on our web site at www.tlpj.org.[2]

TLPJ does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, sometimes respond to informational requests from legislators and have occasionally been invited to testify to a Committee of the United States Congress on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues this Committee is considering today. We start with the most crucial point: the value of class actions.

[2] In addition, many of the briefs in a number of the cases discussed below are available to the public, for free, on our website.

II CLASS ACTIONS ARE ESSENTIAL TO SECURING JUSTICE FOR ALL.

Class actions are absolutely essential to the achievement of justice in the United States. In many circumstances, particularly where large numbers of people have suffered small amounts of damages or require injunctive relief, class actions are the only way that justice can be obtained. In Deposity Guaranty National Bank v. Roper, 445 U.S. 326 (1980), the Supreme Court explained that class actions often offer the only way that individuals with modest claims could ever obtain relief for their claims:

> Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

445 U.S. at 339. See also Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981) ("Class actions serve an important function in our system of civil justice.")

TLPJ's experience demonstrates that class actions are often the only way to achieve justice for victims in cases ranging from consumer fraud to workers' rights to race and sex discrimination. Allow me to provide a few examples:

In Cox v. Shell Oil Co., No. 18,844 (Tenn.Ch.Ct. Obion County 1995), the polybutylene plumbing class action litigation, TLPJ and its co-counsel won the largest property damage class action settlement in U.S. history, with the defendants committing to spend a minimum of $950 million to repair, replace, and pay for property damage stemming from leaking pipes and fittings. By way of background, polybutylene piping had been installed in an estimated six million homes, town houses, mobile homes and other properties after 1978. There was overwhelming evidence that these pipes began to leak in a very great many of these homes, often causing extensive damage, but not enough damage that it would have been economically feasible for most of the homeowners to sue individually.

The vast majority of these homeowners would never have received justice if it were not for the class action device. A number of different corporate defendants each argued that its products were blameless, and fiercely resisted disclosing any documents or witnesses relating to the defects. It took years of work by consumer lawyers, and many thousands of dollars in expert witnesses and investigative expenses, to break through these defenses and determine what had occurred. Many thousands of consumers who have had their homes "re-plumbed," and had defective pipes replaced and repaired at no cost to them, would be left with leaking pipes and no relief if they had not been permitted to band together and pursue this case as a class action.

In Ting v. AT&T, 182 F.Supp.2d 902 (N.D.Cal. 2002), TLPJ and The Sturdevant Law Firm in San Francisco represent a class of consumers challenging the mandatory pre-dispute binding arbitration provision in AT&T's new contract with its long distance customers. While the enforcement of arbitration clauses is favored under California law, an arbitration clause will not be enforced if it is drafted in a way that makes it unconscionable under state contract law. Under California law, a contract is unconscionable if it does not permit consumers to effectively vindicate their rights under the state's consumer protection laws. The case went to trial last November, and the federal court held that AT&T's arbitration clause was unconscionable and unenforceable for 7 million California residents because the clause illegally limits the damages consumers can receive, prohibits class actions, imposes prohibitive arbitration costs, and incorporates excessive secrecy.[3]

In the course of the Ting case, we investigated previous consumer class action lawsuits that had been brought against AT&T and other long distance phone carriers. We determined that a number of class action lawsuits for various overcharges and deceptive practices had been successfully brought to conclusion against AT&T and these other corporations. In one case filed in New Jersey state court, for example, AT&T had been accused of intentionally over-charging subscribers by charging per-minute usage fees in the wrong month. AT&T settled the case, paying out 100 cents on the dollar to 83,611 consumers. 182 F. Supp.2d at 918.[4] Based on the stipulated testimony of the lawyers in the New Jersey case, and unrefuted testimony of a number of experts, the court in the Ting case held that "It would not have been economically feasible to pursue the claims in these cases on an individual basis. . . ." Id. With the class action device, the overcharged consumers in the New Jersey case recovered 100% of the overcharge. Without it, they would have received nothing. There was similar evidence relating to a number of other class actions in the record in the Ting case. Accordingly, the federal court determined that the ban on class actions in AT&T's contract would prevent millions of customers from effectively vindicating their rights.

