
CIVIL PROCEDURE — CLASS ACTIONS — SIXTH CIRCUIT SUGGESTS THAT INTERACTION OF FORFEITURE RULE AND STATUTE OF REPOSE CAN LIMIT *AMERICAN PIPE* TOLLING. — *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir. 2016).

Statutes of limitations, one might say, “introduce[] law to the fourth dimension.”¹ But courts have long recognized that time is not a constant: it can expand or contract, depending upon a litigant’s frame of reference.² Consider the members of a class. In its seminal 1974 decision in *American Pipe & Construction Co. v. Utah*,³ the Supreme Court held that the commencement of a class action tolls (or pauses) the applicable statute of limitations as to all putative class members, allowing them to later file individual actions that might otherwise be time-barred.⁴ This *American Pipe* doctrine — deceptively straightforward on its face — has proven remarkably intricate in practice,⁵ and two questions have recurred with some frequency.⁶ First, is there a “forfeiture rule,” such that a plaintiff who sues independently *before* a ruling on class certification thereby “forfeits” the benefit of *American Pipe* tolling?⁷ Second, does *American Pipe* tolling apply to statutes of repose, which begin running when a defendant acts, rather than when a plaintiff’s claim accrues?⁸

¹ ISAAC ASIMOV, *A Loint of Paw*, in *ASIMOV’S MYSTERIES* 108, 108 (1968) (recounting the time-traveling — and thus statute of limitations—evading — exploits of a scofflaw named Stein).

² This centuries-old practice of “postponing, suspending, or extending” a statute of limitations is known as tolling. *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 n.1 (1950).

³ 414 U.S. 538 (1974).

⁴ See *id.* at 552–54; see also *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

⁵ See Brief of Retired Federal Judges as Amici Curiae in Support of Petitioner at 8–9, *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, No. 16-373 (U.S. filed Oct. 24, 2016).

⁶ On April 17 — seven days after this Recent Case is published — the Supreme Court will hear oral argument in a case presenting the second of these two questions; the Court declined to grant certiorari on the first. *In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App’x 13 (2d Cir. 2016), *cert. granted sub nom.* *Cal. Pub. Emps.’ Ret. Sys. v. ANZ Sec., Inc.*, 85 U.S.L.W. 3339–40, 3398 (U.S. Jan. 13, 2017) (No. 16-373). If it reaches the merits, the Court’s decision in *ANZ* will likely prove the most significant development in *American Pipe* jurisprudence in several decades.

⁷ See, e.g., *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 568–69 (6th Cir. 2005). The *American Pipe* decision involved parties who filed motions to intervene *after* the district court ruled on class certification. See *Am. Pipe*, 414 U.S. at 543–44.

⁸ Compare *Statute of Repose*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a “statute of repose” as “barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury”), with *Statute of Limitations*, *id.* (defining a “statute of limitations” as “establishing a time limit for suing . . . based on the date when the claim accrued (as when the injury occurred or was discovered)”). This act/accrual distinction is a recent phenomenon; it did not exist when the Court decided *American Pipe*. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (suggesting that “[s]tatutes of limitations . . . are statutes of repose”); see also *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185–

Recently, in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*,⁹ a Sixth Circuit panel affirmed that the forfeiture rule remains binding law in that circuit and refused to extend *American Pipe* tolling to statutes of repose.¹⁰ As the panel recognized, these twin holdings may require that “a concerned potential plaintiff . . . file within the limitations period or be out of luck”: no action can be filed beyond the repose period, yet any action filed between the end of the limitations period and the repose period is barred by the forfeiture rule if the court has not yet ruled on class certification.¹¹ This is a curious requirement, given that *American Pipe* itself might fairly be described as standing for the exact opposite proposition.¹² By emphasizing formal, categorical — and ultimately indeterminate — distinctions, *Stein* reached a rule out of step with *American Pipe*, a decision principally concerned with the practical necessity of class action tolling.

Regions Financial managed some mutual funds that invested heavily in mortgage-backed securities. This proved unwise. The funds lost nearly all of their value;¹³ inevitably, litigation ensued. In December 2007, a securities class action was filed against several Regions entities in Tennessee federal court.¹⁴ In October 2013 — while class certification was still pending, nearly six years later — Andrew M. Stein and other putative class members filed individual actions.¹⁵

Regions moved to dismiss the individual suits as untimely. Claims made under the Securities Exchange Act of 1934¹⁶ are subject to a two-year statute of limitations and a five-year statute of repose,¹⁷ and Regions argued that those periods had long since lapsed. At first, the

86 (2014); Recent Case, *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013), 127 HARV. L. REV. 1501, 1505 n.46 (2014).

