1996

Attorneys' Fees. Shareholder Actions. Class Actions.

Attorneys' Fees. Shareholder Actions. Class Actions. Initiative Statute.

Official Title and Summary Prepared by the Attorney General

ATTORNEYS' FEES. SHAREHOLDER ACTIONS. CLASS ACTIONS. INITIATIVE STATUTE.

- Requires losing party to pay winning party's reasonable attorneys' fees and expenses in shareholder actions against corporations and in class actions based on securities law violations.
- Payment by member of losing party not required if position was substantially justified and payment would be unjust. Court may require losing party's attorney to pay.
- After hearing, court may require plaintiff to furnish bond for defendant's estimated fees and expenses, unless plaintiff owns or traded at least 5% of shares. Plaintiff's attorney may agree to furnish bond and pay defendant's fees and expenses for plaintiff.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Adoption of this measure would have unknown, but probably not significant, fiscal impact on state and local governments.

Analysis by the Legislative Analyst

Background

Currently, persons who own stock in a company (shareholders) can sue the company when they believe there has been misconduct by company officials which violates laws protecting the interests of the shareholders. Many of these lawsuits are "class action cases," meaning that these lawsuits are filed on behalf of a group of shareholders with similar interests. Under current law, with certain exceptions, both the suing party (the "plaintiff") and the defending party (the "defendant") are required to pay their own legal expenses.

Proposal

This measure changes who is responsible for paying the legal expenses of persons involved in shareholder lawsuits. Specifically, the measure requires the losing party in shareholder lawsuits to pay the winning party's reasonable legal expenses, including attorney fees. The measure permits the court, however, to waive the liability of the losing party if it finds that the lawsuit was substantially justified and the payment of the legal expenses would be unjust. The court may also reduce the expenses or require the losing attorney, rather than the losing client, to pay all or part of the expenses.

This measure also requires the plaintiff in shareholder lawsuits to post a bond, if ordered by the court, to ensure the payment of the defendant's expenses should the plaintiff lose. No bond is required if the plaintiff owned or traded a specified amount of the company's stock. The measure provides that the plaintiff's attorney may furnish the bond.

Fiscal Effect

The fiscal impact of this measure on state and local governments is unknown, but probably not significant. This is because there are few of these cases in the state courts.

For the text of Proposition 201 see page 68

201 Attorneys' Fees. Shareholder Actions. Class Actions. Initiative Statute.

Argument in Favor of Proposition 201

Proposition 201 stops unscrupulous lawyers from filing frivolous lawsuits against the companies generating the most new jobs for California. Along with Proposition 200 and Proposition 202, it'll stop runaway lawsuits from further damaging California's economy.

Proposition 201 only affects a very specific kind of lawsuit: class-action lawsuits filed by shareholders against their own companies. It does not affect lawsuits individuals bring against companies that have cheated or discriminated against them. It does not affect lawsuits over dangerous products.

Here's the "shareholder class action" scam. When a company's stock drops, a lawsuit is filed claiming that management was "fraudulently" optimistic. Demands of $100 million or more are common. Of course, some such suits are justified. But most are brought by lawyers seeking a fast buck. These lawyers use a handful of "professional plaintiffs" claiming to represent all the shareholders. One of these "plaintiffs" showed up in 38 different lawsuits.

Unfortunately, with so much at risk, even innocent businessmen can't afford to put the survival of their companies in the hands of unpredictable juries. Often, they are forced to settle, in which case lawyers walk away with millions while shareholders get a few cents for each share they own. Frequently, the company's stock is forced down even more, hurting current shareholders.

The leading computer, high technology and biotech companies that hold the greatest promise for generating new jobs get hit the hardest. Why? Because as they develop new products, their stock prices fluctuate. The downturns set them up as easy targets for these shakedowns.

In a single year, one lawyer took almost $250 million out of the California economy. It may be hard to believe, but 63% of the major high tech companies in Silicon Valley have been subjected to these lawsuits. Lawyers would have you believe 63% of our best companies are fraudulently run. That's nonsense.

Why should you care? Because small investors and pension plans lose dividends. Because research and development budgets that generate new jobs and keep California competitive are cut back.

