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## Two Recent Second Circuit Decisions Provide Opportunity for Supreme Court to Address Whether *American Pipe* Tolling Extends to Statutes of Repose

The tolling rule established by the Supreme Court in *American Pipe & Construction Co. v. Utah* generally provides that the commencement of a class action in federal court suspends the applicable statute of limitations for all members of the proposed class.<sup>1</sup> Lower courts are divided over whether *American Pipe* tolling applies to statutes of repose. In 2014, the Supreme Court granted certiorari to review the Second Circuit's holding in *Police & Fire Retirement System of City of Detroit v. IndyMac MBS, Inc.* that *American Pipe* tolling does not apply to the statute of repose in Section 13 of the Securities Act of 1933,<sup>2</sup> but subsequently dismissed the writ as improvidently granted after the *IndyMac* parties resolved that litigation.<sup>3</sup> Two recent decisions from the Second Circuit, however, may provide new opportunities for the Supreme Court to consider the issue. In *In re Lehman Brothers Securities & ERISA Litigation*, No. 15-1879, 2016 WL 3648259 (2d Cir. July 8, 2016), the Second Circuit re-affirmed its *IndyMac* holding, expressly acknowledged that *IndyMac* had created a circuit split on the issue,<sup>4</sup> and suggested that the question was ripe for Supreme Court review. The next week, in *SRM Global Master Fund Limited Partnership v. Bear Stearns Companies*, No. 14-507, 2016 WL 3769735 (2d Cir. July 14, 2016), the Second Circuit extended the rationale of *IndyMac* to the Securities Exchange Act of 1934, holding that *American Pipe* tolling does not apply to the five-year repose period established by 28 U.S.C. § 1658(b)(2) for claims under Section 10(b) of the Exchange Act.

### Background

The issue in *IndyMac* was whether the tolling rule announced in *American Pipe*—that the filing of a class action tolls the statute of limitations for all members of the proposed class—applied to Section 13's statute of repose.<sup>5</sup> The

<sup>1</sup> See 414 U.S. 538, 554 (1974).

<sup>2</sup> See 721 F.3d 95, 104-10 (2d Cir. 2013), *cert. granted*, 134 S. Ct. 1515 (2014).

<sup>3</sup> See 135 S. Ct. 42 (2014).

<sup>4</sup> See *Joseph v. Wiles*, 223 F.3d 1155, 1166-68 (10th Cir. 2000).

<sup>5</sup> Section 13 establishes a one-year statute of limitations, triggered for Section 11 and 12(a)(2) claims by "the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence," and then provides for a separate three-year repose period, as follows: "In no event shall any such action be brought to enforce a liability created under [Section 11] ... more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2)] ... more than three years after the sale." 15 U.S.C. § 77m.

*IndyMac* Court stressed the key differences between statutes of limitations and statutes of repose in holding that *American Pipe* tolling did not apply to the latter. Specifically, the *IndyMac* Court noted that because statutes of limitations limit the availability of remedies, they may be subject to equitable considerations, such as tolling; in contrast, statutes of repose create a substantive right in those protected to be free from liability after a legislatively-determined period of time and thus run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling.<sup>6</sup> Given these differences, the *IndyMac* Court held that the *American Pipe* tolling rule for statutes of limitations could not apply to Section 13's statute of repose. First, if *American Pipe* tolling is considered "equitable," it could not be applied to affect a legislatively-enacted statute of repose.<sup>7</sup> Second, if *American Pipe* tolling is considered "legal" (as based upon Rule 23, governing class actions), then extending it to Section 13's statute of repose would contravene the Rules Enabling Act because it would result in applying Rule 23 so as to modify the substantive right embodied in Section 13's statute of repose.<sup>8</sup>

### **The Lehman Brothers Decision**

The *Lehman Brothers* decision concerned claims under Section 11 of the Securities Act asserted by the California Public Employees' Retirement System ("CalPERS") in connection with offerings dated July 12 and December 17, 2007. However, CalPERS did not file its complaint until February 25, 2011—more than three years after the securities were offered to the public—and the district court (Kaplan, J.) therefore dismissed CalPERS' complaint as time-barred.

