

# Class-Action Tolling, Federal Common Law, and Securities Statutes of Repose: A Recommendation

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*This Essay focuses on a narrow, but potentially outcome-determinative, question: Does the filing of a securities class action toll the three-year outer time limit applicable to claims under sections 11 and 12(a)(2) of the Securities Act and the five-year outer time limit applicable to claims under section 10(b) of the Securities Exchange Act, such that potential class members—after a decision on class certification—can assert an individual federal action, even if those outer time limits would have elapsed absent tolling? There is currently a circuit split on this issue, with the Tenth Circuit answering “yes” and the Second Circuit answering “no.” Although the Supreme Court initially granted certiorari to resolve this issue, it later dismissed the writ as improvidently granted, leaving behind a vigorous debate between advocates of institutional investors and those of securities defendants, as well as among scholars.*

*This Essay makes the unique argument that these outer time limits, properly characterized as statutes of repose, should be tolled if class certification is denied but not if class certification is granted. To reach this conclusion, this Essay builds on the work of several eminent civil procedure scholars who have argued that class-action tolling is a creature of federal common law, drawn from the federal policies underlying Federal Rule of Civil Procedure 23, federal statutes of limitations, and the relevant federal legislative scheme. Then, picking up where these scholars have left off, this Essay argues that, in the context of securities class actions, the policies underlying Rule 23, the securities statutes of repose, and the securities laws merit this Essay’s*

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*proposed bifurcated approach to the class-action tolling of securities statutes of repose.*

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#### INTRODUCTION

I am delighted to join this discussion about the new landscape of securities fraud class actions, including the future of opt-out litigation. In this Essay, I focus on a narrow, but potentially outcome-determinative, question: Does the filing of a securities class action toll the three-year outer time limit applicable to claims under sections 11 and 12(a)(2) of the Securities Act and the five-year outer time limit applicable to claims under section 10(b) of the Securities Exchange Act, such that potential class members—after a decision on class certification—can assert an individual federal action, even if those outer time limits would have elapsed absent tolling? There is currently a circuit split on this issue, which has left institutional investors—those investors with the means and incentive to file individual actions—reeling as they seek to protect their claims in the event that certification is denied and as they seek to defend their ability to opt out of a class settlement in the event certification is granted.

The players in securities litigation are, unsurprisingly, divided on this issue along party lines, with the Business Roundtable<sup>1</sup> and the Securities Industry Financial Markets Association<sup>2</sup> arguing against

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1. See Brief for Business Roundtable as Amicus Curiae Supporting Respondents at 4, Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 3704559, at \*4 (arguing that statutes of repose should “cut off liability absolutely once the statutory period has run”).

2. See Brief for the Securities Industry and Financial Markets Association as Amicus Curiae Supporting Respondents at 1, Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct.

tolling these outer time limits, and with the American Association for Justice<sup>3</sup> and various public and private pension funds<sup>4</sup> arguing in favor of tolling. In this Essay, I make a recommendation that will likely satisfy neither side of this debate. In particular, I argue that these outer time limits should be tolled if class certification is denied but not if class certification is granted. To reach this conclusion, I pick up where the civil procedure scholars on class-action tolling have left off, arguing that unique features of securities litigation merit this bifurcated approach.

This Essay proceeds in five additional parts. In Part I, I summarize the Supreme Court precedent on class-action tolling, focusing on the seminal case *American Pipe & Construction Co. v. Utah*,<sup>5</sup> which applied class-action tolling to an antitrust statute of limitations. In particular, I identify the four prongs of the *American Pipe* Court's analysis: (1) after the 1966 amendments to Federal Rule of Civil Procedure 23, class-certification decisions occurred at an earlier point in the case, preventing potentially abusive "one-way intervention" and undercutting a rationale for declining to toll; (2) Rule 23's purposes of efficiency and economy would be undercut if, absent tolling, potential class members were forced to make protective filings; (3) the purposes of statutes of limitations would not be undercut by tolling; and (4) tolling would be consistent with the federal antitrust legislative scheme.

In Part II, I present the issue of whether *American Pipe* tolling applies to the three-year outer time limit applicable to claims under sections 11 and 12(a)(2) of the Securities Act and the five-year outer time limit applicable to claims under section 10(b) of the Securities Exchange Act. As a component of this presentation, I answer the preliminary question of whether these outer time limits are properly characterized as statutes of limitations or statutes of repose. I argue, drawing on the Supreme Court's recent guidance on this distinction in

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1515 (2014) (No. 13-640), 2014 WL 3704558, at \*1 ("[T]here should be clear rules providing a time within which a claim must be asserted, so that defendants can then seek to resolve it, and after which defendants (and their shareholders) are free from the fear of lingering liabilities.").

3. See Amicus Curiae Brief of the Am. Ass'n for Justice in Support of Petitioner at 1, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 2361895, at \*1 ("[The] commencement of a class action asserting claims under the Securities Act of 1933 suspends the Act's three-year time limit as to all asserted class members.").

4. See Brief of Pub. and Private Pension Funds as Amici Curiae Supporting Petitioner at 3, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 2361892, at \*3 ("*American Pipe* rule is part of a sound structure of class and individual litigation, and it is particularly important to public and private pension funds.").

5. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 544 (1974).

*CTS Corp. v. Waldburger*,<sup>6</sup> that these outer time limits are statutes of repose because they run from the defendant's last culpable act, not from the later accrual date. As such, these statutes of repose implicate different purposes than statutes of limitations do. In particular, they further the goal of affording the securities defendant freedom from liability after a certain point in time.

In Part III, I discuss the circuit split on the issue of whether *American Pipe* tolling applies to the three- and five-year statutes of repose, identifying at the heart of the circuit split confusion about the source of *American Pipe* tolling. On the one hand, if class-action tolling is equitable, then its applicability to the securities acts' statutes of repose is barred by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*.<sup>7</sup> On the other hand, if class-action tolling is based on an interpretation of Rule 23, then it potentially violates the Rules Enabling Act's mandate that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."<sup>8</sup> After identifying this confusion about the source of *American Pipe* tolling, I argue that both potential sources are incorrect. Instead, relying on significant support from civil procedure scholars, I argue that *American Pipe* tolling is a creature of federal common law, drawn from the federal policies underlying Rule 23, federal statutes of limitations, and the relevant federal legislative scheme.

In Part IV, starting with the premise that *American Pipe* tolling is a product of federal common law, I draw from the four prongs of the *American Pipe* decision to propose the following framework to analyze whether to extend class-action tolling to the securities acts' statutes of repose: courts should adopt class-action tolling of the securities acts' statutes of repose if (1) it would not allow for "one-way intervention"; (2) it would further the Rule 23 purposes of efficiency and economy by preventing a "multiplicity of activity"; (3) it would not frustrate the repose policy of allowing the defendant freedom from liability after a certain period of time; and (4) it would be consonant with the securities acts' legislative scheme. I recognize that this framework has the potential to create a tolling rule that is not trans-substantive, but I argue that this potentiality is consistent with the appropriate balancing of the federal interests at issue.

In Part V, I apply this proposed framework to the securities acts' statutes of repose, drawing on unique features of securities litigation and

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6. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014).

7. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).

8. 28 U.S.C. § 2072(b) (2012).

differentiating between securities cases in which certification is denied and those in which certification is granted. I argue that, pursuant to this framework, class-action tolling should apply to the securities acts' statutes of repose if certification is denied but not if certification is granted. Under this recommendation, if a class were not certified, all potential class members would benefit from class-action tolling of the repose period to file individual actions. If a class action were certified after the repose period has elapsed, however, class members would not be able to rely on tolling in order to opt out of the class. In short, before the period of repose has elapsed, potential class members would have to decide whether to stick with the class to the extent that it is certified or to go it alone. I acknowledge that this recommendation has the potential to limit opt-out plaintiffs' ability to exercise their "exit" option at the time of settlement, but I argue that this "exit" option is not rendered completely toothless because often securities counsel and institutional investors are repeat players in securities litigation.