Proposition 201 stops these phony lawsuits. Here's how:

- Proposition 201 requires that losers or their lawyers in "shareholder class action" lawsuits pay the winner's legal fees. Lawyers won't file phony cases if they know they've got to pay the companies' legal expenses if they lose.
- If the case is legitimate, and some clearly are, investors will not only recover their money but get their legal expenses paid, too.
- Lawyers filing phony cases with "professional plaintiffs" will have to post bonds equal to the other side's legal expenses.
- If a legitimate "shareholder class action" is filed, those filing the suit can easily be excused from the bond if they own 5% or more of the company's stock.
- If a judge rules that it would be unjust to make a loser pay the winner's legal expenses, he can excuse them from payment.

We can save jobs and prevent small investors ai pension funds from losing money. UNDER PROPOSITION 201, THE ONLY LOSERS ARE THE LAWYERS.

CHARLES SCHWAB
CEO, Charles Schwab & Co.

KIRK WEST
President, California Chamber of Commerce

LEWIS K. UHLER
President, National Tax Limitation Committee

Rebuttal to Argument in Favor of Proposition 201

"We oppose this serious restriction on consumer access to justice." Harry M. Snyder, Consumers Union, Publisher of *Consumer Reports.*

People who have a pension plan or retirement savings should vote "No" so they don't become victims of stock swindlers.

Here's how stock manipulation and insider trading works.

Many companies give executives big "stock options." Those executives make some "big announcement" . . . a new invention, product, or great earnings. The stock price jumps as small investors try to "get in on the ground floor."

Then once stock prices jump, the "insiders" sell their stock for a big profit. Later the "breakthrough invention" fizzles, the product fails, or the earnings don't come through. But the small investors are left holding the bag and losing their shirts.

Fortunately, many of those people have sued and gotten some of their money back.

The victims of Charles Keating's Lincoln Savings and Loan swindle were not "professional plaintiffs." They were elderly people who filed a lawsuit and recovered 85% of their money.

Under Proposition 201, before small investors can sue the inside traders, they'll have to put up deposits—maybe millions of dollars—to pay the corporation's legal fees.

Will small investors take that chance and sue multi-million dollar corporations? No.

Proposition 201 is funded by corporations that had to settle lawsuits against them and pay back millions of dollars to their investors.

Under Proposition 201, the only winners are the corporations that paid to put it on the ballot . . . you and every other consumer will lose.

LEAH KANE
Chair of Keating Victims Association of Leisure World, Laguna Hills, California

LOIS WELLINGTON
President, Congress of California Seniors

Argument Against Proposition 201

Proposition 201 should be called "The Attack of the Stock Swindlers."

This initiative attacks your pension and retirement savings. It stops you from holding swindlers responsible and getting your money back.

If this initiative becomes law, people who have been cheated will have to put up a deposit for what could be millions of dollars before they can sue. That deposit is there to pay the cheaters' lawyers!

According to the Federal Trade Commission, Americans are losing $1,000,000,000 (one billion dollars) a year to investment swindlers. Securities fraud involving senior citizens has reached epidemic proportions. The last thing we need is an initiative that encourages more fraud.

If this initiative had been the law a few years ago, elderly victims who lost their savings in the Charles Keating Lincoln Savings and Loan swindle could not have gotten their money back in state court.

Advanced Micro Devices put up $25,000 to pass this initiative. They paid $34 million to settle claims that they had defrauded investors.

Adaptec, Inc. put up $50,000. Adaptec was sued for securities fraud and insider trading. They paid back millions to the investors who sued them.

Cadence Design Systems, Inc. put up $25,000. They were sued twice for securities fraud and insider trading. They paid more than $15 million to settle.

An executive of Seagate Technologies put up more than $136,000. He and his corporation have been repeatedly sued for fraud, insider trading, and deliberately misleading investors. They paid millions to investors to settle just one fraud case.

Another contributor is a Director of several corporations. One of those corporations pled guilty to defrauding the Department of Defense, and paid over $100 million in fines and penalties in lawsuits by the government, whistleblowers, and stockholders. Two of his other corporations paid $42 million to settle securities fraud suits against them.

Californians have their pension funds invested in stocks. These nest eggs are what tomorrow's retirees will count on.

Pension and retirement funds need more protection, not less.

Vote "NO" on Propositions 201 and 202.

HOWARD L. OWENS
Legislative Director, Congress of California Seniors, Inc.

