Approved on: March 2, 2001
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. On February 13, 2001 in Room 313-S of the Capitol.

All members were present except:
Representative Geraldine Flaharty - Excused
Representative Andrew Howell - Excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Ed Collister, Kansas Bar Association
Chief Judge Gary Rulon, Kansas Court of Appeals
Representative Jim Garner
District Magistrate Judge Michael Freelove, 16th Judicial District
Representative Tony Powell
Mark Behrens, Crowell & Moring LLP, Washington D.C.
Karen Miller, American Legislative Exchange Council
Gene Balloun, Shook, Hardy & Bacon
Rylan Martin, Kansas Chamber of Commerce & Industry
John Tilllotson, Kansas Bar Association
Ron Pope, Kansas Trial Lawyers Association
Henry Butler, Professor of Law & Economic, University of Kansas
Deborah McIlhenny, Kansas Trial Lawyers Association

Hearings on **HB 2297 - increasing the Court of Appeals Judges to 14**, were opened.

Ed Collister, Kansas Bar Association, appeared in support of adding to the size of the Court of Appeals. He explained that the Court of Appeals was established in 1975 with7 judges and has added three judges to its courts since that time. Since Sentencing Guidelines have gone into effect there has been a tremendous increase in the appeals that have been filed. A 1983 study suggested that judges should write no more than 75 opinions a year and currently written opinions have been between 100-110. (Attachment 1)

Chief Judge Gary Rulon, Kansas Court of Appeals, informed the committee that panels composed of entirely Court of Appeals judges have become almost non-existent. Retired judges and district court judges have been called in to help with the court's caseload. In 2000 the Court of Appeals used 33 district court judges to help hear cases and they receive no additional compensation for doing that. He believes that the lack of adequate funding for the judicial branch affects all areas of their practice from waiting long periods of time for judicial decisions to court files that have not been updated. (Attachment 2)

The Kansas Trial Lawyers Association did not appear but requested that their written testimony, in support of the proposed bill, be included in the minutes. (Attachment 3)

Hearings on **HB 2297** were closed.

Hearings on **HB 2298 - election or retention of district magistrate judges**, were opened.

Representative Jim Garner appeared as the sponsor of the bill. Current law requires that district judges be elected in all counties in their district, but magistrate judges are required to be elected only in the district in which the county the office is in. The proposed bill would mandate that all magistrate judges be elected by the judicial district that they serve in. (Attachment 4)

District Magistrate Judge Michael Freelove, 16th Judicial District, appeared in opposition of the bill. He gave an example of why magistrate judges shouldn't have to be elected by the Judicial District. He spends only one day a week in Ford County and the rest of the time is spent in his home district. He stated that 22 counties

have district magistrate judges and that 13 of those judges serve in more than one county. (Attachment 5)

Hearings on **HB 2298** were closed.

Hearings on **HB 2222 - placing limitations on supersedeas bonds**, were opened.

Representative Tony Powell appeared as the sponsor of the bill. The proposed bill is suggested by the American Legislative Exchange Council and places caps on supersedes bond requirements in cases where the judgement is extremely large. The bill would reform the litigation process and would make it easier for parties seeking relief in courts to exercise their rights, while protection the damaged party. (Attachment 6)

Mark Behrens, Crowell & Moring LLP, Washington D.C., explained that the proposed bill would place a cap of $1 million on the appeal bond for judgements valued over $1 million and cap the appeal bond at $25 million for judgements valued over $100 million. The bill would in no way limit the amount of damages that could be imposed in litigations. (Attachments 7)

Karen Miller, American Legislative Exchange Council, commented that the proposed bill has been discussed by ALEC for the last two years and that five states have passed similar legislation and a few others are considering it this year. The basic premise of the bill is to that the right to appeal be preserved. (Attachment 8)

Gene Balloun, Shook, Hardy & Bacon, stated that it makes good business sense to pass this legislation because it allows companies to appeal judgements without being bankrupt. (Attachment 9)

Rylan Martin, Kansas Chamber of Commerce & Industry, support the legislation because it would allow defendants to access capitol not tied up in bonds for use in financing their appeal. (Attachment 10)

John Tilllotson, Kansas Bar Association, appeared as an opponent of the bill. He provided the committee with a list of reasons why they oppose the changes. (Attachment 11)

Ron Pope, Kansas Trial Lawyers Association, opposes the legislation because that are no instances in Kansas where this would apply. (Attachment 12)

Hearings on **HB 2222** were closed.

Hearings on **HB 2258 - allowing judges to accept bids for representations of class**, were opened.

Representative Tony Powell stated the six basic core changes:

- immediate review for appellate court to review of class certification rulings
- establishing a rule limiting the scope of a class action to the home stat residents
- adopting an explicit classwide proof requirement
- adds a maturity factor to the class certification prerequisites
- adds an administrative process factor to class certification requirements
- allows bidding for class action representation (Attachment 13)

Mark Behrens, Crowell & Moring LLP, Washington D.C. commented that the reason for class action lawsuits are suppose to be a way to resolve similar claims with one lawsuit, instead it's becoming a money making adventure for plaintiff attorneys to make a great amount of money. (Attachment 14)

Karen Miller, American Legislative Exchange Council stated that the reason for the proposed changes is that there has been a surge of class action lawsuits causing huge burdens on the courts and companies that have these cases filed against them. (Attachment 15)

Gene Balloun, Shook, Hardy & Bacon, informed the committee that a vital part of the bill would allow direct appeals of class certification orders. (Attachment 16)

Henry Butler, Professor of Law & Economic, University of Kansas, commented that the proposed bill is a public policy issue and that there are costs & benefits to both sides. The bill finds a middle ground which addresses class certification. (Attachment 17)

Rylan Martin, Kansas Chamber of Commerce & Industry, stated that class action lawsuits are not much of a problem in Kansas but it is possible that there could be devastating implication corporations. (Attachment 18)

John Tilllotson, Attorney, appeared before the committee in opposition of the bill and commented that since there is not a history of class action lawsuits in Kansas there is not the need for change. (Attachment 19)

Deborah McIlhenny, Kansas Trial Lawyers Association, opposed the bill because they believe that the changes will have dire consequences on the ability of citizens to collectively hold wrongdoers accountable for their actions. (Attachments 20)

The committee meeting adjourned at 6:30 p.m. The next meeting is scheduled for February 14, 2001.

TESTIMONY BEFORE THE
HOUSE JUDICIARY COMMITTEE
Re: House Bill 2297

February 13, 2001

Ladies & Gentlemen:

Thank you very much, ladies and gentlemen, for allowing me to testify concerning HB 2297. After I learned of the hearing earlier this week, I gave some thought to how I might approach this topic so that we all might have some feeling for what is happening to the judicial system in the first place, and secondly why this legislation is significant. After some thought I decided to consider several different subjects in some detail.

The first issue that occurred to me is to consider why legislation about the judiciary's operation, and how it is funded for operation, should be significant to every one of us. Having practiced law going on 37 years it has been common place for me to hear or read about a lawyer's interest in the judicial system as being nothing more than protecting the lawyers' collective turf. It is commonly perceived that courts ultimately are important to lawyers because it is important to the lawyer's pocketbook. If you think about that approach for just a minute, the fallacy in the conclusion is apparent. Lawyers represent clients who are the ones that ultimately pay them. Regardless of the efficiency of the judicial system lawyers will have clients and those clients will be obligated to pay for services. If the court system runs badly, is adequate, is inadequate, etc., there will still be lawyers in court representing their clients. The lawyers are still going to have

the same clients that they would otherwise have, and they are still going to have to be compensated for their services just like any other business person. So to say that lawyers work to assist the judicial system or ask for improvements or benefits in the system simply to feather their own nest is inaccurate.

Think about who are the true patrons or customers of the services offered by the judicial branch. It is not the lawyers, it is the clients. It is people like all of you and every other citizen of the State of Kansas who may have a legal problem that has to be resolved in the court. And, it does not even have to be a bad legal problem. Lawyers protect the individual rights of citizens in criminal cases, juvenile cases, civil cases, divorce cases, probate cases, business related cases, property related cases, and others. One never knows when there will be a legal problem to be faced, that unfortunately results in an adjudication of rights in court. It is those who need the services of the court; the clients, or in other words the average person, whose interests lawyers advocate in the courts. Ultimately, if the judicial system is not provided with adequate resources to operate, it is the citizen who suffers, or in other words your constituents, not the lawyer.

Your task today is to consider requests for additional personnel, both judge and support, in the Kansas Court of Appeals. The current Kansas Court of appeals consists of 10 Court of Appeals judges. It was originally established in 1975, to be effective January 10, 1977, after the submission of a Kansas Judicial Study Advisory Committee Report requested by this legislature, submitted on May 13, 1974. That study analyzed many aspects of the Kansas judicial system

and made recommendations concerning, among other things, the appellate court system.

Let me first invite your attention to some of the findings concerning the Kansas Appellate Court system made at the time of that study.

1. Delay in the disposition of appealed cases is excessive. In the fiscal year that ended June 30, 1973 the average lapse time from notice of appeal to decision in criminal cases was 17.6 months.

2. The appellate case load in Kansas has increased in diversity and complexity during the past decade.

3. The volume and complexity of appellate litigation in Kansas will continue to increase.

4. The existing appellate court structure and procedure is not adequate to permit the adjustments that will be required for the prompt and judicious handling of future appellate case loads.

An analysis of some of the causes of the resultant delays was made. "Delay in processing appeals results from the operation of many factors. However, the heart of the problem is a lack of sufficient number of appellate court judges to handle the appellate docket." Report of the Kansas Judicial Study Advisory Committee - Recommendations for Improving Kansas Judicial System, Washburn Law Journal, Volume 19, Number 1, Winter 1974, Page 337. "There is a deeply rooted tradition in Kansas, as in most American jurisdictions that each litigant is entitled to at least one appeal as a matter of right. The objective of

judicial reform ought to make the appellate courts more, not less, accessible to the people." Judicial Study Advisory Committee Report, 19 Washburn Law Journal, Pages 341-342.

The recommendations of that judicial advisory committee than were among others that the legislature should create an intermediate appellate court consisting of seven appellate judges. "Additional judgeships may be created when the proper administration of justice requires." Judicial Study Advisory Committee Report, Washburn Law Journal, Volume 19, Number 1, Winter 1974, Page 280.

Although an additional three judges were added in 1986, case load explosions in number since then have again led to the same problems in volume that led to the creation of the court in the first place. Witness the comments in past reports made by Supreme Court Chief Justices to the legislature.

On January 19, 1995 former Chief Justice Richard Holmes reported to the legislature, among other things that, "...we must face a reality that getting tough on crime, regardless of the merits of any particular program, costs big bucks....[I]t involves more than police, prosecution, and the penitentiary. The means of getting from the first point to the last involves a judicial branch and we cannot be overlooked when it comes to financing or the entire system will break down and be for naught."

Chief Justice McFarland's 1996 report recounts, "The Court of Appeals has experienced an explosive growth in the number of appeals it received."

Chief Justice McFarland's 1997 report to this body states, "The Court of Appeals has an exploding case load and a serious backlog of ready cases. Additional staffing for that court is also urgently needed." There have been no additional judges added to the Court of Appeals since 1986.

I appear here today as a representative of the Kansas Bar Association. The Kansas Bar Association, the state's largest group of lawyers in this state, numbering some 6,000, acting through its governing body, supports the recommendation of the Kansas Justice Initiative (Recommendation 7) that four additional judges be added to the Court of Appeals. That conclusion was reached after much study by the commission. It reflects the input of a number of varied sources. Again, I want to emphasize that adding resources to that court and reducing the length of time it takes from the initiation of appeal to the decision doesn't mean more money in the lawyers' pocket, it means avoiding unnecessary delay caused by lack of judges and staff.

Earlier I referred to comments of Chief Justice Holmes and Chief Justice McFarland in 1995 and 1996 concerning an explosion of the case load of the Court of Appeals. There are normal circumstances concerning the business of the courts, causing us to expect yearly increases for a variety of reasons, including such factors as more population, more disputes, more government regulation, etc. However, the observations reported above, in part, arose out of a tremendous jump, in appellate court business, as a specific result of new legislation. In 1993 this legislature adopted a concept referred to generically as

Sentencing Guidelines for criminal cases. It was a total revamping of the sentencing portion of criminal cases. It was predicted that the legislation would both increase criminal appeals and also trials. Experience has demonstrated that to be the result. In 1995 when appeals from Sentencing Guidelines cases commenced to hit the appellate level, in one month the number of filings in criminal cases doubled. The legislature has amended Sentencing Guidelines for various reasons and in various ways since 1993, and one of the effects of each change is new business for not only the trial court but the appellate court system. And, the increase in the business of the court system apparently has not been unnoticed in the Department of Corrections. They repeatedly asked for new funding to build new prisons. That result is ironic because the institutional proponents of sentencing guidelines promoted the new legislation in 1993 as reducing the number of prison population.

Be that as it may, the result for the court system is more business, specifically for the appellate portion of the system; a tremendous increase in business. But, there has been no corresponding increase in the resources of the appellate branch of the judiciary to respond to those increases. What's the result? Let me give you just one example.

Five years ago, I represented a young man who had been charged with first-degree murder and child abuse in a case in which he was accused of participating in the child's death; a shaken baby syndrome case. The issue was whether or not he caused the death or was an innocent bystander. There was a

trial; he was acquitted of the first-degree murder and was convicted of a felony child abuse. I handled only the appeal. From the time his jail time started counting toward a sentence, until the time the appeal was complete he had served the entire guidelines sentence for the crime. The Appellate Court set aside the conviction and sent the case back for further proceeding. I thought there were pretty clear severe errors that occurred in the trial. After realizing that the law precluded being charged with both of those crimes for the same incident, in other words being charged in violation of double jeopardy protection, the case was dismissed. This young man has no felony record. His constitutional rights were protected by the judicial process, principally based on pretty strong evidence produced during the trial that factually he did not commit the crime, but regardless, he had still served the entire sentence even though he was innocent. That result does not sit well. The length of time his case was in the system was, in part, because of the press of business. The length of time cannot be attributed solely to the appellate system because there were lack of resources throughout the system, *i.e.*, court reporter, clerk's office, trial court, attorney preparation, as well as the time on appeal, that contributed to the delay. One significant cause throughout the system is lack of resources to handle the case load. Some of the delay that was attributable to the appellate system has been temporarily alleviated by a blitz docket reduction program last fall. The only real solution is to increase the number of court of appeals judges. The system is not able to function smoothly and expeditiously. Remember the

Judicial Advisory Committee's conclusion in 1975 that a delay of 17.6 months from notice of appeal to appellate court opinion was excessive.

In 1983, the Judicial Council Appellate Process Advisory Committee recommended that judges write no more than 75 opinions each year. The same committee found judges then were writing 80 opinions a year, a clearly overwhelming task.

In 2000, current Court of Appeals judges wrote in the neighborhood of 100-110 opinions each. And, were not able to keep up. Further compare the motions docket; 4,123 motion filed in 1987 after judges 8, 9, and 10 were added to the Court of Appeals, compared to 9,482 in the year 2000.

Ultimately it is not the judges who suffer. It is not the lawyers who suffer. It is the parties, the customers who suffer.

The Kansas Constitution provides in §18 of our Bill of Rights: "Justice without delay. All persons...shall have remedy by due course of law, and justice administered without delay." Struggle and work as hard as they are able your Court of Appeals Judges may not be able to achieve this goal without your help to provide them with additional help.

Yours very truly,

Ed Collister

Edward G. Collister, Jr.
Collister & Kampschroeder
3311 Clinton Parkway Court
Lawrence, Kansas 66047-2631
(785) 842-3126

KANSAS COURT OF APPEALS

GARY W. RULON
CHIEF JUDGE

301 WEST TENTH
TOPEKA, KANSAS 66612-1507

(785) 296-6184
FAX: (785) 296-7079

February 13, 2001

Chairman Mike O'Neal
House Judiciary Committee
Kansas State House
300 SW 10th Ave
Room 170W
Topeka, Kansas 66612-1504

HB 2297 - Additional Judges for the Kansas Court of Appeals

Dear Chairman O'Neal:

Please find attached my remarks to the House Judiciary Committee. I would like to thank the committee for allowing me the time to address the committee, explain our needs and answer any questions you or the committee might have.

If you, or any of the committee members have any further questions or need additional information, please let me know.

Very truly yours,

Gary W. Rulon
Chief Judge

GWR:aet

Enclosure

House Judiciary
2-13-01
Attachment 2

KANSAS COURT OF APPEALS

GARY W. RULON
CHIEF JUDGE

301 WEST TENTH
TOPEKA, KANSAS 66612-1507

(785) 296-6184
FAX: (785) 296-7079

TESTIMONY PRESENTED BY CHIEF JUDGE GARY W. RULON OF THE KANSAS COURT OF APPEALS

DATE: **February 13, 2001**
RE: **Budget for FY 2002, Court of Appeals**

As in previous years, this year's budget request includes additional judges for the Court of Appeals. As you know, the Kansas Justice Initiative has recommended adding four judges to our court and the Kansas Bar Association supports this recommendation. (See attachment I.) The Justice Initiative's recommendations buttresses our request in the last two years' budget for more judges to keep up with our caseload.

Judges

In last year's budget request we estimated the decline in new case filings, that began after the high in 1997, may be coming to an end. We also estimated that we could reasonably expect case filings to once again increase at the historic rate of 3% per year unless some new dramatic legislation or changes in case law accelerated the increase. Fortunately, our worst fears did not come to pass. In calendar year 2000 our new appeals declined by approximately 6% from those filed the previous year. (See attachment II.) However, we have no reason to believe this is necessarily the

trend of the future. For example, in 1999 the Legislature changed the law regarding probation and postrelease supervision. We are just beginning to see the appeals from such change and, it still has the potential to generate a significant number of new appeals.

Another factor that must be considered is the impact of the U.S. Supreme Court's decision in *Apprendi v. New Jersey*. A recent National Law Journal article noted that after the United States Supreme Court's June 26, 2000 ruling, hundreds of appeals have been filed and scores of state and federal decisions have been handed down interpreting the ruling. The Chief Judge of the U.S. Court of Appeals for the 3rd Circuit observed that *Apprendi* was a case of enormous potential importance and that a great deal of time was going to be devoted to dealing with the sentencing issues raised. Also, U.S. district courts in Minnesota and North Carolina have held that *Apprendi* applies retroactively.

In the context of our sentencing guidelines, we can reasonably predict that a substantial number of direct and 1507 appeals will be forthcoming. As of February 1, 2001, the Court of Appeals is holding multiple cases raising *Apprendi* issues awaiting the Kansas Supreme Court's ruling on the first test case , *State v. Gould*. Other cases seeking to extend *Apprendi* beyond its stated holdings continue to be filed in this court.

Another consideration is the number of cases transferred to our Supreme Court. In prior years our Supreme Court has been extremely helpful in considering this court's request that certain cases be transferred due to issues of first impression or of statewide significance. We realize, however, that as the number of death penalty appeals increase, our Supreme Court may not have the resources to continue to accept transfer of as many cases as it has in the past.

As we noted in last year's budget request, in 1983 when Governor Carlin asked the Judicial Council to make recommendations on alleviating the problems in the Court of Appeals, there were 152 cases filed per judge. The Council subsequently recommended adding three new judges to the Court. In 2000 there were 172 new cases filed per judge and we requested 4 new judges for the Court of

Appeals. Based upon current and projected caseload, we are requesting at least one new judge along with accompanying staff and office space.

Last year, in line with the recommendation of the Justice Initiative, House Bill 2601 was introduced which contained a provision to expand our court from 10 to 14 judges. As you know, the bill was favorably passed out of committee, but failed on the floor of the House. Of note is the fact that in this legislation the timing for adding judges to this court was staggered over a period of four years beginning in FY 2002, with one judge being added in each of the following years. Our budget proposal follows this methodology.

In the last ten years, our court has heavily relied on the use of assigned district court judges to supplement our panels in order to handle the number of new cases filed each year. The reliance on the use of district judges did not disappear with the reduction in our backlog.

In 1999, the court used outside judges 35 times on regular dockets, and 31 were enlisted for the blitz docket. In 2000 we used 33 outside judges These judges agree to work with this court despite the fact that most have busy dockets of their own. While having assigned district judges sit with our court is beneficial, the extent that we rely on their help has become excessive in light of the heavy caseload they are responsible for in their own courts. The addition of full time judges to this court would reduce its reliance on trial judges.

Renovation:

Another immediate need is to upgrade the facilities vacated by the Attorney General's office. The carpet in the area is threadbare and worn, and the wall covering is battered and peeling. We are requesting funds to repair the facilities to make it more productive for our current employees.

Conclusion

I realize the Court of Appeals is again asking for more personnel; however,

most of the needs we outlined in last year's budget still exist. Without additional personnel and space for them to work, it is inevitable that, given the current and projected caseload, the backlog could again increase. There is only so much that can be accomplished in terms of increasing efficiency with a given amount of resources.

We realize that even if the Legislature grants our request for more judges, it will take some time for the selection process to be completed. The process, however, must be started or we will be forced to continue to use short term solutions to combat a long term problem.

Thank you for your consideration.

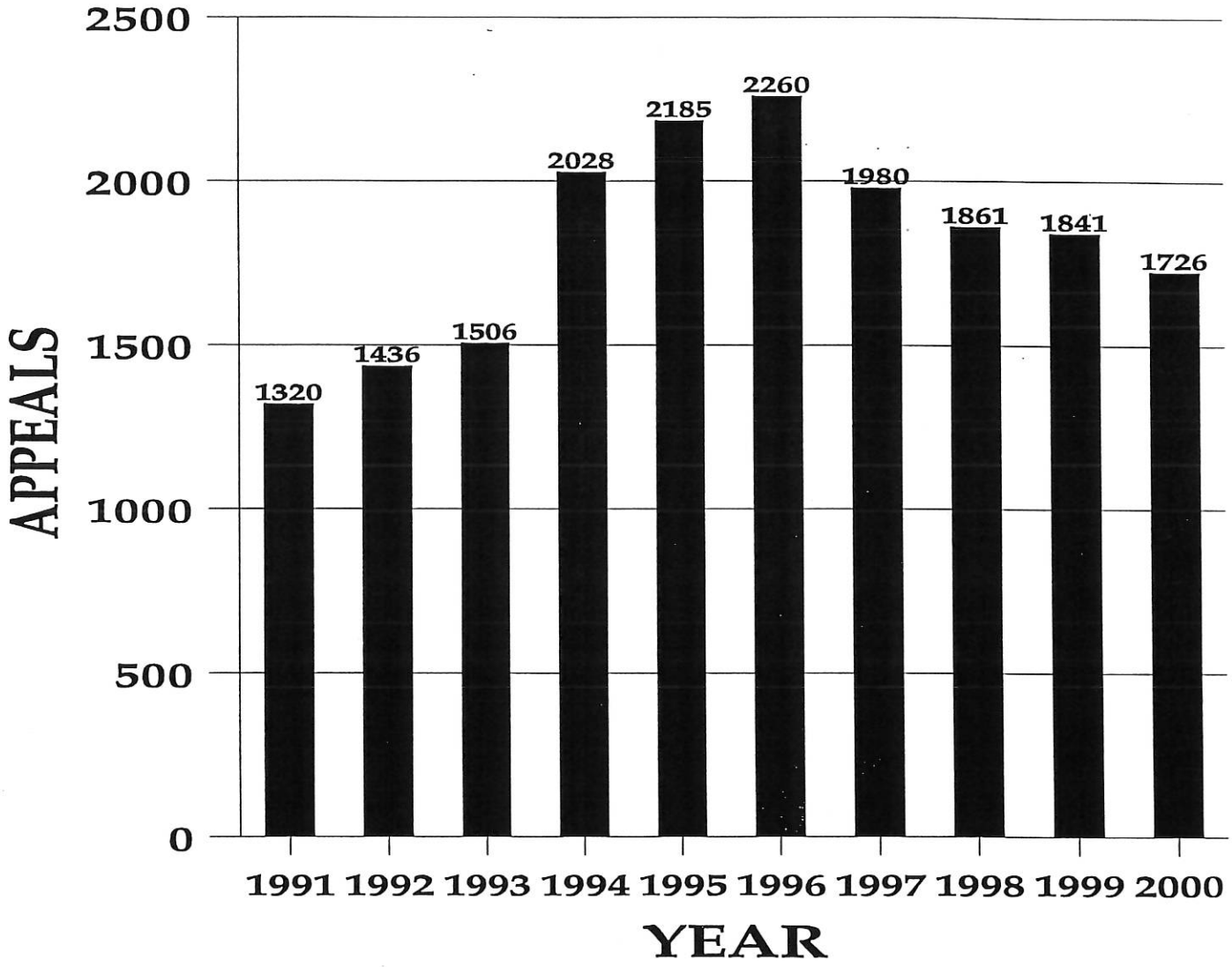
ATTACHMENT II

KANSAS COURT OF APPEALS

CALENDAR YEAR STATISTICS

(as prepared by the Clerk of the Appellate Courts)

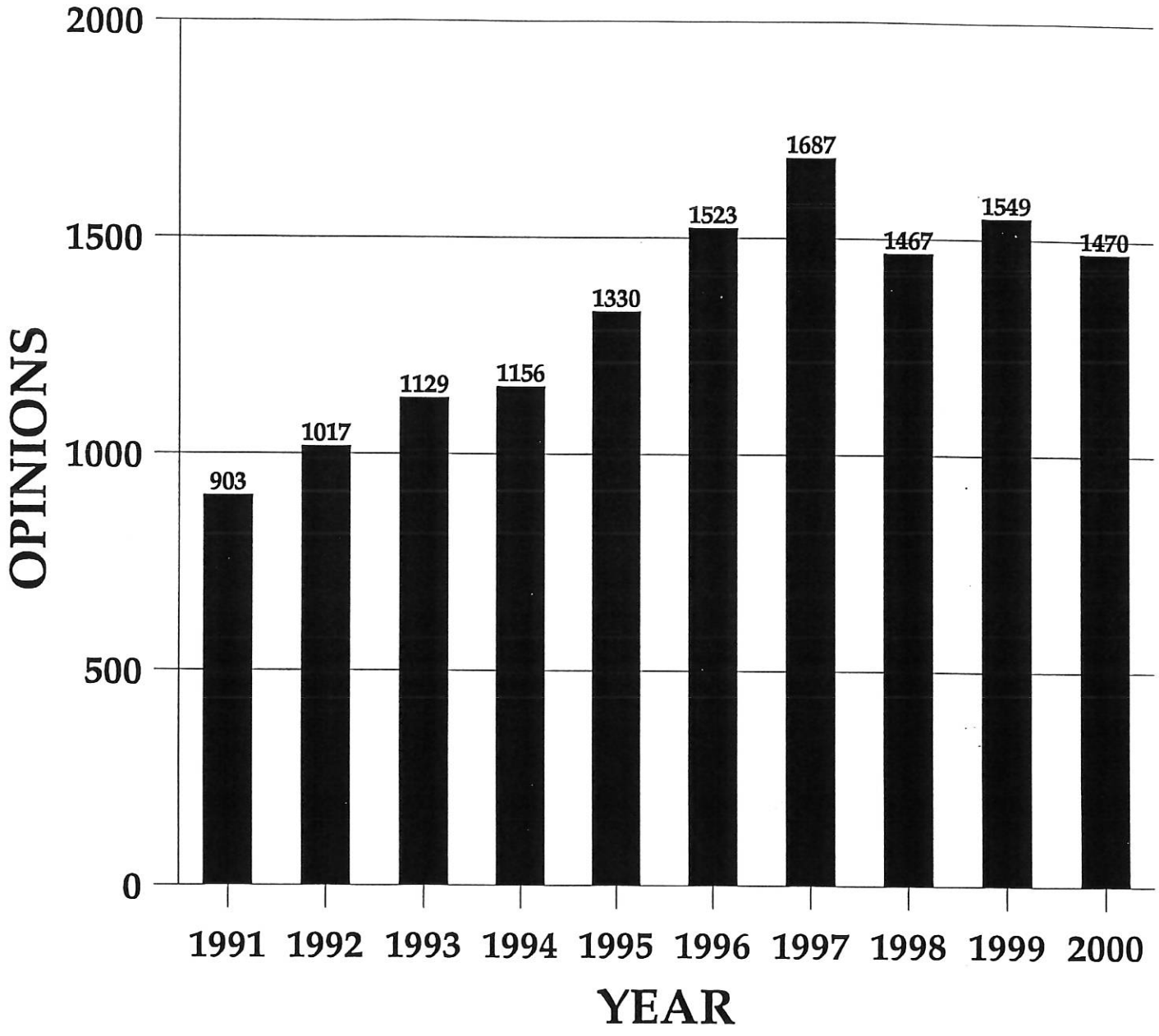
KANSAS COURT OF APPEALS
Appeals Docketed



* **Increase in filings beginning in 1994 primarily due to Kansas Sentencing Guidelines Act.**

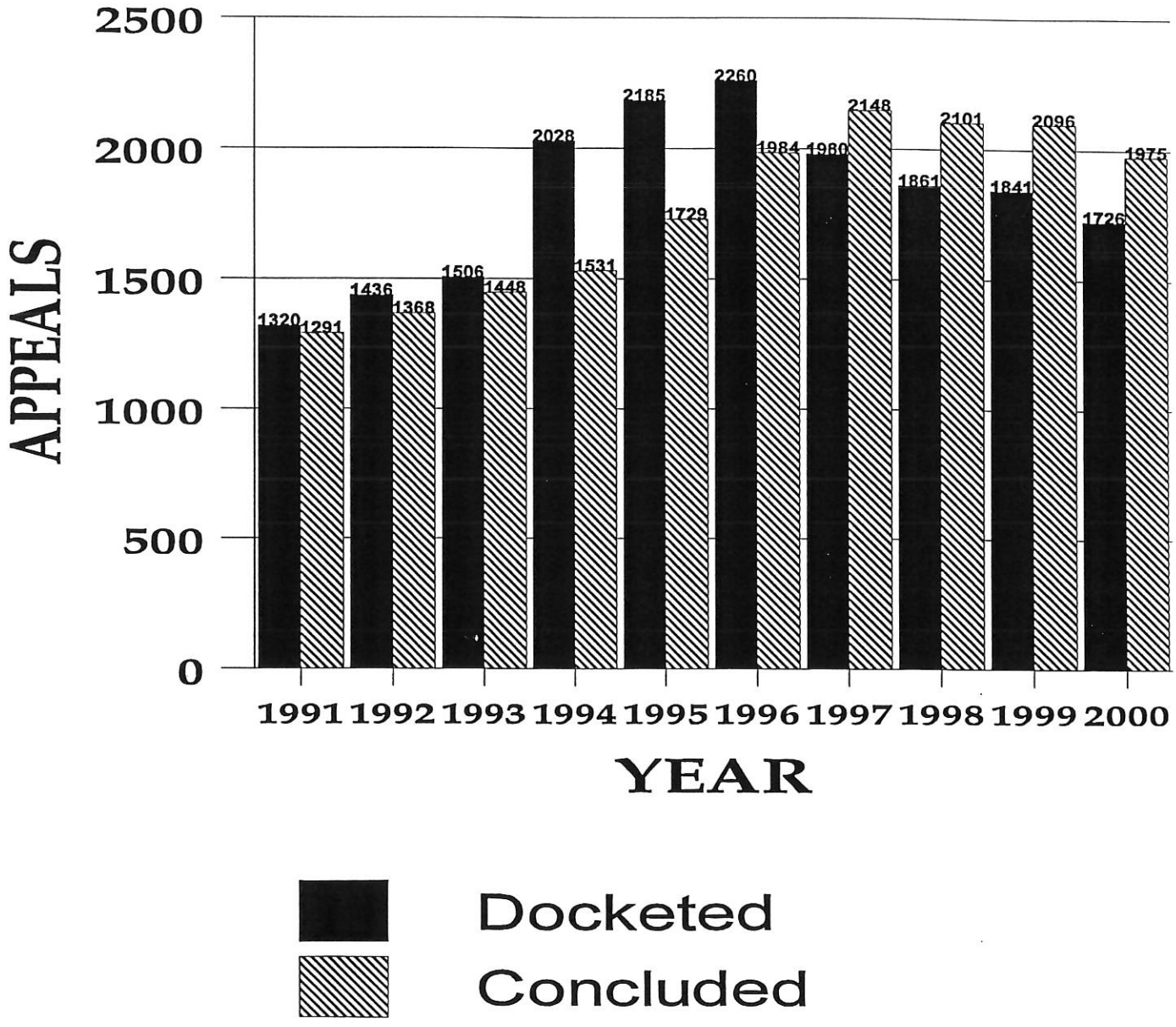
** **Decrease in filings, starting in 1997, a result of decrease in cases under Sentencing Guidelines. Case filings have returned to the number projected with normal growth absent the impact of Sentencing Guidelines. Per Gary Rulon - Chief Judge**

