CIVIL PROCEDURE — CLASS ACTIONS — SECOND CIRCUIT HOLDS THAT *AMERICAN PIPE* CLASS ACTION TOLLING DOCTRINE DOES NOT APPLY TO STATUTE OF REPOSE IN SECURITIES ACT OF 1933. — *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013).

The 2008 financial crisis provoked a flood of class actions alleging securities fraud in violation of the Securities Act of 1933[1] (Securities Act) on the part of issuers and underwriters of mortgage-backed securities. As these cases evolved, some nonparty members of putative classes filed individual claims substantially similar to the class claims after the three-year statute of repose codified in section 13 of the Securities Act[2] had run. Courts therefore had to decide whether the class action tolling doctrine established in *American Pipe & Construction Co. v. Utah*[3] — under which the pendency of a class action tolls the statute of limitations for the individual claims of nonparty class members until definitive resolution of class status[4] — rendered timely these post–statute of repose filings. Recently, the Second Circuit took up this question in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*,[5] ruling that *American Pipe* tolling does not apply to the Securities Act's statute of repose.[6] *IndyMac* was wrongly decided: the court's analysis rests on a mischaracterization of the *American Pipe* decision itself. That decision, properly understood, militates toward tolling the section 13 repose period.

In May 2009, the Police and Fire Retirement System of the City of Detroit (Detroit) filed a putative class action against IndyMac MBS, Inc. and others in the District Court for the Southern District of New York, alleging securities fraud in the sale of certain mortgage-backed

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[1] 15 U.S.C. §§ 77a–77aa (2012).

[2] *Id.* § 77m. Section 13's repose statute reads: "In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale." *Id.*

[3] 414 U.S. 538 (1974).

[4] *Id.* at 552–53; *see also* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (clarifying that the *American Pipe* doctrine extends to claims brought as new individual actions by putative class members). *See generally* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:53 (5th ed. 2013) (explicating the *American Pipe* class action tolling doctrine).

[5] 721 F.3d 95 (2d Cir. 2013).

[6] *Id.* at 101. This ruling created a circuit split. *Compare id.* (rejecting tolling), *with* Joseph v. Wiles, 223 F.3d 1155, 1166–68 (10th Cir. 2000) (adopting tolling). The Second Circuit broke from a thin but near-unanimous line of lower court cases applying the *American Pipe* doctrine to the section 13 statute of repose. *See, e.g.*, *In re* Morgan Stanley Mortg. Pass-Through Certificates Litig., 810 F. Supp. 2d 650, 666–70 (S.D.N.Y. 2011); Me. State Ret. Sys. v. Countrywide Fin. Corp., 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010); *In re* Flag Telecom Holdings, Ltd. Sec. Litig., 352 F. Supp. 2d 429, 455–56 (S.D.N.Y. 2005). *But see* Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624–27 (S.D.N.Y. 2011) (rejecting tolling).

securities.[7] Shortly thereafter, several Wyoming entities (collectively, Wyoming) filed a similar suit.[8] The court consolidated the actions and, per the Private Securities Litigation Reform Act of 1995[9] (PSLRA), named Wyoming lead plaintiff.[10]

The consolidated class complaint named Wyoming as the sole plaintiff and alleged securities fraud in various IndyMac certificate offerings — including several in which Wyoming had made no purchases (but in which Detroit had done so).[11] Defendants successfully moved to dismiss this latter set of claims for lack of standing: Wyoming could sue only for Securities Act violations on offerings in which it had actually purchased securities and thus suffered a justiciable injury.[12] Detroit moved to intervene in the suit[13] to prosecute class claims regarding these offerings.[14]

Section 13's three-year statute of repose had run prior to the dismissal of Wyoming's claims regarding the offerings at issue. The defendants raised this issue in opposition to the proposed intervention,[15] and Detroit made two responses: First, Detroit invoked the *American Pipe* doctrine, arguing that the pendency of the Wyoming action, in which Detroit was a nonparty member of the putative class, tolled the statute of repose such that Detroit's individual claims remained timely.[16] Second, Detroit argued that the relation-back provision of Rule 15(c) of the Federal Rules of Civil Procedure[17] should allow it to amend the class complaint to include it as a named party and thus cure the standing deficiency.[18] The district court ruled against Detroit on both issues.[19]

The Second Circuit affirmed, holding that neither *American Pipe* tolling nor Rule 15(c) relation back could render timely the purported intervenors' claims.[20] Writing for a unanimous panel, Judge Cabranes[21] turned first to the *American Pipe* question. The court be-

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7 *In re* IndyMac Mortgage-Backed Sec. Litig., 793 F. Supp. 2d 637, 641 (S.D.N.Y. 2011).