Rebuttal to Argument Against Proposition 201

I'm one of the businessmen Proposition 201 opponents call a "stock swindler." They say we're criminals because we've been sued.

In 1979, I helped start Seagate Technology, Inc. Today, Seagate employs over 67,000 people and is the world's largest independent maker of computer disk drives. Seagate didn't become successful swindling people. We became successful by working hard and making a great product.

Seagate has been victimized by shareholder lawsuits three times.

The first time, lawyers accused us of being too optimistic and demanded $100 million. At the time, we felt it would cost less to settle than fight. We paid $1 million, our insurer paid $8 million, and the lawyers got nearly $3 million. So they sued us twice again.

Furious, we decided to fight. A judge threw one of the suits out, but it still cost $4 million in legal expenses. The other suit, we're still fighting. Meanwhile, our shareholders have seen their stock value rise dramatically since all this started. Does that make me a stock swindler?

Many honest businesses and their employees are being victimized by the same scam.

Howard Owens wants to scare you by falsely claiming Proposition 201 would hurt seniors. Proposition 201 doesn't target pension funds or retirement. It targets unscrupulous lawyers.

Valid lawsuits against real swindlers WOULD still be brought and won if Proposition 201 passes. But lawyers would think twice before bringing BOGUS suits.

ALAN SHUGART
Chairman, Seagate Technology, Inc.

(o) "Rehabilitation" means (1) reduction of disability; (2) restoration and maintenance, as restored, of the physical and vocational functioning of a person who sustained an injury in an accident; and (3) restoration of the capacity of such a person to be gainfully employed.

(p) "Resident relative" means a person who, at the time of the accident, is related by blood, marriage, or adoption to the named insured (or vehicle owner, if so specified) or his or her resident spouse, and who resides in the named insured's (or vehicle owner's) household, even if temporarily living elsewhere, and any ward or foster child who usually resides with the named insured (or vehicle owner), even if temporarily living elsewhere.

(q) "Wage loss" means the loss of earnings from work, including self-employment, which the covered person would have performed had he or she not been injured.

SECTION FOUR. (a) Except as provided in subdivision (b) of this section, the provisions of this initiative shall not be amended except by a statute that becomes effective only when approved by the electorate.

(b) The provisions of this initiative may be amended only to further its purposes, by a statute passed in each house of the Legislature by roll call vote entered in the journal, two-thirds of the membership of each house concurring, except that a statute which would further the purposes of this initiative and have the effect of providing consumers with further opportunities to reduce their au insurance premiums without reducing their benefits may be passed by major vote in each house. In any judicial action with respect to any legislative amendment, the court shall exercise its independent judgment as to whether or not the amendment satisfies the requirements of this subdivision.

SECTION FIVE. If any provision of this initiative other than Section 12830 of the Insurance Code, or any application thereof to any person or circumstance, is held invalid, that invalidity shall not affect any provision or application of the initiative that can be given effect without the invalid provision or application. To this end, the provisions of this initiative, except Section 12830 of the Insurance Code, are severable.

Proposition 201: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure amends and adds sections to the Corporations Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Shareholder Litigation Reform Act

SECTION 1. This Act shall be known and may be cited as the "Shareholder Litigation Reform Act."

SECTION 2. The People of the State of California find and declare:

(a) Meritorious shareholder lawsuits play a critical role in deterring misconduct by corporate directors and officers and in maintaining the integrity of securities markets, which are a vital source of capital for California businesses. However, meritless shareholder lawsuits impose enormous costs on California businesses and shareholders. These costs deprive California of resources that could be used to make investments in new products and services, expand existing businesses, and create new jobs. Since the most common targets of these meritless shareholder lawsuits are innovative, entrepreneurial businesses, such as high-technology companies, these lawsuits pose an especially serious threat to California's economy and the state's ability to generate new jobs.

(b) The present legal system encourages the filing of such meritless shareholder lawsuits.

(c) Because the potential profit to lawyers filing such lawsuits is so great, the lawyers themselves often initiate these cases by recruiting potential plaintiffs to sue a company. And because the cost in time and money required to defend against such lawsuits is substantial, many companies innocent of wrongdoing are nonetheless forced to settle—encouraging lawyers to file still more such suits.

(d) Under the present legal system, shareholders who have been defrauded cannot obtain fair compensation for their losses since their recovery is typically reduced by as much as one-third to pay the contingent fees of attorneys who brought the case.

