

Securities Litigation

Supreme Court Holds That Statute of Repose Imposes Absolute 3-Year Bar on Opt-Out Claims

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On June 26, 2017, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*,^[1] the Supreme Court held that the three-year statute of repose in the Securities Act of 1933 prevents plaintiffs from pursuing individual actions under Section 11 more than three years after the challenged offering, even if a class action was pending, because the pendency of a class action tolls statutes of limitations and not statutes of repose. In resolving the circuit split on the issue, the Supreme Court, in a 5-4 decision, gave defendants a complete defense against suits initiated after the conclusion of that period. As a result, plaintiffs with Section 11 claims must opt out of a class action and file their own actions (or perhaps move to intervene in the class action) within the three-year period or be barred from pursuing individual claims. This holding provides class action defendants with greater certainty and predictability concerning their exposure and requires class action plaintiffs to consider filing timely actions to protect their ability to opt out of a future class settlement. Defendants in other types of class actions will doubtless look to characterize the limitations periods applicable to those types of claims as statutes of repose that also cannot be tolled.

Discussion

At issue was the timeliness of a lawsuit filed by the Petitioner, "CalPERS," against underwriters of Lehman Brothers ("ANZ") challenging the accuracy of the content of registration statements issued by Lehman Brothers in connection with 2007 and 2008 securities offerings under Section 11 of the 1933 Act. CalPERS was a class member in a putative class action suit brought against Lehman in September 2008 alleging that Lehman's registration statements contained material misstatements or omissions. In February 2011, before class certification was decided, CalPERS filed a separate complaint, bringing identical claims. When the class action settled, CalPERS opted out of the settlement, in favor of pursuing its separate action.

ANZ argued that CalPERS' individual action was time-barred under Section 13 of the 1933 Act, which states:

No action shall be maintained to enforce any liability created under [Section 11] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence In no event shall any such action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public.^[2]

As the transactions underlying CalPERS' individual complaint occurred more than three years before it initiated its separate action in February 2011, ANZ argued that CalPERS' claims were untimely and should be dismissed. CalPERS, meanwhile, contended that the three-year cap merely put an upper limit on the discovery period and that its claims were put on hold during the pendency of the class action lawsuit according to the doctrine known as *American Pipe* tolling.^[3]

The Southern District of New York agreed with the ANZ, as did the Second Circuit. In an opinion by Justice Kennedy, the Supreme Court affirmed, concluding that Section 13 "creates a fixed bar against future liability" for violations of Section 11.^[4]

The Court arrived at this conclusion by reasoning, first, that the three-year time bar set forth in Section 13 constituted a "statute of repose," rather than a "statute of limitation." According to the Court, statutes of repose are distinct insofar as they are aimed not simply at encouraging plaintiffs to assert known claims in a timely fashion, but also at "giv[ing] more explicit and certain protection to defendants."^[5] The Court then reasoned that, "[i]n light of the purpose of a statute of repose," such statutes are generally not subject to tolling.^[6] Indeed, it observed that

[t]he purpose and effect of a statute of repose . . . is to override customary tolling rules arising from the equitable powers of courts. By establishing a fixed limit, a statute of repose implements a legislative decision that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability. The unqualified nature of that determination supersedes that courts' residual authority and forecloses the extension of the statutory period based on equitable principles.^[7]

Thus, *American Pipe* tolling—according to which, in the interest of fairness to plaintiffs, “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class”^[8]—does not apply to claims brought pursuant to Section 11 of the 1933 Act after three years from the date a registration statement was issued.

In a fierce dissent, Justice Ginsburg—joined by Justices Breyer, Sotomayor, and Kagan—argued, in effect, that the timely initiation of the class action suit containing identical allegations was sufficient to preserve CalPERS’ right to sue.^[9] Justice Ginsburg observed that, “whether CalPERS stayed in the class or eventually filed separately, [ANZ] would have known, within the repose period, of their potential liability to all putative class members.”^[10] The result of the Court’s decision, the dissent argued, is to disadvantage the “least sophisticated” class members, who may inadvertently lose their right to sue by failing to bring a protective claim within three years.

Conclusion

Overall, this decision is a major win for banks, underwriters, and issuers, who can now obtain global legal peace through class action settlements and rest assured that they will not face liability once the three-year period from the date of a public offering has lapsed. The decision also offers clarity to prospective plaintiffs and defendants alike.

[1] No. 16-373 (U.S. June 26, 2017), https://www.supremecourt.gov/opinions/16pdf/16-373_pm02.pdf

[2] 15 U.S.C. § 77m.

[3] *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

[4] *CalPERS*, No. 16-373, slip. op. at 5.

[5] *Id.* at 5.

[6] *Id.* at 7.

[7] *Id.* at 8 (internal quotation marks, alterations, and citations omitted).

[8] *American Pipe*, 414 U.S. at 554.

[9] *CalPERS*, No. 16-373 (Ginsburg, J., dissenting), slip. op. at 2.

[10] *Id.*

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