Finally, I briefly conclude, identifying several unanswered questions, including whether investors who opt out of federal class actions can rely on tolling of state statutes of repose when asserting state-law claims in state court.

#### I. SUPREME COURT PRECEDENT ON CLASS-ACTION TOLLING

Class-action tolling derives from the 1974 Supreme Court case *American Pipe & Construction Co. v. Utah*, in which putative class members sought to intervene as plaintiffs in an antitrust suit under the Clayton Act after the district court declined to certify the class action because the class failed to satisfy the numerosity requirement.<sup>9</sup> The district court denied the putative class members' motions to intervene because the limitations period had elapsed between the time that the class action suit was filed and the time that class certification was denied.<sup>10</sup> The Ninth Circuit reversed, reasoning that the filing of the class action suit counted as commencement of the suit within the Clayton Act's statute of limitations for all putative class members.<sup>11</sup> The Supreme Court affirmed the Ninth Circuit, holding that "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action

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9. *Am. Pipe*, 414 U.S. at 544.

10. *Id.*

11. *Id.* at 545.

status.”<sup>12</sup>

The Supreme Court’s analysis in *American Pipe* was four-pronged. First, the Court recognized that the running of the statute of limitations against potential class members during the pendency of the class action—while perhaps necessary to curb the potential for abuse under the pre-1966 version of Rule 23, which allowed for so-called “spurious” class actions—was no longer necessary to prevent abuse under the post-1966 version of Rule 23.<sup>13</sup> Prior to the 1966 amendments to Rule 23, members of the claimed class could wait until a late stage of the case, perhaps even until final judgment, before deciding whether to participate in the case.<sup>14</sup> These spurious class actions allowed for, in effect, “one-way intervention,” whereby members of a class could benefit from a favorable judgment without being bound by an unfavorable one.<sup>15</sup> One way to counter that potential for abuse was to force potential class members to make a decision one way or another before the limitations period had elapsed.<sup>16</sup> The 1966 amendments to Rule 23 eliminated the problem of one-way intervention by requiring the district court to rule on class certification “[a]s soon as practicable after the commencement of an action brought as a class action.”<sup>17</sup> Therefore, the Court reasoned that, post-1966, “the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated . . . .”<sup>18</sup>

Second, the Court reasoned that, if the statute of limitations were not tolled for putative class members between the time of filing and a decision on class certification, the Rule 23 goals of efficiency and economy would be undercut.<sup>19</sup> Absent tolling, “[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.”<sup>20</sup> This “multiplicity of activity” is exactly what Rule 23 was designed to prevent.<sup>21</sup>

Third, the Court rejected the argument that tolling the statute of

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12. *Id.* at 553.

13. *Id.* at 545–51.

14. *Id.* at 547 (discussing FED. R. CIV. P. 23 (1937)).

15. *Am. Pipe*, 414 U.S. at 547.

16. *Id.* at 549.

17. *Id.* at 547 (quoting FED. R. CIV. P. 23(c)(1) (1966)).

18. *Am. Pipe*, 414 U.S. at 550.

19. *Id.* at 551–54.

20. *Id.* at 553.

21. *Id.* at 551.

limitations between the time of filing and a decision on class certification would interfere with the purposes of a statute of limitations.<sup>22</sup> The Court identified two purposes of a statute of limitations: (1) ensuring fairness to a defendant by providing the defendant with adequate notice before “memories have faded” and “witnesses have disappeared”;<sup>23</sup> and (2) barring a plaintiff who has “slept on his rights.”<sup>24</sup> The Court stated that the first purpose is served by the mere filing of the class action because, within the limitations period, “the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation,” regardless of whether the case proceeds as a class action.<sup>25</sup> The Court stated that the second purpose is served because the named plaintiff, as a representative of the class, has been sufficiently diligent.<sup>26</sup>

Finally, the Court rejected the argument that the federal courts lack the power to toll the Clayton Act’s limitations period because it would be an impermissible extension of a procedural rule to abridge a substantive right, in violation of the Rules Enabling Act.<sup>27</sup> The Court rejected this framework, instead stating that “[t]he proper test is not whether a time limitation is ‘substantive’ or ‘procedural,’ but whether tolling the limitation in a given context is consonant with the legislative scheme.”<sup>28</sup> In a footnote, the Court stated that tolling the statute of limitations was indeed consonant with the Clayton Act.<sup>29</sup>

After *American Pipe*, the Supreme Court has twice extended its reach, first to cases in which class certification is granted and second to potential class members’ individual suits. First, in *Eisen v. Carlisle & Jacquelin*, decided just a few months after *American Pipe*, the Court confirmed that a named plaintiff in a class action bears the burden, post-certification, of providing notice to all potential class members in order to allow them an opportunity to opt in or opt out.<sup>30</sup> In so ruling, the Court rejected the named plaintiff’s argument that this notice was unnecessary because “class members will not opt out because the statute of limitations has long since run out on the claims of all class members

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22. *Id.* at 554–55.

23. *Id.* at 554 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)).

24. *Am. Pipe*, 414 U.S. at 554 (quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965)).

25. *Am. Pipe*, 414 U.S. at 555.

26. *Id.* at 554–55.

27. 28 U.S.C. § 2072 (2012).

28. *Am. Pipe*, 414 U.S. at 557–58.

29. *Id.* at 558 n.29.

30. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–80 (1974).

other than petitioner.”<sup>31</sup> The Court stated that *American Pipe*, “which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class,” foreclosed this argument.<sup>32</sup> Therefore, *Eisen* extended class-action tolling from cases in which class certification is denied, as in *American Pipe*, to cases in which class certification is granted. Second, in *Crown, Cork & Seal Co., Inc. v. Parker*, the Court held that *American Pipe* tolling applies, not only to an individual class member’s motion to intervene in the original action, but also to a potential class member’s individual action.<sup>33</sup> The Court reasoned that, otherwise, “[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations.”<sup>34</sup> These protective filings would result in the same inefficiency and multiplicity of actions that Rule 23 and *American Pipe* sought to prevent.<sup>35</sup>

## II. PRESENTATION OF ISSUE: APPLICABILITY OF CLASS-ACTION TOLLING TO SECURITIES CLASS ACTIONS

Against this backdrop, the open question is the applicability of class-action tolling in securities class actions, and, in particular, to the outer time limits applicable to securities claims. Under section 13 of the Securities Act, section 11 claims may not be asserted “more than three years after the security was bona fide offered to the public,” and section 12(a)(2) claims may not be asserted “more than three years after the sale.”<sup>36</sup> Under section 804 of the Sarbanes-Oxley Act, claims under section 10(b) of the Exchange Act must be brought no later than “5 years after such violation.”<sup>37</sup>

This issue is not merely academic. To the contrary, in light of the extensive pre-suit investigation necessitated by the Private Securities Litigation Reform Act (“PSLRA”),<sup>38</sup> the lead plaintiff selection

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31. *Id.* at 176 n.13.

32. *Id.*

33. *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354 (1983).

34. *Id.* at 350–51.

35. *Id.* at 351.

36. 15 U.S.C. § 77m (2012).

37. 28 U.S.C. § 1658 (2012).