⁹ 821 F.3d 780 (6th Cir. 2016).

¹⁰ *Id.* at 789, 794–95.

¹¹ *Id.* at 795 n.6.

¹² See, e.g., *Jarrett v. Kassel*, 972 F.2d 1415, 1428 (6th Cir. 1992) (“The Supreme Court has held that class members . . . need not file individual claims while a class action is pending to prevent their claims from being barred by a statute of limitations.”).

¹³ *Stein*, 821 F.3d at 783 (describing the losses as “catastrophic”).

¹⁴ *Id.* at 785; *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, 166 F. Supp. 3d 948, 959 (W.D. Tenn. 2014). A similar class action filed in the same month was not controlling in the later *Stein* litigation as the *Stein* plaintiffs appeared not to be members of that putative class. See *Stein*, 821 F.3d at 790.

¹⁵ *Stein*, 821 F.3d at 785; *Regions*, 166 F. Supp. 3d at 956. One of the October 2013 complaints named Andrew M. Stein, Stein Holdings, Inc., and Stein Investments, LLC, as plaintiffs; another named Warren Canale and Canale Funeral Directors, Inc. *Stein*, 821 F.3d at 783. On appeal to the Sixth Circuit, the Stein and Canale cases were consolidated. *Id.* at 785.

¹⁶ 15 U.S.C. §§ 78a–78pp (2012).

¹⁷ See 28 U.S.C. § 1658(b) (2012); see also *Stein*, 821 F.3d at 787. Under the Securities Act of 1933, 15 U.S.C. §§ 77a–77aa, claims are subject to a one-year statute of limitations and a three-year statute of repose. See *id.* § 77m; see also *Stein*, 821 F.3d at 787. Because the Securities Exchange Act of 1934 provides for longer limitations and repose periods, any action time-barred by that statute would likely be time-barred by the Securities Act of 1933 as well.

district court denied the motion, concluding that *American Pipe* tolled the applicable statutes of repose and that the forfeiture rule did not apply.¹⁸ But on reconsideration, the district court reversed course: the forfeiture rule was mandated by circuit precedent, and thus the individual actions, which had been filed before a ruling on class certification, were time-barred.¹⁹ The *Stein* plaintiffs appealed.

The Sixth Circuit affirmed on different grounds. Writing for a unanimous panel, Judge Clay²⁰ held that most of the plaintiffs' claims were rendered untimely by the forfeiture rule and, regardless, all were barred by the applicable statutes of repose.²¹ The panel acknowledged that the forfeiture rule remained binding precedent in the Sixth Circuit, though it harbored "doubts" about that rule, which had become the minority approach.²² By lodging the instant action before a certification ruling in the December 2007–filed class action, the *Stein* plaintiffs had forfeited the benefit of *American Pipe* tolling as to most (if not all²³) of their claims.²⁴

And "absent tolling of some kind," Judge Clay noted, the five-year statute of repose surely doomed the plaintiffs' claims: the defendants took no relevant action after July 2008, and the plaintiffs filed suit in October 2013.²⁵ Seeking guidance on this *American Pipe* repose question, a matter of first impression in the Sixth Circuit,²⁶ the panel turned first to a plaintiff-friendly source. In an early discussion of the issue, the Tenth Circuit had held that because *American Pipe* is a doctrine of legal (or "statutory") tolling, rather than equitable (or "judicially created") tolling,²⁷ it applies to both statutes of limitations and stat-

¹⁸ *Regions*, 166 F. Supp. 3d at 959–60, 969. The *Federal Reporter's* Background section for *Stein* cites a 2014 district court order concerning parties other than Stein and Canale; it thus mischaracterizes that court's holdings as to Stein and Canale. See *Stein*, 821 F.3d at 780.

