

July 3, 2013

## **SECOND CIRCUIT ADDRESSES AMERICAN PIPE TOLLING AND “RELATION BACK” IN FEDERAL SECURITIES CLASS ACTIONS**

On June 27, 2013, the Second Circuit resolved a question of law that previously had been unsettled in this Circuit when it held, in *In re IndyMac Mortgage-Backed Sec. Litig.*, No. 11-2998-cv(L), that the Supreme Court’s tolling rule established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) — which provides 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,” *id.* at 554 — does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933, as amended, 15 U.S.C. § 77m (the “Securities Act”). As the Second Circuit emphasized in its decision, statutes of limitations and statutes of repose serve distinct purposes. Whereas the former limits the availability of remedies and may be subject to equitable tolling, the latter creates a substantive right protecting a party from liability for certain causes of action after a specific cut-off date and therefore is “subject [only] to legislatively created exceptions, and not to equitable tolling[.]” *IndyMac*, at 11-12 (citations and quotations omitted). The Second Circuit also held that members of a putative class, who are not named as parties in the class complaint, cannot use Federal Rule of Civil Procedure 15(c)’s “relation back” doctrine to revive untimely claims that were dismissed on jurisdictional grounds.

The issues presented in *IndyMac* arose from two separate putative class actions, commenced by the Police and Fire Retirement System of the City of Detroit (“Detroit PFRS”), on the one hand, and the Wyoming State Treasurer and the Wyoming Retirement System (the “Wyoming entities”), on the other hand, alleging that IndyMac MBS, Inc. and certain of its officers, directors, and underwriters made fraudulent misrepresentations and omissions in the offering and sale of financial instruments known as mortgage pass-through certificates, which plaintiffs and other putative class members had purchased. *Id.* at 5-6. After consolidating the two actions, the district court appointed the Wyoming entities as lead plaintiff, and the Wyoming entities became the sole named plaintiff in the consolidated action, even though the consolidated complaint also asserted claims on behalf of other putative class members. *Id.* at 6-7. In June 2010, the district court dismissed all claims in the consolidated complaint relating to the offerings of mortgage pass-through certificates not purchased by the Wyoming entities, reasoning that the Wyoming entities lacked standing as the only named plaintiff to bring claims with respect to securities that they had not purchased. *Id.* at 7.

Subsequently, Detroit PFRS and five other members of the asserted class, who also were not named plaintiffs, moved to intervene in the consolidated action “to assert claims with respect to the Certificates that those entities had purchased, but which the named Wyoming plaintiffs had not purchased.” *Id.* at 7-8. Even though the three-year statute of repose on their claims set forth in Section 13 of the

Securities Act had expired, these putative plaintiffs argued that the running of the statute had been suspended at the commencement of the class action under the tolling rule set forth in *American Pipe* and its progeny. *Id.* at 8. Alternately, the putative plaintiffs contended that their claims were not untimely because they “related back” to the filing of the consolidated complaint under Federal Rule of Procedure 15(c). *Id.* The district court refused to permit intervention under either theory, and in July 2011, three of the five proposed intervenors appealed the denial of their motions to the Second Circuit. *Id.*

In affirming the district court’s denial of the proposed intervenors’ motions, the Second Circuit first emphasized that the relevant three-year limitations period in Section 13 of the Securities Act is a statute of repose and, as such, is “‘absolute’ and not subject to equitable tolling.” *Id.* at 13. The Court then turned to the specific question of whether there was any basis to apply *American Pipe* tolling to Section 13’s statute of repose. At the outset of its analysis, the Second Circuit noted that “[t]he Supreme Court’s opinion in *American Pipe* does not explicitly state whether the Court was recognizing ‘judicial tolling,’ grounded in principles of equity, or statutory tolling (or ‘legal’ tolling), based on [Federal Rule of Civil Procedure] Rule 23 [governing class actions]” and that, on appeal, “[t]he parties make much of this distinction because . . . if *American Pipe*’s tolling rule is ‘equitable’ in nature, it does not apply to statutes of repose, whereas if its statutory or ‘legal’ in nature, it may.” *Id.* at 14. The Second Circuit also observed that subsequent Supreme Court decisions have not clarified the source of authority for the *American Pipe* tolling rule, that “[t]he Courts of Appeal are divided on this issue[,]” and that “[e]xperienced and capable judges of the district courts in [the Second] Circuit have similarly drawn disparate conclusions and are without consensus.” *Id.* at 14-15 (collecting cases).

