Fordham Journal of Corporate & Financial Law

Volume 19, *Number* 3 2014 *Article* 5

For Whom the Statute Tolls: American Pipe Tolling and Statutes of Repose in Securities Fraud Class Actions

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VOLUME XIX 2014 NUMBER 3

FORDHAM

JOURNAL OF
CORPORATE & FINANCIAL LAW

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"Statutes of limitation, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."[1]

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[*] J.D. Candidate, 2015, Fordham University School of Law. B.A., 2010, Agnes Scott College. Many thanks to Professor Martin Gelter for his comments and guidance in writing this Note and to my family and friends for their constant support and encouragement.

1. United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations omitted).

INTRODUCTION

Corporate entities are typically organized under two systems: concentrated ownership and dispersed ownership.[2] The American economic landscape is dominated by firms operating under dispersed ownership systems.[3] In typical dispersed ownership entities, ownership and control are separate.[4] No single shareholder, or group of shareholders, owns a majority of the firm's shares, enabling them to influence board actions.[5] Consequently, dispersed ownership systems are plagued by the collective action problem.[6] It is difficult for various shareholders, even institutional investors, to efficiently organize and coalesce their votes.[7] Since the interests of shareholders and the board may differ, the implicit separation of ownership and control in a dispersed ownership system fosters concerns for minority shareholders' rights.[8]

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2. *See* John C. Coffee Jr., Dispersed Ownership: The Theories, the Evidence, and the Enduring Tension Between "Lumpers" and "Splitters" 2 (European Corporate Governance Inst., Working Paper No. 144, 2010) [hereinafter Coffee, Lumpers and Splitters], *available at* http://ssrn.com/abstract=1532922.

3. In 2001, less than 3% of American companies exemplified a concentrated ownership system. *See id.* at 2, n.1 (citing Marco Becht & Colin Mayer, *Introduction* to THE CONTROL OF CORPORATE EUROPE (Fabrizio Barca and Marco Brecht eds.) (2001)); *see also* Michael J. Kaufman & John M. Wunderlich, *Toward a Just Measure of Repose: The Statute of Limitations for Securities Fraud*, 52 WM. & MARY L. REV. 1547, 1554 (2011) [hereinafter Kaufman & Wunderlich, *Just Measure of Repose*] (advocating for the abolishment of the discovery provision in the statute of limitations but maintaining the statute of repose in securities class actions).

4. Coffee, Lumpers and Splitters, *supra* note 2, at 2 ("[T]here is instead a 'separation of ownership and control' with neither the directors nor the senior executives typically holding significant blocks of the company's stock and with share ownership instead being dispersed among many institutional and retail shareholders." (citing ADOLF A. BERLE AND GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)).

5. *See id.*; *see also* Kaufman & Wunderlich, *Just Measure of Repose*, *supra* note 3, at 1554.

6. When shareholders are dispersed, "collective action problems undermine shareholder incentives to become informed before voting . . . . Each shareholder will know that if she expends the cost of making a better-informed vote, her vote will have little impact on the outcome, so she might as well remain uninformed and save the information costs." Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 796 (2005).

7. *See* Coffee, Lumpers and Splitters, *supra* note 2, at 61–62.

8. *See id.* at 2–3; Marina Martynova & Luc Renneboog, A Corporate Governance Index: Convergence and Diversity of National Corporate Governance Regulations 4

Securities reform in the 1930s converted the securities industry from a system of *caveat emptor* to one of *caveat vendor*.[9] These legislative measures ensured that minority shareholder rights were not trampled upon and attempted to bridge the gap between ownership and control in dispersed ownership systems.[10] Passed in the wake of the stock market crash of 1929, the Securities Act of 1933 (the "1933 Act") and the Securities and Exchange Act of 1934 (the "1934 Act") (collectively the "Securities Acts") aimed to cure deficiencies in common law fraud practices by establishing higher standards of conduct in the securities industry.[11] The 1933 Act regulates the initial offering of registered shares, while the 1934 Act regulates the secondary market.[12] The 1934 Act provided for the creation of the Securities and Exchange Commission ("SEC") to protect investors.[13] The SEC has the power to register, regulate, and oversee brokerage firms, transfer agents, clearing agencies, and oversee the nation's securities self regulatory

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(Tilburg Law & Econs. Center, Discussion Paper DP 2010-012), *available at* http://www.tilburguniversity.edu/research/institutes-and-researchgroups/tilec/research/publications/Discussion-papers-1/2010/.

9. FEDERAL JUDICIAL CENTER, FEDERAL SECURITIES LAW 1 (Kris Markarian eds., 3d ed. 2011) [hereinafter FEDERAL SECURITIES LAW].

10. For example, in 2009, the Securities and Exchange Commission took steps to enhance the information companies provide to their shareholders by requiring that public companies registered under federal securities law make new or revised disclosures to shareholders regarding director qualifications and skills, board leadership structure and responsibilities, the board's role in risk management, and diversity in the director nomination process. *See* Luis A. Aguilar, Commissioner, SEC, Shareholders Need Robust Disclosure to Exercise Their Voting Rights as Investors and Owners (Feb. 20, 2013), *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1365171492322#.Uu_EB5EeXeI; *see also* Martynova & Renneboog, *supra* note 8, at 7 ("In countries where widely-held companies prevail, the main function of corporate governance regulation is to protect shareholders from being expropriated by the management.").

11. *See* Securities and Exchange Act of 1934 § 2, 15 U.S.C. § 78b (2012); Herman & Maclean v. Huddleston, 459 U.S. 375, 389 (1983); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L. J. 1, 80 (2001) ("[A]s liquid securities markets developed and dispersed ownership became prevalent, a new political constituency developed that desired legal rules capable of filling in the inevitable enforcement gaps that self-regulation left.").

12. JESSE H. CHOPER, JOHN C. COFFEE, JR., RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 301–02 (7th ed. 2008).

13. 15 U.S.C. § 78d.

organizations for the sake of protecting investors, while maintaining a fair and efficient market and facilitating capital formation.[14]

The Securities Acts also authorize a private right of action.[15] Given the dispersed ownership nature of most public corporations, class actions are the most practical method for shareholders to bring securities fraud claims.[16] In fact, securities class actions are the largest category of class actions[17] and may be more effective at deterring and penalizing securities law violations than SEC enforcement measures.[18]

Although effective, securities class actions have become highly regulated and procedurally onerous.[19] Class certification is one of the

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14. *See generally The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, Securities & Exchange Commission, http://www.sec.gov/about/whatwedo.shtml (last visited Apr. 18, 2014).

15. In the Securities Act of 1933, Sections 11, 12(a)(1), 12(a)(2), and 15 provide for private rights of action, whereas the Securities and Exchange Act of 1934 provides for a private right of action in Section 18. *See* JAMES M. BARTOS, UNITED STATES SECURITIES LAW: A PRACTICAL GUIDE 182–83 (2d ed. 2002).

16. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); *see also* HOWARD M. FRIEDMAN, PUBLICLY HELD CORPORATIONS: A LAWYER'S GUIDE 82 (2011).

17. Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 324 (2010) [hereinafter Kaufman & Wunderlich, *Class Certification Merits Trials*].

18. *See* Stephen J. Choi & Adam C. Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison 28–39 (Univ. of Mich. Law & Econ. Research Paper Series, Working Paper No. 12-002, 2014), *available at* http://ssrn.com/abstract=2109739 (performing a regression analysis and finding that SEC investigations may be less likely to have a deterrent effect than securities class actions because class actions have a higher incidence and magnitude of settlements and top officer resignation than do SEC investigations); *see also* Kaufman & Wunderlich, *Class Certification Merits Trials*, *supra* note 17, at 323–24.

19. The Private Securities Litigation Reform Act, passed by Congress in 1995, requires qualification of lead plaintiffs, heightened pleading standards, and sanctions for abusive litigation in federal securities class actions. *See* Nicholas I. Porritt, *Current Trends in Securities Litigation: How Companies and Counsel Should Respond*, *in* RECENT DEVELOPMENTS IN SECURITIES LAW 77, 82–83 (Michaela Falls ed. 2010). In addition to PSLRA's increased burdens, federal courts have begun to treat a motion for class certification into a mini-trial where plaintiffs are required to prove the merits of

first procedural obstacles to commencing a class action and can often make or break a case.[20] Since the adoption of Rule 23 of the Federal Rules of Civil Procedure, federal case law has substantially increased the burdens putative classes must meet to have the class certified.[21] In the event that certification is denied, individual plaintiffs may file individual claims or attempt to intervene as lead plaintiff to gain certification.[22] Once certification is denied, however, statutes of limitations resume running.[23]

In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that statutes of limitations toll while a class seeks certification.[24] The decision highlighted Rule 23's interest in preventing multiple individual suits where class action would be a fair and more efficient alternative for adjudication.[25] The Court has not extended *American Pipe* tolling to statutes of repose, however, and the two circuit courts that have considered the issue have come to different conclusions.[26] In 2000, the Tenth Circuit held that the three-year statute of repose in Section 13 of the 1933 Act tolls during the class certification process in

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the case. *See* Kaufman & Wunderlich, *Class Certification Merits Trials*, *supra* note 17, at 330–43.

20. Dwight J. Davis et. al, *Expert Opinion in Class Certifications: Second Circuit Revisits, Disavows In Re* Visa Check *and Joins Majority Rule*, 74 DEF. COUNS. J. 253, 253 (2007) ("Once a case is certified, an overwhelming majority of the cases go on to settlements, many with large monetary recoveries. On the other hand, those cases that do not survive class certification are typically dismissed . . . .").

