Unfairness Incorporated:
The Corporate Campaign Against Consumer Class Actions

Public Citizen

Congress Watch
June 2003

Acknowledgments

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Executive Summary

Any doubt that big business expects to benefit greatly from a federal takeover of most state class-action laws is dispelled by the overwhelming amount of money and manpower that major companies and industries have spent on legislation that is now before Congress. This Public Citizen investigation into lobbying on class-action legislation – and into the corporate interests financing that lobbying – reveals several cogent points:

1) At least 100 major corporations and pro-business associations have banded together to spend millions of dollars and to employ at least 475 lobbyists to make sure that class-action legislation is tilted in their favor.

2) Many corporations that portray themselves as victims of unjustified class actions have, in fact, engaged in unfair and harmful practices that would not have been corrected if consumers had not been represented in class-action lawsuits.

3) Legislation now under consideration in the U.S. House (H.R. 1115) and Senate (S. 274), the so called Class Action Fairness Act, contains a number of changes that will enable corporations to injure or defraud average Americans while hiding behind legal loopholes or procedural technicalities.

Findings of this Public Citizen report include:

<u>Class-Action Campaign Attracts a Swarm of Lobbyists</u>

- **At least 100 major companies and pro-business associations have unleashed at least 475 lobbyists to Capitol Hill since 2000 to promote their class-action agenda.** This is nearly five lobbyists for every U.S. senator. Public Citizen's analysis of lobbying disclosure records from 2000-2002 reveals that industries active in the class-action effort have included: insurance (with 193 lobbyists), including life insurance companies (79), property and casualty insurers (60) and health maintenance organizations (59); banks and consumer credit companies (36 lobbyists); automotive manufacturers (32 lobbyists); retailers (31 lobbyists); pharmaceuticals (21 lobbyists); gas and oil corporations (21 lobbyists); and tobacco companies (17 lobbyists). [See Figure 1 and Appendix A]

- **Chamber of Commerce orchestrates business lobbying for federal class-action legislation.** The U.S. Chamber of Commerce and the Chamber's Institute for Legal Reform have employed 45 lobbyists in the class-action campaign. In 2001, the Business Roundtable agreed to coordinate its class-action efforts with the Chamber and its Institute for Legal Reform, which subsequently spent more than $22 million lobbying on tort issues in 2002. According to published reports, the Institute plans to increase that figure to $40 million this year. And the Institute for Legal Reform has spent between $5 million and $15 million on an advertising campaign that targets class-action lawsuits.

- **Many class-action lobbyists have "revolving door" connections to top government offices.** At least 131 of the 475 lobbyists (28 percent) who registered to work on class-action legislation have some kind of "revolving door" connection. This list includes at least 10 former members of Congress. At least 10 other lobbyists have connections to the House and Senate Judiciary committees, which have jurisdiction over the class-action bills.

- **Influence of special interests also is reflected in political contributions.** The 29 corporations and business groups that have lobbied most actively for class-action legislation – those that have employed seven or more lobbyists to work the issue –gave a combined $49 million in PAC and soft money political contributions over the past three election cycles. According to data gathered from the Center for Responsive Politics, 82 percent of that money supported Republicans and 18 percent supported Democrats. [See Figure 2]

Proposed Legislation Would Give Corporate Defendants Advantages

Class-action bills in the U.S. House and Senate, H.R. 1115 and S. 274, would not change the underlying laws under which class-action lawsuits are brought – but the legislation would give corporate defendants subtle, but substantial, procedural advantages. Most significantly, the legislation would divert most class-action lawsuits from state courts to federal courts.

- **Class certification rules are applied more stringently in federal courts.** While most states' rules for class actions are copied from the federal rules, there are significant differences in the way the rules are applied. The question of whether common issues – such as companywide fraudulent practices – "predominate" over individual issues is more often answered "no" by federal judges. The result is the dismissal of many more class actions in federal courts.

- **Federal judges feel constrained to apply state laws conservatively.** Even though H.R. 1115 and S. 274 would place most class actions into federal court, they would still be tried on the basis of state law. This would provide an advantage to businesses because of the reluctance of federal judges to extend state law to embrace new theories of compensation. For example, medical monitoring is a newly accepted common law remedy that provides medical testing for persons exposed to toxic substances. Federal judges in Virginia and New Jersey have refused to certify class actions for medical monitoring, saying state courts should rule on the question first.

- **Federal judges are more likely to find that federal law preempts state laws.** Although federal regulations are intended to protect Americans from health and safety hazards, the doctrine of preemption can make them a double-edged sword. If Congress enacts a comprehensive regulatory regime governing a certain type of commerce, any state regulation that doesn't fit into that regime must give way. Often a corporate defendant will argue that a federal regulation trumps state law and mandates that a lawsuit be dismissed.

- **Restrictions on incentive awards would discourage challenges to discrimination and other illegal practices.** The class-action legislation under consideration in Congress would prohibit "bounties" – a disparaging term used to describe incentive awards to named plaintiffs (individuals who come forward as class representatives). Named plaintiffs are subject to such inconveniences as depositions and risk of retaliation by employers. To compensate for these intangibles, courts can grant "incentive awards" to named plaintiffs. Restrictions imposed by the "bounty" provisions in the proposed legislation, however, would make it less likely that individuals would be willing to come forward as named plaintiffs.

- **The House bill stretches the definition of "class action" to repeal California's consumer protection law.** California has a strong consumer protection law that gives courts the power to remedy unfair business practices. A portion of the law, known as Section 17200, provides that a public official, a consumer group or "any person acting for the interests of itself, its members or the general public" can bring such lawsuits Although these consumer protection lawsuits have the same effect as class actions, they are not class actions and do not require a court to determine whether common issues predominate over individual issues.

  Buried in the U.S. House version of the class-action bill, H.R. 1115, is a provision that would bring California's Section 17200 lawsuits under the definition of "class action" – effectively repealing it for any company doing business in California but headquartered or incorporated in another state. Senate Republicans are expected to add such a provision to the Senate bill when it reaches the floor.

- **An appeals provision would delay meritorious cases.** Although the federal rule that sets out procedures for class actions allows discretionary appeals of class certification decisions, H.R. 1115 would go further – giving an absolute right to appeal certifications. This would ensure that *every* decision to certify a class action would be appealed by corporate defendants. This would delay disposition of every class action by an average of 11 months, the median time it takes a U.S. Court of Appeals to decide a case. The delay will be even longer in some places – more than 16 months in the Ninth Circuit, the largest circuit. Defendants would be able to earn an additional year of interest on ill-gotten gains before they are required to make refunds to consumers.

Industries that Want Federal Class-Action Legislation – and Why

- **Insurance:** No industry has thrown more manpower into federalizing class-action lawsuits than the combined efforts of insurance companies and their industry associations, which have devoted at least 193 lobbyists to the issue since 2000. These lobbyists have been divided among life insurance (79), property and casualty insurance (60) and HMOs (59). Some lobbyists have worked for more than one segment of the insurance industry. Some lobbyists worked for clients in more than one of the sectors.

Insurance companies would benefit from proposed class-action legislation because the law would send more cases into federal courts, where judges often fail to find a "predominance" of common issues – resulting in the dismissal of cases. In fact, a Public Citizen review of 43 class-action cases involving life insurance marketing practices found that 11 of the 17 state cases (65 percent) were certified for class-action adjudication, but only nine of 26 federal cases (35 percent) were certified. In other words, life insurers were nearly *twice as likely* to avoid class-action certification in federal court. [See Appendix B]

Life Insurers: Consumers have used class actions successfully to win compensation from life insurance companies for a number of unfair practices. Some such class actions have resulted in:

- A settlement by Prudential for more than $2.3 billion involving fraudulent conduct.
- A settlement by Metropolitan Life Insurance for $1.7 billion involving fraudulent sales practices.
- A settlement by Nationwide Insurance at a cost of between $84 million and $104 million involving deceptive sales practices.
- Settlements by Equitable Life for age discrimination ($12.5 million) and for improperly increasing premiums on major medical policies ($42.5 million). Equitable also lost a $6 million fraud suit relating to life insurance sales practices and faced class-action suits for similar misconduct.
- A settlement by New York Life Insurance for $87 million to settle claims that it misrepresented policies that it sold to customers.

Property and Casualty Insurers: These companies, which have employed techniques similar to those used by HMOs to reduce payouts, are facing allegations in individual lawsuits and class actions that these techniques cross the line separating good faith cost-cutting efforts and bad faith denial of claims. Unfair practices ascribed to property and casualty insurers include:

- Manipulating software in order to systematically lower payments to injured claimants, in some cases by as much as 10 percent. At least six insurers that are lobbying for federal class action bills use a software program called "Colossus" to assess claims. In October 2002, a New Mexico state court certified a class-action complaint against Allstate, the nation's first class action against a company accused of using this controversial tool in an abusive fashion. Farmers Insurance now faces similar allegations in Washington state courts.
- Bad faith review of claims. An ongoing class action in Washington state accuses State Farm of denying claims for medical expenses by more than 5,000 policyholders based on an "unscientific paper-review system."

Health Maintenance Organizations: Sometimes HMOs emphasize cost savings at the expense of good medicine and fairness to patients. Such practices that have drawn class-action lawsuits fall into three broad categories:

- Billing customers for the standard cost of medical services instead of the discounted rate the HMO actually pays to providers. HMOs that have denied their customers the benefit of this "billed/paid" distinction settled class-action suits in Ohio for $9 million and Rhode Island for $4.4 million.

  - Systematically underpaying health-care providers through "downcoding" – reclassifying claims as lower-paid services. In May, Aetna Inc. agreed to pay $100 million to plaintiff doctors and to change its reimbursement policy.
  - Failing to provide a standard quality of care. An ongoing class action against Prudential seeks damages against the corporation for breaking its promise to base its patient care decisions on accepted medical expertise.

- **Banks and Consumer Credit Companies:** At least seven credit card companies, mortgage lenders and their trade association employed at least 36 lobbyists to urge lawmakers to pass class-action legislation. Consumer credit companies and lending institutions would benefit from H.R. 1115 by having cases under California's consumer law, Section 17200, reclassified as class actions and diverted to federal court, where defendants are more likely to prevail.

  Consumer credit and lending companies have drawn lawsuits from consumers and enforcement actions by state officials for a number of unfair and deceptive practices:

  - Household Finance agreed to pay $484 million to settle charges brought by dozens of state attorneys general that it systematically misled customers about interest rates and fine print in loans. Following Household's settlements with the states, several class-action petitions are pending in state and federal courts.
  - In April, MasterCard and Visa were found liable for charging a hidden 1 percent fee in currency exchange transactions and ordered to pay refunds that could total $800 million.
  - Citigroup agreed to pay $240 million for deceiving customers into signing ill-advised home equity loans and hiding extra charges.
  - A California class action revealed that the Bank of America failed to credit car loan payments when they were received, resulting in increased interest payments and late charges. Bank of America also settled a class-action lawsuit and agreed to pay $700,000 to account holders in Washington state for operating "undercover" automated tellers and charging their own customers out-of-network fees to use them.
  - MBNA Corp. agreed to pay $8 million to settle a class-action lawsuit in New York that alleged deceptive pricing practices.
  - Wells Fargo Bank settled a class-action lawsuit and refunded approximately $35 million to trust beneficiaries who were overcharged fees over a 20-year period.

- **Automotive:** The automotive industry has employed at least 32 lobbyists, representing a mix of those with Republican and Democratic connections, to work for class-action legislation. At least seven auto companies and parts makers have contributed to the effort.

  Automotive corporations would benefit from a provision in the House's version of the class-action legislation, H.R. 1115, that would make it mandatory for circuit courts to allow corporations to appeal all class certification decisions.

  The current procedural rule *permits* appeals, but doesn't give a *right* to an appeal – and the question of whether an appeal will be heard is at the discretion of the U.S. Circuit Court. Two automotive companies, General Motors Acceptance Co. and Bridgestone/Firestone, have had favorable experience with class-action appeals – receiving hearings and subsequently overturning the class certifications.

Consumers have received compensation through class-action lawsuits against automotive companies for a range of unfair and unsafe practices. The results of these class actions include:

- A settlement by Ford Motor Co. involving allegations that 12 million Ford cars had defective ignitions. The case revealed that Ford had withheld data from the government for more than a decade concerning a defective design that was blamed for 11 deaths. The lawsuit resulted in a national settlement in 2001 in which Ford agreed to accept returns on poorly engineered ignitions and to reimburse owners who had been forced to replace their ignitions. The settlement could cost Ford $2.7 billion.
- A $58.2 million settlement by Ford Motor Credit Co. (FMCC) in a class action involving inflated premiums for unnecessary insurance coverage on the cars it financed. The suit further alleged that FMCC routinely assessed periodic finance charges on the inflated premium amounts.
- An order for General Motors Acceptance Corp. (GMAC) to pay $3 million to class members after a jury found that GMAC breached its contracts with 14,000 auto buyers by systematically imposing finance charges on insurance policies that either never took effect or were cancelled before completion of the coverage period.
- A $10.6 million settlement by Ford Motor Co. in a state-court class action filed by more than 150 of its managers alleging that the company's performance review process subjected them to unfair age and gender discrimination.

- **Retailers:** The retail sector has devoted 31 lobbyists to class-action legislation, including 20 lobbyists employed by three retail corporations that settled or lost verdicts in class-action lawsuits concerning their practice of forcing employees to work unpaid overtime.

  Retail corporations could gain an upper hand under legislation that diverts class-actions lawsuits into federal courts because federal judges are less inclined than state judges to rule that common issues of a case "predominate" over individual issues. This means that fewer class-actions are certified in federal courts. A case in point: three federal courts have declined to certify class actions against Wal-Mart for unpaid worker hours – but at least three state courts have done so.

  Workers have relied on class-action lawsuits to win compensation from retailers who have engaged in unfair employment practices:

  - Sears and 25 other retailers settled the largest sweatshop lawsuit in history in September 2002 for $20 million. The class-action lawsuit claimed that thousands of Asian workers were kept in indentured servitude in Saipan, forced to pay recruitment fees and give up a wide range of personal freedoms to keep their jobs and avoid reprimand.
  - Wal-Mart agreed to a $50 million settlement in a Colorado class-action lawsuit and $500,000 in a New Mexico class action involving allegations that it forced employees to work off the clock. It currently faces about 40 class-action suits involving similar allegations.
  - Home Depot paid $87.5 million in 1997 to settle a class-action case alleging discrimination on the basis of gender. The lawsuit's class comprised more than 25,000 women.
  - RadioShack settled a 2001 class-action case for $29 million for failing to compensate employees for overtime.

- **Pharmaceuticals:** America's largest pharmaceutical companies have dedicated at least 21 lobbyists to passage of federal class-action legislation. One advantage drug companies can expect if the proposed legislation diverts class-action lawsuits into federal courts would be the tendency of federal judges to apply state laws conservatively. This would prevent relatively new remedies – medical monitoring, for example – from being expanded.

Consumers have received compensation through class-action lawsuits against pharmaceutical companies for a range of unfair and unsafe practices:

  - A class-action lawsuit against American Home Products (now Wyeth) was settled when the company agreed to provide medical monitoring to millions of consumers who had used its anti-obesity drug, Redux. Testimony revealed that the company had delayed warning customers of possible heart-valve damage linked to the drug.
  - In 1996, 11 pharmaceutical manufacturers agreed to a $351 million settlement in a class action by more than 3,800 pharmacies alleging price discrimination, unfair business practices and price fixing.
  - Aventis and five other vitamin makers agreed to pay $19.6 million to settle price-fixing claims brought in a class-action suit in a Massachusetts state court. The class action alleged that the companies had engaged in an international conspiracy to fix prices and allocate markets for bulk vitamins that are used in many processed products, including cereals, milk and bread.

- **Gas and Oil Corporations:** Since 2000, the gas and oil industry has devoted at least 21 lobbyists to the push to rewrite class-action laws. Under the proposed legislation, gas and oil corporations could expect to benefit from the doctrine of "preemption", under which state laws must give way if they exceed or conflict with federal laws, because federal judges are more likely to accept the supremacy of federal law.

  Consumers have received compensation through class-action lawsuits against gas and oil corporations for environmental problems and unfair business practices:

  - Mobil Oil Corporation is embroiled in a class-action lawsuit certified by a Louisiana state court on behalf of 6,000 individuals claiming injuries, emotional distress and economic loss caused by hazardous substances in their drinking water. A Mobil refinery in Chalmette, La., allegedly discharged oil and grease into the Mississippi River in 1998. Approximately 3.4 million gallons of untreated, contaminated waste water and storm water, containing more than 52,000 pounds of oil, grease and other contaminants, infiltrated the drinking water of the surrounding parish.
  - Exxon settled a New Jersey class action alleging deceptive advertising designed to convince consumers who did not need high-test gasoline to use it in their cars. The Exxon advertising campaign drew scrutiny from the Federal Trade Commission, which said consumers paid as much as 20 cents a gallon more for premium gas. In 2002, Exxon agreed to issue one million $3 discount coupons for Exxon 93 Supreme gasoline.

- **Tobacco Companies:** At least two major tobacco firms have lobbied for class-action legislation in Congress, underwriting the efforts of 17 lobbyists. Tobacco companies would benefit from legislation that diverts class-action lawsuits into federal courts because federal judges are inclined to find that federal law "preempts" state law.

  Cigarette companies make no secret of their preference for federal courts. And they have successfully argued that the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969 provides them with a preemption defense against liability claims in state-related actions. In fact, Richard A. Daynard, chairman of Northeastern University's Tobacco Products Liability Project, has observed that, "To send tobacco class actions to federal court is to send them to their death."

  Consumers have been successful, however, in bringing class-action lawsuits in state courts alleging that cigarette companies have misrepresented the tar and nicotine levels of so-called "light" cigarettes. Details of such class actions include:

  - An Illinois judge awarded Philip Morris customers $7.1 billion in a class-action lawsuit involving the false advertising of Marlboro Lights and Cambridge Lights. Testimony in the case revealed that the company has known through its own scientific testing for 25 years that its light cigarettes are actually *more* dangerous than regular cigarettes because they burn with less oxygen, releasing more toxins.
  - Class-action certification was granted in 2001 to smokers of Marlboro Lights in Massachusetts and Florida in a lawsuit against Philip Morris. And class-action lawsuits alleging fraudulent claims for "light" cigarettes have been filed against Philip Morris in California, Minnesota, Missouri, New Jersey, Ohio, Tennessee and West Virginia.
  - Class-action certification was granted in separate lawsuits filed against R.J. Reynolds and Brown and Williamson Tobacco Corp. in Illinois claiming that the companies misled consumers about the safety of "light" cigarettes.

Introduction:

Corporations Seek Unfair Advantage Through Federal Class-Action Legislation

For more than five years, Corporate America has waged a lobbying and public relations campaign aimed at discrediting and rolling back consumer class-action lawsuits. The rhetorical keystone of this campaign has been the assertion that state courts approve "outrageous" settlements of "frivolous" class-action suits, and that only the elite cadre of federal judges can put a stop to this practice.

This report squarely debunks their major arguments. Public Citizen has surveyed the litigation history of those industries lobbying to federalize class-action suits. This research found:

1) Contrary to suggestions that class-action suits are "frivolous," the industries involved in these class-action suits faced serious allegations of misconduct, usually related to fleecing consumers or mistreating employees.

2) Contrary to the portrayal of class-action settlements as providing only meaningless coupons to consumers, class-action suits detailed in this report have forced industries to pay billions of dollars in refunds to consumers and millions of dollars in back pay to employees.

3) The true reason that corporations want class-action lawsuits diverted to federal court is the subtle but substantial advantages that defendants would gain by litigating under a new, federalized regime. Although the business-backed class-action bills in the U.S. House and Senate, H.R. 1115 and S. 274, make no changes to the underlying laws under which class-action lawsuits are brought, the legislation would allow corporations to retain huge amounts of ill-gotten gains at the expense of consumers and employees.

Growth in Litigiousness or a Decline in Fair Dealing?

Central to the corporate lobbying campaign has been the claim that there has been a "dramatic increase in class-action filings." The group coordinating the push for class-action legislation, the U.S. Chamber of Commerce, argues without a hint of irony that the "dramatic increase in state court class actions is not attributable to any change in corporate behavior."[1]

This rhetoric has accompanied previous attempts to pass similar class-action bills. A corporate attorney testified during a May 1999 class-action hearing, just 60 days before Enron's board approved Andrew Fastow's larcenous LJM partnership: "I see no evidence that our nation's business leaders have suddenly lost their moral compass."[2]

Public Citizen's review of the record concludes that there have been major changes in corporate behavior, and those changes have fostered justifiable class-action litigation. Aside from the fraud, deception and other wrongdoing, revealed by the wave of corporate scandals, the 1990s saw the introduction or expansion of many envelope-pushing business techniques. With the exception of a few employment lawsuits, almost all of the class-action cases discussed in this report relate to new industry trends or practices.

For example, between 1995 and 2001, the portion of all reported bank income attributable to "late fees," "release fees" and other junk fees rose from 35 percent to 50 percent.[3] Where businesses have succumbed to the temptation to use undisclosed, padded or unfairly calculated add-on fees, consumer advocates have responded with court challenges. Many of these fees have been ruled illegal by courts; nobody could argue that litigation questioning such practices is frivolous.

The 1990s also saw huge growth in subprime lending, the practice of issuing loans to people with blemished credit records, along with a surge in accompanying predatory practices.[4]

And cost-cutting techniques used by the insurance industry, such as computer programs that automatically shave the amounts of claims, also represent undeniable changes in corporate behavior. It is not surprising that insurance interests are in the forefront of lobbying for these bills.

How Class Actions Work

Class-action lawsuits allow many small individual claims to be bundled into a single lawsuit. They are most appropriate when a single type of illegal behavior has affected many people in a similar way – and when the loss to individual consumers or workers is too small to support individual lawsuits. In these instances, one individual plaintiff whose claim is typical of others' can represent an entire class of people. The outcome of a class-action lawsuit binds everyone who was affected by the misconduct.

Courts employ a checklist of inquiries to decide whether a case is more appropriate for class-action treatment than for individual adjudications. Courts usually require that the issues in common to all class members, such as the unfair practice being questioned, "predominate" over individual issues, such as the specific type or specific amount of damages suffered by each victim. If a bank uses a computer program to automatically place an illegal fee on all of its customers' credit card statements, the common issue clearly predominates. If a pharmaceutical company markets a drug that kills some patients, seriously injures others, and has no ill effects on the majority of patients, then individual issues predominate, at least for those patients who died or were injured. Most cases fall between these two extremes.

Courts must also determine whether a class action is "manageable," and if the class representative can adequately represent all class members' interests. If the court finds these requirements are met, the case will be "certified" to proceed as a class action.

Consumers and employees generally benefit from a flexible attitude toward class certification. This is because the most common rip-offs involve taking a small amount of money from a large number of people. In many cases that relatively "small" loss – such as a failure to pay a thousand dollars in overtime wages – can be significant to the individual, yet not enough to make a full-fledged individual lawsuit economically feasible. Class-action procedure exists to deter small-change chiseling that would otherwise add up to millions of dollars in benefits to a corporation.

What Pro-Corporate Class-Action Legislation Would Do

The centerpiece of H.R. 1115/S. 274 is the jurisdictional provision that reverses what proponents call "antiquated" interpretations of the federal courts' diversity-of-citizenship requirement. Under current law dating from 1939, a federal court may hear a case based on state law only if all the class representatives are from different states than all of the defendants, and each class member's claim exceeds the "amount-in-controversy" threshold (now $75,000). The effect of this doctrine is that most state-law class actions are heard in state courts.

