The evolution of the class action lawsuit: the original intent of providing fairness and equity for all has yet to be achieved

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“The Evolution of the Class Action Lawsuit: The Original Intent of Providing Fairness and Equity for All Has Yet to be Achieved”

by

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ABSTRACT

Although Class Action Lawsuits began with the intention of providing fairness and equity for all, an unintentional turn of events began to take place in 1966, when an amendment to Rule 23 of the Federal Rules of Civil Procedure was put into place. This rule was changed to protect all class members, unless they chose to “opt out.” The amendment did the exact opposite of what it was intended to do. Allegations of abuses of the Rule by plaintiff lawyers surfaced for the next four decades. Today, the question remains, how to correct the unethical practices that have spawned out of the system that created it. Class Action legislation has been in Congress for the past six years without resolve. On June 12, 2003, the House of Representatives passed the “The Class Action Fairness Act of 2003”, but on October 23, 2003, it was blocked from a vote by the Senate.
THE EVOLUTION OF THE CLASS ACTION LAWSUIT:
THE ORIGINAL INTENT OF PROVIDING FAIRNESS AND EQUITY
FOR ALL HAS YET TO BE ACHIEVED

HISTORICAL BACKGROUND

In the 17th Century, the English courts adopted a “bill of peace” that allowed one representative of a group to bring or defend an action on behalf of the entire group. The bill of peace was permissible when three conditions were met: 1) when there were too many interested persons to be joined in one lawsuit, 2) when all the members had a material interest in the issues, and 3) when a named representative could adequately protect the interests of the absent group members. If these three requirements were met, the judgment of the court would be required on all members of the represented group, including those who did not personally appear before the court.

According to California Class Action Law: History and Purpose of Class Actions, the concept of class representation was established and developed on a case-by-case basis in the United States. In 1853, the United States Supreme Court reiterated that, for the sake of both justice and convenience, courts should allow a representative to sue or be sued on behalf of all those who were similarly situated, with the resulting judgment binding all members of the group. In 1938, in an effort to provide more uniformity in the conduct of these cases, the Supreme Court adopted Rule 23 of the Federal Rule of Civil Procedure to govern class action litigation. Rule 23 is a Consumer Class Action Practical
Litigation Guide that provides step-by-step advice on every major aspect of handling a consumer class action case.1

Also, according to California Class Action Law: History and Purpose of Class Actions, many commentators believed that the adoption of Rule 23 reflected developments in society at the time. Industrial developments were advancing faster than safety issues, resulting in large numbers of individuals suffering similar injuries. These individuals often lacked the resources, knowledge, or experience to sue individually. Class action litigation was perceived as a way to address these problems.

This historical document also stated that class actions in state courts developed as an alternative to class actions in the federal system. The Supreme Court discouraged class actions in federal court unless they involved a question of federal law, which made federal courts less accessible for the parties. To compensate, the Supreme Court ruled that state courts could handle all types of class action litigation, even if not all class members resided in a particular state. As was the case in the federal system, class actions in state courts initially developed on a case-by-case basis. Gradually, however, states began to adopt rules to govern the litigation. In 1872, California enacted statutes governing the joinder of plaintiffs or defendants with common interests. These statutes were amended in 1927 and 1971 to permit representative litigation in the form of class actions.

In 1966, another precedent was established that would raise the number of class action suits to an unmanageable phenomenon. The "class notice" provision in Federal Rule 23, Section 10.1.1, was amended to protect all class members in the class action lawsuit unless they "opt out," excluding them from the class.2 This amendment has
been the center of controversy ever since. Since its inception, it has been blamed for the burgeoning growth, evolution, and questionable ethical practices of the legal system. The number of class action lawsuits increased by 1000% in one decade. Plaintiff attorney’s fees soared to as high as $2,000 per hour.

The prerequisites to a Class Action Lawsuit under Rule 23 are very similar to what they were in the 17th Century. Under Section (a), one or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Section (b) of Rule 23 prohibits (1) the prosecution of separate actions by or against individual members of the class, (2) opposition by one party to act on the grounds generally applicable to the class, and (3) the predomination of the interests of one party over that of all the members of the class.

Section (c)(2) of the Federal Rules of Civil Procedure explains the “Notice” procedure that must be maintained under subdivision (b)(3). In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all
members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

The intent of Rule 23 was meant to bring justice to the disadvantaged. According to Timothy D. Cohelan, Cohelan & Khoury, the primary advantage of a class action lawsuit is that it allows a person the opportunity to take part in a claim that would be otherwise prohibited on an individual basis. Additionally, a certified class action strengthens the plaintiff's negotiating position. Class action lawsuits also lower the financial cost of litigation while bringing superior resources and legal expertise to the class. This in turn strengthens the plaintiff's negotiating position and levels out the playing field. Cohelan also stated that class action lawsuits offer the ability to litigate two or more cases involving a similar defendant or common liability questions from a number of states provided each monetary claim is more than $10,000. These cases can be transferred under the auspices of the Multi-district Litigation Panel in federal law. This option can streamline and consolidate similar cases. Also in the 1966 amendment certain causes of action were specified that could be heard only in federal courts such as federal antitrust claims or certain environmental matters. Cohelan stated, “The Federal Court system works to the benefit of a class action because one judge handles the entire proceeding.”

Types of Class Action Law Suits, the Industries That Were Targeted in the Suits, and the Coping Mechanisms That Were Used to Survive the Litigation

One of the earliest cases that demonstrated the utility of the court of equity was Supreme Tribe of Ben Hur v. Cauble, 1921. This was a case about the unlawful use of a trust fund. It was said at the time, “Where the parties interested in the suit are
numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without great inconvenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if they were before the court."7

1940s & 1950s – Civil Rights and Segregation Issues

In the 1940s, Hansberry et al. v Lee et al. set a precedent that a class action member could be bound to a judgment despite not being joined as a party. In this case, a black class member purchased his house from a white defendant, who was not a member of the original contract that read it was a parcel of land not to be sold to any person of the colored race. The U. S. Supreme Court declared the covenant runs with the land to all parties despite the fact that the previous owners were not the original parties to the contract.8

The 1950s brought continued cases of segregation, such as that of Rosa Parks. She was arrested for sitting in the front seat of a bus that resulted in the famous case known as City of Montgomery v. Rosa Parks, 1954. This is said to have been the impetus for the desegregation movement of blacks in the south, and ultimately resulted in one of the major class action lawsuits of the decade, Brown v. Board of Education. Aided by the NAACP in Topeka, Kansas, on May 17, 1954, at 12:52 P. M., the United States Supreme Court issued a unanimous decision that is was unconstitutional and violated the 14th Amendment to separate children in public schools for no other reason than their race.
The Brown Foundation for Educational Equity, Excellence, and Research stated "Brown vs. Board of Education helped change American education forever."9

During this period some attorneys became prominent for being advocates for class members. One of these attorneys is Harold E. Kohn of Philadelphia. He is known as "The Grandfather of Class Actions." Kohn helped draft the modern class action rule and the law establishing the procedure for consolidating similar cases in the United States before one judge. He became nationally known for his work in the electrical equipment conspiracy litigation involving General Electric, Westinghouse, and others. Hundreds of civil cases started after the Justice Department uncovered a massive price fixing conspiracy in that industry. He also is known as an ardent civil libertarian who pressed legal battles for the ACLU and other public interest groups.10

One other civil rights legal activist that credits the legal system for aiding the abolition of segregation is Fred David Gray. This gentleman was denied admission to the University of Alabama's law school based on his color. Gray passed the bar with the help of a racist judge who only knew him via mail correspondence. Gray, one year later, counseled Rosa Parks in the landmark case, City of Montgomery v. Rosa Parks. Subsequently, he became the first civil rights attorney for Martin Luther King, Jr. He also took on Governor George Wallace of Alabama in several class action suits to ensure the safety of protest marchers, black voters, and victims of federally sponsored medical testing in Tuskegee, Al. The Tuskegee incident culminated in a $10 million dollar award and a public apology from President Clinton.11
During the 1960s, the general public became educated to the fact that if it felt that someone was damaged, and there were a significant number of others who agreed that they were also damaged, each could seek protection as a member of a class action lawsuit. To explain how common civil rights cases became, the courts reported about two cases by two civil rights groups that established themselves as "Yesterday’s Children" and "The Adoptees’ Liberty Movement Association." Both of these groups filed class action lawsuits contending that their civil rights were violated because they could not have access to their birth records. Both of these cases were lost at all judicial levels.

During this decade, the government began providing civil rights protection in the workplace. Congress passed ERISA, the Employee Retirement Income Securities Act, which was to ensure redress of wrongs by employers. Kathy Cerminara of the *American Journal of Law and Medicine* wrote, "Congress was concerned with the enforcement of strict fiduciary standards of care (persons put in trust of another’s affairs) in the administration of mainly pension, but also employee benefit plans when it passed the legislation. The purpose of ERISA is to protect the interests of participants in employee benefit plans and their beneficiaries by providing for appropriate remedies, sanctions, and ready access to the federal courts.”

