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CLASS ACTIONS

Supreme Court Rejects Tolling of Securities Act's Statute of Repose

BY JOHN M. GILDERSLEEVE

In a 5-4 decision issued at the end of its 2016 term, the Supreme Court in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373 (June 26, 2017), enhanced the peace that defendants in securities class actions enjoy after the statute of repose governing claims against them has expired. The Court held that unnamed class members may not invoke the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), to opt out of class actions and file otherwise-untimely lawsuits after the end of the Securities Act's three-year repose period.

By eliminating late-breaking opt-out lawsuits after the repose period, *ANZ Securities* affords defendants far greater certainty in assessing their litigation risk, while potentially complicating how class actions are managed before the repose period expires. The Court's reasoning strongly suggests that the five-year repose period for claims under the Securities Exchange Act also may not be tolled, such that defendants in fraud-based actions should enjoy similar peace. And, the Court's characterization of the purpose of *American Pipe* tolling may cause courts to revisit how that rule is applied in other contexts.

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Background

ANZ Securities involved the interaction of two long-standing rules: the three-year statute of repose governing private actions under the Securities Act of 1933, and the rule announced decades ago by the Supreme Court known as "*American Pipe* tolling."

Section 11 of the Securities Act creates a private right of action against issuers and others for material misstatements or omissions in registration statements. Section 13 of the Act sets two time bars for these actions: "No action shall be maintained . . . unless brought within one year after the discovery of the untrue statement or the omission . . . . In no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public . . . ." 15 U.S.C. § 77m.

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 who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. It explained that tolling the limitations period promotes the "efficiency and economy" of class actions, because otherwise absent class members would have to file separate actions to ensure that a timely individual claim

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is on file ''in the event that a class was later found unsuitable.'' *Id*. at 553.

The U.S. Court of Appeals for the Second Circuit—first in *Police & Fire Retirement System v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), and later in *ANZ Securities*—held that *American Pipe* tolling, which by its terms applies to statutes of limitations, does not apply to the Securities Act's statute of repose. Without the benefit of tolling, a class member that opts out of a class action after the three-year repose period still can do so but has a valueless, time-barred claim. The Supreme Court agreed to hear the *IndyMac* case, but the parties settled before oral argument. *ANZ Securities*—in which CalPERS opted out of a class action against underwriters of Lehman Brothers debt securities, only to have its lawsuit dismissed as time-barred by the Securities Act's three-year statute of repose—presented essentially the same issues. And, by the time the Supreme Court heard oral argument, a modest circuit split had emerged.

The Supreme Court's Decision in *ANZ Securities*

In *ANZ Securities*, the Court's five more conservative members sided with the Second Circuit in holding that *American Pipe* tolling does not apply to the Securities Act's statute of repose, such that opt-out lawsuits after the three-year repose period, like that filed by CalPERS, must be dismissed as untimely.

Justice Kennedy, writing for the Court, began by distinguishing statutes of limitations from statutes of repose. Statutes of limitations, the Court held, encourage plaintiffs to act diligently. Statutes of repose ''give more explicit and certain protection to defendants'' by granting ''a complete defense to any suit after a certain period.'' Slip op. at 5. The Court held that three-year period in Section 13 of the Securities Act, which ''on its face creates a fixed bar against future liability,'' unmistakably is a statute of repose. *Id*.

Statutes of repose, the Court held, are ''in general not subject to tolling,'' unless some statutory language creates an exception. *Id*. at 7. The Court acknowledged that courts have inherent equitable power to toll statutes of limitations—indeed, that is what the Court did in *American Pipe*. But statutes of repose are different, the Court explained, because they reflect a legislative policy decision that ''supersedes the courts' residual authority'' and ''override[s] customary tolling rules arising from the equitable powers of courts.'' *Id*. at 8.

