

Cleary Gottlieb Wins Supreme Court Ruling That Securities Act's Statute of Repose Is Not Subject to Class-Action Tolling

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On June 26, 2017, the Supreme Court issued an opinion that will significantly impact the scope of opt-out litigation from securities class actions, by holding that the Securities Act's three-year statute of repose is not subject to class-action tolling. *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373 (June 26, 2017). Cleary Gottlieb has represented the respondents in this and more than a dozen related actions concerning Lehman Brothers securities since the fall of 2008, and served as co-counsel before the Supreme Court.

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In an opinion written by Justice Kennedy, the Supreme Court highlighted the distinctions between statutes of repose and statutes of limitations, including that statutes of repose are intended to provide defendants with "more certainty and reliability" and are therefore not subject to equitable tolling; concluded that the three-year period in the Securities Act is a statute of repose; clarified that the class-action tolling rule established in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), is a rule of equitable tolling; and accordingly held that the Securities Act's three-year period is not subject to class-action tolling.

CalPERS's impact extends beyond cases asserting claims under the Securities Act to repose periods in other statutes, including claims under Section 10(b) of the Exchange Act, which are subject to a five-year statute of repose. The decision will prompt putative class members to consider whether to take protective actions within the repose period to maintain their ability to pursue individual recoveries after the expiration of the statute of repose, and will provide defendants with greater certainty about the scope of potential opt-outs when they settle class actions after the expiration of a repose period.



Background

Around the time Lehman Brothers filed for bankruptcy in 2008, investors filed a putative class action against underwriters of certain Lehman offerings. The class action was consolidated with other securities suits in a single multidistrict litigation in the Southern District of New York.

In February 2011, more than three years after the relevant transactions, CalPERS filed a separate lawsuit in the Northern District of California against certain underwriters.¹ CalPERS's complaint alleged identical securities law violations as the class complaint, including claims under Section 11 of the Securities Act.² CalPERS's individual action was transferred and consolidated with the multidistrict litigation in the Southern District of New York.³

CalPERS subsequently opted out of the settlement of the class action.⁴ The underwriters moved to dismiss CalPERS's Section 11 claims with respect to the relevant offerings as time-barred by the three-year period in Section 13 of the Securities Act.⁵ The district court agreed, holding that the period is not subject to class action tolling.⁶ The Second Circuit affirmed, extending its holding in *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), that the three-year period in Section 13 is a statute of repose that is not subject to class action tolling to the context of individual opt-out actions.⁷

The Supreme Court's Decision

In affirming the Second Circuit's ruling, the Supreme Court first explained that statutes of limitations and statutes of repose have distinct purposes and effects, as it made clear in *CTS Corporation v. Waldburger*, 134 S. Ct. 2175 (2014).⁸ The purpose of statutes of limitations is "to encourage plaintiffs 'to pursue diligent prosecution of known claims.'"⁹ Thus, the limitations clock starts running when the cause of action accrues, meaning "when the plaintiff can file suit and obtain relief."¹⁰ Statutes of repose, on the other hand, "are enacted to give more explicit and certain protection to defendants."¹¹ As a result, the repose clock starts running on the date of the defendant's last culpable act or omission.¹²

The Court then explained that Section 13's language, operation and two-sentence structure, as well as the Securities Act's legislative history, show that the three-year period is a statute of repose.¹³ The statute states clearly that "[i]n no event' shall an action be brought more than three years after the securities offering on which it is based," and "admits of no exception."¹⁴ Moreover, the statute runs from the date of the defendant's last culpable act—the securities offering—not from the accrual of the plaintiff's claim.¹⁵ The structure of Section 13, which pairs a shorter statute of limitations including a discovery rule and a longer period, also indicates that the three-year bar is a repose period that "protects the defendant from an interminable threat of liability."¹⁶ The Court found further evidence of Congress's intent in the amendment of the Securities Act to shorten the

¹ See *Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, No. 16-373, slip op. at 3 (June 26, 2017) ("slip op.").

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 4.

⁷ 721 F.3d at 109.

⁸ Slip op. at 4-5.

⁹ *Id.* at 5 (quoting *CTS*, 134 S. Ct. at 2183).

¹⁰ *Id.* (quoting *CTS*, 134 S. Ct. at 2182).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 5-7.

¹⁴ *Id.* at 5 (quoting 15 U.S.C. § 77m).

¹⁵ *Id.* at 6.

