

---

HOUSE BILL 2423

---

State of Washington

55th Legislature

1998 Regular Session

By Representatives Morris and Grant

Read first time 01/13/98. Referred to Committee on Law & Justice.

1       AN ACT Relating to securities class actions; and adding new  
2 sections to chapter 21.20 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4       NEW SECTION. **Sec. 1.** The provisions of sections 2 through 14 of  
5 this act shall apply to each private action arising under this chapter  
6 that is brought as a plaintiff class action pursuant to the Washington  
7 civil rules.

8       NEW SECTION. **Sec. 2.** (1) A plaintiff seeking to serve as a  
9 representative party on behalf of a class in an action arising under  
10 this chapter shall provide a sworn certification, personally signed by  
11 the plaintiff and filed with the complaint, that:

12       (a) States that the plaintiff has reviewed the complaint and  
13 authorized its filing;

14       (b) States that the plaintiff did not purchase the security that is  
15 the subject of the complaint at the direction of plaintiff's counsel or  
16 in order to participate in any private action under this chapter;

1       (c) States that the plaintiff is willing to serve as a  
2 representative party on behalf of a class, including providing  
3 testimony at deposition and trial, if necessary;

4       (d) Sets forth all of the transactions of the plaintiff in the  
5 security that is the subject of the complaint during the class period  
6 specified in the complaint;

7       (e) Identifies any other action under this chapter, filed during  
8 the three-year period preceding the date on which the certification is  
9 signed by the plaintiff, in which the plaintiff has sought to serve, or  
10 served, as a representative party on behalf of a class; and

11      (f) States that the plaintiff will not accept any payment for  
12 serving as a representative party on behalf of a class beyond the  
13 plaintiff's pro rata share of any recovery, except as ordered or  
14 approved by the court in accordance with section 4 of this act.

15      (2) The certification filed pursuant to this section shall not be  
16 construed to be a waiver of the attorney-client privilege.

17      NEW SECTION. **Sec. 3.** (1)(a) Not later than twenty days after the  
18 date on which the complaint is filed, the plaintiff or plaintiffs shall  
19 cause to be published in a widely circulated state business-oriented  
20 publication or wire service and in a widely circulated national  
21 business-oriented publication or wire service, a notice advising  
22 members of the purported class:

23       (i) Of the pendency of the action, the claims asserted in the  
24 action, and the purported class period; and

25       (ii) That, not later than sixty days after the date on which the  
26 notice is published, any member of the purported class may move the  
27 court to serve as lead plaintiff of the purported class.

28       (b) If more than one action on behalf of a class asserting  
29 substantially the same claim or claims arising under this chapter is  
30 filed, only the plaintiff or plaintiffs in the first filed action are  
31 required to cause notice to be published in accordance with (a) of this  
32 subsection.

33       (c) The notice required under (a) of this subsection is in addition  
34 to any notice required under the Washington civil rules.

35      (2)(a) Not later than ninety days after the date on which a notice  
36 is published under subsection (1) of this section, the court shall  
37 consider a motion made by a purported class member in response to the  
38 notice, including a motion by a class member who is not individually

1 named as a plaintiff in the complaint or complaints, and shall appoint  
2 as lead plaintiff the member or members of the purported class that the  
3 court determines to be the most adequate plaintiff. The most adequate  
4 plaintiff is the member or members of the purported class most capable  
5 of adequately representing the interests of class members.

6 (b) If more than one action on behalf of a class asserting  
7 substantially the same claim or claims arising under this chapter has  
8 been filed, and a party has sought to consolidate those actions for  
9 pretrial purposes or for trial, the court shall not make the  
10 determination of the most adequate plaintiff until after the decision  
11 on the motion to consolidate is rendered.

12 (c) Subject to (d) of this subsection, there is a presumption that  
13 the most adequate plaintiff in a private class action arising under  
14 this chapter is the person or group of persons that:

15 (i) Has either filed the complaint or made a motion in response to  
16 a notice under subsection (1)(a) of this section;

17 (ii) In the determination of the court has the largest financial  
18 interest in the relief sought by the class; and

19 (iii) Otherwise satisfies the requirements of rule 23 of the  
20 Washington civil rules.

