

Sharply-Divided Supreme Court Narrows Class Action Tolling Rule

June 27, 2017

In a 5-4 decision, a sharply divided U.S. Supreme Court ruled yesterday in the *CalPERS v. ANZ Securities, Inc.* case (No. 16-373) that the filing of a class action does **not** "toll" or satisfy the three-year time period for class members to assert individual claims for recovery of damages under Sections 11 and 12 of the Securities Act of 1933. While the Court's decision addressed the timeliness of claims brought under the Securities Act's "statute of repose," it is likely the Court's decision will be extended to apply to statutes of repose governing anti-fraud claims under the Securities Exchange Act of 1934, as well as other private rights of action available to investors under the federal securities laws and related legal regimes.

The Supreme Court's decision in *ANZ Securities* is an unfortunate development that overturns decades of established law and policy, and imposes significant costs and burdens on the institutional investor community, litigants, and the courts. Among other things, it will require investors and fiduciaries to make certain procedures are in place to carefully identify and track statutes of repose in securities class actions of interest across the country to ensure that valuable individual securities fraud claims are protected and preserved. Notwithstanding, the Court's decision provides much needed clarity in this important area of the law.

The Court's Decision in *ANZ Securities* Limits the Time Frame for Investors to Assert Individual Claims for Recovery of Securities Damages

The *ANZ Securities* decision significantly narrows the time frame for investors to assert individual claims for recovery of damages under the federal securities laws. As brief background, there are two time periods for filing certain types of actions under the federal securities laws: the statute of limitations, a relatively short period that starts when investors discover or should have discovered the securities law violation; and the statute of repose, a longer period that starts when the violation occurred.

For over four decades investors have been able to rely on the pendency of a securities class action to "toll" or satisfy both time periods. Under the class action tolling rule, investors' individual claims were preserved by the filing of securities class actions until the court decided whether to grant the case class action status, including in connection with a class-wide settlement. Broad application of the class action tolling rule was important for many reasons, but principally because (1) the majority of securities class actions do not reach a court decision on class certification until after the repose period has expired; and (2) the majority of securities class actions also do not settle until after the repose period has expired. Thus, consistent with the lower courts' broad application of the class action tolling rule to both the statutes of limitations and repose, investors have relied on the rule to ensure that the filing and pendency of class action cases preserved the timeliness of their individual damages claims, i.e., should it become necessary or desirable to assert them at a later point in time.

Yesterday, in *ANZ Securities*, a narrow five-Justice majority of the Supreme Court significantly limited the class action tolling rule by holding that it applies only to the Securities Act's one-year statute of limitations, but not to the Securities Act's separate three-year statute of repose. Under the *ANZ Securities* framework, once this three-year time period has run, investors effectively lose their right to opt out of the class action and pursue their own

individual claims for recovery. While not specifically addressed in the Court's decision, we expect that the reasoning of *ANZ Securities* will be applied to the five-year repose period applicable to anti-fraud claims under the Exchange Act, as well as statutes of repose governing a variety of other federal statutes.

The Supreme Court's opinion was authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Gorsuch, Thomas, and Alito. Justice Ginsburg authored a forceful dissent, which was joined by Justices Breyer, Sotomayor and Kagan.

The four-Justice dissent argued that CalPERS's individual claim "was timely launched when the class representative filed a complaint under [the Securities Act] on behalf of all members of the described class." This, the dissent cogently argued, satisfied both the black letter text of the Securities Act's statute of repose and its underlying purpose. The dissent explained that "[w]hen CalPERS elected to pursue individually the claims already stated in the class complaint against the same defendants, it simply took control of the piece of the class action that had always belonged to it." The dissent also criticized the policy ramifications of the majority's decision. "Today's decision disserves the investing public that §11 was designed to protect," the dissent declared, and "gum[s] up the works of class litigation" by forcing investors to file protective filings in many cases before the statutes of repose expire, which will have the effect of "increasing the costs and complexities of the litigation" for the court and all those involved.

To view the Supreme Court's decision, click [here](#).

Practical Implications for Investors

The Supreme Court's narrowing of the tolling doctrine makes it necessary for investors to exercise heightened vigilance to protect their rights in a number of regards:

- **Identification and Monitoring.** Investors should identify all meritorious securities class actions in which they have a significant financial interest and closely monitor the progress of class certification (as well as other developments that may affect their claims) in each case, because they can no longer rely on the filing of a class action to preserve their individual claims. This is particularly important because, as the *ANZ Securities* dissent recognizes, "Defendants will have an incentive to slow walk discovery and other precertification proceedings so the clock will run on potential opt-outs."
- **Protective Motions and Filings.** Investors should consider filing their own individual actions, or move to intervene in the class action, in all monitored class actions with looming statutes of repose in order to avoid having their significant individual claims for recovery lapse. As Justice Ginsburg's dissenting opinion states, "Any class member with a material stake in a §11 case, including every fiduciary who must safeguard investor assets, will have strong cause to file a protective claim, in a separate complaint or in a motion to intervene, before the three-year period expires."
- **Early Case Evaluation and Recovery Strategy.** Investors will lose the ability in nearly all cases to wait until a settlement is reached to evaluate whether the class settlement provides adequate compensation, or whether to opt out of the class settlement to seek a greater recovery through an individual resolution. In light of the *ANZ Securities* decision, investors will now be forced to evaluate at a much earlier time whether their financial interest in a case is sufficiently large and the case is sufficiently strong to warrant an affirmative litigation strategy.

The Supreme Court's narrowing of the class action tolling doctrine has important practical consequences for investors and their fiduciaries, but also provides much-needed clarity.