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Textualism Takes Center Stage In CalPERS V. ANZ Securities

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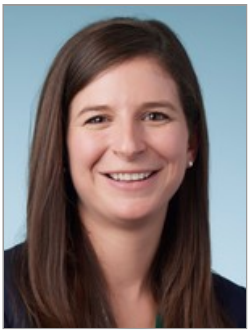

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Law360, New York (April 20, 2017, 11:57 AM EDT) -- CalPERS v. ANZ Securities Inc., argued Monday at the U.S. Supreme Court, deals with a relatively straightforward issue in the generally complex world of securities litigation: Does the filing of a putative class action serve to satisfy the three-year time limit in Section 13 of the Securities Act with respect to the individual claims of other class members. The Second Circuit answered this question with a "no" in Police & Fire Retirement System of Detroit v. IndyMac MBS Inc., and a handful of other circuit courts of appeals have since agreed.

This case was argued on Justice Neil Gorsuch's first day on the bench and involved two of the Supreme Court's most well-known and well-credentialed advocates. Thomas C. Goldstein argued for the petitioner, the California Public Employee Retirement System, or CalPERS. Goldstein publishes the well-known SCOTUSblog website and claims to have served as counsel in approximately 10 percent of all the court's merits cases for the past 15 years. Meanwhile, Paul D. Clement argued for the respondents, ANZ Securities Inc. Clement is a former U.S. solicitor general, has argued 85 cases before the court, and claims to have argued more Supreme Court cases since 2000 than any lawyer in private practice or in government. The two are also no strangers to U.S. securities litigation. Clement recently briefed and argued the issuer's appeal before the U.S. Court of Appeals for the Seventh Circuit in Glickenhaus & Co. v. Household International Inc. The duo previously faced off before the justices in Chadbourne & Parke LLP v. Troice, with Goldstein securing the victory for the investors in that securities case. While only time will tell how the court will interpret the three-year time limit for bringing an action under Section 13 of the Securities Act, this high-quality argument is worth a listen for anyone interested in Supreme Court advocacy, securities litigation, or both.

Other than the caliber of the advocates, the argument itself was notable for Goldstein's focus on appealing to the court's textualists. Goldstein was no doubt aware that Justices Clarence Thomas, Samuel Alito and Neil Gorsuch would not be too receptive to the policy arguments that were a large part of his brief. Tellingly, he sought to engage with the court's textualists from the beginning of his argument, stating in his opening remarks that "action is going to be the important noun here," and focusing on his argument that opting out of a class action and filing an individual complaint (as CalPERs did here) does not constitute bringing a separate "action" as the term is used in Section 13. Indeed, Goldstein focused on the text of Section 13 until nearly the end of his allotted time, a decision noted by Justice Elena Kagan, who asked what she should make of the fact that Goldstein did not speak of the alternative theories that "took place of pride" in CalPERS' brief. Goldstein's response? "I just think ... we have two very good arguments."

As expected, Justice Gorsuch's questions reflected his textualist approach. Justice Gorsuch asked Goldstein a series of questions regarding the meaning of the word "action" within Section 13 of the Securities Act, beginning with: "Why shouldn't we follow the plain language and traditional understanding of the term 'action'?" And, as Goldstein strove to elucidate the text of the statute,

Justice Gorsuch asked a question that put an exclamation point on his textualist approach: "I don't like the policy consequences, but as a matter of plain language, why wouldn't we [interpret the word 'action' to mean lawsuit]?" Notably, Goldstein conceded that "if Congress enacts bad rules, Congress enacts bad rules." However, he also stated that "we try and be pragmatic about what it is that Congress is attempting to accomplish when it's ... using a phrase like 'action' in a limitations period."

Justice Gorsuch's questions, which focused on the text of Section 13 and suggested that policy consequences will play little or no role in his decision-making process, indicate that he may be persuaded by ANZ's plain-meaning-based arguments. Justice Alito also focused on the meaning of "action" during Goldstein's argument, and seemed skeptical of considering Congress' intent when interpreting what he appeared to believe was the unambiguous meaning of the statute. Surprising no one, Justice Thomas remained silent during the arguments.