KANSAS COURT OF APPEALS
Opinions Filed

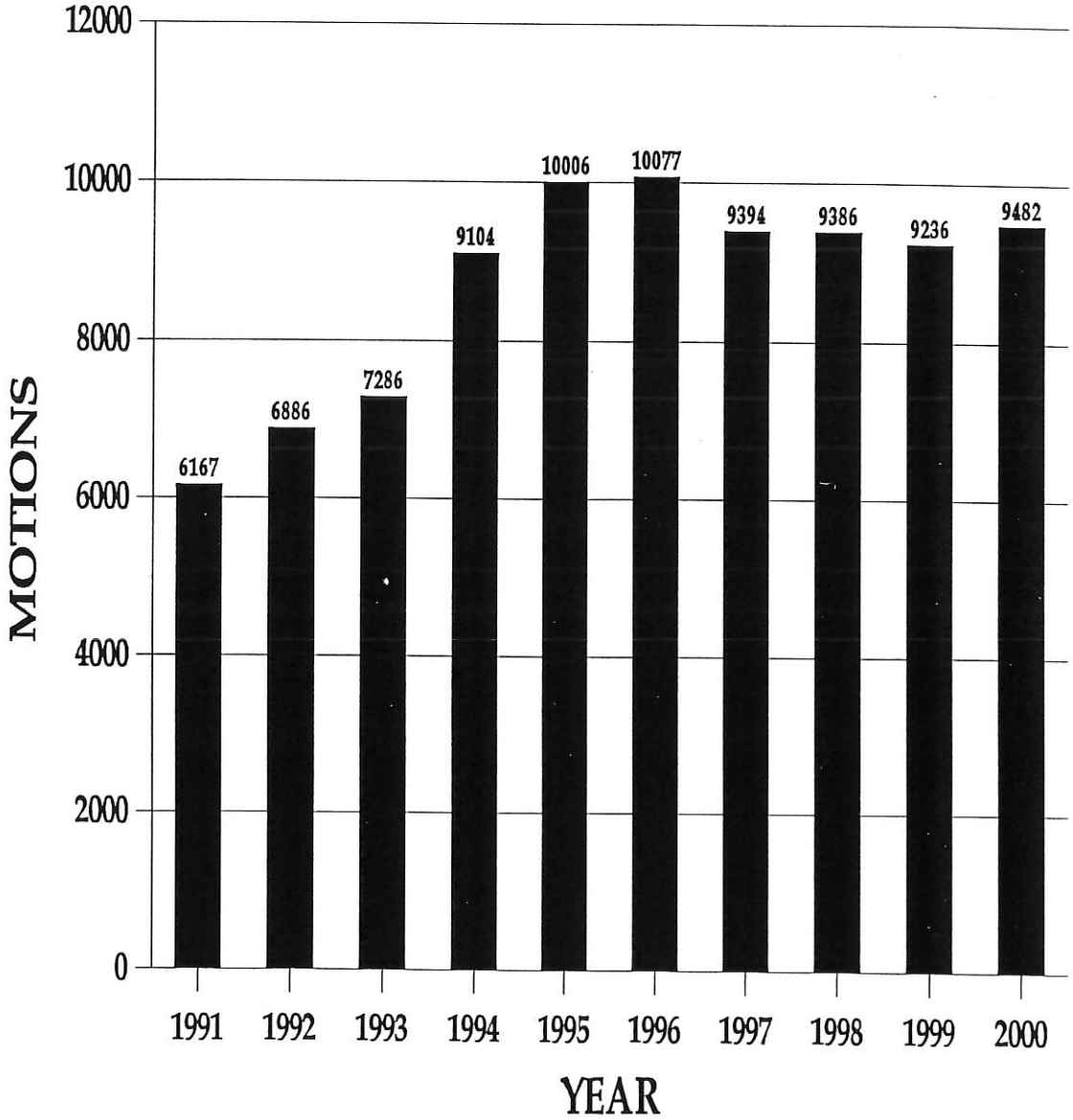


KANSAS COURT OF APPEALS

Appeals Docketed v. Concluded



KANSAS COURT OF APPEALS
MOTIONS FILED



KANSAS COURT OF APPEALS

Number of District Judges assigned

1999	66*	(35 judges used during regular docket and 31 for the blitz docket)
2000	33	

Rate Cases

1998	3
1999	3
2000	4

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Terry Humphrey
Executive Director
Kansas Trial Lawyers Association

RE: 2001 HB 2297

DATE: February 13, 2001

Chairman O'Neal and members of the House Judiciary Committee. Thank you for the opportunity to offer our comments in support of HB. 2297. This bill seeks to expand the number of Kansas Court of Appeals judges from 10 to 14 over a four-year period.

It has long been the philosophy in Kansas that every litigant is entitled to at least one level of appeal. The Kansas Court of Appeals was reestablished in 1997 in an attempt to fulfill this promise but has been hampered by an overwhelming caseload. Due to the current backlog of cases, it is not unusual for a matter to pend in the Court of Appeals for periods of one and half to two and half years. It is not uncommon for the Court of Appeals to have in excess of 1,250 cases pending before it at one time. Appellate judges, in an attempt to keep up, are issuing in excess of 125 opinions each year. To expedite the appeals process and to allow the appellate judges more opportunity for a thorough and equitable review of the matters before them, the Court must be expanded.

We recognize that there is a cost associated with increasing to 14 the number of Court of Appeals judges. Increasing the number by one judge per year over a four-year time span, eases the burden on the judicial system's operating budget.

All litigants are entitled to a timely and thoughtful decision of each matter submitted to the Court of Appeals. Expanding the Court to 14 members will help meet this objective.

Thank you for the opportunity to comment and we urge the committee's support of HB 2297.

Terry Humphrey, Executive Director
Jayhawk Tower • 700 SW Jackson, Suite 706 • Topeka, Kansas 66603-3758 • 785.232.7756 • Fax 785.
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.KA ADDRESS
STATE CAPITOL, ROOM 327-S
TOPEKA, KANSAS 66612-1504
(785) 296-7630
REPRESENTATIVE, ELEVENTH DISTRICT

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

COFFEYVILLE ADDRESS
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JIM GARNER
HOUSE DEMOCRATIC LEADER

February 13, 2001

HOUSE JUDICIARY COMMITTEE
TESTIMONY IN SUPPORT OF HOUSE BILL 2298

Chairman O'Neal and Members of the Committee.

Thank you for the opportunity to testify on House Bill 2298.

Shortly before the August 2000 primary election, I was approached by a constituent in Coffeyville and she asked me why she and other residents of Montgomery County could not vote in the race for District Magistrate Judge. I had never thought about the issue before, but she had a very good question. HB 2298 is proposed to fix this situation.

The 14th Judicial District, consisting of Montgomery and Chautauqua Counties, elects its judges. The current law requires District Judges to be elected by the electors of both counties in the district. However, the Magistrate Judge position is selected by the electors of Chautauqua County only.

As my constituent accurately observed, the Magistrate Judge presides over hearings in Montgomery County, deciding small claims action, limited actions, probate cases and guardian and conservatorship matters involving the citizens of Montgomery County. She makes a sound argument that those citizens should be allowed to vote on this judge position.

HB 2298 would simply require Magistrate Judges in Judicial Districts comprised of more than one county to be accountable to, and elected by, the electors of the entire Judicial District.

I encourage your support of this bill. Thank you for the opportunity to appear on this matter. I will be glad to stand for any questions.

House Judiciary
2-13-01
Attachment 4

KANSAS DISTRICT MAGISTRATE JUDGES ASSOCIATION

LEGISLATIVE COMMITTE

Hon. Keith Whitney
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Hon. Leonard Mastroni
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February 13, 2001

Mr. Chairman
Members of the Committee:

I am Michael Freelove, District Magistrate Judge for the 16th Judicial District; I am here representing the District Magistrate Judge's Association.

I am appearing here today to express our views to House Bill 2298.

This bill if passed requires the district magistrate judge to stand for election or retention district wide as the district judges now do.

Of the 31 judicial districts, 22 have district magistrate judges. Of those 22, there are 13 that have district magistrate judges assigned to a county other than their home county on a regular basis. I am in one of those districts; I serve a minimum of one day a week in Ford County, as do all the district magistrates in the 16th District. In the other 9 districts the district magistrate judges only serve in other counties when the judge for that county is ill, on vacation, or has been recused from a case.

In my situation I could understand if I had to run in Clark and Ford Counties. I would not like it but would understand. If I had to run in all the other counties in the district this would pit me against the judges in the other counties, something that I am not sure that the voters would understand.

There has been discussion on all judges in the state being on the retention system. Again this bill would require the judges to stand for retention in each county of the district. This has the same effect as the election of district magistrate judges district wide. Some judges would be up for retention in counties that they do not serve.

In the elected districts this could mean that all the district magistrate judges would come from the larger counties. Even with the residency requirement in K.S.A. 20-334, the judge would not have to be a resident until they take the oath of office. Again this could mean a large campaign and with the results that some of the counties would not get the judge they voted for.

This is not to say that this will not happen in a county but if it were a district wide election the chances are by far greater.

As legislators you have a district that you serve. In the legislative session you vote on a large number of bills each year. Some do not affect the district you

serve. However you still vote for or against the bill. Your vote might pass or reject the bill and the people in the district that the bill targets did not vote for you.

As a district magistrate judge that serves in a county that I am not elected in, my decision on a case might have the same effect. However, the litigants in my court do have the right to appeal my decision if they think that it adversely affects them. With your vote they do not.

During court unification the people of the State of Kansas were given a promise that they would have a judge in their county, elected by the voter of that county. In some cases it is a district judge, and in 69 counties it is a district magistrate judge. This system has survived for 24 years as it is. Requiring the district magistrate judge to stand for election district wide would have an adverse affect on this system.

The district magistrate judges that we have contacted have opposed this bill, the very same results that we get when we broach subject of deviating from the current method of election or retention.

Mr. Chairman and members of the committee, I, as a member and representative of the District Magistrate Judges Association and personally, would urge you to not allow this bill to become law.

Thank you for your attention.

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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CHAIRMAN: ETHICS AND ELECTIONS
MEMBER: FEDERAL AND STATE AFFAIRS
RULES AND JOURNAL
TAXATION
ALEC STATE CHAIR

TOPEKA

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE IN SUPPORT OF HB 2222

February 13, 2001

Mr. Chairman,

I come before you today to express my support for **HB 2222** , the Appeal Bond Limitation Act, legislation which places limits on supercedes bond requirements in certain cases. In some instances, most recently during the tobacco litigation, some companies, when faced with enormously large judgements, could not even exercise their right to appeal from an adverse judgement because such companies could not even afford the large supercedes bonds that would normally be required. This legislation, one of the American Legislative Exchange's model bills, places reasonable caps on supersedes bond requirements in cases where the judgement is extremely large. By placing these caps on such bonds, companies will not be prohibited from exercising their right to appeal simply because they cannot afford the large bond.

This bill provides that, if the judgement in the case exceeds $1 million but is less than $100 million, the supercedes bond required would be no more than $1 million. In cases where the judgement equals or exceeds $100 million, the supercedes bond is not to exceed $25 million. However, in order to address any concerns about the ability of a company to pay the judgement, the opposing party has the right to go before the court and to request orders which are necessary to stop the dissipation or diversion of assets which can include a requirement that the appellant post a bond in the full amount of the judgement if there is a showing that the party bringing the appeal is purposely dissipating or diverting assets outside of the ordinary course of it's business for the purpose of avoiding ultimate payment of the judgement.

HB 2222 is common sense legislation which will bring important reforms to our litigation process, and will make it easier for any party seeking relief in the courts to exercise their rights, while at the same time, protecting damaged parties and their right to be compensated.

I'll be happy to stand for questions.

Representative Tony Powell

House Judiciary
2-13-01
Attachment 6

TESTIMONY OF MARK A. BEHRENS, ESQ.
PARTNER
CROWELL & MORING LLP
WASHINGTON, D.C.
(202) 624-2675

ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

BEFORE THE KANSAS
HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF LEGISLATION TO PROTECT THE RIGHT TO AN APPEAL: HOUSE BILL 2222 (SUPERSEDEAS BOND REFORM)

TUESDAY
FEBRUARY 13, 2001

TESTIMONY OF MARK A. BEHRENS, ESQ.
CROWELL & MORING LLP

ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee in support of House Bill 2222, a bill to protect the right to an appeal in civil cases, introduced by Representative Tony Powell.

BACKGROUND

By way of background, I am a partner in the 250-person law firm of Crowell & Moring LLP in Washington, D.C.[1] I practice in the Firm's Torts and Insurance Practice Group. Most of our practice involves representing defendants in multi-state product liability litigation. We also provide counseling in the prevention of liability exposure. I am co-counsel to the American Tort Reform Association.[2] In addition, I have taught advanced tort law as a member of the adjunct faculty at The American University, Washington College of Law. I frequently write on subjects involving liability law and civil justice reform.

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1 For more information about Crowell & Moring LLP, please visit our Internet website, www.crowellmoring.com.

2 For more information, please visit ATRA's Internet website, www.atra.org.

I graduated from Vanderbilt University School of Law in 1990, where I served as Associate Articles Editor of the Vanderbilt Law Review and received an American Jurisprudence Award for achievement in tort law. I received a Bachelor's degree in Economics from the University of Wisconsin-Madison in 1987.

I am testifying today on behalf of the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators, numbering over 3,000. I am an Advisor to ALEC's Civil Justice Task Force. The goal of the Civil Justice Task Force is to restore fairness, predictability, and consistency to the civil justice system.[3] ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation. ALEC's Model Appeal Bond Waiver bill provides the basis for the legislation that we are discussing today.

APPEAL BONDS

Supersedeas ("appeal") bonds provide security that a civil defendant who suffers an adverse judgment at trial will have assets sufficient to satisfy the judgment if efforts to challenge the verdict on appeal ultimately prove to be unsuccessful. The Kansas appeal bond statute requires a civil defendant desiring to

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[3] For more information, please visit ALEC's Internet website, www.alec.org.

appeal an adverse judgment to post a bond equal to 100 percent of the judgment, plus costs, interest, and damages for delay.[4]

Thus, a defendant facing a $5 million judgment would have to post a bond of more than $5 million (judgment plus costs and interest) in order to be able to prevent the plaintiff from seizing its assets while it appeals. In this day of increasingly massive verdicts, the current bonding requirement could force a defendant into bankruptcy before it can have its day in an appellate court. This obviously has terrible implications for the defendant, its workers and shareholders, and for the health of the Kansas economy in general. It also raises serious questions about the fairness of the civil justice system, as well as constitutional due process concerns. House Bill 2222 addresses these problems in a sound and fair manner.

NEW LITIGATION TRENDS RAISE BONDING FAIRNESS PROBLEMS

The Kansas appeal bond statute, like the laws in many states, is outdated and in need of reform. It was adopted when judgments were generally more reasonable in scale – before the creation of novel and expansive theories of liability, and before the rapid rise of class actions and mass torts,[5] and the emergence of

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4 See KAN. ST. ANN. § 602103 (d) (1999).

5 From 1988 to 1998, class action filings against Fortune 500 companies increased by more than 1,000 percent in state courts and 338 percent in federal courts. See Federalist Society, Analysis: Class Action Litigation – A Federalist Society Survey, 1 CLASS ACTION WATCH 1, 5 (1999).

state- and local-government sponsored lawsuits that aim to reach deep into the pockets of corporate defendants.[6] These "new style" lawsuits have created the possibility of astronomically large judgments in civil cases. Bonding statutes can stand as an unfair roadblock to appeals of such crushing verdicts.

The problem of oppressive appeal bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. As one law professor has observed, "if multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy."[7] Bonding requirements were a driving force behind the massive $246 billion settlement.

The bonding issue came up again in July of 2000, when a Miami court awarded a record-setting $145 billion in punitive damages in a 700,000- member class action against the tobacco industry,[8] despite the fact that virtually all federal and state courts in similar cases have rejected the trial court's approach.[9] Most

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6 See Victor E. Schwartz, Mark A. Behrens & Leah Lorber, Tort Reform Past, Present And Future: Solving Old Problems And Dealing With "New Style" Litigation, 27 WM. MITCHELL L. REV. 237, 261 (2000).

7 Richard L. Cupp, State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?, 27 PEPP. L. REV. 685, 689-90 (2000).

8 See Engle v. R.J. Reynolds Tobacco Co., No. 9408273 (Cir. Ct., Dade Cty., Fla. 2000).

9 See, e.g., Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

observers believe that the case will ultimately be overturned on appeal, but the defendants almost lost that fundamental right. Some in the industry may not have been able to post an appeal bond on such an enormous verdict; those companies would have been forced into bankruptcy – and the roughly $13 billion a year tap of money that is supposed to flow forever to the states under the Master Settlement Agreement would have been turned off.[10] This problem was avoided when the Florida legislature stepped in and reformed Florida's bonding statute in order to allow the defendants the opportunity to appeal the unprecedented judgment.[11]

Do not let these two examples mislead you into believing that bonding problems are "just a tobacco issue." The new trends in litigation put at risk many other corporations and industries that will face bars to appeal by current state bonding rules. No crystal ball is needed to make this prediction. One only needs to look at what is happening across the nation in the wake of the state attorneys general tobacco litigation.

Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, and that no lawsuits would be brought against other industries, local governments already have hired private attorneys to

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10 See Holman W. Jenkins, Jr., Look Who's Falling in Love With Tort Reform, WALL ST. J., Apr. 26, 2000, at A27.

11 See FL. St. Ann. § 768.733 (2000) (bond for punitive damages portion of class action judgment may not exceed $100 million or 10 percent of defendant's net worth, whichever is less).

sue gun manufacturers in a large number of cities.[12] Rhode Island retained a well-known plaintiffs' firm to assist in an effort to hold former manufacturers of lead paint liable for government health-care costs.[13] Other states are reportedly considering similar actions.[14] Several local governments have filed or plan to file their own lawsuits.[15]

The list may not stop there. Part of the 1998 tobacco settlement included a payment of $50 million into an enforcement fund to be used by the National Association of Attorneys General.[16] While this payment might not be used to fund

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12 See Jeff Reh, Social Issue Litigation and the Route Around Democracy, 37 HARV. J. ON LEGIS. 515 (2000).

13 See Victor E. Schwartz, Trial Lawyers Unleashed, WASH. POST, May 10, 2000, at A29.

14 See Robert A. Levy, Turning Lead Into Gold, LEGAL TIMES, Aug. 23, 1999, at 21.

15 See Scott Winokur, S.D., Oakland Join Suit Over Lead Paint/Redress Sought For Health Costs, S.F. CHRON., Jan. 22, 2001, at B1 (San Francisco and Oakland joining suit brought by Santa Clara County); Greg Borowski, Council Oks Lead Paint Lawsuit, MILWAUKEE J. SENTINEL, Oct. 20, 2000, at B1 (Milwaukee); Norm Parish, City's Lead Paint Suit is Almost Identical to One in Rhode Island Team Handling That Case Was Rejected Here; Harmon Selected More Costly Firm, ST. LOUIS POST-DISPATCH, Feb. 24, 2000, at B1 (reporting that St. Louis complaint was nearly a duplicate of one filed by a legal team that the city rejected to handle the case; the work was given to a more expensive and less experienced attorney who contributed to the Mayor's campaign fund). See also Editorial, It's All About Money, ST. LOUIS POST-DISPATCH, Feb. 22, 2000, at B12; Bill Murphy, 2 School Districts Sue Paint Makers/Houston, Spring Branch Seek Money to Treat Lead and Eliminate Hazards, HOUSTON CHRON., July 7, 2000, at 21.

16 See Samuel Goldreich, Small Farmers Stand Against Big Tobacco's Settlement; $246 Billion Deal Burns Independent Growers, WASH. TIMES, Apr. 26, 1999, at D11.

litigation against other industries, it provides a strong incentive for state attorneys general to attempt to repeat their success with the tobacco settlement. In fact, in June 1999, fifty state attorneys general held a strategy session to discuss future targets.[17] Reports suggest that these targets could include HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries.[18]

The entrepreneurial spirit of some government officials and their new ally, the contingency fee personal injury bar, is probably best illustrated by an August 27, 1999, letter from Rhode Island Attorney General Sheldon Whitehouse to his colleagues across the country.[19] Attorney General Whitehouse's correspondence started as follows: "This is in the nature of a 'brainstorming' letter."[20] Apparently, he was sitting in his office thinking of potential new targets for coordinated lawsuits. He then went on to suggest "[g]oing after the latex rubber industry."[21]

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17 See Mark Curriden, Fresh Off Tobacco Success, State AGs Seek Next Battle; United Front Puts Businesses on the Defensive, DALLAS MORNING NEWS, July 10, 1999, at 1A.

18 See Jim McLean, Lawyers: States abusing litigation, TOPEKA CAP.-J., Mar. 8, 2000; Roger Myers, Lawmaker plugs competitive bids, TOPEKA CAP.-J., Mar. 7, 2000, at 5A.

19 Letter from Rhode Island Attorney General Sheldon Whitehouse to Idaho Attorney General Alan G. Lance, August 27, 1999.

20 Id.

21 Id.

What for? To "put a couple of billion dollars into a foundation to raise awareness and to do research."[22]

Other types of litigations, including class actions, commercial litigation, and even product liability actions are increasingly producing eye-popping verdicts of the type that could present bonding problems for some defendants.

- In December of 2000, a Montgomery, Alabama, court hit Exxon Mobil Corp. with a $3.5 billion judgment ($87.7 million in actual damages and $3.42 billion in punitive damage) for allegedly underpaying natural gas royalties from well in Gulf Coast waters.[23]
- In October of 1999, a Marion, Illinois, trial court entered a judgment of almost $1.2 billion against State Farm Mutual Automobile Insurance Company in favor of a purported nationwide class of State Farm policyholders.[24] The case arose out of a longstanding State Farm practice (shared by other automobile insurers) that was fully disclosed to policyholders of using non-Original Equipment Manufacturer (OEM) parts to repair cars after accidents. State Farm and others followed this policy to create and assure a competitive market with OEM parts and to reduce repair costs. Since State Farm is a mutual insurance company, its policyholders directly benefited from any savings from the use of non-OEM parts.
- In July of 1999, a Los Angeles, California, court ordered General Motors Corp. to pay $1.2 billion to six people who were injured when their vehicle caught on fire after a rear-end collision.[25] The trial court judge refused to allow the jury to learn that a speeding drunk driver caused the crash.[26]

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22 Id.

23 See Kortney Stringer, Exxon Is Ordered to Pay $3.5 Billion In Royalties Suit, WALL ST. J., Dec. 20, 2000, at B7.

24 See Snider v. State Farm Mut. Auto. Ins.Co., No. 97-L-114 (Williamson Cty., Ill. 1999).

25 See California: GM Appeals $1.2 Billion Award in Fiery Crash, LIAB. & INS. WK., Dec. 11, 2000, at 7.

26 See id.

- On January 30, 2001, the front page of the New York Times reported about a new study by a nonpartisan group which found that the median product liability award – not including punitive damages – has more than tripled since 1993, from $500,300 to over $1.8 million in 1999.[27] "Most of that rise has come in the last three years, and awards are now growing at the fastest rate in two decades."[28]

With verdicts such as these being handed down with greater frequency, it does not take a soothsayer to predict that, unless reformed, the existing bonding rules in Kansas and elsewhere will increasingly threaten the right of appeal of corporate defendants and may force some employers into bankruptcy.

BONDING REFORM IS NEEDED AS A MATTER OF FAIRNESS

Civil defendants should have full access to a state's appellate court system to challenge an adverse judgment – just as losing plaintiffs should have the ability to test their case on appeal. The defendant's right to an appeal is particularly important if the verdict contradicts settled legal principles, is based on novel and untested theories of liability, was the product of bias or prejudice, or is so large as to "shock the conscience" and violate constitutional due process protections. Indeed, appeal to at least one appellate court typically is a protected right in most states. The current bonding statute, however, stands as a potential roadblock to keep some defendants from exercising that fundamental right.

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27 See Greg Winter, Jury Awards Soar As Lawsuits Decline On Defective Goods, NEW YORK TIMES, Jan. 31, 2001, at A1.

28 Id.

When faced with an exorbitant judgment and a concomitant equally exorbitant bond to stay a judgment pending appeal, many defendants (even large corporations) may be unable to post the bond necessary to pursue an appeal lest they face bankruptcy. There is no way for a defendant to appeal the judgment when it is financially unable to do so.

The consequences of this can be quite disturbing. Picture the following scenario. A state executive brings a state-sponsored lawsuit against an out-of-state corporation, or a trial court certifies a nationwide class action against the company. Maybe the defendant is unpopular for one reason of another. The trial judge allows the case to proceed based on a novel legal theory. Prejudicial and inflammatory evidence is paraded before the jury. The jury returns an unconstitutionally excessive punitive damages verdict.

If that verdict is more than the defendant can bond, there is nothing that defendant can do to reverse the plainly erroneous and unconstitutional judgment. The defendant's right to an appeal is effectively blocked. Ironically, the more egregious the errors at trial and the more outrageous the award, the more likely it is that the defendant will be unable to post a bond sufficient for the judgment to be appealed. The very cases that cry out for appellate review are the ones that defendants may not be able to appeal. That result is totally unfair, and wrong.

There is only one way for a defendant to avoid this fate, and it is equally disturbing – the defendant must settle, even if it believes the plaintiff's case is flimsy or without merit. As if to add insult to injury, the defendant must not only

settle a case it believes it can win just to avoid a potentially bankrupting judgment, but it must do so at a "premium" rate, because the plaintiff knows they have that defendant placed over a barrel. The defendant either accepts the plaintiffs' terms or risks bankruptcy.

Bonding statutes should not be permitted to be abused this way – as a tool to facilitate legal extortion.

OTHER STATES HAVE ACTED

Recognizing this problem, several states have wisely begun to adopt legislation bringing fairness to the bonding process. In the year 2000, Florida, Georgia, Kentucky, and North Carolina all adopted legislation to limit the amount of the bond a defendant must post in order to appeal an adverse judgment, while fairly protecting plaintiffs' ultimate chance for recovery should the plaintiff prevail on appeal.[29]

HOUSE BILL 2222 IS A SOUND SOLUTION FOR KANSAS

Kansas House Bill 2222 is sound and fair legislation that is needed to protect the right to an appeal in civil cases in the new litigation environment. The

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[29] See FL. ST. ANN. § 768.733 (2000) (bond for punitive damages portion of class action judgment may not exceed $100 million or 10 percent of defendant's net worth, whichever is less); GA. CODE § 5-6-46 (2000) (bond for punitive damages portion of judgment may not exceed $25 million); KY. ST. ANN. § 411.187 (2000) (bond for punitive damages portion of judgment may not exceed $100 million); VA. CODE § 8.01-676.1 (2000) (bond for punitive damages portion of judgment may not exceed $25 million); N.C. ST. ANN. § 1-289 (2000) (bond for punitive damages portion of judgment may not exceed $25 million).

bill would place a cap of $1 million on the appeal bond for judgments valued over $1 million and cap the appeal bond at $25 million for judgments valued over $100 million. The current law would govern judgments below $1 million. These limits would apply both for judgments entered in Kansas and in the situation where a plaintiff who has secured a judgment in another state seeks to enforce that judgment in Kansas.

It is important to note that the bill in no way limits the amount of damages that can be imposed in litigation either in Kansas or elsewhere.

The bill is merely intended to ensure that a defendant can appeal a massive judgment without being put out of business by a plaintiff who seeks to execute on that judgment, because the defendant cannot afford to post the appeal bond that otherwise would be required.

The legislation also allows courts to penalize litigants who attempt to use the bond reform to divert assets while the appeal is pending in order to avoid paying the damages judgment when the appeals are concluded.

Such protection puts defendants on a more equal footing with plaintiffs, whose right to appeal a dismissal of a case is unobstructed by financial obstacles. Moreover, the legislation addresses the basic reason for the bonding rules. If there is no threat that a defendant will dissipate or divert its assets, sound public policy suggests that the defendant's right to appeal should not be hampered based upon its financial wherewithal.

GIVING BONDING DISCRETION TO TRIAL COURTS NOT ENOUGH

Some may ask why bond waiver reform legislation is needed in light of the fact that Kansas trial courts have the discretion to waive an appeal bond (in full or in part) upon a showing of good cause.[30] The reason is that there is a substantial risk that a trial judge that is willing to accept a novel liability theory or award an exorbitant judgment against a defendant will be unwilling to exercise such discretion in favor of that defendant. This risk can be especially high for out-of-state defendants, because some courts are presumably more likely to favor the interests of their own citizens over that of a nonresident, particularly if the defendant is a large corporation. The bar to appeal created by existing bonding requirements could place an entire industry at the mercy of a single trial judge. Bond waiver legislation is the only way to achieve a uniform system to ensure fairness in civil litigation.

CONSTITUTIONAL RIGHTS SUPPORT BONDING FAIRNESS REFORM

Fundamental due process and equal protection principles support the adoption of bonding reform. As the United States Supreme Court has explained in another context, "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms."[31] Bonding requirements that make it impossible to pursue an appeal that would otherwise be available effectively withdraw the right to appeal and are, therefore,

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30 See KAN. ST. ANN. § 602103 (d) (1999).

not only unsound but also constitutionally defective. Similarly, such requirements may run afoul of the Equal Protection Clause by creating a system that treats defendants "differently for purposes of offering them a meaningful appeal" based on their capability of sustaining a bond payment without going bankrupt.[32] Adoption of H.R. 2222 will help ensure that a lack of resources does not result in a denial of constitutional due process or equal protection safeguards.