On appeal, CalPERS argued that the statute of repose on its claim was tolled while it was a member of a timely-filed putative class action (from which CalPERS later opted-out to file its own complaint). Specifically, CalPERS argued that, unlike the situation in *IndyMac*, the putative class action was commenced by a named plaintiff with proper standing and, therefore, its claims were actually asserted within the three-year statute of repose. The Second Circuit rejected this argument as inconsistent with and irrelevant to the reasoning of *IndyMac*. The Court explained that, under *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 on whether the named plaintiff had proper standing to assert claims on behalf of a class.<sup>9</sup> The Court went on to observe that the *IndyMac* decision had created a circuit split on an issue that implicates the very nature of *American Pipe* tolling, and that the question accordingly "may be ripe for resolution by the Supreme Court."<sup>10</sup>

### **The Bear Stearns Decision**

The *Bear Stearns* decision concerned claims under Section 10(b) of the Exchange Act asserted against Bear Stearns Companies L.L.C. ("Bear"), Bear's officers, and Bear's auditor, Deloitte & Touche L.L.P. ("Deloitte").

<sup>6</sup> See 721 F.3d at 106.

<sup>7</sup> See 721 F.3d at 109 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991)).

<sup>8</sup> See *id.* (citing 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011)).

<sup>9</sup> *Lehman Bros.*, at 3-4.

<sup>10</sup> *Id.* at 5-6.

Following Bear's collapse in 2008, a series of securities fraud putative class actions were filed against Bear and the individual defendants; the actions were subsequently consolidated and the consolidated class action lawsuit also named Deloitte as a defendant. The consolidated class action complaint asserted claims on behalf of all persons and entities that had acquired Bear common stock or other equities between December 14, 2006 and March 14, 2008. In May 2012, the parties reached a settlement that was later approved by the district court.

In August 2012, SRM Global Master Fund Limited Partnership ("SRM") requested exclusion from the class action settlement. It filed its own complaint on April 24, 2013, asserting, among other things, Section 10(b) claims that were based on many of the same allegations as were made in the consolidated class action complaint. The defendants moved to dismiss SRM's complaint as time-barred under the five-year repose period for Section 10(b) claims established by 28 U.S.C. § 1658(b).<sup>11</sup> The district court (Sweet, J.) held that the logic and rationale of *IndyMac* foreclosed SRM's attempt to invoke *American Pipe* tolling, and thus granted the motion.<sup>12</sup>

The Second Circuit affirmed. It held that Section 1658(b)(2), as a statute of repose, "defines the right involved in terms of the time allowed to bring suit."<sup>13</sup> The *Bear Stearns* Court rejected the argument that the textual differences between Section 13 and Section 1658(b)(2) should preclude application of *IndyMac* to Section 1658(b)(2),<sup>14</sup> and thus held that, for the same reasons provided in *IndyMac*, *American Pipe* tolling does not apply to Section 1658(b)(2). First, as a statute of repose, Section 1658(b)(2) is not subject to equitable tolling; and second, it creates a substantive right in defendants to be free from liability after five years—a right that *American Pipe* tolling cannot modify without running afoul of the Rules Enabling Act.<sup>15</sup>

## Looking Ahead

The *Lehman Brothers* and *Bear Stearns* decisions provide the Supreme Court with an opportunity to consider the same issue that the Court appeared willing to address when it granted certiorari in *IndyMac*. Whether the changed composition of the Court might affect the Court's willingness to grant certiorari on the issue again remains to be seen, but the issue of whether *American Pipe* tolling extends to statutes of repose continues to divide the lower courts. Especially in light of recent Supreme Court authority discussing the distinction between statutes of limitations and statutes of repose,<sup>16</sup> it will be of great interest to securities issuers and underwriters whether the Supreme Court remains inclined to address whether *American Pipe* tolling extends to statutes of repose.

<sup>11</sup> Section 1658(b) establishes a two-year statute of limitations and a five-year repose period for Section 10(b) claims, as follows: "a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws ... may be brought not later than the earlier of (1) 2 years after the discovery of facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b).

<sup>12</sup> See 995 F. Supp. 2d 291, 299-303 (S.D.N.Y. 2014).

<sup>13</sup> *Bear Stearns*, at 7 (quoting *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102, 104 (2d Cir. 2004)).

<sup>14</sup> *Id.* at 9.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> See *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014); *Credit Suisse Secs. (USA) LLC v. Simmonds*, 132 S. Ct. 1414 (2012).

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