Leave Time for Trouble: The Limitations Periods Under the Securities Laws

Michael J. Kaufman and John M. Wunderlich*

* Michael J. Kaufman is Professor of Law and Associate Dean for Academic Affairs at Loyola University Chicago School of Law. John M. Wunderlich is the Institute Scholar for the Institute for Investor Protection at Loyola University Chicago School of Law. Special thanks are due to the editorial staff of *The Journal of Corporation Law*.

I. INTRODUCTION

In securities-fraud cases, the stakes are high and the litigation is costly, complicated, and time-consuming. Many people invest in the markets, directly or indirectly, to help buy a home, save for retirement, or send children to college. Thus, allegations that fraud tampered with these investments are serious. For these investors, a legitimate securities-fraud suit may present the opportunity to recover these savings, retirement nest eggs, or children's college funds that were lost, not because of risk attendant to investment generally, but because of fraud. A securities-fraud suit is serious for companies as well. For companies, the threat of a securities-fraud suit stands out as a nasty attack on business reputation and a significant litigation risk. Companies have every interest in getting these suits dismissed at the earliest practical time.

Whether a securities-fraud suit is timely is an elementary and crucial question for both sides because failing to file within the limitations periods can be case dispositive. The securities laws set time limits for bringing lawsuits based on when a reasonable investor would have discovered the fraud and when the fraud occurred. If investors do not comply with these time limits, then they are barred from the courthouse—no matter how egregious the scheme or how great their loss. The seemingly draconian result is justified by limitations periods' salutary purposes. For one, deadlines ensure that evidence is relatively fresh, which promotes resolution on the merits. In addition, a time limit allows defendants and others to rest easy knowing that after a certain time, their past transactions will not unravel with a lawsuit.

Legal deadlines are supposed to set clear rules for what is timely and what isn't.[1] Far from easy to apply, however, the law of limitations periods for securities cases is a collection of unsettled questions. This Article discusses the securities laws' legal deadlines and finds that the uncertainty with which they apply renders them less effective than they otherwise could be. Questions linger about whether the securities laws' limitations periods afford any room for equitable exceptions, like tolling, estoppel, or forfeiture. And, as of late, questions concerning how limitations periods apply to securities class actions have come to the fore. But uncertainty in the law of limitations benefits no one. Absent clear timeliness rules, litigants and the system expend time and money resolving purely procedural issues.[2]

But litigants need not wait for the judiciary or the legislature to resolve the ambiguity

1. *See* Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) ("Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation.").

2. *Cf.* Norris v. Wirtz, 818 F.2d 1329, 1332 (7th Cir. 1987) (recognizing that deciding which limitations period applies "wastes untold hours"); Tellis v. U.S. Fidelity & Guar. Co., 805 F.2d 741, 747 (7th Cir. 1986) ("Several centuries from now, when the archeologists have unearthed a copy of the Federal Reporter and turned it over to the legal historians for study and analysis, our descendants will indeed be puzzled to discover that a society in which judicial resources were such a scarce 'commodity' expended so much of that 'commodity' searching its state codes for 'analogous' limitation periods. I doubt very much that, at least in this regard, our priorities will command much admiration.").

of limitations periods. Instead, the parties themselves can accomplish the laudable aims of limitations periods (saving merited claims, deterring the use of stale evidence, and preventing litigation uncertainty) by entering into tolling agreements. This Article shows that tolling agreements should validly arrest the securities laws' limitations periods—the statutes of limitations and the statutes of repose. Thus, this Article advocates "leav[ing] time for trouble"[3] by using tolling agreements to arrest limitations periods and remedy the unclear application of statutory timeliness bars.

II. THE LIMITATIONS PERIODS UNDER THE SECURITIES LAWS

A. The Purposes of the Securities Laws' Limitations Periods

Limitations bars, including those governing securities cases, must balance competing aims. On the one hand, timeliness bars must be long enough to allow litigants enough time to discover and file merited claims.[4] On the other hand, timeliness bars must be short enough to mitigate the risk that evidence of merited claims will become stale[5] and relieve potential defendants and others from unending uncertainty about whether prior transactions will be scrutinized in court.[6]

1. Allowing Sufficient Time to Investigate and File a Securities-Fraud Case

Time limits for filing a securities-fraud action must account for the time it takes to uncover and investigate a securities-fraud scheme. In general, plaintiffs file securities class actions within days or months of a company's announcement of bad news to the market.[7]

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3. David D. Siegel, *The Stature of Limitations in Federal Practice, Including the New "General" One in Federal Question Cases*, 134 F.R.D. 481, 485 (1991).

4. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."); Law v. Medco Research, Inc., 113 F.3d 781, 786 (7th Cir. 1997) ("The statute of limitations in securities fraud cases serves . . . important public purposes. . . . But too much emphasis on the statute of limitations can precipitate premature and groundless suits, as plaintiffs rush to beat the deadline without being able to obtain good evidence of fraud; and the three-year statute of repose gives defendants a definite limit beyond which they needn't fear being sued.").

5. *See, e.g.*, Gabelli v. SEC, 133 S. Ct. 1216, 1221 (2013) ("Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'") (internal citation and quotation omitted).

6. *See, e.g.*, Young v. United States, 535 U.S. 43, 47 (2002) (stating that all limitations periods provide "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities") (internal citation omitted).

7. *See, e.g.*, ALAN R. BROMBERG ET AL., 5 BROMBERG & LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 10:46 (2d ed. 2013) (stating that fraud-on-the-market class actions, which charge misrepresentations of a public company's finances or prospects, "are commonly filed within days (if not hours) of the company's writeoff, negative announcement, or decline in stock price which usually mark the moment when the 1 year statutes starts to run. And the underlying misrepresentations are rarely more than 3 years in the past."). At a minimum, investors often file class action complaints within a year of the end of the alleged class period, which most often corresponds with the last day on which the plaintiffs say the company's stock price plummeted as news of the company's fraud hit the market. According to NERA Economic Consulting, in 2013, about 83% of class action complaints were filed within a year of the end of the alleged class period, and the findings for 2013 are consistent with the average number of cases filed within a year from the prior four years: 2009: 66.1%; 2010: 73.7%; 2011: 83.3%; and 2012: 90.6%. Renzo Comolli & Svetlana Starykh, *Recent Trends*

Investors and their counsel are often fast to file a securities class action after a company announces bad news because, historically, the plaintiff who filed first was most likely to be appointed to lead the class.[8] The lead spot comes with the lions' share of attorneys' fees, which can be substantial in a securities case.[9] In 1995, however, Congress changed the procedure for selecting a lead plaintiff, instead adopting a mechanism that favored the presence of large institutional investors (e.g., pension funds) to serve in the lead-plaintiff role and presumably to slow the race to the courthouse.[10] But securities lawsuits are filed just as quickly after the Private Securities Litigation Reform Act (PSLRA) as before it.[11] The speed with which plaintiffs firms file lawsuits may be a byproduct of offering institutional investors preferred status under the PSLRA.[12] After the PSLRA, plaintiffs'

in Securities Class Action Litigation: 2013 Full-Year Review, NERA ECONOMIC CONSULTING 16 (Jan. 1, 2014), *available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_2013_Year_End_Trends _1.2014.pdf.

8. *See* H.R. CONF. REP. NO. 104-269, at 33 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 732 ("The Conference Committee was also troubled by the plaintiffs' lawyers 'race to the courthouse' to be the first to file a securities class action complaint. This race has caused plaintiffs' attorneys to become fleet of foot and sleight of hand. Most often speed has replaced diligence in drafting complaints. The Conference Committee believes two incentives have driven plaintiffs' lawyers to be the first to file. First, courts traditionally appoint counsel in class action lawsuits on a 'first come, first serve' basis. Courts often afford insufficient consideration to the most thoroughly researched, but later filed, complaint. The second incentive involves the court's decision as to who will become lead plaintiff. Generally, the first lawsuit filed also determines the lead plaintiff."); *In re* Wells Fargo Securities Litigation, 156 F.R.D. 223, 226 (N.D. Cal. 1994) ("In securities cases, particularly, plaintiff lawyers race to have the first case on file after the shock to the security's price that triggers the case and thereby to earn some kind of credit for earnestness in securing lead counsel designation.").

9. The average settlement amount in a securities case can be substantial. *See* Comolli & Starykh, *supra* note 7, at 26 (finding the average settlement in 2013 for securities class actions as $55 million, and that in 2012 it was $36 million). A sizable percentage of a sizable settlement can mean sizable attorneys' fees. *Id.* at 33 (finding that for securities class actions resolved between 1996 and 2013, attorneys' fees as a percentage of settlement value range from 7.6% to 33.3% depending on the settlement value); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 814 (2010) (concluding that the mean and median fee award for class counsel is about 25%); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 265 (2010) (finding that the mean award from settlements in the $100 to $250 million range is 12% and the median 10.2%).

10. In 1995, Congress enacted the Private Securities Litigation Reform Act (PSLRA), in part, to slow investors' race to the courthouse. The PSLRA established a procedure for selecting lead plaintiffs that presumes that the best representative for the class is not the first-filer, but the investor with the largest financial interest. The PSLRA requires the first-filing plaintiff to publish notice to the class within 20 days to encourage the most capable plaintiff to step forward. *See, e.g.*, Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)(3) (1995) (describing the process for selecting a lead plaintiff); Bang v. Acura Pharm., No. 10 C 5757, 2011 WL 91099, at *1 (N.D. Ill. Jan. 11, 2011) (describing the PSLRA's effect on the "race to the courthouse method").

11. Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 913 (2003).

12. Since the PSLRA, institutional investors are more likely to serve as lead plaintiffs. *See, e.g.*, Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements: 2010 Review and Analysis*, CORNERSTONE RESEARCH 8 (2011), *available at* http://securities.stanford.edu/research-reports/1996-2010/Settlements-Through-12-2010.pdf (finding that institutional investors—primarily labor and public pension funds—serve as the lead plaintiffs in approximately two-thirds of all securities class actions); James D. Cox et al., *There are Plaintiffs and . . . There are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 385 (2008) ("The lead plaintiff provision sought to attract institutions and others who have a significant stake in the litigation to become the suit's plaintiff. Our findings not only reflect that nearly eighteen percent of securities class action settlements in suits initiated after the PSLRA are prosecuted by institutional plaintiffs of the type desired by Congress, but also, more importantly, that they add substantial value to the outcome.").

law firms wooed institutional investors by offering to monitor these institutions' investments for free and to notify them when they may have a securities-fraud action.[13] These monitoring arrangements keep institutions up to date on potential securities cases.[14]

Even though plaintiffs file securities cases quickly, these cases still take time to uncover and investigate. Fraud, by its nature, involves concealing the truth, and fraudulent schemes can be complex. Investors may not uncover the most extensive or corrupt scheme for some time.[15] Take for example, *Ernst & Ernst v. Hochfelder*, where the president of an investment firm perpetrated a Ponzi scheme for 25 years, which was uncovered only after he committed suicide and left a note explaining that the firm was bankrupt.[16] Occasionally, securities fraud will become known through chance, like through a remorseful fraudster's suicide note or where a scheme collapses under its own weight.[17] More common, however, is that the media, industry regulators, short sellers, stock analysts, etc., expose corporate fraud.[18] But these sources are not always obligated to reveal to the investing public what they know, let alone reveal what they know within a certain time.

Even when plaintiffs get a whiff of fraud, plaintiffs still have to conduct a pre-filing investigation—without access to formal discovery—to uncover evidence sufficient to satisfy the securities laws' heightened pleading demands.[19] Just sifting through the sheer volume of information companies pour out into the public domain can take a while.[20] In

13. *See* Jed S. Rakoff, *Confidential Informants and Securities Class Actions: Mixed Messages and Motives*, 45 LOY. U. CHI. L.J. 571, 571 (2014) (explaining the relationship between law firms and institutional investors after Congress passed the PSLRA); Elizabeth Chamblee Burch, *Governing Securities Class Actions*, 80 U. CIN. L. REV. 299, 301 (2011) [hereinafter Burch, *Governing Securities Class Actions*] (describing practices of law firms courting institutional investors); Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1121 (2011) [hereinafter Burch, *Optimal Lead Plaintiffs*] ("After the PSLRA, plaintiffs' law firms sought to maintain their competitive advantage by courting large institutions . . .").

14. Brief of Amici Curiae Faculty at Law and Business Schools in Support of Respondents at 33, Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010) (No. 08-905).

15. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 377 (1991) ("The real burden on most investors . . . is the initial matter of discovering whether a violation of the securities laws occurred at all. This is particularly the case for victims of the classic fraudlike case that often arises under § 10(b). '[C]oncealment is inherent in most securities fraud cases.' The most extensive and corrupt schemes may not be discovered within the time allowed for bringing an express cause of action under the 1934 Act. Ponzi schemes, for example, can maintain the illusion of a profit-making enterprise for years, and sophisticated investors may not be able to discover the fraud until long after its perpetration.") (internal citation omitted); THE CORPORATE AND CRIMINAL FRAUD ACCOUNTABILITY ACT OF 2002, S. REP. NO. 107-146, at 9 (2002) ("As most prosecutors and victims will confirm . . . the best cons are designed so that even after victims are cheated, they will not know who cheated them, or how. Especially in securities fraud cases, the complexities of how the fraud was executed often take well over a year to unravel, even after the fraud is discovered. Even with use of the full resources of the FBI, a Special Task Force of Justice Department Attorneys, and the power of a federal grand jury, complex fraud cases such as Enron are difficult to unravel and rarely can be charged within a year.").

16. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 188–89 (1976).

17. *E.g.*, *In re* Bernard L. Madoff Inv. Sec. LLC, 654 F.3d 229, 232 (2d Cir. 2011) (explaining how Bernard Madoff's billion-dollar Ponzi scheme came to light when "the flow of new investments could no longer support the payments required on earlier invested funds" and ultimately collapsed).

18. *See, e.g.*, I.J. Alexander Dyck et al., *Who Blows the Whistle On Corporate Fraud?*, 65 J. FIN. 2213, 2224–26 (2010).

19. 15 U.S.C. § 78u-4(b)(3) (1995) (staying discovery pending "any motion to dismiss").

20. Amicus Curiae Brief of the Council of Institutional Investors in Support of Respondents at 7, Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010) (No. 08-905) ("Companies introduce numerous types of information into the marketplace on a daily basis. Each company alone may make more than ten filings per year with the SEC, not counting restatements. Additionally, companies regularly file press releases, maintain websites containing

addition, a key component to satisfying the pleading standard for securities claims and demonstrating a strong inference of scienter (a necessary component for liability under Rule 10b-5) often involves obtaining information from inside the company to show that what the company told the investing public wasn't matching what the company was saying internally.[21] One of the more common ways investors get the inside scoop is by talking with former employees whose accounts investors can put forward in the complaint, typically as allegations attributed to confidential witnesses.[22] Marshalling sufficient evidence takes time, and filing first and amending later is not without risk given that, in some courts, the liberal policy for amendments may be curtailed by the securities laws' heightened pleading standard.[23]

2. The "Stale Evidence" Rationale

The time allowed for uncovering, investigating, and filing a securities-fraud complaint must be balanced against competing aims, one of which is to prevent the use of stale evidence. The "stale evidence" rationale for limitations periods is rooted in the idea that claims are more likely to be resolved on their merits if litigants preserve, gather, and produce evidence closer in time to the event that gave rise to the claim. A lawsuit involves a fact-finding process of pleading, discovery, and trial, and this fact-finding process is more reliable if the evidence in the case is fresh.[24] Evidence is more likely to be preserved by plaintiffs and defendants if plaintiffs have a prompt deadline for filing.[25] Indeed, a timely

company information, news, and events, and, in the case of pharmaceutical companies, conduct studies regarding their existing products, as well as those still in development, and release reports of the results.").

21. *See* Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1230 (9th Cir. 2004) ("The most direct way to show both that a statement was false when made and that the party making the statement knew that it was false is via contemporaneous reports or data, available to the party, which contradict the statement."); Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2000) ("[T]he inference may arise where the complaint sufficiently alleges that the defendants . . . knew facts or had access to information suggesting that their public statements were not accurate.").

22. *See, e.g.*, City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp., 952 F. Supp. 2d 633, 635 (S.D.N.Y. 2013) ("[A] securities class action cannot survive a motion to dismiss unless it provides considerable factual detail supporting each of the essential elements of a securities fraud claim. . . . While designed to give district courts a 'gatekeeper' responsibility to derail dubious class action lawsuits at the outset, an unintended consequence has been to cause plaintiffs' counsel to undertake surreptitious pre-pleading investigations designed to obtain 'dirt' from dissatisfied corporate employees. Thus in this case, as in many others, the Amended Complaint relied heavily, although not exclusively, on information attributed to 'confidential witnesses' ('CWs').").

23. *See* Fidel v. Farley, 392 F.3d 220, 236 (6th Cir. 2004) (holding that the liberal amendment policy under Rule 15 is curtailed by the PSLRA), *overruled on other grounds by* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 (2007); Stambaugh v. Corrpro Co., 116 F. App'x. 592, 598 (6th Cir. 2004) (discussing the heightened pleading standards of PSLRA in reviewing amended complaints); PR Diamonds, Inc. v. Chandler, 91 F. App'x. 418, 443–44 (6th Cir. 2004) (discussing the higher standard of review for a leave to amend a complaint).

24. *See, e.g.*, Bd. of Regents of the Univ. of N.Y. v. Tomanio, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh.").

25. *See, e.g.*, Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868) ("The policy of these statutes is to encourage promptitude in the prosecution of remedies.").

suit gives defendants notice to start gathering evidence while that evidence is still fresh.[26]

The risk of stale evidence is not absent in securities cases. First, even though the securities laws and practice surrounding the appointment of lead plaintiffs encourage quick filing, there is still a chance that investors have discovered facts that warrant suit and are ready to move forward but, for whatever reason, have sat on their claims.[27] Second, with the passage of time, no matter how slight, there is still the risk that evidence—witnesses' memories and the documents—may go stale or missing.

Witness memory is important because state of mind matters in securities cases. The securities laws factor in, either as positive elements or as defenses, the defendant's state of mind at the time of the statement (i.e., scienter and good faith),[28] as well as what the investor was thinking at the time of the investment (i.e., reliance).[29] And the circumstances

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26. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended to put defendants on notice of adverse claims . . ."); Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations . . . recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim.").

27. *Cf.* City of Pontiac Gen. Emps. Ret. Sys. v. Lockheed Martin Corp., 844 F. Supp. 2d 498, 502 (S.D.N.Y. 2012) (observing that plaintiffs' firm did not file suit until "the very last day" before the limitations period was set to expire and moved for appointment as lead plaintiff also on "the very last day any plaintiff could move to be appointed lead plaintiff," and that the actions taken were "self-protective tactics, designed to ensure that no other plaintiff's firm could swoop in and profit from [the firm's] work merely because that firm had a client with a larger financial stake").

28. *See* 15 U.S.C. § 77k(b)(3) (permitting non-issuers to defend a Section 11 lawsuit by showing that they undertook a reasonable investigation and formed an actual, reasonable belief in the truth of the representations); 15 U.S.C. § 77l(a)(2) (affording defenses of lack of knowledge or exercise of reasonable care to Section 12(a)(2) claims); 15 U.S.C. § 77o (allowing a person who controls another who has violated the 1933 Act to defend himself by proving he acted in good faith); 15 U.S.C. § 78u-4(b) (requiring plaintiffs claiming violations of Section 10(b) and Rule 10b-5 to allege a "strong inference" that the defendant acted with scienter); 15 U.S.C. § 78t(a) (allowing a person who controls another who has violated the 1934 Act to defend himself by proving he acted in good faith); *see also* Pinter v. Dahl, 486 U.S. 622, 647 (1988) (requiring that for actions under Section 12(a)(1), plaintiffs must prove that the defendant was motivated at least in part by a desire to serve his own financial interests or those of the securities owner); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n.12 (1976) (requiring that for actions under Rule 10b-5 plaintiffs must plead and prove that the defendants acted with scienter, an intent to deceive, manipulate or defraud).

29. 15 U.S.C. § 77k(a) (permitting issuers to defend a Section 11 lawsuit by proving that, at the time of the plaintiff's acquisition of the security, the plaintiff knew of the alleged misrepresentation or omission); Stoneridge Inv. Partners LLC v. Scientific-Atlanta Inc., 552 U.S. 148, 159 (2008) ("Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action."); Basic Inc. v. Levinson, 485 U.S. 224, 248–49 (1988) ("Any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance . . . . For example, a plaintiff who believed that Basic's statements were false and that Basic was indeed engaged in merger discussions, and who consequently believed that Basic stock was artificially underpriced, but sold his shares nevertheless because of other unrelated concerns, *e.g.*, potential antitrust problems, or political pressures to divest from shares of certain businesses, could not be said to have relied on the integrity of a price he knew had been manipulated."). To further the point, defendants often seek and obtain discovery of the plaintiffs' past investments in order to uncover evidence about the plaintiff's state of mind when investing. *See, e.g.*, Degulis v. LXR Biotech., Inc., 176 F.R.D. 123, 126 (S.D.N.Y. 1997) (compelling an investor to produce monthly account statements for any securities or commodities account maintained by that investor because the documents would shed light on the investor's sophistication, which was relevant to the investor's claim of direct reliance under Section 10(b) and common-law fraud); Ziemack v. Centel Corp., No. 92 C 3551, 1995 WL 729295, at *3 (N.D. Ill. Dec. 7, 1995) (compelling investors to produce documents related to trading history as relevant to investors' sophistication, which was relevant to common-law fraud claims); *In re* Harcourt Brace Jovanovich, Inc., Sec. Litig., 838 F. Supp. 109, 113–14 (S.D.N.Y. 1993) (compelling plaintiff to produce documents identifying publicly traded securities owned or controlled by the named plaintiffs because

surrounding the fraud are relevant as we can infer someone's mental state from those circumstances.[30]

Someone's mental state, as well as the circumstances surrounding it, may be difficult to verify after several years have passed. With the passage of time, memories may fade, or important witnesses may move, die, or disappear.[31] In fact, experimental studies suggest that the passage of time has a highly distorting effect on witness memory.[32] This very idea—that statements closer in time are more reliable than later statements—underlies the Federal Rules of Evidence that admit otherwise inadmissible hearsay (or second-hand) statements.[33]

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documents would shed light on the investor's sophistication and was relevant to direct reliance in a traditional Rule 10b-5 claim).

30. *See, e.g.*, Herman & MacLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983) ("[T]he proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence."); *cf.*, *e.g.*, *In re* Merck & Co., Inc., Sec., Derivative, & ERISA Litig., No. 05-2367 SRC, 2012 WL 4764589, at *9 (D.N.J. Oct. 5, 2012) (holding that discovery would not be limited to the class period because pre- and post-class evidence is relevant); *In re* SunPower Sec. Litig., No. 09-cv-5473, 2012 WL 4343245, at *2 (N.D. Cal. Sept. 20, 2012) (holding the same); *In re* Toyota Motor Corp. Sec. Litig., No. CV 10-922 DSF, 2012 WL 3791716, at *4 (C.D. Cal. Mar. 12, 2012) (holding the same).

31. *See, e.g.*, Norris v. Wirtz, 818 F.2d 1329, 1333 (7th Cir. 1987) (observing that several plaintiffs died during the 19-year span between the stock sales and the time of trial).

