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The Supreme Court Grants Certiorari in *Indymac*: What's at Stake for Investors, Securities Lawyers, and the Courts. What You Should Do Right Now to Prepare

BY MICHAEL EISENKRAFT

On March 10, 2014, the U.S. Supreme Court granted Public Employees' Retirement System of Mississippi's ("Mississippi") petition for *certiorari*, agreeing to hear briefing and argument in support of Mississippi's assertion that the U.S. Court of Appeals for the Second Circuit's recent decision in *Police and Fire Retirement System of the City of Detroit v. Indymac MBS, Inc.* ("*Indymac*"), 721 F.3d 95 (2d Cir. 2013)[1] was erroneous and should be overturned. The Supreme Court grants approximately 80 petitions for *certiorari* per year a miniscule percentage of the around 10,000 petitions it receives.[2] While the Supreme Court has become more active in hearing securities cases than in years past, out of those approximately 80 cases the Supreme Courts hears, no more than a few involve the securities laws. Adding to the unusualness of the situation, the petition in this case was brought by one of the plaintiffs, as opposed to the defendants in the matter. This is a relatively rare occurrence because, in part, the Supreme Court majority is generally, whether rightly or wrongly, viewed by the plaintiffs securities bar as being a relatively conservative court that is less than friendly to securities class actions. Therefore, it is considered highly risky to ask the Supreme Court to opine on any securities issue. So, what issue did Mississippi and its attorneys believe was so important that they were willing to risk an adverse Supreme Court ruling and that the Supreme Court was so interested in that they were willing to grant *certiorari*? The answer is surprising at first glance as it is an abstruse procedural issue concerning the intersection of Rule 23 with the 1933 Securities Act's three year statute of repose. Specifically, the petition accepted by the Supreme Court asked the following question:

> Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?[3]

To understand why this question is so critical, it is necessary to first understand the *American Pipe* rule. In *American Pipe Construction Co. v. Utah*, 414 U.S. 538 (1974) ("*American Pipe*"), 40 years ago, the Supreme Court held that the filing of a putative class action tolled the statute of limitations for all members of the class included within that class definition. In *American Pipe*, the Supreme Court held that class actions asserting claims on behalf of unnamed class members halted the statute of limitations on their claims unless and until class certification is denied or the members are ex-

[1] For brevity, all citations in this article omit internal references and quotations unless specifically included.

[2] *See* Frequently Asked Questions (FAQ), SUP. CT. OF THE U.S., http://www.supremecourt.gov/faq.aspx#faqgi9 (last visited, March 22, 2014).

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[3] *See* Petition For a Writ of Certiorari filed by Public Employees' Retirement System of Mississippi on Nov. 22, 2013 (Pet. Br.) at i *Police & Fire Ret. Sys. of the City of Detroit v. Indymac MBS, Inc.*, U.S., No. 13-640 (2013).

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cluded from the class.[4] The Court reasoned that ''claimed members of the class stood as parties to the suit'' until such time.[5] Thus, by suspending the statute of limitations while class certification is being considered, *American Pipe* ''protect[s] the policies behind the class action procedure.''[6] The Supreme Court also held that suspending the statute of limitations for claims asserted on behalf of unnamed class members was ''in no way inconsistent with the functional operation of a statute of limitations.''[7] Statutes of limitations are '' 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' ''[8]

In addition to statutes of limitations (one year from discovery for the Securities Act, two years from discovery for the 1934 Securities Exchange Act), both the Securities Act and the Exchange Act contain so-called statutes of repose that extend three years from the time of the public offering for Securities Act claims and five years from the time of the violation for Exchange Act claims.[9] Other federal statutes also contain so-called statutes of repose. Until very recently, whether or not the principles of *American Pipe* applied to statutes of repose in the same way as it applied to statutes of limitation seemed a settled question. Specifically, during a period of over 40 years, at least 17 different decisions by federal courts (including the U.S. Court of Appeals for the Tenth Circuit), all reached the opposite conclusion and concluded that *American Pipe* tolling applied to statutes of repose as well as statutes of limitations.[10]