21. *See generally* Robert H. Klonoff, *F. Hodge O'Neal Corporate and Securities Law Symposium: The Future of Class Actions: The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013).

22. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983).

23. *See id.* at 354.

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

25. *Id.* at 551 (citing FED. R. CIV. P. 23 (b)(3)).

26. *Compare* Joseph v. Wiles, 223 F.3d 1155 (10th Cir. 2000) (holding that the three-year statute of repose in securities class action suits toll during the class certification process), *with* Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013) (holding that for securities class action suits, the three-year statute of repose does not toll during the certification of the class). On November 22, 2013, an investor in IndyMac MBS, Inc. filed a petition for a writ of certiorari asking the United States Supreme Court to decide whether the statute of repose governing securities law claims is tolled while class-action proceedings are pending. *IndyMac Investor Asks Supreme Court to Review Tolling of Statute of Repose*, 20 No.4 WESTLAW J. DERIVATIVES 7, at *1 (Jan. 17, 2014).

securities class actions.[27] This past summer, however, the Second Circuit held that the three-year statute of repose in Section 13 does not toll during class certification for securities class actions.[28] This Note analyzes the current circuit split and suggests a resolution to prevent procedural mechanisms from precluding otherwise viable claims.

Part I of this Note provides a general overview of the procedural mechanisms at issue: statutes of limitations, statutes of repose, and class actions, while highlighting factors specific to claims made pursuant to the Securities Acts. Part II then examines the circuit courts' interpretation of *American Pipe* tolling and its application to Section 13's statute of repose during class certification, while highlighting ways in which lower courts have developed the doctrine. Lastly, Part III concurs with the Second Circuit and argues that the statute of repose should not toll while a class awaits certification, but relies on a different rationale. This Note argues that simply interpreting the language of Section 13 of the 1933 Act and Section 804 of the Sarbanes-Oxley Act is sufficient to show that Congress did not intend for the statutes of repose to be extended. To prevent process from overriding substance, however, this Note advocates for legislative action creating an exception to the statutes of repose in Section 13 and Section 804, allowing the statute of repose to toll exclusively during class certification for securities fraud class actions commenced within the statute of limitations.

I. STATUTES OF LIMITATIONS, STATUTES OF REPOSE, AND CLASS ACTIONS

Although distinct, statutes of repose and statutes of limitations are often confused.[29] Both Congress and the courts have compounded this confusion by referring to the statute of repose as a statute of limitations.[30] Section A discusses statutes of limitations and repose, while Section B addresses class actions and provides an overview of class action adjudication in securities fraud claims.

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27. *Joseph*, 223 F.3d at 1168.

28. *IndyMac MBS, Inc.*, 721 F.3d at 112–13.

29. Fed. Hous. Fin. Agency v. UBS Ams. Inc., 712 F.3d 136, 140 (2d Cir. 2013) (citing Massachusetts v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 (2d Cir. 2010)).

30. *See id.* at 143 nn.3–4.

A. STATUTES OF LIMITATIONS AND REPOSE

Sub-section 1 discusses statutes of limitations and the federal equitable tolling doctrine, while Sub-section 2 focuses on statutes of repose. In Sub-section 3, this Note compares and contrasts statutes of limitations and repose, while Sub-section 4 looks at the public policy justifications for limitation periods. Sub-section 5 discusses the statutes of limitations and repose specific to securities fraud claims.

1. Statutes of Limitations and Equitable Tolling

Statutes of limitations do not destroy a plaintiff's right.[31] They simply withhold the remedy.[32] Failure to bring a claim within the limitations period creates a legal presumption that the plaintiff has no legal rights.[33] Courts, however, can exercise their discretion and toll statutes of limitations, allowing plaintiffs to pursue untimely claims.[34] The federal equitable tolling doctrine may be invoked where the federal cause of action is based on fraud, where the federal causes of action have been concealed by the tortfeasor, and in cases where the plaintiff was induced not to take legal action based on the defendant's statements.[35] If applicable, the federal equitable tolling doctrine tolls the applicable limitations period until the plaintiff discovers, or would have discovered with due diligence, the fraud or the fraudulent concealment.[36]

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31. Sun Oil Co. v. Wortman, 486 U.S. 717, 725–26 (1988) (citing Little v. Blunt, 26 Mass. 488, 492 (1830)).

32. *See id.*

33. *See* Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."). United States v. Oregon Lumber Co., 260 U.S. 290, 299–300 (1922).

34. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting) ("[W]hen none of the reasons on which the statute is founded can possibly apply, the federal courts have exercised equitable discretion to suspend the running of a limitations period in conformity with the policy underlying the statute of limitations.") (internal quotation marks and citations omitted); *see also* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557–59 (1974) (citing Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424 (1965)); LeCroy v. Dean Witter Reynolds, Inc., 585 F.Supp. 753, 758 (E.D. Ark. 1984).

35. *See LeCroy*, 585 F.Supp. at 758 n.1.

36. *See id.* at 758.

While application of the equitable tolling doctrine must be applied on a case-by-case basis after a thorough factual analysis, courts uniformly apply the doctrine to toll the one-year statute of limitations in Section 13 of the 1933 Act.[37]

2. Statutes of Repose

In contrast, statutes of repose demarcate a period in which a plaintiff must place a defendant on notice of his or her claim, regardless of whether the plaintiff himself is aware that he has suffered an injury.[38] Once the specified time period has passed, statutes of repose completely extinguish a cause of action.[39] Hence, equitable tolling principles are inconsistent with statutes of repose.[40]

3. The Practical Difference Between Statutes of Limitations and Repose

While statutes of limitations and repose both limit the time a plaintiff has to bring their claims, statutes of limitations and repose have different lengths and accrue at different times.[41] In cases alleging securities fraud claims, the Supreme Court has held that the statue of limitations does not begin running until the fraud is discovered or could have been discovered with due diligence.[42] Statutes of repose, however, are generally longer and run from the date of the alleged wrongdoing.[43] Consequently, the statute of repose may prevent a plaintiff's claim

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37. *Id.* ("Unquestionably, the equitable tolling doctrine applies in the context of statutes of limitations under the federal securities laws.").

38. *See* Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 177 (D. Mass. 2009).

39. Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013) (citing Massachusetts v. Merril Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4. (2d Cir. 2010)).

40. *IndyMac MBS*, 721 F.3d at 106 ("[S]tatutes of repose affect the underlying right, not just the remedy, and thus they run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling . . . .") (citations omitted).

41. *See* Kaufman & Wunderlich, *Just Measure of Repose*, *supra* note 3, at 1558.

42. *See* Merck & Co. v. Reynolds, 559 U.S. 633, 653 (2010) ("The limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation—whichever comes first.") (internal citations omitted).

43. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 361 (1991) (holding that a uniform federal statutory time bar to federal security fraud claims was preferable to the states applying their own limitations periods).

before she even realizes that a cause of action exists.[44] In such cases, the statute of repose prevents what otherwise could have been a cause of action from ever manifesting.[45] Thus, a defendant who can successfully conceal his fraudulent actions until the statute of repose runs can completely escape liability and leave injured parties with no legal recourse.

4. Policy Justifications for Limitation Periods.

Statutory time bars aim to strike a balance between the competing fundamental values of repose for defendants and vindication of the plaintiff's underlying claim.[46] Both statutes of limitations and statutes of repose function to bar stale claims.[47] The stale claim rationale encourages plaintiffs to file their claims in a timely manner so that defendants are not unduly burdened with presenting a defense with stale evidence.[48] Thus, a plaintiff may not idly sit on their rights. Rather, a plaintiff must perform due diligence and investigate whether they have a viable cause of action before the applicable time bar runs out. Statutory time bars can also promote judicial efficiency by clearing dockets of stale claims and freeing scarce judicial resources.[49]

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44. *See* P. Stolz Family P'ship v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004).

45. *Id.* at 103 (citing Rosenberg v. North Bergen, 61 N.J. 190, 199 (1972)).

46. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988).

47. Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 174 (D. Mass. 2008) ("Statutes of limitations serve to 'ensure essential fairness to defendants and to bar a plaintiff who has slept on his rights.'") (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974) (alterations omitted)); *see also* Wilson v. Iseminger, 185 U.S. 55, 62 (1902) ("Every government . . . is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in the lapse of time.") (quoting THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 44 (2011)).

48. Kaufman & Wunderlich, *Just Measure of Repose*, *supra* note 3, at 1551 n.3 ("The stale evidence rationale is rooted in the premise that resolving claims on their merits is more likely if the evidence, including testimony based on recall, is produced closer in time to the event that gives rise to the claim."); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) ("Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims."); Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944).

49. *See* Kaufman & Wunderlich, *Just Measure of Repose*, *supra* note 3, at 1551 n.3 ("The. . . statute of limitations promotes judicial efficiency and conservation of judicial resources, [and] safeguards the accuracy of . . . judgments by requiring resolution . . .

While statutes of repose appear to be harsh arbitrary cut-offs incentivizing defendants to conceal their violations, they represent a legislative compromise balancing various interests.[50] Legislatures at both the state and federal level have implemented statutes of repose to limit a defendant's liability in furtherance of economic goals, such as keeping insurance premiums down and limiting the perpetual liability of manufacturers.[51] Limitation periods concerned with keeping insurance premium costs low seek to redress the increasing costs for medical malpractice insurance and the reluctance of insurance underwriters to underwrite medical professionals and ultimately are motivated by an interest in increasing the availability of quality health care options.[52] Alternatively, limiting manufacturer liability can increase the availability of affordable product liability insurance and thereby lower the price consumers' pay for products.[53] A possible justification for statutes of repose in securities law is the economic effect of reduced litigation costs for corporations. Litigation costs are ultimately passed down to the shareholders in the form of decreased stock values or decreased dividends.[54] Thus, while statutes of repose might preclude some shareholders from adjudicating their otherwise viable securities fraud claims, they may protect shareholders' economic interests by reducing the potential costs imposed on their investments.

