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Blog Entry: Supreme Court Intensifies Timing Pressure on Federal Securities Claimants

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It is not uncommon for unnamed class members to opt out of the class when securities class actions veer toward settlement. They might deem the proposed settlement inadequate, and would prefer at that point to go it alone, perhaps believing they can elicit a better deal.

For would-be opt-outs in class actions brought under §11 of the Securities Act of 1933, the ground shifted on June 26, 2017 when the United States Supreme Court decided *California Public Employees' Retirement System v. ANZ Securities, Inc.,* 582 U. S. ____ (2017), case no. 16-373.

Generally speaking, §11 imposes liability upon those who issue and sign securities registration statements "contain[ing] an untrue statement of a material fact or omitt[ing] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. §77k(a).

Claims under §11 must be brought within the time periods identified in §13 of the Act: "No action shall be maintained to enforce any liability created under [§11] unless brought within 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. ... *In no event* shall any such action be brought to enforce a liability created under [§11] *more than three years* after the security was bona fide offered to the public[.]" 15 U. S. C. §77m. (Emphasis added.)

Sounds straightforward, doesn't it?

Actually, it wasn't, until the Court decided *ANZ Securities.*

The reason for the murkiness was because that strict three-year deadline was at odds with the Supreme Court's holding in another case, *American Pipe & Constr. Co. v. Utah,* 414 U. S. 538 (1974), in which it ruled 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." (Emphasis added.) The Court expanded on that decision in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), where it stated that "[o]nce the statute of limitations has been tolled" by the commencement of a class action, "it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action."

And therein lay the conundrum. Under under Securities Act of 1933, §11 claims cannot-under any circumstances-be brought more than three years after the trigger date. Yet under *American Pipe*

, because class members' limitations periods are tolled while the class action is pending, opt-outs from the class could bring their own §11 case *more* than three years after the trigger date, as long as they do so within the recalculated limitations period. How do you reconcile these conflicting positions?

That was the question confronting the Court in *ANZ Securities.* And it resolved it by holding that *American Pipe* tolling does not apply to claims brought under §11. You either sue within the three-year period or you lose your claim.

Why?

Because that, the Court explained, is what the statute plainly says. "The statute provides in clear terms that '[i]n no event' shall an action be brought more than three years after the securities offering on which it is based. This instruction admits of no exception and on its face creates a fixed bar against future liability."

But what about *American Pipe*?

That decision, the Court held, does not apply to §11 claims, because §11's three-year limit constitutes a statute of *repose*, not a statute of limitations, and while courts have equitable authority to toll statutes of limitations, they have no such authority for statutes of repose: those deadlines are legislatively fixed, and judicially immovable. "The purpose of a statute of repose," the Court noted, "is to create an absolute bar on a defendant's temporal liability." "Tolling 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."

In other words, the three-year deadline is etched in stone.

What does all this mean from a practical perspective? It means that those who believe they have viable §11 claims that are otherwise being pursued in class actions in which they are unnamed plaintiffs might hasten to file their own lawsuits rather than await the outcome of the class action. Better to take control of their own cases, they might reason, than to confront too late the possibility of a settlement with which they're dissatisfied.

The vote was 5 to 4, with Justices Ginsburg, Breyer, Sotomayor and Kagan dissenting. The decision can be found at https://goo.gl/WBk9XV.