

## **American Pipe Class Action Tolling Inapplicable to Section 13 Statute of Repose**

On June 27, 2013, the United States Court of Appeals for the Second Circuit held, in *In re IndyMac Mortgage-Backed Securities Litigation*,<sup>1</sup> that the class action tolling rule set forth by the Supreme Court in *American Pipe & Construction Co. v. Utah*<sup>2</sup> – 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 – is inapplicable to the three-year statute of repose in Section 13 of the Securities Act of 1933 (“Securities Act”).<sup>3</sup> Additionally, the Court held that, absent circumstances that would render newly asserted claims independently timely, neither Rule 24 (relating to intervention) nor Rule 15(c) (relating to the “relation back” of amended pleadings) of the Federal Rules of Civil Procedure permits members of a putative class who are not named parties to intervene in a class action as named parties in order to revive claims previously dismissed for lack of jurisdiction.

### **I. Factual Background and Procedural History**

This appeal evolved from the consolidation of two securities class actions filed in October of 2009, in which plaintiffs asserted claims for violations of Sections 11, 12(a), and 15 of the Securities Act against IndyMac MBS, Inc. (“IndyMac”). IndyMac issued a series of mortgage pass-through certificates<sup>4</sup> (the “Certificates”) two purchasers of which filed separate putative class actions against IndyMac on behalf of a class of purchasers of the Certificates. The actions were consolidated and the Wyoming State Treasurer and a Wyoming fund were appointed lead plaintiffs.

On June 21, 2010, the district court dismissed for lack of jurisdiction all claims arising from the purchase of the Certificates by plaintiffs other than the Wyoming plaintiffs, finding that the Wyoming plaintiffs failed to demonstrate the requisite showing of injury relating to Certificates purchased by other putative plaintiffs. This spurred other purchasers to move to intervene as additional named plaintiffs in the action. Despite the fact that the three-year statute of repose under Section 13 had expired, the would be intervenors raised the class action tolling rule of *American Pipe*, arguing that it applied to the Section 13 statute of repose. Alternatively, they argued that if the tolling rule did not apply, their proposed amended complaint should “relate back” to the date of the Amended Complaint filed by the Wyoming plaintiffs. Both motions were denied by the district court, which determined that neither class action tolling nor Rule 15(c) relation back could overcome the expired period of repose.

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<sup>1</sup> *In re IndyMac Mortgage-Backed Sec. Litig.*, 11-2998-cv(L) (2d Cir. June 27, 2013), available at [http://www.ca2.uscourts.gov/decisions/isysquery/3bfea9f0-74b5-452e-9a05-ba1332c3b1f3/3/doc/11-2998\\_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/3bfea9f0-74b5-452e-9a05-ba1332c3b1f3/3/hilite/](http://www.ca2.uscourts.gov/decisions/isysquery/3bfea9f0-74b5-452e-9a05-ba1332c3b1f3/3/doc/11-2998_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/3bfea9f0-74b5-452e-9a05-ba1332c3b1f3/3/hilite/) (the “Opinion”).

<sup>2</sup> 414 U.S. 538 (1974) (“*American Pipe*”).

<sup>3</sup> 15 U.S.C.A. § 77m. Section 13 provides in full: No action shall be maintained to enforce any liability created under [section 11 or section 12(a)(2)] of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under [section 12(a)(1)] of this title, unless brought within one year after the violation upon which it is based. *In no event shall any such action be brought to enforce a liability created under [section 11 or section 12(a)(1)] of this title more than three years after the security was bona fide offered to the public, or under [section 12(a)(2)] of this title more than three years after the sale.* (emphasis added).

<sup>4</sup> A mortgage pass-through certificate is “a type of mortgage-backed security that entitles its owner to a portion of the revenue stream generated by an underlying pool of residential mortgage loans.” *IndyMac II*, 793 F. Supp. 2d 637, 640-41 (S.D.N.Y. 2011); see also *Am. Int’l Grp. v. Bank of Am. Corp.*, 712 F.3d 775 (2d Cir. 2013).

## II. The Court of Appeals' Decision

Reviewing the denial of the motion to intervene for an “abuse of discretion,”<sup>5</sup> the Court of Appeals affirmed the district court’s ruling.

### A. The Application of *American Pipe* to the Section 13 Statute of Repose

The Court of Appeals began its analysis by revisiting the *American Pipe* decision. There, relying heavily on Federal Rule of Civil Procedure 23 and courts’ equitable power to toll statutes of limitations, the Supreme Court had ruled that the commencement of a class action suspends applicable statutes of limitations for putative class members, allowing absentee class members to rely on the existence of the class action suit to protect their rights instead of filing their own separate suits and creating the multiplicity of activity that Rule 23 was designed to avoid.

