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## Second Circuit Expands the *IndyMac* Rule

### Introduction

In two recent federal securities fraud actions stemming from the 2008 financial crisis, the Second Circuit has affirmed that statutes of repose, unlike statutes of limitations, are not tolled by the filing of a putative class action. As a result, a plaintiff that seeks to file a separate fraud claim must do so before the statute of repose has expired or its claim will be time-barred.

The Second Circuit had previously held that the statute of repose in the Securities Act of 1933 (“Securities Act”) could not be tolled by the filing of a putative class action. See *Police & Fire Ret. Sys. v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Earlier this month, in *In re Lehman Bros. Securities & ERISA Litigation*, the court rejected a challenge that would have limited the *IndyMac* doctrine to situations in which the putative class plaintiff lacked standing to represent the opt-outs. See No. 15-1879, 2016 WL 3648259 (2d Cir. July 8, 2016) (Summary Order). Then, last week, in *SRM Global Master Fund Ltd. Partnership v. Bear Stearns Cos.*, No. 14-507, 2016 WL 3769735 (2d Cir. July 14, 2016)<sup>1</sup>, the court expressly extended *IndyMac*’s holding to claims under the Securities Exchange Act of 1934 (“Exchange Act”). The Second Circuit’s reasoning in *SRM* suggests that statutes of repose generally—and not simply statutes of repose established under the federal securities laws—are immune to tolling.

### Background

The Supreme Court has held that the filing of a class action lawsuit may toll a statute of limitations for all putative class members. See *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). Under this ruling, opt-out plaintiffs are able to bring suits that would otherwise be barred by the statute of limitations.

Several years ago, in a case filed under the Securities Act, the Second Circuit distinguished statutes of limitations from statutes of repose. See *IndyMac*, 721 F.3d at 104-110. (Our Client Memorandum discussing *IndyMac* can be found [here](#).) A statute of limitations provides an affirmative defense that limits the remedies available to a plaintiff within a certain period after accrual of the claim, while a statute of repose extinguishes the plaintiff’s claim on a date certain after the defendant’s last culpable act or omission. The *IndyMac* court reasoned that, whether *American Pipe* applied equitable or legal tolling (a matter on which courts are divided), such tolling could not apply to the statute of repose in the Securities Act. Equitable tolling of a statute of repose has long been foreclosed by the Supreme Court’s decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (interpreting statute of repose in the Securities Act). See also *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014) (applying this rule to other statutes of repose). However, if *American Pipe* involved legal tolling based on an

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interpretation of Federal Rule of Civil Procedure 23, it would modify a substantive right in violation of the Rules Enabling Act.<sup>2</sup> In either scenario, the Second Circuit concluded, *American Pipe* tolling does not apply to the Securities Act's statute of repose.

### **The Court's Holdings**

In *In re Lehman Bros.*, the Second Circuit rejected a challenge to *IndyMac* that would have limited its holding to cases where the putative named plaintiffs lacked standing. *See* 2016 WL 3648259. In that case, the California Public Employees' Retirement System ("CalPERS") alleged Securities Act claims against Lehman Brothers after opting out of a class action settlement. CalPERS's claims fell outside of the three-year statute of repose, but it argued that its claims were properly "filed" when the named plaintiffs brought a putative class action on their behalf. Under CalPERS's theory, its claims were actually brought within the statutory period when the class action was filed. The Second Circuit rejected the argument that *American Pipe* redefines the point at which an opt-out plaintiff "filed" its claim, and emphasized that *American Pipe* provides for "tolling."<sup>3</sup>

CalPERS also attempted to distinguish *IndyMac* on the ground that the named plaintiffs there did not have standing, and thus the intervenors' claims had not been filed. The Second Circuit rejected this argument as "inconsistent with the reasoning of *IndyMac*": "the inapplicability of *American Pipe* tolling to a statute of repose turns on the nature of the tolling rule and its ineffectiveness against statutes of repose, not whether the named plaintiffs also have standing to assert claims on behalf of a class." *Id.* at \*1. Accordingly, the court upheld the dismissal of CalPERS's claims as time-barred.

