

## St. John's Law Review

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Volume 87  
Number 1 *Volume 87, Winter 2013, Number 1*

Article 7

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April 2014

### Paying the Toll To Be Class Member: The Impact of the American Pipe Doctrine on Section 13 of the Securities Act of 1933

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#### Recommended Citation

Denberg, Bryan (2013) "Paying the Toll To Be Class Member: The Impact of the American Pipe Doctrine on Section 13 of the Securities Act of 1933," *St. John's Law Review*. Vol. 87 : No. 1 , Article 7.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol87/iss1/7>

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# **PAYING THE TOLL TO BE CLASS MEMBER: THE IMPACT OF THE *AMERICAN PIPE* DOCTRINE ON SECTION 13 OF THE SECURITIES ACT OF 1933**

BRYAN DENBERG<sup>†</sup>

## INTRODUCTION

In light of the rampant, disingenuous practices revealed within the financial industry over the past decade, the number of securities class action lawsuits filed has significantly increased.<sup>1</sup> Claims filed under Sections 11 and 12 of the Securities Act of 1933 most often take the form of class actions because of the minimal incentive a single claimant has to bring a suit on his or her own.<sup>2</sup> The effects of these class action suits are severe and threaten the stability of our economy.<sup>3</sup> Because of the costs and uncertainty associated with class action litigation of this magnitude, it is in a defendant's best interest to settle, and large settlements are usually reached as a result.<sup>4</sup>

A class member may pursue a number of different paths to maintain his or her rights. As a class member: (1) one may allow the class action to represent his or her rights and be bound by the judgment rendered in the class action suit;<sup>5</sup> (2) before or after

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<sup>†</sup> Notes and Comments Editor, *St. John's Law Review*; J.D., 2013, St. John's University School of Law; B.S., 2009, Indiana University-Bloomington. Thank you to Professor Robert Ruescher and Nick Allen for their guidance in writing this piece. I would also like to thank Professor Jeremy Weintraub for all of his support, patience, and assistance. Lastly, I would like to thank Professor Michael Perino for the integral role he played in my decision to write this Note.

<sup>1</sup> Jordan Milev et al., *United States: Recent Trends in Securities Class Action Litigation: 2011 Mid-Year Review*, MONDAQ (May 13, 2013), <http://www.mondaq.com/unitedstates/x/140610/Securities>; see also U.S. CHAMBER INST. FOR LEGAL REFORM, *SECURITIES CLASS ACTION LITIGATION: THE PROBLEM, ITS IMPACT, AND THE PATH TO REFORM 5* (2008).

<sup>2</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 1, at 3.

<sup>3</sup> *Id.* at 9.

<sup>4</sup> *Id.* at 6–7.

<sup>5</sup> See FED. R. CIV. P. 23(c)(3).

class certification is determined, one may opt out and bring an individual claim against the defendant;<sup>6</sup> or (3) after class certification has been denied, one may intervene so as to have his or her perspectives on the matter heard.<sup>7</sup> A class member that opts out is no longer a member of that class and will not be bound by any judgment or be entitled to any proceeds that may be achieved in the class action.<sup>8</sup>

Section 13 of the Securities Act of 1933 ("1933 Act") defines two time limits for which claims pursuant to Sections 11 and 12 of the Act may be brought.<sup>9</sup> The outermost limit prescribed is three years from when a "security [is] bona fide offered to the public, or [sold]."<sup>10</sup> Different interpretations of Section 13's effect have caused a split among courts.<sup>11</sup> The circumstances that have caused inconsistent rulings are when a class action, alleging claims under Section 11 or 12 of the 1933 Act, had been commenced within the three-year period provided for in Section 13; however, while the class action is pending and after the three-year repose period runs, a class member moves to intervene or brings a separate, individual claim against the same defendant. Should the court grant the motion to intervene or permit the individual claim to be brought given that the action was commenced more than three years from the offering or sale of the security upon which the claim is based?

Courts are split as to the answer. Some courts have held that the filing of a class action suspends the running of the three-year statute of repose until class certification has been denied or until a claimant opts out of the class.<sup>12</sup> In contrast, other courts have held that Section 13's statute of repose is an absolute bar to

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 23(d)(1)(B)(iii).

<sup>8</sup> *See, e.g.*, *Mayfield v. Barr*, 985 F.2d 1090, 1093 (D.C. Cir. 1993).

<sup>9</sup> 15 U.S.C. § 77m (2006).

<sup>10</sup> *Id.*

<sup>11</sup> *Compare Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000) (holding that Section 13 allows tolling for individual claims while a potential class action is awaiting certification), *with Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011) (holding that Section 13 does not allow tolling for individual claims).

<sup>12</sup> *Joseph*, 223 F.3d at 1168; *Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 380–82 (S.D.N.Y. 2011); *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 666–68 (S.D.N.Y. 2011).

actions brought more than three years from the start of the repose period and that it may not be extended or suspended in any way.<sup>13</sup>

This Note argues that the three-year statute of repose in Section 13 of the 1933 Act runs uninterrupted from the bona fide offering or sale of a security and operates as an absolute bar, extinguishing claimants' rights to bring an action after the three-year period ends. Part I of this Note provides an overview of the early legislation on which the 1933 Act is based and surveys the events that led to the Act's current form. Thereafter Part I discusses four Supreme Court cases that courts are struggling to apply consistently in the context of claims governed by Section 13. Part II identifies the significance of how the doctrine established by the Supreme Court in *American Pipe* is characterized and the range of consequences the different classifications carry with respect to Section 13's statute of repose. Part II also analyzes the conflicting interpretations of the doctrine articulated in *American Pipe*, which has led to the current split among courts. Lastly, Part III argues that Section 13's statute of repose is not susceptible to what has become known as the *American Pipe* doctrine. Part III maintains that regardless of whether or not the *American Pipe* doctrine is recognized as a tolling doctrine, Section 13's statute of repose bars actions brought pursuant to Sections 11 and 12 that are initiated more than three years after the bona fide offering or sale of a security.

## I. THE FEDERAL SECURITIES LAWS AND SUPREME COURT PRECEDENT

This section provides a synopsis of the laws that helped shape the Securities Act of 1933 and summarizes the Supreme Court's rulings that have influenced the split among courts. Part I.A offers an overview of the early British and American laws upon which our country's current federal securities laws are based. Part I.B then excerpts the relevant provision of the 1933 Act, as well as describes the events that led to the passage of the 1933 Act, the reasons for its enactment, and the noteworthy

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<sup>13</sup> *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 482–83 (S.D.N.Y. 2011); *Footbridge Ltd. Trust*, 770 F. Supp. 2d at 626–27.

amendments made to it. Part I.C outlines the four Supreme Court cases that have influenced the courts' inconsistent rulings regarding Section 13's effect.

#### A. *British Legislation and the "Blue Sky" Laws*

The framework for the federal securities laws took its earliest form when Parliament passed the Companies Act in 1844 ("1844 Act").<sup>14</sup> At the time, the 1844 Act was the first modern prospectus requirement enforced by a government body upon corporations.<sup>15</sup> The 1844 Act "introduced the principle of mandatory disclosure through the registration of prospectuses inviting subscriptions to corporate shares," but it was not until the Companies Act of 1867 that prospectus disclosures had to conform with a detailed prescription.<sup>16</sup> These laws held corporate directors and promoters civilly liable for falsities in a prospectus.<sup>17</sup>

Securities regulation in the United States first developed at the state level.<sup>18</sup> Although Massachusetts passed a statute in 1852 regulating the stock and bond issues within the railroad industry,<sup>19</sup> Kansas is credited with passing the first general securities law in 1911, when the state implemented a comprehensive licensing system.<sup>20</sup> The Kansas statute required

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<sup>14</sup> 1 LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION 2-3 (6th ed. 2011).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* (holding actors civilly liable for "untrue statements in the prospectus without proof of *scienter*"); see also *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (*Scienter* denotes "a mental state embracing intent to deceive, manipulate, or defraud.").

<sup>18</sup> 1 LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION 48 (4th ed. 2006).