5. Statutes of Limitations and Repose in Securities Law

The majority of claims in securities class actions are brought pursuant to Rule 10b-5[55] and Section 10(b)[56] of the 1934 Act.[57] While

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while the record is fresh.") (quoting Day v. McDonough, 547 U.S. 198, 205–06 (2006)).

50. Garris Ference, *Statutes of Repose and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution*, 36 ENVTL. L. REP. 10888, 10894 (2006) ("[L]imiting the time within which actions may be brought has in numerous cases been held to be a rational, nonarbitrary means of achieving economic ends.") (quoting Wayne v. Tenn. Valley Auth., 730 F.2d 392, 403 (5th Cir. 1984)).

51. *See id.*; *see also* Lamb v. Volkswagenwerk Aktiengesellschaft, 631 F. Supp. 1144, 1151 (S.D. Fla. 1986).

52. *See* Ference, *supra* note 50, at 10894.

53. *See* Spence v. Miles Lab., 810 F. Supp. 952, 963 (E.D. Tenn. 1992).

54. Kaufman & Wunderlich, *Just Measure of Repose*, *supra* note 3, at 1606 ("[S]cholars suggest that the costs of securities class actions—both the settlement and the litigation expenses of both sides—fall largely on the defendant corporation, and so its shareholders ultimately bear these costs indirectly.").

55.

Section 10(b) and Rule 10(b)-5 do not specify limitation periods within which claims must be brought, the Supreme Court has held that the limitation periods in Section 13 of the 1933 Act[58] extend to claims made

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> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2013).

56.

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j (2012).

57. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILING: 2012 YEAR IN REVIEW 1 (2013) ("In 2012, 85 percent of filings made Rule 10b-5 claims, whereas only 10 percent and 9 percent made Section 11 or Section 12(2) claims, respectively."), *available at* http://securities.stanford.edu/clearinghouse_research/2012_YIR/Cornerstone_Research_Securities_Class_Action_Filings_2012_YIR.pdf.

58.

> No action shall be maintained to enforce any liability created under section 11 or section 12(a)(2) . . . unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(a)(1) . . ., unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section

pursuant to Section 10(b) and Rule 10(b)-5 under the 1934 Act, in addition to claims arising under sections already specified in the 1933 Act, Sections 11, 12(a)(1), and 12(a)(2).[59] The limitation periods in Section 13 have been described as "a statute of limitations framed by a statute of repose."[60] They are "cumulative, not alternative."[61] Thus, a plaintiff must demonstrate that their cause of action was filed within a year of discovering the untrue statement or omission—or a year after they should have discovered the mistake through due diligence—and within three years after the security at issue was bona fide offered to the public.[62]

On July 30, 2002, the Sarbanes-Oxley Act of 2002 (the "Sarbanes-Oxley Act") was enacted.[63] The Sarbanes-Oxley Act effectively extended time bars on private rights of action that involve "a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws."[64] According to Section 804 of the Sarbanes-Oxley Act, the enumerated claims must be brought either within two years after the discovery of the facts constituting the violation, or five years after the violation took place.[65]

> 12(a)(1) . . . more than three years after the security was bona fide offered to the public, or under section 12(a)(2) . . . more than three years after the sale.

Section 13 of the 1933 Securities Act, 15 U.S.C. § 77m.

59. Lampf, Pelva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 359 (1991).

60. Joseph v. Wiles, 223 F.3d 1155, 1166 (10th Cir. 2000) (citing Sterlin v. Biomune Sys., 154 F.3d 1191, 1196 (10th Cir. 1998)).

61. LeCroy v. Dean Witter Reynolds, Inc., 585 F. Supp. 753, 760 (E.D. Ark. 1984).

62. *See id.*

63. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified at 28 U.S.C. §1658(b) (2012)).

64.

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of – (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.

28 U.S.C. § 1658(b) (2012).

65. *Id.*

Thus, the Sarbanes-Oxley Act extended the statute of repose from three years to five years."[66] However, the statutes of limitation and repose set forth in the Sarbanes-Oxley Act cannot be applied retroactively to revive claims extinguished prior to the Act's effective date of July 30, 2002.[67]

Thus, a plaintiff asserting a claim pursuant to Section 10 under the 1934 Act or Sections 11, 12(a)(1), or 12(a)(2) under the 1933 Act must file suit within a year of when they discover, or should have discovered, the violation, but if the cause of action accrued after July 30, 2002, they have two years under the Sarbanes-Oxley Act.[68] If the plaintiff does not file suit within three years – or five years if the Sarbanes-Oxley Act applies – after the initial public offering or sale, the statute of repose then bars their claims.[69] Class actions, however, present a dilemma. If an individual is a plaintiff, named or unnamed, in a class action filed within the applicable statutes of limitations and repose, and class certification is denied, then the individual's subsequent efforts to adjudicate his claims are at risk of being found untimely.[70] While the Supreme Court has held that statutes of limitations toll until the district court's denial of certification,[71] the courts have yet to apply the same tolling doctrine to statutes of repose.[72] Thus, a plaintiff's subsequent

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66. *Compare id.*, *with* Lampf, Pelva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 n.9 (1991). Since the Sarbanes-Oxley Act of 2002 applies to claims of "fraud, deceit, manipulation or a contrivance in contravention" of the requirements of the securities laws, 28 U.S.C. § 1658(b), courts only apply the limitations periods therein for claims that require a showing of "*scienter* and motive to defraud." *See In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 402, 413 (S.D.N.Y. 2005) (finding that the extended limitations periods in the Sarbanes-Oxley Act did not apply to section 18 claims since they do not require plaintiffs to plead scienter. The court noted a general consensus among district courts that the Sarbanes-Oxley Act was only applicable to claims requiring proof of intent as an element of the claim.).

67. Champion v. Homa, No. 3:03-CV-275-MEF, 2008 WL 8837534, at *12 (M.D. Ala. Mar. 31, 2008) (citing six other circuits that have held that the Sarbanes-Oxley Act's statute of limitations cannot revive stale claims).

68. *See Lampf*, 501 U.S. at 362–64; *see also* 28 U.S.C. §1658(b).

69. *See Lampf*, 501 U.S. at 362–64; *see also* 28 U.S.C. §1658(b).

70. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974).

71. *See id.* at 552–54.

72. *See* Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 100 (2d Cir. 2013); *see also IndyMac Investor Asks Supreme Court to Review Tolling of Statute of Repose*, 20 NO. 4 WESTLAW J. DERIVATIVES 7, at *1 (Jan. 17, 2014).

efforts may be time barred if they fall outside the three-year/five-year statute of repose.[73]

B. CLASS ACTIONS

A federal class action is a legal construct meant to increase judicial efficiency by avoiding the separate filing of similar claims.[74] Courts must determine whether an action may be maintained as a class action as soon as practicable after a person sues or is sued as a class representative.[75] When determining if a class action is appropriate, courts must verify that the requirements of the Federal Rules of Civil Procedure are met, specifically those outlined in Rule 23.[76] Sub-section 1 outlines the threshold requirements a putative class must meet for certification while Sub-section 2 discusses Rule 23(b) requiring that class action be preferable to individual action. Sub-section 3 then provides an overview of class action adjudication in securities law.

1. Rule 23(a): Getting over the Threshold

Rule 23(a) provides four threshold requirements for class certification: numerosity, commonality, typicality, and adequacy of representation.[77] To meet Rule 23(a)'s numerosity requirement the number of class members must be so large "that joinder of all members is impractical."[78] The requirements of commonality and typicality focus on the claims the class members assert.[79] While commonality requires that all putative class members present "questions of law or fact common to the class," typicality requires that all named class members assert claims or defenses typical of the class as a whole.[80] Finally, a

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73. *See IndyMac MBS*, 721 F.3d at 109.

74. "A federal class action is no longer an invitation to joinder but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions." *Am. Pipe*, 414 U.S. at 550 (internal quotations omitted).

75. FED. R. CIV. P. 23(c)(1)(a).

76. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974) (quoting Miller v. Mackey Int'l, 452 F.2d 424 (5th Cir. 1971)).

77. *See* FED. R. CIV. P. 23(a); Amchem Prods. v. Windsor, 521 U.S. 591, 613 (1997).

78. *See* FED. R. CIV. P. 23(a)(1).

79. *See* FED. R. CIV. P. 23(a)(2)–(3).