In Chisolm v. TranSouth Financial Corp.,[5] a used car dealer and a bank combined to perpetrate an egregious fraud upon consumers. The evidence established that the used car dealer frequently sold cars to low income persons who could not afford them particularly young servicemen from the Norfolk base at interest rates of up to 30%. As many as 50% of these cars were repossessed in some years. Instead of properly selling their repossessed cars in a public auction or by other legitimate method, the bank and the car dealer had a secret deal. The bank would "sell" the cars back to the car dealer for a nominal amount (usually $1,000 or $1,500), and use phony "bids" to create a bogus below-market "sale price" for the cars. Again and again, the car dealer then re-sold the same cars to other customers for much higher prices. The dealer sold some cars to as many as six different customers. The dealer and the bank then used the phony "bid" prices to cheat thousands of consumers by not paying them the surplus funds generated when they later sold the cars for more than the class members ever actually owed. In many cases, the dealer would actually sue the (generally unrepresented) consumers because the phony bids were below the amount of the loans, and attach their property or salaries.

The Chisolm case could not have been successfully brought on an individual basis. One defendant fought the litigation for eight years, using scorched-

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[3] The case is now on appeal before the U.S. Court of Appeals for the Ninth Circuit. AT&T's principal argument on the appeal is that the Federal Communications Act preempts the state consumer protection and contract statutes on which the case is based.

[4] I know of a number of other cases in which consumers have recovered 100% of their losses through class actions. In Ledesma v. Green Tree (San Francisco Superior Court, Case No. 300007), for example, a lender was collecting certain fees that were illegal under state law. Under the settlement in the case, the defendant refunded or agreed not to collect $8.7 million in these fees, which amounted to 100% of the consumers' losses.

[5] This case produced a number of different published and unpublished opinions. The one that offers the most complete explanation of the underlying facts can be found at 184 F.R.D. 556 (E.D. Va. 1999).

earth tactics such as refusing to answer any discovery requests, filing up to eight different briefs raising the same point on repetitive motions, attacking the consumers' counsel, and the like.[6] No individual consumer could ever have collected the resources to overcome this kind of defense. The court found "that it would be both inefficient and difficult for the 2500 putative class members with individually small claims to sue a large corporation like TranSouth in the absence of a class action. Therefore a class action is the appropriate and superior method for the fair and efficient adjudication of the controversy." 184 F.R.D. at 565.

Class actions have also been crucial to preserving civil rights. In Cohen v. Brown University, for example, our precedent-setting Title IX class action lawsuit, TLPJ proved the school was guilty of sex discrimination, prevented the elimination of successful women's intercollegiate athletic teams, and made new law benefitting women athletes and potential athletes nationwide. See Cohen v. Brown University, 809 F. Supp. 978 (D.R.I. 1992), 991 F.2d 888 (1st Cir. 1993), 879 F.Supp. 185 (D.R.I. 1995), 101 F.3d 155 (1st Cir. 1996), cert denied, 520 U.S. 1186 (1997).

Ten years ago, prior to coming to TLPJ, I had an opportunity to work (in a very junior capacity) on a team of exceptional lawyers who represented residents of a neighborhood in Denver who were victims of severe toxic pollution. The case was captioned Escamilla v. Asarco, and it was filed in state court in Colorado.[7] Asarco operated a cadmium smelter that put so much pollution in the air that there were significant levels of lead in the soil of the yards of many of the residents of Globeville, where our clients lived. After a six-week trial, the jury awarded our clients $28 million for the decreased value of their homes. The case was then settled for $35 million, with Asarco agreeing to remove and replace the top 12-18 inches of topsoil throughout the neighborhood (removing all of the lead and other pollutants that had been threatening the health and families of our clients) and pay $14 million in cash to the clients. There is no doubt that the case could never have been brought on an individual basis. The case involved complex proof of the pathways that the pollution took from the plant to the neighborhood, of the proper values to be placed on the properties in the neighborhood, and many other subjects. No individual could have successfully brought this major polluter to justice it was a class action or nothing.

As these examples reflect, class actions, properly used, have been a powerful tool for holding wrongdoers accountable and vindicating victims' rights. That's why wrongdoers usually oppose their use. Accordingly, we strongly urge the Committee to be cautious in enacting any measure that might make it substantially more difficult for consumers and others to bring class actions. Not so long ago, Congress responded to claims raised about certain class actions by making it much more difficult for consumers and investors to bring securities class actions in state court, as well as to hold accountants

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[6] At several different junctures in the lawsuit, one of the defendants was caught destroying thousands of documents. The day after the case was filed, for example, scores of garbage bags filled with documents related to the case were put in a dumpster. Only six of them were recovered. Despite a court order prohibiting the further destruction of documents, a few years later an employee of the same defendant acknowledge in a deposition that the corporation had destroyed a significant number of computerized documents.