<sup>19</sup> *Id.* at 48-49 ("No railroad company . . . shall begin to build its road until a certificate shall have been filed . . . stating that all of the stock named in its charter has been subscribed for by responsible parties, and that twenty per cent of the par value of each and every share of the stock thereof has been actually paid into the treasury of the company." (quoting 1852 Mass. Acts 208)).

<sup>20</sup> *Id.* at 53 (That is where "the term *blue sky law* first came into general use to describe legislation aimed at promoters who 'would sell building lots in the blue sky in fee simple.'"); *id.* at 53 n.20 (first alteration in original) ("[I]f said bank commissioner finds that such articles of incorporation or association, charter, constitution and by-laws, plan of business or proposed contract, contain any provision that is unfair, unjust, inequitable or oppressive to any class of contributors, or if he decides from his examination of its affairs that said investment company . . . does not intend to do a fair and honest business . . . he shall notify such

the registration of securities and securities salesmen, the filing of semi-annual reports, bookkeeping standards—subject to inspection, and standards for the denial of permits to sell securities.<sup>21</sup> Kansas’s model led to the passage of “blue sky” laws, state implemented prospectus requirements, of one kind or another in almost every state.<sup>22</sup>

### B. *The Securities Act of 1933*

In the wake of the 1929 stock market crash,<sup>23</sup> Congress established the first federal regulation of securities in the United States when it passed the Securities Act of 1933.<sup>24</sup> The bill was drafted and signed into law after President Roosevelt wrote a message to Congress calling for legislation requiring full disclosure to the public of material information relevant to securities to be sold.<sup>25</sup> The 1933 Act, often termed “the truth-in-securities act,”<sup>26</sup> became effective in May 1933 and put in place a mandatory corporate disclosure system.<sup>27</sup> In substance, the Act provided for “the filing of a registration statement and the use of

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investment company in writing of his findings, and it shall be unlawful for such company to do any further business in this state.” (internal quotation marks omitted)).

<sup>21</sup> *Id.* at 53.

<sup>22</sup> *Id.* at 54.

<sup>23</sup> *See id.* at 255.

<sup>24</sup> *See id.* at 256–57.

<sup>25</sup> *Id.* at 255–56.

I recommend to the Congress legislation for Federal supervision of traffic in investment securities in interstate commerce.

In spite of many State statutes the public in the past has sustained severe losses through practices neither ethical nor honest on the part of many persons and corporations selling securities.

. . . [T]he Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound . . . . There is, however, an obligation upon us to insist that every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information, and that no essentially important element attending the issue shall be concealed from the buying public.

. . . .

The purpose of the legislation I suggest is to protect the public with the least possible interference to honest business.

*Id.* at 266–67 (quoting President Roosevelt, Message to Congress (Mar. 29, 1933)).

<sup>26</sup> *Id.* at 268.

<sup>27</sup> *See id.* at 269. “The term *mandatory corporate disclosure system* refers to the information firms must disseminate when issuing new securities under the Securities Act of 1933.” *Id.* at 269 n.21 (alteration in original).

a prospectus in connection with the public offering of securities, and subjected the issuer and those connected with the offering to civil and criminal liabilities in the event of material misstatements or omissions.”<sup>28</sup>

In 1934, Congress made two significant modifications to the 1933 Act. First, it reduced the repose period for Section 13's statute of repose from ten years to three years.<sup>29</sup> Second, Congress established the Securities and Exchange Commission (“SEC”)<sup>30</sup> and charged it with the responsibility to: (1) “interpret federal securities laws”; (2) “issue new rules and amend existing rules”; (3) “oversee the inspection of securities firms, brokers, investment advisers, and ratings agencies”; (4) “oversee private regulatory organizations in the securities, accounting, and auditing fields”; and (5) “coordinate U.S. securities regulation with federal, state, and foreign authorities.”<sup>31</sup>

Section 13, entitled “Limitation of [A]ctions,” is a timing provision that imposes a limitation on the time frame within which a claim must be filed under Sections 11 and 12 of the Act.<sup>32</sup> By enacting Section 13, lawmakers created a “two-tiered limitations period—a one-year statute of limitations framed by a three-year statute of repose.”<sup>33</sup> Section 13 reads, as amended:

No action shall be maintained to enforce any liability created under section [11] or [12(a)(2)] of this title 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)] of this title, 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 [12(a)(1)] of this title more

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<sup>28</sup> *Id.* at 262.

<sup>29</sup> See 15 U.S.C. § 77m (2006).

<sup>30</sup> 15 U.S.C. § 78d(a) (2006 & Supp. IV 2010).

<sup>31</sup> SEC, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, <http://www.sec.gov/about/whatwedo.shtml> (last modified Mar. 8, 2013).

<sup>32</sup> 15 U.S.C. § 77m. Sections 11 and 12 “impose civil liability for false representations made in a registration statement, prospectus or oral communication used in connection with the offer or sale of a security.” *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 622 (S.D.N.Y. 2011); see also 15 U.S.C. §§ 77k, 77l (2006).

<sup>33</sup> *Footbridge*, 770 F. Supp. 2d at 622–23 (citing 15 U.S.C. § 77m).

than three years after the security was bona fide offered to the public, or under section [12(a)(2)] of this title more than three years after the sale.<sup>34</sup>

Statutes of limitations create an affirmative defense for defendants when a plaintiff fails “to bring suit within a specified period of time after his cause of action accrued, often subject to tolling principles.”<sup>35</sup> In contrast, statutes of repose “affect the availability of the underlying right: That right is no longer available on the expiration of the specified period of time.”<sup>36</sup> Accordingly, statutes of limitations are procedural mechanisms that limit the remedy available for causes of action.<sup>37</sup> Dissimilarly, a statute of repose “creates a substantive right [for defendants] to be free from liability after a legislatively-determined period of time.”<sup>38</sup>

### C. *The Supreme Court’s Influential Rulings*

The differing interpretations and applications of the following four cases have fueled the current debate about the effect of Section 13’s statute of repose. The Supreme Court, in its landmark decision in *American Pipe & Construction Co. v. Utah*, established that the commencement of a class action tolls the running of a relevant statute of limitations for class members who intervene after class status is denied.<sup>39</sup> The Court subsequently broadened the applicability of *American Pipe*’s doctrine, holding that the commencement of a class action tolls the running of a statute of limitations for class members who opt out of a class before or after class certification is determined.<sup>40</sup> The Supreme Court also held in *Lampf, Pleva, Lipkind, Prupis &*

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<sup>34</sup> 15 U.S.C. § 77m.

<sup>35</sup> *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2010).

<sup>36</sup> *P. Stolz Family P’ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004) (quoting CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.1, 4–5 (1991)). For a further discussion of the differences between statutes of limitations and statutes of repose see *infra* Part III.B.2.

<sup>37</sup> *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 865 (4th Cir. 1989).

<sup>38</sup> *Id.* at 866; see also *P. Stolz*, 355 F.3d at 102 (“Unlike a statute of limitations, a statute of repose is not a limitation of a plaintiff’s remedy, but rather defines *the right* involved in terms of the time allowed to bring suit.” (emphasis added)).

<sup>39</sup> 414 U.S. 538, 552–53 (1974).

<sup>40</sup> *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 181–82 (1974).



*Petigrow v. Gilbertson*, however, that equitable tolling is inconsistent with statutes of repose.<sup>41</sup> Consequently, courts struggle to consistently apply these decisions in situations where a class action raising claims pursuant to Sections 11 and 12 is commenced before the three-year statute of repose has run and a class member later files an individual suit or intervenes after the three-year repose period ends.

