

104TH CONGRESS
1ST SESSION

H. R. 681

To amend the Securities Exchange Act of 1934 in order to reform private enforcement of the Federal securities laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 25, 1995

Mr. TAUZIN (for himself, Mr. HALL of Texas, Mr. TOWNS, Mr. RUSH, and Mr. BROWN of Ohio) introduced the following bill; which was referred to the Committee on Commerce and, in addition, to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Securities Exchange Act of 1934 in order to reform private enforcement of the Federal securities laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION. 1. SHORT TITLE.**

4 This Act may be cited as the “Securities Private En-
5 forcement Reform Act”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

1 (1) excessive securities litigation is a serious
2 burden on the national economy, diverting limited
3 capital resources to less productive areas;

4 (2) meritless lawsuits filed under Federal secu-
5 rities laws are making it harder for American com-
6 panies to raise capital and attract experienced mem-
7 bers to serve on their boards;

8 (3) in the securities fraud area, the civil justice
9 system is being transformed into a nonmerit-based,
10 unjust system, in which professional plaintiffs ex-
11 tract settlements from entrepreneurs, regardless of
12 the merits of the cases filed;

13 (4) such securities lawsuits impose additional
14 costs on publicly traded companies, often force them
15 into bankruptcy, and create job losses within the
16 economy;

17 (5) such securities fraud lawsuits stifle the de-
18 velopment of future products by compelling invest-
19 ment bankers and accounting firms, whose assist-
20 ance is essential for accessing capital markets, to re-
21 sist working with new venture firms because of the
22 higher risk of litigation associated with them; and

23 (6) reform in the securities fraud laws are need-
24 ed to ensure that the courts can properly hear and
25 adjudicate securities fraud cases.

1 **SEC. 3. PRIVATE CIVIL ACTION PROCEDURES.**

2 The Securities Exchange Act of 1934 is amended by
3 inserting after section 20A (15 U.S.C. 78u-1) the follow-
4 ing new section:

5 “PRIVATE CIVIL ACTION PROCEDURES

6 “SEC. 20B. (a) REQUIREMENT OF PROPORTIONATE
7 LIABILITY.—

8 “(1) LIMITATION ON JOINT AND SEVERAL LI-
9 ABILITY.—A defendant who is found liable for dam-
10 ages in an implied private action arising under a
11 provision of this Act may be liable jointly and sever-
12 ally only if the trier of fact specifically determines
13 that the defendant engaged in knowing securities
14 fraud, as defined in paragraph (3).

15 “(2) DETERMINATION OF LIABILITY.—If the
16 trier of fact does not find, pursuant to paragraph
17 (1), that the defendant engaged in knowing securi-
18 ties fraud, the defendant’s liability shall be deter-
19 mined as follows:

20 “(A) The trier of fact shall determine the
21 percentage of responsibility of the plaintiff, of
22 each of the defendants and of each of the other
23 persons or entities alleged by the parties to
24 have caused or contributed to the harm alleged
25 by the plaintiff. In determining the percentages
26 of responsibility, the trier of fact shall consider

1 both the nature of the conduct of each person
2 and the nature and extent of the causal rela-
3 tionship between that conduct and the damage
4 claimed by the plaintiff.

5 “(B) For each defendant, the trier of fact
6 shall then multiply the defendant’s percentage
7 of responsibility by the total amount of damage
8 suffered by the plaintiff that was caused in
9 whole or in part by that defendant and shall
10 enter a verdict or judgment against the defend-
11 ant in that amount. No defendant whose liabil-
12 ity is determined under this subsection shall be
13 jointly liable on any judgment entered against
14 any other party to the action.

15 “(C) Except where contractual relationship
16 permits, no defendant whose liability is deter-
17 mined under this subsection shall have a right
18 to recover from another defendant any portion
19 of the judgment entered against him.

20 “(3) DEFINITION.—A defendant engages in
21 ‘knowing securities fraud’ only if he (A) makes a
22 material representation with actual knowledge that
23 the representation is false or omits to make a state-
24 ment with actual knowledge that, as a result of the
25 omission, one of his material representations is false;

1 and (B) knows that other persons are likely to rely
2 on that misrepresentation or omission. Reckless con-
3 duct by the defendant shall not constitute ‘knowing
4 securities fraud’. The liability in damages, in any, of
5 a defendant who acts in a reckless manner shall be
6 determined in accordance with paragraph (3).

7 “(4) COVERAGE OF PROVISION.—This sub-
8 section relates only to the allocation of damages
9 among defendants. Nothing herein shall affect the
10 standards for liability under any implied private ac-
11 tion arising under a provision of this Act.

12 “(b) AWARDS OF ATTORNEY FEES.—

13 “(1) AUTHORITY TO AWARD FEES.—If the
14 court in any implied private action arising under this
15 Act enters a final judgment against a party litigant
16 on the basis of a motion to dismiss, motion for sum-
17 mary judgment, or a trial on the merits, the court
18 shall, upon motion by the prevailing party, award
19 the prevailing party reasonable fees and other ex-
20 penses incurred by that party unless the court deter-
21 mines that the position of the losing party was sub-
22 stantially justified. If the court determines that the
23 position of the losing party was substantially justi-
24 fied, it shall not award fees and other expenses to
25 the prevailing party. The determination whether the

1 position of the losing party was substantially justi-
2 fied shall be made on the basis of the record which
3 is made in the civil action for which fees and other
4 expenses are sought.