Business lobbyists have argued that this law is anomalous, since it allows a relatively minor auto accident case to be heard in federal court, but not a nationwide class action that involves millions of dollars. One federal appellate court judge has noted, "From a policy standpoint, it can be argued that national (interstate) class actions are the paradigm for federal diversity jurisdiction because, in a constitutional sense, they implicate interstate commerce, foreclose discrimination by a local state, and tend to guard against any bias against interstate enterprises."[5]

The U.S. Judicial Conference has concurred with part of this analysis, saying that "significant multi-state class-action litigation" belongs in federal court. But as the judges have also noted, the reach of H.R. 1115 and S. 274 extends far beyond this.

H.R. 1115 and S. 274 apply a "minimal diversity" approach, meaning that if any member of a class of plaintiffs is a citizen of a state different from any defendant, the case can be moved to federal court. In practice, this means that corporations could be sued in state courts only in states where they are incorporated or headquartered, and only if all the class members are from that same state. Thus, a Michigan-based automaker could not be sued in Kentucky courts, even if it builds a plant there; a Texas-based airline couldn't be sued in Illinois courts, even if its largest hub is there. In these situations, the possibility of hometown bias, the main justification for diversity jurisdiction, is absent.

On the other hand, the interests of the state whose citizens are plaintiffs may be substantial. In Snyder v. Harris,[6] one of two U.S. Supreme Court decisions that H.R. 1115 and S. 274 would overrule, a class action was filed by residents of Kansas who were billed gas service charges they said were not authorized by Kansas law. In 1969, the Court held that it made more sense for that local dispute to be decided under Kansas procedures than to "add to the burdens of an already overloaded federal court system."

In the years since Snyder v. Harris was decided, the federal courts' policymaking arm has reiterated this vision of "judicial federalism." In the view of federal judges, the federal courts' jurisdiction should be limited to furthering "clearly defined and justified federal interests," meaning those matters that "cannot be dealt with satisfactorily at the state level and involve either (1) a strong need for uniformity or (2) paramount federal interests."[7]

The U.S. Judicial Conference has observed that "no other major class of cases has a weaker claim on federal judicial resources" than the diversity-of-citizenship cases affected by H.R. 1115 and S. 274. "Many believe that the original justification for diversity jurisdiction—to protect against local prejudice in state courts – no longer exists, or that it exists in very few cases. Given the difficulties that federal judges frequently encounter in predicting state substantive law and the unavoidable intrusion of the federal courts in this lawmaking function of the state courts, the theoretical justifications for diversity jurisdiction are extremely weak." Indeed, federal judges have gone so far as to suggest that corporations be treated as "citizens" of every state in which they are licensed or registered to do business.

America's system of federalism allows state officials to take into account local needs, preferences and traditions in making policy. This benefit from having 51 separate state court systems, standing alone, is sufficient reason to question the advisability of moving state class actions to federal court. But an additional factor militating against federalization is the set of hindrances and handicaps that would impede class actions if H.R. 1115 or S. 274 were enacted.

Advantages that Federal Class-Action Legislation Would Give to Corporations

A recent law journal article written by two corporate class-action defense lawyers observed: "As a general rule, defendants are better off in federal court ... there is generally a greater body of federal law precedent favorable to defendants."[8] The individual sections of this report demonstrate the subtle differences that benefit corporations in federal rather than state court class actions. In brief, the advantages come in five categories:

- **Class certification rules are applied more stringently in federal court.** One law professor recently wrote that federal courts have become "increasingly hostile toward damages class certification."[9] While most states' rules for maintaining class actions are copied verbatim from the federal rules, there are significant differences in the way the rules are applied. The question of whether common issues "predominate" over individual issues is more often answered "no" by federal judges, leading to dismissal of cases. [How this difference affects consumers is seen in Sections II and V of this report, devoted to insurance carriers and retailers, respectively.]

- **Federal judges feel constrained to apply state laws conservatively.** Another advantage for businesses is the reluctance of federal judges to extend state law to embrace new theories of compensation – understandable, since state supreme courts have the last word on their states' law. For example, medical monitoring is a newly accepted common law remedy that provides medical testing for persons exposed to toxic substances. Federal judges in Virginia and New Jersey have refused to certify class actions for medical monitoring, saying state courts should rule on the question first. [This is discussed in greater detail in Section VI of this report, devoted to pharmaceuticals.]

- **Federal judges are far more likely to find that federal law preempts state law.** Federal regulations are intended to protect Americans from health and safety hazards. But the legal doctrine of preemption sometimes makes regulations a double-edged sword. Preemption means that because Congress decided to enact a comprehensive regulatory regime governing a certain type of commerce, any state regulation, including tort laws, that doesn't fit into that regime must give way. Often a corporate defendant will argue that a federal regulation trumps state law and mandates that a lawsuit be dismissed. Environmental and anti-smoking activists have found to their dismay that federal courts are more likely than state courts to dismiss a lawsuit based on preemption. [The impact of this tendency is examined in Sections VII and VIII of this report, devoted to gas and oil corporations and tobacco companies, respectively.]

- **Restrictions on incentive awards would discourage challenges to discrimination and other illegal practices.** H.R. 1115 and S. 274 prohibit "bounties" – a disparaging term that sponsors use to describe incentive awards to named plaintiffs in class actions. Named plaintiffs usually don't play a major role in class actions. They are ordinary citizens who lend their names and experiences in an effort to compensate a wrong to themselves and others. But while there isn't heavy lifting involved, there are always inconveniences and occasionally considerable risks. Inconveniences include depositions – intensive questioning by the opposing lawyer –, which can be intimidating, contentious, and upsetting to laypersons. The risks include retaliation by a defendant who holds some leverage over the plaintiff – a mortgage, adverse credit reporting, medical bills, or the plaintiff's job.

  To provide some compensation for these intangibles, courts have discretion to grant "incentive awards" to named plaintiffs that go beyond the relief provided to other class members. Courts scrutinize proposed incentive awards carefully, to ensure that they do not constitute payoffs for agreeing to a collusive settlement nor dip into compensation that rightfully belongs to the class.

  While most provisions of H.R. 1115 and S. 274 have been sold in conjunction with some "horror story" about abuses, the "bounty" provision stands out as one for which no abuse anecdote is offered. Instead, the provision's only intended effect is to make it less likely that individuals will come forward as class representatives, regardless of the merits of the case or the plaintiff's motivation. The same provision was stricken from S. 274 during Senate Judiciary Committee consideration of the bill, but industry supporters are expected to try to restore the provision during Senate floor debate. [How incentive awards were important to a bringing a notorious employment discrimination case is examined in Section VII, devoted to gas and oil corporations.]

- **The House bill stretches the definition of "class action" to severely undermine California's consumer protection law.** California has what is considered the strongest consumer protection law in the country, Business and Professional Code Section 17200. This law gives courts the power to remedy "unfair competition," defined as any "unfair or fraudulent business act or practice," by issuing any order "as may be necessary" to refund money wrongfully taken. The law also provides that such lawsuits can be brought by a public official, a consumer group or "any person acting for the interests of itself, its members or the general public."

  Although lawsuits brought under Section 17200 can have a similar effect as class actions – restitution to people who have been cheated – they are not class actions, and do not require a court to determine whether common issues predominate over individual issues. According to the California Law Revision Commission, "Perhaps the single most significant practical [difference] is that the plaintiff does not have to give notice to the proposed class members, thus avoiding substantial costs. In the arena of consumer actions and public interest law, the representative action under the unfair competition law is a simpler and cheaper alternative than a class action."[10]

Buried at the end of H.R. 1115 is a provision that brings California's Section 17200 lawsuits under the definition of "class action" for purposes of the bill. The effect of this provision is to repeal Section 17200 as it applies to any company doing business in California that is headquartered or incorporated in another state. The same provision was in S. 274 but it was stricken by an amendment during the Senate Judiciary Committee consideration of the bill. Industry supporters are expected to try to add this provision back in during Senate floor debate. [How this would benefit corporations is discussed in Section III of this report, devoted to consumer credit and lending institutions.]

- **The House bill's appeal provision would delay meritorious cases.** Several years ago, the federal rule that sets out procedures for class actions, Rule 23, was amended to allow discretionary appeals of class certification decisions. H.R. 1115 would go further by giving an absolute right to appeal certifications, ensuring that *every* decision to certify a class action will be appealed by corporate defendants. This would delay disposition of every class action by an average of 11 months, the median time it takes a U.S. Court of Appeals to decide a case. The delay will be even longer in some places – more than 16 months in the Fifth Circuit, where the claims of cheated Enron employees await resolution.[11] Defendants would be able to earn an additional year of interest on ill-gotten gains before they are required to make refunds to consumers. [The companies that stand to benefit most from this provision are described in Section IV of this report, devoted to the automotive industry.]

Section I

Corporate Campaign for Class-Action Legislation Recruits a Large Force of Lobbyists

Corporate America is sparing no energy or expense in its campaign to rewrite the rules for class-action lawsuits – an attempt to blunt one of the few tools that protect average consumers from unfair or corrupt practices by large corporations. Public Citizen's analysis of federal lobbying disclosure records reveals that at least 100 large companies and trade associations have employed 475 different lobbyists who pushed for class-action legislation from 2000 through 2002. [See Figure 1, Figure 4 and Appendix A] This is nearly five lobbyists for every U.S. senator – as if a long Metro transit train arrived on Capitol Hill and disgorged seven rail cars filled with class-action lobbyists.

Representatives of these corporate interests know that well-connected lobbyists are not the only way to open doors in Washington, D.C. The corporations and business groups that have lobbied most actively for class-action legislation – the 29 that have employed seven or more lobbyists to work the issue – gave a combined $49 million in PAC and soft money political contributions over the past three election cycles. According to data gathered from the Center for Responsive Politics, 82 percent of that money supported Republicans and 18 percent supported Democrats.[12] [See Figure 2]

It is easy to deduce how Corporate America hopes to get its money's worth from its efforts to weaken consumer class-action protections. The array of special interests that are involved in the class-action campaign represent companies and industry sectors that have paid large settlements for engaging in deceptive practices, defrauding customers, and even cheating their own employees. Case studies of some of these violations appear later in this report.

Companies and Groups Lobbying on Federal Class-Action Legislation

The list of corporations leading the charge against class-action protections is drawn from a number of business sectors that have drawn frequent consumer lawsuits for unfair and deceptive practices. Industry groups and prominent companies from these sectors include:

- **Life insurance:** (79 lobbyists) American Council of Life Insurers; Massachusetts Mutual Life Insurance; Prudential; Liberty Mutual; Northwestern Mutual Life Insurance.
- **Property and casualty insurance:** (60 lobbyists) American Insurance Association; National Association of Independent Insurers; the Alliance of American Insurers; USAA Insurance; ACE INA; Chubb; CNA; State Farm Insurance; Doctors Company.
- **Health maintenance organizations:** (59 lobbyists) American Association of Health Plans; Health Insurance Association of America; CIGNA; WellPoint Health Networks; Aetna; Humana.
- **Banks and Consumer Credit:** (36 lobbyists) Financial Services Roundtable; Countrywide Home Loans; Citigroup; American Express; Bank of America; Bank One; Household Finance; MasterCard.

- **Automotive:** (32 lobbyists) Ford Motor Co.; Cooper Tire & Rubber Co.; General Motors; Bridgestone/Firestone; DaimlerChrysler; Johnson Controls; Goodyear Tire & Rubber Co.; DaimlerChrysler; Johnson Conrols; Goodyear Tire & Rubber Co.
- **Retail:** (31 lobbyists) Sears; National Retail Federation; Food Marketing Institute; International Mass Retail Association; Wal-Mart; RadioShack.
- **Pharmaceuticals:** (21 lobbyists) Pfizer, Eli Lilly & Co.; Bayer Corp.; Bristol-Myers Squibb; Johnson & Johnson; Procter & Gamble; Wyeth; Aventis Pasteur.
- **Gas and oil:** (21 lobbyists) Chevron/Texaco; Shell Oil; Ashland; Atlantic Richfield; Exxon/Mobil.
- **Construction materials:** (21 lobbyists) Owens-Illinois; Vulcan Materials.
- **Chemicals & allied products:** (20 lobbyists) American Chemistry Council; 3M; PPG Industries; Eastman Kodak; Dow Chemical Co.; Dow Corning; Eastman Chemical.
- **Manufacturing:** (18 lobbyists) National Association of Manufacturers; Caterpillar.
- **Tobacco:** (17 lobbyists) Philip Morris; U.S. Smokeless Tobacco.

Chamber of Commerce Orchestrates Business Lobbying

The U.S. Chamber of Commerce and the Chamber's Institute for Legal Reform have employed 45 lobbyists in the class-action campaign, more lobbyists than any other association or corporation. The Chamber has taken the lead in directing efforts by big business to enact tort law changes on both the federal and state levels. In 2001, the Chamber succeeded in teaming up with the Business Roundtable when that association of corporate executives agreed to coordinate its class-action efforts with the Chamber's Institute for Legal Reform.[13]

In published reports, leaders of the U.S. Chamber of Commerce and its Institute for Legal Reform boasted that it spent more than $22 million lobbying on tort issues in 2002 and plans to increase that figure to $40 million in 2003.[14] The Institute for Legal Reform, meanwhile, budgeted $5 million to $15 million on an advertising campaign that targeted class-action lawsuits.[15]

The Institute for Legal Reform declines to disclose its list of supporting corporations, but contributions – in some cases as much as $1 million – have been reported from such companies and trade groups as Aegon, the American Council of Life Insurers, DaimlerChrysler, General Motors, Home Depot, Household Financial Group, Massachusetts Mutual Life Insurance, Morgan Stanley, and State Farm Insurance.[16]

One of the lobbying firms hired by the Chamber of Commerce to work on class-action legislation is Quinn, Gillespie and Associates, which it has paid $590,000 since 2000. A principal in the firm, Ed Gillespie, was a senior aide to House Majority Leader Dick Armey (R-Texas) and is considered a leading strategist behind House efforts to pass a class-action bill.

Despite the Chamber's enthusiasm for class-action legislation, the Republican bills before Congress are notable for failing to address one of the group's primary concerns: so-called "coupon settlements," in which plaintiffs receive discounts for future purchases, but not cash. For example, on the Chamber's Institute for Legal Reform web site, the headline on a page devoted to "Outrageous Class-action Lawsuits" blares**: "**Trial Lawyers Get a 'Blockbuster' Deal, Customers Get Coupons."[17] But the legislation backed by the Chamber of Commerce and its coalition explicitly permits coupon settlements.

Business-wide organizations like the Chamber Institute and Business Roundtable have been joined by influential single-issue groups lobbying for class-action legislation:

- The Civil Justice Reform Group, a business alliance comprising general counsels from Fortune 100 firms, was instrumental in drafting the class-action bill and has committed five lobbyists to the effort.
- The American Tort Reform Association, a coalition of businesses and business groups, has employed seven lobbyists to push for the legislation since 2000. Additionally, at least 17 of 50 members listed on ATRA's web site have lobbied for the class-action bill.[18]
- Citizens for Civil Justice Reform is another business alliance pushing for class-action legislation, committing five lobbyists to the effort since 2000.

These groups are merely the most visible part of a vast network of groups, deeply rooted in the Republican Party, that are aiming to block consumers' access to the courts. For instance, Citizens for a Sound Economy, an advocacy group co-chaired by former House Majority Leader Dick Armey, joined Citizens for Civil Justice Reform and the American Tort Reform Association last year at a legal reform summit sponsored by the Chamber of Commerce.[19]

The Federalist Society, a conservative lawyers' club whose membership includes three current Cabinet members – Attorney General John Ashcroft, Interior Department Secretary Gale Norton and Energy Department Secretary Spencer Abraham – recently published a survey of 75 Fortune 500 companies in an attempt to build its case for changes to class-action laws.[20]

And the Washington Legal Foundation, a conservative activist group, has included assaults on class-action lawsuits in its bi-weekly advertorials in the *New York Times* and has made a practice of filing briefs in class-action lawsuits. The organization lists 18 class-action cases in which it has filed briefs; it has sided with the defense each time, mostly to argue against certification.[21]

Among the testimonials listed on the organization's web site are endorsements from Ashcroft and Defense Secretary Donald Rumsfeld. "They need and deserve all the help we can give them," Ashcroft is quoted as saying.

Large and Powerful Lobbying Effort

Many corporations and business associations have relied on in-house lobbyists, but the campaign for class-action legislation also has brought plenty of work for outside lobbying shops – including some of Washington, D.C.'s biggest and best-connected firms. [See Figure 3]

Three firms that registered to lobby for class-action legislation collected seven-figure payments from corporate or trade group clients that have supported federal class-action bills. (Admittedly, most lobbyists work on more than one bill at a time – and this makes it impossible to pinpoint how much of their clients' fees went toward work on a specific piece of legislation.)

And, not surprisingly, the 10 lobbying firms that collected the most money from clients who hired them to work on class-action legislation employ lobbyists who have high-powered "revolving door" connections – that is, they previously worked on Capitol Hill or in the Executive Branch.

- **Mayer, Brown & Platt** was paid $2.96 million to represent the U.S. Chamber of Commerce on class action and other legislation. Its class-action lobbyists include Mark Gitenstein, former chief counsel to the Senate Judiciary Committee and a leading architect of the Senate strategy in support of class-action legislation; John Schmitz, who was deputy counsel to President George H.W. Bush; David McIntosh, former Republican congressman from Indiana; and Jeffrey Lewis, who was on the staffs of both Sen. John Breaux (D-La.) and Rep. Billy Tauzin (R-La.).

- **Williams & Jensen** was paid $1,640,00 by Owens-Illinois, a company with large asbestos litigation exposure; $400,000 by drug-maker Wyeth and $80,000 by the Business Roundtable to represent them on class action and other legislation. Its class-action lobbyists include William Canfield, staff director of the Senate Republican Conference (1991-93); Anthony Roda, former director of legislative strategy for House Speaker Newt Gingrich (R-Ga.); and Christine McCarlies, who was special assistant to former Senate Majority Leader Trent Lott (R-Miss.) *Roll Call*, the Capitol Hill newspaper, reports that the firm took in $12.3 million during 2002, making it Washington's eighth most lucrative lobbying firm.[22]

- **Aikin, Gump, Strauss, Hauer & Feld** was paid $1,060,000 to represent Liberty Mutual on class action and other legislation. Its class-action lobbyists include Barney Skladany, who served on the Bush-Cheney transition team; and James Tucker, who was legislative counsel to Rep. Bob Inglis (R-S.C.), who served on the House Judiciary Committee. *Roll Call* reported that the firm took in $22.2 million in fees during 2002, making it Washington's third most lucrative lobbying firm.

- **Quinn, Gillespie and Associates** was paid $590,000 by the Chamber of Commerce, $180,000 by the Civil Justice Reform Group and $20,000 by Mass Mutual Life Insurance to represent them on class action and other legislation. Its class-action lobbyists include Jack Quinn, former counsel to President Bill Clinton and former chief of staff to Vice President Al Gore; and Ed Gillespie, who was a senior aide to House Majority Leader Dick Armey (R-Texas) and has been identified in recent news reports as a top candidate to become chairman of the Republican National Committee.[23] Gillespie is considered a leading strategist behind House efforts to pass class-action legislation. *Roll Call* reported that the firm took in $9.9 million in 2002, making it Washington's 12th most lucrative lobbying firm.

- **Jolly/Rissler** was paid $760,000 by CNA to represent it on class action and other legislation. Its class-action lobbyists include Thomas Jolly, who is a former majority counsel to the House Education and Labor Committee and is considered to be in the "inner circle" of Senate Minority Leader Tom Daschle (D-S.D.);[24] and Patricia Rissler, former Democratic staff director of the House Education and Labor Committee.

- **O'Brien Calio** was paid $700,000 to represent Sears on class action and other legislation. Its class-action lobbyists have included Nicholas Calio, former assistant for legislative affairs for both President George H.W. Bush and President George W. Bush and who this year was appointed vice president for Citigroup;[25] Lawrence O'Brien III, the Treasury Department's former deputy for tax legislation (1977-1979); and Patricia Nelson, a former staff member of the House Ways & Means Committee.

- **Robin Tallon** was paid $600,000 by Philip Morris to represent it on class action and other legislation. Ex-Rep. Tallon, a Democrat who represented South Carolina for 10 years, is also former vice president for federal affairs at the Tobacco Institute.

- **Blank Rome Comisky & McCauley** was paid $560,000 by Countrywide Home Loans to represent it on class action and other legislation. Its class-action lobbyists include J.C. Boggs, former Republican counsel to the Senate Committee on Governmental Affairs; and David Norcoss, who helped plan the 1988 Republican National Convention and is on the arrangements committee for the 2004 convention.[26]

- **The Duberstein Group** was paid $280,000 from the American Association of Health Plans; $180,000 by the Business Roundtable; $80,000 by the American Council of Life Insurers; and $16,000 by General Motors to represent them on class action and other legislation. Its class-action lobbyists include Kenneth Duberstein, who was chief of staff for President Ronald Reagan; Michael Berman, an aide to former Vice President Walter Mondale; Steve Champlin, executive director of the House Democratic Caucus (1991-1993); Daniel Myer, former chief of staff to Rep. Newt Gingrich (R-Ga.); and Henry Gandy, who was an aide to former Senate Majority Leader Trent Lott (R-Miss.).

- **Barbour Griffith & Rogers** was paid $460,000 by Massachusetts Mutual to represent it on class action and other legislation. Its class-action lobbyists include Haley Barbour, director of the White House Office of Political Affairs (1985-1987) and former chairman of the Republican National Committee; and Loren Monroe, former aide to Sen. Pete Domenici (R-N.M.). *Roll Call* reported that the firm took in $12.7 million in 2002, making it Washington's seventh largest lobbying firm.

Additional Revolving Door Connections

In all, at least 131 of the 475 lobbyists (28 percent) who registered to work on class-action legislation have some kind of "revolving door" connection. In addition to those already identified (former Reps. McIntosh and Tallon), this list includes at least eight additional former members of Congress – two from the Senate and six from the House:

- Sens. Dennis DeConcini (D-Ariz.) and Rod Grams (R-Minn.). Reps. Beryl Anthony (D-Ark.); Bill Brewster (D-Okla.); Ronnie Flippo (D-Ala.); Norman Lent (R-N.Y.); Toby Roth (R-Wis.); and Richard Schulze (R-Penn.).

At least 10 additional lobbyists have connections to the House and Senate Judiciary committees, which have jurisdiction over the class-action bills:

- Edward Baxter: Former chief counsel and staff director, Subcommittee on Patents, Copyrights, and TradeMarks, Senate Committee on the Judiciary.
- Alan Coffey: Majority staff director and general counsel (1995-97) and minority chief counsel (1983-1995), House Judiciary Committee.
- Smith Davis: Counsel, Subcommittee on Crime, House Judiciary Committee (1978-79).
- Barry Direnfeld: Chief counsel and staff director, Subcommittee on Antitrust, Monopolies, and Business, Senate Judiciary Committee.
- Mark Disler: Chief counsel, Senate Judiciary Committee.
- Thurgood Marshall, Jr.: Assistant to the President and Cabinet Secretary (1997-2000). Deputy Counsel and Director of Legislative Affairs, Office of the Vice President, The White House (1993-1997). Counsel, Senate Judiciary Subcommittee on Immigration and Refugee Affairs (1988-92).
- Beverly McKittrick: Assistant Chief, Policy and Rules Division, Mass Media Bureau, Federal Communications Commission. Counsel, Senate Judiciary Committee.
- William Morley: Special Counsel, Sen. Arlen Specter (R-Penn.), 1995-97. Senior Legislative Assistant, Senate Judiciary Committee, 1987-88.
- Jeffrey Peck: Judiciary Committee Aide, Sen. Joseph Biden (D-Del.).
- Thaddeus Strom: Chief Counsel and Staff Director, Sen. Strom Thurmond (R-S.C.) (1995-96); Republican chief counsel and staff director (1992-93); and Republican general counsel (1989-91), Senate Judiciary Committee.