32. *See, e.g.*, Daniel L. Schacter, *The Seven Sins of Memory: Insights From Psychology and Cognitive Neuroscience*, 54 AM. PSYCHOL. 182, 184 (1999) (discussing the transience of memory and the process of forgetting); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 53 (1996); *see also* Krist v. Eli Lilly & Co., 897 F.2d 293, 297 (7th Cir. 1990) (summarizing cognitive psychology research on the accuracy of memory: "The basic findings are: accuracy of recollection decreases at a geometric rather than arithmetic rate (so passage of time has a *highly* distorting effect on recollection); accuracy of recollection is *not* highly correlated with the recollector's confidence; and memory is highly suggestible—people are easily 'reminded' of events that never happened, and having been 'reminded' may thereafter hold the false recollection as tenaciously as they would a true one.").

33. Hearsay is "a tale of a tale," "a story out of another man's mouth." *See* KENNETH S. BROUN, 2 MCCORMICK ON EVIDENCE § 244 (7th ed. 2013) (quoting College's Trial, 8 How. St. Tr. 549, 663 (1681) and Gascoigne's Trial, 7 How. St. Tr. 959, 1019 (1680)); *see also* Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 996–97 (9th Cir. 2009) (discounting allegations in a complaint attributed to confidential witnesses because the accounts were "vague hearsay"). When someone is relating hearsay, the account is suspect because the person testifying "is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he intrenches [sic] himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author." Coleman v. Southwick, 9 Johns 45, 1812 WL 989, at *50 (N.Y. Sup. 1812) (internal quotations omitted). Nevertheless, the Federal Rules of Evidence sometimes treat hearsay as reliable and admissible evidence. Rule 803(1), for example, allows a court to admit hearsay statements made by the speaker while the speaker is perceiving the event or immediately after. These statements are considered reliable (and thus admissible) because the immediacy of a present-sense impression largely reduces the risk of a lack of memory and precludes time for reflection or revision. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:67 (4th ed. 2013). Likewise, Rule 803(2) allows a court to admit hearsay statements made under the stress of excitement. These statements are considered reliable (and thus admissible) because the speaker's memory "is bound to be fresh because the impression has not yet passed from his mind." *Id.* § 8:68. The Federal Rules contain additional examples. Rule 803(3) allows a court to admit a statement of a declarant's then-existing state of mind or emotional, sensory, or physical condition, but not a statement to prove the fact remembered. These statements are admissible because "problems of memory are negligible and problems of perception minimal, and such statements seem better (more reliable, more persuasive) than the next best alternative, which is backward-looking testimony by the person." *Id.* § 8:71. Rule 803(6) allows a court to admit business records made contemporaneously with an event. The premise of this rule is that a record made close in time to the event, when memories are fresh, is more reliable than a later memory. *Id.* § 8:78. And Rule 803(16) allows a court to admit ancient documents (at least 20 years old). These

The passage of time also increases the likelihood that hindsight may taint evidence. Cognitive psychologists have found that what happens between the event and its recall can change a person's memory of it.[34] The worry that intervening events may unduly color our assessment of preceding ones is certainly attendant in securities cases. There is a tendency for people to conclude that a later, bad outcome was not only predictable but also actually predicted by a firm's managers at the time an earlier, cheerier statement was made, a tendency referred to as "the hindsight bias."[35] But there is no reason to assume that what is true at the moment of the discovery of the alleged fraud was also true at the time of the alleged misrepresentation.[36] The courts have thus prohibited basing fraud merely on hindsight.[37] Indeed, in the time between when a firm announces something to public investors and some sobering truth is revealed (and the company's stock price drops), a number of events could have happened that explain the difference between an earlier, positive statement and a later, less rosy picture. Between an alleged misstatement and a drop in stock price, there may be a general decline in the stock market, a specific decline in the market for the defendant-firm's industry, a change in consumer demand, the entrance of new competitors onto the market, the filing of a major lawsuit, an internal reevaluation of assets, or recalculation of loan-loss reserves.[38] Timeliness bars in securities cases help prevent recoveries based on hindsight.[39]

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documents are allowed as evidence because live, aged testimony is likely no more reliable. The "passage of time lowers the marginal value of live testimony over hearsay. Eyewitness accounts of events 20 years in the past are likely to be less reliable than accounts of recent events, and testimonial descriptions of oral statements made long ago (admissions or excited utterances) are less reliable than descriptions of more recent ones." *Id.* § 8:100.

34. *See, e.g.*, Douglas J. Narby et al., *The Effects of Witness, Target, and Situational Factors on Eyewitness Identifications*, *in* PSYCHOLOGICAL ISSUES IN EYEWITNESS IDENTIFICATION 23, 44–46 (Siegfried Ludwig Sporer et. al. eds., 1996).

35. *See* Mitu Gulati et al., *Fraud By Hindsight*, 98 NW. U. L. REV. 773, 775 (2004) ("Courts cite concerns with hindsight in nearly one-third of all published opinions in securities class action cases. . . . [C]ourts seem generally aware of the problem posed by judging securities fraud cases in hindsight. Judges routinely admonish plaintiffs not to rely on hindsight to support allegations of fraud in pleading securities claims. Increasingly, the doctrine against 'fraud by hindsight' has become a hurdle that plaintiffs in securities cases must overcome.").

36. *In re* GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), *superseded by statute*.

37. *See* DiLeo v. Ernst & Young, 901 F.2d 624, 628 (7th Cir. 1990) ("There is no 'fraud by hindsight,' in Judge Friendly's felicitous phrase."); Denny v. Barber, 576 F.2d 465, 470 (2d Cir. 1978) ("In sum, the complaint is an example of alleging fraud by hindsight.").

38. *In re* GlenFed, Inc. Sec. Litig., 42 F.3d at 1548; *see also* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 342–43 (2005) ("When the purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. (The same is true in respect to a claim that a share's higher price is lower than it would otherwise have been—a claim we do not consider here.) Other things being equal, the longer the time between purchase and sale, the more likely that this is so, i.e., the more likely that other factors caused the loss.").

39. *See, e.g.*, Short v. Belleville Shoe Mfg., Co., 908 F.2d 1385, 1392 (7th Cir. 1990) ("Prices of securities are volatile. If suit may be postponed indefinitely on equitable grounds, then investors may gamble with other people's money. An investor . . . may sell her shares for a price certain. If the firm does poorly, she keeps the money; if it does well, she sues and asks for the increase in value. Congress chose one year after discovery, and a cap of two additional years on tolling principles, in order to curtail the extent to which the securities laws permit recoveries based on the wisdom given by hindsight. . . . Investors then have a more powerful incentive to investigate rather than accept another person's word without question. . . . Prudent investors almost always can sniff out fraud (or enough smoke to justify litigation) within three years. Section 13 cuts off only the claims of the most trusting or somnolent—or the most wily, those who wanted to wait as long as possible.").

Similarly, with the passage of time, documents may be lost or destroyed.[40] Securities cases typically involve alleged misleading or untrue statements made to the public in a registration statement, prospectus, press release, earnings statement, public filing, and the like. By virtue of their public (and publicized) status, there is rarely a dispute about *what* was said in these cases.[41] But still these cases come down to what the paper record shows about the circumstances surrounding what was said—what the paper documents, emails, and internal presentations show.[42] And just as memories may be lost as time goes by, so too are documents subject to loss over any given period. First, there is the plainly sinister reason that documents do not survive the test of time: they are destroyed to cover up any wrongdoing.[43] Second, documents can be destroyed without any motive to sweep misdeeds under the rug. Consider that many large companies—the typical defendants in securities class actions—have document-retention policies that provide for routine destruction or deletion of data after a certain period. These kinds of policies are "common in business."[44] And one can see why: without such a policy, one could "drown in paper."[45] There are unusual circumstances, however, where there is a legal duty to hold on to documents.[46] Otherwise, under ordinary circumstances, there is no legal duty to be a pack rat and nothing inherently wicked in complying with a valid document-retention policy.[47]

3. The "Litigation Uncertainty" Rationale

Not only must limitations periods account for uncovering, investigating, and filing a

40. *See, e.g.*, R.R. Tels. v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) (stating that limitations periods "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

41. *See, e.g.*, Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 527 n.105 (1991).

42. Christopher R. Leslie, *Den of Inequity: The Case for Equitable Doctrines in Rule 10b-5 Cases*, 81 CALIF. L. REV. 1587, 1636 (1993) ("[S]ecurities fraud cases live and die on the paper record.").

43. The Senate Committee on the Judiciary captured this idea in its report on the Sarbanes–Oxley Act of 2002 in response to the Enron debacle when it warned that "[i]t only takes a few seconds to warm up the shredder." S. REP. NO. 107–146, at 9 (2002).

44. Arthur Andersen LLP v. United States, 544 U.S. 696, 704 (2005); *see also* Thomas Y. Allman, Editor, *The Sedona Conference Commentary on Email Management: Guidelines for the Selection of Retention Policy*, 8 SEDONA CONF. J. 239, 240–41 (2007) ("Limitations or 'quotas' on the amount of storage space on the network available to an individual user has historically been a principal feature of email management. In a 2005 Industry Survey, over one half of the respondents reported that they were 'managing' email retention by limiting mailbox sizes.").

45. Fidelity Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 751 (7th Cir. 2005); *see also* Roland C. Goss, *Hot Issues in Electronic Discovery: Information Retention Programs and Preservation*, 42 TORT TRIAL & INS. PRAC. L.J. 797, 806 (2007) (explaining how Fed. R. Civ. P. 37(e) implicitly permits good-faith corporate policies for the purging of data "necessary to prevent a build-up of data that can overwhelm the most robust electronic information systems").

46. When there is a reasonable anticipation of litigation, firms and persons have a common-law duty to preserve documents and information. *See* Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *see also* Pension Comm. of the Univ. of Montreal v. Banc of Am. Sec., 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010). If a federal investigation or bankruptcy is contemplated, then any altering, destroying, or concealing of documents with an intent to impede those proceedings can result in fines and jail time. 18 U.S.C. § 1519. Auditors of a reporting firm also must maintain all audit and review papers for five years (failure to do so can result in fines and imprisonment). 18 U.S.C. § 1520. Moreover, brokers and dealers subject to the securities laws must keep communications relating to their business for at least three years. 17 C.F.R. § 240.17a-4.

47. *Arthur Andersen LLP*, 544 U.S. at 704; *Fidelity Nat'l Title Ins. Co. of N.Y.*, 412 F.3d at 751.

securities-fraud complaint and promoting the use of fresh evidence, but limitations periods must also aim to reduce litigation uncertainty. This rationale is based on two related propositions. First, at some point, it is simply unfair to subject someone to the lingering possibility that litigation could be brought at any moment.[48] As Oliver Wendell Holmes has said, "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[49]

The second proposition is that someone who is constantly distracted by the threat of litigation is less likely to devote resources to productive purposes.[50] Preparing for and defending against litigation increases the costs of doing business and diverts resources from other efforts. For instance, once a company reasonably anticipates litigation, the company has to retain counsel, take steps to identify and preserve documents, notify its insurers, and evaluate insurance coverage.[51] Even before suit, uncertain limitations periods may cause companies and its directors to pay for larger insurance policies than they would otherwise. Thus, from the standpoint of a company and its directors, the more quickly they know about a lawsuit, the better.[52]

Finality for securities transactions protects settled economic expectations of not just the defendant firm or stock issuers, but a multitude of other economic actors as well.[53] This idea is often expressed in the securities case law as preventing investors from gambling

48. *See* Gabelli v. SEC, 133 S. Ct. 1216, 1221 (2013) ("[E]ven wrongdoers are entitled to assume that their sins may be forgotten.") (internal citation and quotation omitted); Order of R.R. Tels. v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("[E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.").

49. Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897).

50. *See, e.g.*, McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011) ("[B]usiness planning is impeded by contingent liabilities that linger indefinitely."); 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 that lingering liabilities would disrupt normal business and facilitate false claims."); Roberts v. Magnetic Metals Co., 611 F.2d 450, 463 (3d Cir. 1979) ("[T]he shorter period permits the company's management to treat a given securities transaction as closed, allowing them to proceed more confidently with running the company."); *see also* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 76 (2005) ("With a limitations system intact, institutions can engage in commercial transactions unencumbered by the risk of litigation and able to structure and plan their affairs.").

51. *See, e.g.*, N. Scott Fletcher & Jefferson T. Michael, *Preliminary Actions for Companies Facing Securities Litigation*, 11 COM. & BUS. LITIG. 3 (2010).

52. 78 CONG. REC. 8200 (daily ed. May 7, 1934) ("[F]rom the standpoint of the director, the more quickly he knows whether he is liable, the better."); *see also* Anthony M. Sabino, *The New Uniform Statute of Limitations for Federal Securities Fraud Actions: Its Evolution, Its Impact, and a Call For Reform*, 19 PEPP. L. REV. 485, 522–23 (1992) ("The 'litigation risk,' like any other component of economics, is something the modern business entity measures on a cost-effective basis. For [the company financial advisor or professional who bears some risk of a section 10(b) suit merely by participating in the capital market], the potential to be a defendant is not necessarily a function of wrongdoing; it may instead be grounded upon various and sundry things, such as a deleterious change in the economic or legal environment, mistakes in business judgment, misplaced optimism in forecasting the future or the mere fact that it is the 'deep pocket' targeted by disgruntled investors or, worse yet, 'quick-buck' artists out to scam a settlement in lieu of a costly lawsuit. This, then, is the risk of litigation that every business, and especially those involved in the stock markets, must take measure of, and accordingly guard against.").

53. *See, e.g.*, Malveaux, *supra* note 50, at 76 ("Given the greater interdependency and globalization of individuals and institutions today, repose plays an even more significant role in providing stability and certainty on a macro level.").

with other people's money. Certainly, no one likes the idea that suspicious investors may sit on the sidelines in perpetuity, waiting for stock prices to rebound and reap investment profits, or waiting for the stock to stay down and recover damages in court. That kind of "heads, I win; tails, you lose" situation is one that the law abhors.[54] Consider that stock is "usually marketed through underwriters and dealers, often including scores of investment banking and brokerage firms across the country."[55] Repose protects the expectations of these repeat market players as well. Repose also protects other nonculpable market players, such as investors, employees, and lenders, to name a few. In the span from the purported fraud until suit, "thousands of people may have invested in the corporation, hundreds of people may have accepted jobs with it, dozens of lenders may have extended credit to it, and scores of firms may have entered business partnerships with it."[56] As a result of a firm's liability, "those investments may be forfeited, those jobs may be lost, those loans may not be repaid, and those business partnerships may collapse."[57]

Limitations periods' important functions—preventing the use of stale evidence and eliminating the uncertainty surrounding potential litigation—explain why limitations periods have been part of the architecture of civil litigation for centuries, "found and

54. 78 CONG. REC. 8199 (daily ed. May 7, 1934) ("[If an investor] finds some technical mistake in the [registration] statement that has been put out, he might say to himself, 'I have something that I can sue on if these bonds go down. If they go up I will not want to sue because I will get a profit on them, but should they go down, then I have the option of suing.'"); *see also McCann*, 663 F.3d at 931 ("If section 1658(b) were a statute of limitations . . . a person who had bought a security could, having later discovered that he'd been defrauded, wait indefinitely to determine whether his purchase had been a mistake (because of the fraud) or a windfall (because despite the fraud the price of the security had risen beyond expectations), since his two-year period under subsection (1) would not begin to run until the fraud caused him harm. This would be a heads I win, tails you lose, proposition, which the law would be unlikely to countenance."); Betz v. Trainer Wortham & Co., 519 F.3d 863, 868 (9th Cir. 2009) ("Such delay is unfair to defendants . . . . While plaintiff is waiting to see whether his investment recovers on its own, defendant 'loses the security of knowing when legal action against him has been foreclosed.' . . . Plaintiff, by contrast, gets the benefit of a 'heads I win, tails you lose' bet: If the investment goes up, he reaps the profit; if it goes down, he gets to recover his losses in court."), *overruled on other grounds by* 559 U.S. 1103 (2010); Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717, 722 (7th Cir. 1993) ("Three years is an age in the stock market. If the suspicious investor had a wide choice of times at which to sue within a three-year period rather than being required to sue no more than one year after the earliest possible date, the opportunistic use of federal securities law to protect investors against market risk would be magnified. These plaintiffs waited patiently to sue. If the stock rebounded from the cellar they would have investment profits, and if it stayed in the cellar they would have legal damages. Heads I win, tails you lose."); Nerman v. Alexander Grant & Co., 926 F.2d 717, 721 (8th Cir. 1991) ("Perhaps it was reasonable for the plaintiffs to take a 'wait and see' approach. But that election did not toll the statute of limitations. That is precisely the point of the statute of limitations: the plaintiffs had five years to 'wait and see,' and to decide whether to sue for fraud or live with the less-than-promised deal."); Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 440 (7th Cir. 1987) ("If the investor can wait before selecting the relief he wants, he can shift all of the ordinary investment risk to the defendant. If things turn out well, the investor will keep the gains and still demand as damages the difference between the prices of the stock and its market value on the day of the transaction; if things turn out poorly the investor will demand rescission. Yet once the investor discovers the fraud, he has an ordinary investment decision to make with respect to the future—to keep (or recover) the stock in hope of gain or to disinvest. Allowing a belated election between market damages and rescission effectively allows him to do both, and therefore visits defendants with expected damages greater than the loss the investor actually suffered.").

55. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 758 (1975).

56. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 467 (1997).

57. *Id.*

approved in all systems of enlightened jurisprudence."[58] Not only is their concept an aged one, but they appear universal as well, present in every country, every state, and for every action.[59] Chief Justice Marshall once stated that an action without a statutory deadline "would be utterly repugnant to the genius of our laws."[60] It is no surprise then that the securities laws have timeliness bars as well.[61]

B. The General Models of Limitations Periods

Before discussing the timeliness bars particular to the securities laws, some general background on timeliness bars is useful. All timeliness rules will bar an action that does not meet the rule's time limits regardless of the merits of the case.[62] All timeliness bars have three basic elements: (1) their length, or the period for which they run;[63] (2) the date that triggers their running; and (3) the legal excuses available when someone blows those statutory deadlines (equitable tolling, estoppel, and forfeiture and waiver).[64] In general,

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58. Wood v. Carpenter, 101 U.S. 135, 139 (1879); *see also* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations,* 37 CREIGHTON L. REV. 493, 507–08 (2004) (describing the "seminal statute of limitations, the statute of James I" as the basis for many American limitations periods); Ugo Colella, *The Case for Borrowing a Limitations Period for Deemed-Denial Suits Brought Pursuant to the Federal Tort Claims Act*, 35 SAN DIEGO L. REV. 391, 420 (1998) ("Statutes of limitations are so widely accepted, the principle of repose so revered, and the truth-seeking function of Article III courts so important that, in an uninterrupted line of cases dating back to 1830, the Supreme Court has held that if federal statutes that confer federal rights on civil litigants are silent on the limitations question, courts should borrow from and apply analogous state or federal statutes of limitations."); *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177–79 (1950) [hereinafter *Developments in the Law*] (discussing limitations periods' Roman-law and English-law roots).

59. *See* Ochoa & Wistrich, *supra* note 56, at 454 ("Statutes of limitation are an important feature of the legal landscape. Virtually every country has them. Their direct antecedents can be traced back for centuries, and some sorts of time limits have been enforced for thousands of years. Today, they are ubiquitous; California alone has thousands of them."); Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 810 (2006) ("All fifty states have enacted statutes of limitations that specify the time periods in which claimants may file suit for civil wrongs, such as torts and breach of contract.").

60. Adams v. Woods, 6 U.S. 336, 342 (1805) (remarking on the absurdity of extending indefinitely liability for a common-law debt).

61. *See* 15 U.S.C. § 77m (providing a one-year statute of limitations and a three-year statute of repose for claims brought under sections 11 and 12 of the 1933 Act); 28 U.S.C. § 1658(b) (providing a two-year statute of limitations and five-year statute of repose for claims brought under Section 10(b) of the 1934 Act).

62. *See, e.g.*, CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014) ("Statutes of limitations and statutes of repose both are mechanisms used to limit the temporal extent or duration of liability for tortious acts. Both types of statute can operate to bar a plaintiff's suit, and in each instance time is the controlling factor."); Kavanagh v. Noble, 332 U.S. 355, 539 (1947) ("[Limitations] periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary."); Leffingwell v. Warren, 67 U.S. 599, 606 (1862) (stating that statutes of limitations are statutes of repose).

63. Setting a limitations period involves considering a host of concerns, including the "difficulty of investigating potential violations, the possibility that consequences of wrongdoing will be delayed, the opportunities for wrongdoers to conceal the wrong, the rate at which evidence of wrongdoing and also evidence pertinent to the alleged wrongdoer's defenses is likely to decay, the sophistication of the relevant tribunals in handling stale evidence, the desirability of freeing court time for fresh claims, the interest of potential defendants in repose—that is, in knowing after a definite period has passed that they no longer have to worry about being sued—and the effect on the deterrence of statutory violators of reducing the time for bringing suit." Short v. Belleville Shoe Mfg., Co., 908 F.2d 1385, 1394 (7th Cir. 1990).

64. *See* J.E. Liss & Co. v. Levin, 201 F.3d 848, 850 (7th Cir. 2000) ("A statute of repose and a statute of limitations are ordinary defenses to liability, differing from each other only in length, accrual, and tolling rules."), *abrogated on other grounds by* Howsam v. Dean Witter Reynolds, 537 U.S. 79 (2002); Ehud Guttel & Michael T. Novick, *A New Approach to Old Cases: Reconsidering Statutes of Limitation*, 54 U. TORONTO L.J. 129, 135

three kinds of statutory timeliness bars exist that vary in the rigidity with which these elements are applied. The three kinds of timeliness bars include statutes of limitations, statutes of repose, and jurisdictional time limits.[65] And, as recently declared by the Supreme Court, these timeliness bars emphasize different aspects of the purposes of limitations periods.[66]

1. Statutes of Limitations

Statutes of limitations are the least rigid of the three kinds of limitations periods. First, statutes of limitations are usually shorter than statutes of repose,[67] but they usually trigger upon a flexible date, generally either when the elements of a cause of action accrue[68] or when the plaintiff discovers or should have discovered the claim.[69] That is, the date the limitations period begins to run is adjusted according to what the plaintiff knew (or should

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(2004) (explaining that all limitations periods have two basic elements: accrual and consequences of delay).

65. The phrase "statutes of limitations" is often used as the collective term for all legal deadlines. 51 AM. JUR. 2D *Limitation of Actions* § 2 (2014). This is the case for the securities laws as well. *See, e.g.*, Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 n.13 (2d Cir. 2013). Statutes of limitations, however, are best understood as a subset of legal timeliness bars that include statutes of limitations, statutes of repose, and jurisdictional time limits. Another timeliness bar is the judge-made doctrine of laches. Under that doctrine, a court may bar suit as untimely where plaintiffs fritter away time to sue while the defendant loses evidence that is invaluable to a defense. *See, e.g.*, Mihara v. Dean Witter & Co., 619 F.2d 814, 822 (9th Cir. 1980). That concept is outside the scope of this article, but in short, laches is the most flexible legal deadline because it has no clear length, allowing for a potentially long period; it has no set trigger, providing further flexibility; and its application is governed by rules of equity, thereby incorporating all available equitable reasons for tolling. *See, e.g.*, *Developments in the Law*, *supra* note 58, at 1184–85.

66. *See CTS Corp.*, 134 S. Ct. at 2182 (describing the differences between statutes of limitations and statutes of repose and the different goal served by these distinctions).

67. *Compare* 15 U.S.C. § 1681p (imposing a two-year limit from discovery of a violation of the Fair Credit Reporting Act and a five-year cap after a violation), *and* 29 U.S.C. § 1113 (imposing a three-year limit from discovery of an ERISA violation and a six-year cap after a violation), *with* 31 U.S.C. § 3731 (imposing a three-year limit from discovery of a violation of the False Claims Act and a six-year cap after a violation). *See also* Hinkle by Hinkle v. Henderson, 85 F.3d 298, 301–02 (7th Cir. 1996) (describing Illinois' medical-malpractice statute under 735 ILCS 5/13-212, which provides a shorter time limit from discovery of a violation capped by an outer time limit triggered based on the violation as "an excellent example of how statutes of limitations and statutes of repose operate").