To add to the turmoil, in 1964 the government established the Civil Rights Act. This Act established a Commission on Equal Employment Opportunity, and a Commission on Civil Rights. It also enforced constitutional rights in public education and public facilities, and finally the enforcement of the right to vote. This law inflated
litigation even more, with cries of mental distress, lost wages, and sexual harassment. Each state developed laws to provide for recovery, and as a result, mental and emotional injury claims became an integral part of virtually every employment lawsuit. According to the Bureau of National Affairs, “The recognition by many states’ workers’ compensation systems of psychological injuries caused by cumulative stress in the workplace is a compelling example of this trend.” The problem is, the courts are now inundated with cases filed by employees who may have had emotional and psychological conditions prior to their experiences on the job.15

Workplace issues were also being taken to the courts with employees seeking compensation for physical harm on the job. In the 1960s, U. S. courts, beginning in the state of California, created a revolutionary broadening of the ability of a party to recover for injuries suffered in the use of a product. No longer was the manufacturer of a product to be simply held to a standard of negligence; now the shift would be to strict liability wherein the nature of the product itself would be scrutinized. A product was to be examined to determine whether it was “unreasonably dangerous” to the consumer or user. In 1965, the American Law Institute adopted the concept of strict liability. This was an attempt to test and measure the quality and standards set by the manufacturer, but eventually resulted in juries second-guessing the actual design of some products. Within a decade, in virtually every state across the country, courts had shifted primary responsibility for the worker safety from the employer, to the manufacturing sector.16
1970s – Product Liability Issues Continued

In 1979, The Uniform Product Liability Act was proposed by the Commerce Department as a model law for adoption by states to standardize product liability statutes and insurance premiums.

1980s – Product Liability Issues Continued: Exposure to Chemicals and Toxins

As a result of the Uniform Product Liability Act and the inception of laws, such as the Occupational Safety and Health Administration and the Employee’s Right to Know Law, attorneys began relabeling what were once classified as “regulatory infractions” or “poor business judgments” as criminally liable acts. The 1980s saw criminal charges being brought against business managers for the first time in history. In 1985, the president, plant manager, and foreman of “Three Film Recovery” were all convicted of murder (People of the State of Illinois v. Film Recovery Systems Inc). Three Film Recovery extracted silver from used hospital x-rays and photographic film. The plant was not ventilated, and workers seldom wore safety equipment. The employees were exposed to cyanide. Three Film Recovery was also accused of removing labels from poisonous containers. An employee died of acute cyanide toxicity.17

In this same article, “When Bad Management Becomes Criminal,” author Joseph P. Kahn, warned, “United States business could fall prey to thousands of state attorneys across the nation, operating under no uniform standard, charging about like loose cannons on the deck of a tossing ship.”
An example of an industry that was accused of being criminal is the chemical industry. In 1987, Judge Jack Weinstein, Federal District Court of New York, heard the Vietnam Veterans' Agent Orange case. After years of controversy between the Veterans Administration and the government, a connection was made between veterans' illnesses and exposure to Agent Orange. This was compounded by a TV station's broadcast that made claims based on a variety of illnesses, diseases, and genetically transmitted birth defects. This culminated in a vast number of claims against a handful of chemical manufacturers. In order to manage the numerous claims from all states, Judge Weinstein outlined a bold new foundation for litigating mass toxic tort claims. He ruled that they should be based on proportional liability of "indeterminate" defendants and probabilistic recovery for "indeterminate" plaintiffs in order to legitimate a settlement on the grounds that causation among other issues is so attenuated. While said that the award was a symbolic gesture, the case was 9 years of chaos, and causality was never proven. 18

Another product liability precedent was established in the chemical manufacturing field by the New York Court of Appeals on April 4, 1989, when it held that all drug manufacturers who marketed diethylstilbestrol for pregnancy use, even those who could prove their product did not cause a particular plaintiff’s injuries, could be held liable based on their share of the national market. The court concluded that apportioning liability based on the percentage of a manufacturer’s market share nationally is the fairest way to assess liability. 19
1990s – Product Liability Topics: Exposure to Chemicals, Auto & Tires, Guns & Tobacco

Asbestos Industry

Each industry has its own liability, but the most damaged of the industries surely was the asbestos sector. A compelling statement by Deborah Hensler of the Rand Institute for Civil Justice addressed to the Members of the Judiciary Committee in 1991 provided a brief status of the asbestos litigation in the United States, at that time. Hensler reported that no one knew for sure how many asbestos-related personal injury claims were then pending nationwide, but it was estimated that it was at least 90,000 suits. The estimated total value of all pending claims at the time was between $8 billion and $14 billion, with at least twelve corporate defendants already having sought the protection of Chapter 11 bankruptcy.20

Hensler injected in her report that it was tempting to attribute the growth in asbestos litigation to perverse incentives produced by various aspects of the civil justice system. She argued that it was wrong to see the asbestos problem simply as a litigation crisis created by lawyers or by inadequacies in our civil law. The purpose of her report, she said, was to identify the obstacles to efficient and equitable resolution of current and future asbestos-related personal injury claims. She recommended a national solution over the piecemeal litigation that had been used to date.

During this period, some courts began stretching the meaning of the Federal Rule of Civil Procedure 23(F) to obtain remedies, including the settlement of many class action suits. An article entitled, “Class Action Settlements in the Aftermath of Amchem Products and Ortiz” explains the change in context.21 The standards for class
certification in this industry began seeing stricter regulation to further protect the integrity of the lawsuit. This was evident in the asbestos case, *Amchem v. Windsor*, where the Supreme Court limited the settlement actions. The court found that the proposed claim for a single nationwide class settlement comprised of all persons who had been exposed through their occupations to asbestos by the 22 defendant companies, failed to satisfy Rule 23, specifically the predominance and the adequacy of representative requirements. The court rejected the possibility that settlement classes could be analyzed under Rule 23. This heightened review is intended to prevent courts from certifying classes based upon their own judgment. The authors of this article, Gelb, Griver, & Berman state that in the Amchem class, the U. S. Supreme Court held that the predominance requirement in Rule 23(b)(3), which demands that common interest predominate over individual ones, could not be met by the common interest settlement (at least not by itself). The court noted that in situations involving asbestos, the enormous variety and individualized nature of personal injury claims, and the disparate state laws that would govern those, have no predominant issue on which to base class unity.

Also in the *Ortiz v. Fibreboard* asbestos case, the Supreme Court rejected the settlement class action. It was found that the Ortiz settlement failed to meet any of the characteristics of the proposed Rule 23(b)(1)(B). The settlement had to demonstrate that the fund exceeded the agreement of the parties. There was no way to predict Fibreboard’s asbestos liability with any certainty; therefore, the Court could not conclude that the class was inadequate. Finally, the Court held that the class members were too dissimilarly placed in one class without discreet subclasses and separate counsel. These cases have set new standards for class actions: since then many settlement class actions
have not been approved because the decisions are being held to a higher level of scrutiny. Also, since Amchem, the courts have begun to scrutinize settlements more thoroughly, seeking clear evidence of fairness. The coupon-based settlements have come under particular scrutiny.

An article in *Mother Jones* in 2000 observed that asbestos manufacturers had become hopeful that they might be able to reduce the damages they face in the courts in the future. The courts, according to the article, were appearing to be more cautious about the claims that were being filed, and were trying to resolve the product liability issues instead of allowing plaintiff lawyers to manipulate the system. In response, lawmakers from both parties sponsored a bill called the “Fairness in Asbestos Compensation Act,” which would help victims get justice more quickly by setting up a government agency to screen all asbestos claims. This legislation has been met with opposition because some victims see the bill as depriving them of their day in court, and would eliminate punitive jury awards against manufactures. As of this date the act is still pending in litigation. On October 16, 2003, the Washington Post published an article about the status of the act. “Under the terms of the agreement, insurers and defendants in the asbestos lawsuits would contribute as much as $115 billion over the 20-plus-year life of the trust to pay medical costs and other damages to asbestos sufferers. In exchange for the creation of this fund, there would be protection from further liability.”