¹⁹ *In re Regions Morgan Keegan Sec., Derivative & ERISA Litig.*, Nos. 2:13-cv-02841-dkv, 2:09-2009-dkv, 2015 WL 10713983, at *2–3 (W.D. Tenn. July 31, 2015); see also *Stein*, 821 F.3d at 785. In its 2014 order, the district court had suggested that the forfeiture rule was no longer good law in the Sixth Circuit. The Sixth Circuit panel that adopted the rule had done so with reference to an opinion later overturned on appeal by the Second Circuit, and the district court at first found that reversal "persuasive." *Regions*, 166 F. Supp. 3d at 960.

²⁰ Chief Judge Cole and Judge Gibbons joined Judge Clay's opinion.

²¹ *Stein*, 821 F.3d at 783, 791–92, 795.

²² *Id.* at 789.

²³ The forfeiture rule barred only some of the plaintiffs' claims because the various suits named different sets of defendants, and the panel "declin[e]d to extend" the rule to reach all defendants regardless of which were named in each suit. *Id.* at 791.

²⁴ *Id.* at 791–92. Nearly eight years after the commencement of the putative class action, the district court provisionally certified a class in November 2015. See *id.* at 790.

²⁵ *Id.* at 792.

²⁶ *Id.*

²⁷ Legal tolling is a term "some federal courts have used . . . to describe [the holding in *American Pipe*] on the ground that the rule 'is derived from a statutory source,' whereas equitable tolling is 'judicially created.'" *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012) (quoting *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009)).

utes of repose.²⁸ Designating *American Pipe* tolling as legal allowed the Tenth Circuit to sidestep a Supreme Court decision commonly read to bar the equitable tolling of statutes of repose.²⁹

But the Second Circuit had taken a different tack, Judge Clay explained, and held that the answer to the legal/equitable question is immaterial: either way, statutes of repose are immune to *American Pipe* tolling.³⁰ On the Second Circuit's logic, if *American Pipe* tolling is equitable, precedent forbids its application to a statute of repose.³¹ And if *American Pipe* tolling derives from the Federal Rules of Civil Procedure and is thus legal, applying it to a statute of repose would violate the Rules Enabling Act³² (REA). The REA "forbids interpreting [the Rules] to 'abridge, enlarge or modify any substantive right'";³³ a statute of repose creates a substantive right freeing defendants from liability; ergo, the Rules cannot toll a statute of repose.³⁴

Stein adopted the Second Circuit's holding and rationale in toto.³⁵ The panel observed that the Second Circuit's repose rule found support in a subsequent Supreme Court decision that both "discussed at length the incompatibility of equitable tolling and statutes of repose"³⁶ and suggested, by analogy, that statutes of repose create a substantive right in defendants.³⁷ In closing, the panel briefly hinted at another potential difficulty: that in certain cases, *Stein*'s twin holdings would force "a concerned potential plaintiff [to] file within the limitations period or be out of luck."³⁸ Still, this complication mattered little for the *Stein* plaintiffs. For them, forfeiture rule or not, the untolled statute of repose disposed of their claims.

As the *Stein* court implicitly recognized, there are at least two ways of approaching the *American Pipe* repose puzzle. The first is broad, practical, functionalist (and comes from *American Pipe* itself): what rule is "necessary to insure [the] . . . efficiency and economy that the [class action device] was designed to serve"?³⁹ The second is narrow,

²⁸ See *Joseph v. Wiles*, 223 F.3d 1155, 1166–68 (10th Cir. 2000).

²⁹ See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); see also *Joseph*, 223 F.3d at 1166.

³⁰ See *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013).

³¹ *Id.* (citing *Lampf*, 501 U.S. at 363).

³² 28 U.S.C. § 2072 (2012).

³³ *IndyMac*, 721 F.3d at 109 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011)).

³⁴ *Id.*

³⁵ See *Stein*, 821 F.3d at 793.

³⁶ *Id.* (citing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)).

³⁷ *Id.* at 794 (citing *CTS*, 134 S. Ct. at 2183).

³⁸ *Id.* at 795 n.6.

³⁹ *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556 (1974); see also *id.* at 550 ("A federal class action is . . . designed to avoid, rather than encourage, unnecessary filing of repetitious papers . . .").

categorical, formalist (and is a later engraftment on *American Pipe*⁴⁰): Is class action tolling legal or equitable? And are statutes of repose substantive or procedural? *Stein* engaged principally with this second line of questions. But the categorical analysis is hardly as neat as the panel suggested, given the intrinsic haziness of those distinctions in the context of class action tolling. And the practical analysis militates against *Stein* altogether, as the decision will needlessly force litigants to file wasteful protective actions. By subordinating pressing practical concerns to an indeterminate categorical analysis, the *Stein* court reached a rule out of step with *American Pipe*.

