

Media inquiries: Véronique Rodman  
202.862.4871 (vrodman@aei.org)  
Orders: 800.343.4499  
www.aei.org/books

FOR IMMEDIATE RELEASE: May 10, 2005

## **HARM-LESS LAWSUITS?**

### **What's Wrong with Consumer Class Actions**

**By Michael S. Greve**

What's the latest way to get a share of \$10.1 billion? Participate in a class action suit against a large group of companies and claim that their products could—hypothetically—have harmed you.

American tort law had always operated on the principle of “no harm, no foul.” No longer. Without claiming any smoking-related harm, past, present, and future plaintiffs in one class action suit against tobacco companies were awarded \$10.1 billion. Their injury? They claimed to be the victims of deceptive advertising of “light” and “low-tar” cigarettes, despite the companies' warnings and compliance with strict federal guidelines.

Should a plaintiff have to prove that he or she was harmed by the defendant's product when suing for damages? While the answer may seem obvious, recent consumer class action suits have effectively dispensed with the injury requirement. Lawsuits against pharmaceutical, electronic, tobacco, and fast-food companies have been allowed to proceed under broadly worded state laws against fraud, misleading advertising, and general unfair business dealing, and have eliminated the need to prove injury, causation, or the consumer's reliance on the company's alleged misrepresentation. The result is billion-dollar verdicts and settlements for consumer classes whose harms are purely hypothetical.

In *Harm-Less Lawsuits? What's Wrong with Consumer Class Actions* (AEI Press, April 2005), AEI scholar Michael Greve describes the origins of consumer class actions and analyzes their theoretical and practical problems. Greve traces the birth of these “harmless lawsuits” to consumer advocacy groups attempting to protect allegedly irrational consumers against corporate exploitation. Common law has traditionally presumed that consumers are, by and large, sufficiently rational to bargain for contractual protections. Consumer law theorists deny that assumption and proceed to argue that the public policy objective of deterring wrongful corporate conduct requires broad-based private enforcement, regardless of whether the particular plaintiffs suffered actual harm.

Greve points out that, somewhat perplexingly, consumer class actions are receiving support from a substantial new body of legal and economic scholarship. The theory behind these papers embodies the belief that class action suits that encompass all possible claimants and that fully compensate for every possible injury will efficiently deter wrongful actions by companies. This view is mistaken according to Greve, who believes that actions on behalf of unharmed consumers, when added to existing legal protections and recovery of damages for *injured* claimants, will generate excessive awards and unnecessary deterrence.

*Harm-Less Lawsuits?* concludes with the notion that a viable reform agenda must focus not only on the courts and their rulings, but also on the laws and regulations that give rise to these rulings. To protect against the massive risk of excessive enforcement and deterrence, the application of consumer protection laws should be closely tied to traditional common-law requirements. Otherwise, the costs of these lawsuits in terms of forgone production and innovations are substantial and likely to increase over time.

###

### **Key Points**

- Billion-dollar verdicts and settlements are being awarded to groups of people who have suffered no injuries. These consumer class actions are sanctioned by broadly worded state laws that claim to protect consumers—who are assumed to be irrational—from corporations.
- By awarding damages to unharmed plaintiffs, consumer class actions are at odds with traditional, common-law notions of justice and fairness.
- Consumer advocates claim that the threat of debilitating awards deters corporate misconduct. However, large penalties for purely hypothetical injuries deter legitimate and beneficial corporate activity.
- Law and economics scholarship generally endorses broad-based class action suits as an efficient means of deterring wrongful corporate conduct. However, outside the common-law context of actual injuries and what caused them, the calculation of “efficient” deterrence penalties becomes pure guesswork.
- Until now, tort-reform efforts have largely ignored the problem of consumer protection statutes and their enforcement by private litigants rather than by public agencies. A plausible reform agenda will have to target the role of state statutes and legislatures, as well as tort law and courts.