*Silicone Industry*

In 1992, the U. S. Food & Drug Administration imposed a ban on the general use of silicone gel-filled breast implants, after complaints from women that leaking implants
were causing auto-immune disease. Despite a lack of scientific evidence of cause and effect, more than 400,000 lawsuits were filed against the company. By 1995, manufacturers of silicone breast implants were forced to pledge several billion dollars in compensation, and the biggest firm, Dow Corning, had to seek Chapter 11 bankruptcy protection. Dow Corning is accused of not realizing early enough how dangerous mass-tort actions can be, and failing to perceive of the potential damage that class action litigation could pose. In an effort to salvage its reputation, Dow Corning hired public relations firm, Burston-Marsteller to implement a campaign on the safety of breast implants. The public relations firm presented endorsements from doctors, former patients, the congressional women’s caucus, women’s rights advocates, and health writers. The company published documentation that stated some Congressional members were using intimidation to force the FDA into banning the implants. Burston-Marsteller published its findings and endorsements nationwide via every credible media possible.

Unsuccessful attempts were made by litigants to draw Dow Chemical into the lawsuits. Richard Alexander of The Consumer Law Page reported that Dow Chemical had responsibility for researching the bioreactivity of silica and silicone compounds used in the breast implants, and the company knew this as early as the 1950s. He accused the company of doing nothing to advise the public of these hazards or to stop the sales, despite the fact that Dow Chemical had the right to control and, in fact, controlled the quality of the products manufactured and sold by Dow Corning. Alexander said that Dow Chemical was liable on the theories of direct product liability, negligent performance of an undertaking, negligent misrepresentation, joint venture liability, and violation of the public trust.
Dow Corning filed for the protection of the United States bankruptcy laws in 1994, destroying the initial Global Settlement of breast implant claims. This caused all actions and claims against Dow Chemical, Dow Corning, and Corning, Inc., to be transferred to the United States District Court for the Eastern District of Michigan, where it has remained to the present. Dow Corning was provided an opportunity to propose a Plan of Reorganization that would outline the plan for repaying its creditors and for compensating the victims of its products, including breast implants. This resulted in "The Revised Settlement Program," which is a federal program set up by the courts to administer the claims. The program provides different levels and avenues of compensation to women allegedly injured by silicone gel-filled breast implants. There is no entitlement to an award based solely on the failure of a product without a demonstrable physical illness.28 There is a web site to make application, MDL926 Breast Implant Litigation. The Settlement Facility -- Dow Corning Trust -- has been created to administer silicone gel and implant claims.29

By May 2000, headlines read, "Saline Breast Implants win U. S. Approval Studies." The Food and Drug Administration decided to permit the two largest makers of implants to continue marketing the devices, despite scientific claims by McGhan Medical Corporation and the Mentor Corporation, both of Santa Barbara, Calif. that they pose a significant risk of infection, tissue hardening, and pain in the breast, as well as repeat surgeries. The author of this article, Sheryl Gay Stolberg wrote that after a study of 9,000 women, the FDA continued to report high rates of complications and ruptures. The agency said it would require the companies to inform women of the risks. Other contributors to the article were Dr. Sidney M. Wolfe and Dr. David Feigal. Dr. Sidney
M. Wolfe, director of Public Citizen’s Health Research Group, said, “One can’t think of any other medical device that has been allowed to stay on the market with such a high failure rate. It is yielding to the device companies and guaranteeing harm to women.” On the other side, Dr. David Feigal, director of the FDA’s Center for Devices and Radiological Health, claims that the complications are cosmetic, and that we have the ability for people to actually see what they are getting into, and make the choice in that light.” It is yet to be seen whether this releases the manufacturers of all liability, but it appears that Dow is back on its feet again.30

In 2003, the Mayo Clinic published the results of a 30-year epidemiological study in the New England Journal of Medicine. The study found no association between silicone breast implants and connective tissue disorders (auto-immune diseases). Also, the Harvard Nurses epidemiological study conducted a 14-year study and found no increased risk of connective tissue diseases or certain signs and symptoms of connective tissue diseases in women with silicone implants.31

**Cell Phone Industry**

In 1993, numerous claims were made that brain cancer was caused by the use of mobile phones. The effect on the mobile communications industry in the U.S. was close to shattering; sales and share prices plummeted. Motorola, the world’s largest manufacturer of cellular phones, saw a brief fall of 20% in its shares in one week.32 The nation’s communications industry -- companies like Motorola, McCaw, and AT&T said that after 40 years of research, there was no evidence of health risks from radio frequencies used in cellular telephones. The Cellular Telecommunications Industry
Association volunteered to finance new studies to be performed independently by the federal government.33

But by 1997, controversy began to surface over the integrity of the telecommunications industry. The Wireless Technology Research Group that was supposed to be employed by the government had direct responsibility to the cell-phone industry association. Related to this was a report that WTR scientists went on strike for nearly a year, refusing to perform contracted research until adequately covered for indemnity against lawsuits by the cellular phone industry association.34

Going into 2000, the cellular phone industry continued to struggle about the debate over whether or not there is scientific evidence that hand-held cellular phones are a potential health risk to the human body. Jeffrey Silva wrote an article on the debate, “Conflicting Data Found in RF Research Studies.” Silva has been studying these hazards for the last ten years, and claims that they have found genetic damage to human blood at 5W/Kg and 10W/Kg. The article outlined many research studies that are in progress to try to clarify the conflict. The Cellular Telecommunications Industry Association is continuing the research, working with the Food and Drug Administration to repeat the wireless technology research that had positive findings. The World Health Organization, the European Commission, and others are organizing mobile phone health research. Also in 2000, Peter Angelos, a Baltimore lawyer, worked with CTIA to conduct more research, and he developed a surveillance system that can detect any pattern of health problems among the 85 million mobile phone subscribers in the United States. Angelos is the lawyer who has litigated successfully against asbestos and tobacco manufacturers,
and is currently suing lead paint manufacturers because of health problems those products may have caused.35

In June 2000, June Langhoff of Scholastic, Inc, reported on the same study. She wrote, “As a result of the ensuing controversy, the Cellular Telecommunications Industry Association has funded an independent Wireless Technology Research agency to conduct studies. After five years of study, no hard facts or smoking guns were found, but the research turned up some disquieting findings, notably that death rates due to brain cancer were higher among handheld phone users than non-handheld phone users.” But, she concluded, “Even the strongest safety critics are saying there is no need to stop using your cell phone.”36

In order to protect its interests, the cellular phone industry has taken the same route as Dow Corning and all the silicone manufacturers. They are making the move to disclose on their packages the radiation levels emitted from the devices they sell. Under the auspices of CTIA, which represents many manufacturers, manufacturers will seek the trade group’s certification. This information was already available to the FDA, but not public knowledge. This safeguard is a defense mechanism to protect cellular manufacturers from the type of legal actions that has plagued other industries.37

In April 2001, Peter Angelos did file class action lawsuits against Motorola, Verizon Wireless, and 23 other wireless companies in Maryland, Pennsylvania, New Jersey, and New York, charging that the companies knew of health risks, including the possibility of brain tumors, to cell phone users, but failed to warn them. The lawsuits seek to require the companies to provide free earpieces for every cell phone.
reimbursement for the cost of an earpiece for those who bought one, and unspecified punitive damages.38

On March 8, 2003, in Baltimore, Md., U. S. District Judge Catherine Blake dismissed five class action lawsuits that claimed cell phone manufacturers were negligent in not providing headsets to protect users from the radio-frequency radiation emitted by cell phones. The judge threw out the suits on the grounds that federal standards regulating cell phones pre-empted the state laws under which the suits were filed.39

Auto & Tire Industries

How has the legal system treated the auto and tire industries? According to U. S. News & World Report, Bridgestone Firestone Inc. received some liability protection from its corporate lawyers by way of concealing evidence of tire failures. In the article “Secret Data Reveal Why Tires Went Bad,” Jim Morris and Marianne Lavelle wrote that an investigation found that Bridgestone Firestone routinely used legal protective orders to conceal crucial data generated when consumers filed warranty claims that showed which of its tires were most likely to fail and why. When Congress became aware of this concealment, it demanded the data be submitted. The article also quoted Attorney Don Fountain, in defense of the allegations. “Typically, defendants in tire-defect cases secure protective orders for all documents before turning them over to plaintiffs; that way, the material can’t be shared with the government, other lawyers, or the news media.” This data includes vital adjustment data from warranty claims that all tire manufacturers compile to spot possible problems.40
After the August 2000 recall, numerous class actions were initiated in many courts. To accommodate the volume, the requests were consolidated into a federal class action lawsuit under the Seventh District Court. The “Tire Settlement Class” consisted of only members who did not sustain personal injury or property damage. The settlement included $15.4 million dollars on a consumer education and awareness campaign, as well as tire design changes to improve high-speed capacity. The settlement also allowed anyone who was still driving the tires to have them replaced free of charge.41