CONCLUSION

House bill 2222 provides a sound solution to the bond bar that has recently emerged in the context of new types of liability litigation. Representative Powell's bill makes good public policy sense. I urge you to enact it now. Thank You.

(...continued)

31 See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985).

32 See id. (discussing cases involving indigent defendants that are denied an appeal (for example, because they are unable to afford a transcript) in violation of equal protection and due process).

Testimony of Karen Czarnecki Miller
Director, Civil Justice Task Force,
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Before the Kansas House Judiciary Committee

Tuesday, February 13, 2001
Topeka, Kansas

Good Afternoon, Mr. Chairman and Members of the Committee. I am Karen Czarnecki Miller, representing the American Legislative Exchange Council, the nation's largest bi-partisan membership organization of state legislators with over 2,400 members.

I serve as the Director of ALEC's Civil Justice and Health & Human Services Task Forces. I have worked in public policy for over 13 years and have previously served on the White House staff under Presidents Reagan and Bush, primarily working on domestic policy issues. I received my undergraduate and law degrees from The Catholic University of America in Washington, DC.

I am testifying today in support of HB 2222, the Appeal Bond Act introduced by Representative Tony Powell.

As an organization, one of ALEC's principal roles is to identify emerging trends in the states before they pose policy challenges, and provide workable legislative solutions to these issues. We do this in committee fashion with bi-partisan support of legislators from around the nation. Our work–product

is model legislation that can be used in any state to address a particular issue. It is meant as a starting point for those legislators who wish to address a particular issue in their state.

HB 2222 is a version of one of ALEC's model bills that has been discussed in our committee for the last two years. It involves the basic right of a defendant to appeal what he or she believes is an unfair judgement. Similar versions of this bill have been introduced and passed in 5 states thus far: Florida, Georgia, Kentucky, North Carolina, and West Virginia. A few others states are considering its introduction this legislative session.

By way of background, when a party is sued and a judgement has been rendered against him, many states require that a party post a supersedeas bond before appealing the final judgement. This bond is designed to protect a plaintiff's ability to enforce a judgement and not be "stiffed" by an insolvent debtor. These bond laws preceded what many have called "Big Government" lawsuits where entire industries have been targeted by state officials who have teamed up with plaintiff's attorneys. In recent years where we have witnessed billion dollar judgements, the unanticipated result

has been the inability of defendants to afford an appeal.

The basic premise of this bill is that the right to appeal is preserved. In many states, the bond requirements can be up to 150 % of the verdict. And with a bond, the money has to be posted at the time of the appeal, and not over a period of time. With billion-dollar judgements, defendants had little options: forego an appeal or go into bankruptcy.

This act has four core provisions that would ensure fairness in the appeal bond process:

1 It sets reasonable limits as to the bond posted so as to preserve a defendants right to appeal.

2 It penalizes a defendant who tries to transfer assets or impoverish itself so as to avoid paying a judgement.

3 It has a provision for small businesses so that they too can afford an appeal, and,

4 It properly gives court discretion to lower a supersedeas bond in a civil action for good cause shown.

We at ALEC believe the appeal bond act has had traction because Americans believe that individuals should have the right to appeal a court judgement. If you cannot afford to post a bond, you simply cannot appeal. We anticipate that several more states will consider this legislation in the near future. It is sound public policy and ensures fairness in our judicial system.

Thank you, Mr. Chairman, for allowing ALEC to be represented today before your committee.

TESTIMONY OF J. EUGENE BALLOUN, ESQ.

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BEFORE THE KANSAS HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF HOUSE BILL NO. 2222

The traditional requirement that supersedeas bonds cover the total damages award may no longer be realistic or defensible in today's litigation where jury awards, particularly of punitive damages, can (and have) reached into the billions of dollars. In this climate, a limitation on the bonding requirement necessary to stay judgment and exercise a defendant's right to appeal is compelled by notions of fundamental fairness and concerns about protecting the State's economy. In other words, it is the right thing to do and it makes good business sense.

House Bill No. 2222 proposes a limit on supersedeas bonds in the amount of $1 million for judgments between $1 million and $100 million and $25 million for judgments exceeding $100 million. The bill also makes provisions for a court to require the posting of a bond in the full amount of judgment when it is proven that the defendant is "purposefully dissipating or diverting assets outside of the ordinary course of its business for the purpose of avoiding ultimate payment of the judgment." (Proposed Sect. 1(d)(2)(B).) Kansas law permits appeals from final judgments – House Bill No. 2222 simply removes a financial impediment to exercising this fundamental right.

A right of appeal is of little significance if it can be effectively foreclosed by an arbitrary procedural requirement. Indeed, a defendant who may have the greatest need for appellate review is often the one against whom an exorbitant verdict is returned. Faced with a mulit-million- or billion-dollar verdict, such a defendant is put in the untenable position of having to settle and

waive its right to appeal or declare bankruptcy. "If a defendant has to liquidate all or a substantial part of his business in order to exercise the right of appeal, then the appeal may surely be of doubtful value." Trans World Airlines v. Hughes, 515 F.3d 173, 178 (2d Cir. 1973).

There are unfortunately plenty of stories from across the country of defendants who are confronted with having to post a bond in the amount of a judgment which threatens to sink the company. One of the most publicized cases was Pennzoil v. Texaco, where a verdict in excess of $11 billion was rendered against Texaco in Texas. Under Texas law, to stay judgment, Texaco needed to post a supersedeas bond in the amount of judgment plus interest and costs. Texaco argued that it was financially unable to do so. In that case, Texaco sought protection from a federal court, getting an injunction against enforcement of the judgment pending appeal.[1] The Second Circuit reasoned: "It is self-evident that an appeal would be futile if, by the time the appellate court considered [the] case, the appeal had by application of a bonding law been robbed of any effectiveness."[2] In another example, reported in the Wall Street Journal, a Canadian funeral services company, the Loewen Group, was ordered to pay $500 million in damages in a breach-of-contract lawsuit brought by a local funeral home operator in Mississippi state court. To appeal the verdict, Loewen would have been required to post an appeal bond of 125 percent of the judgment, or $625 million, approximately the net worth of the company. Instead, Loewen settled the case for $175 million and filed a complaint with the U.S. State Department claiming it was denied equal justice and required to settle the suit under duress.

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1. See Texaco Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir.)(affirming injunction), rev'd, 107 S. Ct. 1519 (1987) (reversing on grounds that federal court should have abstained).

2. Id., at 1154.

The Legislature has already acted to limit the supersedeas bond in medical malpractice actions. The Legislature enacted a statute creating a health care stabilization fund in response to the medical malpractice crisis which limited the supersedeas bond in medical malpractice actions to the $3 million amount payable in those actions from the fund. Kan. Stat. § 40-3422. The Kansas Supreme Court upheld the statute limiting the supersedeas bond to $3 million, plus interest and costs, in a case where the judgment was in the amount of $21,244,824.90. See Todd v. Kelly, 251 Kan. 512, 837 P.2d 381 (Kan. 1992).

The time has come to provide this relief to all defendants. "Procedural limitations may not . . . irrationally or arbitrarily impede access to the courts, because the right of appeal that is granted by a state must be kept clear of any 'unreasoned distinctions.'"[3] House Bill No. 2222 gives effect to defendants' appellate rights by clearing the way.

Thank you.

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3. Carlson, Mandatory Supersedeas Bond Requirements – A Denial of Due Process Rights?, 39 Baylor L. Rev. 29, 31 (1987)(quoting Williams v. Oklahoma City, 395 U.S. 458, 459 (1969)).

LEGISLATIVE TESTIMONY

the Kansas Chamber of Commerce and Industry
The Unified Voice of Business

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HB 2222

February 13, 2001

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

Rylan Martin
Legislative Assistant

Mr. Chairman and members of the Committee:

My name is Rylan Martin. I am a legislative assistant with the Kansas Chamber of Commerce and Industry. I appreciate the opportunity to speak to you today in support of House Bill 2222.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

HB 2222 proposes to change current law regarding appeal bonds by limiting the amount of bond a defendant must post while appealing an adverse judgment. Under this bill, a defendant would be required to post an appeal bond in the amount of $1 million if the judgment rendered exceeds $1 million but is less than $100 million, and a bond not to exceed $25 million if the judgment is more than $100 million.

House Judiciary
2-13-01
Attachment 10

Posting of appeal bonds guarantees recovery for plaintiffs in the event their judgment is upheld on appeal. Requiring a bond to be posted before an appeal is initiated prevents defendants from avoiding satisfaction of the judgment as a result of bankruptcy, reduction of assets, or other insolvency incurred before the appellate decision is rendered. As such, the law in this area as it currently stands presents an unavoidable risk to defendants. In order to cover costs for fees and interest, bonds are often required in amounts exceeding that of the final judgment. In the case where a judgment exceeds a company's accessible capitol, the defendant may be left financially unable to argue their case on appeal. This effectively shuts down their Constitutional right to due process.

While such an impact can have a drastic effect on a small business, perhaps even forcing them into bankruptcy, the same effect may be had for larger corporations when a judgment exceeds their available liquid capitol. Such a corporation may be forced to find alternative means to post bond. In a worst case scenerio, a business might be forced into financial insolvency simply because of an inability to finance an appeal resulting from an excessive bond, even when a judgment is clearly erroneous.

Large appeal bonds can also act to tie a defendant's hands and force them into settlement. This is especially true where small business is concerned. A business may be more likely to settle a claim in order to avoid the risk of posting a large appeal bond in the event that a judgment is rendered against them.

It should be noted that HB 2222 would have no adverse effect on plaintiffs. The bill acts only to reduce the amount in which a bond is required. If the judgment against a defendant is upheld, the bond amount would be released to the plaintiff. If the judgment is upheld in an amount larger than the bond that was posted, the defendant would be required to forfeit the excess amount.

KCCI policy supports tort reform legislation and as a result we urge the committee to favorably pass HB 2222. Without setting a limit on the amount of appeal bonds, a business' access to true justice may be jeopardized. Putting a bond limit in place would allow a defendant access to other capitol not tied up in bonds for use in financing their appeal. Left unable to do so, the potential harm to the economic environment could be great.

Thank you for the opportunity to appear before you today. I would be happy to stand for any questions.

TESTIMONY OF JOHN C. TILLOTSON, CHAIRMAN
KANSAS BAR ASSOCIATION LEGISLATIVE COMMITTEE
REGARDING HOUSE BILL #2222-SUPERSEDEAS BONDS

H.B. #2222 seeks to amend K.S.A. 60-2103(d), which heretofore required the filing of a supersedeas bond equal to 100% of an adverse judgment, plus interest, costs and delay costs, in order to stay the enforcement of that judgment during the pendency of an appeal.

The proposed language of H.B. #2222 states that, for a judgment between $1,000,000 and $100,000,000, the bond cannot exceed $1,000,000. The bill provides for a judgment over $100,000,000 the bond cannot exceed $25,000,000.

The provision further provides that, if the judgment creditor can prove purposeful dissipation or diversion of assets (fraud) for the purpose of avoiding payment of a judgment, the court may require an additional bond.

KBA has evaluated this proposal and unequivocally opposes it for the following reasons:

1. The proposal to permit partial funding of appeal bonds by large judgment debtors jeopardizes the judgment rights of the judgment creditor, despite due process of law (trial for debtor).

2. Judgment liens upon the debtor's property could be jeopardized by dissipation of assets simply through the ordinary course of the debtor's business.

3. Constant litigation will be required for a prudent claimant's lawyer to be satisfied that fraud in the dissipating or diverting of assets is not occurring, notwithstanding the conclusion of the litigation by the entry of a judgment.

4. The proposal is discriminatory in that a judgment debtor of $999,999 will be required to file a bond of $1,249,999* while a judgment debtor owing $100,000,000 will be required to file a bond of $1,000,000. *(includes interest @ 10%, costs, delay costs)

5. There is no rationale stated for this proposal and certainly one cannot be discerned. No need is demonstrated for such a radical and discriminatory change in the law.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Ron Pope
Kansas Trial Lawyers Association

RE: 2001 HB 2222

DATE: February 13, 2001

Chairman O'Neal and members of the House Judiciary Committee. Thank you for the opportunity to appear before you today on behalf of the Kansas Trial Lawyers Association. I am Ron Pope, a practicing attorney from Topeka and a member of the KTLA Executive Committee.

KTLA opposes HB 2222, which places limitations on supersedeas bonds. This amendment applies the supersedeas bond limit of $1 million on judgments from $1 million to $100 million and only $25 million dollar limit on judgments in excess of $100 million.

First, what is the problem to be solved with this legislation? I am not aware of any situations in Kansas where this has become a problem for any judgments that have been entered. These types of verdict amounts are extremely rare in Kansas. However, a verdict in this state of this amount would have to reflect major injuries and damages to victims from a very powerful wrongdoer who, more likely than not, has the capability of paying and posting the bond.

People who have these catastrophic injuries and damages may find themselves facing needless delays without the assurance that they will be fairly compensated when the appeal process is over. Current Kansas law includes statutory procedures for delays and enforcement of judgments that afford reasonable and timely protections to a party for obvious errors or modifications that need to be made to a judgment.

Under K.S.A. 60-262(a), all judgments, except injunctions and receiverships are automatically stayed following entrance of judgment for 10 days.

Terry Humphrey, Executive Director

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In its discretion, the Court may stay the execution of any judgment pending a:

- motion for new trial
- motion to alter or amend the judgment;
- motion for relief from the judgment or order;
- motion for judgment as a matter of law;
- motion for amendment to the findings of fact.

Otherwise, a judgment is the final determination of the rights of the parties in an action. A judgment becomes effective when it is entered pursuant to K.S.A. 60-258. Obviously then a judgment is "effective" before appeal.

The bond requirements are insufficient under this bill. Currently, Kansas law requires bond set at the amount of judgment. Reducing the bond limit sends the wrong message to wrongdoers. Decreasing the supersedeas bond could result in the following:

(a) Encouraging frivolous appeals;
(b) Having as a primary motivation, delay of payment of judgment rather than legitimate issue of law that needs to be decided on appeal;
(c) Increasing the leverage a wrongdoer has over a victim. A victim may feel forced to take a smaller amount, fearing the consequences of delays that are necessarily caused by appeals. This fear would be perpetuated because the wrongdoer has not been required to post a bond for the full value;
(d) Possibly allowing for evasion of judgment responsibilities by disposal of assets. This statute puts the onus on the victim to prove that the wrongdoer is in fact wrongfully disposing of assets;
(e) Discouraging settlements on the part of the wrongdoer unless it is for a much smaller amount. Since the wrongdoer does not have to immediately utilize its assets for payment of the judgment, the wrongdoer gets the benefit of the time value of money, which could easily outpace the amount of interest accruing on the judgment.

Thank you for the opportunity to express KTLA's concerns regarding HB 2222. Because it removes current statutory protections to victims against needless or unreasonable delays and imposes an insufficient bond limit, which unfairly benefits the wrongdoer, we respectfully request the committee to not support this bill.

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STATE OF KANSAS
HOUSE OF REPRESENTATIVES

TOPEKA

COMMITTEE ASSIGNMENTS
CHAIRMAN: ETHICS AND ELECTIONS
MEMBER: FEDERAL AND STATE AFFAIRS
RULES AND JOURNAL
TAXATION
ALEC STATE CHAIR

TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE IN SUPPORT OF HB 2258, THE CLASS ACTIONS IMPROVEMENT ACT

February 13, 2001

BY REPRESENTATIVE TONY POWELL

Mr. Chairman,

As the ALEC State Chairman for Kansas, I am pleased today to once again come before you to support excellent model reform legislation put forward by the American Legislative Exchange Council, a bipartisan organization of legislators from around the nation who believe in Jeffersonian principles of free markets and limited government.

This legislation, the Class Action Improvements Act, makes important, but modest changes to our state's basic class action statute. The Act contains six basic core concepts that will improve the class action procedures in Kansas for both plaintiff and defendant alike. These changes are:

1. **Authorizing Appellate Review of Class Certification Rulings**--typically, such rulings are not appealable until after trial. This bill allows for immediate review.

2. **Establishing a Rule Limiting the Scope of Class Actions to Home State Residents**--the U.S. Supreme Court has ruled that state courts have the ability to handle nationwide class actions. Because of this rule, every court in the country is potentially a candidate to hear national class actions--and decide them. Do we really want another state court to decide the rights of our residents when such claims could be brought here in Kansas? Or do we want our judicial resources used to decide important legal questions that mainly concern non-residents? Of course not. This bill limits class actions in Kansas to those classes which include Kansas residents.

3. **Adopting an Explicit "Classwide Proof" Requirement**--The linchpin of any class action is the "common question" doctrine which allows a class when a group of plaintiffs have common questions of law and fact. However, sometimes common questions are too basic to really make a class action appropriate. This legislation requires common answers. Therefore, a jury can legitimately give a simultaneous, across-the-board answer on a particular issue, thereby ensuring that if the named plaintiffs' claims adjudicated fairly, so will the entire class.

4. **Adding a "Maturity" Factor to the Class Certification Prerequisites**--The maturity concept is predicated on the idea that a court should not certify a matter for class treatment unless there is a record of litigating similar claims individually that demonstrates the feasibility of aggregated adjudication. Without proper maturity, there is a greater risk that a class action may not be superior to individual suits. By adding a maturity factor in the court's analysis, courts will be less likely to approve class actions where none are really required.

5. **Adding an "Administrative Process" Factor to Class Certification Requirements**--in order to promote judicial economy, this legislation adopts a new rule which may prevent a class action if such claims can be brought by a government agency or before a government agency.

6. **Allows "Bidding" for Class Action Representation**--this provision allows what has been done in some large multidistrict class action litigation in the federal courts--bidding by law firms to represent the class. Engaging in the bidding process is solely at the discretion of the court, and can be done if the court believes that the class' interests can be better served. According to a recent Wall Street Journal Article, which is attached, many classes have been able to be better represented at a lower cost thanks to using market-based solutions in the class action arena. We can put an end to the grievous practice of some lawyers receiving billions in legal fees for representing classes while the class members themselves only get a coupon.

This testimony only skims the surface of this important legislation. Later speakers will talk in much greater detail than I can about the benefits of this bill and its impact on class actions. I am happy to stand for questions.

Wall Street Journal

Yahoo launches search ior sales executive **Page B6.**

id Media: *HomeBase ısiness strategy* **Page B10.**

To Rein In Fees, Some Judges Ask Attorneys to Bid

By Kathryn Kranhold
And Richard B. Schmitt
Staff Reporters of The Wall Street Journal

One of the hottest bidding wars this year wasn't over a $55 million Picasso at Christie's or a $21 million Manet at Sotheby's but for the lucrative role as lead counsel in the class-action lawsuit against the two auction houses for alleged price-fixing.

In April, the federal judge overseeing the antitrust action, Lewis Kaplan, sought bids from lawyers in a move to tap a qualified firm that would represent class members at the lowest cost. The winning bidder was the upstart Armonk, N.Y., firm of Boies, Schiller & Flexner, led by David Boies who prosecuted **Microsoft** Corp. for the government and who is now one of Vice President Al Gore's lead campaign lawyers. Mr. Boies's firm now stands to earn $26.75 million—or about 5% of the proposed Sotheby's-Christie's settlement—far less than lawyers usually receive in class-action cases where attorneys' fees typically account for as much as 30% of the settlement.

The case has shed a spotlight on the relatively new, and somewhat contentious, practice of allowing attorneys to bid for the right to represent class-action lawsuits. Historically, lead counsel has been selected based on who was first to file a lawsuit, or the lawyers would decide among themselves. But the process usually became politicized as lawyers cut deals among themselves and carved up fees, often at the expense of their clients' share of the settlement. Fees are taken directly off the top before the class is paid. It is a "really terrible system," says Stephen Susman, of Houston-based Susman Godfrey, which represents plaintiffs and defendants.

Hoping to infuse some competition into the system, some judges are experimenting with attorney auctions. U.S. District Judge Vaughn Walker in San Francisco first did so almost a decade ago in a securities class-action suit against **Oracle** Corp. Since then, judges in several class-action suits, including one against real-estate and travel giant **Cendant** Corp. and another against **Lucent Technologies** Inc. have also employed versions of the auction model.

The Sotheby's-Christie's dispute is the most high-profile example to date, and some in the legal world question whether the trend will discourage big plaintiffs firms from taking on time-consuming class-action suits if robust fees aren't guaranteed. In September, the Boies firm settled the antitrust action against **Sotheby's Holdings** Inc. and **Christie's International** PLC for $512 million. The lawsuit alleges the two auction houses colluded on commissions charged art buyers and sellers and defrauded them in the process. While the Boies firm's $26.75 million fee isn't bad for some six months worth of work to date on such a high-profile case, the fee is low compared with what others have taken home over the years. In a 1996 study of 400 class-action suits, the Federal Judicial Center, the research arm of the federal courts, found that attorneys' fees typi-

Please Turn to Page B4, Column 3

Karen Mazurkewich

"Miss Saigon," which will be shuttered in January, and dancing "Cats," which closed in September, audiences can expected to be treated to a work based on the life of physicist Richard Feynman, which will open at the Mark Taper Forum in Los Angeles this spring. New York's Lincoln Center Theater will present a production based on the after-life of British poet and scholar A.E. Housman by Tom Stoppard, one of Britain's more esoteric playwrights.

How thick is this stuff? "Copenhagen" is sufficiently dense with atomic theory that the Playbill actually includes a four-page gatefold walking playgoers through atomic history from 1895 to 1945 (Sample item: "The Critical Mass: Frisch and Peierls . . . calculate, wrongly, but encouragingly, the minimum amount of U-235 needed to sustain an effective chain reaction"). Even one of of the producers of "Copenhagen," Roger Berlind, says he understands the facts of nuclear science buttressing the play only "in a certain way. I was terrible at physics."

	Ahmanson Theatre	through time, m to keep track of
Copenhagen	Royale Theatre	Lines like 'An e chain of split nu through the ura doubling and qu in millionths of a
Proof	Walter Kerr Theatre	It's impossible t what the proof a
The Unexpected Man	The Promenade Theatre	High-brow intell conversations a characters' inte

"Proof" saves its hardest stuff for the last speech: "I've got Eberhart's Conjecture setting up this section," says the play's protagonist. "qn as the nth prime, all that stuff, b's positive not divisible by p . . . . Pretty basic number theory. . . ." Then the stage goes dark.

Now, Bidding on Legal Fees

Continued From Page B1

cally fell between 27% and 30% of the settlement.

Lawrence A. Sucharow, of New York's Goodkind Labaton Rudoff & Sucharow, says he was "shell-shocked" over the Boies bid, calling it "an extraordinarily low fee for the result achieved." Mr. Sucharow's firm was one of the bidders that lost out to Boies, but he declined to say what his firm bid. "Maybe they are trying to shake up the [plaintiffs] industry," he says of the Boies firm, adding, "I don't think he has a firm large enough to run every case."

New York class-action specialist Melvyn Weiss, whose firm was also among the bidders and later filed a separate suit on behalf of buyers overseas, adds that while the plaintiffs may have gotten "a windfall," the auction model could backfire in the long-run. "For the system to work properly, you have to set standards that provide adequate compensation" for plaintiffs firms to take on big defense firms, he says. He declines to comment on what his firm bid.

Boies Schiller says its fee is generous. "Anytime that I can earn a $26 million fee for my firm within a year, I will take all those cases," says Richard Drubel, a partner who helped settle the case. "If other firms think that is too low a fee and want to leave that to our firm, that is fine with me."

Over the years, a small group of firms has come to control class-action lawsuits. Critics say these firms haven't had to compete on the basis of fees—and the fees have gone relatively unchecked by judges who have the authority to set them. "I think competition is good for lawyers," says Joseph Grundfest, a professor specializing in securities class-action litigation at Stanford Law School. "It's good when you're going out to buy a car, and it's good when you're going out to buy class-action counsel."

Others caution that it's too early to evaluate the auction-house deal—or the use of auctions. Jonathan Dickey, a Palo Alto, Calif., defense attorney with Gibson, Dunn & Crutcher, says the bidding process doesn't always result in the most qualified firm being selected. "I would rather have the best plaintiffs' counsel on the other side of the case than the worst," he says.

Auctions also don't necessarily lead to the lowest fees, as the nation's biggest pension funds learned in a recent securities class-action against Cendant, which faced numerous suits after it announced it would restate several years of earnings due to accounting irregularities. The New York City Pension Fund and two other major retirement funds retained two law firms to represent them in the case. The judge held an auction for lead counsel, and ultimately selected the two firms the pension funds were already using.

Last December, after Cendant agreed to settle the case, the court approved $262 million in fees for the firms, or about 8.4% of the settlement, and an additional $14.6 million in expenses, according to court documents. The New York City Pension Fund protested, claiming its original agreement with the firms would have produced a fee that was at least $76 million lower. But in August, Judge Walls approved the $262 million fee, stating that the "outstanding result justifies the expenditures."

In the Christie's and Sotheby's case, by the end of February, more than 20 firms had filed lawsuits in the U.S. District Court in Manhattan against the auction houses. Judge Kaplan asked firms to submit a fee structure that would state a minimum amount of a settlement that would go to the class. Once the target figure was reached, 25% of anything in excess of that would be paid to lead counsel with the remaining 75% percent going to the class.

The Boies firm proposed that anything up to $405 million won at trial or in a settlement would go to the class. Other bids came in with substantially less going straight to the class, according to lawyers familiar with the losing bids, which remain sealed by court order.

There are other fee structuring proposals circulating in the legal community. In a report last year, the Rand Institute for Civil Justice, Santa Monica, Calif., urged that judges peg fees to the sums actually collected by class members, as opposed to the amount that a case initially settles for. The reason: Many settlements are structured in a way that any unclaimed settlement funds revert to the defendants.

Ultimately, the truest test of a good deal is whether the fees still look reasonable once the class members collect their money, says Nicholas Pace, a researcher at Rand. "You can settle for 5% or 10%, but the bottom line is what is the class going to get when everything is said and done," he says.

13-3

TESTIMONY OF MARK A. BEHRENS, ESQ.
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ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

BEFORE THE KANSAS
HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF HOUSE BILL 2258:
CLASS ACTION IMPROVEMENTS LEGISLATION

TUESDAY
FEBRUARY 13, 2001

TESTIMONY OF MARK A. BEHRENS, ESQ.
CROWELL & MORING LLP

ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today before your distinguished Committee in support of House Bill 2258, a class action reform bill introduced by Representative Tony Powell.

BACKGROUND

By way of background, I am a partner in the 250-person law firm of Crowell & Moring LLP in Washington, D.C.[1] I practice in the Firm's Torts and Insurance Practice Group. Most of our practice involves representing defendants in multi-state product liability litigation. We also provide counseling in the prevention of liability exposure. I am co-counsel to the American Tort Reform Association.[2] In addition, I have taught advanced tort law as a member of the adjunct faculty at The American University, Washington College of Law. I frequently write on subjects involving liability law and civil justice reform.

I graduated from Vanderbilt University School of Law in 1990, where I served as Associate Articles Editor of the Vanderbilt Law Review and received an

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1 For more information about Crowell & Moring LLP, please visit our Internet website, www.crowellmoring.com.

2 For more information, please visit ATRA's Internet website, www.atra.org.

American Jurisprudence Award for achievement in tort law. I received a Bachelor's degree in Economics from the University of Wisconsin-Madison in 1987.

I am testifying today on behalf of the American Legislative Exchange Council ("ALEC"), the nation's largest bipartisan membership association of state legislators, numbering over 3,000. I am an Advisor to ALEC's Civil Justice Task Force. The goal of the Civil Justice Task Force is to restore fairness, predictability, and consistency to the civil justice system.[3] ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation. ALEC's Class Action Improvements Act provides the basis for the legislation that we are discussing today.

CLASS ACTIONS

Class actions are supposed to be an efficient way to resolve in one lawsuit similar legal claims held by numerous people. Instead, class action litigation has become a moneymaking bonanza for plaintiffs' lawyers, who often persuade state courts to sanction sweetheart settlements that result in million-dollar fees for the lawyers, but provide little or no actual benefit to their clients, the actual class members. Class members instead often find themselves "compensated" with coupons or negligible damages awards – or nothing of value at all.

The explosion of class actions over the past decade has highlighted these abuses and allowed new ones to flourish. From 1988 to 1998, class action filings

against Fortune 500 companies increased by more than 1,000 percent in state courts and by 338 percent in the federal courts.[4] A 1997 Rand study similarly noted the "dramatic[ ]" increase in class action activity.[5]

A GOOD IDEA GONE AWRY

Class actions promote efficiency when used correctly. They allow many injured parties with substantially similar claims to be tried together in a single legal proceeding, when otherwise the cost of individual litigation would outweigh any potential benefit and raise a practical bar to resolution of the claims. In addition, class actions preserve judicial resources and prevent duplicative claims by determining once, rather than repeatedly, facts and legal issues that are common to many people, such as those arising out of a single incident like a hotel fire or airplane crash.

Unfortunately, the current class action system also encourages unwarranted litigation and provides few safeguards against abuse. While injured consumers undoubtedly drive some class actions, others appear to arise out of the creativity of entrepreneurial plaintiffs' lawyers. As one federal appeals court noted, "the drum beating that accompanies a well-publicized class action . . . may well attract

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(...continued)

3 For more information, please visit ALEC's Internet website, www.alec.org.

4 See Federalist Society, Analysis: Class Action Litigation – A Federalist Society Survey, 1 CLASS ACTION WATCH 1, 5 (1999).

5 See Deborah Hensler, et al., Preliminary Results of the Rand Study of Class Action Litigation 15 (May 1, 1997).

excessive numbers of plaintiffs with weak to fanciful cases."[6] Indeed, a recent newspaper survey of class actions filed in Mobile County Circuit Court in Alabama found that in a number of cases, "plaintiffs had no plans to sue, and no idea they might have cause to, until a lawyer or a friend of a lawyer told them they'd been wronged."[7]

PROBLEMS FOR CLASS MEMBERS

In class actions, the traditional relationship between lawyer and client is often attenuated to the point that the term "relationship" is a misnomer.[8] Class action plaintiffs generally have little or no contact with their lawyers. While the lawyer is supposed to be the servant of the client, in many instances, the roles of servant and master have been reversed. Reportedly, one nationally recognized class action plaintiffs' lawyer has even said, "I have the greatest practice of law in the world. I have no clients."[9]

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6 In re Agent Orange Prod. Liab. Litig., 818 F.2d 145, 165-66 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988).

7 See Eddie Curran, Have class, need plaintiff, MOBILE REGISTER, Dec. 28, 1999, at 1A.

8 See generally Carol McHugh Sanders, Fees Slashed For Recycled Legal Arguments, CHICAGO DAILY L. BULLETIN, Nov. 27, 1995 (reporting that a federal judge recently slashed an attorney fee request in a successful class action after defense counsel produced copies of pleadings from other cases which showed that the plaintiffs' firm had reused "large chunks of legal memoranda from prior cases" and charged "nearly a week's worth of attorney time for the effort.").

9 The Honorable Christopher Cox, An Attempt to Fight Class-Action Abuse, WALL ST. J., June 30, 2000, at A15 (quoting class action specialist Bill Lerach).