The Court therefore arrived at the question of whether *American Pipe* tolling is equitable, such that it cannot override the Securities Act's statute of repose. Reviewing *American Pipe*, the Court found that it was ''grounded in the traditional equitable powers of the judiciary'' rather than ''in a legislative enactment.'' *Id*. at 9-10. That resolved the case, as ''the mandate of the statute of repose takes [it] outside the bounds of the *American Pipe* rule.'' *Id*. at 16.

The Court also rejected CalPERS's alternative argument that its claim was constructively filed, or pre-filed, by the class action itself, such that it did not need to invoke *American Pipe* at all. Justice Ginsburg, in dissent, accepted this argument, writing that CalPERS did not need the benefit of tolling because ''it simply took control of the piece of the action that had always belonged to it.'' Slip op. (Ginsburg, J., dissenting) at 3. Citing the plain text of Section 13, however, the Court held that ''it defies ordinary understanding to suggest that [a class action filed] in a separate forum, on a separate date, by a separate named party . . . was the same 'action.' '' Slip op. at 15.

The basic disagreement at the Court was about how peaceful a defendant's repose must be. The dissent took CalPERS's view that a class action complaint tells a defendant all that it needs to know about its potential liability, that is, ''the substance of the claims asserted . . . and the identities of potential claimants.'' Slip op. (Ginsburg, J., dissenting) at 1. To the majority, however, the repose mandated by the Securities Act—and, presumably, any other statute—is ''complete peace'' and ''full and final security,'' in which a defendant knows not only what the claim is and what class of persons might bring it, but also the exact manner in which liability might arise. Slip op. at 11. The Court held: ''If the number and identity of individual suits, where they may be filed, and the litigation strategies they will use are unknown, a defendant cannot calculate its potential liability or set its own plans for litigation with much precision.'' *Id*. at 12. These ''uncertainties'' and ''practical burdens,'' with the potential ''to alter and expand a defendant's accountability, contradict[ed] the substance of a statute of repose.'' *Id*. at 12-13.

A major theme of CalPERS's argument, and of many *amicus* filings, was that without the benefit of *American Pipe* tolling, absent class members—and especially institutional investors with fiduciary obligations—would flood the courts with protective filings, undermining the efficiency of class actions. The Court disposed of this argument on multiple grounds. It observed that it had no authority to undo such side effects of a statute of repose chosen by Congress. And it found that these concerns in any event ''likely are overstated,'' noting the absence of a surge in protective filings in the Second Circuit, the minimal work such filings might entail (''A simple motion to intervene or request to be included as a named plaintiff . . . may well suffice.''), and the ability of district courts to manage their dockets, likely a reference to mechanisms such as consolidating or staying protective actions. *Id*. at 13-14.

Implications

For class actions under the Securities Act, *ANZ Securities* likely will accomplish what the Court expressly intended it to do, that is, promote ''certainty and reliability'' for issuers, underwriters, and other actors ''in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors.'' *Id*. at 16. Indeed, the Court was well-attuned to the potential of late-breaking litigation to ''caus[e] destabilization in markets which react with sensitivity to these matters.'' *Id*. at 13. Once the three-year repose period expires, defendants no longer will have to account for the possibility of opt-out lawsuits that tend to command disproportionate settlement recoveries. Class action settlements after the three-year period will be held together, eliminating the need for ''blow'' provisions conditioning agreement on there being only a minimal number of opt-out plaintiffs. The effect of *ANZ Securities* therefore may be to promote settlement generally—and specifically to promote settlement after, not before, the clarifying and solidifying moment at the end of the repose period.

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The cost of streamlined litigation after the repose period, however, will be some additional complication during that period. It may be, as the Second Circuit's experience has shown, that courts will not suffer from an unmanageable number of protective filings. But, without the escape valve of *American Pipe* tolling, class counsel and district courts may take new measures to advise absent class members that the end of the repose period effectively will lock them into the class action. Justice Ginsburg's prescription, in dissent, for augmented class notice would not seem too disruptive: ''As 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.'' Slip op. (Ginsburg, J., dissenting) at 5. By encouraging the orderly filing of any individual actions by a particular date, providing this notice might further enhance the new predictability of defending Securities Act claims.