38. 15 U.S.C. § 77z-1(c); *id.* § 78u-4(c); *see, e.g.*, *City of Livonia Emps.’ Ret. Sys. v. Boeing Co.*, No. 09-C-7143, 2014 WL 4199136, at \*6–7 (N.D. Ill. Aug. 21, 2014) (“This kind of ‘shoot first, aim later’ practice, whereby [Plaintiffs’] attorneys wait until after the complaint is filed to ‘conduct an investigation that [they] should have conducted before filing [the] lawsuit,’ has already been criticized in this District. . . . [T]he source should have been interviewed before the complaint was filed. Plaintiffs’ counsel’s failure to interview Singh before filing their securities



procedure mandated by the PSLRA,<sup>39</sup> and the protracted nature of motion-to-dismiss litigation in securities cases (encouraged by the PSLRA's stringent scienter pleading requirement),<sup>40</sup> class-certification decisions are often made after these outer time limits have elapsed.<sup>41</sup> Indeed, according to a recent study of securities class actions filed in the period from 2002 through 2009, section 13's three-year time period elapsed prior to a certification decision in seventy-three percent of cases that asserted claims under only section 11 or section 12 of the Securities Act and that reached a certification decision.<sup>42</sup> The same study found that the five-year time period applicable to section 10(b) claims elapsed prior to a certification decision in forty-four percent of cases that asserted section 10(b) claims and that reached a certification decision.<sup>43</sup> The Supreme Court's recent decision in *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*"), which invites an expert witness battle at the class certification stage about price impact,<sup>44</sup> will likely further extend the period of time between filing and a decision on class certification in cases asserting section 10(b) claims.

At the outset, it is necessary resolve whether these outer time limits—the three-year period applicable to sections 11 and 12(a)(2) claims and the five-year period applicable to section 10(b) claims—are properly characterized as statutes of limitations or statutes of repose. This characterization is important, not because *American Pipe* tolling is

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fraud complaint constitutes a failure to conduct a reasonable pre-filing investigation as required by the PSLRA.”)

39. 15 U.S.C. § 77z-1(a)(3); *id.* § 78u-4(a)(3).

40. 15 U.S.C. § 78u-4(b)(2)(a); *see* Wendy Gerwick Couture, *Around the World of Securities Fraud in Eighty Motions to Dismiss*, 45 LOY. U. CHI. L.J. 553 (2014) (discussing the omnipresence of motions to dismiss in securities litigation and the high prevalence with which those motions are asserted, and succeed, on the basis of the failure to plead a strong inference of scienter).

41. The argument, proffered by the Business Roundtable, that plaintiffs' attorneys should simply be more diligent in bringing suit in a timely fashion in order to prevent these outer time limits from elapsing before a certification decision is highly questionable in light of the PSLRA's role in mandating and encouraging these delays. *See* Brief for Business Roundtable as Amicus Curiae Supporting Respondents at 4, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 3704559, at \*4 (“Any need for urgency comes not from slow judicial resolution, but from dilatory conduct by class-action and other plaintiffs in filing suit with too little time remaining on the repose clock.”).

42. Brief of Civil Procedure & Securities Law Professors as Amici Curiae in Support of Petitioner at 4–7, *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 2361893, at \*4–7. This Essay's author was not a signatory to this brief.

43. *Id.* at 8–10.

44. *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 573 U.S. —, — 134 S. Ct. 2398, 2417 (2014) (“[D]efendants must be afforded an opportunity before class certification to defeat the [fraud on the market] presumption [of reliance] through evidence that an alleged misrepresentation did not actually affect the market price of the stock.”).

necessarily confined to statutes of limitations, but because statutes of repose implicate different policy considerations than statutes of limitations do. Therefore, any analysis of the applicability of *American Pipe* tolling to statutes of repose must encompass those policy considerations.

Helpful to the resolution of this issue, the Supreme Court in *CTS Corp. v. Waldburger* recently expanded its guidance on the distinction between statutes of limitations and statutes of repose.<sup>45</sup> According to the Court, a statute of limitations ordinarily creates a time limit “based on the date when the claim accrued,”<sup>46</sup> while a statute of repose is measured “from the date of the last culpable act or omission of the defendant.”<sup>47</sup> A statute of limitations furthers the policy goals articulated in *American Pipe*<sup>48</sup> of ensuring fairness to defendants “by preventing surprises through [plaintiffs’] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared” and of requiring plaintiffs to be diligent.<sup>49</sup> A statute of repose, on the other hand, “effect[s] a legislative judgment that a defendant should ‘be free from liability after the legislatively determined period of time.’”<sup>50</sup> In other words, “a statute of repose can be said to provide a fresh start or freedom from liability.”<sup>51</sup>

Applying this guidance to the outer time limits applicable to claims under sections 11, 12(a)(2), and 10(b), these time limits are appropriately characterized as statutes of repose, thus implicating the policy concern of giving securities defendants a fresh start after a legislatively determined period of time. The three-year outer limit applicable to section 11 claims begins to run when the security is “bona fide offered to the public,” and the three-year outer limit applicable to section 12(a)(2) claims begins to run with “the sale.”<sup>52</sup> In both instances, this is the last culpable act by the defendant, not the accrual of the claim. The claim does not accrue, at the very earliest, until the truth emerges, demonstrating the existence of an earlier misrepresentation. The shorter one-year limitations period contained in

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45. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2178–79 (2014).

46. *Id.* at 2182 (quoting BLACK’S LAW DICTIONARY 1546 (9th ed. 2009)).

47. *CTS Corp.*, 134 S. Ct. at 2182.

48. *See supra* notes 20–21 and accompanying text (discussing the policy goals articulated in *American Pipe*).

49. *CTS Corp.*, 134 S. Ct. at 2183 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)).

50. *CTS Corp.*, 134 S. Ct. at 2183 (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)).

51. *Id.*

52. 15 U.S.C. § 77m (2012).

section 13, which begins to run upon “the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence,” approximates this later accrual date.<sup>53</sup> The five-year outer limit applicable to section 10(b) claims begins to run with “the violation.” Again, this is measured by the defendant’s last culpable act,<sup>54</sup> not by the accrual of the claim, which does not occur—at the earliest—until the truth emerges, demonstrating the existence of the earlier violation. The shorter three-year limitations period applicable to section 10(b) begins to run upon “discovery of the facts constituting the violation,” which the Supreme Court has interpreted to include “facts a reasonably diligent plaintiff would have known” in addition to those actually known by the plaintiff.<sup>55</sup> This discovery date approximates the date of accrual.<sup>56</sup> (Of note, it is currently unsettled whether this shorter three-year limitations period begins to run upon the plaintiff’s reasonable discovery of the facts showing the elements of falsity, materiality, and scienter, or upon the potentially later date of the plaintiff’s reasonable discovery of the facts showing the elements of reliance and loss causation.<sup>57</sup> Regardless of how this unsettled issue is resolved, however, this later “discovery” date approximates claim accrual, while the earlier “violation” date coincides with the defendant’s last culpable act.) Therefore, when analyzing whether *American Pipe* tolling applies to these outer time limits, it is necessary to consider whether the repose rationale of granting the securities defendant freedom from liability after a certain period of time is consistent with class-action tolling.

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53. *Id.*

54. See *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 931 (7th Cir. 2011) (“A bit of further evidence that ‘violation’ in section 1658(b) does not require injury is that the SEC can bring an enforcement action for a ‘violation’ of federal securities law without anyone having suffered harm, which is to say without anyone having relied on a misrepresentation or misleading omission to his detriment.”).

55. *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010).

56. 28 U.S.C. § 1658(b)(1) (2012).

