Client Update
U.S. Supreme Court Strictly Interprets Three-Year Time Limit for Filing Section 11 Claims

NEW YORK
Maeve L. O'Connor
mloconnor@debevoise.com

WASHINGTON, D.C.
Colby A. Smith
casmith@debevoise.com

Jonathan R. Tuttle
jrtuttle@debevoise.com

Ada Fernandez Johnson
afjohnson@debevoise.com

Ryan M. Kusmin
rmkusmin@debevoise.com

The U.S. Supreme Court held on Monday that the three-year time limitation set forth in the Securities Act of 1933 is a statute of repose intended to give defendants a "complete defense to any suit after a certain period of time" and is not subject to equitable tolling by courts.[1] In the 5-4 ruling, the Court held that CalPERS, which had originally been a member of a timely-filed class action but opted out of that case's resolution, could not bring an individual claim under Section 11 of the Securities Act because the three-year deadline could not be tolled during the pendency of the class action.

The Court's decision, which is consistent with preexisting Second Circuit law, will likely have a significant impact on private securities lawsuits arising from the Securities Act, including class actions alleging Section 12 and Section 14 claims, which also have a three-year statute of repose, as well as claims brought under Section 10(b) of the Securities Exchange Act, which is subject to a five-year statute of repose. The Court's decision comes on the heels of *Kokesh v. SEC*, decided earlier this month, which limited the U.S. Securities and Exchange Commission's ("SEC") ability to obtain disgorgement beyond the statutory five-year limitations period.[2]

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[1] *CalPERS v. ANZ Securities, Inc.*, No. 16-373, Slip Op. (June 26, 2017), *available at* https://www.supremecourt.gov/opinions/16pdf/16-373_pm02.pdf.

[2] *See* Debevoise & Plimpton, LLP, Client Update: U.S. Supreme Court Holds SEC Disgorgement Is a Penalty Subject to a Five-Year Statute of Limitations (June 7, 2017), *available at* http://www.debevoise.com/insights/publications/2017/06/us-supreme-court-holds-sec-disgorgement.

BACKGROUND

Section 11 of the Securities Act provides "'purchasers [in a public offering] a right of action against an issuer or designated individual,' including securities underwriters for any material misstatements or omissions in a registration statement."[3] Private actions under Section 11 are subject to two time limitations set forth in Section 13 of the Securities Act: (i) a statute of limitations, which prohibits actions brought "one year after the discovery of the untrue statement or the omission or after such discovery should have been made by the exercise of reasonable diligence;"[4] and (ii) a statute of repose, which prohibits any action "brought to enforce a liability created under [Section 11] more than three years after the security was bona fide offered to the public. . . ."[5]

Appellant CalPERS had been a member of a class of plaintiffs that brought Section 11 claims in 2008 against respondents, financial firms associated with registration statements filed by Lehman Brothers in 2007 and 2008. CalPERS eventually filed a separate complaint against respondents in 2011, and opted out of the class action settlement. Respondents sought to dismiss the stand-alone CalPERS complaint, citing the three-year statute of repose. The U.S. District Court for the Southern District of New York granted respondents' motion to dismiss, and the Second Circuit affirmed.[6] Appellants then sought review by the U.S. Supreme Court.

THE COURT'S OPINION

Justice Kennedy, writing for the majority, noted that statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time."[7] The Court concluded that the three-year period in Section 13 is clearly a statute of repose because it is paired with the one-year statute of limitations (a common statutory structure); as such, it begins to run when the securities are offered.

Further, the Court held that the statute of repose is not subject to tolling, which arises from the equitable powers of courts. Statutes of limitations may be tolled

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[3] *CalPERS*, Slip Op. at 2.

[4] *Id.*

[5] 15 U.S.C. § 77m.

[6] *In re Lehman Bros. Securities and ERISA Litig.*, 655 Fed. Appx 13 (2d Cir. 2016).

[7] *Id.* at 5.

to "allow injured persons to recover for injuries that, through no fault of their own, they did not discover because the injury or the perpetrator was not evident until the limitations period otherwise would have expired."[8] Statutes of repose, by contrast, reflect "[t]he unqualified nature of [the legislature's] determination [and] supersede[] the courts' residual authority and foreclose[] the extension of the statutory period based on equitable principles."[9]

The Court distinguished this case from *American Pipe and Construction Co. v. Utah*,[10] in which the Court had allowed plaintiffs to intervene in a federal antitrust class action after a four-year time bar had expired, because *American Pipe* interpreted a statute of limitations, not a statute of repose.[11] The Court noted that statutes of repose are intended "to grant complete peace to defendants," which necessarily "supersedes the application of a tolling rule based in equity."[12] Allowing tolling here, the Court said, "would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose."[13]

The Court also rejected CalPERS's argument that its suit was timely because claims (in the class action) had been brought on its behalf before the end of the three-year period. The Court found that the term "action," as it appears in Section 13's statue of repose, referred to "suit." As a result, an individual suit could not be brought at some later date simply because a class action had been filed within the initial three-year period.

The four dissenting justices argued that the majority's ruling will "gum up the works of class litigation" by incentivizing defendants to "slow walk discovery and other precertification proceedings" and thereby incentivize any class member to "file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires" to preserve their right to opt-out of the class.[14] Justice Ginsberg also warned that class counsel as well as district courts

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[8] *Id.* at 16.

[9] *Id.* at 8.

[10] 414 U.S. 538 (1974).

[11] *CalPERS*, Slip. Op. at 11 (internal citations omitted).

[12] *Id.*

[13] *Id.* at 13.

[14] *Id.* at 4-5 (Ginsburg, J., *dissenting*).

may have a duty to notify class members about the possible consequences of not filing a timely protective claim.

CONCLUSION

The Court's decision not only protects issuers and underwriters against new Section 11 litigation after the three-year statute of repose has passed, but also will likely apply to other securities law claims, such as those arising under Sections 12 and 14 of the Securities Act and Section 10(b) of the Securities Exchange Act.[15] This should inhibit large, well-resourced institutions from employing a recently common tactic of waiting until a potential class settlement is negotiated and then opting out in hopes of leveraging their position to secure a more significant individual payout. As the dissent notes, such plaintiffs may seek to file a protective claim, in a separate complaint, before expiration of the three-year period. Forcing such plaintiffs to make an earlier decision to opt out may enable opt-out cases to be coordinated with class action litigation and facilitate global settlements.

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Please do not hesitate to contact us with any questions.

[15] Applying similar reasoning, the Second Circuit concluded last year that the five-year statute of repose in the Exchange Act is not subject to equitable tolling. *See SRM Global Master Fund Ltd. Partnership v. Bear Stearns Cos*., No. 14-507, 2016 WL 3769735 (2d Cir. July 14, 2016).