

Forum

Congress Must Impose Safeguards to Prevent Lawsuit Abuse

By Sherman Joyce

As Congress returned to work following Easter recess last week, Treasury Secretary Henry Paulson formally issued proposals to reform America's financial system in the wake of mortgage and broader credit market crises.

Lawmakers are expected to debate the proposals thoroughly and offer many of their own before finalizing legislation.

Similarly, following corporate accounting scandals at Enron, WorldCom and elsewhere several years ago, Congress diligently went about the work of crafting reforms to regulate corporate governance, the legislative result of which became commonly known as Sarbanes-Oxley.

“Regulation follows crisis as surely as mushrooms follow the rain,” wrote Yale law professor Jonathan Macey in a recent Wall Street Journal op-ed. So why has Congress yet to acknowledge, much less seriously debate, legislation that could appropriately deal with the ongoing crisis of credibility within our civil justice system?

Within the past several months, three of the nation's most powerful, widely known plaintiffs' lawyers have pleaded guilty to federal felonies in connection with their conduct as attorneys. Melvyn Weiss, of the firm formerly known as Milberg Weiss, his former law partner William Lerach and Mississippi legend Richard “Dickie” Scruggs each copped to conspiracy charges — Weiss and Lerach for paying a stable of on-call shareholder clients used in trumped up securities litigation and Scruggs for bribing a judge over the

distribution of lawyers' fees in a Hurricane Katrina insurance lawsuit.

Weiss and Lerach are largely credited or blamed, depending on one's point of view, for inventing the modern securities class action wherein investors sue corporations and their senior executives for alleged fraud when their stocks lose value, claiming to have been cheated. Since 1965, according to syndicated columnist George Will, Milberg Weiss has “won, often by tactics indistinguishable from extortion, \$45 billion from corporations.” (The entire firm also faces federal racketeering charges.)

Scruggs was no small-time operator either. Also an innovator, he made a name for himself in asbestos cases, and his so-called “home cookin'” helped force four tobacco giants into a landmark \$246 billion settlement with 46 states and various private sector personal injury law firms in 1998. Scruggs' firm stands to gain \$1 billion from that settlement alone and has aggressively pursued insurers and other “deep pocket” defendants with litigation.

Talk about big business. Scruggs, Lerach and Weiss personified the industrialization of personal injury and securities litigation that, during



the past few decades, radically changed America's legal climate, diminished the concept of personal responsibility and eroded the public's respect for the rule of law, all while siphoning hundreds of billions of dollars in judgments and legal fees away from more economically productive use.

Now Scruggs, Lerach and Weiss have given a whole new meaning to the term “criminal lawyers.” But incredibly, their behavior — unlike the behavior of baseball slugers Barry Bonds, Mark McGuire and Sammy Sosa — hasn't drawn scrutiny in Washington. Like the home run kings, the tort kings set bad examples within a very competitive industry. And their overreaching and outright cheating have led to festering questions about the integrity and credibility of our civil courts.

If gasoline prices rise, Big Oil executives are dragged before congressional committees and television cameras, as they were last week. Other Big Business CEOs get similarly grilled whenever *their* industries are accused of the slightest wrongdoing.

But when three giants of Big Litigation plead guilty to corrupting our courts, Congress shows not the remotest interest in probing their industry's practices. Why?

According to OpenSecrets.org, the specialized Web site of the nonpartisan Center for Responsive Politics, no single industry group has contributed more to national political campaigns since 1990 than lawyers. In fact, the litigation industry's nearly \$784 million in campaign contributions through the 2006 election cycle easily exceeds those of the oil and gas, pharmaceutical, tobacco, insurance and gambling and casino industries *combined*.

In fairness, the \$784 million from lawyers included contributions from defense attorneys, too. But accompanying the many newspaper reports about jail terms and stiff fines for Scruggs, Lerach and Weiss in recent months were sidebar stories and editorials about the wealth and political influence many mega-millionaire plaintiffs lawyers wield nationally and within the states.

Despite this influence, Congress has in the past taken some measures to rein in the abuses of the tort bar. The Class Action Reform Act, signed into law by President Bush

in early 2005, has been credited with reducing the number of speculative, constitutionally questionable class action lawsuits that plaintiffs attorneys had previously shopped to friendly state court judges around the country, regardless of where the plaintiffs and defendants resided or did business or where the alleged injuries in a given case may have taken place.

The U.S. House of Representatives also passed, in 2004 and 2005, the Lawsuit Abuse Reduction Act (LARA), which aimed to reinstate serious sanctions for attorneys found by a judge to have filed a "frivolous" claim or motion. Both times, senators failed to give the measure any consideration.

But the need for the LARA persists. In 1993, mandatory sanctions for filing frivolous lawsuits contained in Federal Rule of Civil Procedure 11 were eliminated, despite the fact that a survey at the time showed a strong majority of federal judges preferred the rule as it was. The federal rule change triggered comparable state rule changes which have allowed judges to forgo sanctions, reduced the likelihood that a plaintiff's lawyer will be forced to pay a defendant's needless legal expenses and provided a 21-day "safe harbor" period during which offending lawyers can simply withdraw frivolous pleadings to avoid sanctions.

These changes have made it much easier for plaintiffs' lawyers to squeeze from defendants settlement figures just below what it might cost to fight their claims in court. Not surprisingly, businesses —

especially small businesses — now pay more for liability insurance.

Considering that America's per capita spending on tort litigation is already more than twice as high as that of any of any other industrialized country, members of Congress shouldn't need degrees in economics to figure out that lawsuit abuse takes a huge toll on the nation's ability to compete against its global rivals.

Without preventing plaintiffs from filing personal injury cases in jurisdictions with legitimate connections to their alleged injuries, the Lawsuit Abuse Reduction Act would, among other things, restore mandatory sanctions on parties who file frivolous lawsuits, abolish the "safe harbor" provision and appropriately restore risk to an attorney's decision to file a frivolous claim, and permit monetary sanctions, including reimbursement of reasonable attorney's fees and litigation costs in connection with frivolous lawsuits.

Many foreign countries already maintain such commonsense safeguards against lawsuit abuse. And the crimes of Scruggs, Lerach and Weiss aren't qualitatively different from the crimes of Dennis Kozlowski at WorldCom or Jeff Skilling and Ken Lay at Enron. So why aren't chairmen of the House and Senate judiciary committees and other congressional leaders willing to give needed tort reform legislation a serious hearing?

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