

June 27, 2017

CalPERS v. ANZ Securities: U.S. Supreme Court Holds That Securities Act's Three-Year Statute of Repose Is Not Tolled by a Pending Class Action

Decision Has Important Implications for Class Action Lawsuits and Potential Opt-Out Claimants

SUMMARY

In 1974, the U.S. Supreme Court held in *American Pipe & Construction Co. v. Utah* that the commencement of a putative class action lawsuit tolls “the applicable statute of limitations as to all asserted members of the class,” including those member who later bring individual actions. Accordingly, unnamed class members could wait to determine whether to bring individual claims without risk that those claims would be barred by the statute of limitations.

Yesterday, in a case closely watched by the securities bar, the U.S. Supreme Court held in *California Public Employees' Retirement System v. ANZ Securities* that *American Pipe* tolling is inapplicable to the three-year statute of repose for claims brought under Section 11 of the Securities Act of 1933, because statutes of repose, as opposed to statutes of limitations, are not subject to equitable tolling. Accordingly, California Public Employees' Retirement System's (“CalPERS”) lawsuit—brought in 2011 against underwriters of 2007 and 2008 Lehman Brothers offerings—was untimely under the applicable three-year statute of repose, even though similar claims had been pending in a putative class action.

As a result of yesterday's decision, the filing of putative class action lawsuits will serve only to toll statutes of limitations but not statutes of repose. The ruling may encourage unnamed putative class members in cases subject to statutes of repose to file separate actions or to seek to join the putative class action as a named plaintiff before the statute of repose expires in order to protect their right to pursue individual

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claims at a later stage. Yesterday's decision will also allow class action defendants in cases where statutes of repose apply to better assess the risk they face from opt-out litigants and other potential individual actions beyond the risks faced from the putative class action.

BACKGROUND

Section 11 of the Securities Act of 1933 ("Securities Act") provides investors with a "right of action against an issuer or designated individuals," including underwriters, for any material misstatements or omissions in a registration statement.¹ Section 11 suits are subject to the time bars set out in Section 13 of the Securities Act providing that an action must be brought "within one year after the discovery of the untrue statement or omission" (statute of limitations), and that "[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public" (statute of repose).²

In 2008, a putative class action was filed against underwriters of 2007 and 2008 Lehman Brothers offerings, alleging that registration statements for certain of these offerings included material misstatements or omissions.³ CalPERS, the largest public pension fund in the country and an unnamed member of the putative class, had purchased securities in some of these Lehman offerings.⁴ In February 2011, more than three years after the relevant securities offering, CalPERS filed a separate complaint against the Lehman underwriters, alleging identical securities law violations as did the putative class action complaint.⁵ Soon after, a proposed settlement was reached in the putative class action, from which CalPERS opted out.⁶ The underwriters then moved to dismiss CalPERS' individual suit, arguing that the Section 11 claims were untimely under the three-year period in Section 13.⁷ The District Court ruled in favor of the underwriters, holding that the three-year period in Section 13 was not tolled due to the pending putative class action.⁸ The Second Circuit affirmed.⁹

The U.S. Supreme Court granted *certiorari* to resolve a split among the Courts of Appeals over whether "§13 permits the filing of an individual complaint more than three years after the relevant securities offering, when a class action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it."¹⁰

THE ANZ DECISION

In a 5-4 opinion authored by Justice Kennedy, the U.S. Supreme Court affirmed the ruling of the Second Circuit and held that CalPERS' individual complaint, filed more than three years after the relevant securities offerings, was properly dismissed as untimely.¹¹ The Court held that Section 13's three-year time limit is a statute of repose, and thus is not subject to the Supreme Court's 1974 ruling in *American Pipe*, which held that the commencement of a securities class action lawsuit "suspends the applicable statute of limitations as to all asserted members of the class."¹² *American Pipe* had potentially benefitted the parties and the court system by removing any requirement for individual litigants to file separate

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actions while (i) the court determined whether the action could proceed as a class (and thus cover the individual litigant's claim) or (ii) the litigant determined whether it wanted to participate in any class action settlement.

In reaching its decision yesterday, the Court reasoned that each of the two categories of statutory time bars serves a "distinct purpose": whereas statutes of limitations are designed to encourage plaintiffs "to pursue diligent prosecution of known claims," statutes of repose are enacted to "effect a legislative judgment that a defendant should be free from liability" after a determined period of time.¹³ Analyzing the structure and language of Section 13, the Court concluded that the three-year bar is a statute of repose, and thus reflected the legislative objective to provide a defendant a complete defense to any suit commenced after a certain period by creating a "fixed bar against future liability."¹⁴