In January 1974, the Supreme Court in *American Pipe* established a doctrine that in effect tolls a statute of limitations.<sup>42</sup> In *American Pipe*, the respondents moved to intervene in an antitrust class action lawsuit to which they had been unnamed purported class members after the named plaintiff failed to obtain class certification.<sup>43</sup> At the time respondents moved to intervene, the one-year statute of limitations period had extinguished.<sup>44</sup> The Court held, in the statute of limitations' context, that "the commencement of the original class suit tolls the running of the [relevant] statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."<sup>45</sup> Timely motions, according to the Court, were those motions that were brought within the tolled statute of limitations period.<sup>46</sup> The Court reasoned that "the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."<sup>47</sup>

Within months of its decision in *American Pipe*, the Supreme Court handed down two rulings extending the reach of its recently recited doctrine. In *Eisen v. Carlisle & Jacquelin*, the Supreme Court stated that the doctrine described in *American Pipe* permitted class members to opt out of a certified class and bring their own individual suit even when the statute of

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<sup>41</sup> See 501 U.S. 350, 363 (1991), *superseded by statute*, 15 U.S.C. § 78aa-1(a) (2006), *as recognized in* *Greenfield v. Shuck*, 856 F. Supp. 705 (D. Mass. 1994).

<sup>42</sup> See *generally Am. Pipe*, 414 U.S. at 552-53 (ruling made in the context of an antitrust suit).

<sup>43</sup> *Id.* at 543-44.

<sup>44</sup> *Id.* at 544.

<sup>45</sup> *Id.* at 553.

<sup>46</sup> See *id.* at 552-53.

<sup>47</sup> *Id.* at 554.

limitations has run out.<sup>48</sup> The Court reasoned that its decision in *American Pipe* “established that commencement of a class action tolls the applicable statute of limitations as to *all members* of the class.”<sup>49</sup>

Thereafter, in *Crown, Cork & Seal Co. v. Parker*, the Supreme Court further extended the *American Pipe* doctrine to include tolling for putative class members who seek to file independent actions before certification of a class is determined.<sup>50</sup> The Court reasoned that the statute of limitations remains tolled for all members of the putative class until class certification is denied.<sup>51</sup> The Court again based its reasoning on a broad reading of the principle explained in *American Pipe*, that the filing of a class action tolls the statute of limitations for *all* members of the class.<sup>52</sup> Furthermore, the Court explained that not permitting tolling would give putative class members incentive to file individual actions prior to the expiration of the limitations period and that this would result in “a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.”<sup>53</sup>

More recently in *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilberston* (“*Lampf*”), the Supreme Court confirmed an integral feature of statutes of repose.<sup>54</sup> In *Lampf*, the plaintiff-respondents’ complaint alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.<sup>55</sup> Claims filed pursuant to Section 10(b) and Rule 10b-5 “must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation.”<sup>56</sup> The plaintiff-respondents contended that both the one-year statute of limitations period and the three-year statute of repose period governing the Section 10(b) claims were subject to the doctrine of equitable tolling.<sup>57</sup> The Court, however, held that equitable

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<sup>48</sup> See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974).

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> See *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353–54 (1983).

<sup>51</sup> *Id.* at 354.

<sup>52</sup> *Id.* at 350.

<sup>53</sup> *Id.* at 351.

<sup>54</sup> See *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilberston*, 501 U.S. 350 (1991), *superseded by statute*, 15 U.S.C. § 78aa-1(a) (2006), *as recognized in Greenfield v. Shuck*, 856 F. Supp. 705 (D. Mass. 1994)).

<sup>55</sup> *Id.* at 353.

<sup>56</sup> *Id.* at 364.

<sup>57</sup> *Id.* at 363.

tolling principles did not apply to the three-year repose period.<sup>58</sup> The Court reasoned that the purpose of the three-year limitation is “clearly to serve as a cutoff,” and that the “equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure,”<sup>59</sup> an identical structure to the one- to three-year structure in Section 13 of the 1933 Act.

## II. THE CONFLICTING INTERPRETATIONS OF *AMERICAN PIPE* AND SECTION 13

This section begins by discussing the different characterizations of the *American Pipe* doctrine and why the label placed on the doctrine matters. Part II.B then surveys the line of cases that have held the *American Pipe* doctrine to be applicable to Section 13's statute of repose and the rationale behind the rulings. Part II.C reviews the line of cases that held the *American Pipe* doctrine to be incompatible with Section 13's statute of repose and disallow any extension of the three-year time limit prescribed.

### A. *The Significance of How American Pipe Is Characterized*

How the Supreme Court's holdings are interpreted and classified is central to analyzing the effect of Section 13's statutes of repose. The *American Pipe* doctrine has been characterized as: (1) equitable tolling, (2) legal tolling, and (3) not a tolling doctrine at all.<sup>60</sup> A court's adoption of one of these three theories significantly impacts its determination of whether actions can be brought, for any reason, after Section 13's three-year repose period has run.

Tolling is considered “legal,” or “statutory,” when a court's power to toll is provided for in an appropriate statutory source and can properly be applied to the limitations period.<sup>61</sup> An

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* Furthermore, “the inclusion of the three-year period can have no significance in this context other than to impose an outside limit.” *Id.* (alteration in original) (quoting Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 288 (1989)).

<sup>60</sup> Compare *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 624–25 (S.D.N.Y. 2011), with *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 666–68 (S.D.N.Y. 2011), and *Joseph v. Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000).

<sup>61</sup> See *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011).

example of this form of tolling is found in the statutory provision governing post-conviction review of judgments.<sup>62</sup> The statute explicitly states that the time during which a properly filed application for state post-conviction or other collateral review is pending “shall not be counted toward any period of limitation under this subsection.”<sup>63</sup>

Tolling is “equitable” when a tolling doctrine is judicially created and deemed appropriate due to equitable considerations contemplated by the court.<sup>64</sup> Equitable tolling is appropriate only when it effectuates the policies underlying the statute and the purposes underlying the limitations period.<sup>65</sup> For example, equitable tolling has been applied to toll a statute of limitations in the Railway Labor Act while lengthy administrative proceedings were pending.<sup>66</sup>

It is less clear, however, what impact the *American Pipe* doctrine has on Section 13’s statute of repose when it is not considered to be a tolling doctrine, but rather a mechanism whereby the filing of a class action “effectively” commences an action for all class members. Tolling is said to occur when, by operation of law, plaintiffs are excused from commencing a suit to enforce their rights within a prescribed time frame because of some event that the law recognizes as sufficient to extend the prescribed deadline.<sup>67</sup> Since *American Pipe* held that the “filing of a timely class action complaint *commences* the action for all members of the class as subsequently determined” and pursuant to Rule 23 a class action is “a truly representative suit,”<sup>68</sup> class

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<sup>62</sup> 28 U.S.C. § 2244(d)(2) (2006).

<sup>63</sup> *Id.*

<sup>64</sup> See *Footbridge*, 770 F. Supp. 2d at 626.

<sup>65</sup> *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 427–28 (1965); *Albano v. Shea Homes Ltd. P’ship*, 634 F.3d 524, 537–38 (9th Cir. 2011) (quoting *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177 (D. Mass. 2009)).

<sup>66</sup> See, e.g., *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944).

<sup>67</sup> Brief for W.R. Huff Asset Mgmt. Co. as Amicus Curiae Supporting Petitioners at 4–5, *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, No. 11–1158 (2d Cir. July 6, 2011) (describing the discovery rule as a classic example of tolling, as well as statutes that relieve minors of their obligation to file suit until they reach the age of majority and the federal habeas statutes that excuse state prisoners from filing for habeas relief within the prescribed one-year deadlines while that prisoner sought an alternative remedy in state court that might moot the habeas claim).

<sup>68</sup> *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) (emphasis added).

members need not be excused from commencing an individual suit for their claims within the prescribed time limit because they have already commenced suit by operation of law.