Start where *Stein* ends, with substance and procedure. The panel chose not to recognize this distinction for what it really is — a conclusion in place of analysis.⁴¹ The assertion that a statute of limitations merely limits a plaintiff's remedy (and is thus procedural), whereas a statute of repose "create[s] a *substantive* right in those protected to be free from liability,"⁴² is easily reversible. One might say instead that defendants have a substantive right to be free from liability once the limitations period has run⁴³ — or that a statute of repose limits a plaintiff's remedy, as it surely does.⁴⁴ There's another problem here: *Stein*'s implicit assumption that something substantive is entirely sub-

⁴⁰ In the *American Pipe* context, the legal/equitable distinction stems from *Joseph v. Wiles*, 223 F.3d 1155, 1166–67 (10th Cir. 2000), and the substance/procedure categories first arose in *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013). It's worth noting that *American Pipe* itself appeared to abjure the latter distinction. See *Am. Pipe*, 414 U.S. at 557–58 ("The proper test is not whether a time limitation is 'substantive' or 'procedural' . . ."); see also Recent Case, *supra* note 8, at 1506 & n.48. But see *IndyMac*, 721 F.3d at 109 n.17 (arguing that *American Pipe*'s "proper test" statement shouldn't be taken at face value).

⁴¹ See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4508, at 213 (3d ed. 2016) (noting that "the terms 'substance' and 'procedure' often are used in highly conclusory fashion").

⁴² *IndyMac*, 721 F.3d at 106 (quoting *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996) (emphasis added)).

⁴³ On another line of reasoning, the substantive right at issue is the defendant's right to be put on notice of all potential claims — which the filing of a class action would provide, regardless of any limitations or repose concerns — rather than the defendant's right to be free from liability. See *Am. Pipe*, 414 U.S. at 554–55; *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1450–51 (1976); Recent Case, *supra* note 8, at 1507.

⁴⁴ Cf. Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 246 (1927) (observing that "the distinction . . . between rights and remedies . . . is of use primarily as a basis on which to classify decisions after they have already been reached on other grounds"). One might concede that these are unsatisfying distinctions but argue they're supported by precedent all the same. See, e.g., *IndyMac*, 721 F.3d at 106. Note, however, that the Supreme Court has never drawn this procedural-limitations/substantive-repose distinction — though it certainly has had the opportunity to do so. See, e.g., *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010) for the proposition that a statute of repose functions to "free [a defendant] from liability after the legislatively determined period of time," but neglecting to include the full sentence from the quoted source, which begins: "A statute of repose creates a *substantive right* in those protected to be free from liability . . ." (emphasis added) (footnote omitted)).

stantive, and that something procedural is entirely procedural.⁴⁵ Let's concede arguendo that statutes of repose confer a substantive right upon defendants. If a statute of repose can fairly be described as a more robust statute of limitations,⁴⁶ then a statute of limitations might *also* confer a substantive right upon defendants, if in lesser degree. Thus, on *Stein's* logic, *American Pipe* tolling of statutes of limitations could violate the REA. But that can't be right: it threatens to swallow the *American Pipe* doctrine whole.

Consider next the threshold question in *Stein*: whether the tolling doctrine is legal or equitable. Analogy and disanalogy are time-honored tools for answering such questions. But the *American Pipe* repose jurisprudence seldom uses this device, likely because the analogies offer each side little succor.⁴⁷ Instead, courts opt to parse vague dicta from *American Pipe*, always a risky strategy.⁴⁸ Yet if *American Pipe* tolling is sui generis, perhaps the legal/equitable distinction presents a false choice.⁴⁹ Maybe the better answer is that *American Pipe* is

⁴⁵ Many legal concepts — including statutes of limitations — encompass aspects of substance and procedure, a fact obscured when courts place them exclusively in one box or the other. See Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 290 (“Limitations law is famously a body of rules that are neither grass nor hay, being at once both substantive and procedural.”); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974) (noting that statutes of limitations are enacted for substantive and procedural purposes); see also *Sibbach v. Wilson & Co.*, 312 U.S. 1, 17 (1941) (Frankfurter, J., dissenting).