68. *See* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990) ("Accrual is the date on which the statute of limitations begins to run."); Jenna M. Fischer, *The Limits of Statutes of Limitations*, 16 SW. U. L. REV. 1, 3 (1986) ("Accrual denotes the point when an action can be maintained.").

69. *See* 51 AM. JUR. 2D *Limitation of Actions* § 126 (2014) (collecting cases and explaining that for statutes of limitations, "[t]ime begins to run . . . when, and only when, the cause or right of action has accrued or arisen"); City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 174 (2d Cir. 2011) ("Since the purpose is to prevent stale claims, it would make no sense for a statute of limitations to begin to run before the plaintiff even has a claim: A claim that has not yet accrued could never be considered stale. Thus, in the limitations context, it makes sense to link the standard for 'discovering' the facts of a violation to the plaintiff's ability to make out or plead that violation. Only after a plaintiff can adequately plead his claim can that claim be said to have accrued, and only after a claim has accrued can the statute of limitations on that claim begin to run."); Guttel & Novick, *supra* note 64, at 136–37 (explaining that statutes of limitations traditionally contain a discovery rule). The discovery rule protects victims who do not know they are injured and reasonably do not investigate whether they have been injured. Gabelli v. SEC, 133 S. Ct. 1216, 1222 (2013) ("Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded. And the law does not require that we do so. Instead, courts have developed the discovery rule, providing that the statute of limitations in fraud cases should typically begin to run only when the injury is or reasonably could have been discovered.").

have known) and when, as well as the facts of the particular case. Also, statutes of limitations are generally subject to the full gamut of legal excuses when one misses the statutory deadline, including equitable tolling, equitable estoppel, and forfeiture and waiver (which are fully explained in the following section).[70] The Supreme Court has said that statute of limitations predominately serves the "stale evidence" rationale, requiring the plaintiff to diligently prosecute claims.[71]

2. Statutes of Repose

Statutes of repose are less generous than statutes of limitations. Although they are longer than statutes of limitations,[72] statutes of repose are triggered by an event certain, which does not depend on the plaintiff's actual or constructive knowledge.[73] In other words, a statute of repose may bar a claim even though the plaintiff never knew he had one.[74] Because the statute of repose is triggered by an event certain, and not some malleable date, courts often explain statutes of repose as less of a procedural mechanism and more of a substantive right to repose for defendants, "extinguish[ing] a plaintiff's cause of action after the passage of a fixed period of time."[75] Statutes of repose may work in tandem with

70. *See* Day v. McDonough, 547 U.S. 198, 202 (2006) ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto."); Young v. United States, 535 U.S. 43, 49 (2002) (quoting Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) and United States v. Beggerly, 524 U.S. 38, 48 (1998)) ("It is hornbook law that limitations periods are 'customarily subject to 'equitable tolling' unless tolling would be 'inconsistent with the text of the relevant statute.'").

71. *CTS Corp.*, 134 S. Ct. at 2183 ("Statutes of limitations require plaintiffs to pursue diligent prosecution of known claims. . . . Statutes of limitations promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (internal quotations and citations omitted).

72. *Compare* 15 U.S.C. § 1681(p) (imposing a two-year limit from discovery of a violation of the Fair Credit Reporting Act with a five-year cap), *and* 29 U.S.C. § 1113 (imposing a three-year limit from discovery of an ERISA violation and a six-year cap after a violation), *with* 31 U.S.C. § 3731 (imposing a three-year limit from discovery of a violation of the False Claims Act with a six-year cap).

73. *See* 51 AM. JUR. 2D *Limitation of Actions* § 4 (2014) (collecting cases and stating that "[t]here is a fixed beginning and end to the time period which a party has to file a complaint under such a statute [a statute of repose]. A statute of repose limits the time within which an action may be brought, but is not related to the accrual of the cause of action"); 51 AM. JUR. 2D *Limitation of Actions* § 126 (2014) (collecting cases and stating that a statute of repose "begins running when a specific event occurs, regardless of whether an action has accrued or whether any injury has resulted; once the statute of repose has expired, the potential plaintiff no longer has a recognized right of action to redress any harm that has been done. Statutes of repose do not incorporate the discovery rule and generally terminate claims regardless of a plaintiff's lack of knowledge of his or her cause of action"); *see also* City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 176 (2d Cir. 2011) ("Unlike a statute of repose, which begins to run from the defendant's violation, a statute of limitations cannot begin to run until the plaintiff's claim has accrued.").

74. *See* Yates v. Mun. Mortg. & Equity, LLC, 744 F.3d 874, 898 (4th Cir. 2014) ("[T]hat plaintiffs did not know that the registration statement was effective as of January 14 is of no consequence for statute of repose purposes."); *In re* Exxon Mobil Corp. Sec. Litig., 500 F.3d 189, 199 (3d Cir. 2007) ("[S]tatutes of repose start upon the occurrence of a specific event and may expire before a plaintiff discovers he has been wronged or even before damages have been suffered at all."); P. Stolz Family P'ship LP v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004) (explaining that the statute of repose begins to run "even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action").

75. Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); *see also* Margoilies v. Deason, 464 F.3d 547, 551 (5th Cir. 2006) ("Statutes of limitations speak to matters of remedy, whereas statutes of repose eliminate the underlying rights when they lapse."); Wuliger v. Owens, 365 F. Supp. 2d 838, 844 (N.D. Ohio 2005) ("Unlike statutes of limitations, statutes of repose . . . extinguish the claim and

a statute of limitations to cap the flexible date when the statutes of limitation are triggered.[76] Statutes of repose are more rigid in another respect. Only circumstances outlined by the statute are sufficient to excuse a statutorily tardy filing.[77]

Statutes of repose, like statutes of limitations, encourage plaintiffs to bring timely actions (the "stale evidence" rationale). But statutes of repose target a different actor than do statutes of limitations.[78] Statutes of repose, which are unconcerned with the plaintiff's diligence or any circumstances whatsoever that may hinder timely filing, illustrate a legislative judgment that the defendant should be free from liability after the legislatively determined period has lapsed.[79] Thus, statutes of repose serve the second rationale of limitations periods, the "litigation uncertainty" rationale explained above.

3. Jurisdictional Time Limits

Jurisdictional time limits are most unforgiving. They can be as short as a matter of days; a certain date triggers them; and almost no situations will excuse a late filing.[80] Their inflexibility likely explains why jurisdictional time limits appear to be the exception rather than the rule. As a general matter, timeliness bars will not detract from a court's

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'rest[ ] on the time from some initiating event unrelated to an injury.'").

76. *See* Serafin v. Seith, 672 N.E.2d 302, 310 (Ill. App. Ct. 1996) ("[T]he period of repose [in a medical-malpractice action] gives effect to a policy different from that advanced by a period of limitations; the purpose of a statute of repose is to impose a cap on the applicability of the discovery rule so that the outer limit terminates the possibility of liability after a definite period of time, regardless of a potential plaintiff's lack of knowledge of his cause of action."); Jordan v. Talaga, 532 N.E.2d 1174, 1189 (Ind. Ct. App. 1989) (explaining that the product-liability repose period "sets a cap on the maximum time limit allowed for the commencement of an action without expanding the regular statute of limitations or reasonable time period for providing notice applicable to the underlying cause of action").

77. *See* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014) ("Statutes of limitations, but not statutes of repose, are subject to equitable tolling . . . Statutes of repose, on the other hand, generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control."); Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013) ("[A] statute of repose is subject [only] to legislatively created exceptions . . . and not to equitable tolling.") (internal citations omitted); McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011) ("The rule in the federal courts is that both tolling doctrines—equitable estoppel and equitable tolling—are . . . grafted on to federal statutes of limitations," but "neither tolling doctrine applies to statutes of repose; their very purpose is to set an outer limit unaffected by what the plaintiff knows.").

78. *CTS Corp.*, 134 S. Ct. at 2183.

79. *See id.* ("Statutes of repose also encourage plaintiffs to bring actions in a timely manner, and for many of the same reasons. But the rationale has a different emphasis. Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.' . . . Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability. Indeed, the Double Jeopardy Clause has been described as 'a statute of repose' because it in part embodies the idea that at some point a defendant should be able to put past events behind him.").

80. *See* Bowles v. Russell, 551 U.S. 205, 205–06 (2007) (holding that the timely filing of a notice of appeal is jurisdictional and triggered upon entry of the judgment or order appealed from, that an error "of jurisdictional magnitude" cannot be forfeited or waived, and the Court "has no authority to create equitable exceptions to jurisdictional requirements"); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133–34 (2008) (holding that the limitations period in 28 U.S.C. § 2501 for claims under the purview of the U.S. Federal Claims Court is jurisdictional and is not subject to tolling, waiver, or estoppel); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (stating that jurisdictional limitations periods are not subject to equitable estoppel or equitable tolling).

adjudicatory power.[81] A limitations period is jurisdictional only if explicit in the statute.[82]

C. The Securities Laws' Hybrid Limitations Periods

The securities laws contain both statutes of limitations and repose that work in tandem to allow investors enough time to discover and file their claims but also to cap the time for defendants' liability.[83] The securities laws' limitations periods are not jurisdictional.[84]

The securities laws' limitations periods are a chief aspect of securities regulation. With the enactment of the federal securities laws, Congress established measures to protect investors from fraudulent behavior. These consist of mandatory disclosure of material information as well as certain antifraud remedies embodied in the Securities Act of 1933 and the Securities Exchange Act of 1934. With both laws, Congress sought to protect investors by allowing them to make autonomous, fully informed investment decisions.[85] The federal securities laws demand that those with the greatest degree of access to information disclose that information to the investing public.[86] Yet, so as not to deter honest and productive business practices, Congress was cautious not to require too much disclosure. Instead, the securities laws require disclosure of only material facts—those that have a substantial likelihood to influence the investment decision of the objective, reasonable investor.[87]

To ensure that those with access to information are accurately disclosing it to investors, the securities laws provide broad antifraud remedies for materially misleading statements. The most commonly invoked antifraud remedies under the securities laws are

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81. *See* Scarborough v. Principi, 541 U.S. 401, 413 (2004) (holding that the Equal Access to Justice Act's 30-day deadline for attorney-fee applications is not jurisdictional, but a claim-processing rule); Kontrick v. Ryan, 540 U.S. 443, 454–55 (2004) (holding that rules governing time limits for creditors to file objections to a bankruptcy discharge are not jurisdictional, but claims-processing rules); Wis. Valley Imps. Co. v. United States, 569 F.3d 331, 333 (7th Cir. 2009) ("Timely suit is a condition of relief, to be sure, but time limits in litigation do not detract from a court's adjudicatory competence.").

82. *See, e.g.*, 51 AM. JUR. 2D *Limitation of Actions* § 12 (2014) (collecting cases and stating that "[a] statute of limitations generally is not jurisdictional, or erects no jurisdictional bar, since a statute of limitations is an affirmative defense that is waived if it is not pleaded. The bar of a statute of limitations does not go to the court's jurisdiction to hear a case, and an expired statute of limitations thus does not deprive the trial court of jurisdiction. A statute, however, may explicitly state otherwise, by referring to jurisdiction, and thereby provide a jurisdictional requirement.").

83. *See, e.g.*, 15 U.S.C. § 77m (summarizing the limitation of actions); 28 U.S.C. § 1658(b) (describing when a private right of action can be brought); Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 650 (2010) (referring to the two- and five-year limitations periods applicable to Section 10(b) and Rule 10(b)(5) claims as a two-year statute of limitations and a five-year statute of repose); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 361 (1991) (referring to the one- and three-year limitations periods applicable to Section 11 and Section 12 claims as a one-year statute of limitations and a three-year statute of repose).

84. *See* Eriline Co. v. Johnson, 440 F.3d 648, 654 n.8 (4th Cir. 2006) (stating that the limitations period that applies to Section 10(b) claims is not jurisdictional); Hays v. Adam, 512 F. Supp. 2d 1330, 1346 (N.D. Ga. 2007) (stating that the limitations period under Section 13 is not jurisdictional).

85. *See, e.g.*, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963) ("A fundamental purpose, common to [the securities laws], was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry.").

86. *See* Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975) (explaining that the purposes of one of the securities laws, the Williams Act, is to ensure that shareholders who are confronted with a cash tender offer are not required to respond to the offer without adequate information).

87. *See, e.g.*, Basic Inc. v. Levinson, 485 U.S. 224, 234 (1988) (explaining that the purpose of the materiality requirement is to exclude information that an investor would deem unimportant).

those under Section 11 of the 1933 Act and Section 10(b) of the 1934 Act.[88] But investors cannot bring these claims whenever they choose. Private antifraud remedies are governed by the securities laws' statutes of limitations and repose.[89]

1. The One- and Three-Year Limitations Period Under Section 13 of 1933 Act

The 1933 Act regulates distributions of securities in the primary market (e.g., initial public offerings). The 1933 Act requires those selling most kinds of securities to register them, and the Act makes it unlawful to distribute and sell securities with materially fibs in the registration statement.[90] Thus, the 1933 Act seeks to provide investors with sufficient material information regarding securities that are offered for sale and to prohibit deceit by the offerees.[91] The 1933 Act regulates the primary offering of securities by granting a private right of action under Section 11 to stock purchasers against those who make material misstatements or omissions in a registration statement of an IPO.[92]

Section 13 of the 1933 Act governs the timeliness bars of Section 11 claims and contains a one-year statute of limitations and a three-year statute of repose.[93] That statute provides that actions under Section 11 must be brought (1) within one year from the time of discovery of the untrue statement or omission, or from the time that discovery should

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88. *See* Securities *Class Action Filings: 2013 Year in Review*, CORNERSTONE RESEARCH 7 (2014), *available at* http://www.cornerstone.com/getattachment/d88bd527-25b5-4c54-8d40-2b13da0d0779/Securities-Class action-Filings—2013-Year-in-Revie.aspx (demonstrating that from 2009 to 2013, the largest percentage of total filings include rule 10b-5 claims and Section 11 claims as compared to lawsuits without any such claims).

89. 15 U.S.C. § 77m; 28 U.S.C. § 1658(b).

90. 15 U.S.C. §§ 77k, 77l(a)(2).

91. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) (explaining that a purpose of the 1933 Act was protecting investors against fraud).

92. 15 U.S.C. § 77k. The elements of a claim under Section 11 are: (1) an omission or misrepresentation, (2) of a material fact required to be stated or necessary to make other statements made not misleading, (3) in a registration statement, (4) that resulted in damages. *See e.g., In re* Initial Pub. Offering Sec. Litig., 358 F. Supp. 2d 189, 205 (S.D.N.Y. 2004). Scienter, reliance, and loss causation are not positive elements of a Section 11 claim. *See e .g.,* Panther Partners, Inc. v. Ikanos Commc'ns, Inc., 681 F.3d 114, 120 (2d Cir. 2012). Loss causation is an affirmative defense to a § 11 claim. 15 U.S.C. § 77l(b). Liability under Section 11 may seem heavy-handed, but it is tempered by the defendant's affirmative defense of due diligence, in which defendants other than the securities issuer itself may avoid liability by proving that, after a reasonable investigation, they had no grounds to believe that the parts of the registration statement attributed to them contained any falsehoods. 15 U.S.C. § 77k(b)(3). In addition, to prevent issuers from skirting registration, Section 12(a)(1) provides a cause of action against those who sell unregistered securities that were required to be registered. 15 U.S.C. § 77l(a)(1). *See also* Shuman v. Sherman, 356 F. Supp. 911, 917 (D. Md. 1973) (stating that Section 12(a)(1) "exists for the prophylactic purpose of insuring registration"). The elements of a Section 12(a)(1) claim include: "(1) a sale or offer of sale of securities by the defendant"; "(2) the absence of a registration statement" or failure to meet prospectus requirements; "(3) the use of the mails or facilities of interstate commerce in connection with sale or offer." Ellison v. Am. Image Motor Co., 36 F. Supp. 2d 628, 638 (S.D.N.Y. 1999). Moreover, Section 12(a)(2) addresses all other forms of materially incorrect or misleading selling literature and oral communications in the sale of a security. 15 U.S.C. § 77l(a)(2). The elements of a claim under Section 12 (a)(2) are: (1) an omission or misrepresentation (2) of a material fact required to be stated or necessary to make other statements made not misleading, (3) in a prospectus or oral communication, (4) of which the plaintiff was unaware, (5) that resulted in damages. *See, e.g.*, Miller v. Thane, 519 F.3d 879, 885 (9th Cir. 2008) (stating the elements a plaintiff must show to win under Section 12(a)(2)); *see also* Gustafson v. Alloyd Co., 513 U.S. 561, 567 (1995) (holding that an oral communication is only actionable if it relates to the prospectus).

93. 15 U.S.C. § 77m. When differentiating these two time limits, the former is called a statute of limitations and "the latter is called a statute of repose." Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co., No. 13 Civ. 6705, 2014 WL 241739, at *4 (S.D.N.Y. Jan. 22, 2014).

have been made in the exercise of reasonable diligence; and (2) in no case more than three years after the security was first offered to the public.[94] A discovery rule is grafted onto the one-year limitations period for Section 11 claims. That is, by statute, the one-year statute of limitations does not begin to run until discovery, which means (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, the facts constituting the violation—whichever comes first.[95] The statute triggers upon constructive (not just actual) discovery because it is arguably quite simple to uncover an untrue statement in a registration statement or prospectus.[96]

The three-year statute of repose begins running from when the security is first bona fide offered to the public, which, for Section-11 claims, is typically the date of an effective registration statement filed with the SEC.[97] An example illustrates this rule. In *Yates v. Municipal Mortgage & Equity LLC*, in 2008, investors sued claiming that a registration statement and a prospectus for a 2005 secondary public offering contained false and misleading statements.[98] The SEC declared the registration statement effective in mid-January 2005, which meant that the investors' complaint was untimely by about two weeks, even though the investors did not know the registration was effective on that date.[99]

2. The Two- and Five-Year Limitations Period for Section 10(b) of the 1934 Act

The 1934 Act, like the 1933 Act, aims to ensure that stock issuers disseminate adequate information to investors so that they can make informed investment decisions. But, unlike the 1933 Act, the 1934 Act addresses disclosure of information that affects the secondary market where investors buy or sell securities from other investors rather than the issuing companies themselves (e.g., stock traded on the New York Stock Exchange). The 1934 Act imposes a duty on various securities issuers, dealers, and exchanges to register and report information about securities to the investing public.[100] Section 10(b) of the 1934 Act also contains language from which courts have recognized an implied private right of action for materially misleading statements or omissions in connection with the purchase or sale of a security in violation of Rule 10b-5 promulgated by the Securities and Exchange Commission.[101]

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94. 15 U.S.C. § 77m.

95. Pension Trust Fund for Operating Eng'rs v. Mortg. Asset Securitization Transactions, Inc., 730 F.3d 263, 273 (2013) (citing Merck & Co., Inc. v. Reynolds, 559 U.S. 633 (2010)).

96. *See, e.g.*, Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 658 (2010) (explaining that the constructive discovery rule may be easier to apply to § 77m claims).

97. *See, e.g.*, Yates v. Mun. Mortg. & Equity, LLC, 744 F.3d 874, 895–98 (4th Cir. 2014) (explaining different court interpretations of what "bona fide offering date" refers to and concluding that the effective date of the registration statement is the "bona fide offering date"); P. Stolz Family P'ship LP v. Daum, 355 F.3d 92, 99–100 (2d Cir. 2004) (finding that the bona fide offering date is the date of registration).

98. *Yates*, 744 F.3d at 894.

99. *Id.* at 898.

100. *See, e.g.*, 15 U.S.C. §§ 78 f, n, o(d), 0-1, q, s (2011) (explaining that "an exchange may be registered as a national securities exchange," requiring proxies to follow specific requirements, requiring issuers to file registration, explaining effective broker and dealer registration, requiring every national securities exchange member, broker or deal to register and keep records, and requiring the Commission to publish notice of filings of application and receive comments).

101. 17 C.F.R. § 240.10b-5. The first case implying a private remedy under Rule 10b-5 was *Kardon v. National Gypsum Co.,* 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). The private right of action under Rule 10b-5 is now "beyond peradventure." Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983); *see also* Blue Chip

Claims under Section 10(b) and Rule 10b-5 are governed by a two-year statute of limitations and a five-year statute of repose.[102] The limitations statute provides:

> [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.[103]

Like Section 13, the statute of limitations for Section 10(b) claims contains a discovery provision. Although the statute does not expressly reference constructive discovery, the Supreme Court has interpreted the statute to run "(1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the

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Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (describing the judicially implied private right of action under Section 10(b) of the 1934 Act and SEC Rule 10b-5 as a "judicial oak which has grown from little more than a legislative acorn"); SEC v. Nat'l Sec., Inc., 393 U.S. 453, 465 (1969) (observing that claims under Section 10(b) and Rule 10b-5 "may well be the most litigated provisions in the federal securities laws"). The elements of a claim for securities fraud under Section 10(b) and Rule 10b-5 include: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008).

102. 28 U.S.C. § 1658(b). Historically, the Rule 10b-5 claim was judicially implied, and as a result, there was no accompanying statutory time limit. Courts, "faced with the awkward task of discerning the limitations period that Congress intended . . . to apply to a cause of action it really never knew existed," implied the applicable period using one of four alternatives: (1) the one- and three-year period under Section 13 of the 1933 Act; (2) the forum state's limitations' period under the common law of fraud; (3) the forum state's "blue sky law" limitations period; or (4) the limitations periods applicable to Section 9(e), Section 16(b) or Section 18(a) claims under the 1934 Act. Michael J. Kaufman & John M. Wunderlich, *Toward a Measure of Repose: The Statute of Limitations for Securities Fraud*, 52 WM. & MARY L. REV. 1547, 1559 (2011). In *Lampf*, the Court held that claims under Section 10(b) of the 1934 Act and Rule 10b-5 were governed by a one-year statute of limitations and the three-year statute of repose applicable to Section 9(e) of the 1934 Act. *See* Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 364 n.9 (1991). Corporate scandals such as Enron, Worldcom, and Adelphia, however, caused Congress to lengthen the period to its current two- and five-year structure. *See, e.g.*, S. REP. NO. 107-146, at 8 (2002).

