

# Collusive Lawsuits Cheat the Public and Violate the Law

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Picture this. The American Lung Association and other environmentalist non-governmental organizations (NGOs) sue the U.S. Environmental Protection Agency (EPA). The lawsuit settles and EPA awards them grants, and in other forums treats them like allies.

You might wonder whether this raises a potential for abuse of the legal system. Two parties pretend to be in conflict on a regulatory matter, when in fact the agency wanted the litigation as an opportunity to expand its power and regulatory influence. Despite an aroma of fraud on the court, judges knowingly allow such things so they can impose a “consent decree” endorsed by the court that imposes a new regulatory burden on the two parties to the litigation and worse, the public.

In the 1990s I was troubled to see that the American Lung Association was taking EPA money for research and programs, and suing EPA to push a regulatory expansion or the schedule of regulatory actions on air quality. Incestuous relationships and collusion are closely allied—I couldn’t help but notice that a beneficiary of EPA largess in grants and aid money was the suing source—could it be that this indicated a conflict, or maybe just a corrupt “arrangement” to promote EPA ambitions and regulatory overreach?

In my studies I came across many examples of these collusive arrangements that interposed a court proceeding to enable the suing environmental advocacy organization to enter into back-room arrangements that resulted in consent decrees or settlements, which in turn created regulatory actions that interfered with activities of parties who were not involved and had not been participants in the litigation. In some cases, when the interested parties asked to be allowed into the litigation as “interveners” (third parties that have an interest), the court and the parties prevented their participation.

Such collusive arrangements and court-approved decrees and orders are not exclusive to environmental agency activities; they are repeatedly a part of the perverted regulatory regimes that develop in other areas of government activity, including civil rights, education, integration, labor law, and economic and banking regulation.

It’s most important to consider that these new regulations occur outside normal legislative and administrative processes.

## Bootleggers and Baptists

The concept of bootleggers and Baptists joining forces for conflicting reasons to reduce access to liquor was introduced by economist Bruce Yandle in 1983. That can be easily distinguished from the collusive lawsuit and “sue and settle” industry. In the bootleggers-Baptists model, two parties promote a law despite their vastly different moral, economic, or political interests. For example, Baptists wanted to restrict access to liquor for religious reasons, while bootleggers reaped financial benefits when legal

liquor outlets were restricted.

In the case of collusive lawsuits and sue-and-settle misuse of the courts, another dynamic is in play: “democracy by decree.” This happens when courts run government. Authors Ross Sandler and David Schoenbrod, professors at New York University School of Law, helped me understand this problem that I had suspected had corrupted the system. Even as a young physician I wondered how all these federal judges were suddenly promoted to approving civil-rights remedies that normally should have been composed and executed by the other two federal government branches.

As a law student in the late ‘70s I found judge-made legislation troubling but saw it everywhere.

In their extensively referenced book, Schoenbrod and Sandler explained that when parties and government entities engage in litigation it isn’t always a dispute; it may be collusion for a purpose. Environmental, civil rights, labor, banking, and many other areas were considered proper subject matter for court orders and decrees that often resulted from collusive lawsuits.

The authors note, “Lawyers today have grown up in a culture believing that many of the improvements that people want come only through judicially enforceable rights.” Furthermore, “The basic premise of democracy by decree is that government can be made more compassionate only if judges impose their will on elected officials.”<sup>1</sup>

More recently, economist John Goodman posted two fine pieces<sup>2,3</sup> on the problem on the website of the National Center for Policy Analysis (NCPA), [www.ncpa.org](http://www.ncpa.org).

On Mar 5, 2014, Michael Stroup discussed “sue and settle” as the “performance enhancement drug” of public regulators.<sup>2</sup> Quoting Andrew Grossman, senior legal fellow at the Heritage Foundation, NCPA summarized issues that had initially concerned me:<sup>3</sup>

1. EPA had entered into more than 60 consent decree settlements with 100 new regulations that circumvented normal procedures for rules and regulations. Not only was there no opportunity for public comment, but legislators and others could avoid public scrutiny and prevent intervention by affected parties.

2. Settlements cover important procedural and policy questions, yet take place behind closed doors without the normal public scrutiny. For example, the Fish and Wildlife Service created Endangered Species Act set-asides and designated areas for species without public input, and paid legal fees to the plaintiff environmental organizations. (Two good examples are the recent designation of the prairie chicken and the Hine’s emerald dragonfly).

Unfortunately, expensive consent decrees with long tails have occurred in civil rights, corrections, and education matters, with judges supervising “remedies” as though they were social scientists and administrators with proper credentials. We know they are not, and cannot be.

Andrew Grossman offers an in-depth discussion of the issues in his fine monograph for the Heritage Foundation on Feb 25,

2014.<sup>4</sup> He notes:

“At the most basic level, sue and settle compromises public officials’ duty to serve the public interest.”

“At the same time consent-decree settlements allow political actors to disclaim responsibility for agency actions that are unpopular, thereby evading accountability. Consent decrees also diminish the influence of other executive branch actors.”

“Sue and settle is a tactic by which agencies settle cases through consent decrees that voluntarily cede lawful agency discretion.”

“The abuse of consent decrees in regulation raises a number of practical problems that reduce the quality of policymaking actions and undermine representative government.”

Grossman shows how sue and settle or collusive litigation has high costs and consequences.

Sue-and-settle litigation:

- Creates special-interest advantages;
- Produces rushed rulemaking and skirts notice-and-comment public participation for assessment of alternative, more acceptable, and less burdensome approaches;
- Creates secret and obscure regulations;
- Eliminates flexibility; and
- Allows evasion of political accountability for actions by introducing a judicial order or decree.