8 *Id.*

9 Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

10 *IndyMac*, 793 F. Supp. 2d at 641.

11 *Id.*

12 *Id.*

13 Other institutional investors also moved to intervene, including the pension systems for Philadelphia, Los Angeles County, and Mississippi. *See id.* at 642 n.13.

14 *Id.* at 642.

15 *See id.*

16 *Id.*

17 FED. R. CIV. P. 15(c). This provision allows certain amendments to pleadings to relate back to the filing date of the original pleading.

18 *IndyMac*, 793 F. Supp. 2d at 643.

19 *Id.* at 642–43.

20 *IndyMac*, 721 F.3d at 101.

21 Judge Cabranes was joined by Judges Raggi and Carney.

gan with an account of the *American Pipe* decision itself, noting the ambiguity as to whether the Court's analysis rested on the application of a general judicial power to equitably toll statutes of limitations or, by contrast, a form of legal tolling based on an interpretation of a statute.[22] On the Second Circuit's understanding, the source of the *American Pipe* doctrine is ambiguous — but to the extent that it is a legal tolling doctrine it is derived from an interpretation of Rule 23.[23]

The court next turned to the section 13 time limitation at issue. It began by outlining the oft-elided distinction between statutes of limitation and statutes of repose.[24] A statute of limitations, Judge Cabranes explained, is a procedural restriction on the availability of a remedy — and is therefore subject to tolling on equitable grounds.[25] A statute of repose, on the other hand, confers upon the defendant a right to be free from liability after a certain period; running the repose period extinguishes the existence of the right, and thus such statutes are not subject to equitable tolling doctrines.[26] Section 13 contains a one-year limitations period and a three-year repose period.[27]

The court then considered whether the *American Pipe* doctrine applies to section 13's repose period. The court concluded that tolling was inapplicable regardless of whether the doctrine is equitable or legal.[28] If the doctrine is equitable, then the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[29] bars its application to statutes of repose.[30] And if the doctrine is legal, tolling section 13's repose statute violates the Rules Enabling Act[31] (REA).[32] Since a statute of repose bestows a substantive right upon the defendant, the court reasoned that application of *American Pipe* tolling —

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[22] *See IndyMac*, 721 F.3d at 104–05. Courts' views on which of these grounds motivated *American Pipe* have largely determined whether they have applied tolling to statutes of repose. *See, e.g.*, Albano v. Shea Homes Ltd. P'ship, 634 F.3d 524, 534–40 (9th Cir. 2011) (outlining both theories in determining whether the Arizona Supreme Court would toll a statute of repose); Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624–27 (S.D.N.Y. 2011) (concluding that *American Pipe* is an equitable tolling rule); *In re* Discovery Zone Sec. Litig., 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998) (concluding that *American Pipe* is a legal tolling rule).

[23] *IndyMac*, 721 F.3d at 104–05; *see also* FED. R. CIV. P. 23.

[24] *IndyMac*, 721 F.3d at 106 (citing Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010), for the proposition that statutes of limitation and statutes of repose are fundamentally distinct but frequently confused).

[25] *Id.* (citing Fed. Hous. Fin. Agency v. UBS Americas Inc., 712 F.3d 136, 140 (2d Cir. 2013)).

[26] *Id.* Statutes of repose are, however, subject to legal tolling applied through interpretation of a statute or combination of statutes. *See id.*

[27] *See id.* at 106–07.

[28] *Id.* at 109.

[29] 501 U.S. 350 (1991).

[30] *IndyMac*, 721 F.3d at 109 (citing *Lampf*, 501 U.S. at 363).

[31] 28 U.S.C. §§ 2071–2077 (2012); *see id.* § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right.").

[32] *See IndyMac*, 721 F.3d at 109.

which on the court's understanding is grounded exclusively in Rule 23 if it is a legal doctrine at all — would be precisely the sort of abridgement or modification of a substantive right that the REA prohibits.[33] Thus, the intervenors' claims could not be rendered timely on an *American Pipe* theory.

