THE CLASS ACTION CON GAME

by Lawrence W. Schonbrun

A LITTLE NOTICED CHANGE IN THE 1966 Federal Rules of Civil Procedure is currently having serious ramifications for businesses, and by extension, consumers. On the recommendation of the Federal Judicial Conference's Advisory Committee on Civil Rules, Congress expanded the ability of attorneys to prosecute class action lawsuits. Previously, the law had required that all plaintiffs in a class action suit be identified and demonstrate a willingness to participate in the litigation. But the 1966 change gave attorneys, through the use of token plaintiffs, the ability to sue on behalf of limitless numbers of unknown persons. The result has been an explosion in class action lawsuits.

At a recent hearing before the Advisory Committee on changes to Rule 23, Ford Motor Company's general counsel observed that his company, which in the past might have fought a half-dozen class actions suits at a time, as of 1997 faced nearly seventy such actions. Most suits have little to do with recovering meaningful damages for plaintiffs injured by the misconduct of others. Rather, they encourage lawyers to pursue what Federal Appeals Court Judge Richard Posner has described as "blackmail settlements," that obtain millions of dollars in attorney's fees from enterprises with deep pockets. The potential of those suits to affect the American economy rivals the power of Congress and the President. It is essential to understand how the legal system currently is malfunctioning if a modicum of restraint and justice is to be restored.

COURTS AS JUDICIAL LABORATORIES

Apart from controversial criminal trials, no area of law has captured the attention of the press more than the spectacle of American industries forced to fork over not merely millions, but billions of dollars to settle class action lawsuits. The recent $369 billion tobacco industry settlement represents a watershed for such settlements. However, one judge over a decade ago foresaw the direction that class actions were headed when he observed:

> During the Hundred Years' War, Europe was nearly brought to its knees by roving bands of mercenaries who pillaged and robbed and left a barren landscape in their wake. The modern equivalent of these mercenaries is the plaintiff's attorney in . . . class actions.

During the 1960s, the legal profession and the judiciary played a leading role in eliminating institutional racial segregation in America. Legal academia promoted the notion that giving lawyers and judges greater power in American society would allow them to reform other domestic social ills.

Class action lawsuits resolved the problem that the likely compensation for real injuries caused by the misconduct of others might be more than offset by the high cost of litigation. They were meant to allow individuals with separate but similar claims to pool their efforts in one representative suit filed on behalf of many plaintiffs. Prior to 1966, individuals had to choose affirmatively to be a party in such a lawsuit, and only parties could share in the recovery. However, the more permissive procedural changes allowed lawyers to sue whenever they believed that a group of individuals was harmed, merely by suing on one individual's behalf. The changes also required that class members be notified "as soon as practicable" after the case was filed, thereby allowing class members to learn about the existence of the case and permitting those who wished to pursue their claims independently to "opt-out" and sue separately. The class action would then proceed on behalf of all other class members in absentia.

The ability to sue on behalf of groups of unknown individuals has revolutionized the dynamics of litigation. Class action lawyers and their allies have fostered the exaggerated belief that wealthy corporations hire large law firms and give them unlimited budgets to defeat the justified claims of poor plaintiffs. The modern class action suit is buttressed by modern society's ethos that others are responsible for one's misfortunes and that someone with money, whether responsible for the misfortune or not, should compensate the unfortunate. As a result, Americans have replaced the fear of God with the fear of being sued.

The class action suit is not regulation in the sense of big, inefficient bureaucracy. Rather, it is the deputation of the nation's lawyers as "bounty hunters" to sue whomever they can legally assert has engaged in conduct injurious to large

Lawrence W. Schonbrun is a nationally recognized authority on the issue of attorney's fees in class actions. He has appeared on 60 Minutes, 20/20, *and recently testified before the U.S. Congress on the issue of attorney contingency fees. His work has been chronicled in* The Wall Street Journal, Barron's, *and the* Washington Post.

groups of individuals. In practice, it amounts to the lawyers suing whomever they believe vulnerable to a settlement and capable of paying large attorneys' fees.