*B. Courts That Held American Pipe Permits Actions Beyond the Three-Year Statute of Repose*

The United States Court of Appeals for the Tenth Circuit is the only appellate court to address the issue of whether the three-year statute of repose in Section 13 of the 1933 Act is subject to the *American Pipe* doctrine.<sup>69</sup> In *Joseph v. Wiles*, the court had to determine whether the plaintiff's Section 11 claim filed pursuant to the 1933 Act, which was filed almost three months after the repose period ran out, was timely.<sup>70</sup> The plaintiff argued that either a class action complaint previously filed in California state court or a class action complaint filed in Colorado's federal district court tolled the repose period for his Section 11 claim.<sup>71</sup> The defendants relied on the Supreme Court's holding in *Lampf* to argue that equitable tolling did not apply to statutes of repose.<sup>72</sup>

The court held that the repose period for the plaintiffs' Section 11 claim had not extinguished because the filing of the federal class action complaint commenced an action that was truly representative of the plaintiff.<sup>73</sup> Therefore, the court concluded, the plaintiff's Section 11 claim was timely filed within the *tolled* repose period.<sup>74</sup> The court gave three reasons for its conclusion. First, the court concluded that the type of tolling the plaintiff sought was "legal rather than equitable in nature" because the claimant had not filed a defective pleading during the statutory period or been tricked into missing the filing deadline by his adversary's misconduct.<sup>75</sup> The court reasoned that legal tolling ensues any time an action is commenced and class certification is pending.<sup>76</sup> Second, the court reasoned that

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<sup>69</sup> See generally *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000).

<sup>70</sup> *Id.* at 1166.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 1168.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1166.

<sup>76</sup> *Id.* at 1166-67 ("[T]olling [is] no longer appropriate after [the] court ruled definitively to deny class certification."). The court goes on to proffer that the

“[t]olling the limitations period for class members while class certification is pending serves the purposes of Rule 23 of the Federal Rules of Civil Procedure governing class actions.”<sup>77</sup> Rule 23 “encourages judicial economy by eliminating the need for potential class members to file individual claims” and the purpose of Rule 23 would be diminished if class members were forced to file their own claims to ensure their ability to maintain their rights.<sup>78</sup> Third, the court reasoned that tolling the statute of repose while class certification was pending did not “compromise the purpose[] of statutes of . . . repose” because the plaintiff had already been a party to an action against these defendants since the class action was commenced.<sup>79</sup> The purpose of statutes of repose, the court stated, is to “demarcate a period of time within which a plaintiff must bring claims or else the defendant’s liability is extinguished.”<sup>80</sup> Since a truly representative claim was commenced, as the Supreme Court alluded to in dicta, the *American Pipe* doctrine “in a sense . . . does not involve ‘tolling’ at all.”<sup>81</sup>

Two cases recently decided in the Southern District of New York also held that the *American Pipe* doctrine applied to Section 13’s statute of repose and permitted individual claims to be brought after the three-year repose period had run. In *In re Morgan Stanley*, the court stated that “the applicability of the *American Pipe* rule to [Section 13’s] statute of repose here hinges on whether its tolling principle is equitable or legal in nature,” and the court found “more persuasive the view . . . that *American Pipe* . . . ‘is a species of legal tolling, in that it is derived from a statutory source, in this case Rule 23.’”<sup>82</sup> The court reasoned that the *American Pipe* doctrine is based on the “‘notion that

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Supreme Court addressed this particular type of tolling in *American Pipe*. *Id.* at 1167.

<sup>77</sup> *Id.* at 1167.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1168.

<sup>81</sup> *See id.* (explaining that this doctrine may not be “tolling” because the plaintiff “has effectively been a party to an action against these defendants since” a class action brought on his behalf was requested but not yet denied).

<sup>82</sup> *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011) (quoting *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009)); *see also* 28 U.S.C. §§ 2072, 2074(a) (2006) (describing the Supreme Court’s power to promulgate procedural rules and the effectiveness of rules absent contrary legislative action).

class members are treated as parties to the class action' and that, '[b]ecause members of the asserted class are treated for limitations purposes as having instituted their own actions . . . the limitations period does not run against them' until class certification is determined.<sup>83</sup> The court also explained that tolling Section 13's statute of repose is consistent with Rule 23's goals of efficiency and judicial economy, and therefore "consonant with the legislative scheme."<sup>84</sup> The court expressed that class members would be induced to file motions to secure their claims because of the length of the certification process, the risk of certification denial, and the fact that evidence of the offensive conduct could take years to come to light.<sup>85</sup>

The court in *International Fund Management S.A. v. Citigroup Inc.* also held that the *American Pipe* doctrine applied to Section 13's statute of repose.<sup>86</sup> The court had to decide whether the pendency of a class action that raised the same claims the plaintiffs contended in their individual suits extended Section 13's repose period by way of the *American Pipe* doctrine.<sup>87</sup> The court held that tolling was available with respect to the statute of repose not only for the same reasons enumerated above, but added that the plain language of the statute itself did not bar the application of tolling.<sup>88</sup> The court reasoned that Section 13's statute of repose and statute of limitations are written in comparable language, and since the statute of limitations is subject to the *American Pipe* doctrine, the statute of repose shall be as well.<sup>89</sup> Moreover, in dicta, the court insisted that the statute of limitations in question in *American Pipe* "was more emphatically absolute, providing that 'any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced' within the limitations period."<sup>90</sup>

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<sup>83</sup> *Morgan Stanley*, 810 F. Supp. 2d at 667 (alterations in original) (quoting *In re Worldcom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007)).

<sup>84</sup> *See id.* at 668 (internal quotation marks omitted).

<sup>85</sup> *Id.*

<sup>86</sup> *See Int'l Fund Mgmt. S.A. v. Citigroup Inc.*, 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011).

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* at 380–81.

<sup>89</sup> *Id.* at 381; *see also* 15 U.S.C. § 77m (2006).

<sup>90</sup> *Int'l Fund Mgmt.*, 822 F. Supp. 2d at 381 (quoting 15 U.S.C. §§ 15b, 16(b)).

Therefore, the court reasoned that if *American Pipe* was applied to a statutory time limitation that involved more forceful language than Section 13, it should apply to Section 13 itself.<sup>91</sup>

C. *Court's That Held American Pipe Has No Application Within Section 13's Statute of Repose*

The United States District Court for the Southern District of New York, however, has rendered inconsistent judgments on the issue. The same court that found tolling appropriate in *In Re Morgan Stanley* and *International Fund* has, on two occasions, articulated different interpretations of Section 13 with respect to *American Pipe*.<sup>92</sup> In *Footbridge Ltd. Trust v. Countrywide Financial Corp.*, the plaintiffs sought to avoid the absolute effect of the three-year statute of repose and argued that the repose period was tolled pursuant to *American Pipe*.<sup>93</sup> The court, however, held that the “*American Pipe* tolling does not apply to [Section 13’s] statute of repose.”<sup>94</sup> The court announced two reasons for its decision. First the application of *American Pipe* violated the plain language of Section 13.<sup>95</sup> The court stated that “[g]iving the words ‘[i]n no event’ their ordinary meaning precludes the application of *American Pipe*.”<sup>96</sup> The second, and more extensive, reason set forth by the court was that *American Pipe* tolling is equitable tolling and statutes of repose are not subject to equitable tolling doctrines.<sup>97</sup> The court reasoned that not only is “tolling . . . not [explicitly] provided for in the text of the [1933] Act or any governing statute” but “[i]n fashioning the tolling rule, the [*American Pipe*] Court [acknowledged that] ‘. . . recognizing judicial power to toll statutes of limitation in federal courts’” is not a new phenomenon.<sup>98</sup> Furthermore, the

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<sup>91</sup> *Id.* at 381–82.

<sup>92</sup> Compare *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 670 (S.D.N.Y. 2011), and *Int’l Fund Mgmt.*, 822 F. Supp. 2d at 382, with *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 620 (S.D.N.Y. 2011), and *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 482–83 (S.D.N.Y. 2011).

<sup>93</sup> *Footbridge*, 770 F. Supp. 2d at 624.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (quoting 15 U.S.C § 77m (2006)).

<sup>97</sup> *Id.* at 624–26.

