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Motion to Sever Denied as Opt Out Alternative by Judge Swain of the Southern District of New York

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On March 19, 2015, in what can be characterized as terse and sternly worded **Memorandum Order** (the "Order"), Judge Swain of the Southern District denied a Motion to Sever Individual Claims (the "**Motion to Sever**") filed by three funds managed by D. E. Shaw & Co (the "D. E. Shaw Funds"). This aspect of the case highlights a growing concern among institutional investors: how, in light of the Second Circuit's decision in ***IndyMac***, to preserve their right to bring an individual action when the repose period expires while the class litigation is in its early stages.

Rather than object or opt-out, the D. E. Shaw Funds filed the Motion to Sever, seeking "take control of their own claims" claims against AIG, and certain of its officers, directors and underwriters, for alleged violations of **Sections 10(b)** and **20(a)** of the **Exchange Act** and **Sections 11**, **12(a)(2)** and **15** of the **Securities Act**. Mem. in Supp. of Motion to Sever at 3. Notably, the D. E. Shaw Funds pointed out that because the Court certified the settlement class more than six years after the action commenced, "nonnamed class members who elected to opt-out and file a separate action faced the risk of a statute of repose defense based on the Second Circuit's 2013 decision in *IndyMac*." *Id*. Thus, they argued that they should be allowed to sever their claims because Rule 21 "enables the Court to sever either claims or parties at any time, 'on just terms' and in the interest of fundamental fairness," and

> **"the risk of having their claims time-barred under a statute of repose is not present if the D. E. Shaw Funds are permitted to sever their claims under Rule 21."**

Id. at 4. If accepted, this argument would have provided a mechanism for institutional investors to delay the opt-out decision and allow them to "wait and see" how the class litigation progressed before deciding to opt-out, without having the statute of repose expire.

Unfortunately for institutional investors, the Court disagreed, concluding that the Motion to Sever was "meritless." The Court made clear that Rule 21 provided no end-run around *IndyMac*. In denying the Motion to Sever in no uncertain terms, the Court stated that

> **"[t]hese sophisticated parties chose not to avail themselves of the options provided under the proposed settlement and undertook no other steps prior to the opt-out deadline to protect their positions with respect to** *IndyMac***."**

Thus, when institutional investors elect not to opt-out, in the Court's words, "[t]hey are bound by their choice."

Authors

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Joel D. Rothman is an attorney who handles commercial, securities, insurance, and employment litigation matters for Mintz clients. Joel advises institutional investors on securities class actions, represents shareholders in merger disputes, and counsels insurers in coverage disputes.