Grossman asserts that proper reform would create:

- Transparency;
- Robust public participation;
- Sufficient time for rulemaking; and
- Adherence to a public interest standard and accountability for agency agreement to a consent decree.

## Violating the Separation of Powers

This federal government and private/public party collusion by various agencies and entities is known to the judges who are complicit in the fraud because they want to legislate from the bench. Judges approve settlements that satisfy their preferences on policymaking, in this case environmental policy and regulations. They shut out anyone from affected parties who might be a proposed intervener, or they don’t allow interveners to impact the settlements they cobble together.

In the recent past, corrective legislation has been introduced in Congress in the form of the Federal Consent Decree Fairness Act and Sunshine for Regulatory Decrees and Settlements Act. Schoenbrod and Sandler, testified on the issue and advocated for the bills.<sup>5</sup>

Stephen Moore, an economist and policy analyst, recently revisited the problem and pointed out:

“Sue and settle is especially pernicious because it allows the Fish and Wildlife Service (in the case of designations of endangered species) to bypass the normal scientific-inquiry process. Oftentimes cozy relationships between anti-development green groups and the Obama administration bureaucrats grease the process for an endangered listing whether it is warranted or not.”<sup>6</sup>

Collusive lawsuits violate our Constitution in a basic way. The courts are supposed, under the provisions of Article 3 and basic Anglo-American Law, to decide cases in controversy. This principle is codified in federal law and by Supreme Court precedent. Indeed, even the far-left Ninth Federal Circuit Court has called into question the practice of using consent decrees to set policy. Sue-and-settle lawsuits are manufactured controversy that misrepresents the

positions of the parties for a subversive goal of achieving a court-ordered or approved ruling.

The Ninth Circuit recently highlighted the problem in the environmental issues case of *Conservation Northwest v. Sherman (Conservation Northwest II)*, No. 11-35729, 2013 WL 1760807 (9th Cir. Apr. 25, 2013). The Court makes a critical distinction between consent decrees that temporarily modify a rule to achieve a particular result in a particular case, and consent decrees that purport to have broader applicability. Specifically, the Court held that it is an abuse of discretion for a federal court to “enter a consent decree that permanently and substantially amends an agency rule that would have otherwise been subject to statutory rulemaking procedures.”

Judges and courts are not supposed to be staging legislative hearings and formulating laws and rules and regulations that are properly in the province of the other federal branches. Judges are sworn to uphold the law, not circumvent it, and should not usurp the roles of the other branches created by the Constitution.

If you or I went into court with a collusive lawsuit, a judge would instantly take note, but in the case of agency and government collusive lawsuits, the judges are part of the fraud. They know what is happening, and since they were educated to believe that they are wise and qualified, and that government agencies are well-intentioned and expert, they apparently do not have the humility or good sense to limit their roles. Judges see this as the ends justifying the means: the acting or deceit serves the cause of justice. They know what they’re doing, but approve a little cheating and circumventing messy legislative and political processes to promote some objective, such as “making things right” or saving the environment. Thus judges ignore their oaths to administer law according to the Constitution.

Besides, whoever imagined that a judge would not be supremely self-confident and correct in his preferences?

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## REFERENCES

1. Sandler R, Schoenbrod D. *Democracy by Decree: What Happens When Courts Run Government*. New Haven, Conn.: Yale University Press; 2003:30.
2. Stroup M. Sue and settle: the performance enhancement drug (PED) of public regulators. NCPA Environmental Blog, Mar 5, 2014. Available at: <http://environmentblog.ncpa.org/sue-and-settle-the-performance-enhancement-drug-ped-of-public-regulators/>. Accessed Apr 12, 2014.
3. NCPA. Using settlements to advance regulatory agenda. NCPA Research, Mar 10, 2014. Available at: [www.ncpa.org/sub/dpd/index.php?Article\\_ID=24184&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=DPD](http://www.ncpa.org/sub/dpd/index.php?Article_ID=24184&utm_source=newsletter&utm_medium=email&utm_campaign=DPD). Accessed Apr 12, 2014.
4. Grossman AM. Regulation through sham litigation: sue and settle phenomenon. Legal Memorandum #110. Heritage Foundation, Feb 25, 2014. Available at: [www.heritage.org/research/reports/2014/02/regulation-through-sham-litigation-the-sue-and-settle-phenomenon](http://www.heritage.org/research/reports/2014/02/regulation-through-sham-litigation-the-sue-and-settle-phenomenon). Accessed Apr 12, 2014.
5. Schoenbrod D, Sandler R. Federal Consent Decree Fairness Act and Sunshine for Regulatory Decrees and Settlements Act. Statement before the House Committee on the Judiciary, Feb 3, 2012. Available at: [www.aei.org/speech/politics-and-public-opinion/judicial/federal-consent-decree-fairness-act-sunshine-for-regulatory-decrees-and-settlements-act/](http://www.aei.org/speech/politics-and-public-opinion/judicial/federal-consent-decree-fairness-act-sunshine-for-regulatory-decrees-and-settlements-act/). Accessed Apr 12, 2014.
6. Moore S. The sue-and-settle racket. *National Review Online*, Mar 20, 2014. Available at: [www.nationalreview.com/article/373810/sue-and-settle-racket-stephen-moore](http://www.nationalreview.com/article/373810/sue-and-settle-racket-stephen-moore). Accessed Apr 12, 2014.