However, the Second Circuit concluded that identifying the source of authority for the tolling rule was academic, as the *IndyMac* Court found that the *American Pipe* tolling rule could not apply to the proposed intervenors’ claims whether that rule was classified as “equitable” or “legal.” *Id.* at 15. Specifically, if deemed “equitable,” the *American Pipe* tolling rule would not apply to Section 13’s three-year statute of repose because statutes of repose are not subject to equitable tolling, *id.*; and, even if deemed “legal,” extending the statute of repose in Section 13 would be barred by the Rules Enabling Act, 28 U.S.C. § 2072(b), which prohibits interpreting Rule 23 in a manner that would abridge, enlarge, or modify a substantive right, such as the right to protection from certain securities liability afforded by Section 13’s three-year cut-off date. *Id.* at 16. Thus, the Second Circuit’s “conclusion [was] straightforward: *American Pipe*’s tolling rule, whether grounded in equitable authority or on Rule 23, does not extend to the statute of repose in Section 13.” *Id.* at 16.

With respect to the proposed intervenors’ alternate argument that their claims could “relate back” to the prior-filed consolidated class complaint pursuant to Rule 15(c) even if *American Pipe* tolling was unavailable, the Second Circuit also disagreed. *Id.* at 17. Although the proposed intervenors had been members of the putative class in the consolidated action, the Court stressed the fact that none of the proposed intervenors were named plaintiffs in the consolidated complaint and that, prior to class certification, the district court had dismissed on standing grounds all claims in the consolidated complaint relating to offerings of mortgage pass-through certificates purchased by entities other than the lead plaintiff, i.e., the Wyoming entities. *Id.* at 18-19.<sup>1</sup> Since the proposed intervenors were never

<sup>1</sup> Notably, the district court ruled on standing before the Second Circuit issued its decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012) (ruling that, in certain defined circumstances, purchasers of RMBS certificates have standing to assert claims on behalf of purchasers of certificates in other offerings). The lead plaintiff in *IndyMac* since has moved for reconsideration of the district court’s ruling insofar as it relates to claims that it would now have standing to assert under *NECA-IBEW*. Therefore, as the Court clarified, the Second Circuit’s decision in *IndyMac* “implicates only those claims and defendants as to which [the lead plaintiff] would lack standing under *NECA-IBEW*.” *IndyMac*, at 18 n.19.

lead or named plaintiffs in the consolidated action, the Second Circuit found that this jurisdictional standing defect — that “no named plaintiff in the suit had constitutional standing to bring the claims that the proposed intervenors later sought to assert” — could not be cured by later intervention. *Id.* at 19. In sum, the Court ruled that “absent circumstances that would render the newly asserted claims independently timely, neither Rule 24 [governing intervention] nor the Rule 15(c) ‘relation back’ doctrine permits members of a putative class, who are not named parties, to intervene in the class action as named parties in order to revive claims that were dismissed from the class complaint for want of jurisdiction.” *Id.* at 19.<sup>2</sup>

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Although the *IndyMac* decision focused on the applicability of *American Pipe* tolling to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933, the rationale behind the Court’s decision would seem to apply with equal force to class actions implicating the five-year statute of repose for Section 10(b) and Rule 10b-5 claims under the Securities Exchange Act of 1934. Accordingly, the decision should be borne in mind when dealing with class actions involving those claims as well.

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<sup>2</sup> Limiting its analysis to the facts before it, the Second Circuit left unaddressed questions of whether “proposed intervenors, who were not parties to the proceedings below, may invoke Rule 15(c)(1) to become parties by amending the complaint of a party” and “whether Rule 15(c) allows ‘relation back’ of claims otherwise barred by a statute of repose[.]” *Id.* at 17 n.18.

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