In the last few years, however, a few District Court decisions went a different way. For instance, in *Dickson v. American Airlines, Inc*., 685 F. Supp. 2d 623, 627 (N.D. Texas 2010), that court held that ''class action tolling is not applicable to the Montreal Convention two-year repose provisions.'' The first decision, however, holding that *American Pipe* did not apply to the statutes of repose contained in the securities laws came in 2011 from Judge Kevin Castel of the U.S. District Court for the Southern District of New York who held in *Footbridge Ltd. Trust v. Countrywide Fin. Corp*., 770 F. Supp. 2d 618, 624-27 (S.D.N.Y. 2011) that the Securities Act's three year statute of repose is not subject to *American Pipe* tolling. Judge Castel reasoned that ''American Pipe tolling is not a form of legal or statutory tolling, but is a form of equitable tolling'' and under the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991) (''*Lampf*''), ''a federal statute of repose is not subject to equitable tolling.''[11] After Judge Castel's decision, a split within the District Courts of the Second Circuit emerged—with a number of courts following Judge Castel's logic[12] and a number of courts rejecting it.[13]

Eventually, however, the Second Circuit issued a decision on the issue in *Indymac*. The *Indymac* case itself consisted of two consolidated class action cases where plaintiffs asserted claims under the Securities Act with respect to 106 different mortgage-backed securities offerings issued pursuant to three registration statements. When the two class actions cases were consolidated in 2009, only one originally-named plaintiff remained as lead plaintiff, while the plaintiff in the other case, while not named lead plaintiff by the district court, remained in the case and became part of what the court referred to as ''asserted'' or putative plaintiffs. In 2010, the dis-

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[4] *Am. Pipe*, 414 U.S. at 551.

[5] *Id.*

[6] *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 349 (1983)

[7] *Am. Pipe*, 414 U.S. at 554.

[8] *Id.* (internal quotations omitted). *See also id.* at 555 (noting that the filing of a class action ''notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment'').

[9] Exactly what constitutes a statute of repose rather than a statute of limitations or, if, indeed, such a thing as a statute of repose exists as a separate category than a statute of limitations is a somewhat contested question. The Second Circuit itself in *Indymac* admitted confusion on the subject and noted that the Supreme Court itself referred to it inconsistently. *See Indymac*, 721 F.3d at 106-107. In Mississippi's petition, the Securities Act's so-called statute of repose is referred to carefully as a ''three year time limitation.'' For purposes of convenience, however, this article shall refer to the three and five year time limitations in the Securities Act and Exchange Act respectively as statutes of repose.

[10] *See, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (applying American Pipe to Section 13 of the Securities Act); *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, No. 08 Civ. 10841 (JSR), 2011 U.S. Dist. LEXIS 93222 (S.D.N.Y. August 22, 2011) (*American Pipe* tolled the statute of repose for Securities Act claims as of the date such claims were first asserted in a complaint); *Me. State Ret. Sys. V. Countrywide Fin. Corp*., 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (applying *American Pipe* to Section 13 of the Securities Act); *Hildes v. Andersen*, No. 08-cv-0008-BEN (RBB), 2010 BL 265493, at *3 (S.D. Cal. Nov. 8, 2010) (applying *American Pipe* to the statute of repose governing claims under the Exchange Act); *Arivella v. Lucent Techs., Inc*., 623 F. Supp. 2d 164, 178 (D. Mass. 2009) (ERISA); *Andrews v. Chevy ChaseBank*, FSB, 243 F.R.D. 313, 315-17 (E.D. Wis. 2007) (Truth in Lending Act); *In re Enron Corp. Secs*., 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006) (Securities and Exchange Acts); *Grubka v. WebAccess Int'l, Inc*., 445 F. Supp. 2d 1259, 1267 (D. Colo. 2006) (same); *In re Flag Telecom Holdings, Ltd. Secs. Litig*., 352 F. Supp. 2d 429, 455-56 (S.D.N.Y. 2005),abrogated on other grounds, 574 F.3d 29 (2d Cir. 2009) (Securities Act); *Ballard v. Tyco* Int'l, Ltd., Nos. MDL 02-MD-1335-PB, Civ. 04-CV-1336-PB., 2005 BL 20932, at *6–7 (D.N.H. July 11, 2005) (Securities and Exchange Acts); *In re Heritage Bond* Litig., Nos. CV 01-5752 DT (RCx), CV 02-382 DT (RCx), CV 02-993 DT (RCx), CV 02-2745 DT (AJWx), CV 02-6484 DT (RCx), CV 02-6841 DT (RCx), CV 02-9221 DT (RCx), CV 02- 6512 DT (AJWx), 2003 WL 25779465, at *3 (C.D. Cal. Aug. 18, 2003) (Exchange Act); *Official Comm. of Asbestos Claimants of G-I Holding, Inc.v. Heyman*, 277 B.R. 20, 31-32 (S.D.N.Y. 2002) (applying *American Pipe* to the statute of repose governing state law fraudulent conveyance claims in a federal bankruptcy proceeding); *In re Discovery Zone Secs. Litig*., 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998) (Exchange Act); *Salkind v. Wang*, Civ. A. No. 93-10912-WGY, 1995 WL 170122, at *3 (D. Mass. Mar. 30, 1995) (same); *Mott v. R.G. Dickinson & Co*., No. 92-1450-PFK, 1993 WL 63445, at *5 (D. Kan. Feb. 24, 1993) (Securities and Exchange Acts); *In re Activision Secs. Litig*., No. C-83- 4639(A) MHP, 1986 WL 15339, at *4-5 (N.D. Cal. Oct. 20, 1986) (Securities Act); *Hellerstein v. Mather*, 360 F. Supp. 473, 475 (D. Colo. 1973) (same).