21 (d) The presumption established in (c) of this subsection may be  
22 rebutted only upon proof by a member of the purported plaintiff class  
23 that the presumptively most adequate plaintiff will not fairly and  
24 adequately protect the interests of the class or is subject to unique  
25 defenses that render the plaintiff incapable of adequately representing  
26 the class.

27 (e) Discovery relating to whether a member or members of the  
28 purported plaintiff class is the most adequate plaintiff may be  
29 conducted by a plaintiff only if the plaintiff first demonstrates a  
30 reasonable basis for a finding that the presumptively most adequate  
31 plaintiff is incapable of adequately representing the class.

32 (f) The most adequate plaintiff shall select and retain counsel to  
33 represent the class, subject to the approval of the court.

34 (g) Except as the court may otherwise permit, a person may be a  
35 lead plaintiff, or an officer, director, or fiduciary of a lead  
36 plaintiff, in no more than five securities class actions brought as  
37 plaintiff class actions pursuant to the Washington civil rules during  
38 any three-year period.

1        **NEW SECTION.**    **Sec. 4.**    The share of any final judgment or of any  
2 settlement that is awarded to a representative party serving on behalf  
3 of a class in an action arising under this chapter shall be equal, on  
4 a per share basis, to the portion of the final judgment or settlement  
5 awarded to all other members of the class. This section shall not be  
6 construed to limit the award of reasonable costs and expenses,  
7 including lost wages, directly relating to the representation of the  
8 class to any representative party serving on behalf of the class.

9        **NEW SECTION.**    **Sec. 5.**    The terms and provisions of a settlement  
10 agreement of a class action shall not be filed under seal, except that  
11 on motion of a party to the settlement, the court may order filing  
12 under seal for those portions of a settlement agreement for which good  
13 cause is shown for filing under seal. Good cause exists only if  
14 publication of a term or provision of a settlement agreement would  
15 cause direct and substantial harm to a party.

16        **NEW SECTION.**    **Sec. 6.**    Total attorneys' fees and expenses awarded  
17 by the court to counsel for the plaintiff class shall not exceed a  
18 reasonable percentage of the amount of damages and prejudgment interest  
19 actually paid to the class.

20        **NEW SECTION.**    **Sec. 7.**    A proposed or final settlement agreement  
21 that is published or otherwise disseminated to the class shall include  
22 each of the following statements, along with a cover page summarizing  
23 the information contained in the statements:

24              (1) The amount of the settlement proposed to be distributed to the  
25 parties to the action, determined in the aggregate and on an average  
26 per share basis;

27              (2)(a) If the settling parties agree on the average amount of  
28 damages per share that would be recoverable if the plaintiff prevailed  
29 on each claim alleged, a statement concerning the average amount of the  
30 potential damages per share;

31              (b) If the parties do not agree on the average amount of damages  
32 per share that would be recoverable if the plaintiff prevailed on each  
33 claim alleged, a statement from each settling party concerning the  
34 issue or issues on which the parties disagree;

35              A statement made under this subsection concerning the amount of  
36 damages shall not be admissible in any federal or state judicial action

1 or administrative proceeding, other than an action or proceeding  
2 arising out of such statement.

3 (3) If any of the settling parties or their counsel intend to apply  
4 to the court for an award of attorneys' fees or costs from any fund  
5 established as part of the settlement, a statement indicating which  
6 parties or counsel intend to make an application, the amount of fees  
7 and costs that will be sought, including the amount of the fees and  
8 costs determined on an average per share basis, and a brief explanation  
9 supporting the fees and costs sought;

10 (4) The name, telephone number, and address of one or more  
11 representatives of counsel for the plaintiff class who will be  
12 reasonably available to answer questions from class members concerning  
13 any matter contained in a notice of settlement published or otherwise  
14 disseminated to the class;

15 (5) A brief statement explaining the reasons why the parties are  
16 proposing the settlement; and

17 (6) Other information that the court may require.

18       **NEW SECTION.**   **Sec. 8.** In any private action arising under this  
19 chapter that is certified as a class action pursuant to the Washington  
20 civil rules, the court may require an undertaking from the attorneys  
21 for the plaintiff class, the defendant, or both, in such proportions and at such times as the court determines are just and  
22 equitable, for the payment of fees and expenses that may be awarded.

25       **NEW SECTION.**   **Sec. 9.** If a plaintiff class is represented by an attorney who directly owns or otherwise has a beneficial interest in the securities that are the subject of the litigation, the court shall make a determination of whether the ownership or other interest constitutes a conflict of interest sufficient to disqualify the attorney from representing the plaintiff class.

