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Client Alert

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Supreme Court Holds Opt-Out Lawsuit Asserting Section 11 Claims Was Untimely

At the end of its recent term, the Supreme Court of the United States issued an opinion that will restrict investors' ability to pursue individual claims in certain securities class actions. In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Supreme Court held that claims brought under Section 11 of the Securities Act of 1933 are subject to a three-year statute of repose. As a result, after that three-year period has expired, a plaintiff may not file a new action and pursue their claims individually, even when a class action on their behalf had already been timely filed. This decision should have a significant impact on how Section 11 claims are litigated, and may invite earlier and more frequent decisions by institutional plaintiffs to opt out of class actions and litigate on their own.

In *ANZ Securities*, the plaintiffs alleged that registration statements for certain securities offerings of Lehman Brothers Holdings, Inc., in 2007 and 2008 contained material misstatements and omissions. After more than three years of litigation, the California Public Employees' Retirement System (known as CalPERS) filed a separate complaint that asserted the same claims as those of the pending class action. After CalPERS's case was transferred and consolidated with the class action, the class action settled. CalPERS then opted out of the class and sought again to pursue its individual action, but the district court dismissed CalPERS's case as untimely, and the Second Circuit affirmed.

In a 5-4 vote, the Supreme Court affirmed the judgment of the Second Circuit. Critical to Justice Kennedy's majority opinion was the distinction between statutes of limitations and statutes of repose. As the Court explained, statutes of limitations generally provide for limitations periods that begin to run "when the injury occurred or was discovered." In contrast, statutes of repose begin to run following "the last culpable act or omission of the defendant."

The Court concluded that the Securities Act contains both a statute of limitations and a statute of repose: Plaintiffs must bring their claims within one year after a material misstatement and omission was discovered or should have been discovered, but "in no event" shall such claims be brought more than three years after the offering. Because CalPERS had filed their action more than three years after the offering, the Court found that the action did not comply with the three-year statute of repose. In ruling as it did, the Court declined to extend the rule of *American Pipe & Construction Company v. Utah* (1974), which suspended the limitations period applicable to members of a class during the pendency of a class action. The Court concluded that the rule in *American Pipe* was a form of equitable tolling, which can apply to a statute of limitations but not to a statute of repose.

ANZ Securities promises to change the way in which Section 11 claims are litigated. Because it imposes a strict-liability standard, Section 11 claims are among the most challenging claims under the federal securities laws to defend. The Court's adherence to the statute of repose reduces the danger of dormant but still potent claims' being pursued well after an offering has occurred. At the same time, the ruling could elevate the risk of earlier and more frequent attempts to opt out of class actions because dissatisfied institutional plaintiffs will lose their right to do so by waiting more than three years. Defendants could therefore be left to litigate multiple individual actions more often than they have in the past.

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