Testimony of

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Judicial Improvements Act of 1990, S.2648

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I am pleased to be here today to support the Judicial Improvements Act of 1990 on behalf of the American Corporate Counsel Association ("ACCA"). ACCA, which was founded in 1982, is a Bar Association for members who do not hold themselves out to the public for the practice of the law, but primarily serve one client -- usually a business entity. ACCA currently has over 8,000 members of which more than 2,500 are the senior legal officers of their client. One of ACCA's goals is the cost effective management of legal process. The Association and its members have been working towards this goal. ACCA has recognized that the cost and delay associated with the Judicial system as it operates today is a significant problem for all users of the system.

This Bill, which is a product of the Brookings Task Force on Civil Justice Reform, is a *first* step towards dealing with the significant problems facing the users of the judicial system today.

The Task Force's Report is a product of much thought by a group of lawyers representing divergent interests. It is a testimony to the need that the Bill attempts to address that the Brookings Task Force with its divergent interests representing the corporate community, the Plaintiff's and Defendant's trial bar, academia, public interest groups, and the insurance community could agree on the proposals as they did. Although not each member of the Task Force, including myself, is necessarily supportive of every word and proposal in the Task Forces Report or, for that matter, the Bill itself, we nevertheless were able to agree generally on the Report and the end purpose of this Bill.

In order to help this Committee understand the perspective that I bring to this hearing and the subject matter, let me briefly provide my background. I am a graduate of New York University School of Law (Jan. 1967). While at N.Y.U. I

worked for the Senior Partner, a trial lawyer, of one of the Wall Street law firms and attended law school at night. Following graduation from law school, I was with the Antitrust Division of the Department of Justice until February 1968, when I began a two year tour of active duty with the U.S. Army. Upon completion of my active duty service, I joined the New York law firm of White & Case where I was an associate in the litigation department until December, 1972 when I became General Counsel of Arthur Young & Company. I served in that position until Arthur Young and Ernst & Whinney merged in 1989 when I became General Counsel to the merged firm. I have thus spent the better part of the past 27 years closely allied with legal process in general, and with trial work in particular. In my role as General Counsel of Ernst & Young and its predecessor, Arthur Young & Company, I have not only supervised litigation through the retention of outside law firms, but have continued to do hands on litigation through our own internal legal staff. I personally have appeared in numerous Federal and state trial courts in more than half the states in this Country. Prior to our merger, approximately 80% of all litigation in which the firm was involved was handled internally by the General Counsel's office. In fact, during the 1980s, the staff of Arthur Young;s General Counsel's Office under my supervision and direction tried over 15 cases in Federal and State courts and argued more than 25 appeals including two cases before the United States Supreme Court. In the past twenty years (including my days in private practice)I have been involved in the managing and direct handling of over 1,000 active cases ranging from a small claims matter to the multi-million dollar complex litigation which has become and all too frequent part of our legal life.

In addition to both the hands on experience I have had and the close observation of the litigation process while in law school, I have been exceptionally active in Bar Association activities since the early 1970s.

In 1982 I helped form the American Corporate Counsel Association ("ACCA") of which I served as Chairman of the Board in 1984 and have been a member of the Board and Executive Committee of the Board since its founding in 1982. I am currently chairman of its Amicus Committee and serve on its litigation committee.

As a member of the American Bar Association, I have been active over the years in the Litigation Section and in the Economics of Law Practice Section with a particular emphasis on the management processes of litigation.

Over the years I have been a frequent lecturer and writer on the subject of litigation management and litigation management techniques. This has ranged from the use of technology in both the law office and court room to the more efficient use of personnel in the process.

I offer the foregoing to help you understand the background I bring to my comments on the Civil Justice Improvements Act of 1990. I am not just an observer of the system, but a lawyer who has both hands on experience in doing and managing the litigation process.

The Act

I, and many members of the Corporate Bar, support the Bill. In addition to myself, the Brookings Task force enjoyed the support and participation of several other distinguished members of the corporate legal community. Frank

McFadden, currently General Counsel of Blount, Inc., and the former Chief Judge of the Northern District of Alabama, and Norman Krivosha, currently General Counsel of Ameritas Financial Services and former Chief Judge of the Supreme Court of Nebraska, served on the Task Force. ACCA considered the Task Force's Report and provisions of the Bill and authorized me to testify before this distinguished Committee on its behalf in support of the Bill.

