

# Caution to Investors: Second Circuit Holds That Securities Act Statute of Repose Not Tolled

A recent ruling by the United States Court of Appeals for the Second Circuit signals that investors should be more proactive to protect their interests in securities fraud cases. In *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc. (IndyMac)*, the Court of Appeals held that the tolling rule established in *American Pipe and Construction Co. v. Utah (American Pipe)* does not apply to the three-year statute of repose in Section 13 of the Securities Act of 1933.<sup>1</sup> This means that potential class members can no longer safely wait to see how a class action progresses before deciding whether to pursue their individual actions.

## Background

Two class actions were filed against IndyMac MBS, Inc., asserting Securities Act claims relating to offerings of mortgage pass through certificates.<sup>2</sup> The District Court consolidated the two class actions and appointed the Wyoming State Treasurer and the Wyoming Retirement System as lead plaintiffs.<sup>3</sup> The District Court, however, dismissed for lack of standing all claims concerning the certificates the Wyoming entities did not purchase.<sup>4</sup>

Following the decision, five different pension funds moved to intervene as additional plaintiffs to the action to assert the claims with respect to the certificates they had purchased.<sup>5</sup> Although the three-year period of the statute of repose in Section 13 had run on most of their claims, the putative intervenors argued that the statute of repose was tolled under the tolling rule in *American Pipe* where the Supreme Court held 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."<sup>6</sup> Alternatively, they argued that they could nonetheless "relate back" their proposed amended complaint pursuant to Rule 15(c).<sup>7</sup> The District Court turned down the putative intervenors' arguments, holding that no form of tolling may be invoked to avoid the three-year statute of repose in Section 13 and that the three-year statute of repose cannot be extended by operation of the relation back rule.<sup>8</sup> Three of the five putative intervenors appealed.<sup>9</sup>

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## IndyMac

The Court of Appeals affirmed the District Court's decision, holding that (1) the *American Pipe* tolling rule does not apply to the statute of repose in Section 13 regardless of whether the *American Pipe* tolling rule was characterized as "equitable" or "legal" in nature, and that (2) the proposed intervenors could not rely on the relation back rule because intervention cannot be used to establish jurisdiction that had been held to be lacking.<sup>10</sup> The Court of Appeals stated that while statutes of limitations may be subject to equitable considerations because they merely limit the availability of remedies<sup>11</sup>, *statutes of repose are not subject to equitable considerations because they affect not only the remedies but also the underlying rights.*<sup>12</sup> *The Court of Appeals also cited precedents to emphasize that the three-year period of repose in Section 13 is absolute and not subject to equitable tolling.*<sup>13</sup>

The Court of Appeals also stated that the *American Pipe* tolling rule cannot be considered "legal" in nature because of the Rules Enabling Act.<sup>14</sup> The Rules Enabling Act provides that "the power to prescribe general rules of practice and procedure<sup>15</sup> ... shall not abridge, enlarge or modify any substantive right."<sup>16</sup> According to the Court of Appeals, permitting a plaintiff to file a complaint or intervene after the three-year period of repose would enlarge or modify a substantive right and violate the Rules Enabling Act.<sup>17</sup>

## Investor Attention to Time Limits Required

The *IndyMac* decision means that investors who may want to wait to file individual actions should file prior to expiration of the three-year period of repose in Section 13. Although there is still a dispute among the courts regarding the interpretation of the *American Pipe* tolling rule<sup>18</sup>, investors need to be aware of the *IndyMac* decision and plan ahead in order to protect their interests in securities fraud cases.<sup>19</sup>

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<sup>1</sup> 721 F.3d 95, 112 (2d Cir. 2013) (hereinafter *IndyMac III*).

<sup>2</sup> *In re IndyMac Mortgage-Backed Sec. Litig.*, 718 F.Supp.2d 495, 498 (S.D.N.Y. 2010) (hereinafter *IndyMac I*); *IndyMac III* at 101-02.

<sup>3</sup> *IndyMac I* at 498; *IndyMac III* at 102.

<sup>4</sup> *IndyMac I* at 501.

<sup>5</sup> *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F.Supp.2d 637, 642 (S.D.N.Y. 2011)



(hereinafter *IndyMac II*). The five pension funds included (1) the City of Philadelphia Board of Pensions and Retirement; (2) the Los Angeles County Employees Retirement Association (LACERA); (3) the Public Employees' Retirement System of Mississippi (PERS); (4) the Iowa Public Employees' Retirement System; and (5) the General Retirement System of the City of Detroit (Detroit Retirement). *Id.* n. 13; *IndyMac III* at 103.

<sup>6</sup> *IndyMac II* at 642, 646; *IndyMac III* at 103; 414 U.S. 538, 554 (1974).

<sup>7</sup> *IndyMac II* at 649-51. Rule 15(c) governs when an amended pleading "relates back" to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations.

<sup>8</sup> *Id.* at 642-43.

<sup>9</sup> *IndyMac III* at 104. The putative intervenors included Detroit Retirement, LACERA, and PERS. *Id.*

<sup>10</sup> *Id.* at 106-13.

<sup>11</sup> *Id.* at 106.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 107.

<sup>14</sup> *Id.* at 109.

<sup>15</sup> *Id.*; 28 U.S.C. §2072(a);

<sup>16</sup> *IndyMac III* at 109; 28 U.S.C. §2072(b)

<sup>17</sup> *IndyMac III* at 109.

<sup>18</sup> *Joseph v. Wiles*, 223 F.3d 1155, 1166-68 (10th Cir. 2000) (holding that the statute of repose applicable to the Securities Act of 1933 is subject to the American Pipe tolling rule); *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006) (describing the *American Pipe* tolling rule as an "equitable tolling rule"); *Albano v. Shea Homes Ltd.*, 634 F.3d 524, 535 (9th Cir. 2011) (stating that there is no consensus whether the American Pipe tolling rule should be characterized as legal or equitable).

<sup>19</sup> After *IndyMac III*, the PERS filed a petition for a writ of certiorari with the U.S. Supreme Court on November 22, 2013, and the respondents filed a brief in opposition on January 27, 2014.

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