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Memorandum

The Supreme Court Holds *American Pipe* Tolling Inapplicable to Section 13's Three-Year Statute of Repose, Which Governs Claims Under Sections 11 and 12 of the Securities Act

June 27, 2017

"The purpose of a statute of repose … is to allow more certainty and reliability. Those ends, too, are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors."

— Justice Kennedy

On June 26, 2017, the Supreme Court held *American Pipe* tolling does not apply to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933, which governs claims brought under Sections 11 and 12 of that Act. *California Public Employees Ret. Sys. v. ANZ Securities, Inc.* (No. 16-373), 2017 WL 2722415 (2017) (Kennedy, J.) (*CalPERS*). The Court's decision resolves a circuit split, and affirms the approach adopted by the Second Circuit in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013) (*IndyMac*).

Background

Section 13 establishes a one-year statute of limitations and a three-year statute of repose for claims under Sections 11 and 12. The statute provides in relevant part that "[i]n no event shall any … action be brought to enforce a liability created under [Section 11] or [Section 12(a)(1)] … more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2)] …more than three years after the sale." 15 U.S.C. § 77m.

In 2008, purchasers of securities issued by Lehman Brothers Holdings filed a putative class action complaint in the Southern District of New York alleging Section 11 claims in connection with offerings made in 2007 and 2008. The putative class included the California Public Employees' Retirement System ("petitioner"), but petitioner was not a named plaintiff in the suit.

In 2011, more than three years after the offerings at issue, petitioner filed an individual suit in the Northern District of California alleging securities law violations "identical" to those pled in the class complaint. Petitioner's suit was transferred to and consolidated with the putative class action in the Southern District of New York. When a proposed settlement was reached in the putative class action, petitioner opted out of the class.

Defendants-respondents moved to dismiss petitioner's individual suit as untimely under Section 13's three-year repose period. Petitioner claimed that the three-year time bar was tolled during the pendency of the putative class action pursuant to the *American Pipe* doctrine. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme 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." *Id.* at 554.

The Southern District of New York held *American Pipe* tolling inapplicable to Section 13's three-year time bar, and the Second Circuit affirmed based on its earlier decision in *IndyMac*. The Sixth Circuit followed the Second Circuit's approach, while the Tenth Circuit previously concluded that the repose period was subject to tolling.[1]

Summary of the Court's Decision

Justice Kennedy delivered the Court's 5-4 opinion, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch. The Court first reaffirmed that Section 13's three-year bar sets forth a statute of repose.[2] The Court reasoned that the statutory language "admits of no exception and on its face creates a fixed bar against future liability." *CalPERS*, 2017 WL 2722415, at *7. The Court found Section 13's inclusion of a one-year statute of limitations supported its view, since "[t]he pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits." *Id.* In addition, the Court deemed it significant that Congress shortened Section 13's previous "outside limit" from ten years to three years in order "to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability." *Id.* at *8.

The Court deemed "critical" its "determination that the 3-year period is a statute of repose" because "the question whether a tolling rule applies to a given statutory time bar is one of statutory intent." *Id.* (internal quotation marks omitted). The Court emphasized that "[t]he purpose of a statute of repose is to create 'an absolute bar on a defendant's temporal

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[1] Compare *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 792-95 (6th Cir. 2016) with *Joseph v. Wiles*, 223 F.3d 1155, 1166-1168 (10th Cir. 2000).

[2] The Court noted that it has previously "described [Section 13's three-year time bar] as establishing a 'period of repose' which 'impose[s] an outside limit' on temporal liability" *CalPERS*, 2017 WL 2722415, at *7 (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 401 U.S. 350, 363 (1991)).

liability'" that "is in general not subject to tolling." *Id.* (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)). The Court found that tolling a statute of repose "is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances," such as cases in which "the statute of repose itself creates an express exception." *Id.*

With this framework, the Court held that "the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13." *Id.* at *11. The Court explained that "the object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity" such as the *American Pipe* tolling doctrine. *Id.* The Court found that "[n]o feature of § 13 provides that deviation from its time limit is permissible in a case such as this one." *Id.*

"Today's decision disserves the investing public that § 11 was designed to protect. The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period."

— Justice Ginsburg

The Court rejected petitioner's contention that "the filing of a class-action complaint within three years fulfills the purposes of" Section 13's statute of repose "with regard to later filed suits by individual members of the class" because "the class complaint puts a defendant on notice of the content of the claims against it and the set of potential plaintiffs who might assert those claims." *Id.* The Court found that "permitting a class action to splinter into individual suits" would "threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose." *Id.*

The Court also rejected petitioner's argument that "an 'action' is 'brought' when substantive claims are presented to any court, rather than when a particular complaint is filed in a particular court." *Id.* at *13. The Court observed that adopting this approach would mean that "an individual action would be timely even if it were filed decades after the original securities offering—provided a class-action complaint had been filed at some point within the initial 3-year period." *Id.*

Finally, the Court found meritless petitioner's contention that dismissal "would eviscerate its ability to opt out." *Id.* at *12. The Court explained that the "privilege to opt out" does not encompass the right to file suit "without regard to mandatory time limits set by statute." *Id.*

Justice Ginsburg filed a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan. The dissent asserted that petitioner's claim "was timely launched when the class representative filed a complaint … on behalf of all members of the described class," including petitioner. *Id.* at *15. The dissent stated that petitioner's "statement of the same allegations in an individual complaint could not disturb anyone's repose, for respondents could hardly be at rest once notified of the potential claimants and the [claims] at issue" by the class complaint. *Id.* at *16.

The dissent opined that "[th]e harshest consequences" of the majority's decision "will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period … [and] stand to forfeit their constitutionally shielded right to opt out of the class." *Id.*

Implications

The *CalPERS* decision reinforces the certainty and reliability afforded by statutes of repose. The decision may prompt a modest increase in the timely filing of protective claims by individual investors during the pendency of putative class actions asserting claims under Sections 11 or 12 of the Securities Act. Any such increase is unlikely to be substantial, however, consistent with the Court's observation that no "influx of protective filings" followed the Second Circuit's decision in *IndyMac,* which adopted the rule affirmed in *CalPERS*. *Id.* at *12.

The most significant aspect of the *CalPERS* decision may be its sweeping language on the effects of statutes of repose. Because the Court did not limit its discussion to Section 13, but instead addressed statutes of repose more broadly, the *CalPERS* decision will prove useful to defendants seeking to obtain dismissal of actions brought outside of any statute of repose that does not expressly incorporate a tolling provision.

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