(e) Many of the meritless shareholder lawsuits filed today could be discouraged without discouraging lawsuits that do have merit. This could be accomplished by:

(1) Requiring the loser or the loser's attorney in a securities class action or shareholder derivative lawsuit to pay the winner's costs, including reasonable attorney's fees, unless the court determines that circumstances would make it unjust to do so; and

(2) Requiring the named plaintiffs in such a lawsuit to post a bond to secure their obligation to pay these costs if they lose, unless the named plaintiffs constitute 5% of the class.

(f) Imposing such a "loser-pays" rule on litigants in shareholder lawsuits would help to protect companies and their shareholders from the costs of meritless litigation, would encourage companies that were guilty of wrongdoing to make early settlement offers, and would allow shareholders who did have meritorious claims to recoup the legal costs of pursuing those claims.

SECTION 3. Section 800.5 is added to the Corporations Code, to read:

800.5. (a) [APPLICATION] This section applies to any shareholder derivative action and any securities law class action based in whole or in part on California law, notwithstanding any other provision of law. All references in this section to "plaintiffs" or "defendants" refer also to the singular of those terms in cases involving a single defendant or plaintiff.

(b) [AWARD OF FEES AND EXPENSES] (1) In any shareholder derivative action or securities law class action, if a final judgment that is not appealed or is no longer subject to appeal is entered in favor of either the plaintiffs or the defendants (the "prevailing party"), the opposing party (the "losing party") shall be liable to the prevailing party for the reasonable fees and expenses incurred by the prevailing party in the prosecution or defense of the action, except as provided in paragraph (4) of this subdivision. However, if the defendants make an offer of judgment under Section 998 of the Code of Civil Procedure which is not accepted by the plaintiffs and the judgment is not greater than the amount of that offer, the defendants shall be considered the prevailing party.

(2) If judgment is entered in favor of the plaintiffs on some of the claims in the complaint and in favor of the defendants on others, the court shall allocate the liability for fees and expenses between the parties based upon the fees and expenses incurred with respect to each claim. The amounts for which each of the opposing parties is determined to be liable shall be off set against each other.

(3) In the case of multiple named plaintiffs, the proportion of the prevailing defendants' fees and expenses for which each named plaintiff is liable shall be equal to the proportion of the total claims of all named plaintiffs which that named plaintiff's claim represents. In the case of multiple defendants, the proportion of the prevailing plaintiffs' fees and expenses for which each defendant is liable shall be equal to the proportion of the total judgments against all defendants which the judgment against that defendant represents, unless otherwise determined by the court to prevent an injustice.

(4) If the losing party establishes that its position was substantially justified, the court shall waive the liability of any member of the losing party for fees and expenses if requiring that member of the losing party to pay its full share of such fees and expenses would be unjust. A losing party's position is substantially justified if it has a reasonable basis both in law and in fact. This provision shall not apply with respect to the liability of any plaintiff if an attorney has agreed to indemnify that plaintiff against such liability pursuant to subdivision (h).

(c) [APPLICATION FOR FEES AND EXPENSES] A party seeking an award of fees and expenses shall, within 30 days of a final judgment in the action that is not appealed or is no longer subject to appeal, submit to the court an application for fees and expenses that verifies that the party is entitled to such an award under subdivision (b) and the amount sought, including an itemized statement from ar attorney or expert witness representing or appearing on behalf of the party stat the actual time expended and the rate at which fees and expenses are computed.

(d) [ALLOCATION AND SIZE OF AWARD] The court, in its discretion, may:

(1) Determine whether the amount to be awarded pursuant to this section shall be awarded against the losing party, its attorney, or both; and

(2) Reduce the amount to be awarded pursuant to this section, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy.

(e) [SECURITY FOR PAYMENT OF FEES AND EXPENSES] (1) In any shareholder derivative action or securities law class action, the named plaintiffs shall, upon motion duly made as provided in paragraph (3) of this subdivision by any defendant (including the entity in a shareholder derivative action) and granted by the court after notice and hearing, furnish a bond to secure the named plaintiffs' liability under subdivision (b) of this section for the defendants' estimated fees and expenses, as determined by the court, except as provided in paragraph (2) of this subdivision. All references in this subdivision to a "motion for security" mean a motion made under this paragraph.

