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Supreme Court holds that class action-equitable tolling does not apply to statute of repose in Securities Act case

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The Supreme Court issued its opinion in *California Public Employees Retirement System v. ANZ Securities, Inc.*, No. 16-373 (*CalPERS*) on June 26, 2017, holding that the equitable tolling rule set forth in *American Pipe* does not apply to claims under Section 11 of the Securities Act of 1933 because the statutory language requiring such claims be brought within three years is a statute of repose, and courts are not free to apply equitable tolling doctrines to vary an explicit statute of repose. The Court held that statutes of repose, such as that found in Section 13 of the Securities Act, reflect a legislative determination to grant a measure of certainty to defendants that the courts do not have the power to override. Thus, the Court affirmed the dismissal of an action brought by a putative class member more than three years after the subject securities offering. The opinion has important practical implications for plaintiffs and defendants in the context of class action litigation.

In 2008, class actions were filed under Section 11 of the Securities Act alleging that false statements were made in registration statements for certain public offerings of Lehman Brothers securities. CalPERS was an unnamed class member. In 2011, CalPERS filed its own separate case, which was consolidated with the class action. Eventually the class case settled, but CalPERS opted out in favor of trying its fortune in its stand-alone case. Defendants then moved to dismiss CalPERS' case on the grounds that it was filed more than three years after the securities issue in question. Section 13 of the Securities Act provides a "one year from discovery" statute of limitations applicable to actions brought under Section 11, but then states, in a separate sentence, that "[i]n no event" may an action be brought "more than three years after the security was bona fide offered to the public." The question before the Court, therefore, was whether CalPERS' status as an unnamed class member in the timely filed class action tolled the three-year rule so as to allow CalPERS to pursue its otherwise untimely individual case after CalPERS opted out of the class action. The district court held "no," and the Second Circuit and a majority of the Supreme Court agreed.

At the Supreme Court, the majority and four-justice dissent clashed over how statutes of repose should be applied in the class action context in light of the equitable tolling doctrine previously laid down in *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974). In that case, some

putative class members rushed to file individual cases after class certification was denied in an antitrust case. The Court held that the statute of limitations was tolled from the date the class action was filed until the date class certification was denied. Because the class action complaint was filed eleven days before the statute ran, class members had eleven days to file their own complaint or motion to intervene after class certification was denied. CalPERS took the position at the Supreme Court, as it had in the courts below (adopted by the dissent), that it should be treated like the class members in *American Pipe*.

The majority disagreed, emphasizing that the three-year limitation period in Section 13 is a "statute of repose," rather than a mere statute of limitation as in *American Pipe*. As such, the statute reflects a legislative determination that defendants should enjoy finality as to their liability after a set period of time. Evidence that the second sentence of Section 13 was a statute of repose, rather than a statute of limitation, included the inflexible language of the provision ("In no event …"), and the fact that the three-year limit was tied to the date of the "offering," and not to any plaintiff-specific facts such as notice or accrual of the cause of action. The Court also noted that the provision had been amended, just one year after enactment, to shorten the outside limit on suits to three years, which the Court found was evidence of an intent to protect defendants in "fast-changing markets" from protracted exposure by limiting the time to bring claims. Critically, because a statute of repose reflects an express legislative determination, the courts are not free to use their equitable powers to alter that intent by applying equitable tolling rules, as had been done to a statute of limitation (not repose) in *American Pipe*.

The dissent argued that the purpose of a statute of repose would be fulfilled even if equitable tolling is applied because a defendant in class action litigation is given fair notice of the extent of the liability it faces from all class members. Later-filed actions by opt-out class members do not defeat that expectation by presenting a defendant with an unanticipated level of risk. The majority disagreed, and pointed out that there is a big difference between facing a single class action versus multiple stand-alone lawsuits brought by well-funded and highly motivated individual parties who can each assert substantial damages in their own name. In the view of the majority, allowing a class action to fragment into numerous individual cases after the repose period, as a result of denial of class certification or numerous opt-outs from a perceived cheap settlement, would constitute an unexpected change to the scope of a defendant's risk, defeating the goal of certainty inherent in statutes of repose.

The Court's decision in CalPERS has important practical implications for parties and counsel. It means that whenever a claim is subject to a statute of repose, a putative class member must monitor the litigation, and the expiration of the period of repose, and cannot rely on the pendency of a class action to preserve its right to opt out of the class and bring an individual claim. That right can only be preserved by intervening as a named class member or commencing a separate action in a timely fashion, which may require action long before the grant or denial of class certification. The dissent complained that this was unworkable and inefficient, because it would result in a tidal wave of prophylactic lawsuits filed by class members to hedge against the risk of denial of class certification (or a low class settlement), undermining the utility of the class action procedure from the judicial management perspective. But the majority replied that this fear was overblown because class actions generally champion the rights of parties whose individual claims are too small to justify a stand-alone action, and pointed to the absence of an increase in such individual actions in the Second Circuit, which issued its decision in this case in 2013.

The decision has implications for class action defendants and plaintiffs. The decision may impact the timing and strategy of plaintiffs in seeking class certification where statutes of repose are involved and, notwithstanding the Court's observations of filings in the Second Circuit, could lead to a proliferation of prophylactic filings by individual putative class members, particularly institutional investors, in some situations. As the minority pointed out, when the certification occurs *after* a statute of repose has run, the class notices will need to inform class members that their decision to opt out at that stage will leave them without a remedy unless they have already protected their rights by intervening or filing their own action.

The decision has implications beyond Securities Act claims. One can anticipate arguments that the requirement in 28 U.S.C. § 1658 that private claims of securities fraud under the Securities Exchange Act of 1934 be brought "not later than" five years after the alleged violation is also a statute of repose that cannot be tolled by the pendency of a class action.

And, outside of the securities realm, there are other claims that are subject to language that may be construed as a statute of repose. For example, many states have enacted laws with a statute of repose for latent construction defects. *E.g.,* Fla. Stat. Ann. § 95.11(3)(c) (West 2016) ("In any event, the action *must* be commenced within 10 years after" the latest of possession, a certificate of occupancy, abandonment of construction or completion of the relevant contract) (emphasis added); *see also, e.g.,* Ala. Code Ann. § 6-5-221 (West [date]) (seven-year statute of repose for latent construction defects); Ariz. Rev. Stat. Ann. § 12-552(A), (B) (West 2016) (eight- or nine-year statute of repose for latent construction defects); Mo. Ann. Stat. § 516.097 (West 2016) (similar). Left for another day are questions of how these provisions may be interpreted by the state courts in the class action context.

The CalPERS opinion reflects the clash of two contrary views regarding the power of courts to apply equitable tolling in the context of class actions. While the dissent would have crafted a rule more favorable to investor plaintiffs, the majority opinion came down firmly on the side of defendants, emphasizing the overriding importance of giving defendants certainty about the extent of their legal liability.

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