

Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—2d Cir.: *American Pipe* tolling does not apply to Securities Act statute of repose, (Jul. 8, 2016)

By [Amy Leisinger, J.D.](#)

In a summary order without precedential effect, a Second Circuit panel reiterated its existing position that the tolling rule set forth by the U.S. Supreme Court in *American Pipe & Construction Co. v. Utah* does not apply to the three-year statute of repose contained in Securities Act Section 13. In *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, the appellate court found that if *American Pipe*'s tolling rule is "equitable" in nature, it would not apply to statutes of repose, and, even if it is assumed to be "legal," extending the rule would be barred. Until the Supreme Court addresses the circuit split created by this case, *IndyMac* is the law of the Second Circuit, the panel stated ([In re Lehman Brothers Securities and ERISA Litigation](#), July 8, 2016, *per curiam*).

Tolling not applicable. In [IndyMac](#), several putative class members sought to intervene in an action in order to revive dismissed claims, arguing that *American Pipe* preserved their right to sue. After the district court found that the repose period could not be tolled and denied intervention, the class members appealed. In its [decision](#) affirming the district court's determination, the Second Circuit panel noted that courts have repeatedly recognized that the three-year limitations period in Section 13 is a statute of repose, an "absolute" period not subject to equitable tolling. *American Pipe* thus does not affect the statute of repose and permitting a plaintiff to file a complaint or intervene after the period has run would necessarily modify a substantive right in violation of the Rules Enabling Act, the panel stated.

IndyMac is the law. Rejecting the appellant's attempts to distinguish the present case from *IndyMac*, the court noted that, under *IndyMac*'s reasoning, the *American Pipe* tolling rule is ineffective against statutes of repose, regardless of whether named

plaintiffs have proper standing to assert claims on behalf of a class. If a class member's claims were essentially "filed" in the class complaint, there would be no need for *American Pipe* tolling, the court noted, as any putative class complaint would count as a legitimate "filing" of all members' claims within the limitations period. Further, the panel explained, the argument that time-barring the claims violates the due process protections of Rule 23's opt-out mechanism is without merit, as that rule only prevents a class member from being bound by a judgment without consent.

Affirming the district court's dismissal of the claims, the panel concluded: "unless and until the Supreme Court informs us that our decision was erroneous, *IndyMac* continues to be the law."

The case is [No. 15-1879](#).

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Companies: Moody's Investors Service, Inc.; McGraw-Hill Companies, Inc.; Moody's Corp.; Ernst & Young LLP

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