LAWYERS "CALL THE SHOTS"

The class action system essentially allows plaintiffs' lawyers, not their clients, to decide whether to file a lawsuit. Lawyer-driven class actions can put class members' rights at risk by proceeding on a "lowest common denominator" basis. Class members with more serious and complex claims risk having those claims "lumped into" those of the rest of the class and not given the attention they need.[10]

The result can be settlements, engineered by lawyers without consulting clients, on a "one size fits all" theory. While the average result may seem fair, the process can be grossly unjust to a particular plaintiff whose losses exceed the average. Thus, the process invites lawyers to abandon the traditional concept that an individual relationship with a client is at the heart of practicing law.

Moreover, plaintiffs' lawyers may dispense with certain claims for tactical reasons to try to satisfy the legal requirements needed to certify a class. For example, plaintiffs' counsel may waive fraud claims because they require individualized proof of reliance that can defeat class status. Plaintiffs' lawyers also may seek to bring the claims of class members from fifty states under one state's law in order to minimize problems of meeting the commonality and predominance requirements for class certification – even though that one state's law may be

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10 See John H. Beisner, Testimony before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, Hearing on S. 353, The Class Action Fairness Act of 1999, at 10 (May 4, 1999).

devastating to the claims of certain class members. Unnamed class members, particularly those without legal training, have little say in how their claims are handled. These practices do them a disservice.

"WINDFALL" PLAINTIFFS' LAWYER FEES

The opportunity to generate a huge contingency fee is a major factor in the large increase in class action filings. Stanford University Law Professor Deborah Hensler has observed, "Lawyers are entrepreneurial, they're part of the capitalist economy, and there are very powerful economic incentives to bring these types of lawsuits."[11]

Plaintiffs' lawyers normally seek to make class claims as broad as possible to pull in the greatest number of potential class members. A large class gives the class action attorney leverage against the defendant – and creates the potential to generate lucrative, "windfall" fees without requiring a significantly larger investment on the part of the attorney. These fees often are obtained at the expense of the contingency fee lawyer's own clients.

The widely reported Bank of Boston class action settlement provides an example. The case involved allegations that the Bank of Boston had overcollected escrow monies from homeowners and profited from the interest. The plaintiffs' attorneys in the case raked in over $8.5 million in fees, which came out of the class members' escrow accounts. As a result, class members who received up to a mere

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11 Eddie Curran, On behalf of all others; Legal growth industry has made plaintiffs of us all, MOBILE REGISTER, Dec. 26, 1999, at 4A.

$8.76 saw upward of $100 deducted from many of their accounts, leaving them poorer then they were before the lawsuit was ever filed.[12]

In 1998, a Florida state court approved a $349 million settlement of a class action brought against tobacco companies by flight attendants who claimed injuries from exposure to secondhand smoke. The individual flight attendants received nothing, but their lawyers received $49 million in fees and expenses. The rest of the settlement was applied to fund scientific research.[13] The settlement was approved despite the objections of 35 class members, who said their attorneys breached their duty to the class, the settlement did not provide any benefits to the class members, and the class representatives did not adequately represent the class as a whole.[14]

PROBLEMS FOR DEFENDANTS

The certification of a class action places tremendous pressure on defendants to settle, regardless of the merits of the case. "For defendants, the risk of participating in a single trial [of all claims], and facing a once and for all verdict is ordinarily intolerable," even where an adverse judgment is improbable.[15] As Judge Posner of the United States Seventh Circuit Court of Appeals has observed, certification of a class action, even one lacking in merit, forces defendants "to stake

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12 See Barry Meier, Math of a Class action Suit: 'Winning' $2.19 Costs $91.33, N.Y. TIMES, Nov. 21, 1995, at A1.

13 See Settlement of Broin Class Action Approved by Florida Judge, 1 DIET DRUGS LITIG. RPTR., Mar. 1998, at 17.

14 See id.

their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. . . ."[16] He further explained: "[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."[17] Judge Posner called these settlements "blackmail settlements."[18]

Class actions have been described by other courts as "legalized blackmail"[19] and "judicial blackmail,"[20] because "a greedy and unscrupulous plaintiff might use the threat of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' 'actual worth.'"[21] Moreover, defendants that are forced to settle in order to avoid the remote, but potentially crippling, "lightning strike" verdict at trial are denied appellate review, the most fundamental method of protecting against unfairness in the court system.

(...continued)

15 Barry F. McNeil & Beth L. Fanscal, Mass Torts and Class Actions: Facing Increased Scrutiny, 167 F.R.D. 483, 489 (1996).

16 In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir.), cert. denied, 516 U.S. 867 (1995).

17 Id. at 1298.

18 Id.

19 In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784-85 (3d Cir. 1995), cert. denied, 516 U.S. 824 (1995).

20 Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

21 General Motors, 55 F.3d at 784-85.

Even worse, some attorneys have reportedly attempted to manipulate "Wall Street" to increase their chances of obtaining a lucrative settlement.[22] The attorneys apparently use the threat of class action litigation to drive down stock prices, then agree to "lift the cloud" of litigation from the company's balance sheet, restoring the value of the company's stock, in exchange for the company's "agreement" to settle. This form of "legal extortion" puts enormous pressure on corporate executives to settle even the flimsiest of cases in order to appease anxious shareholders.[23]

HOUSE BILL 2258: CLASS ACTION IMPROVEMENT ACT

House Bill 2258 would make five key changes to the current Kansas class action statute to help ensure that Kansas does not become a haven for the type of lawyer-driven class actions that have become far too commonplace in other states.[24] These changes would achieve modest, but significant, improvements to current Kansas class action law. The key reforms contained in House Bill 2258 are as follows:

1. The bill would authorize appellate review of trial court orders certifying or denying certification of proposed classes (tracking a recent

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22 See Collin Levey, Three Ways to Shake Down an HMO, WALL ST. J., Sept. 30, 1999, at A3.

23 See Walter Olson, Gold bugs, REASON, Feb. 1, 2000.

24 See KAN. CIV. PROC. CODE § 60-223 (2000).

similar change to the Kansas statute's federal companion – Rule 23 of the Federal Rules of Civil Procedure).

2. The bill would establish a rule limiting the scope of plaintiff class actions in Kansas to residents of the state (emulating the view of some state courts that they should devote their limited resources primarily to resolving the claims of their own citizens, not the thousands of out-of-state residents' claims typically asserted in interstate class actions).

3. The bill would adopt an explicit "classwide proof" prerequisite for class certification (embracing a prevailing policy of federal courts to ensure that the due process rights of unnamed class members and defendants are protected at trial).

4. The bill would add a "maturity" factor to the class certification prerequisites (adopting another prevailing policy of federal courts to ensure that class actions are not employed prematurely).

5. The bill would add an "administrative process" factor to the class certification prerequisites (codifying the federal court policy are not needed where the allegations asserted are within the purview of a federal or state regulatory agency).

In addition, House Bill 2258 would:

- Eliminate defendant class actions (that is, instances in which a plaintiff seeks to sue a class of defendants);

- Require that the trial court consider whether the expense and effort required to litigate the case on a class basis is justified by the amount of the recovery that each class member is likely to obtain;
- Codify the federal court policy that (b)(2) class actions are not available where monetary relief is sought;
- Make clear that the appropriate timing for trial court consideration of class certification issues varies from case to case (tracking a proposed amendment to the Federal Rules of Civil Procedure);
- Require that a trial court give a written explanation of a decision to certify (or not to certify) a proposed class;
- Establish that class certification may be granted only where there is a full record and where the proponents have proffered clear and convincing evidence that the certification prerequisites have been satisfied;
- Codify the federal court view that there should be no presumption in favor of class certification;
- Establish a rebuttable presumption against the certification of classes asserting claims about which the class members would have to prove knowledge, reliance, or causation on an individual basis;
- Add language stressing that class certification does not excuse each class member's burden to prove each element of his/her claim;

- Add specifications concerning the categories of information that should be included in any notices sent to the unnamed class members;
- Clarify that the proponents of class certification have the exclusive burden of paying for any class notice (consistent with federal court policy);
- Clarify that the rule does not authorize "issues" class actions (cases in which proponents seek to have out-of-context trials on issues that favor their position, depriving the jury of the opportunity to judge the "whole story");
- Specify basic procedures that a trial court should follow in reviewing a proposed class action settlement; and
- Confirm that unnamed class members may be subject to court-approved discovery regarding their individual claims.

CONCLUSION

House bill 2258 provides sound and fair improvements to Kansas class action law. I urge you to enact it now. Thank You.

Testimony of Karen Czarnecki Miller
Director, Civil Justice Task Force,
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Before the Kansas House Judiciary Committee

Tuesday, February 13, 2001
Topeka, Kansas

Good Afternoon, Mr. Chairman and Members of the Committee. I am Karen Czarnecki Miller, representing the American Legislative Exchange Council, the nation's largest bi-partisan membership organization of state legislators with over 2,400 members. I serve as the Director of ALEC's Civil Justice and Health & Human Services Task Forces. I have worked in public policy for over 13 years and have previously served on the White House staff under Presidents Reagan and Bush, primarily working on domestic policy issues. I received my undergraduate and law degrees from The Catholic University of America in Washington, DC.

I am testifying today in support of HB 2258, the Class Actions Improvements Act, introduced by Representative Tony Powell.

As an organization, one of ALEC's principal roles is to identify emerging trends in the states before they pose policy challenges, and provide workable legislative solutions to these issues. We do this in committee fashion with bi-partisan support of legislators from around the nation. Our work–product is model legislation that can be used in any state to address a particular issue. It is meant as a starting point for those legislators who wish to address a

particular issue in their state.

The purpose of the bill under consideration today is to address what our legislator members have seen as the manipulation of the class action device at the state level and the growing practice of forum shopping for parties whose cases do not merit class action certification at the state court level.

Our members, many of whom are attorneys, have noted with interest that several of these cases have provided enrichment to the trial attorneys handling the cases while providing little or no benefit to those consumers/class action members involved in those cases. Many in this room have probably received, at some point in his or her life, a coupon in the mail as a remedy for a specific class action. I myself, never knowing I was a member of a class action, received a coupon worth $75.00 from a cruise I took many years ago. It wasn't a check, but a coupon towards my next cruise and it expired a year after that point. Needless to say, and I do mean needless, I never used that coupon, not did I ever want or expect to be part of a class action. In addition, when I called the 800 number on the coupon, I could not discover the amount of attorney's fees in that particular case.

My colleagues today have addressed the underlying rationale on the class action device and how it is intended to work. I will address the five major components of HB 2258 that make modest, yet reasonable suggestions for state law changes to the class action process.

First, this act authorizes immediate appeals from class certification rulings. This helps ensure that plaintiffs are not forced to drop cases that are denied class certification but too costly to litigate from an individuals' standpoint. It also helps defendants because they are not forced to settle cases that may have been improperly certified but too expensive to defend throughout the lengthy court process.

Second, this bill limits a class action to home state residents and does not unduly burden the court system or taxpayers of Kansas. A state court in one locale should not be imposing its state law or state regulations on residents of any another state, nor should it bear the burden of interpreting the laws in 49 other states as to how they would handle a particular claim. Also, Kansas

taxpayers should not be volunteering and paying for resolution to nationwide class action claims.

Third, the bill clarifies a threshold requirement by adopting a classwide proof requirement where "commonality" is satisfied with common answers to the questions asked. This must apply to all class members. Rather than allowing a low threshold for common features which breeds inconsistency in application to each class member, it ensures that the most fair adjudication would be a consolidation of claims into a single class action rather than litigating every claim individually. A class designation must be superior to all other available methods for a fair and efficient adjudication of the controversy.

Fourth, this bill adds a "maturity" factor for potential mass tort actions. That means that a record can be established over time that may demonstrate the efficacy of aggregated adjudication. A track record assists the court in determining whether a claim has greater individual merit to proceed or whether it can be consolidated. A maturity factor also helps in determining causation for torts as well as typical injuries. With this a court can decide if

there is a real need for class proceedings.

Fifth, this bill adds an administrative feature to class certification whereby administrative remedies must be ruled out before proceeding. Courts should not expend resources if a case can be resolved by a federal or state regulatory body. In some instances, administrative remedies may be superior to any class action, and an administrative agency may be better equipped to resolve the dispute.

Overall, HB 2258 is a comprehensive class action bill that would ensure that only meritorious claims are being certified as class actions. It would also employ a reasonable set of criteria for class certification. Kansas is at the forefront of this legislation. It is one of three states that has introduced it this year and the first to hold hearings. We support its passage.

Thank you, Mr. Chairman.

RECENT EXAMPLES OF TROUBLING STATE COURT CLASS ACTION SETTLEMENTS

- *Kampf v. Comcast Corp.* (New Jersey state court) – Under this settlement, the defendant offered one month of a free premium channel for plaintiffs who sued because 25 Mets games were blacked out by their cable channel. The plaintiffs' attorneys received $112,500. As one report noted, "the settlement doesn't say how much it will cost the [defendant]. Nor does it say how much the [defendant cable company] may make in the future from class action members who – having tried premium cable free for a month – discover that they can't live without it, and buy it."[1]

- *Cash v. Farmland Industries, Inc.* (Kansas state court 1999) – "When 75-year old Olga Heaven received some legal papers in the mail a few weeks ago, she asked her daughter, a lawyer, to look them over. A good thing, too. If Ms. Heaven had misunderstood the notice or simply thrown it away, her daughter says, she might have been required to sell her house and property as part of a recent class action settlement. . . . Ms. Heaven [was] one of 60 class action plaintiff homeowners – many of them unwitting parties to the litigation – who received a notice that a property damage suit against a local oil refinery had settled . . . . The unusual deal requires settling plaintiffs to sell their homes to [the defendant refinery owner] for two times their tax-assessed value. In addition, the plaintiffs are required to withdraw from the lawsuit . . . and release any property damage or personal injury claims against [the defendant], which was accused of polluting the area. The settlement was set up [as] a so-called opt-out class, meaning that homeowners would be included in the deal [and required to sell their homes] unless they sent in responses to the notice within 30 days. . . . The total payout by [the defendant] could be as much as $1.1 million. Plaintiffs' lawyers could earn as much as $200,000, depending on how many plaintiffs participate in the deal."[2]

- *Southwestern Bell Mobile Systems, Inc., d.b.a. Cellular One* (Illinois state court 1998) – In a case involving alleged overcharges on cellular phone services, customers received $15 coupons to purchase future products. The coupons had to be used to buy future products; they could not be used to pay existing bills. As one reporter who was a class member described the situation, "Basically, the conditions of the settlement require that I give them more cash to retrieve money that they took in a questionable practice in the first place." For fees, the class lawyers received more than $1 million.[3]

- *Computer Monitor Cases* (San Francisco Superior Court 1997) – In this lawsuit, plaintiffs alleged that 20 manufacturers misrepresented the size of computer monitors. The class members received a $13 rebate on purchase of new monitors, and the class attorneys

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1 New Jersey Law Journal, March 8, 1999, at 7.

2 The National Law Journal, March 15, 1999, at A1.

3 Michelle Singletary, *This Settlement Doesn't Ring True,* Wash. Post, Sept. 5, 1999, at H1.

received approximately $6 million in fees.[4]

- *PaineWebber* (New York state court 1998) – "Investors assessed $50 by PaineWebber when they moved their accounts to other firms . . . would be eligible to receive a maximum of $7 each under the terms of a proposed [class action] settlement . . . . The suit . . . alleged customers weren't adequately notified of the new fee. . . . The total value of the settlement could be as much as $1.9 million, according to plaitniffs' attorney . . . . But the actual payout would likely be just a fraction of $1.9 million, legal experts say, because of the amount of work investors would have to do to collect. PaineWebber would be allowed to keep any portion of the proposed settlement that wasn't paid out . . . . To receive the $7, investors would have to send in proof of a notified or signature-guaranteed claim plus copies of the first three statements they received after the account was transferred."[5]

- *Broin v. Philip Morris, et al* (Florida state court 1998) – This purported class action against various tobacco companies was brought on behalf of flight attendants who alleged that they suffered health problems as a result of being exposed to cigarette smoke on airplanes. Under the terms of the settlement, the flight attendants received no money at all. All they secured was a "right to sue" individually. Meanwhile, the state court awarded the class counsel $49 million (on the basis of a medical research contribution made by defendants. Counsel for one of the class members who protested the settlement reportedly commented: "It's mind-boggling that a court would permit this kind of settlement to go ahead. What is the class getting out of this? Nothing."[6]

- *Acushnet Golf Equipment Litigation* (Cook County, Illinois 1999) – A manufacturer made an offer that if a consumer bought a dozen Pinnacle golf balls, he/she would get a free golf glove. Unfortunately, the manufacturer ran out of the golf gloves and substituted a set of three free golf balls. As a result of this change, some people sued. The settlement provided that the manufacturer would send each class member three more free golf balls. The attorneys who brought the lawsuit got $100,000 and the persons who served as class representatives each received $2,500. As one commentator observed about this case, the manufacturer's "unfortunate experience won't be lost on other equipment producers, which means golfers can expect fewer promotions that benefit them. Meantime, the taxpayers are footing the costs involved in the use of county court to pursue this exercise in wretched litigation excess."[7]

- *Littau Computer Class Action* (San Francisco Superior Court 1998) – In this case, plaintiffs alleged that discount stores overstated the value of software bundles that came

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4 Michelle Singletary, *`Coupon Settlements' Fall Short,* Wash. Post, Sept. 12, 1999, at H1.

5 Wall St. J., Oct. 13, 1998, at B5.

6 The Legal Intelligencer, Sept. 22, 1999, at 4.

7 Jerry Heaster, *Enough Already With the Lawsuits,* Kansas City Star, July 10, 1999, at C1.

with computers. In the settlement, consumers received coupons worth the lesser of 7 percent or $25 in discounts on the future purchase of products from the defndants' stores. The attorneys received $890,000 in fees.[8]

- *Jenny Craig* (Orange County, California, Superior Court 1994) – In a class action alleging misleading advertising about weight-loss services, each class member received a $100 coupon that could be applied to future purchases. The settlement also provided an additional $10 million to be divided among 22,000 former clients.[9]

- *In re Packard Bell Consumer Class Action Litig.* (California state court) – In this action, plaintiffs alleged a defect in a product manufactured by defendant. For the settlement, the class members were offered a six-month extended service contract, for which the class members were required to pay $25 each.

- *AirTouch Communications and L.A. Cellular Telephone* (California state court 1997) – In this class action alleging collusion to fix cellular phone prices, the defendants agreed to offer coupons and discounts to three million current and former customers in four Southern California counties.[10]

- *Ameritech* (Madison County, Ill, state court 1999) – In two suits alleging telephone service overcharges to customers in several states, class members received modest checks and pre-paid phone cards, while attorneys received a total of $16 million in fees (amounting to $457 an hour according to local news reports). The overcharge sustained by one customer was $360, but the customer claimed that in the settlement, he received a check for only $30.[11]

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8 Los Angeles Times, June 8, 1998, at D3.

9 Orange County (Cal.) Register, July 15, 1994, at B4.

10 Seattle Times, July 26, 1997, at C1.

11 St. Louis Post-Dispatch, Sept. 22, 1999, at A1; St. Louis Post-Dispatch, Sept. 23, 1999.

TESTIMONY OF J. EUGENE BALLOUN, ESQ.

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BEFORE THE KANSAS HOUSE JUDICIARY COMMITTEE

IN SUPPORT OF HOUSE BILL NO. 2258

The amendments to K.S.A. 2000 Supp. 60-223 proposed in House Bill No. 2258 reflect judicial precedent and bring the Kansas class action rule into conformity with the federal rule, Fed. R. Civ. P. 23. The purpose of a class action is to aggregate and resolve individual claims in one action, thereby promoting judicial efficiency by avoiding repetitious litigation of duplicative claims. The underlying goals of judicial efficiency and economy can be realized, however, only if resolution of the class representative's claims resolves most, if not all, of the class members' claims without resort to multiple individual follow-up trials. The principle underlying the class action device is that a class representative's claims are so typical of those of class members, that the class representative may stand in the class members' shoes and establish each class member's right to recovery based upon the class representative's proof. The proposed amendments to K.S.A. 2000 Supp. 60-223 simply reflect these fundamental class action principles.

One of the most significant and necessary amendments to bring the state rule in line with the federal rule is the proposal to allow direct appeals from class certification orders. In 1998, Fed. R. Civ. P. 23(f) was enacted to allow appeals from class certification decisions. As the Advisory Committee Notes to the 1998 Amendments explain:

> An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim

> that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.

Likewise, enacting proposed Sect. 2(g) will ensure that the class action device is used appropriately and enable appellate review before judicial and party resources are squandered on an improperly certified (or not certified) class action.[1] See In re Rhone-Poulenc Rorer Inc., 51 F. 3d 1293, 1298-99 (7th Cir. 1995)(granting writ of mandamus to review class certification order because improper certification may not be effectively reviewable after trial when defendants are forced "to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

House Bill No. 2258 also would amend the Kansas class action rule to expressly acknowledge that class certification is only proper when "the evidence likely to be admitted at trial regarding the elements of the claims for which certification is sought and of the defenses thereto is substantially the same as to all class members." (Proposed amendment, Sect. 2(b)(3)(B).) While this notion is implicit in the class action rule as it now exists, the proposed amendments will focus courts on the elements of plaintiffs' causes of action and defendants' affirmative defenses. Class certification is not appropriate merely because abstract issues may be identified that appear common to the class.[2] Instead, courts must analyze plaintiff's causes of action to determine what findings,

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1. Proposed Sect. 2(c)(2), which requires the court to provide a "written decision setting forth all reasons why the action may be maintained as a class action and describing all evidence in support of the determination," is necessary to facilitate appellate review.

2. Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 2250, 138 L. Ed. 2d 689, 713 (1997) (holding that "overarching dispute about the health consequences of asbestos exposure," while common, cannot satisfy predominance standard where class members' (continued...)

if any, are applicable to each and every class member based solely on the proofs of the class representative.[3] Moreover, to the extent a defendant has asserted affirmative defenses, the court must determine whether the evidence will be substantially the same for all class members.[4]

There are certain elements of causes of action under Kansas law which routinely turn on facts unique to each individual, such as knowledge, reliance and causation. In most fraud cases, evidence that one person relied on an alleged misrepresentation from a defendant will prove nothing as to whether any other person relied. Instead, each class member would have to come for ward with individual proof. Reliance is an overwhelmingly individual issue and the reason many courts have rejected class certification.[5] Similarly, questions of causation and knowledge must be proved on

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2. (...continued)
claims turned on unique facts -- "'Class members were exposed to different asbestos containing products for different amounts of time, in different ways and over different periods.'").

3. See e.g., Castano v. The American Tobacco Co., 84 F. 3d 734, 744-745 (5th Cir. 1996).

4. See, e.g., Georgine v. Amchem Prods., 83 F. 3d 610, 626 (3d Cir. 1996)("[F]actual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff."), aff'd, 521 U.S. 591 (1997); Emig v. The American Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998) (holding that statute of limitations defense "involves an individual, fact intensive analysis that makes a class action suit an improper method of adjudication of these [product liability] claims.").

5. See, e.g., Andrews v. American Tel. and Tel. Co., 95 F. 3d 1014, 1025 (11th Cir. 1996) (determining that individual proof of reliance renders class action unmanageable); Castano, 84 F. 3d at 745 ("a fraud class action cannot be certified when individual reliance will be an issue."); In re Hotel Telephone Charges, 500 F. 2d 86, 89 (9th Cir. 1974) ("without eliminating or eroding the traditional or statutory elements of a fraud action, there is no possibility that common questions can predominate over individual ones in these claims.").

facts that will likely vary from one person to the next, precluding a finding of predominance.[6] Therefore, House Bill 2258 makes it a rebuttable presumption that a case in which class members must prove knowledge, reliance or causation cannot be maintained as a class action. (Proposed amendment, Sect. 2, (c)(4).)

In addition to illuminating the class certification requirements, House Bill 2258 clarifies the procedure for arriving at a class certification determination. In order to conduct the rigorous analysis necessary to find class certification appropriate, the court must have a detailed record explicating the facts underlying plaintiffs' claims.[7] (Proposed amendment, Sect. 2, (c)(3).[8]) Without such a record, the court will have difficulty anticipating the individual issues that may frustrate class certification and render the case unmanageable and untriable as a class action. A complete record is not only necessary to a determination of predominance and superiority, but a court cannot analyze the adequacy of a class representative and the typicality of his or her claims without

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6. See, e.g., Castano, 84 F. 3d at 742 n. 15; In re Ford Motor Company Ignition Switch Products Liab. Lit., 194 F.R.D. 484, 490-91 (D.N.J. 2000); Emig, 184 F.R.D. at 389.

7. See Castano, 84 F. 3d at 744 ("A district court certainly may look past the pleadings to determine whether the requirements of Rule 23 have been met. Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the class certification issues."); In re Amer. Med. Sys., 75 F. 3d 1069, 1082-83 (6th Cir. 1996) (holding that failure of plaintiffs to develop factual record made class certification analysis more difficult and resulted in plaintiffs' failure to carry their burden on class certification.) See also Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S. Ct. 2454, 2458, 57 L. Ed. 2d 351 (1978) (reasoning that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiffs' causes of action.'").

8. "A court shall not certify that an action may be maintained as a class action unless, on the basis of a full record on the relevant issues, the proponents proffer clear and convincing evidence that the action complies with all requirements for such certification." Sect. 2, (c)(3) (emphasis added).

it.[9] Just as under federal class action precedent, House Bill 2258 makes clear that the proponent carries the burden of proof on each class certification requirement. (Proposed amendment, Sect. 2(c)(3).[10])

House Bill No. 2258 brings K.S.A. 2000 Supp. 60-223 into line with the federal rule and provides thoughtful guidance to the courts and litigants in this State on class certification. It should be enacted.

Thank you.

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9. This is precisely why House Bill 2258 expressly states that "[r]epresentative parties and intervenors are subject to discovery in the same manner as parties in other civil actions." (Proposed amendment, Sect. 2(f).)

10. See, e.g., Castano, 84 F. 3d at 740; In re American Med. Sys., 75 F. 3d at 1086.

Prepared Statement of

Henry N. Butler, J.D., Ph.D.

Mary Robinson Koch Distinguished Professor of Law and Economics

University of Kansas

Before the

Committee on the Judiciary

Kansas House of Representatives

Hearing on H.B. 2258

"The Class Action Improvement Act"

February 13, 2001

Prepared Statement of

Henry N. Butler, J.D., Ph.D.

Mary Robinson Koch Distinguished Professor of Law and Economics

University of Kansas

Thank you for the opportunity to participate in today's discussion of H.B. 2258 – the Class Action Improvement Act.

Among other things, I teach courses on "Law and Economics." Those courses typically include a detailed discussion of the economics of civil procedure. "Class Actions" receive considerable attention because of the economic justification for the creation of class actions as well as the unusual set of incentives facing lawyers in the class action setting. I also organize and teach in an Economics Institute for State Judges. Over the past five years, almost 1,000 judges from all over the country have come to KU to study economics. I've had detailed conversations with many of these judges about their experiences and views on class actions. Also, I should mention that I have served as an expert witness in a class certification hearing in Wichita. Finally, although I was initially contacted about H.B. 2258 by a representative of the American Legislative Exchange Council, I am not being compensated to testify and the views I express are my own.

Introduction: The State Court Class Action Crisis

In recent years, state courts have been flooded with interstate class action lawsuits. The best systematic study of this crisis is the Institute for Civil Justice/RAND Report on class action litigation, which I have provided as Exhibit A to my testimony. The RAND Report documents that the number of state court class actions pending against surveyed companies has increased dramatically – ***by 1,042%*** – over the ten-year period 1988-1998.

That dramatic increase in state court class actions is not attributable to any change in corporate behavior that is giving rise to new claims. Attorneys have simply discovered that some state courts have an "anything goes" attitude toward class action lawsuits — they are willing to ignore class members' and defendants' fundamental due process rights and to certify for class treatment cases that really do not comport with applicable class certification prerequisites. As a result, attorneys are filing class actions in state courts that they would have not seriously considered bringing five years ago.

The class action procedure was intended to aid in the resolution of claims that people have actually brought or genuinely wish to assert. Unfortunately, class actions are now used by attorneys to build lawsuits where none would otherwise exist. In interviews for the RAND Report, many attorneys (*including plaintiffs' counsel*) observed that "too many non-meritorious lawsuits are [being] filed and certified" as class actions.

Please do not take seriously any suggestion that class actions normally originate when an injured party seeks out an attorney and asks for assistance in obtaining a remedy. Attorneys usually "develop" the concept for a claim and then search for a plaintiff to fit the mold. Many interstate class actions assert claims that are utterly without merit (or marginal, at best). But because the cases are brought on behalf of thousands (and sometimes millions) of claimants, the potential exposure is enormous, often exceeding a defendant's assets. Attorneys use this potential exposure to coerce settlements that offer uniformly minimal benefits to the putative class members (taking no account of the extent (if any) to which the class member is actually owed any relief). Then, class counsel apply to the state courts for huge attorneys' fee awards, which are often granted. The result is that defendants are extorted, putative class members obtain no real benefits, and plaintiffs' counsel are rewarded handsomely.

Increasingly, state court class actions are benefiting only the attorneys for the purported class. The RAND Institute case study of class action settlements indicates that in state court class action settlements, the class counsel typically walk away with more money from consumer class action settlements (that is, non-personal injury cases) than all class members combined.

Attorneys' fees are a major problem. Please do not get me wrong on this point. I have no problem with attorneys making a decent living from their work. In the current environment, however, attorneys too often succeed in walking off with fees that vastly exceed the level of benefits that they have actually obtained for the class members they supposedly represent. In too many cases, courts award class attorneys millions in fees, but their class member clients get little or nothing. The RAND Institute Study indicates that the problem appears more likely to occur in state court class actions.

In summary of the national problem, state court abuses of the class action device have become open and notorious. Some state courts readily trample on the due process rights of defendant corporations, particularly if they are out-of-state entities. For example, some state courts have routinely engaged in so-called "drive-by class certifications." They certify classes before the defendant is even served with a complaint and given a chance to defend itself. In interstate class actions, some state courts employ very lax class certification criteria, rendering virtually any controversy subject to class action treatment.

Kansas Courts for Kansas Citizens?

Although not yet a major problem in the Kansas courts, the trial of national class actions in other state courts does affect Kansans. Most class actions are too broad. Class action lawyers try to define their cases to cover as many claims and claimants as possible. Bigger classes give attorneys far more leverage against defendants and create the potential for more substantial attorneys' fees. The problem is that these bigger classes almost invariably proceed on a "lowest common denominator" basis. The "average" claim becomes the claim by which all claims in the purported class are judged; class members with larger, more serious claims get lost in the crowd, seldom receiving the individualized attention they deserve. [This concern has driven federal courts – including the U.S. Supreme Court – to examine more carefully whether proposed classes are as homogenous (and therefore as worthy of class certification) as counsel represent.]

Undoubtedly, many Kansans are surprised to learn that their injuries have been redressed through state courts in distant states.

Likewise, for very practical as well as selfish reasons, Kansas state courts are not the appropriate venue to resolve the claims of non-Kansans. Kansas state courts (as well as state courts in other states) are not equipped to deal with interstate class actions. Many state courts (which devote their energies to hearing domestic relations disputes, probate matters, individual tort actions, and smaller claims disputes) have neither the support staff and other resources nor the complex litigation experience to handle interstate class actions, which often involve thousands (and sometimes millions) of purported class members. Many state courts have crushing caseloads. As a group, the civil caseload in state courts has grown much more rapidly than have federal court caseloads. Civil filings in state trial courts of general jurisdiction have increased ***28 percent*** since 1984 (versus only ***4 percent*** in the federal courts). I am sure that you have heard many stories of overburdened courts in various Kansas counties.