Other class-action lobbyists with notable “revolving door” connections include:

- Steve Ricchetti: Deputy chief of staff to President Bill Clinton.
- Walter Dellinger: Solicitor General (1996-97) and assistant Attorney General in charge of the Office of Legal Counsel for the first three years of the Clinton Administration.
- James Burnley, Secretary of Transportation during the Reagan Administration.
- Scott Hatch: Son of Judiciary Committee Chairman Sen. Orrin Hatch.

Many Lobbyists Work for More than One Class-Action Client

A complete listing of lobbying disclosure data compiled by Public Citizen shows that at least 193 of the 475 lobbyists who registered to work on class-action legislation have represented multiple clients. [See Appendix A]

Figure 1

Number of Lobbyists from Industries and Business Associations Working on Federal Class-Action Legislation, 2000 – 2002

Organization	Number of Lobbyists
Business-wide Associations	**68**
U.S. Chamber of Commerce (includes U.S. Chamber Institute for Legal Reform)	45
Business Roundtable	12
National Fed. of Ind. Business	11
Single-Issue Groups	**17**
American Tort Reform Association	7
Citizens for Civil Justice Reform	5
Civil Justice Reform Group	5

Industry	Company or Association	Number of Lobbyists*
Life Insurance Carriers		**79**
	American Council of Life Insurers	21
	Massachusetts Mutual Life Insurance	14
	Prudential	14
	Liberty Mutual	8
	Northwestern Mutual Life Insurance	6
	Hartford Financial	4
	Nationwide Insurance	4
	Equitable Life Insurance	2
	Metropolitan Life Insurance	2
	MONY Life Insurance	2
	New England Financial	2
	New York Life Insurance	2
	Pacific Life Insurance	2
	Aegon	1
	Lincoln National Corp.	1

Industry	Company or Association	Number of Lobbyists*
Property and Casualty Insurance Carriers		**60**
	American Insurance Association	10
	National Association of Ind. Insurers	7
	USAA Insurance	7
	CAN	6
	ACE INA Holdings	5
	Chubb	5
	State Farm Insurance	4
	Alliance of American Insurers	3
	Doctors Company	3
	Allmerica Financial	2
	American International Group	2
	Zurich Insurance	2
	Farmers Group	1
	Allstate Insurance	1
	ING	1
	Lumbermens Mutual Casualty	1
Health Maintenance Organizations		**59**
	American Association of Health Plans	30
	Health Insurance Association of America	12
	CIGNA	8
	Wellpoint Health Networks	8
	Aetna	6
	Humana	1
Banks and Consumer Credit		**36**
	Financial Services Roundtable	12
	Countrywide Home Loans	6
	Citigroup	5
	Bank of America	4
	American Express	3
	Bank One	3
	Household Finance	3
	MasterCard	2
Automotive		**32**
	Ford Motor Co.	11
	Cooper Tire & Rubber Co.	7
	General Motors	7
	Bridgestone/Firestone	2
	DaimlerChrysler	2
	Johnson Controls	2
	Goodyear Tire & Rubber Co.	1

Industry	Company or Association	Number of Lobbyists*
Retail		**31**
	Sears	11
	Food Marketing Institute	11
	National Retail Federation	4
	International Mass Retail Association	2
	Wal-Mart	2
	RadioShack	1
Pharmaceuticals		**21**
	Pfizer	8
	Eli Lilly & Co.	3
	Bayer Corp.	2
	Bristol-Myers Squibb	2
	Johnson & Johnson	2
	Procter & Gamble	2
	Wyeth (formerly American Home Products)	2
	Aventis Pasteur	1
Gas and Oil		**21**
	Chevron/Texaco	10
	Shell Oil	4
	Ashland	3
	Atlantic Richfield	2
	Exxon/Mobil	2
Construction Materials		**21**
	Owens-Illinois	15
	Vulcan Materials	6
Chemicals & Allied Products		**20**
	3M	8
	PPG Industries	4
	American Chemistry Council	3
	Eastman Kodak	2
	Dow Chemical Co.	1
	Dow Corning	1
	Eastman Chemical	1
Manufacturing		**18**
	National Association of Manufacturers	17
	Caterpillar	1
Tobacco		**17**
	Philip Morris	9
	U.S. Smokeless Tobacco	8

Industry	Company or Association	Number of Lobbyists*
High Tech		**9**
	Intel	8
	Hewlett-Packard	1
Insurance Services		**7**
	Risk and Management Insurance Society	4
	National Association of Insurance & Financial Advisors	3
Distribution & Wholesale		**5**
	National Association of Wholesaler-Distributors	5
Sanitary Services		**4**
	Environmental Industry Association	4
Mining		**3**
	Freeport-McMoran	2
	IMC Global	1
Defense		**3**
	Raytheon	3
Railroads		**2**
	CSX	2

Source: Public Citizen analysis of lobby disclosure reports filed with the Secretary of the Senate and Clerk of the House pursuant to the Lobby Disclosure Act of 1995.

* The sum of lobbyists hired by companies may exceed the total hired within the industry because certain lobbyists worked for more than one company.

Figure 2

Political Donations by Corporations and Groups Most Active in Class-Action Lobbying, 1998-2002 Election Cycles

(PAC and Soft Money)

Corporation or Organization (Number of lobbyists)	1998 Cycle	2000 Cycle	2002 Cycle	Total	To Dems	To Reps
U.S. Chamber of Commerce (45)	$45,901	$490,483	$273,150	$809,534	7%	93%
American Association of Health Plans (30)	103,524	115,420	227,490	446,434	13%	87%
American Council of Life Insurers (21)	494,280	961,881	895,887	2,352,048	25%	75%
National Association of Manufacturers (17)	20,000	32,607	10,600	63,207	3%	97%
Owens-Illinois (15)	117,800	123,950	41,150	282,900	11%	89%
Massachusetts Mutual (14)	357,724	1,007,750	857,917	2,223,391	21%	79%
Prudential (14)	600,424	1,020,175	833,614	2,454,213	42%	58%
Business Roundtable (12)	204,866	223,645	180,940	609,451	6%	94%
Health Insurance Assn. of America (12)	186,512	212,128	117,310	515,950	17%	83%
Financial Services Roundtable (12)	18,527	201,338	303,274	523,139	31%	69%
Food Marketing Institute (11)	601,747	782,633	685,129	2,069,509	9%	91%
Ford Motor Co. (11)	477,950	495,300	715,657	1,688,907	19%	81%
National Fed. of Ind. Business (11)	1,232,836	1,060,142	812,749	3,105,727	4%	96%
Sears (11)	54,500	231,000	651,412	936,912	20%	80%
American Insurance Association (10)	382,418	451,886	494,855	1,329,159	11%	89%
Chevron/Texaco (10)	743,824	720,314	1,258,900	2,723,038	23%	77%
Philip Morris (9)	3,240,349	3,250,610	3,793,501	10,284,460	20%	80%
3M (8)	68,450	338,305	383,504	790,259	29%	71%
Pfizer (8)	1,048,850	2,018,287	1,805,186	4,872,323	16%	84%
CIGNA (8)	548,150	735,224	1,225,227	2,508,601	8%	92%

Corporation or Organization (Number of lobbyists)	1998 Cycle	2000 Cycle	2002 Cycle	Total	To Dems	To Reps
Intel Corp. (8)	81,007	205,287	251,779	538,073	21%	79%
Liberty Mutual (8)	196,000	167,500	183,000	546,500	39%	61%
U.S. Smokeless Tobacco (8)	739,442	1,394,320	1,280,070	3,413,832	13%	87%
Wellpoint Health Networks (8)	127,500	195,550	223,800	546,850	23%	77%
American Tort Reform Association (7)	0	0	0	0	n/a	n/a
Cooper Tire & Rubber (7)	0	2,500	1,000	3,500	0%	100%
General Motors (7)	404,490	383,610	310,850	1,098,950	26%	74%
National Association of Independent Insurers (7)	258,657	304,962	243,750	807,369	7%	93%
USAA Insurance (7)	259,500	589,450	595,310	1,444,260	20%	80%
Totals	$12,615,228	$17,716,257	$18,657,011			
Three-Cycle Total	**$48,988,496**				**18%**	**82%**

Source: Public Citizen analysis for Responsive Politics data, available online at www.opensecrets.org.

Figure 3

Lobbying Firms Paid the Most by Clients Supporting Federal Class-Action Legislation, 2000-2002

Lobbying Firm	Lobbying Fees *
Mayer, Brown & Platt	$2,960,000
Williams & Jensen	$1,820,000
Akin, Gump, Strauss, Hauer & Feld	$1,060,000
Quinn Gillespie and Associates	$790,000
Jolly/Rissler	$760,000
O’Brien Calio	$700,000
Robin Tallon	$600,000
Blank Rome Comisky & McCauley	$560,000
Duberstein Group	$556,000
Barbour Griffith & Rogers	$460,000
Black, Kelly, Scruggs & Healey	$420,000
Robert A. McConnell	$410,000
Deborah F. Winston	$400,455
Alan Coffey	$340,000
Shook, Hardy & Bacon	$325,000
Lent Scrivner & Roth	$300,000
Hogan & Hartson	$290,000
Winston and Strawn	$240,000
Swidler Berlin Shereff Friedman, L.L.P.	$220,000
Murray Montgomery & O’Donnell	$200,000

Source: Public Citizen analysis of lobby disclosure reports filed with the Secretary of the Senate and Clerk of the House pursuant to the Lobby Disclosure Act of 1995.

* *Note:* most lobbyists work on more than one bill at a time – and this makes it impossible to pinpoint how much of their clients’ fees went toward work on a specific piece of legislation.

Figure 4

Number of Lobbyists from Corporations and Business Associations Lobbying on Federal Class-Action Legislation, 2000 – 2002

Company	Number of Lobbyists Employed by Company (In-House and Outside Firms)
U.S. Chamber of Commerce	45
American Association of Health Plans	30
American Council of Life Insurers	21
National Association of Manufacturers	17
Owens-Illinois	15
Massachusetts Mutual Life Insurance	14
Prudential	14
Business Roundtable	12
Health Insurance Association of America	12
Financial Services Roundtable	12
Food Marketing Institute	11
Ford Motor Co.	11
National Fed. Of Ind. Business	11
Sears	11
American Insurance Association	10
Chevron/Texaco	10
Philip Morris	9
Pfizer	8
3M	8
CIGNA	8
Intel	8
Liberty Mutual	8
U.S. Smokeless Tobacco	8
Wellpoint Health Networks	8
American Tort Reform Association	7
Cooper Tire & Rubber	7
General Motors	7
National Association of Independent Insurers	7
USAA Insurance	7
Aetna	6
CNA	6
Countrywide Home Loans	6
Northwestern Mutual Life Insurance	6
Vulcan Materials	6

Company	Number of Lobbyists Employed by Company (In-House and Outside Firms)
ACE INA Holdings	5
Chubb	5
Citigroup	5
Citizens for Civil Justice Reform	5
Civil Justice Reform Group	5
National Association of Wholesaler-Distributors	5
Bank of America	4
Environmental Industry Association	4
Hartford Financial	4
National Retail Federation	4
Nationwide Insurance	4
PPG Industries	4
Risk and Management Insurance Society	4
Shell Oil	4
State Farm Insurance	4
Alliance of American Insurers	3
American Chemistry Council	3
American Express	3
Ashland	3
Bank One	3
Doctors Company	3
Eli Lilly & Co.	3
Household Finance	3
National Association of Insurance & Financial Advisors	3
Raytheon	3
Allmerica Financial	2
American International Group	2
Atlantic Richfield	2
Bayer Corp.	2
Bridgestone/Firestone	2
Bristol-Myers Squibb	2
CSX	2
DaimlerChrysler	2
Eastman Kodak	2
Equitable Life Insurance	2
Exxon/Mobil	2
Freeport-McMoran	2
International Mass Retail Association	2
Johnson & Johnson	2
Johnson Controls	2

Company	Number of Lobbyists Employed by Company (In-House and Outside Firms)
MasterCard	2
Metropolitan Life	2
MONY Life Insurance	2
New England Financial	2
New York Life Insurance	2
Pacific Life Insurance	2
Procter & Gamble	2
Wal-Mart	2
Wyeth (formerly American Home Products)	2
Zurich Insurance	2
Aegon	1
Allstate	1
Aventis Pasteur	1
Caterpillar	1
Dow Chemical Co.	1
Dow Corning	1
Eastman Chemical	1
Farmers Group	1
Goodyear Tire & Rubber Co.	1
Hewlett-Packard	1
Humana	1
IMC Global	1
ING	1
Lincoln National Corp.	1
Lumbermens Mutual Casualty	1
RadioShack	1

Source: Public Citizen analysis of lobby disclosure reports filed with the Secretary of the Senate and Clerk of the House pursuant to the Lobby Disclosure Act of 1995.

Section II

Insurance Industry

No industry has thrown more manpower into federalizing class-action lawsuits than the combined efforts of insurance companies and associations, which have devoted at least 193 lobbyists to the issue from 2000 through 2002. They have been divided among life insurance (79), property and casualty insurance (60) and HMOs (59). Some have worked for more than one segment of the industry.

A. Life Insurance

Life Insurance Industry Lobbying on the Federal Class-Action Bills

Life insurers began seeking to weaken consumer class-action litigation after facing lawsuits in the 1990s involving fraudulent marketing practices. Over the past three years, the life insurance industry has fielded the largest battalion of lobbyists of any of the industries involved – at least 79 since 2000 – working to pass class-action legislation:

- The American Council of Life Insurers has employed 21 lobbyists.
- Massachusetts Mutual Life Insurance has employed 14 lobbyists.
- Prudential has employed 14 lobbyists, including former Sen. Dennis DeConcini (D-Ariz.). Prudential settled class actions involving fraudulent conduct for more than $2.3 billion in 1997. (See below.)
- Liberty Mutual has employed eight lobbyists.
- Northwestern Mutual Life Insurance has employed six lobbyists.
- Hartford Financial has employed four lobbyists.
- Nationwide Insurance, which settled a New York State court class action in 1998 involving deceptive sales practices at a cost of between $84 million and $104 million[27] has employed four lobbyists.
- Equitable Life Insurance has employed two lobbyists. Equitable, which settled class-action suits for age discrimination ($12.5 million)[28] and for improperly increasing premiums on major medical policies ($42.5 million),[29] lost a $6 million fraud suit relating to life insurance sales practices[30] and faced class-action suits for similar misconduct.[31]
- Metropolitan Life Insurance has employed two lobbyists. Met Life agreed to a $1.7 billion settlement for class actions involving fraudulent sales practices. (See below.)
- New York Life Insurance has employed two lobbyists. The company paid $87 million in 1995 to settle claims that it sold "vanishing premiums" policies to customers. (See below.)
- Pacific Life Insurance has employed two lobbyists.
- Aegon has employed one lobbyist.
- Lincoln National Corp. has employed one lobbyist.

Unfair Practice: Customers Victimized by "Churning"

During the 1990s, the life insurance industry faced a spate of lawsuits over "churning" – a method by which life insurance agents earn commissions by selling new policies to current policyholders, thereby stripping the cash value accrued under old policies. Typically, the agent tells a consumer that a much higher death benefit can be obtained at "no extra cost." The "churning" of client policies is encouraged by the commission structure of many life insurance companies, because agents are generally paid higher commissions in the first year of policies than in subsequent years. (Insurers often pay salespersons up to 80 percent of the first year premium of life insurance policies with greatly reduced commissions thereafter.)[32]

As explained by *Kiplinger's Personal Finance* magazine, "The cash value of your old policy – minus the agent's commission – is rolled over into the new policy, where it is systematically bled away to 'invisibly' subsidize higher premiums on the new policy. In a worst-case scenario, the cash value runs out, out-of-pocket premiums jump and, if you can't pay them, the policy lapses. Even if the policy doesn't lapse, you'll pay heavily for the churn."[33] It seldom, if ever, makes sense to replace a policy because most of the first-year premium is swallowed up in commission, and the premium is higher because the insured client is older.

Carol Nicholson, a retired K-Mart personnel manager, was a typical churning victim.[34] She and her husband, Keith Nicholson, purchased four Prudential life insurance policies between 1966 and 1984 with death benefits totaling approximately $30,000. In 1984, Prudential agent Homer Gernigan contacted the Nicholsons with the usual "churn" pitch: they could use the dividends and earnings from their policies to "work for them" in their estate and retirement planning. He told them they could acquire additional insurance by paying premiums on a new policy with the earnings from their current policies, with no additional out-of-pocket costs. Gernigan said the Nicholsons would need additional insurance for financial security during retirement or in the event of Keith Nicholson's death.

The Nicholsons agreed to buy a $100,000 whole life insurance policy. Gernigan told them that in order to apply the earnings from the original policies to the premiums for the additional policy, Keith Nicholson would need to sign certain blank forms, which he did. Unknown to the Nicholsons, these forms authorized loans from the cash value of the Nicholsons' original policies. Later, the Nicholsons received notices from Prudential indicating that policy loans had been taken and the additional policy had lapsed. The Nicholsons contacted Prudential, which advised them to ignore the notices.

When Keith Nicholson died on Aug. 26, 1994, Carol Nicholson learned that, because of Prudential's misrepresentations and omissions, his $130,376 in insurance coverage had dwindled to $22,514. Keith Nicholson's additional policy had lapsed and the unauthorized loans had substantially diminished the cash value and available death benefits of the other policies. Contrary to Gernigan's representations, the earnings and dividends on the original policies were insufficient to pay the premiums and other charges for the new policy. Without additional premium payments, the policy had lapsed.[35]

As a result of class-action suits filed in several state and federal courts, Prudential ultimately agreed to a settlement that paid out $2.3 billion to thousands of victims of its sales practices.[36]

A Reason Insurance Companies Want to Divert Class Actions to Federal Court: Cases Are More Likely to be Dismissed for Lack of "Predominance"

There is little doubt that churning violates state consumer protection laws. A more controversial issue is whether, under traditional interpretations of class-action rules, churning can be remedied through class-wide litigation.

Class-action certification requires that all members of the class have at least one common question of law or fact. If, as numerous former employees have alleged, a life insurance company trains its agents to use churning and other improper practices to increase sales for the company, that is a fact common to every consumer claim.

Class-action certification also requires that common questions of law and fact *predominate* over individual questions of law and fact. Most life insurance class-action lawsuits are based on oral representations of agents about the policies, often made at a consumer's kitchen table. Judges frequently find that these individual representations predominate over common questions and deny certification, even though all class members received similar representations.[37] This traditional application of the rules leads to a harsh result: most consumers are left without any compensation. It is impracticable for individual lawsuits to be brought over every churned policy, and even if individual suits were brought, much of the evidence would be duplicative.

A number of courts, both state and federal, have permitted life insurance class actions to proceed, but it is clear that federal courts have been less likely than state courts to relax the "predominance" requirement and grant certification. Some states, such as Oregon and North Dakota, have case law holding that common issues of fact need not predominate.[38] Attorneys who represent insurers are aware of this difference. As one corporate defense lawyer wrote:

> "First, to the extent that it is possible for an insurer to secure a more favorable forum than the one selected by a named plaintiff, careful consideration should be given to early motion practice directed at finding the most pro-defendant forum available. Common wisdom usually dictates that a defendant insurer would prefer to litigate in a Federal rather than State Court. In addition to the fact that Rule 23(b)(3) is more familiar to the defendant than a particular state's class-action statute, a defendant may also find that the federal forum is less likely to pressure the parties to settle, pre-maturely certify a class, or award massive punitive damages to plaintiffs. For this reason, if a case is filed in State Court, defense counsel should consider whether the case may be removed to Federal Court, based on either federal question or diversity jurisdiction."[39]

In fact, numbers bear out this conventional wisdom. Public Citizen reviewed 43 class-action cases involving life insurance marketing practices – all of the reported decisions dating back to 1996. The review found that 11 of the 17 state cases (65 percent) were certified for class-action adjudication, but only nine of 26 federal cases (35 percent) were certified. In other words, life insurers were nearly *twice as likely* to avoid class-action certification in federal court, largely because federal judges were reluctant to find that common issues of fact predominated in the litigation. [See Appendix B]

This kind of advantage motivates the life insurance industry to push for class-action legislation that would push more states into federal courts. By increasing federal jurisdiction over class actions, companies reduce the likelihood that a lawsuit will be brought against them in a state such as Oregon and, ultimately, they decrease the likelihood that such class actions will be certified. Legislation now in the U.S. Senate and House, S. 274 and H.R. 1115, would leave thousands of victims of systematic deceptive sales practices without class-action redress. In addition to churning, two other deceptive practices have been rampant in the life insurance industry by companies lobbying for the class-action legislation, as explained below.

Other Class-Action Cases Involving Life Insurance Companies

- **New York Life Insurance: The "vanishing premium" pitch.** New York Life settled a New York State Court class action in August 1995 for $87 million that was brought on behalf of three million customers who were given "vanishing premium" sales pitches.[40] The vanishing premium technique sells life insurance policies based on misrepresentations that, at a specified time, the investment earnings from each policy's cash value will be sufficient to maintain the policy so that the consumer will no longer have to pay premiums. While this may be true under exceptional market conditions, the increase in cash value of policies is so interest-sensitive that a slight reduction in dividend interest rates causes the premiums to "re-appear." To boost sales, agents withhold this crucial piece of information from customers. *Money Magazine* called vanishing premiums one of "The Eight Biggest Rip-Offs in America."[41]

- **Metropolitan Life Insurance: The "investment" pitch.** The company agreed in 1999 to pay $1.7 billion to settle three class-action lawsuits and dozens of other actions brought by seven million policyholders who claimed they were deceived by Met Life sales practices between 1982 and 1997.[42] In addition to allegations of vanishing premiums and churning, consumers claimed that they were led to believe that they were investing in savings or retirement plans, when in fact they were purchasing life insurance policies.[43]

  Under the settlement, class members could submit claims to an independent adjuster who could award them cash, an increase in the death benefits of their life insurance policies or some combination. Of the total settlement, about $690 million was dedicated to that fund.[44]

B. Property/Casualty Insurers

Property/casualty insurers are a variety of techniques to reduce claim payouts. Insurers are facing a spate of allegations, both in individual lawsuits and in class actions, that these techniques cross the line separating good faith efforts to cut costs and bad faith denial of claims. These insurance companies have joined in the campaign for federal class-action legislation that would weaken consumers' chances of obtaining compensation for unfair or abusive corporate practices.

Property/Casualty Insurance Lobbying on the Federal Class-Action Bills

At least 12 property and casualty insurers and three industry groups have devoted at least 60 lobbyists to rewriting class-action laws.