(2) No bond shall be required if the named plaintiffs show to the satisfaction of the court that in the case of a shareholder derivative action the named plaintiffs own at the time of the ruling on the motion 5% or more of the total outstanding common shares of the organization, or in the case of a securities law class action, the named plaintiffs traded 5% or more of the total number of shares traded during the class period, provided that in determining the total number of shares traded only 50% of the reported volume of trading on NASDAQ shall be included.

(3) The motion for security may be made at any time within 30 days after service of the summons in the case of a shareholder derivative action or any time within 30 days after conditional or final certification of the class in the case of a securities law class action and shall be heard by the court as expeditiously as possible. The court shall consider such evidence, written or oral, by witnesses or affidavit, as may be relevant to any ground for denial of the motion under paragraph (2) of this subdivision and to a determination of the fees and expenses likely to be incurred by the moving party in the defense of the action. If the motion is granted, the order shall fix the amount of the bond in the amount of the estimated fees and expenses as determined by the court. A ruling by the court on the motion shall not be a determination of any issue in the action or of the merits thereof. The court may for good cause shown extend the time period specified in this paragraph for an additional period not to exceed 60 days and may increase or decrease the amount of any security required on a showing of changed circumstances.

(4) If the court makes a determination that a bond shall be furnished by named plaintiffs as to any one or more defendants and the bond is not furnished within such time as may be fixed by the court, the action shall be dismissed without prejudice to the individual plaintiffs' rights to pursue an action in their individual capacities.

(f) [STAY OF DISCOVERY] (1) Except as provided in paragraph (3) of this subdivision, all discovery in a shareholder derivative action shall be stayed for at least 30 days after the service of the summons. If the court has extended the time allowed for making a motion for security, pursuant to subdivision (e), discovery shall be stayed until the expiration of such additional time allowed. If a motion for security is made, discovery shall be stayed until 10 days after the motion is disposed of.

(2) Except as provided in paragraph (3) of this subdivision, all discovery in a securities law class action shall be stayed until at least 30 days after the conditional or final certification of the class. If the court has extended the time allowed for making a motion for security, pursuant to subdivision (e), discovery shall be stayed until the expiration of such additional time allowed. If a motion for security is made, discovery shall be stayed until 10 days after the motion is disposed of.

(3) The stays of discovery provided for in this subdivision do not apply to discovery with respect to any ground for denial of a motion for security or with respect to class certification.

(g) [NOTIFICATION OF SHAREHOLDERS] Upon motion of the named plaintiffs, the court may order that a notice be given to the shareholders or potential class members of the pendency of the action and of the fact that any shareholder or class member may join the action as a named plaintiff. That notice may be given by publication in such manner as may be directed by the court, unless the court rules that personal service by mail is feasible and necessary. The expense of such notice shall be borne by the named plaintiffs.

(h) [INDEMNIFICATION OF PLAINTIFFS BY ATTORNEY] The attorney for the plaintiffs in any shareholder derivative action or securities law class action may agree to indemnify any named plaintiffs or persons considering becoming a named plaintiff against any liability under this section and may furnish any security required under this section on behalf of the named plaintiffs, notwithstanding any provision of the State Bar Rules of Professional Conduct. An attorney who agrees to indemnify a plaintiff or plaintiffs under this provision shall be primarily liable. An offer to indemnify persons joining as named plaintiffs may be included in the notice referred to in subdivision (g).

(i) For the purposes of this section:

(1) A "shareholder derivative action" means any action instituted in the right of any corporation, domestic or foreign, partnership or any other organization (the "entity") with respect to which such an action may be maintained by a shareholder or holder of a voting trust certificate or a partner or a member alleging a wrong to the entity. "Shareholder" as used in this section includes such holders, partners, and members, and "shares" includes such certificates, partnership interests, and memberships.

(2) A "securities law action" means an action alleging wrongful conduct by the defendant in connection with the purchase or sale of securities.

(3) A "class action" means an action sought to be maintained by the named plaintiffs on behalf of a class of persons with a common interest or involving common questions of law or fact, if the persons to be benefited are too numerous for the joinder of all in the action to be practicable.

