

# Alert

## Supreme Court Holds that Individual ‘Opt Out’ Securities Act Plaintiffs Cannot Rely on *American Pipe* Tolling to Extend the Statute of Repose

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In *California Public Employees’ Retirement System v. ANZ Securities, Inc.* (“CalPERS”),<sup>1</sup> the United States Supreme Court recently held that the filing of a class action for violations of Section 11 of the Securities Act of 1933 does not toll the three-year statute of repose set forth in Section 13 of the Act with respect to identical, individual “opt out” claims of the putative class members. The Court’s ruling that *American Pipe* tolling<sup>2</sup> applies only to statutes of limitations, not statutes of repose, resolved an issue over which federal courts had become divided and will likely lead to the filing of “opt out” claims earlier in the life-cycle of federal securities class actions.

### The CalPERS Decision

At issue in the case was the timeliness of an individual opt-out suit brought by CalPERS under Section 11 arising out of Lehman Brothers’ collapse, which the pension fund filed after the expiration of Section 13’s three-year time bar. After the Second Circuit affirmed the dismissal of its claims as untimely, CalPERS appealed to the Supreme Court, arguing that its claims were tolled during the pendency of a timely-filed class action suit. In a 5-4 decision, the Supreme Court affirmed, making two explicit holdings: (i) the three-year time bar prescribed by Section 13 is a statute of repose, and (ii) *American Pipe* tolling does not apply to statutes of repose.

Before addressing the *American Pipe* rule directly, Justice Kennedy, writing for the majority, explained that Section 13’s three-year period operates as a statute of repose — which “give[s] a defendant a complete defense to any suit after a certain period” — rather than a statute of limitations — which serves the “distinct purpose” of “encourag[ing] plaintiffs to pursue diligent prosecution of known claims.” Slip op. at 5 (quotations omitted). Among other factors, the Court relied on the statutory language and structure of Section 13 to reach this conclusion. Section 13 provides, in relevant part, that “no action shall be maintained to enforce liability under [Sections 11 and 12] unless brought within one year after the discovery of the untrue statement or the omission, ... [but i]n no event shall any such action be brought to enforce a liability created under [Section 11 or 12] more than three years after the security was bona fide offered to the public.” 15 U.S.C. § 77m. As the statute prescribes two different time periods, and because the three-year time period beings to run “from the defendant’s last culpable

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<sup>1</sup> No. 16-373, 582 U.S. \_\_\_, No. 16-373, Slip op. (June 26, 2017).

<sup>2</sup> In its 1974 *American Pipe* decision, the 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.” *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

act (the offering of the securities),” rather than the one-year period that runs from plaintiff’s discovery of the cause of action, the Court reasoned that the longer period operated as a statute of repose enacted to “protect[] the defendant from an interminable threat of liability.” Slip op. at 6.

Having determined that the three-year limit is a statute of repose, the majority went on to explain that it is not subject to *American Pipe* tolling. Equitable tolling rules, like the one announced in *American Pipe*, cannot apply to override “fixed limit[s]” set by Congress in statutes of repose — which, as the Court explained, reflect a “legislative decision that as a matter of policy there would be a specific time beyond which a defendant should no longer be subjected to protracted liability.” Slip op. at 8 (alterations omitted). As such, applying *American Pipe* to “permit[] a class action to splinter into individual suits” after expiry of the repose period would controvert the intent behind statutes of repose. Slip op. at 13.

### **Implications for Securities Class Action Litigants**

While the *CalPERS* Court explicitly considered only the specific statutory language before it, its decision may well be applied outside Securities Act cases. For example, claims under Section 10(b), the general antifraud provision of the Securities Exchange Act of 1934, must be brought no later than “2 years after the discovery of the facts constituting the violation; or 5 years after such violation.” 28 U.S.C. § 1658(b). Lower courts, may, therefore, extend the reasoning of *CalPERS* to deny application of *American Pipe* tolling to opt-out claims under Section 10(b) to save suits filed after its five-year repose period. The *CalPERS* decision will undoubtedly lead to the filing of “opt out” suits earlier in the life-cycle of federal securities class actions — many of which take more than five years to resolve.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or the author.

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