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Following *CalPERS v. ANZ Securities*, the Third Circuit Confirms No Equitable Tolling of Exchange Act’s Statute of Repose

by Marissa Parker and Bridget Giroud

Earlier this month, the Third Circuit became the first federal appellate court to extend the U.S. Supreme Court’s reasoning in *California Public Employees’ Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017) (*CalPERS*), which held that the Securities Act of 1933’s three-year statute of repose is not subject to equitable tolling under *American Pipe*.¹ In the non-precedential decision of *North Sound Capital, LLC v. Merck & Co. Inc.*, No. 16-1364, 2017 WL 3278886 (3d Cir. Aug. 2, 2017), the Third Circuit held that the Securities Exchange Act of 1934’s five-year statute of repose also cannot be tolled. *North Sound Capital* confirms that aggrieved investors must file a direct “opt out” action before the statute of repose applicable to their individual claims expires, whether under the Securities Act or the Exchange Act.

By way of background, in its 5-4 decision, the *CalPERS* Court resolved a decades-old circuit split regarding whether a securities class action filing tolled the statute of repose for putative class members. In concluding that the Securities Act’s statute of repose cannot be equitably tolled, the *CalPERS* Court contrasted the purposes behind statutes of repose versus statutes of limitations. The former exist to establish the time period after which a defendant is absolutely free from liability, “to give more explicit and certain protections to defendants.” Conversely, the latter, which gave rise to *American Pipe* tolling, are aimed at encouraging plaintiffs to timely pursue claims, grounded in a plaintiff’s reasonable ability to discover its claims. The Court also explicitly found that *American Pipe* tolling is equitable in nature rather than being grounded in legislative enactment, and it again contrasted how statutes of repose are generally subject only to tolling by express legislative exception. The Court further rejected *CalPERS*’ argument that a class action complaint filing could be treated as an individual action for all putative class members, foreclosing opt-out plaintiffs from relying on the class complaint for statute of repose purposes.

In *North Sound Capital*, in 2016, the Third Circuit granted an interlocutory appeal addressing two questions: whether *American Pipe* tolling was legal or equitable in nature, and whether the five-year statute of repose in the Exchange Act was subject to *American Pipe* tolling. The district court below had applied *American Pipe* tolling to the Exchange Act’s statute of repose applicable to individual actions filed after the certification of a securities class action, which would be untimely without tolling. As the Third Circuit aptly noted, back in 2015, when the “case was before the District Court the outcome was not obvious.” In light of the reasoning behind the *CalPERS* majority decision, however, the court concluded that federal securities laws’ statutes of repose cannot be tolled. Accordingly, the Third Circuit remanded the case to dismiss the Exchange Act claims as time-barred.

Taken together, *CalPERS* and *North Sound Capital* eliminate previous uncertainty concerning the application of securities laws’ statutes of repose, a key consideration for both aggrieved investors considering an opt-out action where the alleged securities fraud reaches back several years, and public issuers and underwriters defending against such claims.

¹ *American Pipe* tolling refers to the Supreme Court decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349-54 (1983), which together establish that the timely filing of a class action complaint tolls the statute of limitation for putative class members who opt out of a class action and file a direct action.