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Tolling Securities Claims: "In No Event" Means ... What It Says

US Supreme Court: Securities Act's 3-year statute of repose is not subject to equitable tolling, providing greater certainty to underwriters.

Key Points:

- Case has significant implications for financial Institutions that serve as underwriters to securities offerings.
- The Court explained that policy arguments are irrelevant when the statutory language is clear, as the Court "lacks the authority to rewrite the statute."
- The Court determined that the statute of repose's purpose to provide defendants with protection after a certain time distinguishes between class suits and individual suits.

In *California Public Employees' Retirement System v. ANZ Securities, Inc*., the Supreme Court, in a 5-4 ruling authored by Justice Anthony Kennedy, upheld the Second Circuit decision dismissing CalPERS' opt-out action against a group of bank underwriters as untimely under the 3-year time limitation in §13 of the Securities Act of 1933. The Supreme Court's ruling confirmed that the time bar functions as a statute of repose that is not subject to equitable tolling.

The tension in the case rested with whether the Court could apply equitable principles to toll §13's clear language that "[i]n no event shall any action be brought ... more than three years after the security was bona fide offered to the public." The decision largely focused on the fact that a statute of repose is "an absolute bar on a defendant's temporal liability," and is designed to provide defendants with certainty regarding the claims they will face. The Court emphasized that this certainty would be nullified if statutes of repose were subjected to equitable tolling. As such, in order to allow the statutes to meet their legislative objective, the Court held that statutes of repose are not subject to equitable tolling.

This decision will create certainty for defendants in terms of the identity of the plaintiffs and the number of claims. Further, defendants will be in a better position to formulate a litigation strategy and assess potential liability, which will allow the marketplace to function with more confidence. While the dissent commented that the rule will "gum up the works of class litigation,"[1] the majority noted that "Petitioner has not offered evidence of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013."[2]

In short, the Court determined that the decision was "straightforward," as the plain language of the statute of repose "displaces the traditional power of courts to modify statutory time limits in the name of equity."[3]

The *CalPERS* Litigation

The CalPERS case stems from a class action filed by another retirement fund in June 2008. This class action alleged that several dozen financial firms involved in underwriting debt offerings from a global investment bank were liable for false and misleading statements in registration statements that violated §11 of the Securities Act of 1933.

In February 2011, more than three years after the relevant transactions occurred, CalPERS filed a separate complaint on its own behalf alleging securities violations identical to those in the class-action complaint. Soon thereafter, a proposed settlement was reached in the putative class action, but CalPERS opted out of the class, choosing instead to pursue its individual suit.

Shortly thereafter, CalPERS' suit was dismissed as untimely under the 3-year bar in §13.

§13 provides both that an action "must be 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 ..." and that "[i]n no event shall any such action be brought ... more than three years after the security was bona fide offered to the public ...."

CalPERS argued that its suit was timely under the Supreme Court's 1974 ruling in *American Pipe & Construction Co. v. Utah*,[4] which established that the filing of a putative class action tolls the statute of limitations for all members of a proposed class who make timely motions to intervene after a court denies class certification. The District Court disagreed and the Second Circuit affirmed, holding that because §13's 3-year time bar was a statute of repose, American Pipe's tolling principle was inapplicable.[5]

The Second Circuit also rejected CalPERS' alternative argument that the timely filing of the class action made petitioner's individual claims timely as well. CalPERS argued that the right to opt out from class actions would be illusory if this decision was allowed to stand and petitioned to the Supreme Court.

The Supreme Court's Decision

The Supreme Court framed the issue as "whether §13 permits the filing of an individual complaint more than three years after the relevant securities offering, even when a class-action complaint was timely filed, and the plaintiff filing the individual complaint would have been a member of the class but for opting out of it."[6] In affirming the Second Circuit, the Supreme Court held that the answer was definitively no.