[11] *Footbridge Ltd. Trust v. Countrywide Fin. Corp*., 770 F. Supp. 2d 618, 624-26 (S.D.N.Y. 2011).

[12] *See, e.g., In re Lehman Bros. Sec. & ERISA Litig*., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011). N.b. The author of this article was counsel for plaintiffs in this case.

[13] *See, e.g., N.J. Carpenters Health Fund v. Residential Capital, LLC*, 288 F.R.D. 290, 294 (S.D.N.Y. 2013). N.b. The author of this article was counsel for plaintiffs in this case.

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trict court dismissed securities act claims on behalf of purchasers of some of the 106 mortgage-backed securities offerings because, according to the district court, lead plaintiff did not have standing to represent purchasers of securities in offerings which it did not itself purchase. Some of these securities however, had been purchased by the plaintiff originally named in the pre-consolidated cases who then sought to intervene as a named plaintiff and cure the purported standing deficiency identified by the district court.

By this point in the litigation, however, more than three years had passed since the securities at issue had been sold to the public and defendants in the case argued that the district court should deny the motion to intervene because the securities act claims the intervenor sought to assert were barred by Securities Act Section 13's statute of repose. The intervening plaintiff opposed, arguing that the putative class action had covered its claim until the district court's dismissal on standing grounds and this fact should toll the statute of repose. The district court agreed with the defendants, holding that ''neither American Pipe nor any other form of tolling may be invoked to avoid the three year statute of repose set forth in Section 13 of the Securities Act of 1933.''[14] In short, this decision meant that investors who had purchased those securities timely named in both the pre-consolidated complaint as well as the consolidated amended complaint had not only been excluded from the case, but would be forever barred from pursuing relief or seeking damages at all. Plaintiffs appealed this decision to the Second Circuit.

The appeals court declined to toll the three-year deadline under Section 13. Instead, it held that a statute of repose is qualitatively different and cannot be tolled in the same way as a statute of limitation.15 The difference, the Second Circuit explained, is that a statute of limitation cuts-off a plaintiff's access to certain remedies while having no effect on the accessibility of the underlying right.16 For this reason, statutes of limitation are subject to equitable considerations and may be tolled.17 Yet the ''most important'' feature of statutes of repose is that they can only be tolled by ''legislatively created exceptions''—otherwise called ''legal'' tolling.18 The court held that the stricter nature of statutes of repose is due to the fact that they ''affect the underlying right, not just the remedy, and thus they run without interruption once the necessary triggering event has occurred.''19 The court went on to hold that—even if *American Pipe* tolling could somehow be construed as legal tolling (and not equitable)—the Rules Enabling Act conferring exclusivity on the Supreme Court in the design of rules of practice and procedure would bar construing the statute of repose under Section 13 as affected by even arguably ''legal'' tolling under *American Pipe*. This is because ''the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' ''[20] and a statute of repose confers a substantive right. Therefore, despite the plaintiffs' vigilance in identifying and naming certain securities from the outset of the lawsuit, those claims were summarily dismissed from the litigation in favor of defendants.

