Bridging the Political Divide: Conservative and Liberal Perspectives Agree on the Benefits of Class Actions

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Introduction

Public pension funds are among those with the most at stake in the enforcement of the federal securities laws through class actions, yet the efficacy and legitimacy of class actions are often clouded by ideological rhetoric. For public pension attorneys navigating fiduciary obligations in increasingly polarized environments, it is crucial to understand that support for class actions transcends political ideology. Conservative and liberal principles supporting class actions are quite similar. This article offers a bipartisan case for continued engagement and leadership in securities fraud class action litigation.

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The Class Action Mechanism

It is important to understand how class actions operate. Class actions allow fraud victims to take advantage of economies of scale to vindicate victims' rights. Victims of fraud often suffer losses too small to justify the expense of litigation, or they may not even know they were defrauded. Class actions overcome this by allowing one representative to sue on behalf of all similarly situated victims, transforming a widespread but individually small harm into an actionable claim.

Consider *Kukorinis v. Walmart, Inc.*, where plaintiffs alleged Walmart's scales inflated product weights and mislabeled produce.[1] No single shopper lost enough to justify a lawsuit, but in the aggregate Walmart allegedly profited substantially from deceptive practices. The class action settled for $45 million,[2] demonstrating the powers of aggregation to hold wrongdoers accountable.

This is even more critical in the securities context. When companies lie to investors about their financials or business, they defraud investors just as surely as if they breached a contract.

The Conservative Case for Class Actions

From a conservative perspective,[3] class actions represent a decentralized and free-market way to uphold the rule of law.

Even for small government conservatives, adjudicating breach of contract, theft, and fraud is an essential role of government.[4] These rules are essential to the functioning of markets, which depend on voluntary exchange and trust. Conservatives and liberals understand that contracts are the backbone of free markets, and for markets to work efficiently, promises must be credible—and punished by strong anti-fraud laws—and property rights must be secured by strong anti-theft enforcement. Unchecked breach of contract, fraud, and theft distort markets and undermine societal trust and market efficiency.

One option is to entrust enforcement to regulators where private actors report their dealings to government regulators or agencies, usually before those dealings occur. The government, in turn, may be empowered to prevent the venture from occurring, or otherwise levy charges against individuals and businesses that, in the government's view, should be punished. Under this model, government alone has the power to decide whether and how to investigate, prosecute, and penalize breach of contract, theft, and fraud on terms that the government sees fit.

This is the European method for handling such actions. When regulators failed to catch the key misconduct in both the Volkswagen diesel scandal, in which Volkswagen inserted computer code that only turned on the cars' emission controls when the car was being tested, but not on the road, and the GM ignition switch scandal, in which GM's ignition switches suddenly turned off, causing fatal crashes. The crucial discoveries were made by private attorneys enforcing plaintiff's private rights.[5] However, only American car owners benefited from the $15 billion class action settlement.[6]

Privatized enforcement upholds both conservative and liberal principles in that it empowers victims to seek redress for the harms they have suffered. Victims use their own resources to bring claims, and if they succeed, they are compensated in proportion to the harm suffered. This model aligns incentives with enforcement: wrongdoers face real consequences and victims are compensated, while enforcement is driven by those who suffered harm.

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The Liberal Case for Class Actions

The liberal, or left-leaning,[7] rationale of class actions is more familiar, grounded in equity, consumer protection, and corporate governance and accountability.

Class actions give ordinary people and institutional investors alike a pathway to justice that may otherwise be inaccessible. Lawsuits are expensive, and many claims are not individually viable. Liberals see class actions as a democratizing tool that ensures all individuals, regardless of wealth or status, may vindicate their rights and receive compensation in the amount of their loss, regardless of the size of their loss.

This is especially true in securities litigation. Individual fund members may lose only a few dollars per share, which is hardly worth an individual claim. But pension funds represent thousands of members, many in public service jobs, and are uniquely positioned to bring class actions that protect both financial security and long-term retirement stability.

In this sense, class actions serve both liberal and conservative principles. For liberals, the aggregation of many cases of small individual harms promotes access to justice. But, as seen above, for conservatives, this same aggregation of claims is an effective tool to protect property rights, punish wrongdoers, and ensure the efficient allocation of capital in a market-based system.

Class actions also serve as a necessary counterbalance to corporate power.[8] They allow dispersed victims to aggregate claims and hold executives accountable for misconduct that would otherwise go unchecked.