The logic of *ANZ Securities* should extend to the five-year statute of repose governing fraud-based claims under Section 10(b) of the Securities Exchange Act. 28 U.S.C. § 1658(b)(2). The Court's reasoning—that *American Pipe* tolling is equitable and statutes of repose are not subject to equitable tolling—applies equally to that statute of repose. In *SRM Global Master Fund Limited Partnership v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016), the Second Circuit held that *American Pipe* tolling does not apply to the Exchange Act's five-year repose period, rejecting the argument that minor ''textual differences'' between the Securities Act and Exchange Act statutes of repose call for a different outcome. One day after its decision in *ANZ Securities*, the Supreme Court declined to review the Second Circuit's decision in *SRM Global*.

That said, the Supreme Court's emphasis in *ANZ Securities* on the ''clear terms'' and ''two-sentence structure'' of the Securities Act's statute of repose could offer plaintiffs some minimal hope of avoiding the straightforward application of *ANZ Securities* to Exchange Act claims. Slip op. at 5-6. There are superficial differences in the wording of the two statutes of repose. Section 1658(b) provides that ''a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.'' It is not two sentences, but one sentence with two subsections; it also lacks the Securities Act's ''in no event'' language that led Justice Gorsuch, at oral argument, to ask: ''Where — where is the ambiguity in — in no event?'' Section 1658(b) equally ''on its face creates a fixed bar against future liability.'' Slip op. at 5. Still, plaintiffs may persist in arguments that its language somehow is softer than the language of Section 13 of the Securities Act.

Indeed, *ANZ Securities* confirms the power before the current Court of text-based plain-meaning arguments. Like the oral argument, the decision is focused on plain-meaning readings of the Securities Act. And, the Court used similar reasoning to sidestep the complex questions that would arise if *American Pipe* tolling were grounded in Federal Rule of Civil Procedure 23, which governs class actions. The Court held that *American Pipe* tolling could not be ''mandated by'' Rule 23 because ''Rule 23 does not so much as mention the extension or suspension of statutory time bars.'' *Id*. at 10. But, as CalPERS and others argued, suspending time bars for absent class members could be considered a necessary adjunct to the functioning of a Rule 23 class action. That Rule 23's silence on this issue, for the Court, alone foreclosed this argument is telling.

Finally, the Court's characterization of *American Pipe* raises new questions going beyond its application to statutes of repose. The Court could have resolved *ANZ Securities* by citing its past descriptions of *American Pipe* tolling as equitable. It went further, observing that ''the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner'' and ''did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct.'' *Id*. at 10-11. *American Pipe* tolling, the Court announced, is ''a rule based on traditional equitable powers, designed to modify a statutory time bar *where its rigid application would create injustice*.'' *Id*. at 11 (emphasis added).

Not every plaintiff invoking *American Pipe* tolling to avoid a statute of limitations can cite injustice. On the one hand, the plaintiffs in *American Pipe* were absent class members cast adrift when class certification was denied after the four-year limitations period expired. *Id*. at 9. But plaintiffs regularly invoke *American Pipe* tolling in opting out of a securities class action after a class has been certified. Applying the limitations period chosen by Congress to the claims of those plaintiffs—tactical actors neither surprised by a late denial of certification nor the victims of extraordinary circumstances—is no injustice. There is at least the possibility that, in reviewing the purpose of *American Pipe* tolling at some length, the Court meant to limit it to the circumstances it described, that is, ''tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.'' *Id*. at 16. And, the Court's brisk rejection in *ANZ Securities* of the alternative argument that an individual action is constructively filed through a class action will render that argument unavailable to save untimely suits that do not fit the unjust circumstances described by the Court.