31       **NEW SECTION.**   **Sec. 10.** (1) In a private class action arising under this chapter in which the plaintiff alleges that the defendant made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances in which they were made, the complaint shall:

1       (a) Specify each statement alleged to have been misleading;  
2       (b) State the reason or reasons why the statement is misleading;  
3 and

4       (c) If an allegation regarding the statement or omission is made on  
5 information and belief, state with particularity all facts on which  
6 that belief is formed.

7       (2) If the cause of action is one in which the plaintiff may only  
8 recover money damages on proof that the defendant acted with a  
9 particular state of mind, the complaint shall, with respect to each act  
10 or omission alleged to violate this chapter, state with particularity  
11 facts giving rise to a strong inference that the defendant acted with  
12 the required state of mind.

13      (3) The court shall, on the motion of any defendant, dismiss the  
14 complaint if the requirements of subsections (1) and (2) of this  
15 section are not met.

16      (4) All discovery and other proceedings shall be stayed during the  
17 pendency of a motion to dismiss, unless the court finds upon the motion  
18 of a party that particularized discovery is necessary to preserve  
19 evidence or to prevent undue prejudice to the party.

20      (5)(a) During the pendency of a stay of discovery under subsection  
21 (4) of this section, unless otherwise ordered by the court, a party to  
22 the action with actual notice of the allegations contained in the  
23 complaint shall treat all documents, data compilations including  
24 electronically recorded or stored data, and tangible objects that are  
25 in the custody or control of the person and that are relevant to the  
26 allegations, as if they were the subject of a continuing request for  
27 production of documents from an opposing party under the Washington  
28 civil rules.

29      (b) A party aggrieved by the willful failure of an opposing party  
30 to comply with (a) of this subsection may apply to the court for an  
31 order awarding appropriate sanctions.

32      (6) The plaintiff shall have the burden of proving that the act or  
33 omission of the defendant alleged to violate this chapter caused the  
34 loss for which the plaintiff seeks to recover damages.

35      NEW SECTION. **Sec. 11.** (1) In a private class action arising under  
36 this chapter, upon final adjudication of the action, the court shall  
37 include in the record specific findings regarding compliance by each  
38 party and each attorney representing any party with each requirement of

1 rule 11 of the Washington civil rules as to any complaint, responsive  
2 pleading, or dispositive motion.

3 (2) If the court makes a finding under subsection (1) of this  
4 section that a party or attorney violated any requirement of rule 11 of  
5 the Washington civil rules as to any complaint, responsive pleading, or  
6 dispositive motion, the court shall impose sanctions on the party or  
7 attorney in accordance with rule 11 of the Washington civil rules.  
8 Prior to making a finding that any party or attorney has violated rule  
9 11 of the Washington civil rules, the court shall give the party or  
10 attorney notice and an opportunity to respond.

11 (3)(a) Subject to (b) and (c) of this subsection, there is a  
12 presumption that the appropriate sanction: (i) For failure of any  
13 responsive pleading or dispositive motion to comply with any  
14 requirement of rule 11 of the Washington civil rules is an award to the  
15 opposing party of the reasonable attorneys' fees and other expenses  
16 incurred as a direct result of the violation; and (ii) for substantial  
17 failure of a complaint to comply with any requirement of rule 11 of the  
18 Washington civil rules is an award to the opposing party of the  
19 reasonable attorneys' fees and other expenses incurred in the action.

20 (b) The presumption established in (a) of this subsection may be  
21 rebutted upon proof by the party or attorney against whom sanctions are  
22 to be imposed that: (i) The award of attorneys' fees and other  
23 expenses will impose an unreasonable burden on that party or attorney  
24 and would be unjust, and the failure to make such an award would not  
25 impose a greater burden on the party in whose favor sanctions are to be  
26 imposed; or (ii) the violation of rule 11 of the Washington civil rules  
27 was de minimis.

28 (c) If the party or attorney against whom sanctions are to be  
29 imposed meets the burden under (b) of this subsection, the court shall  
30 award the sanctions that the court deems appropriate pursuant to rule  
31 11 of the Washington civil rules.