CLASSIC CLASS ACTION CASES

In many class actions, the supposed victims gain little. Sometimes, the victims end up losing even more money as a result of the lawsuit. The only clear beneficiaries of class actions are the lawyers. A review of several cases highlights the phenomenon.

In 1989, attorneys sued a San Francisco title company because its fees included a $25 charge for a rarely performed physical inspection of the property. (If the company had included the charge as a service fee, there would have been no grounds for a lawsuit.) The company settled the case by setting up a $4.9 million fund representing the revenue from the inspection fees. Class members who filed a written request for a refund received $15. Those who did not file a request received additional insurance coverage.

According to information provided by a statistician retained by plaintiffs' counsel, .05 percent of class members would likely need the additional insurance coverage, and for those who did need it, claims would average $20,000. The lawyers devoted the largest amount of legal research time in the case to preparing their attorneys' fee applications. Out of the fund, class members actually collected refunds of several hundred thousand dollars. The lawyers received a million dollars in fees, and the defendants got to keep over $2.5 million, purportedly to pay future insurance claims. Twelve claims were made for additional insurance coverage within six months after the settlement was announced.

In 1988, class action lawyers sued the Mt. Konocti Water Company for overcharging lot owners on their water bills in a Lake County, California subdivision. The court ordered the water company to return $1.2 million, but the company only had $500,000 in assets. The real problem, however, was that the water company was self-insured and owned by the owners of the lots. As a result of the judgment, the water company went into bankruptcy, requiring it to pay over $3 million in attorneys' fees for the settlement and a plan of reorganization. The original plaintiff received $300 as a result of the class action settlement, but will owe $6,000 for the cost of the reorganization.

In 1993, class action lawyers settled a lawsuit in Alabama against the Bank of Boston. The bank had allegedly taken excessive escrow fees from customer accounts to cover taxes and insurance payments. As part of the settlement, the bank was permitted to charge class member accounts for the costs of the litigation, including attorneys' fees. One objecting class member got a $2.19 credit on his account and was charged $91.33 for the cost of obtaining the credit.

In 1993, class action lawyers sued a large California bank, claiming that it was collecting an excessive late fee penalty of $3 to $5 dollars and overlimit fees of $10. The bank admitted that it had not done a study to determine whether its fees reflected the actual cost of handling late payments. As a result of the lawsuit, the bank instituted such a study and determined that costs associated with late payments exceeded fees collected. It returned $1 million in overlimit fees, but has raised its late fee charges to future customers. The attorneys who brought the lawsuit negotiated a $450,000 attorney payment. As a result of that type of litigation, several California bank credit card operations have moved to neighboring states. Effective 1995, the California legislature allows credit card issuers to impose late fees of up to $15.

In 1992, class action lawyers sued VIACOM Cable Company, claiming that a $6 late fee charged in several Northern California communities was excessive. The judge concluded that the method used to calculate the late fee at $6, while not perfect, was reasonable. The judge nonetheless approved a settlement reducing the late fee for customers who paid within fifty days of the payment due date, but increasing for those who paid after the fifty day period. The lawyers received $514,000 in attorneys' fees for bringing the lawsuit.

In 1994, in Los Angeles, California, after learning about a lawsuit by Compaq Computer against Packard Bell Corporation, class action lawyers sued Packard Bell for selling computers containing recycled and reconditioned parts in new computers. The suit claimed that the practice reduced the value of computers sold to the general public. The case was settled; the company agreed to place language in its instruction manual for a three-year period with words to the effect that the computer "may contain used or reconditioned parts." In seeking approval of the settlement, both sides agreed that recycled parts have lower failure rates and thus are, in fact, better than new parts. The lawyers received $3.95 million in attorneys' fees for a settlement negotiated within two months after filing the complaint.