<sup>98</sup> *Id.* at 626 (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974)). “*American Pipe* tolling is a judicially-created rule premised on ‘traditional equitable



court identified that nowhere in *American Pipe* did the Supreme Court read Rule 23's text as explicitly creating a class action tolling rule and therefore concluded that it must be an equitable doctrine.<sup>99</sup>

Thereafter, the court in *In re Lehman Brothers Securities and ERISA Litigation* found *Footbridge* persuasive and similarly held that the statute of repose in Section 13 of the 1933 Act was not tolled by the pendency of class actions.<sup>100</sup> The court concluded that *American Pipe* is an equitable tolling doctrine and focused its analysis on the differences between statutes of limitation and statutes of repose.<sup>101</sup> The court noted that *American Pipe* was a case about a statute of limitations, not a statute of repose, and unlike statutes of repose, courts may toll statutes of limitations in appropriate circumstances.<sup>102</sup>

### III. SECTION 13'S STATUTE OF REPOSE BARS ALL ACTIONS BROUGHT AFTER THE UNINTERRUPTED THREE-YEAR REPOSE PERIOD RUNS

A definitive determination of the effect of Section 13's statute of repose is needed to alleviate the split among courts and the uncertainty of perpetual claims that businesses face. Part III explains why treating Section 13's three-year statute of repose as an absolute bar, not subject to any suspension by way of the *American Pipe* doctrine, is the accurate interpretation of the statute as it is written. Part III.A analyzes Section 13 under the assumption that the *American Pipe* doctrine is a tolling doctrine. Part III.B then analyzes Section 13 under the assumption that the *American Pipe* doctrine is something other than a tolling doctrine. Analyzing the *American Pipe* doctrine both as a tolling doctrine and as something other than a tolling doctrine results in the same conclusion: Section 13's statute of repose cannot be extended by application of the *American Pipe* doctrine.

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considerations' of fairness, judicial economy and needless multiplicity of lawsuits." *Id.* (quoting *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 537 (9th Cir. 2011)).

<sup>99</sup> *See id.*

<sup>100</sup> *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481 (S.D.N.Y. 2011).

<sup>101</sup> *See id.* at 482.

<sup>102</sup> *Id.* at 482–83. "That decision, however, spoke only of tolling statutes of limitations—something courts may do in appropriate circumstances. When it comes to statutes of repose, however, the relevant policies are those of Congress rather than any that courts might think preferable." *Id.* at 483.

A. *American Pipe's Effect as a Tolling Doctrine upon Section 13's Statute of Repose*

This section confirms that if the doctrine announced by the court in *American Pipe* is a tolling doctrine, it is a form of equitable tolling and therefore inconsistent with Section 13's statute of repose. This section then explains that even if the *American Pipe* doctrine is considered to be legal tolling, Section 13's statute of repose bars claims brought after the uninterrupted three-year repose period ends.

1. *If American Pipe Is a Form of Tolling, It Is Equitable and Inconsistent with Section 13's Statute of Repose*

If considered to be a tolling doctrine at all, the *American Pipe* doctrine is equitable and not legal tolling. The Supreme Court itself has unequivocally referred to *American Pipe's* doctrine as a form of equitable tolling. There is no evidence more conclusive than the Supreme Court's characterization of its own creation. For example, in *Young v. United States*, the Supreme Court cited *American Pipe* for the proposition that limitations periods are usually subject to equitable tolling unless tolling is inconsistent with the text of the statute.<sup>103</sup> And in *Irwin v. Department of Veterans Affairs*, the Supreme Court cited *American Pipe* for the assertion that the Supreme Court has allowed equitable tolling in situations where defective pleadings are filed during the statutory periods.<sup>104</sup>

In keeping with Supreme Court precedent, three federal circuit courts—the Second, Fourth, and Sixth Circuits—have also referenced *American Pipe* as an equitable tolling doctrine. For example, in *Veltri v. Building Services 32B-J Pension Fund*, the Second Circuit cited *American Pipe* as an example of equitable tolling,<sup>105</sup> and in *Bridges v. Department of Maryland State Police*, the Fourth Circuit stated that the “*American Pipe*/Crown, Cork & Seal equitable tolling rule is a limited exception.”<sup>106</sup> Also, in *Youngblood v. Dalzell*, the Sixth Circuit alluded to the plaintiff's failure to discuss whether the relevant limitations period was

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<sup>103</sup> *Young v. United States*, 535 U.S. 43, 49 (2002).

<sup>104</sup> *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990).

<sup>105</sup> *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322–23 (2d Cir. 2004).

<sup>106</sup> *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006).

subject to equitable tolling under *American Pipe* precedent.<sup>107</sup> The Second Circuit has even explicitly referred to tolling based on the pendency of a class action, exactly the situation that the *American Pipe* court was confronted with, as equitable tolling.<sup>108</sup>

Furthermore, in *American Pipe*, the Supreme Court acknowledged that it alone possessed the power to toll statutes of limitations in federal court.<sup>109</sup> In doing so, the Court declared that the *American Pipe* doctrine was promulgated by way of its discretion to do so and not as a result of an express grant provided for in the statute.<sup>110</sup> Therefore, the *American Pipe* doctrine is effectuated by use of judicial power alone and not by way of power conferred on the court by the text of a relevant statute. Accordingly, it must be a form of equitable tolling.

Moreover, the *American Pipe* rule was premised on equitable considerations of fairness and judicial economy.<sup>111</sup> The Court concluded that, although a federal statute provides for substantive liability and defines a time period within which a suit must be brought, the federal courts *alone* have the power to toll in circumstances where tolling would not be inconsistent with the legislative purpose.<sup>112</sup> For the reasons stated above, if the *American Pipe* rule is deemed a tolling doctrine, it is an equitable one. Since equitable tolling principles are inconsistent with the one- to three-year structure, the *American Pipe* doctrine may not be validly applied to Section 13's statute of repose.

## 2. Even If *American Pipe* Is Considered Legal Tolling, It Does Not Effect Section 13's Statute of Repose

When Congress enacted the Rules Enabling Act, it granted the Supreme Court the power to promulgate rules of procedure, subject to congressional review.<sup>113</sup> A federal rule, the Supreme Court stated, is permissible if it regulates the judicial process for enforcing rights and duties recognized by substantive law,<sup>114</sup> but

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<sup>107</sup> *Youngblood v. Dalzell*, 925 F.2d 954, 959 n.3 (6th Cir. 1991).

<sup>108</sup> *See Casey v. Merck & Co.*, 653 F.3d 95, 97 (2d Cir. 2011).

<sup>109</sup> *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 (1974).

<sup>110</sup> *See id.* at 558–59.

<sup>111</sup> *See id.* at 550–54; *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 537–38 (9th Cir. 2011).

<sup>112</sup> *See Am. Pipe*, 414 U.S. at 559.

<sup>113</sup> 28 U.S.C. § 2072(a) (2006).

<sup>114</sup> *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

it may not “change [a] plaintiffs’ separate entitlements to relief nor abridge defendants’ rights.”<sup>115</sup> The theory that the *American Pipe* doctrine is a form of legal tolling rests on the notion that the Supreme Court’s power to “toll” the statute of limitations in *American Pipe* is derived from Rule 23 of the Federal Rules of Civil Procedure.<sup>116</sup> By holding that pursuant to Rule 23 the commencement of a class action tolls the running of an applicable statute of limitations for class members, the Supreme Court is believed to have promulgated the rule known as the *American Pipe* doctrine from a statutory source, thereby making it a legal tolling doctrine.

But even if the *American Pipe* doctrine is considered a form of “legal tolling,” a statute of repose’s substantive character precludes the *American Pipe* doctrine from applying to Section 13 because rules promulgated by the Supreme Court, such as the *American Pipe* doctrine, cannot alter substantive rights granted by Congress. Since statutes of limitations operate as a procedural mechanism and regulate the time at which an affirmative defense to a claim may be raised, the Rules Enabling Act permits tolling them.<sup>117</sup> On the other hand, statutes of repose grant a substantive right, which cannot be curtailed by a rule promulgated by the Supreme Court, and tolling them pursuant to the *American Pipe* doctrine is therefore prohibited.<sup>118</sup> Congress enacts a statute of repose with the intention that the time period prescribed not be modified in the absence of further legislative action.

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<sup>115</sup> *Id.* at 408; *cf. id.* (holding that a federal rule may not “alter[] [substantive] rights themselves”); *see also* 28 U.S.C. § 2072(b).

<sup>116</sup> *See* FED. R. CIV. P. 23(c)(1)(A).