57. *Merck & Co.*, 559 U.S. at 649 (“We consequently hold that facts showing scienter are among those that ‘constitut[e] the violation.’ In so holding, we say nothing about other facts necessary to support a private § 10(b) action.” (citing Brief of the United States as Amicus Curiae Supporting Respondents at 12 n.1, *Merck & Co. v. Reynolds*, 559 U.S. 633 (2009) (No. 08-905), 2009 WL 3439204, at \*12)). The United States’ amicus brief suggested that facts concerning a plaintiff’s reliance, loss, and loss causation are not among those that constitute “the violation” and therefore need not be “discover[ed]” for a claim to accrue. Brief of the United States as Amicus Curiae Supporting Respondents, *supra*, at 12 n.1 (quoting 28 U.S.C. § 1658(b)(1)); see *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (“For one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that at that instant possesses equivalent value.”).

### III. CIRCUIT SPLIT REGARDING APPLICABILITY OF CLASS-ACTION TOLLING TO SECURITIES STATUTES OF REPOSE

There is currently a circuit split about whether *American Pipe* tolling applies to the section 13 statute of repose, with the Tenth Circuit holding that the three-year period is tolled during the pendency of the class action<sup>58</sup> and with the Second Circuit holding that it is not.<sup>59</sup> Although neither case addressed section 10(b)'s five-year statute of repose, in recognition of the similarity between the three-year statute of repose in section 13 and the five-year statute of repose applicable to section 10(b) claims, lower courts have applied this circuit precedent by extension to section 10(b) claims.<sup>60</sup> The Supreme Court granted certiorari to resolve this circuit split in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*,<sup>61</sup> but later reversed course, dismissing the writ as improvidently granted.<sup>62</sup> Thus, this issue remains unresolved.<sup>63</sup>

At the heart of the confusion about *American Pipe* tolling's applicability to securities statutes of repose is disagreement about the source of *American Pipe* tolling: equity, Rule 23, or something else. If *American Pipe* tolling is equitable in nature, then under the Supreme Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, it does not apply to statutes of repose.<sup>64</sup> The Tenth Circuit rejected the argument that *American Pipe* is grounded in equity,<sup>65</sup> while the Second Circuit cited *Lampf* as one of two alternative grounds for its holding that *American Pipe* tolling does not apply to section 13's statute

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58. *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

59. *Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013).

60. *E.g., In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 995 F. Supp. 2d 291, 303 (S.D.N.Y. 2014) (relying on *IndyMac* to hold that *American Pipe* tolling does not apply to section 10(b)'s five-year statute of repose).

61. *Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014).

62. *Id.*

63. A review of the extensive briefing of the parties and amici in *IndyMac* is beyond the scope of this essay. *But see* Linda S. Mullenix, *Securities Class Actions: For Whom the Bell Tolls* (Univ. of Tex. Sch. of Law Pub. Law and Legal Theory Research Paper Series, No. 569, 2014), available at <http://ssrn.com/abstract=2517487>.

64. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (holding that equitable tolling was inconsistent with the three-year statute of repose, which is contained in various provisions of the Securities Act, including section 13, and which, prior to the enactment of the Sarbanes-Oxley Act, applied to section 10(b) claims "[b]ecause the purpose of the 3-year limitation is clearly to serve as a cutoff").

65. *Joseph v. Wiles*, 223 F.3d 1155, 1166 (10th Cir. 2000) ("*Lampf* and *Anixter* are not relevant in the present context because the tolling that Mr. Joseph seeks is legal rather than equitable in nature.>").

of repose.<sup>66</sup>

The contention that *American Pipe* tolling is equitable in nature is shaky. For one, the Court did not even cite *American Pipe* in *Lampf*. Additionally, while the Court discussed equitable tolling in *American Pipe* to counter the argument that the Court lacks the power to toll statutes of limitations,<sup>67</sup> the Court did not suggest that class-action tolling is likewise grounded in equity. Indeed, none of the four prongs of *American Pipe*'s analysis is premised on the notion that the potential class member would be unfairly disadvantaged by the absence of tolling or that the class action defendant has acted unfairly so as to compel tolling.<sup>68</sup> To the contrary, the Court expressly stated that class-action tolling applies even to plaintiffs who do not know about the pendency of the class action.<sup>69</sup>

If *American Pipe* tolling is based on an interpretation of Rule 23, then tolling is valid only if it does not run contrary to the Rules Enabling Act's prohibition on a procedural rule's abridging a substantive right.<sup>70</sup> The Second Circuit, as one of two alternative grounds for its holding that *American Pipe* tolling does not apply to section 13's statute of repose, stated that, if grounded in Rule 23, class-action tolling would violate the Rules Enabling Act because it would deprive the defendant of the substantive right to freedom from liability after a proscribed period of time.<sup>71</sup> The Tenth Circuit held that *American Pipe* tolling was "legal" rather than "equitable," without expressly indicating whether the legal source was Rule 23 or something else and without analyzing the Rules Enabling Act.<sup>72</sup>

The contention that *American Pipe* tolling is based on an

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66. *Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) ("If the tolling rule is properly classified as 'equitable,' then application of the rule to Section 13's three-year repose period is barred by *Lampf* . . .").

67. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974).

68. *Id.* at 545–51.

69. *Id.* at 551 ("We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit.").

70. 28 U.S.C. § 2072(b) (2012) ("Such rules shall not abridge, enlarge or modify any substantive right.").

71. *IndyMac MBS, Inc.*, 721 F.3d at 109 ("[T]he statute of repose in Section 13 creates a substantive right, extinguishing claims after a three-year period. Permitting a plaintiff to file a complaint or intervene after the repose period set forth in Section 13 of the Securities Act has run would therefore necessarily enlarge or modify a substantive right and violate the Rules Enabling Act.").

72. *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000).

interpretation of Rule 23 is likewise shaky. Nothing in the text of Rule 23 compels tolling, and the Court's analysis in *American Pipe* was four-pronged, with only the first two prongs based on Rule 23 policy.<sup>73</sup>

Additionally, although the Court in *American Pipe* addressed the contention that class-action tolling would violate the Rules Enabling Act, the Court rejected the Act's substance/procedure framework in favor of an analysis of whether tolling "in a given context is consonant with the legislative scheme."<sup>74</sup> If the Court in *American Pipe* were truly engaging in an analysis of the Rules Enabling Act, it would have applied its standard analysis for distinguishing between substance and procedure for purposes of the Rules Enabling Act—whether the rule governs only the "manner and the means" by which the litigant's rights are "enforced" or whether it alters "the rules of decision by which [the] court will adjudicate [those] rights."<sup>75</sup>

Further, in *Shady Grove Orthopedic Associates. v. Allstate Insurance Co.*, the Supreme Court stated that it had "rejected every statutory challenge to a Federal Rule that has come before us" and cited its prior precedent in support of this proposition; yet the Court did not cite *American Pipe*,<sup>76</sup> suggesting that—despite the brief discussion of the Rules Enabling Act in *American Pipe*—the Court itself does not view *American Pipe* tolling as an interpretation of Rule 23.

In addition, the Court's subsequent reasoning in *Chardon v. Soto* is inconsistent with the contention that Rule 23 compels *American Pipe* tolling.<sup>77</sup> In *Chardon*, the Court analyzed the effect of tolling in a class action asserted under 42 U.S.C. § 1983. Because no federal statute of limitations applied to § 1983 claims, the Court looked to state law—here, the law of Puerto Rico—to determine the limitations period, the availability of tolling, and the effect of tolling.<sup>78</sup> All parties agreed that class-action tolling applied to the case; thus the Court did not disrupt the First Circuit's holding that class-action tolling applied because Puerto Rico had adopted it.<sup>79</sup> The Court did address, however, the effect of

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73. See *supra* notes 14–29 and accompanying text (reviewing the Court's discussion of tolling in *American Pipe* and its relation to Rule 23).

