January 17, 2017

U.S. Supreme Court to Review Ruling That Class Action Tolling Does Not Apply to Statutes of Repose

On January 13, 2017, the U.S. Supreme Court agreed to review a decision from the U.S. Court of Appeals for the Second Circuit holding that the class action tolling doctrine established in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933. *See In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13 (2d Cir. 2016), *cert. granted sub nom. Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, No. 16-373 (U.S. Jan. 13, 2017).[1]

This issue arises in securities class action cases, in which the three-year statute of repose under the Securities Act of 1933 and the five-year statute of repose under the Securities Exchange Act of 1934 limit the period within which members of a putative class can opt out and file their own individual lawsuits. As a practical matter, tolling the limitations period from the date of the filing of a class action—irrespective of the repose cutoff—provides optionality for large, sophisticated plaintiffs (who are the only investors with resources to pursue individual actions), while reducing the certainty of a fixed time bar for defendants and compromising the ability of all parties to settle class action lawsuits.

Nearly three years ago, the Supreme Court agreed to review the Second Circuit's decision in *Police & Fire Retirement System of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), which likewise held that *American Pipe* tolling does not apply to the statute of repose now at issue in *ANZ Securities*.[2] In *IndyMac*, the Second Circuit reasoned that a statute of repose—unlike a statute of limitations—"*extinguishes* a plaintiff's cause of action" and creates a "*substantive* right [for defendants] to be free from liability after a legislatively-determined period of time."[3] The Second Circuit's decision diverged from a

1 Three other petitions for review were filed to consider substantially the same issue, but the Supreme Court granted *certiorari* only in *ANZ Securities*. *See Dusek* v. *JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016), *petition for cert. filed*, No. 16-389 (U.S. Sept. 26, 2016); *SRM Global Master Fund Ltd. P'ship* v. *Bear Stearns Cos. L.L.C.*, 829 F.3d 173 (2d Cir. 2016), *petition for cert. filed*, No. 16-372 (U.S. Sept. 22, 2016); *DeKalb Cnty. Pension Fund* v. *Transocean Ltd.*, 817 F.3d 393 (2d Cir. 2016), *petition for cert. filed*, No. 16-206 (U.S. Aug. 12, 2016). Paul, Weiss represents Bear Stearns in *SRM Global*.

2 *See Pub. Emps.' Ret. Sys. of Miss.* v. *IndyMac MBS Inc.*, No. 13-640, 134 S. Ct. 1515 (Mar. 10, 2014) (granting certiorari), *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (Sept. 29, 2014).

3 *IndyMac*, 721 F.3d at 106 (tolling the statute of repose in Section 13 of the Securities Act of 1933 is barred by the Rules Enabling Act, 28 U.S.C. § 2072(b), because any such tolling would "necessarily enlarge or modify a substantive right").

Tenth Circuit decision dating back to 2000, which had held that the same three-year statute of repose was subject to *American Pipe* tolling.[4]

Apparently as a result of settlements by some parties, the Supreme Court ultimately dismissed the writ of certiorari in *IndyMac* as improvidently granted. The Sixth and Eleventh Circuits have since joined the Second Circuit in concluding that statutes of repose are immune to tolling under *American Pipe*.[5]

The Supreme Court's decision as to whether *American Pipe* tolling applies to the three-year statute of repose in Section 13 of the Securities Act of 1933 could have significant practical implications in federal securities litigation. Plaintiffs and defendants in these cases often face the question of whether institutional investors may wait to opt out until after a class action settlement has been announced—and after the statute of repose has lapsed. The Supreme Court's resolution of the tolling issue may also shed light on related issues, such as whether plaintiffs and their counsel will get additional chances at class certification when their putative representative is found to be inadequate after the repose period has run.[6] Enforcement of statutes of repose as written would not only preserve defendants' substantive rights to repose, but also facilitate the ability of all parties to settle class actions and of courts to resolve class-related litigation in a timely and efficient manner.

We anticipate that the Supreme Court will hear oral argument in *ANZ Securities* by the Spring and issue an opinion by the end of June.

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4 *See Joseph* v. *Wiles*, 223 F.3d 1155, 1166-68 (10th Cir. 2000). The *Joseph* court acknowledged that the statute of repose in Section 13 of the Securities Act cannot be equitably tolled under the rule of *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991). *Joseph*, however, stated that *American Pipe's* interpretation of Rule 23 of the Federal Rules of Civil Procedure constitutes "legal tolling that occurs any time an action is commenced and class certification is pending." *Joseph* did not mention the Rules Enabling Act.

5 *See Dusek* v. *JPMorgan Chase & Co.*, 832 F.3d 1243, 1247-49 (11th Cir. 2016); *Stein* v. *Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 793-95 (6th Cir. 2016). These decisions cited the Supreme Court's recent ruling in *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014), which considered a North Carolina statute of repose for tort suits, and clarified that statutes of repose create an "absolute" bar on liability and "will not be tolled for any reason."

6 Indeed, that was the fact pattern presented in the *DeKalb County* petition for certiorari.

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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