- The American Insurance Association has committed 10 lobbyists, including Daniel Mattoon, former deputy chairman, National Republican Congressional Committee; Matt Gelman, former legislative aide to Rep. Richard Gephardt (D-Mo.); and Drew Littman, former policy director for Sen. Barbara Boxer (D-Calif.).
- The National Association of Independent Insurers has committed seven lobbyists.
- USAA Insurance has committed seven lobbyists, including Victor Schwarz, a veteran lobbyist who has at least 10 clients interested in class-action legislation.
- The Alliance of American Insurers has committed three lobbyists.
- CNA has committed six lobbyists, including Alan Coffey, former House Judiciary Committee Staff Director (1995-97) and Minority Chief Counsel (1983-1995).
- ACE INA Holdings has committed five lobbyists.
- Chubb has committed five lobbyists.
- State Farm Insurance has committed four lobbyists.
- The Doctors Company has committed three lobbyists, including former Rep. Richard Schulze (R-Penn.), who served from 1975-1993; and Wayne Valis, former special assistant to President Ronald Reagan (1981-1983).
- Allmerica Financial has committed two lobbyists.
- American International Group has committed two lobbyists.
- Zurich Insurance has committed two lobbyists.
- Allstate Insurance has committed one lobbyist.
- ING has committed one lobbyist.
- Lumbermens Mutual Casualty has committed one lobbyist.
- Farmers Group has employed one lobbyist.

Other Class-Action Cases Involving Property/Casualty Insurers

- **Colossus.** At least six insurers that are lobbying for federal class-action bills use a software program called "Colossus" to assess personal injury claims.[45] Allstate, CNA, USAA Insurance and Farmers are listed immediately above; Hartford Financial and Metropolitan Life Insurance are listed in the Life Insurance section earlier in this chapter. In October 2002, a New Mexico state court certified the nation's first class-action complaint against Allstate that accused the company of using this controversial tool in an abusive manner.[46]

  Attorneys for the class members allege that Colossus is used to systematically lower payments to injured claimants, in some cases by as much as 10 percent. The lawsuit claims Allstate violated state "good faith" statutes by manipulating the software to recommend low-ball payout ranges and then forcing adjusters to settle according to those biased ranges. Purportedly, Colossus compares accident documents with similar cases in a database. But discovery in the lawsuit revealed evidence that Allstate systematically excluded jury awards and settlements above a certain dollar level from the database.[47] Farmers Insurance faces similar allegations in Washington state courts.[48]

- **Bad Faith Utilization Reviews.** A Washington state class action against State Farm is proceeding to trial in accordance with a February state appeals court decision. The class action charges State Farm with bad faith in denying claims for medical expenses by more than 5,000 policyholders. According to the lawsuit, State Farm uses an "unscientific paper-review system" to find ways to deny medical expense claims made under personal injury protection (PIP) coverage. State Farm had King County Superior Court seal lawsuit documents that would divulge company policies and procedures in the claims review process. However, an attorney representing class members said his firm had reviewed more than 6,000 claims filed in the last eight years and found reason to claim the company acted in bad faith 94 percent of the time.[49] Doctors have been victimized by similar practices, and have filed a class action against several auto insurers in New Jersey Superior Court in Camden.[50]

C. Health Maintenance Organizations

HMOs are insulated from many lawsuits by federal law, and those suits that go forward are generally litigated in federal court. Nonetheless, the HMO industry has assembled a powerful team to fight for class-action legislation that would further repress class actions in state court.

HMO Lobbying on the Federal Class-Action Bills

HMOs and associations that represent them have unleashed 59 lobbyists in their quest to get the class-action laws rewritten. The high-powered group includes an array of former officials from both sides of the aisle.

- The American Association of Health Plans committed 30 lobbyists, including Kenneth Duberstein, chief of staff to President Ronald Reagan; Henry Gandy, a former aide to Sen. Trent Lott (R-Miss.) and a liaison officer in the White House during the Reagan administration; and Steven Champlin, executive director of the House Democratic Caucus from 1991-93.
- The Health Insurance Association of America committed 12 lobbyists.
- CIGNA committed eight lobbyists, including former Rep. Bill Brewster (D-Okla.).
- Wellpoint Health Networks committed eight lobbyists, including Linda Tarplin, special assistant for legislative affairs under President George H.W. Bush.
- Aetna committed six lobbyists, including Thomas Donnelly Jr., special assistant to President Reagan and a former assistant secretary for legislation at the Department of Health and Human Services.

Other Class-Action Cases Involving HMOs

Managed care techniques emphasize cost savings, sometimes at the expense of good medicine and fairness to patients. HMO practices that have led to class actions fall into three broad categories:

- **Denying consumers the benefit of the "billed/paid" distinction**. Most medical providers bill for services far in excess of what the HMOs *actually* pay. This is because HMOs have worked out deals for reduced payments to the providers – deals that are the very heart of what managed care is all about. However, HMOs frequently base the cost that its enrollees must share on the "billed" amounts, rather than the paid amounts.

One such case, Corsini v. United Health Care, involved billing by the HMO for 20 percent co-payments. The patient received care from podiatrists that cost the HMO $328. The HMO, however, told her the treatment had cost $980 – and demanded that she pay $196. In fact, her actual responsibility was for only $65. The same kind of fraud had been perpetrated systematically by the HMO, and it was ordered to repay its patients $4.4 million.[51]

In DeGarmo v. Health Plan of Upper Ohio Valley, the plaintiff's 10-year-old son was paralyzed in an auto/bicycle accident and recovered $950,000 from the driver. The HMO asserted a lien of $128,000 to recover the costs of the boy's medical care. In fact, the HMO had paid only about $70,000 to the medical providers. A class was certified in this case, and the HMO agreed to pay $9 million in restitution to 3,500 patients.[52]

- **Downcoding.** Medical providers currently are suing all major HMOs for systematically underpaying them through "downcoding" – reclassifying claims as lower-paid services. For example, a doctor who performs a skin biopsy costing $120 may be reimbursed based on a downcoded service that costs half that amount. Class-action suits filed by physicians for breach of contract are pending in both state and federal courts. In May Aetna Inc. became the first insurer to settle such a lawsuit, agreeing to a payment of $100 million to plaintiff doctors, and changes to its reimbursement policy.[53]

- **Quality of Care.** An ongoing lawsuit against Prudential seeks damages against the corporation for breaking its promise to base its decisions about patient care on accepted medical expertise. The lawsuit, which a New York state appellate court allowed to proceed in 2001, reveals an undisclosed Prudential policy of basing treatment decisions on data contained in a book of general guidelines rather than on doctors' opinions.[54]

  The lead plaintiff was six months pregnant and stricken with an attack caused by Crohn's disease, which inflames the small intestine. Her physician requested continued hospitalization, but Prudential's "concurrent review nurse," who neither examined the patient nor consulted her physician, concluded the additional stay was not medically necessary based on data contained in a book, *Milliman & Robertson's Guidelines*.[55]

  A week later, the plaintiff "was rushed to the emergency room with a high fever and severe pain. Her treating physician determined that exploratory surgery was necessary and requested pre-approval from Prudential, but received no response," according to the 2001 appeals court opinion. Three days later, her intestine burst, and she was rushed to the emergency room where a portion of her colon was removed. "Pre-authorization" for the exploratory surgery arrived two days later – five days after the initial request had been made.[56]

A Brief Study in Hypocrisy ...

The American Association of Health Plans, the trade association for HMOs, has lobbied for restrictions on class actions. On its "class-action center" Web page, AAHP opines that, "Litigation leads to higher product costs in all aspects of the American economy. Health care is no exception. The cost of defending against these and other lawsuits of questionable merit will result in higher premiums for patients and more uninsured Americans. Complex health care decisions belong with elected and accountable representatives, not personal injury lawyers."[57]

That's not to say, however, that litigation is a bad thing when *HMOs* are injured by a fraudulent business practice.

Desiano v. Warner-Lambert Co.[58] is a class action filed by HMOs to recover their expenditures for Rezulin, an expensive and dangerous diabetes drug, between February 1997 and April 2001. The HMOs allege that doctors were fraudulently induced to prescribe Rezulin, for which HMOs paid about $1.4 billion at a monthly cost of about $135 per patient. Before Rezulin was introduced, the most commonly prescribed oral drug therapy for Type II diabetes had been Metformin**,** which had a prescription cost of about $55 per month, of which the typical HMO paid about $50.

Warner-Lambert marketed Rezulin aggressively, touting it as "the first anti-diabetes drug designed to target insulin resistance" – a statement the Food and Drug Administration called "false and misleading." Warner-Lambert had published full-page color advertisements in the *New England Journal of Medicine* and the *Washington Post* describing Rezulin as a drug with breakthrough effectiveness, and said it had "side effects comparable to placebo." Warner-Lambert allegedly made this statement when its own clinical trial data had shown Rezulin users three to six times more likely to suffer liver injury than patients taking the placebo.

By July 1997, seven people receiving Rezulin had died from the same side effects that Warner-Lambert had observed in its pre-market tests. By the fall of 1997, the FDA began to receive reports of Rezulin patients suffering serious liver injuries, including death following liver failure. On March 21, 2000, Warner-Lambert withdrew Rezulin from the U.S. market at the request of the FDA.

Section III

Banks and Consumer Credit Companies

State class-action lawsuits have exposed an abundance of unfair practices by banks, credit card companies and other lenders, including concealed transaction fees, hidden conditions in loans, "bait and switch" tactics, the use of telemarketing to "sell" customers sham add-on products without their consent and other scams designed to inflate penalties and fees.[59]

Consumer Credit Lobbying on the Federal Class-Action Bills

At least seven credit card companies, mortgage lenders and their trade association employed at least 36 lobbyists to urge lawmakers to pass federal class-action legislation.

- Financial Services Roundtable has committed 12 lobbyists to the bills.
- Countrywide Home Loans has committed six lobbyists to the class-action campaign, including David Norcross, former general counsel for the Republican National Committee.
- Citigroup, parent company of Citibank, has committed five lobbyists to its class-action lobbying lineup, including Maura Soloman, congressional affairs specialist for the Treasury Department's Office of Thrift Supervision during the Clinton administration. In 2001, Citibank agreed to pay $240 million for deceiving customers into signing ill-advised home equity loans and hiding extra charges. (See below.)
- Bank of America, which recently settled state class actions for charging out-of-network fees for use of its own automatic teller machines and for incorrectly applying late fees to auto loans, has committed four lobbyists. (See below.)
- Household Finance has committed three lobbyists. (See below.)
- Bank One has committed three lobbyists.
- American Express has committed three lobbyists.
- MasterCard, which in April was found liable for raising $195 million through a hidden 1 percent fee in currency exchange transactions, has committed two lobbyists. (See below.)

Unfair Practice: Credit Card Users Hit with Secret Conversion Fee

The two leading credit card companies recently made news when a California Superior Court ruled that MasterCard and Visa U.S.A. improperly hid a 1 percent currency conversion fee that was charged to cardholders on transactions conducted abroad.

The judge in the case, Schwartz v. Visa International, said his decision was strongly influenced by "the intentional concealment by defendants of the currency conversion fee from consumers."[60] Visa and MasterCard were ordered to refund such charges and begin disclosing the fee on statements. Refunds could total $800 million.[61]

In addition to the typical currency exchange fee assessed on purchases made overseas, Visa and MasterCard added a 1 percent currency conversion fee – and did not inform its customers. Evidence presented at the six-month trial showed that Visa collected approximately $630.1

million in currency conversion fees from cardholders between 1996 and March 2002. During the same time period, the actual costs Visa incurred for currency conversion transactions were a tiny fraction of this income ($6.9 million).[62]

MasterCard received revenue from U.S. cardholders of $195 million as a result of its 1 percent currency conversion fee between February 1996 and the end of 2000.[63] In 1999 and 2000, MasterCard earned an average of about $1.05 per transaction in conversion fees, while its actual costs were less than two cents a transaction, the court found.[64]

Trial testimony showed the defendants were fearful that if cardholders discovered the fee, Visa and MasterCard would be forced by competitive pressures to reduce or eliminate it. Further evidence that the corporations had tried to conceal the fees from cardholders was reflected in their policy of not imposing the fees on transactions that involved foreign currencies pegged to the value of the dollar at a 1:1 ratio. The addition of a 1 percent conversion fee on a currency pegged at 1:1 could have been easily noticed on a billing statement, leading to unwanted questions from cardholders.

Visa was the first credit card company to add the 1 percent currency conversion fee. In October 1986, MasterCard consultants provided cost estimates for a proposed currency conversion program that the company was considering. Depending on volume, the estimates ranged between 0.04 percent (four-hundredths of 1 percent) and 0.13 percent (thirteen hundredths of 1 percent). The consultants suggested to MasterCard that a fee of 0.25 percent would cover all anticipated direct and indirect costs and still yield a handsome profit. However, after learning of Visa's plans to charge a full 1 percent fee, MasterCard modified its plans to incorporate a 1 percent fee.

Visa and MasterCard were ordered to repay the 1 percent currency conversion fee to all cardholders within the court's jurisdiction who had paid the fee since its inception. The California State judge also scheduled an additional hearing to consider the mechanics for refunding the payments.

A Reason Lenders Want to Divert Class Actions to Federal Court: "Private Attorney General" Actions Would Face a Higher Hurdle

The Schwartz v. Visa International case was not a class action but a "private attorney general" action brought under a unique California law known as Section 17200. Few laws stick in the business community's craw more than Section 17200, because California State judges have applied it broadly to remedy consumer rip-offs.

The class-action bill in the U.S. House, H.R. 1115, uses an unusual definition of "class action" (as did the original version of the Senate bill, S. 274). The House bill states that:

> "[A] civil action that is not otherwise a class action … shall nevertheless be deemed a class action if the named plaintiff purports to act for the interests of its members (who are not named parties to the action) or for the interests of the general public, seeks a remedy of damages, restitution, disgorgement, or any other form of monetary relief."[65]

By defining 17200 cases as "class actions" and diverting them to federal court, corporations gain three advantages. First, California consumers would no longer benefit from the relaxed standards for maintaining fraud suits under state law; instead, they would have to meet the tougher certification requirements of the federal class-action rules. Second, as explained in this report's section on pharmaceutical companies, federal judges feel obliged to interpret state laws conservatively and reject claims that might expand the application of those laws. Finally, any ruling by a federal judge on California's Section 17200 does not carry the force of precedent. This means other companies that are not specifically party to a federal judge's ruling in a case are not bound by that judge's interpretation of the law.

Other Class-Action Cases Involving Consumer Credit Companies

- **Citigroup's Subprime Unit: Predatory Lending.** Some of the most flagrant abuses committed by consumer credit firms in recent years have been in the so-called subprime loan market, which targets customers with blemished credit records. Consumer lawyers' investigations have revealed a disturbing trend of companies strategically preying on their customers' lack of bargaining power and financial savvy, and often resorting to full-fledged fraud.

  Several class actions filed in state courts against Associates Corporation of North America (which Citigroup bought in 2000 from Ford Motor Co.) spurred a Federal Trade Commission (FTC) investigation that resulted in a $240 million national settlement,[66] at the time the largest FTC consumer protection settlement ever.[67]

  Class-action suits were filed in several states during the mid-1990s against Associates, then owned by Ford. The suits charged that Associates deceived customers into signing for home equity loans that included several hidden charges. Associates also were accused of adding insurance policies to the loans without informing customers.[68]

  The FTC agreed with these accusations. The commission also found that Associates was guilty of falsely presenting itself as a financial advisory service for its customers, pledging "to recommend only those products and services that fit *your* needs" (emphasis in original marketing materials).[69] In fact, the FTC found that Associates coached its workers to avoid discussing factors that might dissuade customers from using their service, such as higher interest rates and longer repayment periods on restructured debts. Employees also were told not to disclose closing costs of up to 5 percent of the credit line.[70]

  The firm also violated the law, the FTC found, by offering immediate $5,000 advances (to be paid back at 28 percent interest if a loan was not consummated) that circumvented home equity loan laws, failing to disclose points and interest rates, and failing to disclose that loans included balloon payments.[71]

  In 2002, the FTC and Citigroup announced a $240 million settlement.[72] Citigroup also agreed to stop selling credit insurance shortly before the settlement was reached.[73] Of the $240 million, $215 million will reimburse customers for the majority of money they paid or still owe for credit insurance, and $15 million will reimburse customers for service fees and other losses customers suffered from ill-advised home equity loans.

- **Household Finance: Predatory Lending.** Household in 2002 agreed to pay $484 million to settle charges brought by dozens of state attorneys general that it systematically misled customers about interest rates and embedded fine print in loans that made it virtually impossible for customers to exit their relationship with Household.[74]

  A study by the state of Washington found "sales tactics intended to mislead" were too widespread to be blamed on individual loan officers.[75] Following Household's settlements with the states, several class-action petitions were filed in state and federal courts. They are pending.

- **Bank of America: Fraudulent Fees.** In September 2001, Bank of America agreed to adjust existing auto loan balances and refund closed loans accounts for unwarranted interest and late fees. A California Superior Court class action revealed that the bank failed to credit car loan payments when they were received, resulting in increased interest payments and late charges. The bank was aware of the systemic problem but took no steps to correct it, evidence introduced in the case revealed. Total restitution was estimated at about $1 million, including cy pres (i.e., charitable) donations of $150,000 to The Utility Reform Network, the Volunteer Legal Services Program of the Bar Association of San Francisco and Consumer Action.[76]

  In April 2002, Bank of America also settled a class-action lawsuit and agreed to pay $700,000 in damages to account holders in Washington state. The bank was operating "undercover" automated teller machines at supermarkets and charging their own customers out-of-network fees to use them.[77]

- **MBNA Corp: Payment Jockeying.** In March 2002 MBNA, a Financial Services Roundtable member, agreed to pay $8 million to settle a class-action lawsuit in New York Supreme Court that alleged deceptive pricing practices. According to the suit, MBNA advertised annual interest charges of 6.9 percent for new customers, but failed to warn that the rate applied only to balances transferred from rival cards, while the charge for new loans would be 17.9 percent. Payments received are first applied to the low interest balance, allowing the higher rate balance to continue to grow.[78]

- **Providian Financial Corp: Sham "Add-on" Services.** In its marketing materials, Providian Financial claimed that there was "no annual fee" for its card, but failed to disclose the hidden condition that to be eligible the cardholder must purchase a $156 a year credit protection plan. Providian, another Financial Services Roundtable member, on November 8, 2001, agreed to pay $105 million to settle class-action lawsuits alleging this scam and the sale of other add-on services that customers were unlikely to use or benefit from.[79]

- **General Electric Credit Auto Leasing: Fraudulent Overcharges.** GECAL, another Financial Services Roundtable member, settled a state class-action lawsuit in 1995 in response to allegations that it had systematically charged customers for lease-end repairs that were never performed, for "excessive wear and tear" regardless of the condition of the cars, and for damage that GECAL's own personnel caused to the car after lease-end but prior to wholesale. According to the terms of the agreement, class members received refunds of 75 percent of the overcharged amount, and GECAL agreed to waive its right to collect unpaid "excess wear and tear" charges.[80]

- **Wells Fargo Bank: Fraudulent Fees.** On April 17, 2002, Wells Fargo Bank, another Financial Services Roundtable member, settled a class-action lawsuit refunding approximately $35 million to trust beneficiaries who were overcharged trustee fees over a 20-year period. The bank charged customers a "standard fee" to administer the provisions of trusts even though the trust documents specified a different, lower fee. Initially, the bank resisted class-wide discovery, claiming there was no evidence that anyone other than the named plaintiff had been overcharged. However, the San Francisco Superior Court Judge was skeptical and ordered the bank to perform an internal investigation, which uncovered widespread overcharges. After years of litigation, the case settled on the eve of trial.[81]

  Wells Fargo also agreed to pay $37.5 million to settle a class-action lawsuit in the California Superior Court of San Francisco County alleging it had assessed excessive finance charges against cardholders. As part of the settlement, Wells Fargo pledged to refund all cardholders included in the class through credits against annual cardholder fees or finance charges over the next four years. For claimants who had closed their accounts, Wells Fargo agreed to issue a one-time payment equal to the remaining credits due.[82]

Section IV

Automotive Industry

Automotive companies have joined with large corporations from other industries in the push for legislation that will increase their advantage in consumer class-action lawsuits. After all, the auto industry has discovered first-hand that consumer litigation can be more difficult to sidestep than federal regulators.

Automotive Industry Lobbying on the Federal Class-Action Bills

The automotive industry has employed at least 32 lobbyists, representing a mix of those with Republican and Democratic connections, to work for class-action legislation. At least seven auto companies and parts makers have contributed to the effort.

- Ford, which settled a class-action case involving 12 million car owners in 2001,[83] registered 11 lobbyists to work on the bill. Additionally, Ford counsel John Beisner is the chief architect of the current class-action legislation and head of the corporate class-action defense division at the law firm O'Melveny & Myers.[84] (See below.)
- Cooper Tire and Rubber Co., which settled a class-action case involving 40 million Cooper customers in 2002,[85] has hired seven lobbyists to work for the class-action bill, including former Rep. Beryl Anthony (D-Ark.) and James Burnley, Secretary of Transportation during the Reagan Administration.
- General Motors has committed seven lobbyists, including Steven Champlin, former executive director of the House Democratic Caucus (1991-93). (See below.)
- Bridgestone/Firestone has committed two lobbyists. One of them is Victor Schwartz, a veteran lobbyist on tort issues who has at least 10 clients interested in class-action legislation.
- DaimlerChrysler has committed two lobbyists.
- Johnson Controls has committed two lobbyists.
- Goodyear Tire & Rubber has committed one lobbyist.

Unfair Practice: Ignitions Defect Covered Up by Ford

A class-action suit in California state courts, which alleged that millions of Ford Motor Co. cars had defective ignitions, revealed that Ford had withheld data from the government for more than a decade concerning a defective ignition design that was blamed for 11 deaths.

The lawsuit resulted in a national settlement in 2001 in which Ford agreed to accept returns on 12 million poorly engineered ignitions and to reimburse all owners who had previously been forced to replace their ignitions. The settlement could cost Ford $2.7 billion. [86]

The suit also brought to light Ford's efforts to stonewall multiple federal investigations and its failure to furnish required reports to federal and state environmental agencies over failing ignitions. [87]

Against the recommendation of the companies' engineers, ignitions had been installed too close to the engines of about 20 million Ford cars sold from 1983 to 1995. By 2001, sudden stalling from the faulty ignitions had been blamed for accidents that caused 11 deaths and 31 injuries, prompting several civil lawsuits.[88] Evidence submitted in the California class-action lawsuit revealed that Ford was fully aware of the problems from the outset, yet kept the problems under wraps for cost reasons.

"The record is replete with internal Ford documents and testimony, all detailing the levels of failure, concerns with design (soldering), attempts to rectify the problem, cost concerns about warranty rates, and early consideration of engine mounting," California Superior Court Judge Michael E. Ballachey wrote in a 2000 opinion that sided with the plaintiffs.[89]

"While Ford's efforts to achieve a remedy for the problem were under way, the National Highway Traffic Safety Administration (NHTSA) opened five separate investigations in response to stalling complaints," Ballachey wrote. "Ford withheld responsive information from NHTSA that it was obligated to divulge."[90]

The NHTSA official who oversaw several federal investigations into the ignitions said that the government might not have closed the investigations if Ford had provided key documents that were revealed in the lawsuit.[91]

Ford also had been obligated to report emissions-oriented warranty returns to the Environmental Protection Agency. "In spite of internal information of warranty failures of this ignition/emission control device far in excess of statutory or regulatory standards, Ford repeatedly failed to report these returns to EPA," Ballachey wrote. "Moreover, there was no evidence that any of the warranty-returned TFI [ignitions] modules were ever tested to ascertain the impact of their failure on air quality."[92] The company also failed to fulfill reporting requirements to the California Air Resources Board.