Kansas courts are not equipped to deal with national class actions, nor should they be equipped for such cases. Kansas courts should provide justice to Kansans. Kansas courts have generally stayed out of the national class action business.

Interstate Class Actions are Effectively Being "Federalized" by State Courts

Interstate class actions are being "federalized," not by the federal government or federal courts, but by *state courts.* This phenomenon is occurring in two respects: First, when state courts preside over class actions involving claims of residents of more than one state (especially nationwide class actions), as they are increasingly inclined to do, they end up dictating the *substantive* laws of other states, sometimes over the protests of those other states. For example, last year, *The New York Times* reported that in a nationwide class action, one Illinois state court may effectively "overturn insurance regulations or state laws in New York, Massachusetts, and Hawaii, among other places," notwithstanding the protests of officials in those other states. According to the *Times,* that Illinois state court (elected by the residents of one county) was on the verge of "mak[ing] what amounts to a national rule on insurance."

Second, *procedural* class action law is also being "federalized" to a large extent in the same bizarre way. Even though only a minority of state courts are routinely failing to exercise sound judicial judgment on class action issues, those courts have become magnets for a hugely disproportionate share of the interstate class actions that are being filed. Attorneys file their class actions in the minority of courts that have shown a "laissez-faire" attitude toward the class action device. That distinct minority of state courts is setting the national norm. Those state courts are effectively dictating national class action policy.

As a result of some state courts' "anything goes" attitude toward class actions, class counsel are able to gain enormous leverage over defendants. By readily obtaining certification of huge classes, they are able to create enormous potential financial exposure and to thereby create substantial coercive force in cases that otherwise would not be taken seriously. Often, the

result is settlements that do not really benefit class members, are very costly for defendants, and serve primarily to make attorneys rich.

Judicial Incentives to Certify Classes: Justice Denied

Most state court judges don't want to hear these cases. Indeed, many commentators believe that judges often are inclined to certify cases for class-action treatment not because they believe a class trial to be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial. Chief Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has made the same point more recently and more bluntly: in his words, the mere act of certifying a class "often, perhaps typically, inflict[s] irreparable injury on the defendants." When a class is certified in state court, where an out-of-state defendant has little confidence in the prospect of a fair and impartial trial on the merits, the coercive power of class certification is all the greater. Plainly, the judicial system is supposed to provide *procedures* and a *forum* for dispute resolution; it is not supposed to coerce a particular outcome. The class action device, which is intended to improve access to justice, now often creates the opposite result. Too often, "class certification granted" means "justice denied."

The Important Role of H.B. 2258 in Restoring Sanity to Our Civil Justice System

I hope that I have convinced you that interstate class actions are a serious Kansas problem as well as a serious national problem. So what is the solution? What should Kansas do to address this problem? Some among us might argue quite persuasively that we should simply abolish class actions altogether – that we should heed the U.S. Supreme Court's general admonition that claims normally should be litigated individually. However, we should keep in mind that the class action device was created for valid reasons. Those reasons are still valid in Kansas today. It would be a mistake to throw out the baby with the bathwater.

I believe that H.B. 2258 – the Class Action Improvement Act – represents a modest approach that addresses the problems without destroying an important tool of our civil justice system. **It is important to understand, in considering the merits of HB 2258, that the bill would not change the substantive legal rights of any Kansan. Class actions are procedural devices. H.B. 2258 would only change the procedural rules governing class actions.**

Given the need for improvement through legislative intervention, I would like to emphasize five core concepts contained in HB 2258 that I believe would be significant improvements to Kansas statutes governing the use of the class action device. Those core concepts are as follows:

(1) Authorizing Appellate Review of Class Certification Rulings. Sec. 2(h).

Typically, the most important event in a class action lawsuit is the trial court's class certification determination – the decision whether the litigation may proceed as a class action. If the court says "yes," the case may advance to trial to determine the rights of all of the members

of the class, often thousands (and in some cases, millions) of people. On the other hand, if the trial court denies certification, the ensuing litigation will resolve only the claims of the named plaintiffs – the small group of people (or frequently, lone person) who brought the lawsuit in the first place. In short, class certification is a determination whether the lawsuit will be a "big deal" or "small potatoes." Again, it is important to recognize that denial of certification does not change the underlying substantive right of the plaintiffs to recover for a loss.

For years, many courts (including all federal courts) viewed this determination as nonreviewable until the case had concluded – that is, appellate courts were not allowed to examine class certification rulings and decide whether they were correct. This was a problem because if a trial court decides not to certify a class, the plaintiff's sole certain route to obtaining appellate review of that decision was to take the case to trial as to the named plaintiffs' claims only, a process that could cost far more than the value of the named plaintiffs' claims. Likewise, if the trial court certified a class, the defendant was often forced to settle rather than (a) incur the enormous costs of defending a class action and (b) run the risk of losing a class action to thousands (and possibly millions) of claimants and facing the ruinous liability resulting from such a loss. Indeed, some commentators have observed that because class certification rulings were not subject to immediate appellate review, trial courts essentially had unfettered power to make a case go away by denying class certification (and leaving plaintiffs and their counsel with little hope of obtaining any meaningful relief) or forcing a case toward settlement by certifying a class (leaving the defendant with little choice but to yield to plaintiffs' demands).

Over the past year, the federal courts have addressed this problem by adding to their class action rule (Rule 23 of the Federal Rules of Civil Procedure) a provision giving federal courts of appeals discretion to hear appeals from trial court class certification rulings if such review is sought within 10 days after the ruling. HB 2258 (in Sec. 2(h)) would authorize, by right, immediate appeals from class certification rulings. Adoption of this proposal would help ensure that plaintiffs are not forced to drop cases and that defendants are not forced to settle cases due to suspect class certification rulings.

(2) Establishing a Rule Limiting the Scope of Class Actions to Home State Residents. Sec. 2(a)

Several years ago, the U.S. Supreme Court ruled that state courts had the authority to handle nationwide class actions – class actions that involved claimants from all 50 states – so long as the cases were conducted in a manner that protected the due process rights of all involved. With that ruling, virtually every court in the country (state and federal) became an automatic candidate to hear any class action involving claims that were held by persons residing all over the United States. In short, attorneys could file such cases wherever they wanted. Not surprisingly, some state courts soon became flooded with nationwide class actions. And in such cases, a court in one state was being asked to undertake the burden of resolving the claims of persons residing in 49 other states (even though those out-of-state claims were governed by the varying state laws of other jurisdictions).

A very effective way to avoid this potential problem in Kansas would be to adopt Sec. 2(a) of HB 2258 which would permit the certification of classes only insofar as the class includes Kansas residents. Kansas courts should not be in the business of providing justice to citizens of other states.

(3) Adopting an Explicit "Classwide Proof" Requirement. Sections 2(b)(3)(B) and 2(a)(2)

The linchpin of the class action device is the concept of "common questions." Some authorities hold that if a lawsuit presents even one common question, the commonality prerequisite for obtaining certification of a class is satisfied. And if, in a particular lawsuit, common questions predominate over individual ones, the action is said to satisfy the key class certification prerequisite – that common questions will "predominate" in the litigation. Normally, the battle over whether a case may be afforded class treatment focuses on the latter point: Regardless of how many supposedly "common questions" are presented, does the case really have enough commonality to warrant class treatment?

Unfortunately, some courts fail to come to grips with this point when they rule on class certification motions. Instead, if the party moving for class certification cobbles together a list of purportedly "common" questions, these courts perfunctorily hold that the commonality and predominance requirements are met, without considering what should be the real test: Can those questions be *answered* with respect to the class as a whole based on the presentation of a single body of evidence that applies with equal force to each and every class member? Indeed, as some state courts have noted, the label "common question" is really a misnomer. The relevant commonality inquiry is not whether a case involves common *questions*, but whether, based on the proof likely to be presented by both sides at trial, a jury could reasonably be expected to give the same *answer* to these common questions with respect to all claims of all putative class members.

This "common question" versus "common answer" issue is not a mere semantic sideshow – it is a bedrock due process issue. When a trial court certifies a class, it is effectively declaring that a jury can legitimately give a simultaneous, across-the-board answer on a particular issue (*e.g.*, is the defendant liable to all members of the purported class?). Put another way, an order granting class treatment is (or should be) tantamount to a finding that as to class issues, whatever result the jury reaches on the named plaintiffs' claims can legitimately and fairly dictate the result for the claims of all class members. Otherwise, the efficiency principles that underlie the class action device are not served.

The best way to ensure that courts properly take account of this issue is to include in the class certification prerequisites an explicit "classwide proof" requirement. Under this approach, the purported class representatives would have the burden of demonstrating to the court that they have available for trial an evidentiary methodology that would prove in a simultaneous, uniform manner the elements of the claims of all purported class members.

Sections 2(a)(2) and (b)(3)(B) of H.B. 2258 would reduce this potential for error by adding an explicit classwide proof prerequisite for class certification.

(4) Adding a "Maturity" Factor to the Class Certification Prerequisites. Sec. 2(b)(4)(B)

For several years, there has been discussion about adding a requirement that in addressing class certification proposals, trial courts consider the "maturity" of the controversy presented. This concept is premised on the idea that a court should not certify a matter for class treatment unless there is a record of litigating similar claims individually that demonstrates the feasibility of aggregated adjudication. As the U.S. Court of Appeals for the Fifth Circuit has put it,

> a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority [determinations] required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.

Castano v. American Tobacco Co., 84 F.2d 734, 746-47 (5th Cir. 1996). As the Fifth Circuit observed, avoiding premature certification of mass tort claims and allowing the adjudication of such claims to play out for awhile on an individual basis pays enormous benefits. For example, it permits trial courts to "aggressively weed out untenable theories" of recovery. *Id.* at 747. Further, in cases "where causation is a key element, disaggregation of claims allows courts to dismiss weak and frivolous claims on summary judgment." *Id.* In short, "fairness may demand that mass torts with few prior verdicts or judgments be litigated first [on an individual basis] until general causation, typical injuries, and levels of damages become established." *Castano*, 84 F.3d at 748.

Sec. 2(b)(4)(B) of H.B. 2258 would add a "factor" requiring that in assessing a proposed class, the trial court consider "the extent and nature of any related litigation, and the maturity of the issues involved in the controversy." In offering this proposal, it should be stressed that the "maturity" requirement should not serve simply to postpone aggregated litigation until plaintiffs' counsel can develop a better case on the merits. As articulated in *Castano,* besides promoting better-reasoned class certification decisions, the "maturity" concept should function to discourage the launching of class proceedings where none are required. Unless and until individual claims are actually filed, "no court can determine" whether there is any real need for class proceedings – whether "all or even any plaintiffs will pursue legal remedies." 84 F.3d at 747.

(5) Adding an "Administrative Process" Factor to Class Certification Requirements. Sec. 2(b)(4)(F)

H.B. 2258 would revise the Kansas class action statute to add an additional factor that courts should consider in assessing compliance with certification prerequisites:

> (F) the extent to which the allegations at issue are subject to the jurisdiction of federal or state regulatory agencies.

The purpose of this provision would be to ensure that before undertaking the substantial burden of litigating a collection of claims on a class basis, the trial court will confirm there does not exist a federal or state administrative agency with processes that could address some or all of the issues presented and/or craft appropriate relief.

Recommendation

In my opinion, the Kansas Legislature has two options:

- **Do nothing**. Since class actions are not yet a major problem in the Kansas courts, the Legislature can ignore what appears to be "only" a national crisis while Kansas citizens, Kansas shareholders, and Kansas businesses are victimized by this chaotic, unjust system.

- **Take the Lead**. Recognize that the nationwide crisis in state court class actions is harming many Kansans and take the lead by being the first state to adopt the ALEC Model Class Action Improvement Act.

In my opinion, the choice is clear.

Thank you for the opportunity to express my views on this important bill.

Exhibit A

Executive Summary -- Class Action Dilemmas: Pursuing Public Goals for Private Gain (The Rand Institute for Civil Justice, 1999)

Prepared Statement of

Henry N. Butler, J.D., Ph.D.

Mary Robinson Koch Distinguished Professor of Law and Economics

University of Kansas

Before the

Committee on the Judiciary

Kansas House of Representatives

Hearing on H.B. 2258

"The Class Action Improvement Act"

February 13, 2001

Class Action Dilemmas

Pursuing Public Goals for Private Gain

Executive Summary

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FOREWORD

When the RAND Institute for Civil Justice approached Neuberger Berman with a proposal to fund a study of class action litigation, we were intrigued. Billions of dollars were being spent on these suits, and nobody really understood the implications: What types of lawsuits should be handled in a class action format? Were class participants receiving their fair share of settlements? On what basis should plaintiff lawyers be paid? There were many opinions on what was right and wrong with the class action system, but little objective research on which to base policy recommendations.

We knew that for this type of research to be valuable, it had to be conducted by an independent organization, above reproach and experienced in civil justice issues. The ICJ seemed ideal. From 1988 to 1994 I sat on the ICJ Board and experienced firsthand the quality and thoroughness of the ICJ's work. I saw and respected its groundbreaking research on aviation accident and asbestos litigation, and alternative dispute resolution. Confident in the ICJ's capabilities and credentials, Neuberger Berman agreed to fund a disciplined study that could help shed light on an arcane and controversial part of our legal and economic system.

The ICJ worked on the study from 1996 to early 1999. During that time, Neuberger Berman's involvement was limited to being given study completion dates, as it was important to both organizations that the ICJ's work remain totally independent. The results you are about to read fulfill Neuberger Berman's goal to provide all who are interested in class action policy with legislative recommendations based on research by a nonpartisan authority on civil justice. We hope this study will be a valuable addition to every law school library, law firm, and corporate boardroom, and the subject of active, enlightened debate.

Lawrence Zicklin
Managing Principal
Neuberger Berman, LLC
March 24, 1999

PREFACE TO THE EXECUTIVE SUMMARY

This document summarizes the major findings and recommendations of our book-length study of class actions, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, a work that represents the product of more than three years' research into the current policy controversy over class action lawsuits for money damages.

In the interests of producing a summary that can be quickly read by policymakers and others, we focus here on findings and recommendations that we believe will contribute most to ongoing discussions about how and whether Rule 23 and other rules relevant to class actions should be amended. Consequently, we have made only passing mention of some features of the complete manuscript. For example, in the course of the research, we conducted ten intensive case studies of recently settled class action lawsuits. Although the summary contains information derived from this portion of our research, it includes few details about the cases themselves. The full book contains a narrative of each of the case studies as well as a comparative analysis of them. Similarly, this summary makes only a few references to the cases, court documents, and other published materials that we consulted during our research, which are extensively documented in the book.

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We are grateful to the many lawyers, judges, other public officials, and business, consumer, and other public interest representatives who gave generously of their time and shared their perspectives, experiences, and information about class action litigation with us. We could not have conducted the study summarized here without their help.

We also want to thank Neuberger Berman, the New York–based investment management firm, for its generous financial support for our research and writing. Without their support, this project would not have been possible.

Additional support for the study was provided by more than a dozen law firms, corporations, and individuals, and by core funds from the Institute for Civil Justice. The names of all of the donors are listed at the conclusion of these acknowledgments.

All of those who helped fund the study did so without placing any conditions upon the design or conduct of our research, and none had any control over the publication of the results. We gratefully acknowledge these donors' willingness to support independent research in the public interest.

Many people encouraged us to undertake the study and offered advice along the way. We particularly want to thank Judge Patrick Higginbotham, whose interest in the use of empirical research in legal procedural reforms stimulated us to consider such a project, and Sheila Birnbaum, Francis Hare, Judy th Pendell, Paul Rheingold, and Judith Resnik, who offered helpful counsel as the study progressed. Portions of the book manuscript were written while Deborah Hensler was on the faculty at the University of Southern California Law School. She gratefully acknowledges the advice of her colleagues and the assistance of USC's wonderful law librarians.

We also wish to thank those who reviewed drafts of the book manuscript and provided us with written and oral comments: Professors Janet Alexander, Jennifer Arlen, Stephen Burbank, Francis McGovern, Arthur Miller, Judith Resnik, and Tom Rowe; John Aldock, John Beisner, Sheila Birnbaum, Kim Brunner, Elisabeth Cabraser, James Greer, William Montgomery, Paul Rheingold, and Brian Wolfman; and RAND colleagues Alan Charles, David Kanouse, and Barbara Williams.

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THE ONCE AND FUTURE CONTROVERSY

The current controversy was ignited in 1966 when the federal rule that governs class action lawsuits for money was changed.

Class action litigation—lawsuits filed by one or a few plaintiffs on behalf of a larger number of people who together seek a legal remedy for some perceived wrong—is as old as the medieval English roots of the United States civil legal system. [1] The controversy over class actions is long-lived as well: Allowing a few individuals to represent the legal interests of many others who do not participate in the lawsuit but who are nonetheless bound by its outcome has always seemed like a dubious proposition to some. But the current controversy over class actions roared to life in 1966 when Rule 23, the procedural rule that provides for class actions in federal courts, was significantly revised. Amidst a host of other rule revisions were a few words that presaged a dramatic change in the class action litigation landscape: Whereas previously, all individuals seeking money damages with a class action lawsuit needed to sign on affirmatively ("opt in"), now those whom the plaintiffs claimed to represent would be deemed part of the lawsuit unless they explicitly withdrew ("opted out"). Overnight the scope of money damage lawsuits—and hence the financial exposure of the corporations against whom they usually were brought—multiplied many times over.

Before 1966, only those who said they wanted to be part of a class were included in such lawsuits; after 1966, all those whom the class description were included unless they explicitly declined. The change substantially increased the financial exposure of corporate defendants.

In the decade that followed, a wave of consumer rights statutes, enacted by Congress and state legislatures, expanded the substantive legal grounds for money damage class actions. State courts revised their own class action rules to match the changes in the federal rule. Both federal and state courts interpreted the new rules expansively. By the mid-1970s the business community was up in arms, and there were calls for legislative action and a new round of rule revision. But as the years passed, the legal system gradually acclimated itself to the 1966 rule. Courts pulled back from their initial enthusiastic support, litigation patterns became more predictable and therefore easier for corporations to adjust to, and the clamor for rule revision died down.

Then, in the 1980s, the landscape shifted again with the advent of large-scale product defect litigation, now known as "mass torts." Asbestos lawsuits, brought by thousands of workers who had been exposed to asbestos in shipyards, petrochemical plants, and other industrial settings, inundated federal and state courts in areas of the country where such work was concentrated. The litigation was characterized by features not seen before then: large numbers of individual lawsuits, litigated in a coordinated fashion by a small number of plaintiff law firms, against a

[1] Class action lawsuits can be filed on behalf of individuals, businesses, or other organizations. They may be filed by public officials, such as state attorneys general, or private citizens. Defendants may also seek class action status, but class certification is most often sought by plaintiffs.

A new controversy emerged in the 1980s, when some judges began certifying mass tort class actions, breaking with previous practice. In 1991, the Civil Rules Advisory Committee took up the issue of mass tort class actions.

small number of defendants, before a few judges. As the lawyers, parties, and judges sought to reduce litigation expense by aggregating the cases and resolving them on a group basis—rather than individually—the balance of power between individual tort lawyers and corporate defendants tilted. Where once defendants clearly had the superior resources, now they faced organized networks of well-heeled tort lawyers. It was not long until the attorneys applied the lessons they had learned—and the resources they had earned—from asbestos litigation to lawsuits arising out of the use of drugs and medical devices and exposure to toxic substances.

In an advisory note, the committee that revised the class action rule in 1966 had rejected the notion of using class actions for personal injury litigation except in very limited circumstances. [2] But with courts awash in large-scale product defect and environmental exposure litigation, some judges, lawyers, and defendants began to rethink that position. Class actions, they thought, offered vehicles for efficiently resolving the large numbers of new suits. Some judges certified mass tort class actions, but others ruled that certification was barred by the 1966 committee's advisory note. In 1991, the Civil Rules Advisory Committee took up the issue of class action reform with an eye to resolving this question.

FAIRNESS ISSUES CATALYZE AN IDEOLOGICAL DEBATE

What began as an effort to find better ways to manage mass torts became an ideological debate about the social purposes of class actions.

Soon after the committee began its work, its members started to question the wisdom of proposals to facilitate certification of mass tort class actions. Advice poured into the committee from practitioners and scholars alike. Some defendants argued that once a mass tort was certified as a class action, their exposure to damages increased so dramatically that they had no recourse but to settle—even when little or no scientific evidence existed that their products had caused the harms alleged by class members. Some tort attorneys argued that class certification of mass torts denied people an opportunity to pursue claims individually, an approach that might gain these plaintiffs larger awards than they would receive from class action settlements. Law professors and public interest attorneys questioned the fairness of some of the mass tort settlements that had been negotiated by plaintiff class action attorneys and defendants.

As controversy over mass tort class actions continued to grow, corporate representatives pressed for other changes in Rule 23 to respond to a new wave of class actions in which consumers sought compensation for small financial losses. They found allies in unlikely quarters: lawyers outside the corporate defense bar who argued that too many of these consumer

[2] While such notes do not have the force of law, judges look to them for guidance in applying the rules.

suits served only to line the pockets of class action attorneys. As the committee shifted its attention from proposals to expand the scope of Rule 23 to proposals to restrict damage class actions, consumer advocacy groups became alarmed that some of their gains of the past several decades would be lost. Over time, the tenor of discourse about Rule 23 revision became increasingly adversarial. When the committee issued a set of proposed rule revisions for public comment in 1996, a full-scale political battle erupted, echoing the controversy of the 1970s.

Sharp disagreement within the legal community over proposed rule changes brought the reform process to a halt in 1996. The debate over class actions shifted to Congress.

When the dust settled a year later, only one technical revision to the rule had survived. The debate had revealed deep political rifts within the legal community about the merits of consumer class actions and continued uncertainty about how to solve the mass tort problem. The committee tabled proposals to raise the bar for damage class actions. Chief Justice Rehnquist appointed another committee to consider mass tort issues, including but not limited to class actions. The battle over damage class action reform shifted to Congress, which is now considering class action legislation.

BRINGING POLICY ANALYSIS TO BEAR

The debate over damage class actions is characterized by charges and countercharges about the merits of these lawsuits, the fairness of settlements, and the costs and benefits to society. Anecdotes abound, and certain cases are held up repeatedly as exemplars of class actions' great value or worst excesses. In the fervor of debate, it is difficult to separate fact from fiction, aberrational from ordinary. The debate implicates deep beliefs about our social and political systems: the need for regulation, the proper role of the courts, what constitutes fair legal process. These beliefs exert such strong influence over people's reactions to class action lawsuits that different observers sometimes will describe the same lawsuit in starkly different terms. The protagonists disagree not only about the facts, but also about what to make of them. In a democracy such as ours, these kinds of controversies are extraordinarily difficult to resolve.

The class action controversy is characterized by disagreement on what the facts are and what they imply for policy. Policy analysis can aid decisionmakers by sorting out the facts and explaining contending positions—and offering a disinterested perspective.

Policy analysis can sometimes help decisionmakers faced with such a controversy by objectively describing the facts and what information is missing; identifying the issues at the heart of the debate and laying out different perspectives on these issues; and exploring the likely consequences of proposed policy changes. We undertook this study of damage class actions in the hope that we could provide such help. Specifically, we sought to:

- describe the pattern of current damage class actions, including state and federal class actions
- place the current controversy and reform efforts in a historical context

- investigate the bases for charges that many class actions are frivolous and many settlements are improper
- obtain information on the benefits and costs of damage class actions
- recommend changes in class action rules or practices, if necessary.

Methods

There is a dearth of statistical information about class action activity.

Enormous methodological obstacles confront anyone conducting research on class action litigation. The first obstacle is a dearth of statistical information. No national register of lawsuits filed with class action claims exists. Until recently, data on the number of federal class actions were substantially incomplete, and data on the number and types of state class actions are still virtually nonexistent. Consequently, no one can reliably estimate how much class action litigation exists or how the number of lawsuits has changed over time. Incomplete reporting of cases also means that it is impossible to select a random sample of all class action lawsuits for quantitative analysis. But even if there were a registry of class actions, it would not provide a detailed picture of class action practices. Such information is critical because charges about class action litigation practices are central to the debate. Such practices are not recorded publicly and must be studied by qualitative methods.

We used a variety of research methods to describe class action practices, identify problems, and propose solutions.

To address the special problems of conducting research on class actions, we used a combination of methods.

- We assembled data on the number and types of class action lawsuits from a variety of electronic sources, including LEXIS (for reported judicial opinions) and the general and business news media. None of these sources is comprehensive and the contents of each reflect the interests of its compilers. But by piecing together these fragmentary data, we can discern the shape of the class action litigation terrain in the 1990s.
- We interviewed more than 70 individuals in more than 40 law firms, corporations, and other organizations to learn about class action practices. Many of the nation's leading class action practitioners, on both the plaintiff and defense sides, were among those we interviewed.
- We reviewed commentary following the adoption of amendments to Rule 23 in 1966, congressional testimony from that period on legislation that was proposed in response to the new rule amendments, minutes of the Advisory Committee's meetings on the rule from 1991 to the present, and testimony before the committee. We also attended Advisory Committee meetings and hearings. Our historical analysis allowed us to identify the persistent themes in the controversy.

- We conducted an extensive literature review of the rich scholarly commentary on damage class actions, which provided a theoretical framework for our analysis of qualitative data.
- Drawing on the insights gained from our data collection and interviews, we selected ten recently settled class action lawsuits for intensive "case study" investigation. For each of these cases, we reviewed public court documents and interviewed key players in the litigation (sometimes more than once), including outside and corporate defense counsel, plaintiff class counsel, judges, special masters, and sometimes objectors, regulators, and reporters. In all, we interviewed about 80 litigation participants and others.

By combining these data, we are able to paint a picture of damage class action practice and problems at the close of the century. Our interpretations of all these data—taken together—shape our policy recommendations.

THE CURRENT CLASS ACTION LANDSCAPE

A common thread in the current controversy is that class action litigation has increased dramatically, imposing new costs for business and new burdens for courts. We found no quantitative data to permit us to calculate growth trends. But we are persuaded by our interviews with plaintiff and defense counsel that there has been a surge in damage class actions in the past several years, particularly in state courts and in the consumer area. Many practitioners trace this growth to the curbs on securities litigation enacted by Congress in 1995. [3] Faced with these curbs, they say, plaintiff attorneys looked for new types of suits to bring and found their opportunities in consumer complaints against business practices and products. The shift toward consumer cases gained impetus from the increasing availability of information on consumer complaints and regulatory investigations from the internet.

Though quantitative data are not available to calculate growth trends, our research persuaded us that there has been a surge of damage class actions in the past several years.

It is important to note that when plaintiff and defense lawyers talk about the number of class actions in which they are involved, they are often referring to the number of cases in which a class action claim—or the threat of one—exists, rather than only cases that have been certified as class actions. Our interviews suggest that a significant fraction of cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money, when the case is dismissed by the court, or when the claims of representative plaintiffs are settled. Sometimes the latter cases are dropped with an agreement by the plaintiff attorney not to pursue class litigation on this charge again. Lawsuits with class action claims that are not certified

[3] *Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

nonetheless result in legal transaction costs. Plaintiff attorneys invest resources in exploring the grounds for these suits and, because of the threat of certification, defendants are likely to spend more preparing to defend these cases than they would individual lawsuits. Consequently, these lawsuits are included in class counsel's and defense attorneys' estimates of the amount of class action litigation, even though they might not be counted in a tally of formal class action lawsuits.

Damage class actions predominated over civil rights and other social policy reform litigation in the mid-1990s.

The electronic databases of class action activity that we assembled provide a rough picture of the variety and relative proportions of different types of litigation in the mid-1990s. Figure S.1 describes the variety of class action activity as it was reported in judicial decisions and in the business and general press. The data indicate that damage class actions—suits for money, as opposed to suits seeking only injunctions or changes in business or public agency practices—predominated over civil rights and other social policy reform litigation. For example, civil rights cases accounted for just 14 percent of reported judicial opinions, while securities, consumer, and tort cases accounted for about 50 percent.

Different pictures of class action activity emerge from published judicial decisions, the business press, and the general press.

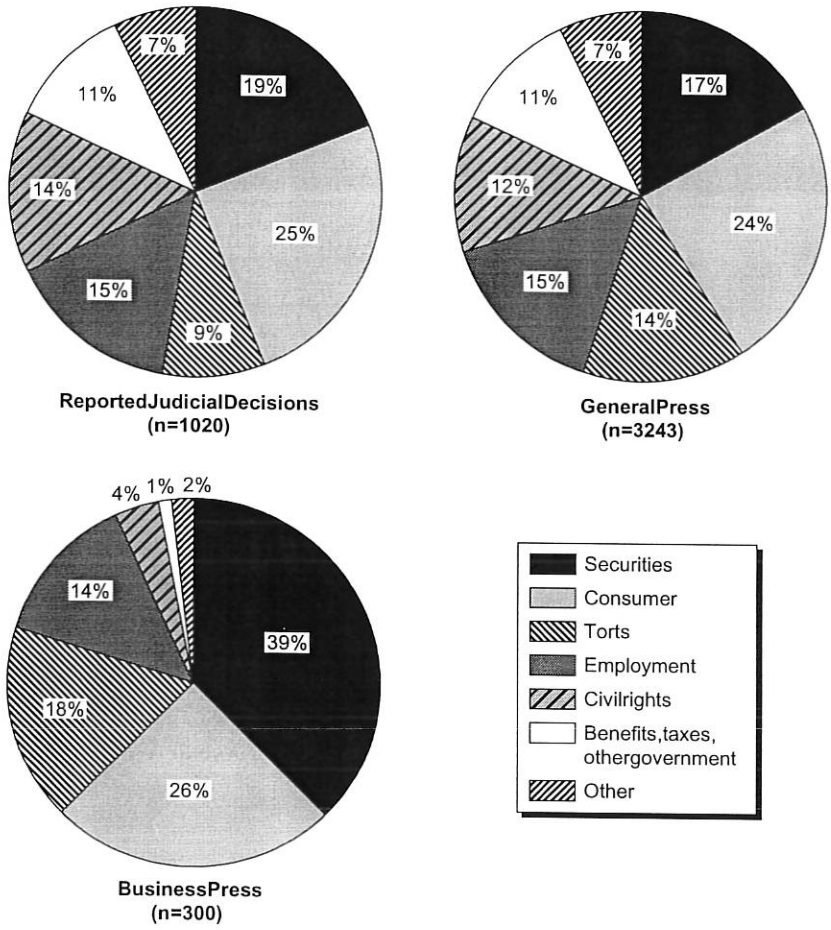
Figure S.1 also suggests that the landscape of class action litigation looks different according to one's vantage point; judges deciding cases are likely to be aware of different trends and features than general newspaper readers and business persons. For instance, securities class actions preoccupied the business community in 1995–1996—not surprising, since Congress had just adopted legislation to rein in securities cases. However, securities cases figured much less prominently in the general press and in reported judicial opinions, accounting for about a fifth of the cases in each during the same period. Similarly, tort cases accounted for only 9 percent of reported judicial opinions, but figured more prominently in the general and business press, constituting 14 percent of class actions reported in the general press and almost 20 percent of the cases reported by the business press. Consumer cases, however, received about equal play; they comprised a quarter of each of the three databases.