In *SRM*, the Second Circuit extended its holding in *IndyMac* to Section 10(b) of the Exchange Act. *See* 2016 WL 3769735.<sup>4</sup> In this case, SRM, a hedge fund, had opted out of a class action settlement and brought its own Section 10(b) claims outside of the five-year statute of repose that governs claims under the Exchange Act. SRM argued that it was entitled to *American Pipe* tolling on the ground that *IndyMac* applies only to the Securities Act, not the Exchange Act, based on differences in the text of their respective statutes of repose. The Second Circuit disagreed, noting that *IndyMac* was based on the nature of statutes of repose generally, and not on any particular language in the Securities Act. The court explained that *American Pipe* tolling does not apply to statutes of repose because statutes of repose confer a "substantive right," and substantive rights cannot be abridged, enlarged, or modified by any Federal Rule of Civil Procedure. Therefore, the court held, *IndyMac* applies with equal force to the Exchange Act's statute of repose.

### **Analysis**

These decisions may be expected to deter institutional investors from waiting until late in the class proceedings before deciding whether to opt out of the class. Discouraging such a "wait and see" approach to class participation is consistent with the legislative policy to provide defendants with an absolute period

of repose, as well as with the goal of judicial efficiency. Adherence to *IndyMac* allows opt-out cases to be consolidated or coordinated with the class proceedings in real time, rather than burdening the parties and the courts with seriatim litigation, duplicative discovery, and possibly consecutive trials on the same subject matter. It also enhances the ability of defendants to understand the scope of their exposure, which facilitates settlement of class actions.

And because the Second Circuit's rationale is not tied to the text of a particular statute of repose, *SRM* suggests that the filing of putative class actions in the Second Circuit will not toll *any* statute of repose. The reach of *IndyMac* and its progeny may therefore extend beyond the securities context.

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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. Buerger  
212-373-3553  
[sbuerger@paulweiss.com](mailto:sbuerger@paulweiss.com)

Geoffrey R. Chepiga  
212-373-3421  
[gchepiga@paulweiss.com](mailto:gchepiga@paulweiss.com)

Charles E. Davidow  
202-223-7380  
[cdavidow@paulweiss.com](mailto:cdavidow@paulweiss.com)

Andrew J. Ehrlich  
212-373-3166  
[aehrlich@paulweiss.com](mailto:aehrlich@paulweiss.com)

Brad S. Karp  
212-373-3316  
[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

Daniel J. Kramer  
212-373-3020  
[dkramer@paulweiss.com](mailto:dkramer@paulweiss.com)

Daniel J. Leffell  
212-373-3218  
[dleffell@paulweiss.com](mailto:dleffell@paulweiss.com)

Jane B. O'Brien  
202-223-7327  
[jobrien@paulweiss.com](mailto:jobrien@paulweiss.com)

Walter Rieman  
212-373-3260  
[wrieman@paulweiss.com](mailto:wrieman@paulweiss.com)

Richard A. Rosen  
212-373-3305  
[rrosen@paulweiss.com](mailto:rrosen@paulweiss.com)

Audra J. Soloway  
212-373-3289  
[asoloway@paulweiss.com](mailto:asoloway@paulweiss.com)

Daniel J. Juceam  
212-373-3697  
[djuceam@paulweiss.com](mailto:djuceam@paulweiss.com)

*Associate David Pucino contributed to this client alert.*

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<sup>1</sup> Paul, Weiss served as counsel for Bear Stearns.

<sup>2</sup> See 28 U.S.C. § 2072(b) (The Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”)

<sup>3</sup> See *id.* (“The very principle of tolling is to permit claims *not* timely asserted to proceed if the requirements for suspending the limitations period are met.”).

<sup>4</sup> Earlier this year, the Second Circuit had applied *IndyMac* to Section 14(a) of the Exchange Act. See *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016).