As part of its cover-up, Ford resorted to "manipulation of testing procedures by reducing temperature levels," Ballachey wrote. "The unexplained reduction of temperatures was suspicious even to Ford's emissions expert."[93]

Ballachey also noted in his opinion that the firm excluded discussions of ignition failures from the minutes of company meetings; failed to inform dealers about the failures, despite a company policy that required this; and insisted on the return of all discovery materials in related civil lawsuits that it settled.

A Reason Class-Action Legislation Appeals to Corporations: The Right to Mandatory Appeal of Class Certifications

Corporations want to make it mandatory for circuit courts to allow them to appeal all class certification decisions – a change that is included in the class-action bill, H.R. 1115, now under consideration in the U.S. House.

Several years ago, procedural rule 23(f) took effect, allowing appeals of class certification decisions. Rule 23(f) *permits* appeals, but doesn't give a *right* to an appeal – and the question of whether an appeal will be heard is at the discretion of the U.S. Circuit Court. Here's why special interests want the mandatory right to appeal:

Seven of the companies lobbying for H.R. 1115, including two from the automotive industry, have had experience with Rule 23(f) appeals. General Motors Acceptance Company and Bridgestone/Firestone were among four companies that appealed class certifications and received hearings. *All four* of those were subsequently successful in overturning the class certification.[94]

In contrast, two insurance companies – Allstate and State Farm – appealed certifications only to have the Circuit Court decline to hear their cases.[95] In view of the other four companies' success, it is easy to see why corporations would prefer that appeals be mandatory.

A seventh company was on the receiving end of a certification appeal. The plaintiffs appealed the trial judge's denial of certification, and the denial was upheld.[96]

Even if an appeal is unsuccessful, defendant corporations still win under H.R. 1115. The bill provides that all proceedings are stayed while an appeal is pending. On average, it takes the federal Circuit Courts of Appeal 11.3 months to dispose of a civil case. In two circuits, the Sixth and Ninth, the average disposition time is more than 16 months. During this time, routine purging of records may take place, witnesses' memories can fade, and key parties may change jobs or relocate, all complicating the ability to prepare a case for trial.[97]

Moreover, while the bills' jurisdictional provisions do not apply to securities class actions—lawsuits brought by investors to remedy insider trading and misrepresentation by corporate officers—the appeal provision in H.R. 1115 does apply to such cases. This means that victims of Enron fraud would be forced to wait yet another year to receive any compensation for their losses. Citigroup, one of the companies lobbying for H.R. 1115, is a defendant in the Enron lawsuit.

Other Class-Action Cases Involving the Automotive Industry

- **Ford Motor Co.: Employment Discrimination.** Ford agreed to a $10.6 million settlement in a state-court class action filed by more than 150 of its managers in 2001. The suit arose from allegations that the company's internal performance review process subjected them to unfair age and gender discrimination. Ford's Performance Management Process (PMP) was said to be a tool used to "weed out" older workers in order to make room for younger, more "flexible" employees and to increase diversity among the company's ranks. In one of the "largest white-collar civil actions in recent history," the settlement allocated $100,000 to those Ford managers named in the suit, $10,000 to $50,000 to other similarly affected employees, and $5,000 to an estimated 100 employees who received severance packages from the company after receiving a "low grade" in their performance review.[98]

- **General Motors Acceptance Corp. (GMAC): Breach of Contract.** GMAC, a subsidiary of General Motors that finances automobile purchases, was ordered to pay $3 million to class members after a California Superior Court jury found that GMAC had breached its contracts with auto buyers. GMAC systematically imposed finance charges on collateral protection insurance ("force-placed") policies that either never took effect or were cancelled before completion of the coverage period, and the company failed to adequately disclose the method it used to calculate premium refunds or credits. According to the terms of the settlement, 14,000 claimants were to receive refund payments equal to the amount of the excessive finance charges assessed.[99]

- **Ford Motor Credit Company (FMCC)**: **Insurance Scam**. FMCC in 1993 agreed to pay $58.2 million to settle a class-action suit in Alameda County Superior Court of California. Consumers alleged that FMCC had purchased collateral (force-placed) insurance policies that went beyond the minimum coverage required under California law for the cars it financed, thereby charging car owners inflated premiums for unnecessary coverage. The suit further alleged that FMCC routinely assessed periodic finance charges on the inflated premium amounts, even as it received regular discounts and rebates from insurance companies. FMCC failed to credit the car owner's account to reflect the discounts and rebates, effectively pocketing the extra cash. As part of the settlement, FMCC was prohibited from charging customers for all-inclusive insurance coverage packages and from receiving any kind of rebate or commission from an insurance company for three years.[100]

Section V

Retailers

Several class-action lawsuits have allowed employees to receive back pay covering hours of work, especially overtime, for which wages were withheld in violation of state and federal laws. While these lawsuits run the gamut of American industries, in recent years there has been a concentration of actions against retail businesses.

Most of the large companies that lost or settled class-action lawsuits relating to overtime issues in the past three years (with the notable exception of Starbucks) are lobbying for proposed federal legislation that would weaken class-action protections.

Retail Lobbying on the Federal Class-Action Bills

Two retail industry associations and three retail corporations that settled or lost verdicts in class action cases concerning overtime violations have contributed 20 of at least 31 lobbyists in this sector who have pushed for class-action legislation.

- The National Retail Federation has committed four lobbyists.
- The International Mass Retail Association has committed two lobbyists.
- The Food Marketing Institute has committed 11 lobbyists.
- Sears, one of 26 major retailers that settled class-action lawsuits in 2002 over alleged sweatshop abuses on Saipan in the U.S. territory of the Northern Mariana Islands, has committed 11 lobbyists to the class-action bills. (See below.)
- Wal-Mart, which is facing about 40 class-action suits for allegedly forcing employees to work off the clock, began lobbying for the class-action bill in 2001, a year after it settled a Colorado case for $50 million and a New Mexico case for $500,000. The company devoted two lobbyists to the issue last year. (See below.)
- RadioShack registered its in-house lobbyist to work on class-action legislation in 2002, a year after it settled a class-action overtime case for $29 million.[101]

And non-retail businesses that have been forced by similar class-action suits to pay compensation for overtime violations also are lobbying for the bill, including:

- Bank of America, which in 2001 paid $22 million to settle four suits in which it was accused of cheating thousands of personal bankers out of overtime, had four class-action lobbyists.[102]
- Farmers Insurance Group devoted one lobbyist to the issue since 2001, when it lost a $90 million jury verdict over failure to pay overtime to its adjusters.[103]

Unfair Practice: Wal-Mart's Culture of Worker Exploitation

Testimony in dozens of class-action lawsuits around the country revealed a culture within retail giant Wal-Mart that hourly employees were expected to work through breaks and lunch hours, and to work off the clock after they reached 40 official hours in a week.[104] Witnesses also testified they altered time cards to show that employees took breaks and lunch hours never taken and to remove time worked in excess of 40 hours.

For instance, Carolyn Thiebes, a former personnel manager who served as lead plaintiff in an Oregon case, testified "that her bosses sometimes asked her to use her computer to erase hours from employees' time records to hold costs down."[105]

A payroll department assistant testified in a Louisiana case "that if an employee had clocked 43 hours in a week ... her supervisor often asked her to delete three hours. Other times, she said, when an employee worked through several 15-minute breaks, helping push that employee over 40 hours, her boss asked her to edit the timecard so it would show the worker had taken those breaks."[106]

Reports of store "lock-ins" also emerged in the spate of Wal-Mart cases. Former employees in six states said they were prohibited from leaving the store until assignments were completed,[107] according to a *New York Times* story drawn from court testimony and interviews with former Wal-Mart workers.

"Workers said these lock-ins ... forced many employees to work an hour or two unpaid, and enraged parents whose school-age children worked at Wal-Mart. Wal-Mart officials acknowledged that employees were sometimes locked in but said the policy was to pay workers for every hour they [worked]."[108]

An Indiana Superior Court certified a class of an estimated 166,000 hourly Wal-Mart workers on April 22. In his certification order, Judge Gary L. Miller wrote:

> "The evidence suggests that Wal-Mart stores are knowingly understaffed in proportion to their needs; and that this is a common practice throughout Indiana and other states. In most stores, the employees are allegedly faced with the dilemma of having to do more work in a shift than they can complete; yet, generally, they may not work overtime to finish it."[109]

Many witnesses testified that a "do whatever it takes" ethos permeated Wal-Mart. And Miller wrote that, "To 'do whatever it takes' allegedly places the employee in an impossible position. If the employee remains at work on the clock, they [sic] might be reprimanded for working overtime. If they leave without finishing, they may be reprimanded for not completing their assigned work. Plaintiffs' witnesses have testified that an employee who wants to remain at Wal-Mart will do the work and not remain clocked in."[110]

Plaintiffs obtained Wal-Mart's timekeeping database and cash register data that show the times in which certain employees used certain registers. Testimony in the Indiana case alleged "frequent" instances in Indiana and other states when employees were logged onto a cash register while not on the payroll clock, Miller wrote.[111]

A Reason Retailers Want Class Actions Diverted to Federal Court: Cases Are More Likely to be Dismissed for Lack of "Predominance"

Wal-Mart currently faces about 40 class-action lawsuits for allegedly forcing employees to work off the clock and for refusing to pay overtime.[112] So far, the corporation's track record clearly shows that Wal-Mart would benefit from federal legislation that pushes more class-action lawsuits into federal courts.

To date, class certification has been denied in three federal cases against Wal-Mart for unpaid worker hours; whereas, at least three state courts have certified such cases. Aggrieved class members have found state courts to be much more receptive to their allegations of abusive working conditions and violations of the Fair Labor Standards Act.[113] State class actions have resulted in settlements in Colorado and New Mexico for $50 million and $500,000, respectively.[114]

In one of the federal cases, Basco v. Wal-Mart Stores, a federal judge denied certification of the class after strictly applying the "predominance of common issues" standard. Wal-Mart had argued that there were a "myriad of possibilities that could be offered to explain why any one of the plaintiffs worked off the clock," including the possibility that the employees "voluntarily chose to engage in such work in deviance of [company] policy."[115]

While the court's ruling called for individual lawsuits, it is doubtful that the amount of back pay that could be recouped for Wal-Mart employees, who earned about $8.50 an hour, could justify the court costs.

An Indiana state judge's ruling was opposite the Louisiana federal court's. "This evidence supports a finding that questions of fact or law predominate over questions only affecting individual employees," Judge Gary L. Miller wrote, adding that the interest of saving time, effort and expense favored class-action litigation.[116]

Other Class-Action Cases Involving Retailers

- **Home Depot: Gender discrimination.** Home Depot recently settled a federal class-action case alleging discrimination on the basis of gender.[117] One of the named plaintiffs, Vicki Butler, was a former Air Force mechanic with a plant science degree working in the plant department of a Home Depot store. Butler filed a class-action lawsuit alleging gender discrimination when a man with less education and experience was promoted over her to be supervisor of the department. The lawsuit's class comprised more than 25,000 women.

  The 1997 settlement provided $65 million to the women involved in the class and $22.5 million to pay their attorneys.[118] More importantly, the settlement provided for a modification of Home Depot's hiring, promotion, and compensation practices, ensuring that interested and qualified women will be hired and promoted commensurate with their experience. The injunctive relief has created thousands of job opportunities in sales and management positions.[119]

- **Sears: Saipan sweatshops.** Twenty-six retailers, including Sears, settled the largest sweatshop lawsuit in history in September 2002.[120] The lawsuit claimed that thousands of Asian workers are kept in indentured servitude in Saipan, forced to pay recruitment fees and give up a wide range of personal freedoms to keep their jobs and avoid reprimand.[121]

  Saipan, an island in the U.S. territory of the Northern Marianas, is exempt from certain federal labor and immigration laws. Many factories there pay wages that are roughly half the minimum amount required by U.S. law.[122] In addition, the retail industry is permitted to bring

> in about 20,000 workers annually from Asian nations, who are forced to pay recruitment fees of as much as $5,000 each, forced to work overtime, and are kept in debt with paycheck deductions for housing and food.[123]
>
> The settlement totaled $20 million. More than 30,000 factory workers employed on Saipan at various times since 1989 are eligible to share about $6.4 million for unpaid back wages.[124] Workers who want to return to their home countries will be eligible for up to $3,000 in travel and relocation costs. The settlement also establishes a code of conduct for the treatment of workers and a monitoring program of the factories.[125]

A Brief Study in Hypocrisy…

Are class actions bad or good? The National Retail Federation (NRF) and its members can't make up their minds.

In a March 13, 2002 press release headlined, "Retailers Urge Passage of Class-Action Lawsuit Reform," NRF urged passage of the Class Action Fairness Act of 2002, saying the legislation "would reduce the number of frivolous lawsuits faced by retailers and other businesses." NRF Vice President for Government Relations Katherine Lugar was quoted saying, "The number of class-action lawsuits filed nationwide has exploded in recent years, resulting in legal costs and jury awards that drive up costs for retailers and prices for consumers."[126]

Meanwhile, NRF and a score of the nation's top retailers were prosecuting a class action against Visa and MasterCard. The lawsuit alleged that the companies violated federal anti-trust law with their "honor all cards"[127] practice, which required retailers who accept their credit cards to also accept their "Visa Check" and "Master Money" debit cards. Merchants objected to the cards because they carry higher transaction fees than independent bank debit cards. NRF said that the settlement of "more than six years of long and arduous litigation" would bring *lower* costs for retailers and consumers.

Section VI

Pharmaceuticals

Few industries have earned the kind of reputation that hounds pharmaceutical companies. Their brushes with the law include sloppy manufacturing practices; foot-dragging on reports of adverse drug reactions; circumventing the government's drug approval process by promoting drugs for off-label uses, which the Food and Drug Administration does not test for safety; bribing doctors to prescribe their drugs; and using unethical tactics to avoid competition from generic drugs. With this push-the-envelope attitude, it is little wonder that the drug industry ranks high on the list of special interests actively lobbying for legislation that would weaken consumer class-action protections.

Pharmaceutical Industry Lobbying on the Federal Class-Action Bills

America's largest pharmaceutical companies have dedicated significant lobbying resources to passage of two bills, S. 274 and H.R. 1115. Altogether, pharmaceutical companies have devoted at least 21 lobbyists to the effort.

- Pfizer, the largest drug manufacturer, has committed eight lobbyists to push for class-action legislation, including former Rep. Norman F. Lent (R-N.Y.) and Alan Roth, former Democratic staff director of the House Energy and Commerce Committee. Pfizer faces charges that it used kickbacks and ghost-written scientific articles in a scheme to promote its anti-seizure medication, Neurontin, for unapproved uses. (See below.)
- Eli Lilly assigned three lobbyists to the class-action campaign, including Victor Schwartz, a veteran lobbyist who represents at least 10 clients interested in class-action legislation.
- Bayer Corp., seeking to "reform" its way out of charges by consumer groups that it unlawfully quashed generic competition to the high-profile drug Cipro and manipulated the "average wholesale price" of other drugs,[128] assigned two lobbyists to class-action legislation.
- Bristol-Myers Squibb, which has faced allegations of price fixing of its prescription drugs and baby formula,[129] committed two lobbyists to class-action legislation. (See below.)
- Johnson & Johnson, defending itself against charges that it markets its arthritis drug Remicade by bribing physicians,[130] committed two lobbyists to class-action legislation.
- Procter & Gamble and Wyeth (formerly American Home Products) each assigned two lobbyists to the class-action legislation.
- Aventis Pasteur employed one lobbyist to support class-action legislation. (See below.)

Unfair Practice: Dangers of Redux Were Not Disclosed

Even before the anti-obesity drug Redux was approved for use in the United States by the Food and Drug Administration, questions were raised about its safety. Serious adverse reactions to another version of the drug, Pondimin, were reported in Europe, including 15 deaths (although no causal relationship had been established). Concerns arose that the drug produced only meager weight loss, and thus had minimal value in reducing the health risks of obesity, while being associated with incidences of primary pulmonary hypertension (PPH). Soon after it came into widespread use in the U.S., many users were found to have suffered heart valve damage.[131]

Redux users who were seriously injured by the drug could bring individual lawsuits for damages. But for the millions of Redux users to whom no injuries had become apparent, a medical and legal remedy was needed.

Medical experts, including the American Heart Association and Department of Health and Human Services, recommend that patients with leaky heart valves receive antibiotics before many routine medical or dental procedures, such as tooth extractions. This is because people with significant valve disease can develop bacterial endocarditis, a life-threatening condition, from the bleeding associated with such procedures. To determine whether a patient is at risk, an echocardiogram is necessary.

The appropriate remedy for Redux users with latent injuries is medical monitoring, which is achieved through a class action. The monitoring required for Redux users is an echocardiogram, which, while costly for a patient, is too small an amount of money to make an individual lawsuit practicable. A medical monitoring class action against Redux's manufacturer, American Home Products (now Wyeth) was certified by a state court in New Jersey. The following excerpts from the *Wall Street Journal* present some of the evidence from that trial.[132]

- "Bernard Poussot, president of global pharmaceuticals at American Home's Wyeth-Ayerst unit, testified that 'similar issues' to the heart-valve problems had been seen 'as early as 1960.' He couldn't be reached for comment, but American Home says he was referring to reports about Aminorex, a diet drug sold in Europe."

- "American Home employees testified that the company was hard-pressed to keep up with its growing responsibility of monitoring side-effect reports…. An official testified to a 30 percent rise during the first half of 1996 in reports of 'adverse events' problems with American Home's drugs, the more serious of which went into red folders. 'Will this flood of red folders never end,' employee Mary Frances Moeller wrote to a colleague in an October 1996 memo involving Pondimin reports. 'We are in desperate need of a lull.' American Home says Ms. Moeller nonetheless completed her work on time.

  The company relied heavily on temporary employees to monitor and process side-effect reports. Marc Deitch, former global medical director for Wyeth-Ayerst, testified that as of July 1996, soon after Redux won FDA approval, 33 percent of safety staffers were temps. One monitor, Amy Myers, testified that she repeatedly complained to her boss about the burgeoning workload, including time spent training short-term temps."

- "A major trial issue was why American Home didn't warn the public after receiving reports of several dozen cases of heart-valve problems involving Pondimin in Europe, well before valve problems arose in the U.S. in the spring of 1997.

  "Fredrick S. Wilson, one of American Home's medical monitors for Pondimin, testified via deposition in [an earlier Texas trial involving a single plaintiff] that he took a month-long vacation in February 1995, the same time that several reports of heart-valve problems from Belgium reached the company. Dr. Wilson's deposition said that when he returned to work part-time in March, he didn't review the valve reports that had arrived during his vacation."

- “American Home says another staffer reviewed the reports in his absence. Its defense was that the European reports it got weren’t alarming because the heart valve leaks were very mild, of a kind that isn’t uncommon in the population at large. And it said the Belgian cases – the bulk of the reports – were complicated by the fact that many patients also took a concoction of Chinese herbs to lose weight.”

- [American Home] “made repeated efforts to avoid putting prominent warnings on the drug’s package insert. The first trial evidence about the warnings dated back to June 1994, when Dr. Wilson found out that the company had reports of 41 Pondimin users coming down with primary pulmonary hypertension, while the package insert was showing just four, according to his testimony. Dr. Wilson testified that he proposed updating the warning to reflect additional cases of the dangerous disorder and that company officials initially agreed to a draft change. But the warning wasn’t strengthened until two years later, according to Ms. Myers’s testimony in the New Jersey case.”

- “That was in July 1996, about two months after Pondimin’s chemical cousin, Redux, won FDA approval in a close vote, in the wake of considerable debate over side effects. Lawyers for American Home Products say the company didn’t update the package insert sooner because it was waiting for results of a large- scale study on the incidence of the lung disorder. The company adds that the FDA told it in 1994 that the warning didn’t need to be updated.

  “… Deitch, who was responsible for the label at the time, testified that it was a ‘mistake’ not to update the Pondimin label’s reference to just four pulmonary-hypertension cases. ‘I’m not saying we shouldn’t have changed the number four. We should have,’ he testified.”

- “During the approval process for Redux, the company argued against a ‘black box’ warning for pulmonary hypertension on the package insert, which is sent to pharmacies and printed in doctors’ reference manuals. In these warnings, the cautionary information is set off in a bordered box to draw attention. Lawyers for Ms. Lovett [Debbie Lovett, a fen-phen user who had filed a Texas lawsuit] produced a document circulating at American Home showing a consultant had said Redux sales could be as much as 50 percent lower if there was a black-box warning.”

Eventually, the trial was terminated when American Home agreed to settle. Under terms of the settlement, class members received exactly what the medical experts recommended – an echocardiogram.

A Reason Pharmaceuticals Want Class Actions Diverted to Federal Court: Federal Judges Feel Constrained to Apply State Laws Conservatively

Although it is based on old notions of compensating victims of negligence, medical monitoring is a relatively new legal remedy. As such, each time a court orders it for a new type of toxic exposure, it represents an expansion of state law.

Such expansions are hard to come by in federal courts, the venue to which drug companies want to remove state class actions. In Birchler v. Gehl,[133] the U.S. Court of Appeals for the Seventh Circuit explained why federal courts are often reluctant to take such a step:

> In adjudicating state law claims, it is our role as a federal appellate court to decide the case as we believe the highest state court would. When we are faced with opposing plausible interpretations of state law, we generally choose the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability. We avoid speculation about trends in diversity cases: our policy will continue to be one that requires plaintiffs desirous of succeeding on novel state law claims to present those claims initially in state court.

Indeed, federal judges asked to certify medical monitoring class actions have declined to do so for this reason. In Ball v. Joy Mfg. Co.[134] the district court judge ruled in a case involving Virginia and West Virginia law:

> [T]his Court must apply the presently existing law of these States and not suggest or surmise its expansion. Where such law is unclear or unsettled, this Court must faithfully make an informed prediction as to how those States' highest courts would rule if the case were before them and may not do so according to its own sense of what the law should be. In light of the presently existing law of these States, this Court cannot reasonably and faithfully predict that their highest courts would recognize the Plaintiffs' claims to recover the costs of future medical monitoring where these Plaintiffs have not suffered an actionable injury under such law. Moreover, as recently noted by the Fourth Circuit "[a] state claim which has not been recognized by state courts may well be a settled question of state law. Federal courts are permitted… to rule upon state law as it presently exists and not to surmise or suggest its expansion."

And in another case, In re Rezulin Products Liability Litigation,[135] the federal judge had made a similar ruling:

New Jersey has made the remedy of medical monitoring available as a special compensatory remedy designed to address the unique harm entailed in an increased risk of future injury arising from the exposure to toxic chemicals. This Court should not reach out for an opportunity to perform the New Jersey Supreme Court's function of deciding whether to extend that remedy to the ingestion of prescription drugs.

Other Class-Action Cases Involving Pharmaceuticals:

- **Pfizer, Wyeth, Bristol-Myers Squibb, and Eli Lilly: Price fixing, price discrimination and unfair business practices.** In 1993, more than 3,800 pharmacies filed suit against 23 pharmaceutical manufacturers, alleging price discrimination, unfair business practices and price fixing. Five separate lawsuits were filed: two were filed, consolidated, and subsequently certified in San Francisco Superior Court; two were filed and consolidated in federal court; and a fifth case was dropped.[136] Among the defendants were Pfizer, American Home Products (Now Wyeth), Bristol-Myers Squibb and Eli Lilly, all companies lobbying for federal legislation to weaken consumer class-action protections.