In 1986, class action lawyers sued several major banks in San Francisco, California, for conspiring to fix credit card interest rates at 18 percent. The evidence of the conspiracy (in addition to purported statistical probability) came from a Southern California college professor who claimed that an employee of one of the banks, since deceased, told him of a meeting he had attended twenty years earlier. Reportedly, bank representatives discussed interest rates. (The professor's motives, it was found, were suspect; he had sued one of the banks unsuccessfully for allegedly stealing his idea for a debit card.) Three banks settled for $55 million (plaintiffs had alleged nearly $2 billion in damages), of which $7 million went to attorneys' fees. The professor himself opposed the settlement as inadequate. A fourth bank refused to settle and a jury, after ten weeks of testimony, found in the bank's favor. One juror stated that the plaintiffs "had no case." The judge, commenting on the plaintiffs' expert witness, said "I would never let this man testify at a criminal trial . . . and anyone who did would be worthy of discipline."

In 1995, in Portland, class action lawyers sued a west coast lumber company on behalf of homeowners because the company's wood siding was subject to premature deterioration. It was later disclosed that the company itself arranged to be sued in a

national class action. The company was seeking to avoid numerous individual lawsuits. Although the settlement could theoretically cost the defendants up to $425 million, collections from class members almost always are less than the total settlement amounts made available. The average payout per class member to date has been $6,300, in spite of the fact that a complete home residing can cost between $10,000 and $20,000. The class action attorneys received $26.2 million in attorneys' fees.

In 1993, class action attorneys sued General Chemical Corporation over an accidental release of sulfuric acid from its facility in Richmond, California. At its highest level of concentration, the amount of sulfuric acid released in the one-time event was a small fraction of the daily exposure limit allowed by California safety laws. Plaintiffs' lawyers hired "representatives" to scour the neighborhood. They successfully signed sixty thousand clients. Thirty thousand residents flooded local hospitals but treating doctors claimed that very few had any significant injury. It was reported that neighbors in adjacent communities came to the area in order to become clients in the litigation. The chemical firm's insurance company settled the case for $180 million, $50 million of which went to the lawyers. The average payment to class members was under $1,000.

OUT OF CONTROL ENFORCEMENT

An analogy with another area of the law helps clarify the kinds of incentives that currently operate in the class action arena. Those guilty of breaking the speed limit are subject to police arrest and prosecution by the state. Imagine a new law creating a right for all drivers, passengers, and bystanders to sue a speeder for reckless endangerment of their lives and for mental distress. Assuming the speeder's automobile insurance covers such claims, lawyers bringing suits would share in the money claimed on behalf of each person allegedly "injured" by the speeding car. Under such a law, analogous to class action practices, any lawyer that could find a representative plaintiff could sue the speeder and seek to represent all other "victims."

The rationale for such a law might be to encourage private persons to help rid the nation's roads of dangerous drivers. In practice, the attorneys would simply review police blotters to find out who had been cited for speeding. The lawyers would then locate someone in the area at the time to be a representative plaintiff, and sue on behalf of everyone in the area who might have been endangered or traumatized by the speeder. Naturally, they would select speeders with the most expensive cars—those likely to have the largest insurance policies and the most personal assets.

LAWYERS MAKING LAWSUITS

In order to identify potentially successful class action suits, law firms engage in a sophisticated form of ambulance chasing. Everyday, television and radio programs, newspapers, and magazines, report on companies injuring people. Everyday, an elite group of thirty to fifty class action law firms scour the media for the best companies to sue. The lawsuits filed by one firm are photocopied, slightly altered, and then refiled by other law firms. Dozens of firms may file lawsuits against a company or an entire industry. Typically, large class action law firms have lawsuits pending against scores of companies to hedge their risk of losing any one case.

More often than not, the lawyers appear in court and advise the judge that they have worked out an arrangement to handle the case together. Between one and four law firms will seek to be appointed lead counsel. The lead counsel divides the work among the lawyers thereby determining which firms will reap the largest financial rewards. Typically, the largest law firms, those that can finance litigation long-term, control the case as lead counsel. Smaller firms that cannot afford to go months or years without payment of their fees assume secondary roles. The lead counsel selects the law firms that will draft pleadings, review documents, perform legal research, prepare experts, and negotiate a settlement.