More consumer, citizens' rights, and tort cases appear to be filed in state courts. Federal courts hear a larger share of securities, employment, and civil rights cases than state courts.

From the database on judicial decisions for 1995–1996, we estimate that nearly 60 percent of reported class action decisions arose in state courts, implying that a large share of class action litigation takes place there.[4] Although variety characterized the caseload in both federal and state courts, when state and federal class action activity is examined separately, important differences emerge. More consumer, citizens' rights, and tort cases appear to be filed in state courts, while federal courts hear larger shares of securities, employment, and civil rights cases (see Figure S.2).

Our analyses of the databases also highlight the importance of consumer cases brought against corporations, particularly in state courts. These

[4] Our estimate takes into account differences in federal and state reporting of judicial decisions.



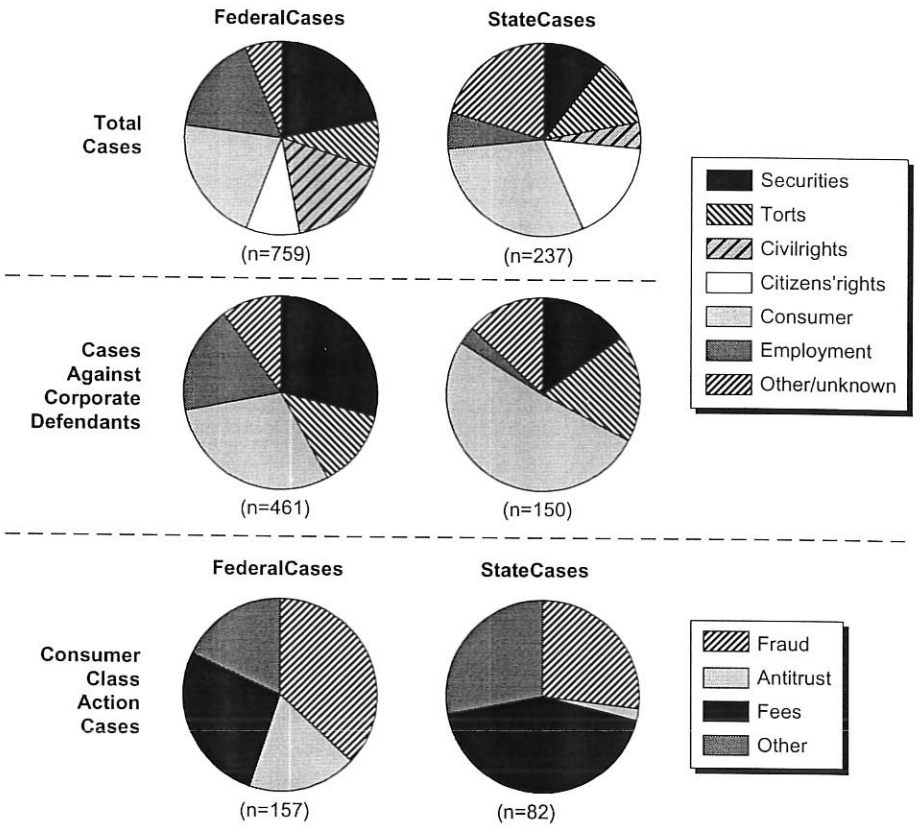
FigureS.1—SurveyingtheClassActionLandscape(1995–1996)

include cases alleging illegal fee calculations, fraudulent business practices, and false advertising. Our research suggests that the number of consumer cases is much larger than the number of mass tort cases and that the proportion of consumer cases in state courts is considerably larger than the proportion in federal courts.

Particularly in the state courts, consumer cases outnumber mass tort class actions.

Critics claim that class action attorneys "shop" for judges who are more favorable to class actions, and find them most often in state courts, particularly in the Gulf region. We found evidence of such patterns in our 1995–1996 data: Consumer class actions were more prevalent in Alabama than one would expect on the basis of population, and Louisiana led in the number and rate of mass tort class actions. [5] In a later section, we discuss the strategic choices that drive filing patterns.

[5] A concentration of mass torts in Louisiana may also reflect the concentration of petrochemical factories that might stimulate toxic exposure litigation in that state.



FigureS.2—DistributionofCasesAmongFederalandStateCourts (reportedjudicialdecisions)

Classaction practicesare currentlyinflux. Wecannotsay whethertheclass actionlandscape willstabilizesoon, orwhethercases willcontinueto growinnumber andvariety.

At the time of our interviews, class action practices were in flux. Virtually all those with whom we talked felt that they were litigating at the leading edge of the civil justice system. As one practitioner put it: "The ground is shifting under us as we speak." Whether what we observed was a shift in a landscape that will soon stabilize—consistent with history—or whether damage class action litigation is on a growth trajectory cannot be determined from the information we collected.

CLASSACTIONDILEMMASARISEFROMTHE INCENTIVESOFLAWYERS,PARTIES, ANDJUDGES

Private class actions for money damages, particularly those lawsuits in which each class member claims a small loss but aggregate claimed losses are huge, pose multiple dilemmas for public policy. Many believe that these lawsuits serve important public purposes by supplementing

the work of government regulators whose budgets are usually quite limited and who are subject to political constraints. Hence, these are sometimes called "private attorneys general" lawsuits. Consumer advocates argue that without the threat of such lawsuits, businesses would be free to engage in illegal practices that significantly increase their profits as long as no one individual suffered a substantial loss. This notion of the purpose of damage class actions is sharply contested. In our view, the evidence regarding the historical intent of damage class actions is ambiguous. But whatever the rulemakers may have intended, the corporate representatives whom we interviewed said that the burst of new damage class action lawsuits has played a regulatory role by causing them to review their financial and employment practices. Likewise, some manufacturer representatives noted that heightened concerns about potential class action suits have had a positive influence on product design decisions.

The purposes of damage class actions are sharply contested. Our research suggests that such lawsuits do play a regulatory enforcement role in the consumer arena.

Relying on private attorneys to bring litigation for regulatory enforcement has important consequences. When class action lawsuits are successful, they may yield enormous fees for attorneys because fees are usually calculated as a percentage of the total dollars paid by defendants. So, attorneys have substantial incentives to seek out opportunities for litigation, rather than waiting for clients to come to them. Over the years, class actions specialists have developed extensive monitoring strategies to improve their ability to detect situations that seem to offer attractive grounds for litigation. To spread the costs of monitoring, they look for opportunities to litigate multiple class action lawsuits alleging the same type of harm by different defendants or in different jurisdictions. Success in previous suits provides the wherewithal for investigating the potential for more and different types of suits—suits that test the boundaries of existing law. Thus, the financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards. In our interviews, attorneys talked candidly about how these incentives operated in their practices and the practices of those who litigated against them. The key public policy question is whether the entrepreneurial behavior of private attorneys produces litigation that is, on balance, socially beneficial. Whereas public attorneys general may be reluctant to bring meritorious suits because of financial or political constraints, private attorneys general may be too willing to bring nonmeritorious suits if these suits produce generous financial rewards for them.

The substantial financial incentives that damage class actions provide to private attorneys tend to drive the frequency and variety of class action litigation upwards.

The key policy question is whether "private attorneys general" lawsuits are, on balance, socially beneficial.

Most consumer class members have only a small financial stake in the litigation. And, because of the way the class action rules are commonly applied, the class members may not even learn of the litigation until it is almost over. Even representative plaintiffs (i.e., those in whose name the suit is filed) may play little role in the litigation. As a result, there are few if any consumer class members who actively monitor the class action

Class members typically play a small role in class action litigation. Their virtual absence may lead lawyers to questionable practices.

Plaintiff attorneys can be motivated by the prospect of substantial fees for relatively little effort. For their part, defendants may want to settle early and inexpensively. When these incentives intersect, the settlements reached may send inappropriate deterrence signals, waste resources, and encourage future frivolous litigation.

attorney's behavior. Such "clientless" litigation holds within itself the seeds for questionable practices. The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity. These incentives can produce settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society. For class counsel, the rewards are fees disproportionate to the effort they actually invested in the case. For defendants, the rewards are a less-expensive settlement than they may have anticipated, given the merits of the case, and the ability to get back to business rather than engage in continued litigation. For society, however, there are substantial costs: lost opportunities for deterrence (if class counsel settled too quickly and too cheaply), wasted resources (if defendants settled simply to get rid of the lawsuit at an attractive price, rather than because the case was meritorious), and—over the long run—increasing amounts of frivolous litigation as the attraction of such lawsuits becomes apparent to an ever-increasing number of plaintiff lawyers.

Though judges have special responsibilities for supervising class action litigation, they may not have the resources or inclination to scrutinize settlements for self-dealing and collusion among attorneys.

Recognizing the potential for conflicts of interest in representative litigation, legal rulemakers have assigned judges special oversight responsibilities for class action litigation, including deciding class counsel's fees, and have devised other procedural safeguards as well. But procedural rules, such as the requirements for notice, judicial approval of settlements, and opportunities for class members and others to object to settlements, provide only a weak bulwark against self-dealing. Notices may obscure more than they reveal to class members. Fees may be set formulaically without regard to the value actually produced by the litigation. Whether class settlements are actually collected by class members or returned to defendants, whether the awards are in the form of cash or coupons, may receive little judicial attention. Those who might object to the settlement may not be granted sufficient time or information to make an effective case. Individuals who do step forward to challenge a less-than-optimal resolution or a larger-than-appropriate fee award may have a price at which they will agree to go away or join forces with the settling attorneys. Judges whose resources are limited, who are constantly urged to clear their dockets, and who increasingly believe that the justice system is better served by settlement than adjudication may find it difficult to switch gears and turn a cold eye toward deals that—from a public policy perspective—may be better left undone.

Our data do not provide a basis for estimating the proportion of litigation in which questionable practices obtain. But because both plaintiff class counsel and defense and corporate counsel related experiences to us pertaining to such practices, often in vivid terms, and because there is documentary evidence of such practices in some cases, we believe that they occur frequently enough to deserve policymakers' attention.

MASS TORT CLASS ACTIONS INJECT ADDITIONAL INCENTIVES

The multiplicity of parties and high financial stakes of mass tort class actions exacerbate the incentive problems of class action practice.

Rather than solving the incentive problems posed by clientless consumer class actions, mass torts bring an additional set of problems to class action practice. Although mass tort plaintiffs have significant financial as well as nonmonetary stakes in their litigation, their role is typically little larger than that of consumer class members, regardless of whether a class is certified or whether the litigation is pursued in some other aggregative form. The history of mass torts—which we detail in our book—has created a contentious bar comprising class action practi tioners, individual practitioners who take on large numbers of cases of varying strength and pursue them aggregatively, and more-selective tort attorneys who represent individual clients with strong claims and large damages. The multiplicity of lawyers with different strategic interests provides additional opportunities for deal making, which may or may not benefit the class members themselves. The need to satisfy so many legal representatives tends to drive up the total transaction costs of the litigation. The size of individual class members' claims—tens or hundreds of thousands of dollars, rather than the modest amounts of consumer class actions—means that the financial stakes of the litigation are enormous, measured in hundreds of millions, or billions, of dollars. Defendants' drive to fix their ultimate financial exposure leads them to put huge amounts of money on the table in order to settle class litigation, an investment of resources that serves society's interests only when the class members' injuries are, in fact, caused by the defendants' products. Plaintiff class action attorneys are hard put to reject the largess that flows from fees calculated as a percentage of such enormous sums, even when the deals that defendants offer are not necessarily the best that the class counsel could obtain for injured class members if they were to invest more effort and resources in the litigation. Defendants' incentives to settle mass tort class actions even when scientific evidence of causation is weak, and class action attorneys' incentives to settle for less than the individual claims taken together are worth, diminish the deterrence value of product litigation and lead to both over- and underdeterrence.

In mass tort class actions, notice campaigns that attract large numbers of class members and settlement formulae may result in outcomes that over-compensate some claimants while undercompensating others.

The tendency of damage class actions to expand the claimant population also has special consequences for mass torts. In consumer class actions, a successful notice campaign will increase the cost of litigation for defendants if more claimants come forward, but may have little impact on the amount that class members collect, since the individual financial losses that lead to such class actions are usually modest and the remedies commensurately small. But in mass tort litigation, the expansion of the claimant population as a result of class certification affects both defendants *and* plaintiffs. Defendants will probably pay more to settle a class action than they would absent the class certification, because more claimants come forward in response to notices and the media attention

that class actions often receive and because some of those who secure payment might not have been able to win individual lawsuits. Individual class members whose claims have merit are likely to get *less* than if they sued individually because mass tort settlements are often "capped" and the money will have to be shared with many other claimants, including those with less serious or questionable injuries. Those class members with the most serious injuries and strongest legal claims are likely to lose the most.

Allocating damages to mass tort class members also raises special questions. In consumer classes, if the primary goal is regulatory enforcement, carefully matching damages to losses is not a great concern. As long as defendants pay enough to deter bad behavior, economic theorist tell us, it does not matter how their payment is distributed. But the primary objective of tort damages is to make the victim whole, meaning that compensation should match loss (adjusted for factors such as the strength of the legal claim). When class members' injuries vary in nature and severity, finding a means of allocating damages proportional to loss without expending huge amounts of money on administration is a tall challenge. The need to save transaction costs drives attorneys towards formulaical-location schemes. But resolutions that lack individualization challenge a fundamental reason for dealing with mass injuries through the tort liability system, rather than using a public administrative approach.

We conducted extensive research on ten recently resolved class action suits to gain a richer understanding of class action practices, costs and benefits, and outcomes. The group included six consumer class actions, two mass product class actions, and two mass personal injury cases. The remarkable variation we found in these cases provided insight into the public policy dilemmas posed by damage class actions.

HOW INCENTIVES SHAPE OUTCOMES

To develop a better understanding of how these incentives play out in class action litigation, we selected a small number of class action lawsuits for intensive analysis. Because critics claim that damage class actions are simply vehicles for entrepreneurial attorneys to obtain fees, we investigated the factors that contributed to the inception and organization of the lawsuits and their underlying substantive allegations. Because critics claim that damage class actions achieve little in the way of benefits for class members and society—while imposing significant costs on defendants, courts, and society—we examined the outcomes of the cases in detail. And because critics and supporters debate whether current class action rules, as implemented by judges, provide adequate protection for class members and the public interest, we studied notices, fairness hearings, judicial approval of settlements, and fee awards.

Because practitioners had told us that class action practice is in flux, we studied *recently filed* class action lawsuits, which best reflect current practices. Because so much of the controversy over damage class actions focuses on alleged shortcomings in their resolution, we studied cases that were *certified* and *resolved* as class actions. This means that our research did not tell us anything about an important segment of the class action universe: lawsuits that are filed and *not* certified. What happens to those cases remains a question for further research. Our interest in outcomes

also meant that we needed to study substantially *terminated* cases. Had litigation still been underway, we would not have been able to answer questions about benefits and costs. Finally, we decided to study cases that had *not* been the subject of widespread controversy. It is through large numbers of mundane cases, rather than through a few notorious lawsuits, we reasoned, that class actions bring about broad social and economic effects.

Because of resource constraints, we could conduct only ten case studies. We focused on two types of cases: consumer class actions because they were so numerous and such a source of contention and mass tort class actions because of the central role they have played in the controversy over class actions during the 1990s. Ultimately, we studied six consumer class actions, two mass product damage cases, and two mass personal injury cases. Table S.1 lists the cases and their subjects. Five were settled in federal court, and the other half was settled in state court. [6] Four of the five federal cases were nationwide class actions, as was one state case; one of the federal cases and two of the state cases were statewide class actions; the remaining cases were regional and were brought in state court. In six of the ten cases either the settling lawyers or other lawyers filed similar class action lawsuits in other jurisdictions. At the time we selected these cases, we did not know their outcomes other than that they had reportedly reached resolution. Our book details the facts that gave rise to these cases, their course of litigation, and their outcomes.

Although our case study investigation was limited to ten lawsuits, we found a rich variety of facts and law, practices and outcomes. The case studies provided a concrete basis for considering the claims that are central to the controversy over damage class actions: that these lawsuits are solely the creatures of class action attorneys' entrepreneurial incentives; that nonmeritorious class actions are easily identified—and that most suits fit in that category; that the benefits of class actions accrue primarily to the lawyers who bring them; that transaction costs far outweigh benefits to the class; and that existing rules are not adequate to insure that class actions serve their public goals. By arraying the facts of the class actions that we studied closely alongside the claims of critics, we were better able understand the public policy dilemmas posed by damage class actions.

Class Actions Are Complex Social Dramas

Class actions arise in diverse circumstances. But plaintiff attorneys drive the litigation.

The image of class action lawyers as "bounty hunters" pervades the debate over damage class actions. Without greedy lawyers to search them out, the argument goes, few, if any, such lawsuits would ever be filed.

[6] Because of controversy over whether class actions are triable, we would have liked to study some cases that were retried; however, it turned out that all of the cases we identified as candidates for study—like most civil cases and most class actions—never reached trial.

TableS.1

PROFILEOFCLASSACTIONCASESTUDIES

ShortCaseTitle	Subject	(Court) Jurisdiction,FilingYear	Scope
	ConsumerClassActions		
Roberts v. Bausch and Lomb	Contactlenspricing	(Federal)NorthernDistrictof Alabama,1994	Nationwide
Pinney v. Great Western Bank	Brokerageproductsales	(Federal)CentralDistrictof California,1995	Statewide
Graham v. Security Pacific Housing Services, Inc.	Collateralprotectioninsurance charges	(Federal)SouthernDistrict ofMississippi,1996	Nationwide
Selnick v. Sacramento Cable	CableTVlatecharges	(State)SacramentoCounty, California,1994	Metropolitanarea subscribers
Inman v. Heilig-Meyers	Creditlifeinsurancepremium charges	(State)FayetteCounty, Alabama,1994	Statewide
Martinez v. Allstate Insurance; Sendejo v. Farmers Insurance	Automobileinsurancepremium charges	(State)ZavalaCounty, Texas,1995	Statewide
	MassTortClassActions		
In re Factor VIII or IX Blood Products	Personalinjury,productdefect, bloodproducts	(Federal)NorthernDistrict ofIllinois,1996	Nationwide
Atkins v. Harcros	Personalinjuryandproperty damage,toxicexposure, chemicalfactory	(State)OrleansParish, Louisiana,1989	Currentandformer neighborhoodresidents
In re Louisiana-Pacific Siding Litigation	Propertydamage,productdefect, manufacturedwoodsiding	(Federal)DistrictofOregon, 1995	Nationwide
Cox et al. v. Shell et al.	Propertydamage,productdefect, polybutylenepipes	(State)ObionCounty, Tennessee,1995	Nationwide

Our case studies tell a more textured tale of how damage class actions arise and obtain certification.

In the ten case study lawsuits, class action attorneys played myriad roles. Some class actions arose after extensive individual litigation or efforts to resolve consumer complaints outside the courts; others were the first and only form of litigation resulting from a perceived problem. Sometimes class action attorneys uncovered an allegedly illegal practice on their own; sometimes angry consumers (or their attorneys) contacted them. Sometimes the lawyers first found out about a potential case from regulators or the media. Sometimes they jumped on to a litigation bandwagon that had been constructed by other class action attorneys. When they came later to the process, class action attorneys sometimes brought resources and expertise that helped conclude the case successfully for the class, but sometimes they seemingly appeared simply to claim a share of the spoils.

Defendants' responses to the class actions varied from case to case. In seven of the cases, they opposed class litigation vigorously, not only

seeking to have the case dismissed on substantive legal grounds but also contesting certification, sometimes all the way up to the highest appellate courts. Once they lost the initial battle(s) over certification, however, defendants joined with plaintiff attorneys in pursuing certification of a settlement class. In the remaining three cases, from the moment of filing, defendants seemed about as eager as plaintiff attorneys to settle the litigation against them by means of a class action, which followed either extensive individual litigation, or previously filed class actions, or both. Once defendants decided to support class action treatment of the litigation against them, they (not surprisingly) favored as broad a definition of the class as possible. Some defendants also sought to bind class members definitively by seeking certification of non-opt-out classes or subclasses.

Defendants may energetically fight class certification, but sometimes see class wide settlements as advantageous.

Critics charge that class action attorneys file lawsuits in certain courts simply because they believe that judges there are most likely to grant certification. As with many other aspects of damage class actions, the dynamics of case filing are more complicated than this critique suggests.

Forum choice is an important strategic decision in all civil lawsuits. But class action attorneys often have greater latitude in their choice of forum or venue than their counterparts in traditional litigation. Under some circumstances, an attorney filing a statewide class action can file in any county of a state and an attorney filing a nationwide class action can file in virtually any state in the country, and perhaps any county in that state as well. In addition, class action attorneys often can file duplicative suits and pursue them simultaneously. These are powerful tools for shaping litigation, providing opportunities not only to seek out favorable law and positively disposed decision makers, but also to maintain (or wrest) control over high-stakes litigation from other class action lawyers.

Forum choice allows plaintiff class action attorneys to wrest control over litigation from competing attorneys and allows defendants to seek out plaintiff attorneys who are attractive settlement partners.

As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward. But defendants then may also choose among competing lawyers—and among jurisdictions, venues, and judges—by deciding to negotiate with one set of class action attorneys rather than another.

The availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another. Broad forum choice enables both plaintiff class action attorneys and defendants to seek better deals for themselves, which may or may not be in the best interests of class members or the public.

Broad forum choice weakens judicial control over class action litigation.

The Merits Are in the Eyes of the Beholders

A central theme of the testimony before the Civil Rules Advisory Committee in 1996–1997 was the notion that a large fraction of such lawsuits "just ain't worth it" because the alleged damages to class members are

Argumentsabout themeritsof damageclass actionsoften confoundthemerits oftheunderlying claimswiththe meritsofthe settlementsthatare negotiated.

"trivial," "technical," or just plain make-believe. In the policy debate, questions about lawsuits' merits—which pertain to the facts and law—are often confused with criticisms of their outcomes—which are a product of the incentive structure that were reviewed above, as well as of the merits. In our case studies, we looked at the claims themselves and the allegations that parties made about practices and products to assess the seriousness of the claims underlying the class actions, rather than at the way the claims were settled. We could not fully evaluate the validity of every assertion or counter-assertion by the parties, but we did examine the materials in court records, discuss the claims and evidence with the litigators and, in some cases, talk also with consumer advocates and regulators about plaintiffs' charges and defendants' counter-assertions.

Observersoften disagreeaboutthe meritsofparticular classactions.

Although many of these class action lawsuits were vigorously contested, at the time of settlement considerable uncertainty remained about the defendants' culpability and plaintiff class members' damages. To us, it seems unclear which, if any, of the ten class actions "just weren't worth it"—and which were. Viewed from one perspective, the claims appear meritorious and the behavior of the defendant blameworthy; viewed from another, the claims appear trivial or even trumped up, and the defendant's behavior seems proper. The complexity of the stories behind these lawsuits and the ambiguity of the facts underlying them provide partial explanations of why reaching a consensus over what sorts of damage class actions should be entertained by the courts is so difficult.

Inthelawsuitswe examined,class members'estimated lossesranged widely.Though theyweregenerally toomodesttohave supportedindivid-uallegalrepre-sentationona contingency-fee basis,theyoften numberedinthe hundredsor thousandsof dollars.

Among the ten class actions, the estimated losses to individuals varied enormously. Among consumer suits, the estimated individual dollar losses ranged from an average of $3.83 to an average of $4550; in five of the six cases the average was probably [7] less than $1000 (see Table S.2). It is highly unlikely that any individual claiming such losses would find legal representation without incurring significant personal expense. By comparison with the consumer cases, the individual losses estimated in the mass tort class actions varied more in character and quantity, ranging from less than $5000 to death. In the latter case, had plaintiff attorneys been confident that they could prevail on liability, individuals would have been able to secure legal representation on a contingency-fee basis. In cases like the other three mass tort class actions, where damages were relatively modest, securing individual legal representation on a contingency-fee basis would have been more problematic unless plaintiff attorneys were prepared to pursue individual claims in a mass but non-class litigation.

The defendants' practices that led to the consumer class actions ranged from modest alleged overcharges on individual transactions to sales practices that were allegedly calculated to deceive. Depending on how one tells the story of what defendants did, they appear more or less cul-

[7] Information on losses was not available in all cases.

TableS.2

CLAIMSUNDERLYINGTHETENCLASSACTIONS

	Natureof AllegedHarm[a]	Regulators'Assessment ofWhetherPractice ViolatedtheLaw	EstimatedLoss toIndividualClass Members[b]	EstimatedAllegedGain toDefendants [b]
		ConsumerClassActions		
Roberts v. Bausch & Lomb	Labeledsame productdifferently andsoldatdifferent prices.	FDAheldthatlabelingcomplied withregulations;stateattorneys generalheldpracticeunlawful.	Atretailprice,loss rangedfrom$7to$62 perpair;overtheperiod coveredbysuit approximately$210–$310perlenswearer.	Estimatedat$33.5million byplaintiffattorneysand defendant,basedon wholesalepricedifferences.
Pinney v. Great Western Bank	Encouraged depositorstoconvert savingstoriskier investmentswhile implyingFDIC insurance.	SECreportedlyconducted investigation;nopublicrecord available.	Approx.$4550per eligibleclaimant.	Notestimatedinlawsuit; GreatWesternreportedly drew$2.8billionintothe mutualfunds.
Graham v. Security Pacific Housing Services, Inc.	Purchasedmore coveragethan necessaryforloan-holders,increasing premium.	Noregulatoryaction.	Representativeplaintiffs claimeddamageranging fromseveralhundred dollarstonearly$1000.	Notestimated.Plaintiff attorneysallegedthat insurancechargeswereten timesmarketrate.
Selnick v. Sacramento Cable	Chargedexcessive latefees.	Cablecommissioninvestigation ledtochangeinpolicy.	$5perlatepayment; couldhavetotaled$250 ifallpaymentswerelate.	$5million.
Inman v. Heilig-Meyers	Soldmorecoverage thanneeded.	Insuranceandbankingdept.staff saidpracticewasincompliance; statesupremecourtheldpractice contravened"plainmeaning"of statute.	$3.83onaverage.	Notestimatedin settlement,butprobably lessthan$1million.
Martinez v. Allstate/Sendejo v. Farmers	Overchargedfor policies.	Insurancecommissionsaid currentregulationswere ambiguous;refusedtotakeaction butissuedorderrequiringsingle roundinginfuture.	$3peryearonaverage, withamaximumof$14; couldhavetotaled$30 onaverageoverten years,oramaximumof $140.	Estimatesrangedfrom$18 million(defendants')to$46 million(plaintiffs');parties compromisedon$42 million.
		MassTortClassActions		
In re Factor VIII or IX Blood Products	SoldHIV-contaminated products.	NodisputethatbloodproductswereHIVcontaminated.	Attimeofsuit,HIV infectionwasviewedas invariablyfatal.	Noallegationsre defendants'gain.
Atkins v. Harcros	Chemicalfactory contaminated propertyaroundsite.	La.Dept.ofEnvironmentalQuality requiredremediation.	Illnessesdueto exposure,diminished propertyvalue,andfear.	Noallegationsre defendants'gain.
In re Louisiana-Pacific Siding Litigation	Productdeteriorated, requiringreplace-ment.	Defendantsettledattorney generalcomplaintsinOregonand Washingtonbypayingpenalties andrevisingadvertisingandwar-rantypractices.	$4367perstructure. [c]	Noallegationsre defendants'gain.
Cox et al. v. Shell et al.	Productdeteriorated, requiringreplacement andpropertyrepairs.	FederalTradeCommission reportedlyconductedinvestigation. Nopublicrecordofoutcome.	Coststoreplumb:$1200 permobilehome;$3700 persinglehome. [d]	Noallegationre defendants'gain.

[a]Basedonplaintiffs'complaints.Defendantsneveradmittedliabilityinanyofthesecases.

[b]Allegedlossesandgainswerethesubjectofcontentiouslitigation.Thenumbersinthistableindicatethegeneralmagnitudeoflosses andgainsallegedbythepartiesinsettlementnegotiationsandarepresentedto providesomegeneralsenseoftheeconomicvaluesat stake.Inthe *credit life insurance* case,individuallosseswerenotestimatedontherecord;weestimatedtheaverageallegedovercharge basedonpublicreportsofclasssizeandthetotalvalueofallpremiumspaid.Inmostofthemasstortcases,plaintiffs'cla imsofpersonal injuryorpropertydamageweredisputedbydefendants.Forbasesofparties'estimates,seecasestudiesandAppendixEinthebook.

[c]Averagevalueofclaimspaidin1997.

[d]AveragevalueofclaimspaidthroughJune1998byadministrativeclaimsfacilityestablishedbysettlement.

Defendants' culpability for alleged harms was sharply contested and remains unresolved since none of the cases we examined—as is typical with class actions—went to trial.

pable. Whether defendants' practices violated applicable statutes, regulations, and case law was the most contentious issue in the consumer class actions we studied, one that was never fully resolved because none of these cases went to trial.

Three of the mass tort class actions alleged manufacturing defects and the fourth concerned disposal of toxic factory waste products. In three of the four cases, defendants did not contest plaintiffs' assertions that the products involved were defective, although defendants did contest their liability for these defects. The battles over scientific evidence that have characterized many high-profile mass tort class actions—and that go to the heart of the question of their merit—were largely absent from these cases.

The Benefits and Costs Are Difficult to Assess

The outcomes of the cases we studied varied dramatically, challenging the assertion that all class action lawsuits result in pennies for class members and huge profits for attorneys.

The notion that class action attorneys are the prime beneficiaries of damage class actions is widespread. Tales abound of lawsuits in which class members receive checks for a few dollars—or even a few cents—while lawyers reap millions in fees. The "aroma of gross profiteering" that many perceive rising from damage class actions troubles even those who support continuance of damage class actions and fuels the controversy over them.

Among the damage class actions we studied, we found enormous variety in the amounts of money that class members received and in the suits' nonmonetary consequences. Class action attorneys received substantial fees in all of the suits, but both the amount of their fees and their share of the monetary funds created as a result of the settlements varied dramatically.

The way these outcomes were reached challenges the assertion that class actions are instruments for public good, rather than private gain.

The wide range of outcomes that we found in the lawsuits contradicts the view that damage class actions invariably produce little for class members, and that class action attorneys routinely garner the lion's share of settlements. But what we learned about the process of reaching these outcomes suggests that class counsel were sometimes simply interested in finding a settlement price that the defendants would agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions. Such instances undermine the social utility of class actions, which depends on how effectively the lawsuits compensate injured consumers and—many would argue—deter wrongful practices. Moreover, among the class actions we studied, some settlements appeared at first reading to provide more for class members and consumers than they actually did, and class action attorneys' financial rewards sometimes were based on the settlements' apparent value

rather than on the real outcomes of the cases. Such outcomes contribute to public cynicism about the actual goals of damage class actions as compared to the aspirations articulated for them by class action advocates.