The pharmacies alleged that the pharmaceutical manufacturers conspired to fix the prices of brand name prescription drugs, causing the community pharmacies to pay more for the drugs than certain favored buyers, i.e., mail-order firms, HMOs and other managed care customers.[137] For example, pharmacists paid $33.61 for an asthma inhaler system while a mail order firm paid only $2.58 – a price discrepancy not justified by economies of scale. The complaint alleged that the pricing scheme created "a two-price system with community pharmacists subsidizing the extraordinary low prices of the favored buyer by the extraordinary price they paid."[138] But, rather than passing on the savings to consumers, the favored firms priced drugs just below those of community pharmacists, driving up costs and reaping enormous profits.[139]

In 1996, a federal judge approved a $351 million settlement covering 11 of the defendant companies, and which included a firm commitment by the drug manufacturers to change their pricing practices. The judge had rejected a previous settlement, because the manufacturers had failed to agree to such a commitment. The judge noted, "[A]llegedly on account of defendants pricing policies, retail plaintiffs have been driven out of business at a staggering rate."[140] Four more defendants agreed to settle in 1998, for a staggering $343 million, and a firm commitment to change their multi-tiered pricing policies.[141]

- **Aventis: Price fixing.** Aventis and five other vitamin makers have agreed to pay $19.6 million to settle price-fixing claims brought in a class-action suit in a Massachusetts state court. The settlement called for the companies to deposit the money into a fund to be distributed to Massachusetts charities for food and nutrition programs.[142] The class action, filed in June 1999, alleged that the defendant companies and others had engaged in an international conspiracy over a 10-year period to fix prices and allocate markets for bulk vitamins that are used in many processed products, including cereals, milk and bread.[143]

  The settlement was a spin-off of a larger investigation into price fixing by major vitamin producers. Since 1999, the companies have agreed to pay a total of $497 million to settle similar claims brought by state attorneys general and plaintiffs in class-action lawsuits filed in federal court.[144] Similarly, the companies paid more than $1 billion collectively in fines to the federal government, and a further $750 million in fines in Europe.[145]

A Brief Study in Hypocrisy…

- **Bristol-Myers Squibb: Filing frivolous lawsuits and delaying generic drug competition**. While Bristol-Myers Squibb (BMS) lobbyists have trolled the halls of the Capitol decrying frivolous litigation, BMS lawyers have pursued "objectively baseless patent infringement lawsuits" only blocks away in federal court, according to the Federal Trade Commission.

  While the U.S. Chamber of Commerce complains that a "deluge of frivolous filings is making it nearly impossible for people with legitimate claims to get their day in court," BMS has the distinction of being the only company in America under order to desist from "any fraudulent or objectively baseless claim, or otherwise engage in sham litigation."[146]

BMS unfairly extended patent protection for its drugs by taking advantage of loopholes in the Hatch-Waxman Act, which was designed to encourage innovation and competition from generics.[147] The government and consumer groups allege that brand name companies delay entrance of generic drugs to the market by filing frivolous patent-infringement suits against generic manufacturers and by listing add-on patents for already patented products.[148]

Typically just before a drug's original patent expires, brand name companies list additional patents for the product in the FDA Orange Book, a registry of approved prescription drugs. The listings allow companies to file patent-infringement suits against any manufacturer developing a generic version of the product protected by the patent. The infringement suits automatically initiate a provision in Hatch-Waxman that delays final approval of a generic version of the product for 30 months or until litigation over the patent is adjudicated, whichever comes first.[149]

The suits often are frivolous, covering such items as the color of a bottle. The patents often have nothing to do with the brand's chemical makeup. There is no limit to the number of patents a company can list in the Orange Book, or to the number of infringement suits it can file. Brand companies do not have to post a bond when bringing the suit, or pay damages if they lose their case.

Bristol-Myers Squibb delayed generic competition for its anti-anxiety medication BuSpar by listing a new patent for the product in the Orange Book the same day generic versions were set to be approved. A federal judge eventually forced Bristol-Myers Squibb to delist the patent from the Orange Book, but the four-month delay in approval of generic versions of the product reportedly cost consumers $100 million.[150]

Bristol-Myers Squibb has since been hit with a consumer class-action suit alleging fraud in the patent listing. According to analysts at Prudential Securities Inc., "[T]his marks the first success in a legal and public-relations attack against drug pricing and patent-extension strategies. The eventual damages levied against Bristol-Myers Squibb are hard to quantify, but more importantly the case could act as a deterrent to other brand companies pondering whether to pursue similarly aggressive strategies."[151]

Section VII

Gas and Oil Corporations

The gas and oil industry knows that class-action bills under consideration in the U.S. House and Senate ultimately would reduce its accountability for the industry's damaging actions. The bills would sweep many class-action cases from state into federal courts, where consumers will have a more difficult time winning compensation for contamination and exposure to chemicals. Because federal courts are more likely to find that federal regulations preempt state tort causes of action, the legislation would ultimately prevent redress for communities harmed by dangerous products and toxic spills.

Gas and Oil Lobbying on the Federal Class-Action Bills

Since 2000, the gas and oil industry has devoted at least 21 lobbyists to the corporate campaign to rewrite class-action laws.

- Chevron/Texaco, which is embroiled in a class-action lawsuit involving oil and grease contamination of drinking water in Louisiana, has committed 10 lobbyists. (See below.)
- Shell has committed four lobbyists.
- Ashland has committed three lobbyists.
- Exxon/Mobil, which issued $3 million in coupons to settle a New Jersey class action alleging deceptive advertising, has committed two lobbyists. (See below.)
- Atlantic Richfield has committed two lobbyists.

Unfair Practice: Drinking Water Contamination

A Mobil Oil Corporation refinery in Chalmette, La., allegedly discharged oil and grease into the Mississippi River in 1998. Approximately 3.4 million gallons of untreated, contaminated waste water and storm water, containing more than 52,000 pounds of oil, grease and other contaminants, infiltrated the drinking water of the surrounding parish.[152]

A Louisiana state court judge certified a class action on behalf of more than 6,000 individuals who experienced physical injuries, emotional distress and economic loss caused by exposure to the hazardous substances in their drinking water. Subsequently, at least 3,000 more injured class members have joined the action, claiming they became ill as a result of the chemical discharge.[153]

The judge found that the common question of liability extended to all defendants because there was no dispute whether there had been a discharge or whether the water tasted and smelled offensive to the plaintiffs. Additionally, there was expert testimony that the contaminants in the water could have caused many of the plaintiffs' physical complaints.[154]

Mobil Oil had argued that the federal Clean Water Act and Safe Drinking Water Amendments to the Clean Water Act preempted all state law claims, and therefore the company should not be held liable. But the court found that the Clean Water Act did not preempt state law claims, and even if it did, the preemption question might be raised as a defense but would not deprive the state court of jurisdiction over the case.[155]

Mobil's co-defendant, St. Bernard Parish, agreed to settle to the extent of its limited liability insurance coverage. As of February, 2003, Mobil has refused to settle this case.[156]

The Chalmette case is only the tip of an iceberg of industrywide litigation involving drinking water contamination. The gas and oil industry's use of methyl tertiary butyl ether ("MTBE") as a gasoline additive has raised serious health and environmental concerns, with accompanying lawsuits.

The federal Clean Air Act (CAA) mandated in 1992 that gasoline producers add some kind of oxygenate to make their fuel burn cleaner. Although MTBE was listed as one available alternative, there were others to choose from, including a much safer oxygenate, ethanol.[157] Over the past decade, MTBE-treated gasoline has leaked from storage tanks across the United States. Because MTBE is extremely water soluble, it spreads farther and faster than other components of gasoline and does not attach to soil. These pollutants are difficult and costly to remediate from groundwater. A Blue Ribbon Panel appointed to advise the Environmental Protection Agency Administrator issued a 1999 report recommending that MTBE usage be reduced substantially, if not eliminated altogether.[158]

Health concerns, undrinkable water and costly cleanups prompted numerous lawsuits against manufacturers who opted to use MTBE as the oxygenate for their fuels.[159] In an attempt to avoid liability, oil and chemical companies claimed that state law claims are preempted by the federal CAA oxygenate requirement. Where successful, this argument relieved oil companies of all financial liability for environmental degradation, pollution of community water systems and harm to consumers' health caused by exposure to MTBE.

A Reason the Gas and Oil Industry Wants Class Actions Diverted to Federal Court: Cases Are More Likely to Be Dismissed due to Federal Preemption

Our system of federalism demands that federal interference with a state's policy decision, such as the decision to give citizens tort and contract remedies, is the product of a considered judgment and a careful balancing. Courts should only find that federal law preempts state law if the federal government has made it unmistakably clear that it intends to displace state law. Because a finding of preemption can eliminate financial responsibility for harms caused to consumers and the environment, corporations frequently argue preemption as a defense to lawsuits.

Traditionally, federal courts have been more likely than state courts to find that state tort law claims are preempted by federal law.[160] When a preemption argument is presented by the same company in similar state and federal cases, the argument frequently is accepted by the federal court and rejected by the state court.

Here are four examples:

1. **MTBE**. In a class action filed against Chevron and Gulf, a New Jersey federal judge found that strict liability claims were federally preempted because the Clean Air Act required the use of an oxygenate, and "MTBE was an oxygenate that Congress contemplated would be used frequently."[161]

   There was a different outcome when the South Tahoe Public Utilities District filed suit against 31 refineries, alleging the oil companies failed to adequately warn the government, customers or water agencies of the risk involved with MTBE. It sought to recover the costs of a clean-up plan and remediation of 34 drinking water wells, which provided water to over 12,600 homes and businesses in the Lake Tahoe area.

   In South Tahoe Public Util. Dist. v. Atlantic Richfield Co., a California state court rejected the federal preemption argument. The jury held the defendants liable under a product liability theory, finding that gasoline containing MTBE was defective because the risk of harm inherent in its design outweighed the benefits. The jury also decided that gasoline containing MTBE was defective because the defendants failed to provide warnings about it. In addition, the jury found that Shell Oil and Lyondell Chemical Co. (formerly ARCO Chemical) acted with malice in selling the defective MTBE gasoline. Thirty-one defendants ultimately settled the South Tahoe case for $69 million.[162]

2. **ERISA.** Federal judges are inclined to find that the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts state tort laws protecting workers from discrimination or wrongful firing.

   ERISA is designed to promote the interests of employees and their beneficiaries in employee benefit plans. Among other things, the statute sets uniform rules concerning reporting, disclosure and fiduciary responsibilities.[163] The federal act also includes a broad preemption provision intended to keep the regulations uniform and unencumbered by conflicting state laws.[164]

   If a court determines that an employee's complaint, essentially, concerns an employer's efforts to avoid paying benefits, then ERISA preempts the *entire* state claim. If, however, the principal claim is that the employer fired an employee on the basis of race, sex or some motive unrelated to the benefits plan, then the state law claim survives preemption.[165]

   Preemption of state common law is significant because actions based on state laws generally can receive damage awards, while those based on ERISA cannot.[166] In the case of Ingersoll-Rand Co. v. McClendon, the Texas Supreme Court ruled that a plaintiff could proceed with a wrongful discharge lawsuit if "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund."[167] But on appeal, the U.S. Supreme Court reversed, finding that ERISA preempted the employee's claim.[168]

3. **Ford Ignition Recall:** A California state class-action case [also discussed in Section IV of this report, devoted to the automotive industry] alleging that 12 million Ford cars had defective ignitions, resulted in a nationwide settlement and revealed that Ford had withheld

documents from a series of federal investigations. But a concurrent case with the same allegations, brought in an Illinois state court and moved into federal court at the company's request, was dismissed. The courts' treatments of these two cases contrast starkly.

In Illinois, the federal court refused to entertain the plaintiffs' request that Ford be required to recall the ignitions, regardless of their safety or quality, finding that Congress had exclusively granted recall authority to administrative agency regulators when it passed the law creating the National Highway Traffic Safety Administration.[169] "The Safety Act charges the Secretary of Transportation with identifying risk-generating factors, making informed assessments of the potential for failure in a class of motor vehicles ... and policing manufacturers' compliance with chosen directions," the court wrote.[170]

The federal court made this ruling despite acknowledging that Ford had deceived the administrative agency charged with ordering recalls. "Ford represented to the NHTSA that there was no single causal factor for engine stalling," the federal court wrote. "During these investigations, Ford withheld documents from the NHTSA that indicated that [the ignition] modules cause stalling."[171]

In California, Judge Michael E. Ballachey did not accept the argument that Congress had preempted his power to order a recall. "The court intends to issue orders compelling recall and repair of class vehicles regardless of the mileage on those vehicles," he wrote.[172]

4. **Mandatory Arbitration:** Several recent court cases have centered on the legality of companies requiring their customers to settle disputes through arbitration, with state courts proving more willing than federal courts to rule the terms of those arbitration agreements as unconscionable, according to a lawyer for defense firm O'Melveny and Myers.[173]

In one example, both a state court and federal court found fault with an arbitration clause that a dubious "credit repair" company imposed on its customers and both sympathized with the companies' customers. Their differing interpretations of the clause's legality, however, resulted in starkly contrasting outcomes.

American Fair Credit Association charged up to $40 a month to sponsor customers in obtaining a credit card with a $300 credit limit. In about 1998, American Fair Credit severed its connection with the card-issuing bank, BankFirst, negating the value of its credit sponsorship service.[174]

But American Fair Credit made it virtually impossible for its customers to cancel its monthly subscription service by frequently changing its telephone number. The company continued to make automatic withdrawals from customers' bank accounts for the monthly fees. Ironically, American Fair Credit also struck back at those who closed their accounts, or blocked the withdrawals, by making bad references to credit agencies.[175]

In early January 1998, the company sent notices to members stipulating a change in terms that would require all disputes to be handled in arbitration, not litigation. The notice required customers who did not agree with the new terms to send notice by certified mail within about two weeks. The notice applied to existing litigation.[176]

A California state court voided this arbitration clause, which prohibited class-action lawsuits and would have negated an ongoing lawsuit against American Fair Credit.[177] The court's willingness to throw out the arbitration clause led to negotiations and a nationwide settlement requiring the company to repair bad marks it placed on the credit records of 330,000 people, to forgive $26 million in unpaid service fees and to redeem $8.6 million in damages and fees.[178]

A North Carolina federal court reached a different conclusion in a similar case. While the court noted that a person suing American Fair Credit was "exactly the type of person" Congress meant to protect with the Credit Repair Organizations Act, the court ruled that the company's notice requiring arbitration was a legally binding contract even if customers "never read, much less understood or agreed to" it, due to preemption by the Federal Arbitration Act. [179]

The perception that federal judges are more willing to enforce unfair arbitration clauses is widespread among corporate counsel. For example, when CIGNA was sued by doctors in Illinois court for refusing to fully reimburse various services provided to patients, CIGNA's first action was to file a complaint in federal court in Chicago contending that the case should not go forward as a class action because contracts with health care providers contained arbitration clauses. CIGNA's ploy failed because the federal judge did not have jurisdiction.[180] Under the class-action bills now in the U.S. House and Senate, H.R. 1115 and S.274, the federal court would have such jurisdiction.

Unfair Practice: Texaco Employment Discrimination

In 1997, Texaco settled for $176 million a class-action suit brought on behalf of 1,500 minority employees.[181] The lawsuit alleged that Texaco employment practices and policies relating to promotions, compensation, training and job assignments had a disparate impact upon African-American employees.[182] The lawsuit contended that minority employees were systematically passed over for promotions in favor of less experienced whites and that the company fostered a racially hostile environment. Some participants in the suit said that they were called "uppity" for asking questions; others said that black employees were called "orangutans" and "porch monkeys."[183] The employees further alleged that Texaco violated the Civil Rights Act by retaliating against employees who objected to its alleged acts of discrimination.

As part of the lawsuit, in 1996, Spencer H. Lewis, Jr., a district director of the Equal Employment Opportunity Commission for the New York City district found against Texaco for failing to promote blacks in certain employee groups because of a company-wide pattern of racial bias. In his determination, Lewis wrote, "with respect to the promotion issue, analysis of the record shows that blacks (as a class) in grades seven through 14 who sought promotions between February 1, 1992 and December 31, 1994 were selected at rates significantly below that of their non-black counterparts."[184]

According to a survey submitted by the plaintiffs, only 0.4 percent of Texaco employees making more than $128,000 were black, compared with 1.8 percent on average for the nation's other major oil companies. Of Texaco's more than 19,000 U.S. employees at the time, 8.3 percent were black and 3.75 percent of so-called officials and managers were black. Of black Texaco employees, about 40 percent were in sales or clerical jobs. And in the boardroom, Texaco had only one black director.[185]

The case was settled when surreptitious recordings of Texaco business meetings surfaced. The tapes contained statements that evidenced racial bias by senior officials of Texaco, and also documented Texaco's effort to conceal, destroy, or withhold information relevant to discovery proceedings in the case.[186]

A special master was appointed to scrutinize the settlement, including whether special circumstances were present warranting an award (or bounty) for the named plaintiffs. The special master found that each plaintiff expended time and effort in assisting in the prosecution of the litigation.[187]

The special master further found that after commencement of litigation, named plaintiffs suffered retaliatory action by a Texaco supervisor and employees, ranging from hostility to threats to assignment changes. From the outset, these plaintiffs were aware that Texaco had previously retaliated against employees charging discrimination. There was also evidence that an African-American attorney employed by Texaco, who had been trying to initiate a race discrimination class action against Texaco, was fired, assertedly because of these efforts. Several plaintiffs knew of this and were afraid to commence a class action in fear of losing their jobs.[188]

The special master carefully analyzed the risks of each named plaintiff separately, and recommended incentive awards varying from $85,000 to $2,500 based on their personal special circumstances.[189]

For example, plaintiff Veronica Shinault only received $2,500. Because Shinault resigned from Texaco after litigation commenced, the special master found that she was less likely to encounter the retaliatory effects from the lower echelons of Texaco, such as co-workers, forepersons, and lower-level supervisors who would perceive her to be "not a team player." However, because Shinault still feared possible post-employment retaliation by personnel managers who would be less likely to give her a positive referral, she was entitled to an award for taking a risk and nevertheless assisting in the litigation.[190]

In contrast, named plaintiff Bari-Ellen Roberts received an award of $85,000 based on her contributions, and the risks she assumed. Roberts had become a vice president and team leader in the Corporate Pensions Department at Chase Manhattan Bank before joining the Finance Department at Texaco's Harrison, N.Y. headquarters. After her requests for consideration for equal opportunity programs were rejected by Texaco in racially disparaging terms and she was denied advancement that seemed merited, she filed discrimination claims.[191]

After filing suit, she was threatened with physical violence by a superior, treated with hostility by senior management, and told by Texaco's EEOC officer not to show her face at Texaco for a while. Roberts participation in the class-action ranged from regular conference calls with counsel and other plaintiffs, to participation in discovery, conferring with other class members, and actively participating in the mediation process. To participate to such a degree required Roberts to take many vacation days.[192]

Texaco agreed to increase the salaries of all members of the class by 11.34 percent, and affirmed its commitment to an environment without prejudice. As part of this commitment, a Task Force on equality and fairness was created to initiate and determine the effectiveness of improvements and additions to Texaco's human resources program, and to create equal opportunities for all Texaco employees.[193]

A Reason Gas and Oil Corporations and Other Employers Want to Ban Incentive Awards: No "Bounty," No Mutiny

The U.S. Chamber of Commerce says that so-called "bounties" – a derisive term they apply to incentive awards to named plaintiffs – deserve to be banned because they "result in the interests of class representatives significantly diverging from those of absent class members." And both H.R. 1115 and S. 274 include provisions banning such incentives. The Chamber's argument, however, does not take account of the realities of employment discrimination lawsuits.

First, it is not always possible for class members and named plaintiffs to obtain the same relief. An individual who successfully sues for discrimination in hiring or promotions will obtain a hiring or promotion order and full back pay. But when there are more qualified female and minority candidates than there are vacancies, as is usually the case, class members in a successful lawsuit action normally receive only a pro rata fraction of a back pay award, and a fractional chance of being selected for future hiring or promotions. By limiting named plaintiffs to the relief that other class members get, the bill would impose a huge financial penalty on victims of discrimination who try to represent a class.

Second, plaintiffs who undertake class representation expose themselves to great inconvenience and risks. In the Texaco case, plaintiffs suffered retaliatory action by supervisors and employees, ranging from hostility to threats to assignment changes. From the outset, plaintiffs were aware that Texaco had previously retaliated against employees charging discrimination. There was also evidence that an African-American attorney employed by Texaco, who had been trying to initiate a race discrimination class action against Texaco, was fired, assertedly because of these efforts. Several plaintiffs knew of this and were petrified to commence a class action in fear of losing their jobs.[194]

Third, judges are aware of that incentive awards can possibly create a conflict of interest, and carefully scrutinize settlements to determine whether special circumstances warrant an incentive award. In the Texaco case, a special master was appointed to examine the time, effort and risk that each plaintiff expended in assisting in case.[195] The special master analyzed the risks of each plaintiff separately, and recommended incentive awards varying from $85,000 to $2,500 based on their personal special circumstances.[196]

Another Class-Action Case Involving the Oil Industry:

- **Exxon: Deceptive Advertising.** Exxon settled a New Jersey state class action alleging deceptive advertising designed to convince consumers who did not need high-test gasoline to use it in their cars. During the early 1990s, Exxon made several unsubstantiated representations to consumers that Exxon gasoline would keep engines cleaner and reduce maintenance costs.[197] The Exxon advertising campaign drew scrutiny from the FTC, which said consumers paid as much as 20 cents a gallon more for premium gas.[198]

A New Jersey state court judge certified a consumer class action against Exxon alleging that the false advertising created higher demand which, in turn, sustained a higher price – thus causing all purchasers in the relevant time period an ascertainable loss because of the artificially inflated price.[199] In 2002, Exxon settled with the class for one million $3 discount coupons for Exxon 93 Supreme Gasoline upon the purchase of at least eight gallons.[200] Unlike most coupon settlements, in this instance nearly all of the coupons were redeemed. This is because gasoline is a product purchased by consumers on a regular basis.

Section VIII

Tobacco Companies

The revelation that tobacco companies have made fraudulent claims about the tar and nicotine content of so-called "light" cigarettes has brought a number of class-action suits on behalf of smokers who were deceived into believing these products were safer than regular cigarettes.

Tobacco Industry Lobbying on the Federal Class-Action Bills

Two major tobacco firms have contributed at least 17 lobbyists to the campaign for anti-consumer class-action bills in the U.S. House and Senate.

- Philip Morris, maker of Marlboros and several other brands of cigarettes, has committed nine lobbyists to class-action legislation since 2000, including Beverly McKittrick, former Republican counsel, Senate Judiciary Committee.
- U.S. Smokeless Tobacco, the world's largest producer of smokeless tobacco products, has paid eight lobbyists to work on the bills. They have included Charles Black, former senior adviser to Presidents Ronald Reagan and George H.W. Bush; and Mark Disler, former Republican chief counsel, Senate Judiciary Committee.