80. *See id*.

court must find that the named class members "fairly and adequately protect the interests of the class."[81]

2. Rule 23(b): Class Action Is Preferable to Individual Action

Once Rule 23(a) is satisfied, plaintiffs must demonstrate that class action is preferable to individual class members pursuing their claims separately.[82] Plaintiffs seeking class certification contend that individual actions may result in inconsistent adjudications and may establish incompatible standards of conduct.[83] Alternatively, a court may grant a certification order if individual adjudication of the claims at hand "would be dispositive of the interests of other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."[84] A class action lawsuit may also be certified in instances where a defendant "has acted or refused to act on grounds that apply generally to the class" or where the court determines "that the questions of law or fact common to class members predominate over any questions affecting only individual members."[85]

Since Rule 23(f) was adopted in 1998, parties have been able to challenge orders either denying or granting certification. [86] Consequently, a court of appeals may vacate a district court's certification order, so long as "the petition for permission to appeal is filed . . . within 14 days after the order is entered."[87]

3. Class Actions in Securities Law

In 1994, over 200 securities class actions were filed.[88] In an effort to reign in securities litigation, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA") and the Securities Litigation

81. *See* FED. R. CIV. P. 23(a)(4).
82. *See* FED. R. CIV. P. 23(b); *Amchem*, 521 U.S. at 613.
83. *See* FED. R. CIV. P. 23(b)(1)(A).
84. FED. R. CIV. P. 23(b)(1)(B).
85. FED. R. CIV. P. 23(b)(2)–(3).
86. *See* FED. R. CIV. P. 23(f) and advisory committee's note.
87. *See id.*
88. RICHARD PAINTER, MEGAN FARRELL & SCOTT ADKINS, FEDERALIST SOC'Y L. & PUB. POL'Y STUD., PRIVATE SECURITIES LITIGATION REFORM ACT: A POST-ENRON ANALYSIS 3–4 (2002), *available at* http://fedsoc.server326.com/pdf/PSLRAFINALII.PDF.

Uniform Standards Act of 1998 ("SLUSA").[89] The PSLRA applies to securities claims brought in federal court.[90] It added Section 27 of the 1933 Act and Section 21D of the 1934 Act.[91] The PSLRA aimed to decrease frivolous securities class actions by requiring qualification of the lead plaintiff, limiting attorney's fees, restricting pre-trial discovery, providing sanctions for frivolous lawsuits, and increasing pleading requirements so that plaintiffs must allege, with particularity, "facts giving rise to a strong inference that the defendant acted with the required state of mind."[92] While the PSLRA was enacted to preclude plaintiffs from filing frivolous securities class actions, studies indicate that the law did not actually chill litigation.[93] At first, PSLRA seemed to fulfill Congress' desired effect. The number of securities class actions filed following PSLRA's enactment dropped from approximately 191 in 1995 to approximately 119 in 1996.[94] This trend reversed soon thereafter. In 1997, approximately 174 securities class actions were filed.[95]

Since the PSLRA governs securities claims in federal court, plaintiffs sought to side-step PSLRA's additional hurdles by filing their securities fraud claims in state court.[96] Through SLUSA, Congress established a uniform set of procedural and substantive restrictions that would govern all securities fraud class action claims.[97] SLUSA prevents forum shopping by requireing all class action claimants alleging fraud in connection with the purchase or sale of securities to file in federal court.[98] Plaintiffs that fail to comply with SLUSA risk having their claims precluded.[99] For example, if a plaintiff files a state-law class action alleging misconduct covered by SLUSA in federal court, the defendant can move to dismiss the action, and the court must grant the

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89. *See* FEDERAL SECURITIES LAW, *supra* note 9, at 76.

90. *See id.*

91. *See* FRIEDMAN, *supra* note 16, at 83; BARTOS, *supra* note 15, at 225.

92. *See* BARTOS, *supra* note 15, at 225.

93. *See generally* PAINTER, FARRELL & ADKINS, *supra* note 88 (providing a statistical analysis of securities class action filings since PSLRA's enactment).

94. Mukesh Bajaj, Sumon C. Mazumdar, & Atulya Sarin, *Securities Class Action Settlements*, 43 SANTA CLARA L. REV. 1001, 1003 (2003).

95. *Federal Securities Class Action Litigation 1996-YTD*, STANFORD LAW, http://securities.stanford.edu/charts.html (last visited Apr. 18, 2014).

96. *See* FRIEDMAN, *supra* note 16, at 84.

97. *Id.*

98. *Id.*

99. John M. Wunderlich, *"Uniform" Standards for Securities Class Actions*, 80 TENN. L. REV. 167, 168 (2012).

motion.[100] Alternatively, if a plaintiff files a state-law class action claim covered by SLUSA in state court, the defendant may remove the action to federal court.[101] Once the SLUSA claim is properly in federal court, the defendant can move for dismissal and the court must grant the motion.[102]

II. A REVIEW OF *AMERICAN PIPE* AND ITS APPLICATION IN THE CIRCUIT COURTS

Part II of this Note reviews *American Pipe* tolling and explores the current circuit split between the Second and Tenth Circuits on whether or not *American Pipe* tolling can apply to the statute of repose in securities fraud class action claims. Section A outlines *American Pipe & Construction Co. v. Utah*[103] and discusses the rationale behind the court's holding concerning the tolling doctrine. Section B outlines *Joseph v. Wiles,*[104] a Tenth Circuit case, which held that *American Pipe* tolling applied to the statute of repose in securities fraud class action lawsuits. Section C outlines *Police and Fire Retirement Systems of City of Detroit v. IndyMac MBS, Inc.*,[105] a Second Circuit case, which held that *American Pipe* tolling could not toll the statute of repose in securities fraud class action lawsuits. This Part concludes with Section D, which gives an overview of the implications of the *Joseph* and *IndyMac* decisions.

A. *AMERICAN PIPE & CONSTRUCTION CO. V. UTAH*

Sub-section 1 describes the facts that gave rise to the *American Pipe* tolling doctrine. Sub-section 2 discusses the Supreme Court's rationale behind the *American Pipe* tolling doctrine decision. Finally, Sub-section 3 outlines developments to the *American Pipe* tolling doctrine.

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100. *Id.*
101. *Id.*
102. *Id.*
103. Am. Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974).
104. Joseph v. Wiles, 223 F.3d 95 (10th Cir. 2000).
105. Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95 (2d Cir. 2013).

1. Background of the Case

American Pipe concerned antitrust claims brought by the state of Utah on behalf of the public agencies of the state and local government who were end-users of pipes sold by defendants, American Pipe & Construction Co. ("American Pipe") and other such distributors.[106] On March 10, 1964, American Pipe and others were indicted by a federal grand jury for violations of Section 1 of the Sherman Act.[107] The indictment alleged that the Defendants restrained trade by conspiring to fix prices for the sale of steel and concrete pipes at auction and distributing the proceeds among the parties.[108] The Defendants pled *nolo contendere* to the allegations on June 19, 1964.[109] On June 23, the United States filed civil complaints in the United States District Court for the Central District of California against the same Defendants which resulted in a settlement.[110]

On May 13, 1969, eleven days before the expiration of the statute of limitations, the State of Utah brought civil claims against American Pipe in the United States District Court for the District of Utah pursuant to Section 1 of the Sherman Act claiming that petitioners conspired to illegally fix the prices of concrete and steel pipes.[111] Subsequently, the Judicial Panel on Multidistrict Litigation from Utah transferred the suit to the United States District Court for the Central District of California where the court held that the State did not meet the "numerosity" requirement under Rule 23(a)(1) and thus the lawsuit could not be maintained as a class action.[112] On December 12, 1969, more than 60 towns, municipalities, and water districts in the State of Utah filed motions with the Court to intervene in the State's action.[113] The district court denied these motions finding them untimely since the limitations period had run.[114] The Court of Appeals for the Ninth Circuit subsequently affirmed the district court's decision to deny leave to intervene as of right, but reversed the district court's decision to deny

106. *See Am. Pipe*, 414 U.S. at 540.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 540–41.
111. *Id.* at 542.
112. *Id.* at 542–43.
113. *Id.* at 543–44.
114. *Id.* at 544.

permissive intervention.[115] The Supreme Court granted certiorari to decide whether limitations periods toll for putative class members once a class action has been filed.[116]

2. A New Tolling Doctrine Emerges

The Supreme Court affirmed the Ninth Circuit's decision and held that the commencement of a class action tolls the statute of limitations for all timely intervenors.[117] The Court emphasized Rule 23's purpose of promoting judicial efficiency and determined that to hold otherwise would frustrate that purpose.[118] The opinion noted that the statute of limitations' underlying policy of ensuring fairness to defendants was preserved with the new tolling doctrine since commencement of the initial class suit put defendants on notice of the substantive claims and the number and generic identities of potential plaintiffs.[119] Although the new tolling doctrine expanded the court's power to toll statutes of limitations, the Supreme Court limited its holding to cases in which class action status was denied due to a failure to satisfy the Rule 23(a) numerosity requirement.[120]

3. Developments After American Pipe

In *Crown, Cork & Seal Co. v. Parker*,[121] the Supreme Court held that *American Pipe* tolling extended to all asserted members of the putative class and to non-class members who later file their own independent actions, not simply intervenors.[122] The *Crown* Court

115. *Id.* at 544–45.
116. *Id.* at 545.
117. *Id.* at 553.
118. *Id.*
119. *Id.* at 555.
120. *Id.* at 552–53.
121. 462 U.S. 345 (1983).
122. *See id.* at 352. However, the Circuit Courts are divided on whether *American Pipe* tolling applies to individuals who commence individual suits before the certification issue is resolved in an impending class action. *Compare* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1231 (10th Cir. 2008) (holding that *American Pipe* tolling applied to separate suits regardless of when they are filed), *with* Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568 (6th Cir. 2005) (concluding that "a plaintiff who chooses to file an independent action without waiting

maintained that Rule 23 encourages class members to remain passive and rely on the named plaintiffs to press their claims.[123] Since defendants are on notice as to the substantive claims and the number and generic identities of potential plaintiffs, tolling the statute of limitations for putative class members who do not seek intervention and individuals filing independent claims does not create the unfair surprise that a statute of limitations seeks to prevent.[124] Thus, with respect to securities fraud claims, filing a class action tolls the one-year statute of limitations period under Section 13 and the two-year period under Section 804 if the Sarbanes-Oxley Act controls for *all* putative class members during class certification.[125]

In *American Pipe*, the Supreme Court clearly held that the relevant statute of limitations tolls while the class awaits certification, however, the Court did not specify when tolling would end.[126] The *Crown* Court held that tolling ends when class certification is denied.[127] Recently, the United States Court of Appeals for the Fifth Circuit held that in the event that a class certification order is vacated, the running of the limitations periods resumes.[128] Generally, voluntarily dismissed claims are treated as though they never existed.[129] However, some courts have held that when a class action is voluntarily dismissed, *American Pipe* tolling can be invoked when an amended complaint is filed.[130]

Although *American Pipe* tolling has been extended to claims outside of the antitrust domain, lower courts have recognized certain

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for a determination on the class certification issue" of an impending class action cannot rely on *American Pipe* tolling).