(4) "Fees and expenses" means reasonable attorney's fees and other reasonable expenses incurred by a party in the prosecution or defense of an action covered by this section. Reasonable attorney's fees are the reasonable hourly charges multiplied by the reasonable number of hours spent on a case, as determined by the court. For purposes of determining the liability of the losing party, reasonable attorney's fees incurred by plaintiffs do not include any amounts allowed by the court (A) under any common fund or substantial benefit theory or (B) as a result of applying a "multiplier" to the reasonable hourly charges in order to compensate the attorney for the risk involved in representing the plaintiffs on a contingent-fee basis. However, nothing herein shall limit the authority of the court to award an attorney out of the damages awarded fees based on any common fund or substantial benefit theory or based on the application of such a "multiplier". Reasonable expenses other than attorney's fees include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, report, test, or project which is found by the court to be necessary for the preparation of the party's case, costs allowable under Sections 1032 and 1033.5 of the Code of Civil Procedure, and attorney's expenses other than fees. However, reasonable expenses do not include overhead charges or employee salaries of the law firm representing a party.

SECTION 4. The State Bar shall, with the approval of the Supreme Court, amend the Rules of Professional Conduct of the State Bar, if necessary, in order to conform such Rules to subdivision (h) of Section 800.5 of the Corporations Code.

SECTION 5. Section 800 of the Corporations Code is amended to read:

800. (a) As used in this section, "corporation" includes an unincorporated association; "board" includes the managing body of an unincorporated association; "shareholder" includes a member of an unincorporated association; and "shares" includes memberships in an unincorporated association.

(b) No action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares or of voting trust certificates of the corporation unless both of the following conditions exist:

(1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part thereof of which plaintiff complains or that plaintiff's shares or voting trust certificates thereafter devolved upon plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of; provided, that any shareholder who does not meet these requirements may nevertheless be allowed in the discretion of the court to maintain the action on a preliminary showing to and determination by the court, by motion and after a hearing, at which the court shall consider such evidence, by affidavit or testimony, as it deems material, that (i) there is a strong prima facie case in favor of the claim asserted on behalf of the corporation, (ii) no other similar action has been or is likely to be instituted, (iii) the plaintiff acquired the shares before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains, (iv) unless the action can be maintained the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty, and (v) the requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation; and

(2) The plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.

~~(c) In any action referred to in subdivision (b), at any time within 30 days after service of summons upon the corporation or upon any defendant who is an officer or director of the corporation, or held such office at the time of the acts complained of, the corporation or the defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish a bond as hereinafter provided. The motion shall be based upon one or both of the following grounds:~~

~~(1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its shareholders.~~

~~(2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.~~

~~The court on application of the corporation or any defendant may, for good cause shown, extend the 30-day period for an additional period or periods not exceeding 60 days.~~

~~(d) At the hearing upon any motion pursuant to subdivision (c), the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground or grounds upon which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the corporation and the moving party which will be incurred in the defense of the action. If the court determines, after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the amount of the bond, not to exceed fifty thousand dollars ($50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317. A ruling by the court on the motion shall not be a determination of any issue in the action or of the merits thereof. If the court, upon the motion, makes a determination that a bond shall be furnished by the plaintiff, as to any one or more defendants, the action shall be dismissed as to the defendant or defendants, unless the bond required by the court has been furnished within such reasonable time as may be fixed by the court.~~

~~(e) If the plaintiff shall, either before or after a motion is made pursuant to subdivision (c), or any order or determination pursuant to the motion, furnish a bond in the aggregate amount of fifty thousand dollars ($50,000) to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the requirements of this section and with any order for a bond theretofore made, and any such motion then pending shall be dismissed and no further or additional bond shall be required.~~

~~(f) If a motion is filed pursuant to subdivision (c), no pleadings need be filed by the corporation or any other defendant and the prosecution of the action shall be stayed until 10 days after the motion has been disposed of.~~

SECTION 6. Section 15702 of the Corporations Code is amended to read:

15702. ~~(a)~~ No action may be instituted or maintained in right of any domestic or foreign limited partnership by any partner of the limited partnership unless both of the following conditions exist:

