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The U.S. Supreme Court Decides American Pipe Tolling Does Not Apply to Statutes of Repose

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On June 26, 2017, the Supreme Court issued its decision in *California Public Employees' Retirement System v. ANZ Securities, Inc., et al.* ("ANZ"), and held that a statute of repose—as contrasted with a statute of limitation—cannot be equitably tolled.¹ In a 5-4 opinion authored by Justice Kennedy, the Supreme Court held that the filing of a class action for violations of Section 11 of the Securities Act of 1933 (the "Securities Act") did not toll the statute of repose for putative class members that opted out of the class action after the statute of repose had expired.

Section 11's statute of repose is set out in Section 13 of the Securities Act, which provides: "In no event shall any such 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 . . ."² In *ANZ*, the California Public Employees' Retirement System ("CalPERS") opted out of a timely class action suit predicated on defendants' violations of Section 11 of the Securities Act, and after Section 13's three-year deadline, filed a separate lawsuit against the ANZ defendants.

Relying largely on *American Pipe & Construction v. Utah*,³ CalPERS argued its opt-out claims had been equitably tolled by the filing of the class action suit for which it was a putative class member. The Supreme Court disagreed, explaining that:

[S]tatutory time bars can be divided into two categories: statutes of limitations and statutes of repose. Both "are mechanisms used to limit the temporal extent or duration of liability for tortious acts," but "each has a distinct purpose."⁴

The Supreme Court explained that its earlier *American Pipe* decision had tolled *statutes of limitations* for putative class members based on principles of equity.⁵ But since Section 13, the statute at issue in *ANZ*, is a *statute of repose*, it serves a different purpose and equity would not support tolling. Specifically, Justice Kennedy's opinion explained that "[s]tatutes of limitations are designed to encourage plaintiffs 'to pursue diligent prosecution of known claims,'"⁶ while statutes of repose are meant to create "an absolute bar on a defendant's temporal liability."⁷ "The purpose and effect of a statute of repose . . . is to *override* customary tolling rules arising from the equitable power of courts."⁸ Statutes of repose, "enacted to give more explicit and certain protection to defendants," would be rendered meaningless without steadfast enforcement.⁹ In order "to grant complete peace to defendants," statutes of repose must "supersede[] the application of a tolling rule based in equity."¹⁰

CalPERS principally argued that "the filing of a class-action complaint within three years fulfills the purposes of a statutory time limit with regard to later filed suits by individual members of the class."¹¹



Joined by three other Justices in dissent, Justice Ginsburg found this argument persuasive.¹² But the majority of the Supreme Court disagreed, reasoning that “[i]f 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.”¹³

The Supreme Court also addressed the practical concern raised by CalPERS and *amici* that the denial of equitable tolling would result in putative class members prematurely filing complaints in order to preserve their individual claims. The Supreme Court noted that there is no evidence “of any recent influx of protective filings in the Second Circuit, where the rule affirmed here has been the law since 2013.”¹⁴ The Supreme Court also noted that a putative class member’s right to litigate issues on an individual basis would likely be preserved with “[a] simple motion to intervene or request to be included as a named plaintiff in the class-action complaint.”¹⁵

In sum, the Supreme Court held that *American Pipe* tolling was inapplicable based on the statutory language and legislative purpose behind Congress enacting a statute of repose as part of the Securities Act. While the Supreme Court acknowledged that tolling is of value to “injured persons to recover for injuries that, through no fault of their own, they did not discover,”¹⁶ it ultimately concluded that the ends promoted by the statute of repose, “certainty and reliability,” are “necessit[ies] in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors.”¹⁷

Finally, although *ANZ* deals specifically with Section 13 of the Securities Act of 1933, the Supreme Court’s reasoning indicates the decision will have far-reaching implications with regard to statutes of repose generally and securities cases specifically. With regard to the latter, *ANZ* will likely foreclose putative class members in securities fraud cases from opting out and pursuing individual claims based on violations of Section 10(b) of the Securities Exchange Act of 1934 more than five years after the purported violation occurred. This is because such actions may not be brought later than the earlier of “2 years after the discovery of the facts constituting the violation; or 5 years after such violation,”¹⁸ and the Supreme Court has previously noted that the latter five-year deadline operates as a statute of repose.¹⁹



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- ¹ *California Public Employees' Retirement System v. ANZ Securities, Inc., et al.*, No. 16-373.
 - ² 15 U.S.C. § 77m.
 - ³ 414 U.S. 538 (1974).
 - ⁴ *ANZ*, No. 16-373, slip op. at 4–5 (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182–83 (2014)).
 - ⁵ 414 U.S. at 550.
 - ⁶ *ANZ*, No. 16-373, slip op. at 5.
 - ⁷ *Id.*, slip op. at 7 (quoting *CTS Corp.*, 134 S. Ct. at 2183).
 - ⁸ *Id.* (emphasis added).
 - ⁹ *Id.*, slip op. at 5.
 - ¹⁰ *Id.*, slip op. at 11.
 - ¹¹ *Id.*, slip op. at 12.
 - ¹² *Id.*, slip op. at 1 (Ginsburg, J., dissenting) (arguing that the filing of a class complaint gave respondents “what §13’s repose period was designed to afford them: notice of their potential liability within a fixed time window”).
 - ¹³ *Id.*, slip op. at 12.
 - ¹⁴ *Id.*, slip op. at 13. See also Respondents’ Brief at 47, *California Public Employees’ Retirement System v. ANZ Securities, Inc., et al.*, (April 17, 2017) (No. 16-373) (noting that “[a]s of November 2016, only three out of 189 securities class actions (1.59%) filed in the Second Circuit since IndyMac had generated any opt-out litigation”).
 - ¹⁵ *ANZ*, No. 16-373, slip op. at 14.
 - ¹⁶ *Id.*, slip op. at 16.
 - ¹⁷ *Id.*
 - ¹⁸ 28 U.S.C. § 1658(b).
 - ¹⁹ *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 650 (noting that 28 U.S.C. § 1658(b)(2) “giv[es] defendants total repose after five years”) (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)).

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