

**BILL NUMBER: H.R. 985 (Goodlatte, R-VA) as amended March 9, 2017**

**SUMMARY**

H.R. 985, entitled the Fairness in Class Action Litigation Act of 2017, makes significant changes to laws governing class action lawsuits, including prohibiting class certification unless “each class member has suffered the same type and scope of injury.” Among other provisions, also limits the amount and timing of attorney’s fees and allows defendants to automatically appeal class certifications.

**BOARD POSITION**

**Oppose.** The board’s policy is to oppose legislation that restricts the investment authority of the board or is inconsistent with the investment policy adopted by the board as presented in CalSTRS Investment Policy and Management Plan.

**REASON FOR THE BILL**

According to the author, “The current state of class action litigation has become an expensive business, and one easily gamed by trial lawyers to their own advantages. Frivolous lawsuits can cost parties millions of dollars. When baseless class action suits come before our courts, it not only impacts companies, but it has an impact on the American consumer who gets less, while lawyers get more.”

**ANALYSIS**

**Existing Law:**

Rule 23 of the Federal Rules of Civil Procedure governs federal class action lawsuits. The courts have interpreted Rule 23 over several decades, and the Advisory Committee on Civil Rules has reviewed and amended the rule several times. Among other things, Rule 23 requires that, in order to be certified as a class for purposes of a class action lawsuit, there are questions of law or fact common to the class. This rule is also known as the commonality standard.

**This Bill:**

Among other things, H.R. 985:

- Prohibits the certification of class action lawsuits unless a determination is made, based on “rigorous analysis of the evidence presented,” that:
  - “Each proposed class member suffered the same type and scope of injury.”
  - The class certification prerequisites of Rule 23 are satisfied.
- Prohibits attorney's fees from being paid until:
  - Distribution of the monetary recovery to class members has been completed.
  - The class action lawyer submits an accounting of the disbursement of funds paid by defendants in class action settlements to the Federal Judicial Center and the Administrative Office of the U.S. Courts.

- Requires a stay of discovery during preliminary motions to transfer, dismiss, strike or dispose of class allegations in class action proceedings.
- Requires class action lawyers to disclose any person or entity who has a contingent right to receive compensation.
- Requires appeals courts to permit appeals of class certifications.

H.R. 985 imposes significant new restrictions on class action lawyers and plaintiffs seeking to proceed under Rule 23. Among the stated purposes of H.R. 985 is to “assure fair and prompt recoveries for class members.” However, in practice, several provisions would do exactly the opposite by imposing unnecessary obstacles to class certification and additional procedural requirements substantially increasing the financial risk born by class action lawyers.

Specifically, the bill’s requirement that all class members suffer the “same type and scope of injury” is a significant departure from the commonality standard under Rule 23 and creates a potentially insurmountable hurdle in even the most basic securities class action cases. In a typical securities class action case, a company makes misleading statements artificially increasing stock prices that carry on for months or years. During that period, shareholders purchase and sell the artificially inflated priced stock, which results in varying degrees of harm. As a result, it would be impossible for any securities class action members to have the “same” injury.

In addition, H.R. 985 imposes several additional requirements that would increase the time and resources required of class action lawyers to pursue class action lawsuits resulting in increased financial risk. This could significantly diminish the appetite for class action lawsuits, which could result in increased incidents of corporate misconduct. In addition, those class action lawyers willing to undertake such risks would likely increase the contingency percentages they charge, reducing recoveries for institutional investors like CalSTRS.

## **LEGISLATIVE HISTORY**

S. 5 (Grassley, Public Law 109–2—Feb. 18, 2005) enacted the Class Action Fairness Act of 2005 to, among other things, amend the federal judicial code to specify the calculation of contingent and other attorney’s fees in proposed class action settlements that provide for the award of coupons to class members.

## **PROGRAM BACKGROUND**

According to board policy, CalSTRS Corporate Governance Program is intended to be a catalyst for enhanced management accountability, disclosure and performance with the objective to enhance long-term shareholder returns for the exclusive interest of members, participants and beneficiaries. As a key component of this program, CalSTRS pursues securities class action litigation both as a passive participant as a class member as well as, in select cases, as a lead plaintiff. The goals of CalSTRS securities litigation efforts are to increase the value of settlements, increase the long-term values of investments and deter wrongful corporate conduct that undermines the integrity of financial markets. CalSTRS currently averages an estimated \$10 million per year in recoveries as a result of securities litigation.

**FISCAL IMPACT**

Program Cost – Unknown losses resulting from rejected class certifications, increased opportunity costs from delayed recoveries, and reduced recoveries due to potential increases in contingency percentages charged by class action lawyers.

Administrative Costs/Savings – Unknown costs to provide class action lawyers with evidence of class eligibility.

**SUPPORT**

U.S. Chamber of Commerce Institute for Legal Reform

**OPPOSITION**

CalSTRS

Numerous others

**ARGUMENTS**

Pro: Potentially reduces frivolous class action lawsuits.

Con: Prevents class certification for CalSTRS securities litigation efforts.

Eliminates recoveries of damages from corporate malfeasance.

Significantly increases the time and resources required to undertake class action lawsuits.

Increases the opportunity costs of delayed payments.

Could increase contingency percentages of class action lawyers.

Could undermine the integrity of financial markets by making it more difficult to hold corporations accountable.

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