

### 33 No. 1 Westlaw Journal Corporate Officers & Directors Liability 5

Westlaw Journal Corporate Officers & Directors Liability

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July 10, 2017

Securities/Tolling

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#### NO TOLLING FOR LEHMAN INVESTOR, SUPREME COURT RULES

California Public Employees' Retirement System v. ANZ Securities

In a case stemming from the collapse of Lehman Brothers in 2008, the U.S. Supreme Court has ruled that the filing of a class action under the Securities Act of 1933 did not extend the time limit for a pension fund to file an individual investor suit.

*California Public Employees' Retirement System v. ANZ Securities Inc. et al.*, No. 16-373, 2017 WL 2722415 (U.S. June 26, 2017).

In a 5-4 decision, the high court held the tolling principle from *American Pipe & Construction Co. v. Utah*, 94 S. Ct. 756 (1974), does not apply to the three-year statute of repose in Section 13 of the Securities Act, 15 U.S.C.A. § 77m.

In *American Pipe* the Supreme Court held that under certain circumstances, the filing of a class action tolls the limitations period for later-filed individual actions brought by prospective class members.

A limitations period begins to run when an injury occurs or should have been discovered, while a repose period is a fixed time span that runs from the date of a defendant's allegedly harmful action or inaction.

The California Public Employees' Retirement System, which had opted out of a timely filed class-action securities case against Lehman, filed its own suit under Section 11 of the Securities Act, 15 U.S.C.A. § 77k, more than three years after it bought securities from the investment firm.

CalPERS argued the earlier class action had tolled the pension fund's time to sue, but a majority of the Supreme Court disagreed, finding the *American Pipe* principle does not apply to a repose period.

According to attorneys who have been following the case, the Supreme Court's ruling will provide certainty and peace of mind to defendants.

“This decision gives defendants in securities class actions certainty that they will face no new suits once three years have passed since the relevant securities were issued,” said Joshua D. Yount, a partner with Mayer Brown. “And it makes clear that class actions will not toll similar statutes of repose in other laws.”

Morrison & Foerster partner Mark R.S. Foster said the holding will give defendants peace of mind by letting them determine their potential liability and exposure to expenses more easily.

Expenses may include the cost of defending the company, its top executives and third parties it is contractually obligated to indemnify, such as underwriters, for securities litigation related to an offering, Foster said.

While the holding will also impose monitoring obligations on institutional investors that may want to opt out of a class action, those are “de minimis,” he added.

\*2 “If anything, this creates a business-generation opportunity for the plaintiffs’ bar, which is likely to gladly approach institutional investors to monitor portfolios for the filing of such potential claims at no charge,” Foster said.

Attorney Brendan P. McGarry of Kaufman Dolowich Voluck LLP said the Supreme Court’s ruling resolves the question of whether a repose period can be tolled for Section 11 claims and provides insight into the court’s future.

“This decision makes it clear that issuers and other designated individuals, including underwriters, do not have unending risk of claims with respect to registration statements,” McGarry said.

The ruling also may signal a “pro-corporate stance” on the court, with Justice Neil Gorsuch as the deciding vote, he added.

### ***Underlying dispute***

Lehman sold debt securities to CalPERS and other investors from July 2007 to January 2008.

The investment firm filed the largest bankruptcy in history in September 2008, with debt totaling \$613 billion against total assets of \$639 billion. The filing is widely believed to have played a key role in the 2008 financial crisis.

A retirement fund filed a class-action suit against the investment firm, its top executives and the debt securities’ underwriters shortly before it declared bankruptcy. The suit alleged violations of Section 11 of the Securities Act for misrepresenting the debt securities.

CalPERS filed its own complaint against the same defendants in February 2011, asserting the same claims under Section 11.

The Judicial Panel on Multidistrict Litigation consolidated CalPERS’ suit with other similar actions in the U.S. District Court for the Southern District of New York later that year.

After the MDL plaintiffs reached a proposed settlement with the defendants, CalPERS opted out to pursue its already-filed individual action.

U.S. District Judge Lewis A. Kaplan dismissed the majority of CalPERS’ claims in two short orders 10 months apart, ruling that the pension fund waited too long to file its individual suit. *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-2017, *order issued* (S.D.N.Y. Oct. 15, 2012); *order issued* (S.D.N.Y. Aug. 9, 2013).

The three-year repose period for filing claims involving debt securities began when they were purchased, making all claims related to securities purchased before February 2008 untimely, Judge Kaplan ruled.

### ***American Pipe and IndyMac***

CalPERS appealed to the 2nd Circuit, arguing that *American Pipe* saved its allegations for the debt securities bought before February 2008.

A 2nd Circuit panel, citing its decision in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS Inc.*, 721 F.3d 95 (2d Cir. 2013), held that *American Pipe*'s tolling rule does not apply to the Securities Act's statute of repose because it only applies to statutes of limitations. *In re Lehman Bros. Sec. & ERISA Litig.*, 655 Fed. Appx. 13 (2d Cir. 2016).

\*3 Section 13 provides that any "actions" brought under Section 11 of the Securities Act must be filed within one year after the discovery of the violation or within three years after the security involved was first offered to the public.

Because CalPERS filed its individual suit more than three years after Lehman sold the debt securities, the statute of repose barred its claims, the panel said.

The Supreme Court had agreed to review the application of *American Pipe*'s tolling rule to Securities Act claims when it granted certiorari in *IndyMac*, but the parties settled the case, prompting the justices to dismiss the appeal.

The issue presented itself again in the Lehman case, and a majority of justices held that the tolling principle does not apply to Section 13's repose period.

Justice Anthony Kennedy, writing for the majority, said *American Pipe* tolling is equitable, while repose periods are meant to provide defendants finality.

"The object of a statute of repose, to grant complete peace to defendants, supersedes the application of a tolling rule based in equity," the opinion said.

Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas and Gorsuch joined in the majority opinion.

Although the plaintiffs claimed that not applying *American Pipe* to Section 13 would result in a significant rise in protective filings, the majority noted that an influx of such filings has not occurred in the 2nd Circuit since 2013, when the appeals court decided *IndyMac*.

A plaintiff may move to intervene or request to be named a plaintiff in a pending class action to preserve their right to pursue an individual action, Justice Kennedy's opinion said.

### ***The dissent***

In a dissenting opinion, Justice Ruth Bader Ginsburg, joined by Justices Sonia Sotomayor, Stephen Breyer and Elena Kagan, said the majority's holding will harm the investing public.

"The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period," the dissenting opinion said.

"Absent a protective claim filed within that period, those members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages," Justice Ginsburg wrote.

33 No. 1 WJCODL 5