

**Thomas M. Susman**  
Director  
Governmental Affairs Office

**AMERICAN BAR ASSOCIATION**  
740 Fifteenth Street, NW  
Washington, DC 20005-1022  
(202) 662-1760  
FAX: (202) 662-1762

February 1, 2012

The Honorable Howard Coble  
Chairman  
Subcommittee on Courts, Commercial  
and Administrative Law  
Committee on the Judiciary  
U. S. House of Representatives  
Washington, D.C. 20515

The Honorable Steve Cohen  
Ranking Member  
Subcommittee on Courts, Commercial  
and Administrative Law  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Re: H.R. 3041, the “Federal Consent Decree Fairness Act”

Dear Chairman Coble and Ranking Member Cohen:

On behalf of the American Bar Association (ABA), which has almost 400,000 members, I write to express our concerns regarding H.R. 3041, legislation that would permit state and local governmental officials to challenge and re-litigate—for any reason—existing federal court consent decrees to which they are a party. If enacted, this legislation would strongly discourage settlements, encourage expensive and protracted litigation, and create undue burdens on the federal court system. Accordingly, we urge you and your colleagues to oppose this legislation, and we respectfully request that this letter be included in the official record of your subcommittee’s hearing on the bill scheduled for February 3.

Consent decrees entered by federal courts—usually involving federal government agencies as plaintiffs and state or local governments, companies and/or private individuals as defendants—have long been an effective tool in resolving disputes to the mutual satisfaction of the parties. A consent decree is essentially a settlement agreement reached between adverse parties in a lawsuit that the court then approves and enters as an order of the court. By incorporating the parties’ settlement agreement into a court order, the judge can then enforce the terms of the agreement if one side or the other later fails to follow through on its obligations under the agreement.

For many years, consent decrees have been very helpful in resolving a wide variety of claims brought by the federal government, including suits to preserve public health and safety, enforce environmental regulations, and protect individual rights. In fact, consent decrees have been particularly useful in resolving complex disputes that cannot be resolved quickly through the traditional system of full-blown litigation. By entering into consensual agreements, the federal government is able to craft solutions with states, localities, and private parties that a trial court could not otherwise order. Consent decrees also give the parties the flexibility to come into compliance with federal law in a reasonable amount of time and in a manner that may be more achievable than what a court would order. From the defendants’ perspective, consent decrees provide a useful

means of promptly implementing voluntary settlements in complex cases, thereby allowing them to avoid the enormous expenses, delays, and liability risks associated with protracted litigation.

As introduced, H.R. 3041 would jeopardize the continuity of many federal court consent decrees entered into by states and local governments. The bill would authorize state or local governments, and related officials sued in their official capacity or their successors, to file motions to modify or vacate consent decrees four years after the consent decree was originally entered or whenever the highest elected state or local government official who is a party to the decree leaves office, whichever occurs first. Once a motion is filed, the burden of proof would shift to the party that originally sought the decree to demonstrate that it should remain in effect. If the party fails to meet the burden of proof, the court would be required to terminate the consent decree. Even if the party meets the burden, however, the court still would be required to narrow the consent decree to the maximum extent possible. The legislation also would force federal courts to rule on the motion in an expedited manner, enter rigid scheduling orders, and severely limit both motions and the discovery process.

In February 2006, the ABA House of Delegates adopted a policy resolution supporting the use of consent decrees as an important tool for resolving litigation and opposing legislation (such as H.R. 3041 and other similar bills introduced in the 109<sup>th</sup> and 110<sup>th</sup> Congresses) that constrains the efficacy of consent decrees to which state, local or territorial governments are parties. A copy of ABA Resolution 109 and the related background report is available online at: [http://www.americanbar.org/content/dam/aba/directories/policy/2006\\_my\\_109.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_109.authcheckdam.pdf)

In our view, H.R. 3041 would be highly detrimental to the nation's civil justice system for a number of important reasons.

