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REPORT NO. 4 OF THE
SECTION OF LITIGATION

RECOMMENDATION*

RESOLVED, That the American Bar Association reaffirms its support for access to the American system of justice without regard to financial wherewithal, and it is further

RESOLVED, That the American Bar Association supports the availability to access to the federal courts under the grant of diversity jurisdiction without regard to financial wherewithal, and it is further

RESOLVED, That the American Bar Association opposes loser pays legislation that would apply to all cases brought in the federal court pursuant to the grant of diversity jurisdiction.

REPORT

A hallmark of the American Bar Association has been the goal of providing access to justice for all. In that regard, the ABA has been a leader in supporting a) legal services for the poor, b) the allocation of more resources to the court system, c) improvements in the efficiency of handling cases and d) expanding the use of alternative dispute resolution. The ABA has also led the way in preserving diversity jurisdiction in the Federal courts, a fundamental grant of jurisdiction whose importance continues undiminished.

Now the ABA is confronted with a proposal, part of the Contract with America, which would undo much of the good that has been accomplished on access to justice issues while un-

dermining diversity jurisdiction in a fundamental way. For the first time this proposal would implement a loser pays requirement on all diversity cases filed in federal court, imposing this requirement without regard to the identity of the parties or the subject matter of the litigation.

The Bill provides that the District Court "shall award" to the party that "prevails" a reasonable attorney's fee that may not exceed the actual attorney's fees of the non-prevailing party or, if no such fee was incurred because the non-prevailing party had a contingency fee agreement, the reasonable fee that would have been incurred by that party if that party were represented by an attorney proceeding on a non-contingent basis. The

*The recommendation was approved. See page 28. (Judge Matthew Byrne, Jr., of California abstained from all voting with regard to this recommendation.)

only discretion given to the Court is to refuse or reduce an award if the Court finds "special circumstances" that would make an award "unjust," terms otherwise undefined. The problems with this loser pays provision are profound.

First, and most important, it undermines access to the federal courts by the middle class and the poor. All of the advantages provided by the time-honored availability of lawyers who will take matters on contingent fees are jettisoned by the fact that the client who hires a lawyer on a contingent fee basis, if she were to lose, would be responsible for the fees of the other side. Even for those who are able to proceed on a non-contingent fee basis, the fact that the individual or small company might be liable not just for their lawyer's fees but for double those fees means that the access to the courthouse will be reduced.

The proposal would also fall harshly upon those who bring litigation to vindicate public rights and establish important principles. Entities that bring such litigation have difficulty obtaining lawyers and finding the necessary funding for legal services now. If in pressing such litigation in the future they were forced to confront the penalty effected by this loser pays rule, much, if not all, of this important law-shaping litigation will not be brought in the federal Courts.

The rule is in effect a regressive tax on the right to litigate. A fee shifting statute will not deter wealthy corporations and individuals from litigating their claims. The rule will bind more and more until it reaches the poorest of our citizens, who only can proceed through counsel who undertakes the matter on a contingency fee or on a pro bono basis. But the benefits offered by those alternatives would be totally eliminated by this legislation.

The proposal draws on the experience with fee shifting provisions that are employed in England and Wales. When supporters of this proposal look across the Atlantic for support, they fail to acknowledge that all litigants in England and Wales whose incomes are below \$45,000 a year receive complete free legal services and for them loser pays is no deterrent.

Its advocates suggest that one purpose of the rule is eradicating frivolous litigation. The problem is that the proposal makes no distinction between cases that are frivolous and those that are meritorious; all are subject to the same draconian provision. Thus, it will discourage the institution of any litigation unless the individual or small company is so convinced of the merits of its case that it is prepared to run the significant risk of the fine this legislation imposes. The ABA should never find itself in the position of suggesting that the courts are only open for disputes where the result is certain. It is just in those situations where either the facts and/or the law present close questions that the courts provide an extraordinary service to our citizens for resolving their disputes.

The courts today have ample authority to deal with the frivolous lawsuit and to charge attorneys' fees against the loser in cases that cry out for such extraordinary relief. That court-imposed remedy is more than sufficient to penalize those who truly abuse our system of justice by bringing vexatious and frivolous litigation. The proposal is a frontal attack designed to end diversity jurisdiction, without repealing 28 U.S.C. § 1331. It virtually requires those who would otherwise be entitled to bring cases within that jurisdiction to file their claims in state court in order to avoid the vise created by its fee shifting terms. Thus, *sub rosa*, the legislation

creates a situation where the important benefit of being able to come into federal court, one the ABA has long supported, is only available to those for whom the "penalty" exacted by loser pays is something they can afford.

The proposal gives no equivalent choice to defendants who are forced into a loser pays situation by the choice made by the plaintiff. While it is easy to over-generalize and assume all plaintiffs will avoid loser pays at all costs and all defendants will embrace it, in fact many defendants, because of their limited means, will be shocked to learn that in order to have an opportunity to present what they believe to be a meritorious, albeit close-question-defense, must run the risk of paying not only their fees, but the fees of the plaintiff as well.

The proposal will foster legal maneuvering as parties try to become federal "plaintiffs" or "defendants" to take advantage of or avoid the operation of the statute. Defendants sued in state courts will file federal declaratory judgment actions and defendants sued in federal court will file non-removable state court actions. All of which will give rise to ancillary litigation over whether fees should be shifted and which cases should proceed or be stayed as multiple judges are presented with precisely the same claims.

The proposal will introduce into the settlement process economic leverage unrelated to the merits of the claims. The experience in England demonstrates this point. There cases in which fee-shifting is applicable settle at about one-half the value of cases where it does not apply.

Federal Courts Study Committee chaired by Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals. What that August group concluded bears repeating here:

"Although sometimes advocated, a general rule making losing parties fully liable for the winners reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk averse—as is likely to be true of middle-class persons who cannot risk a big loss. Furthermore, the rule could actually make settlement less likely: other things being equal, it increases the negotiation gap between the litigants. Even jurisdictions like the United Kingdom that formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases."

For all these reasons, we urge the American Bar Association House of Delegates to adopt the annexed resolution.

Respectfully submitted,

DAVID C. WEINER
Chair

Section of Litigation

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The problems with loser-pays legislation were best highlighted by the

Conclusion