

[Securities Regulation Daily Wrap Up, SUPREME COURT NEWS—On final day, High Court decides statute of repose issue, will hear whistleblower case, \(Jun. 26, 2017\)](#)

Securities Regulation Daily Wrap Up

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On the last day of the October Term 2016, the Supreme Court decided one case and granted certiorari in another. The Court held that Securities Act Section 13's three-year time limit is a statute of repose not subject to equitable tolling. Certiorari has been granted for a case asking whether the Dodd-Frank anti-retaliation provision applies to individuals who have not reported to the SEC. Finally, two petitions have been filed asking the court to consider the application of the Securities Litigation Uniform Standards Act to state law contract and breach of fiduciary duty claims.

Calpers v. ANZ. The court held in a 5-4 vote that American Pipe's equitable tolling rule is unavailable to save an individual suit filed outside the three-year repose period contained in Securities Act Section 13. Due to its structure and language, the court said, Section 13 is a statute of repose. American Pipe emphasized equitable principles to the near exclusion of other interests, the court said, suggesting that it is limited to a court's equitable powers to toll a statute of limitations, and a repose statute's purpose supplants a court's equitable powers ([California Public Employees' Retirement System, Petitioner v. ANZ Securities, Inc.](#), Kennedy, A., June 26, 2017).

The court has not yet addressed a petition filed on the same day as ANZ and asking a similar question. [SRM Global Master Fund L.P. v. The Bear Stearns Companies LLC](#) concerns the application of American Pipe to the statute of repose under Exchange Act Section 10(b).

Somers. The court also [granted certiorari](#) for a petition asking if Dodd-Frank protections apply to whistleblowers who did not report to the SEC. The case below turned on Dodd-Frank Act's definition of a "whistleblower." A divided [Ninth Circuit](#) panel held that the anti-retaliation provision applies to all who make internal reports under SOX and other federal laws. In so holding, the panel agreed with the Second Circuit's interpretation of the question, but conflicted with that of the Fifth Circuit ([Digital Realty Trust v. Somers](#), April 25, 2017).

SLUSA petitions. Next, two petitions from the Seventh Circuit ask the court to consider the application of the SLUSA to contract and breach of fiduciary duty claims. The petitioners, who ran afoul of SLUSA preclusion, note that misrepresentations or omissions are not elements of breach of contract or fiduciary duty claims, but misrepresentations or omissions can sometimes be the basis for those claims. The role that the false statement or omission must play in a complaint in order to find SLUSA preclusion has led to a circuit split, the petitions say, and the issue arises frequently in the lower courts. Both cases were decided on the same day, and the petitions each cite the other opinion.

In [Holtz v. JPMorgan Chase Bank, N.A.](#), the petitioner asks the court to address when a party is properly held to be "alleging" a "misrepresentation or omission of a material fact" within the meaning of 15 U.S.C. Section 78bb(f)(1)(A). In this case, investors claimed that they were led to believe that JPMorgan was acting in their best interests when offering mutual funds when, in fact, the bank failed to disclose a bias toward recommending its own funds. Seeking to avoid invoking federal law, the investors framed their claims under state contract and fiduciary principles (16-1536, June 22, 2017).

The district court threw the case out under the SLUSA, concluding that the class action claims rested on the "omission of a material fact." The Seventh Circuit panel [agreed](#), finding that nondisclosure was a "linchpin of this suit" regardless of how the pleadings were framed. According to the court, if JPMorgan had disclosed the

challenged practices at the outset, the petitioners would have no claim. The court also focused at length, the petition remarks, on why the claims could have been brought as federal securities claims.

The petition argues that the issue of whether a party has alleged a misrepresentation or omission under the SLUSA has led to at least a three-way circuit split. The majority approach, as applied in the Second, Third, and Ninth Circuits, asks whether plaintiffs can prevail without proving that the defendants engaged in deceptive misrepresentations or omissions. In the Ninth Circuit, for example, a plaintiff's claim was not barred by SLUSA merely because the complaint also alleged that the defendant had concealed its breach with misrepresentations. In contrast, the petition asserts, the Seventh Circuit holds that a suit is barred whenever an omission is even implicitly alleged and when it is likely that a fraud issue will arise in the course of the litigation. This position effectively eliminates most contract and fiduciary duty claims, "regardless of what the complaint actually alleges."

The Seventh Circuit, the petition argues, stands alone and in conflict with every other circuit to have considered the question. This conflict, the petition continues, is entrenched, long-standing, and widely acknowledged and needs the Court's intervention to be resolved. The viability of a breach of contract or fiduciary duty class action depends entirely on where the lawsuit was filed, the petition says. Moreover, the Seventh Circuit's decision was "obviously wrong" because it ignored the text of the statute in favor of what the court believed to be the scope of SLUSA preclusion.

On the same day it decided *Holtz*, a divided Seventh Circuit panel sided with the lower court and Bank of America in holding that certain banking fees charged, but not disclosed, amounted to an omission of material fact. As a consequence, Goldberg's state law claims for breach of contract and fiduciary duty were preempted by the SLUSA and must be brought in federal court (*Goldberg v. Bank of America, N.A.*, 16-1541, June 21, 2017).

In this case, Goldberg, a trustee, filed suit in Illinois state court alleging that some mutual funds paid the bank a fee based on the balances it transferred without notifying customers that it was retaining them, the economic equivalent of a secret fee. The Bank removed the suit to federal court under SLUSA and Goldberg filed an amended complaint alleging the same state law breach of contract and breach of fiduciary duty claims. The district court held that Goldberg's claims were all precluded by the SLUSA because they were "predicated upon allegations of misstatements, omissions, deception, or manipulation" relating to the transfer of assets to a mutual fund. The Seventh Circuit [affirmed](#), concluding that the complaint depended on the omission of a material fact in connection with a covered security.

Goldberg's petition asks the court to address whether the SLUSA requires dismissing with prejudice a class action complaint for breach of contract and breach of fiduciary duty under state law, when the plaintiff's claims are not predicated on a misrepresentation or omission of material fact. The petition focuses on the dissenting opinion in the Seventh Circuit case, which asserted that the matter was merely a breach of contract claim, proof of which did not require showing any misrepresentation or omission.

According to the petition, the Seventh Circuit's interpretation of the SLUSA places serious restrictions on the enforcement of state laws governing contractual and fiduciary relationships, effectively nullifying Illinois contract law in situations in which a federal fraud claim "could be imagined." As in *Holtz*, the decision conflicts with holdings of the Second, Third, and Ninth Circuits focusing on whether a plaintiff's claim is predicated on a misrepresentation or omission. The petition urges in conclusion that the court clarify that the SLUSA only reaches claims predicated on misrepresentations or omission of material fact.

Read the docket. This case, and others pending before the Court, can be referenced in the latest version of the [Supreme Court Docket](#). Cases are listed separately, along with a brief summary of the questions raised and the status of the appeal.

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