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U.S. Supreme Court to Decide Whether American Pipe Tolling Applies to the Securities Act Statute of Repose

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On January 13, 2017, the U.S. Supreme Court granted *certiorari* in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, No. 16-373, and will finally address whether the statute of repose under the Securities Act of 1933 can be tolled during the pendency of a class action (commonly referred to as *American Pipe* tolling). Nearly three years ago, the Supreme Court agreed to take up this issue in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, but *certiorari* was withdrawn soon after the majority of parties in the case settled.

Whether *American Pipe* tolling applies to the statutes of repose under the federal securities laws is significant for both defendants and plaintiffs because it impacts the date by which issuers are free from liability and investors must commence individual actions.

Unlike statutes of limitation, which typically run from when a cause of action is discovered by a plaintiff, statutes of repose place an outer limit on the period within which a claim can be brought regardless of whether the plaintiff is even aware of its claim. Claims brought under Section 11 or 12 of the Securities Act of 1933 are subject to a three year statute of repose. See 15 U.S.C. § 77m. Claims brought under Sections 10(b) and 20(a) of the Exchange Act of 1934 are subject to a five year statute of repose. See 28 U.S.C. § 1658.

Over the years, federal courts have reached differing views as to whether the federal securities laws' statutes of repose can be tolled under *American Pipe*. Back in 2000, in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), the Tenth Circuit became the first Circuit Court to hold that *American Pipe* tolling could be applied to the three year repose period for Securities Act claims. Several district courts across the country followed suit. Over ten years after *Joseph*, the Second Circuit reached the opposite conclusion in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013). Since the U.S. Supreme Court withdrew *certiorari* in *IndyMac*, both the Sixth and Eleventh Circuits have joined the Second Circuit in holding that *American Pipe* tolling does not apply to statutes of repose. See *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016); *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243 (11th Cir. 2016). Additionally, the Supreme Court itself has recently reiterated that statutes of repose represent a "cutoff" and "effect a legislative judgment that a defendant

should be free from liability” after a certain period of time. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). Nevertheless, many district courts have continued to apply tolling principles to the federal securities laws’ statutes of repose, creating confusion and disparate application of the federal securities laws.

Thus, not surprisingly, the Supreme Court had four petitions for *certiorari* this term raising variations of this issue. With the grant of *certiorari* in *ANZ Securities*, it appears the Court will finally decide the issue by the end of its term in June.

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