

# Second Circuit Affirms That Statutes of Repose Are Not Subject to Class Action Tolling in Opt-Out Actions

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The Second Circuit previously held, in *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013) (“*IndyMac*”), that the class action tolling rule set forth by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) (“*American Pipe*”) does not apply to the statutes of repose in the federal securities laws. The Second Circuit’s summary order in *In re Lehman Brothers Securities & ERISA Litigation*, Case No. 15-1879 (2d Cir. July 8, 2016), clarifies that *IndyMac*’s holding applies with equal force to opt-out actions. In doing so, the Second Circuit rejected arguments that plaintiffs have frequently made in an attempt to limit *IndyMac*’s reach, including that the *IndyMac* decision should be limited to situations where the class plaintiffs lack standing and that declining to toll a statute of repose violates absent class members’ due process rights to opt out of a class action.

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## **Background**

The California Public Employees' Retirement System ("CalPERS") invested in notes issued by Lehman Brothers Holdings, Inc. (together with its affiliates, "Lehman") between July 2007 and January 2008. The value of the notes declined leading up to Lehman's bankruptcy in September 2008, allegedly because Lehman's financial statements had concealed or misrepresented its overall financial strength, including its net leverage, risk management practices, and exposure to risky real estate-related holdings.<sup>1</sup>

Beginning in June 2008, multiple class actions were filed by investors in Lehman common stock and notes offerings. These class actions were consolidated in a multi-district litigation in the United States District Court for the Southern District of New York (the "Class Action").

CalPERS filed the lawsuit subject to the appeal more than three years after its notes purchases, on February 7, 2011, while the Class Action remained pending and before any class was certified. The lawsuit asserted Section 11 claims against many purported underwriters of Lehman securities (the "Underwriter Defendants").<sup>2</sup>

Although CalPERS was a putative class member, in March 2012 it excluded itself from the class settlements with the Underwriter Defendants, choosing instead to pursue its claims individually.<sup>3</sup> In January 2013, the Underwriter Defendants moved to dismiss CalPERS's Section 11 claims as time-barred under the District

Court's prior holding that statutes of repose are not subject to class action tolling.

After the motion was filed, the Second Circuit issued its decision in *IndyMac*, which held that regardless of whether *American Pipe* tolling is considered legal or equitable in nature, it cannot apply to statutes of repose. In June 2013, the District Court issued an order granting the Underwriter Defendants' motion to dismiss in light of *IndyMac*.<sup>4</sup>

CalPERS then appealed, arguing that *IndyMac* should be limited to circumstances where the class plaintiffs lacked standing, that its claims were effectively brought within the repose period because a class action was filed by a plaintiff with standing to assert its claims, and that applying *IndyMac* to opt-out cases would violate absent class members' due process opt-out rights.<sup>5</sup>

## **The Second Circuit's Decision**

In a summary order, the Second Circuit affirmed the district court's ruling that CalPERS's claims were untimely because the three-year statute of repose was not tolled under *American Pipe*. In so holding, the Second Circuit rejected CalPERS's attempts to distinguish *IndyMac*.

First, the Second Circuit was "unpersuaded" by CalPERS's argument that its claims were timely because "unlike in *IndyMac*, the putative class action was commenced by a named plaintiff with proper standing."<sup>6</sup> The Second Circuit noted that, to the contrary, "*IndyMac* made no reference to the standing of named plaintiffs when it concluded that *American Pipe* tolling did not

<sup>1</sup> See Second Amended Complaint, Dkt. No. 551, *In re Lehman Bros. Sec. & ERISA Litig.*, Case No. 09 MD 2017 (S.D.N.Y.).

<sup>2</sup> CalPERS also asserted, but settled, claims against Lehman's auditor and certain of its officers and directors. Dkt. Nos. 899, 1429.

<sup>3</sup> Dkt. No. 894.

<sup>4</sup> Pretrial Order No. 73, Dkt. No. 1279.