74. *Am. Pipe*, 414 U.S. at 557–58.

75. *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946) (citation omitted); see *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (reaffirming that this is "[t]he test" to determine whether a Federal Rule withstands challenge under the Rules Enabling Act).

76. *Shady Grove*, 559 U.S. at 407 (citing *Hanna v. Plumer*, 380 U.S. 460, 463–65 (1965); *Miss. Publ'g Corp.*, 326 U.S. at 445–46).

77. *Chardon v. Soto*, 462 U.S. 650 (1983).

78. *Id.* at 662.

79. *Id.* at 658.

that tolling. Puerto Rico's class-action tolling rule allowed the statute of limitations to begin running anew upon denial of class certification, while under *American Pipe* tolling, the statute of limitations merely resumes upon denial of class certification.<sup>80</sup> The Court held that Puerto Rico's running-anew rule applied, rejecting the contention that *American Pipe* "established a uniform federal procedural rule applicable to class actions brought in the federal courts."<sup>81</sup> Therefore, the *Chardon* Court's reasoning is inconsistent with the contention that *American Pipe* tolling is compelled by an interpretation of Rule 23.<sup>82</sup> Indeed, the *Chardon* dissent criticized the majority opinion for this very reason.<sup>83</sup>

Finally, if class-action tolling were compelled by Rule 23, it would pose serious concerns under the Rules Enabling Act, even when applied to statutes of limitations,<sup>84</sup> as most starkly visible when applied to state-law claims in class actions based on diversity jurisdiction.<sup>85</sup>

Therefore, the question remains: if not equity and not Rule 23, what is the source of *American Pipe* tolling? Only by resolving this question can courts determine whether class-action tolling applies to securities statutes of repose. This Essay explores a third option, proposed by several eminent civil procedure scholars, that *American Pipe* tolling's source is federal common law. The Second Circuit did not address this argument. The Tenth Circuit, by characterizing *American Pipe* tolling as "legal" but without identifying the legal source, may have viewed *American Pipe* tolling as a product of federal common law, albeit without so stating explicitly. The Tenth Circuit's failure to analyze whether class-action tolling of repose periods would violate the Rules Enabling Act is consistent with the view that the source is federal common law.

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80. *Id.* at 650.

81. *Id.* at 658–62 (quoting Brief of Petitioner, *Chardon v. Soto*, 462 U.S. 650 (1983) (No. 82-271), 1982 U.S. S. Ct. Briefs LEXIS 797, at \*24)).

82. Mitchell A. Lowenthal & Normal Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 556 (1996) ("Although the doctrine clearly relates to, and is supported by, the Rule 23 class action device, it is perhaps better thought of as a rule of federal common law. By insisting that *American Pipe* had not announced a uniform tolling doctrine in all federal court class actions, the *Chardon* majority certainly seemed to embrace this view.").

83. *Chardon*, 462 U.S. at 664 (Rehnquist, J., dissenting) ("[T]he source of the tolling rule applied by the Court was necessarily Rule 23.").

84. Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1027 (1989) (arguing that "Rule 23 does not and could not validly provide a tolling rule").

85. Lowenthal & Feder, *supra* note 82, at 549 ("But even assuming Rule 23 explicitly embraced the tolling provision announced in *American Pipe*, it would not be valid under the Enabling Act—at least not as applied to state law claims.").

#### IV. ALTERNATIVE APPROACH: CLASS-ACTION TOLLING AS FEDERAL COMMON LAW

Civil procedure scholars Stephen B. Burbank and Tobias Barrington Wolff have argued that *American Pipe* tolling, rather than grounded in equity or in an interpretation of Rule 23, is a product of federal common law, developed based on the federal policies underlying Rule 23 and the federal substantive statute at issue.<sup>86</sup> As Professors Burbank and Wolff explain, “[w]hen the underlying law is federal, the role of federal judges in shaping the relationship between remedial structures and substantive policy objectives is unproblematic: it is coextensive with their role as expositors of federal common law.”<sup>87</sup> Indeed, this explanation for the source of class-action tolling, unlike an explanation grounded in equity or Rule 23 itself, encompasses the four prongs of the *American Pipe* Court’s analysis, which considered the policies underlying Rule 23, the policies underlying federal statutes of limitations, and the federal legislative scheme.<sup>88</sup>

Therefore, understanding that *American Pipe* tolling is a rule of federal common law derived from the federal policies underlying Rule 23, federal statutes of limitations, and the federal legislative scheme, courts should apply this same framework to analyze whether class-action tolling applies to the securities acts’ statutes of repose. Indeed, the “Brief of Civil Procedure and Securities Law Professors as Amici Curiae in Support of Petition for Writ of Certiorari” in the *IndyMac* case proposes exactly this approach:

Rather, the validity of an application of *American Pipe* to a limitations period would instead turn, as the Court instructed, on a broader and more textured inquiry that takes account of the “legislative scheme,” including the limitations provision in question, and Federal Rule of Civil Procedure potentially in conflict with that provision, and the

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86. See Burbank, *supra* note 84, at 1027 (“Rule 23 does not provide a rule for tolling the applicable limitations period, state or federal, in a class action brought in federal court, and *American Pipe & Construction Co. v. Utah* does not suggest otherwise. In that case, the Supreme Court was making federal common law. Both the governing substantive law and the applicable limitations period were federal.” (footnotes omitted)); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 49–50 (2010) (“Rule 23 was not the source of the limitations-tolling rule that the Court announced in *American Pipe* . . . . Rather, the application of Rule 23 in those proceedings was the occasion for the Court to implement class action policies in federal common law that it was otherwise authorized to make.” (footnotes omitted)); *accord.* Lowenthal & Feder, *supra* note 82, at 556 (“Although the [*American Pipe* tolling] doctrine clearly relates to, and is supported by, the Rule 23 class action device, it is perhaps better thought of as a rule of federal common law.”).

87. Burbank & Wolff, *supra* note 86, at 67 (footnote omitted).

88. See *supra* notes 14–29 and accompanying text (summarizing and discussing the four prongs of the Court’s analysis in *American Pipe* and the foundation behind them).



statutory scheme governing the litigation, and asks whether applying *American Pipe* would be consonant with each.<sup>89</sup>

When engaging in this “broader and more textured inquiry,” courts should apply the four prongs of the *American Pipe* analysis in order to decide whether to adopt class-action tolling of the securities acts’ statutes of repose as a rule of federal common law.

In particular, courts should adopt class-action tolling of the securities acts’ statutes of repose as a rule of federal common law if: (1) it would not allow for “one-way intervention”; (2) it would further the Rule 23 purposes of efficiency and economy by preventing a “multiplicity of activity”; (3) it would not frustrate the repose policy of allowing the defendant freedom from liability after a certain period of time; and (4) it would be consonant with the securities acts’ legislative scheme.

This federal common law approach, in addition to being consistent with the analysis in *American Pipe*, would dispel federalism concerns about applying *American Pipe* tolling to state-law claims asserted in diversity class actions. If the source of *American Pipe* tolling is federal common law rather than Rule 23, the *Erie Railroad Co. v Tompkins* Test,<sup>90</sup> rather than the Rules Enabling Act, would govern whether *American Pipe* tolling applies to state law claims.<sup>91</sup> Under *Erie*,<sup>92</sup> federal courts would likely defer to state tolling rules in diversity actions.<sup>93</sup>

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89. Brief of Civil Procedure and Securities Law Professors as Amici Curiae in Support of Petition for a Writ of Certiorari, *Pub. Emps.’ Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, 134 S. Ct. 1515 (2014) (No. 13-640), 2013 WL 8114524, at \*16. This Essay’s author was not a signatory to this brief.

90. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

91. *Hanna v. Plumer*, 380 U.S. 460, 471–74 (1965) (differentiating between cases in which a Federal Rule conflicts with a state rule, which are analyzed under the Rules Enabling Act, and cases outside the scope of a Federal Rule, which are analyzed under *Erie*); see Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act after Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1160 (2011) (“Imagine this scenario: *Shady Grove* is ultimately certified as a class action. Eventually the case proceeds to a favorable judgment for the plaintiff class, at which point ten thousand class members step forward to claim the statutory damages to which they are entitled. Allstate moves to dismiss the vast majority of these claims as time-barred, arguing that the limitations period expired while the litigation was still pending. Under the *American Pipe* rule, that motion would fail. But Rule 23, however, does not address the extent to which a class action tolls the limitations period for unnamed class members. Thus a federal court would face a relatively unguided *Erie* choice.” (footnote omitted)).

92. *Hanna*, 380 U.S. at 468 (“The ‘outcome-determination’ test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.” (footnote omitted)).

93. Lowenthal & Feder, *supra* note 82, at 557 (“While the competence of federal courts to create federal common law has, of late, been a magnet for academic comment, there seems to be little doubt that, for *state law claims*, the Rules of Decision Act and *Erie* pose limitations. Although there may not be unanimity on what those limits are, the rule we are contemplating—

The viability of this federal common law approach is admittedly subject to several criticisms. First, although the Court engaged in a textured policy analysis when extending the reach of *American Pipe* tolling to potential class members' individual actions in *Crown, Cork & Seal Co.*,<sup>94</sup> the Court did not do so when extending the reach of *American Pipe* tolling to potential class members' claims after the denial of class certification in *Eisen*.<sup>95</sup> Rather, in *Eisen*, the Court summarily extended the reach of *American Pipe* tolling, without discussing the purposes of Rule 23, the policies underlying statutes of limitations, or the relevant legislative scheme (in that case, the antitrust and securities laws).<sup>96</sup> One possible explanation for this summary approach in *Eisen* is that the Court concluded that federal statutes of limitations serve comparable roles in all federal statutes, and thus do not necessitate an individualized analysis each time that *American Pipe* is applied to toll federal statutes of limitations.

Second, although *Eisen* suggests that this textured approach would reach the same result for all federal statutes of limitations, the approach itself invites the possibility that *American Pipe* tolling is not trans-substantive, even across federal statutes, because its applicability includes as a component of its analysis consonance with the relevant legislative scheme. Applied to statutes of repose then, it opens the possibility that *American Pipe* would apply to toll the statutes of repose of some federal statutes but not others. The response to this criticism is to reject the notion that federal common law affecting procedure, such as class-action tolling, must be trans-substantive. Indeed, Professor Wolff has argued that a variety of apparently procedural class action decisions—including the Supreme Court's decision in *Wal-Mart v. Dukes*<sup>97</sup>—are in fact rules of federal common law influenced by the substantive law at issue in the case.<sup>98</sup> Under this approach, “[w]hen

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*American Pipe* applied to displace state law on state law claims—would seem to fall distinctly outside of everyone's vision of what federal courts can do.” (footnotes omitted)); see *Casey v. Merck & Co.*, 653 F.3d 95, 100 (2d Cir. 2011) (“[W]e now join the majority of our sister courts that have addressed the issue in holding that a federal court evaluating the timeliness of state law claims must look to the law of the relevant state to determine whether, and to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction.”).

94. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349–51 (1983).

95. *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 176 n.13 (1974).

96. See *id.* at 175–77 (applying *American Pipe* to the facts of the case).

97. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

98. Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1034 (2013) (“[T]he academy has been too quick to assign the opinion [in *Dukes*] broad trans-substantive meaning. The Court's discussion of the commonality issue in *Dukes* is grounded in Title VII policy and speaks primarily to the federal common law of disparate impact

judges must determine whether to constrain or authorize expansive and unprecedented forms of litigation in class or mass-tort adjudication, they can use the goals of the underlying substantive law in disputes before them as guideposts for their decisions.”<sup>99</sup> Therefore, although applying a textured framework to determine whether class-action tolling applies to the securities acts’ statutes of repose is not a trans-substantive approach, this approach is consistent with “the dynamic nature of the relationship that frequently exists between the mechanisms of litigation and the underlying substantive law.”<sup>100</sup>

#### V. APPLICATION OF FEDERAL COMMON LAW FRAMEWORK TO SECURITIES STATUTES OF REPOSE

Accepting that *American Pipe* tolling is a rule of federal common law, all that remains is to analyze whether applying class-action tolling to the securities acts’ statutes of repose: (1) would not allow for “one-way intervention”; (2) would further the Rule 23 purposes of efficiency and economy by preventing a “multiplicity of activity”; (3) would not frustrate the repose policy of allowing the securities defendant freedom from liability after a certain period of time; and (4) would be consonant with the securities acts’ legislative scheme. Because the implications of class-action tolling differ when class certification is denied and when it is granted, this Essay analyzes each scenario separately, concluding that class-action tolling should apply to the securities acts’ statutes of repose when class certification is denied and that class-action tolling should not apply when class certification is granted.

In the scenario in which class certification is denied, this framework supports tolling the securities acts’ statutes of repose. First, tolling the securities acts’ statutes of repose for potential class members would not allow for potentially abusive “one-way intervention.” Although Rule 23 now merely requires a decision on class certification “[a]t an early practicable time”<sup>101</sup> as opposed to “[a]s soon as practicable,” this change does not defer class certification so late as to suggest a return to

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remedies under the Civil Rights Act of 1964. The handful of statements on Rule 23 and commonality play only an equivocal role in the analysis. The Court’s treatment of Rule 23(b)(2), in contrast, does speak to core questions of class-action policy. Even so, the substantive policies underlying the dispute played a major role in the Court’s determination that a (b)(2) action was unavailable, albeit a role that the Court itself left largely unexplored. The constraints that *Dukes* imposes upon class-action practice are inextricably tied to a series of express and implied holdings under Title VII and should be approached with that substantive focus in mind.”)

99. *Id.* at 1069.

100. *Id.* at 1027.

101. FED. R. CIV. P. 23(c)(1)(A).

the spurious class actions that existed pre-1966.<sup>102</sup> Upon denial of class certification, a potential class member could decide to seek to join the suit as a named plaintiff or file an individual suit. At that point, the potential class member would not be weighing a potential class recovery against an individual recovery, invoking the concerns about one-way intervention, because there would not be a potential class recovery on the table. Second, absent tolling, potential class members would be forced to file duplicative motions to intervene or file individual suits, lest class certification be denied after the repose period has elapsed, foreclosing any remedy. This multiplicity of activity, like that described by the Court in *American Pipe*, would frustrate the Rule 23 purposes of economy and efficiency. Third, tolling would not undercut the repose policy of affording the securities defendant freedom from liability after a certain point. Tolling would merely enable the disaggregated assertion of claims previously asserted in the putative class action. Finally, tolling would serve the securities acts' dual purposes of deterrence and compensation<sup>103</sup> by ensuring that violators of the securities acts would not escape liability by virtue of a lengthy period between the filing of a class action and a certification decision (of which, to some degree, the very same violators could be the architect)<sup>104</sup> and that injured investors would not be left without compensation merely because too much time had elapsed before the court reached a decision on class certification.

