

Supreme Court Declines to Apply Class Action Tolling and Upholds Dismissal of Individual Securities Cases Filed After Expiration of Statutes of Repose

June 27, 2017

Decision Yesterday and Two Denials of Certiorari Today Decline to Apply *American Pipe* Tolling to Statutes of Repose Under Both the '33 Act and '34 Act

On June 26, 2017, the United States Supreme Court decided *California Public Employees' Retirement System v. ANZ Securities, Inc.* ("*CalPERS*"),¹ an important case that will provide protection and greater certainty about litigation risk to participants in securities offerings.

In *CalPERS*, the Court applied the three-year statute of repose in the Securities Act of 1933 to bar actions filed more than three years after the relevant securities offerings, including barring individual actions filed by putative class members seeking to opt-out of an otherwise timely class action.

The following day, the Supreme Court denied certiorari in *SRM Global Master Fund v. Bear Stearns Companies* (No. 16-372) and *Dusek v. JPMorgan Chase & Co.* (No. 16-389), leaving intact two Court of Appeals decisions reaching the same result as to the corresponding five-year period in the Securities Exchange Act of 1934.

The Issue Before the Court in *CalPERS*

The case addressed the interplay between two different statutory time bars in the '33 Act: the one-year statute of limitation, that runs from the date the claim accrues (i.e., when plaintiff discovers or should have discovered its claim); and the three-year statute of repose that runs from the date the securities were offered or sold.

In a typical securities litigation under the '33 Act, a putative class action complaint seeks recovery on behalf of a class of purchasers in a securities offering. In *American Pipe & Construction Co. v. Utah* ("*American Pipe*"),² the Supreme Court held in the context of antitrust claims that the filing of a class-action complaint suspends or "tolls" the **limitations period**. Under this rule, individual members of a class are permitted to opt out and file their own actions after the expiration of the statute of limitations as long as the class action was timely.

The question before the Court in *CalPERS* was whether *American Pipe* tolling also applies to the **repose period** in the '33 Act—i.e., whether individual plaintiffs are permitted to wait until after the expiration of the three-year repose period before opting out of a putative class action.

The federal courts of appeals had split on this question. The Second, Sixth, and Eleventh Circuits held that the statute of repose provides an absolute deadline on the filing of new actions. The Tenth Circuit disagreed and applied *American Pipe* tolling to the '33 Act's statute of repose.³

¹ No. 16-373 (U.S. June 26, 2017).

² 414 U.S. 538 (1974).

³ The Supreme Court had previously granted certiorari on the same question in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, but following a settlement, the writ of certiorari was dismissed as improvidently granted.

Supreme Court's Decision in *CalPERS*

The Supreme Court held that *American Pipe* tolling does not apply to the '33 Act's three-year period of repose. Justice Kennedy wrote the majority opinion and was joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch.

The Court held that the plain language of the '33 Act, which provides that “[i]n no event” shall an action be brought more than three years after the offering date, indicated that its three-year time limit is a period of repose and not a period of limitation. As the Court had held previously, periods of repose are not subject to tolling unless there is a particular indication that Congress intended for the statutory period of repose not to be absolute. The Court concluded that there was no such indication in the '33 Act. The Court further held that *American Pipe* tolling is a species of equitable tolling and that “statutes of repose are not subject to equitable tolling.”

In reaching this decision, the Court rejected a number of petitioners' counterarguments. Of note, the Court made clear that statutes of repose do not simply serve to provide notice of claims against defendants: “the purpose of a statute of repose is to give the defendant full protection after a certain time.” The Court explained that the filing of new individual actions—beyond already pending class claims—may “increase a defendant's practical burdens” or “increase a defendant's financial liability,” thereby “put[ting] defendants at added risk.”

Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan.

Implications of *CalPERS*

The Court's ruling that the '33 Act's statute of repose cannot be tolled by a pending class action will provide certainty to participants in securities offerings—including issuers, underwriters, auditors, and individual officers and directors—that the three-year period for filing suits is absolute. After three years, participants in securities offerings will know both the nature of any claims against them and the identity of any plaintiffs.

Although petitioner had speculated that such a ruling would lead to protective filings by potential opt-out plaintiffs, the Court observed that this concern is likely overstated, given the nature of class action litigation and the infrequency of opt-outs in general. As noted in the opinion, the experience in the Second Circuit—where the rule announced in *CalPERS* has been in effect since 2013—does not suggest that the Court's opinion will have a dramatic effect on filings by potential opt-outs.

***SRM Global* and *Dusek* and the Application of *CalPERS* to the '34 Act's Statute of Repose**

Through its denials of certiorari in *SRM Global* and *Dusek*, the Supreme Court left intact decisions by the Second and Eleventh Circuit Courts of Appeals, which had both rejected the application of *American Pipe* tolling in '34 Act cases on similar grounds to those adopted by the Supreme Court in *CalPERS*. Although the repose language in the '34 Act is not identical to the '33 Act's language, the Supreme Court's reasoning and analysis in *CalPERS* applies equally to the '34 Act's five-year repose period. Together, the *CalPERS*' decision yesterday and the Court's companion denials of certiorari today should effectively end the argument that *American Pipe* tolling allows opt-out plaintiffs additional time to pursue claims after expiration of the strict statutes of repose in both the '33 and '34 Acts.

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