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Class actions bear gifts for attorneys, lump of coal for public

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Posted: Monday, January 10, 2011 12:00 am

By **JOSEPH M. NIXON**

For The Citizen | 0 comments

The holiday season each year brings cheerful greetings from people I haven't heard from in a long time or, in some cases, I don't even know.

Among these are a half-dozen greetings with the statement, "You could receive a payment from a class action settlement." That's right: within the last two weeks, I have been notified that I am an unwilling member of no less than six class action lawsuits.

I have been notified that I am a member of a class involving shares of stock, a car I haven't owned in years, a book my mother wrote in the 1970s, a flashlight battery, and two other products I'm pretty sure I never bought. The common theme among all of these proposed class settlements is that Santa isn't bringing any of the class members a gift. The real gift goes to the attorneys who file the class action case.

For example, the proposed class settlement involving alleged fraud in the issuance of stock is one-tenth of one cent per share of stock purchased. The lead counsels are scheduled to receive \$1.05 million, plus another million in reimbursement costs.

In order to qualify for the settlement, I have to spend some time investigating how many shares of the stock that I might have once owned, make copies of the documents proving that I owned the shares, fill out the claim form, and mail everything to a United States District Court in New York. At a recovery of \$0.001 per share, I can assure you that the stamp alone will exceed the cost of reimbursement to me.

The battery settlement was even more ludicrous. While the attorneys' fees were once again in the million dollar range, the settlement to me was a coupon worth 25 cents towards my next purchase of the battery that was allegedly defective. One hopes the attorneys spent some effort fixing the problem in addition to securing their fees.

Other recent class actions of note have resulted in class members getting one free tube of mascara, their SAT results being disregarded because of moisture in the grading machine, and more coupons towards the next purchase of the allegedly defective product.

Many class action notices have moved beyond mail and newspaper legal notice columns to the Internet. One web page offers a class action "deal of the day." Another requires registration and payment of a fee to get notice of the latest class action suits. (I'm waiting for when this site gets sued in a class action by the people who paid to be notified of all the class actions.)

A web page just for defense lawyers keeps track of what types of suits have been filed each week just in California. In March of this year, it noted 44 new class action suits were filed in the Golden State in one week—down 10 percent from the normal weekly filing!

The real problem with class action lawsuits is that they are very expensive to defend. In order to certify a class, the court must find a probable right of recovery, which is always an early indication that the defendant will lose. This is the point at which class action cases settle. An incorrect certification of a class by a trial judge puts an innocent defendant in a no-win situation. They would have to try the case and go through the appellate process in order to seek vindication. This is massively expensive.

Instead of incurring the expense of a defense, many targets of a class action simply agree to an early settlement.

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Lawyers are paid a large fee, the class gets a de minimis award, and the alleged wrongdoer buys an early peace. If the defendant is truly liable, this is wrong. If they are not liable, this is wrong.

In 2003, in Texas, one of the most important changes made to class action procedure is to allow either party a direct and immediate appeal to the Texas Supreme Court in the event a class is or is not certified. With an appeal on the certification permitted at an early stage, plaintiffs who have a valid position are in a better position to obtain a full recovery on behalf of a class. Similarly, a defendant who is in a valid position has a better opportunity for full vindication against the allegation of wrongdoing. In either event, justice is better served.

And in Texas, thankfully, we have tried to put an end to frivolous class action cases in state court. For example, if an attorney obtains a coupon as a result of the settlement of a class action case, the attorney is to be paid in coupons, not dollars.

I, like the vast majority of those reading this article, throw away almost every class notification letter I receive. I am tired of reading how much money class counsel is earning to obtain meaningless settlements on behalf of plaintiffs. Enactment of much needed reforms in Texas have reduced frivolous class action cases in our state, allowed valid claims to go forward and have helped free up space in mail bags for sincere holiday greetings.

The Honorable Joseph M. Nixon is a Senior Fellow with the Texas Public Policy Foundation and of counsel with the Houston law firm Beirne, Maynard & Parsons, LLP. He served six terms in the Texas House of Representatives and chaired the House Committee on Civil Practices during his last two terms.

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