103. 28 U.S.C. § 1658(b). In 2002, Congress responded to corporate scandals in Enron, Worldcom, and Adelphia, which shook investor confidence, by enacting the Sarbanes–Oxley Act (SOX) of 2002. SOX created stringent reporting requirements aimed at perceived lax corporate oversight. First, SOX required principal executive officers to certify that certain reports contained no false or misleading information. Sarbanes–Oxley Act of 2002, 15 U.S.C. § 7241(a). Second, SOX provided criminal penalties if the CEO knowingly certified false information. 18 U.S.C. § 1350(c). Finally, SOX mandated that each annual report filed by a company contain a report on internal controls established to guard against fraud. 15 U.S.C. § 7262(a)-(b). SOX also expanded the limitations periods that apply to most private remedies under the securities laws, providing a two-year statute of limitations and a five-year statute of repose. 28 U.S.C. § 1658(b). In its report on SOX, the Senate Judiciary Committee expressed concern that the one- and three-year structure "unfairly limit[ed] recovery for defrauded investors in some cases," noting that some states were forced to forgo their claims against Enron, for example, because of the statute of limitations. S. REP. NO. 107-146, at 8 (2002). The Committee was also concerned that the complexity and nature of securities fraud made these claims difficult to detect. *Id.* at 9. Additionally, the Committee observed that plaintiffs faced significant procedural obstacles under the PSLRA, including its lead-plaintiff selection process, its stay of discovery pending a motion to dismiss—"consideration of which can take over a year in itself"—and its heightened pleading standards. *Id.* at 9–10. The Committee worried that by the time plaintiff-investors learned enough facts to file a complaint capable of surviving a motion to dismiss and to begin discovery, the claim was likely to be time barred. *Id.* at 9. To allow plaintiffs time to adequately investigate their claims and to file meritorious suits, the Committee proposed, and Congress accepted, lengthening the limitations period. *Id.* at 9–10.

facts constituting the violation'—whichever comes first."[104] The "facts constituting the violation" include, at a minimum, (1) the statements made were false, material facts were omitted, or other acts that constitute the breach existed; and (2) the defendant acted with scienter.[105]

The time limit that applies to Section 10(b) claims is slightly longer than the time limit that applies to Section 11 claims. Additional time is justified because investors bringing claims under Section 10(b) must allege facts with particularity and a "strong inference" of scienter,[106] that is, enough facts for a district judge to find "cogent and compelling"[107] the inference that the defendant acted with intent to deceive, manipulate or defraud.[108] The longer period gives investors more time to try to meet this higher pleading burden.[109] To illustrate, in *Merck & Co., Inc., v. Reynolds*, investors sued a pharmaceutical manufacturer claiming it made false statements about medical risks of one of its blockbuster drugs in November 2003.[110] The defendants argued that the statutory clock started more than two years earlier as the result of a published research study, other products-liability lawsuits, and an FDA warning letter.[111] The Court concluded that these events did not show that the investors should have discovered the facts constituting securities fraud because the events did nothing to show that the drug maker was making any false statements with intent to defraud, manipulate, or deceive the investing public.[112]

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104. Merck & Co., Inc. v. Reynolds, 559 U.S. 633, 637 (2010).

105. *Id.* Whether reliance, damages, and loss causation also constitute "the violation" is an open question. *See also* McCann v. Hy-Vee, Inc., 663 F.3d 926, 931–32 (7th Cir. 2011) (recognizing this open question and concluding that the "violation" does not include injury or economic loss); City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc., 637 F.3d 169, 174 (2d Cir. 2011) (recognizing that after *Merck*, what facts constitute a securities-fraud violation remains unresolved).

106. 15 U.S.C. § 78u-4(b)(2).

107. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007).

108. *Merck & Co., Inc.*, 559 U.S. at 657–58 ("There is good reason . . . for providing an actual-discovery rule for private § 10(b) claims but providing (explicitly) a constructive-discovery rule for claims governed by [§ 11 and § 12]: The elements of § 10(b) claims, which include scienter, are likely more difficult to discover than the elements of claims under [§ 11 and § 12], which do not . . . And a constructive-discovery standard may be easier to apply to the claims covered by [§ 11 and § 12]. Determining when the plaintiff should have uncovered an untrue assertion in a registration statement or prospectus is much simpler than assessing when a plaintiff should have learned that the defendant deliberately misled him using a deceptive device covered by § 10(b).").

109. *See* Elizabeth Cosenza, Dura-*Tion: A New Paradigm for Construing the Statute of Limitations in Securities Fraud Class Actions*, 62 BAYLOR L. REV. 681, 718 (2010) ("Keenly aware of the additional and unprecedented pleading burdens that it had imposed on securities fraud plaintiffs when it passed the PSLRA, Congress enacted Section 804(a) of the Sarbanes–Oxley Act in 2002 to give plaintiffs additional time to develop the particularized facts necessary to plead a strong inference of scienter as to each possible defendant."); MICHAEL J. KAUFMAN, 26 SECURITIES LITIGATION: DAMAGES § 5B:2 (2013) ("Another possible benefit to plaintiffs . . . is that the 2/5 will allow more time to try to meet the Private Securities Litigation Reform Act's heightened pleading requirements (thought these might even be substantively easier to meet now as well). Now there is more time for vital information to surface in order to try to establish a cause of action that can meet those standards, in some cases, up to five years for information to surface."); Tony Mauro, *Merck Shareholder Suit Timely, Justices Rule*, LEGAL INTELLIGENCER (Apr. 28, 2010), http://www.thelegalintelligencer.com/id=12-2453295741/Merck-Shareholder-Suit-Timely-Justices-Rule?SIreturn=20141005154758 (access required) (quoting David Frederick of Kellogg, Huber, Hansen, Todd, Evans & Figel, who argued and won the case for Merck shareholders, as stating that *Merck* is especially significant because scienter is "usually the hardest part of the securities fraud to find out about").

110. *Merck & Co., Inc.*, 559 U.S. at 633.

111. *Id.*

112. *Id.* at 653–54.

The securities laws' time limits with discovery provisions purport to provide a shorter time to sue and thus a more attractive method for getting claims dismissed. Most of the time, however, discovery provisions impair the effectiveness of limitations periods. Discovery provisions in general are characterized by the defense groan-causing phrase "fact intensive."[113] Whether plaintiffs discovered or should have discovered something is often a question that itself requires some discovery, which means that time-barred claims are less and less likely to be disposed of on a motion to dismiss.[114]

III. TOLLING PRINCIPLES TO ARREST THE SECURITIES LAWS' LIMITATIONS PERIODS

The sanction for failing to comply with the time set by a limitations period is severe: Investors lose their day in court. At times, however, depriving one of access to the courts because of an arbitrary deadline is simply too severe a sanction. Certain circumstances may excuse a late complaint and the statutory clock will not run, it will be stopped or tolled.[115] Four doctrines identify circumstances where tolling applies. First, equitable tolling applies when it is unfair to hold the plaintiff to the statutory deadline because of some extraordinary event that impeded the plaintiff's compliance. Second, equitable estoppel applies when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit. Third, forfeiture applies when the parties have acted as if the case need not operate under the statutory deadlines. Fourth, waiver applies when the parties have explicitly agreed that their case need not operate under legal deadlines.

As shown in this part, case law interpreting the securities laws generally does not allow for equitable tolling or estoppel. Even forfeiture applies only to toll the securities laws' statutes of limitations and not statutes of repose. Touched on in this section, but explained in more depth in Part V, the only tolling circumstance that applies uniformly is waiver by tolling agreement.

A. Equitable Tolling

Equitable tolling refers to the situation in which the litigant has been pursuing rights diligently, but some extraordinary circumstance prevented timely discovery or prosecution of the claim.[116] The standard example is where, despite the plaintiff's diligence, the plaintiff could not discover the wrongdoer's identity or the facts essential to show an

113. *Cf.* Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 235 (5th Cir. 2009) (per curiam) (characterizing the former standard for discovery—"inquiry notice"—under Rule 10b-5's limitations period as one involving "disputed factual issues"); Lentell v. Merrill Lynch & Co., 396 F.3d 161, 169 (2d Cir. 2005) (stating that the securities laws' limitations periods are "fact-specific" and that the court is "decidedly reluctant to foreclose such claims as untimely absent a manifest indication that plaintiffs 'could have learned' the facts underpinning their allegations" earlier).

114. *See, e.g.*, Ochoa & Wistrich, *supra* note 56, at 496 ("[G]iven the complexity of existing limitation rules and the manner in which they have evolved, it has become increasingly difficult to dispose of time-barred claims as a threshold or preliminary matter (that is, by demurrer or summary judgment) rather than at trial.").

115. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) ("Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'").

116. *See, e.g.*, Credit Suisse Sec. (USA) LLC v. Simmonds, 132 S. Ct. 1414, 1419 (2012) ("Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.").

actionable wrong.[117] Diligence is a prerequisite to equitable tolling.[118] As long as a plaintiff acted diligently, equitable tolling can apply in a variety of situations, including where the defendant in a fraud case has successfully concealed the fraud and prevented discovery.[119]

Equitable tolling does not depend on the defendant's conduct.[120] As an example, equitable tolling may be appropriate if the plaintiff diligently pursued his rights, filed a timely but defective pleading, and was assured by a judicial officer that the defect would not act as a bar.[121] Equitable tolling may be appropriate if other circumstances rendered the plaintiff incapable of suing on time. Perhaps the plaintiff was waiting for the court to appoint counsel, possibly the plaintiff received inadequate notice,[122] maybe the plaintiff died and the estate needed a reasonable amount of time to appoint a proper representative,[123] or, by chance, the plaintiff was from a country at war with the defendant's country.[124]

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117. *See, e.g.*, Williams v. Sims, 390 F.3d 958, 960 (7th Cir. 2004) ("[E]quitable tolling, refers to situations in which, without fault by the defendant, the plaintiff is unable to sue within the statutory period. The standard example is where despite the exercise of due diligence the plaintiff simply cannot discover the wrongdoer's identity, or facts essential to show that there was an actionable wrong, within the statutory period.").

118. *See, e.g.*, Oliver Wendell Holmes, *The Path of Law*, 110 HARV. L. REV. 991, 1007 (1997) ("[I]f a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.").

119. *See, e.g.*, Holmberg v. Armbrecht, 327 U.S. 392, 396–97 (1946) (stating that when a party injured by fraud "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party"). Fraudulent concealment is conduct beyond the wrongdoing upon which the plaintiff's claim is filed. *See, e.g.*, Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) ("Equitable estoppel in the limitations setting is sometimes called fraudulent concealment, but must not be confused with efforts by a defendant in a fraud case to conceal the fraud. To the extent that such efforts succeed, they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of a fraud. They are thus within the domain of the discovery rule. Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant-above and beyond the wrongdoing upon which the plaintiff's claim is founded-to prevent the plaintiff from suing in time.").

120. *See, e.g.*, Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010) ("Equitable tolling does not depend on the defendant's wrongful conduct; rather, it focuses on whether the plaintiff's delay was excusable.").

121. *See* Osterneck v. Ernst & Whinney, 489 U.S. 169, 179 (1989) (stating that "where a party has performed an act which, if properly done, would [meet] the deadline . . . and has received specific assurance by a judicial officer that that this act has been properly done," then the deadline will not act as a bar).

122. *See, e.g.*, Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (concluding that there was no reason to equitably toll limitations period because "this is not a case in which a claimant has received inadequate notice . . . or where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon").

123. *See* Amy v. City of Watertown, 130 U.S. 320, 325 (1889) ("[I]f a man dies after commencing an action, and it abates by his death, and the limitation of time for bringing another action expires before the appointment of an executor or administrator, the courts have held that as there is no person to bring suit, the statute is suspended for a reasonable period, in order to give an opportunity to those interested to have the proper representative appointed."); Lake v. Arnold, 232 F.3d 360, 370–71 (3d Cir. 2000) (stating that equitable tolling may be appropriate where a guardian conspires to deprive a mentally incompetent person of her rights).

124. *See, e.g.*, *Amy*, 130 U.S. at 324 (stating that limitations periods were tolled by the Civil War); Hangar v. Abbott, 73 U.S. 532, 541–42 (1867) (stating that inevitable occurrences, such as war, could toll statutes of limitations); Osborne v. United States, 164 F.2d 767, 769 (2d Cir. 1947) (stating that the limitations period was arrested for plaintiff who was prisoner of war overseas); *see also* Hon. Mark C. Dillon, *An Overview of Tolls of Statutes of Limitations on Account of War: Are They Current and Relevant in the Post-September 11th Era?,* 13 N.Y.U. J. LEGIS. & PUB. POL'Y 315, 322–23 (2010) (surveying states and finding that nearly half statutorily

Equitable-tolling principles will interrupt statutes of limitations for some claims[125] but not for claims under the securities laws. That is, equitable tolling does not apply to the securities laws' statutes of limitations.[126] The reason for this special treatment is that the securities laws' statutes of limitations build in equitable principles by virtue of their discovery provisions.[127] Based on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, courts will not toll the securities laws' statutes of limitations for equitable reasons.[128] In *Lampf*, the Court addressed whether equitable tolling was available for claims governed by Section 13's one- and three-year limitations period.[129] In that case, in 1986, investors sued a law firm for conduct between 1979 and 1981. The investors claimed that the law firm wrote false opinion letters incorporated in offering statements that touted tax benefits of investing in certain partnerships.[130] The plaintiffs missed the three-year repose deadline but sought equitable tolling based on a narrow circumstance: their failure to discover the alleged fraud within the three-year period.[131] The plaintiffs relied on the fact that the IRS sent notice in late 1982 and 1983 that it was investigating the partnerships, but only later disallowed the claimed tax benefits.[132] The Court rejected this argument, observing that Congress already built "equitable tolling" into the statute's one- and three-year limitations period.[133] The Court explained that Section 13 provides a one-year limit from the date of *discovery*. This statute of limitations still caps the time to sue at three years when the plaintiff has difficulty uncovering the claim.[134]

Nevertheless, there may be reason to question whether all forms of equitable tolling should be unavailable to toll the securities laws' statute of limitations. As explained by

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recognize a generalized toll of limitations periods on account of war).

125. *See, e.g.*, Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling.") (quotation omitted).

126. *See* McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011) ("The rule in the federal courts is that both tolling doctrines—equitable estoppel and equitable tolling—are . . . grafted on to federal statutes of limitations," but "neither tolling doctrine applies to statutes of repose; their very purpose is to set an outer limit unaffected by what the plaintiff knows."); Law v. Medco Research, Inc., 113 F.3d 781, 785–86 (7th Cir. 1997) ("[T]he Supreme Court has held that, given the discovery rule, there is no defense of equitable tolling to the statute of limitations," and that "[t]he Court [in *Lampf*] said not that equitable tolling was inconsistent with the one-year statute of limitations (as it was, the Court held, with the three-year statute of repose), but that it was 'unnecessary' because of the discovery rule. This formulation implies that the rule should be so interpreted as to make equitable tolling unnecessary to protect investors' interest in having a reasonable, a practical, time within which to sue."); Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717, 720–21 (7th Cir. 1993) (stating that the plain import of the Supreme Court's decision in *Lampf* is that "when knowledge or notice is required to start the statute of limitations running, there is no room for equitable tolling"); Topolian v. Ehrman, 954 F.2d 1125, 1135 (5th Cir. 1992) (stating that *Lampf* held that "equitable tolling is not applicable").

127. *See McCann*, 663 F.3d at 930; Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956, 974 (11th Cir. 2007); Johnson v. Aljian, 490 F.3d 778, 782 n.13 (9th Cir. 2007).

128. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991).

129. *Id.*

130. *Id.* at 352.

131. The plaintiffs argued that tolling was appropriate where "reasonably diligent plaintiffs are unaware of their claims through no fault of their own, or where defendant have actively concealed the fraud." Brief for Respondents at 42–43, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Glibertson, 501 U.S. 350 (1991) (No. 90-333), 1991 WL 11007794, at *42–43.

132. *Lampf*, 501 U.S. at 352–53.

133. *Id.* at 363.

134. *Id.*

securities scholar Harold Bloomenthal:

> The aspect of equitable tolling that the Court rejected in *Lampf* was not directed at what constitutes discovery under [the statute of limitations], but . . . on the inconsistency of applying equitable tolling so as to extend the outside three-year [statute of repose]. The Court in *Lampf* did not purport to resolve the issue of when the one year after discovery period of limitations commences.[135]

Similarly, equitable principles do not toll a *statute of repose* because repose provisions set an outer limit unaffected by what the plaintiff knows or does,[136] and the securities laws are no exception. Indeed, the federal courts are in complete agreement that the securities laws' statutes of repose begin to run without interruption once the necessary triggering event has occurred, even if equitable considerations would have otherwise warranted tolling.[137]

B. Equitable Estoppel

Equitable estoppel refers to the situation where the defendants' conduct somehow prevents the plaintiff from suing.[138] Estoppel stems from the traditional legal maxim that one cannot take advantage of one's own wrongs, a principle "older than the country itself."[139] Perhaps the defendant lulled the plaintiff into letting the deadline pass by engaging in sham settlement negotiations,[140] or by promising not to plead any limitations defenses.[141] Or perhaps the defendant threatened the plaintiff in order to prevent suit.[142] The doctrine also applies when the plaintiff discovered (or should have discovered) the

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135. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 1 GOING PUBLIC HANDBOOK § 10:115 (2014).

136. McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011); Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956, 974 (11th Cir. 2007); Johnson v. Aljian, 490 F.3d 778, 782 n.13 (9th Cir. 2007).

137. P. Stolz Family P'ship LP v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004); *see also* THOMAS LEE HAZEN, 2 LAW SECURITIES REGULATION § 7.10[4] (2014) (collecting cases and stating "Section 13 is not only a statute of limitations but also operates as a statute of repose. There is an absolute maximum of three years in order to prevent stale claims. The three-year repose period is absolute in that it cannot be extended by applying equitable tolling principles"); J. WILLIAMS HICKS, 17 CIVIL LIABILITIES: ENFORCEMENT & LITIGATION § 4:77 (2013) (collecting cases and stating that the three-year repose period "is an absolute outer limit," and thus "courts have uniformly refused to apply the doctrine of equitable estoppel").

138. Bain & Colella, *supra* note 58, at 504 ("Because equitable estoppel prevents a defendant from taking advantage his own wrongdoing, it is, by definition, limited to situations in which the actions of the defendant are at issue.").

139. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–34 (1959).

140. Schroeder v. Young, 161 U.S. 334, 344 (1896); *see also* Doe v. Blue Cross & Blue Shield United of Wisc., 112 F.3d 869, 876 (7th Cir. 1997) ("The most common example of equitable estoppel is where the defendant asks the plaintiff to delay the filing of his suit pending negotiations aimed at resolving the parties' dispute out of court."); Tregenza v. Great Am. Commc'ns Co., 12 F.3d 717, 720–21 (7th Cir. 1993) ("If Lehman had made lulling noises, designed to allay the investors' concerns, the plaintiffs might have been able to arrest the running of the statute of limitations by pleading equitable estoppel."); *Developments in the Law*, *supra* note 58, at 1177–79 ("Originally the doctrine was invoked only if the defendant had misrepresented a present fact, raising an estoppel *in pais*. Now, however, the courts often employ what has been loosely termed 'equitable estoppel' to remove the statutory bar in any situation in which the plaintiff's reasonable failure to sue appears to result from reliance on any sort of misleading conduct, such as assurances that the obligation would be discharged without suit, or a request that the plaintiff delay prosecution of the claim.").

141. *Glus*, 359 U.S. at 232–34.

142. Barnette v. Wells Fargo Nev. Nat'l Bank of S.F., 270 U.S. 438, 445–46 (1926).

claim, but the defendant took steps beyond the wrongdoing upon which the plaintiff's claim is founded to stall the suit (referred to as "fraudulent concealment").[143] In those situations, a court may prohibit a defendant from raising a timeliness defense.

As a rule, estoppel pauses a deadline set by statutes of limitations.[144] But whether estoppel arrests the securities laws' statutes of limitations is uncertain. Recall that the *Lampf* Court did not address estoppel's application to the securities laws' limitations periods. It addressed only equitable tolling's application. The federal courts have noticed that although *Lampf* forbids suspending the securities laws' limitations provisions via equitable tolling, *Lampf* does leave room for suspending the securities laws' statutes of limitations based on principles of *estoppel*.[145] Therefore, some courts have suggested that plaintiffs may arrest the securities laws' statute of limitations based on estoppel principles, but only until the cap imposed by the statute of repose.[146]

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143. *See, e.g.*, Shropshear v. Corp. Counsel of Chi., 275 F.3d 593, 595 (7th Cir. 2001) ("Equitable estoppel in the limitations setting is sometimes . . . called fraudulent concealment but must not be confused with efforts by a defendant in a fraud case to conceal fraud. Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered or, as required by the discovery rule should have discovered, that the defendant injured him. It denotes efforts by the defendant, above and beyond the wrongdoing upon which the plaintiff's claim is founded, to prevent, by fraud or deception, the plaintiff from suing in time."); Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990).

144. *See, e.g.*, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

145. *See Tregenza*., 12 F.3d at 720–21 ("*Lampf* holds, it is true, that when knowledge or notice is required to start the statute of limitations running, there is no room for equitable tolling. . . . But there may still be room in such a case for equitable *estoppel*. *Katz v. Amos Treat & Co.,* 411 F.2d 1046, 1055 (2d Cir. 1969) (Friendly, J.), holds that there is room; *Short v. Belleville Shoe Mfg. Co*., 908 F.2d 1385, 1392 (7th Cir. 1990), leaves the question open. Equitable tolling just means that without fault by either party the plaintiff does not have enough information to sue within the period of limitations, and in the type of statute of limitations that we are discussing the period of limitations doesn't start until he has the information, making equitable tolling redundant. But the plaintiff might have the required information—actual knowledge of the violation or inquiry notice, as the case may be—yet be thwarted from suing in time by misrepresentations or other actions by the defendant; for example, the defendant might have promised not to plead the statute of limitations."); *see also* Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607, 607 (1992) (contending that under *Lampf*, "[o]nly claims of securities fraud uncomplicated by a later cover-up of the original fraud are free from tolling principles. The limitations period for fraud which is subsequently concealed by an original wrongdoer remains, because of the still viable doctrine of fraudulent concealment, subject to tolling."); Betz v. Trainer Wortham & Co., 519 F.3d 863, 869 (9th Cir. 2008) (observing with approval, post *Lampf* that "[t]here is a handful of cases where a defendant's outright lies and malfeasances prevented an investor who made diligent inquiries from discovering facts known only to the defendant. In such cases, courts have held that the statute wasn't triggered"), *cert. granted*, *vacated sub nom*. Trainer Wortham & Co. v. Betz, 559 U.S. 1103 (2010). Legal scholarship has noticed this as well. *See* Roy M. Van Cleave, *The Federal Securities Acts' One-Year Inquiry Notice Statute of Limitations: Are the Scales Tipped Against Fraud Claimants?*, 22 J. CORP. L. 79, 89–90 (1996) (collecting cases that find that equitable estoppel survives *Lampf*); *cf.* Johnson, *supra*, at 629–30 (arguing that fraudulent concealment, a variant of equitable estoppel, should survive *Lampf* and apply to the securities laws' statutes of repose).

146. *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 310 F. Supp. 2d 819, 857–58 (S.D. Tex. 2004) (collecting case law and explaining that whether *Lampf* precludes equitable estoppel is unresolved but concluding that the "persuasive" approach to allow estoppel to toll the securities laws' statutes of limitations, but not repose); Friedman v. Wheat First Sec., Inc., 64 F. Supp. 2d 338, 346–47 & n.7 (S.D.N.Y. 1999) (stating that "the equitable estoppel doctrine as applied to the one-year from discovery period is not inconsistent with *Lampf* as long as the claim is brought within the three-year period of repose," but finding no injustice to support its application in that case); Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 484 (N.D. Ill. 1991) (stating that "it is possible for equitable estoppel to extend the time for filing suit beyond the one-year discovery limitation to the time that

Turning to estoppel's application to the securities laws' statute of repose, a few courts have held that estoppel does not arrest repose provisions because those provisions are unyielding and absolute.[147] On the other hand, other courts, however, have suggested restiveness with this conclusion,[148] and, as explained by Harold S. Bloomenthal, there may be reason to treat estoppel differently from equitable tolling: "Equitable estoppel, properly understood, is not inconsistent with the fact that Congress intended the periods of limitation to be absolute."[149] Bloomenthal writes, "Congress was attempting to assure directors and others that, after a period of time, no action would be brought against them for allegedly false statements made in a registration statement or otherwise in connection with the sale or purchase of a security. Congress was not saying that by their own subsequent conduct they could not, in effect, extend the period of limitation."[150]

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they actually filed suit within the three-year repose period," but finding no grounds to apply the doctrine), *rev'd on other grounds*, 990 F.2d 272 (7th Cir. 1993).

