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## The Role of Litigation and Alternatives Thereto in Consumer Activism

*Alan B. Morrison\**

**I**n 1832 Karl Von Clausewitz set forth the dictum that “war is not merely a political act but also a political instrument, a continuation of political relations, a carrying out of the same by other means.” The same statement could be made about litigation; that litigation is simply an attempt to carry out policy objectives by other means. Someday we ought to ask ourselves why that is necessarily true for war. Today I will discuss why it is necessarily true for litigation.

Consumer litigation is different than litigation between major corporations, (e.g. American Telephone & Telegraph and NCR or Pennzoil and Texaco), or litigation involving employment discrimination, or any other kind of litigation. Largely because of the relationships between the parties and the amounts of money at stake, consumer litigation presents a very different kind of dynamic than other forms of litigations in that one party has a major advantage over another.

I will begin by talking about a case that I had in the District of Columbia. A friend of mine, whom I have known for a number of years, called me one day in a modest rage. He had just bought a house, and in fact, had sold another house. It turned out that he did not receive his money from the closing for about a week. As a result, he had to continue to pay interest on his old mortgage at the same time he was paying interest on his new mortgage, even though he did not own more than one house at any time. Apparently, this practice, under which the mortgage companies did not pay off the old loan for a week or ten days, was quite common in the District of Columbia. In fact, even if an individual had the loan from the same bank, that is, the old and new loan was from one bank, the bank would still charge interest on both loans at the same time. Not bad business if you could get it.

My friend wrote letters, made noises, and registered objections, but nothing happened. It was then that the Public Citizen Litigation Group (“Litigation Group” or “Group”) decided to bring a lawsuit. The banks claimed that the problem was a matter of paperwork; they could not get everything done quickly enough; they needed the money for all the title searches and one thing and another. The amounts of money involved in this lawsuit, even considering the price of most District of Columbia homes, was fairly modest; something in the order of \$200 to \$300 for the

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week or two of interest. In addition, if the tax deductions that the home owner received are subtracted, the amount was even smaller. Obviously, for this amount, no one would be able to go to court against a major lending institution unless there was a possibility of agglomerating together others in a class action. Therefore, the Litigation Group brought a class action and attempted to attack this problem in a way that would be effective on behalf of the consumers.

A rather interesting thing happened. One of the banks was extremely forthcoming and told us that it did not engage in the practice, and that it was the other bank which had the money. Besides that, it wanted it to be absolutely clear that it would be that bank's policy not to engage in this practice. As a result, we let them out of the lawsuit.

The other bank, however, was absolutely adamant. It said that it certainly could not allow this money to be going out before all the paperwork was completed. This was in spite of the fact that in a number of other jurisdictions it was able to complete house closings in a day.

We went to court and tried to get the class action certified. Unfortunately for us, the Superior Court judge in the trial court would not certify the class action because it viewed each mortgage as a different mortgage, and each contract as a different contract, since different people were involved at different plots. We tried to convince the judge to allow us to prove that the claims were similar, but the judge agreed with the bank and maintained that they were different.

The judge's decision put us in a terrible bind. First, we could no longer stay in the main trial because the amount in controversy had dipped below the amount required. We were now in the small claims section where: a) class actions are not allowed; b) appeals are not permitted; c) there is no precedential effect if a case is won because no opinions are published; and d) as soon as you are in the small claims court, the bank simply writes you a check. That would amount to one hour's worth of time for its lawyer, and the case would be closed. You would have no claim.

A good friend of mine, who was on the District of Columbia City Council at the time, became interested in the case. The Public Citizen Litigation Group, being an organization that does not limit itself to going to court for litigation, and being one that has never been afraid of a little unfavorable publicity, went to the press and succeeded in getting some stories published about the case. The publicity caused the City Council to become interested in the problem, and within a year the law was changed. The law now requires the bank to transfer the money within twenty-four working hours of the time of closing.

