

# ***North Sound v. Merck* - Over Fifty Prominent Institutional Investors Band Together to Support Amicus Brief on Critical Issue Impacting the Timeliness of Securities Claims**

June 1, 2016

With broad support from the institutional investor community, an amicus curiae brief was filed yesterday with the United States Court of Appeals for the Third Circuit in *North Sound Capital LLC v. Merck & Co., Inc.* The "friend of the Court" brief - which was supported by 55 public and private pension funds from throughout the United States and internationally with total assets under management exceeding \$1.5 trillion, along with the National Conference on Public Employee Retirement Systems (NCPERS) - details the severe adverse consequences to institutional investors of overturning the established class action "tolling" doctrine.

For over forty years, investors have relied on the filing of class action cases to preserve the timeliness of their claims for recovery of securities fraud damages. The amicus brief expresses the strong support of the pension fund community for continued application of the class action tolling rule to both the "limitations" and "repose" periods for claims brought under the U.S. federal securities laws. The amicus brief also emphasizes the importance of private securities class actions to the interests of long-term institutional investors, and the importance of the class action tolling rule to the court system as a whole.

Available [here](#), the brief was prepared by BLB&G in consultation with counsel to the petitioner in the *North Sound* appeal.

## **Third Circuit to Weigh in on Long Established Doctrine**

The Supreme Court laid down the class action tolling doctrine over forty years ago in the *American Pipe* case. Under the *American Pipe* rule, investors have been able to rely on the commencement of a securities class action to protect and preserve the timeliness of their individual claims for recovery of securities damages until the court decided whether to grant the case class action status. For four decades, it has been understood in the lower courts that the *American Pipe* rule applied to both the three-year period applicable to claims under Sections 11 and 12 of the Securities Act of 1933 for material misrepresentations in public offerings, and the five-year period applicable to claims under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 for fraud in connection with open market purchases.

In 2013, the U.S. Court of Appeals for the Second Circuit upset this settled law by holding in *IndyMac* that *American Pipe* rule does not apply to the three-year period applicable to strict liability claims under the Securities Act. A week ago, the Sixth Circuit adopted and extended *IndyMac* in holding that *American Pipe* also does not apply to the five-year period applicable to general antifraud claims under the Exchange Act. There is now an even 2-2 split among the federal Circuit Court of Appeal on this critical timeliness issue, with the Tenth Circuit and the Federal Circuit lining up on the other side in holding that class action tolling applies to both the statute of limitation and the statute of repose for federal securities claims.

The Third Circuit is set to break this tie in *North Sound*. In the proceedings below, the district court in *North Sound* adopted a broad reading of *American Pipe* consistent with the majority of the lower federal district courts nationwide.

### **What's at Stake for Investors**

The practical effect of the Second and Sixth Circuit's narrow rulings, if they are not ultimately reversed by the Supreme Court, will be that:

- Investors will have to monitor closely the progress of class certification in each case in which they have a significant financial interest (as well as other developments that may impact their claims) because they can no longer rely on the filing of a class action to preserve their claims;
- Investors will need to retain counsel and file their own individual actions, or move to intervene in the class action, to avoid losing their right to recover for violations of the federal securities laws in the large number of cases in which class certification may not be decided until after the applicable periods for asserting new claims has run; and
- Investors would lose the ability in nearly all cases to wait until a settlement is reached to decide whether or not to opt out of the class in order to seek a greater recovery of their losses, and would be forced to decide whether to opt out much earlier without any ability to assess whether the class settlement provides adequate compensation.

### **Supreme Court Resolution?**

The Supreme Court was set to resolve this issue less than two years ago in an appeal from *IndyMac*. However, the Court dismissed *certiorari* only days before oral argument after a settlement of the underlying case. Now that the Circuit split has widened, the High Court should have an even greater interest in resolving the issue - particularly if the Third Circuit in *North Sound* rejects the recent Second and Sixth Circuit decisions.