Updates
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SCOTUS Upholds Strict Statute of Repose on Federal Section 11 Securities Claims

In a 5-4 decision in *California Public Employees' Retirement System (CalPERS) v. ANZ Securities, Inc., et al.* (No. 16-373), 582 U.S. ___ (2017), the U.S. Supreme Court upheld, at the end of last month, a U.S. Court of Appeals for the Second Circuit decision dismissing as untimely a lawsuit filed by CalPERS against underwriters of public securities offerings by global investment bank Lehman Brothers. Writing for the majority, Justice Anthony Kennedy concluded that the three-year limit on federal Section 11 claims imposed by Section 13 of the federal Securities Act of 1933 "is a statute of repose" that cannot be tolled by the filing or pendency of a class action.

CalPERS, the largest public pension fund in the country, was a member of the putative class in a class action filed in the U.S. District Court for the Southern District of New York in 2008. The class asserted Section 11 claims, alleging that the registration statements for several securities offerings by Lehman in 2007 and 2008 contained material misstatements and omissions.

In 2011, more than three years after the challenged offerings, CalPERS filed a separate complaint in the U.S. District Court for the Northern District of California alleging identical securities claims against the same set of underwriters. After a proposed settlement in the class action, CalPERS opted out to pursue its separate lawsuit, which had been consolidated in the Southern District of New York. There, the district court granted the underwriters' motion to dismiss CalPERS' Section 11 claims as untimely under the three-year bar in Section 13. The Second Circuit later affirmed.

In affirming the lower rulings, the Supreme Court stressed the difference between statutes of limitations, which "are designed to encourage plaintiffs to pursue diligent prosecution of known claims," and statutes of repose, which "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." Drawing upon this distinction, the Court held that Section 13 "provides in clear terms that '[i]n no event' shall an action be brought more than three years after the securities offering on which it is based," and that such legislative "instruction admits of no exception and on its face creates a fixed bar against future liability."

CalPERS argued that the statute of repose was equitably tolled during the pendency of the initial class action, based on the ruling in *American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974)*. The majority rejected that argument, holding that the tolling rule in *American Pipe* derives from "the judicial power to promote equity, rather than to interpret and enforce statutory provisions," and therefore *American Pipe* "cannot alter the unconditional language and purpose of the 3-year statute of repose" in Section 13. Accordingly, "the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity."

Although the *CalPERS* ruling affords public companies and other issuers greater protection from endless litigation exposure, it also threatens to increase the costs of class action litigation. As Justice Ruth Ginsburg warned in her dissent, class members in any Section 11 case "will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires," and both courts and class counsel will be required "to take on a more active role in protecting class members' opt-out rights."

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