32 **NEW SECTION. Sec. 12.** In any private class action arising under  
33 this chapter in which the plaintiff may recover money damages, the  
34 court shall, when requested by a defendant, submit to the jury a  
35 written interrogatory on the issue of each defendant's state of mind at  
36 the time the alleged violation occurred.

1        NEW SECTION.    **Sec. 13.** (1) In any private class action arising  
2 under this chapter in which the plaintiff seeks to establish damages by  
3 reference to the market price of a security, the award of damages to  
4 the plaintiff shall not exceed the difference between the purchase or  
5 sale price paid or received, as appropriate, by the plaintiff for the  
6 subject security and the mean trading price of the security during the  
7 ninety-day period beginning on the date on which the information  
8 correcting the misstatement or omission that is the basis for the  
9 action is disseminated to the market.

10        (2) In any private action arising under this chapter in which the  
11 plaintiff seeks to establish damages by reference to the market price  
12 of a security, if the plaintiff sells or repurchases the subject  
13 security prior to the expiration of the ninety-day period established  
14 in subsection (1) of this section, the plaintiff's damages shall not  
15 exceed the difference between the purchase or sale price paid or  
16 received, as appropriate, by the plaintiff for the security and the  
17 mean trading price of the security during the period beginning  
18 immediately after dissemination of information correcting the  
19 misstatement or omission and ending on the date on which the plaintiff  
20 sells or repurchases the security.

21        (3) As used in this section, "mean trading price" of a security is  
22 the average of the daily trading prices of the security, determined as  
23 of the close of the market each day during the ninety-day period set  
24 forth in subsection (1) of this section.

25        NEW SECTION.    **Sec. 14.** (1) Nothing in this section may be  
26 construed to create, affect, or in any manner modify the standard for  
27 liability associated with an action arising under this chapter.

28        (2)(a) A defendant against whom a final judgment is entered in a  
29 private class action arising under this chapter is liable for damages  
30 jointly and severally only if the trier of fact specifically determines  
31 that the defendant knowingly committed a violation of this chapter.

32        (b) Except as provided in (a) of this subsection, a defendant  
33 against whom a final judgment is entered in a private class action is  
34 liable solely for the portion of the judgment that corresponds to the  
35 percentage of responsibility of that defendant, as determined under  
36 subsection (3) of this section.

37        (3)(a) The court shall instruct the jury to answer special  
38 interrogatories, or if there is no jury, shall make findings with

1 respect to each defendant and each of the other persons claimed by any  
2 of the parties to have caused or contributed to the loss incurred by  
3 the plaintiff, including persons who have entered into settlements with  
4 the plaintiff or plaintiffs, concerning: Whether the person violated  
5 the securities laws; the percentage of responsibility of the person,  
6 measured as a percentage of the total fault of all persons who caused  
7 or contributed to the loss incurred by the plaintiff; and whether the  
8 person knowingly committed a violation of the securities laws.

9 (b) The responses to interrogatories or findings under (a) of this  
10 subsection shall specify the total amount of damages that the plaintiff  
11 is entitled to recover and the percentage of responsibility of each  
12 defendant found to have caused or contributed to the loss incurred by  
13 the plaintiff or plaintiffs.

14 (c) In determining the percentage of responsibility under this  
15 subsection, the trier of fact shall consider: The nature of the  
16 conduct of each defendant found to have caused or contributed to the  
17 loss incurred by the plaintiff or plaintiffs; and the nature and extent  
18 of the causal relationship between the conduct of each person and the  
19 damages incurred by the plaintiff or plaintiffs.

20 (4)(a) Notwithstanding subsection (2)(b) of this section, upon  
21 motion made not later than six months after a final judgment is entered  
22 in any private class action, the court determines that all or part of  
23 the share of the judgment of the defendant is not collectible against  
24 the defendant, and is also not collectible against a defendant  
25 described in subsection (2)(a) of this section, each defendant  
26 described in subsection (2)(b) of this section is liable for the  
27 uncollectible share of the damages as follows:

28 (i) Each defendant is jointly and severally liable for the  
29 uncollectible share if the plaintiff establishes that: (A) The  
30 plaintiff is an individual whose recoverable damages under the final  
31 judgment are equal to more than ten percent of the net worth of the  
32 plaintiff; and (B) the net worth of the plaintiff is equal to less than  
33 two hundred thousand dollars.