¹⁶ *Id.*

statutory periods with the aim of reducing the period for potential liability.¹⁷

The Court next reaffirmed that, in light of the purpose of statutes of repose, they generally are not subject to tolling.¹⁸ As the Court explained, the application of a tolling rule to a statutory period depends on legislative intent.¹⁹ The purpose of a statute of repose is to free defendants “from liability after the legislatively determined period of time.”²⁰ Accordingly, a statute of repose may be tolled only if “there is a particular indication that the legislature did not intend the statute to provide complete repose.”²¹ By the same token, the purpose and effect of statutes of repose supersede courts’ equitable tolling rules.²² Thus, repose statutes are not subject to equitable tolling.²³

The Court then held that *American Pipe*’s tolling rule is equitable and consequently does not apply to the three-year statute of repose in Section 13.²⁴ The Court in *American Pipe* recognized that its tolling rule was authorized by its “judicial power.”²⁵ In addition, the decision drew on cases applying equitable tolling principles.²⁶ Furthermore, subsequent decisions referred to *American Pipe* as “equitable tolling.”²⁷ Although *American Pipe* did not directly apply equitable tolling factors, its reasoning reflected a rule based on equitable powers.²⁸ The Court rejected the argument that *American Pipe*’s tolling rule derived from Rule 23 and revealed a legislative intent to modify the statute of repose.²⁹

In response to various counterarguments made by CalPERS, the Court explained that: (1) *American Pipe*

did not compel a contrary holding because that case involved a statute of limitations, which could be subject to equitable tolling;³⁰ (2) the timely filing of a class action complaint does not fulfill the purpose of a statute of repose with respect to later filed individual actions, which may impose additional financial liability and practical burdens on defendants;³¹ (3) the ability to opt out does not excuse a plaintiff’s compliance with statutory time bars;³² and (4) the Court lacks the authority to disregard a statute of repose based on concerns about an influx of protective filings.³³ With respect to the final point, the Court further stated that the concerns about an influx of protective filings “likely are overstated” in any event, given the experience in the Second Circuit since *IndyMac*, the premise of class actions that small recoveries do not provide incentives to litigate individual actions, the mechanisms for unnamed class members to protect their rights and the methods available to district courts to manage their dockets.³⁴

Finally, the Court also rejected CalPERS’s alternative argument that the filing of the class action complaint “brought” its individual “action” within the statutory period, reasoning that it is inconsistent with the text of the Securities Act, which required “actions” and not just “claims” to be filed within the repose period, and the reasoning in *American Pipe*, whose tolling rule

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ *Id.* at 5 (quoting *CTS*, 134 S. Ct. at 2183).

²¹ *Id.* at 7.

²² *Id.* at 8.

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *Id.* at 10 (quoting *American Pipe*, 414 U.S. at 558).

²⁶ *Id.*

²⁷ *Id.* (citing cases).

²⁸ *Id.* at 10-11.

²⁹ *See id.* at 9-10.

³⁰ *Id.* at 11-12.

³¹ *Id.* at 12-13.

³² *Id.* at 13.

³³ *Id.*

³⁴ *Id.* at 13-14.

would have been unnecessary if the filing of a class action “brought” the claims of absent class members.³⁵

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor and Kagan. The dissent asserted that the filing of a class action complaint within the repose period satisfied the statute of repose by providing defendants with notice of their “potential liability to all putative class members.”³⁶ The dissent would have concluded that by filing an individual action, CalPERS “simply took control of the piece of the action that had always belonged to it,” which did not implicate the concerns protected by statutes of repose.³⁷ The dissent also warned that the Court’s refusal to toll the repose period could impair the constitutionally protected opt-out rights of class members and burden courts with protective filings.³⁸

Significance of CalPERS

The *CalPERS* decision will prompt putative class members to consider within the repose period whether to preserve their ability to pursue an individual opt-out action by filing a separate complaint or a motion to intervene, instead of delaying that decision until after a class settlement or class certification. The decision also may encourage institutional investors to seek to serve as lead plaintiffs—much as Congress intended in enacting the Private Securities Litigation Reform Act—instead of opting out.

By requiring putative class members to come forward within the repose period, the *CalPERS* decision clarified the duration of potential liability under the securities laws, and thereby provided certainty and predictability to securities issuers and underwriters, as well as corporate officers and directors. The decision will also facilitate the settlement of securities class actions, by providing the negotiating parties with

clarity about the scope of potential opt-outs from such settlements.

While *CalPERS* specifically addressed Section 13 of the Securities Act, its reasoning applies broadly to all statutes of repose. *CalPERS*’s impact thus extends beyond cases asserting claims under the Securities Act to repose periods in other statutes, including the Exchange Act. The effect of the *CalPERS* decision to prevent the application of class-action tolling to the statutes of repose applicable to claims under Sections 10(b) and 14(a) of the Exchange Act was further confirmed by the Supreme Court’s denial of three petitions for certiorari that raised the same issue under those statutes shortly after it issued the *CalPERS* decision.³⁹

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³⁵ *Id.* at 14-15.

³⁶ See *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Secs., Inc.*, No. 16-373, dissenting op., at 1-2 (June 26, 2017).

³⁷ *Id.* at 3.

³⁸ *Id.* at 4-5.

³⁹ See *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016), *petition for cert. denied*, No. 16-389 (June 27, 2017); *SRM Glob. Master Fund Ltd. P’ship v. Bear Stearns Cos. LLC*, 829 F.3d 173 (2d Cir. 2016), *petition for cert. denied*, No. 16-372 (June 27, 2017); *DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016), *petition for cert. denied*, No. 16-206 (June 27, 2017).