One other lawsuit that needs further public scrutiny for its ambiguous means of defense is that of Joseph A White, III, J. L. Monson and Anthony O. Cashiola, Sr. versus General Motors Corporation, Brockhoefis’s Chevrolet, Inc. and Hank Pontiac-GMC-Buick, Inc. GM’s unusual survival technique was addressed in the class member settlement. The settlement implied the creativity of a floundering corporation. It implied that the defendant was protecting its remaining assets while guaranteeing a future market share for itself. The award was to be $5.5 billion to be divided amongst 5.5 million class members. The distribution was not awarded in cash, but in $1,000 General Motors certificates. Class members wanted to sell their certificates for cash, which further complicated the settlement.42 The settlement required that the attorneys guarantee that at least 100,000 settlement certificates be redeemed by truck owners. GM objected to having truck owners told about the proposal that would create a national market for certificates and make them easily transferable. GM demanded that it be the sole market for transferring certificates. The trial court denied GM’s demand, but authorized a right to appeal.43
Guns & Tobacco Industries

There have been at least two industries in the 1990’s that have managed to maintain their resilience to class action suits. An article in the Economist “When Lawsuits Make Policy” explained that in 1998, attorneys-general from eight states unveiled a $206 billion deal with the tobacco companies to settle all state lawsuits against them. It did not require Congressional approval. The settlement, which was to be paid over a 25-year period, involved restrictions on cigarette advertising and marketing. It was the biggest legal settlement in history.44

The article also reported that the same tactics were planned for the gun industry. Sixty-five cities filed ambitious suits against the industry the following year. Opponents of this tactic say that it is illegal, and an abuse of the legal system to bully industries in this way. Opponents of the tobacco and gun suits concluded that if this litigation succeeds, public officials would be eager to swell their budgets with huge legal payments, and would look for new targets. The Economist predicted that alcohol, junk food, and fast cars, etc. would be the next targets, calling the lawsuits legal extortion. The cigarette makers boldly bragged that the settlements would largely be paid by the consumers and not the companies’ shareholders. Critics on the subject warned, “If America is ever to get its priorities right on tobacco, guns or any other issue, it will do so only in the debating chamber of democratically elected legislatures, not through threats of mass litigation.”
At the present time there is a trend among plaintiff lawyers to go after fast-food restaurants for causing public obesity. Ever since the Surgeon General David Satcher declared obesity soon to be America’s number one killer, class action lawyers have been keeping their eyes out for opportunities to get rich. Some are even suggesting this is similar to the success the legal industry experienced in litigation class actions for the thousands of people who developed lung cancer due to smoking tobacco. No matter one’s view, the rush is on, and it is being met with surprisingly strong defense. For example, several cases that were dismissed for questionable tactics are noted. U. S. District Court Judge Robert Sweet dismissed the first case against McDonald’s, affirming that the restaurant chain is not responsible for the eating habits of its overweight customers. Richard Berman, Executive Director of the Center for Consumer Freedom, hailed the decision, and stated, “The first case was laughed out of the court of public opinion, and never even made it to the judge’s chambers. The entire episode was a tabloid farce, cooked up to fatten a few attorneys’ wallets.”

The plaintiff lawyer, John Banzhaf, defended his position by saying, “It was a suitable way to shift the weight of responsibility back onto the appropriately plump shoulders. By filing class action lawsuits, which would penalize the companies who make and market sugary nothings in the form of higher price tags on hot dogs and gooey confections, it will also discourage people with eating problems from overindulging.”

The only thing McDonald’s was held liable for was false advertising, claiming its french fries were cooked in vegetable oil, when they were not; they were cooked in beef oil. The settlement was for $10 million, but there is a controversy pending about the
distribution of the settlement. The judge said that he would rule on the list of groups that would receive money from the settlement agreement.47

At the moment, the courts are standing firm on their judgments for the fast food industry, but there is concern that this may change. A slip of the tongue by U. S. District Judge Robert Sweet has the lawyers looking for loopholes to slip through a lawsuit. Judge Sweet, in an effort to delineate what may be considered probable cause for guilt, explained, “It may be the way that McDonald’s processes its food, especially, if it does not make it public knowledge.” But the judge advised that almost any company could be accused of this. Steve Chapman of the Washington Post wrote, “With state budgets swimming in red ink, how long can it be before some attorney general gets the idea to try to go after fast-food companies to pay the costs of treating people for illnesses caused by obesity? “It worked for the tobacco industry.” He also berated lawyers, by insinuating that they will be looking to win large damage awards from the fast-food industry.48

Securities Exchange Violations

The most recent class action lawsuits are being waged against industries that have violated the Securities Exchange Commission. Blame is being put on the government for giving corporations too much freedom in managing its financial concerns. Some see it from the opposing view -- that business concerns are too volatile, and not every issue needs to be public knowledge. An example of such a case is that of Schering-Plough, which is under scrutiny for disseminating misleading information and concealing problems arising from its manufacturing practices. The company is accused of providing misleading information about the likelihood of speedy FDA approval for Clarinex, an
allergy drug, when in actuality, the FDA denied approval pending deficiencies in the facility’s inspection. The following day the price of Schering-Plough stock dropped $10.00 per share. Five class action lawsuits were filed, and the Director of External Communication Robert Consalvo advised that the company would defend itself vigorously against the claims.

One other alarming report by *USA Today* alleges that 20 Internet financial firms have been funneling cash to other companies, and then funneling it back. This procedure has boosted their revenues by $193 million dollars. Some of the defendants noted in the class action lawsuits were the online real estate firm, Homestore, AOL Time Warner, Cendant, & Price Waterhouse. The retirement funds of these companies are in a deficit of $9 million dollars. They are under investigation by the Securities Exchange Commission and the Justice Department.

### Alleged Abuses of Class Action Lawsuits

By the mid 1990’s, the class action lawsuit had made its mark, dictating national policy from every state. In May, 1996, *The Wall Street Journal* wrote, “It’s becoming commonplace to hear of class action suits in which the lawyers reap millions and the plaintiffs pennies.” Many accounts have been published about people discovering they are part of a class action lawsuit and didn’t even know it. *The New York Times* printed an article about a person who discovered he was part of a class action suit against his mortgage bank when he discovered a $91.33 deduction from his escrow account that turned out to be his payment for lawyers’ fees he never knew he hired. He won $2.19 minus the lawyer fee and back interest. The Lawyers received $8.5 million.
Even scholars began to protest about suspicious behaviors of attorneys. The Rand Institute for Civil Justice discovered that “some plaintiffs’ attorneys routinely scan electronic databases in the press to find reports of product recalls, safety warnings, regulatory actions and other consumer complaints that can provide the basis for class actions.”

Abuses of the legal system by class counsel began to appear daily.

- “Judge fines lawyer who can’t find plaintiff.” The National Law Journal reported an incident by Abbey & Ellis who claimed responsibility for not being able to bring forth Jean Giles as a plaintiff. U. S. Senior District Judge Douglas W. Hillman of the Western District of Michigan issued sanctions for discovery abuse in the class action lawsuit against Upjohn Company when they could not contact such a client.

- Auto industry accuses lawyers of being more interested in huge fees than seeking justice. Automotive News printed an article “Feeding Frenzy: Lawyers Feast on Publicity over National Highway Traffic Safety Administration.” Several lawyers have filed class-action suits on behalf of owners of General Motors Corporation vehicles being investigated for possible defects by the (NHTSA). The article continued with a statement that a deluge of lawsuits has clogged the courts and increased automobile prices and manufacturers’ insurance premiums.

- Class counsel drags out the discovery process as a weapon. Insight on the News published an article, “Lawyers ‘discover’ How to Beat the Rap.” (Discovery Phase Becomes Tactic in Civil Litigation). The article states that in November of 1997, the Defense Research Institute, the intellectual arm of the tort-defense bar, held a conference in Baltimore examining various issues, including reform of the process known as “discovery.” The DRI suggested more supervision of the process. They suggested a new profession called a Special Discovery Master.

