

STATEMENT BY THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS ON HR 5463

March 14, 2008

Legislation recently re-introduced in Congress (HR 5463, "Securities Litigation Attorney Accountability and Transparency Act") would, among other provisions, establish conditions under which a Court could require plaintiffs' attorneys to pay defendants' legal fees and expenses should a motion to dismiss a securities class action be granted. NASCAT believes that the provisions of HR 5463 have no relation to the abuse they purport to address, and are simply designed to reduce or eliminate all private securities cases, regardless of their merit and the extent to which investors have been defrauded. Court decisions and substantial changes in statutory law governing private securities litigation have already addressed conceivable abuses without closing court room doors to defrauded investors and without resorting to the punitive British "loser pays" rule.

Under the traditional "American Rule," all litigants pay their own legal fees and costs, ensuring that access to courts is not barred to those who cannot afford to both bear their own legal expenses and also shoulder those of a well-financed adversary who succeeds in defeating their claim. To prevent abuse, federal procedural rules already provide penalties, including possible payment of some or all of an adversary's legal expenses, but only upon a finding that the claim was frivolous or undertaken for an improper purpose. Indeed, under a provision of the Private Securities Litigation Reform Act of 1995 (PSLRA), in securities litigation -- unlike any other type of litigation -- a court is *required* at the end of each case to review whether such sanctions should be imposed.

Notwithstanding this unique provision deterring frivolous securities lawsuits, HR 5463 would dramatically lower the threshold standard permitting imposition of fee-shifting, thereby establishing a significant disincentive for investors who have been cheated by fraud to seek recovery. Rather than a court finding that a claim was frivolous, under this legislation all that a corporation accused of cooking the books would need to show was that a claim was not "substantially justified." Under this proposed change, if a claim had some merit, but not enough in a court's eyes to "justify" bringing it, the unlucky investor would have to pay the potentially crushing fees of a corporate law firm hired by the fraud defendant.

Given the PSLRA's requirement that a court review each case for frivolousness and the fact that sanctions against attorneys who bring frivolous lawsuits are already available to courts under the Federal Rules of Procedure, there is no justification or need for the new "loser pays" provision of HR 5463. Moreover, two other important reforms of the PSLRA enacted in 1995 further reduced the likelihood that meritless private securities lawsuits will be filed.

First, lead plaintiffs are required by the PSLRA to be the investors with the largest losses in the securities frauds at issue, rather than those who simply file first. Since 1995, lead plaintiffs have typically been pension funds or other institutional investors who have no interest in “gaming the system.” In the three largest post-PSLRA securities class actions, for instance, the lead plaintiffs were the Board of Regents of the University of California (lead plaintiff in Enron Corp. suit), New York State Common Retirement Fund (lead plaintiff in WorldCom suit), and the California Public Employees Retirement System, New York State Common Retirement Fund and New York City Funds, which served as co-plaintiffs in the Cendant Corporation fraud case.

Secondly, under the PSLRA and subsequent court decisions, the pleading standards in securities class actions have become far more difficult to meet than in the years prior to 1995. These standards weed out any cases without merit at a very early stage. Attorneys simply do not take on cases they do not believe meet the heightened standards.

In the years since 1995, no serious problem with frivolous securities class actions has been demonstrated by any independent authority. Changes such as those proposed in HR 5463 and by the corporate “tort reform” lobby address phantom problems. The actual effects of such “reforms” would be to chill meritorious lawsuits and effectively deny aggrieved investors their day in court and the nation of the strong deterrent value of securities fraud class action lawsuits.

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