34 (ii) For a plaintiff not described by (a)(i) of this subsection,  
35 each defendant is liable for the uncollectible share in proportion to  
36 the percentage of responsibility of that defendant, except that the  
37 total liability of a defendant under this subsection (4)(a)(ii) may not  
38 exceed fifty percent of the proportionate share of that defendant, as  
39 determined under subsection (3)(b) of this section.

1       (iii) Net worth for the purposes of this subsection (4) is  
2 determined as of the date immediately preceding the date of the  
3 purchase or sale by the plaintiff of the security that is the subject  
4 of the action, and shall be equal to the fair market value of assets,  
5 minus liabilities, including the net value of the investments of the  
6 plaintiff in real and personal property.

7       (b) In no case may the total payments required pursuant to (a) of  
8 this subsection exceed the amount of the uncollectible share.

9       (c) A defendant against whom judgment is not collectible is subject  
10 to contribution and to continuing liability to the plaintiff on the  
11 judgment.

12      (5) To the extent that a defendant is required to make an  
13 additional payment pursuant to subsection (4) of this section, the  
14 defendant may recover contribution from: (a) The defendant originally  
15 liable to make the payment; (b) any defendant liable jointly and  
16 severally under subsection (2)(a) of this section; (c) any defendant  
17 held proportionately liable pursuant to this section who is liable to  
18 make the same payment and has paid less than his or her proportionate  
19 share of that payment; or (d) any other person responsible for the  
20 conduct giving rise to the payment that would have been liable to make  
21 the same payment.

22      (6) The standard for allocation of damages under subsections (2)  
23 and (3) of this section and the procedure for reallocation of  
24 uncollectible shares under subsection (4) of this section shall not be  
25 disclosed to members of the jury.

26      (7)(a) A defendant who settles any private action at any time  
27 before final verdict or judgment shall be discharged from all claims  
28 for contribution brought by other persons. Upon entry of the  
29 settlement by the court, the court shall enter a bar order constituting  
30 the final discharge of all obligations to the plaintiff of the settling  
31 defendant arising out of the action. The order shall bar all future  
32 claims for contribution arising out of the action by any person against  
33 the settling defendant and by the settling defendant against any  
34 person, other than a person whose liability has been extinguished by  
35 the settlement of the settling defendant.

36      (b) If a defendant enters into a settlement with the plaintiff  
37 prior to final verdict or judgment, the verdict or judgment shall be  
38 reduced by the greater of: (i) An amount that corresponds to the

1 percentage of responsibility of that defendant; or (ii) the amount paid  
2 to the plaintiff by that defendant.

3 (8) A defendant who becomes jointly and severally liable for  
4 damages in any private class action may recover contribution from any  
5 other person who, if joined in the original action, would have been  
6 liable for the same damages. A claim for contribution shall be  
7 determined based on the percentage of responsibility of the claimant  
8 and of each person against whom a claim for contribution is made.

9 (9) In any private class action determining liability, an action  
10 for contribution shall be brought not later than six months after the  
11 entry of a final, nonappealable judgment in the action, except that an  
12 action for contribution brought by a defendant who was required to make  
13 an additional payment pursuant to subsection (4) of this section may be  
14 brought not later than six months after the date on which the payment  
15 was made.

16 (10) For the purposes of this section, a defendant "knowingly  
17 commits a violation of this chapter":

18 (a) With respect to an action that is based on an untrue statement  
19 of material fact or omission of a material fact necessary to make the  
20 statement not misleading, if: (i) The defendant makes an untrue  
21 statement of a material fact, with actual knowledge that the  
22 representation is false, or omits to state a fact necessary in order to  
23 make the statement made not misleading, with actual knowledge that, as  
24 a result of the omission, one of the material representations of the  
25 defendant is false; and (ii) persons are likely to reasonably rely on  
26 that misrepresentation or omission; and

27 (b) With respect to an action that is based on any conduct that is  
28 not described in (a) of this subsection, if the defendant engages in  
29 that conduct with actual knowledge of the facts and circumstances that  
30 make the conduct of that defendant a violation of this chapter.

31 Reckless conduct by a defendant shall not be construed to  
32 constitute a knowing commission of a violation of this chapter.

33 **NEW SECTION. Sec. 15.** Sections 1 through 14 of this act are each  
34 added to chapter 21.20 RCW and codified with the subchapter heading of  
35 "class action suits."

--- END ---