Unfair Practice: Philip Morris Lies About Safety of "Light" Cigarettes

Documents and testimony in a class-action lawsuit brought in Illinois on behalf of 1.1 million smokers who bought Marlboro Lights or Cambridge Lights cigarettes between 1971 and 2001 revealed that the "light" cigarettes do not contain less tar and nicotine, as advertised. Indeed, if used correctly, these products are actually more dangerous than their regular counterparts.[201]

The lawsuit revealed that no significant differences exist between the content of Marlboro Lights and regular Marlboros. Philip Morris, however, had put small ventilation holes in the filters of Marlboro Lights, which allowed some smoke to escape.[202] These ventilation holes caused the Federal Trade Commission's cigarette testing machines to register lower levels of nicotine and tar for Marlboro Lights than for their regular counterparts. Testimony in the case revealed that many smokers, unlike government testing equipment, cover the ventilation holes with their fingers or lips, usually negating any health benefit that "lights" might have over regular cigarettes.[203]

Moreover, Philip Morris also had been aware since at least 1984 that users who did not cover the ventilation holes while inhaling often compensated for the loss of nicotine by increasing the number of cigarettes they smoked, testimony in the case revealed.[204] And public health experts testified in the trial that the use of the term "light" in cigarette branding could have caused further harm because smokers might have been less likely to quit if they saw smoking lights as a less harmful alternative.[205]

Further, testimony of a former Philip Morris employee revealed that the company has known through its own scientific testing for 25 years that its light cigarettes are actually *more* dangerous than regular cigarettes because they burn with less oxygen, releasing more toxins.[206]

In the aftermath of the Illinois lawsuit, in which Illinois Circuit Court Judge Nicholas G. Byron ruled in favor of the plaintiffs, Philip Morris announced that it would cease printing "lowered tar and nicotine" on packs of Marlboro Lights. The firm said its plans to strike the advertisement predated the March decision in the Illinois case.[207] But lawyers for the plaintiffs said Philip Morris announced the change during a closed-door hearing with the judge to determine the size of the bond it would have to post while it appealed.[208]

Byron awarded the plaintiffs $7.1 billion in damages to compensate consumers for Philip Morris's deceptions in the sale of Marlboro Lights and Cambridge Lights cigarettes. Brown also awarded $3 billion in punitive damages, to be paid to the state of Illinois.[209] Philip Morris has appealed both awards.[210]

A Reason Tobacco Companies Want Class Actions Diverted to Federal Court: Federal Judges Believe Large Class Actions Are Unfair to Defendants

Tobacco companies make no secret of their preference for federal courts, the venue to which bills in the U.S. House and Senate would move most major state class actions. Tobacco gained an important advantage in 1996, when the Fifth Circuit Court threw out a nationwide class action on behalf of all nicotine-addicted smokers, in a case known as "Castano," that had been approved at the District Court level.[211] The litigation page of R.J. Reynolds web site contains this proclamation:

> Federal Courts have unanimously rejected tobacco class actions. Every federal court that has considered tobacco class actions since the Castano case has denied certification, decertified the class, or dismissed the case without reaching the certification issues.[212]

The Castano ruling is anathema among those who wish to bring tobacco-oriented class actions in federal court, both because of the judges' findings on the merits of the case and because of the views they expressed about large class actions in general. The judges found fault with the District Court for allowing a case that did not take into account varying degrees of addiction faced by individual smokers and for not insisting on a coherent explanation as to how the law of all 50 states could be uniformly applied.[213]

Most chilling, perhaps, was the ruling's view that the cards should be stacked against certification of class actions in general. "Class certification creates an insurmountable pressure on defendants to settle, whereas individual trials would not," the court wrote. "These settlements have been referred to as judicial blackmail. It is no surprise then, that historically, certification of mass tort litigation classes has been disfavored."[214]

Cigarette companies have successfully argued that the preemption clauses of the Federal Cigarette Labeling and Advertising Act (the "1965 Act") and its successor the Public Health Cigarette Smoking Act of 1969 (the "1969 Act") are affirmative defenses against liability claims, such as a failure to warn or a strict products liability, in state-related actions. Tobacco companies assert that the federal laws preempted any further state regulations.

In federal courts, tobacco manufacturers have successfully relied on the preemption defense to avoid liability for smoking-related illnesses and deaths. However, state courts generally have refused to recognize a blanket preemption of all state common law claims on the basis of either the 1965 Act or the 1969 Act.[215]

The tobacco companies preference for federal courts is evident in their actions as well as their rhetoric. The companies requested that state court cases alleging fraudulent claims surrounding light cigarettes be moved to federal court in at least nine states and the District of Columbia, according to data from the Tobacco Control Resource Center Inc., of Boston.[216] In all jurisdictions but the District of Columbia, the cases were remanded to state court.

Richard A. Daynard, chairman of Northeastern University's Tobacco Products Liability Project, drew on the Castano opinion to conclude in testimony before Congress that an earlier class-action reform bill (similar to the one being debated now) should be entitled "The Tobacco Industry Relief Act."[217] Daynard observed, "To send tobacco class actions to federal court is to send them to their death."

Other Class-Action Cases Involving the Tobacco Industry

- **Other "Light" Cigarette Litigation.** Class-action certification was granted in 2001 to smokers of Marlboro Lights in Massachusetts and Florida in a lawsuit against Philip Morris.[218] Class-action lawsuits alleging fraudulent claims for "light" cigarettes also have been filed against Philip Morris in California, Minnesota, Missouri, New Jersey, Ohio, Tennessee and West Virginia. Class-action certification was granted in separate lawsuits filed against R.J. Reynolds and Brown and Williamson Tobacco Corp. in Illinois claiming that the companies misled consumers about the safety of "light" cigarettes. Similar class-action suits have been filed against R.J. Reynolds in Missouri, New Jersey and Ohio; and against Brown & Williamson in Missouri and Ohio.[219]

- **Cheating Tobacco Growers.** On May 17, 2003, Phillip Morris and several other tobacco companies settled a class action lawsuit with hundreds of thousands of tobacco growers. The lawsuit alleged the tobacco companies had conspired to fix the price of tobacco. The settlement will distribute $200 million to growers now and promises to pay more than a billion dollars in coming years in additional purchases of domestically grown tobacco. R. J. Reynolds refused to participate in the settlement, saying that it will go to trial next April.[220]

Appendix A

Lobbyists Who Worked on Federal Class-Action Legislation, 2000 – 2002

Last Name	First Name	Client	Registrant Name
Adams	Tiffany	Self	National Association of Manufacturers
Alexander	Pamela	Self	Ford Motor Co.
Amundson	Jan	Self	National Association of Manufacturers
Anderson	Philmore	Self	American Council of Life Insurers
Anderson	Brenda	Self	Ashland
Anderson	Kathryn	Self	Massachusetts Mutual Life Insurance
Anderson	Rebecca	Owens-Illinois	Williams & Jensen
Anderson, Jr	James	Self	National Association of Wholesaler-Distributors
Andrews	Michael	Self	Citigroup
Andrews	Bruce	Civil Justice Reform Group	Quinn Gillespie and Associates
Andrews	Bruce	Massachusetts Mutual Life Insurance	Quinn Gillespie and Associates
Andrews	Bruce	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Angus, III	John	American Association of Health Plans	Duberstein Group
Angus, III	John	American Council of Life Insurers	Duberstein Group
Angus, III	John	Business Roundtable	Duberstein Group
Angus, III	John	General Motors	Duberstein Group
Anthony	Beryl	Cooper Tire & Rubber Co.	Winston and Strawn
Arlington	John	Self	American Insurance Association
Axell	Brian	Self	International Mass Retail Association
Baker	George	Owens-Illinois	Williams & Jensen
Bales	Douglas	Self	Northwestern Mutual Life Insurance
Barbour	Haley	Massachusetts Mutual Life Insurance	Barbour Griffith and Rogers
Barbour	Andy	Self	Financial Services Roundtable
Barnes	John	Self	Raytheon
Baroody	Mike	Self	National Association of Manufacturers
Barry	Daniel	Self	Risk & Insurance Management Society
Bartlett	Steve	Self	Financial Services Roundtable
Basquin	Ashley	Citizens for Civil Justice Reform	Valis Association
Baxendell	Jennifer	Self	American Association of Health Plans
Baxter	Edward	Prudential	Parry, Romani, DeConcini & Symms
Bean	Robert	Self	American Council of Life Insurers
Beatson	Nora	Self	American International Group
Beddow	Thomas	Self	3M
Begans	Peter	Self	Prudential

Last Name	First Name	Client	Registrant Name
Behrens	Mark	American Tort Reform Association	Crowell & Moring
Behrens	Mark	Bridgestone/Firestone	Crowell & Moring
Behrens	Mark	Cigna	Crowell & Moring
Behrens	Mark	National Association of Wholesaler-Distributors	Crowell & Moring
Behrens	Mark	American Association of Health Plans	Shook, Hardy & Bacon
Behrens	Mark	American Tort Reform Association	Shook, Hardy & Bacon
Behrens	Mark	Cigna	Shook, Hardy & Bacon
Behrens	Mark	Eli Lilly & Co.	Shook, Hardy & Bacon
Behrens	Mark	Health Insurance Association of America	Shook, Hardy & Bacon
Behrens	Mark	USAA Insurance	Shook, Hardy & Bacon
Beisner	John	Civil Justice Reform Group	O'Melveny & Meyers
Bennett	Catherine	Self	Pfizer
Berman	Michael	American Association of Health Plans	Duberstein Group
Berman	Michael	American Council of Life Insurers	Duberstein Group
Berman	Michael	Business Roundtable	Duberstein Group
Berman	Michael	General Motors	Duberstein Group
Biderman	David	Self	Environmental Industry Association
Biggert	Adrienne	Self	American Association of Health Plans
Binzel	William	Self	MasterCard
Black	Charles	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Blanchard	Laricke	Self	Citigroup
Boggs	J.C.	Countrywide Home Loans	Blank Rome Comisky & McCauley
Bosgraaf	Kimberly	Self	National Fed. of Ind. Business
Boswell	L. Blaine	Self	PPG Industries
Bouchard	Francis	Self	Zurich Insurance
Bourne	Laura	Self	Food Marketing Institute
Bowen	Robin	Self	Health Insurance Association of America
Bowlin	Chris	Self	Health Insurance Association of America
Boyd	Michael	Self	Pfizer
Brady	Cathleen	Self	American Council of Life Insurers
Brandau	Herman	Self	State Farm Insurance
Brazil	Barbara	Self	Intel
Bresnick	William	Self	Chevron/Texaco
Brewstar	Bill	Cigna	Capitol Hill Group
Brubaker	Alan	Self	Prudential
Bruse	J. Charles	Self	Allstate Insurance
Bullard	Joanne	Self	Risk & Insurance Management Society
Burnley	James	Cooper Tire & Rubber Co.	Winston and Strawn

Last Name	First Name	Client	Registrant Name
Burtschi	Mark	Self	Goodyear Tire and Rubber Company
Cain	Morrison	Self	International Mass Retail Association
Calio	Nicholas	Sears	O’Brien Calio
Callanan	Susan	Self	USAA Insurance
Canfield	William	Owens-Illinois	Williams & Jensen
Carroll	Bruce	Self	Johnson & Johnson
Caskie	Alan	Self	American Council of Life Insurers
Castle	Rita	Self	Atlantic Richfield
Castle	Rita	Self	Caterpillar
Cate	Penelope	Self	Sears
Chadwick	Kirsten	Sears	O’Brien Calio
Champlin	Steven	American Association of Health Plans	Duberstein Group
Champlin	Steven	American Council of Life Insurers	Duberstein Group
Champlin	Steven	Business Roundtable	Duberstein Group
Champlin	Steven	General Motors	Duberstein Group
Chaney	Julia	Cigna	Capitol Hill Group
Chiccehitto	Karen	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Close	Brad	Self	National Fed. of Ind. Business
Coffey	Alan	CAN	Alan Coffey
Coffey	Alan	U.S. Chamber Institute for Legal Reform	Alan Coffey
Coffey	Alan	CAN	Morgan, Lewis & Bockius
Cohen	Sharon	Self	Health Insurance Association of America
Cohen	Kenneth	Self	Massachusetts Mutual Life Insurance
Cole	Grant	Self	National Association of Manufacturers
Coler	Kate	Self	Food Marketing Institute
Comer	Doug	Self	Intel
Connaughton	Jeff	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Conway	Daniel	Self	Chubb
Cook	Judy	Self	Aventis Pasteur
Cortese Jr.	Alfred	General Motors	Cortese PLLC
Cragin	Charles	Countrywide Home Loans	Blank Rome Comisky & McCauley
Crawford	Thomas	Allmerica Financial	Murray Montgomery & O’Donnell
Crawford	Thomas	Equitable Life Insurance	Murray Montgomery & O’Donnell
Crawford	Thomas	MONY Life Insurance	Murray Montgomery & O’Donnell
Crawford	Thomas	New England Financial	Murray Montgomery & O’Donnell
Crawford	Thomas	Pacific Life Insurance	Murray Montgomery & O’Donnell
Culler	Mary	Self	Ford Motor Co.
Curry	Anne	Self	Food Marketing Institute
D’Arcy	Sean	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Daley	Justin	Self	Financial Services Roundtable
Danner	Dan	Self	National Fed. of Ind. Business

Last Name	First Name	Client	Registrant Name
Davis	Smith	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Davis	Timothy	Self	American Express
Davis	Heather	Self	CNA
de Cervens	Jeanne	Self	Aegon
Dearybury	Sheila	U.S. Chamber of Commerce	Mayer, Brown & Platt
Deasy	Kay	Self	Intel
DeConcini	Dennis	Prudential	Parry, Romani, DeConcini & Symms
Defkin	Peter	Self	Intel
Delaney	Wilma	Self	Dow Chemical Company
Dellinger III	Walter	Civil Justice Reform Group	O'Melveny & Meyers
Dennett	Diana	Self	American Association of Health Plans
Desmarias	Henry	Self	Health Insurance Association of America
Desser	John	Aetna	Jefferson Government Relations
Detmer	Kyra	Self	Hartford Financial
DeYulia	Thomas	Self	CNA
Dillard	Regina	Self	State Farm Insurance
Dineen	Michael	Self	Lumbermens Mutual Casualty
Dineen	Michael	Self	Massachusetts Mutual Life Insurance
Direnfeld	Barry	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Disler	Mark	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Docksai	Ronald	Self	Bayer Corp.
Dodson	Melissa	Self	Health Insurance Association of America
Donahue	Mary Beth	Self	American Association of Health Plans
Donnelly, Jr.	Thomas	Aetna	Jefferson Government Relations
Donohue	Thomas	Self	U.S. Chamber of Commerce
Donovan	Laura	Self	Hartford Financial
Doremus	Ted	Self	Financial Services Roundtable
Dorgan	Kimberly	Self	American Council of Life Insurers
Doucel	Shane	Cigna	Capitol Hill Group
Doucet	Shane	Self	National Fed. of Ind. Business
Dover	Jack	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Dowell	Jill	Self	American Association of Health Plans
Duberstein	Kenneth	American Association of Health Plans	Duberstein Group
Duberstein	Kenneth	American Council of Life Insurers	Duberstein Group
Duberstein	Kenneth	Business Roundtable	Duberstein Group
Duberstein	Kenneth	General Motors	Duberstein Group
Duckenfield	Thomas	Chevron/Texaco	Holland & Knight
Durbin Condrill	Margaret	National Association of Insurance & Financial Advisors	Margaret Durbin Condrill
Eastman	Penny	U.S. Chamber of Commerce	Mayer, Brown & Platt

Last Name	First Name	Client	Registrant Name
Eberly	Brenda	Self	IMC Global
Eckerly	Susan	Self	National Fed. of Ind. Business
Edwards	Brad	Self	American Council of Life Insurers
Eilers-Browsers	Heather	Self	National Assn of Insurance & Financial Advisors
Engman	Patricia	Self	Business Roundtable
Evans	Donald	Self	American Chemistry Council
Faber	Josh	Johnson Controls	Roth Group
Fager	D.L.	Self	Chevron/Texaco
Faris	Jack	Self	National Fed. of Ind. Business
Farmer	David	Self	Alliance of American Insurers
Farr	Dagmar	Self	Food Marketing Institute
Fenig	David	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Ferguson	Denise	Self	American Express
Fineran	Lawrence	Self	National Association of Manufacturers
Finkel	Louis	Pfizer	Lent Scrivner & Roth
Fisher	Tim	Self	ACE INA Holdings
Flippo	Ronnie	Massachusetts Mutual Life Insurance	R.G. Flippo
Foster	Behrends	Self	American Association of Health Plans
Franasiak	David	Owens-Illinois	Williams & Jensen
Friess	Katherine	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Gandy	Henry	American Association of Health Plans	Duberstein Group
Gandy	Henry	American Council of Life Insurers	Duberstein Group
Gandy	Henry	Business Roundtable	Duberstein Group
Gandy	Henry	General Motors	Duberstein Group
Garcia	Nelson	Self	Alliance of American Insurers
Garritson	Dean	Self	National Association of Manufacturers
Geller	Kenneth	U.S. Chamber of Commerce	Mayer, Brown & Platt
Gelman	Matt	American Insurance Association	PodestaMattoon
Genovesi	Jacqui	Self	Procter & Gamble
Gilbert	Jeffrey	Self	PPG Industries
Gillespie	Ed	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Gilliland	Michael	Vulcan Materials	Hogan & Hartson
Gitenstein	Mark	U.S. Chamber of Commerce	Mayer, Brown & Platt
Glen	S.B.	Self	Shell Oil
Glennon	Robert	Owens-Illinois	Williams & Jensen
Goasel	Kristin	Self	Health Insurance Association of America
Goldfield	H.P.	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Goon	Julie	Self	American Association of Health Plans
Gorman-Graul	Faye	Self	Dow Corning

Last Name	First Name	Client	Registrant Name
Grams	Rodney	3M	Hecht Spencer & Associates
Green	George	Self	Food Marketing Institute
Gregory	Er	Self	Financial Services Roundtable
Griffin	Patrick	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Griffith	Gary	Self	American Chemistry Council
Griffith, Jr.	G.O.	Massachusetts Mutual Life Insurance	Barbour, Griffith & Rogers
Grissom	Janet Mullins	Self	Ford Motor Co.
Grothues	Arnold	Self	RadioShack
Guidry	Jerene	Self	Freeport-McMoran
Haddow	John	Prudential	Parry, Romani, DeConcini & Symms
Hagge	Damaris	Self	Nationwide Insurance
Hammer	A.R.	Self	Exxon/Mobil
Hammonds	Tim	Self	Food Marketing Institute
Han	Joanna	Chevron/Texaco	Holland & Knight
Hanlon	A. Blake	Self	Household Finance
Harriet	James	Massachusetts Mutual Life Insurance	Quinn Gillespie and Associates
Harriet	James	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Hart	Steven	Owens-Illinois	Williams & Jensen
Hart	Steven	Wyeth (American Home Products)	Williams & Jensen
Hatch	Scott	Prudential	Parry, Romani, DeConcini & Symms
Hatcher	Jennifer	Self	Food Marketing Institute
Hatcher	Michael	Chevron/Texaco	Holland & Knight
Hayden	L.	Self	Chevron/Texaco
Haynes	Mildred	Self	3M
Haynes	Scott	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Healey	James	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Heard	Gary	Self	Chubb
Hecht	Timothy	3M	Hecht Spencer & Associates
Hecht	William	3M	Hecht Spencer & Associates
Heimbach	Jay	American Council of Life Insurance	Ricchetti Inc.
Henderson	Shannon	Prudential	Parry, Romani, DeConcini & Symms
Herath	Kirk	Self	Nationwide Insurance
Higgins	Lawrence	Northwestern Mutual Life Insurance	Higgins, McGovern & Smith
Hildebrant	Jeffrey	Chevron/Texaco	Holland & Knight
Hill	Edward	Self	Bank of America
Hill	Edward	Self	Financial Services Roundtable
Hoel	John	Self	Philip Morris
Holeman	Mark	Countrywide Home Loans	Blank Rome Comisky & McCauley
Holten	Patrick	Self	National Association of Manufacturers
Hotra	Michael	Self	American Tort Reform Association

Last Name	First Name	Client	Registrant Name
House	Michael	Vulcan Materials	Hogan & Hartson
Howard	Robert M.	Self	Ford Motor Company
Howe	Jessie	Self	National Fed. of Ind. Business
Hrynick	Tim	Self	American Association of Health Plans
Hughes	Gary	Self	American Council of Life Insurers
Hyman	Lester	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Ignagni	Karen	Self	American Association of Health Plans
Iovino	Peter	Self	Ford Motor Co.
Isaacs	David	Self	Hewlett-Packard
Iuculano	Russel	Self	Metropolitan Life Insurance
James	Claudia	American Insurance Association	PodestaMattoon
Jasinowski	Jerry	Self	National Association of Manufacturers
Johnson	David	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Johnson	Greg	Self	Health Insurance Association of America
Johnson	Michael	Sears	O'Brien Calio
Johnson	Michael	WellPoint Health Networks	O'Brien Calio
Johonnes	Mary	Self	Ford Motor Co.
Jolly	Thomas	CNA	Jolly/Rissler
Jones	Janine	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Josten	R. Bruce	Self	U.S. Chamber of Commerce
Joyce	Sherman	Self	American Tort Reform Association
Jury	David	Cigna	Capitol Hill Group
Kanwit	Stephanie	Self	American Association of Health Plans
Keaney	David	Self	Bristol-Myers Squibb
Keating	Thomas	Sears	O'Brien Calio
Keating	Thomas	WellPoint Health Networks	O'Brien Calio
Keller	James	Self	Bank One
Kelly	John	Self	Food Marketing Institute
King	William K.	Self	Ford Motor Co.
King	W. Russell	Self	Freeport-McMoran
Kinzler	Peter	Prudential	Peter Kinzler
Kinzler	Peter	U.S. Chamber Institute for Legal Reform	Peter Kinzler
Kirtland	John	Cooper Tire & Rubber Co.	Winston and Strawn
Knox	Loren	Self	National Association of Manufacturers
Korkuch	MaryLu	Self	Chubb
Kountoupos	Lisa	American Council of Life Insurers	Ricchetti Inc.
Kramer	Craig	Self	Johnson & Johnson
Kranowitz	Alan	Self	National Association of Wholesaler-Distributors
Krasow	Christina	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Krese	Jenny	Self	National Association of Manufacturers

Last Name	First Name	Client	Registrant Name
Kuo	Ellen	Self	Bank of America
Kurrie	Jennifer	Self	National Retail Federation
Lacovara	Philip	U.S. Chamber of Commerce	Mayer, Brown & Platt
LaMarca	Louis	Self	Pfizer
Lampkin	Marc	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Langer	Andrew	Self	National Fed. of Ind. Business
Lanza	Sue	Self	Health Insurance Association of America
Latham	Weldon	Chevron/Texaco	Holland & Knight
LeClair	Larry	Self	American Tort Reform Association
Lefrancois	Ronald	Self	New York Life Insurance
Legler	Jack	Self	Environmental Industry Association
Leifer	David	Self	American Council of Life Insurers
Lemon	Chrys	Risk & Insurance Management Society	McIntyre Law Firm
Lent	Norman	Pfizer	Lent Scrivner & Roth
Lent III	Norman	Pfizer	Lent Scrivner & Roth
Leon	Mary Reed	Self	National Fed. of Ind. Business
Levy	Roger	Self	Citigroup
Lewis	Jeffrey	U.S. Chamber of Commerce	Mayer, Brown & Platt
Lewis	Karen	Owens-Illinois	Williams & Jensen
Lezy	Normand	Self	Wal-Mart
Liberatore	Robert	Self	DaimlerChrysler
Liddle	David	Self	Financial Services Roundtable
Liebengood	Howard	Self	Philip Morris
Lieber	Michele	Self	Zurich Insurance
Liebman	Dianne	Self	CSX
Littman	Drew	American Insurance Association	PodestaMattoon
Long	Patricia	Self	National Association of Manufacturers
Lorber	Leah	American Association of Health Plans	Shook, Hardy & Bacon
Lorber	Leah	American Tort Reform Association	Shook, Hardy & Bacon
Lorber	Leah	Cigna	Shook, Hardy & Bacon
Lorber	Leah	Eli Lilly & Co.	Shook, Hardy & Bacon
Lorber	Leah	Health Insurance Association of America	Shook, Hardy & Bacon
Lorber	Leah	USAA Insurance	Shook, Hardy & Bacon
Lugar	Katherine	Self	National Retail Federation
Lugar	Dave	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Lugbill	Tim	Self	National Association of Manufacturers
Lundberg, Jr.	Rolf	Self	U.S. Chamber of Commerce
Lynn	William	Self	Raytheon
Maduros	Nicolas	U.S. Chamber of Commerce	Quinn Gillespie and Associates

