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Alert

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U.S. Supreme Court Holds *American Pipe* Equitable Tolling Does Not Apply to the Securities Act's Statute of Repose

By Stacy Nettleton, Melanie A. Conroy, and Ellen Shapiro

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On June 26, 2017, the U.S. Supreme Court issued a 5-4 decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.,* No. 16-373, holding that the Securities Act of 1933's statute of repose (the time period within which claims must be brought) cannot be equitably tolled during the pendency of a class action (commonly referred to as *American Pipe* tolling). The Supreme Court first agreed to hear this issue more than three years ago in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640; but, when a majority of the parties in that case settled, *certiorari* was withdrawn. There had been a growing circuit split on whether tolling applied to the Securities Act's statute of repose, which led to differing treatment of similarly situated plaintiffs who opted out of class actions and tried to pursue individual Securities Act claims after the repose period had expired.

Yesterday, the Supreme Court rendered its long-awaited resolution of this question. In the case, California Public Employees' Retirement System ("CalPERS"), the largest public pension fund in the United States, opted out of a securities class action alleging claims under the Securities Act for false and misleading statements in offering documents arising from the demise of Lehman Brothers in 2008. CalPERS then brought a separate suit alleging identical Securities Act claims. Section 13 of the Securities Act gives purchasers one year from the time a misstatement or omission was discovered, or should have been discovered, to bring suit, but "[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public." 15 U.S.C. § 77m. The first provision is known as a statute of limitations, while the latter provision is commonly referred to as a statute of repose.

While the original class action had been timely filed within the Securities Act's statute of repose, CalPERS's individual suit was filed after the repose period had expired. The central issue before the Supreme Court was whether the filing of a class action "tolls" the running of the statute of repose such that individual members of a class in a securities class action can wait while the class action is being litigated without having to make a decision about opting out and pursuing an individual claim before the class action has settled or gone to verdict. CalPERS had argued that it would be unfair and inefficient to force members of a class to decide whether to pursue their own individual claims while the class action is still being litigated. The respondents argued that the language of the statute provides for an absolute deadline beyond which they can no longer be liable.

Justice Kennedy delivered the opinion of the Court. He was joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. As an initial matter, the Supreme Court held for the first time that *American Pipe* tolling is a form of equitable tolling (a classification about which federal circuit courts and district courts had disagreed). The Supreme Court noted that, while "[s]tatutes of limitations are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims[,]'" "statutes of repose are enacted to give more explicit and certain protection to defendants." Slip op., at 5 (citing *CTS Corp. v. Waldburger,* 575 U.S. __ (2014) (slip op., at 6-7)). The majority opinion concluded that while equitable tolling may apply to statutes of limitations, "the *American Pipe* tolling rule does not apply to the 3-year bar mandated in §13." *Id.* at 11.

Rejecting CalPERS's arguments, the Supreme Court's decision relied on the text of the Securities Act and the congressional purpose in enacting the statute of repose provision. The Court held "the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years" from any Securities Act claims and the "object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity." *Id*. The Court also ruled that "as a matter of policy there should be a specific time beyond which a defendant should no longer be subject to protracted liability." *Id.* at 8 (quoting *CTS*, 573 U.S. at __ (slip op., at 7)).

The impact of this decision will be far-reaching for plaintiffs and defendants in securities actions alike. Prior to this opinion, federal circuit and district courts were split as to whether the statutes of repose contained in the federal securities laws could be tolled pursuant to *American Pipe*. As a result, many plaintiffs sought to take advantage of the differing approaches by filing in jurisdictions where courts had found tolling applied to the statute of repose. *ANZ Securities* provides uniformity to the determination of timeliness for federal securities law claims. Now, plaintiffs will have to make the decision as to whether they will opt out of a class action and pursue their own individual securities claims within the time period proscribed by the securities laws' statutes of repose, even if the underlying class action is still being litigated. The decision also affords more certainty to defendants, who will now have a date certain after which they will face no additional liability under the securities laws. It is anticipated that courts will likely extend the Supreme Court's decision to claims under the Securities Exchange Act of 1934 as well, providing further consistency to the application of federal securities laws throughout the country.

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Today, the U.S. Supreme Court granted *certiorari* in *Cyan v. Beaver County Employees Retirement Fund* and will decide next term whether state courts lack subject matter jurisdiction over covered class actions that allege only Securities Act of 1933 claims. As explained in the petitioner's opening brief, "[c]haos has resulted from the lower courts' efforts to resolve the jurisdictional question presented." Petitioner's Br. at i. Specifically, while some federal district courts have interpreted the Securities Litigation Uniform Standards Act of 1998 to permit state court subject matter jurisdiction over class actions solely asserting Securities Act of 1933 claims, others have not. The Supreme Court's grant of *certiorari* comes after the Solicitor General's office urged the Court to grant *certiorari* despite questions about the Court's ability to review an unpublished, interlocutory ruling of the California state superior court, as covered in depth in our previous alert on the case. Given that procedural obstacles have prevented federal circuit courts from addressing the question presented in this case, the Supreme Court's review will provide important guidance to divided federal district courts throughout the country. Regardless how the Supreme Court ultimately rules, in granting *certiorari* to hear this case next fall, the Supreme Court will provide much-needed uniformity to the federal securities laws.

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