

Advocate

COURT PROHIBITS MISLEADING SOLICITATION OF CLASS MEMBERS

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The court overseeing the McKesson securities litigation has recently issued an order castigating the misleading mass solicitation undertaken by two well known plaintiffs' law firms that were unsuccessful in their bid to obtain a leadership role in this consolidated class action. The firms, using direct mailings and internet and website postings, urged class members to retain them to file "individual" actions. The solicitations also included a pre-authorization to opt those persons out of the class action.

The court-appointed lead plaintiff, the New York State Common Retirement Fund (the "NYSCRF"), learned of the campaign and reviewed the solicitation materials. It concluded that the materials were misleading and seriously undermined the goals of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"). Therefore, the NYSCRF determined to challenge the solicitation in court. The Federal Court in California agreed with the NYSCRF's assessment. In an unprecedented decision, Judge Whyte ordered that: corrective notice be given to all recipients of the solicitations; all retainers could be unilaterally rescinded; any attempt in the future to obtain pre-class certification opt-outs is precluded. The court also set forth information required to be included in any future solicitation, including, requiring a prominent designation that the solicitation is an "Attorney Advertisement — Not An Official Notice — No Obligation to Respond." The soliciting attorneys must pay for the corrective notice.

The court, in compliance with the provisions of the PSLRA, had previously determined that the more than 50 class actions filed on behalf of purchasers of McKesson and HBOC securities alleging various violations of the federal securities laws should be consolidated and

proceed as one action. In consolidating the actions, the court expressly rejected the argument of numerous plaintiffs' attorneys, *including the soliciting attorneys*, that speculation about purported conflicts among class members militated against consolidation. In appointing the NYSCRF as lead plaintiff for the consolidated action, the court found, not only that it had the largest financial

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interest in the litigation, but also that it satisfied all of the other requirements of the PSLRA and was, therefore, the most adequate person to represent the interests of all class members.

Notwithstanding these findings by the court, the soliciting attorneys disseminated a "notice" directed to class members "representing" that the court-appointed lead plaintiff had conflicts and, therefore, would not prosecute certain claims vigorously in the consolidated action. The solicitations also represented that, for class members to protect their interest in these claims, they needed to act now and file an "individual" action with the soliciting attorneys. Though the actions were to be filed as individual actions, they were going to be aggregated and prosecuted as a group under the supervision and control of a "Steering Committee," hand-picked by the soliciting attorneys. The solicitation materials included a retention agreement that, among other things, authorized the soliciting attorneys to opt that person out of the class.

Judge Whyte found that the solicitation materials were inimical to the goal of the PSLRA to "prevent lawyers from fomenting unnecessary and duplicative litigation." He stated that they appeared to contemplate a scheme that would resurrect the "evil of past securities litigation [which] was the control that plaintiff's counsel exercised over large aggregated masses of clients, who minimally supervised their lawyers through unwieldy steering committees." Judge Whyte concluded that "the solicitation materials were misleading, if not intentionally deceptive."

The full text of the court's Order can be accessed at www.cand.uscourts.gov. (Click on "Recent Orders," then "Judge Whyte.")

In January, we issued a bulletin alerting you to deceptive mass solicitations undertaken by some law firms to secure lead plaintiff positions in securities class actions. See *Institutional Investor Advocate* January, 2000 Bulletin. This attempt to gain a "position" after losing the bid to be appointed lead counsel, is a new twist on the "solicitation" process. The NYSCRF's vigilance which brought the matter to the court's attention, and the order obtained, represent a significant victory for all class members and a stellar example of the effectiveness of an institutional investor protecting the class action process. The inventiveness of some traditional class action lawyers, however, knows no bounds when it comes to devising ways to get around the provisions of the PSLRA; investors must remain ever wary.

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