In the scenario in which class certification is granted, on the other hand, this framework does not support tolling the securities acts' statutes of repose. First, tolling the securities acts' statutes of repose for potential class members would enable them to engage in something akin to "one-way intervention." Because class certification in securities actions ordinarily triggers a proposed class settlement, if the securities acts' statutes of repose were tolled, potential class members would be in the position to examine the class settlement and then decide at that point

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102. FED. R. CIV. P. 23 adv. comm. notes accompanying 2003 amendments ("The 'as soon as practicable' exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision.").

103. Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 960 (2014) ("Although the primary goal of the prohibition on securities fraud is to deter fraud, it also serves the secondary interest of compensating injured investors.").

104. See Kevin M. LaCroix, *Guest Post: Class Certification Timing and the IndyMac MBS Case in the Supreme Court*, D&O DIARY (July 8, 2014), <http://www.dandodiary.com/2014/07/articles/securities-litigation/guest-post-class-certification-timing-and-the-indymac-mbs-case-in-the-supreme-court/> (recognizing the potential for defendants "to drag their heels in the course of pre-trial proceedings").

whether to go it alone or not.<sup>105</sup> Securities attorneys have characterized this as a “no risk, ‘wait-and-see’ approach.”<sup>106</sup> This approach implicates the *American Pipe* Court’s concern about the potential for abuse if “members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests.”<sup>107</sup> Second, the absence of tolling in cases in which class certification is granted would not trigger a multiplicity of protective filings. Only those potential class members with the means and incentive to potentially achieve a better result in an individual action would file individual actions.<sup>108</sup> One commentator has suggested that the tipping point may be around \$50 million in damages among aggregated institutional investors in an opt-out action.<sup>109</sup> Moreover, allowing opt-out plaintiffs to pursue individual actions after certification, by virtue of tolling of the statutes of repose, would undercut the economy and efficiency sought to be furthered by the class action mechanism itself.<sup>110</sup> Third, applying tolling in cases in which a

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105. See AMIR ROZEN, JOSHUA B. SCHAEFFER & CHRISTOPHER HARRIS, CORNERSTONE RESEARCH: OPT-OUT CASES IN SECURITIES CLASS ACTION SETTLEMENTS 1 (2013) (“Out of 1,272 securities class action settlements between January 1, 1996, and December 31, 2011, we identified 38 cases in which at least one plaintiff opted out of the class action settlement and pursued a separate case against the defendant.”); John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why “Exit” Works Better Than “Voice,”* 30 CARDOZO L. REV. 407, 437 (2008) (“To date, opt outs have largely occurred after a class action settlement has been reached.”). This reality is recognized by numerous client alerts published by members of the securities bar. See, e.g., Nicole Lavallee, *Practical Matters: When Should Funds Opt Out of a Class Action?*, BERMAN DEVALERIO, <http://www.bermandevalerio.com/news/firm-newsletter/67-practical-matters-when-should-funds-opt-out-of-a-class-action> (last visited Mar. 26, 2015) (“More likely, however, a fund would decide to opt out at settlement time. At this point, funds will know the dollar amounts involved – the plan of allocation as well as the attorney fees – and can assess whether their recovery share is reasonable and adequate.”).

106. BLAIR A. NICHOLAS & IAN D. BERG, PLLI, WHY INSTITUTIONAL INVESTORS OPT-OUT OF SECURITIES FRAUD CLASS ACTIONS AND PURSUE DIRECT INDIVIDUAL ACTIONS 2 (2009) (prepared for publication and distribution at the Securities Litigation & Enforcement Institute 2009).

107. *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 547 (1974).

108. See Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 MICH. L. REV. 399, 428 (1982) (hereinafter, Note, *Statutes of Limitations*) (“The relative infrequency of opting out would seem to rebut any argument of numerous protective filings. The threat of such activity seems little more than a trace of the problem faced in *American Pipe*, where the denial of certification left class members with no remedy unless they had previously filed protective motions.”).

109. Coffee, *supra* note 105, at 436.

110. Note, *Statutes of Limitations*, *supra* note 108, at 428–29 (“In fact, a decision to allow tolling would significantly encourage the waste of judicial resources, contrary to the policies behind class actions. The opt-out tolling decision only arises where the court already has determined the suit is maintainable as a class action. In reaching this conclusion, the court has made a finding that ‘a class action is superior to other available methods for the fair and efficient

class is certified would undercut the repose rationale of allowing the defendant freedom from liability at a certain point. The defendant would be forced to defend against—not only the certified class—but also various later-filed individual actions.<sup>111</sup> Finally, tolling the statutes of repose when a class is certified, although consistent with the deterrence rationale underlying the securities acts, would arguably undercut the compensation rationale, at least for those class members with negative-value claims such that they have no viable option but to remain within the class. Opt-out settlements, for a variety of reasons separate from the merits of the case—including, perhaps most significantly, the absence of insolvency constraints in the settlement of opt-out cases<sup>112</sup>—often result in a greater percentage of recovery per dollar of loss than class settlements.<sup>113</sup> Class action defendants, in recognition of this potential second wave of opt-out liability if statutes of repose were tolled, would likely attempt to decrease the amount of the class action settlement by more than the proportionate share of the opt-outs, either through express provisions in the settlement agreement<sup>114</sup> (if permitted by the courts<sup>115</sup>) or through hold-backs from

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adjudication of the controversy.’ The court, after considering ‘the interest of the members of the class in individually controlling the prosecution of separate actions,’ and the efficiency of alternative procedures, has decided the class action objectives will be achieved. By opting out, the plaintiff ignores this determination. The plaintiff insists on a second trial on essentially the same facts and issues with all the inefficiencies and inconsistencies avoided by a class suit.” (footnotes omitted)).

111. See Kevin M. LaCroix, *Opt-Outs: A Worrisome Trend in Securities Class Action Litigation*, INSIGHTS, Apr. 2007, at 4 (“Even if the number of opt-outs does not forestall a class settlement altogether, it could still substantially increase the total litigation cost. If a defendant must defend itself against both a class action and multiple individual lawsuits, the costs of defense and of ultimate case resolution could escalate, potentially enormously.”); Paul Weiss, *Client Memorandum: Second Circuit Holds that American Pipe Tolling Does Not Apply to the Securities Act’s Statute of Repose*, PAUL WEISS (June 28, 2013), <http://www.paulweiss.com/practices/litigation/securities-litigation/publications/second-circuit-holds-that-american-pipe-tolling-does-not-apply-to-the-securities-act’s-statute-of-repose.aspx?id=13939> (“If institutional investors are now forced to file their actions earlier, this might obviate the problem of having to negotiate a class settlement only to find that large numbers of class members have decided to opt out.”).

112. Coffee, *supra* note 105, at 432.

113. ROZEN, SCHAEFFER & HARRIS, *supra* note 105, at 1 (“Based on limited anecdotal evidence, opt-out settlement plaintiffs may succeed in obtaining a larger recovery than would have been received by remaining part of the class action (although opt-out plaintiffs may also face higher proportionate costs, and we have also identified instances where the opt-out plaintiff failed to recover any losses).”); Coffee, *supra* note 105, at 414 (“[C]lass members who opt out and flee the class seem to do extraordinarily better than those who remain within the class.”).

114. Coffee, *supra* note 105, at 440 (“A more effective way to protect the corporation from opt outs would be a provision that reduced the settlement amount in respect of each opt out. But here, because the typical opt out recovers more than the typical class member, the corporate defendant would need to set the amount of the reduction at a level well above the amount that the opt out would have received under the class action if the defendant is to be held harmless. Thus,

the settlement at the outset.<sup>116</sup> Therefore, opt-out claims would not operate to increase the size of the pie for investors overall; rather, they would merely carve out larger slices for those investors with the means and incentives to opt out, to the detriment of negative-value claimants. For the same reason, although the deterrence rationale would not be undercut by tolling the statutes of repose when a class is certified, the deterrence rationale would be enhanced only slightly. Class action defendants would still incur the same amount of liability, with any enhanced deterrent effect only by virtue of the increased costs associated with defending against multiple suits rather than a single class action.