123. *Crown*, 462 U.S. at 353.

124. *Id.*

125. *See id.* at 353–54; *Am. Pipe*, 414 U.S. at 553; *see also In re* Vivendi Universal, S.A. Sec. Litig., 281 F.R.D. 165 (S.D.N.Y. 2012) (holding that *American Pipe* tolling applied to the two-year statute of limitations in the Sarbanes-Oxley Act).

126. *See generally Am. Pipe*, 414 U.S. 538.

127. *See Crown*, 462 U.S. at 354.

128. Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 378 (5th Cir. 2013) (finding that vacated certification orders were essentially the same as decertification or a denial of certification).

129. *See In re* Direxion Shares ETF Trust, 279 F.R.D. 221, 236 (S.D.N.Y. 2012) (citation omitted).

130. Monroe Cnty. Emps. Ret. Sys. v. YPF Sociedad Anonima, No. 13 Civ. 842, 2013 WL 5548833, at * 3 (S.D.N.Y. Oct. 8, 2013) (quoting Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 731 F. Supp. 2d 850, 853 (E.D. Wis. 2010)). *But see Direxion Shares*, 279 F.R.D. at 236 (holding that because voluntarily dismissed claims are treated as though they do not exist, they cannot toll the statute of limitations.).

limitations. For example, *American Pipe* tolling can only be invoked if the plaintiff is bringing the same claims as those at issue in the original class action.[131] Similarly, plaintiffs cannot invoke *American Pipe* tolling if they seek to bring an action against defendants who were not defendants in the initial class action.[132] *American Pipe* tolling is generally allowed in cases where an original named plaintiff does not have standing.[133] However, where the named plaintiff clearly lacked standing to the extent that no reasonable class member would have relied on the filing of the class action, district courts may refuse to apply *American Pipe* tolling.[134]

B. THE TENTH CIRCUIT APPROACH: *JOSEPH V. WILES*

In *Joseph v. Wiles*, the Tenth Circuit was the first United States Court of Appeals to consider whether *American Pipe* tolling applied to the three-year statute of repose in Section 13 of the 1933 Act.[135] The court's decision distinguished the tolling in *American Pipe* from equitable tolling and held that the three-year statute of repose in Section

131. *See* Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988) ("[T]he pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class.").

132. Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568 (6th Cir. 2005) (holding that *American Pipe* tolling of limitation periods against a defendant by class action did not apply to a subsequent action against a different defendant, regardless of whether the clams arose out of the same or a similar transaction); Champion v. Homa, No. 3:03-CV-275-MEF, 2008 WL 8837534, at *11 (M.D. Ala. Mar. 31, 2008) ("The *American Pipe* doctrine is not without limits. First, only those defendants who were parties to the original class action can be deemed to have had the requisite notice of the claims asserted against them to be subject to the rule.").

133. The Third Circuit has held that *American Pipe* tolling applies where the original named plaintiff in the putative class lacked standing to pursue the claims. *See* McKnowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380, 385, 389 (3d Cir. 2002) ("[T]he class claims of intervening class members are tolled if a district court declines to certify a class for reasons unrelated to the appropriateness of the substantive claims for certification."). The Eleventh Circuit agreed with the Third Circuit's analysis in *Griffin v. Singletary*. 17 F.3d 356, 360 (11th Cir. 1994).

134. *In re* Morgan Stanley Mortg. Pass-Through Certificates Litig., 810 F.Supp. 2d 650, 669–70 (S.D.N.Y. 2011) ("*American Pipe* 'is predicated on the proposition that an intervenor that reasonably expected to be represented in the originally filed action' should be able to rely on the representatives to vindicate his rights.") (quoting Trief v. Dun & Bradstreet Corp., 144 F.R.D. 193, 202 (S.D.N.Y. 1992).

135. *See id.*

13 tolled during class certification.[136] Sub-section 1 gives a brief overview of the facts giving rise to the Tenth Circuit's decision while Sub-section 2 discusses the Tenth Circuit's rationale for extending *American Pipe* tolling to Section 13's statute of repose.

1. Background of the Case

Joseph concerned the public offering of convertible debentures by MiniScribe Corporation, a manufacturer of computer hard disk drives.[137] On May 21, 1987, MiniScribe made over $97 million in the public offering.[138] Subsequent to the public offering, Mr. Joseph purchased 250 of the debentures on the secondary market.[139] Approximately two years later, in March of 1989, MiniScribe announced that prior financial statements could not be relied upon due to irregularities in its business and accounting practices.[140] In June 1989, Mr. Joseph sold his debentures at a loss of $17,000.[141] In September 1989, an Independent Evaluation Committee report revealed widespread intentional fraud at MiniScribe resulting in material overstatements of revenues and earnings.[142] By late 1989, MiniScribe filed for Chapter 11 bankruptcy.[143]

As to be expected, a series of lawsuits ensued. Notably, on April 5, 1989, the first suit brought by debenture holders was filed as a class action in the District Court of Colorado, asserting claims pursuant to Section 10(b) of the Securities and Exchange Act of 1934.[144] Several other suits followed in various jurisdictions, with two suits of importance to Mr. Joseph's Tenth Circuit appeal. On May 9, 1989, a suit was filed in California state court asserting state law claims as well as claims under Section 11 of the Securities Act of 1933 on behalf of all MiniScribe securities purchasers, but contained no named plaintiffs who had purchased debentures.[145] On November 1, 1989 the complaint was

136. *Id*. at 1168.
137. *Id*. at 1157.
138. *Id*.
139. *Id*. at 1157, 1158.
140. *Id*. at 1157.
141. *Id*.
142. *Id*.
143. *Id*.
144. *Id*.
145. *Id*.

amended and claims under Section 11 were omitted.[146] The second suit of import to Mr. Joseph's claims was filed October 4, 1989. The October 4th suit, filed in a Colorado federal district court, asserted claims pursuant to Section 10(b) and Section 11 on behalf of common stock and debenture purchasers.[147] At a hearing on the motions to certify classes of shareholders and debenture purchasers, the district court held that it was not prepared to certify a debenture class in the instant proceeding and allowed the debenture holders thirty days to file a separate amended complaint.[148] Pursuant to the hearing, the district court certified a shareholder-only class in a related action in October 1990.[149]

On August 10, 1990, a complaint was filed in California state court with Mr. Joseph as a named plaintiff in this action.[150] The complaint asserted claims pursuant to Section 11 on behalf of all purchasers.[151] Subsequently, the action was removed and transferred to federal district court in Colorado, where Mr. Joseph moved to certify the class.[152] However, on October 24, 1991, the district court denied his motion on the grounds that Mr. Joseph lacked standing to pursue a Section 11 claim as an after market purchaser and, alternatively, that the class claims were barred by the statute of repose.[153] The shareholder action eventually settled in 1993.[154] On June 3, 1994, the district court held a hearing and ordered that remaining debenture purchasers file their claims.[155] Accordingly, on July 5, 1994, Mr. Joseph filed an amended complaint asserting his Section 10(b) and Section 11 claims.[156] Defendants moved to dismiss for failure to state a claim and the district court granted the motion finding that the claims were untimely and the allegations were insufficient for class certification.[157]

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146. *Id*.
147. *Id*.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 1157–58.
154. *Id.* at 1158.
155. *Id.*
156. *Id.*
157. *Id.*

Mr. Joseph appealed to the Tenth Circuit.[158] Most pertinent to this Note was Mr. Joseph's argument that his claims were timely because the applicable limitations periods should toll while class certification was pending.[159]

2. The Tenth Circuit's Rationale

The Tenth Circuit affirmed in part and reversed in part the district court's order and decision with respect to Mr. Joseph's claims.[160] The issue of importance to this Note is the Tenth Circuit's ruling with regards to Mr. Joseph's third argument: whether the statute of repose tolls during class certification for claims filed pursuant to Section 11.

Ultimately, the Tenth Circuit held that Mr. Joseph's Section 11 claim was timely because the applicable statute of repose in Section 13 of the 1933 Act tolls during class certification.[161] Defendants argued that precedent barred the court from applying equitable tolling principles to the statute of repose.[162] However, the Tenth Circuit found their arguments unavailing and distinguished equitable tolling from legal tolling.[163] While the Supreme Court has held that the statute of repose is not subject to equitable tolling,[164] the Court has not ruled as to whether or not statutes of repose are subject to legal tolling.[165] The Tenth Circuit held that the tolling rule in *American Pipe* was a rule of legal tolling, not equitable tolling, which allowed the court to apply *American Pipe* tolling to the statute of repose in Section 13.[166]

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158. *Id.*

159. *Id.*

160. *Id.* at 1169.

161. *Id.* at 1168.