147. *See, e.g.*, McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011) ("The argument for so unbending a rule is that the risk of error is great when the interval between an alleged wrongful act and its harmful consequence is a protracted one."); Soley v. Wasserman, No. 08 Civ. 9262, 2010 WL 931888, at *6 (S.D.N.Y. Mar. 12, 2010) ("Soley's equitable tolling and estoppel arguments are of no moment because the three year limit is a period of repose . . . and is therefore not subject to tolling, equitable or otherwise."); Del Sontro v. Cendant Corp., 223 F. Supp. 2d 563, 574 (D.N.J. 2002) (stating that "equitable estoppel does not prevent Defendant from raising the repose period as a defense"); Berning v. A.G. Edwards & Sons, Inc., 774 F. Supp. 480, 484 (N.D. Ill. 1991) ("[I]t is possible for equitable estoppel to extend the time for filing . . . suit beyond the one-year discovery limitation to the time that they actually filed suit within the three-year repose period."); Borden, Inc. v. Spoor Behrins Campbell & Young, Inc., 778 F. Supp. 695, 698 (S.D.N.Y. 1991) (holding that the statute of repose was "an absolute bar" to Section 10(b) claims and equitable estoppel was not available).

148. *See, e.g.*, Caviness v. Derand Res. Corp., 983 F.2d 1295, 1301–02 (4th Cir. 1992) (recognizing that the doctrine of equitable estoppel *may* have applied to toll Section 13's statute of repose); Anixter v. Home-Stake Prod. Co., 939 F.2d 1420, 1436 & n.27 (10th Cir. 1991) (observing that *Lampf* did not address equitable estoppel but concluding that Section 13's three-year cap is absolute and not tolled by equitable estoppel, but also stating that "there may be circumscribed settings in which the doctrine of equitable estoppel might apply to claims governed by Section 13"), *amended on reh'g*, 947 F.2d 897 (10th Cir. 1991), *vacated on other grounds sub nom*. Dennler v. Trippet, 503 U.S. 978 (1992). Before *Lampf*, courts concluded that the three-year repose provision could be extended by virtue of estoppel. *See In re* Home-Stake Prod. Co. Sec. Litig., 76 F.R.D. 337, 344–45 (N.D. Okla. 1975) (holding that three-year period applicable to Section 12(a)(2) claims was not an absolute bar); *see also* Zola v. Gordon, 685 F. Supp. 354, 361 n.7 (S.D.N.Y. 1988) (stating that *In re Home-Stake* is "[i]n reality," a case in which the court "used equitable estoppel against the defendants" and recognizing that under appropriate circumstances, equitable estoppel could extend the three-year repose period). Courts have used estoppel to extend repose periods in other contexts. *See* Cange v. Stotler & Co., 826 F.2d 581, 583 (7th Cir. 1987) (The Commodity Exchange Act); Bomba v. W.L. Belvidere, Inc., 579 F.2d 1067, 1070 (7th Cir. 1978) (The Interstate Land Sales Full Disclosure Act).

149. Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. COLO. L. REV. 235, 292 (1989).

150. *Id.* at 292; *see also* HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, 2 SECURITIES LAW HANDBOOK § 32:24 (2013) ("Congressional intent . . . is not so clear with respect to equitable estoppel. Congress did intend a three-year period of repose, even to the degree of barring claims for fraud, so that participants in securities transactions (often assumed in the debate to be the board of directors) and their estate had assurance after a definite period of time . . . need not concern themselves that claims might be asserted against them. But this was on the assumption that the defendant committed acts that should not be called into question years later. Congress was not saying that a defendant, by his or her own subsequent conduct, could not extend the period of limitations; that is what the doctrine of equitable estoppel is all about.").

C. Forfeiture and Waiver

Timeliness defenses are ordinarily viewed as personal, affirmative defenses,[151] allowed as a matter of legislative and juristic grace.[152] As a consequence, timeliness defenses can be forfeited and waived. At the outset, it is appropriate to emphasize the following: waiver and forfeiture are often used interchangeably, but they are not the same.[153] Waiver is an intentional relinquishment of a known right (forgoing a defense for strategic reasons), compared to forfeiture, which is mere conduct inconsistent with the rights conferred.[154] For example, one can forfeit a defense by acting inconsistently with the rights conferred by failing to raise the defense, and one can expressly waive the defense by entering into a tolling agreement.[155]

Litigants can forfeit statutes of limitations. It is a familiar concept in the law that litigants can forfeit rights—even constitutional ones—by failing to make a timely assertion of that right before the court having the jurisdiction to determine it.[156] Failing to timely assert a right is conduct inconsistent with the right and a forfeiture of it. The federal courts have recognized that failing to raise the securities laws' statutes of limitations forfeits that defense (although the courts often use the term "waiver").[157] Under case law for statutes

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151. *See, e.g.*, Fed. R. Civ. P. 8(c)(1); *see also* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.").

152. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.").

153. Courts commonly use the word "waiver" when they mean "forfeiture," and this has led to some admitted difficulty by the judiciary in distinguishing the two terms. *E.g.*, United States v. Murdock, 491 F.3d 694, 698 (7th Cir. 2007).

154. *See, e.g.*, United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment of abandonment of a known right.'").

155. *See* Lee v. Cook Cnty., Ill., 635 F.3d 969, 973 (7th Cir. 2011) ("Like other legal contentions, the benefit of the statute of limitations may be waived by agreement or by conduct inconsistent with the rights it confers, but defendants did not waive their right to have these untimely suits dismissed.").

156. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 444 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right before a tribunal having jurisdiction to determine it."); *see also* Day v. McDonough, 547 U.S. 198, 202 (2006) ("Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or an amendment thereto."). Jurisdictional time limits cannot be forfeit or waived. *See, e.g.*, Tapia-Lemos v. Holder, 696 F.3d 687, 690 (7th Cir. 2012) (stating that "true jurisdictional rules are not subject to waiver or forfeiture," and holding that the time limit to seek judicial review of a removal order was jurisdictional and could not be waived or forfeited).

157. *See, e.g.*, Slayton v. Am. Express Co., 460 F.3d 215, 229–30 (2d Cir. 2006) ("While Amex did argue before the district court that the entire original complaint was time-barred because appellants were on inquiry notice of fraud as of April 2, 2001, we find no record of a claim in the alternative of a statute of limitations defense specific to Goeltz, Crittenden, and Henry. The failure to raise the specific statute of limitations defense as to Goeltz, Crittenden, and Henry in the district court waives [read "forfeits"] this defense, and it cannot be raised for the first time on appeal."); Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 967 F.2d 742, 751–52 (2d Cir. 1992) ("A claim that a statute of limitations bars a suit is an affirmative defense, and, as such, it is waived [read

of repose, however, courts generally refuse to find that one may forfeit that defense by failing to raise it in a pleading.[158] One may forfeit the benefit of a statute of limitations, but not a statute of repose because courts view the benefit conferred by statutes of repose as a "substantive" aspect of the claim, which cannot be forfeited.[159]

A special kind of waiver involves tolling agreements. At times, parties agree to toll timeliness bars to allow additional time to negotiate settlement or explore the merits of their respective positions.[160] Agreeing to toll timeliness bars can suspend hostilities, spare parties unnecessary legal costs, and save the court the administrative time and expense of handling a lawsuit that the parties just want stayed.[161] It is an arrangement that is beneficial to plaintiffs, defendants, and the court. This kind of explicit waiver suspends statutes of limitations in general and the securities laws' statutes of limitations specifically.[162] Also, although one cannot forfeit the benefit of a statute of repose, case law *does* suggest that one can waive the benefit of repose provisions of the securities laws and repose periods generally.[163] This case law is discussed more fully in Part V.

IV. SPECIAL TIMELINESS RULES APPLICABLE TO PUTATIVE SECURITIES CLASS ACTIONS

Timeliness rules that apply to class actions have special relevance for securities

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"forfeit"] if not raised in the answer to the complaint.").

158. *See, e.g.*, Roskam Baking Co., Inc. v. Lanham Mach. Co., 288 F.3d 895, 902–03 (6th Cir. 2002) (holding that party could not "waive" [read "forfeit"] a statute of repose by failing to raise it in an initial pleading); *but see* Pratcher v. Methodist Healthcare Memphis Hosps., 407 S.W.3d 727, 739–40 (Tenn. 2013) (holding that a party could "waive" [read "forfeit"] a statute of repose by failing to timely raise it).

159. *See, e.g.*, Am. Fed'n of Teachers, AFL–CIO v. Bullock, 605 F. Supp. 2d 251, 260–61 (D.D.C. 2009) (collecting cases and observing that the statute of repose is a substantive provision and may not be forfeited).

160. *See, e.g.*, SECURITIES AND EXCHANGE COMMISSION, DIVISION OF ENFORCEMENT, Enforcement Manual § 3.1.2 (Oct. 2013), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf ("If the assigned staff investigating potential violations of the federal securities laws believes that any of the relevant conduct may be outside the five-year limitations period before the SEC would be able to file or institute an enforcement action, the staff may ask the potential defendant or respondent to sign a 'tolling agreement.' Such requests are occasionally made in the course of settlement negotiations to allow time for sharing of information in furtherance of reaching a settlement.").

161. *See* CHARLES S. ZIMMERMAN, 1 PHARMACEUTICAL & MEDICAL DEVICE LITIGATION § 8:31 (2013) ("The MDL courts for the most part believe tolling agreements are helpful for it takes the pressure off the clerk's office in the MDL court district and allows meaningful work in the MDL to occur and holds down mass filings of cases simply to protect the statute of limitation, especially in short statute states like California and Louisiana where one year statute of limitations exist."); Clarex Ltd. v. Natixis Sec. Am. LLC, No. 12 Civ. 7908, 2013 WL 2631043, at *1 n.2 (S.D.N.Y. June 11, 2013) (tolling agreement suspended limitations period for contract claim by almost 5 years).

162. *See* Randon v. Toby, 52 U.S. 493, 510–11 (1850) ("An agreement by a debtor to apply a certain portion of his crops towards the extinguishment of the debt in consideration of further indulgence, will take a case out of the statute of limitations, and may set up in avoidance of the plea by way of estoppel upon the debtor."); *see also In re* Dynegy, Inc. Sec. Litig, 339 F. Supp. 2d 804, 859 (S.D. Tex. 2004) ("The ability of parties to enter agreements to waive the assertion of defenses based on limitations has long been recognized in this circuit.").

163. *See* ESI Montgomery Cnty., Inc. v. Montenay Int'l Corp., 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995) (upholding an express waiver of repose period in a federal securities action); McRaith v. BDO Seidman, LLP, 909 N.E.2d 310, 328–29 (Ill. App. Ct. 2009) (upholding 12 tolling agreements that "forfeit" the defendant's "potential timeliness defenses without exception or condition precedent"); First Interstate Bank of Denver v. Cent. Bank & Trust Co., 937 P.2d 855, 860 (Colo. App. 1997) (upholding written agreement tolling statute of repose pending a final adjudication of federal claims); One N. McDowell Assoc. v. McDowell Dev. Co., 389 S.E.2d 834, 836 (N.C. Ct. App. 1990) (upholding written agreement tolling repose period under North Carolina construction law).

litigators. Securities cases most often proceed as a class action because the class mechanism provides a means to aggregate a dispersed group of investors into a single suit and offset otherwise de minimis losses with economies of scale.[164] In fact, the substantive rules that apply to securities claims facilitate resolving securities cases on a class-wide basis.[165]

To understand the timeliness rules that apply to securities class actions, we must revisit the central feature of any class action: representation.[166] The federal class action enables large numbers of diverse people to aggregate similar claims into a single lawsuit.[167] By doing so, the class action device provides persons with injuries too small to justify the cost of a lawsuit with an economically feasible remedy and spares the courts from having to shepherd hundreds of substantially similar cases.[168] But a class, which can consist of hundreds, maybe thousands, of persons across the country, cannot hope to direct a case in the same way that a single plaintiff can.[169] Instead, the class action mechanism dictates that one person (or group) should represent and protect the interests of the whole class.[170] Per Federal Rule of Civil Procedure 23, the named representative must adequately represent the class and have claims that are typical of the group.[171]

The desire that an adequate representative lead the class is elevated under the securities laws.[172] Congress perceived that securities litigation was too lawyer-driven and

164. *See* Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir. 1985) ("Class actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, since the effectiveness of the securities laws may depend in large measure on the application of the class action device.") (internal quotations omitted); Green v. Wolf Corp., 406 F.2d 291, 296 (2d Cir. 1968) ("[A] class action may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf.").

165. *See, e.g.*, MICHAEL J. KAUFMAN & JOHN M. WUNDERLICH, RULE 10B-5 PRIVATE SECURITIES-FRAUD LITIGATION § 1.1, at 3–4 (2014) (explaining that securities claims are often litigated as class actions in federal court because the Supreme Court's securities jurisprudence facilitates class-wide resolution of securities claims).

166. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) ("The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. . . . [T]o justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.") (internal quotations and citations omitted); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974) ("A federal class action is . . . truly [a] representative suit.").

167. Hansberry v. Lee, 311 U.S. 32, 41 (1940) ("The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.").

168. *See* FED. R. CIV. P. 23(b)(3) advisory committee's note (suggesting that a class action is appropriate when "the amounts at stake for individuals [are] so small that separate suits [are] impracticable"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 598 (1997) (lamenting the flood of asbestos-related lawsuits that began in the 1970s).

169. *See, e.g.*, *In re* Cendant Corp. Litig., 264 F.3d 201, 223 n.3 (3d Cir. 2001) ("Most of the safeguards we have described vanish in the class action context, where 'the client' is a sizeable, often far-flung, group. Logistical and coordination problems invariably preclude class members from meeting and agreeing on anything, and, at all events, most class members generally lack the economic incentive or sophistication to take an active role. There is simply no way for 'the class' to select, retain, or monitor counsel.").

170. *See, e.g.*, FED. R. CIV. P. 23(a) (allowing for one or more members of a class to sue as representative parties on behalf of all members when certain conditions are met).

171. FED. R. CIV. P. 23(a)(3)–(4) (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and . . . the representative parties will fairly and adequately protect the interests of the class").

172. *See* Tellabs, Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 320–21 (2007) (recognizing that a central

that lead plaintiffs were often figureheads who did too little to monitor or control plaintiffs' counsel.[173] To remedy that, the securities laws require that a securities class action be led by, not just any adequate representative, but by the "most capable" representative—defined as the representative who meets Rule 23's requirements and has the greatest financial interest in the case.[174] Congress devised special rules to govern the lead plaintiff's selection in a securities class action to ensure the plaintiff with the largest losses (typically an institutional investor) and thus, presumably, the plaintiff who is the most motivated to manage the case and direct counsel, would lead the group.[175] That is, the securities laws actively "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."[176]

Thus, securities class actions and class actions generally depend on the legal fiction that unnamed class members are, in fact, parties to the action represented by an adequate proxy.[177] The Federal Rules allow—indeed encourage—class members to rely on the lead

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aim of Congress's PSLRA was to encourage efficient resolution of claims in class action proceedings overseen by a single, institutional investor plaintiff and litigated by a single law firm); Berger v. Compaq Computer Corp., 257 F.3d 475, 483 (5th Cir. 2001) ("Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA's requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.").

173. *Cf.* 7B CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 1806 (3d ed. 2005) ("Several factors support the conclusion that the scope of the [Securities Litigation Uniform Standards] Act's phrase 'misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security,' 15 U.S.C.A. § 78bb(f)(1)(A), does not extend further than misrepresentations that are material to the decision by one or more individuals . . . to purchase or sell a covered security.").

174. Under the PSLRA, a court "shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. § 78u–4(a)(3)(B)(i). *In re* Cavanaugh, 306 F.3d 726, 729 (9th Cir. 2002) ("While the words 'most capable' seem to suggest that the district court will engage in a wide-ranging comparison to determine which plaintiff is best suited to represent the class, the statute defines the term much more narrowly: The 'most capable' plaintiff-and hence the lead plaintiff-is the one who has the greatest financial stake in the outcome of the case, so long as he meets the requirements of Rule 23.").

175. Courts are to "adopt a [rebuttable] presumption" that the most adequate plaintiff is the plaintiff who: (1) has either filed a complaint or moved to be named lead plaintiff; (2) has the largest financial interest in the relief sought by the class; and (3) satisfies the requirements of Federal Rule of Civil Procedure 23. 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I)–(II). As explained by the court in *In re Cendant Corp. Litig*., "The goal of this scheme is to 'increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel.' . . . Its underlying assumption is that the plaintiff or plaintiff group with the strongest financial interest will pursue the claims with the greatest vigor and will have both the interest and the clout to engage qualified counsel at the best rates for the class. The court is then charged with ensuring that the reality of the case accords with these assumptions." In re Cendant Corp. Litig., 182 F.R.D. 144, 145–46 (D.N.J. 1998).

176. *Second Circuit Holds that* American Pipe *Class Action Tolling Doctrine Does Not Apply to Statute of Repose in Securities Act of 1933*, 127 HARV. L. REV. 1501, 1508 (2014).

177. *See, e.g.*, *In re Cendant Corp. Litig*., 264 F.3d at 223 n.3 (reasoning that, in the context of a securities class action, only one entity is entitled to speak for the class, the lead plaintiff); *In re* Gap Stores Sec. Litig., 79 F.R.D. 283, 291 (C.D. Cal. 1978) ("The fiction of vicarious presence may be justified in plaintiff class actions . . . where many if not all absent members of a plaintiff class would never enjoy a day in court but for the class action, and while technically lacking a day in court they are compensated by free, effective representation and the possibility of a windfall recovery in a suit they might never have brought.") (internal citations and quotations omitted); *see also* State Farm Mut. Auto Ins. Co. v. Boellstorff, 540 F.3d 1223, 1229 (10th Cir. 2008) ("[T]he filing of a class action, in a classic legal fiction, causes the courts to treat members of the asserted class as if they hav[e] instituted their own actions, at least so long as they continue to be members of the class . . . and they have

plaintiff to press their claims.[178] The Federal Rules provide absent class members three different ways they can be involved in the class litigation. First, class members can be passive by allowing the class to represent their rights and agreeing to be bound by the judgment.[179] Second, class members can be active by opting out of the class action and bringing their own suit.[180] Or third, class members may wait to see how the class action unfolds and later intervene if the district court denies class certification.[181] To encourage absent plaintiffs to expediently evaluate and exercise one of these three options, the Federal Rules urge the district judge to decide whether an action should proceed as a class action at an early practicable time.[182]

Like all other lawsuits, class actions are subject to timeliness bars. Their representative nature, however, presents a unique timeliness issue. The problem is that the class action mechanism would not reduce repetitious and unnecessary filings if each member of the putative class has to file an individual suit or protective motion just to prevent claims from expiring in the event that the district court denies class certification. In *American Pipe & Construction Co. v. Utah*, the Supreme Court addressed this issue and held that for limitations purposes, once a class suit is filed, that suit is effectively commenced for all members of the class, thus arresting limitations periods until that action is definitively not a class action.[183] *American Pipe* has been consistently justified and extended as not only a necessary corollary of the class action's representative nature (i.e., Rule 23) but also consistent with the limitations periods' purposes.

A. American Pipe's Common-Law Rule for Putative Class Members

Generally, a limitations period stops once the plaintiff files the complaint.[184] Commencing an action stops limitations periods from running for the parties and those in privity with them, but it does not affect the rights of others.[185] In *American Pipe*, the Court explained that the class action's representative nature necessarily has implications for when a suit is "commenced" for putative class members. *American Pipe* said that once a plaintiff

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the benefit of tolling . . . for as long as the class action purports to assert their claims.") (internal citations and quotations omitted).

178. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) (stating that Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims").

179. *See* FED. R. CIV. P. 23(c)(3), (d)(1)(B)(iii).

180. *Id.*

181. *Id.*

182. *See* FED. R. CIV. P. 23(c)(1)(A) (requiring the class certification order "at an early practicable time"). Originally, Rule 23 provided that the district judge should make a class-certification decision "when practicable." Then, in 1966, Rule 23 was amended to provide that the court should rule on class certification "as soon as practicable after commencement of an action." Rule 23 was amended in 2003 to alter this language, the new language, "at an early practicable time." Under the earlier versions and under the current version, the certification decision should be made promptly. *See, e.g.*, CHARLES ALAN WRIGHT ET AL., 7AA FED. PRAC. & PROC. Civ. § 1785.3 (3d ed. 2014).

183. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550–52 (1974). State courts likewise adopted *American Pipe* to govern state-law class actions. *See* White v. Sims, 470 So.2d 1191, 1193 (Ala. 1985); Ling v. Webb, 834 N.E.2d 1137, 1141–43 (Ind. Ct. App. 2005); Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 355 (Md. Ct. App. 2006); Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. Ct. App. 1987); Am. Tierra Corp. v. City of West Jordan, 840 P.2d 757, 762 (Utah 1992).

184. *See, e.g.*, Romualdo P. Eclavea et al., 51 AM. JUR. 2D *Limitation of Actions* §§ 221, 228 (2014) (describing general rules for commencement of proceedings).

185. *See, e.g.*, *id.* § 224 (describing generally, persons affected by commencement).

commences a class action, an action is commenced on behalf of all putative class members for purposes of limitations periods.[186] The Court framed this rule as "tolling" and "suspending" limitations periods for putative class members who move to intervene after the district judge has denied class certification.[187] But the Court also explained that its rule was one of commencement. For the purposes of timeliness rules, class members filed suit simultaneously with the filing plaintiff (they "stood as parties to the suit") until the case was conclusively not a class action ("until and unless they received notice thereof and chose not to continue").[188]

The Court explained its rule was consistent with the Federal Rules of Civil Procedure and limitations periods. First, the Court said that a contrary rule would "deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of the procedure."[189] If putative class members could not rely on the class action to comply with the limitations period, then, the Court said, class members "would be induced to file" placeholder actions or "protective motions" to intervene—"precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found superior to other available methods for the fair and efficient adjudication of the controversy."[190] Second, the Court explained that its rule was consistent with the purposes of limitations periods because once the class claim is filed there is neither the risk of stale evidence nor litigation uncertainty. The Court said that the defendant has notice "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."[191]

The defendants in *American Pipe* claimed that "tolling" for putative class members extended the limitations period beyond that provided for by Congress and thus the Court was promulgating a rule of procedure that abridged, enlarged, or modified the substantive right to repose in violation of the Rules Enabling Act.[192] The Court explained that the

186. *Am. Pipe & Constr. Co*., 414 U.S. at 550–51 ("A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where the District Court found that the named plaintiffs asserted claims that were 'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,' Rule 23(a)(3), (4), the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue."). In *American Pipe*, Utah—on behalf of other Utah public bodies and state agencies—sued members of the steel and concrete pipe industries for conspiring to rig prices for steel and concrete conduit piping in violation of the federal antitrust laws. *Id.* at 541. The district court denied class certification because, in the judge's view, joining the remaining government entities would not have been impracticable and thus, there was no need for the class action mechanism. *Id.* at 538. The district judge concluded that, based on the number of potential class members, joinder would be practicable. *Id.* He based this conclusion on his prior experience with similar antitrust litigation against the same defendants yielded some attrition among the litigants. *Id.* at 554 n.23. Afterward, more than 60 Utah towns, municipalities, and water districts moved to intervene as plaintiffs in the suit. The district judge, however, refused to allow them to do so, concluding that the motions were untimely. *Am, Pipe & Constr. Co.*, 414 U.S. at 544. The Supreme Court disagreed. *Id.* at 538.

187. *Id.* at 553.

188. *Id.* at 551.

189. *Id.* at 553.

190. *Am. Pipe & Constr. Co*., 414 U.S. at 551, 553.