The papers supporting Mississippi's petition for certiorari explain both why this decision was important enough for the Supreme Court to grant *certiorari* and why Mississippi decided to try to bring this important issue to a potentially hostile Supreme Court. In addition to Mississippi itself, three other groups filed briefs in the action: (1) a group of Civil Procedure and Securities Law Professors filed an *amicus curiae* brief written by Professor David Freeman Engstrom of Stanford Law in support of Mississippi's petition (''Law Professor Brief''); (2) the National Association of Shareholder and Consumer Attorneys (''NASCAT'') filed a second amicus curiae brief in support of Mississippi's petition (''NASCAT Brief''); and (3) a group of very large pension funds, including the California Public Employees' Retirement System and the Teacher Retirement System of Texas, filed a third amicus curiae brief, also in support of Mississippi's petition (''Pension Fund Brief'').

When viewed altogether, the papers filed in support of certiorari made three main arguments: (1) the Second Circuit's decision in *Indymac* created a circuit split with the Tenth Circuits decision in *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (''*Joseph*''), a situation which would create confusion and differing results around the country; (2) the Second Circuit's decision in *Indymac* was erroneous and misapplied *American Pipe*; and (3) the Second Circuit's *Indymac* decision would prejudice investors, destroy absent class members' rights, and clog the courts. The first argument is relatively straightforward—*Indymac* holds that American Pipe does not toll section 13's statute of limitations, *Joseph* holds the reverse. Claims in the different circuits would have dramatically different fates. Petitioner also argues that the Second Circuit's decision is ''inconsistent with Federal Circuit decisions that have applied American Pipe to 'jurisdictional' provisions setting time limits for bringing claims against the U.S.—thus increasing the appeal to the Supreme Court by expanding the potential impact of the Second Circuit. [21]

The briefs also argued that *Indymac* was wrongly decided. Specifically, Mississippi argued that *American Pipe* is best understood as ''determining when a putative class member's action commences.''[22] In other words, under *American Pipe*, an action is brought or commenced for all members of the class when the putative class action is filed. According to Mississippi, when understood this way, neither the Supreme Court's limitation on equitable tolling in *Lampf* or the limitations of the Rules Enabling Act interfere with applying *American Pipe* to the Security Act's statute of repose. Mississippi goes on to argue at length that the Indymac

[14] *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011).

15 *Indymac*, 721 F.3d at 106 & n.13, 109.

16 *Id.* at 106.

17 *Id.*

18 *Id.* at 106-07.

19 *Id.* 106.

[20] *Indymac*, 721 F.3d at 109, quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561, 180 L. Ed. 2d 374 (2011) (quoting 28 U.S.C. § 2072(b)).

[21] *See Bright v. United States*, 603 F. 3d 1273 (Fed. Cir. 2010). Federal Circuit held that, unlike equitable tolling, ''statutory tolling 'suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consisted with the proper function of a statute of limitations.'' *Id*. at 1287-88.

[22] Pet. Br., *supra* note 3, at 24.

court's application of *Lampf* and the Rules Enabling Act were erroneous.

Perhaps most importantly, the briefs discussed the dramatic harm that the application of the *Indymac* decision would cause to investors, absent class members, and the court system. First, there is the sheer volume of cases that would be affected. According to Mississippi, there are approximately 200 securities class actions filed each year, representing more than $200 billion losses. [23] Each one of those actions has the potential to be affected by the circuit split on the issue of the statute of repose. This does not count the numerous other federal statutes that contain statutes of repose, multiplying the effects of *Indymac* outside the securities arena. So, what would the effect of *Indymac* be on all these cases?

Essentially, any investor who does not file their own claim would lose their rights outside of the class action context past the statute of repose date and, if the class did not get certified, they would not have any claims past the statute of repose. In other words, the individuals who would be most obviously harmed would be those class members who wanted to opt out after the statute of repose expired, because their claims would be extinguished by the statute of repose and those unfortunate members of putative classes where certification was denied after the statute of repose expired, forever barring their claims.

