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U.S. District Court Holds that Certain Claims by Opt-Out Plaintiffs Are Barred by the Statute of Repose

Article By
Peter M. Saparoff
Joel D. Rothman
Ellen Shapiro
Mintz
Securities Matters

- Litigation / Trial Practice
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In a recent ruling in In re: BP p.l.c. Securities Litigation the United States District Court for the Southern District of Texas dismissed claims asserted by opt-out plaintiffs as time barred by the Exchange Act’s statute of repose pursuant to the U.S. Supreme Court’s ruling in *ANZ Securities*. This decision underscores that institutional investors should closely monitor the statutes of limitation and repose applicable to securities fraud claims to ensure they are not later barred from recovery.

This decision stems from the various class actions that were filed against BP in the Southern District of Texas. Initially, some of the classes included common stock and English securities law claims that were added to avoid *Morrison*’s bar on asserting claims under the U.S. securities laws to recover potential losses for transactions that occur on non-U.S. exchanges. While the class actions—with a much narrower time scope—were eventually settled, they only included American Depository Receipts (ADRs). Those who had common stock claims as well partially opted out to pursue these claims. For more information, see our prior blog entitled U.S. Courts Continue to Deny Attempts to Bring Foreign Law Actions in U.S. Courts to Recover for Potential Losses in Foreign Transactions.

In its September 18, 2018 opinion, the court addressed the BP defendants' motion for judgment on the pleadings to dismiss over a dozen Exchange Act claims, which arose from alleged misstatements and omissions related to the 2010 Deepwater Horizon oil spill. The defendants argued that all Exchange Act claims based upon alleged misstatements made more than five years before the filing of the individual actions at issue were foreclosed by the Exchange Act's statute of repose—an argument that they made on two prior occasions.

Previously, the defendants first raised the statute of repose argument in a 2014 motion to dismiss. However, in its September 2014 decision denying the motion, the court applied *American Pipe* tolling, which provides that "the filing of a class action tolls applicable statutes of limitations as to all putative class members until class certification is denied or until the individual ceases to be a member of the class." At the time of the court's 2014 decision, there was a circuit split as to whether *American Pipe*tolling applied to statutes of repose. The district court held that *American Pipe* tolling was a legal rule, not equitable, and determined that it applied to the Exchange Act claims at issue in denying the BP defendants' motion.

However, in light of the Supreme Court's June 26, 2017 decision in *ANZ Securities*, resolving the circuit split, the Texas court reanalyzed the BP defendants' repose-based arguments. In *ANZ Securities*, the plaintiff opted out of a putative class of investors when the class action settled, and, like the plaintiffs in the BP cases, had filed a separate complaint. Since the complaint in *ANZ Securities* was filed after expiration of the Securities Act's three-year statute of repose period, the Supreme Court dismissed the Securities Act claims—reasoning that *American Pip*e tolling is equitable in nature, and therefore could not toll the statute of repose.

The BP defendants argued that *ANZ Securities* clarified that *American Pipe* tolling is an equitable rule, and since equitable tolling does not apply to statutes of repose, the Exchange Act's five-year statute of repose barred all claims based upon alleged misstatements made more than five years before the filing of the actions. The plaintiffs presented three procedural counterarguments, one of which was that the court's decision as to the BP defendants' motion to dismiss established the law of the case regarding *American Pipe* tolling, and that this prior holding could not be disturbed. The Court rejected this argument under precedent that "[a] court may reexamine its prior decision if 'controlling authority has since made a contrary decision of the law applicable to such issues.'"

Substantively, the plaintiffs sought to distinguish *ANZ Securities*—pointing to the fact that it concerned the Securities Act's three-year statute of repose, and arguing that the Exchange Act's five-year time-bar instead qualified as a statute of limitations to which American Pipe tolling applies. However, the court rejected this argument as well because: (1) "[c]ourts routinely characterize the Exchange Act's five-year statutory limitation restriction as a 'statute of repose'"; and (2) similar to the Securities Act, the Exchange Act's limitations statute provides two different terms—"a shorter one that begins after the discovery of the facts constituting the violation, and a longer one that begins after the violation itself." According to the court, this "support[ed] a conclusion that the longer time-restriction, calculated from the defendant's acts, is intended to be a statute of repose."

Accordingly, in finding that the Exchange Act's five-year bar constitutes a statute of repose, and is not subject to equitable tolling, the court granted the BP defendants' Motion for Judgment on the Pleadings as to the Exchange Act claims based upon alleged misstatements made more than five years before the filing of the actions. While the plaintiffs' English securities law claims remain to be decided upon, this decision highlights the need for institutional investors to closely monitor the statutes of limitation and repose applicable to securities fraud claims, whether filed under the Securities Act or the Exchange Act, in the wake of the *ANZ Securities* decision.