Our support for the bill is based on the fact that it is a *first* step, albeit a small *first* step, towards coming to grip with a serious problem. The problem is not just a problem for the business community which frequently finds itself the target of massive litigation, but it is a problem for any one who legitimately has a claim for which redress is sought in the court system. The cause of the problem must squarely be laid on the door steps of many constituencies which include every group represented on the Brookings Task Force, the judiciary (both Federal and State), and the Congress itself. Attempts at dealing with the problem have been minimally successful. Lawyers over litigate. Congress over legislates, and then, when it provides the multitude of new acts to address the problems it perceives, it under legislates by leaving too many issues open for the Courts to decide -- time and time again at substantial cost to the litigants. And the judiciary itself fails to take an active and aggressive role in managing the process before it leaving, far too often, the litigants to over litigate a case for whatever the reason.

The Cost Issue

In my role as both litigator and manager of litigation, I have spent considerable time analyzing the litigation process and identifying the causes of delay and cost in litigation. During the past decade, I have carefully reviewed our legal bills and internal time charges associated with the litigation in which we are involved.

Based on these reviews, I have found that almost 80% of our time is spent in the discovery process:

- producing and getting produced millions of pieces of paper (much of which have little and nothing to do with what is at issue);
- attending countless depositions (and the closer one gets to trial, we find triple and quadruple tracking of depositions becomes a common place occurrence in large scale litigation); and
- answering countless interrogatories which will never again see the light of day after they have been answered and provided to the requesting party.

This is a case management issue. In all candor, however, I should note that the Bill does not cure the root problem, but only affords some possible relief -- provided, of course, the the Judiciary actively embraces the case management techniques suggested by the Bill and takes a hands on, non-delegable involvement in them.

The root problem is the fact that with the advent of the Federal Rules of Civil Procedure, we adopted a policy of wide open discovery. The test no longer was production of materials which bore directly on the issues, but rather we face a standard for testing the discovery process of whether the material sought "might lead to relevant evidence."

This standard is applied to litigants and non-litigants alike. Our firm averages well in excess of 500 third party subpoenas a year in both Federal and State Court and from innumerable government agencies. A disproportionate number of these subpoena request *all* documents we have with respect to a client and do not even

attempt to limit them to the subject matter of the litigation or investigative process. Recently, in one third party subpoena situation we estimated that the request called for in excess of 40,000 pieces of paper -- many of which were of extremely doubtful relevancy to the matter at issue.

Litigants and government agencies are encouraged to send out broad, dragnet requests for information because they know that due to the exceptionally broad standard, the overwhelming majority of courts, when confronted with a discovery motion, will rotely apply the rubric that the the information sought might lead to relevant evidence and order its immediate, total, unfettered production.

This past week I had the occasion to study the estimated annual photocopy costs for a relatively homogeneous group of litigants. Based on the data I was able to derive from various public sources, I found that a relatively small group of homogeneous litigants would incur annual photo reproduction costs in their litigation of approximately $5,000,000. This did not even begin to account for the costs of preparing the documents for copying, personnel time spent in making the copies, reviewing the copies, and doing whatever else had to be done with them in the litigation process. In one major litigation of which I am aware, the document depository into which the Judge ordered one copy of all documents deposited contains over 32,000,000 pieces of paper. The reproduction costs to merely put the documents in the Federal Depository for the litigants in that case alone have to exceed $3,500,000.

By my comments I do not mean to imply that the Courts are not doing their job. On the contrary, they are trying to. Unfortunately, they are faced with a discovery standard which invites the wholesale production of documents and information at tremendous cost to the system. Since the existing system allows (and in fact

almost encourages) the court to step back until the gladiatorial contest between litigants is ready to proceed to the arena of the Court room, it is too easy for the courts (both Federal and State) to step back and let the side show proceed -- sometimes in the hope that the expense will be such a heavy burden that the litigants will choose to settle the dispute without regard to the merits of the action.

At the same time as this discovery process is going on, the Courts are subjected to a barrage of motions which are trying to narrow the issues and which, in turn, may facilitate the narrowing of the discovery process. Although we have, on occasion, been successful in convincing a court to delay merits discovery until such time as the preliminary motion practice is resolved, it is rare that a defendant is successful in this endeavor. Notwithstanding the lack of success, I have found that in a significant number of cases, the preliminary motion practice in fact substantially narrows the issues or causes the case to be dismissed and the discovery costs incurred in the interim have been wasted. (The only ones to have benefited by the process are the piece work lawyers and the document reproduction services.)

It is with this back ground and set of views that I come to support the proposed legislation. Although it does not cure the problem -- the wide open discovery standard of *might be relevant* -- it forces the court to a more interactive management role where hopefully it will look at some of these issues early in a case and force the issues into a narrower framework at an earlier point in time. This process, with is stress of discovery management, should also lead to a more directed discovery process with the Courts taking a role in that process. On the other hand, if the Court merely use the devices which this Bill establishes to bless an already existing process, we will have achieved nothing; but in fact added to the expense of litigation.