Last Name	First Name	Client	Registrant Name
Maguire	Aileen	Self	U.S. Chamber Institute for Legal Reform
Maher	Walter	Self	DaimlerChrysler
Mahler Weisman	Robin	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Maness	Alan	Self	State Farm Insurance
Mang	Jeff	Vulcan Materials	Hogan & Hartson
Marshall, Jr.	Thurgood	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Martin	Jack	Prudential	Parry, Romani, DeConcini & Symms
Martinez	Robert	Owens-Illinois	Williams & Jensen
Mason	Stephen	Self	Health Insurance Association of America
Mattera	Paul	Self	Liberty Mutual
Mattoon	Daniel	American Insurance Association	PodestaMattoon
Maury	Samuel	Self	Business Roundtable
McCarlie	Christine	Owens-Illinois	Williams & Jensen
McCarthy	James	Self	Procter & Gamble
McConnell	Robert	Civil Justice Reform Group	Robert A. McConnell
McGreevy	Lisa	Self	Financial Services Roundtable
McIntosh	David	U.S. Chamber of Commerce	Mayer, Brown & Platt
McIntyre	James	Risk & Insurance Management Society	McIntyre Law Firm
McKenzie	Mary	Self	Humana
McKernan	Kim	Sears	O'Brien Calio
McKernan	Kim	WellPoint Health Networks	O'Brien Calio
McKittrick	Beverly	Self	Philip Morris
McLaughlin	Michael	Cooper Tire & Rubber Co.	Winston and Strawn
McMackin	John	Owens-Illinois	Williams & Jensen
McMackin	John	Wyeth (American Home Products)	Williams & Jensen
McMurtry	Van	Self	Aetna
Meece	Ashley	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Melior	Gwen	American Insurance Association	PodestaMattoon
Mellody	Charles	Sears	O'Brien Calio
Mellody	Charles	WellPoint Health Networks	O'Brien Calio
Merin	Charles	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Metzner	David	Intel	American Continental Group
Meyer	Roberta	Self	American Council of Life Insurers
Meyer	Daniel	American Association of Health Plans	Duberstein Group
Meyer	Daniel	American Council of Life Insurers	Duberstein Group
Meyer	Daniel	Business Roundtable	Duberstein Group
Meyer	Daniel	General Motors	Duberstein Group
Miller	K. Michael	Self	ACE INA Holdings

Last Name	First Name	Client	Registrant Name
Miller	Jessica	Civil Justice Reform Group	O'Melveny & Meyers
Miller, Jr.	William	Self	U.S. Chamber of Commerce
Mills	Gordon	Self	Countrywide Home Loans
Milne	John	Self	3M
Monroe	Loren	Massachusetts Mutual Life Insurance	Barbour Griffith and Rogers
Moore Hamrick	Mary	Self	New York Life Insurance
Morgan	J.R.	Self	Ford Motor Co.
Morley	William	Self	U.S. Chamber of Commerce
Morrill	James	Self	Lincoln National Corp
Motley III	John	Self	Food Marketing Institute
Munk	Jeffrey	Vulcan Materials	Hogan & Hartson
Murphy	Jeanne-Marie	Self	Bank of America
Murray	Michael	Allmerica Financial	Murray Montgomery & O'Donnell
Murray	Michael	Equitable Life Insurance	Murray Montgomery & O'Donnell
Murray	Michael	MONY Life Insurance	Murray Montgomery & O'Donnell
Murray	Michael	New England Financial	Murray Montgomery & O'Donnell
Murray	Michael	Pacific Life Insurance	Murray Montgomery & O'Donnell
Musselman	Ian	Intel	American Continental Group
Napier	John	Cooper Tire & Rubber Co.	Winston and Strawn
Nee	Amy	Chevron/Texaco	Holland & Knight
Nelson	Bill	Aetna	Jefferson Government Relations
Nelson	Patricia	Sears	O'Brien Calio
Nelson	Patricia	WellPoint Health Networks	O'Brien Calio
Nemetz	Miriam	U.S. Chamber of Commerce	Mayer, Brown & Platt
Nichols	Fred	Self	National Association of Manufacturers
Nicoll	Eric	Self	Food Marketing Institute
Nisanci	Didem	Self	American Express
Noah	Jeff	Self	National Association of Manufacturers
Norcross	David	Countrywide Home Loans	Blank Rome Comisky & McCauley
Nord	Nancy	Self	Eastman Kodak
Norrell	Julia	Chubb	Julia Norrell & Assoc.
O'Brien III	Lawrence	Sears	O'Brien Calio
O'Brien III	Lawrence	WellPoint Health Networks	O'Brien Calio
O'Connor	Peter	Self	ACE INA Holdings
O'Hara	Thomas	Self	Prudential
O'Toole	J. Dennis	Self	Household Finance
Overton	Amy	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Owens	John	Civil Justice Reform Group	O'Melveny & Meyers
Pastrick	Scott	U.S. Smokeless Tobacco	Black, Kelly, Scruggs & Healey
Peck	Jeffrey	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Peebles	Ryan	Self	National Fed. Of Ind. Business
Pemberton	Laura	Self	National Fed. Of Ind. Business
Pergal	Patricia	Self	American Association of Health Plans

Last Name	First Name	Client	Registrant Name
Pernick	Carol	Self	CAN
Perros	Georgette	Self	USAA Insurance
Peterson	Helena	Self	3M
Pfister	Steven	Self	National Retail Federation
Phifer	Franklin	3M	Hecht Spencer & Associates
Pickle	G.E.	Self	Shell Oil
Pierez	Joshua	Self	MasterCard
Pinter	Kimberly	Self	National Association of Manufacturers
Pitts	Jim	Self	American Council of Life Insurers
Pitts	James	Cooper Tire & Rubber Co.	Winston and Strawn
Podesta	Anthony	American Insurance Association	PodestaMattoon
Pomfret	Jacqueline	Self	American Association of Health Plans
Pruitt	Penny	Self	ACE INA Holdings
Pruzao	Jerry	Self	Atlantic Richfield
Pryde	Charles	Self	Ford Motor Co.
Pubala III	James	Self	Massachusetts Mutual Life Insurance
Pusey	Leigh Ann	Self	American Insurance Association
Quinn	John	Civil Justice Reform Group	Quinn Gillespie and Associates
Quinn	John	U.S. Chamber of Commerce	Quinn Gillespie and Associates
Radke	Steven	Self	Northwestern Mutual Life Insurance
Ramsey	Richard	Self	American Association of Health Plans
Randazzo	Vince	Self	Business Roundtable
Rassmussen	Erik	Aetna	Jefferson Government Relations
Reichenbach, Jr	John	Self	PPG Industries
Reusing	Vincent	Self	Metropolitan Life Insurance
Ricchetti	Jeff	American Council of Life Insurers	Ricchetti Inc.
Ricchetti	Steve	American Council of Life Insurers	Ricchetti Inc.
Rich	J.E.	Self	Shell Oil
Riddle	Gregory	Self	Eastman Chemical
Rissler	Patricia	CAN	Jolly/Rissler
Rivers	Phillip	Self	Chevron/Texaco
Rizzo	Eric	Self	Farmers Group
Roberts	Carole	Self	Citigroup
Roda	Anthony	Owens-Illinois	Williams & Jensen
Rodney	Irvin	Self	Eastman Kodak
Rohlen	Mary Ellen	Sears	O'Brien Calio
Romani	Romano	Prudential	Parry, Romani, DeConcini & Symms
Rosenberg	Brad	U.S. Chamber of Commerce	Mayer, Brown & Platt
Rosenkoetter	Thomas	Business Roundtable	Williams & Jensen
Roslow	Victoria	Self	Bank One
Roth	Alan	Pfizer	Lent Scrivner & Roth
Roth	Toby	Johnson Controls	Roth Group
Rothfeld	Charles	U.S. Chamber of Commerce	Mayer, Brown & Platt
Rouch	Jeff	Self	Nationwide Insurance

Last Name	First Name	Client	Registrant Name
Ruhlen	Mary Ellen	WellPoint Health Networks	O'Brien Calio
Russell	Shannon	Self	Ashland
Ryan	John	Self	Bristol-Myers Squibb
Saccoccio	Louis	Self	American Association of Health Plans
Saiman	Gary	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Saliba	Khalil	Northwestern Mutual Life Insurance	Saliba Action Strategies
Sarmir	Danielle	Self	National Association of Manufacturers
Satterfield	Gary	Self	Environmental Industry Association
Schaller	Candace	Self	American Association of Health Plans
Scheller	E.M.	Self	Exxon/Mobil
Schloman	Kenneth	Self	Alliance of American Insurers
Schmidt	Lynne	Self	PPG Industries
Schmitz	John	U.S. Chamber of Commerce	Mayer, Brown & Platt
Schulze	Richard	Citizens for Civil Justice Reform	Valis Association
Schulze	Richard	Doctors Company	Valis Association
Schwartz	Victor	American Tort Reform Association	Crowell & Moring
Schwartz	Victor	Bridgestone/Firestone	Crowell & Moring
Schwartz	Victor	Cigna	Crowell & Moring
Schwartz	Victor	Eli Lilly & Co.	Crowell & Moring
Schwartz	Victor	National Association of Wholesaler-Distributors	Crowell & Moring
Schwartz	Victor	American Association of Health Plans	Shook, Hardy & Bacon
Schwartz	Victor	American Tort Reform Association	Shook, Hardy & Bacon
Schwartz	Victor	Cigna	Shook, Hardy & Bacon
Schwartz	Victor	Eli Lilly & Co.	Shook, Hardy & Bacon
Schwartz	Victor	Health Insurance Association of America	Shook, Hardy & Bacon
Schwartz	Victor	USAA Insurance	Shook, Hardy & Bacon
Scott	Gregory	Self	Philip Morris
Scrivner	Michael	Pfizer	Lent Scrivner & Roth
Scruggs	John	Self	Philip Morris
Scully	Timothy	Self	Philip Morris
Seeger	Christopher	Self	USAA Insurance
Sells	Bill	Self	Environmental Industry Association
Shelk	Melissa	Self	American Insurance Association
Shoanise Washington	A'jeanette	Self	Philip Morris
Sitilides	Angela	Citizens for Civil Justice Reform	Valis Association
Skladany	Barney	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld

Last Name	First Name	Client	Registrant Name
Slaiman	Gary	U.S. Chamber Institute for Legal Reform	Swidler Berlin Shereff Friedman
Sloane	Adam	U.S. Chamber of Commerce	Mayer, Brown & Platt
Smeallie	Shawn	Intel	American Continental Group
Smith	Rick	Self	American Association of Health Plans
Smith	Kelly	Self	Philip Morris
Smith	Richard	Chubb	Richard D. Smith
Smythers	Michael	Self	CSX
Soloman	Maura	Self	Citigroup
Soloman	Maura	Self	Financial Services Roundtable
Spiezo	Julie	Self	American Council of Life Insurers
St. Amand	Janet	Self	Household Finance
Starr	David	Owens-Illinois	Williams & Jensen
Steen	Daniel	Self	Owens-Illinois
Steplowski	Monica	Citizens for Civil Justice Reform	Valis Association
Steplowski	Monica	Doctors Company	Valis Association
Stewart	Kristin	Self	American Association of Health Plans
Stewart	Barbara	Self	Bank One
Stirrup	John	U.S. Chamber of Commerce	Griffin, Johnson, Dover & Stewart
Strom	Thaddeus	Intel	American Continental Group
Styles	Scott	Self	American Association of Health Plans
Sweeney	Kevin	Self	Massachusetts Mutual Life Insurance
Sweet	Frederic	Self	Northwestern Mutual Life Insurance
Tager	Evan	U.S. Chamber of Commerce	Mayer, Brown & Platt
Talbott	Scott	Self	Financial Services Roundtable
Tallon	Robin	Philip Morris	Robin Tallon
Tarplin	Linda	Sears	O'Brien Calio
Tarplin	Linda	WellPoint Health Networks	O'Brien Calio
Tassey	Jeffrey	Business Roundtable	Williams & Jensen
Tassey	Jeffrey	Owens-Illinois	Williams & Jensen
Taylor	Lonnie	Self	U.S. Chamber of Commerce
Teasdale	Barbara	Self	Ford Motor Co.
Thompson	David	Cigna	Capitol Hill Group
Thompson	Eric	Self	Hartford Financial
Thompson	Kyra	Self	Hartford Financial
Todesco	Rochelle	American Tort Reform Association	Shook, Hardy & Bacon
Tompkins	Kristina	Self	USAA Insurance
Toohey	Mike	Self	Ashland
Topodas	Jonathan	Self	Aetna
Tormquist	David	American Insurance Association	PodestaMattoon
Tucker	James	Liberty Mutual	Akin, Gump, Strauss, Hauer & Feld
Udwin	Gerald	State Farm Insurance	Udwin Group
Ulsh	Sandra E.	Self	Ford Motor Co.
Valanzano	Karen	Self	ACE INA Holdings

Last Name	First Name	Client	Registrant Name
Valis	Wayne	Citizens for Civil Justice Reform	Valis Association
Valis	Wayne	Doctors Company	Valis Association
Van Dongen	Dirk	Self	National Association of Wholesaler-Distributors
Van Egmond	Juliane H.	Self	Bayer Corp.
Vinson	Scott	Self	National Retail Federation
Wackerle	Rex	Self	Bank of America
Wackerle	Rex	Self	Prudential
Waits	John	Cooper Tire & Rubber Co.	Winston and Strawn
Waldman (was Bullard)	Joanne	Self	Risk & Insurance Management Society
Walker	Angela	Self	Prudential
Wallace	Vicki	Mass. Mutual Life Insurance	R.G. Flippo
Ward	Stephen	Self	Shell Oil
Wamke	Christine	Vulcan Materials	Hogan & Hartson
Webb	Matthew	Self	U.S. Chamber Institute for Legal Reform
Welling	Brad	Self	American International Group
Wamke	Christine	American Chemistry Council	Hogan & Hartson
White	Toni	Self	Raytheon
Whitenton	Marshall	Self	National Association of Manufacturers
Whiting	Richard	Self	Financial Services Roundtable
Wilber	Kathryn	Self	American Association of Health Plans
Wilder	Tom	Self	American Association of Health Plans
Wilkins Ellis	Ellen	Self	Massachusetts Mutual Life Insurance
Wilkinson	John	Self	Vulcan Materials
Williams	Jimmie	Self	Countrywide Home Loans
Williams	Kaye	Self	Prudential
Williams	J.D.	Owens-Illinois	Williams & Jensen
Winborn	Erik	Self	Wal-Mart
Winston	Deborah	ING	Deborah F. Winston
Winston	David	Self	National Assn of Insurance & Financial Advisors
Wise-Vaughan	Elizabeth	Self	Food Marketing Institute
Woodworth	Gregory	Self	Massachusetts Mutual Life Insurance
Wootton	James	Self	U.S. Chamber Institute for Legal Reform
Yehle	Christina	Self	American Association of Health Plans
Youngman	Michael	Self	Northwestern Mutual Life Insurance
Zimpher	W. Craig	Self	Nationwide Insurance
Zurawski	Paul	Self	Business Roundtable

Source: Public Citizen analysis of lobby disclosure reports filed with the Secretary of the Senate and Clerk of the House pursuant to the Lobby Disclosure Act of 1995.

Appendix B

Comparison of State v. Federal Certification of Life Insurance Class-Action Lawsuits, 1996 - 2003

Source	Case Name	Federal Certified?	State Certified?
SF36 ALI-ABA 223	In re The Hartford Sales Practices Litigation, Civ. No. 97-MD-1204 (D. Minn. June 10, 1999.	No	
SF36 ALI-ABA 223	Parkhill v. Minnesota Mut. Life Ins. Co., 188 F.R.D. 332 (D. Minn. 1999).	No	
SF36 ALI-ABA 223	Velasquez v. Crown Life Ins. Co., 1999 U.S. Dist. LEXIS 13186 (S.D. Tex. Aug. 10, 1999).	No	
SF36 ALI-ABA 223	Cohn v. Massachusetts Mut. Life Ins. Co., 189 F.R.D. 209 (D. Conn. 1999).	No	
SF36 ALI-ABA 223	Kent v. SunAmerica Life Insurance Co., No 97-12317, 2000 U.S. Dist. LEXIS 139 (D. Mass. Jan 4, 2000).	No	
SF36 ALI-ABA 223	Zarella v. Minnesota Mutual Lif Ins. Co., No. 96-2782 (R.I. Super. Ct., April 14, 1999).		No
SF50 ALI-ABA 295	Varacallo v. Massachusetts Mut. Life Ins. Co., No. ESX-L3403-97 (NJ. Sup. Ct. Sept. 24, 1999).		Yes
SF36 ALI-ABA 223	M.C. Sullivan Inv. Co. Pension Trust v. Jackson Nat'l Life Ins. Co., No. 97-548796 (Mich. Cir. Ct. Aug. 13, 1999).		No
SF50 ALI-ABA 295	Keyes v. The Guardian Life Insurance Co., No. 3-97CV439 (S.D. Miss., Feb. 15, 2000).	No	
SF36 ALI-ABA 223	Soloman v. Massachusetts Mut. Life Ins. Co., No. 9602-0025, (Pa. Dist. Ct., Phila. County Jan. 19, 2000).		No
SF36 ALI-ABA 223	Mentis v. Delaware American Life Insurance Company, CA No. 98C-12-023 WTQ (Sup. Ct. Del. May 30, 2000).		No
SF36 ALI-ABA 223	Kreidler v. Western-Southern Life Assurance Co., No. 95-CV-157 (Ohio Ct. Common Pleas Apr. 14, 1999).		Yes
SF36 ALI-ABA 223	Security Life of Denver Ins. Co. v. Ferguson, No. 05-98-01738-CV, 1999 Tex. App. LEXIS 4102 (Tex. Ct. App. May 28, 1999).		Yes
SF36 ALI-ABA 223	Adams v. Kansas City Life Ins. Co., No. 98-1053-CV-W-9-6 (W.D. Mo. Apr. 1, 2000).	No	

Source	Case Name	Federal Certified?	State Certified?
SF36 ALI-ABA 223	Vos v. Farm Bureau Life Insurance Co., No. CL 78865 (Iowa Dist. Ct., Polk Cty., Feb. 14, 2000).		Yes
	In re Jackson Nat. Life Ins. Co. Premium Litigation 209 F.R.D. 134 W.D.Mich.,2002.	No	
SF36 ALI-ABA 223	In re Great Southern Life Ins. Co. Sales Practices Litig., MDL No. 1214, 2000 U.S. Dist. LEXIS 3117 (N/D. Tex. Mar. 13, 2000).	Yes	
SF50 ALI-ABA 295	People's v. American Fid. Life Ins. Co., 176 F.R.D. 637 (N.D. Fla. 1998).	No	
SF50 ALI-ABA 295	Russo v. Massachusetts Mut. Life Ins. Co., 746 N.Y.S.2d 380 (2002).		No
SF50 ALI-ABA 295	Clarke v. Guardian Life Ins. Co. of Am., No. 95-12590-REK (D. Mass. May 28, 1997).	No	
SF50 ALI-ABA 295	Willoughby v. John Hancock Mut. Life Ins. Co., No. 96.00307, slip op. (N.Y. Sup. Ct. Feb. 3, 1997).		Yes
SF50 ALI-ABA 295	Elkins v. Equitable Life Ins. Co., No. 96-296-CIV-T-17B, 1998 U.S. Dist. LEXIS 1557 (M.D. Fla. Jan. 28, 1998).	Yes	
SF50 ALI-ABA 295	Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54 (d.C. Mass. 1997).	Yes	
SF50 ALI-ABA 295	In re New England Mut. Life Ins. Co. Sales Practices Litig., 183 F.R.D. 33 (D.C. Mass. 1998).	Yes	
SF50 ALI-ABA 295	Kirkham v. American Liberty Life Ins. Co., 717 So. 2d 1226 (La. App. 2d Cir. 1998).		No
SF50 ALI-ABA 295	Cope v. Metropolitan Life Ins. Co., 82 Ohio St. 3d 426; 696 N.E. 2d 1001 (1998).		Yes
SF50 ALI-ABA 295	Holt v. Metropolitan Life Ins. Co., No. 94-C-109 (W.V. Cir. Ct. Feb. 15, 1996).		Yes
SF50 ALI-ABA 295	Banks v. New York Life Ins. Co., 722 So. 2d 990 (La. 1998).		Yes
SF50 ALI-ABA 295	Rothwell v. Chubb Life Ins. Co. of America, 191 F.R.D. 25 (D.N.H., 1998).	No	
SF50 ALI-ABA 295	Young v. Nationwide Life Ins. Co., 183 F.R.D. 502 (S.D. Tex. 1998).	No	

Source	Case Name	Federal Certified?	State Certified?
SF50 ALI-ABA 295	Michels v. Phoenix Home Life Mutual Ins. N.Y.Sup., 1997. 1997 WL 1161145		Yes
	Moore v. PaineWebber, Inc. 306 F.3d 1247 C.A.2 (N.Y.),2002.	No	
	Massachusetts Mutual Life Ins. Co. v. Superior Court, Cal.App. 4 Dist.,2002. 119 Cal.Rptr.2d 190		Yes
	Snell v. Allianz Life Ins. Co. of North America 2000 WL 1336640 D.Minn.,2000.	Yes	
	Markarian v. Connecticut Mut. Life Ins. Co. 202 F.R.D. 60 D.Mass.,2001.	No	
	In re Prudential Ins. Co. of America Sales Practices 148 F.3d 283 C.A.3 (N.J.),1998.	Yes	
	In re Lutheran Brotherhood Variable Ins. Products Co. 201 F.R.D. 456 D.Minn.,2001.	Yes	
	Grove v. Principal Mutual Life Ins. Co. 200 F.R.D. 434 S.D.Iowa,2001.	Yes	
	Van West v. Midland Nat. Life Ins. Co. 199 F.R.D. 448 D.R.I.,2001.	No	
	Begley v. Academy Life Ins. Co. 200 F.R.D. 489 N.D.Ga.,2001.	No	
	Bussie v. Allmerica Financial Corp. 50 F.Supp.2d 59 D.Mass.,1999.	Yes	
	Franze v. Equitable Assurance 296 F.3d 1250 C.A.11 (Fla.),2002. July 11, 2002.	No	
	Wilson v. Massachusetts Mut. Life Ins. N.M.Dist.,1999. Not Reported in P.2d		Yes

Total Certified:	**Federal Courts: 9 (35%)**	**State Courts: 11 (65%)**
Total Not Certified:	**Federal Courts: 17 (65%)**	**State Courts: 6 (35%)**

Source and Methodology: Public Citizen researched Westlaw, a legal resources web site, for all cases that had addressed the question of class-action certification in life insurance deceptive sales cases. Public Citizen also looked at law review articles found on Westlaw discussing the same issue. Where noted under the "source" column, Public Citizen found that case in the law review article citation stated. Where nothing is listed in the source column, the case was found through a Westlaw case search and the source is the citation listed after the case name. Despite Public Citizen's extensive research on this issue, some cases are not published on Westlaw and it is possible that some cases were omitted because they were unavailable.

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