The Second Circuit concluded this analysis by briefly rebutting the proposed intervenors' argument that nonapplication of the tolling doctrine would burden the courts by incentivizing duplicative filings to preserve individual causes of action in the event that class status is denied after the repose period ran: First, the court explained that parties in these actions are sophisticated and ably represented, and that class status determinations are often made prior to the running of the repose period.[34] Second, the court noted that such considerations were properly a matter for congressional, rather than judicial, consideration.[35]

The court then turned to the Rule 15 relation-back argument. Because Wyoming had lacked constitutional standing to assert claims regarding securities it had not purchased, the court had never had subject matter jurisdiction over those claims;[36] Detroit's intervention could not cure that jurisdictional defect.[37] Even if Detroit could relate back its intervention, there was no justiciable case to which to relate back.[38]

A careful reading of *American Pipe* reveals that the Supreme Court faced, and rejected, arguments closely analogous to those accepted by the Second Circuit. Instead of deciding on REA grounds, the *American Pipe* Court looked to the statutory scheme governing the litigation and determined that tolling was consistent therewith. The *IndyMac* court's holding rests on a dual mischaracterization of *American Pipe*. First, the court's assertion that *American Pipe* dealt only with procedural statutes of limitations is flawed. Second, the court's characterization of the *American Pipe* opinion as one driven only by a combination of equitable considerations and analysis of Rule 23 — the key basis of the REA argument — is incorrect. Properly understanding what the Supreme Court considered and decided in *American Pipe* militates toward tolling section 13's repose statute[39] on the ground that tolling is consonant with Congress's approach to securities litigation.[40]

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[33] *See id.*

[34] *See id.* at 109–10.

[35] *See id.* at 110.

[36] *See id.* at 111.

[37] *See id.*

[38] *See id.* at 111–12.

[39] The necessary reasoning of Supreme Court opinions is binding on lower courts — to the extent that the characterization of the *American Pipe* decision advanced herein is correct, the Second Circuit was bound to adopt it. *See, e.g.*, Barclays Capital Inc. v. Theflyonthewall.com, Inc.,

In *American Pipe*, nonparty class members in an antitrust action brought under the Clayton Act[41] sought to intervene as individual plaintiffs after the district court refused class certification on numerosity grounds.[42] However, the time limitation in section 4B of the Clayton Act had run during the pendency of the motion for class certification.[43] The Supreme Court ultimately held that the statute of limitations for the purported intervenors' individual claims was tolled by the pendency of a class certification motion.[44] More relevant for present purposes is the structure of the argument that the defendants employed and the Court's response thereto.

The *American Pipe* defendants' main argument on appeal bore a stark similarity to that advanced by the defendant in *IndyMac*. The defense argued that the section 4B time limitation in the Clayton Act was a substantive right of the defendant, which, per the REA, could not be altered by interpretation of Rule 23.[45] The similarity of the two arguments — and therefore the true import of the Court's reasoning in *American Pipe* — is obscured by a shift in vocabulary since *American Pipe* was decided. Forty years ago, the federal courts of appeal simply did not utilize the modern vocabulary drawing a strict linguistic distinction between substantive "statutes of repose" and procedural "statutes of limitations."[46] It is therefore unsurprising that the decision

650 F.3d 876, 911–12 (2d Cir. 2011) (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66–67 (1996)).

40 A federal district court in the Second Circuit followed a somewhat similar analysis in the course of holding that section 13 was tolled. *See In re* Morgan Stanley Mortg. Pass-Through Certificates Litig., 810 F. Supp. 2d 650, 666–70 (S.D.N.Y. 2011). That case was indirectly overruled by *IndyMac*.

41 15 U.S.C. §§ 12–27, 52–53 (2012).

42 *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 543–44 (1974).

43 *See id.* at 544.

44 *See id.* at 552–53.

45 *See id.* at 556–57.

46 A Westlaw search for the phrase "statute of repose" in Supreme Court decisions between 1950 and 1980 returned seven cases, *none* of which used the term in its modern sense as a distinct type of time limitation embodying a substantive termination of a right. Many of these cases directly and affirmatively conflated statutes of limitations and repose at a linguistic or conceptual level. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) ("Statutes of limitations . . . are statutes of repose . . . ."); United States v. Powell, 379 U.S. 48, 59–60 (1964) (Douglas, J., dissenting) ("Here we have a congressional 'statute of repose' embodied in the three-year statute of limitations."); Bridges v. United States, 346 U.S. 209, 230–31 (1953) (Reed, J., dissenting) ("Of course, statutes of limitation are statutes of repose."). Expanding the search to include cases from the federal courts of appeals in the same period reveals a few instances of rigorous differentiation between the concepts, but the confused vocabulary remains. *See, e.g.*, Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611–12 (7th Cir. 1975) (differentiating between limitations rules that are subject to tolling on equitable grounds and those that serve as an absolute bar and thus serve as "a true statute of repose," *id.* at 612, but using "statute of limitations" as an umbrella term throughout). In fact, the *IndyMac* court noted the linguistic confusion generally, *see IndyMac*, 721 F.3d at 106, and in the specific context of the *American Pipe* decision, *see id.* at 106 n.13. However, it immediately dismissed that confusion as a reason why *American Pipe* might extend to statutes of