#### The Legislation Would Strongly Discourage Settlement of Lawsuits in Federal Courts

H.R. 3041 provides that upon the change of the political leadership of a state or locality or four years after a consent decree is entered, whichever comes first, the state or local government could move to modify or vacate the consent decree without offering any reason or justification at all. While the original plaintiff—in most cases, the federal government—could oppose the motion, the bill would shift the burden of proof to that party to prove the underlying basis for continuing the decree. By making consent decrees involving state or local governments inherently temporary and subject to being reopened and re-litigated every four years or sooner, H.R. 3041 would strongly discourage both plaintiffs and defendants from agreeing to settle the cases at all.

#### The Legislation Would Encourage Expensive and Protracted Litigation

By eliminating the finality and permanence of federal court consent decrees in cases involving state and local governments, H.R. 3041 would create a strong incentive for all parties—including the federal government, state and local governments, businesses and other private parties—to continue litigating their cases all the way to final judgment, and perhaps through the appellate system as well. In addition to the long delays associated with protracted litigation, the parties also would be forced

to incur substantial additional attorney and expert witness fees, discovery costs, and other expenses as well as an uncertain final result.

### The Legislation Would Create Undue Burdens on the Federal Court System

By allowing state and local government officials to reopen—and re-litigate—existing federal court consent decrees over and over again for any reason, H.R. 3041 would significantly expand the caseload of the federal trial courts. In addition, the provisions in H.R. 3041 that require federal courts to issue expedited rulings, enter rigid scheduling orders, and then either terminate the prior consent decrees or rewrite them to minimize their scope would impose a substantial and unjustified burden on limited judicial resources and could interfere with the efficient operation of the federal trial court system. In addition, by micromanaging federal district court procedures and arbitrarily shifting the burden of proof applicable to consent decrees entered by the federal courts, these provisions would improperly infringe on the independence of the federal judiciary.

### H.R. 3041 is Unnecessary Because Adequate Tools Already Exist to Modify or Vacate Consent Decrees in Appropriate Circumstances

Although federal courts generally enforce consent decrees as written and agreed to by the parties—as they should—existing law also provides mechanisms for the courts to modify or vacate consent decrees for good cause shown. In particular, Federal Rule of Civil Procedure 60(b)(5) allows courts to modify a judgment when “...applying it prospectively is no longer equitable.”

The U.S. Supreme Court also recently confirmed the federal courts’ existing authority to vacate or modify consent decrees in appropriate circumstances in the case of *Frew v. Hawkins*, 540 U.S. 431 (2004). In that case, the Court articulated the following standard:

[W]hen the objects of the decree have been attained, responsibility for discharging the State’s obligations is returned promptly to the State and its officials. . . . If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms...

*Frew v. Hawkins* at 442.

The duration and all other terms of a consent decree should continue to be determined by the language of the decree itself until terminated or modified by a court of competent jurisdiction for good cause shown, not through legislation like H.R. 3041. In addition, the burden of proof with respect to a motion to modify or terminate a consent decree should remain on the party seeking modification or termination, not on the party that obtained the original consent decree. In our view, the existing law governing federal consent decrees strikes the proper balance between enforcing agreements and preserving flexibility, and this system should be preserved.

February 1, 2012

Page 4

In sum, the ABA is concerned that if H.R. 3041 is enacted, it could be the death knell for federal court consent decrees to which state or local governmental entities are parties. By discouraging federal government agencies, state or local governments, companies and private individuals from settling their legal disputes and entering into consent decrees, the legislation would result in increased and unnecessary litigation, reduced flexibility and greater burdens on federal courts and agencies, and further erosion of the independence of the federal judiciary. For all these reasons, we urge you oppose the legislation.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA's position on the legislation or any other matter, please contact me at (202) 662-1765 or ABA Senior Legislative Counsel Larson Frisby at (202) 662-1098.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members of the House Judiciary Committee