1. Negotiated Compensation Amounts Varied Dramatically

In none of the ten class actions, no public record exists of the total amount the defendant had agreed to pay class members, although there was a record of the attorney fee award. In the nine remaining cases, the total compensation defendants offered class members ranged from just under $1 million to more than $800 million. One of these cases included a substantial coupon component; depending on how one valued these coupons, the settlement was worth close to $70 million or just about $35 million (see Table S.3).

Table S.3

TOTAL COMPENSATION OFFERED AND COLLECTED BY CLASS MEMBERS, AND AVERAGE CASH PAYMENTS

	Total Amount Defendants Agreed to Pay in Compensation ($M)	Total Amount Collected by Class Members ($M)	Average Cash Payment
Consumer Class Actions			
Roberts v. Bausch & Lomb	$33.500 plus $33.500 in coupons	$9.175, plus $9.175 in coupons[a]	Unknown
Pinney v. Great Western Bank	$11.232	$11.232	$1478.89
Graham v. Security Pacific Housing Services, Inc.	$7.868	$7.868[c]	$130.71
Selnick v. Sacramento Cable	$0.929	$0.271[e]	$35.58
Inman v. Heilig-Meyers	Unknown	$0.272[b]	$45.79[b]
Martinez v. Allstate/Sendejo v. Farmers	$25.235	$8.914	$5.75
Mass Tort Actions			
In re Factor VIII or IX Blood Products	$650.000	$620.000[c]	$100,000
Atkins v. Harcros	$25.175	$25.175	$6404.22
In re Louisiana-Pacific Siding Litigation	$470.054	$470.054[c]	$4367.27[d]
Cox et al. v. Shell et al.	$838.000	$838.000[c]	$1433.29[d]

[a] Uses midpoint of range estimated from financial reports and other public documents.

[b] Information not from public records.

[c] Projected.

[d] To June 1998.

[e] All unclaimed compensation was awarded to a nonprofit organization.

When reviewing class action settlements, judges must consider their "adequacy" and "fairness." Comparing a proposed settlement amount to the estimated total class losses provides one basis for such an assessment. However, in six of the class actions we studied, the attorneys never offered a public estimate of the total amount of these losses.

2. In Some Cases, Actual Compensation Was a Lot Less Than the Amount Negotiated

In three cases, all or almost all of the money set aside for compensation already has been claimed by class members; in three others, apparently all or almost all of the funds committed by the defendants for class compensation will ultimately be claimed. But in another three cases, class members claimed one-third or less of the funds set aside for compensation. In a fourth case, although the total compensation made available to the class was not reported to the court, we believe that less than half was claimed.[8] In three of these four cases the remaining money was returned to the defendants; in a fourth it was awarded to a nonprofit organization.

The total amount of compensation dollars collected or projected to be collected by class members in the cases we studied ranged from about $270,000 to about $840 million. Average payments to individual class members ranged from about $6 to $1500 in consumer suits, and from about $6400 to $100,000 in mass tort suits (see Table S.3).

3. Consumer Litigation Was Associated with Changes in Practice—but Some Changes May Have Had Other Explanations

In all six consumer cases, the litigation was associated with changes in the defendants' business practices. In four of the six cases the evidence strongly suggests that the litigation directly or indirectly produced the changes in practice. In the two other lawsuits, the evidence of whether the instant class action led to the change is more ambiguous. Three of the consumer cases also led to changes in state consumer law, although in one case the revision was arguably pro-business. In three of the mass tort cases we studied, the class litigation followed removal of the product from the market or change in the product; in the fourth, the manufacturer changed the product (which is still marketed) after state attorneys general investigations and litigation commenced.

4. Class Counsel's Fees Were a Modest Share of the Negotiated Settlements

Awards to class action attorneys for fees and expenses ranged from about half a million dollars to $75 million.[9] Under law judges award

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[8] Our calculation is based on estimates from public financial data.

[9] We could not obtain data on how much defense attorneys earned from these lawsuits because these fees were not a matter of public record and most defendants were unwilling

class counsel fees, calculated either by taking a percentage of the total monetary value of the settlement, or by adding hours, assigning an hourly rate (sometimes adjusted by a factor to reflect the quality of the work), and adding in expenses. Generally, the total monetary value of the settlement is defined as including monies made available for compensation to class members, payments to other beneficiaries, class counsel's fees and expenses, and all of the costs required to administer the settlement, including those for notice. In all of our case studies, judges apparently used the percentage-of-fund (POF) method. In the nine cases for which we know both the total amount of the negotiated settlement and the total amount awarded or set aside for class counsel, class counsel fee-and-expense awards ranged from 5 percent to about 50 percent of the total settlement value. In eight of the nine cases, class counsel received one-third or less of the total settlement value[10] (see Figure S.3).

5. In Some Cases, Class Counsel Got a Larger Share of the Actual Dollars Paid Out Than Indicated by the Negotiated Settlement

As we have seen, class members do not always come forward to claim the full amount defendants make available for compensation. Class counsel received one-third or less of the actual settlement value in six of the ten cases;[11] in the remaining four cases, class counsel's share of the actual settlement value was about one-half. In three of the mass tort cases, class counsel were awarded less than 10 percent of the actual settlement value, but the absolute dollar amount of fees was very large, because these settlements were huge (see Figure S.3).

6. In a Few Cases, Class Counsel Got More Than the Total Collected by Class Members

Critics often use yet a third benchmark to assess plaintiff class action attorney fees: the amount the attorneys are awarded compared to the amount class members receive. Because class counsel are paid for what they accomplish for the class as a whole, their fee awards will almost certainly be greater than any individual class member's award, even in a mass tort class action where class members sometimes receive substantial settlements. But in three of the cases we studied, class counsel received more than class members received altogether (see Table S.4).

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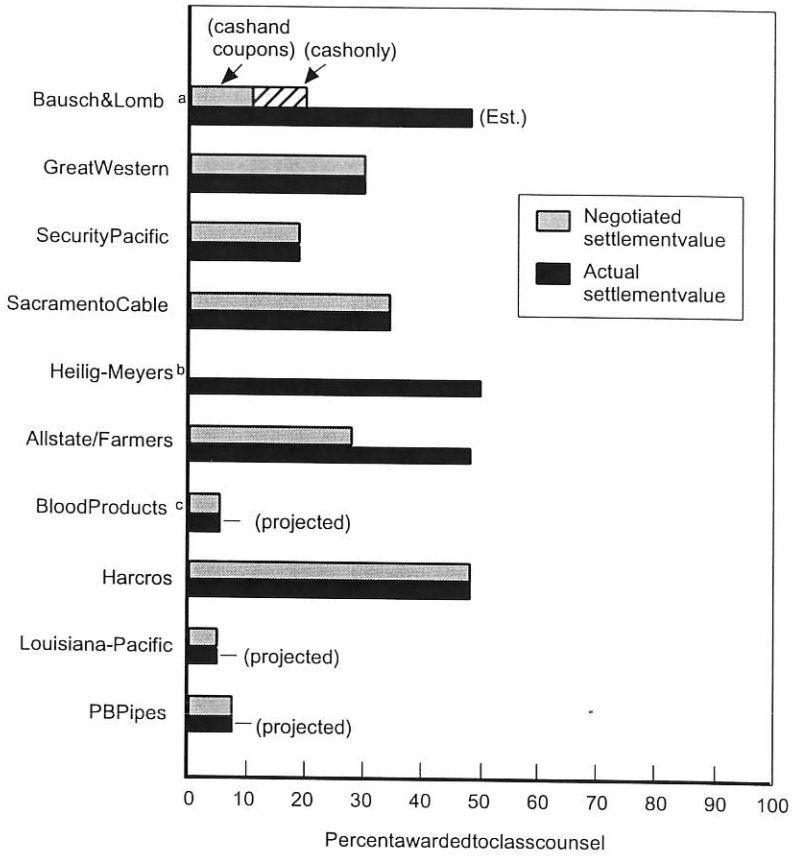
to share the information with us. In the three cases in which defendants shared information on their outside-attorney charges, those amounts were one-fifth, two-fifths, and equal to the amount of class counsel's fees and expenses, respectively.

[10] In the tenth case, the judge apparently was not provided with any means for comparing the fee request with this benchmark, because there was no public estimate of the aggregate common benefit.

[11] Although we do not know the total negotiated settlement value in one case, the defendant shared information with us on its actual value. Hence, we can compute these shares for all ten cases.



[a] Defendant'scostsofadministration,notice,andothersettlement-related expensesareunknown.

[b] Negotiatedsettlementvaluenotavailable.

[c] Assumes$36.5millionavailableforclasscounselfees+costs.

FigureS.3—ClassCounselFeesandExpensesasaPercentageof NegotiatedandActualSettlementValue

7.TotalTransactionCostsAreUnknown

Classactionsarecostly.Weestimatethattotalcostsinthetencases,excludingdefendants'ownlegalexpenses,rangedfromabout$1millionto over$1billion.Eightofthecasescostmorethan$10million;fourcost morethan$50million;threecostmorethanhalfabilliondollars.

Transactioncostsinclassactionlawsuitsincludenotonlyfeesandexpensesfortheplaintiffclassactionattorneysanddefenseattorneys,but alsothecostsofnoticeandsettlementadministration,whichcanbesubstantial.Becausemostdefendantsdeclinedtosharedataontheirown legalexpenses,wecouldnotcalculateatransactioncostratiothatac-

TableS.4

TOTALAWARDEDTOCLASSCOUNSEL,COMPAREDWITHTOTAL PAIDTOCLASS

	ClassCounsel AwardforFees& Expenses($M)	TotalCashPay-menttoClass Members($M)
ConsumerClassActions		
Roberts v. Bausch & Lomb	$8.500	$9.175[b]
Pinney v. Great Western Bank	$5.223	$11.232
Graham v. Security Pacific Housing Services, Inc.	$1.920	$7.583
Selnick v. Sacramento Cable	$0.511	$0.271
Inman v. Heilig-Meyers	$0.580	$0.272[c]
Martinez v. Allstate/Sendejo v. Farmers	$11.288	$8.914
MassTortClassActions		
In re Factor VIII or IX Blood Products	$36.500[a]	$620.000[a]
Atkins v. Harcros	$24.900	$25.175
In re Louisiana-Pacific Siding Litigation	$25.200	$470.054[a]
Cox et al. v. Shell et al.	$75.000	$838.000[a]

[a]Projected.

[b]Estimatedfromfinancialreportsandotherpublicdocuments.

[c]Informationnotfrompublicrecords.

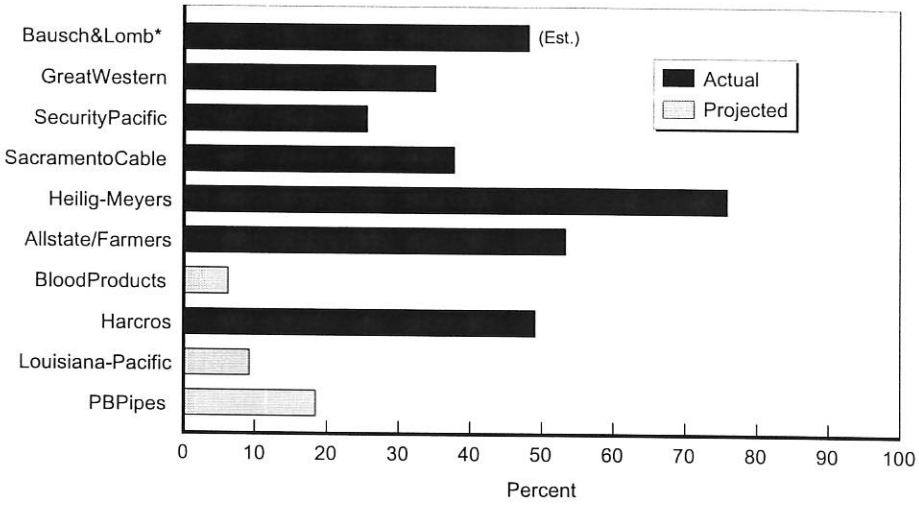
countedforalldollarsspentontheselawsuits. [12] Asashareofthetotal billexcludingdefendants'legalfeesandexpensesbutincludingplaintiff attorneys'feesandexpensesandadministrativecosts,transactioncosts werelowestinthreeofthefourmasstortclassactions,andhighestinthe consumerclassactions(seeFigureS.4).Butbecausemasstortcasesare likelytoimposelargedefensecosts,thesedifferencesmaybeillusory. Becausetheyexcludedefendants'legalcostsforallten cases,the percentagesshowninFigureS.4representthelowerboundontransaction costratios.

JUDGES'ACTIONSDETERMINETHECOST-BENEFIT RATIO

Whenjudgesfully exercisetheiroversightresponsibilities,thequalityof classactionsettlementsandthesocial benefitsofthe litigationare improved.

AssessingwhetherthebenefitsofRule23damageclassactionsoutweigh theircosts—evenintenlawsuits—turnsouttobeenormouslydifficult. Whethertheconsumerclassactionssoughttochangewereworthchanging,whetherthedollarsthatplaintiffclassactionattorneyssoughttoobtainforconsumerclassmemberswereworth recouping,andwhetherthechangesincorporatebehaviorthatwere achievedandtheamountsofcompensationconsumerscollectedwere significantare,toaconsiderableextent,mattersofjudgment.Whether

[12]Inthreecases,wedoknowoutsidedefenseattorneys'charges.Includingthose expensesincreasesthetransactioncostratiobyjust10percentinonecase,byaboutonethirdinthesecond,andby85percentinthethird.



NOTES: Transactioncostsincludepaymentstoplaintiffs'attorneysandcosts ofadministration,notice,andotherexpenditures.

*Defendants'costsofadministration,notice,andothersettlement-relatedexpensesareunknown.

FigureS.4—ProportionoftheSettlement,ExcludingDefendants'OwnLegal FeesandExpenses,AttributabletoTransactionCosts

the damages claimed by mass tort class members were legitimate, whether defendants should have been held responsible for these damages, and whether plaintiffs were better served by class litigation than they would have been by individual litigation are also matters of judgment.

However one assesses the bottom line, the evidence from our case studies suggests strongly that what judges do is the key to determining the benefit-cost ratio. In the class actions we studied, we found considerable variation in what judges required of attorneys and parties. From a societal perspective, the balance of benefits and costs was more salutary when judges:

- required clear and detailed notices
- closely scrutinized the details of settlements including distribution strategies
- invited the participation of legitimate objectors and intervenors
- took responsibility for determining attorney fees, rather than simply rubber-stamping previously negotiated agreements
- determined fees in relation to the actual benefits created by the lawsuit

- required ongoing reporting of the actual distribution of settlement benefits.

How judges exercise their responsibilities not only determines the outcomes of the class actions that come before them, but more important, also determines the shape of class actions to come. Lawyers and parties learn from judges' actions what types of claims may be certified as class actions, what types of settlements will pass muster, and what the rewards of bringing class actions will be.

FINDING COMMON GROUND BY FOCUSING ON PRACTICE

Because the controversy over class action litigation springs from sharp differences in political and social values, it is difficult to resolve. The continuing focus on these questions squanders opportunities for reforming practices.

Damage class actions pose a dilemma for public policy because of their capacity to do both good and ill for society. The central issue for policymakers is how to respond to this dilemma.

Those who believe that the social costs of damage class actions outweigh their social benefits think that the best course of action would be to abandon the notion of using private collective litigation to obtain monetary damages in consumer and mass tort cases. We should rely, say these critics, on administrative agencies and public attorneys general to enforce regulations, and on individual litigation to secure financial compensation for individuals' financial losses.

Those who believe that the social benefits of damage class actions outweigh their costs say that prohibiting private collective litigation in these circumstances would be unacceptable. They have less faith in the capacity of regulatory agencies and public attorneys to enforce regulations. And they argue that some federal and many state consumer protection statutes were enacted with the understanding that claims brought under the statutes would be so small that the only practical way for individuals to assert the rights granted by the statutes would be through collective litigation.

The current controversy over damage class actions reflects this clash of views. History suggests that it will be difficult to resolve the fundamental conflict between them. But many on both sides of the political divide share concerns about current damage class action practices. We think this argues for refocusing the policy debate on proposals to better regulate such practices, so as to achieve a better balance between the public and private gains of damage class actions. Below, we assess the leading proposals for damage class action reform that have been put forward in recent years, seeking to identify those that might attract support from actors on opposite sides of the policy divide and that might make a difference in outcomes.

Adding a Cost-Benefit Test for Certification Would Yield Unpredictable Outcomes

One of the Civil Rules Advisory Committee's proposed rule changes would have encouraged judges to deny certification when they believe the likely benefits of class action litigation are not worth the likely costs. This proposal evoked sharp controversy, arraying business representatives against consumer advocates, and was ultimately tabled by the committee. We think such a proposal would also yield unpredictable outcomes.

The ambiguity of case facts revealed by our case studies illuminates the problems associated with asking a judge to assess likely benefits and costs when deciding whether to certify a damage class action. Under current law, a judge is not authorized to adjudicate the legal merits of a case when he or she rules on certification. Without such adjudication, we do not think it is at all certain that we could depend on judges who have different social attitudes and beliefs to arrive at the same assessment of the costs and benefits of lawsuits such as these. Judges presiding over class actions should use their summary judgment and dismissal powers, when appropriate—as many do now. Preserving the line between certification based on the form of the litigation (e.g., numerosity, commonality, superiority) and dismissal and summary judgment based on the substantive law and facts seems more likely to produce consistent signals to parties as to what types of cases will be certified than conflating the two decisions.

Requiring Class Members to Opt In Would Array Business Representatives Against Consumer Advocates

Some critics have proposed amending Rule 23 to require that those who wish to join a damage class action proactively assert their desire by opting in, thereby returning to pre-1966 practice. In consumer class actions involving small individual losses, requiring class members to opt in would lead to smaller classes that would likely obtain smaller aggregate settlements; in turn, class counsel would probably receive smaller fee awards. The social science research on active versus passive assent suggests that minority and low-income individuals might be disproportionately affected by an opt-in requirement, a worrisome possibility.

Reduced financial incentives flowing from smaller class actions would discourage attorneys from bringing suit. How one feels about this result depends on one's judgment about the social value of small-dollar consumer class actions, meaning that this proposal is unlikely to attract broad political support.

Prohibiting Settlement Classes Might Not Cure Any Problems

One of the most hotly debated issues pertaining to class action procedure during the 1990s was whether judges should be permitted to certify classes for settlement purposes only. Rule 23 makes no provision for such classes, although it does provide for certification to be conditionally granted and to be withdrawn if a judge subsequently decides it is inappropriate. But certification for settlement purposes had apparently become a common practice by the 1990s. Generally, such certification is granted preliminarily [13] after the class counsel and defendants have negotiated a settlement. In a recent decision, the Supreme Court found that Rule 23 permits such certification.[14]

Settlement classes have attracted two types of criticism, the first implicating the broad social policy question about when damage class actions should be permitted, and the second focusing more on class action practices. If judges certify classes for settlement that they would not agree to certify for trial, we would expect to see, over time, more damage class actions. Certification of settlement classes also has financial benefits for class counsel—for example, when a class is not certified until a settlement is preliminarily approved, the defendant will generally bear the notice costs. Settlement class certification might therefore encourage damage class action litigation by reducing plaintiff class action attorneys' financial risk.

Critics also argue that certification for settlement only facilitates collusion between plaintiff class action attorneys and defendants. The critics suggest that the former are at a strategic disadvantage when they negotiate a settlement without knowing whether the judge will ultimately grant class certification. Attorneys we interviewed argued to the contrary that uncertainty about the judge's ultimate decision on certification can disadvantage defendants as well. Some attorneys told us that the availability of settlement class certification has different import, depending on the evolution of the litigation. For example, in some lawsuits there has been extensive individual litigation or significant legal skirmishes prior to settlement. In both instances, class counsel and defendants know a good deal about the strength of the case by the time of settlement.

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[13] The judge grants preliminary approval for the purpose of noticing class members and inviting objections. Final approval is granted after a fairness hearing.

[14] *Amchem Products v. Windsor* , 117 S.Ct. 2231 (1997). The Court held that settlement classes must satisfy the same criteria as cases certified for all purposes, including trial, although the criteria may apply differently to settlement class certification. Some trial judges had previously held that the fact of settlement itself satisfied key certification criteria; the Court rejected this interpretation.

Our analysis suggests that the key to forestalling improper settlements is the amount and quality of judicial scrutiny, rather than whether a class is certified for trial or settlement only. Settlement class certification may enhance the risk that class counsel and defendants will negotiate settlements that are not in class members' best interests, but certifying a class unconditionally (i.e., for trial) will not automatically eliminate this risk. Conversely, when a lawsuit has been fiercely contested by the defendant, when a significant amount of factual investigation has taken place, and when class counsel have and are willing to spend resources to obtain a fair resolution, settlement class certification may facilitate settlements that are in the interest of class members as well as defendants.

Broadening Federal Court Jurisdiction Would Give Federal Judges More Control, but Would Not Address Other Important Issues

A fourth proposal for class action reform, which passed the House of Representatives in 1999, is to broaden federal court jurisdiction over class actions so that many class actions that are now brought in state court could be removed by defendants to federal court, where they would be governed by federal rules, practices, and judges.[15] Some critics of class actions believe that federal judges scrutinize class action allegations more strictly than state judges, and deny certification in situations where a state judge might grant it improperly. Others suggest that state judges may not have adequate resources to oversee and manage class actions with a national scope.[16] Still others suggest that if a single judge is to be charged with deciding what law will apply in a multistate class action, it is more appropriate that this take place in federal court than in a state court. The proposed new legislation is animated by these beliefs.

Because there are no systematic data on state court class actions, there is no empirical basis for assessing the arguments that federal judges are more likely than state judges to deny class certification, or that federal judges generally manage damage class actions better than state judges. But the current situation, in which plaintiff class action attorneys can file multiple competing class actions in a number of different state and federal courts, has other important consequences. Duplicative litigation drives up the public and private costs of damage class actions. Perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may take their law-

[15] H.R. 1875, 106th Cong., 1st Sess. (1999). Similar bills were introduced in the previous Congress.

[16] In its study of class actions in four district courts, the Federal Judicial Center found that federal judges spend about five times as many hours on class actions as on an "average" civil case. See Thomas Willging, Laurel Hooper, and Robert Niemic, *Empirical Study of Class Actions in Four Federal District Courts,* Washington, D.C.: Federal Judicial Center, 1996.

suit to another jurisdiction and another judge. Under most circumstances, none of the judges in the different courts in which the case is filed has the authority to preclude action by another judge as long as all cases are still in progress. A class action settlement approved by a judge in one court often cannot be overturned by another court, even if the claims settled in the first court are subject to the jurisdiction of the second court. If we look to judges to rigorously scrutinize class action settlements and attorney fee requests—as we argue below that we should—finding a way to preclude "end-runs" around appropriately demanding judges is critical.

Deciding how to handle duplicative multistate class actions is a difficult problem in our system of federal and state courts. In the federal courts, duplicative class actions can be assigned to a single judge by the Judicial Panel on Multi-District Litigation (MDL). [17] However, under the MDL statute, the transferee judge does not currently have the power to try all the cases assigned to her, but only to manage them for pretrial purposes. Although MDL transferee judges can and do preside over settlements of aggregate litigation, the fact that an MDL judge cannot try cases that were not originally filed in her court may undercut her ability to regulate class action outcomes. To address this issue, Congress could amend the statute that authorizes multidistricting to give the panel authority to assign multiple competing federal class actions to a single federal judge for all purposes, including trial. [18] Some states have already developed procedures for collecting like cases within their states, analogous to the federal multidistricting procedure. States could adapt these mechanisms, or develop new ones, to assign multiple, competing class actions within their state to a single judge for all purposes, including trial. But consolidating cases *within* federal or individual state courts would not solve the problem of competing federal *and* state class actions, which may be filed within a single state or in different states by the same or competing groups of class action practitioners. By facilitating removal of multistate class actions to federal court, the proposed legislation would provide a means of collecting duplicative class actions, at least for pretrial purposes, using the MDL provision. [19] But the proposed legislation leaves other important issues unresolved.

First, a key issue pertaining to multistate class actions that arises whether they are brought in state or federal court is what law to apply when class members' claims allege violations of different state laws. In some class

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[17] 28 U.S.C. §1407.

[18] In 1999, the House of Representatives passed a bill that broadens the transferee judge's authority to include trial and provides for the removal of related state claims to federal court for assignment to the transferee judge. But this bill applies only to mass personal injury claims arising out of a catastrophic event. H.R. 2112, 106th Congress, 1st. Sess. (1999). Similar bills were introduced in previous Congresses.

[19] However, the House bill passed in September is not limited to such multistate actions.

actions, defendants have argued and judges have agreed that when multiple states' laws are implicated, a lawsuit cannot meet the damage class action requirement that common issues predominate. If the proposed legislation were to be enacted into law, this might be the fate of some of the lawsuits that were removed to federal court. [20] Some past proposals for consolidating multistate claims include provisions for resolving choice-of-law problems,[21] but the proposed class action jurisdiction legislation does not address this issue.

Second, if many state class actions were removed to federal court, some federal judges could be faced with significant numbers of new and complex lawsuits. In a later section, we suggest that under the current jurisdictional rules additional resources may have to be provided to judges to ensure that they exercise their responsibilities under law to assess and approve the quality of class action settlements and determine appropriate attorney fees. The proposed legislation does not address the resource issue.[22]

Proposals to expand federal jurisdiction over damage class actions have evoked controversy because many believe that federal judges are now disposed against such suits. Hence the proposed legislation attracts support from business representatives and opposition from consumer advocates and class action attorneys. Perhaps the ingredients for a consensus approach to the problems of multistate class actions could be found by incorporating a solution to the choice-of-law problem in a proposal that expands federal jurisdiction over multistate class actions and provides additional resources for federal judges who preside over such lawsuits.

Prohibiting Mass Tort Class Actions Would Not Solve the Mass Tort Problem

Arguments over the costs and benefits of mass tort class actions have been hampered by the apparent belief of many legal scholars that, absent class certification, mass product defect and mass environmental exposure claims would proceed as individual lawsuits. Empirical research suggests, to the contrary, that when claims of mass injury exist, litigation usually either proceeds in aggregate form or dies on the vine. The important public policy questions relating to mass torts are not *whether* to aggregate litigation, but *how* and *when*.

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[20] In other instances, judges have allowed class counsel to try class actions under multiple state laws; the jury was asked whether the claims of different class members are valid under the particular legal standards that apply to those claims.

[21] For example, H.R. 2112, 106th Congress, 1st. Sess. (1999).

[22] In July 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to H.R. 1875 (and its companion Senate bill) in part because of concern about its probable impact on federal judicial workload.

Class action certification often puts class action attorneys in control of mass tort litigation, and these attorneys often adopt a strategy of settling the largest possible number of claims early in the litigation process according to a formula that only roughly distinguishes among claimants with injuries of differing severity. But mass tort litigation often involves significant numbers of claimants who would be better served by lengthier litigation (to develop a stronger factual basis for negotiation) and more individualized damage assessment. Plaintiff attorneys who aggregate mass tort cases informally argue that they are better able than the class action attorneys to achieve these ends. Class action certification also gives judges control over attorney fees, and may put class action attorneys in a position to obtain the lion's share of these fees. Plaintiff attorneys who aggregate mass tort cases informally enter into contingent fee agreements with each of their clients, who may pay the attorney the same share of any settlement that they would in individual litigation, notwithstanding any savings that may accrue to such attorneys because of the scale of the litigation. Conducted in the lofty terminology of due process, the public debate over mass tort class actions masks the power struggle between these two groups of attorneys: class action specialists and the tort practitioners who bring many individual cases at a time outside the class action structure. To date, insufficient empirical evidence exists to indicate whether mass tort claimants are better served by formal aggregation, through class certification, by informal aggregation, or by the somewhat ambiguous middle ground that MDL currently provides.

Increasing Judicial Regulation of Damage Class Actions Is the Key to a Better Balance Between Public Goals and Private Gain

Judges hold the key to improving the balance of good and ill consequences of damage class actions. If judges approve settlements that are not in class members' best interest and then reward class counsel for obtaining such settlements, they sow the seeds of frivolous litigation—settlements that waste society's resources—and ultimately of disrespect for the legal system. If more judges in more circumstances dismiss cases that have no legal merits, refuse to approve settlements whose benefits are illusory, and award fees to class counsel proportionate to what they actually accomplish, over the long run the balance between public good and private gain will improve.

Judicial regulation of damage class actions has two key components: settlement approval and fee awards. Judges need to take more responsibility for the quality of settlements, and they need to reward class counsel only for achieving outcomes that are worthwhile to class members and society. For assistance in these tasks they can sometimes turn to objectors and intervenors. But because intervenors and objectors often are also a

part of the triangle of interests that impedes regulation of damage class actions, judges should also turn for help to neutral experts and to class members themselves.

1. Judges Need to Scrutinize Proposed Settlements More Closely

Rule 23 requires judges to approve settlements of class actions, but does not itself specify the criteria that judges should use to decide whether or not to grant such approval. Case law requires that class action settlements be fair, adequate, and reasonable, but these elastic concepts do not offer much guidance as to which settlements judges should approve and which they should reject, and current case law and judicial reference manuals do not speak to key aspects of settlements. Based on our analysis, we think judges should:

- ask what the estimated losses were and how these losses were calculated
- exercise heightened scrutiny when settlements fall far short of reasonably estimated losses, even after properly adjusting for the likely outcome if the case were tried
- require settling parties to lay out their plans for disbursement, including proposed notices to class members, information dissemination plans, whether payments will be automatic (e.g., credited against consumers' accounts) or class members will be required to apply for payment—and, in the latter instance, what class members will be required to do and to show in their applications. Generally, in consumer class actions involving small individual losses, automatic payments to class members should be favored when lists of eligible claimants are available from defendants and when a formula can be devised for calculating payments.
- exercise heightened scrutiny when coupons comprise a substantial portion of the settlement value, and require estimates of the rate of coupon redemption
- require information on the estimated *actual* payout by defendants, taking into account all of the above
- exercise heightened scrutiny when claims regarding regulatory enforcement are put forward in support of a settlement, particularly when large dollar values are assigned to alleged injunctive effects. When inquiring about changes in practice, ask whether the instant class action is the first such suit against the defendant or one in a long chain of such suits, as later suits are less valuable as regulatory enforcement tools.

- exerciseheightenedscrutinywhentheamountoffeeshasbeennegotiated separately by class counsel and defendants prior to settlement.[23]

Judges' responsibility for the fairness, adequacy, and reasonableness of class action settlements should not end with their formal approval of those settlements. Judges should:

- require that settlement administrators report, in a timely fash ion, both the total amounts of disbursements to class members and the total costs of administration, and review these reports to determine whether rates of claiming and coupon redemption are in line with parties' projections at the time the settlement was proposed
- require, at least, annual reports of disbursements and costs when settlements are structured to provide payments over lengthy periods, as well as reports on the process of claims administration—including the numbers of claims accepted and denied, reasons for denial, use and outcome of appellate procedures (where provided), and time to disposition. When settlements provide for so-called cy pres remedies (payments to parties other than class members), the beneficiaries of those remedies and the amount of disbursement to them should also be reported. When alternative dispute resolution procedures such as arbitration or mediation are utilized in the claims administration process, judges should require reports on the selection and training of the arbitrators or mediators, payment provisions, and quality control procedures. These regular reports on claims administration should be available to the public for review.
- refrain from making cy pres awards to organizations with which they have a personal connection, to avoid the appearance of conflict of interest.