does not frame the dispute in those terms. And yet the *American Pipe* Court explicitly considered whether tolling would violate the REA by modifying a substantive right — precisely the issue in *IndyMac*, and one that would not arise were the statute in question understood by all parties to be a statute of limitations in the modern parlance.[47] Whether the statutory language amounted to what we would today call a statute of repose was a live controversy in the case — but it was litigated using a "substance/procedure" vocabulary rather than the modern "repose/limitations."

The Court, however, rejected the relevance of the substance/procedure distinction (and therefore the basis for the defendant's REA argument), writing that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."[48] This language leaves open two possibilities. The first is that the Court was simply rejecting the argument that interpreting Rule 23 to toll a substantive time limitation would violate the REA.[49] The second, and more likely, possibility is that the Court did not understand its ruling to be a mere interpretation of Rule 23. On this view, the Court decided as it did because tolling the time limitation was consonant with the structure of Rule 23, the purpose underlying the time limitation,

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repose without considering whether the linguistic confusion that plagued the *American Pipe* Court might obscure that decision's implications in *IndyMac*. *See id.*

[47] Note that it is *not* relevant that modern courts treat section 4B of the Clayton Act as a procedural limitation subject to equitable tolling doctrines. What matters is that in *American Pipe* the defendant argued that Section 4B *should* be treated as a substantive limitation immune to tolling on REA grounds and that the Supreme Court rejected that argument, stating that tolling applied regardless of whether the limitation was substantive or procedural.

[48] *Am. Pipe*, 414 U.S. at 557–58. In footnote 29 of the opinion, the Court referenced legislative history that suggested that section 4B's time bar is in fact procedural. *See id.* at 558 n.29. But the main-text language's clear and unequivocal rejection of the importance of the substance/procedure distinction makes it unlikely that this footnote amounts to a *sub silentio* resolution of that dispute. *But see* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:15 (9th ed. 2012) (assuming that footnote 29 represents a decisive resolution of the substance/procedure issue). The district court in *In re Morgan Stanley Mortgage Pass-Through Certificates Litigation*, 810 F. Supp. 2d 650 (S.D.N.Y. 2011), made the main-text language rejecting the substance/procedure distinction the centerpiece of its opinion applying tolling to section 13. *See id.* at 666. However, that court's analysis was hampered by a lack of attention to the historical-usage shift and to the extent to which the *American Pipe* decision was grounded in the substantive law governing the litigation, rendering it vulnerable to the same REA attack that was decisive in *IndyMac*.

[49] The Tenth Circuit's reasoning in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000), echoed this view. That decision argued that *American Pipe* tolling should not be understood as tolling in the ordinary sense, because the plaintiff "ha[d] effectively been a party to an action against [the] defendants" since class status was asserted. *Id.* at 1168. The court there was not addressing an REA claim, but the logical next step would be to argue that as such no substantive right is being abridged or modified.

and the overall legislative scheme.[50] The tolling doctrine was then based on interpretation not only of Rule 23 but also of the purpose of the time limitation at issue in the context of private antitrust litigation — and thereby was not barred by the REA from application to the statute of repose. In short, the Second Circuit's *IndyMac* decision rests entirely on its characterization of *American Pipe* as an interpretation of Rule 23, and that characterization is probably inaccurate.[51]

A correct application of *American Pipe* would have produced the opposite holding in *IndyMac*, because tolling is fundamentally consonant with the purpose of the section 13 repose statute and the overall legislative scheme for private securities litigation. Tolling is consonant with the purpose of the statute of repose because of the nature of the substantive right that such statutes confer on defendants: the right to be put on notice of claims stemming from the defendant's conduct within a certain period following the conduct.[52] The filing of a purported class action readily accomplishes this notification for those individuals included within the class definition; barring an individual action would not in any way further the repose statute's purpose.[53]

Tolling is consonant with the securities litigation regime because that regime is structured by a set of laws — Rule 23 and the PSLRA — specifying an aggregative approach to securities litigation.[54] After a putative securities class action is filed, the PSLRA requires early notice to putative class members and appointment of a single lead plaintiff who will manage the litigation on behalf of the class.[55] The statute in-

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[50] *Am. Pipe*, 414 U.S. at 554–56; *see also Morgan Stanley*, 810 F. Supp. 2d at 666 (explaining the *American Pipe* decision as hinging on the determination that tolling was consonant with the purpose of the time limitation in the legislative scheme).

