Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Court finally hears 'IndyMac' while Justice Gorsuch asks first questions, (Apr. 17, 2017)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The Supreme Court heard oral arguments in a case asking whether Securities Act Section 13 can be tolled in certain contexts. The case before the court resembles one the court ultimately dismissed several years ago and could resolve a split between the Tenth, Seventh, and Federal Circuits on one hand, and the Second, Sixth, and Eleventh Circuits on the other. The Tenth Circuit opinion, discussing tolling, pre-dated now-Justice Neil Gorsuch's service on the Tenth Circuit, although today marked the justice's first questions in active Supreme Court cases (*California Public Employees' Retirement System v. ANZ Securities, Inc.*, April 17, 2017).

Great Recession. The case arose out of CalPERS's purchase of large amounts of Lehman Brothers securities before Lehman Brothers collapsed at the height of the Great Recession. In both *IndyMac* and via an unpublished opinion in CalPERS's case against ANZ Securities, Inc., the Second Circuit held that *American Pipe* tolling did not save untimely individual claims outside the context of the underlying class action suit into which those claims had been consolidated. CalPERS later opted out of a class settlement; CalPERS then unsuccessfully argued to the Second Circuit that its falling within the putative class before the opt-out was sufficient to meet the three-year time limit.

The question of whether *American Pipe* equitable or legal tolling (based on FRCP Rule 23) theories apply to Securities Act Section 13's three-year repose period could dramatically impact similar future cases. The Rules Enabling Act's (28 U.S.C. §2072) command that court procedural rules must not abridge, enlarge or modify any substantive right also overshadows the case. The Second Circuit said in *IndyMac* and *ANZ* that the circuit's reasoning had roots in two concepts: (1) a legislatively created repose statute cannot be affected by *American Pipe* tolling that is equitable in nature; and (2) application of a version of *American Pipe* based on legal tolling would run afoul of the Rules Enabling Act.

Ghost of IndyMac. The Second Circuit's IndyMac decision from a few years ago was supposed to be the vehicle for the Supreme Court to address the *American Pipe* issue inherent in Securities Act Section 13. But that case partially settled and the justices, after having initially granted certiorari, reversed course and dismissed the grant as having been improvidently granted. Hence, today's *IndyMac* redux.

The grant in *ANZ* was limited to the same question presented in *IndyMac* about Section 13: "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?"

Thomas Goldstein, counsel for CalPERS, opened by noting that American Pipe would apply to the first sentence of Section 13. According to CalPERS, the class suit was "brought" within the limitations period on CalPERS's behalf. CalPERS further argued that if the class suit was timely filed (within one year), then it was necessarily brought within the three-year repose period. Justice Gorsuch would later ask a series of questions, the upshot of which was that "action" means law suit and "claim" means claim within a law suit such that there can be a scenario where the claims are the same, but there are different actions.

Justice Kagan asked CalPERS about its non-tolling argument. Counsel for CalPERS replied that tolling fills the gap between a first and second action. But CalPERS in this case had simply decided to "take control" of its own action, so there was no need for tolling.

Paul Clement, arguing on behalf of ANZ, said the "no event" language in Section 13 is "emphatic" and the statute's two-tiered structure and legislative history backed the view that CalPERS could not maintain its case. Clement noted that the Supreme Court has previously labeled *American Pipe* as a tolling decision.

Justices Sotomayor, Kagan, and Ginsburg asked Clement about the practical realities of class action litigation. Justice Sotomayor suggested the differences between a district court judge transferring a case, dismissing a case and the party re-filing, and a situation where a party files a motion to intervene. Clement said intervention still would have to be timely.

Justice Kagan returned to this theme a brief time later and suggested that a large investor like "…CalPERS is not going to make this mistake again" but that smaller investors could be disadvantaged by the need to file a protective action. Justice Ginsburg, referencing the retired federal judges' and law professors' amici briefs (noting need to intervene), asked whether lead counsel in a class action would have a duty to tell other plaintiffs of the need to file separately or to intervene. Clement said he thought lead counsel likely had no such duty and that the worries voiced by amici were unfounded.

Justice Gorsuch takes the bench. Newly sworn-in Justice Gorsuch's presence on the bench restored the court to its full complement of nine justices. In his first questions of the day in a jurisdictional case (*Perry v. Merit Systems Protection Board*), Justice Gorsuch appeared to focus on the "plain language" of the statute in question.

In a second case dealing with intervention (*Town of Chester v. Laroe Estates, Inc.*), Justice Gorsuch again proved to be an active questioner, exacting a "concession" from the Assistant to the Solicitor General regarding the government's constitutional avoidance theory and later setting the stage for the corporate respondent to disclaim relief sought in the complaint in the case (if only because the litigant's emphasis had changed). At other times, Justice Gorsuch inquired about legal points he identified by pinpoint citations to the record.

By contrast, in the *ANZ* case, Justice Gorsuch was a less active questioner, but he returned to the theme of plain statutory language. In one exchange with CalPERS's counsel, the justice asked why the court should not adhere to the "plain language" of Securities Act Section 13 and the "traditional understanding" of the term "action"? In his previous question, Justice Gorsuch had noted "… the laws often distinguish between actions and claims."

A key line of inquiry for Justice Gorsuch focused on the relationship between "No action" and "In no event shall any such action" in the two sentences in Section 13. CalPERS's counsel had just noted ambiguity in the statute when Justice Gorsuch asked: "Where -- where is the ambiguity in -- in no event?" CalPERS's counsel suggested there was more to the statute than the phrase "in no event." Soon after, Justice Alito intervened in another attempt by the court to clarify "such action." The CalPERS reply was that "such action" refers to an action subject to the discovery rule stated in the first sentence of Section 13.

The case is No. 16-373.

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Companies: California Public Employees' Retirement System; ANZ Securities, Inc.

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