<sup>5</sup> See Brief for the Bank Defs., Dkt. No. 67, *In re Lehman Bros. Sec. & ERISA Litig.*, Case No. 15-1879 (2d Cir.).

<sup>6</sup> See Slip op. at 3.

apply to section 13’s statute of repose.”<sup>7</sup> Thus, “under *IndyMac*’s reasoning, 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 whether the named plaintiffs have proper standing to assert claims on behalf of a class.”<sup>8</sup> In reaching this ruling, the Second Circuit relied on the Supreme Court’s recent recognition in *CTS Corp. v. Waldburger* that a “critical distinction between statutes of limitations and statutes of repose is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.”<sup>9</sup>

*Second*, the Second Circuit rejected CalPERS’s suggestion that “because it fell within the putative class before exercising its right to opt out, its claims were essentially ‘filed’ . . . within three years.”<sup>10</sup> The Second Circuit observed that, were this the case, “there would be no need for *American Pipe* tolling at all [because] any putative class complaint would count as a legitimate ‘filing’ of all putative class members’ claims within the limitations period.”<sup>11</sup> In any event, the Second Circuit noted that the *IndyMac* panel considered and rejected the argument that *American Pipe* tolling “should be conceptualized as something other than ‘tolling.’”<sup>12</sup>

Third, the Second Circuit rejected CalPERS’s contention that declining to toll the statute of repose for opt-out plaintiffs would violate their due process rights to opt out of the class action.<sup>13</sup> In so ruling, the Second Circuit stated that “[t]he due process protections of Rule 23 are directed at preventing a putative class member from being

bound by a judgment without her consent,” and that “[t]he opt-out right does not,” as CalPERS contended, “confer *extra* benefits to a plaintiff’s independent action.”<sup>14</sup> Indeed, the Second Circuit stated that “CalPERS’s right to initiate and pursue an individual action before, during, and after the putative class action was unchanged – including the necessity of instituting such an action within . . . [the] statute of repose.”<sup>15</sup>

The Second Circuit’s opinion concluded by commenting that “the question whether *American Pipe* tolling applies to statutes of repose – and if so, when – may be ripe for resolution by the Supreme Court,” in light of the circuit split that its *IndyMac* decision created with the Tenth Circuit and the Supreme Court’s prior granting of certiorari in *IndyMac*.<sup>16</sup>

### **Significance of *In re Lehman***

The Second Circuit’s decision in *In re Lehman* emphasizes the unequivocal holding of *IndyMac*, and eliminates all doubt about its applicability to opt-out actions. Especially in light of the frequently significant claims of opt-out plaintiffs, who are typically large institutional investors, the Second Circuit’s decision provides greater certainty and finality to defendants in securities actions.

In addition, while the Second Circuit raised the possibility of Supreme Court review in light of the circuit split created by *IndyMac*, it did not mention the Sixth Circuit’s recent decision in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, which adopted *IndyMac*’s

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> 134 S. Ct. 2175, 2187 (2014).

<sup>10</sup> Slip op. at 4.

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

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

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* (emphasis in original).

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

<sup>16</sup> See *Joseph v. Wiles*, 223 F.3d 115 (10th Cir. 2000).

holding.<sup>17</sup> As in *Stein, In re Lehman*'s recognition that *IndyMac*'s rule is supported by the Supreme Court's recent decision in *CTS*, which post-dates the Tenth Circuit's contrary ruling, provides a strong basis for other circuits – including the Third and Ninth Circuits, where appeals raising the same issue remain pending – to hold that statutes of repose are not subject to class action tolling. Such rulings would further diminish the need for Supreme Court review.

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<sup>17</sup> 821 F.3d 780, 794-95 (6th Cir. 2016) (“We therefore join the Second Circuit in holding that, regardless of whether

*American Pipe* tolling is derived from courts’ equity powers or from Rule 23, it does not apply to statutes of repose.”).