- Attorneys are filing actions in state courts where they are known to get a favorable ruling (forum shopping). The Washington Post printed “House GOP Targets Abuses in Class Action Lawsuits.” In the article Rep. John Linder (R-Ga.) stated “Hundreds of frivolous lawsuits are filed in favorable state courts and used as high-stakes, court-endorsed blackmail devices against companies that usually settle rather than face a long and arduous court battle.” Supporters of legislation that would move most such suits into federal courts believe that this shift would prevent such practices as “forum shopping.”
Class counsel accused of manipulating the uneducated and initiating scams about lost data on computers. *The Houston Chronicle* article “Lawsuits and Lawyers Like This? No Place but Texas” published the reason why Toshiba settled on a $2.1 billion settlement rather than face a $9.5 billion lawsuit on behalf of 5 million consumers. Toshiba’s president, Taizo Nishimuro, said his firm simply didn’t want to take a chance on the type of justice available in Texas courtrooms, where personal injury lawyers have been known to emotionally manipulate uneducated juries for huge damage awards. Despite the genesis of the suit which was initiated by Wayne Reaud the plaintiff attorney who discovered that an IBM engineer in the 1980’s found a logic flaw in the chip that controls the floppy drive in Toshiba’s laptops, Toshiba said none of its customers had ever complained until Shaw and Moon, 2 plaintiff lawyers from Texas, filed a claim about their own laptops. 58

Lobbying Lawyers – Lawrence W. Schonbrun, a nationally recognized authority on the issue of attorney’s fees in class actions published a paper “The Class Action Con Game.” It stated that 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. 59

Duplication of Class Action Litigation – The Federalist Society for Law and Public Policy Studies did a survey to determine duplication/overlapping of class action suits (2 suits or more filed on behalf of the same class). The study covered the period 1990 through 2000. 60 The study concluded:

25% of all class actions were filed by the same plaintiff lawyer
60% of all class actions were filed in five states
36% of all class actions were filed in state courts
42 % of all class actions were filed in federal courts

Even as criticism of class action lawsuits continued, plaintiff attorneys continued to seek exorbitant fees for cases that resulted in little to no rewards for the class members. The issue became so aggravated that consumer activists began protesting in front of federal courthouses. A case that became well known for its explicit protests was filed against the Publishers Clearing House in St. Louis, Mo. by Steven A Katz, Judy L. Cates, and Douglas Sprong. The protest was held in front of the courthouse where there was a
hearing going on about the fairness of the prospect of the lawyers getting $3 million in fees for the case. A protestor lamented, “The suit is silly, and it means people with important lawsuits can’t get in the courtroom, and it’s making the lawyers wealthy.”

Katz defended the $3 million fee by saying, “Publishers Clearing House had to spend $30 million, with $20 million going into the hands of consumers who bought the magazine. The firm has spent several million dollars on notices and other expenses, and if we are awarded the $3 million it would be less than 10% of the award.” The lawyers retaliated and sued the Post-Dispatch columnist, Bill McClellan, over a column he wrote opposing the proposed settlement. Due to the publicity over the case, 16 other states filed suits against Publishers Clearing House out of fear that the suit’s settlement might prevent them from filing future suits for restitution. Class action suits have turned into a game of dominoes.

According to two members of the Trial Lawyers of America, Gilbert T. Adams III and Alto V. Watson III, defense attorneys are beginning to use aggressive tactics against plaintiff attorneys. Some defense attorneys have gotten so callous in nature that they are accused of playing “hardball litigation.” In their article, Adams & Watson summarize the abuse of discovery tactics among “big box” retailers, the K-Marts and Wal-Marts. It described the tactics that defendant’s attorneys use, such as ignoring discovery requests or filing answers with false, incomplete, non-responsive, or half-hearted responses. Adams and Watson explained that because the attorneys are paid a flat fee, it is to their benefit to work as little as possible. Lawyers were accused of making it impossible to contact them by phone, or to schedule hearings in order to delay the discovery process.
Adams and Watson suggest a defensive approach that does not deal with the
criminal aspect of abusing the discovery process. They recommend using a genteel
approach, and not to play hardball with the retailer’s defense attorneys. They advise the
plaintiff to use computer databases to retrieve the discovery information needed, and send
a notice to the retailer’s counsel for a hearing on objections with the discovery request.
Adams and Watson further recommended filing a certificate of conference to confirm that
the retailer will not meet with the plaintiff attorneys. It is also possible to obtain an order
requiring the retailer to list more than one attorney in charge of the case. The best
defense is to request a sanction every time a defendant engages in abuse. These include
admonitions, evidence preclusion, monetary fines, and striking of a party’s pleadings. A
final recommendation is to obtain a written order overruling objections and compelling
responses to discovery. It is advised to have the order prepared and ready for the judge to
sign before going to court.62

Questionable ethical practices by class counsel continued despite public allegations
of mistrust. Distasteful advertising is not illegal, but is being used to attract clients. There
are ads usually disguised as a service or educational message addressed to the general
public. Lawyers use the media to solicit clients without legitimate proof that they have
been damaged by the allegations. One such Internet ad, The Consumer Law Page, warns
members of the public that they may still be eligible to participate in a lawsuit if they
have been exposed to cancerous agents. The article advises that the latency period
between exposure and cancer can be as long as 20 years, and this also applies to children
who have been damaged in utero. They have 19 years in California to file a claim.63
The law firm of Alexander, Hawes & Audet recommends not to delay in taking action.
It also advises, “In many states, such as California, delayed discovery, the basis upon which to bring a lawsuit, applies to both wrongful death and personal injury claims against the manufacturers of dangerous solvents.” Their ads are sometimes disguised as a warning label, but wouldn’t the warnings and advice be more legitimate if they came from the manufacturer or the government rather than your local plaintiff attorneys? Alexander, Hawes & Audet also advertise by publishing the results of past suits that have been won, and suits that are presently pending, and they use the information as a testimonial or endorsement of their record.

Attorneys are also being accused of cold calling clients, according to an article in the St. Louis Dispatch. The article written by Michael Shaw and Jim Getz reported a story about Doug Wojcieszak, a former aide to state representative Lee Daniels of Elmhurst, Illinois. Wojcieszak formed the Illinois Lawsuit Abuse Watch that is fighting for limits on damage awards and the elimination of filing questionable lawsuits. This article included a story about Ricky Kelly, who didn’t know he had a legal problem until a law firm brought one to him. An investigator had combed through a body shop’s records to find cars that lawyers suspected were rebuilt with inferior parts. Kelly’s car turned up. He became the lead plaintiff in a class-action suit filed in Madison County.

The St. Louis article is basically about abuses in the Metro East area, known as a plaintiff’s paradise, where lawyers are using what critics say are questionable methods to find clients. A local lawyer responded, “The ends justify the means.”

Another person who found out she was a member of a class action lawsuit was Susan Taylor Martin, a journalist for the St. Petersburg Times. She was notified that she was a class member of a lawsuit against American Airlines, who raised the requirements
for a free coach-class ticket from 20,000 to 25,000 points. According to the lawsuit settlement, she discovered that she could expect a 5,000-mile discount on a frequent-flier award, or a certificate for $75.00 off a ticket costing at least $220.00. She later discovered several of her peers also were part of the same suit. Martin joined the lawsuit “Out of curiosity.”

The *St. Petersburg Times* article also included criticisms by Walter Olson, a Yale-educated author and think-tank fellow, who added, “The number of class actions has ballooned as lawyers found them an effective way to generate enormous fees under the guise of consumer protection. Between 1988 and 1998, class-action filings increased by 338 percent in federal courts and more than 1,000 percent in state courts.”

**Analysis**

It was in the mid-1970s when concerns about too much class action litigation became a serious issue. In *Business Week*, June 6, 1977, a headline read, “Litigation has become America’s secular religion. Chief Justice Burger wrote in his book *Isn’t There a Betty Way*, “There is a litigation explosion during this generation.”

Concerns began to surface about the legitimacy of the entire class action system since the inception of Federal Rule 23. The courts were not prepared to adequately handle the caseloads, the class members were not adequately educated to what it means to be a part of a class action suit, and the defense class was suddenly held to a standard of performance that until now was unheard of. Product liability laws put legal restraints on manufacturers and retailers. They were suddenly looked upon as criminals if they didn’t abide by the laws. After 1965, product liability law, adopted by the American Law
Institute, not only held the manufacturer liable for their own specifications, but were held to strict liability that later evolved into the juries undermining the actual design of the product.68

During 1988, The Rand Institute for Civil Justice did a study on whether there was an explosion in product litigation going on. The study indicated that a distinction must be drawn between the tiny number of defendants named in thousands of suits, and the thousands of defendants named only once or twice. The author, Terence Dungworth explained, “The former cases have engendered the view that a federal litigation explosion has occurred. By contrast, litigation involving the thousands of rarely named defendants supports the contention that product liability is an increasingly widespread phenomenon for U. S. businesses.”