[7] No reported opinion was ever produced in the case.

and other professionals liable for their roles in defrauding consumers and investors. We fear that these actions may have contributed to the erosion of standards for corporate governance that led to much of the fraud that has recently harmed the economic security of so many Americans. We urge the Committee to be careful of passing legislation that might insulate some corporate defendants from being held accountable for serious wrongdoing.

III. CLASS ACTION ABUSE CAN BE PREVENTED.

While class actions provide enormous benefits to millions of Americans, class actions can be abused and, when they are, serious damage can be done. TLPJ's extensive experience shows, however, that class action abuse can be prevented.

A. TLPJ's Class Action Abuse Prevention Project

TLPJ's Class Action Abuse Prevention Project is a nationwide campaign dedicated to monitoring, exposing, and fighting class action abuse. Through the Project, TLPJ seeks to enforce class members' existing legal rights by objecting to illegal or unfair class action settlements; develop the law by winning judicial recognition of additional protection against class action abuse; educate lawyers, the judiciary, and the public about class action abuse and possible ways to prevent it; and help others to do all of the above. Among other activities, we monitor class action cases throughout the country and take legal action to challenge specific abuses on behalf of objectors or as amicus curiae.

Through the Project, TLPJ has targeted and fights a number of specific abuses. While the following list is not all-inclusive, the primary abuses that concern us are:

efforts to limit a class member's right to opt out of a class action for damages and pursue his or her own compensatory and/or punitive damages claims on an individual basis;

attempts to use class actions to settle the "future" personal injury claims of people who are not currently injured or, in some cases, may not yet even exist;

"settlement-only" class actions that would and could never be litigated as class actions, but are being used to cap the defendant's liability through the class action device;

settlements that release class members' claims in exchange for "coupons" that provide little or no meaningful relief to the class and, in some cases, extraordinarily handsome fees for class counsel;

unnecessary claims procedures, such as requiring credit card customers to file claims forms, instead of simply crediting their recoveries to their accounts; and

improper secrecy provisions, including gag orders on class members or their counsel and attempts to conceal terms of a settlement or the amount of attorneys' fees.

In the past six years, TLPJ has had great success fighting these class action abuses and establishing new law to help others fight them as well. To cite just a few examples:

In Graham v. Security Pacific Services, Inc., No. 2:96-CV-132 (S.D.Miss. 1996), we won massive improvements to a proposed nationwide settlement of consumer fraud claims against BankAmerica in Mississippi federal district court. The original settlement would have paid approximately $2 million to class members, $5.4 million to class counsel, and deprived all Mississippi class members of their right to opt out. It also would have required all class members to file claim forms to receive compensation, allowed any unclaimed funds to revert to the bank, and paid non-Mississippi class members only half as much as Mississippi class members. After we were done, the final settlement paid $7.9 million to the class, $1.92 million to class counsel, and allowed all class members to opt out. The funds were automatically distributed, no class members had to file claims forms, no money reverted to the bank, and class members from all states received the same relief.

In Kalhammer v. First USA Bank, No. 95-4563 (N.Dist. Ca.), in San Francisco federal court, we defeated outrageous secrecy provisions and won huge improvements to a proposed nationwide settlement of claims that First USA cheated its credit card holders. The allegations were fairly egregious. The gist of them was that First USA promised new customers that they would be charged a low interest rate for a period of six months, then substantially raised the interest rates well before the six month period had elapsed. The consumers lost $9.12 on average, but the bank had so many customers that the total wrongful profits approached $15 million. This is precisely the kind of case that could never have been brought if the class action procedure was not available. Unfortunately, the original settlement barred public disclosure of both the total settlement amount and total attorneys' fees, and prevented class counsel and class members but not First USA from talking to the press about the deal. It also provided current First USA cardholders with "rebate certificates" for five dollars or less, but gave nothing to former cardholders. According to experts, the rebate certificates would have yielded less than $400,000 in actual relief to the class. In response to our challenge, the settlement was amended to eliminate the secrecy, give automatic credits to the vast majority of the class, and require First USA to pay a minimum of $6 million.

In a series of amicus briefs, TLPJ challenged and ultimately helped persuade the U.S. Supreme Court to reject the proposed class action settlements of millions of present and future asbestos victims' claims in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and Ortiz v. Fibreboard Corporation, 527 U.S. 815 (1999). These two Supreme Court decisions established important new procedural protections severely limiting class action abuse.

In Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D.W.Va. 1997), and, subsequently, Fletcher v. Brooke Group Ltd., CA. No. CV 97-913 (Ala.Cir.Ct. Mobile County), we ensured that tobacco victims nationwide could proceed with their claims against the Liggett cigarette company, defeating proposed no-opt-out settlements in West Virginia federal court and Alabama state court, respectively, that would have capped the company's liability and provided virtually no relief to the class. The decision in Walker was the first in the country to reject a proposed class settlement based on the U.S. Supreme Court's decision in Amchem.

B. The Causes of Class Action Abuse

The driving force behind most class action abuse is the desire of wrongdoers to cap their liability in consumer and mass tort cases. Defendants do not generally want cases to be litigated as class actions because they recognize that class actions, properly used, can be a powerful tool for vindicating their victims' rights. They do, however, often want cases to be inappropriately settled as class actions because they realize that class action settlements   especially settlements that misuse the class action device   can be an equally powerful tool for limiting or even eliminating their victims' rights.

Regardless of the defendant's motives or desires, abusive class action settlements cannot take place without the cooperation of class counsel. Unfortunately, some class action counsel are far too willing to agree to a bad class settlement in exchange for a quick or hefty fee. And, regrettably, many more feel forced to agree to objectionable or inadequate settlement terms because they sincerely believe   rightly or wrongly -- that the judge will not allow them to pursue the class' legitimate claims and that any recovery for the class (and a fee) is better than nothing for the class (and no fee at all).

The most important point, in our view, is that courts hold the key to stopping class action abuse. While plaintiffs, defendants, and their attorneys all contribute to class action abuse, judges have the power to prevent it. Unfortunately, some judges do not understand how they can stop class action abuse, others do not seem interested in stopping it, and others actually take actions that encourage it. For example, some judges are extremely hesitant to certify a case as a class action for litigation purposes, while others are extremely eager to do so, without regard to whether the legal criteria for class certification are met. The former are contributing to class action abuse because they are effectively telling class counsel that, unless they reach a settlement acceptable to the defendants, the class will recover nothing -- and, since class counsel do not have a credible threat to take the case to trial, they can't force the defendant to provide much relief to the class in settlement negotiations. The latter are contributing to class action abuse because the legal criteria for class certification are designed to ensure that the absent class members' interests are truly served by the class representative and class counsel. If the criteria are not met, the case should not be certified as a class action.

As the foregoing suggests, the single best way to stop class action abuse is for judges to take seriously their fiduciary duty to protect class members and their rights. If judges want justice to be done, they must certify cases for litigation as class actions when the legal criteria are met. The solution to class action abuse isn't eliminating class actions. That only hurts class members a different way. At the same time, judges must make sure that the class action rules and Constitution are satisfied; that any proposed settlement truly is fair, reasonable, and adequate; and that attorneys' fees are properly based on the recovery actually obtained for the class.

IV. INCREASING THE NUMBER OF CLASS ACTIONS IN FEDERAL COURT WILL INCREASE CLASS ACTION ABUSE AND HURT CONSUMERS.

A. Because Federal Courts are Extremely Busy and Overburdened, Abusive Class Action Settlements are More Likely to be Reached and Approved if the Federal Courts' Jurisdiction Over Class Actions is Expanded.

As I mentioned above, judges play the key role in defeating class action abuse. In our experience, moreover, courts with very heavy dockets and courts that are overburdened face far greater pressures to move cases quickly. And one of the easiest ways to move a case quickly is to approve a poor settlement because, even if the consumers or victims receive very little, the case goes away.

In our experience, particularly as more and more criminal cases have found their way into federal court, many federal courts around the United States have exceptionally heavy dockets. As a result, civil cases in federal court tend to move much more slowly than cases in most state courts, despite some of the reforms that this Committee spearheaded in the early 1990s. One example from my own practice may help illustrate this point.