In the *In re California Micro Devices Litigation* in 1995, federal judge Vaughn Walker refused to allow the arrangement between several law firms and insisted that the firms submit competing bids to act as lead counsel. Only two bids were submitted and the court found that only one was serious. Judge Walker observed that "[The] plaintiffs' securities class action bar has become a cartelized industry."

Since defense costs are open-ended, the potential liability is huge, and the outcome of litigation is unpredictable, defendants usually are willing to discuss settlement soon after the lawsuit is filed, regardless of the cases' merits. A defendant may file a motion to dismiss the complaint; however, according to the statistics compiled by the Federal Judicial Center, 90 percent of such motions are denied. Settlement is usually the most rational option, regardless of individual case facts.

Unlike traditional litigation, attorneys' fees in class actions are not negotiated with the client, but rather with the defendant. A standard clause in every settlement agreement requires the defendants to agree to support the fee requested by plaintiffs' counsel as long as it does not exceed a certain figure. Imagine if the IRS deputized lawyers to assist in auditing tax returns, and allowed them to negotiate with the offending taxpayer both the amount of tax due the government and the amount of their fee.

The fee paid to the attorneys to stop the litigation is typically justified to the court as an acceptable percentage of the value of the settlement for the class. Class action attorneys like to compare their fees to the standard personal injury contingency fee of 33.3 percent of the client's recovery. Such fees are calculated without regard to the amount of time spent on the case. It is currently fashionable to settle disputes by having the defendant issue coupons to class members toward future product purchases and issue cash to the attorneys. Such settlements allow plaintiffs and defendants to create an exaggerated value for the settlement, based, for example, upon the face value of the coupons, not the number of coupons actually used by class members.

Lawyers usually protect themselves from judges concerned about the amount of work actually done on the case by assign-

ing between one hundred and two hundred lawyers and paralegals to work on large cases. It is not unusual for class action lawyers to rack up six thousand to ten thousand hours of work on a medium-sized class action. Those hours include between one thousand and three thousand hours on discovery; between one thousand and three thousand hours on negotiating the settlement; and between one thousand and three thousand hours preparing pleadings. In fact, according to rumor, plaintiffs' lawyers sometimes delay settlement discussions in order to allow themselves the opportunity to generate billable time in the case. If it appears that a settlement will be achieved quickly, high-priced lawyers earning between $300 and $450 per hour perform work that would otherwise be done by attorneys earning $150 to $200 per hour.

To assist in obtaining court approval for a settlement, lead counsel will often hire local attorneys familiar with the judge and one or more experts to say that the settlement is fair and the attorneys' fee is reasonable. A university professor can earn a significant percentage of his yearly salary for several days' work supporting a proposed settlement. Retired judges are particularly sought after to "bless" the money negotiated by class counsel from the defendants, characterized as attorneys' fees.

NOTICE TO THE CLASS

Class action rules require that all class members be notified "as soon as practicable" after "their" lawsuit is filed. It is rarely done, however, since early notice to class members would invite clients into the process, contrary to the interests of the main players. Unaccustomed to the real rules of class actions, the "strangers" could demand a greater recovery for class members, or, worse yet, less money for the attorneys. Notification of class members is therefore delayed until after a settlement has been preliminarily approved by the court. The legal press has reported that the Advisory Committee on Civil Rules will recommend that Civil Rule 23 language reading "as soon as practicable" be changed to "when practicable," since lawyers and judges routinely ignore the existing rule. Apparently, the Committee considered it easier to change the rule than enforce it, especially when the rule's enforcers are its violators.