<sup>117</sup> *P. Stolz Family P’ship L.P. v. Daum*, 355 F.3d 92, 102–03 (2d Cir. 2004) (holding that since a statute of limitation is procedural and a limit to plaintiff’s remedy, it may be subject to “various forms of tolling” (quoting CORMAN, *supra* note 36)).

<sup>118</sup> *Id.* (clarifying that statutes of repose cannot be tolled because they are substantive and “affect the availability of the underlying right.” (quoting CORMAN, *supra* note 36)); *see Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (*American Pipe* tolling of statutes of repose would “‘abridge, enlarge or modify . . . substantive right[s],” which is exactly what the Rules Enabling Act prohibits (quoting 28 U.S.C. § 2072(b))); *see also Albano v. Shea Homes Ltd. P’ship*, 254 P.3d 360, 366 (Ariz. 2011) (en banc) (concluding that *American Pipe*’s judicially created tolling rule could not “alter the substantive effect of a statute of repose”).

B. *Principles of Statutory Interpretation Indicate That Section 13's Statute of Repose Is an Absolute Bar*

This section confirms Section 13's absolute effect even under the notion that the doctrine articulated by the Court in *American Pipe* is something distinguishable from a tolling doctrine altogether. Principles of statutory interpretation indicate that Section 13's statute of repose operates as an absolute bar to both individual claims and motions to intervene brought more than three years after the date the security in question is sold. An analysis of the following demonstrates why the three-year limit serves to extinguish claims once reached: (1) the statute's plain language; (2) the congressional intent behind enacting the statutory provision; (3) the Security and Exchange Commission's own interpretation of the provision; and (4) the public policy issues surrounding the debate.

1. *Section 13's Plain Language Indicates That the Statute of Repose Is an Absolute Bar and That There Are No Exceptions*

The *American Pipe* doctrine and the Court's rationale for its ruling are incompatible with Section 13's statute of repose because the application of that doctrine is unambiguously prohibited by the express language of the provision and the rules governing civil procedure. Analysis of Section 13's text pursuant to the Federal Rules of Civil Procedure supports the conclusion that the *American Pipe* doctrine cannot modify the statute's three-year repose period. The Court in *American Pipe* held that a timely class action complaint *commences the action* for all members of the subsequently determined class.<sup>119</sup>

But the filing of a class action only commences that particular action against the defendant for all class members, not all actions that class members may subsequently bring. To illustrate this point, consider the statute's text under the two situations that call into question the statute of repose's absolute nature: (1) when a class member seeks to bring a separate, individual suit, and (2) when a class member seeks to intervene in the class action. Section 13 states "[i]n no event shall any such action be brought to enforce a liability . . . more than three years"

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<sup>119</sup> *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974).

after the bona fide offering or sale of a security.<sup>120</sup> An action at law is any judicial proceeding in which rights are determined.<sup>121</sup> Therefore, since both an individual claim and motion to intervene require judicial proceedings to determine the rights requested, they constitute an action. An action is *brought* when the action is *commenced*.<sup>122</sup> To commence an action is to demand something by institution of process in a court of justice.<sup>123</sup> The reason for which a particular action is brought is immaterial; the statute says “[i]n no event shall any.”<sup>124</sup>

According to Rule 2 of the Federal Rules of Civil Procedure (“FRCP”), “[t]here is one form of action—the civil action.”<sup>125</sup> Rule 3 states that a civil action is commenced by the filing of a complaint.<sup>126</sup> In the context of an individual suit, claimants, regardless of their membership in the class action suit previously filed on their behalf, must file a new, separate complaint. As per Rule 3 of the FRCP, a civil action is *commenced* by the filing of a complaint, and as per Rule 2 of the FRCP, the only form of *action* is a civil action.<sup>127</sup> Therefore, by filing a separate complaint pursuant to Section 11 or 12 of the 1933 Act more than three years from the sale of a security, a claimant is attempting to commence an action beyond the three-year limitation prescribed by the statute of repose, conduct which is strictly prohibited by the plain language of the provision.<sup>128</sup>

Rule 24 of the FRCP governs intervention and subsection (c) states that “[a] motion to intervene . . . must state the grounds for intervention and be *accompanied by a pleading*.”<sup>129</sup> In turn, Rule 7 lists the only pleadings that are permitted in federal courts and includes only forms of complaints and answers to complaints.<sup>130</sup> So, per the FRCP, for class members to intervene they must submit a pleading to the court, which can only be in the form of a complaint if it is not an answer or reply to a

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<sup>120</sup> 15 U.S.C. § 77m (2006) (emphasis added).

<sup>121</sup> BLACK’S LAW DICTIONARY 33 (9th ed. 2009).

<sup>122</sup> See *Goldenberg v. Murphy*, 108 U.S. 162, 163 (1883).

<sup>123</sup> *What is Commence?*, THE LAW DICTIONARY, <http://www.thelawdictionary.org/commence/> (last visited Oct. 30, 2013).

<sup>124</sup> 15 U.S.C. § 77m.

<sup>125</sup> FED. R. CIV. P. 2.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *Id.* at 2, 3.

<sup>128</sup> 15 U.S.C. § 77m.

<sup>129</sup> FED. R. CIV. P. 24(c) (emphasis added).

<sup>130</sup> *Id.* at 7(a).

previously filed complaint.<sup>131</sup> A motion to intervene, however, cannot possibly take form as an answer or reply to a prior complaint.<sup>132</sup> Thus, since a claimant seeking to intervene must file a complaint and a complaint commences a civil action, a claimant seeking to intervene more than three years from the sale of the security upon which the class action is based is effectively bringing an action and is acting in direct contravention of the express language of the statute.

Instances where a court permits a plaintiff to submit an "Amended Complaint" pose no further difficulty to this rationale. Rule 15 of the FRCP governs amended and supplemental pleadings.<sup>133</sup> Federal courts sitting in diversity jurisdiction should adhere to state rules governing the commencement of a suit, while the FRCP governs the commencement of a suit where federal courts face questions of federal law.<sup>134</sup> As per Rule 15, an amended complaint "commences" a new action if it does not relate back to the original pleading.<sup>135</sup>

Courts that have confronted this issue have only paid attention to Rule 23 of the FRCP, disregarding the other relevant and applicable provisions found within the FRCP. Those who believe that Section 13's statute of repose does not prohibit motions to intervene or individual suits after the three-year period has run argue that, according to *American Pipe*, the filing of a timely class action complaint effectively commences the action for all members of the subsequently determined class and therefore the obligation to bring an action within the three-year period prescribed by the statute of repose is satisfied when the class action is filed.<sup>136</sup> This justification, however, disregards relevant rules of civil procedure and ignores the statute's text.

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<sup>131</sup> *Id.* at 24, 7(a).

<sup>132</sup> *Id.* at 24.

<sup>133</sup> *Id.* at 15.

<sup>134</sup> *See, e.g.*, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-53 (1980); *Larsen v. Mayo Med. Ctr.*, 218 F.3d 863, 867 (8th Cir. 2000).

<sup>135</sup> FED. R. CIV. P. 15(c).

<sup>136</sup> *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-53 (1974).

Furthermore, the 1933 Act's plain language cannot be ignored so that remedial purposes can be served.<sup>137</sup> Remedial goals are necessarily considered in enacting the federal securities laws<sup>138</sup> and "it is proper for a court to consider . . . policy considerations in construing terms in [the federal securities] Acts."<sup>139</sup> Courts, however, cannot disregard the actual language of a statute in its analysis.<sup>140</sup> While the 1933 Act does provide civil remedies for violations, the remedial goals of the Act are not a proper basis for a broader interpretation of Section 13 than that allowed for by its language.

Statutory analysis begins with the plain meaning of a law's text, and since the language "[i]n no event shall any such action be brought"<sup>141</sup> is unambiguous, the scrutiny should end there.<sup>142</sup> Section 13's plain language indicates Congress's understanding that statutes of repose operate differently from statutes of limitations. The language of Section 13 of the 1933 Act is where courts must primarily ascertain the scope of limitation Congress intended by the statute of repose.<sup>143</sup> When congressional intent is clearly indicated by the text of the law in question, as it is in Section 13, courts must effectuate that meaning.<sup>144</sup> Congress purposely inserted "[i]n no event shall any . . . action be brought

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<sup>137</sup> *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) ("The broad remedial goals of the Securities Act are insufficient justification for interpreting a specific provision 'more broadly than its language and the statutory scheme reasonably permit.'" (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (internal quotation marks omitted))).