Dungworth’s research offers support both for the “thousands of products and businesses” point of view and for the “epidemic of litigation” notion. He states, “The former is characterized by slow but steady growth that is not very different from that observed in comparable non-product suits. The latter is characterized by surges of litigation that have a limited life span, although the limit varies from product to product and in some instances may be distant.” Dungworth recommended, “Policy and law that is developed to deal with the situation must take the complexities of these two different worlds, and that an approach that seems suitable for one facet of litigation may well be inappropriate for another.” The study concluded, “There is significant diversity between defendants, between industries, and even within industries.” To summarize, this study does confirm that there is a burgeoning increase in product liability litigation, but the
same standards of law cannot be applied simultaneously to every industry and every defendant.69

Some analysts, in an effort to seek justice for all, have researched numerous methods on how class counsel could be paid for their services, rather than the arbitrary practices that are now used. In 1992, the Journal of Consumer Policy published the findings of a study on “Effective Consumer Access to Justice: Class Actions” by Nicole L’Heureux. The study concluded that if class actions are to be effective, many different models have to be proposed. It cited three models to be taken into consideration. Some legislatures advocate a no-way cost rule under which each side bears its own costs regardless of the outcome. Others advocate a contingency fee scheme whereby the lawyer and the class representative make an agreement that the counsel will be paid only in the event of a success. The one L’Heureux advocates, is the percentage approach that results not only in savings of court time and expenses, but also in class members receiving monetary relief earlier than might be the case otherwise. The Journal of Consumer Policy also published that legislators recommend public funding.70 To date, studies do not imply much success with these models. The contingency fee model promotes apathy by class counsel, particularly, when the forecast of the success of the case is slight, or the monetary award is not a strong incentive.71 The percentage approach is considered the most appropriate, but again, it is known to inflate the size of the settlement.72 Public funding has not proven to bear much of the load either. Some funds are not sufficient enough to cover the settlement.73

L’Huereux also recommended that the role of judges be extended, the cost rules be modified, and the right of a member to opt out be recognized. He said that judges must
play a more active management role than has been traditional, specifically, in the control and supervision of the proceedings. The judge has power to control all incidents with the potential to modify the progress or the outcome of the proceedings. He is guardian of the absent members' interests.

In 1997, a third-year law student, Julie Rubin, published an alternative solution to plaintiffs' lawyers' abuse in “Auctioning Class Actions to the Highest Bidder.” She admitted that current regulatory procedures are not sufficient to overcome the ample opportunities for lawyer abuse. Her approach synthesizes the roles of client and counsel, thereby eliminating several problems currently associated with class actions. She explained, “The highest bidder (plaintiff’s attorney) pays the bid amount to the court, which then distributes the fund to the class members.” The class members are relieved of their position, and are no longer involved with the claim. She admitted there are some potential problems, but they do not seem insurmountable, and may present their own solutions. She said she wholeheartedly believes that this is an alternative that should be given serious consideration.

In 1998, David Andelman, author of the article “Toward Classless Litigation,” recommended doing away with class actions in the states, and sending them all to the federal courts. He said, “No company or industry is exempt today from the threat of a class action lawsuit. Having a case designated a class action is the brass ring on the merry-go-round, — a free ride into the pockets of major corporations.” Also in this article Andelman wrote that Martin F. Connor, chairman of Stateside Associates, a state government relations lobbying firm, who studies class action filings in Alabama, found that judges often were beholden to politically active plaintiff lawyers because they owned
their jobs or career prospects to the political machines that attorneys help run and fund. Martin said he found remnants of the same political relationships in Tennessee, Texas, Illinois, and California.

Another contributor to the article, “Toward Classless Litigation,” is Walter Olson, a senior fellow at the Manhattan Institute, who has studied class actions throughout his career. He wrote, “There’s finally a head of steam mounding to deal with class actions; the current system is simply getting to be intolerable.”

The Rand Institute for Civil Justice made several recommendations to deter the vast number of class action suits. A study made in 1999, “Class Action Dilemmas: Pursuing Public Goals for Private Gain,” recommended going back to pre-1966, when Federal Rule 23 provided that every member who wished to join a damage class action proactively assert their desire by opting in. If the responsibility of joining a class were placed on the claimant as it was pre-1966 the claims would be much smaller. According to the Rand study, this would automatically require smaller settlements, and in return, class counsel would require smaller fees. Pragmatists are concerned that minority and low-income individuals would be left out. But, optimists in the study were hoping that small settlements and the small classes would deter class counsel from filing for certification.

The Rand study “Class Actions Dilemmas” also suggested that increasing judicial regulation of damage class actions be the key to a better balance between public goals and private gain. He explained that judges hold the key to improving the balance of good and ill consequences of damage class actions. The study suggested that judicial regulation of damage class actions have two key components: settlement approval and fee
awards, and that 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. The study further recommended that neutral advisory experts and perhaps the class members themselves participate in the decision-making process. 76

Rand advised that this approach calls for a new mindset. Judges must consider themselves an integral part of the class; the rights of the plaintiffs and the defendants are at stake. They must realize that the outcome of one case sends a fundamental message to the community, and that this may or may not affect future litigation. A suggestion was also made that judges should be celebrated for how they carry out their responsibilities in damage class actions, not just for how fast or how cheaply, but by the way they resolve the lawsuits. One final recommendation by Rand is to hold the courts accountable via public scrutiny. Public awareness would induce tighter regulations. “Comprehensive reporting of class action litigation by an unbiased source would provide a rich resource for policymakers concerned about class action reform, as well as an unbiased information source for print and broadcast reporters.”

One June 26, 2003, the Federal Trade Commission came forward to speak on behalf of the consumers in class action suits. Commissioner Thomas B. Leary, in an address to the Class Action Litigation Summit in Washington, DC, pledged to the FTC that he would continue to keep a watchful eye on class-action settlements to ensure that the interests of consumers are adequately represented. Leary criticized the 1966 amendment “to opt out” as a major fault of the abuses by lawyers. “An unintended consequence of the amendment was to make class action lawyers themselves, rather than their nominal clients, the real parties in interest. This conflict-of-interest can compromise
the class action mechanism's ability to achieve its two principal goals of compensating consumers and deterring similar conduct in the future.” 77

Many critics of the 1966 amendment spoke out at the 81st annual meeting of the Alliance of American Insurers in San Diego on April, 2003. Federal Judge Paul Niemeyer from the U. S. Fourth Circuit Court of Appeals in Maryland addressed the alliance by asking, “How do you put your arms around a risk that is undeterminable?” He blamed the Supreme Court for gradually relaxing the standards, so that almost anybody can sue. Justice-elect Jess Dickinson of the Mississippi Supreme Court told the members, “There is a new direction in litigation in Mississippi. There are three or four counties that account for about 75 percent of the problem.” He claimed that those counties have become a haven for lawyers filing class action suits, and are known to have judges and juries that will likely side with them. And finally, Michigan Supreme Court Justice Stephen Markham added, “The members must pay greater attention to the judicial branch selection in their states; judges need to say what the law is, not what it ought to be.” 78

In order to give class counsel an opportunity to defend their position, and give their viewpoints on the matter, this paper includes the Federalist Society's Class Action Watch survey of 2002. It was given to class action attorneys to illicit their opinions on the issues affecting the course of class action litigation. This study does not address any improprieties in detail; it surveys the management of class actions. The survey gives evidence of who is satisfied with the status quo, and who would like to see change and in what areas. The survey reached 1,884 class actions plaintiff lawyers and 300 class action defense lawyers. There was a 24% overall response rate. In the end, 464 of the 1,884
class action plaintiff lawyers and 61 of the 300 class action defense counsel responded to the survey. The following are a list of questions that were posed on the survey.

1. Do class actions result in a net savings?
2. Is there a greater desire to file in state courts rather than federal courts where there are tougher requirements?
3. Are state courts appropriate forums for nationwide class actions?
4. Should it be easier to remove nationwide class actions to federal courts?
5. Should it be easier to appeal orders granting or denying class certification?
6. Are the incidence and magnitude of excessive class action attorneys’ fees exaggerated?
7. Does certification of nationwide class actions guarantee settlement?
8. Should a regulatory agency’s ongoing examination of a defendant’s conduct, counsel against certification of a class action?
9. Is the existing Rule 23 providing sufficient screening for class treatment?
10. Are cases seeking medical monitoring particularly strong candidates for a class action treatment?
11. Is it appropriate for state courts or legislatures to modify the elements of a cause of action to make it easier to seek class action treatment?
12. Should a settlement class action be permitted even if the putative class could not be certified for litigation purposes in Rule 23?

The results are as follows:

- Both plaintiff and defense counsel favor filing in state courts
- Defense counsel favors filing nationwide cases in federal courts
- Plaintiff counsel unsure if it should be made easier to move national cases to federal courts
- Both plaintiff and defense counsel agree that the trend is to file in state courts
- Both plaintiff and defense counsel agree there is a greater incentive to file in state courts
- Plaintiff counsel agrees that national cases should remain in state courts
- Defense counsel agrees to ease the rules for appealing certification
- Only 45% of plaintiff counsel is in favor of easing the rules for appealing certification

This survey suggests the legal counsels for both sides are in favor of the present trends, and do not have a great interest in making any changes. But some defense attorneys feel a need to defend their position, according to Attorney Bruce Cook, who said he acts as local counsel on class actions, and defends his colleagues who earned $3 to $16 million
on the recent Publisher's Clearing House and Ameritech cases. He said that he does not feel they are overpaid. He said, “Corporations hire high-powered and highly paid lawyers to beat them; plaintiffs need lawyers of the same caliber.” He called it a weapon against abuse. Cook continued, “Lawyers who file class actions defend them as the only available check and balance against corporate abuses.” They believe that their clients can benefit even if they don’t get any money. Madison County Circuit Judge Randy Bono said, “If lawyers never get the victims a penny back but stop the fraud, isn’t the public better off for it?” There is also the argument that even though government agencies sometimes force companies to correct wrongdoings, it doesn’t provide the compensation to the victims.80

The following data does not imply any partisan bias for the state of the legal system today, but it may be another avenue to explore in the battle for class action reform. The Center for Responsive Politics published data on how lawyers and law firms contribute to their favorite party. The following three organizations were the highest contributors to their party during the years 1999 and 2000. 81

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Total Contributions $80,124,403 (82)

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This data does not suggest any party bias, but it was included in the paper as an awareness tool to suggest the relevance of political affiliation, and how it may determine the outcome of federal and state laws.