The notice to class members is designed to look forbidding so that they will not read it. The lawyers hope that legal jargon, small type, detailed explanations of unimportant information, publication in obscure parts of newspapers, and late delivery of the notices will cause class members to treat the forms as junk mail. The Federal Judicial Center's 1996 report, *Empirical Studies of Class Actions in Four Federal District Courts*, notes, "most notices are not comprehensible to the lay reader." Notices always invite class members wishing further information about their case to travel to the city in which the lawsuit has been filed—perhaps thousands of miles away—to review the court papers.

FAIRNESS SETTLEMENT HEARING

Class action rules also require a public hearing allowing class members to appear before the judge to orally object to the terms of a proposed settlement and the attorneys' fee request. Obviously, class counsel and defendants prefer that the judge merely rubber stamp the settlement and fee award. To facilitate that, settlement hearings involving the claims of hundreds of thousands and even millions of people are often scheduled on crowded court calendars in order to pressure the court to conclude the matter quickly. Objectors are as welcome in the courtroom as is the guest at a wedding ceremony who responds affirmatively to the minister's question, "Is there anyone here who opposes this marriage?" Typically, no class members attend the hearing. Usually, a half-dozen letters of objection are written, often by class members who are themselves attorneys, complaining about the inadequacies of the settlement and/or the excessiveness of the attorneys' fee request.

When objectors do show up, they raise various concerns. The first concern is over the amount of the settlement; even if it is for millions of dollars, when divided among the large number of class members, it works out to a pittance. In securities class actions, for example, a 1994 study by the Law and Economics Consulting Group determined that class members typically recovered between 5 percent and 10 percent of every dollar of damage claimed, before the deduction of attorneys' fees and costs. In the 1997 settlement of the *Presidential Life* class action litigation against Michael Milken, over five thousand claims were filed, but only 471 claimants were eligible to share in the settlement. Those claimants had damages valued at over a billion dollars, to be paid out of a $50 million fund.

The second concern is that the procedure necessary for class members to obtain their benefits is so cumbersome that few will take the trouble to do so. In the *In re Petroleum Products* antitrust litigation class action, settled in Los Angeles in the early 1990s, only $60,000 was claimed by class members out of a $10 million fund. The balance of the money was returned to the defendants. In 1997, a class action was settled on behalf of every American who purchased a computer monitor between the period 1991 and 1995. The suit claimed that computer manufacturers deceptively advertised the size of the monitor's screen. Under the settlement, class members must wait until the year 2000 to obtain a $6 cash refund, if they do not use a $13 rebate coupon to purchase at least $250 of computer equipment in the meantime.

The third concern is that the consumers will end up paying for the benefits of the settlement through increased prices. For example, banks, forced to reduce charges for late fees, can simply increase the charges for the use of their ATM machines. It is probably safe to say that bank charges for late credit card payments and bounced checks are higher now than they were when class action attorneys began suing banks, and claiming that their fees were excessive.

The fourth concern is that the settlement is a disguised marketing scheme. Providing a $1,000 reduction on the price of a $20,000 truck, as was done in the *General Motors Pickup Truck Fuel Tank* litigation in 1995, merely brought additional business and profits to GM. Besides, many class members

simply did not have the resources or desire to pay an additional $19,000 to buy a new truck. In the 1997 class action settlement of the *Toyota Motor Co. TDA*, class members were given a $150 credit voucher that could be used toward the purchase of a new or used Toyota automobile.

DEFENDING SETTLEMENTS

A defense counsel often responds to obviously valid complaints about class members receiving little in a proposed settlement by arguing that the case has very little merit to begin with and therefore no greater recovery is justified. However, no attention is paid to the fact that the lawyers who brought the unmeritorious case are receiving multimillion dollar fees to end the litigation. Class counsel will remind the judge of the defendant's unwillingness to increase the amount of the recovery. They remind the court that there is great risk in pursuing the litigation; that valuable court time will be taken up if the case is not settled; and that if litigation continues, class members run the risk of receiving nothing. (In the world of class actions, receiving next to nothing is significantly better than nothing.) In the 1995 settlement of the *Domestic Airline Ticket Antitrust* class action, Judge Marvin H. Shoob's opinion noted that, had the parties not agreed to the settlement that included $14 million in attorneys' fees, he would have dismissed the case. He stated, "The court finds that the present state of the law, the novelty of plaintiffs' claims, and the lack of any direct evidence proving plaintiffs' claims, create considerable risk to the class should the case proceed to summary judgment or trial."

