



# LAWYERS FOR CIVIL JUSTICE

1140 Connecticut Ave, N.W. • Suite 503 • Washington, D.C. 20036

Phone: (202) 429-0045 • Fax: (202) 429-6982

## Board of Directors

**JOHN H. MARTIN\***

LCJ President  
Thompson & Knight LLP  
Dallas, Texas

**L. GINO MARCHETTI\***

LCJ President-Elect  
Taylor Pigue Marchetti, PLLC  
Nashville, Tennessee

**WAYNE B. MASON\***

LCJ Vice President  
Sedgwick, Detert Moran & Arnold, LLP  
Dallas, Texas

**JEFFREY W. JACKSON\***

LCJ Secretary-Treasurer  
State Farm Mutual Automobile  
Insurance Company  
Bloomington, Illinois

**STEVEN L. BARNEY**

Plutkett & Cooney  
Petoskey, Michigan

**JULIA L. BRICKELL**

H5  
New York, New York

**R. MATTHEW CAIRNS**

Gallagher, Callahan & Gartrell, PC  
Concord, New Hampshire

**JAMES M. CAMPBELL**

Campbell Campbell Edwards & Conroy  
Boston, Massachusetts

**F. THOMAS CORDELL**

Frailey, Chaffin, Cordell,  
Perryman, Sterkel & McCalla LLP  
Chickasha, Oklahoma

**MARKUS GREEN**

Pfizer Inc.  
New York, NY

**MICHAEL J. HARRINGTON\***

Eli Lilly and Company  
Indianapolis, Indiana

**THOMAS H. HILL**

General Electric  
Fairfield, Connecticut

**CARY HILTGEN**

Hiltgen & Brewer  
Oklahoma City, Oklahoma

**ROBERT D. HUNTER**

Altec Inc.  
Birmingham, Alabama

**JOHN K. KIM**

Johnson & Johnson  
New Brunswick, New Jersey

**CONNIE LEWIS LENSING**

Federal Express Corporation  
Memphis, Tennessee

**ROBERT L. LEVY**

Exxon Mobil Corporation  
Houston, Texas

**LEAH L. LORBER\***

GilaxoSmithKline  
Washington, DC

**MICHAEL T. LUCEY**

Gordon & Rees LLP  
San Francisco, California

**G. EDWARD PICKLE**

Shell Oil  
Humble, Texas

**JOSEPH W. RYAN, JR.**

Porter Wright Morris and Arthur LLP  
Columbus, Ohio

**MARC E. WILLIAMS**

Nelson Mullins Riley & Scarborough, LLP  
Huntington, West Virginia

**LISA MARTINEZ WOLMART\***

Merck & Company  
Kenilworth, New Jersey

*Board Chairman & Ex-Officio*

**LEWIS F. COLLINS, JR.\***

Butler Pappas Weihmuller Katz Craig LLP  
Tampa, Florida

Executive Director

**BARRY BAUMAN**

\*Member Executive Committee

June 28, 2010

The Honorable Steny H. Hoyer  
Majority Leader  
U.S. House of Representatives  
H-107 The Capitol  
Washington, DC 20515

The Honorable John A. Boehner  
Minority Leader  
U.S. House of Representatives  
H-204 The Capitol  
Washington D.C. 20515

Dear Leaders:

The Coalition to Protect Privacy, Property, Confidentiality, and Efficiency in the Courts strongly opposes Section 6 of H.R. 5503, the *Securing Protections for the Injured from Limitations on Liability Act*, which would amend Title 28, United States Code to severely restrict the long-standing discretion of federal judges to protect the privacy and intellectual property rights of litigants in the federal courts. We also strongly oppose Section 5 of H.R. 5503, which would amend the widely supported, bipartisan Class Action Fairness Act (“CAFA”) to exempt *parens patriae* actions (suits brought by a state on behalf of its citizens) from CAFA jurisdiction. This letter focuses on our concerns with Section 5.

While superficially designed to allow parties affected by the oil spill in the Gulf to seek legal remedies, this legislation could be interpreted to severely restrict the long-standing discretion of federal judges to protect the privacy, property, and confidentiality of litigants in many other types of cases by changing the long standing, balanced rule of law governing the entry of protective orders under Rule 26 (c) of the Federal Rules of Civil Procedure. Even in those cases to which the legislation is designed to apply, the severely restrictive standard would in fact harm the very persons it is purportedly designed to protect. Many earlier efforts by Congress to pass an even less restrictive standard in so-called “Sunshine in Litigation” bills were opposed by the Judicial Conference of United States Courts and numerous business groups, practicing lawyers, and academics and have repeatedly failed because imposition of such a standard by legislative fiat is unnecessary, costly, unwise, and contrary to the public interest.

In sum, Section 6 of H.R. 5503, as amended, would declare void and unenforceable in any legal proceeding, any “agreement, promise, or directive to restrict the dissemination of information” regarding the cause, nature and extent, damage, or efforts to remediate a contaminating discharge into the off shore waters of the United States, except a “directive contained in a court order or issued by a Government agency ... restricting

dissemination of information as necessary to protect public health or safety.” “Judicial enforcement” of such a directive or order must be proved by “clear and convincing evidence” and “the court shall state the court’s findings and conclusions of law relating to that enforcement on the record.”

Requiring that a party can protect its privacy and intellectual property rights only if it demonstrates by clear and convincing evidence that the directive or order is “necessary to protect the public health and safety” would deprive such party of those constitutionally protected rights and is directly contrary to years of precedent giving judges balanced discretion to protect those rights.

One of the substantive rights that only confidentiality can protect is the right to privacy. The Supreme Court has indicated that litigants have privacy rights in the information produced during litigation, and that courts should protect those rights by ensuring confidentiality when good cause is shown.

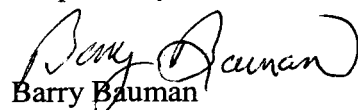
Another substantive right placed at extreme risk by Section 6 is the right to the exclusive use of private property. Our legal system considers information to be property - intellectual property. Confidentiality is the sine qua non of preserving the modern property right in the intellectual property that has become the backbone of the American economy. Once confidentiality is taken away, the value that comes from confidentiality -- exclusive ownership and possession of the information -- is irretrievably lost and can never be restored.


While purporting to benefit the public interest and protect public health and safety, Section 6 is unnecessary and would be harmful to litigants’ rights and our judicial system. According to studies conducted and analyzed by the U.S. Judicial Conference Rules Committee, there is no need to make it more difficult to issue protective or sealing orders, because there is no evidence that they in fact create any significant problems by concealing information about public hazards or in impeding efficient sharing of information. Current law provides judges with the discretion to issue or deny protective and sealing orders for good cause and there is no reason to think that they would not use such discretion as needed.

Our members strongly believe that Section 6 of H.R. 5503 could undermine the privacy and property rights of all litigants and have a profoundly damaging affect on the United States civil justice system. Therefore, Section 6 should be stricken from H.R. 5503.

Copies of this letter are being sent to the Speaker, and the Chairs, Ranking Members, and Members of the Committee on the Judiciary and the Committee on Transportation and Infrastructure.

Respectfully,

  
Barry Bauman  
Executive Director  
Lawyers for Civil Justice

  
John H. Martin  
President  
Lawyers for Civil Justice