**Reforms with Consenting and Dissenting Views**

During July 1999, a Judicial Conference Civil Rules Advisory Committee was formed to address Class Action reform. A Defense Counsel Journal by Rex K. Linder outlined the event. The committee report recommended that legislative, procedural and practical solutions be developed to address problems created by mass tort litigation. The report favored limiting state court class actions to matters affecting the forum (district) state, consolidation of federal and state proceedings for discovery purposes, and greater control of attorney’s fees, using court-appointed expert panels to resolve scientific issues, and punitive damages reform.

The report highlighted the strain that mass torts imposed on the system. Other problems addressed were significant delays in recovery, inadequate pools of assets, defendants who are forced to settle weak claims that may pose numerous other claims, and the means to generating enormous attorney’s fees that cause its own momentum.

The committee summarized some possible solutions as follows:

- Opt-in class actions for trial
- Limiting state court class actions to matters primarily affecting the forum state
- Transfer and consolidation of federal and state proceedings for discovery purposes
- Increased control of attorneys’ fees
- Changes in the rules of professional responsibility
- Resolution of scientific issues by employing court-appointed expert panels and, possibly, "scientific issue class actions" as an independent class action category or specialty
- Punitive damages reform to eliminate multiple awards, or a cap on punitive damages

The report concluded with the recommendation that the Judicial Conference take a leading role in developing a combination of legislative, procedural and practical solutions to the many problems facing state and federal courts with respect to mass tort litigation. 83

The last effort to reform the system before the turn of the 21st century was initiated by Senators Grassley and Kohl, who introduced "The Class Action Fairness Act of 1999." Senate Bill 353 addressed the growing problem of abusive state court class action suits. The bill was drafted to resolve the problems encountered when state court judges hear interstate class action cases by allowing such cases to be heard in federal court. The bill proposed:

- Settlement notices to be written in plain English and for state attorneys general to be notified of settlements
- Courts to determine the amount of damages to be paid to class members before awarding attorneys' fees
- Claims involving parties from multiple states can be heard in federal court to ensure all class members will be treated equally and fairly
- Mandatory sanctions for filing frivolous lawsuits

The senators concluded, "Class action cases are being used with an increasing frequency and in ways that were never envisioned by its creators. This legislation will improve the efficiency of the judicial system because federal courts have special procedural tools for dealing with complex litigation and are better able to manage claims involving parties from multiple states." 84
The remainder of this paper will focus on the bills that have been litigated in Congress for the past 6 years, and the controversy that they caused among political pundits, legal advisors, and corporate interests. Although most participants in the class action process agree that some reforms are necessary, their opinion depends on which side of the fence one is on, and the relevance of the issue to one's position. In 1999, Attorney D. Jeffrey Campbell of Porzio, Bromberg, & Newman wrote an editorial defending the class action-related federal jurisdictional provision Senate Bill 353 (The Class Action Fairness Act of 1999) and it's comparable House Rule 1875 (The Interstate Class Action Jurisdiction Act of 1999).

In his article "Proposed Legislation Would Expand Federal Diversity Jurisdiction to Remedy Abuse of State Class Actions," Campbell wanted to clarify that the provisions would restore fair and equal justice to defendants by resolving some of the purported abuses and problems that are prevalent among mass tort litigations. He said that these "acts" would resolve the burden that is put on state courts to accommodate the friendly demands of plaintiff's lawyers. Campbell pointed out that Congressional committees want to curb the "elastic" and dynamic nature of mass torts that encourage the filing of claims. He published the dynamics that the committee felt needed restraining:

"1) Inconsistent state court standards for certifying class actions; 2) Economies of scale that make a class action profitable; and 3) A rush to file claims before they have matured out of fear that a defendant's assets will be exhausted by earlier plaintiffs." He continued, "The International Class Action Jurisdiction Act ensured that the federal courts have the measures to avoid the risk of inconsistent verdicts, and the ability to handle voluminous and duplicative class actions by consolidating them. Both of these
provisions also curtail the financial incentives for plaintiff's lawyers to file mass tort claims; reasonable percentages and lodestar calculations will be used to determine counsel fees.”

During February 2000, the Committee of Rules and Practices was also questioning whether certain product liability cases needed to be reviewed for their worthiness before they are relegated to the federal courts. There is a concept known as the maturity factor that some courts use to justify whether a case is worthy of federal jurisdiction. The courts are referring to the product reaching a track record of success with juries. “Several circuit courts have held that where a product liability claim has not yet achieved some sort of track record, for example, record of success with juries, class action treatment for the purpose of litigating the cases is simply inappropriate.” Peter A. Drucker, author of “Class Certification and Mass Torts: Are ‘Immature’ Tort Claims Appropriate for Class Action Treatment?” wrote, “Instead of merely authorizing courts to consider maturity in the mix of issues presented by an application for class certification, Rule 23 should be amended to forbid certification of ‘immature’ tort claims.” Drucker concluded that mass tort class actions are often unfair to defendants, and this issue exacerbates it even more. One formula he recommended is, “Complete discovery, careful scrutiny of scientific expert testimony, acceptance of plaintiff’s theories under relevant state law by trial (and perhaps appellate) judges, and several plaintiff’s jury verdicts are probably minimum requirements.” He feels that the determination of whether a tort has sufficiently matured should be left to the discretion of the trial judge.

In July 2000, Bruce Alpert of the Washington Bureau wrote that in the Senate, Democrats were opposing bill S.353, while Republicans were supporting it. Senate
Republicans were quoted in the article as complaining that some lawyers have become instant millionaires by taking advantage of the system by collecting enormous fees, while often leaving the class members with little of value. They also accused lawyers of using the system to shop around for judges who favor their point of view.

Alpert also wrote that Russ Herman, one of the country's best-known plaintiff's attorneys, agreed that some class actions have "reached inappropriate settlements, or attempted inappropriate results." But, Herman said that if the class action legislation passed, "Corporate wrongdoers will celebrate, and the little guys will see the doors of the justice system shut tight." He also claimed that generally it is tougher for plaintiffs to get the legal standing to bring such lawsuits to the federal courts. Both sides of Congress were waging an all-out battle, along with corporations and business trade associations who spent millions of dollars in lobbying efforts on behalf of the bill.87

On August 27, 2001, the Washington Post published an endorsement for the bill. The editorial suggested that the focus of tort reform should be to demand more accountability to real clients, and seek justice for filing frivolous claims. The article included a study by the Manhattan Institute that related some damaging evidence against the present class action system. A discovery was made about three class-action-rich counties in three states. Cases filed in these counties generally didn't involve defendant corporations based there, nor were the lawyers generally local. Yet the judges who heard the cases were becoming the regulators of products and services sold far beyond the borders of their states. The editorial continued with accusations that class counsels are known to file cases that are often expected not to survive certification, but the defendant is likely to settle because litigation is expensive and the discovery process embarrassing.
The editorial concluded with a statement in support of making it easier to move state court cases to the federal courts, and urging lawmakers to vote for the present bill that is in congress that will accomplish these measures.88

Another endorsement for reform was published in an editorial from USA Today, October 9, 2002, which reported on how the Federal Trade Commission and state attorneys general are coming to the aid of consumers harmed by wrongdoing. The article defended the ideology of class action by noting, that when applied correctly, benefits those who can’t afford to sue individually, but can be a potent force when they band together. But, it also warns that too often, the injustices that are committed are compounded by the misdeeds of lawyers who put their own interests before that of their clients. The editorial noted that the FTC had entered the picture, and challenged several class action settlements. It was able to have one case dismissed, win a 50% reduction in lawyers’ fees in another, and challenged an unusually high legal fee in a third case. The October 9, 2002 USA Today editorial also stated that the FTC claimed that in 2002 they were observing the results of dozens of other class-action cases, with particular attention to unfair deals.