In contrast to Goldstein, Clement's argument focused almost exclusively on the practical implications that may stem from the court ruling that Section 13's three-year time limit is a statute of repose that is not tolled by the filing of a class action. Justices Ruth Bader Ginsburg, Sonia Sotomayor and Kagan fueled this focus on the practical effects of ANZ's position. For instance, Justice Kagan asked Clement to "suppose that 'action' is a word that sometimes [is] used one way, and sometimes [is] used another way," and asked whether "we should look a little bit as to the practical consequences of what [we're] doing." Justice Kagan also asked Clement what would happen to small investors under his proposed rule, reasoning that while institutional investors will be well-equipped to deal with a rule that requires individuals within a prospective class to file protective actions, small investors would be unlikely to be aware of such a rule.

Justice Ginsburg echoed this concern and her questions also touched on the practical implications of a rule that would require putative class members to file separate complaints to preserve their opt-out rights. Justice Ginsburg brought up the amicus briefs filed by retired federal judges and law professors that raised concerns over the administrative burden that the Second Circuit's interpretation of Section 13 imposes on federal courts. Although the issue was not briefed by either party, Justice Ginsburg also focused on the fact that a putative class member could effectively lose its opt-out rights with no notice. In response to her questions, Clement had to concede that current class action procedures do not require the class representative to inform everyone in the class that they must file a separate action or intervene before the three-year period expires in order to protect their rights.

This exchange dovetailed into a relatively lengthy question from Justice Kagan, again focusing on the potential for putative class members to lose their ability to opt out due to repose issues. She noted that ANZ's proposed rule,

> puts a tremendous pressure on the opt-out right, right? We're used to thinking that the opt-out right is a very important part of class actions; it's what saves them from a due process problem, that people actually do get to say, I don't want any part of that. And you're saying they only get to say that within three years, which may be not within three years of the time the suit was brought; it may be six months of the time the suit was brought, or one month or something like that. And, you know, if — if you haven't decided within that month or six months that these lawyers are not doing a good job, you've lost your ability forever to do it yourself. ... Rule 23 wanted to allow people to opt out rather than to be confined in the suit for the entire pendency of the suit and then to start fighting the outcome at the — at the last moment.

Clement's response was, in part, that while due process requires an opt-out right, it does not "guarantee that you're going to have a viable individual action to opt into." To which Justice Kagan responded, "[i]t's not much of an opt-out right. ... [if] you can't bring your own claim," suggesting that Clement did not satisfy her concerns about the functional implications ANZ's rule has for opt-out rights in the context of due process.

Although Justices Anthony Kennedy, Thomas, Alito and Gorsuch remained mostly silent during Clement's argument, Chief Justice John Roberts asked a few questions at the end of Clement's arguments that indicated that he seemed to be amenable to CalPERS's argument that the filing of the class action satisfied Section 13's timeliness requirement regardless of when a putative class

member files a subsequent opt-out suit. He asked whether statutes of repose are primarily concerned with making sure defendants are not faced with any more "surprises," that is, whether the purpose of a statute of repose is satisfied if defendants are on notice of a claim against them.

Similarly, Justice Stephen Breyer appeared willing to accept CalPERS' position that the filing of an opt-out complaint does not constitute filing a new action that had to comply with Section 13's three-year time limit. During Clement's argument Justice Breyer noted:

> Why interpret those words in the way I just said? The reason why is because it is the same action. The other reason why is because you will, even if not so far, discover that people do want to protect themselves and will do so. ... I mean, you see, that's the way their argument goes, I think.

So, it appears that the answer to the straightforward question at stake in CalPERS v. ANZ may not be so simple after all. The court seems divided on whether to decide the case based on the plain language of Section 13, whether to consider the policy implications of such a ruling, and what effect such a ruling would have on the securities laws regime in general. If the court holds true to form, we expect it to issue a decision at the end of June.

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