In arriving at its decision, the Court first outlined the important distinction between statutes of limitations "designed to encourage plaintiffs 'to pursue diligent prosecution of known claims'" and statutes of repose "enacted to give more explicit and certain protection to defendants."[7]

The Court relied on the two-sentence structure and the two separate time limitations set forth in §13 to conclude that §13 was a statute of repose, stating that " [t]he 3-year time bar in §13 reflects the legislative objective to give a defendant a complete defense to any suit after a certain period."[8] The Court relied further on the statute's language, which provides that "[i]n no event" shall an action be brought more than three years after the securities offering on which it is based. The Court found the language "admits of no exception and on its face creates a fixed bar against future liability."[9]

The Court's "determination that the 3-year period is a statute of repose is critical in this case," as *American Pipe*'s equitable tolling is inapplicable to statutes of repose. *American Pipe*, the case CalPERS relied upon, found that the filling of a class action provided sufficient notice of potential claims to warrant the tolling of a statute of limitations. However, the Court explained that *American Pipe*'s equitable tolling applied only to statutes of limitations, and would not serve to toll a statute of repose.

The Court also rejected CalPERS' argument that the timely filing of a class action fulfills the statute's purpose by putting the "defendant on notice as to the content of the claims against it and the set of potential plaintiffs." The Court stated again that "the purpose of a state of repose is to give the defendant full protection after a certain time," not merely to put it on notice. "By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose."[10]

Finally, without much discussion, the Court rejected CalPERS' argument that "the filing of the class-action complaint "brought" petitioner's individual "action" within the statutory time period." The Court explained that "[w]hether or not petitioner's individual complaint alleged the same securities law violations as the class-action complaint, it defies ordinary understanding to suggest that its filing — in a separate forum, on a separate date, by a separate named party — was the same 'action,' 'proceeding,' or 'suit.'"

Looking Ahead

The Court's decision will eliminate any ambiguity over the timeliness of §11 or §12 cases, as tolling often presents factual issues that prevent the Court from being able to rule on early dispositive motions. The primary uncertainty revolves around two factors identified by the dissent.

First, will the ruling result in more protective filings that will "gum up the courts"?[11] The context of the *CalPERS* decision is important in any assessment. *CalPERS* was one of hundreds of cases involving residential mortgage-backed securities (RMBS) that were filed after the most recent financial crisis. Sophisticated entities such as CalPERS chose to opt out of RMBS class actions at a rate atypical in securities class actions to attempt to obtain greater recovery. As these cases were largely all filed prior to 2013, the Court's observation that no uptick in protective filings has occurred since 2013 is not surprising. Therefore, time will tell whether the frequency of opt-outs may have been a temporary phenomenon, or whether the dissent's forewarning comes to bear.

Second, courts may require class counsel to take a more active role in protecting class members' rights. The dissent called it "incumbent" on class counsel to notify class members about the consequences of failing to file a timely claim as the repose period nears expiration.[12]

Conclusion

The *CalPERS* decision is an example of the US Supreme Court acknowledging the limits of its role. The Court held that the Court is not empowered to impose its own equitable considerations to override Congressional intent, regardless of the policy considerations, if the statutory construction makes clear that Congress intended a period of repose. Here, the Court held that Congress' use of the phrase "in no event" mandates such restraint.

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Endnotes

1 *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373, 2017 WL 2722415, at *16 (U.S., June 26, 2017) (Ginsburg, J., dissenting).

2 *Id*. at *12.

3 *Id*. at *14.

4 414 U.S. 538 (1974).

5 The Court of Appeals noted that there had been disagreement amongst the Circuits as to whether the tolling rule of American Pipe applies to the 3-year time bar in §13. *Compare Joseph v. Wiles*, 223 F. 3d 1155, 1166–1168 (CA10 2000), with *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F. 3d 780, 792–795 (CA6 2016), and *Dusek v. JPMorgan Chase & Co.*, 832 F. 3d 1243, 1246–1249 (CA11 2016).

6 *CalPERS* at 6.

7 *Id*. at *6-7.

8 *Id*. at *7.

9 The Court also pointed to the statute's history, in which the initial 10-year outside limit had been reduced to the current 3-year period, finding that "The evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability."

10 *CalPERS* at 12.

11 *Id*. at *16 (Ginsburg, J., dissenting).

12 *Id*. at *17 (Ginsburg, J., dissenting).