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## Supreme Court Holding on Statutes of Repose Supportive of Respondents' Arguments in Upcoming *IndyMac* Case

Next Term, the Supreme Court will hear argument in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640 ("*IndyMac*"), which will decide whether the three-year statute of repose in Section 13 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77m, *et seq.*, is tolled for class members during the pendency of a class action. In its recent decision in *CTS Corp. v. Waldburger*, No. 13-339 (June 9, 2014) ("*Waldburger*"), the Court analyzed the differences between statutes of repose and statutes of limitations in a different setting, but one that sheds light on how it will approach the *IndyMac* case. Its opinion provides encouragement for the defense position in *IndyMac* that the statute of repose is not subject to tolling.

### *IndyMac*

At issue in *IndyMac* are the limitations provisions that attach to actions brought under Section 13 of the Securities Act. These provisions include a one-year statute of limitations from the date of discovery of the violation, and a three-year statute of repose from the date the security was *bona fide* offered to the public. In the Second Circuit, it is established that under the tolling doctrine articulated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) ("*American Pipe*"), the filing of a purported class action tolls the one-year statute of limitations while the class action is pending. Whether *American Pipe* tolling also applied to the three-year statute of repose was an open question in the Second Circuit until last June, when the court held that it did not. *See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).<sup>1</sup>

The Second Circuit held that whether the tolling doctrine in *American Pipe* was construed as equitable or statutory, in neither case could it extend Section 13's statute of repose. To the extent that *American Pipe* tolling was considered an equitable doctrine, its application to the repose period was barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) ("*Lampf Pleva*"), in which the Supreme Court declared that statutes of repose cannot be equitably tolled. If, on the other hand, *American Pipe* was an example of non-equitable tolling rooted in a statutory source (in this case, Federal Rule of Civil Procedure 23), then tolling of the repose period was foreclosed by the Rules Enabling Act, 28 U.S.C. § 2072. The Rules Enabling Act prohibits interpreting a Federal Rule of Civil Procedure to abridge,

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<sup>1</sup> We discussed the Second Circuit's *IndyMac* decision in our June 28, 2013 Client Memorandum, "Second Circuit Holds that *American Pipe* Tolling Does Not Apply to the Securities Act's Statute of Repose," available at [http://www.paulweiss.com/media/1696310/28jun13\\_indymac.pdf](http://www.paulweiss.com/media/1696310/28jun13_indymac.pdf)

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enlarge, or modify a substantive right. The Second Circuit held that Section 13's statute of repose created such a right, and so *American Pipe* tolling could not apply.

The Supreme Court granted certiorari in *IndyMac* in March and the petitioners filed their brief in May. Respondents' brief is expected next month.

### ***Waldburger***

*Waldburger* involves § 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) ("§ 9658"), which by its terms preempts state-law statutes of limitations that attach to certain environmental torts actions. The Supreme Court had to determine whether § 9658 preempted a North Carolina statute of repose, which states that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." N. C. Gen. Stat. Ann. § 1-52(16). The Court of Appeals for the Fourth Circuit had held that the repose period was preempted, but in a 7-2 decision with an opinion authored by Justice Kennedy the Supreme Court reversed.

The Court explained that while statutes of limitations and repose are both mechanisms that limit "the temporal extent or duration of liability for tortious acts," the statutes measure their limitations periods from different points and have different objectives. Statutes of limitations, measured from the date when the claim accrued, are intended to require plaintiffs "to pursue diligent prosecution of known claims." In contrast, statutes of repose are measured from the date of the last culpable act or omission of the defendant, and act as an "absolute bar on a defendant's temporal liability." According to the Court, statutes of repose "effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time," even if that period ends before the plaintiff suffered an injury (thus effectively foreclosing the possibility of recovery).

As one example of the clear distinction between statutes of limitations and repose, the Court highlighted that "[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling." The Court explained that equitable tolling is anathema to statutes of repose, citing in support *Lampf Pleva*. In fact, the Court pointed to § 9658's inclusion of a tolling provision as an "altogether unambiguous textual indication that § 9658 does not pre-empt statutes of repose." For this and other reasons, the Court held that while § 9658 preempted statutes of limitations, it did not apply to statutes of repose.

### **Analysis**

*Waldburger* reaffirms that both the language and purpose of statutes of repose differ materially from those of statutes of limitations and that, as a consequence, some rules designed to modify the effect of statutes of limitations do not extend to statutes of repose. This insight is directly relevant to the core issue

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in *IndyMac* – whether *American Pipe* tolling, which applies to the statute of limitations in Section 13 of the Securities Act, also applies to the statute of repose.

There are several parallels between *Waldburger* and *IndyMac* that lend support to the conclusion that the three-year statute of repose in the Securities Act is not susceptible to equitable tolling. Most fundamentally, the *Waldburger* opinion places great emphasis on the fact that statutes of repose reflect a legislative decision that as a matter of policy, a defendant should be free from liability after a certain period of time, even when application of the statutory bar would prevent the pursuit of a claim of which a plaintiff was previously unaware. The Court compared a statute of repose to a discharge in bankruptcy or the Double Jeopardy Clause, designed to provide “a fresh start” and to allow a defendant “to put past events behind him.” This is why, the Court continued, statutes of repose “generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff’s control.” The opinion confirms that a legislature has a number of policy goals in mind when choosing to enact a statute of repose. This approach is a forceful counter to the various policy-based arguments advanced by those who advocate equitable tolling of statutes of repose in the Securities Act context, because it validates the argument that the remedy lies in the legislature, which is best suited to weigh those policy considerations.

*Waldburger* also may foreshadow how the *IndyMac* Court will analyze some of the more technical arguments that will be before it. First, like § 9658, the antitrust statute at issue in *American Pipe* involved a statute of limitations, and the Supreme Court’s opinion therefore makes reference only to statutes of limitations, not statutes of repose. *Waldburger* would therefore counsel against reading *American Pipe*’s doctrine to encompass statutes of repose because they are not explicitly mentioned in the opinion. Second, petitioners in *IndyMac* argue that because the three-year repose period in Section 13 is found in the same section of the Securities Act as the one-year limitations period, and because (they assert) there are no textual distinctions between the two within the statute, tolling should be applied to both provisions. The Court in *Waldburger* confronted similar arguments relating to the North Carolina statute at issue, and still found the repose period to be distinct from the limitations period for purposes of the application of preemption rules.

Third, the Court in *Waldburger* cited a section of the Securities Act, 15 U.S.C. § 78u-6 (h)(1)(B)(iii)(I)(aa), as an example of a distinct statute of repose appearing under a “statute of limitations” heading. The Court explained that including statutes of repose within statutes of limitations provisions does not necessarily mean that Congress intended to conflate the two for all purposes. The repose period in Section 13 similarly appears in a section captioned “[l]imitation of actions,” which the *IndyMac* petitioners have pointed to as support for treating the repose period the same as a statute of limitations for tolling purposes.

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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:

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