Until such time as the lawyers recognize that they must apply some judgment to the process and cannot get away with the free wheeling discovery process and pre-trial activities they currently engage in, we will continue to face a cost crisis in litigation. An activists judiciary will start to move us to this result.

As I indicated at the outset of my remarks, there is ample criticism to go around for the cost and delay problems in litigation we face today.

One cause is our legislative bodies which generate a volume of new legislation that is impossible for all but the largest of computers to keep track of. Regardless of whether one supports or abhors the contents of this legislation, the fact is that this legislative process adds more to the court and litigant burden than just a plethora of new cases. By the failure of the legislative bodies to deal comprehensively with the type of issues that are routinely raised with respect to new ~~litigation~~ LEGISLATION and formulating a legislative policy with respect to these issues, the legislation generates untold motion practice before the courts with attendant costs to all litigants. This in turn bogs down the courts such that it has little time to manage the process with which it must cope. Simply put, if you have to spend almost all of your time putting out small brush fires, you never get a chance to practice fire prevention.

Specifically, I am addressing the failure of the legislative bodies to deal with certain fundamental issues which have become almost axiomatic to almost all legislative initiatives today. Some typical examples of these failures are:

- the failure of Congress to clearly state whether it intended to create a private civil remedy by the statute

- if there is a private remedy, is it one to which the parties are entitled to a jury trial?

- if there is a private civil remedy available, what is the statute of limitations?

- is the Federal legislation intended to pre-empt any state legislation?

The foregoing are but a few of the repetitive issues that occur as a result of legislation which fails to address them. Congress should have a check list of these types of issues which have spawned innumerable and costly motion practice and require that they be addressed before any bill emerges from committee.

Although I have not made a comprehensive analysis of my legal costs for the past decade, I believe that it is fair to say that our firm has incurred well in excess of $2,500,000 in legal costs litigating these types of issues. This would not be a monumental item in the overall scheme of things if it were just a cost that we incurred and these issues were *sui generis* to our firm. However, the fact is that they are not *sui generis* to my firm, but are common issues faced by all litigants. For example, the issue of the proper statute of limitations in a 10b-5 securities case has been litigated in over 400 reported decisions in the past decade. Even if the parties spent only $25,000 in total (or $12,500 to a side) in briefing and dealing with the statue of limitations issue (a number which is unrealistically low), it means that this one issue in one area of the law has generated a minimum of $10,000,000 of legal costs. This does not even begin to take into account the innumerable cases where the trial court has decided the issue one way only to be later reversed by the appellate courts on an issue of statutory interpretation with

the result that the system has absorbed the litigation costs of a case which should have been dismissed at the pleading stage.

From a judicial management standpoint, the cost is no less great. If the judges who rendered these 400 decisions spent only 10 hour reading the briefs, doing their research, and writing their opinions on this one issue, we still have lost 4,000 hours of judicial time or the equivalent of 2 judges for one year on this *one* issue alone.

Although standing alone this number seems insignificant, when one multiplies it by the number of similar issues which have spawned motion practice on "legislative intent" where the legislature has failed to speak and instead left the issue open for judicial resolution, we find that the system is incurring a heavy cost -- a cost which serves the interests of no one (except possibly lawyers who charge by the piece) and which clearly inures to the detriment of all litigants -- rich and poor, big and small.

This redundant motion practice to resolve issues, which should have been addressed in the first instance by the legislative branch, is a major contributor to both the cost and delay that the judicial system is experiencing. Regrettably, the Judicial Improvements Act of 1990 does not address this equally critical concern.

I am not enamored with a Bill which mandates action for one of our three branches of government. My own preference would be to see that we cooperatively work out solutions to the problems we are facing. However, I have been practicing law as a trial lawyer and litigator for over 23 years and have been involved with the law for over 27 years. Rather than seeing the situation improve, I have watched it get progressively worse. The costs and delays associated with litigation are mounting in geometric progression.

I find that even the largest of the defendants cannot afford to see that justice is done or can even expect that if justice is to be done, it will be done for a reasonable cost. Brobdingnagian problems require draconian solutions. Sometimes, the only way we can get things done is if we issue edicts which force all of our hands.

The Judicial Improvements Act of 1990, with all its warts and even with the dislike for certain of its provisions which I share, is a small *first* step forward in that direction. Hopefully, it will force us to address some of the other problems that exist in the way the system is currently structured. It is not a panacea; and I am sure that it will not achieve all of the hoped for results. Clearly, it will not achieve any of our desired objectives unless both litigants and the judiciary make a concerted effort to fulfill the laudatory goals set forth in the Bill and in the Brookings Institute Task Force Report. However, I am equally convinced that unless we take this small first step, we will continue to be caught up in a Serbonian bog from which no one will ever escape and where justice will be achieved for no one.