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March 23, 2006

The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

The Honorable Patrick J. Leahy  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Re: S. 489, the "Federal Consent Decree Fairness Act"

Dear Chairman Specter and Ranking Member Leahy:

On behalf of the American Bar Association (ABA) and its more than 400,000 members, I write to express our concerns regarding S. 489, legislation that would permit state and local governmental officials to re-open and re-litigate—for any reason—existing federal consent decrees to which they are a party. If enacted, this legislation would strongly discourage settlements, overburden the federal courts, and encourage unnecessary litigation. Accordingly, we urge you and your colleagues to oppose this legislation when it is considered by your committee.

Consent decrees entered in 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 settlement agreement into a court order, the judge is able to enforce the terms of the agreement if one side or the other later fails to follow through on 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 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, S. 489 would jeopardize the continuity of all 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, to file a motion to modify or vacate a consent decree upon the earlier of (1) four years after the consent decree was originally entered or (2) the expiration of the term of office of the highest elected state or local government official authorizing the consent decree. Once such a motion to modify or vacate the consent decree is filed, the legislation would place the burden of proof on the party that originally sought the decree—usually the federal government—to demonstrate that continued enforcement is necessary to uphold a federal right. The legislation also provides that if the court does not rule on the motion to modify or vacate within 90 days, the consent decree automatically would be terminated until the court rules on the motion.

In February 2006, the ABA House of Delegates adopted a policy position supporting the use of consent decrees as an important tool for resolving litigation and opposing legislation, such as S. 489 and H.R. 1229, which constrains the efficacy of consent decrees to which state, local or territorial governments are parties. A copy of the ABA's policy position is attached.

In our view, S. 489 would be highly detrimental to the nation's civil justice system for many reasons:

•**The legislation would strongly discourage settlement of lawsuits in federal courts.** S. 489 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 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 re-opened and re-litigated every four years or sooner, S. 489 would strongly discourage both federal government plaintiffs and business co-defendants from agreeing to settle the cases at all. As a result, all parties—including the federal government, state and local governments, and private parties—would be forced to continue litigating their cases to judgment, and perhaps through the appellate system as well. In addition to the long delays associated with protracted litigation, the parties would also 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 re-open—and re-litigate—existing consent decrees over and over again for any reason, S. 489 would significantly expand the caseload of the federal trial courts. In addition, the provisions in S. 489 that would automatically terminate existing consent decrees unless the federal court rules on the motion to modify or vacate within 90 days would impose a further undue burden on federal courts. Although the federal trial courts' civil and criminal caseload continues to increase each year, the courts have not been provided with the additional

resources necessary to adjudicate these cases in a timely manner. Therefore, any legislative mandate requiring the courts to consider and rule on a large number of motions to modify or vacate complex consent decrees within 90 days is unrealistic and unworkable.

In his July 19, 2005 testimony to the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, former Federal Circuit Court Judge Nathaniel R. Jones expressed a number of concerns regarding S. 489, including the effect that the legislation would likely have on the federal courts' workload:

One of the concerns I have listed is the impact of the bill on the sensible functioning of courts and the administration of justice...Just a few weeks ago, representatives of the federal judiciary testified before a House Appropriations subcommittee that the workload of the courts had increased by 18% between FY 2001 and FY 2005, while funded staffing levels over the same period of time decreased by 1%. Moreover, in FY 2004, the judiciary lost more than 6% of its workforce due to funding constraints, resulting in fewer clerks' office hours in many courthouses for the public to file papers and seek information. And as additional testimony before another House subcommittee indicated, the judiciary's current staffing level is 8% lower than it was in FY 2003. Even though the workload is expected to increase even further as a result of the recently enacted Class Action Fairness Act, the judiciary will be operating approximately at only its FY 2001 staffing levels if it receives the FY 2006 staff funding it has requested...Under such circumstances, defendants who have had their day in court, and who voluntarily settled their case, ought not be permitted to routinely tie up the courts [through motions to modify or vacate existing consent decrees] at the expense of other litigants seeking justice.

Testimony of Federal Circuit Court Judge Nathaniel R. Jones at pgs. 4-6.

The ABA shares these concerns and believes that if S. 489 becomes law, the burden on judicial resources and the confusion created by such a result would be severe and would seriously interfere with the efficient operation of the federal trial court system.

**•The legislation 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. The Federal Rules of Civil Procedure includes a provision, Rule 60(b)(5), which provides for the modification of judgments when “it is no longer equitable that the judgment should have prospective application.”

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

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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 ABA believes that 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 S. 489. In addition, we believe that 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.

In sum, the ABA believes that S. 489, if enacted, would be the death knell for federal consent decrees to which state or local governmental entities are a party. By discouraging parties from settling their cases and entering into these consent decrees, the legislation would result in increased and unnecessary litigation, less enforcement of federal policies, reduced flexibility and greater burdens on federal courts and agencies. For all these reasons, we urge you oppose this legislation.

Thank you for considering the views of the ABA on these important matters. If you would like more information regarding the ABA's positions on these issues, please ask your staff to contact our senior legislative counsel for business law and alternative dispute resolution issues, Larson Frisby, at (202) 662-1098.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans

cc: All members of the Senate Judiciary Committee

**AMERICAN BAR ASSOCIATION**

**ADOPTED BY THE HOUSE OF DELEGATES**

**February 13, 2006**

**RECOMMENDATION**

RESOLVED, that the American Bar Association supports the use of consent decrees as an important tool for resolving litigation, and opposes legislation that constrains the efficacy of consent decrees when state, local or territorial governments are parties thereto, such as proposed S. 489 and H.R. 1229 (109<sup>th</sup> Congress), consistent with the following principles:

1. The duration and all other terms of a consent decree should be determined by the language of the decree itself as interpreted by courts of competent jurisdiction, or as otherwise modified by such courts for good cause shown, not through legislation;
2. Consent decrees that do not state a specific duration should remain in effect until terminated or modified by a court of competent jurisdiction for good cause shown; and
3. 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.