In sum, applying the federal common law framework from *American Pipe* to the securities acts' statutes of repose, courts should adopt class-action tolling in cases in which class certification is denied and should decline to adopt class-action tolling in cases in which class certification is granted. This bifurcated approach differs from the approach that the courts currently apply to federal statutes of limitations, as compelled by *Eisen*, although there is some scholarly support for this bifurcated approach even in the context of statutes of limitations.<sup>117</sup> Nonetheless, this bifurcated approach is consistent with the unique policies underlying Rule 23, statutes of repose, and the securities laws.

One anticipated criticism of this bifurcated approach is that, in cases

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hypothetically, the class settlement amount might be reduced, for example, by five times the amount that the opt outs would have received under the settlement. Although such a tactic does hold the corporation harmless, there is now a significant cost to opting out that falls heavily on the smaller shareholders who remain behind within the class. Such a tactic will not deter opting out, but it will shift the cost of their gains to the remaining class members.”).

115. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 327 (2010) (“Third, opt-outs should reduce the smaller class members’ recovery only when defendants negotiate disproportionate reductions to reflect the opt-outs or impose complex and onerous claim filing requirements. Such tactics are, however, subject to judicial control if courts are alerted to them.”).

116. ROZEN, SCHAEFFER & HARRIS, *supra* note 105, at 5 (“[I]f larger shareholders are expected to opt out of a settlement, defendants may offer less money to settle with the class. This could result in a two-tiered settlement, in which smaller shareholders are significantly disadvantaged.” (footnote omitted)); *Securities Class Action Opt-Out Claims: A Growing Problem*, BAILEY CAVALIERI LLC 2–3, [http://www.baileycavalieri.com/73-Securities\\_Opt\\_Out\\_Claims.pdf](http://www.baileycavalieri.com/73-Securities_Opt_Out_Claims.pdf) (last visited Mar. 26, 2015) (“From the perspective of the defendants and their insurers, this means they must negotiate the class settlement without knowing what additional money will be required to defend and settle possible opt-out claims. Since both the company defendant and the insurers typically have finite amounts dedicated to resolve the litigation, it is now very difficult to evaluate what is a reasonable amount to pay for settlement of the class action and how much should be held in reserve for the unknown but likely opt-out claims.”).

117. Note, *Statutes of Limitations*, *supra* note 108, at 403–04 (“This Note argues that one who opts out of a class action should not benefit from tolling for the time during which the individual was a class member.”).

in which class certification is granted after the relevant repose periods have elapsed, class members who have not previously filed individual actions would effectively lose their “exit” option, leaving them with only their “voice” to ensure that the class settlement is fair and adequate. Professor John C. Coffee, Jr. has written about the value of the “exit” option to “stimulate greater competition and compel class attorneys to become more faithful champions” of members of the class.<sup>118</sup> This criticism is countered, at least somewhat, by two considerations in the context of securities class actions. First, the PSLRA mandates certain additional disclosures to class members as part of a proposed settlement,<sup>119</sup> arguably enhancing class members’ ability to effectively exercise their voice in opposition to a class settlement under Rule 23(e)(2). Second, class counsel and institutional investors (who are those investors with the means and incentive to opt out) are repeat players in securities litigation.<sup>120</sup> Therefore, although class counsel might not be incentivized to champion the class by an institutional investor’s ability to opt out of a class settlement achieved in the instant case, class counsel would be well aware that, if the institutional investor were displeased with the class settlement in the instant case, the institutional investor would be more likely to file a timely individual action in future cases in which counsel serves as class counsel. Therefore, although the exit option would be undercut somewhat if statutes of repose were not tolled in cases in which a securities class action is certified, it would not be rendered toothless.

#### CONCLUSION

In conclusion, this Essay contends that *American Pipe* tolling is properly understood as a rule of federal common law, developed based on the policies underlying Rule 23, the policies embodied in the relevant time limit, and the relevant federal liability scheme. Whether class-action tolling should apply to the securities acts’ statutes of repose depends, therefore, on whether it: (1) would not allow for “one-way intervention”; (2) would further the Rule 23 purposes of efficiency and economy by preventing a “multiplicity of activity”; (3) would not frustrate the repose policy of allowing the defendant freedom from

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118. Coffee, *supra* note 105, at 408.

119. 15 U.S.C. § 77z-1(a)(7) (2012); *id.* § 78u-4(a)(7).

120. Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1529 (2006) (“These results are consistent with the hypothesis that institutional investors that potentially may act as lead plaintiffs tend to develop repeat relationships with only a handful of the top-tier plaintiff law firms.”).



liability after a certain period of time; and (4) would be consonant with the securities acts' legislative scheme. Applying this framework, this Essay argues that class-action tolling should apply to the securities acts' statutes of repose when class certification is denied and that class-action tolling should not apply when class certification is granted.

Left open by this Essay is the degree to which a federal securities class action operates to toll statutes of repose applicable to state law claims asserted in state court. Because state discovery, pleading, and liability standards are often more advantageous than federal standards, many opt-out plaintiffs proceed in state court rather than federal court.<sup>121</sup> In addition to the question of whether state courts should adopt class-action tolling of state statutes of repose, the availability of tolling in these state opt-out cases will depend on whether the relevant state (1) recognizes cross-jurisdictional tolling (here, from federal court to state court);<sup>122</sup> and (2) recognizes cross-claim tolling (here, from federal securities claims to state law claims).<sup>123</sup> State courts have found *American Pipe* tolling persuasive, however, in the context of state statutes of limitations, suggesting that the federal courts' resolution of whether class-action tolling applies to the federal securities acts' statutes of repose will influence the future resolution of these important issues by state courts.

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121. Coffee, *supra* note 105, at 430 (“[B]y opting out and suing in state court, plaintiffs can escape obstacles that either uniquely apply to class actions or to securities actions in federal court. The most obvious example is the [PSLRA], whose provisions, including its stay on discovery, its heightened pleading standards, and presumption in favor of cost shifting against the plaintiff, apply only in federal court. Also, state ‘blue sky’ statutes often do not require plaintiffs to plead or prove scienter.”).

122. See John J. Koltse, *Cross Jurisdictional Tolling of the Statute of Limitations in Antitrust Claims: Plaintiffs Lose Their Day in Federal Court*, 1 SEVENTH CIRCUIT REV. 20, 20 (2006) (“State supreme courts have wrestled with the related question of whether the filing of a federal class action tolls the statute of limitations for class members who seek to file subsequent state law claims after their federal class action is dismissed, reaching opposing outcomes.” (citing authority)).

123. Compare Cullen v. Margiotta, 811 F.2d 698, 720 (2d Cir. 1987) (“Notwithstanding the differences between the legal theories advanced by plaintiffs in the state court action and those advanced in the present action, we are persuaded that the *American Pipe* doctrine has applicability to the present action. . . . *American Pipe* tolling is properly extended to claims of absent class members that involve the same evidence, memories, and witnesses as were involved in the initial putative class action.”), with *In re Copper Antitrust Litig.*, 436 F.3d 782, 794 (7th Cir. 2006) (“However similar or dissimilar the function of federal antitrust law may be with respect to state law, the federal claim is part of a distinct body of law that must be pursued in a wholly different court system. This fact cuts decisively against the application of the policies of *American Pipe* across jurisdictional lines to respond to state class actions, even if some federal interest in such an application could be divined.”).