The USA Today article also published that The Association of Trial Lawyers of America argued, however, that “Judges have the power to overturn bad settlements, so the FTC would be better off spending its time addressing wrongs more serious than excessive attorney fees.” But the editorial pointed out that ATLA was missing the point. “Token settlements and high fees benefit everyone involved in class-action suits except the damaged parties. If judges and lawyers aren’t looking out for their interests,
consumers can at least count on the FTC and state attorneys general to make sure they’re treated fairly.”89

As of February 2002, there were two other bills in Congress that were seeking additional consumer protection under the jurisdiction of the Securities Exchange Commission. The 1st bill was the Sarbanes-Oxley Act of 2002, which was designed to force accounting firms to maintain absolute independence from the companies whose books they audit.90 The other bill was to repeal the Private Securities Litigation Reform Act of 1995 that was designed to curtail class action lawsuits by the plaintiffs’ bar.91

Adam C. Pritchard, author of “Should Congress Repeal the Securities Class Action Reform?” stated that the high-technology industries, accountants, and investment bankers thought that they were unjustly victimized because they were being sued for nothing more than a decline in company stocks. The argument since the institution of the PSLRA is that corporate entities now have too much protection and are abusing the Act by not disclosing public information. Pritchard, Assistant Professor of Law, University of Michigan Law School, did a study on how class actions have been operating both before the Act and since the Act was instituted. He claims that the evidence does not support repealing the PSLRA. He explains that securities class actions are being filed at a record pace, and that a higher percentage of these lawsuits are being dismissed now than before the act; the ones that do survive lead to larger settlements. He equates this as a more cost-effective job of deterring corporate fraud. What Pritchard did recommend was a reform to change the damages remedy in securities fraud class action to focus on deterrence.
Pritchard said that he sees the pendulum swinging in the direction of a repeal of the PSLRA because opponents are seeking to deter plaintiff lawyers from seeking billions of dollars in fees from lucrative accounting firms, investment banks, and high-tech companies. Pritchard also wrote, “In the fiasco, Enron’s lawyers said, “It shows that the curbs on abusive lawsuits created by the PSLRA give corporations carte blanche to engage in fraud.” William Lerach, dean of the class action bar, labeled PSLRA a “Corporate License to Lie Act.” He also said that the PSLRA emboldened executives to think they could do whatever they wanted.” Pritchard predicted that whatever occurred, it would include loosening restrictions on securities class actions.

Supreme Court Rule 306 may help reduce the number of class action lawsuits. Adopted on January 1, 2003, the new rule by the Supreme Court of Illinois allows appellate review at an early stage of class action lawsuits. Supreme Court Rule 306 was amended to allow a party to seek an appeal based on whether a suit was properly certified as a class action before resolution of the suit is complete at the trial court. Under the rule, the Illinois Appellate Court would have the discretion to hear the appeal.

On February 4, 2003, the Senate introduced Bill S.274 during the 108th Congress. Its purpose was to amend the procedures that apply to consideration of the interstate class actions to assure fairer outcomes for class members, defendants, and other purposes. This act was cited as the “Class Action Fairness Act of 2003.” The amendments were cited as follows:

- Coupon scrutiny
- Protection against loss by class member
- Protection against discrimination or geographic location
- Prohibit payment of bounties
- Clearer and simpler settlement terms
• Appropriate notification to federal and state officials
• Federal District Court Jurisdiction for interstate class actions
• Removal of interstate class actions to federal district courts
• Removal of class actions
• Report on settlements

_Dissenting views to House Rule 1115 “The Class Action Fairness Act of 2003”_

was written by:


These lawmakers strongly opposed H.R. 1115, stating that it would bar most forms of state class actions and massively tilt the playing field in favor of corporate defendants in both class action and non-class action cases. The lawmakers claimed it was opposed by numerous entities, such as state and federal judiciaries, consumer and public interest groups, including Public Citizens, Consumers Union, the Consumer Federation of America, and the U.S. Public Interest Research Group. The list of opponents continued with environmental and health advocates, such as the American Heart Association, Campaign for Tobacco Free Kids, and the American Lung Association. Civil rights groups, such as the Leadership Conference on Civil Rights and the Lawyers’ Committee for Civil Rights also were said to oppose the legislation.

This was the fourth time class action legislation had been offered in Congress. During the 105th Congress, the full committee marked-up and reported out on a party line vote the “Class Action Jurisdiction Act of 1998,” which was similar to H.R 1115. The bill was never considered by the Full House during the 105th Congress. In 1999, after a hearing and mark-up, the House Committee on the Judiciary reported out, by a 15-
12 vote, the “Interstate Class Action Jurisdiction Act of 1999,” which was similar in most other respects to HR 1115. On September 23, 1999, the House passed the legislation, 222-207. It was never voted on in the Senate. During the 106th Congress, the House passed H.R 2341, the “Class Action Fairness Act of 2001,” (identical in most other respects to the 2003 bill) by a vote of 233 to 190. While the Senate Judiciary Committee held a hearing on the bill, it did not take any further action.

The senators cited several objections to the legislation, including that the Act would undermine the importance of aggregating small claims. These claimants would find it difficult to obtain access to the justice system, providing exceeding opportunities for them to be victims of fraud. The senators particularly objected to the state courts being isolated from violations of their own state laws, such as state consumer protection laws.

The senators objected to the few circumstances in which the federal courts could remove the case to the states jurisdiction.94

- When a substantial majority of the members of the proposed class are citizens of a single state of which the primary defendants are citizens, and the claims asserted will be governed primarily by the laws of the state.
- When all matters in controversy do not exceed $2,000,000 or the membership of the proposed class is less than a 100 (a limited scope case)
- When the primary defendants are states, state officials, or other government entities against whom the district court may be foreclosed from ordering relief (a state action case).

On June 12, 2003, the House of Representatives by a 253 to 170 vote passed the bipartisan legislation, the “Class Action Fairness Act of 2003.” The House Judiciary Committee Chairman, F. James Sensenbrenner, Jr. (R-Wis.) stated, “Today the House seized the opportunity to end the extortion and fix the class action problem. Class actions
were originally created to efficiently address a large number of similar claims by people who suffered small harms. Today, they are too often used to efficiently transfer large fees to a small number of trial lawyers doing great harm.”

The Vice President for Regulatory and Competition Policy, Lawrence Fineran, said, “Basically, the current system is a form of legalized extortion. The Act would restore the intent of the Constitution’s framers, and allow federal courts to hear nationwide, multi-million dollar lawsuits.”

One very significant proponent of the 2003 Act was The National Association of Manufacturers. The members lobbied senators, and pleaded with the general public to contact their Congressional delegations and their state attorney general to pass the senate version of the bill, S.274. Association members said that they wanted to make sure that members of Congress knew that the Act would help to solve a major problem in the legal system, specifically, that the plaintiff’s lawyers know that several jurisdictions allow just about any class action lawsuit to move forward. NAM continued its argument by stating that this not only allows those jurisdictions to have a disproportionate effect on national policy, it also forced companies to settle a case, even for lawful conduct.

“On October 23, 2003, (39) members of the Senate blocked a vote on the Class Action Fairness Act of 2003. Supporters of the bipartisan bill failed by one vote to get the 60 votes necessary to invoke cloture (closure) and limit the debate on the bill.”

Several senators who voted against cloture say they support the reform, which means the subject could come back to the Senate floor before the end of the current session. 38 Democrats and 1 Republican voted against the cloture.
President Bush stated, "Class action reform is favored by a large bi-partisan majority in the Senate. Bush stated he is eager to sign it, our economy needs it, and I urge those Senators who stand in the way to let the will of the people be heard." 99

CONCLUSION. I want to quote a favorite line by California-based Senior U. S. District Court Judge William Schwarzer who feels that if the system is going to be revamped, "We need to go about it with great care. It's not a system that is broken. There is no question that automobiles are much safer today than they were 30 or 40 years ago. Hospitals are safer places than they were 30 or 40 years ago. That's not to say there are not problems, there are problems." 100

The world may be a better place today because of the introduction of class actions into this country, but now we have to find a balance between scamming Corporate America into bankruptcy and maintaining the well-being of consumers and stakeholders. The many laws that have been instituted over the last century have been a part of the evolution of class actions, and they have served a very vital purpose in our development. Just like the evolution of the class action lawsuit, these laws may have to be altered to maintain a balance of justice. The legal system is in a constant state of flux, and this is how we arrived at this juncture today. We are on a road to recovery that will benefit both the plaintiff and the defendant class, while guarding the interests of legal counsel. The institution of the "Class Action Fairness Act of 2003" was a huge step in the right direction. Although it was blocked from a vote by the Senate, there is optimism among the Senate members that a revised bill can be formulated that will attract a more democratic vote. Such reforms may not solve all of the inequities immediately, and it
may cause even others, but we have learned that even the well meaning in society have weaknesses, and that is why our constitution has served us so well throughout history.
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