

CASE ALERT

California Public Employees' Retirement System
(CalPERS) v. ANZ Securities, Inc., et al.:

The Future Of Opt-Outs Hangs In The Balance



An Important Alert for Institutional Investors

On April 17, 2017, the U.S. Supreme Court heard oral arguments in *CalPERS v. ANZ Securities*, a case that stands to have far-ranging implications in opt-out litigation. At issue in *CalPERS* is whether, under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), the filing of a class action complaint tolls the three-year statute of repose in Section 13 of the Securities Act of 1933 ("Securities Act") with respect to individual claims filed more than three years after the offending conduct took place. The outcome of this case has important ramifications for institutional investors. Indeed, amicus briefs were filed by at least 77 institutional investors, the Attorney Generals of sixteen States, the National Conference on Public Employee Retirement Systems, six retired federal judges, current and former directors of publicly traded companies, ten civil procedure and securities law professors from distinguished universities, national public interest advocacy groups, and the North American Securities Administrators Association, Inc.

Under *American Pipe* tolling, the filing of a securities class action suspends the running of the statute of limitations for all class members. However, courts have been divided on whether *American Pipe* tolling has the same effect on a statute of repose which, unlike a statute of limitations, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but from the date of the last culpable act or omission of the defendant, regardless of whether a plaintiff has been injured.

Until recently, courts operated under the assumption that the statutes of repose in the Securities Act and Securities Exchange Act of 1934 ("Exchange Act") were tolled by the filing of a putative class action.¹ Because securities class action litigation is complex and highly contested, class certification decisions and settlements frequently do not take place until after the repose period has lapsed. Class members, therefore, had the luxury of waiting until a class had been certified or a settlement had been reached before deciding whether to opt-out and file an individual action.

Background to the CalPERS case

In 2000, the Tenth Circuit became the first U.S. Court of Appeals to decide whether *American Pipe* tolling applies to the Securities Act's statute of repose, holding in the affirmative.²

In 2013, the Second Circuit became the first U.S. Court of Appeals to conclude that the Securities Act's statute of repose was not subject to *American Pipe* tolling. *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013) ("*IndyMac*"). The U.S. Supreme Court had initially agreed to review *IndyMac*, but dismissed the appeal after the parties reached a tentative settlement. The Sixth and Eleventh Circuits have since sided with *IndyMac*.

¹ The Securities Act has a three-year statute of repose and the Exchange Act has a five-year statute of repose.

² See *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000).

In *CalPERS*, a retirement fund filed a putative class action against underwriters of various debt securities issued by Lehman Brothers. More than three years after the debt securities were offered to the public but before the district court ruled on class certification, the California Public Employees' Retirement System ("CalPERS") decided to file an individual action against the underwriters. After the parties to the class action reached a settlement and the district court preliminarily certified the class, CalPERS opted out of the settlement, deciding to pursue its own claims individually. The district court, however, dismissed these claims as untimely, finding that the individual action had been filed after the Securities Act's three-year statute of repose had lapsed. The Second Circuit affirmed, concluding that the filing of the putative class action does not toll the Securities Act's statute of repose.

If the Supreme Court determines that the Securities Act's statute of repose is not tolled under *American Pipe*, investors will have to promptly decide whether or not to file an individual action, particularly in cases that are already pending, or risk being forced to accept an unsatisfactory recovery. Oral arguments suggest that the Justices could be closely divided. We will see in June as the high court will issue a ruling before the current session ends.

Practical Implications for Shareholders

The Supreme Court decision will have a big impact on public shareholders. Numerous studies have shown that in some circumstances, shareholders who have incurred losses in securities fraud cases can fare much better if they opt out and file an individual action.³ While there certainly may be increased risks, pension funds have historically recovered from 13% to 90% more by opting-out rather than remaining class members in the right case. *Id.*

Should the Supreme Court find that the statute of repose is not tolled by the filing of a class complaint, institutional investors will need to implement or revise their procedures with respect to monitoring securities fraud class actions. According to an empirical study conducted by a number of law professors, the Securities Act's three-year repose period would have expired in 73% of cases that reached a certification decision between 2002-2009.⁴ In cases arising under Section 10(b) of the Exchange Act, the five-year repose period would have expired in 44% of all cases that reached a certification decision between 2002-2009.

First, monitoring counsel will need to calculate the deadlines for filing an individual complaint as soon as possible, generally when the first complaint is filed. A comprehensive analysis will need to be done at the inception of the case, and investors will not have the luxury of waiting to see how the factual record develops, or how the court rules on key pleadings. Second, if the choice is made to file an individual action, counsel must calculate the deadline for doing so, and make sure any initial pleading is timely filed based on the date of the last culpable act.

While this may create more work on the front end, it is possible that filing an individual action early in a case may yield favorable results sooner. For example, many public funds who have been operating under the restrictions of the *IndyMac* case and who opted out early in the *Petrobras* case⁵ have already reached successful settlements, even though the class case is currently stayed pending an appeal to the Second Circuit on class certification issues.

For more information on *CalPERS* and opt-out litigation, please contact Maya Saxena at msaxena@saxenawhite.com.

³ Amir Rozen, Joshua B. Schaeffer and Christopher Harris, Opt-Out Cases in Securities Class Action Settlements, Cornerstone Research, 2013 and 2012-2014 Update.

⁴ Br. of Civil Procedure and Securities Law Professors As *Amici Curiae* in Support of Pet., p. 7-10, *CalPERS v. ANZ Securities* (No. 16-373).

⁵ *In re Petrobras Secs. Lit.*, Case No. 14-cv-9662-JSR (S.D.N.Y.).