162. *Id.* at 1166. The defendants cited *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), and *Anixter v. Home-Stake Production Co.*, 939 F.2d 1420, 1434–35 (10th Cir. 1991).

163. For example, equitable tolling is appropriate where "the claimant has filed a defective pleading during the statutory period . . . or where the plaintiff has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Joseph*, 223 F.3d at 1166–68. On the other hand, "tolling that occurs any time an action is commenced and class certification is pending" is legal tolling. *Id*.

164. *Lampf*, 501 U.S. at 363.

165. Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 100 (2d Cir. 2013).

166. *Joseph*, 223 F.3d at 1166–68.

In reaching this decision, the Tenth Circuit relied heavily on the *American Pipe* Court's emphasis on Rule 23.[167] The court held that tolling the statute of repose while a class is awaiting certification serves Rule 23's interests in judicial economy by eliminating the need for potential class members to file individual claims to secure their interests.[168] Furthermore, defendants were not unfairly prejudiced by applying *American Pipe* tolling to the statute of repose since the previous class actions put them on notice as to the substantive claims and the general number and identities of the parties that brought them.[169]

Although the Tenth Circuit was the first circuit court to apply *American Pipe* tolling to statutes of repose, district courts in other circuits have heavily relied on *Joseph* to support applying *American Pipe* tolling in the same context. In 2007, the Eastern District of Wisconsin adopted the *Joseph* rationale and held that *American Pipe* tolling applies to the three-year statute of repose in the Truth in Lending Act.[170] Two years later, in 2009, the First Circuit applied *American Pipe* tolling to the statue of repose in an employee benefits case.[171] In 2012, the District of New Jersey agreed with the Tenth Circuit's holding in *Joseph* and tolled the three-year statute of repose for Section 10(b) claims.[172] Each of these courts adopted the *Joseph* Court's distinction between equitable tolling and legal tolling and held that *American Pipe* tolling was legal tolling.[173]

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167. *Id.* at 1167.

168. *Id.*

169. *Id.* at 1167–68.

170. Andrews v. Chevy Chase Bank, 243 F.R.D. 313, 316–17 (E.D. Wis. 2007) (holding that the filing of a class action tolls the statute of repose, serves the purposes of Rule 23, and does not compromise the purposes of the three-year statute of repose because defendants were on notice of the nature of the claim and the identity of plaintiffs).

171. Arivella v. Lucent Techs., Inc., 623 F.Supp. 2d 164, 177 (D. Mass 2009) (holding that statutes of repose are meant to demarcate a set time frame in which a plaintiff must place a defendant on notice and that American Pipe tolling "accomplishes the exact same goal, rendering the statute of repose superfluous for the period of time that the class action is pending").

172. *In re* Merek & Co., 2012 U.S. Dist. Lexis 180707, at *44 (D.N.J. Dec. 20, 2012).

173. *See id.* at *41–42; *Andrews*, 243 F.R.D. at 316–17; *Arivella*, 623 F.Supp. 2d at 177 ("The differences between the forms of tolling is crucial because the animating principles of legal tolling are compatible with tolling a statute of repose, while the reasoning behind equitable tolling is not.").

C. THE SECOND CIRCUIT APPROACH: *POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT ET AL. V. INDYMAC MBS, INC.*

In contrast to the Tenth Circuit's decision in *Joseph*, this past summer, the Second Circuit held that *American Pipe* tolling could not apply to the three-year statute of repose in Section 13.[174] In *IndyMac MBS, Inc.*, the lead plaintiff and putative class members brought claims pursuant to Sections 11, 12(a), and 15 of the 1933 Act.[175] Allegedly, the defendants made fraudulent misrepresentations and omissions in over 100 various offerings regarding the sale of certain mortgage pass-through certificates under the related registration statements and prospectus.[176]

1. Background of the Case

Two separate class action lawsuits were brought against defendants in district court, one by the City of Detroit Police and Fire Retirement System ("Detroit PFRS") and one by the Wyoming State Treasurer and the Wyoming Retirement System (jointly, "Wyoming").[177] The actions were consolidated and Wyoming was appointed the lead plaintiff pursuant to PSLRA.[178] On June 21, 2010, the district court dismissed all claims arising from offerings of securities that were not purchased by Wyoming for lack of standing by the named Plaintiffs.[179] Subsequently, Detroit PFRS and other putative members of the class moved to intervene in the action to assert their claims with respect to the certificates not purchased by Wyoming.[180] Even though the three-year statute of repose had run its course, the intervenors argued that *American Pipe* tolling should apply.[181] In the event that *American Pipe* tolling could not be invoked, the intervenors sought to have their claims "relate back" to the initial action.[182]

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174. Police and Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 101 (2d Cir. 2013).
175. *Id.* at 101–02.
176. *See id.*
177. *Id*.
178. *Id*. at 102.
179. *Id*. at 103.
180. *Id*.
181. *Id*.
182. *Id*.

The district court denied both motions, holding that *American Pipe* tolling did not apply to the statute of repose and that relation back pursuant to Rule 15(c) could not be employed to extend the statute of repose.[183] Three of the five intervenors appealed to the United States Court of Appeals for the Second Circuit arguing that *American Pipe* tolling should toll the applicable statute of repose. [184]

2. The Second Circuit's Rationale

The Second Circuit refused to extend *American Pipe* tolling to Section 13's statute of repose noting that only the legislature can create an exception to a statute of repose.[185] The Second Circuit did not characterize the tolling in *American Pipe* as equitable or legal as other courts had when faced with the issue of applying the doctrine to statutes of repose.[186] The court saw no need to do so. If the tolling sanctioned in *American Pipe* was a form of equitable tolling, then it could not apply to statutes of repose.[187] The Second Circuit determined that statutes of repose created a substantive right in defendants to be free of liability after the time period Congress prescribed had passed.[188] Since the Rules Enabling Act dictates that general rules of practice and procedure "shall not abridge, enlarge or modify any substantive right,"[189] the Second Circuit held that the tolling in *American Pipe*, largely based on the

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183. *Id*.

184. *Id*. at 104.

185. *Id*. at 106 (citing P. Stolz Family P'ship v. Daum, 355 F.3d 92, 102 (2d Cir. 2004)).

186. *Id*. at 107–09.

187. *Id*. at 109 (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991)).

188. *Id.* at 106 (quoting Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996).

189.

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Rules Enabling Act, 28 U.S.C. §2072(a)–(b) (2012).

judicial efficiency interests in Rule 23, could not extend to statutes of repose, even if classified as legal tolling.[190]

Prior to the Second Circuit decision in *IndyMac*, other courts refused to apply *American Pipe* tolling to the statute of repose, but relied on a different rationale. One federal judge for the Southern District of New York adopted a statutory interpretation approach and held that *American Pipe* tolling could not be extended to Section 13's statute of repose because doing so would violate the plain language of Section 13.[191] Another federal judge for the Southern District of New York also previously held that *American Pipe* tolling was a form of equitable tolling and thus inapplicable to the statute of repose.[192]

D. THE AFTERMATH

Currently, the Tenth and Second Circuits are the only United States Courts of Appeals to rule as to whether or not *American Pipe* tolling applies to the statute of repose.[193] Each circuit court highlighted important policies in handing down their decisions.[194] After weighing Rule 23's interest in judicial economy against a defendant's interest in fair notice of the claims brought against him and the generic number and identities of the individuals bringing them, the Tenth Circuit held that the statute of repose is tolled during class certification.[195] By extending *American Pipe* tolling to statutes of repose, the *Joseph* ruling increases a plaintiff's opportunities to adjudicate their securities fraud claims.[196] Resolving securities fraud claims on their merits—rather than dismissing them on procedural grounds—furthers enforcement of the securities laws and has a greater deterrent effect on violators.[197] On the

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190. *IndyMac MBS, Inc.*, 721 F.3d at 108.

191. Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 623 (S.D.N.Y. 2012) ("By the plain language of section 13, the three-year statute of repose is absolute . . . . Simply put the words "[i]n no event" mean what they say.") (citing Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990)); *In re* Lehman Bros. Sec. & ERISA Litig., 800 F. Supp 2d 477, 483 (S.D.N.Y. 2011).

192. Plumbers, Pipefitters & MES Local Union 392 v. Fairfax Fin. Holdings, Ltd., 886 F. Supp. 2d 328, 333–35 (S.D.N.Y. 2012).

193. *IndyMac Investor Asks Supreme Court to Review Tolling of Statute of Repose*, 20 No. 4 WESTLAW J. DERIVATIVES 7 at *2 (Jan. 17, 2014).

194. *Cf.* Joseph v. Wiles, 223 F.3d 1155, 1157 (10th Cir. 2000); *IndyMac MBS, Inc.*, 721 F.3d 95.

195. *Joseph*, 223 F.3d at 1169.

196. *Id.* at 1166 (citing Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968)).

197. *See* Kaufman & Wunderlich, *supra* note 3, at 1608.

other hand, the Second Circuit weighed a defendant's substantive right of repose against the Rule 23's interests in judicial economy and refrained from tolling the statute of repose during class certification.[198] Refraining from tolling statutes of repose protects defendants from the prospect of perpetual liability.[199] By enforcing statute of repose in Section 13 as a cutoff, the *IndyMac* ruling may even prevent excessive securities fraud litigation costs from being passed on to shareholders.[200]

III. AN EQUITABLE SOLUTION REJECTING PROCESS OVER SUBSTANCE

March 10, 2014, the Supreme Court granted the IndyMac MBS investors' petition for a writ of certiorari.[201] Taking into consideration the canons of statutory construction and issues of the separation of powers, Section A of this Part discusses why courts should refrain from extending *American Pipe* tolling to statutes of repose. Section B will propose a legislative exception to the statute of repose for class actions that satisfy the statute of limitations so that viable claims are not precluded on procedural grounds. Section C demonstrates that state courts have also refrained from tolling statutes of repose and that state legislatures have created legislative exceptions to statutes of repose in cases involving fraud.