<sup>138</sup> *Id.* at 653 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967)) ("And the Court has recognized that Congress had 'broad remedial goals' in enacting the securities laws and providing civil remedies." (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200 (1976))).

<sup>139</sup> *Id.* (alterations in original) (quoting *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 694 n.7 (1985)).

<sup>140</sup> *Id.*

<sup>141</sup> 15 U.S.C. § 77m (2006).

<sup>142</sup> *Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("[S]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there." (alteration in original) (quoting *Bustamante v. Napolitano*, 582 F.3d 403, 406 (2d Cir. 2009))).

<sup>143</sup> *Pinter*, 486 U.S. at 653 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472 (1977)) ("The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section.").

<sup>144</sup> *Id.* ("The ultimate question is one of congressional intent, not one of whether this Court thinks [that] it can improve upon the statutory scheme that Congress enacted into law." (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979))).



to enforce a liability” for the statute of repose.<sup>145</sup> Likewise, Congress chose to draft the statute of limitations, just a sentence prior, in a more subtle way, stating that “[n]o action shall be maintained to enforce any liability.”<sup>146</sup> The use of different words in Section 13, specifically the more forceful language employed in the statute of repose, eliminates the ambiguity and expresses the intention that unlike the statute of limitations, the statute of repose is to be an absolute bar.

Moreover, the primary tools of statutory analysis buttress the interpretation that Section 13’s statute of repose is not subject to the *American Pipe* doctrine. Every word of Section 13 is to be given effect.<sup>147</sup> “In no event” would not be given its proper effect if in this event an action was permitted after the limitations period expires.<sup>148</sup> Also, courts should not construe a statute in a way that would cause the statutory language to be superfluous.<sup>149</sup> “Unless the ‘in no event more than three’ language cuts off claims of tolling and estoppel at three years . . . it serves no purpose at all . . . .”<sup>150</sup> Accordingly, to interpret Section 13’s statute of repose not as an absolute bar would contradict the statute’s very purpose, ignore its plain text, and disregard the Supreme Court’s instruction on how to properly analyze a statute.

Because the plain language of Section 13 expressly and unambiguously forbids the exact conduct that is sought by those wishing to benefit from the *American Pipe* doctrine, the statutory analysis should come to an end. In the event that this logic is not persuasive enough, other principles of statutory interpretation

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<sup>145</sup> 15 U.S.C. § 77m.

<sup>146</sup> *Id.*

<sup>147</sup> *Carciere v. Salazar*, 555 U.S. 379, 391 (2009) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)); *accord* *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 337 (2d Cir. 2006).

<sup>148</sup> *See* 15 U.S.C. § 77m.

<sup>149</sup> *Corley v. United States*, 556 U.S. 303, 314 (2009) (“[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . .” (internal quotation marks omitted)).

<sup>150</sup> *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990); *see* *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1301 (4th Cir. 1993) (concluding “an interpretation that tolling principles should be applied to extend the three-year period of § 13 would . . . ignore the plain meaning of the language . . . ‘in no event’ . . . and defeat the very purpose of a statute of repose”).

support the conclusion that the *American Pipe* doctrine does not extend the period of time for which an individual claim or a motion to intervene must be commenced beyond three years.

## 2. Congress Intended Section 13's Statute of Repose To Operate as an Absolute Bar

Allowing someone to intervene or file an individual suit after the uninterrupted repose period has run would undermine congressional intent. The legislature's purpose for enacting Section 13's statute of repose reveals its nature as an absolute bar to claims brought after the date of repose. The key purpose of a statute of repose is to provide a fixed and definite date for the quieting of litigation.<sup>151</sup> Like statutes of repose in other contexts, Section 13's statute of repose is "based on considerations of the economic best interests of the public as a whole" and "a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists."<sup>152</sup> Allowing actions to be brought after the three-year repose period would favor the rights of plaintiffs over those of defendants. It would also run afoul of the certainty that Congress sought. It is immaterial that some courts feel that the absolute bar may induce parties to file protective claims and potentially cause the needless multiplicity of suits that Rule 23 seeks to avoid because Congress, in passing Section 13, has already weighed these concerns and determined that to ensure stability of business, such causes of action need be extinguished despite whatever exigent circumstances or judicial inefficiencies may arise.

The legislative history of the Securities Act of 1933 also supports the conclusion that *American Pipe* should not apply to Section 13's statute of repose.<sup>153</sup> When the 1933 Act was first enacted, Section 13 initially contained a one- to ten-year structure within which the statute of limitations would be a one-year period and the statute of repose would be a ten-year

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<sup>151</sup> *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 104 (2d Cir. 2004) (holding that a statute of repose is meant to provide parties, investors, and the business community with "an easily ascertainable and certain date for the quieting of litigation").

<sup>152</sup> *Webb v. United States*, 66 F.3d 691, 701 (4th Cir. 1995) (quoting *First United Methodist Church v. U.S. Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989)).

<sup>153</sup> *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 558 & n.29 (1974).

limitation.<sup>154</sup> In 1934, in reaction to criticism, Congress reduced the statute of repose to a three-year time limitation.<sup>155</sup> The lingering liability concern had the effect of disrupting business dealings<sup>156</sup> and the shorter repose period was intended to give greater assurance to corporations.<sup>157</sup> Also, the concern that too long a window for a strict liability statute would discourage individuals from serving on boards of directors for fear of liability motivated this change.<sup>158</sup> These qualms were met by the 1934 amendments and addressed by the shortening of the repose period from ten to three years.<sup>159</sup> If the statute of repose is not an absolute bar, the legislature's concern for ongoing lawsuits would be blatantly ignored.

### 3. The SEC's Interpretation That Section 13's Statute of Repose Is Absolute Should Carry Import

Moreover, courts should defer to the Securities and Exchange Commission's ("SEC") interpretation of Section 13's statute of repose because of the SEC's conferred power and expertise in dealing with the Act. Courts addressing the issue have not made much reference to the SEC's perspective on the matter despite the SEC's authority to interpret the securities laws.<sup>160</sup>

It is imperative that courts defer to the SEC's interpretation of Section 13's statute of repose. In *Skidmore v. Swift & Co.*, the Supreme Court had to interpret the Fair Labor Standards Act ("FLSA") to determine what constituted "hours worked, for which

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<sup>154</sup> See Securities Act of 1933, ch. 38, Pub. L. No. 73-22, § 13, 48 Stat. 74, 84 (1933).

<sup>155</sup> 78 CONG. REC. 8668 (1934) (responding to "criticisms and complaints which have come to the committee that the present act is too drastic, and is interfering with business," Congress reduced the fixed repose period to three years in 1934) (remarks of Sen. Fletcher).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 10,186.

<sup>158</sup> Brief for the SEC as Amicus Curiae, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) (No. 90-333), 1990 WL 10012716, at \*28-29 (quoting 78 CONG. REC. 8200 (1934) (remarks of Sen. Byrnes)) (expressing that an extended window would "'deter [individuals] from serving on boards of directors' because of fear of lingering liabilities" (alteration in original)).

<sup>159</sup> See *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear[s] that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute.").

