

## Circuit Court Decisions Addressing Limitations Periods

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### **Second and Sixth Circuits: *American Pipe* Tolling Does Not Apply to the Five-Year Statute of Repose for Claims Brought Under Section 10(b) and Rule 10b-5**

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”

On July 14, 2016, the Second Circuit determined “*American Pipe* tolling does not apply to” 28 U.S.C. § 1658(b)(2), which establishes a five-year statute of repose for securities fraud claims brought under Section 10(b) and Rule 10b-5. *SRM Glob. Master Fund Ltd. P’ship v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016) (Lohier, J.).

The Second Circuit explained that in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS*, 721 F.3d 95 (2d Cir. 2013) (*IndyMac*), it held *American Pipe* tolling inapplicable to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933, which governs claims brought under Sections 11 and 12(a) of that Act. For the same reasons set forth in *IndyMac*, the Second Circuit held “*American Pipe* tolling does not apply to § 1658(b)(2)’s five-year statute of repose.” The court explained that “as a statute of repose, § 1658(b)(2) is not subject to equitable tolling.” Moreover, the court found § 1658(b)(2) “creates a substantive right in defendants to be free from liability after five years—a right that *American Pipe* tolling cannot modify without running afoul of the Rules Enabling Act.”

On May 19, 2016, the Sixth Circuit also relied on the Second Circuit’s decision in *IndyMac* to hold *American Pipe* tolling inapplicable to both the five-year statute of repose for claims brought under Section 10(b) and the three-year statute of repose for claims brought under Sections 11 and 12 of the Securities Act of 1933. *Stein v. Regions Morgan Keegan Select High Income Fund*, 821 F.3d 780 (6th Cir. 2016) (Clay, J.). The Sixth Circuit expressly disagreed with the Tenth Circuit, which applied *American Pipe* tolling to the statute of repose for Section 11 claims in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000).

### **Second Circuit: (1) Three-Year Statute of Repose Applies to Claims Alleging Materially Misleading Proxy Statements Under Section 14(a), and (2) the Repose Period Begins to Run on the Date of the Most Recent Alleged Violation**

On March 17, 2016, the Second Circuit held the five-year statute of repose established by the Sarbanes-Oxley Act of 2002 (“SOX”) for certain fraud claims does not apply to claims brought under Section 14(a) of the Exchange Act, which prohibits material misleading proxy statements. *DeKalb Cty. Pension Fund v. Transocean*, 817 F.3d 393 (2d Cir. 2016) (Cabrane, J.). The court reasoned that SOX’s five-year statute of repose “applies only to ‘private right[s] of action that involve[] a claim of fraud, deceit, manipulation, or contrivance,’ which Section 14(a) does not.” The court determined that Section 14(a) claims still remain subject to the three-year statute of repose that applied before the passage of SOX.<sup>[1]</sup>

The Second Circuit further held that the statute of repose for Section 14(a) claims “begin[s] to run on the date of the defendant’s last culpable act or omission.” The court found the “discovery rule” does not toll the three-year statute of repose for Section 14(a) claims until the date the alleged fraud was discovered or “could have been discovered in the exercise of reasonable diligence.” The court deemed the “discovery rule” inapplicable both because “Section 14(a) claims do not demand fraud” and “also because the discovery rule does not extend to statutes of repose.”

**Tenth and Eleventh Circuits: Circuit Split Deepens on Whether Section 2462’s Five-Year Limitations Period Applies to SEC Claims for Disgorgement**

Pursuant to 28 U.S.C. § 2462, the Government may not bring any “action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture” more than five years after the claim accrues.

On May 26, 2016, the Eleventh Circuit held Section 2462’s limitations period applies to SEC claims for disgorgement and declaratory relief, but not to claims for injunctive relief. *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) (Pryor, J.). The court determined that, for Section 2462 purposes, disgorgement is a type of “forfeiture” and declaratory relief “operate[s] as a penalty.” However, the court found injunctions are “equitable, forward-looking remedies” outside the reach of Section 2462.

On August 23, 2016, the Tenth Circuit held Section 2462’s limitations period does not apply to SEC claims for disgorgement or injunctive relief. *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016) (Hartz, J.). The Tenth Circuit’s decision deepened a circuit split on the question of whether disgorgement is a type of “forfeiture” within the meaning of Section 2462.<sup>[2]</sup>

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<sup>[1]</sup> There is no express private right of action under Section 14(a), nor is there a statute of repose that expressly governs Section 14(a) claims. However, in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990), the Second Circuit “borrowed the three-year statutes of repose applicable to Sections 9(f) and 18(a) . . . and applied them to Section 14.”

<sup>[2]</sup> Several years earlier, the D.C. Circuit held that disgorgement is not a “penalty” subject to Section 2462’s limitations period. *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010).

Authors and Contacts	Paul Gluckow	Peter Kazanoff
	Partner and General Counsel	Partner
	<a href="mailto:pgluckow@stblaw.com">pgluckow@stblaw.com</a>	<a href="mailto:pkazanoff@stblaw.com">pkazanoff@stblaw.com</a>
	+1-212-455-2653	+1-212-455-3525
	Jonathan Youngwood	
	Partner	

[jyoungwood@stblaw.com](mailto:jyoungwood@stblaw.com)  
1-212-455-3539