In the previously mentioned *Computer Monitor* class action, filed in San Francisco in 1995, Judge William Cahill, after listening to the objectors' argument, said "O.K., suppose I accept what you are saying. What should I do?" The objector responded, "You should dismiss this case, Your Honor." The judge answered, "I've already done that once." Indeed, the judge had dismissed the lawsuit, but class action lawyers filed an appeal. The defendants were willing to settle the case, even after it had been dismissed, rather than risk defending similar lawsuits in other courts and going through the expense and uncertainty of the appellate process, which could drag on for years. Looked at another way, if an insurance company is willing to pay from $10,000 to $20,000 to avoid trial in a questionable automobile whiplash case, it is certainly worth a couple of million dollars to settle a class action involving hundreds of thousands of plaintiffs.

However, dismissal of a class action lawsuit in one court is no assurance that the same case will not simply be filed in a different state. In the *Polybutelene Pipe* class action, settled in 1995, the case was dismissed by a Texas court only to be refiled in Alabama, California, and Tennessee.

In lawsuits filed by individual hemophiliacs against plasma manufacturers over the issue of AIDS tainted blood, the defendants had won twelve of thirteen jury trials. But when a class action was filed, it was a new ball game. Because of the risk, regardless of how small, that a runaway jury could render a judgment which would threaten the existence of the entire industry, and since going to trial in America is akin to Russian roulette, defendants settled the litigation in 1996 by offering each plaintiff a $100,000 recovery.

LAWYERS' POLITICAL MUSCLE

The enormous amount of money that lawyers have made from class actions has allowed them to expand their influence. [According to a report by the non-profit group Contributions Watch, lawyers contributed $100 million to federal and state political campaigns between 1990 and 1995.] Attorney contributions to political campaigns now rival big business contributions at all levels. In 1996, several class action law firms sponsored ballot proposition 211, an initiative in California that would have changed state law to make securities class actions even easier. The advocates of the proposition spent millions supporting the measure.

In 1991, the Supreme Court decision in *Lampf, et al. v. Gilbertson* shortened the time period for filing securities class actions. The effect of that ruling meant the potential loss of tens of millions of dollars in fees for securities class action lawyers. The securities bar undertook a major lobbying effort that resulted in Congressional legislation, adding Section 27(a) to the Securities and Exchange Act of 1934. The amendment effectively neutered *Lampf* and extended the time allowed to file security class action suits. The Congressional legislation was subject to a constitutional challenge in *Plaut v. Spendthrift Farm, Inc.,* Supreme Court justice Antoine Scalia remarked, "Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of any Article III court by retroactive legislation."

An even starker example of class action attorneys flexing their political muscle was evidenced in the controversy surrounding the 1995 Private Securities Litigation Reform Act. The act was designed to tighten rules for filing securities class actions and make them less attorney-driven. Initially, President Clinton announced himself in favor of the proposed reforms. However, after a midnight White House meeting with a powerful class action attorney who was also an important Democratic party fundraiser, Clinton apparently felt the action lawyers pain and changed his mind and vetoed the legislation.

STOCK-DROP CASES

One type of securities class action that has become particularly popular in recent years involves suing companies whose stock price has dropped dramatically. A company's stock goes up and down for many reasons. The legal basis for those cases is the assertion that company officials withheld information from the general public that, in hindsight, was a cause of the stock price drop. The company's failure to disclose that information caused buyers to purchase their shares at inflated prices, and they therefore suffered exaggerated losses when the share price dropped.