~~(1)~~ *(a)* The plaintiff alleges in the complaint that plaintiff was a partner of record or beneficially, at the time of the transaction or any part thereof of which plaintiff complains or that plaintiff's interest thereafter devolved upon plaintiff by operation of law from a partner who was a partner at the time of the transaction or any part thereof complained of. Any partner who does not meet these requirements may nevertheless be allowed in the discretion of the court to maintain the action on a preliminary showing to and determination by the court, by motion and after a hearing at which the court shall consider any evidence, by affidavit or testimony, as it deems material, that ~~(A)~~ *(1)* there is a strong prima facie case in favor of the claim asserted on behalf of the limited partnership, ~~(B)~~ *(2)* no other similar action has been or is likely to be instituted, ~~(C)~~ *(3)* the plaintiff acquired the interest before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains, ~~(D)~~ *(4)* unless the action can be maintained the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty, and ~~(E)~~ *(5)* the requested relief will not result in unjust enrichment of the limited partnership or any partner of the limited partnership.

~~(2)~~ *(b)* The plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the general partners such action as plaintiff desires or the reasons for not making that effort, and alleges further that plaintiff has either informed the limited partnership or the general partners in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited partnership or the general partners a true copy of the complaint which plaintiff proposes to file.

~~(b) In any action referred to in subdivision (a), at any time within 30 days after service of summons upon the limited partnership or upon any defendant who is a general partner of the limited partnership or held that position at the time of the acts complained of, the limited partnership or the defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. The motion shall be based upon one or both of the following grounds:~~

~~(1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the limited partnership or its partners.~~

~~(2) That the moving party, if other than the limited partnership, did not participate in the transaction complained of in any capacity. The court on application of the limited partnership or any defendant may, for good cause shown, extend the 30-day period for an additional period not exceeding 60 days.~~

~~(c) At the hearing upon any motion pursuant to subdivision (b), the court shall consider evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground upon which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the limited partnership and the moving party which will be incurred in the defense of the action. If the court determines after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security, not to exceed fifty thousand dollars ($50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the limited partnership in connection with the action. A ruling by the court on the motion shall not be a determination of any issue in the action or of the merits thereof. The amount of the security may thereafter be increased or decreased in the discretion of the court upon a showing that the security provided has or may become inadequate or is excessive, but the court may not in any event increase the total amount of the security beyond fifty thousand dollars ($50,000) in the aggregate for all defendants. If the court, upon any such motion, makes a determination that security shall be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within any reasonable time as may be fixed by the court. The limited partnership and the moving party shall have recourse to the security in such amount as the court shall determine upon the termination of the action.~~

~~(d) If the plaintiff shall, either before or after a motion is made pursuant to subdivision (b), or any order or determination pursuant to such motion, post good and sufficient bond or bonds in the aggregate amount of fifty thousand dollars ($50,000) to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the requirements of this section and with any order for security theretofore made pursuant hereto, and any such motion then pending shall be dismissed and no further or additional bond or other security shall be required.~~

~~(e) If a motion is filed pursuant to subdivision (b), no pleadings need be filed by the limited partnership or any other defendant and the prosecution of the action shall be stayed until 10 days after the motion has been disposed of.~~

SECTION 7. Section 17501 of the Corporations Code is amended to read:

17501. ~~(a)~~ No action shall be instituted or maintained in right of any domestic or foreign limited liability company by any member of the limited liability company unless both of the following conditions exist:

~~(1)~~ *(a)* The plaintiff alleges in the complaint that plaintiff was a member of record, or beneficiary, at the time of the transaction or any part thereof of which plaintiff complains, or that plaintiff's interest thereafter devolved upon plaintiff by operation of law from a member who was a member at the time of the transaction or any part thereof complained of. Any member who does not meet these requirements may nevertheless be allowed in the discretion of the court to maintain the action on a preliminary showing to and determination by the court, by motion and after a hearing at which the court shall consider any evidence, by affidavit or testimony, as it deems material, of all of the following:

~~(A)~~ *(1)* There is a strong prima facie case in favor of the claim asserted on behalf of the limited liability company.

~~(B)~~ *(2)* No other similar action has been or is likely to be instituted.

~~(C)~~ *(3)* The plaintiff acquired the interest before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains.

~~(D)~~ *(4)* Unless the action can be maintained, the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty.

~~(E)~~ *(5)* The requested relief will not result in unjust enrichment of the limited liability company or any member of the limited liability company.

