Supreme Court Holds that Securities Act Statute of Repose is not Subject to Equitable Tolling

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On June 26, 2017, the Supreme Court held in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, that the three-year time limit in the Securities Act of 1933 is a statute of repose that is not subject to equitable tolling. This means that shareholders will not be able to rely on the filing of a proposed class action lawsuit to suspend the running of a statute of repose on their individual claims. The decision could have far-reaching ramifications for the manner in which class actions are litigated, including the number of individual opt-out suits defendants will face.

Background

A putative class action was filed in June 2008, in the Southern District of New York relating to over $31 billion of debt securities issued by Lehman Brothers Holdings Inc. between July 2007 and January 2008. The suit asserted strict liability claims under Section 11 of the Securities Act of 1933, alleging that the registration statement contained material misrepresentations or omissions. California Public Employees' Retirement System ("CalPERS") was not one of the named plaintiffs.

In February 2011, more than three years after the offering, CalPERS opted out of the class and filed a separate complaint asserting identical securities law violations as alleged in the class action complaint. The district court dismissed CalPERS' complaint as untimely under the Securities Act's statute of repose, which provides that "[i]n no event shall any . . . action be brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public." CalPERS appealed, asserting that its individual suit was timely because the three-year time limit was subject to equitable tolling pursuant to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which held that the filing of a class action complaint tolls a statute of limitations for all putative class members while class certification remains pending. CalPERS also argued that its claims were "essentially filed in the putative class action complaint" and therefore timely even if tolling did not apply. The Second Circuit rejected both arguments and affirmed the district court's ruling.

The Supreme Court Opinion

The Supreme Court affirmed the Second Circuit, indicating that the "nature and purpose of the three-year bar and the tolling rule [CalPERS] seeks to invoke" was the determining factor. The Court first discussed the differences between statutes of limitations and statutes of repose, explaining that the former begin to run when a cause of action accrues, and the latter begin to run on the date of the last culpable act or omission of the defendant. Statutes of limitations are intended to encourage plaintiffs to diligently pursue the prosecution of claims, while statutes of repose are reflect a judgment "that a defendant should be free from liability after the legislatively determined period of time." Accordingly, the Court opined that the three-year bar in the Securities Act is a statute of repose because it "admits of no exception and on its face creates a fixed bar against future liability." This determination was critical because "statutes of repose are not subject to equitable tolling."

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The Court held that the equitable tolling doctrine set forth in *American Pipe* could not supersede the express language of the statute of repose. The Court also rejected CalPERS' argument that its individual claims should be deemed to have been filed when the earlier class action suit was filed. The Court held that the filing of a class action lawsuit is not equivalent to the filing of a suit by unnamed proposed class members.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented asserting that the majority decision "disserves the investing public" and would "gum up the works of class litigation."

Looking Ahead

The *CalPERS* ruling is likely to have practical ramifications for securities class actions and class actions more broadly. Where the applicable law includes a statute of repose, plaintiffs are likely to file suits more quickly and try to move their cases along faster with the goal of reaching a class certification decision before the repose period expires.

The Court's holding also provides a level of certainty for defendants regarding the scope of their potential liability and litigation costs in class actions subject to statutes of repose. No longer will plaintiffs be able to opt out of a class or file their own suits after the repose period has run. This means that whenever a statutory repose period expires, defendants will know exactly which suits they will have to face and from whom. Justice Ginsberg's dissent notes that this may give defendants an incentive to try to slow-play suits and delay a decision on class certification.

On the other hand, the decision has the potential to increase the number of individual suits that defendants will have to face alongside class litigation, as putative class members may feel compelled to file protective suits within the repose period to preserve their right to litigate apart from the class proceedings. The Court noted, however, that predictions from the plaintiffs' bar of a massive uptick in individual suits have not borne out in the Second Circuit.

Finally, the *CalPERS* decision will confront litigants and courts with new issues related to its application, notice to putative class members, and certification of a class after the repose period has run. Courts will work through these issues in the years ahead. In the meantime, class action defendants should confer with outside counsel regarding how to take full advantage of the *CalPERS* decision in existing and future cases.

Read *California Public Employees' Retirement System v. ANZ Securities, Inc.*

For more information please contact one of the lawyers listed below.

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