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Jurisdiction and Procedure

High Court Ruling Could Burden Investors, Lawyers Say

By Antoinette Gartrell

Large institutional investors will need to decide more quickly whether to opt out of securities class litigation to preserve their right to bring separate suits after a June 26 U.S. Supreme Court ruling, said attorneys who represent them (*Calif. Pub. Emp. Ret. Sys. v. ANZ Sec. Inc.*, 2017 BL 218907, U.S., No. 16-373, 6/26/17).

Snapshot

- High court ruling that commencement of class action doesn't suspend applicable three year time bar could burden investors, lawyers say
- Others say ruling adds certainty to litigation process

Defense lawyers, on the other hand, said the decision will bring much-needed certainty to the securities class action process.

In a five-to-four decision, the high court held the California Public Employees’ Retirement System had waited too long to file its class lawsuit against the underwriters of more than $31 billion in Lehman Brothers’ debt offerings.

The decision means institutional investors will need to spend more time and money more closely monitoring the progress of class actions that might implicate their financial interests, James Commons of McDermott Will & Emery LLP, Washington told Bloomberg BNA.

In the case, CalPERS opted out of a class action and brought an individual suit in 2011 claiming that the underwriters didn't disclose risks related to Lehman's exposure to subprime mortgages in the years before its demise in September 2008. In its petition, the pension fund told the justices that its ’33 Act Section 11 claims would have been timely if the three-year statute of repose had been tolled by the filing of a class lawsuit based on the same alleged misconduct.

The justices determined that the filing of a class action doesn't stop the clock on a three-year time limit set out in 1933 Securities Act Section 13, meaning that its long-standing tolling decision in *American Pipe & Constr. Co. v. Utah* is inapplicable.

The ruling “turned its back on” its own tolling precedent and practical, common-sense considerations and, in so doing, “has imposed hurdles on investors that are onerous, needless and in many cases insurmountable,” Washington lawyer Daniel S. Sommers, Cohen Milstein Sellers & Toll PLLC, told Bloomberg BNA.

Little Impact?

Some investors will simply have their rights “extinguished in cases where their interests were previously protected, as they never will be able to navigate the path set by the Court today,” Sommers, who represents investors in class actions, said.

But Susan Saltzstein, securities litigator at Skadden, Arps, Slate, Meagher & Flom LLP, New York, said the ruling “injects certainty into the litigation process that didn't exist before.” Whether you're a claimant or defendant, “it's nice to know what the rules of the road are,” she said. “Now we have a clear-cut ruling as to when late is too late.”

Securities defendants won't be surprised by last-minute opt-outs and will know where large institutional investors stand at the time defendants make decisions about whether to settle a class action and if so, for how much, ANZ Securities' attorney Victor L. Hou said.

New York lawyer Michael Dell of Kramer Levin Naftalis & Frankel LLP told Bloomberg BNA that the ruling ensures that claims can be adjudicated based on "fresh" evidence. After three years, market participants will be "free from the fear of lingering liabilities and stale claims," he said.

Mark R.S. Foster of Morrison & Foerster LLP, San Francisco, said that the ruling won't diminish the rights of institutional investors in any way and will have little "real-world impact." There aren't a lot of investors that get involved with opt-out actions, he said. Those that do will either need to "move to intervene or be added as lead plaintiff in pending cases, as the Court suggested, or they can set up a reminder on their calendars to assess whether they have a claim that needs filing." Additionally, investors may consider reaching tolling agreements with defendants, Foster said. "It is an easy solution to get around any time bar issues. Savvy institutional investors have always done it."

CalPERS was represented by Thomas C. Goldstein of Goldstein & Russell PC, Bethesda, Md. ANZ Securities was represented by Victor L. Hou of Cleary Gottlieb Steen & Hamilton LLP, New York.

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