

SECURITIES LITIGATION

CLASS ACTION DOES NOT TOLL STATUTE FOR SECURITIES LAW CLAIMS

By: Lawrence M. Rolnick, Esq. and Sheila A. Sadighi, Esq.

Professional Investors Should Review Portfolios and Enter Into Tolling Agreements

Professional and institutional investors have increasingly exercised their right to “opt out” of securities class actions either to pursue individual claims or to pursue settlement discussions with defendants who commit securities law violations. Historically, such opt-outs have provided substantially greater returns to investors for a number of reasons, including the relatively low recoveries for class members, poor (and sometimes arbitrary) allocation of class action settlements and unique, stronger claims available to institutional investors that cannot be prosecuted on a class basis. In exercising their right to opt out, professional investors have relied upon their status as putative class members to toll the statute of limitations during prosecution of the class action. Accordingly, when exercising their right to opt out, the statutes of limitations or repose for claims arising from the facts at issue in the class action have been tolled pursuant to the long-established rule laid down by the United States Supreme Court almost forty years ago in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

Last month, however, the Second Circuit created a split among federal circuit courts in ruling that American Pipe tolling does not apply to repose periods applicable to claims brought under the Securities Act of 1933. Under the federal securities laws, claims of misrepresentation generally must be brought within the earlier of (1) a certain time period from discovery of the violation (the statute of limitations) and (2) a certain time period from commission of the violation (the statute of repose). See, e.g., 15 U.S.C. §77m (stating that an action brought pursuant to the Securities Act must be commenced before the earlier of one year after discovery of the untrue statement or three years after the security was offered). In In Re IndyMac Mortgage-Backed Securities Litigation, No. 11-2998-CV, 2013 WL 3214588 (2d. Cir. June 27, 2013), the Second Circuit held that the statute of repose in Section 13 of the Securities Act is not tolled under American Pipe. The practical result of the IndyMac ruling is that by the time professional investors are given the opportunity to opt out of a class action or a class action settlement, their claims often will already be time-barred. This ruling is inconsistent with the ruling of the

10th Circuit and a host of district court decisions, which have gone the other way. See, e.g., Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000); In re Merck & Co., Inc. Sec. Derivative & Erisa Litig., MDL 1658 SRC, 2012 WL 6840532 at *2-5 (D.N.J. Dec. 20, 2012) (reviewing cases).

In light of the Second Circuit’s ruling – and given the fact that many securities law defendants are located in New York – professional investors must now be proactive to preserve their option to opt out. Specifically, professional investors must review their portfolios to determine whether they have large positions in existing class actions. If they do, they must enter into tolling agreements with defendants in order to preserve their right to opt out should they wish to do so in the future, or they should consider commencing their own suit.

If you would like to request a review of your portfolio, please contact:

Lawrence M. Rolnick, Esq.
973 597 2468
lrolnick@lowenstein.com

Sheila A. Sadighi, Esq.
973 597 6218
ssadighi@lowenstein.com

www.lowenstein.com

New York
1251 Avenue of the Americas
New York, NY 10020
212 262 6700

Palo Alto
390 Lytton Avenue
Palo Alto, CA 94301
650 433 5800

Roseland
65 Livingston Avenue
Roseland, NJ 07068
973 597 2500

Lowenstein Sandler makes no representation or warranty, express or implied, as to the completeness or accuracy of this Client Alert and assumes no responsibility to update the Client Alert based upon events subsequent to the date of its publication, such as new legislation, regulations, and judicial decisions. Readers should consult legal counsel of their own choosing to discuss how these matters may relate to their individual circumstances.