191. *Id.* at 554–55.

192. *Id.* at 556–57 & n.26. The Rules Enabling Act in effect at the time of *American Pipe* and the current version provide that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals," but that these rules "shall not abridge, enlarge or modify any

"proper test [under the Rules Enabling Act] is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the [limitations period] in a given context is consonant with the legislative scheme."[193] The Court applied its test, and said its rule still fulfilled the "policies of repose and certainty inherent in the limitation provisions."[194]

American Pipe settled that class members who intervene stand as parties to the initial complaint and may rely on it for purposes of the limitations periods. Recall, however, that under the Federal Rules, absent class members who do not let the class representative represent their rights have other options. For example, they may opt out of the action altogether, either before or after the class-certification decision.[195] The Supreme Court and the federal courts extended *American Pipe*'s holding to class members who opt out after and before the class decision. In each instance, the federal courts repeated that the rule set forth in *American Pipe* is consistent with Rule 23 and the purposes of limitations periods.

1. Opt-Outs After Class Certification

First, in *Crown, Cork & Seal Co. v. Parker*, the Court extended *American Pipe* beyond those who intervene to those who opt out and file their own suits after the district judge denies class certification.[196] The Court was unequivocal: For the purposes of limitations periods, the Court would consider unnamed plaintiffs to have sued when the first plaintiff filed the class action complaint, regardless whether class members move to intervene or later opt out of the class and bring their own suit.[197] The rule, the Court said, was consistent with Rule 23 and the purposes of limitations provisions.[198] First, there was no reason to

substantive right." 28 U.S.C. § 2072; *see also* Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (1934).

193. *Am. Pipe & Constr. Co.*, 414 U.S. at 557–58.

194. *Id.* at 558. The Court also relied on *Herb v. Pitcairn*, 325 U.S. 77 (1945), to support the notion that the judiciary interprets rules of commencement for limitations periods. In *Herb*, a railroad employee sued under the Federal Employers' Liability Act, but brought suit within its three-year limitations period in state court, not federal court. Herb v. Pitcairn, 325 U.S. 77, 78 (1945). Nevertheless, the Court held that the commencement of the state suit fulfilled the policies of repose and certainty inherent in the FELA's limitations provision. *Id.* at 79 ("[W]hen process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute.").

195. FED. R. CIV. P. 23(c)(3), (d)(1)(B)(iii).

196. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983). In *Crown*, two former employees sued their employer for race discrimination. *Id.* at 347. They purported to represent all African Americans who were or continued to be denied equal job opportunities by the defendant because of their race. *Id.* The district judge refused to certify the class. *Id.* Then, an employee filed an individual suit in federal court, but the district judge concluded that that suit was filed too late. *Id.* at 348. The Supreme Court concluded that the suit was timely. *Crown, Cork & Seal Co.*, 462 U.S. at 354. After *American Pipe*, some courts read *American Pipe* narrowly, suspending limitations periods only when class members actually intervened. Pavlak v. Church, 681 F.2d 617, 618, 620 (9th Cir. 1982); Stull v. Bayard, 561 F.2d 429, 433 (2d Cir. 1977).

197. *Crown, Cork & Seal*, 462 U.S. at 350 ("While *American Pipe* concerned only intervenors, we conclude that the holding of that case is not to be read so narrowly. The filing of a class action tolls the statute of limitations as to all asserted members of the class, not just as to intervenors.").

198. *Id.* at 351. The Court also observed that failure to apply *American Pipe* to class members filing separate actions would have been inconsistent with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). *Id.* at 345–46. A few months after *American Pipe*, the Supreme Court confirmed that *American Pipe* was meant to have real teeth and suggested that *American Pipe* tolling applies to putative class members who opt out after the district court grants class certification. In *Eisen* the Court held that individual notice must be sent and paid for by plaintiffs to all class members who can be identified with reasonable efforts. *Eisen*, 417 U.S. at 173. In the course of its

treat opt outs any different from intervenors because without *American Pipe* the "same inefficiencies" would ensue and putative class members who feared "that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations."[199] Second, the Court reiterated that applying *American Pipe* to opt-outs was consistent with the purposes of limitations periods. Once the lead plaintiff filed a class action complaint, that complaint notified the defendant of, not only the claims, but also the number and generic identities of the potential plaintiffs who may participate in the suit, thereby causing the parties to preserve evidence and eliminating any litigation uncertainty.[200] Indeed, once the first plaintiff files a class complaint, the defendant must find its witnesses, revive memories, and gather evidence to defend the class suit, and so, a separate opt-out suit using the same witnesses and same evidence does not implicate the problems of stale evidence or upset settled expectations.

2. *Opt-Outs Before Class Certification*

Second, recent federal decisions have extended *American Pipe* even further to cover class members who opt out and file individual actions before the district judge rules on class certification.[201] These cases extend *American Pipe* to this situation because "members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class," and thus "the limitations period does not run against them during that time."[202] And these courts invoke

decision, the Court addressed the argument that class members, even if individually notified of the class's certification, would not opt out because the limitations period had long since run on the class members' claims. *Id.* The Court said that this contention "is disposed of by [*American Pipe*], which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." *Id.* at 176 n.13.

199. *Crown, Cork, & Seal*, 462 U.S. at 350–51.

200. *Id.* at 352.

201. *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Boellstorff, 540 F.3d 1223, 1230 (10th Cir. 2008); *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008–09 (9th Cir. 2008); *In re* WorldCom Sec. Litig., 496 F.3d 245, 254–56 (2d Cir. 2007); *see also* Blanco v. AmVAC Chemical Corp., No. 11c-07-149, 2012 WL 3194412, at *14 n.12 (Del. Sup. Ct. Aug. 8, 2012) (describing these decisions as "more recent decisions at the appellate level"). Not all courts agree with this approach. Other courts conclude that when plaintiffs file their own suit before the district judge rules on certification, the plaintiffs have "forfeit" the chance to rely on *American Pipe*. According to these courts, first, filing their own lawsuit is an affirmative choice not to rely on the class action mechanism, and second, early filing generates more litigation and expense, precisely what *American Pipe*'s rule is designed to avoid. *See* Wyser-Pratte M Co. v. Telxon Corp., 413 F.3d 553, 568–69 (6th Cir. 2005) (collecting other cases).

202. *In re* WorldCom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007); *see also In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008–09 (9th Cir. 2008) (holding that limitations period for plaintiff's action against manufacturer of plutonium was tolled by virtue of *American Pipe*). Other federal courts have even extended *American Pipe* to situations when the class action is voluntarily dismissed. *See, e.g.*, Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 563 (7th Cir. 2011) ("The rationale of *American Pipe* does not permit a distinction among situations in which the putative class representative gives up before, or after, the judge decides whether the case may proceed on behalf of a class. Tolling lasts from the day a class claim is asserted until the day the suit is conclusively not a class action—which may be because the judge rules adversely to the plaintiff, or because the plaintiff reads the handwriting on the wall and decides not to throw good money after bad. (Or perhaps because the defendant buys off the original plaintiff as soon as the statute of limitations runs, hoping to extinguish the class members' claims. That's a good reason for tolling, not a reason for blocking later suits.)."). Unnamed class members cannot control whether the named plaintiff decides to abandon the suit, and if the limitations periods are not arrested in cases of voluntary dismissal, then unnamed class members would be encouraged to file their own lawsuits to ensure that their claims are not deemed untimely in the event that the

the same two principles consistently applied by the Supreme Court. First, suspending the limitations period by former class members who opt out before class certification is consistent with Rule 23: "The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually."[203] Moreover, when plaintiffs opt out to file their own suit, they are not disavowing that the class action represented their interests, but they are retaking the reins from the lead plaintiff who initially filed the class complaint.[204] Second, the rule is consistent with the purposes of limitations provisions in preventing stale evidence and precluding litigation uncertainty. These courts reason that defendants receive no less notice when putative class members file an individual suit before certification.[205]

Tolling under *American Pipe* does not continue forever, however. Under *American Pipe*, limitations periods resume running when the action is definitively no longer a class action, which can occur when the district court denies class certification or decertifies a class,[206] or when the plaintiff decides, at whatever point, not to pursue his claim as part of the class and intervenes or files suit individually.[207] In sum, *American Pipe* and its progeny generally provide that the filing of a class action will toll a limitations period for the lead plaintiff and putative class members until the suit is no longer a class action.[208]

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named plaintiff does decide to voluntarily dismiss claims. *See, e.g.*, Monroe Cnty. Emps.' Ret. Sys. v. YPF Sociedad Anonima, No. 13 Civ. 842, 2013 WL 5548833, at *3 (S.D.N.Y. Oct. 8, 2013) (similar). Yet, these courts observe, "the whole point of *American Pipe* is to allow unnamed class members to rely on the pending class action in lieu of filing their own protective lawsuits," thereby giving effect to a class action's representative nature. Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 731 F. Supp. 2d 850, 853 (E.D. Wis. 2010).

203. *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007); *see also In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008–09 (9th Cir. 2008) (holding that "members of the plaintiff-class who have filed individual suits are entitled to the benefits of *American Pipe*").

204. *See, e.g.*, State Farm Mut. Auto Ins. Co. v. Boellstorff, 540 F.3d 1223, 1233 (holding that "each putative class member has effectively been a party to an action against the defendant").

205. *See, e.g.*, *In re* WorldCom Sec. Litig., 496 F.3d at 255 ("A defendant is no less on notice when putative class members file individual suits before certification.").

206. These events serve as notice to the plaintiff that his rights are no longer being represented. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983); *see also* Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 375–76 (5th Cir. 2013) ("Under *American Pipe*, the statute of limitations for the putative class members resumes running when class certification is denied or when a certified class is decertified. . . . Once the district court denies certification or decertifies a class, the putative class members have no reason to assume that their rights are being protected.") (internal citations and quotations omitted); Larson v. JPMorgan Chase & Co., 530 F.3d 578, 582 (7th Cir. 2008) (stating that *American Pipe* tolling applies upon the commencement of a class action until it is "certain that the suit would not proceed" as such).

207. Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 563 (7th Cir. 2011).

208. *See, e.g.*, WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:56 (5th ed. 2013) (explaining that *American Pipe* tolling applies when "five foundational requirements exist," including that (1) someone has filed a purported class action; (2) the class action compliant includes the plaintiff within its asserted class; (3) the plaintiff possessed a claim that was timely when the putative class suit was filed; (4) the plaintiff possessed a claim that the prior class action asserted; and (5) the plaintiff presses that claim against a person or entity whom the purported class action named as a defendant). *American Pipe* and its progeny do not allow one to file successive class action lawsuits. Were the rule otherwise, limitations periods could theoretically be extended indefinitely. *See* Basch v. Ground Round, Inc., 139 F.3d 6, 11 (1st Cir. 1998) (holding that "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely"); Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994); Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988); Robbin v. Flour Corp., 835 F.2d 213, 214 (9th Cir. 1987); Korwek v. Hunt, 827 F.2d 874, 879 (2d Cir. 1987); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 13351 (5th Cir. 1985).

B. *American Pipe's Questionable Application to Statutes of Repose*

American Pipe has universal application to the statutes of limitations under the securities laws. No court has questioned this.[209] Whether *American Pipe* applies to the repose provisions of the securities laws, however, is uncertain.[210] The Supreme Court was set to resolve this uncertainty in *Police Retirement Systems v. IndyMac*, but revoked its granting of the writ of certiorari just days after the parties announced a pending settlement.[211]

1. *Federal Courts Applying American Pipe to the Securities Laws' Repose Provisions*

Several federal courts conclude that *American Pipe* applies to the securities' repose provisions. These courts conclude that arresting limitations periods under *American Pipe* is a common-law rule of procedure applicable to class actions, not just another species of equitable tolling.[212] Treating *American Pipe* as "not really tolling at all" was the approach

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209. Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013) (holding that *American Pipe* applies to the statute of limitations applicable to Section 11 and Section 12 claims under the 1933 Act); Larson v. JPMorgan Chase & Co., 530 F.3d 578, 582 (7th Cir. 2008) (same); Yang v. Odom, 392 F.3d 97, 101–02 (3d Cir. 2004) (same); Smith v. Pennington, 352 F.3d 884, 892–93 (4th Cir. 2003) (same); Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 894 F. Supp. 2d 144, 154–55 (D. Mass. 2012) (same); Kirkwood v. Taylor, 590 F. Supp. 1375, 1486 (D. Minn. 1984) (same). *See also* Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 375 (5th Cir. 2013) (recognizing that *American Pipe* applies to the statute of limitations applicable to claims under Section 10(b) and 20(a) of the 1934 Act); Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors, 498 F.3d 920, 925 (9th Cir. 2007) (same); Becks v. Emery-Richards, Inc., No. 87-1554, 1990 WL 303548, at *10 (S.D. Fla. Dec. 21, 1990) (same).

210. *See In re* Merck & Co., Inc., Sec., Derivative & ERISA Litig., No. MDL 1658, 2012 WL 6840532, at *3 (D.N.J. Dec. 20, 2012) (remarking that "the applicability of the *American Pipe* tolling doctrine on periods of repose for claims filed through the class action vehicle has remained uncertain"); *In re* Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 159 (S.D.N.Y. 2012) (observing that courts in the Southern District of New York are divided over whether the filing of a class action complaint tolls the securities laws' statutes of repose); Plumbers, Pipefitters & MES Local Union No. 392 Pension Fund v. Fairfax Fin. Holdings Ltd., 886 F. Supp. 2d 328, 334 (S.D.N.Y. 2012) ("There is no consensus among courts on whether to toll statutes of repose.").

211. Stephanie Russell-Kraft, *High Court Reverses Decision To Hear IndyMac Appeal*, LAW360 (Sept. 29, 2014, 3:38 PM), http://www.law360.com/securities/articles/582081?nl_pk=a43b563a-bd15-45a2-aeda-d1a9cb668d75&utm_source=newsletter&utm_medium=email&utm_campaign=securities (access required).

212. *See* Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000) (applying *American Pipe* to the statute of repose governing Plaintiff's cause of action); New Jersey Carpenters Health Fund v. Residential Capital, LLC, 288 F.R.D. 290, 293–95 (S.D.N.Y. 2013); *In re* Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 159–60 (S.D.N.Y. 2012); *In re* Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 767 (S.D.N.Y. 2012); Genesee Cnty. Emps. Ret. Sys. v. Thornburg Mortg. Sec. Trust 2006-3, 825 F. Supp. 2d 1082, 1129 (D.N.M. 2011); Int'l Fund Mgmt. S.A. v. Citigroup Inc., 822 F. Supp. 2d 368, 380 (S.D.N.Y. 2011); *In re* Morgan Stanley Mortg. Pass-Through Certificates Litig., 810 F. Supp. 2d 650, 667 (S.D.N.Y. 2011); Plumbers' & Pipefitters' Local No. 562 Supplemental Plan & Trust v. J.P. Morgan Acceptance Corp. I, No. 08 Civ. 1713, 2011 WL 6182090, at *5 (E.D.N.Y. Dec. 13, 2011); Maine State Ret. Sys. v. Countrywide Fin. Corp., 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010); Ballard v. Tyco Int'l, Ltd., No. MDL 02-MD-1335, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005); *In re* Discovery Zone Sec. Litig., 181 F.R.D. 582, 600 n.11 (N.D. Ill. 1998); Salkind v. Wang, No. Civ. A. 93-10912, 1995 WL 170122, at *3 (D. Mass. Mar. 30, 1995). Courts have concluded that *American Pipe* applies to statutes of repose found outside the securities laws. *See* Hrdina v. World Sav. Bank, FSB, No. C 11-05173, 2012 WL 294447, at *3–*4 (N.D. Cal. Jan. 31, 2012) (applying *American Pipe* to the statute of repose under the Truth in Lending Act, 15 U.S.C. § 1635(f)); Arivella v. Lucent Techs., Inc., 623 F. Supp. 2d 164, 176–77 (D. Mass. 2009) (applying *American Pipe* to the statute of repose under ERISA, 29 U.S.C. § 1113(1)).

taken by the Tenth Circuit in *Joseph v. Wiles*.[213] In that case, the court differentiated *American Pipe* from equitable tolling prohibited under *Lampf* by calling *American Pipe* "legal rather than equitable in nature."[214] The court explained that equitable tolling is appropriate when the plaintiff files a timely but defective pleading or does not file a timely pleading because the adversary tricked him into letting the deadline pass.[215] The rule, as laid out in *American Pipe*, in contrast, is not about excusing a late or defective filing, but treating an earlier-filed complaint as the plaintiff's complaint because he was a member of that putative class.[216] This kind of "tolling," the Tenth Circuit said, was perfectly consistent with *Lampf* because *Lampf* provided that "litigation . . . must be *commenced* within one year after the discovery of the facts constituting the violation and within three years after such violation."[217]

The Tenth Circuit also explained that *American Pipe* applies to repose periods just as it would to statutes of limitations because it was consistent with the policies of Rule 23 and the point of repose periods.[218] First, with respect to Rule 23, the Tenth Circuit observed that Rule 23 encourages judicial economy by eliminating the need for potential class members to file individual claims, and if all class members were required to file claims to avoid timeliness bars, the point of Rule 23 would be defeated.[219] Courts following this approach warned that investors may file protective motions and lawsuits to secure their claims because "[o]ffending conduct often comes to light years after the fact" and "class certification can be a lengthy process, and there is always a risk that certification would be denied."[220] Just as with the statute of limitations, without tolling for the repose provisions, "putative class members have significant incentives to file placeholder actions and protective motions."[221]

Second, the Tenth Circuit stated that tolling the limitations period while class certification is pending does not undermine the purposes of statutes of repose but is consistent with them. The securities laws' statutes of repose protect defendants from the unfair surprise of stale claims and provide defendants with peace of mind knowing that earlier actions will no longer be the subject of a suit. These ends are met, the court said, when a class action is commenced.[222] Once a class action is filed, the defendants are on notice of the substantive claim as well as the identities of potential plaintiffs.[223]

213. *See* Joseph v. Wiles, 233 F.3d 1155, 1168 (10th Cir. 2000) ("[I]n a sense, application of the *American Pipe* tolling doctrine to cases such as this one does not involve 'tolling' at all. Rather, Mr. Joseph has effectively been a party to an action against these defendants since a class action covering him was requested but never denied.").

214. *Id.* at 1166–67.

215. *Id.*

216. *Id.* at 1167.

217. *Id.* at 1166–67.

218. *Joseph*, 233 F.2d at 1167.

219. *Id.*

220. *In re* Bear Stearns Mortg. Pass-Through Certificates Litig., 851 F. Supp. 2d 746, 767 (S.D.N.Y. 2012).

221. *See, e.g.*, *In re* Smith Barney Transfer Agent Litig., 884 F. Supp. 2d 152, 159–60 (S.D.N.Y. 2012) (quoting *In re* Morgan Stanley Mortg. Pass-Through Certificates Litig., 810 F. Supp. 2d 650, 668 (S.D.N.Y. 2011)). The Tenth Circuit also explained that the notice and opt-out provision of Rule 23 would be irrelevant without tolling because the limitations period for absent class members would most likely expire, making the right to pursue individual claims meaningless. *Joseph*, 223 F.3d at 1167.

222. *Joseph,* 223 F.3d at 1167.

223. *Id.* at 1168.

2. Federal Courts Refusing to Apply American Pipe to the Securities Laws' Statutes of Repose

Decisions that do not apply *American Pipe* to statutes of repose do so because they consider *American Pipe* an equitable rule.[224] *American Pipe* is premised on equitable considerations of fairness (i.e., the defendant does not suffer unfair surprise because the class complaint provides adequate notice) and judicial economy (i.e., the rule spares the system from multiple placeholder suits).[225] But *Lampf* prohibits applying equitable tolling to the securities laws' statutes of repose, and therefore, these courts conclude, *American Pipe* does not apply to the securities laws' statutes of repose.

There is reason to question whether *American Pipe* is the equitable species of tolling or really tolling at all. Equitable tolling excuses a late filing because some extraordinary circumstance prevented the plaintiff from complying with the deadline. In that situation, the policies of limitations periods (stale evidence and litigation uncertainty) are outweighed by the injustice the plaintiff has suffered because the plaintiff missed the deadline, not for lack of diligence, but because of some other factor outside of the plaintiff's control. *American Pipe*, however, does not address whether a court may excuse a plaintiff from filing a late complaint because of some impediment to timely compliance. Rather, *American Pipe* addresses the circumstance where a plaintiff relied on a timely, earlier-filed complaint as his very own. *American Pipe* says that this complaint is, for limitations purposes, the start of a proceeding for all putative class members.

Other decisions do not apply *American Pipe* to the securities laws' statutes of repose for a different reason. In *Police & Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, the Second Circuit refused to apply *American Pipe* to the securities laws' statute of repose, not because *American Pipe* was equitable, but because repose for defendants should be unyielding and absolute.[226] The Second Circuit stressed that regardless whether *American Pipe* was equitable, legal, or some other kind of tolling, a court could not extend the limitations period beyond the time allowed under the statute of repose under any circumstances. That approach has support from the Supreme Court's recent pronouncements on the differences between statutes of limitations and statutes of repose.

224. *See, e.g.*, John Hancock Life Ins. Co. (U.S.A.) v. JP Morgan Chase & Co., 938 F. Supp. 2d 440, 445–46 (S.D.N.Y. 2013) (describing *American Pipe* as equitable tolling); *In re* Lehman Bros. Sec. & ERISA Litig., 800 F. Supp. 2d 477, 482 (S.D.N.Y. 2011) (describing *American Pipe* as equitable tolling); Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 625–26 (S.D.N.Y. 2011) (describing *American Pipe* as equitable tolling).

225. *Footbridge Ltd.*, 770 F. Supp. 2d at 626.

226. Police & Fire Ret. Sys. of the City of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 109 (2d Cir. 2013) ("But we need not try to divine any hidden meanings in *American Pipe*. If its tolling rule is properly classified as "equitable," then application of the rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable "tolling principles do not apply to that period."). In later decisions, the Second Circuit affirmed its position. *See* Friedus v. ING Groep, N.V., 543 F. App'x. 92, 93 (2d Cir. 2013) (nonprecedential decision) (stating that tolling is unavailable under the statute of repose); Caldwell v. Berlind, 543 F. App'x. 37, 39. (2d Cir. 2013) (nonprecedential decision) (same). District courts in the Second Circuit have extended the *IndyMac* holding and treated statutes of repose as always inviolable unless specifically modified by statute. *See, e.g.*, *In re* Bear Stearns Co., Sec., Derivative, & ERISA Litig., 995 F. Supp. 2d 291, 300 (S.D.N.Y. 2014) (holding that *American Pipe* does not apply to the 5-year statute of repose applicable to claims under Section 10(b) and Rule 10b-5); *In re* Longtop Fin. Techs. Ltd. Sec. Litig., 939 F. Supp. 2d 360, 379–80 (S.D.N.Y. 2013) (holding that Federal Rule of Civil Procedure 15 may not be construed to permit a claim to relate back beyond the five-year statute of repose applicable to Section 10(b) claims).