2. Judges Should Reward Attorneys Only for Actual Accomplishments

The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.

To avoid rewarding class action attorneys for dubious accomplishments, judges should:

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[23] In *Evans v. Jeff D.*, 475 U.S. 717 (1986), the U.S. Supreme Court held that class counsel and defendant could negotiate fees as a component of a settlement. In our book, we review alternative approaches to fee-setting that we believe would reduce opportunities for self-dealing.

- award fees in the form of a percentage of the fund *actually disbursed* to class members or other beneficiaries of the litigation [24]
- award fees based on the monetary value of settlement coupons *redeemed*, not coupons offered
- reject fee awards for illusory changes in regulatory practices, such as changes made in response to independent enforcement actions by public attorneys general or other public officials, individual litigation, or previous class actions
- award less, proportionally, when the total actual value of the settlement is very large
- award less, proportionally, when settlements are disbursed to non-class members—cy pres remedies—except in instances where direct compensation to class members is clearly impracticable
- use phased awards when projected payouts are uncertain and disbursements will be made over time
- require detailed expense reports.

3. Judges Should Seek Assistance from Others

To assure that key aspects of settlements are brought to light, judges should seek assistance from knowledgeable but disinterested parties.

Judges should:

- provide sufficient information and adequate time for objectors and intervenors to come forward and participate in fairness hearings
- be wary of "false helpers"—e.g., lawyers who claim to represent a particular set of parties, but whose real motivation is to negotiate a fee with defendants and plaintiff class action attorneys in exchange for disappearing from the scene. To help guard against collusion, payments made by one set of lawyers to another or by defendants to intervening or objecting lawyer sought to be disclosed to the judge.
- award fees to intervenors representing nonprofit organizations who significantly improve the quality of a settlement
- seek assistance from neutral experts in assessing claims of regulatory enforcement and valuing other nonmonetary settlement benefits
- appoint neutral accountants to audit attorney expense reports before making a final award of expenses.

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[24] In *Boeing Co. v. Van Gemert*, 442 U.S. 472 (1980), the U.S. Supreme Court held that class action attorney fees may be awarded on the basis of the negotiated size of a settlement fund, without regard to how many class members come forward to claim shares of the fund. We think this rule has perverse effects in damage class actions.

The additional costs of intervenors and neutral experts should be split evenly between the defendant and class counsel (from the latter's already-decided share of the settlement). All such costs should also be a matter of public record.

In order to improve class members' participation, judges also should:

- provide mechanisms for class members to receive timely information about the progress and outcomes of the litigation, and encourage class members' questions and comments
- require plain-English notices. Notices of the pendency of class actions should indicate what defendants are alleged to have done, to whom, and with what effects. Notices of settlements should describe, in detail, what eligible claimants will receive on average; what they will have to do to receive payments; what defendants are projected to pay, in the aggregate; what other activities defendants have agreed to undertake, if any; what plaintiff attorneys will receive, if fees have been negotiated during the settlement process; and whether any plans have been made for residual or supplementary payments to other organizations.
- consider appointing a committee of unrepresented class members in mass tort class actions, where class members frequently include represented and unrepresented parties, to serve as spokespeople for the latter.

THE ROAD TO REFORM

If judges already have the power to regulate damage class actions but not all of them use it fully, what stands in the way of stricter regulation? We see three obstacles: a discourse about judging that emphasizes calendar-clearing above all other values, a belief that court efficiency is measured in terms of dollars spent rather than dollars spent well, and a failure to systematically expose what occurs in damage class actions to public light.

Change Judicial Discourse

To promote stricter regulation of damage class actions, we need to change the discourse about the role of judges in collective litigation. Judges need to be educated that damage class actions are not just about problem solving, that the rights of plaintiffs and defendants are at stake, that responsibility for case outcomes lies not just with the class counsel and defendant but with the judge as well, and that what is deemed acceptable in one case sends important signals about what will be deemed acceptable in another.

Judges presiding over their first damage class action need mentors to guide them, not just about the process, but also about the incentives for self-dealing inherent in representative litigation and the strategies available to judges for countering them. Judges should be reminded of their authority to dismiss cases and grant summary judgment, when appropriate. At conferences of state and federal judges, participants should share with their colleagues techniques for ensuring that settlements they approve are appropriate and that fee awards are proportionate to real outcomes. Questions about how certification criteria apply to various types of lawsuits, at what stage of the process it is appropriate to certify cases, and whether to certify cases conditionally for settlement should be debated. *Most important, judges should be celebrated for how they carry out their responsibilities in damage class actions, not just for how fast or how cheaply they resolve these lawsuits.*

Increase Judicial Resources

Our recommendations for judicial management of damage class actions might well require an increase in public expenditures for the courts. Judges presiding over class actions may need more administrative support and legal assistance, as well as a reduced load of other cases, so that they can devote sufficient time to class action management. They may need assistance in identifying neutral experts and experienced settlement masters to assist them. Saving money on damage class actions by limiting judicial scrutiny is a foolish economy that has the long-term consequence of wasting society's resources.

In the short run, our recommendations also might increase the private costs of individual damage class actions. The price to settle the individual class actions that survive a more rigorous judicial approval process might be higher than the current average cost of settling damage class actions. But if the current costs of damage class actions reflect significant amounts of frivolous litigation and worthless settlements, as critics allege, these costs would diminish over the long run as such litigation is driven from the system, benefiting both defendants and consumers.

Open Class Action Practice and Outcomes to Public View

As with many other public controversies, the debate over damage class actions has created a lot of heat without shedding much light on the range of practices and outcomes in these lawsuits. Shining more light on damage class action outcomes would enhance judges' incentives to regulate class actions. Comprehensive reporting of class action litigation would provide a rich resource for policymakers concerned about class action reform as well as an unbiased information source for print and broadcast reporters.

To increase public information about class action outcomes:

- Judges should require public reporting of the number of class members who claimed and received compensation, the total funds disbursed to class members, the names of other beneficiaries and amounts disbursed to them, and the amounts paid to class counsel in fees and expenses.
- Courts and legislatures should find ways of facilitating broad public access to such data, for example, by making electronically readable case files available through the internet.

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History suggests damage class actions will survive for some purposes. Improving practice is a goal that protagonists can agree on and holds out the hope of achieving a better balance between public goals and private gain.

Notwithstanding the controversy they arouse, history suggests that damage class actions for some purposes will remain a feature of the American civil litigation landscape. Whether and when to permit specific types of damage class actions will be decided by Congress and the fifty state legislatures. But judges will decide the kinds of cases that will be brought—within whatever substantive legal framework evolves—by their willingness or unwillingness to certify cases, to approve settlements, and to award fees. Educating judges to take responsibility for class action outcomes and providing them with more detailed guidance as to how to evaluate settlements and assess attorney fee requests, ensuring that courts have the resources to manage the process and scrutinize outcomes, and opening up the class action process to public scrutiny will not resolve the political disagreement that lies at the heart of the class action controversy. But they could go a long way toward ensuring that the public goals of damage class actions are not overwhelmed by the private interests of lawyers.

LEGISLATIVE TESTIMONY

the Kansas Chamber of Commerce and Industry
The Unified Voice of Business

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HB 2258

February 13, 2001

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Judiciary Committee

by

Rylan Martin
Legislative Assistant

Mr. Chairman and members of the Committee:

My name is Rylan Martin. I am a legislative assistant with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to speak to you today in favor of House Bill 2258.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

As the law currently stands, the risk of exposure for a business involved in a class action lawsuit is great. Although the amount of damages that individual claimants may be entitled to may be relatively small, when multiplied by hundreds or even thousands of class members, an adverse judgment against a defendant could ultimately result in a multimillion dollar judgment against them. With that kind of risk, the potential for extortion of settlement is large, even when the defendant corporation stands a small chance of losing the lawsuit. The net result in such a case rewards the

attc y with fees that can be grossly disproportionate to the negligible amounts of recovery the cl. members are left with. In an example cited by the US Chamber of Commerce, in one instance of class action abuse the trial lawyers received fees totaling $8.5 million, while the class members who were to benefit from the "settlement" received a $93 debit to their mortgage escrow accounts.

House Bill 2258 seeks to ease some of the burden that results from class action litigation. One of the most important changes regards certification of the class. If a judge decides to certify the class, the case may ultimately determine the rights of the entire class, which has the potential to include thousands of people. If the judge decides against certification, the case will only decide the rights of the named plaintiffs, which could possibly leave some wrongfully aggrieved plaintiffs with no relief at all. This bill establishes an interlocutory right to appeal class certification decisions if the appeal is filed within ten days of entry of the order. This eliminates the problem of having to wait until an ultimate decision is rendered in the case before the class certification can be raised as an issue on appeal.

Another important provision of this bill allows a judge to open bidding for the representation of a class once certification has been granted. Presumably the attorney or law firm that submits the lowest bid would be awarded representation of the class. This would act to make large reductions in the exorbitant fees often recovered by class attorneys and would ultimately benefit the defendant who must pay those fees.

The bill also limits the scope of class action plaintiff's by requiring that one or more of the class members be a Kansas resident. This revision is an attempt to limit forum shopping by class attorneys. Currently, class action lawsuits may be filed in virtually any jurisdiction as long as the case is conducted in a way that protects the due process rights of everyone involved. This can force a court in one state to interpret laws enacted by another state's legislature. By limiting the scope of plaintiffs to Kansas residents, this bill corrects this problem.

When addressing the class action issue, the question may be asked whether class action lawsuits are much of a problem in Kansas. The answer is probably not. Kansas is not generally known for being a hotbed of tort litigation. However, as the law currently stands, the possible problems and devastating implications for defendant corporations are obvious. By favorably passing HB 2258, the Kansas legislature has the opportunity to take on a leadership role among states in the area of tort reform.

I would be happy to stand for any questions the committee may have.

TESTIMONY OF JOHN C. TILLOTSON*,
ATTORNEY, LEAVENWORTH, KANSAS,
RE: HOUSE BILL #2258

I. UNIFORM LAWS AND PROCEDURES

The adoption of Federal Rule of Civil Procedure 23, followed by implementation of K.S.A. 60-223, embodying the same legal principles and virtually identical to the federal procedure, is one more example of the creation of uniform procedures and practices to permit the evolution of case law and management techniques to protect the substantive interests of the citizens of various states in our federal system. H.B. #2258 substantially modifies Kansas class action procedure to make it unique. Such modifications make the years of precedent, wisdom and experience of the courts of sister states and the United States irrelevant.

II. SPECIFIC CRITIQUE

A. New Section 1. This section, which allows the selection of class counsel and the bidding therefor, not only violates the attorney/client and fiduciary relationship of representative parties as to the class but basically creates a tremendous disincentive to the filing or organizing of any class action. It is difficult to conceive of any lawyer taking the time and resources to investigate, organize and file a class action without any assurance of participation in the prosecution of that action. Fee allowance in class action cases are controlled by the court anyway.

B. Section 2. This section provides for the maintenance of a class action by residents of the state of Kansas only. Why should a class of non-resident plaintiffs versus a defendant over whom Kansas courts have jurisdiction be excluded from class treatment, except to limit the efficacy of the class procedure?

Section 2 embodies some basic principles of class actions, i.e., numerosity, commonality, typicality and adequate representation. The traditional analyses and tests are now supplanted in part by new definition requiring a hypothecation of what a jury might do and, therefore, injects merits determinations into class certification determinations. Subsection 5, which causes identification of class members to be defined in the petition, is virtually not possible in many cases at the filing stage.

C. Section 2(b)(2). This section requires that the party seeking to maintain the class action should not seek monetary relief. The effect of limiting this potential remedy could bar a substantial number of class actions. What is the meaning of the term "monetary relief"? Does this mean money to be paid to the plaintiffs, to the class representatives, to the class members or money expended by the defendant to correct wrongdoing?

D. Section 2(b)(3). This section, by reference to what a jury might reasonably determine with respect to the predominance of common issues, again injects merits determinations into the certification decision-making process.

E. Section 2(b)(4)(C). This section requires a certification decision speculating as to whether the probable amount which might be recovered would be disproportionate to the expense of recovery as a grounds for consideration for denying class certification. This proposal removes one of the most urgent needs for the availability of class actions, i.e., to make an economic class procedure available to individual claimants who would otherwise have absolutely no financial incentive to proceed with an individual claim.

F. Section 2(c)(2)(3). These provisions provide for a mandatory memorandum decision by a court determining class certification describing all evidence to support such determination and further require that the court find that the proponents have proffered evidence meeting a standard of "clear and convincing" prior to certification. The combination of these two provisions require the Court to apply the highest level of proof in a civil case in order to reach a certification decision. This is a higher level than the plaintiff class representatives are required to maintain in order to win the case! The obvious purpose of these combined provisions are to provide the most difficult level of proof for class certification and the easiest possibility for reversal on an interlocutory appeal.

G. Section 2(c)(4). This section provides for a rebuttable presumption against the maintenance of a class action as to claims which the members would have to show knowledge, reliance or causation. This provision essentially rules out class action treatment for all fraud situations (reliance) and perhaps many negligence cases (causation), i.e., environmental damage or the like.

H. Section 2(c)(6). These provisions appear to require the conveying of notice to potential class members of "financial consequences for the class" and counterclaims or intent to counterclaim against members of the class. This is an appalling suggestion implying threats against individual class members.

I. Section 2(f). Discovery of class members is traditionally restricted only to limited discovery pursuant to specific direction of the court. See Manual for Complex Litigation 3d, Federal Judicial Center (1995). The language of the amendment proposes to broaden the possibility of class member discovery. Broad discovery essentially defeats the entire idea of class action litigation by representative parties and results in the loss of the efficiencies and cost savings of the class action process.

J. Section 2(g). Appellate jurisdiction is provided for class action certification decisions of the district courts. This is a new provision supplanting present law which requires certification by the trial court that the question sought to be raised are controlling of the entire issues and may be dispositive of the case. The right to an interlocutory appeal without substantial basis certified by the trial court will result in delay of twelve to eighteen months, constituting substantial hurdles to the effectiveness of any class action procedure.

III. THE CONCEPT OF CLASS ACTIONS.

The concept of class actions, respectfully, is not new and is not a creature of rule-making or of statutory provisions. Class action procedures have derived from the use of inherent powers by courts to manage court dockets in an efficient and economical way. It is suggested that severe restrictions upon the exercise of the inherent power of the courts to manage court business may raise sticky issues with respect to separation of powers.

*Mr. Tillotson has been lead counsel or co-lead counsel in the following class action cases: 1) Keystone Camera/Pioneer Financial, Leavenworth District Court 1970; 2) Aluminum phosphide class action litigation, U. S. District Court, District of Kansas, 1994; 3) Sprint class action litigation, Leavenworth District Court 1999; and 4) Williams Brothers Communications class action litigation, Leavenworth District Court 2000.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the House Judiciary Committee

FROM: Deborah McIlhenny
Kansas Trial Lawyers Association

RE: 2001 HB 2258

DATE: Feb. 13, 2001

Chairman O'Neil, and members of the House Judiciary Committee, on behalf of the Kansas Trial Lawyers Association, thank you for the opportunity to appear before you today. I am Deborah McIlhenny, a lawyer practicing with the firm of Hutton & Hutton in Wichita.

HB 2258 proposes sweeping changes to the Kansas class action rule. KTLA opposes this bill because we believe these changes will have a dire consequences on the ability of the average citizen to collectively hold wrongdoers accountable for their actions. If passed, the technical infirmities of HB2258 would:

- deprive many Kansans of their constitutional right to access to the court;
- invalidate an proven and effective means to create good public policy; and
- provoke litigation and overburden an already swamped court system.

Class action originated with the "little guy" in mind, those who might recover little in the way of money, but who deserve to be compensated for the harms done to them. It has evolved into a federal and state statutory tool with very stringent rules for use. K.S.A. 60-223 is practically identical to its federal forebear. As a result, Kansas courts look to federal case law for help with interpretation of the rule. The principle driving class actions is to save time and money, and promote uniform decisions.

The class action serves two vital purposes: constitutional and public policy. It ensures that the "little guy," who has suffered a harm similar to others from a defendant they share in common, gets a day in court. It also promotes public policy by correcting a defendant's bad behavior on behalf of everybody in the class; establishing standards for corporate behavior socially acceptable to society as a whole; and efficiently utilizing judicial resources by streamlining litigation.

Kansas is not a hotbed for class action litigation. Since 1963, when Kansas adopted K.S.A. 60-223, only approximately 95 class actions have reached the appellate courts. Very few of those dealt with whether or not a case should be a class. While the numbers of class actions filed may be much higher, the low number and the issues decided in those

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reaching appellate courts indicates that Kansas law is working very well to ensure that only qualified cases become class actions.

Kansas class actions benefit Kansans of all sorts, such as taxpayers challenging the State income tax statute, nursing homes seeking proper reimbursement for its needy patients so as not to have to dilute quality care for the elderly and infirm, oil and gas royalty interest holders seeking proper calculation of their royalty payments, children with emotional and psychiatric needs seeking proper treatment from their custodian S.R.S., cemetery plot owners seeking peace and tranquility from the owner of the cemetery, and sweet corn farmers seeking recovery in a market depressed by the impact of genetically modified corn. Without class action, many of these Kansans would not have been able to afford to bring their individual claims to court. Such is the plight of the "little guys" who would have been caught in the cost-benefit Catch-22 dilemma: they need help but would not recover enough to pay the costs of seeking help.

Unfortunately, the technical infirmities of HB2258 will eradicate class action in Kansas. The end result will leave these "little guys," stuck in the cost-benefit Catch-22, without their day in court. HB2258 will remove from the State, an efficient and effective means to correct bad behavior and establish standards for socially acceptable behavior. Finally, HB2258 will encourage individual lawsuits, further straining the court system and wasting money of the parties, courts, and, ultimately, the taxpayers.

Thank you very much for the opportunity to express KTLA's grave concerns and strong opposition to this bill. We urge the committee to reject this bill. I would be happy to answer any questions that you may have.

Addendum to testimony by the Kansas Trial Lawyers Association
HB 2258 -- House Judiciary Committee
2/13/2001

Technical Problems of HB2258

New Section 1. (a)-(e) -- Criteria for certifying a class and proposed bidding process. This seciont raises more questions than it answers. It deviates significantly from K.S.A. 60-223 and Fed. R. Civ. P. 23; there is no State or federal case law that explains it. Thus, it will trigger litigation for years to interpret and clarify it and determine its application under differing circumstances.

First, one of the criteria for class certification is adequate counsel, codified in Fed. R. Civ. P. 23(a)(4) and K.S.A 60-223(a)(4). This technical requirement has been interpreted *ad nauseum* in State and federal court. In fact, the court considers the very factors listed here: counsel's experience with similar litigation, expertise generally, size and staffing capabilities (if relevant), and any other matters that the court may deem pertinent. While its language may reflect case law, the problem is that the provision opens the bidding process after the court has determined that counsel is adequate.

Second, HB2258 makes the bidding process absolutely arbitrary: any person, party, or the court can ask for this procedure. In fact, the court has full discretion to allow or not allow the process.

Third, the provision allows for "reasonable fees" but sheds no light on how a replaced firm gets paid, by whom, and when. Does the defendant pay those fees? Do plaintiffs? Does the replaced firm get paid upon replacement, end of the trial court litigation over which it no longer had control/involvement, or after appeal? If the theory of the case is novel, requiring extensive research (which the petition certainly would reflect), can some other lawyer come in and just buy that work at a "reasonable fee"? What is the cost of work product? What is the impact of HB2258 on work product doctrine?

Fourth, and possibly most importantly, this provision interferes with the freedom to contract and the resulting fiduciary relationship between counsel and client. A fiduciary relationship is not a position that should be put up for bid. Nor should clients be forced to accept counsel they did not choose.

Amended Sec. 2.a.1. – Restricting classes to residents of Kansas. These amendments offend the constitutional right to be heard and will encourage individual, duplicative lawsuits to satisfy that right. Duplicative actions waste money.

Restricting all classes to residents of the state of Kansas will promote removal of class actions from State court into federal court based on diversity jurisdiction where the defendant is not a Kansas resident. Yet, only those class members with an individual financial stake in the case exceeding $75,000 will be allowed to remain in a class action

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removed to federal court. The remaining members of the class must seek their recovery in State court, thus, creating at the very least one more lawsuit between the parties on the same issues.

Further, restricting all class members to Kansas residents may exclude plaintiffs who have viable claims but no longer reside in Kansas, thus, denying them their constitutional right to a day in court or encouraging further litigation. For example, I had lived in County X since birth. I underwent a blood transfusion at the local county hospital in November of 2000. Immediately thereafter I developed a near fatal bacterial infection from the transfused blood that required expert care, so I permanently moved to a community outside Johns Hopkins University to obtain it. A routine compliance audit of the County X hospital revealed the existence of a defective filter system for all transfusions performed after January 2000. Several plaintiffs bring a class action against the hospital, but I am excluded because I no longer reside in Kansas although I have a viable claim for my injury. Under HB2258, I must file another lawsuit that duplicates the class action just to have my day in court. Absent this provision in HB2258, my claim would be included in the class.

Multi-state class actions are virtual relics. Variations in state laws have been used to prevent certification of "nationwide" actions on the grounds that such actions are not manageable.

This provision will trigger litigation for years challenging its constitutionality and to interpret and clarify it and determine its application under differing circumstances.

Amended Sec. 2.a.2. – Changing the definition of "common questions of law or fact. This provision may be construed as a requirement that all members have exactly identical claims, which has never been the rule. Does this provision extinguish the court's power to manage the class with subclasses, the claims or relief of which may vary from the primary class in some minor but meaningful way? If so, it seriously undermines the court's power.

This change also has the potential to trigger years of additional litigation to interpret, clarify, and determine its application under differing circumstances.

Amended Sec. 2.a.5. – Identifying members of a class. This amendment seeks to permit the identity of all class members before the merits of the case are considered. This provision will encourage duplicative lawsuits and may violate public policy, especially where defendants have exclusive control over the class members' identity and cannot release the information for privacy reasons (for example: a banking or insurance case). In these cases, it may be necessary to resolve merits issues before the court will require disclosure of names. Yet, this provision demands that identity come before merits.

Defendants who are not obligated to protect privacy concerns, nonetheless will exploit this provision to prevent class action. While defendants may avoid a class action, the end result may be unnecessarily costly duplicative actions filed by individuals who would otherwise have been in a class.

This provision also will trigger needless litigation to interpret and clarify and determine application of the provision under differing circumstances. Does "identification" mean actual identity or does it refer to the words of the class definition? For example, would "identification" mean the expression "All owners of 1965-1967 Ford Pintos manufactured with metal gas tanks mounted within 10 inches of the rear bumper" or the actual names and addresses of these owners? The expression may be useful and would give the court discretion to specify, certify, and manage a class. Yet, some members of the class may never be identifiable during the litigation. When the case is over, the court's rulings and findings will prevent those who are never identified from attempting to seek individual relief. As well, those who move, or transfer, sell, or bequeath property may never be identifiable, especially in the early stages of litigation.

Amended Sec. 2.b.2. – Injunctive Relief. This section relates to classes that usually ask for a ruling that makes defendant do or not do something. This provision would forbid this type of class from seeking any kind of monetary relief. Yet, this restriction runs afoul of long-established federal law that allows these classes to seek insignificant monetary relief.

What is the meaning of "monetary relief"? Consider: If Fred, an imprisoned criminal prosecuting an appeal, get a court order entitling all state criminal defendants to use prison copiers in the course of legal appeals, has Fred sought relief with monetary value? If Jane obtains a declaratory judgment that determines that all second mortgages issued by lender X are null and void, has Jane sought monetary relief? If Dick, one of many wrongfully terminated employees, obtains a declaratory judgment that the corporation must reinstate the employees with back pay per federal law, would Dick have sought monetary relief? Under this provision, back pay would invalidate the class. Would the court's declaratory judgment allowing monetary relief in the form of back pay be invalid, then, <u>after</u> the class was certified and the case came to a close?

Amended Sec. 2.b.4.C. – Cost Benefit Analysis to Justify the Class Action. The amendment mandates the cost-benefit Catch-22 that strips Kansans of their right to their constitutionally guaranteed day in court. This provision requires the court to find that the recovery will be large enough to justify bringing the case as a class action. Yet, all Kansans have a right to their day in court, regardless the amount of recovery.

For example, for the past five years a super-store discount retailer overcharged by $15 every Kansas purchaser of its brake services. No single consumer could find counsel to take so small a case to court. Unchecked, the discount retailer would continue to rip-off

Kansas consumers. Over a five-year period, however, the discount retailer could have overcharged several thousand Kansans. Class action would be the most efficient means to correct the discount retailer's bad behavior and to recover the overcharges, particularly where the plaintiffs have minor monetary claims. Yet, under HB2258, these Kansans would likely lose their day in court and the State would have little chance to correct this kind of bad behavior.

Amended Sec. 2.c. -- Creating the presumption against class action. This presumption flies in the face of long-established federal law that tells judges to certify a class where a question of certification exists and to exercise discretion later to decertify the class if circumstances so dictate. This provision deviates significantly from K.S.A. 60-223 and Fed. R. Civ. P. 23.

This provision places a higher burden on proponents of a class to show that the circumstances meet the conditions of the Rule than it puts on opponents to show that the circumstances do not. Proponents must produce "clear and convincing" evidence. The "clear and convincing" standard is just one step below "beyond a reasonable doubt." If equated to percentages, "beyond a reasonable doubt" might be 95% or higher. "Clear and convincing" would be roughly 85%. "Any showing" would be 51%. Further, this presumption strips the court of its discretion to consider the totality of the circumstances in each case.

Provision 2.c.4. and 5., read together, effectively eradicate class action altogether, which has expensive implications. Provision 2.c.4. states that the presumption against class action exists in any case where the individual members must prove causation. Provision 2.c.5. requires that all members must prove that the defendant caused their harm and the extent of that harm. Causation is an element in every case filed. Read together, then, these two provisions tell every practitioner and the courts that, as a matter of legislative fiat, no class action may exist because every member must prove causation and wherever members must prove causation, there is no class action. By wiping out class action, this provision will force each member of a class to bring individual cases to prove the same matters over and over again against the same defendant.

As a result, Provisions 2.c.4. and 5. will sink the court system, wasting enormous resources of all involved, and jeopardize the constitutional rights of the "little guys" who would be caught in the cost-benefit Catch-22.

The language in Provision 2.c.4. speaking to cases alleging fraud and reliance is mere repetition of current practice. Practitioners in Kansas know that fraud class actions, and the showing of reliance necessary to prove them, are unworkable.

Amended Sec. 2.c.9. – Certifying a class for resolution of a specific issue. This amendment strikes the court's discretion to certify a class as to specific issues, for example whether a defendant caused the harm ("liability") or how much harm the defendant caused ("damages"). This provision encourages repetition, conflicting directly

with provision (d)(1) which puts the onus on the court to prescribe measures to prevent undue repetition.

What could be more repetitious – and expensive – than to have 5000 taxpayers each parade before the court the same evidence, challenging the constitutionality of the state income tax statute? That was the scenario in *Peden*, where one class action resolved the issue of constitutionality without repetition. Under this provision, however, the *Peden* court would had to have heard all 5000 taxpayers' arguments individually. The *Peden* class action was decided in 1996. Had all 5000 taxpayers brought individual cases, the litigation probably would be ongoing yet today.

Amended Sec. 2.f. – Discovery. This provision references "representative parties," "intervenors," and "other class members." "Representative parties" and "intervenors" describe the plaintiffs usually found in any class action. Under current federal and state law, representative parties carry the burden of discovery in the spirit of the class action rule and for the sake of economy and efficiency. Unnamed plaintiffs usually do not participate in discovery. This provision raises questions: exactly who does "other class members" refer to -- unnamed plaintiffs, defendants, or somebody else? What discovery procedures does the provision reference? By what process do "other members" submit to discovery? Who requests the discovery from "other members" . . . the court, defendant, other plaintiffs? Under what circumstances?

The Implications of HB 2258

HB2258 is a major departure from Fed. R. Civ. P. 23 and K.S.A. 60-223. Case law does not exist to explain it. If passed, a number of the changes proposed in this bill will trigger litigation for years to interpret and clarify its provisions and determine how, if at all, they apply under differing circumstances. The questions surrounding interpretation and clarity of a number of changes in the statute will increase litigation costs for the parties, counsel, and the courts. Taxpayers pay the ultimate price.

If passed, HB2258 virtually will eliminate class actions in Kansas and jeopardize the constitutional rights to a day in court for the "little guys" whose claims, even if fully recovered, would not cover the expense to bring the claims.

Moreover, HB2258 would deprive the State of effective means to create good public policy, to correct bad behavior, establish standards for good corporate behavior generally, and save money.

For these reasons, the Kansas Trial Lawyers Association opposes HB2258.

Addendum to testimony by the Kansas Trial Lawyers Association
HB 2258 -- House Judiciary Committee
2/13/2001

Examples of How Recent Kansas Class Action Cases Would Have Been Affected by HB 2258

Sternberger v. Marathon Oil Co. established in one efficient action the proper way to calculate royalty payments for oil and gas royalty interest holders in Kansas and three other states. Under HB2258, the case would not have been a class action because each plaintiff would have had to prove that the oil company caused their losses; all 38 Kansans would have been forced to bring individual claims, providing that recovery would justify the expense of suit; and because individual cases even on the same issues tend to return different results, the State would have been unable to correct the bad behavior of the oil company as to all 38 Kansans consistently from case to case. Thirty-eight individual claims would have overburdened the court system, back-logging the court's schedule, and wasting taxpayer money and straining other judicial resources.

HB2258 would have deprived the children who sought from S.R.S. emotional and psychiatric care in *Sheila A. v. Whiteman* of their constitutionally guaranteed day in court. First, class action would not have been an option because each child would have to prove that S.R.S. had caused their harm. Second, each child would have been forced to bring an individual claim; however, those claims were not for money, thus, they would be caught in the cost-benefit Catch-22 where recovery would not pay the expense of suit. Some of these children in need would never have been able to bring suit or obtain care. Third, the individual cases would have brought about differing results, thus, the State would not have been able to establish consistently the proper placement procedures as to all children in State care.

HB2258 would have prevented the cemetery plot/grave/mausoleum crypt owners in *Connolly v. Frobenius* from bringing a class action against the cemetery corporation that was disrupting the peace and tranquility of the cemetery where they grieved their dead. Here again, plaintiffs did not seek monetary recovery to justify the expense of bringing individual suits. Counsel would charge by the hour for such a case. Assuming the owners could afford it, they would have been forced to bring individual duplicative cases in an attempt to stop the corporation from disrupting the peace.

In *Peden v. State*, the State resolved the common issues of liability for 5000 taxpayers challenging the State income tax statute. HB2258 would have forced the taxpayers to file individual duplicative actions (because they had to prove causation) and the State to defend against them all, ironically, at taxpayer expense. Those 5000 cases would have overwhelmed the judicial system and be ongoing even today.

Finally, in *Country Club Home v. Harden*, under HB2258 the nursing homes would have been forced to bring individual actions to challenge the regulations that determined their reimbursements for services rendered to needy individuals. In all probability, multiple cases would have slowed down recovery. It would have been the individuals seeking care – those who could least afford it – who suffered from the delay.