These potential effects would create additional ripple effects. For example as the Law Professors Brief pointed out: ''[i]f absent class members did not enjoy protection under *American Pipe*, they would be compelled to take protective action, either intervening or filing independent lawsuits, in order to avoid being subsequently time-barred.''[24] Moreover, it ''will create perverse incentives for litigants to delay pre-trial proceedings for as long as possible in order to extinguish the rights of potential class members who might seek to go it alone.''[25] The Law Professors Brief also provided some insight into how many cases would actually be affected. Using a dataset of all Securities Act class actions between 2002 and 2008, the Law Professors Brief determined that the three year limitation period would have expired prior to a court order on certification in 83 percent of the cases that reached a certification order and in roughly half of all filed cases.[26] Moreover, for Exchange Act cases, the Law Professor Brief applied the same analysis to a random sample of 500 securities class actions and found that potential class members who wished to preserve their right to proceed independently if class proceedings failed would have to take action in 76 percent cases that reached a certification order in 25 percent of all sample cases.[27] Moreover, successful certification does not even protect against protective filings because it does not guarantee that the action will not subsequently fail on other grounds not binding on other class members.[28] The NASCAT brief described the tremendous work that would have to be done by investors to keep apprised of their rights in an *Indymac* world, stating that ''[i]nvestors will need to engage in significant monitoring efforts to keep track of when the statute of repose will expire in each putative class action where they purchased shares of the subject company, in order to be ready to file protective cases or motions to intervene if the class cert issue is not resolved prior to such expiration.''[29] The Pension Fund brief showed how this could be problematic—even for, and perhaps especially for, large institutional investors. The investors who signed the Pension Fund Brief have between $271 billion and $13 billion in assets. As they point out, they have numerous responsibilities, but limited personnel and other resources and it would be both inefficient and impractical for them to ''file their own actions in every instance in which they suffer losses as a result of violations of the securities laws.''[30]

So, what does this mean for securities lawyers and what should they do in the interim. First, and most obviously, *Indymac* decision is a highly significant boon to defendants in securities litigation because it extinguishes the claims of any potential securities claimant after the statute of repose expires unless their claim is covered by a class definition certified by the court or they have brought an individual claim. Securities defense lawyers, under the assumption that *Indymac* may well become the law of all the land, would do their clients a service by attempting to delay securities class actions until the statutes of repose expired—thus limiting the potential for opt outs or individual claims.

For plaintiffs' lawyers, the possibility that the Supreme Court could endorse *Indymac* means that they should insure that their investor clients carefully monitor cases where they have significant losses and, if a class has not been certified by the time the statute of repose could arguably run, they should consider filing individual prophylactic cases to ensure that their clients' claims do not get extinguished. Ironically, the *Indymac* decision could also prove beneficial for the certification of certain classes where otherwise the statute of repose would have run. This is because the superiority requirement of Rule 23(b)(3)—which requires that a putative class representative demonstrate that a class action is superior to individual actions—should be easily satisfied in cases where the comparison is between a viable class action and time barred individual claims.

It is impossible to predict at this point which way the Supreme Court will decide *Indymac*, but it is certain that the entire securities bar will be watching extremely closely.

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[23] *See id.* at 20. Moreover, according to Mississippi, the Second Circuit has nearly double the number of securities class actions as any other circuit. *Id.* at 21. This probably answers the question as to why Mississippi filed its certiorari position. Since the Second Circuit encompasses the most securities class actions and is seen as a leader on securities issues amongst the circuits meant that, even without Supreme Court review, *Indymac* was likely to be the dominant decision on this issue. That meant there was little to lose in seeking *certiorari*.

[24] Brief amici curiae of Civil Procedure and Securities Law Professors on Dec. 26, 2013 (Law Professor Br.) at 3 *Police & Fire Ret. Sys. of the City of Detroit v. Indymac MBS, Inc.*, U.S., No. 13-640 (2013).

[25] *Id.* at 4.

[26] *Id.* at 7-8.

[27] *Id.* at 9.

[28] *Id.* at 11.

[29] Brief amicus curiae of National Association of Shareholder and Consumer Attorneys on Dec. 26, 2013 (NASCAT Br.) at 8 *Police & Fire Ret. Sys. of the City of Detroit v. Indymac MBS, Inc.*, U.S., No. 13-640 (2013).

[30] Brief amici curiae of Public Pension Funds (Pension Fund Br.) at 4 *Police & Fire Ret. Sys. of the City of Detroit v. Indymac MBS, Inc.*, U.S., No. 13-640 (2013).

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