In the end it worked out all right, but not without the Litigation Group going to court, doing some litigating and discovery to find out what really was going on in the matter.

Another case the Public Citizen Litigation Group was involved in

did not turn out as well for the defendants. This one proceeded all the way to litigation. As many may remember, in the early 1970s, lawyers had a wonderful little thing going for them called "minimum fee schedules." In northern Virginia, there was a minimum fee schedule for the closing of houses. It called for a minimum fee of 1% of the purchase price of the house, all for an opinion as to the state of the title. The opinion, in fact, did not even have to be in writing - all the lawyer had to do was look over a report from the title examiner and make sure everything was in order. If there was nothing wrong with it, the attorney would simply tell the title insurance company that it could write the title insurance. The title insurance company would then write the title insurance, for which the lawyer would get 1% of the purchase price of the house or the value of the mortgage (sometimes the mortgage exceeded the purchase price). Then the lawyer would proceed to charge the homeowner for preparing the deed, for preparing the mortgage, and for doing the closing. The title insurance company would charge the homeowners for the title insurance as well. All this was done, not surprisingly, because the Bar Association was of the opinion that only lawyers could decide whether the state of the title was valid. The Bar Association also prohibited the title insurance companies from dealing directly with home buyers.

In this case, the Public Citizen Litigation Group represented an individual who had bought a house in Reston, Virginia. In the deed for the contract for the house it said that the house closing would be done by one A. Burke Hertz. The Litigation Group's clients, of course, had never before heard of Mr. Hertz. What the Litigation Group uncovered was that Mr. Hertz was the lawyer who had done the legal work for the developer. He had his name placed on all the contracts of sale for doing the house closing. Luckily, my clients knew that they could not be forced to go to Mr. Hertz, and that they could get their own lawyer. They wrote letters to thirty-five lawyers in northern Virginia asking them what they would charge for a house closing. Every one of them wrote back saying, "We charge the minimum fee. We think it would be unethical for anyone to charge less than the minimum fee, and we know of no lawyer who would do it." The reason no other lawyers would do it was because the minimum fee schedule was, not surprisingly, a price fixing arrangement which the lawyers had set up.

The Litigation Group brought a class action lawsuit on behalf of 3,000 persons who had bought homes in Reston, Virginia. Under the Federal Sherman Antitrust Act, the Group sued the local bar associations that were in Fairfax, Alexandria, and Arlington Counties. In addition, the Group sued the Virginia State Bar Association. As the case prepared to go to trial, two of the local bar associations approached the Litigation Group and said that they would abolish their fee schedules if the case against them was dropped.

The Litigation Group decided to drop the cases against them for

three reasons. First, enough lawyers were involved in the case to begin with. Second, these lawyers were pretty good lawyers and we did not look forward to going up against them at trial. Third, the Litigation Group thought that if it could show that two of the bar associations had dropped out without any adverse effects upon northern Virginia real estate, it would be very hard for people to say, "We absolutely have to have these minimum fee schedules." However, things did not work out as planned.

The suit continued to trial. It was a very short trial since the facts were largely undisputed. The judge ruled against the local bar association, but in favor of the state bar association, citing the fact that the state bar association had state action immunity. The Litigation Group appealed the latter decision to the Court of Appeals. The court upheld the trial court's ruling. Next, the Group appealed to the United States Supreme Court. This time the Court unanimously found in its favor. The Supreme Court held that the bar associations were engaged in price fixing, that they had no exemptions merely because they were lawyers, and that the state bar's role in this was not sufficiently controlled by the state supreme court to receive immunity.

This was a great first step; it made lawyers' fees entirely subject to the antitrust laws. Not only that, but the court also awarded damages. After considerable pressure, the Litigation Group managed to get \$225,000 from the state and local bar associations.

Today, since the Public Citizen Litigation Group succeeded in this case, the bar associations are now subject to the antitrust laws and the whole legal profession has been significantly altered as a result.