⁴⁶ It can be. See, e.g., *CTS*, 134 S. Ct. at 2190 (Ginsburg, J., dissenting) (“What is a repose period, in essence, other than a limitations period unattended by a discovery rule?”). A statute of repose is the more categorical cousin of a statute of limitations: the difference between the two is one of degree, not kind. Each compels plaintiffs to act with dispatch and grants defendants freedom from liability after a period of time; the major difference is whether that period begins when the defendant acts or when the plaintiff’s claim accrues. See *id.* at 2182–83 (majority opinion). Wherever we choose to draw the elusive substance/procedure line, it shouldn’t be *between* these two intimately related concepts.

⁴⁷ The paradigmatic example of legal tolling is one statute that clearly tolls another. See, e.g., *Pace v. DiGuglielmo*, 544 U.S. 408, 410 (2005). But one can search Rule 23 in vain for any mention of tolling; it features no such reference, whether explicit or obscure. The analogy to equitable tolling fares no better. Equitable tolling tends to arise in “rare and exceptional” cases, 54 C.J.S. *Limitations of Actions* § 134 (2010), where a plaintiff has diligently pursued his rights yet been stymied by “some extraordinary circumstance,” *Pace*, 544 U.S. at 418. *American Pipe* tolling looks nothing like this. There’s nothing rare or exceptional about it, and an absent class member can hardly be described as diligently pursuing anything. See *Am. Pipe*, 414 U.S. at 551–52.

⁴⁸ See, e.g., *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1248–49 (11th Cir. 2016) (relying on Supreme Court dicta in *American Pipe* and elsewhere to conclude that the doctrine is equitable, not legal). This is a dangerous tactic, for the dicta cuts both ways. See *IndyMac*, 721 F.3d at 108 & n.15 (collecting cases on both sides).

⁴⁹ One might say the same of the substance/procedure distinction. But unlike the REA, which appears to force a choice between procedure and substance, compare 28 U.S.C. § 2072(a) (2012), with *id.* § 2072(b); see also *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting), the legal/equitable distinction in tolling law is more a matter of inertia than of statute.

simply “class-action tolling,”⁵⁰ something separate and apart from legal or equitable tolling, and needn’t fit into one of those two pigeon-holes.⁵¹ Or maybe not. But the *Stein* court never considered any of these questions.⁵²

Were this the end of the matter, one might grant *Stein* its “out of luck” rule: after all, the panel reached plausible (if not unassailable) answers to those nettlesome categorical questions. Yet that line of analysis fails to reach *American Pipe*’s true concern: the salutary practical effects of the rule the Court adopted.⁵³ For one illustration of *Stein*’s practical problems, consider the calculations you’d face as a litigant under the repose rule alone. You might choose to remain a member of the putative class — then see the district court deny class certification after the repose period has run. Alas, you’re forever “out of luck.” Unwilling to risk that outcome, you might file independently — only to see the district court grant class certification and approve a settlement that excludes you.⁵⁴ This dilemma forces litigants to play a needless guessing game.⁵⁵ The choice between remaining a member of the putative class and filing independently was already complex, but *Stein* introduces a new variable: the probability that the district court will rule on class certification before the repose period has run. The

⁵⁰ *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (intimating — albeit obscurely — that *American Pipe* is “class-action tolling,” perhaps distinct from “equitable tolling”).

⁵¹ See Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington’s* “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 1012, 1027–28 (arguing that the *American Pipe* doctrine is a creature of federal common law); Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Laws*, 40 J. CORP. L. 143, 181 (2014) (“There is reason to question whether *American Pipe* is the equitable species of tolling or really tolling at all.”).

⁵² And never mind another riddle: that the statutory source for *American Pipe* tolling is Rule 23, see *IndyMac*, 721 F.3d at 107, which is itself judicially created pursuant to the REA. Thus, one can fairly characterize *American Pipe* tolling as derived from a judicially created statutory source. Does that make it legal? Or equitable? Or just circular?