In 1991, in Los Angeles, California, class action lawyers sued Occidental Petroleum Company, claiming that a sudden reduction in the corporation's dividend from $3 to $2 per

share constituted fraud, in view of previous statements that the dividend would not be lowered. A settlement was reached when the company agreed not to reduce its dividend below $2 per share unless, in the judgment of the company's board of directors, the dividend should be reduced. The lawyers negotiated a $2,975,000 attorneys' fee for arranging the settlement.

In hindsight, it is easy to point to an undisclosed fact that can arguably have contributed to the drop in the share price. Corporations are not generally in the business of reporting every piece of information that might negatively impact the future price of their stock. That simple fact makes securities stock drop cases a gold mine. The most unfortunate aspect of those cases is that the money supposedly received by class members often involves a mere transfer of the shareholder's equity from his left pocket (as a shareholder) into his right pocket (as an individual), with the lawyer trying to take twenty cents to thirty-three cents out of every dollar transferred.

COMPANIES, SUE THYSELVES

Shareholder derivative lawsuits are an unusual type of case in that a company seems to be suing itself. Lawyers in the name of the corporate entity sue the directors and/or officers of the corporation on behalf of shareholders, claiming that those executives have wronged the company.

In a classic example of the purposelessness of such cases, lawyers in 1993 settled a derivative suit brought in the name of Oracle Systems Corporation shareholders for no monetary payments. But they sought $750,000 in attorneys' fees from the corporation in whose behalf they sued. When the court asked why the corporation received no money as part of the settlement, the lawyers explained that because of an indemnity agreement between the corporation and its directors, any recovery against the directors would actually be paid by the corporation. That, they argued, made further litigation a hopeless drain on corporate assets. In awarding attorneys' fees, Judge Vaughn Walker wryly noted:

> if derivative plaintiffs' counsel actually believed this argument, then they should never have brought this lawsuit in the first place. Derivative plaintiffs knew of Oracle's indemnification policy when they filed their lawsuit and were equally capable of conducting their cost benefit analysis at that time.

Of course, in such cases, stockholders suffer since payments come out of the corporate treasury. Even when corporations have insurance to cover such settlements, it inevitably means higher insurance premiums, paid by the corporation. Settlements that shift the costs of litigation from culpable officers to the corporation itself not only rob the law of its deterrent impact, but paradoxically force shareholders—the intended beneficiaries of these laws—to bear the costs of the actions.

FOCUS, FOCUS . . . HOCUS POCUS

In the past few years, a spate of media attention has focused on the problems of class action litigation. A recent *60 Minutes* segment entitled "The Disaster that Wasn't," aired in January of 1997, provided a clear insight into a class action toxic spill case in California. The plaintiffs' attorney's pleas to host Morley Safer can be characterized as: "Morley, why are you focusing on how much money we lawyers get? Why aren't you focusing on the fact that poor minorities in this community will be getting money from the settlement?" And "Morley, why are you focusing on the fact that most people really weren't injured? Why don't you focus on the fact that people shouldn't have been subjected to this chemical release." Class action lawyers never focus on the fact that in the end, the general public, either as consumers, taxpayers, or as beneficiaries of employee stock retirement plans, pay the cost of litigation.

The changes in class action procedure in 1966 spawned what *The Wall Street Journal* described as a "class action shakedown racket." In too many cases, the class members who are supposed to be beneficiaries of the litigation are instead a pretext for allowing attorneys to file large lawsuits of varying degrees of merit whose sole purpose is to arrange settlements with wealthy defendants that will pay them huge attorneys' fees.

The radical departure from traditional legal principles, codified in the 1966 "reforms," was a mistake. By returning to the principles that governed group action litigation for two centuries before 1966, the most predatory abuses of modern class action litigation can be curbed. By requiring attorneys to sue only on behalf of class members who affirmatively indicate a desire to participate in what should be their—not their attorneys'—litigation, a giant step could be taken in repairing the appearance of extortion from which modern class action litigation presently suffers.

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