The last area that I would like to discuss is that it sometimes "takes two to tango." By this I mean that what sometimes start out as consumer lawsuits often end up as consumer lawsuits in which the consumer is on the defending side.

I once represented a couple that owned a home in New York State, just outside of the city. They had a mortgage under which the bank required them to pay a certain amount of money every month as principal and interest, plus 1/12 of the estimated annual taxes as calculated by the bank. In Westchester County, where they resided, there were five separate taxes; the bank, therefore, set up five separate accounts. The problem was that the bank insisted that they keep enough money in each of the accounts to be able to pay off all of the money at the same time. As a result, the bank ended up keeping between \$1,000 and \$2,000 more of the couple's money on hand at any one time than it would have if it had treated all the money as pooled together. The reason that the bank did this, of course, was that the bank was taking the couple's money, loaning it out at 8% and only having to pay 2% back as interest. When the couple refused to go along with this, the bank foreclosed on their house. The couple lost at the trial level. The Litigation Group represented them at the court of appeals and won. The story becomes long and unpleasant

after that although they eventually prevailed on their two primary claims. They lost thousands of dollars in time and investment income as a result of the bank's recalcitrance.

The final denouement must wait on Washington. Congress has held hearings on this practice of excessive escrow deposits and multiple accounts for insurance, and HUD is looking at it too. The best solution would be for Congress to pass a law that would require interest payments on all escrow deposits at the market rate. If this happens, the lenders will be in a far worse position than they ever imagined.

In conclusion, let me suggest some lessons that can be learned about consumer litigation. One is that lawsuits are sometimes, and maybe often, necessary. Sometimes you have to have at least a credible threat of bringing a lawsuit before anyone will listen.

Second, consumers are often willing to settle cases for less or even no restitution, if the issue will be cleaned up in the future. This is because organizations like Public Citizen Litigation Group have limited resources, and while it would be nice to get damages for everyone, the Litigation Group feels that in the long run it is better to settle. In some cases, the Litigation Group is willing to walk away without worrying about having its attorneys' fees because it believes that in the long run it is the better course of action.

Third, the threat of a lawsuit is occasionally enough to get practices changed.

Fourth, businesses know that small claims are very easy to dismiss. They know that most people cannot find lawyers, cannot afford lawyers, and certainly cannot afford lawyers to fight over a few hundred dollars.

Fifth, lawyers are essential. I say that not just because I happen to be a lawyer, but because I have seen it happen so many times that, at least in our system, if you do not have a lawyer, the chances of being able to get people to change their practices significantly are very small.

Sixth, publicity helps a lot; and it especially helps in those situations where you do not prevail in court. The only thing you may have left is publicity to try to shame either the offender, regulator or legislator, to change the practices.

Seventh, there are enormous variations in the way in which defendants in the same industry, or in the same community, facing the same problem, respond. In some cases they are perfectly willing to change their practices and do what is right. In others they are extremely recalcitrant and will not budge an inch. Looking at these various situations from a business prospective, there is no rational explanation for the difference in conduct. I can only ascribe it to the difference in personalities and ethos of the decision-makers in the particular industry.

Eighth, when defendants lose, sometimes they lose very big, far bigger than they ever expected.

Ninth, cases are handled very differently with different plaintiffs.

The Public Citizen Litigation Group is, for better or worse, not in the business of suing to make a lot of money. It likes to get fees once in a while, but if it does not get fees, it will walk away quite content if it knows it has done the right thing for its clients. Businesses often forget that there are some "economically irrational" lawyers like us out there. If you get one on the other side, you are in a lot of trouble.

Finally, it needs to be remembered that litigation imposes costs such that sometimes lawyers are the only winners in the case. We ought to be able to find better ways of at least reducing those costs, if not eliminating them entirely.

There are still a large number of social and economic problems that need to be solved, and there are still people acting in ways that are fundamentally unfair; people who are taking advantage of their powerful position in relation to consumers. The real problem is that litigation is, as they say about the carrot and the mule, the tool that you use to get his attention.