Having determined that the three-year limit is a statute of repose, the Court held that the effect of such a provision is to "override customary tolling rules arising from the equitable powers of courts."¹⁵ The Court reasoned that the "unqualified nature" of a statute of repose "supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles."¹⁶ As a result, the Court rejected CalPERS' argument that the rationale of *American Pipe* applies to all statutory bars, including statutes of repose. As the Court highlighted, the source of the tolling rule applied in *American Pipe* was the "traditional equitable powers of the judiciary," as opposed to judicial interpretation of statutory provisions.¹⁷ Because the object of a statute of repose, "to grant complete peace to defendants," supersedes the application of an equitable tolling rule, no deviation from the time limit of Section 13 is permissible.¹⁸

The Court next addressed certain policy concerns that CalPERS raised, including CalPERS' contention that denying *American Pipe* tolling to a statute of repose would not provide any benefit to defendants because defendants were already on notice of the claims against them through the filing of a putative class action suit. The Court took the contrary view, reasoning that, having a more definite sense of "the number and identity of individual suits, where they may be filed, and the litigation strategies" after the expiration of the statute of repose would help the defendant "calculate its potential liability or set its own plans for litigation" with better precision.¹⁹

The Court also rejected CalPERS' concern that individual litigants would lose their opportunity to file individual claims, noting that "a simple motion to intervene or request to be included as a named plaintiff in the class-action complaint may well suffice" to preserve an individual claim should a class ultimately not be certified or the case result in a settlement that the individual litigant does not like.²⁰ And the Court rejected CalPERS' prediction that failing to apply *American Pipe* tolling to statutes of repose would lead to "nonnamed class members [inundating] district courts with protective filings," noting that CalPERS "has

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not offered evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013.”²¹

Finally, the Court rejected CalPERS’ alternative argument that Section 13’s requirement that an action must be “brought” within three years was satisfied by the filing of the initial putative class action complaint.²² The term “action,” the Court ruled, refers specifically to a “judicial proceeding,” as opposed to merely the “general content of claims,” and as a result the filing of a putative class action complaint, in a “separate forum, on a separate date, by a separate named party,” cannot be said to be the same “action.”²³

Justice Ginsburg’s dissent, joined by Justices Breyer, Sotomayor, and Kagan, argued that CalPERS’ claim against Lehman was timely because of the filing of the putative class action complaint on behalf of all members of the putative class.²⁴ According to Justice Ginsburg, the filing of the class complaint would have constituted adequate notice to Lehman in providing the “essential information necessary to determine both subject matter and size of prospective litigation.”²⁵ In Justice Ginsburg’s view, when CalPERS decided to pursue its claims individually, it simply “took control of the piece of the [putative class] action that had always belonged to it.”²⁶ Justice Ginsburg viewed the majority’s opinion as potentially imposing harsh consequences on less sophisticated class members who fail to file a protective claim within the repose period and burdening the courts with increased costs and complexity of litigation.²⁷

IMPLICATIONS

ANZ resolves a question that has divided circuit courts for years, and thus removes the uncertainty as to whether filing a putative class action lawsuit also tolls a statute of repose. The decision may have significant implications for opt-out practices in class action lawsuits under the Securities Act and other laws with statutes of repose.

First, yesterday’s decision will likely be applied to other claims subject to statutes of repose, including for violations of certain federal securities fraud claims and for breaches of fiduciary duty under the Employee Retirement Income Security Act. The decision could also influence the determinations of State courts as to their States’ statutes of repose.

Second, larger investors may seek to preserve their option of bringing individual claims by filing their own individual actions shortly after the commencement of a putative class action complaint or by seeking to intervene in the putative class action as a named plaintiff. Although such individual lawsuits likely would be stayed pending the putative class action lawsuit, these additional filings could result in more complicated (and cumbersome) initial case management procedures.

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Third, defendants facing putative class actions based on claims governed by a statute of repose will have a better understanding—at least after the statute of repose has run—as to potential exposure from individual litigants (should a class not be certified) or opt-out litigants, and have a powerful weapon to obtain dismissal of any individual cases filed after the statute of repose has expired.

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-5-

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ENDNOTES

¹ *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U. S. ____ , No. 13-435, slip op. at 2 (Mar. 24, 2015); see 15 U. S. C. §77k(a).

² 15 U. S. C. §77m.

³ *Cal. Pub. Employees' Ret. Sys. v. ANZ Sec., Inc., et al.*, 582 U. S. _____, No. 16-373, slip op. at 2 (June 26, 2017).

⁴ *Id.* at 2 - 3.

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *Id.*

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 16 – 17.

¹² *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 540 (1974).

¹³ *ANZ*, slip op. at 5 (citation omitted).

¹⁴ *Id.*

¹⁵ *Id.* at 8.

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 14.

²¹ *Id.* at 13.

²² *Id.* at 14.

²³ *Id.* at 14.

²⁴ *Id.* at 2 (Ginsburg, J., dissenting).

²⁵ *Id.* at 3 (Ginsburg, J., dissenting).

²⁶ *Id.*

²⁷ *Id.* at 4 (Ginsburg, J., dissenting).

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