

## Supreme Court Decisions

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### Supreme Court Unanimously Upholds State Court Jurisdiction Over Class Actions Alleging Only Claims Under the Securities Act of 1933

On March 20, 2018, the Supreme Court unanimously held that state courts have jurisdiction over class actions alleging only violations of the Securities Act of 1933 (“the Securities Act”). *Cyan v. Beaver Cty. Emp. Ret. Fund*, 138 S. Ct. 1061 (2018) (Kagan, J.). The Court rejected the issuer’s argument that the Securities Litigation Uniform Standards Act (“SLUSA”), passed in 1998, eliminated the jurisdiction of state courts to hear such class actions. In resolving a split among state and federal courts, the Court likewise rejected a middle-of-the-road position advanced by the Solicitor General that such actions should be removable from state to federal court.

Prior to SLUSA’s enactment, federal and state courts had concurrent jurisdiction over actions asserting Securities Act claims pursuant to 15 U.S.C. § 77v(a). SLUSA amended Section 77v(a) to add the italicized language: “The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, *except as provided in [S]ection 77p of this title with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by” the Securities Act. The central dispute in *Cyan* was whether Section 77v(a)’s reference to “covered class actions” pointed to the definition of that term in 15 U.S.C. § 77p(f)(2) of SLUSA. If it did, the issuer argued, state courts would not have jurisdiction over such class actions brought under the Securities Act.

The Court determined that if Congress had wanted to refer to § 77p(f)(2), it would have done so. The Court further explained that § 77p(f)(2) provides a definition (of “covered class action”), not an exception to concurrent jurisdiction. The Court found that, by its terms, § 77p only prevents certain class actions based on state law from being heard in state courts, and that nothing in the text prevents a state court from hearing class actions based exclusively on federal law.

The Court also held that § 77p(c) of SLUSA does not permit the removal of class actions alleging only Securities Act claims from state to federal court because that provision addresses class actions described in § 77p(b). The Court found that § 77p(b) refers to *state-law* class actions, which are removable to federal court (after which they are to be dismissed), not *federal-law* class actions asserting Securities Act claims.

### Dodd-Frank’s Anti-Retaliation Provisions Apply Only to Employees Who Report Allegedly Wrongful Activity to the SEC

On February 21, 2018, the Supreme Court unanimously held that the anti-retaliation protections created by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) do not apply to an employee who internally reports allegedly wrongful activity but fails to report the activity to the SEC. *Digital Realty Trust v. Somers*, 138 S. Ct. 767 (2018) (Ginsburg, J.) (*Digital Realty Trust II*). The Court’s decision resolved a split between the Second, Fifth and Ninth Circuits. [1]

Section 78u-6 of the Dodd-Frank Act defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (emphasis added). The same section creates anti-retaliation provisions for “whistleblowers,” prohibiting employers from firing employees who “mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002,” among other things. 15 U.S.C. § 78u-6(h)(1)(A)(iii). In 2011, the SEC promulgated a rule that, for purposes of the Dodd-Frank Act’s anti-retaliation protections, interpreted “whistleblower” to include employees who make only internal disclosures of potentially wrongful activity. 17 C.F.R. § 240.21F-2(a)(1).

The Supreme Court found that the “definition section of the statute supplies an unequivocal answer” to the issue of the meaning and reach of the term “whistleblower” in the Dodd-Frank Act’s anti-retaliation provisions. The Court emphasized that the definition requires reporting “to the Commission,” and that the statutory text instructs “that the ‘definition shall apply’ ‘in this section,’ that is, throughout § 78u-6.” *Digital Realty Trust II*, 138 S. Ct. 767 (quoting 15 U.S.C. § 78u-6(a)(6)). The Court further noted that “when Congress includes particular language in one section of a statute but omits it in another, . . . this Court presumes that Congress intended a difference in meaning.” Because Congress placed a government-reporting requirement in § 78u-6 but not elsewhere in the Dodd-Frank Act, the Court concluded that Congress intended that the definition of “whistleblower” cover only individuals who report potentially wrongful activity to the SEC.

**American Pipe Does Not Permit Unnamed Class Members to Bring a New Class Action After the Expiration of the Applicable Limitations Period**

On June 11, 2018, the Supreme Court unanimously held that the tolling of individual claims established in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), does not toll limitations periods for successive class claims.[2] *China Agritech v. Resh*, 138 S. Ct. 1800 (2018) (Ginsburg, J.). Thus, individual claimants who could invoke *American Pipe* tolling for their individual claims may not bring putative class claims if such class claims would be barred by the applicable statute of limitations.

The Court explained that the goals of “‘efficiency and economy of litigation’ that support tolling of individual claims” under *American Pipe* “do not support maintenance of untimely successive class actions.” Instead, the Court noted that class claims should be made soon after the first action seeking class certification. The Court reasoned that while economy of litigation favors delaying the limitation period until class certification is denied because certification would eliminate the need for individually asserted claims, the opposite is true for competing class representative claims: when class treatment is appropriate, it is best for all possible representatives to be known so the district court can select the best plaintiff.

The Court also explained that plaintiffs usually must show they have been diligent in pursuing their claims to benefit from equitable tolling. The Court stated that a “would-be class representative who commences suit after expiration of the limitation period . . . can hardly qualify as diligent in asserting claims and pursuing relief.” In addition, the Court expressed concern that applying *American Pipe* tolling to successive class claims would permit the statute of limitations to be extended indefinitely, noting that “[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*.”

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[1] Compare *Somers v. Digital Realty Trust*, 850 F.3d 1045 (9th Cir. 2017) (Dodd-Frank Act’s anti-retaliation provisions apply to employees who report alleged misconduct internally), and *Berman v. Neo@Ogilvy*, 801 F.3d 145 (2d Cir. 2015) (same) with *Asadi v. G.E. Energy (USA)*, 720 F.3d 620 (5th Cir. 2013) (Dodd-Frank Act’s anti-retaliation provisions apply only to individuals who provide information to the SEC).

[2] The *American Pipe* Court held that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” 414 U.S. 538 (1974).

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