<sup>160</sup> 15 U.S.C. § 78d-1(a) (2006).

overtime compensation [was] due.”<sup>161</sup> The Court explained that Congress created the office of Administrator and imposed responsibilities upon it with respect to enforcement of the FLSA.<sup>162</sup> Pursuant to its duties, the Administrator “has accumulated a considerable experience in the problems of ascertaining working time in employments.”<sup>163</sup> In its *Brief Amicus Curiae*, the Administrator asserted that proper interpretation of the statute excluded sleeping and eating time of employees from the workweek and included all other on-call time.<sup>164</sup> In drawing its conclusion, the Court stated that while “[t]here is no statutory provision as to what, if any, deference courts should pay to the Administrator’s conclusions[,] . . . [t]his Court has long given considerable and in some cases decisive weight to . . . other bodies that were not of adversary origin.”<sup>165</sup> The Court went on to explain that although the Administrator’s rulings, interpretations, and opinions are not controlling, they do represent experience and informed judgment to which courts appropriately may resort to for guidance.<sup>166</sup> However, “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>167</sup>

More recently in *United States v. Mead Corp.*, the Supreme Court affirmed and expanded upon the policy prescribed in *Skidmore*.<sup>168</sup> In *Mead*, the issue was whether a three-ring binder with pages for daily schedules, phone numbers and addresses, a calendar, and so forth was a “diary” under the Harmonized Tariff Schedule of the United States.<sup>169</sup> Congress charged the United States Customs Service with classifying and fixing rates of imports.<sup>170</sup> The Court had to determine what weight to give a

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<sup>161</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944).

<sup>162</sup> *Id.* at 137.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 139.

<sup>165</sup> *Id.* at 139–40. “The fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect.” *Id.* at 140.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See generally* *United States v. Mead Corp.*, 533 U.S. 218 (2001).

<sup>169</sup> *Id.* at 218.

<sup>170</sup> *Id.* at 221–22.

Customs ruling letter in making its decision.<sup>171</sup> The Court acknowledged that “it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in [a] statute.”<sup>172</sup> The Court emphasized that an agency’s interpretation, in whatever form it may appear, “may merit some deference . . . given the ‘specialized experience and broader investigations and information’ available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires.”<sup>173</sup> Ultimately, the Court afforded deference to the interpretation proffered by the Customs Service proportional to its “power to persuade.”<sup>174</sup>

Accordingly, deference should be given to the SEC’s description of Section 13’s statute of repose. In an amicus brief, the SEC confirmed that Section 13’s statute of repose bars all actions brought more than three years from the bona fide offering or sale of a security. Congress created the SEC to enforce the securities laws, promote stability in the markets, protect investors, and granted the SEC broad authority to carry out its obligations.<sup>175</sup> Specifically, one of the SEC’s primary responsibilities is to interpret the federal securities laws.<sup>176</sup> In a brief submitted by the SEC as amicus curiae, the SEC explained that the three-year repose period reflects a congressional policy against allowing actions to be brought after the repose period has run so that potential defendants will not be subject to liabilities for indefinite periods.<sup>177</sup> The SEC further explained that Congress established the relatively short periods for express

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<sup>171</sup> See *id.* at 226.

<sup>172</sup> *Id.* at 229.

<sup>173</sup> *Id.* at 234 (citation omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944)); see *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (finding that reasonable agency interpretations carry “at least some added persuasive force” where *Chevron* is inapplicable).

<sup>174</sup> *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140).

<sup>175</sup> See 15 U.S.C. § 78d(a) (2006 & Supp. IV 2010); *id.* § 78d-1(a) (2006); SEC, *supra* note 31.

<sup>176</sup> See SEC, *supra* note 31.

<sup>177</sup> Brief for the SEC as Amicus Curiae, *supra* note 158 (“[T]he outside period of repose in the 1933 and 1934 Act periods reflects a general congressional policy against tolling of securities claims . . . . This policy stems from the view that, if tolling is available, potential defendants will be subject to contingent liabilities for indefinite periods.”).

rights, such as those found in Sections 11 and 12 of the 1933 Act, because they are strict liability provisions.<sup>178</sup> Given the SEC's expertise enforcing the federal securities laws, its reasoned logic for interpreting the statute as it did, the consistency of the SEC's interpretation with the legislative intent for enacting the statute of repose, and the thoroughness of the opinion set forth in its *Amicus Brief*, the SEC's interpretation should be given deference by courts.<sup>179</sup> This deference, combined with the unambiguous statutory language and intent, should foreclose any finding that Section 13's statute of repose is subject to the *American Pipe* doctrine.

#### 4. The Benefits of Section 13 Barring Actions After the Date of Repose Outweigh the Costs

The interpretation of Section 13's statute of repose as an absolute bar to actions brought after expiration of the uninterrupted three-year repose period results in the most efficient use of judicial resources. To allow investors with large individual claims to take a wait-and-see approach with respect to the class action without having to decide whether to opt out or join the class would significantly hinder settlement negotiations.<sup>180</sup> Furthermore, the uncertainty with respect to class size and number of opt-outs will make it difficult for parties to effectively negotiate settlements.<sup>181</sup> Also, the likelihood of a settlement, which promotes greater judicial economy by resolving disputes outside of the courtroom, is increased by requiring early decisions to be made by unnamed class members.

Moreover, forcing plaintiffs to decide whether to have their rights represented by the class action or to file individual claims before expiration of the statute of repose period best serves the interests of judicial economy and efficiency. Whether or not more suits are filed for protective purposes, these suits will be decided much earlier than if the *American Pipe* doctrine allowed actions to be brought long after the repose period extinguished.

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<sup>178</sup> *Id.*

<sup>179</sup> *See id.* at 28–30.

<sup>180</sup> Brief for Defendant-Appellee Stanford L. Kurland at 18–19, *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, No. 11-1158 (2d Cir. Sept. 28, 2011), 2011 WL 4735347.

<sup>181</sup> *Id.* at 19.

The inefficiencies caused by not allowing actions to be brought after the three-year repose period are overshadowed by the inefficiencies that would result if *American Pipe* did modify Section 13's statute of repose. While it is acknowledged that applying Section 13 as an absolute bar may result in a multiplicity of lawsuits being filed as protective measures, this concern, in practicality, is overstated for three reasons.

First, protective actions will be filed by unnamed class members in only limited circumstances. Protective actions will be filed only when claims are subject to a statute of repose and the class certification motion has not yet been decided as the repose limitation period draws near.<sup>182</sup> In addition, those choosing to file their own protective claims would have to be aware of their rights and have enough of an individual interest to motivate them to pursue a claim on their own. As discussed, most individual investors have only minimal damages and it would not prove cost-effective to bring an individual claim.

Second, plaintiffs, in conjunction with their lawyers, govern the nature of the suit they wish to bring.<sup>183</sup> The Federal Rules of Civil Procedure demand that class certification be determined at "an early practicable time" after the commencement of an action.<sup>184</sup> In essence, plaintiffs control the timing at which class certification is determined, based on the adequacy of their claim of being a class. Therefore, it is in the plaintiff's control whether or not the three-year repose period becomes a concern.

Third, the inefficiency feared by plaintiffs having to file protective suits can be mitigated by procedures already commonly used to manage class actions.<sup>185</sup> Opt-out actions can be consolidated for pretrial proceedings by the U.S. Judicial Panel for Multidistrict Litigation,<sup>186</sup> and motions to intervene, at the court's discretion, can be deferred pending class certification decisions.<sup>187</sup>

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<sup>182</sup> *Id.* at 16–17.

<sup>183</sup> *Id.* at 17; *see also* FED. R. CIV. P. 23(c)(1)(A).

<sup>184</sup> FED. R. CIV. P. 23(c)(1)(A).

<sup>185</sup> Brief for Defendant-Appellee Stanford L. Kurland, *supra* note 180, at 17.

<sup>186</sup> *Id.* at 18; *see also* 28 U.S.C. § 1407 (2006).

<sup>187</sup> Brief for Defendant-Appellee Stanford L. Kurland, *supra* note 180, at 18.

## CONCLUSION

This Note reveals that the *American Pipe* doctrine, regardless of whether it is declared a tolling doctrine or not, cannot be applied to Section 13's statute of repose so as to permit claimants to bring individual claims or motions to intervene after the repose period has run. The statute as written operates as an absolute bar to any action brought after the uninterrupted three-year repose period extinguishes and is not subject to any doctrine that modifies its limitation period. The statute's plain language, its legislative intent, the SEC's interpretation of the statutory text, and the policy interest of finality in the business arena, all point toward this conclusion. It is understood that Congress can legislate in order to permit the conduct that the statute of repose presently prohibits. In the absence of legislative action, however, Section 13 of the 1933 Act must be given its absolute and uninhibited effect.