A. COURTS SHOULD NOT APPLY *AMERICAN PIPE* TOLLING TO THE STATUTES OF REPOSE IN SECTION 13 AND SECTION 804

Although the Tenth Circuit sought to enforce the judicial economy concerns in *American Pipe*, the court should not have tolled the statute of repose.[202] Inconvenience or hardship cannot justify a departure from

198. *IndyMac MBS, Inc.*, 721 F.3d at 108.

199. *See* Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds. See generally* Spence v. Miles Labs., Inc., 810 F. Supp. 952 (E.D. Tenn. 1992).

200. *See* Kaufman & Wunderlich, *supra* note 3 at 1605–06 ("[S]cholars suggest that the costs of securities class actions-both the settlement and the litigation expenses of both sides-fall largely on the defendant corporation, and so its shareholders ultimately bear these costs indirectly.").

201. Public Empees.' Ret. Sys. v. IndyMac MBS, Inc.,134 S. Ct. 1515 (2014).

202. Wilson v. Iseminger, 185 U.S. 55, 63 (1902) ("[W]hat shall be considered a reasonable time [to bring claims] must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of

the plain language of the statute.[203] Thus, determining whether *American Pipe* tolling is legal or equitable, or whether a defendant has a substantive right to repose, is unnecessary. Courts should simply rely on the plain language of the statute. This Note advocates that courts adopt a statutory interpretation approach and find that *American Pipe* tolling cannot apply to the statute of repose. Sub-sections 1 and 2 demonstrate that utilizing the tools of statutory interpretation preclude courts from tolling the statutes of repose in securities fraud claims. Sub-section 1 analyzes the plain language of Section 13 of the 1933 Act and 804 of the Sarbanes Oxley Act. Sub-section 2 employs the principle of statutory construction that prohibits interpreting statutes in a way that makes part of the statute superfluous or void. Sub-section 3 shows that, aside from adhering to the correct statutory interpretation of Sections 13 and 804, courts should not toll the statutes of repose in securities fraud class actions because the legislature intended for them to be a firm deadline.

1. The Plain Language of Section 13 and Section 804 Precludes Courts from Tolling the Statutes of Repose for Securities Fraud Class Actions

The first step in statutory interpretation is to look to the language of the statute and determine whether the language at issue has a plain and unambiguous meaning.[204] The language of the statute of repose in Section 13 of the 1933 Act is clear. "*In no event* shall any such action be brought to enforce a liability created under Section 11 or Section 12(a)(1) . . . more than three years after the security was bona fide offered to the public."[205] The language in Section 804 of the Sarbanes-Oxley Act of 2002 is equally clear.[206] The judiciary is not at liberty to create an exception to an unambiguous legislative decree.[207] To do so

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legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice.").

203. Amy v. Watertown, 130 U.S. 320, 324 (1889) (noting that the general rule is the judiciary could not create an additional exception to the applicable statute of limitations that was not among those already articulated in the statute).

204. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

205. 28 U.S.C. § 1658 (2012) (emphasis added).

206. *Id*. ("[M]ay be brought *no later than* . . .") (emphasis added).

207. Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013) ("[A] statute of repose is subject only to legislatively created exceptions.") (citing P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004)).

would be judicial legislation.[208] Courts are only granted the authority to interpret legislative decrees and determine their constitutionality; they cannot modify them at their discretion.[209] The words "[i]n no event" in Section 13 mean just that.[210] Since the language of Section 13 and Section 804 is clear and unambiguous, judicial inquiry as to whether the statute of repose can be tolled should end here.[211]

2. Tolling the Statutes of Repose in Securities Fraud Class Actions Would Contravene Principles of Statutory Construction

Statutes should be interpreted so that so that each clause, sentence, or word is meaningful.[212] Applying *American Pipe* tolling to statutes of repose would render the phrases "in no event", in Section 13, and "not later than", in Section 804, void and insignificant. Furthermore, since the one-year/two-year period is subject to equitable tolling principles, any interpretation that does not consider the three-year period, in Section 13, and the five-year period, in Section 804, an absolute

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208. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 307–08 (1993) ("Adherence to these restraints on judicial review preserves to the legislative branch its rightful independence and its ability to function. The restraints have added force where a legislature must engage in a process of line drawing . . ."); Turner v. Safley, 482 U.S. 78, 85 (1987) ("Separation of powers concerns counsel a policy of judicial restraint."); *see also* Morgan v. Des Moines, 60 F. 208, 209 (8th Cir. 1894) (holding that the judiciary could not import an exception to the statute of limitations that Congress did not intend; "[t]o do so would be judicial legislation . . .").

209. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.").

210. Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624 (S.D.N.Y. 2012) (citing Short v. Belleville Shoe Mfg. Co., 908 F. 2d 1385, 1391 (7th Cir. 1990)).

211. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)).

212. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (stating that it is a "cardinal principle of statutory construction" that a statute should be interpreted so that "no clause, sentence, or word [is] superfluous, void, or insignificant.") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotations omitted)).

limitation would make the language outlining those limitation periods superfluous.[213]

3. Inquiry into the Legislative Intent Precludes Court from Tolling Statutes of Repose in Securities Fraud Class Actions

In the event a statute's language is ambiguous, the inquiry turns to the congressional intent.[214] To determine congressional intent, the court must look to the policies underlying the limitation periods.[215] The language of Section 13 and Section 804 is clear and unambiguous.[216] However, it is apparent Congress intended for the statutes of repose to completely extinguish a plaintiff's claim.[217] The Tenth Circuit erred when it examined the purpose of Rule 23 to determine if tolling should be permitted rather than Congress' purpose for creating the three-year statute of repose.[218] The Second Circuit correctly found that Congress intended the three-year period in Section 13 to be an absolute limitation.[219] Senate and House conference reports reveal Congress was dissatisfied with the limitations periods in Section 13, but was wary of

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213. Summer v. Land & Leisure, Inc., 664 F.2d 965, 968 (5th Cir. 1981) ("Otherwise [Section 13] would create a limitation period for all suits of one year from the time discovery of the untrue statements or omissions should have been made, and the three year provision would serve no purpose at all.") (internal quotation omitted).

214. *See* United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008).

215. Burnett v. N.Y.C. Ry. Co., 380 U.S. 424, 427 (1965).

216. Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624, 627 (S.D.N.Y. 2012) (citing Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990)).

217. S. REP. NO. 107–146, at 24 (2002); 148 Cong. Rec. H5462-02 (daily ed. July 25, 2002) (statement of Rep. Jackson-Lee); 148 Cong. Rec. S7350-04 (daily ed. July 25, 2002) (statement of Sen. Gramm).

218. Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 107 (2d Cir. 2013) ("[T]he Supreme Court in *Lampf* noted that Section 13's three-year limitation is a period of repose inconsistent with tolling and reiterated that the purpose of the 3-year limitation is clearly to serve as a cutoff.") (internal citations omitted).

219. *Id.*; *see* Maxwell v. LaBrunerie, 731 F. Supp. 358, 361 (W.D. Mo. 1989) (citing Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1308 (9th Cir. 1982)); Armbrister v. Roland Int'l Corp., 667 F. Supp. 802, 823 (M.D. Fla. 1987); Antinore v. Alexander & Alexander Servs., 597 F. Supp. 1353, 1356 (D. Minn. 1984) (citing Engl v. Berg, 511 F. Supp. 1146, 1150 (E.D. Pa. 1981) and Turner v. First Wis. Mortg. Trust, 454 F. Supp. 899, 911 (E.D. Wis. 1978)); Brick v. Dominion Mortg. & Realty Trust, 442 F. Supp. 283, 289–91 (W.D.N.Y. 1977); Cowsar v. Reg'l Recreation, Inc., 65 F.D.R. 394, 397 (M.D. La. 1974).

the potential for abusive litigation.[220] The Senate explicitly noted that the five-year statute of repose in the Sarbanes-Oxley Act should not be subject to equitable tolling.[221] Prior to the Sarbanes-Oxley Act extension, Congress failed to extend the statute of limitations when passing PLSRA and SLUSA despite a noted dissatisfaction with the Supreme Court's decision in *Lampf v. Gilbertson* to create the current one-year limitations and three-year repose periods for securities fraud claims.[222] Congress's reluctance to alter the limitations periods in place prior to the Sarbanes-Oxley extension, coupled with the concern for abusive litigation, evinces the legislature's interest in creating an absolute bar to untimely claims rather than allowing all viable claims to be adjudicated.[223]

B. CONGRESS SHOULD AMEND THE SECURITIES ACTS TO CREATE AN EXCEPTION TO THE STATUTES OF REPOSE IN SECURITIES FRAUD CLASS ACTIONS

This Note calls for congressional action to rectify the procedural impediments plaintiffs face when opting to bring their securities fraud claims in a class action. Congress should create an exception to the statutes of repose in Section 13 of the 1933 Act and Section 804 of the Sarbanes-Oxley Act to permit *American Pipe* tolling while a class awaits certification. Sub-section 1 gives an example of a current legislative exception to a statute of repose while Sub-section 2 explains why an exception to the statute of repose is the most effective option for remedying procedural impediments to securities fraud class actions.

