

Update: Briefs Filed in CalPERS v. ANZ Securities



Article By

[Joel D. Rothman](#)

[Mintz](#)

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The [Supreme Court](#) is set to hear arguments on Monday in [CalPERS v. ANZ Securities](#). Previously we provided a [comprehensive overview](#) of CalPERS's brief. In anticipation of oral arguments, below we discuss the arguments raised in ANZ's brief and CalPERS's reply.

The *CalPERS* litigation is notable because of the potential impact it will have on the Second Circuit's *IndyMac* decision, which held that because the three-year limitations period in Section 13 of the Securities Act is a statute of repose, the time to initiate a claim is not tolled by the filing of a class action. In the case now before the Supreme Court, CalPERS argues that the Second Circuit's ruling in *IndyMac*, and in the instant case, conflicts with the Supreme Court's holding in *American Pipe* that the filing of a class action tolls the limitations period for any unnamed member of the proposed class.

ANZ's AND AMICI'S ARGUMENTS

In sum, in its brief ANZ (a) urges the Court to adopt the Second Circuit’s reasoning in *IndyMac*, which distinguishes the two limitations periods in Sections 13, delineating Section 13’s one-year limitations period as a statute of limitations and Section 13’s three-year period as a statute of repose; (b) argues that *American Pipe* establishes an equitable tolling rule that cannot be applied to a congressionally mandated repose period; (c) argues that CalPERS has intentionally distorted the issues to its own advantage by framing its argument to addresses case-specific matters on which the Court declined to grant certiorari; and (d) addresses CalPERS’s policy arguments (which we outlined in our [prior post](#)).

Three amicus briefs were filed on behalf of the Securities Industry and Financial Markets Association and the Clearing House Association L.L.C., the United States Chamber of Commerce, and the Washington Legal Foundation. The substance of the briefs largely mirrors the arguments raised by ANZ, with a focus on the importance of repose periods, the lack of empirical evidence that the *IndyMac* rule has produced the policy problems that CalPERS identifies, as well as suggesting that on the contrary, a requirement that investors file their own actions before repose periods expire leads to consolidated discovery, relieving the administrative burden on courts, rather than adding to it.

American Pipe and Statutes of Repose

ANZ begins by pointing to the language of Section 13, which provides that, “[i]n no event shall any . . . action be brought . . . more than three years after the security was bona fide offered to the public” It argues that the statutory phrase “in no event” clearly distinguishes the three-year limitation period of Section 13 as a statute of repose, not subject to judge-made tolling rules. ANZ also compare the language of the two limitations provisions of Section 13, one of which imposes a one-year limitations period for discoverable claims, providing that, “[n]o action shall be maintained”; and the other, that sets forth a three-year limitations period based on when the securities in question were offered, containing the “in no event” language. ANZ contends that the differential language of the statute cannot be ignored, nor can the language of comparable two-tiered limitations periods that exist in other statutes, such as 28 U.S.C. § 1658(b), which the Court has interpreted in consonance with ANZ’s logic. It also points to the legislative history of Section 13, arguing that Congress intentionally retained the two-tiered framework of the statute in order to be fair to both plaintiffs and defendants.

Building on this logic, ANZ contends that the Court’s decision in *CTS Corporation v. Waldburger*, unquestionably establishes that equitable tolling does not apply to statutes of repose, citing language from *Waldburger* that provides “[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling.” The Respondents argue that since *American Pipe* tolling is clearly equitable in nature, as it was based on traditional equitable principles and has been subsequently characterized as such, its tolling rule cannot apply to the three-year limitations period in Section 13. Further, ANZ asks where *American Pipe*’s tolling rule emanates from if not the courts’ equitable powers, reasoning that it cannot come from Rule 23, which does not discuss tolling, nor can it come from Section 13 itself pursuant to the plain language of the statute. Further, ANZ contends that even if *American Pipe* did establish a legal tolling rule, as CalPERS claims, such “judicial gloss” could not

abridge a substantive right that would override the clear language of Section 13 in violation of the Rules Enabling Act.

ANZ Rebut CalPERS's Arguments Relating to this Individual Action and CalPERS's Policy Arguments

CalPERS's petition for certiorari presented two questions, and the Court only accepted certiorari on the first:

1. 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?
2. May a member of a timely filed putative class action file an individual suit on the same causes of action before class certification is decided, notwithstanding the expiration of the relevant time limitations?

ANZ asserts that CalPERS's theory, that its claims were brought within Section 13's three-year repose period because CalPERS was a member of a timely-filed class action, falls squarely within the scope of Question 2. Because the Court granted certiorari limited to Question 1, ANZ asserts that the Court should decline to consider the portion of CalPERS's brief that fall within the scope of the latter question. Regardless, however, ANZ argues that CalPERS's argument regarding the timeliness of its filing fails on the merits, because while similar claims may have been filed in New York within the three-year repose period, Section 13 speaks not of claims, but of actions timely filed, and CalPERS was never a party to such an action because no class had been certified when CalPERS filed its claim in California.

Finally, ANZ addresses CalPERS's policy arguments regarding the effect of *IndyMac* on the class action system, retorting that *IndyMac* has been the law in the Second Circuit for almost four years without any negative affect. ANZ also argues that CalPERS misconstrues the constitutional right to opt out of class actions as a non-existent constitutional right that an absent class member will have a viable action to opt into.

CalPERS REPLY

CalPERS's reply focuses on ANZ's argument that CalPERS improperly briefed a question that was not certified for consideration by the Court. CalPERS contends that the question of whether it can satisfy Section 13's limitations period is within the scope of the question certified. Question 2, CalPERS argues, addresses class member status, not whether an action was timely filed. CalPERS goes on to assert that it's action was timely filed, arguing that ANZ's reading of Section 13 is erroneous because the meaning of "action" pursuant to Section 13 is a claim brought under Section 11. CalPERS argues that it would be nonsensical to think that Congress intended for each member of a class asserting a claim under Section 11 to file individual suits against a defendant, and that the tolling rule in *American Pipe* is aimed at reducing such inefficiencies.

If the Court holds true to form, we expect a decision to issue by the end of June.

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