⁵³ It is beyond peradventure that the *American Pipe* Court was principally focused on practical considerations (as opposed to formalist distinctions), see *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550–51, 553–56 (1974); see also 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:15 (13th ed. 2016); Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 830 (2006), though the specific “primary motivating concerns” of that decision have long been debated, *Stein*, 821 F.3d at 795 n.6. Perhaps the *American Pipe* Court was most interested in maximizing judicial economy and minimizing duplicative litigation. Perhaps the Court wanted to protect putative class members from being compelled to file protective motions. See *id.* Or perhaps both. One need not resolve the question to recognize that *Stein* does damage to any concern emanating from *American Pipe*. *Stein*’s twin holdings will force litigants to file independently within the limitations period — duplicative actions that would be needless absent these rules.

⁵⁴ See 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:39 (5th ed. 2013).

⁵⁵ Cf. *Am. Pipe*, 414 U.S. at 553–54 (“[A] rule requiring successful anticipation of [class certification] would breed needless duplication of motions.”).

speed with which a court handles its docket ought not determine the outcome of litigation. But that's exactly what *Stein* requires.⁵⁶

The repose rule adopted by *Stein* is practically problematic on its own terms,⁵⁷ but the forfeiture rule significantly aggravates its effects. Forfeiture alone yields unwanted outcomes.⁵⁸ Still, in isolation, it offers litigants an out: just wait for a class certification ruling. The repose rule eliminates that escape route. This is the *Stein* "bind"⁵⁹: after the repose deadline, no putative class member can file individually, yet no member can file between the limitations and repose deadlines if the court hasn't yet ruled on class certification.⁶⁰ The practical inquiry at the core of *American Pipe* would recognize the undesirable consequences of combining these two rules.⁶¹ Tellingly, *Stein*'s examination of each in isolation does not.

"Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues . . ."⁶² An apt description of *American Pipe*, a decision often misconstrued. *Stein* emphasized intricate (yet indeterminate) categories of law, equity, substance, and procedure. In so doing, it misapprehended the Court's true focus: the practical necessity of class action tolling. *Stein* won't be the last word on this topic.⁶³ When the Court takes up the question again, it should recognize that at long last, it's time to put *American Pipe* back into practice.

⁵⁶ Tellingly, in the normal context, statutes of limitations and statutes of repose don't operate this way. The key event is the filing of the complaint: if that happens before the limitations or repose period has run, the plaintiff is in luck. A defendant can't point to some later event in the litigation and argue that because the court was moving slowly, the action is time-barred.

⁵⁷ Due to the act/accrual distinction, the statute of repose might run before the corresponding limitations period ends. In that circumstance, the repose rule would still force class members to file duplicative actions before the repose (and limitations) deadlines, forfeiture rule or not.

⁵⁸ See *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1234 (10th Cir. 2008) (noting that the forfeiture rule "has the potential to backfire" by encouraging class members to file unnecessary protective actions before the limitations period ends or else wait — perhaps years — for a ruling on class certification); RUBENSTEIN, *supra* note 54, § 9:63. Few regard the rule with much enthusiasm today, a fact not lost on the *Stein* panel. See *Stein*, 821 F.3d at 789.

⁵⁹ *Stein*, 821 F.3d at 795 n.6.

⁶⁰ The class action at issue in *Stein* took nearly eight years from commencement to certification. See *id.* at 790. Lengthy delays between commencement and certification are not uncommon. See Brief of Civil Procedure and Securities Law Professors as Amici Curiae in Support of Petition for a Writ of Certiorari at 4–12, *DeKalb Cty. Pension Fund v. Transocean Ltd.*, No. 16-206 (U.S. filed Sept. 14, 2016) (providing empirical data); RUBENSTEIN, *supra* note 54, §§ 7:8, 8:31, 9:43 (explaining why a class might be certified so late in the case).

⁶¹ To put a finer point on it: the *American Pipe* Court *did* recognize these manifestly undesirable consequences, because that Court expressly rejected a rule that required "a concerned potential plaintiff [to] file within the limitations period or be out of luck." *Stein*, 821 F.3d at 795 n.6.

⁶² Wolin v. Smith Barney Inc., 83 F.3d 847, 849 (7th Cir. 1996) (Posner, C.J.).

⁶³ See *In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13 (2d Cir. 2016), cert. granted *sub nom.* Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 85 U.S.L.W. 3339–40 (U.S. Jan. 13, 2017) (No. 16-373) (granting certiorari on the repose issue, but not the forfeiture issue).