In *CTS Corp. v. Waldburger*,[227] the Supreme Court explained that statutes of repose establish the "outer limit on the right to bring a civil action," a "cutoff" of liability similar to the discharge in bankruptcy. In *CTS*, the Court stressed that repose periods were unrelated to the accrual of any cause of action, but instead ran from the date of the last culpable act or omission, barring a plaintiff's claim regardless whether the plaintiff discovered the injury or an injury even occurred.[228]

Additionally, in *IndyMac*, the Second Circuit held that the Rules Enabling Act prohibited tolling the securities laws' statutes of repose under *American Pipe*. That Act prohibits rules of procedure from modifying substantive rights.[229] The Second Circuit said that the repose provisions create a substantive right to be free from liability after a period, and allowing a plaintiff to intervene or file a suit after this period modifies that substantive right.[230] Problematic for this argument, however, is the portion of *American Pipe* where the Court considered—and rejected—the argument that tolling was inconsistent with the Rules Enabling Act. The Second Circuit said that portion of *American Pipe* did not apply because *American Pipe* addressed the statute of limitations, not the statute of repose, which, as many courts have said, is substantive, not procedural.[231] On the other hand, *American Pipe* said the "proper test [under the Rules Enabling Act] 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."[232] The Court did not suggest any different treatment for a statute of repose. When the Court applied its test, it said broadly that the judicial power to toll statutes of limitations was "not breaking new ground," but fulfilling the "policies of repose and certainty inherent in the limitation provisions."[233]Additionally, some scholars have proposed that what the Court was really doing in *American Pipe* was announcing a federal common-law rule, not interpreting Rule 23 at all.[234] That is, Rule 23 was not "the source of the limitations-tolling rule" announced by the Court, but rather, the case provided the Court with the "occasion . . . to implement class action policies in federal common law that it was otherwise authorized to make."[235] As argued by Professors Stephen Burbank and Tobias Wolff, "[m]any, if not most, of the Federal Rules are charters for discretionary decisionmaking, setting boundaries and leaving the actual choices to federal trial judges" to develop through the federal common law.[236] The Rules Enabling Act does not interfere with the Court's ability to develop the federal common law. The Rule Enabling Act ensures that if Congress has had a chance to review and make a policy choice, then the Court must respect that choice.[237] In *American Pipe*, however, the Court

227. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182–83 (2014).

228. *Id.* at 2182.

229. *IndyMac MBS, Inc.*, 721 F.3d at 109.

230. *Id.*; *see also* Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 366–67 (Ariz. 2011) (concluding that *American Pipe* did not apply to Arizona's statutes of repose).

231. *IndyMac MBS, Inc.*, 721 F.3d at 109 n.17.

232. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557–58 (1974).

233. *Id.* at 558 (emphasis added).

234. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 49–50 (2010) (telling how the courts have confused federal procedure and common law); 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, 1027–29 (1989) (similar).

235. Burbank & Wolff, *supra* note 234, at 50.

236. *Id.* at 48.

237. *Id.* at 48–49.

was not overriding any choice by Congress.[238]

C. American Pipe's Relevance to Securities Litigation

American Pipe has special relevance to securities litigation for three reasons. First, the securities laws facilitate the resolution of securities laws on a class-wide basis, but the securities laws' rules of procedure also build in delay from the filing of the complaint until the appointment of a lead plaintiff.[239] Second, institutional investors, usually those with the most money lost, claim to rely on *American Pipe* while evaluating their claims.[240] Third, some worry that without *American Pipe*, litigants would glut the courts with securities placeholder actions and protective motions, increasing costs for plaintiffs, defendants, and the judicial system.[241]

1. The Securities Laws Build in Delay Before Class Certification

The procedural rules governing securities suits build in delay from the filing of the complaint until the appointment of the lead plaintiff. The rules do so in two ways. First, the PSLRA "contemplates a window of almost four months between filing of the first class complaints and appointment of a lead plaintiff."[242] Under the PSLRA, a plaintiff who files a securities class-action compliant must publish notice to other potential class members within 20 days to encourage them to step forward.[243] Then, putative class members may move the district judge to consider them as lead plaintiffs for 60 days after publication of the notice.[244] This period "affords investors an opportunity to assess the case and decide whether they wish to play a leadership role in the litigation."[245] The court must then appoint a lead plaintiff within 90 days of the publication.[246]

Second, the securities laws effectively put a class action on ice until the defendants' motion to dismiss is resolved, which can take over a year.[247] In virtually every securities

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238. Burbank, *supra* note 234, at 1027–28.

239. *See* KAUFMAN & WUNDERLICH, *supra* note 165, § 1.1, at 3–4, and *infra* Part III.C.1.

240. *See infra* Part III.C.2.

241. *See infra* Part III.C.3. Even the courts that refuse to apply *American Pipe* to statutes of repose recognize the strong policy aims in favor of the rule. *See, e.g.*, Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011) ("True, many of the policy considerations present in *American Pipe* would support tolling of a statute of repose."); Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 366–67 (Ariz. 2011) ("We agree that 'many of the policy considerations present in *American Pipe* would support tolling a statute of repose.'").

242. *In re* Cendant Corp. Sec. Litig., 404 F.3d 173, 193 n.11 (3d Cir. 2005); *see also* The Corporate and Criminal Fraud Accountability Act of 2002, S. REP. NO. 107–146, at 9 (2002) ("A lead plaintiff must be selected by the court, a process that can take months.").

243. 15 U.S.C. § 78u–4(a)(3)(A); *see also* Burke v. Ruttenberg, 102 F. Supp. 2d 1280, 1310 (N.D. Ala. 2000) ("The obvious and primary goal with which subsection 21D(a)(3)(A)(i) was drafted was that of encouraging the most adequate plaintiff to step forward and control the litigation.").

244. 15 U.S.C. § 78u–4(a)(3)(A)(i)(II).

245. KAUFMAN & WUNDERLICH, *supra* note 165, § 7:2 at 302.

246. 15 U.S.C. § 78u–4(a)(3)(B)(i).

247. The Corporate and Criminal Fraud Accountability Act of 2002, S. REP. NO. 107–146, at 9 (2002) ("Discovery is automatically stayed during the pendency of any motion to dismiss, consideration of which can take over a year in itself. During that period the stop watch continues to run on the claim, even though the victim has little or no ability to find out more about exactly who participated in the fraudulent activity and how the fraud was accomplished. With the higher pleading standards that also govern securities fraud victims, it is unfair to expect victims to be able to negotiate such obstacles in the span of 12 months.").

class action, defendants move to dismiss.[248] Under the PSLRA, discovery "and other proceedings" are stayed pending any motion to dismiss.[249] According to some case law, under the PSLRA, it is inappropriate to rule on class certification (one of these "other proceedings") once the stay kicks in and a motion to dismiss is pending.[250] This may also mean that plaintiffs cannot even engage in discovery to challenge the lead plaintiff's adequacy until later either.[251]

2. Institutional Investors Rely on American Pipe

American Pipe also has special significance to institutional investors (e.g., university endowments, public and union pension funds, mutual funds, etc.). Institutional investors are most likely to have losses large enough to justify an individual suit.[252] For class actions seeking money damages under the Federal Rules, as securities class actions usually do, the Federal Rules and the Constitution demand that class members receive the right to opt out

248. For standard securities-fraud claims (which include those brought under Section 11 and Section 12 of the 1933 Act, and Section 10(b) of the 1934 Act), filed and resolved between January 2000 and December 2012, defendants moved to dismiss in more than 96% of cases, and almost all cases without a motion to dismiss ended with settlement. Renzo Comolli et al., *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review: Settlements Up; Attorneys' Fees Down*, NERA ECONOMIC CONSULTING 16 (Jan. 29, 2013), *available at* http://www.nera.com/nera-files/PUB_2013_YearEnd_Trends.pdf.

249. 15 U.S.C. § 77z–1(b)(1); 15 U.S.C. § 78u–4(b)(3). The PSLRA explicitly provides that during the stay, a party with actual notice of the allegations must treat all discoverable evidence within that party's control as if it were subject to a continuing request for production of documents under the Federal Rules. The PSLRA does provide limited exceptions to the stay if the court finds that particularized discovery is necessary to either: (1) "preserve evidence"; or (2) "prevent undue prejudice to that party." 15 U.S.C. § 78u–4(b)(3)(B).

250. *See In re* Nat'l Austrl. Bank Sec. Litig., No. 03 Civ. 6537, 2006 WL 3844463, at *3 (S.D.N.Y. Nov. 8, 2006) (collecting cases and stating that "[p]laintiffs were not in a position to move for class certification because Defendants moved to dismiss the Complaint in lieu of filing an answer, and because discovery was stayed."); Abrams v. Van Kampen Funds, Inc., No. 01 C 7538, 2002 WL 1989401, at *1 n.1 (N.D. Ill. Aug. 27, 2002) ("Although a motion for class certification should generally be ruled upon prior to ruling on a motion to dismiss some case law supports that, under the PSLRA, it is appropriate to rule on a motion to dismiss prior to considering class certification."); Winn v. Symons Int'l. Grp., Inc., No. IP 00-0310-C-B/s, 2001 WL 278113, at *2 (S.D. Ind. Mar. 21, 2001) (stating that the PSLRA's discovery stay applies to discovery and other proceedings with some exceptions, but that "[c]ourts generally do not regard class certification proceedings as one of the exceptions"); *In re* ValuJet, Inc., 984 F. Supp. 1472, 1481–82 (N.D. Ga. 1997) (observing that plaintiffs' motion for class certification was stayed pending resolution of the defendants' motion to dismiss); *but see In re* Diamond Multimedia Sys., Inc., Sec. Litig., No. C 96–2644, 1997 WL 773733, at *3 (N.D. Cal. Oct. 14, 1997) (holding that "other proceedings" does not include class certification, but applies to "other proceedings which relate to discovery matters.").

251. Case law has not definitively resolved this issue. The PSLRA explicitly allows for discovery into whether the lead plaintiff is incapable of adequately representing the class, but only if the plaintiff "first demonstrates a reasonable basis for a finding that the presumptively most adequate plaintiff is incapable of adequately representing the class." 15 U.S.C. § 78u–4(a)(3)(B)(iv); *see also In re* KIT Digital, Inc. Sec. Litig., 293 F.R.D. 441, 448 (S.D.N.Y. 2013). Moreover, this discovery is designed to rebut the presumptive lead plaintiff, and thus, presumably occurs *after* the district court makes an initial determination about the presumptive lead plaintiff. *See, e.g.*, *In re* Cavanaugh, 306 F.3d 726, 730 (9th Cir. 2002) (describing discovery into the presumptive lead plaintiff's adequacy as the third stage that happens after the district court makes its initial determination).

252. *See* Burch, *Optimal Lead Plaintiffs*, *supra* note 13, at 1132 (observing that large institutional investors are most likely to opt out of securities class actions and file individual suits); Rozen et al., *Opt-Out Cases in Securities Class Action Settlements*, CORNERSTONE RESEARCH 1 (2013), *available at* http://www.cornerstone.com/getattachment/7cf8bd53-9e0b-45be-b4b3-3d810dfe2be3/Opt-Out-Cases-in-Securities-Class action-Settlemen.aspx ("The most frequently observed opt-out plaintiffs are pension funds, followed by other types of asset management companies.").

of the class and pursue their own claims if they wish.[253] Empirical study suggests that the rate at which investors opt out of securities class actions has increased after the 1995 PSLRA,[254] and the more money at stake, the greater the likelihood that an individual investor will opt-out and proceed with its own case.[255] An opt-out suit may be more attractive than remaining a member of a class for several reasons. First, opting out may present a chance to recover more money than if the institution remained in the class.[256] Second, a single plaintiff has more flexibility in the legal claims that that plaintiff may assert. And third, a single plaintiff likely has more control over litigation strategy and settlement decisions.[257] Historically, because of the rule set down in *American Pipe*, once a plaintiff filed a class-action complaint and until class certification, these institutional investors could "sit back and allow the litigation to run its course,"[258] without fear of letting their time to sue pass by.[259]

3. A World Without American Pipe

What does the world look like if *American Pipe* does not apply to statutes of repose? Those who support applying *American Pipe* to statutes of repose worry that if that decision does not apply to statutes of repose, then litigants may inundate courts with placeholder actions and protective motions. For instance, amici supporting *American Pipe*'s application to statutes of repose conducted an empirical analysis of securities filings and concluded that without *American Pipe*, the potential number of plaintiffs who would need to file a placeholder suit or protective motion would be substantial.[260] That study estimated that the

253. FED. R. CIV. P. 23(c)(2); Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

254. Rozen et al., *supra* note 252, at 2; *see also* Kevin LaCroix, *Opt-Outs: A Worrisome Trend in Securities Class Action Litigation*, 2 OAKBRIDGE INSIGHTS 1 (Apr. 2007) (providing anecdotal support for the idea "many more investors, representing significant investment interests, are concluding that it is in their financial interest to opt-out of the class settlement, often at the urging of prominent plaintiffs' securities firms").

255. Rozen et al., *supra* note 252, at 3.

256. *See* John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why 'Exit' Works Better Than 'Voice*,*'* 30 CARDOZO L. REV. 407, 417 (2008) ("When institutional investors exit the class and sue individually, they appear to do dramatically better—by an order of magnitude!").

257. *Id.* at 429–33. This not to say that opting out has no drawbacks whatsoever. Opt-out litigants may have to pay a higher percentage of attorneys' fees, expert fees, and other litigation costs. To boot, opt-out plaintiffs now expose themselves to an increased risk that they will be subject to discovery. KAUFMAN & WUNDERLICH, *supra* note 165, § 14:2 at 541.

258. *Shutts*, 472 U.S. at 810 ("Unlike a defendant in a normal civil suit, an absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.").

259. *See, e.g.*, Coffee, *supra* note 256, at 425 ("For decades, institutions did not opt out. Nor did they serve as class representatives. Rather, they simply remained passive."). Institutional investors' interest in this issue is evidenced by the amicus brief several institutional investors filed in the *IndyMac* petition for certiorari to the Supreme Court. *See, e.g.*, Brief of Public Funds as Amici Curiae in Support of Petition for a Writ of Certiorari, Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) (No. 13-640), 2013 WL 6843346.

260. Brief of Civil Procedure and Securities Law Professors as Amici Curiae in Support of Petition for a Writ of Certiorari at 7–9, Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) (No. 13-640), 2013 WL 8114524, at *7–9 [hereinafter Brief of Civil Procedure and Securities Law Professors]. The filing of placeholder cases may not be reviewed favorably by the courts if the filing is considered simply a means to extend the limitations periods and the proposed plaintiff has no real legal claim. In Levine v. Atricure, Inc., 508 F. Supp. 2d 268 (S.D.N.Y. 2007), the plaintiff moved for appointment as lead plaintiff but the defendant opposed, arguing that the lead plaintiff was nothing more than a placeholder, chosen not because of his injuries, but to avoid the expiration of the statute of limitations and provide counsel with more time to find a viable plaintiff. Although the

potential number of plaintiffs who would need to take protective action by counting the number of cases in which the court's certification order came after the repose periods expired.[261] For claims under the 1933 Act, the study found that for cases between 2002 and 2009, the three-year repose period would have expired in about 83% of the cases.[262] For Section 10(b) claims under the 1934 Act, the study found that for cases for the same timeframe, the five-year repose period would have expired in 76% of the cases.[263] When one considers that, on average, there are more than 200 securities class actions a year,[264] and each one consists of potentially thousands of class members, the number of placeholder actions or protective motions could be considerable.[265] And, for large institutional investors with significant losses, it would be reasonable to expect those plaintiffs to file protective motions or placeholder actions.[266]

Opponents of applying *American Pipe* to statutes of repose observe that the amici's data presents only part of the story. Counting the number of cases where the district court decides class certification a certain time after the class complaint is filed does not provide insight on class members who wouldn't have timely claims anyway.[267] That is, the data does not explain the difference between class members whose time ran out because the district judge took too long and those whose time ran out only because the named plaintiff

court rejected that argument as a reason for denying lead-plaintiff status, it cautioned that "if it is entirely clear that the named plaintiff's claim was without legal basis" and counsel used that plaintiff merely as a placeholder to obtain an extension just to comply with the limitations period, then sanctions, including dismissal, may be appropriate. *Id.* at 277–78. *See also* Boilermakers Nat'l Annuity Trust Fund v. WaMu Mortg. Pass Through Certificates, Series AR1, 748 F. Supp. 2d 1246, 1258–59 (W.D. Wash. 2010) ("Courts since *American Pipe* have found that the statute of limitations does not toll for putative class actions whose named plaintiff lacks standing to advance claims in the first place."); Palmer v. Stassinos, 236 F.R.D. 460, 465–66 n.6 (N.D. Cal. 2006) ("It is one thing to toll a period of limitations because of the discretionary act of one judge seeking to manage his or her docket in an efficient manner, but it would be beyond the constitutional power of a federal court to toll a period of limitations based on a claim that failed because the claimant had no power to bring it.").

261. Brief of Civil Procedure and Securities Law Professors, *supra* note 260, at 7.

262. *Id.* at 8. Similarly, according to NERA Economic Consulting, about 66% of securities class actions reach a decision on class certification within three years from filing of the original complaint. Comolli & Starykh, *supra* note 7, at 20.

263. Brief of Civil Procedure and Securities Law Professors, *supra* note 260, at 8.

264. In 2013 alone, there were 234 securities class actions. Comolli & Starykh, *supra* note 7, at 2.

265. Brief of Civil Procedure and Securities Law Professors, *supra* note 260, at 10 (concluding that the potential number of placeholder actions or protective motions could "easily number[] in the thousands").

266. David D. Siegel, *Practice Commentary*, *in* 28 U.S.C.A. § 1658 ("Optimism has no place on a scene that the [limitations period] is closing in on. Lawyers should not wait until the eleventh hour to ask whether suit is inevitable, perhaps excusing earlier inaction on the rosy assumption that there was always the chance of a settlement."); Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 984–85 (1988) ("One consequence of a sophisticated bar that represents substantial numbers of victims in discovery rule jurisdictions is that lawyers run—rather than walk—directly to the courthouse with any client who manifests the slightest indication of insidious disease. Regardless of whether the client has suffered any disability or pecuniary loss, the attorney knows the safest course of action is filing a suit as promptly as possible."); Anne E. Thar, *Statute of Limitations Boo-Boos,* 86 ILL. B.J. 97, 98 (1998) ("'I'll think about it tomorrow' may have worked for Scarlett, but it's a dangerous philosophy for lawyers. . . . [I]nvestigate the facts and file the complaint as *soon* as possible rather than as late as possible."); Anne E. Thar, *Top 10 Ways Not to Blow a Statute of Limitations*, 84 ILL. B.J. 529, 529 (1996) ("According to an ABA nationwide study, over 20% of all legal malpractice claims result from missed deadlines.").

267. Brief for Bus. Roundtable as Amicus Curiae Supporting Respondents at 30, Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) (No. 13-640), 2014 WL 3704559, at *30.

or absent class member waited too long to file in the first place.[268] Opponents point out that if you consider as evidence just the length of time it takes a district judge to decide on class certification, there is less of a concern because, according to NERA Economic consulting, nearly two thirds of the decisions on class certification are reached within three years from the original filing date of the complaint and the median time is about two and a half years.[269] Thus, in a world where *American Pipe* does not apply to statutes of repose, there is no clear agreement on the number of placeholder suits or protective motions likely to be filed.

What about cost? No doubt, placeholder actions and protective motions, even few, have costs associated with them. For instance, the system will have to spend resources shepherding cases that the parties really have no interest in pushing forward until after the class action plays out. Investors—most likely large institutional investors—will have to spend money and resources to monitor class actions and determine whether to file placeholder actions and protective motions.[270] But it is questionable how much of a cost this would really impose. Administrative costs seem mitigated by efficiencies gained from electronic filings and efficiencies achieved through the Multidistrict Litigation Act.[271] And for institutional investors, plaintiffs' lawyers often offer large institutional investors free monitoring services.[272] Moreover, large institutional investors may have to monitor the

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268. *Id.*

269. *Id.* (citing NERA).

270. *See* Brief for Public Funds as Amici Curiae in Support of Petition for a Writ of Certiorari, Pub. Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc., 134 S. Ct. 1515 (2014) (No. 13-640), 2013 WL 6843346, at *3 (stating that investors must be able to redress corporate wrongdoing through class actions under the Securities Act to both deter improper conduct and recoup losses).

271. 28 U.S.C. § 1407(a); *see also* Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2235 (2008) (explaining that the MDL process is designed to "promote fairness [and] efficiency," that motion deadlines are "relatively short," oral arguments are quick, and the JPML's decisions are "brief and to the point").

272. *See* Motley Rice, *Portfolio Monitoring Service*, http://www.motleyrice.com/securities-and-consumer-fraud/portfolio-monitoring-service (last visited Sept. 27, 2014) ("These are precisely the benefits supplied by our Portfolio Monitoring Service—at no cost to participating institutional and individual clients."); Robins Arroyo LLP, *Investment Monitoring for Shareholders*, http://www.robbinsarroyo.com/stock-watch/ (last visited Sept. 27, 2014) ("Stock Watch is [our] investment monitoring service for individual and institutional investors. Through Stock Watch, we track participants' publicly traded investments, including stocks, bonds, mutual funds, and other securities"); Robbins Geller Rudman & Dowd LLP, *Portfolio Monitoring Program*, http://www.rgrdlaw.com/services-portfolio-monitoring-program.html (last visited Sept. 27, 2014) ("The cost-free service is built around proprietary software that is able to provide essential information to track investment losses."); Bernstein Litowitz Berger & Grossman LLP, *Portfolio Monitoring and Case Evaluation*, http://www.blbglaw.com/client_services/portfolio_monitoring (last visited Sept. 27, 2014) ("At no cost to our clients, we review the fund's portfolio losses on a regular basis, investigate potential claims and prepare detailed reports of our findings."); Hausfeld LLP, *Hausfeld's Portfolio Monitoring Service*, http://www.hausfeldllp.com/pages/portfolio_monitoring (last visited Sept. 27, 2014) ("Hausfeld LLP offers a free portfolio monitoring service to public and private investment funds."); Kessler Topaz Meltzer & Check, LLP, *Kessler Topaz's Portfolio Monitoring & Claims Administration Program*, http://ktmc.com/investors_portfolio.php (last visited Sept. 27, 2014) ("We provide this service at NO cost and without taking a percentage of what is recovered."); Wolf Haldenstein Adler Freeman & Herz, LLP, *Institutional Investor Services*, http://www.whafh.com/modules/practice_area/index.php?action=view&id=22 (last visited Sept. 27, 2014) ("The firm provides settlement monitoring and claims monitoring to its institutional clients free of charge and with no obligation on the part of its clients."). *But see* Sara Hansard, *Attorneys Question Portfolio-Monitoring Services*, INVESTMENTNEWS (Dec. 4, 2006) (stating that Mintz Levin Cohn Ferris Glovsky and Popeo PC "charges a fee for its service").

litigation regardless of their decision to opt in or out. In fact, many plaintiffs' firms advertise their free monitoring services as a way for an institutional investor to satisfy fiduciary obligations, independent of any decision to join the case.[273] But there is also cost to defendants who will have to monitor and respond to these placeholder actions and protective motions, including handling any removal, consolidation, or centralization.[274] That kind of procedural wrangling doesn't come free. It costs defendants time and money.[275] For class actions, there is an added public-relations incentive to keep plaintiffs from filing a mass of actions to avoid a series of actions that make the situation look worse than it actually may be—less is more in that regard.[276] But all this cost may be worth it if it allows defendants to dismiss a claim via the limitations period rather than defend new claims that are brought by later opt outs.