I am currently handling a case involving double-billing practices by an HMO in violation of Maryland state law. The case was divided into two parts by a federal district court, which held that some of the consumers' state law claims were preempted and barred by a federal statute (the Employee Retirement Income Security Act, or "ERISA"), but that the other consumers could go forward with their claims in state court. The federal part of the case was appealed, and I argued the appeal to the U.S. Court of Appeals for the Fourth Circuit in January of 1999, more than three and a half years ago. Our clients still do not have a ruling from that court. The state part of the case went forward to the Maryland Court of Appeals (the high court in Maryland), which issued a unanimous, lengthy decision in favor of our clients within about 30 days of the oral argument. See Riemer v. Columbia Medical Plan, 358 Md. 222, 747 A.2d 677 (Md. 2000). This is only one particularly egregious illustration of a phenomenon that most practicing litigators take as given in most of the country federal courts are generally slower because of their very heavy case load.[8]

This kind of heavy caseload creates strong incentives for courts to approve settlements and move cases along. I respectfully suggest that a case in point is Cusack v. Bank United of Texas, a case that was filed in the Northern District of Illinois and later went to the U.S. Court of Appeals for the Seventh Circuit. I should make clear at the outset that TLPJ was counsel for objectors to this settlement, and that both the district court and the court of appeals rejected our clients' objections.

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[8] As one more illustration, I earlier described the case of Escamilla v. Asarco. That case proceeded through the Colorado state court system in a few years. By contrast, I was also counsel in a similar toxic tort case that was in federal court. The federal case took more than three times as many years to proceed. At one point, the federal district court dismissed the case. We appealed, successfully, and the U.S. Court of Appeals for the Tenth Circuit reinstated the case. Then, after the case was remanded, we waited over one year for the district court to schedule a hearing in the case on new motions filed by the defendant, and then more than one more year for the district court to rule on those motions. While we waited for the harried federal court to rule in the case, our clients watched the value of their homes deteriorate and their businesses collapse (some of our clients operated white water rafting concerns, for example) due to the pollution of the river. I also earlier described the Chisolm v. TranSouth case. That case took eight years to complete, even though it was filed in the Eastern District of Virginia's "rocket docket."

In this case, the plaintiffs alleged that, in the course of servicing its customers' residential mortgages, Bank United required homeowners to maintain "cushions" in their escrow accounts that exceeded certain contractual and statutory limits. This practice allegedly deprived homeowners of millions of dollars, in violation of the Real Estate Settlement Procedures Act, various state laws, and the class members' contracts with Bank United.

According to the lawyers for the plaintiffs, this was one of more than 70 similar cases filed against different lenders around the country, and through the multi-district litigation process more than 50 of these cases were filed in the same court, before the same federal district court judge. If each of these cases proceeded through normal litigation, with motions practice and discovery and an actual trial, it would have imposed enormous burdens upon that federal court. Instead, the cases were apparently all or nearly all resolved through extremely similar settlements.

Judging from the district court docket sheet in the Bank United of Texas case, there was essentially no activity in the case from March 1994, when it was filed, until September 1996, when class counsel filed a joint motion for certification of this case and at least 14 other virtually identical actions against other lenders. After the district court granted the motion and certified the case as a class action a few months later, no further filings were made in the case until November 1997, when the parties moved for approval of a proposed settlement that would resolve all the remaining issues in the litigation.

Under the settlement, the sole relief for the consumers was a $175 "discount certificate" that could be applied only against the closing costs of a new or refinanced mortgage with Bank United. Class members who did not use their discount certificates would receive no value from the deal, and the certificates cannot be used in conjunction with any other discounts or promotions offered by Bank United. In exchange for these coupons, Bank United got a total release of all liability for all claims relating to its mortgage escrow overcharges, and class counsel got $400,000 in attorneys' fees.

For most of the class members, the only notice they ever received of the settlement was a one-time notice published in the New York Times. This was for a class of persons who largely lived in Texas. For any of these class members to get anything from the deal, they had to (a) buy a copy of the New York Times (something not terribly common for most Texas homeowners) on the one day when the notice appeared; (b) find and read and understand a fine-print class action notice buried deep in the paper that took up one eighth of a page; (c) refinance their mortgage or take out another mortgage with Bank United; and (d) present the notice at closing. In objecting to the settlement, our clients argued that only a tiny percentage of the class members would ever get anything out of this deal.

Despite our objections, the district court approved the settlement as fair, adequate, and reasonable, and granted class counsel's request for $400,000 in attorneys' fees. More remarkably, the federal judge on his own motion ordered that the redemption rates for the discount certificates be filed under seal. In other words, there is a secrecy order in place that prevents the public from learning whether many consumers will ever redeem the coupons.

Our clients appealed this decision to the U.S. Court of Appeals for the Seventh Circuit. In opposition to the appeal, among other arguments, the settling parties stressed that dozens of similar suits were pending, and that breaking up this settlement would lead to enormous delays in the handling and resolution of those other cases. Ultimately the Court of Appeals approved the district court's order, and thus the entire settlement, in a very brief unpublished opinion.