[51] *See* 1 MCLAUGHLIN, *supra* note 48, at § 3:15 (describing the *American Pipe* decision as motivated by the purpose of the limitation in the legislative scheme).

[52] *See Joseph*, 223 F.3d at 1167–68; *Morgan Stanley*, 810 F. Supp. 2d at 668; *see also Am. Pipe*, 414 U.S. at 554 (describing tolling as consistent with the notice-provision function of time limitations).

[53] *See Morgan Stanley*, 810 F. Supp. 2d at 668; Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 177 (D. Mass. 2009).

[54] Rule 23 is self-evidently proaggregation, in the sense that it is a rule providing for aggregation of claims. And while the PSLRA is a defense-friendly statute enacted to curtail the perceived excesses of the plaintiffs' bar, *see, e.g.*, S. REP. NO. 104-98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683–84, it is not an antiaggregation policy. Just the opposite — the PSLRA evinces a clear proaggregation agenda. *Cf.* Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 345, 348–49 (2010) (arguing that Congress's failure to implement heightened class certification standards in the PSLRA was an affirmative choice to maintain aggregation in securities procedures). It is unsurprising that a probusiness litigation scheme would seek maximal aggregation — such aggregation enhances a defendant's ability to buy finality in the form of a class settlement covering as many claims as possible, thereby avoiding future liability exposure and litigation costs. *See* William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 419–20 (2001).

[55] 15 U.S.C. § 77z-1(a)(3) (2012).

centivizes intervention by major stakeholders through a presumption that the intervenor with the largest financial stake in the litigation will be named lead plaintiff.[56] The straightforward purpose of these provisions is to funnel as many claims as possible arising out of a given fraud into a single action managed by a single institutional-investor plaintiff and litigated by a single law firm.[57] The *IndyMac* decision's inconsistency with this framework is clear: instead of encouraging efficient aggregation and resolution of claims in relatively few actions managed by relatively few sophisticated plaintiffs and counsel, the decision incentivizes precisely the rush to the courthouse that Rule 23 and the securities-litigation regime are designed to avoid.[58]

The *IndyMac* court's misreading of *American Pipe* is understandable, given that the *American Pipe* rule, on a facial reading, seems not to apply to the *IndyMac* dispute. However, a facial reading is not an accurate reading: *American Pipe*'s logic, properly understood, moots the *IndyMac* defendants' arguments. The likely policy implications of this misreading are clear. Institutional investors — and anyone else whose stake is large enough to merit a contingency fee — will file protective suits or motions in order to preserve individual causes of action[59] should class certification fail or the lead plaintiff be found unable to assert certain claims.[60] These protective filings will likely occupy substantial judicial time and energy and impose significant costs on defendants.

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[56] *See id.* § 77z-1(a)(3)(B)(iii). Further, the lead plaintiff is appointed only after motions for consolidation of actions arising out of the same underlying facts have been considered. *See id.* § 77z-1(a)(3)(B)(ii).

[57] *See* S. REP. NO. 104-98, at 11, *reprinted in* 1995 U.S.C.C.A.N. at 690.

[58] *See Morgan Stanley*, 810 F. Supp. 2d at 666–70 (explaining that not tolling the repose statute during the pendency of class certification proceedings in securities actions would incentivize protective filings, undermining the efficiency and economy goals of the aggregate-litigation system).

[59] *See* Rubenstein, *supra* note 54, at 399 (noting that institutional investors typically have sufficient incentive to litigate individually if necessary).

[60] The *IndyMac* court's argument to the contrary is unpersuasive. The first prong of the argument — that the sophistication of parties and counsel in securities litigation militates against a rush to the courthouse — actually cuts against the court. It is *precisely* sophisticated, well-counseled parties who will make protective filings, since they will understand the possibility of protracted class-status litigation and the potential consequences of denial of certification after the repose statute has run. The second prong of the court's argument — that forestalling a rush to the courthouse is a purely congressional function — applies only to the extent that the court's REA holding is correct, which it is not.