What then are reasons for why *American Pipe* should *not* apply to the securities laws' statutes of repose? On the one hand, this approach may prevent class members from waiting on the sidelines to see if the class litigation unfolds favorably. There is value in forcing class members to decide early whether they will stay part of the class or opt out. An early, binding decision can lend certainty to the size of the class, which may be significant in settlement negotiations. Moreover, in *CTS Corp.*, the Supreme Court stressed that the very purpose of a repose period is to provide the defendant certainty and a fresh start free from

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273. *See* Motley Rice, *supra* note 272 ("It is important that funds have multiple firms monitoring their portfolios to ensure they are able to . . . meet their fiduciary duties."); Robbins Geller Rudman & Dowd LLP, *What Services Do I Receive?*, http://www.rgrdlaw.com/services-portfolio-monitoring-services.html (last visited Sept. 27, 2014); Robbins Geller Rudman & Dowd LLP, *Why is Monitoring My Portfolio Important?*, http://www.rgrdlaw.com/services-portfolio-monitoring-results.html (last visited Sept. 27, 2014) ("This report allows fund fiduciaries to make timely assessments of the funds options"); Berman Devalerio, *Best Practice: Hire More Than One Monitoring Firm*, http://www.bermandevalerio.com/newsfeed/100-best-practice-hire-more-than-one-monitoring-firm (last visited Sept. 27, 2014) ("[M]onitoring for investment losses due to fraud and settlement eligibility is an important aspect of an institutional investor's fiduciary duties.").

274. *See, e.g.*, Bryan Denberg, *Paying the Toll to be Class Member: The Impact of the* American Pipe *Doctrine on Section 13 of the Securities Act of 1933*, 87 ST. JOHN'S L. REV. 239, 268 (2013) (stating that "the inefficiency feared by plaintiffs having to file protective suits can be mitigated by procedures already commonly used to manage class actions. Opt-out actions can be consolidated for pretrial proceedings by the U.S. Judicial Panel for Multidistrict Litigation, and motions to intervene, at the court's discretion, can be deferred pending class certification decisions."). Granted, plaintiffs already have significant incentive to consolidate actions themselves as the PSLRA prohibits a federal judge from appointing a lead plaintiff before resolving any pending motions to consolidate. *See* 15 U.S.C. § 78u-4(a)(3)(B)(ii) ("If more than one action on behalf of a class asserting the same claim or claims arising under this chapter has been filed, and any party has sought to consolidate those actions for pretrial purposes or for trial, the court shall not make the determination required by clause (i) until after the decision on the motion to consolidate is rendered."). But the PSLRA does not demand that like cases be consolidated. *See, e.g.*, *In re* New Oriental Educ. & Tech. Grp. Sec. Litig., No. 12-cv-5724, 2013 WL 1875102, at *2 (S.D.N.Y. May 6, 2013) ("[C]onsolidation is not mandatory under the PSLRA.").

275. Litigation costs for major companies are already substantial. According to one study, independent of judgments, litigation transaction costs, a portion of which would include paying for attorneys' time to handle procedural wrangling and paying for the various filing fees, account for about 60% of U.S. tort costs, with only 40% of the cost going to the claimant. Statement, Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies*, Conference on Civil Litigation, Duke Law School (May 10–11, 2010), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf.

276. *Cf.* Richard S. Levick & Scott Sobel, *Smile, You're On Television*, 25 LEGAL TIMES (June 3, 2002), *available at* www.mondaq.com/unitedstates/x/17863/Business+Strategy+Management+Consultancy/Smile+Youre+on+Television.

liability.[277] On the other hand, this argument appears to have been confronted and rejected in *American Pipe* itself. According to the *American Pipe* Court, Rule 23 already adequately mitigates the risk that classes won't be defined until too late in the suit by demanding that federal judges address class certification "at an early practicable time."[278]

Another counter to *American Pipe*'s application to repose provisions is that, in reality, repose would achieve judicial economy consistent with Rule 23. Proponents of this point contend that the worry about placeholder actions and protective motions is overstated. Class members with damages too small to justify investment into the case would never file a protective action or motion anyway, and those plaintiffs who would file such a pleading or motion, would likely have filed them regardless of the limitations period provided for in a statute of repose. But does repose in that setting undermine the class mechanism? The "very core" of a class mechanism is to provide a remedy for those investors with damages too small to justify individual investment in the first place.[279] And with respect to those most likely to opt out regardless, *American Pipe* was designed to prevent them from being *forced* to file individual suits and protective motions to preserve their claims.[280]

In sum, the answer to the question what does the world look like if *American Pipe* does not apply to statutes of repose, is we don't really know. On the one hand, there is the concern that merited claims will be lost. On the other hand, there is the counter that such concern is overstated, and in fact, there is the worry that defendants will never receive repose. The federal courts have yet to resolve the tension between these aims.

V. REMEDYING THE UNCERTAIN APPLICATION OF LIMITATIONS PERIODS WITH TOLLING AGREEMENTS

What, then, can parties do about the uncertain application of timeliness bars to the securities laws? Tolling agreements lend the needed clarity. These agreements have several laudable ends. First, the use of tolling agreements is a well-established tactic to postpone protective motions and placeholder actions while the parties work out a settlement or resolve claims that are more pressing.[281] To that end, tolling agreements counter the

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277. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014).

278. FED. R. CIV. P. 23(c)(1).

279. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.") (internal citation omitted).

280. *See, e.g.*, *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007) ("The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually.").

281. *See, e.g.*, 5D ARNOLD S. JACOBS, DISCLOSURE & REMEDIES UNDER THE SECURITIES LAWS § 19:29 (2013) ("A plaintiff and a defendant sometimes contractually agree to extend the period of limitations. Tolling agreements usually are executed when the statute is about to expire and the parties are negotiating settlement."); *see also In re* Enron Corp. Sec., Derivative & ERISA Litig., No. Civ. A. H040087, 2005 WL 3504860, at *7 n.15 (S.D. Tex. Dec. 22. 2005) (quoting letter from plaintiffs' counsel to defendants: "While we believe that the Sarbanes Oxley legislation extends the statute of limitations to two years from the date of actual knowledge of a claim, there exists the possibility that a defendant could argue that the statute of limitations expires in mid-October of this year. Thus in an abundance of caution, absent a tolling agreement signed by Royal Bank of Canada, we will have to name Royal Bank of Canada as a defendant on or before October 16, 2002.").

protective-motion and placeholder-action problem.[282] Additionally, tolling agreements allow the parties to focus on more immediate concerns without sacrificing the plaintiffs' rights to litigate.[283] That tolling agreements suspend the securities laws' statutes of limitations appears well settled.[284] Compelling authority suggests that tolling agreements validly arrest statutes of repose as well statutes of limitations.

Tolling agreements arrest repose provisions for several reasons. First, tolling agreements may practically prevent parties from asserting the statute of repose. It takes bravado for a party to enter a tolling agreement promising not to raise any timeliness defenses and then turn around and argue to a court that the claim is time barred.[285]

Second, case law holds that tolling agreements are consistent with a repose period. Although only a few courts have confronted whether a tolling agreement arrests a statute of repose under the securities laws, these courts are unanimous: A tolling agreement may arrest statutes of repose under the securities laws.[286] The most robust explanation for this

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282. *See In re* Zyprexa Prods. Liab. Litig., 549 F. Supp. 2d 496, 525–26 (E.D.N.Y. 2008) ("Lilly's agreement to enter tolling agreements was reported in *The Indianapolis Star* as a 'legal tactic to stall the filing of potentially hundreds of new lawsuits' related to Zyprexa. . . . The article reported that Lilly was facing 125 Zyprexa-related lawsuits and the tolling agreements 'delay the filing of lawsuits on behalf of more than 1800 potential claimants.'"); LaSala v. E*Trade Sec. LLC, 457 F. Supp. 2d 188, 189–90 (S.D.N.Y. 2006) (observing that to prevent statute of limitations from expiring, defendants entered into tolling agreements with plaintiffs, but some did not, and thus plaintiff filed "over a hundred separate actions" against those defendants).

283. *See* ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 54 (1st Cir. 2008) (describing how investors voluntarily dismissed securities-fraud claims without prejudice under tolling agreements while defendant went through bankruptcy proceedings); Gamoran v. Neuberger Berman, LLC, No. 11 Civ. 7957, 2012 WL 2148217, at *3 n.3 (S.D.N.Y. June 12, 2012) (involving shareholders who demanded the company bring a derivative action against executives who entered into a tolling agreement with the company while its board conducted internal investigation into shareholders' claims).

284. *See* Oaktree Capital Mgmt. LP v. KPMG, 963 F. Supp. 2d 1064, 1085 (D. Nev. 2013) (holding that the tolling agreement suspended the one-year statute of limitations under Section 18 of the 1934 Act); Dow Corning Corp. v. BB & T Corp., No. Civ. 09-5637, 2010 WL 4860354, at *13 (D.N.J. Nov. 23, 2010) (recognizing that a tolling agreement suspended two-year statute of limitations under Section 10(b) of the 1934 Act); Lane v. Page, 649 F. Supp. 2d 1256, 1303 (D.N.M. 2009) (holding that a tolling agreement suspended the one-year statute of limitations under Section 14(a) of the 1934 Act); AIG Global Sec. Lending Corp. v. Banc of Am. Sec. LLC, 646 F. Supp. 2d 385, 410 (S.D.N.Y. 2009) (recognizing that the tolling agreement suspended the one-year statute of limitations then applicable to Section 10(b) of the 1934 Act); *In re* Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804, 858–59 (S.D. Tex. 2004) (recognizing that the tolling agreement suspended the one-year statute of limitations under Section 11 of the 1933 Act); Lindner Dividend Fund, Inc. v. Ernst & Young, 880 F. Supp. 49, 55 (D. Mass. 1995) (accepting plaintiff's argument that the tolling agreement suspended the one-year statute of limitations); Xerox Fin. Serv. Life Ins. Co. v. Salomon Bros., Inc., No. 92 C 1767, 1992 WL 151923, at *5 (N.D. Ill. 1992) (recognizing that the tolling agreement suspended the one-year statute of limitations under Section 12(a)(2) of the 1933 Act and the one-year statute of limitations then applicable to Section 10(b) of the 1934 Act); *see also* Photopaint Tech., LLC v. Smartlens Corp., 335 F.3d 152, 161 (2d Cir. 2003) (recognizing that the tolling agreement suspended the one-year statute of limitations under the Federal Arbitration Act); G.M. Harston Constr. Co. v. City of Chicago, No. 01 C 268, 2003 WL 22508172, at *2 (N.D. Ill. Nov. 4, 2003) ("[P]arties can contract to toll the statute of limitations for federal causes of action."). A tolling agreement entered into after the limitations period has passed does not revive dead claims. *See, e.g.*, Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 700 (2d Cir. 1994).

285. *See In re* Lehman Bros. Sec. & ERISA Litig., No. 11 Civ. 1281, 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012) ("In reliance on the tolling agreement, Calpers waited until November 2011 to file suit. In a notable bit of 'chutzpah,' E & Y now argues that—notwithstanding its tolling agreement—the claim is time-barred.").

286. *See id.* (holding that the tolling agreement arrested the three-year statute of repose applicable to Section 11 claims); ESI Montgomery Cnty., Inc. v. Montenay Int'l Corp., 899 F. Supp. 1061, 1066 (S.D.N.Y. 1995) (holding that the tolling agreement arrested the three-year statute of repose then applicable to claims under Section

conclusion comes from the Colorado Court of Appeals in *First Interstate Bank of Denver N.A. v. Central Bank & Trust Co. of Denver*, which addressed whether the parties' tolling agreement arrested the Colorado Securities Act's statute of repose.[287] The court explained that whether a statute of repose—which is more rigid than the statute of limitations but less rigid than a jurisdictional time limit—supersedes a private agreement is a question of public policy.[288] In other words, the court said, the inquiry is "whether the legislative purpose is thwarted if the statute is not applied in a particular circumstance."[289] This sounds similar to the inquiry *American Pipe* used to evaluate whether tolling was applicable in light of the Rules Enabling Act. In *American Pipe*, the Court said: The "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."[290] Under this test, *First Interstate Bank* concluded that tolling agreements were valid as applied to statutes of repose. To begin, the court observed that the statutory text did not evidence a clear intent to override parties' private agreements on the matter. The court pointed out that the legislature could have precluded the parties' ability to waive the statute of repose in the Act itself, but did not.[291] For instance, the statutory text under the securities laws is unlike the statutory text in the Extender Statute under the Housing and Economic Recovery Act of 2008.[292] The language in the Extender Statute may supersede a tolling agreement.[293] The Extender Statute—unlike the securities laws—is explicit: Its limitations periods apply "[n]otwithstanding any provision in any contract."[294]

10(b) of the 1934 Act); *In re* Enron Corp., Sec., Derivative, & ERISA Litig., No. MDL 1446, 2005 WL 3704688, at *7 n.42 (S.D. Tex. Dec. 5, 2005) (holding that the tolling agreement arrested the three-year statute of repose then applicable to claims under Section 10(b) of the 1934 Act and Rule 10b-5); *see also* McCool v. Strata Oil Co., 973 F.2d 1452, 1460–61 (7th Cir. 1992) (holding that the tolling agreement arrested the five-year statute of repose applicable to claims under the Illinois securities laws); Comerica Bank v. FGMK, LLC, No. 10 C 1930, 2010 WL 2723177, at *3 (N.D. Ill. July 2, 2010) (same); First Interstate Bank of Denver N.A. v. Cent. Bank & Trust Co. of Denver, 937 P.2d 855, 860–63 (Colo. App. 1996) (holding that the tolling agreement arrested the three-year statute of repose applicable to claims under the Colorado securities laws); McRaith v. BDO Seidman, LLP, 909 N.E.2d 310, 329 (Ill. App. Ct. 2009) (holding that the tolling agreement postponed the statute of repose for re-filing a voluntarily dismissed lawsuit so long as the agreement uses clear language and "contemplates an eventual ending that is reasonable based on the facts specific to [the] case"). In other contexts, courts have enforced tolling agreements to arrest statutes of repose. *See* One N. McDowell Ass'n of Unit Owners, Inc. v. McDowell Dev. Co., 389 S.E.2d 834, 836 (N.C. App. Ct. 1990) (estopping property developers from asserting a statute of repose in defense of unit owners' claim arising from defective air-conditioning system where developers signed a series of agreements in which they agreed not to raise timeliness defenses); Charlotte Motor Speedway, Inc. v. Tindall Corp., 672 S.E.2d 691, 694 (N.C. App. Ct. 2009) (holding that the speedway owner and contractor's tolling agreement arrested repose period while personal injury claims were resolved).

287. *First Interstate Bank of Denver N.A.*, 937 P.2d at 860.

288. *Id.* at 862.

289. *Id.*

290. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557–58 (1974).

291. *First Interstate Bank of Denver N.A.*, 937 P.2d at 862; *see also* Stephan v. Goldinger, 325 F.3d 874, 876 (7th Cir. 2003) (holding that the tolling agreement suspended the two-year limitation under the Commodity Exchange Act, which provided that suits should be brought "no later than two years after the date the cause of action arises").

292. The Extender Statute was intended to allow certain government agencies acting as a conservator or liquidating agent more time to sue. 12 U.S.C. § 1787(b)(14).

293. Nat'l Credit Union Admin. Bd. v. Credit Suisse Sec. (USA), LLC, 939 F. Supp. 2d 1113, 1134 (D. Kan.), *aff'd on other grounds by* 727 F.3d 1246 (10th Cir. 2013).

294. 12 U.S.C. § 1787(b) (14). One may be tempted to rely on 15 U.S.C. § 78cc(a) to argue that a similar prohibition applies under the securities laws. That provision forbids waiver of "any provision" of the 1934 Act.

Additionally, *First Interstate Bank* explained that a tolling agreement is consistent with the purposes of the securities laws' repose provisions.[295] As a general matter, contracts rarely defeat the function of the statute so utterly that the contract may be set aside. As explained by Judge Easterbrook:

> A statutory right affects the initial bargaining position of the parties, so that the contract affords people the benefits of the statute even as it alters the rules. The beneficiary of the statutory right may enjoy it or trade it for something he prefers; when a court observes that the right has been surrendered (traded) in a contract, it may not leap to the conclusion that the statutory plan has been defeated. The contract tells us only that the parties valued something else more highly. To forbid the contractual waiver is to make the class of statutory beneficiaries worse off, by depriving them of the opportunity to obtain the benefits of the statutory entitlement by using it as a bargaining chip in the process of contracting.[296]

First Interstate further explained that a waiver of limitations periods is consistent with the repose provisions of the securities laws. According to *First Interstate*, the repose provisions were designed to avoid potential problems of proof (the "stale evidence" rationale). But with a tolling agreement, the claims are defined and there is a strong likelihood that a similar suit is already pending, which means that the parties are already preserving or gathering evidence.[297] Additionally, the court observed that repose was designed to prevent lingering liabilities from disrupting the defendant's normal business operations (the "litigation uncertainty rationale").[298] But, the court countered, a tolling agreement is for the benefit of *both* parties, including the defendant, and it is implemented to preclude unnecessary litigation, which would have distracted the defendant from normal business operations.[299] Other courts have likewise observed the "very important public

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 228 (1987), the Supreme Court clarified that this provision does not mean that any waiver of any part of the securities laws (i.e., the securities laws' limitations periods) is void. "What the antiwaiver provision" does, the Court said, is it "forbids . . . enforcement of agreements to waive '*compliance*' with the provisions of the statute." *Id.* (emphasis added). The Court then held that agreements to arbitrate were valid waivers even though the 1934 Act purported to reserve jurisdiction to the federal courts because compliance with the securities laws was not waived. This construction is supported by the intent of the anti-waiver provision. The anti-waiver provision is intended to prohibit brokers and others in the industry from providing a reduction in commissions or other benefit in exchange for waiving compliance with the requirements of the Exchange Act. Put another way, the anti-waiver provision serves to invalidate attempts to obtain anticipatory waivers intended to provide immunity for breaking the securities laws. Thus, courts have held that the provision does not apply to the release of matured claims or to waiving defenses. *E.g.*, *In re* Gas Reclamation, Inc. Sec. Litig., 733 F. Supp. 713, 718–19 (S.D.N.Y. 1990) (listing defenses); Korn v. Franchard Corp., 388 F. Supp. 1326, 1329 (S.D.N.Y. 1975) (dealing with the release of matured claims).

295. *First Interstate Bank of Denver N.A.*, 937 P.2d at 862–63; *see also In re* Lehman Bros. Sec. & ERISA Litig., No. 11 Civ. 1281 LAK, 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012) ("No public policy would be offended by permitting a private party like Calpers to contract out of the Act's statute of repose with a particular litigant. In fact, a very important public interest may be served in doing so. Tolling agreements allow parties to extend statutory periods while they evaluate their claims and defenses in the hope that they can resolve their dispute without litigation. In cases such as this one, such agreements can serve the interests of the parties, the public, and the courts.").

296. Cange v. Stotler & Co., 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring).

297. *First Interstate Bank of Denver N.A.*, 937 P.2d at 863.

298. *Id.* at 862.

299. *Id.* at 863; *see also* Stephan v. Goldinger, 325 F.3d 874, 876 (7th Cir. 2003) (holding that the tolling agreement suspended the Commodity Exchange Act's two-year limitations period because that provision was

interest" that may be served by upholding parties' tolling agreement.[300] "Tolling agreements allow parties to extend statutory periods while they evaluate their claims and defenses in the hope that they can resolve their dispute without litigation."[301] Limitations periods are largely about convenience for the parties; they are practical and pragmatic devices to spare the parties from litigating stale claims.[302] So, where the parties have found it more convenient to toll the limitations period while the parties sort things out, it makes no sense to force them to litigate.

Last, the *First Interstate* court explained that *Lampf*, which refused to apply equitable tolling to the securities laws' limitations periods, did not address the policies at play in an agreed-upon waiver case.[303] *Lampf* foreclosed the application of equitable tolling but did not address waiver.[304] Thus, *Lampf* did not preclude waiver of a limitations defense in a tolling agreement.[305]

One authority suggests that statutes of repose are not tolled by agreement. *Midstate Horticultural Co. v. Pennsylvania Railroad Co*.[306] is the authority most often invoked to argue that statutes of repose cannot be arrested via tolling agreement. That case held that a three-year limit on suits under the Interstate Commerce Act could not be tolled by agreement. But it did so largely because allowing tolling by agreement would have disrupted the "uniformity and equality of treatment . . . between carrier and shipper" that the Interstate Commerce Act was meant to protect.[307] The Court specifically contrasted that case with one in which "only the parties' private interests or equities were involved."[308] Most courts have limited *Midstate* to cases involving shippers and

"intended primarily for the benefit of the defendant, to protect him from having to defend against stale claims").

300. *In re* Lehman Bros. Sec. & ERISA Litig., No. 11 Civ. 1281 LAK, 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012).

301. *Id.*

302. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims."); Lawyers Title Ins. Corp. v. Dearborn Title Corp., 118 F.3d 1157, 1166 (7th Cir. 1997) ("The practical meaning of a jurisdictional limitation is that the court must enforce it regardless of any agreement between or conduct by the parties; it is not only for their protection. Statutes of limitations are ordinarily for the protection of defendants and so can be waived or forfeited by them; but they also protect the courts from the burden of adjudicating old claims. . . . If the second goal were paramount, the period of limitations would not be within the defendant's power to waive. But we cannot find any case that holds a federal statute of limitations jurisdictional on this ground.").

303. *First Interstate Bank of Denver N.A.*, 937 P.2d at 863.

304. *See In re* Dynegy, Inc. Sec. Litig., 339 F. Supp. 2d 804, 858–59 (S.D. Tex. 2004) (holding that *Lampf* did not foreclose express waiver as grounds to arrest statute of limitations applicable to Section 11 claims); ESI Montgomery Cnty. Inc. v. Montenay Int'l. Corp., 899 F. Supp. 1061, 1065–66 (S.D.N.Y. 1995) (holding that *Lampf* did not foreclose equitable estoppel or waiver as grounds to arrest the statute of limitations applicable to Rule 10b-5 claims).

305. Nat'l Credit Union Admin. Bd. v. Credit Suisse Sec. (USA) LLC, 939 F. Supp. 2d 1113, 1125 n.7 (D. Kan. 2013) ("Credit Suisse also relies on the Supreme Court's statement in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson* that the three-year period of repose for actions under Section 10(b) of the Securities Exchange Act is not subject to tolling, but it was clear in that case that the Court was referring to equitable tolling. The present case involves the issue of legal tolling by agreement.") (internal citations omitted).

306. Midstate Horticultural Co. v. Pa. R.R. Co., 320 U.S. 356 (1943).

307. *Id.* at 361.

308. *Id.*; *see also* ARNOLD S. JACOBS, 5D DISCLOSURE & REMEDIES UNDER THE SECURITIES LAWS § 19:29 (2013) (stating that *Midstate* addressed a "different context" and that otherwise "[t]olling agreements should be valid").

carriers.[309] And the courts have limited that holding because it was necessary to implement the strong congressional policy favoring uniformity of rates among all shippers, a policy that might otherwise have been undermined by applying varying periods of limitations or by the carrier's waiver of the limitations defense in some cases but not others.

VI. CONCLUSION

Many of the issues that pertain to the securities laws' limitations periods are unsettled. There are lingering questions about whether the securities laws' limitations periods afford any room for equitable exceptions, like tolling, estoppel, or forfeiture. And, as of late, questions concerning how limitations periods apply in the securities class action context have come to the fore, with courts casting doubt on whether putative class members may rely on a class action complaint to toll the legal deadline. This uncertainty dilutes the force of these limitations bars. But the ambiguity of limitations periods does not have to be resolved by a court. Instead, the parties themselves can deter the use of stale evidence and prevent the uncertainty of litigation by entering into tolling agreements. Tolling agreements can leave the necessary time for trouble, arresting limitations periods, and thus remedying the unclear application of statutory timeliness bars.

309. *See, e.g.*, Davis v. Valley Distrib. Co., 522 F.2d 827, 830 n.7 (9th Cir. 1975) (discussing constitutional considerations vis-à-vis 'reviving a dead claim'); *In re* Lehman Bros. Sec. & ERISA Litig., No. 11 Civ. 1281 LAK, 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012) (upholding parties' agreement to arrest statute of repose and distinguishing *Midstate Horticultural*).