BARRACK
BULLETIN
THE INSTITUTIONAL INVESTOR'S GUIDE TO SECURITIES CLASS ACTION LITIGATION

U.S. Supreme Court to Hear Argument Regarding Limitation Period Affecting Opt-Out Claims: *California Public Employees' Retirement System v. ANZ Securities, Inc.*

January 2017

Barrack, Rodos & Bacine issues this alert to inform investors who are considering opt-out claims that the U.S. Supreme Court has agreed to review a July 8, 2016 Second Circuit decision that held that the three-year statute of repose[1] that applies to Section 11 and Section 12 Securities Act claims is not stayed by the filing of a class action. The appeal of this case decision will also likely determine whether the five-year statute of repose[2] that applies to Section 10(b) Securities Exchange Act claims is tolled by the filing of a class action. If the Supreme Court affirms the Second Circuit's holding, investors may have to file "protective lawsuits" before the statutes of repose applicable to such claims expire, regardless of whether a class action has already been filed. For this reason, BR&B will work to inform investors considering such claims as to when applicable deadlines are approaching.

American Pipe Doctrine

In federal court litigation, a complaint filed as a class action asserts claims not only on behalf of the named plaintiff, but also for the benefit of the rest of the class, namely all those in a similar situation as the named plaintiff, called absent class members. Historically, absent class members could rely upon the pendency of a class action to protect their rights without requiring them either to intervene in the litigation or to commence their own lawsuit. Instead, the prosecution of the class action would provide them with the same legal protection as if they had personally been named as plaintiffs in the class action complaint.

In 1974 the U.S. Supreme Court held in *American Pipe & Construction Co. v. Utah*,[3] that the 1966 amendments to Rule 23, which made a judgment on a class action binding upon all class members, had eliminated the need for each class member to individually satisfy the statute of limitations, explaining, "there remain

[1] 15 U.S.C. § 77m.

[2] 28 U.S.C. § 1658(b)(2).

[3] 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined …. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. "[4] The Supreme Court was quick to add that its decision did not turn upon whether the absent class members had relied upon the pendency of the class action complaint, or were even aware that such a suit existed.[5] This has become known as the *American Pipe* doctrine.

Nearly a decade later, a unanimous Supreme Court extended the rule of *American Pipe* to protect absent class members who respond to the denial of a class action by filing their own independent actions, rather than moving to intervene in the now uncertified original action, stating "Once the statute of limitations has been tolled, 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." *Crown, Cork & Seal Co., Inc. v. Parker*.[6]

In response to *American Pipe* and *Crown Cork & Seal*, absent class members confidently relied upon the filing of class action complaints to toll the statute of limitations for their covered claims. Unless they felt a need to become a more active participant either by affirmatively moving to intervene or by opting out of the class case, they felt secure in knowing that a timely class complaint tolled the statute of limitations for them unless and until the court determined that the lawsuit could not be maintained as a class action.

American Pipe and *Crown Cork & Seal* were rendered in the context of ***statutes of limitations***, which provides that a claim must be initiated within a certain period of time ***after the plaintiff learned or should have learned of the violation*** giving rise to that claim. Such limitations are somewhat different from ***statutes of repose***, which provide that no claim may be brought after a certain period of time elapses following an event, such as a stock offering, ***regardless of when the plaintiff discovered or should have discovered the violation***.

The Circuits have split with regard to whether *American Pipe* tolls statutes of repose. The Tenth, Seventh and Federal Circuits have held that the filing of a class action lawsuit tolls an otherwise applicable statute of repose, while the Second, Sixth and Eleventh Circuits have refused to apply *American Pipe* tolling to statutes of repose. This split has gone unaddressed by the U.S. Supreme Court until now.

Case Background

On January 13, 2017, the U.S. Supreme Court certified one of two questions submitted to it concerning an appeal of

[4] 414 U.S. at 550-51.

[5] 414 U.S. at 552.

[6] 462 U.S. 345, 354, 103 S.Ct. 2392, 2397-98, 76 L.Ed.2d 628 (1983).

the Second Circuit's decision in *In re Lehman Bros. Sec. & Erisa Litig.*[7] This question asks,

> Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?[8]

The appeal was granted in an opt-out action that CalPERS filed in February 2011 concerning over $31 billion of debt securities offered between July 2007 and January 2008. CalPERS unsuccessfully argued to the District Court and Second Circuit that the filing of a class action concerning these securities on June 18, 2008, tolled the applicable three-year statute of repose because of the *American Pipe* doctrine. The U.S. Supreme Court will now decide whether *American Pipe* extends to statutes of repose.

What to Do Now?

Depending on how the U.S. Supreme Court resolves the conflict between the circuits as to whether class actions toll the Securities Act's statute of repose, absent class members may need to be more pro-active to protect their rights as the three-year statute of repose approaches. The same may be said for Securities Exchange Act claims, although the repose period is longer at five years.

Should the U.S. Supreme Court decline to extend *American Pipe*'s reasoning to statutes of repose, investors who could previously take a "wait and see" approach in deciding whether to stay in a class or opt out and bring their own individual suit may now be acting at their peril. One option might be to seek a tolling agreement with defendants. But this requires defendants to agree to such terms. An alternative strategy that merits consideration would be for those institutional investors that have a sufficiently large claim to ask their individual counsel to file a complaint before the statute of repose period expires on their Securities Act or Exchange Act claims. Such "protective filings" may become necessary nationwide depending on the outcome of this case.

BR&B will follow the progress of *Cal. Pub. Employees' Ret. Sys. v. ANZ Securities, Inc.*, No. 16-373, and will provide updated information concerning this important case. In the meantime, should any fund wish to have BR&B review the fund's financial exposure in current class actions that may productively be the subject of a potential opt out action, the firm would be pleased to undertake such a review.

[7] 655 F. App'x 13 (2d Cir. 2016).

[8] *Cal. Pub. Employees' Ret. Sys. v. ANZ Securities, Inc. et al.*, No. 16-373, petition for cert. at 1.