In the securities context, the executives who run America's largest corporations often operate with little shareholder oversight. Securities class actions empower investors to challenge misconduct. For example, a securities class action against BP recovered $175 million for alleged misrepresentations surrounding the Deepwater Horizon oil spill, which killed 11 workers and spilled an estimated 4.9 billion barrels of crude oil into the ocean.[9]

The liberal principle of corporate accountability fits hand-in-glove with conservative principles for privatized market regulation. For liberals, the BP and Volkswagen cases exemplify fairness and accountability. For conservatives, privatized enforcement to remedy fraud and damaged property ensures efficient markets with minimal government intrusion. Class actions achieve what government alone cannot: efficient, market-based enforcement of the rule of law.

Conservatives and Liberals Can Agree on Privatized Enforcement Through Class Actions

Finding Common Ground: Conservatives and Liberals Can Agree on Privatized Enforcement Through Class Actions

As demonstrated above, both conservatives and liberals can support class actions. The actions that enforce the conservative's desire for anti-fraud, anti-theft, and contract enforcement are the same actions that punish corporate wrongdoing and hold powerful actors accountable for their actions. Similarly, the actions that ensure victims' rights are vindicated are the same actions that democratize access to the courts and allow everyone to seek redress for their harms.

Class actions thus embody liberal and conservative principles. They prevent businesses from profiting from widespread fraud in amounts too small to trigger individual suits, allowing victims to vindicate their rights, and deter executives from manipulating markets for personal gain. They provide swift and fulsome redress for wrongdoing and maintenance of the rule of law essential to a free and prosperous society, while preserving the limited-government values conservatives prize. This is nearly identical to liberal reasoning: by harnessing economies of scale, class actions allow all individuals, regardless of their level of resources or background, to vindicate their rights and hold corporations accountable for wrongdoing. At bottom, and at minimum, conservatives and liberals can agree that the class action mechanism is an important tool in the regulatory toolbelt.

Conclusion

Public pension plans are not partisan actors, they are fiduciaries. Whether one subscribes to conservative or liberal principles, class actions are indispensable. By taking a leadership role in class actions, pension funds do more than recoup funds and protect the retirements of their beneficiaries. They help maintain market integrity, deter future fraud, and elevate best practices in corporate governance. In a polarized age, class actions remain a rare bipartisan tool where conservatives and liberals alike can agree that the rule of law, faithfully enforced, sustains both markets and democracy.

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Endnotes

[1] No. 8:22-cv-02402-VMC-TGW, ECF No. 56 (M.D. Fla. July 20, 2023).

[2] *Id.*, ECF No. 132 (M.D. Fla. June 28, 2024).

[3] By conservatives, we refer to those who adhere to the tenants of conservatism, including free enterprise, limited government, private ownership, and socially traditional ideas.

[4] *See* Milton Friedman and Rose Friedman, Free to Choose: A Personal Statement 30 (Harcourt Brace Jovanovich, 1990) ("Th[e] role of government also includes facilitating voluntary exchanges by adopting general rules – the rules of the economic and social game that the citizens of a free society play."); Milton Friedman, Capitalism and Freedom 34 (University of Chicago Press, 1962) ("A government which maintained law and order, defined property rights, served as a means where we could modify property rights and other rules of the economic game, adjudicated disputes about the interpretation of the rules, enforced contracts, promoted competition, provided a monetary framework, engaged in activities to counter technical monopolies and to overcome neighborhood effects widely regarded as sufficiently important to justify government intervention ... such a government would clearly have important functions to perform. The consistent liberal is not an anarchist.").

[5] Brian T. Fitzpatrick, The Conservative Case for Class Actions 42 (The University of Chicago Press, 2019); Fitzpatrick, *supra* note 3.

[6] *See, e.g.*, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litig.*, No. 15-md-02672-CRB, ECF No. 3229 (N.D. Cal. May 17, 2017) (order granting final approval of settlement regarding 3.0-liter cars for a "nationwide," *i.e.*, American-only class).

[7] By liberal, or left-leaning, we refer to those who subscribe to principles of liberalism, including supporting individual rights, civil liberties, democracy, and free enterprise.

[8] Notably, conservatives also decry corporate overreach. As Milton Friedman observed, "Over and over again you have the big businessman who talks very effectively about the great virtues of free enterprise and ... he is off on a plane to Washington to push for special legislation ... The National Association of Manufacturers, the Chamber of Commerce – you name them – the big organizations and big business – they are almost always on the wrong side." Milton Friedman, *The Source of Strength* (speech delivered to the Presidents' Club of Michigan General Corp., April 2, 1977).

[9] Vince Sullivan, *BP To Pay $175M To Settle Deepwater Horizon Investor MDL*, Law360 (June 3, 2016) https://www.law360.com/articles/803372.