This experience highlights a problem we have repeatedly witnessed: overburdened courts are more likely to approve abusive class action settlements and federal courts are already overburdened. To put it simply, expanding the jurisdiction of federal courts over class actions will make the problem of class action abuse worse, not better.

B. There Are Good and Valid Reasons Why Consumer Plaintiffs Often Prefer State Court

Much of the rhetoric that has accompanied the drive to federalize class actions has lampooned state courts as being a supposedly lower quality forum than federal courts. Corporate advocates often describe state court judges as typically unsophisticated, and more prone to doing whatever they like. My experience and practice, and that of other lawyers at TLPJ, and that of a great many consumer lawyers with whom I have spoken, indicates that this caricature is not only wrong, it is grossly unfair. Many of the generalized attacks upon state courts that I have seen are flatly at odds with the experience I have had in walking into state courtrooms around the country. Moreover, we know of no empirical evidence suggesting that abuse of class actions much less abuse of class actions in state courts has had any significant harmful effect on American business or the U.S. economy.

Many tort reformers suggest that consumer plaintiffs prefer state court because they are looking for less sophisticated decision makers. The claim of such advocates is that corporate defendants would generally be found innocent of any wrongdoing if the judge was just intelligent enough to understand their arguments. This insinuation is not only unfair to both consumers and state courts, but also ignores the true and valid reasons why consumer plaintiffs generally prefer state courts.

First, state law remedies in many jurisdictions are greatly superior to federal consumer protection laws for a great many types of scams. As a result, many consumer plaintiffs prefer to bring claims under state laws. In many jurisdictions, our experience and the experience of practicing lawyers with whom we regularly work is that state court judges tend to be far more familiar with, and sometimes more respectful of, state statutes and state consumer protection laws.

Second, delay nearly always favors corporate defendants in civil litigation, and federal courts often tend to move more slowly than state courts. Plaintiffs bear the burden of proof in civil litigation and, if a case lingers for years, it becomes harder to meet that burden. Documents are "lost," witnesses' memories begin to fade (particularly where the witnesses are poorly educated low income persons, being asked to remember specifics of complex transactions that occurred years before), class members move and become harder to find and keep track of, etc. In addition, most experienced lawyers will agree that few defendants are likely to take any serious interest in settlement negotiations until a trial date approaches, and delays ultimately allow even plainly guilty corporations to hold onto wrongful profits (and thus have the use of that money) for long periods of time.

Third, overburdened courts are more likely to look for ways to dispose of cases short of trial.[9] Accordingly, it should be little surprise that federal courts tend to be far more likely to dispose of cases through devices such as summary judgment than are most state courts. At one point several years ago, I was doing legal research on the application of the standard for summary judgment in one federal court of appeals before which I was appearing. I ran an extensive computer search and came up with more than 30 cases in the previous 18 months where that court had heard appeals of grants of summary judgment, and in every single case the grant of summary judgment was approved! While the court repeatedly used the standard legal phrases   cases will only be taken from the jury if there was no "significant dispute" about any "material fact"   the reality was that this court strongly favored the use of summary judgment as a means of clearing dockets and finally resolving cases. TLPJ's experience, and that of many other consumer lawyers with whom I have spoken, is that state court judges are far more likely to permit cases to go to trial.

Fourth, the United States District Courts are not convenient to the many Americans who live outside of the largest metropolitan districts. In Maryland, where I live, an attorney or witness who lives in Garrett County or in Somerset County on the Eastern Shore must drive three hours to get to the nearest federal court. And Maryland is one of our smallest states.

CONCLUSION

If class actions are restricted or made significantly more difficult, it is predictable that corporate wrongdoing will increase, and many fleeced consumers will have no remedy for wrongs done to them. While class action abuse is a serious problem that deserves closer attention from judges at all levels, increasing the federal courts' jurisdiction over class actions is far more likely to exacerbate the problem than to solve it.

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[9] It is clear that at least some federal judges view civil litigation as a burden. In Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1313 (2001), for example, a majority of the Supreme Court justified its holding that the Federal Arbitration Act permits employers to require employees to submit to mandatory arbitration as a condition of employment, in part, by arguing that forcing employment disputes out of court and into arbitration would relieve the "burden to the Courts." It is fair to say that a great many civil rights plaintiffs, and their lawyers, would prefer a forum that does not see their statutory claims as a "burden."