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220. *See* 148 Cong. Rec. H5462-02 (daily ed. July 25, 2002) (statement of Rep. Jackson-Lee) and 148 Cong. Rec. S7350-04 (daily ed. July 25, 2002) (statement of Sen. Gramm).

221. S. REP. NO. 107-146, at 24 (2002).

222. S. REP. No. 105-182 16–17, 19 (1998) (noting that the PSLRA's failure to extend the statute of limitations applicable to securities fraud cases was one of its shortcomings).

223. *See* S. REP. No. 105-182 at 16–17, 19 (1998); *see also* 148 Cong. Rec. H5462-02 (daily ed. July 25, 2002) (statement of Rep. Jackson-Lee); 148 Cong. Rec. S7350-04 (daily ed. July 25, 2002) (statement of Sen. Gramm).

1. The Statute of Repose Exception in GARA

In the General Aviation Revitalization Act of 1994 ("GARA"),[224] Congress provided for four exceptions to GARA's 18-year statute of repose: the fraud exception, the medical emergency exception, the not aboard the aircraft exception, and the written warranty exception.[225] In practice, the fraud exception is GARA's most litigated exception.[226] While objectors argue that GARA and the Securities Acts are not analogous, Congress enacted both with policies geared towards protecting public consumers.[227] GARA seeks to protect the public interests by regulating small commercial airlines,[228] while Congress implemented the securities acts to offer shareholders greater protections in the pre-reform securities market.[229]

2. A Statutory Exception is the Most Efficient Solution to Overcoming Procedural Obstacles to Viable Claims

Statutory exceptions to statutes of repose allow plaintiffs greater opportunities to adjudicate their claims. Thus, a statutory exception to the statute of repose for securities fraud cases would further the purpose of the Securities Acts and shareholder protection through regulation and agency oversight. An exception similar to the GARA misrepresentation exception would not prejudice defendants with the unfair surprises

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224. General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

225. *See id*.; *see also* Franklin F. Bass & Robert Modica, *The General Aviation Revitalization Act: A BriefOoverview*, WILSON ELSER (2006), *available at* http://www.wilsonelser.com/files/repository/GARA_April2006.pdf.

226. *See* Bass & Modica, *supra* note 226.

227. *See* General Aviation Revitalization Act of 1994, Pub. L. 103-298, 108 Stat. 1552; s*ee also* Securities Act of 1933 § 2, 15 U.S.C. § 77b(a) (2012).

228.

> The Secretary of Transportation must consider factors such as the public interests in:
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> (4) the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices . . . (7) developing and maintaining a sound regulatory system that is responsive to the needs of the public . . . (9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation . . .
>
> General Aviation Revitalization Act of 1994, 49 U.S.C. § 40101(2012).

229. *See* FEDERAL SECURITIES LAW, *supra* note 9, at 1; Aguilar, *supra* note 10.

statutes of repose aim to avoid.[230] Prior class actions dismissed on procedural grounds put defendants on notice as to the number and generic identities of possible plaintiffs and the claims they are likely to bring.[231] Since plaintiffs must still satisfy the one/two year statutes of limitations, a class action exception to the statute of repose would not give plaintiffs free reign to pursue stale claims and expose defendants to perpetual liability.[232]

While others may advocate an extension of the statutes of repose, such a compromise would not suffice. Admittedly, an extension would likely allow more individuals to bring claims after class certification is denied. However, it would not extend the same opportunity to all shareholders that creating a statutory class action exception would. A congressional amendment allowing an exception to the statutes of repose for class action securities fraud claims would provide a bright-line rule for district courts and courts of appeals satisfying a defendant's interest in fair and timely notice and a plaintiff's interest in a fair opportunity to vindicate his rights.

C. STATE COURT AND LEGISLATIVE EXAMPLES

Although securities fraud claims are within the jurisdiction of federal courts, a look at state court decisions indicates that state courts have routinely refused to toll statutes of repose. To avoid viable claims

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230. GARA's fraud exception to its 18-year statute of repose allows claimants who plead:

> with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered . . . .

49 U.S.C. § 40101.

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

232. *See* Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 555 (1974).

from being precluded on procedural grounds, state legislatures have carved out exceptions to statutes of repose, especially in claims involving fraudulent behavior by defendants. Sub-section 1 of this Section outlines state cases where the court refused to toll the statute of repose. Sub-section 2 gives examples of various state legislative exceptions to statutes of repose.

1. State Courts Refuse to Toll Statutes of Repose

State supreme courts refuse to toll statutes of repose, even in cases where defendants have committed fraud. In *Albano v. Shea Homes Ltd. Partnership*, the Supreme Court of Arizona held that filing a motion for class certification in securities fraud claims does not toll the statute of repose for individual class members.[233] State courts also typically refrain from tolling statutes of repose in fields outside of securities regulation. For example, Arkansas has refrained from applying the state's "repair" tolling doctrine to the five-year statute of repose for claims arising from defective construction, even in cases where the defendant fraudulently concealed the defective construction.[234] In declining to toll statutes of repose, the states have recognized that the judiciary's duty is to apply the law as it is, and not as they believe it should be.[235]

2. State Legislatures Provide Exceptions to Statutes of Repose in Claims

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233. Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360 (D. Ariz. 2011). Initially, the United States District Court for the District of Arizona held that Arizona's statute of repose barred the plaintiff's claim. *Id.* The plaintiff appealed and the Ninth Circuit certified the question to the Supreme Court of Arizona. Albano v. Shea Homes Ltd. P'ship, 634 F.3d 524 (9th Cir. 2011).

234. First Electric Coop. Corp. v. Black, Corley, Owens & Hughs, P.A., 2011 Ark. App. 447, at *4 (Ct. App. 2011) ("[O]ur supreme court has identified the five-year-limitations period in section 16-56-112(a) as a statute of repose. A statute of repose . . . is an absolute time limit beyond which liability no longer exists and is not tolled for any reason. . .") (internal citations omitted)).

235. *See id.* at *4–5 ("[The] supreme court has consistently refused to graft judicially created exceptions onto the statute of repose . . . we are hesitant to impose on [the statute of repose] any construction not warranted by its own clear terms."); Rosenberg v. Falling Water, Inc., 709 S.E.2d 227 (Ga. 2011) (affirming the lower court's decision to grant summary judgment and holding that the statute of repose cannot be tolled, even in cases where plaintiffs allege the defendant fraudulently concealed a defect in the construction of their patio and the plaintiff was injured after the statute of repose had passed).

Involving Fraud

States legislatures have also sought to remedy the harsh results of statutes of repose in fraud cases by carving out statutory exemptions to statutes of repose for specific claims, such as claims of fraud, intentional misrepresentation, or gross negligence.[236] In Tennessee, for example, the legislature created an exception to the statute of repose for health care liability actions.[237] The statute of repose can toll in actions where the statute of limitations has been satisfied and the defendant fraudulently concealed his violation.[238] Similarly, the Minnesota legislature has provided an exception to the ten-year statute of repose for injury claims arising from construction services when fraud is involved.[239] In Arizona, the legislature included an exception to the twelve-year statute of repose in product liability cases where the cause of action is based on the manufacturer or seller's negligence or a breach of express warranty.[240] Mississippi's legislature adopted a broad exception to limitation periods in cases where the defendant fraudulently concealed the cause of action.[241] Since most state statutory exceptions require fraudulent action or concealment by defendants, state exceptions

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236. *See* Alan R. Levy, Buckley & Curtis, *Limited Respite is Found in Statutes of Repose*, *in* FOR THE DEFENSE (2010), *available at* http://buckleyandcurtis.com/articles/levy-articles/dri-repose-article.pdf.

237. TENN. CODE ANN. § 29-26-116(a)(3) (2014).

238. *Id.*

239. MINN. STAT. ANN. § 541.051 (2014).

240. ARIZ. REV. STAT. §12-551 (2014). Similarly, Colorado has a legislative exception for products liability claims where injuries were caused by hidden defects or prolonged exposure to hazardous materials, or if the manufacturer, seller, or lessor intentionally misrepresented or fraudulently concealed material facts regarding the product that proximately caused the injury. COLO. REV. STAT. ANN. § 13-80-107 (2014).

241.

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

MISS. CODE ANN. §15-1-67 (2014). The Mississippi statute has been held to extend to statutes of repose. *See* Windham v. Latco of Miss., Inc., 972 So. 2d 608, 613–14 (Miss. 2008).

to statutes of repose evince a concern for inequitable results that allow defendants to escape liability while injured plaintiffs are left with no legal recourse.[242]

CONCLUSION

While the statute of repose for securities fraud claims precludes meritorious class action claims from adjudication, the judiciary should not be the branch to create an exception for securities class actions. The plain language of Section 13 and Section 804's statutes of repose is clear and Congress's intent is apparent: the judiciary cannot exercise its discretion to toll the statute of repose during class certification.[243] Therefore, this Note encourages Congress to amend the 1933 Act and the Sarbanes-Oxley Act and create an exception to the statutes of repose for securities fraud class actions allowing *American Pipe* tolling in cases where the initial class action was filed within the statute of limitations.[244] Such an exception would satisfy a defendant's right to fair notice of the plaintiffs and their claims and their interest in avoiding perpetual liability while protecting a plaintiff's right to pursue legal recourse in a timely manner.[245]

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242. *See Windham*, 972 So. 2d 608.

243. *See* Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624, 627 (S.D.N.Y. 2012) (citing Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1391 (7th Cir. 1990)); *see also* Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 107 (2d Cir. 2013).

244. *See supra* Part III.B.

245. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554–55 (1974).