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Attorneys' Fees and Plaintiffs' Recoveries in Class Action Cases: Myths Obscure Facts

A driving force behind the push for federal class action legislation¹ has been the claim by the U.S. Chamber of Commerce and others that they want to stop class action settlements that result in worthless coupons for plaintiffs. Public Citizen strongly opposes most coupon settlements, and we have challenged many of them in court. However, until 2003 the Senate bill had no provision to discourage coupon settlements,² and the House bill in the last Congress, which the Chamber prefers, had no such provision.³

Corporations actually like coupon settlements as they allow a company to save substantial sums – if the coupon is of little real value to class members it will not be redeemed. The Senate bill's coupon settlement provision, which requires that the attorney's fee be a percentage of the coupons actually redeemed, rather than the estimated total value of the coupons, was only added because Sen. Patrick Leahy (D-Vt.) offered a Democratic alternative that included such a provision suggested by national consumer groups.

The Chamber and its allies have also been deceitful about other aspects of attorneys' fees and plaintiffs' recoveries in class action cases. The most comprehensive empirical study ever done of attorneys' fees in class action lawsuits challenges some of their most cherished myths. The study, *Attorney Fees in Class Action Settlements: An Empirical Study*, examined 370 class action lawsuits settled between 1993 and 2002 in which the client recovery and the attorneys' fees were available.⁴ The study's major findings are below.

MYTH: Class action members often *lose* money while their attorneys receive excessive fees,⁵ and/or attorneys often hoard settlement money while class members are left with coupons or other awards of little or no value.⁶

FACT:

- **Median attorneys' fees were only 21.9 percent of the recovery⁷**—not more money than all class members combined get, as claimed by the Chamber's Institute for Legal Reform,⁸ and even less than the typical one-third fee in personal injury cases.
- **Median attorneys' fees in consumer class actions, the type that would be most effected by federal class action legislation, were only 13 percent.⁹**
- **Attorneys' fees as a percent of recoveries were higher in federal rather than state court settlements.** This is the opposite of the "anything goes" attitude that's supposed to prevail in state courts, according to the Chamber's Institute for Legal Reform.¹⁰ Fees were about 20 percent in federal courts and 19 percent in state courts for nonsecurities, non-fee-shifting cases and 38 percent compared to 32 percent in fee-shifting cases.¹¹

- **Only 7 percent of the class actions resulted in a coupon settlement that offered little value to the plaintiffs.**¹² Although Public Citizen opposes most coupon settlements, this is still a modest percent of the total number of class actions. Moreover, some of the most egregious coupon settlements have been in *federal* court.

MYTH: Class action client recoveries and fee awards have skyrocketed in recent years.

FACT: While Public Citizen believes it would be a good sign if client recoveries had dramatically increased, signaling that wrongdoers were being made to pay for their fraud, these claims are way overblown.

- **There has been only a modest real-dollar increase in recoveries over the last 10 years.** In 1993, the median recovery for plaintiffs in a class action was about \$13 million and rose to about \$15 million in 2002, in adjusted dollars.¹³
- **Median attorneys' fees increased from about \$2 million in 1993 to about \$3 million in 2002,** over the 10-year period tracking the modest increase in overall dollar recovery.¹⁴
- **There is a "strong correlation between the fee amount and the client recovery."** "As the comprehensive study found, and as one would expect, "[a]s the client recovery increases, so does the fee."¹⁵ However, as the "client recovery increases, the fee percent [in contrast to the fee amount] decreases, putting more money in the clients' pockets."¹⁶
- **Attorneys' fees strongly correlate with the risk involved in pursuing a case:** "high risk is associated with a higher fee, while low-risk cases generate a lower fee."¹⁷

¹ S. 12, introduced by Sen. Charles Grassley (R-Iowa), November 19, 2004.

² See amendment to S. 274, offered by Sen. Leahy on June 4, 2003.

³ H.R. 1115, Sections 1711 and 1712, passed by the House of Representatives on June 18, 2003, basically would continue the present practice of leaving approval of the attorney fee in the hands of the trial judge.

⁴ Theodore Eisenberg, Cornell Law School and Geoffrey P. Miller, New York University School of Law, "Attorney Fees in Class Action Settlements: An Empirical Study," *Journal of Empirical Legal Studies*, Vol. 1, Issue 1, 27-78, March 2004. The authors examined all available published opinions on federal and state class actions between 1993 and 2002, inclusive, which included information on class recoveries and attorneys' fees. There was a total of 370 cases in which the attorneys' fee and class recovery could be determined with reasonable confidence. In addition, the authors were able to favorably compare their data with class actions reported in the March-April 2003 edition of Class Action Reports (CAR), which contains more than 600 common fund cases from 1993 to 2002.

⁵ U.S. Chamber of Commerce, <http://www.uschamber.com/government/issues/reform/classaction.htm>.

⁶ S. 12, Sec. 2. Findings and Purposes.

⁷ Eisenberg, p. 27 and p. 51, Table 1, A, analyzing "non-fee shifting cases." These are common funds cases where the attorney fee is taken out of the common fund. "Fee-shifting cases" are those where calculation of the fee is specified by statute and is paid directly by the defendant, not out of the common fund.

⁸ U.S. Chamber Institute for Legal Reform, Brochure on Class Action Fairness Act, p.1.

⁹ Eisenberg supra, p. 51.

¹⁰ U.S. Chamber Institute for Legal Reform, Brochure on Class Action Fairness Act, p.1.

¹¹ Eisenberg supra, p. 67. Securities cases are not included as they are not covered by the federal class action bills.

¹² Eisenberg supra, Table 3, B, examining non-fee shifting cases of which there were 303 out of the 370, p. 60.

¹³ Id., Figure 1, p. 47-48.

¹⁴ Id., p. 57, Fig. 6, median fee, non-fee shifting line. According to Eisenberg, the median fee, non-fee shifting line was transposed with the median fee, fee-shifting line in the original article; phone conversation on Jan. 20, 2005.

¹⁵ Id., p. 52.

¹⁶ Id., p. 54.

¹⁷ Id., p. 27.