5 “(2) APPLICATION FOR FEES.—A party seeking
6 an award of fees and other expenses shall, within 30
7 days of a final, nonappealable judgment in the ac-
8 tion, submit to the court an application for fees and
9 other expenses that verifies that the party is entitled
10 to such an award under paragraph (1) and the
11 amount sought, including an itemized statement
12 from any attorney or expert witness representing or
13 appearing on behalf of the party stating the actual
14 time expended and the rate at which fees and other
15 expenses are computed.

16 “(3) ALLOCATION AND SIZE OF AWARD.—The
17 court, in its discretion, may—

18 “(A) determine whether the amount to be
19 awarded pursuant to this section shall be
20 awarded against the unsuccessful party, its at-
21 torney, or both; and

22 “(B) reduce the amount to be awarded
23 pursuant to this section, or deny an award, to
24 the extent that the prevailing party during the
25 course of the proceedings engaged in conduct

1 that unduly and unreasonably protracted the
2 final resolution of the matter in controversy.

3 “(4) AWARDS IN DISCOVERY PROCEEDINGS.—
4 In adjudicating any motion for an order compelling
5 discovery or any motion for a protective order made
6 in any implied private action arising under this Act,
7 the court shall award the prevailing party reasonable
8 fees and other expenses incurred by the party in
9 bringing or defending against the motion, including
10 reasonable attorney fees, unless the court finds that
11 special circumstances make an award unjust.

12 “(5) DEFINITIONS.—For purposes of this sub-
13 section—

14 “(A) The term ‘fees and other expenses’
15 includes the reasonable expenses of expert wit-
16 nesses, the reasonable cost of any study, analy-
17 sis, report, test, or project which is found by
18 the court to be necessary for the preparation of
19 the party’s case, and reasonable attorney fees
20 and expenses. The amount of fees awarded
21 under this section shall be based upon prevail-
22 ing market rates for the kind and quality of
23 services furnished.

1 “(B) The term ‘substantially justified’
2 shall have the same meaning as in section
3 2412(d)(1) of title 28, United States Code.

4 “(c) ABUSIVE PRACTICES.—

5 “(1) SHARES OF AWARDS TO REPRESENTATIVE
6 PLAINTIFFS.—In any implied private action arising
7 under this Act that is certified as a plaintiff class
8 action pursuant to the Federal rules of civil proce-
9 dures, the share of any final judgment or of any set-
10 tlement that is awarded to any party serving as a
11 representative plaintiff shall be calculated in the
12 same manner as the shares of the final judgment or
13 settlement awarded to all other members of the
14 plaintiff class.

15 “(2) REPRESENTATION OF CLASS ACTIONS.—

16 (A) In any implied private action arising under this
17 Act that is certified as a plaintiff class action pursu-
18 ant to the Federal rules of civil procedure, the plain-
19 tiff class may not be represented by (i) any attorney
20 who directly or indirectly owned or otherwise had a
21 beneficial interest in the securities that are the sub-
22 ject of the litigation, or (ii) any attorney affiliated
23 with such an attorney. An attorney who knowingly
24 violates this prohibition shall be barred from rep-

1 resenting any party in any action arising under this
2 Act or under the Securities Act of 1933.

3 “(B) In any implied private action arising
4 under this Act that is certified as a plaintiff class
5 action, an attorney may not represent the plaintiff
6 class if the attorney has paid or is obligated to pay
7 a fee to a third party who assisted him in obtaining
8 the representation of any party to the action. An at-
9 torney who knowingly violates this prohibition shall
10 be barred from representing any party in any action
11 arising under this Act or under the Securities Act of
12 1933.

13 “(3) DISGORGED FUNDS.—(A) Funds disgorged
14 as a result of any action brought by the Commission
15 in Federal court or of any Commission administra-
16 tive action shall not be distributed as payment for
17 attorney fees or expenses incurred by private parties
18 seeking distribution of the disgorged funds.

19 “(B) Any judgment awarded against any person
20 in any implied private action arising under this Act
21 shall be diminished by the amounts, if any, that
22 such person has been or may be required to dis-
23 gorge, pursuant to a court order obtained at the in-
24 stance of the Commission in a proceeding brought
25 under section 21(d) of this Act, or in connection

1 with any Commission administrative action, relating
2 to the same alleged misconduct.

3 “(d) BURDEN OF PROOF.—In any implied cause of
4 action arising under this Act in which the plaintiff may
5 recover money damages only if it proves that the defend-
6 ant acted with scienter, the plaintiff must establish that
7 element of his claim by clear and convincing evidence in
8 order to establish a right to recover money damages.

9 “(e) PLEADING REQUIREMENT.—In any implied
10 cause of action arising under this Act in which the plain-
11 tiff may recover money damages only if it proves that the
12 defendant acted with scienter, the plaintiff must allege in
13 its complaint facts suggesting that the defendant acted
14 with that state of mind.

15 “(f) AIDING AND ABETTING LIABILITY.—In any im-
16 plied cause of action arising under this Act in which the
17 plaintiff may recover damages only if it proves that the
18 defendant acted with scienter, a defendant may be held
19 liable as an aider and abettor only if the plaintiff proves
20 that the defendant knew that another party had violated
21 a provision of this Act and that the defendant, acting with
22 deliberate intent to deceive, manipulate, or defraud for the
23 defendant’s own direct pecuniary benefit, provided sub-
24 stantial assistance to the other party’s violation. Direct

1 pecuniary benefit shall not include ordinary compensation
2 for services provided.”.

3 **SEC. 4. EFFECTIVE DATE.**

4 The provisions of this Act shall apply to all actions
5 commenced on or after the date of the enactment of this
6 Act.

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