Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

May 14, 2003

Re: Kyl/Cornyn Attorney Fee Tax Proposal

Dear Senator:

We write urging you to oppose adoption of the Kyl/Cornyn attorney fee proposal (S. 887), which may be offered as a floor amendment to the tax bill. In the guise of a tax law, Kyl/Cornyn would write new substantive standards for awarding attorneys fees in large cases in federal and state courts. We believe that the Internal Revenue Service has no business supervising legal fees and that the substantive goals of the Kyl bill are misguided and in many respects unconstitutional.

Public Citizen takes a back seat to no one in its concern about excessive legal fees. We have worked tirelessly to assure that no client pays excessive fees and that all lawyers, on both sides of a case, are paid only fees that are reasonable. In class actions, our lawyers have been among the few willing to oppose unreasonable fees – often to the displeasure of class counsel. But if there is a problem in this area, Kyl/Cornyn is clearly the wrong way to go about solving it.

Although labeled a tax bill, the undeniable purpose of S. 887 is to impose on all large lawsuits what its sponsors believe to be the "right way" to calculate attorneys fees. The bill uses the gimmick of imposing a 200 percent penalty on what its sponsors call "excess" legal fees, which means that there is no choice but to follow federal law, even though most cases, including the tobacco cases at which the sponsors claim to be directing this amendment, are based on state and not federal law. That has not stopped the two sponsors, who claim to be supporters of principles of federalism and states' rights, from attempting to pass federal legislation telling the states what their laws must be on attorneys fees.

The bill would:

- Create a new system in both state and federal courts for "auditing" legal fees to determine whether they are excessive, even if no one objects, and then require the already-overworked and understaffed IRS to become the law enforcer for attorneys fees;
- Change the laws that Congress recently passed to prevent abuses in the securities class action field, by depriving the lead plaintiff of the right to negotiate a fee with class counsel, and by bringing in the federal government to "prevent" the very plaintiff that Congress has directed to lead the action from deciding what a reasonable fee is in a particular case. Most federal

judges now reject the so-called "lodestar method" demanded by this bill in large damages cases, because that method can be very time-consuming and costly to implement, is often unfair and rewards inefficiency. Yet S. 887 would insist on it as the *only* way to calculate fees.

- Take away from federal and state judges their traditional function of supervising fees in class actions, without any showing that they are not, by and large, doing their job properly.

- Apply to "qui tam" actions under both state and federal law, with a potential adverse impact on the efficacy of this important litigation method for rooting out corrupt practices that victimize governments and the public.

The bill's provisions on "aggregation" of similar claims seem to apply to mass torts like asbestos where, if a lawyer or law firm, or even "related" firm, recovers for hundreds or thousands of plaintiffs a total of more than $100 million, no matter how many years it takes, requiring that once that threshold is reached, all future fees be subject to the new limits.

To top it all off, S. 887 applies not just to contracts entered into and cases filed and even settled before the bill becomes law, but it covers any fee paid after June 1, 2002 – 10 months before the bill was even introduced.

Senators Kyl and Cornyn have offered two principal rationales for S. 887. First, they argue, lawyers act as fiduciaries, and tax laws are needed as a backstop to prevent violation of their duties. We agree that lawyers should honor their duty, but we fail to see why many other notorious practices of self-dealing are not subject to the bill. Kickbacks paid to real estate brokers, high-interest loans sold by tax preparers, and insider trading of stock held by employee pension funds are examples of widespread rip-offs of vulnerable individuals arguably more deserving of the imposition of punitive "excise taxes."

Second, the senators point to the apparent use of "pinstripe patronage" to select attorneys representing states in tobacco suits. The dispensation of legal and other business to campaign contributors is abhorrent, but here only members of the plaintiffs' bar are singled out for punishment. If the problem of "pay-to-play" by municipal finance lawyers was addressed by the bill, its bona fides might be more evident. Instead, the bill seems squarely aimed at the sponsors' political foes.

If Senators Kyl and Cornyn were sincere in their April 10 statements introducing S.887, they should be willing to back up their contentions by bringing Congress' investigatory and hearing mechanisms to bear on the broad issue of excessive legal fees by all parts of the legal community. In that event, we would be happy to participate in a full and comprehensive debate of the concerns they have raised. For now, S.887 should be rejected as plainly the wrong answer to the wrong question.

Sincerely,

Joan Claybrook
President

Alan Morrison
Director
Public Citizen Litigation Group