Securities Litigation Alert

June 29, 2017

Key Points

- U.S. Supreme Court holds that claims brought under Section 11 of the Securities Act of 1933 are subject to a strict three-year statute of repose which cannot be equitably tolled.
- Pressure is now on investors to determine earlier in class actions whether to remain members of a class or to bring individual actions.
- The decision provides important guidance on identification and application of statutes of repose and likely applies to claims beyond the securities context.

The Supreme Court Holds Statute of Repose Cannot Be Equitably Tolled

Securities defendants can rest easier after the Supreme Court's decision to strictly construe certain statutory time limits under the Securities Act of 1933. On June 26, 2017, the Court issued its opinion in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, holding that claims brought under Section 11 are subject to a three-year statute of repose, which cannot be equitably tolled. The 5-4 decision will likely have major implications, not only for securities litigation, but for any case involving application of a limitations period that may be construed as a statute of repose.

Background

The case before the Court stemmed from a 2008 class action brought against several financial firms that underwrote various public securities offerings for Lehman Brothers in 2007 and 2008. It sought recovery under Section 11 of the Securities Act, alleging that registration statements for the offerings included material misstatements or omissions. CalPERS, the largest public pension fund in the country, was a presumptive member of the class because it had purchased some of the offerings at issue.

In February 2011, CalPERS filed a separate complaint alleging the same claims. Shortly thereafter, the parties to the 2008 class action settled. CalPERS opted out of the settlement class in order to pursue its claims individually. Defendants moved to dismiss the February 2011 action, arguing that it was untimely under Section 13 of the Securities Act.

Section 13 provides two time limits for Section 11 claims. First, it provides that an action must be brought "within one year after the discovery of the untrue statement or omission . . . or after such discovery should have been made in the exercise of reasonable diligence . . . ." Second, it provides that "[i]n no event shall

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any such action be brought . . . more than three years after the security was bona fide offered to the public."

Opinion

The Court focused on Section 13's three-year limitation. Writing for the five justice majority, Justice Kennedy determined that the three-year time limit is a statute of repose. This was based on its analysis of four factors: First, the plain language of the statute "admits of no exception and on its face creates a fixed bar against future liability." Second (and most importantly), the statute "runs from the defendant's last culpable act (the offering of the securities)," rather than accrual of the claim. Third, Section 13 has a two-sentence structure that pairs a shorter, malleable limitations period with a longer, rigid period encompassing the same claims. Fourth, the history of Section 13 shows an initial discovery period of two years followed by a 10-year repose period, indicating a design "to protect defendants' financial security in fast-changing markets." Each of these four factors, the Court concluded, weighed in favor of finding that the three-year limitations period in Section 13 is a statute of repose.

Having determined that the claims at issue were governed by a statute of repose, the Court turned to CalPERS's argument that its claims were timely pursuant to the Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class." CalPERS argued that its case was indistinguishable from *American Pipe*, and, thus, its claims should been tolled during the pendency of the timely filed 2008 class action lawsuit.

The Supreme Court rejected that argument, drawing a distinction between the tolling of a statute of limitations, as in *American Pipe*, and the tolling of a statute of repose. Statutes of repose, the Court reasoned, reflect a legislative intent to impose an absolute bar on defendants' temporal liability. Accordingly, claims subject to a statute of repose may be tolled only where it is apparent the legislature intended to allow for an extension of the statutory period. Where no such exception is provided, the unqualified nature of the legislature's determination "supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles." Statutes of repose, therefore, are not subject to equitable tolling, so the rule articulated in *American Pipe* does not apply.

The Court similarly rejected CalPERS's other arguments in favor of tolling the three-year statute of repose. CalPERS argued, for example, that its claim was timely under Section 13 because the 2008 class action satisfied the statutory requirement that an "action" be brought within three years. In other words, the term "action" in the statute should be interpreted to mean the general substance of a claim, which, in this case, did not change between the 2008 class action and CalPERS's individual case. The Court declined to accept this novel argument, observing that it would practically eviscerate any limitations period for individual actions—including those that would otherwise fall within the tolling protections of *American Pipe*. Because the Court in *American Pipe* described its holding as creating a tolling rule that allowed the ensuing individual actions to proceed, CalPERS could not be correct, since its positions would have made tolling of the limitations period in *American Pipe* unnecessary.

Also, the Supreme Court was not persuaded by CalPERS argument that applying Section 13 as a total bar would encourage a multiplicity of unnecessary suits by class members seeking to preserve individual cases. In the 2nd Circuit, where the decision below had been law since 2013, the Court found no empirical evidence of such inefficiencies. Moreover, the Court held, any such inefficiencies were inconsequential because the repose period was determined by the legislature, and the Court had no authority to alter it. Accordingly, the Court determined that no legal or equitable principle could save CalPERS's claims from the applicable three-year statute of repose.

Dissent

Justice Ginsberg authored the lone dissent, joined by Justices Breyer, Sotomayor, and Kagan. The dissent focused primarily on the consequences of the Court's decision on individuals, stating that the decision "disserves the investing vesting public that § 11 was designed to protect." Justice Ginsberg cautioned that, in light of the Court's decision, "[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."

In response to the majority's concern that statutes of repose are designed to provide certainty, Justice Ginsberg argued that any such purpose is satisfied when a class action is filed because, "whether CalPERS stayed in the class or eventually filed separately, respondents would have known, within the repose period, of their potential liability to all putative class members."

Impact

Although the Court's decision in *CalPERS* was limited to application of Sections 11 and 13 of the Securities Act, the same reasoning might well apply to private securities claims brought under Section 10(b) of the Exchange Act of 1934. Such claims are governed by a similar two-part statute, which begins running from the last culpable act of the defendant and limits claims to the earlier of (1) two years after discovery of the facts constituting the violation or (2) five years after such violation. Based on the Court's decision, then, securities class action defendants may find greater certainty in determining the scope of their potential liability. Given that the average length of a securities class action is 2-5 years, investors considering opting out of the class will need to make a decision on whether to opt out and file a separate action before the end of the statute of repose in order to avoid dismissal of their individual action. This puts significant pressure on plaintiffs to determine whether to opt out earlier in the class action, costing them leverage at the end of the litigation. In short, the *CalPERS* decision could eliminate uncertainty of opt-outs for Section 11 cases that exceed two years and Section 10(b) cases that exceed five years.

The decision could also have a significant impact beyond the securities context. In *CalPERS*, the Court not only affirmed the principle that statutes of repose are not subject to equitable tolling, but it also set out a framework for evaluating whether a statutory period is properly considered a statute of repose. These holdings will undoubtedly apply to many nonsecurities class actions, as well as many other causes of action governed by limitations periods that may be construed as statutes of repose.

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