LANE POWELL

Related People

Related Practices & Industries

Litigation

Securities & Corporate Governance Litigation

June 28, 2017 Publication

The Supreme Court Holds that the Securities Act's Statute of Repose Is Not Subject to American Pipe Tolling, in CalPERS v. ANZ Securities (June 26, 2017)

Securities Litigation Legal Update

In a 5-4 decision split along traditional ideological lines, the U.S. Supreme Court held in *CalPERS v. ANZ Securities, Inc.*, 582 U.S. ___ (2017), that the statute of repose in Section 13 of the Securities Act cannot be tolled under any circumstances. In particular, the Court held that the 3-year repose period—unlike the 2-year limitations period set forth in the same section of the Securities Act—is not tolled by the filing of a securities class action under the principles of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

Under *American Pipe*, the statute of limitations for a claim timely asserted in a putative class action is tolled for the period that the putative class claim is pending. Thus, if class certification is denied (or if a class member later decides to opt out of the class), individual putative class members can still pursue their separate claims, even if those claims would otherwise be untimely at the time they are filed. The question presented in *CalPERS* was whether that tolling principle likewise applied to Section 13's 3-year statute of repose.

The *CalPERS* case arose out of the collapse of Lehman Brothers in 2008. Shortly after Lehman declared bankruptcy, a plaintiff filed a putative class action complaint alleging claims under Section 11 of the Securities Act against the underwriters of several of Lehman's securities offerings from 2007 and early 2008. The complaint alleged that Lehman's securities offered included material misstatements or omissions. CalPERS was not one of the named plaintiffs in that suit.

In 2011—more than three years after the last of those securities was first offered—CalPERS filed a separate complaint on its own behalf, alleging identical claims to those asserted in the putative class action. Shortly thereafter, the putative class action settled, and CalPERS opted out so it could continue to pursue its claims separately. However, the defendants then successfully moved to dismiss CalPERS' separate lawsuit as untimely under Section 13, which provides, "In no event shall any [Section 11] action be brought…more than three years after the security was bona fide offered to the public…." The Second Circuit affirmed, and the Supreme Court granted certiorari.

Justice Kennedy delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. The Court began by re-emphasizing the distinction between statutes of limitations and statutes of repose that the Court had described in *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014). Statutes of limitations are intended to encourage diligence on the part of plaintiffs, and are therefore typically triggered by the accrual of a cause of action. (Slip op. at 4-5.) Statutes of repose, by contrast, reflect "a legislative judgment that a defendant should be free from liability after the legislatively determined period of time[,]" and usually begin to run from the date of the defendant's last culpable act. (*Id*. at 5 (quoting *CTS Corp.*).) The Court observed that Section 13 of the Securities Act has both types of time limits: a 2-year limitations period that runs from when the actionable untrue statement or omission was or should have been discovered, and a 3-year repose period that runs from the date the security was first offered. (*Id*. at 5-7.)

The Court explained that the distinction between the purposes of a statute of repose and a statute of limitations was decisive in the *CalPERS* case. Because the purpose of a statute of repose is to create an "absolute bar" to the defendant's liability after a period of time, such statutes are generally not subject to tolling in the absence of some legislatively-enacted exception. (Slip op. at 7-8.) In particular, unlike statutes of limitations, statutes of repose are not subject to tolling based on equitable principles. (*Id*. at 8.) *American Pipe* tolling is based on just such equitable considerations: it was intended to serve judicial economy by obviating the need for protective motions to intervene by individual putative class members, while still serving the purpose of the statute of limitations by ensuring that the defendants were on notice of the substantive claims against them and the "generic identities" of the claimants. (*Id*. at 8-11 (quoting *American Pipe*).) Those considerations could not serve to toll a statute of repose, whose purpose "to grant complete peace to defendants…." (*Id*. at 11.) The Court found that "the text, purpose, structure, and history of the [Section 13] statute [of repose] all disclose the congressional purpose to offer defendants full and final security after three years." (*Id*.)

The Court then quickly dispensed with the four counterarguments CalPERS had raised. First, the Court found that *American Pipe* was readily distinguishable based on the distinction between statutes of limitation and statutes of repose: while the first may be tolled based on equitable considerations, the second may not. (Slip op. at 11-12.) Second, the Court found that the fact that the class action put the defendant on notice of the putative class members' claims missed the point—"the purpose of a statute of repose is to give the defendant full protection after a certain time." (*Id*. at 12.) Moreover, while the defendant might be on notice of the claims generally, it would not be on notice of the "number and identity of individual suits, where they may be filed, and the litigation strategies they will use[,]" which could significantly affect a defendant's "practical burdens" and "financial liability[.]" (*Id*. at 12-13.) Third, the Court found that a putative class member's right to opt out, while important, could not override the "mandatory time limits set by statute." (*Id*. at 13.) Fourth, the Court rejected the argument that its ruling would "create inefficiencies," noting that the Court was not free to ignore the plain terms of the statute, and observing that, in any event, the Second Circuit had not seen any "recent influx of protective filings" since its rule was announced in 2013. (*Id*. at 13-14.)

Finally, the Court rejected CalPERS' alternative argument that it *had* timely "brought" its "action" within the meaning of Section 13 because it was a member of the putative class on whose behalf the original lawsuit was brought, and that its separate action was merely part of that same "action." The Court found that argument did violence to the term "action," which generally refers to a particular "proceeding" or "suit." (*Id*. at 14-15.) Moreover, the Court observed that the argument proved too much: if it were correct, there would be no need for *American Pipe* tolling at all, and even an action commenced "decades after the original securities offering" would be timely as long as a class action had been commenced within the applicable limitations and repose periods. (*Id*. at 15.)

Justice Ginsburg dissented, joined by Justice Breyer, Sotomayor, and Kagan. Justice Ginsburg accepted CalPERS' alternative argument that its filing date should relate back to the filing of the original class action complaint, and that by filings its separate action, CalPERS "simply took control of the piece of the action that had always belonged to it." (Slip op. at 2-3.) She asserted that the majority's rule would render the right to opt out "illusory[,]" because most securities class actions reach their "critical stages" years after the initial complaint is filed. (Slip op. at 1-2, 4.) Moreover, Justice Ginsburg contended, the "harshest consequences" were likely to fall on the "least sophisticated" class members, who would be unaware of their need to file a protective claim within the repose period. (*Id*. at 4.) Finally, she stated that the majority's ruling was likely to "gum up the works of class litigation" by encouraging defendants to engage in dilatory tactics and encouraging the filing of protective claims. (*Id*. at 4-5.)

The *CalPERS* decision is likely to have repercussions far beyond Section 11 securities cases. The Court's logic would also apply to the 5-year statute of repose governing class action claims under Section 10 of the Exchange Act, which are much more common. Indeed, *any* federal statute of repose without an express legislative tolling provision will now be fully applicable in any class action asserting a claim governed by that statute. It will be interesting to see whether the inefficiencies predicted by Justice Ginsberg come to fruition.