The Court of Appeals then addressed the question of whether class action tolling could apply to the statute of repose in Section 13. First, the Court distinguished a statute of repose from a statute of limitations. While statutes of limitations only limit the availability of remedies and are often subject to tolling principles,<sup>6</sup> statutes of repose create a substantive right that extinguishes unasserted claims after a fixed period of time.<sup>7</sup> Given this distinction, the Court of Appeals held that a statute of repose is “‘subject [only] to legislatively-created exceptions,’ and not to equitable tolling.”<sup>8</sup>

Applying these guidelines to the two time periods in Section 13, the Court recognized the first period as a one-year statute of limitations subject to equitable tolling, and the second as a three-year “absolute” statute of repose that cannot be extended by the same tolling principles. The Court explained that statutory or “legal” tolling based on Rule 23 did not apply to the statute of repose in Section 13 because it is barred by the Rules Enabling Act, which mandates that the Federal Rules of Civil Procedure “shall not abridge, enlarge or modify any substantive right.”<sup>9</sup> Given that the statute of repose in Section 13 creates a substantive right that extinguishes unasserted claims after a three-year period, permitting intervention after the expiration of the period of repose would enlarge or modify a substantive right and, as a result, violate the Rules Enabling Act. Accordingly, the Court concluded that the class action tolling rule of *American Pipe*, whether grounded in equitable authority or statutorily under Rule 23, does not extend to the three-year statute of repose in Section 13.<sup>10</sup>

The Court of Appeals was unmoved by the appellants’ argument that a failure to apply class action tolling to the Section 13 statute of repose could burden the courts by creating a multiplicity of suits that Rule 23 was designed to prevent. It explained that such a risk was not an inevitable outflow of the holding given the sophisticated and well-counseled litigants involved in securities fraud class actions.<sup>11</sup>

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<sup>5</sup> See *AT & T Corp. v. Sprint Corp.*, 407 F.3d at 561 (2d Cir. 2005).

<sup>6</sup> See *Fed Hous. Fin. Agency v. UBS Americas Inc.*, 712 F.3d 136, 140 (2d Cir. 2013); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2011).

<sup>7</sup> See *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996); *Ma*, 597 F.3d at 88 n.4.

<sup>8</sup> *Opinion* at 12 (citing *P. Stolz Family P’ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004)).

<sup>9</sup> 28 U.S.C. § 2072(b).

<sup>10</sup> *Opinion* at 16.

<sup>11</sup> *Id.*

## B. Rule 15 (“Relation Back”) in *IndyMac*

The Court also considered whether appellants, as intervenors, could “relate back” their proposed amended complaint to a prior complaint pursuant to Rule 24 and Rule 15(c).

Rule 24 permits non-parties to join in an action provided they share common legal or factual questions with that action and their motion is made before the expiration of any statutorily-mandated time period. Rule 15(c) applies when a party seeks to amend a pleading after the expiration of a statutorily-mandated time period, and allows an amendment to relate back to the original, timely pleading provided it asserts a claim or defense that arose out of the same transaction or occurrence.

As an alternative to their argument for class action tolling, appellants sought to intervene pursuant to Rule 24 and amend the complaint pursuant to Rule 15(c), asserting claims that would otherwise be time-barred. The Court of Appeals rejected the argument, holding that appellants’ ability to intervene was barred by the “long recognized” rule that “if jurisdiction is lacking at the commencement of a suit, it cannot be aided by the intervention of a plaintiff with a sufficient claim.”<sup>12</sup> The Court explained that because no named plaintiff in the suit had constitutional standing to bring the claims initially, the defect may not be remediated by the appellants’ later intervention pursuant to Rule 24. Thus, absent circumstances that would render the newly asserted claims independently timely, neither Rule 24 nor Rule 15(c)’s “relation back” doctrine allows absentee class members to intervene as named parties in order to revive claims dismissed from the class complaint for lack of jurisdiction.

## III. Significance of the Decision

The Second Circuit’s holding in *IndyMac* provides clarity to those involved in the offer and sale of securities. Respecting the absolute time limit created by the statute of repose in Section 13 identifies a date by which unasserted claims under Sections 11 and 12 of the Securities Act relating to a specific securities offering will be extinguished. The court’s analysis suggests similar treatment for other statutes of repose, including the five-year statute of repose governing claims for violation of Section 10(b) of the Securities Exchange Act of 1934.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or [cgilman@cahill.com](mailto:cgilman@cahill.com); Jon Mark at 212.701.3100 or [jmark@cahill.com](mailto:jmark@cahill.com); or John Schuster at 212.701.3323 or [jschuster@cahill.com](mailto:jschuster@cahill.com).

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<sup>12</sup> *Opinion* at 18 (citing *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012)).