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Second Circuit Holds that *American Pipe* Tolling Does Not Apply to the Securities Act's Statute of Repose

Yesterday, in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, --- F.3d ---, No. 11-2998-cv, 2013 WL 3214588 (2d Cir. June 27, 2013) ("*IndyMac*"), the Second Circuit issued an important decision, holding that the tolling doctrine established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) ("*American Pipe*"), does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77m, *et seq.* This decision is likely to have significant consequences for securities class action litigants.

The Court's Holding

In *IndyMac*, the lead plaintiffs asserted claims under Sections 11, 12(a) and 15 of the Securities Act arising out of IndyMac's issuance of securities in 106 different offerings. The district court dismissed for lack of standing all claims arising from the offering of securities not purchased by the lead plaintiffs. *In re IndyMac Mortgage-Backed Sec. Litig.*, 718 F. Supp. 2d 495 (S.D.N.Y. 2010). Five members of the putative class that did purchase those securities moved to intervene in the action to pursue the claims that had been dismissed. The district court denied the motions to intervene on the ground that the Section 13 repose period had lapsed and could not be tolled by *American Pipe* or extended by Federal Rule of Civil Procedure 15(c). *See In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637 (S.D.N.Y. 2011). An appeal to the Second Circuit by certain of the proposed intervenors followed.

Section 13 of the Securities Act contains two limitations periods: (i) a one-year statute of limitations from the date of discovery of the violation; and (ii) a three-year statute of repose from the date the security was *bona fide* offered to the public.¹ Although it is well established under *American Pipe* that the one-year statute of limitations is suspended while the class action is pending, prior to the Second Circuit's decision in *IndyMac*, there was a split of authority within the Circuit on the question of whether the statute of repose is similarly suspended.

¹ "No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale." 15 U.S.C. § 77m.

The Second Circuit held that Section 13's statute of repose is not tolled by the filing of a class action complaint. In reaching this conclusion, the Second Circuit found that, to the extent *American Pipe* tolling is an equitable doctrine, as the appellees argued, then its application to Section 13's repose period is barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Supreme Court held that equitable tolling principles do not apply to that period. Slip op. at 15. If, on the other hand, it is a "legal" tolling rule based on the class action provisions of Federal Rule of Civil Procedure 23, as the appellants argued, its application to a statute of repose is barred by the Rules Enabling Act, 28 U.S.C. § 2072(b), which prohibits a Federal Rule of Civil Procedure from operating to "abridge, enlarge or modify any substantive right." Slip op. at 15–16.

The Second Circuit was not persuaded by the appellants' argument that such a rule would burden the courts and disrupt class action litigation and noted that even if such a problem arose, it would be for Congress, not the courts, to address. *Id.* at 17.

The Implications of *IndyMac*

By giving effect to Section 13's statute of repose, the *IndyMac* decision allows issuers and underwriters of securities to know, by a date certain, when all potential claims arising out of a particular securities issuance have been extinguished. In addition, the Second Circuit's decision is likely to have significant consequences for class action practice beyond the Securities Act context.

First, the Second Circuit's analysis appears to be equally applicable to other statutes of repose. *IndyMac* lends strong support to the argument that no statutes of repose may be tolled under *American Pipe*, including the five-year statute of repose governing claims brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* In addition, the Second Circuit's holding raises questions as to the enforceability of private agreements to toll statutes of repose like Section 13.

Second, although *IndyMac* happens to have involved plaintiffs that intervened in the class action, its statutory analysis is almost certainly equally applicable to the claims of class members who elect to opt out of a class to pursue individual litigation. Thus, *IndyMac* will likely require class members to make a more prompt decision as to whether to opt out.

Third, nothing in *IndyMac* suggests that it will not be applied to litigations that are currently pending. As a result, the decision is likely to be invoked in pending opt-out actions.

Fourth, *IndyMac* is likely to halt the tendency of sophisticated and large institutional investors to wait to file individual actions until the class action has proceeded well into, and indeed sometimes after, merits discovery. If institutional investors are now forced to file their actions earlier, this might obviate the problem of having to negotiate a class settlement only to find that large numbers of class members have decided to opt out. Such a development would be particularly welcome because standard "blow" or

termination provisions have historically not protected defendants against significant downside risks. The ruling may also permit earlier discussions that could lead to the global resolution of all related matters arising out of the same core set of facts.

Finally, *IndyMac* may result in other changes to class action practice, including pressure to brief class certification motions earlier in the life of the litigation.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Susanna M. Buergel
212-373-3553
sbuergel@paulweiss.com

Charles E. Davidow
202-223-7380
cdavidow@paulweiss.com

Brad S. Karp
212-373-3316
bkarp@paulweiss.com

Daniel J. Kramer
212-373-3020
dkramer@paulweiss.com

Richard A. Rosen
212-373-3305
rrosen@paulweiss.com

Jane B. O'Brien contributed to this client alert.