KING & SPALDING

Client Alert

Shareholder and Securities Litigation Practice Group

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U.S. Supreme Court's *ANZ* Decision Prohibits Tolling Of The Securities Act Of 1933's Three-Year Statute Of Repose

The Securities Act of 1933 prevents a securities purchaser from suing over an alleged material misstatement or omission in a registration statement more than three years after the offering date.[1] A circuit split developed over whether this three-year time limit is subject to so-called "*American Pipe* tolling," which equitably tolls a statute of limitations during the pendency of a putative class action.[2] This week, in *CalPERS v. ANZ Securities, Inc.*, the Supreme Court of the United States ruled, in a 5-4 decision, that the three-year time bar is a statute of repose that is not susceptible to *American Pipe* tolling, affirming the Second Circuit.[3] As a result, the Supreme Court held CalPERS's complaint, filed more than three years after the offerings at issue, was time-barred and subject to dismissal, notwithstanding a timely-filed putative class action challenging the same registration statements. This important decision will impact litigation strategies in Securities Act class actions and reduces the time frame for exposure to litigation risks for issuers, underwriters, and directors and officers of public companies, thereby making the American capital markets potentially more attractive to issuers and investors.

BACKGROUND

ANZ arose out of the Lehman Brothers bankruptcy. In 2008, a putative class action was filed under Section 11 of the Securities Act against underwriters who handled various securities offerings for Lehman Brothers in 2007 and 2008. CalPERS, the largest pension fund in the country and a member of the putative class, but not a named or lead plaintiff, decided to pursue its own Section 11 action against the underwriters. By the time CalPERS filed its complaint in 2011, however, more than three years had elapsed since the challenged offerings. CalPERS argued that *American Pipe* tolling saved it from the Securities Act's three-year bar, given the pending class action alleging similar claims, but the district court disagreed and the Second Circuit affirmed the dismissal.[4]

Justice Kennedy, writing for the five-member majority of the Supreme Court, began by explaining that the Securities Act's three-year bar is a statute of repose, rather than a statute of limitations. As such, the three-year bar is not subject to a judicially-created rule like *American Pipe* tolling, because such equitable tolling is contrary to the intent expressed in the statute. Having dispensed with *American Pipe* tolling, the Court went on to reject CalPERS's

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argument that its action should be deemed brought in a timely fashion in light of the class action complaint raising similar claims filed in 2008.[5]

KEY TAKEAWAYS

ANZ is a beneficial development for issuers and the underwriters who handle their securities offerings. As the Court explained, the Securities Act's three-year bar is meant "to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability."[6] By holding that *American Pipe* tolling is inapplicable to suits brought more than three years after an offering, the Court faithfully serves "the congressional purpose to offer defendants full and final security after three years," thereby "grant[ing] complete peace to defendants."[7] The "certainty and reliability" that will flow from *ANZ* "are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors."[8] If the decision actually reduces exposure to litigation risks, it could make the American capital markets more attractive.

It remains to be seen how *ANZ* will affect the course of litigation in Securities Act class actions. The dissenting justices hypothesize that as a consequence of the ruling, "[d]efendants will have an incentive to slow walk discovery and other precertification proceedings so the clock will run on potential opt outs."[9] Troubled by their perception that the "least sophisticated" class members "stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages," the dissenting justices called upon "class counsel, guided by district courts, to notify class members about the consequences of failing to file a timely protective claim," while simultaneously lamenting the prospect that a wave of "protective" individual filings as the three-year time limit draws near may "gum up the works" of pending class actions.[10] The majority downplayed these potential concerns, noting that "[t]he very premise of class actions is that 'small recoveries do not provide the incentive for any individual to bring a solo action.'"[11] In the typical class action, the majority reasoned, most class members will lack the motivation to litigate their claims on an individual basis and, thus, will "have no interest in protecting their right to litigate" separately from the class.[12] The majority also cited the absence of any suggestion that district courts in the Second Circuit, where the inapplicability of *American Pipe* tolling to suits brought after the expiration of the Securities Act's three-year time bar has been the law since 2013, have been inundated by protective filings and observed that district courts faced with such protective filings "have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion."[13]

The *ANZ* decision may spur plaintiffs' counsel to begin filing their class certification motions closer to the beginning of case, and otherwise exerting what pressure they can to move cases along more quickly.[14] In addition, counsel for individual claimants may pursue tolling agreements seeking relief from the statute of repose in order to protect class members' rights without the need to file protective claims. However the decision may impact Securities Act class action strategies and proceedings going forward, for now, *ANZ* represents another case in a recent line of Supreme Court decisions limiting claimants' abilities to pursue securities class action matters.

[1] *See* 15 U.S.C. § 77m ("In no event shall any such action be brought to enforce a liability created under section 77k or 77*l*(a)(1) of this title more than three years after the security was bona fide offered to the public, or under 77*l*(a)(2) of this title more than three years after the sale.").
[2] *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).
[3] Justice Kennedy's opinion for the Court was joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. Justice Ginsburg filed a dissenting opinion that was joined by Justices Breyer, Sotomayor, and Kagan.
[4] *CalPERS v. ANZ Sec., Inc.*, No. 16-373, slip op. at 2–4 (U.S. June 26, 2017).
[5] *See id.* at 14–15.
[6] *Id.* at 7.
[7] *Id.* at 11.
[8] *Id.* at 16.
[9] *ANZ*, slip op. at 4 (Ginsburg, J., dissenting).
[10] *ANZ*, slip op. at 5 (Ginsburg, J., dissenting).
[11] *ANZ*, slip op. at 13 (majority opinion) (quoting *Amchem Products, Inc. v. Windsor*, 521 U. S. 591, 617 (1997)).
[12] *See id.* at 14.
[13] *Id.*
[14] *Cf.* FED. R. CIV. P. 23(c)(1)(A) (assuming that a class-certification motion will be filed "[a]t an early practicable time after a person sues"); *Fontenot v. McCraw*, 777 F.3d 741, 751 (5th Cir. 2015) ("[T]he plaintiffs could have filed a class action certification motion . . . , and indeed could have filed the motion simultaneously with the filing of their first amended complaint."). Note, however, that 15 U.S.C. § 78u-4 stays all discovery pending resolution of a motion to dismiss, which are filed in nearly every securities class action. There are very limited exceptions to this statutory discovery stay, so, as long as a motion to dismiss is pending, a plaintiff's ability to push a securities class action in its initial stages -- at least as to discovery -- is limited.