

Institutional Investors Beware: U.S. Supreme Court Rules That the Three-Year Statute of Repose on Securities Act Claims Is Not Suspended By the Pendency of a Class Action

June 2017

In an important opinion that will affect institutional investors, the U.S. Supreme Court issued a 5-4 decision today in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, ruling that the pendency of a securities class action **does not** suspend or "toll" the three-year statute of repose for claims brought under the Securities Act of 1933 and that, accordingly, any such claims brought more than three years from the date of a challenged offering are time-barred. The decision means that investors may need to file "protective lawsuits" to preserve their right to bring an individual claim, even though a class action may be pending.

The *CalPERS v. ANZ Securities* Decision

In federal court litigation, a complaint filed as a class action asserts claims not only on behalf of the named plaintiff, but also for the benefit of the rest of the class, namely all those in a similar situation as the named plaintiff, called absent class members. In 1974, the U.S. Supreme Court held in *American Pipe & Construction Co. v. Utah* that the filing of a timely class action complaint effectively commences the action for all

members of the class. In a 1983 decision, *Crown Cork & Seal Co. v. Parker*, the Supreme Court made clear that its *American Pipe* decision meant that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification has been denied."

The Securities Act of 1933 has both a one-year statute of limitation and a three-year statute of repose. The one-year limitations period provides that claims in connection with securities offerings must be brought within one year of the date when an investor, exercising reasonable diligence, should have discovered that a material statement in the prospectus was false or misleading. The statute of repose imposes a bar on claims made more than three years from the date of a challenged offering. For many years following the Supreme Court's *American Pipe* pronouncement, it was assumed (although not expressly decided) that the pendency of a class action asserting Securities Act claims tolled both the one-year statute of limitations and the three-year statute of repose. More recent decisions from the Second Circuit Court of Appeals, however, held that *American Pipe* tolling does not apply to the

statute of repose, and today's Supreme Court decision embraces that view.

In *CalPERS v. ANZ Securities*, CalPERS brought suit in February 2011 to recover on various securities offerings made by Lehman Brothers in 2007 and 2008. A securities class action involving the same offerings had been pending since September 2008. After CalPERS's lawsuit was filed, a settlement was reached in the class case. CalPERS elected to opt out of the class settlement in favor of pursuing its own action. Both the district court and the Second Circuit held that because CalPERS did not file its lawsuit until legislative judgment that a defendant should be free from liability after the legislatively determined period of time." The Court stated that the language of the Securities Act's statute of repose "admits to no exception and on its face creates a fixed bar against future liability." The Court characterized its *American Pipe* decision as "grounded in the traditional equitable powers of the judiciary," but concluded that such "equitable tolling" could not be applied to a statute of repose:

[T]he object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity. No feature of [the Securities Act's statute of repose] provides that deviation from its time limit is permissible... To the contrary, the text, purpose, structure and history of the statute all disclose a congressional purpose to offer defendants full and final security after three years.

Accordingly, the Supreme Court affirmed the dismissal of CalPERS's action. Responding to CalPERS's argument that declining to apply *American Pipe* would create "inefficiencies" arising from courts being inundated with the filing of protective actions, the Supreme

more than three years after the challenged Lehman offerings, its Securities Act claims were time-barred. CalPERS sought review by the Supreme Court, maintaining, among other things, that under the *American Pipe* doctrine, the pendency of the class case suspended the running of the statute of repose.

In the majority opinion authored by Justice Kennedy, the Supreme Court affirmed the decisions of the lower courts. The Supreme Court noted that statutes of repose "are enacted to give more explicit and certain protection to defendants" and reflect "a Court said that the process was not likely to be onerous because "a simple motion to intervene or request to be included as named plaintiff in the class-action complaint may well suffice."

The Dissenting Opinion

A dissent authored by Justice Ginsburg, in which three other justices joined, argued that the original class complaint timely filed within the three-year period of repose gave the defendants exactly what the repose period was designed to afford them: "notice of their potential liability within a fixed time window." As such, "whether CalPERS stayed in the class or eventually filed separately, [defendants] would have known, within the repose period, of their potential liability to all putative class members." Further, because the original complaint commenced the action for all members of the class, CalPERS's claim remained timely when it decided to exercise its constitutional right to opt out of the class and proceed independently. By opting "to pursue individually the claims already stated in the class complaint against the same defendants, [CalPERS] simply took control of the piece of the action that had always belonged to it."

Justice Ginsburg was also very critical of the practical effects of the majority's decision, bluntly observing that "[t]oday's decision disserves the investing public that §11 [of the Securities Act] was designed to protect. The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period. Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages." She noted that because critical stages of securities class actions, like the class-certification decision, often occur years after the filing of the original class complaint, "the risk is high that class members failing to file a protective claim will be saddled with inadequate representation or an inadequate judgment." The dissent further stated that the majority decision means that, for investor funds to protect themselves, "[a]ny class member with a material stake in a §11 case, including every fiduciary who must safeguard investor assets, will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires." As such, it "impels courts and class counsel to take on a more active role in protecting class members' opt-out rights," with Justice Ginsburg observing that "[a]s the repose period nears expiration, it should be incumbent on class counsel, guided by district courts, to notify class

members about the consequences of failing to file a timely protective claim."

Barrack, Rodos & Bacine Will Assist Its Institutional Investor Clients in Dealing with the Supreme Court's Decision

Justice Ginsburg's dissent makes very clear that "*every fiduciary*" will now have a "*strong cause*" in appropriate cases to file a protective claim before the three year statute of repose operates to bar claims. While today's decision applies only to cases brought under the Securities Act, there is every reason to expect that the lower courts – and eventually the Supreme Court – will extend the *CalPERS v. ANZ* decision to fraud claims arising under the Securities Exchange Act of 1934, which has a five-year statute of repose. Thus, investors will need to be vigilant in protecting their rights to pursue both offering and open market securities claims.

Through a new system of notifications and monitoring system enhancements, BR&B will assist its institutional investor clients in protecting their claims. Our systems will allow clients to see the statute of repose deadline for bringing an individual claim in any case in which a class action is pending. Please contact us for additional information.