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Southern District of New York Issues Ruling in AIG Securities Litigation That Increases the Hurdles for Opt-Out Plaintiffs

On Thursday, the United Stated District Court for the Southern District of New York (Swain, J.) issued a decision granting, in part, the defendants' motions to dismiss in a series of individual actions filed by AIG shareholders who opted out of a parallel class action lawsuit. *Kuwait Investment Office, et al.* v. *American International Group, Inc., et al.*, No. 11-cv-8403 (S.D.N.Y. Sept. 10, 2015). The decision addresses a number of developing areas in federal securities law, including the application of the preclusion provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") in "opt out" actions asserting state law claims, as well as the unavailability of tolling principles to federal statutes of repose for claims previously asserted in the parallel class action lawsuit. The decision also addresses the application of *Janus*'s requirement that only the "maker" of a statement has primary liability under Section 10(b).

Relevant Background

The plaintiffs, who were investors in AIG before its near-bankruptcy and takeover by the federal government in 2008, sued AIG and certain of its officers and affiliates, alleging misrepresentations and omissions regarding AIG's exposure to risks in the housing market. The plaintiffs had requested exclusion (*i.e.*, opted out) from a class settlement in a consolidated securities class action against AIG and some of its officers and affiliates (the "class action"). The opt-out plaintiffs asserted claims under the Securities Act and Exchange Act that were virtually identical to those asserted in the class action, as well as state common law claims for fraud and unjust enrichment. (Slip Op. at 7–8.)

The District Court's Decision

SLUSA Preclusion. SLUSA provides that "[n]o covered class action based upon the statutory or common law of any State . . . may be maintained in any State or Federal court by any private party" alleging misrepresentations or omissions (or other manipulative conduct) in connection with securities traded on national exchanges. 15 U.S.C. § 77p(b)(1). The statute defines "covered class action" to include groups of lawsuits seeking damages on behalf of 50 or more people if those lawsuits are "joined, consolidated, or otherwise proceed as a single action for any purpose." 15 U.S.C. § 77p(f)(2)(A)(ii). The defendants argued that, because the individual opt-out actions had been coordinated in various respects with the settled class action, they fell within the definition of a "covered class action" and the opt-out plaintiffs' state law claims were precluded. Plaintiffs responded that their individual actions did not fall within this definition because the cases had not been formally joined or consolidated with the class action.

The Court held that the opt-out actions were indeed part of a covered class action. Judge Swain held that, even though the individual actions had not been "formally consolidated or joined with the class action and are not part of a multi-district litigation," the actions were subject to case management orders tied to the class action, the litigation of the individual actions and the class action were "highly coordinated," and the plaintiffs had opted out of the class action. (Op. at 35.) Judge Swain explained that SLUSA's preclusion provision—which was broadly drafted to cover actions proceeding together "for any purpose"—was intended to prevent plaintiffs from evading federal pleading standards by instead basing securities class actions on state common law, and that SLUSA makes federal courts "the exclusive venue of, and federal law the exclusive remedy for, certain class actions." (*See* Op. at 34.)

The Court therefore held that the individual actions and the class action had "proceed[ed] as a single action for any purpose[,]" under the broad interpretation favored by most courts that had considered that language. (Op. at 36.) Judge Swain thus joined the increasing number of federal district court judges in this Circuit who have held that opt-out action plaintiffs are precluded from asserting common law claims. *See, e.g., In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 480 (S.D.N.Y. 2012); *Amorosa* v. *Ernst & Young LLP*, 672 F. Supp. 2d 493, 517 (S.D.N.Y. 2009); *but see Ventura* v. *AT&T Corp.*, No. 05 Civ. 05718, 2006 WL 2627979, at *1 (S.D.N.Y. Sept. 13, 2006).

Statute of Repose under IndyMac. The Court also clarified the application of *Police & Fire Department Systems* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2014) ("*IndyMac*") by holding that many of the plaintiffs' federal claims (including all of their Securities Act claims) were barred by the relevant statutes of repose. (Op. at 16–17); *see* 15 U.S.C. § 77m; 28 U.S.C. §1658(b). The plaintiffs argued that because the parallel class action had been brought within the period set by the statute of repose, their individual claims were still timely under *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974). *American Pipe* and its progeny had held that the filing of a class action tolls the statute of limitations for members of the purported class. In *IndyMac*, however, the Second Circuit more recently held that statutes of repose, unlike statutes of limitations, are not tolled under *American Pipe*.

Plaintiffs argued that *IndyMac's* holding was limited to cases in which the original class action plaintiff lacked standing to pursue a claim asserted by a later intervenor. Judge Swain rejected this narrow interpretation of *IndyMac*. (Op. at 22–23.) The Court also rejected the plaintiffs' other arguments, including their argument that *IndyMac* was wrong when decided, and that they effectively were being deprived of the ability to opt out and assert additional claims, violating their constitutional rights to due process. (Op. at 23.) The Court explained, "[t]he simple rejoinder to this argument is that no rule or statute, much less the Constitution, guarantees any plaintiff a right, unbounded by time and space, to assert a cause of action . . . . Rule 23 requires that [class members] be given the choice to opt out of the certified class rather than be bound by the resolution of the class action, but does not guarantee a plaintiff a viable cause of action." *Id.*

Janus and "Making" a Statement. Finally, the court dismissed the securities fraud claims against two of the individual defendants, holding that plaintiffs had not adequately alleged that the individuals controlled the relevant statements. In *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296 (2011), the Supreme Court had held that only the "person or entity with ultimate authority over [a] statement" could be held primarily liable for securities fraud based on that statement. *Id.* at 2302. The district court noted that, while certain claims were based on statements attributed to AIG, these two individual defendants were officers in an AIG *subsidiary* involved in the alleged fraud, not AIG itself. The Court held that the plaintiffs had included only conclusory allegations that these individuals had control over statements by AIG, the parent entity. (Op. at 31–32.) The Court further rejected plaintiffs' attempt to invoke the group pleading doctrine, which allows a presumption at the pleading stage that certain publications by a company "are the collective work of those individuals with direct involvement in the everyday business of the company." (Op. at 31 (quoting *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 438 (S.D.N.Y. 2005).) The Court concluded that "[w]here, as here, the defendants have no role in the business structure of the speaking entity and are instead officers of a separate entity, and there is no allegation that corporate formalities have not been observed," generalized allegations of control are insufficient under Section 10(b).

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It is an increasingly common aspect of class action litigation for some class members to "opt out" at late stages in the litigation and pursue individual claims that are identical to those asserted by the class, often after a settlement has been announced. Opt Out plaintiffs often demand more money than they would have received had they remained in the class, reducing the effectiveness of the class settlement mechanism. This decision by Judge Swain undercuts this "wait-and-see" strategy by holding that opt-out plaintiffs can be subject to repose periods that are not tolled by the existence of the class action, and by enforcing the broad preclusion provisions of SLUSA to prevent shareholders from using state law claims—which often have longer statutes of limitations—to end-run such constraints. This decision is thus likely to be useful in several respects in defending federal securities opt-out cases.

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:

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