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Supreme Court Agrees to Decide Critical Issue Affecting the Timeliness of Securities Claims

January 17, 2017

On January 13, 2017, the Supreme Court granted a petition for a writ of *certiorari*--i.e., it agreed to hear an appeal--in a case that presents a vitally important question for institutional investors. In this case, *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373, the Court will decide whether the filing of a putative class action "tolls" (serves to satisfy) the three-year time limitation in Section 13 of the Securities Act of 1933 with respect to putative class members' claims under Sections 11 and 12 of the Securities Act. The Court's decision will likely also apply to the similar five-year time limitation applicable to claims under Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5.

The Long-Established *American Pipe* Tolling Doctrine Is Vital for Investor Rights

The Supreme Court laid down the class action tolling doctrine over forty years ago in the *American Pipe* case. Under the *American Pipe* rule, investors have been able to rely on the commencement of a securities class action to protect and preserve the timeliness of their individual claims for recovery of securities damages until the court decided whether to grant the case class action status. For four decades, it was understood in the lower courts that the *American Pipe* rule applied to both the three-year period applicable to claims under Sections 11 and 12 of the Securities Act for material misrepresentations in public offerings, and the five-year period applicable to claims under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 for fraud in connection with open market purchases. Thus, investors have relied on this doctrine for over forty years to ensure that the filing of class action cases would preserve the timeliness of their claims for recovery of damages under the federal securities laws.

In the decision that is now being appealed to the Supreme Court, the Second Circuit Court of Appeals rejected the established class action "tolling" doctrine. The Tenth and Federal Circuits have all held that the tolling doctrine applies to the three-year limitations period in the Securities Act or to substantially similar limitations periods in other statutes, but the Second Circuit held in 2013 in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* that tolling applies only to the Securities Act's one-year statute of limitations, not to its three-year statute of "repose." The Second Circuit's ruling, which it reiterated in *ANZ Securities*, created a circuit split that caused serious uncertainty about whether investors' claims were timely depending on where in the country they were filed. Since then, the Sixth and Eleventh Circuits have agreed with the Second Circuit, exacerbating the circuit split and the resulting uncertainty about investor rights. The Supreme Court was set to resolve this issue in 2014 in an appeal from the Second Circuit's decision in *IndyMac*. However, the Court dismissed *certiorari* in that case only days before oral argument after a settlement of the underlying case. Now the Court will finally resolve the circuit split in *ANZ Securities*.

What's at Stake for Investors

The practical effect of the Second Circuit's narrow ruling, if it is not reversed by the Supreme Court, will be that:

- Investors will have to monitor closely the progress of class certification in each case in which they have a significant financial interest (as well as other developments that may affect their claims) because they can no longer rely on the filing of a class action to preserve their claims;

- Investors will need to retain counsel and file their own individual actions, or move to intervene in the class action, to avoid losing their right to recover for violations of the federal securities laws in the large number of cases in which class certification may not be decided until after the applicable periods for asserting new claims has run; and
- Investors will lose the ability in nearly all cases to wait until a settlement is reached to decide whether to opt out of the class in order to seek a greater recovery of their losses, and would be forced to decide whether to opt out much earlier without any ability to assess whether the class settlement provides adequate compensation.