~~(2)~~ *(b)* The plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the managers the action plaintiff desires or the reasons for not making that effort, and alleges further that plaintiff has either informed the limited liability company or the managers in writing of the ultimate facts of each cause of action against each defendant or delivered to the limited liability company or the managers a true copy of the complaint that plaintiff proposes to file.

~~(b) In any action referred to in subdivision (a), at any time within 30 days af~~ service of summons upon the limited liability company or upon any defend~~ who is a manager of the limited liability company or held that position at the tn... of the acts complained of, the limited liability company or the defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security as hereinafter provided. The motion shall be based upon one or both of the following grounds:~~

~~(1) That there is no reasonable possibility that the prosecution of the cause of the action alleged in the complaint against the moving party will benefit the limited liability company or its members.~~

~~(2) That the moving party, if other than the limited liability company, did not participate in the transaction complained of in any capacity. The court, on application of the limited liability company or any defendant, may, for good cause shown, extend the 30-day period for an additional period not exceeding 60 days.~~

~~(c) At the hearing upon any motion pursuant to subdivision (b), the court shall consider evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground upon which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the limited liability company and the moving party that will be incurred in the defense of the action.~~

~~If the court determines, after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security, not to exceed fifty thousand dollars ($50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, that may be incurred by the moving party and the limited liability company in connection with the action. A ruling by the court on the motion shall not be a determination of any issue in the action or of the merits thereof. The amount of the security may thereafter be increased or decreased in the discretion of the court upon a showing that the security provided has or may become inadequate or is excessive, but the court may not in any event increase the total amount of the security beyond fifty thousand dollars ($50,000) in the aggregate for all defendants. If the court, upon a motion, makes a determination that security shall be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to that defendant or defendants, unless the security required by the court has been furnished within any reasonable time as may be fixed by the court. The limited liability company and the moving party shall have recourse to the security in the amount that the court determines upon the termination of the action.~~

~~(d) If the plaintiff, either before or after a motion is made pursuant to subdivision (b), or any order or determination pursuant to that motion, posts and sufficient bond or bonds in the aggregate amount of fifty thousand dol ($50,000) to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff shall be deemed to have complied with the requirements of this section and with any order for security made pursuant to this section. Any motion then pending shall be dismissed and no further or additional bond or other security shall be required.~~

~~(e) If a motion is filed pursuant to subdivision (b), no pleadings need be filed by the limited liability company or any other defendant and the prosecution of the action shall be stayed until 10 days after the motion has been disposed of.~~

SECTION 8. (a) Except as provided in subdivision (b) of this section, the provisions of this initiative shall not be amended except by a statute that becomes effective only when approved by the electorate.

(b) The provisions of this initiative may be amended only to further its purposes, by a statute passed in each house of the Legislature by roll call vote entered in the journal, two-thirds of the membership of each house concurring. In any judicial action with respect to such amendment, the court shall exercise its independent judgment as to whether or not the amendment satisfies the requirements of this subdivision.

SECTION 9. If any provision of this act or application thereof to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Proposition 202: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure adds sections to the Business and Professions Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Lawyer Contingent Fee Limitation Act

SECTION ONE. This Act shall be known and may be cited as the "Lawyer Contingent Fee Limitation Act".

SECTION TWO. The People of the State of California find and declare:

(a) The contingent-fee arrangements lawyers typically negotiate with claimants, most of whom are inexperienced and unsophisticated purchasers of legal services, often require claimants to pay their lawyers too much for handling tort claims that a defendant has offered to settle.

(b) These excessive fees harm claimants by depriving them of compensation they deserve.

(c) The excessive fees also discourage early settlement of tort claims, forcing injured people to suffer long delays in receiving compensation and clogging the courts with lawsuits that should not have to be filed.

(d) Imposing a cap on the fees lawyers can charge for handling tort claims that a defendant has offered to settle quickly would:

(1) Prevent lawyers from taking an unreasonable portion of the compensation offered or awarded to an injured person.

(2) Encourage defendants to settle claims quickly.

(3) Enable injured people to be compensated more promptly.

(4) Relieve some of the present burden placed on the courts, reducing cost taxpayers and enabling other legal disputes to be resolved more quickly.

SECTION THREE. Sections 6146.1, 6146.2, 6146.3, 6146.4, 6146.5 and 6146.6 of Article 8.5 of Chapter 4 of Division 3 of the Business and Professions Code are added as follows: