

16-1364; 16-1365; 16-1366; 16-1367

**United States Court Of Appeals
for the
Third Circuit**

NORTH SOUND CAPITAL LLC; NORTH SOUND LEGACY INTERNATIONAL;
NORTH SOUND LEGACY INSTITUTIONAL; UNITED FOOD COMMERCIAL WORKERS
LOCAL 1500 PENSION FUND,

Plaintiffs-Appellees,

- v. -

MERCK & CO INC; MERCK SCHERING PLOUGH PHARMACEUTICALS;
MSP DISTRIBUTION SERVICES C LLC; MSP SINGAPORE CO LLC;
RICHARD T. CLARK; DEEPAK KHANNA,

Defendants-Appellants.

(See Inside Cover For Continuation of Consolidated Captions)

APPEAL PURSUANT TO 28 U.S.C. § 1292(b) FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY, ENTERED ON AUGUST 26, 2015
CIVIL ACTION NOS. 3:14-00242 (FLW); 3:14-00241 (FLW);
3:13-07241 (FLW); 3:13-07240 (FLW)

**BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS,
URGING REVERSAL**

Ira D. Hammerman
Kevin M. Carroll
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
1399 New York Avenue, N.W.
Washington, D.C. 20005
Telephone: (202) 962-7382

Of Counsel
The Securities Industry and
Financial Markets Association

Lewis J. Liman
Jared M. Gerber
CLEARY GOTTlieb STEEN & HAMILTON LLP
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000

Counsel for Amicus Curiae
The Securities Industry and
Financial Markets Association

(Consolidated Captions Continued From Inside Front Cover)

GIC PRIVATE LIMITED,
Plaintiff-Appellee,

- v. -

MERCK & CO INC; MERCK SCHERING PLOUGH PHARMACEUTICALS;
MSP DISTRIBUTION SERVICES (C), LLC; MSP SINGAPORE COMPANY, LLC;
RICHARD T. CLARK; DEEPAK KHANNA,
Defendants-Appellants.

GIC PRIVATE LIMITED,
Plaintiff-Appellee,

- v. -

MERCK & CO., INC f/k/a SCHERING-PLOUGH CORPORATION;
MERCK SCHERING PLOUGH PHARMACEUTICALS; MSP DISTRIBUTION
SERVICES (C) LLC; MSP SINGAPORE COMPANY, LLC; FRED HASSAN; CARRIE COX,
Defendants-Appellants.

NORTH SOUND CAPITAL, LLC; NORTH SOUND LEGACY INTERNATIONAL; NORTH
SOULD LEGACY INTERNATIONAL; NORTH SOUND LEGACY INSTITUTIONAL;
UNITED FOOD COMMERCIAL WORKERS LOCAL 1500 PENSION FUND; COLONIAL
FIRST STATE INVESTMENT, LTD.; CFSIL-CFS WHOLESALE INDEXED GLOBAL
SHARE FUND; COMMONWEALTH BANK OFFICERS SUPERANNUATION
CORPORATION AS TRUSTEE FUND OFFICERS SUPERANNUATION FUND WGSS04;
CFSIL-COMMONWEALTH GLOBAL SHARES FUND 4; COMMONWEALTH BANK
OFFICERS SUPERANNUATION CORPORATION AS TRUSTEE FUND OFFICERS
SUPERANNUATION FUND WGSS02; COMMONWEALTH BANK OFFICERS
SUPERANNUATION CORPORATION AS TRUSTEE FUND OFFICERS
SUPERANNUATION FUND WTRA02; CFSIL-COMMONWEALTH SPECIALIST FUND 13;
CFSIL WHOLESALE GEARED GLOBAL SHARED FUND; CFSIL ATF CMLA
INTERNATIONAL SHARE FUND; CFSIL-COMMONWEALTH GLOBAL SHARES FUND
6; CFSIL-COMMONWEALTH GLOBAL SHARES FUND 2; CFSIL-CFS WHOLESALE
ACADIAN GLOBAL EQUITY FUND; CFSIL-CFS WHOLESALE GLOBAL HEALTH &
BIOTECHNOLOGY FUND; CFSIL-CFS WHOLESALE GLOBAL SHARE FUND,
Plaintiffs-Appellees,

- v. -

MERCK & CO, INC., f/k/a SCHERING-PLOUGH CORPORATION;
MERCK SCHERING PLOUGH PHARMACEUTICALS; MSP DISTRIBUTION
SERVICES (C) LLC; MSP SINGAPORE COMPANY, LLC; FRED HASSAN; CARRIE S.
COX,
Defendants-Appellants.

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
RULE 26.1 CORPORATE DISCLOSURE STATEMENT	vii
STATEMENT OF INTEREST OF THE <i>AMICUS CURIAE</i>	1
ARGUMENT.....	2
I. TOLLING THE FIVE-YEAR PERIODS IN THE FEDERAL SECURITIES LAWS WOULD DEFEAT THE CENTRAL PURPOSES OF STATUTES OF REPOSE	2
A. Applying <i>American Pipe</i> Would Undermine The Certainty and Finality That Statutes of Repose Are Intended to Promote.....	2
B. Application of <i>American Pipe</i> to the Federal Securities Laws’ Statutes of Repose Would Have Other Pernicious Results.....	6
1. Discovery Would Be More Difficult	6
2. Settlement Would Be More Difficult.....	9
3. Other Absent Class Members Would Be Prejudiced.....	11
II. APPLYING <i>AMERICAN PIPE</i> TO A STATUTE OF REPOSE IS NOT NECESSARY TO SERVE THE PURPOSES OF RULE 23	12
A. Tolling a Statute of Repose Would Not Further the “Core” Purpose of Rule 23	13
B. Declining to Apply <i>American Pipe</i> Would Not Result in a “Needless” Multiplicity of Actions or Defeat Judicial Efficiency	15
CONCLUSION	19
APPENDIX	A-1

TABLE OF AUTHORITIES

	<u>Page(s)</u>
 <u>Rules and Statutes</u>	
15 U.S.C. § 78t-1(b)(4)	1
15 U.S.C. § 78u-4(a)(3)	3
15 U.S.C. § 78u-4(b)(1)	4
15 U.S.C. § 77z-1(a)(3)(A)(i).....	15
28 U.S.C. § 1658	1
Fed. R. Civ. P. 23(f).....	5
Fed. R. Civ. P. 23 advisory committee’s note	3
Fed. R. Evid. 801(d)(2)	6
 <u>Cases</u>	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	13
<i>American Pipe & Constr. Co. v. Utah</i> , 414 U.S. 538 (1974).....	1, 12
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	4
<i>Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)</i> , Civ. Action No. 99-20593 2002, U.S. Dist. LEXIS 12139 (E.D. Pa. Jan. 16, 2002)	14
<i>In re Cendant Corp.</i> , 260 F.3d 183 (3d Cir. 2001).....	9

<i>In re Exxon Mobil Corp. Secs. Litig.</i> , 500 F.3d 189 (3d Cir. 2007).....	3
<i>In re Lucent Techs. Inc. Sec. Litig.</i> , 221 F. Supp. 2d 472 (D.N.J. 2001).....	15
<i>In re Lucent Techs. Inc. Sec. Litig.</i> , No. 2:00-CV-621, 2002 WL 32815233 (D.N.J. July 16, 2002)	7
<i>In re Nat’l Football League Players Concussion Injury Litig.</i> , 775 F.3d 570 (3d Cir. 2014).....	3
<i>Kline v. First W. Gov’t</i> , No. CIV.A. 83-1076, 1996 WL 122717 (E.D. Pa. Mar. 11, 1996).....	7
<i>Malack v. BDO Seidman, LLP</i> , 617 F.3d 743 (3d Cir. 2010).....	4
<i>Malack v. BDO Seidman LLP</i> , No. 08 Civ. 0784 (TNO), 2009 WL 2393933 (E.D. Pa. Aug. 3, 2009)	5
<i>Neale v. Volvo Cars of N. Am., LLC</i> , 794 F.3d 353 (3d Cir. 2015).....	4
<i>Norris v. Wirtz</i> , 818 F.2d 1329 (7th Cir. 1987), <i>overruled on other grounds</i> , <i>Short v.</i> <i>Belleville Shoe Mfg. Co.</i> , 908 F.2d 1385 (7th Cir. 1990).....	2-3
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	11-12
<i>Phillips Petroleum Co. v. Shutts</i> , 472 U.S. 797 (1985).....	8, 14
<i>Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.</i> , 721 F.3d 95 (2d Cir. 2013).....	14

<i>Richards v. Wyeth (In re Diet Drugs Prods. Liab. Litig.)</i> , Civ. Action No. 05-25157, 2009 U.S. Dist. LEXIS 100028 (E.D. Pa. Oct. 23, 2009)	15
<i>Smith v. Bayer Corp.</i> , 131 S. Ct. 2368 (2011)	8
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 131 S. Ct. 2541 (2011)	4
<u>Other Authorities</u>	
Amir Rozen, Joshua B. Schaeffer & Christopher Harris, <i>Opt-Out Cases in Securities Class Action Settlements</i> , Cornerstone Research (2013)	16
Blair A. Nicholas & Ian D. Berg, <i>Why Institutional Investors Opt-Out of Securities Fraud Class Actions and Pursue Direct Individual Actions</i> , PLI (2009)	5-6, 10
Cornerstone Research, <i>Securities Class Action Filings: 2013 Year in Review</i> (Jan. 28, 2014)	16
David Betson & Jay Tidmarsh, <i>Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies</i> , 79 Geo. Wash. L. Rev. 542, 571-72 (2011)	12
David Rosenberg, <i>Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master</i> , 69 B.U. L. Rev. 695, 705-06 (1989)	12
David Rosenberg, <i>Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases</i> , 115 Harv. L. Rev. 831, 871 (2002)	10-11
Elliott J. Weiss & John S. Beckerman, <i>Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions</i> , 104 Yale L.J. 2053, 2110 (1995)	8
H.R. Rep. No. 104-369 (1995) (Conf. Rep.)	8

James D. Cox & Randall S. Thomas, <i>Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements</i> , 58 Stan. L. Rev. 411, 413 (2005)	9
Jamie S. Gorelick, et al., <i>Destruction of Evidence</i> § 13.3 (1989)	7
John C. Coffee, Jr., <i>Class Wars: The Dilemma of the Mass Tort Class Action</i> , 95 Colum. L. Rev. 1343, 1352 n.25 (1995)	8-9
John C. Coffee, Jr., <i>Litigation Governance: Taking Accountability Seriously</i> , 110 Colum. L. Rev. 288, 311-13 (2010).....	5, 10
Jon Romberg, <i>The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong</i> , 39 J. Marshall L. Rev. 231, 245 (2006)	11
Lesley Frieder Wolf, <i>Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991</i> , 100 Colum. L. Rev. 1847, 1875 (2000) ..	11
<i>Manual for Complex Litigation</i> (Third).....	17
<i>Manual for Complex Litigation</i> (Fourth)	18
Michael A. Perino, <i>Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions</i> , 46 Emory L.J. 85, 105 (1997)	6, 10, 12
Myriam Gilles & Gary B. Friedman, <i>Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers</i> , 155 U. Pa. L. Rev. 103, 133 (2006)	12
Stanford Law School, <i>Filings Database</i> , Securities Class Action Clearinghouse, http://securities.stanford.edu/filings.html (last visited Apr. 8, 2016).....	17
Stanford Law School, Securities Class Action Clearinghouse, http://securities.stanford.edu/index.html (last visited Apr. 8, 2016).....	A-3

Stephen J. Choi & Robert B. Thompson, <i>Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA</i> , 106 Colum. L. Rev. 1489, 1504 (2006)	8
United States Courts, <i>Federal Judicial Caseload Statistics</i> , http://www.uscourts.gov/statistics-reports/analysis-reports/ federal-judicial-caseload-statistics (last visited Apr. 8, 2016)	15-16, A-2, A-3
William B. Rubenstein, <i>Newberg on Class Action</i> § 9:11 n.10 (5th ed. 2016)	8

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae the Securities Industry and Financial Markets

Association states that it is not a subsidiary of another corporation, and no publicly held corporation owns more than 10% of its stock.

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Securities Industry and Financial Markets Association (“SIFMA”) is an association comprised of hundreds of member securities firms, banks, and asset managers, who are frequent targets of class action litigation.¹ As an organization, SIFMA has an interest in the strong, accurate, and timely enforcement of the federal securities laws. SIFMA supports the arguments of Defendants-Appellants that the tolling doctrine of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), does not apply to extend the absolute five-year periods of repose established by 28 U.S.C. § 1658 and 15 U.S.C. § 78t–1(b)(4). SIFMA submits this brief to elaborate on the practical reasons, based on extensive experience with securities class action lawsuits, why Congress’s decision to create strict statutes of repose makes sense and should be honored.

A rule that would “toll” the statutes of repose until after class certification would defeat the essential legislative purpose of the statutes of repose. In most securities cases, a class certification motion may not be made – and will not be decided – until well after motion practice and discovery. These proceedings frequently are lengthy: class discovery usually overlaps with merits-discovery, the

¹ SIFMA hereby certifies that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amicus curiae*, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

court is required to make findings concerning a number of factors, and appeals may be sought. Thus, rather than receiving repose within five years – as Congress intended – companies, and their officers and directors, would be subjected to uncertain and lingering liability for many years. Individual plaintiffs – typically sophisticated investors with substantial resources – would be permitted to sit on the sidelines until class certification, thereby threatening judicial economy and other absent class members that lack the financial wherewithal to opt out. This would increase duplicative discovery and make settlement more difficult.

The District Court’s holding is fundamentally inconsistent with the purposes of a statute of repose, does little to further the purposes of Rule 23, and benefits a cottage industry of sophisticated investors at the expense of defendants, judicial economy, and absent class members. Accordingly, it should be reversed.

ARGUMENT

I. TOLLING THE FIVE-YEAR PERIODS IN THE FEDERAL SECURITIES LAWS WOULD DEFEAT THE CENTRAL PURPOSES OF STATUTES OF REPOSE

The effect of tolling a statute of repose is to defeat its purpose by rewarding opt-out plaintiffs for delaying the filing of their claims.

A. Applying *American Pipe* Would Undermine The Certainty and Finality That Statutes of Repose Are Intended to Promote

Congress’s motivation behind the statutes of repose contained in the federal securities laws is “pellucid.” *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.

1987), *overruled on other grounds*, *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). The Third Circuit has recognized the need to “minimize uncertainty and time-consuming litigation” and promote “uniformity and certainty” by adopting those repose periods. *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 194 (3d Cir. 2007) (internal citations omitted).

The decision of the court below – applying *American Pipe* to override the securities laws’ five-year periods of repose – undermines the very principles of certainty and finality that these provisions were intended to legislate. Since at least the 2003 amendments to Rule 23, class certification motions need not be made “as soon as practicable” but only at “an early practicable time.” Fed. R. Civ. P. 23 advisory committee’s note. In the typical securities case, there are “many valid reasons that may justify deferring the initial certification decision,” *id.*, including – after the filing of the initial complaint – notice of the pendency of the action and of the right of any member of the purported class to move within 60 days to serve as lead plaintiff, *see* 15 U.S.C. § 78u-4(a)(3)(A); the appointment of lead plaintiffs and lead counsel, *see* 15 U.S.C. § 78u-4(a)(3)(B); and in most cases, the filing of a consolidated amended complaint by the party that is appointed lead plaintiff. *See In re Nat’l Football League Players Concussion Injury Litig.*, 775 F.3d 570, 579 (3d Cir. 2014) (“district courts may need time to gather information necessary to make the certification decision”) (internal citation omitted). Moreover, because of

the statutory discovery stay under the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 78u-4(b)(1), a class certification motion is typically preceded by briefing and decision on motions to dismiss, which may add still more months to the time period from the filing of a complaint to a class certification motion.

Assuming that the complaint survives a motion to dismiss, months (or potentially years) of discovery will follow. The Supreme Court has held that “[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). “Frequently, th[is] ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim.” *Id.*; *see also Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 370-71 (3d Cir. 2015). In cases involving a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224, 245-47 (1988), which are frequently coupled with Exchange Act claims, it may also include questions regarding market efficiency and price impact. *See, e.g., Malack v. BDO Seidman, LLP*, 617 F.3d 743, 747 (3d Cir. 2010). And, even then, the district court may hold a hearing before making a

class certification decision. *See Malack v. BDO Seidman, LLP*, No. 08 Civ. 0784 (TNO), 2009 WL 2393933, at *1 (E.D. Pa. Aug. 3, 2009).²

Under the ruling below, would-be plaintiffs could wait in the shadows until after class certification before informing the defendants of their decision to file suit, and demand a premium for an after-the-fact settlement. These costs and concerns are real. So-called “out-opt” lawsuits are not a mere sideshow in major securities litigation. They can be the main show. As recent experience shows, opt-out actions can impose significant additional liability on top of a class action. *See, e.g., John C. Coffee, Jr., Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 311-13 (2010) (listing hundreds of millions of dollars in settlements for individual plaintiffs in *WorldCom*, *AOL Time Warner*, and *Qwest* securities litigations).³ Opt-out plaintiffs engage in a “no risk, ‘wait-and-see’ approach” as they await subsequent developments to assess whether to join the class, leaving defendants subject to lingering liabilities for an extended period of time. *See Blair A. Nicholas & Ian D. Berg, Why Institutional Investors Opt-Out of*

² Even after a class certification motion is granted, a defendant may seek review, potentially adding still more time to the timetable. Fed. R. Civ. P. 23(f).

³ Indeed, in at least one recent litigation, plaintiffs who filed individual suits received larger combined settlements than the class as a whole. *Id.* at 313 (“The Qwest class action settled in 2005 for \$400 million, but Qwest has disclosed payments of \$411 million to opt-outs.”).

Securities Fraud Class Actions and Pursue Direct Individual Actions, PLI 2 (2009).

B. Application of *American Pipe* to the Federal Securities Laws' Statutes of Repose Would Have Other Pernicious Results

Application of *American Pipe* to the statute of repose would distort the discovery process, make settlement more difficult, and – ironically – prejudice the very absent class members Appellees profess to be protecting.

1. Discovery Would Be More Difficult

Under a system that permits institutional investors to delay filing a solo securities action through application of *American Pipe*, few institutional investors would refrain from letting class counsel do the hard work (and incur the expense) of investigating and filing a comprehensive consolidated complaint, as well as framing discovery requests, serving interrogatories, and taking depositions – free-riding off of that work if it is helpful with little consequence if it is not. *See, e.g.*, Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 Emory L.J. 85, 105 (1997). For example, the admission of a party defendant is admissible in subsequent opt-out litigation (even if made only to class counsel) but, of course, exculpatory deposition testimony is not. *See* Fed. R. Evid. 801(d)(2). Thus, an institutional investor has every incentive to impose on defendants, the class, the witnesses, and the court system the cost of taking discovery while preserving for

itself the right to take duplicative discovery – including repetitive depositions of the same witnesses – if it does not like the evidence the class has adduced.

At the same time, extending *American Pipe* would also give an institutional investor an added opportunity to avoid or delay discovery of itself, depriving defendants of the ability to receive timely and fresh recollections from the parties who frequently have the most significant claims. Defendants’ ability to mount plaintiff-specific defenses would be jeopardized because they may not be able to take necessary discovery until those potential plaintiffs become parties to lawsuits. Indeed, those plaintiffs may not even be subject to an obligation to preserve relevant documents. *See, e.g.*, Jamie S. Gorelick, et al., *Destruction of Evidence* § 13.3 (1989) (“[w]hat triggers that duty [to preserve evidence]” before litigation is filed “varies from jurisdiction to jurisdiction and among factual situations”). Although putative class members may be subject to Rule 45 subpoenas, they are not usually required to answer interrogatories or requests to admit.⁴ Furthermore, a member of an uncertified class is not considered a party to the class action for preclusion purposes, and is therefore free to re-litigate adverse

⁴ *See, e.g.*, *Kline v. First W. Gov’t*, No. CIV.A. 83-1076, 1996 WL 122717, at *2 (E.D. Pa. Mar. 11, 1996) (“[U]pon survey of the cases, it is safe to state that discovery of absent class members is disfavored.”); *In re Lucent Techs. Inc. Sec. Litig.*, No. 2:00-CV-621, 2002 WL 32815233, at *2 (D.N.J. July 16, 2002) (collecting cases rejecting discovery of absent class members).

decisions from the class action. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379-82 (2011).⁵

As important, discovery from absent class members – even through alternative methods permitted under the Rules – is “generally disfavored” and “ordinarily not permitted.” *See* William B. Rubenstein, *Newberg on Class Action* § 9:11 n.10 (5th ed. 2016). Thus, even if a defendant could take discovery of such an erstwhile individual plaintiff, the defendant would not know which institutional investors – many of whom may still be shareholders of the company – intended to sue and were therefore an important subject of discovery.⁶

⁵ *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-11 (1985) (“[A]bsent plaintiff class members are not subject to other burdens imposed upon defendants. . . . Nor will an adverse judgment typically bind an absent plaintiff for any damages He may sit back and allow the litigation to run its course . . . and if he takes advantage of th[e] opportunity [to opt out] he is removed from the litigation entirely.”).

⁶ By no means will every institutional investor who is a member of a putative class choose to bring an individual claim. *See, e.g.*, H.R. Rep. No. 104-369, at 34 (1995) (Conf. Rep.) (recognizing that institutional investors have incentive to bring “meritorious securities litigation” rather than weaker claims); *see also* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 Colum. L. Rev. 1489, 1504 (2006) (noting that even after the PSLRA, “there has not been substantial involvement by private institutional investors, such as mutual funds, banks, and insurance companies” in securities litigation); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053, 2110 (1995) (acknowledging that “concerns about client and customer pressure . . . are not inconsequential” and “may account for much of institutional investors’ . . . passivity” in pursuing securities claims); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort*

2. Settlement Would Be More Difficult

Statutes of repose also facilitate the prompt and fair settlement of securities litigation by allowing defendants to know with certainty the size of their potential exposure, so they can resolve that exposure on a global basis without unfairly reducing the class recovery to account for the possibility of additional opt-outs in the future. A principal objective of the PSLRA is to “empower investors so that they . . . exercise primary control over private securities litigation,” including over the settlement of the class action. *In re Cendant Corp.*, 260 F.3d 183, 197 (3d Cir. 2001) (quoting S. Rep. No. 104–98, at 4 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 683). That objective is furthered by the repose periods set forth in the federal securities laws. At a relatively early stage and date within the litigation, the defendant, lead plaintiff, and lead counsel have the certainty necessary to resolve a case. They will know whom lead counsel represents and who has preserved the potential for pursuing an individual claim by filing a motion to intervene or a timely follow-on complaint. If a putative plaintiff has not timely preserved its rights by filing its own complaint or motion, the threat of additional

Class Action, 95 Colum. L. Rev. 1343, 1352 n.25 (1995) (“[I]nstitutional investors are likely to continue to prefer passivity [in securities litigation] for extrinsic and reputational reasons[.]”); James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 Stan. L. Rev. 411, 413 (2005) (finding that less than 30 percent of institutional investors file claims in class action settlements).

liability will be extinguished. The defendant thus can evaluate its liability and get all the relevant parties in the negotiating room to settle the entire matter.

The same is not true under a regime that would permit institutional investors to delay filing complaints or intervention motions until after class certification, and potentially well after the repose period. In any case where there is the potential for large solo claims that would be pursued by opt-outs, any rational defendant would need to be fearful that a settlement negotiated with class counsel before class certification – and before those opt-outs are forced to come out of the woodwork – would set merely a floor but not a ceiling for resolution of subsequent cases. Opt-out settlements frequently result in increased recoveries for opt-out plaintiffs as compared to class settlements. Nicholas & Berg, *supra*, at 1. Thus, as commentators have confirmed, the fear of “[m]ore opt-outs . . . means that the class action settlement process will be slower and more difficult, because the defendant does not achieve finality. Lacking finality, defendants may be slower to settle, fearing that the settlement may trigger a wave of opt-outs[.]” Coffee, *Litigation, supra*, at 328; *see also* Perino, *supra*, at 126 (“preserving opt-out rights may reduce the prospects for negotiated class action settlements because it may be difficult for defendants to obtain global peace”). Indeed, some commentators have suggested that uncertainty concerning large opt-outs causes defendants to reduce the size of class settlements. *See, e.g.*, David Rosenberg, *Mandatory-Litigation*

Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 871 (2002) (a “[b]ack-end opt-out” harms individuals that remain in the class “by reducing the defendant’s fixed class-settlement offer by an amount equal to the expected value of the” opt-out).⁷

3. Other Absent Class Members Would Be Prejudiced

Applying *American Pipe* to a statute of repose could prejudice the vast majority of absent class members that lack the means to pursue an individual claim – by unwittingly forcing those investors, whose interests are at the very “core” of Rule 23, *see infra* at 13, to subsidize the much larger recoveries received by sophisticated investors with the resources to strategically file individual actions. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.35 (1999) (recognizing that limiting opt-outs may be desirable “to prevent claimants” that “might attempt to maintain costly individual actions” from “unfairly diminishing the eventual recovery of other class members”) (quoting *In re Drexel Burnham Lambert Grp.*,

⁷ See also Jon Romberg, *The Hybrid Class Action as Judicial Spork: Managing Individual Rights in a Stew of Common Wrong*, 39 J. Marshall L. Rev. 231, 245 (2006) (defendants are willing to provide a “significant premium” to receive “global peace” through a class action settlement and “absent class members will likely be harmed when opt-out is permitted”); Lesley Frieder Wolf, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 Colum. L. Rev. 1847, 1875 (2000) (“Companies may not offer equally desirable settlements [to the class] because they face the frightening possibility of an inordinate and unpredictable number of separate suits.”); Perino, *supra*, at 136 (“[P]roviding an unrestrained right to opt out of a class action . . . may impose significant costs on other claimants[.]”).

Inc., 960 F.2d 285, 292 (2d Cir. 1992)).⁸ Applying the statute of repose as written thus minimizes prejudicial opportunism by institutional investors, as reflected here.

II. APPLYING *AMERICAN PIPE* TO A STATUTE OF REPOSE IS NOT NECESSARY TO SERVE THE PURPOSES OF RULE 23

Application of *American Pipe* to the statute of repose would not further – but rather would retard – the purposes Rule 23 is intended to serve. Appellees have argued that if *American Pipe* is not applied to the statute of repose that would “deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” 414 U.S. at 553. But, not only have those interests decreased in importance in the 42 years since

⁸ See also David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 Geo. Wash. L. Rev. 542, 571-72 (2011) (“[A]n opt-out right creates the possibility of strategic behavior, in which some parties who stand to gain from class treatment nonetheless opt out to extract rents from members remaining in the class.”); Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 133 (2006) (“[C]lass members and class counsel effectively subsidize opt-outs, who are able to free-ride on the litigation work of class counsel, are relieved of litigating often difficult class certification issues, and only have to prove their own damages.”); Perino, *supra*, at 105 (“In effect, small claimants may subsidize large claimants’ individual suits and similarly situated plaintiffs may receive substantially different recoveries” because opt-outs are able to “benefit from . . . class discovery or trial preparation that may be more extensive than any individual litigant could afford on its own.”); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. Rev. 695, 705-06 (1989) (class actions “remov[e] the costs and risks of trying common questions” for opt-outs, allowing their actions to “be subsidized by the public, particularly by the segment composed of the rest of the victim class”).

American Pipe was decided, but they also do not support extending *American Pipe* to statutes of repose.

A. Tolling a Statute of Repose Would Not Further the “Core” Purpose of Rule 23

Since *American Pipe*, the Supreme Court has recognized that “[t]he 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[.]” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Refusing to apply *American Pipe* to the statute of repose would not undermine that policy or achieve a harsh result. The investor whose “small recover[y]” would not provide sufficient incentive to “bring a solo action” before a class action is filed would not have the incentive to do so after a class certification motion is denied, and would not benefit from *American Pipe*. Rather, *American Pipe* benefits primarily those persons whose potential recovery is sufficiently great to provide an incentive to bring a solo action if class certification is denied, as reflected in the fact that Plaintiffs here (large investment companies) are the only opt-outs from the Vytorin Class Actions to have brought their own lawsuits against Merck and Schering.

As both experience and logic demonstrate, if an investor would have the wherewithal and interest to file a solo action if class certification is denied, it would have the same wherewithal and interest to file a complaint – here, a mere copy of the class action complaints filed in 2008 – or motion to intervene to

preserve its rights after a class action complaint is filed but before class certification has been decided. *Cf. Shuttles*, 472 U.S. at 813 (“If . . . the plaintiff’s claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to ‘opt out.’”). Thus, applying the statute of repose by its terms would merely require sophisticated institutional investors who have the ability to file their own actions (without a need for tolling) to file those actions within five years, and give the defendants the certainty and finality the statute of repose was intended to achieve. *See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) (“Given the sophisticated, well-counseled litigants involved in securities fraud class actions,” refusing to toll the statute of repose is unlikely to “burden the courts and disrupt the functioning of class action litigation.”).

Requiring an institutional investor to file a complaint or motion to intervene before class certification is decided also would not prejudice that investor if class certification were granted. Such an action may not constitute a final and binding decision to opt-out from the class action. *See Brown v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, Civ. Action No. 99-20593 2002, U.S. Dist. LEXIS 12139, at *21-22 (E.D. Pa. Jan. 16, 2002) (“The pendency of an individual action does not excuse class members from filing valid requests for

exclusion.”); *Richards v. Wyeth (In re Diet Drugs Prods. Liab. Litig.)*, Civ. Action No. 05-25157, 2009 U.S. Dist. LEXIS 100028, at *10 (E.D. Pa. Oct. 23, 2009) (same). Moreover, in the securities class action context (unlike the antitrust context of *American Pipe*), class action plaintiffs are required by the PSLRA to publish – within “20 days after the date on which the complaint is filed” and “in a widely circulated national business-oriented publication or wire service” – “a notice advising members of the purported plaintiff class of the pendency of the action, the claims asserted therein, and the purported class period.” See 15 U.S.C. § 77z-1(a)(3)(A)(i). This “put[s] potential plaintiffs on notice so that they can seek to become lead plaintiffs” or intervene. *In re Lucent Techs. Inc. Sec. Litig.*, 221 F. Supp. 2d 472, 485 (D.N.J. 2001). Furthermore, after filing a complaint, any ongoing burden on that plaintiff would be reduced – if not eliminated – by case-management techniques that have been developed since *American Pipe* was decided. See *infra* at 17-18.

B. Declining to Apply *American Pipe* Would Not Result in a “Needless” Multiplicity of Actions or Defeat Judicial Efficiency

There is no basis to the concern that applying *American Pipe* to a statute of repose would lead to an onslaught of small individual claims. Statistics from the Administrative Office of the United States Courts show that private securities actions represent a significantly smaller proportion of the federal docket than many other types of cases. See United States Courts, *Federal Judicial*

Caseload Statistics, <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics> (last visited Apr. 8, 2016); Figure 1. The number of private actions asserting securities claims has also decreased substantially over the past decade – from 2,751 in 2004 to 975 in 2013. *Id.* Notably, the number of securities class actions has remained largely constant over the same time. *See* Cornerstone Research, *Securities Class Action Filings: 2013 Year in Review*, at 3 (Jan. 28, 2014). This demonstrates that the decline in total securities cases has been driven by a large drop in individual actions over the last decade – further undercutting the contention that investors will flood federal courts with such actions. *See* Figure 2.

In 2013, a prominent research firm, Cornerstone Research, released a comprehensive study of opt-out cases from securities class action settlements. It found that opt-out cases were filed in only three percent of the settlements reached between 1996 and 2011. *See* Amir Rozen, Joshua B. Schaeffer & Christopher Harris, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, 2 (2013).⁹ Similarly, a review of securities class actions filed in the Second Circuit since that court’s holding in *IndyMac* that *American Pipe* tolling

⁹ Indeed, the study reported that “[t]he most frequently observed opt-out plaintiffs are pension funds, followed by other types of asset management companies.” *Id.* at 1. These well-financed investors need this Court’s protection the least.

does not apply to a statute of repose demonstrates that declining to toll a statute of repose does not lead to a flood of individual actions: only three out of 140 class actions filed in the Second Circuit since *IndyMac* have generated opt-out litigation. *See Guevoura Fund Ltd., et al. v. Sillerman, et al.*, No. 15-cv-07192 (CM) (S.D.N.Y. filed Sept. 11, 2015); *Ngo v. Petroleo Brasileiro S.A. – Petrobras*, No. 14-cv-09760 (JSR) (S.D.N.Y. filed Dec. 10, 2014); *In re Sanofi Sec. Litig.*, No. 13-cv-08806 (PAE) (S.D.N.Y. filed Dec. 11, 2013); Stanford Law School, *Filings Database*, Securities Class Action Clearinghouse, <http://securities.stanford.edu/filings.html> (last visited Apr. 8, 2016).

Finally, since *American Pipe* was decided, courts have developed mechanisms to reduce the cost and burden of “protective motions to intervene” on the parties and the Court system. As the authors of the *Manual for Complex Litigation* (“Manual”) have recognized, “[g]iven the federal courts’ growing dockets and the increasing complexity, cost, and time demands of litigation, judicial control through effective management techniques and practices is now considered imperative.” Manual (Third) Preface (1995). These include:

- Staying individual actions during the pendency of motion practice in related class actions, *e.g.*, Pretrial Order No. 5, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017 (LAK) (S.D.N.Y. Mar. 5, 2009), ECF No. 25;
- Agreeing not to re-brief arguments resolved in the class action and treating them as if raised in the individual actions, so they are preserved for appeal, *e.g.*, Stipulation & Order, *Wolf Opportunity Fund Ltd., et. al., v. McKinnell et. al.*, No. 12-cv-08379 (LTS) (S.D.N.Y. Jan. 16, 2013), ECF No. 26;

- Appointing liaison counsel to coordinate individual and class action discovery, including by serving shared discovery requests and cross-noticing depositions, *e.g.*, Pretrial Order No. 61, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017 (LAK) (S.D.N.Y. Jan. 23, 2013), ECF No. 1130;
- Postponing initial disclosures, *e.g.*, Manual (Fourth) § 40.21 (2004);
- Staying counterclaims and staging discovery, *e.g.*, Manual (Fourth) §§ 31.6, 40.53 (2004);
- Creating shared document repositories, *e.g.*, Pretrial Order No. 56, *In re Lehman Bros. Sec. & ERISA Litig.*, No. 09-md-02017 (LAK) (S.D.N.Y. Jan. 17, 2013), ECF No. 1125;
- Permitting document productions and deposition testimony to be admissible in related actions, *e.g.*, Stipulation and Order Regarding Use of Prior Deposition Testimony, *In re Merck & Co., Inc. Sec., Derivative & “ERISA” Litig.*, No. 05-cv-01151 (SRC) (D.N.J. Mar. 12, 2010), ECF No. 248; and
- Establishing a procedure for individual plaintiffs to pursue additional discovery that the lead plaintiffs in the class action choose not to pursue, *e.g.*, Manual (Fourth) § 40.22 (2004).

These mechanisms can be used only if the relevant parties surface within the repose period. They are of no value under a rule that would permit putative plaintiffs to defer filing after discovery in the class proceeding is well underway. Indeed, extension of *American Pipe* to a statute of repose would – if anything – disserve judicial efficiency, including by preventing the consolidation necessary to apply the case management techniques described above. *See, e.g.*, Order Coordinating Pre-Trial Matters, *In re Petrobras Sec. Litig.*, No. 14-cv-09662 (JSR) (S.D.N.Y. Aug. 3, 2015), ECF No. 195 (combining class action with individual actions for a single trial before a single jury).

CONCLUSION

For the foregoing reasons, SIFMA respectfully submits that the decision of the District Court should be reversed.

Dated: New York, N.Y.
April 13, 2016

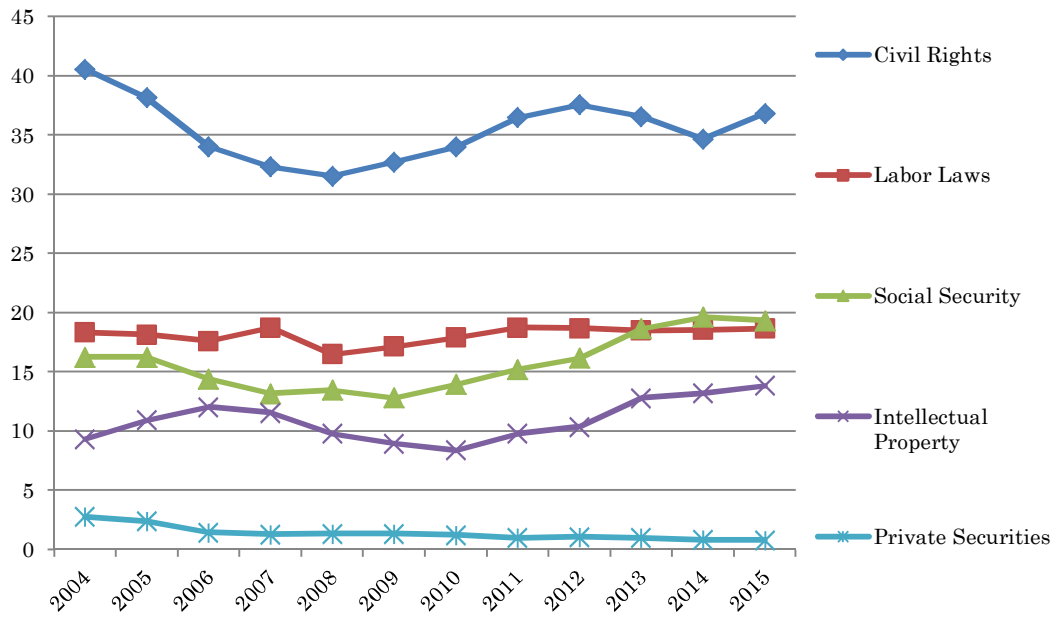
Respectfully submitted,
CLEARY GOTTlieb STEEN & HAMILTON LLP
By: /s/ Lewis J. Liman
Lewis J. Liman
Jared M. Gerber

One Liberty Plaza
New York, New York 10006
(212) 225-2000
Counsel for *Amicus Curiae* the Securities
Industry and Financial Markets Association

Of Counsel:
Ira D. Hammerman
Kevin M. Carroll
Securities Industry and Financial
Markets Association
1399 New York Avenue, N.W.
Washington, D.C. 20005

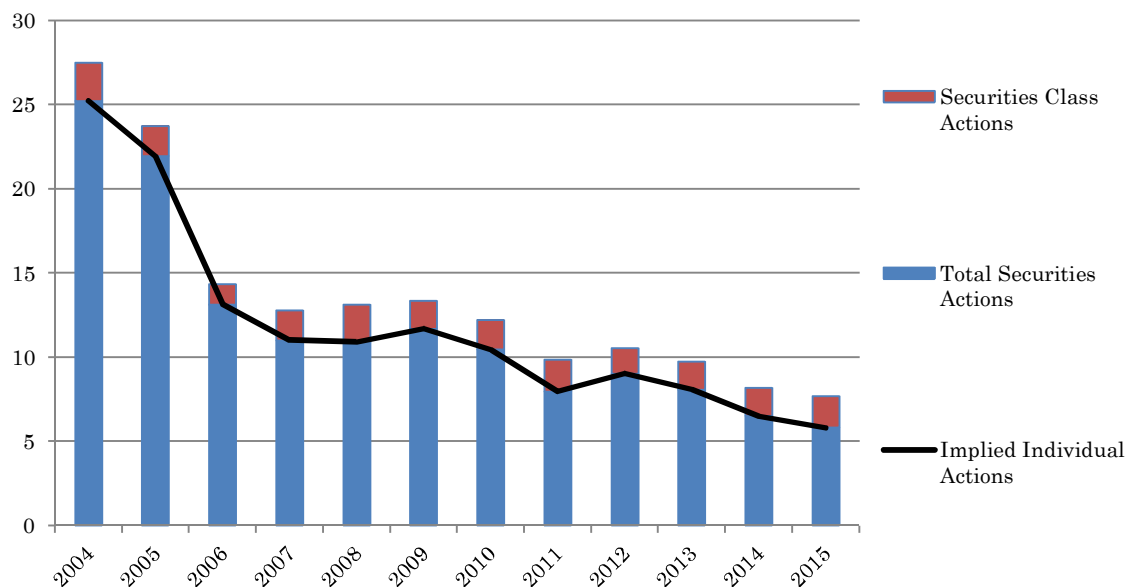
APPENDIX

Figure 1. Civil Cases Commenced by Nature of Suit (in thousands), 2004-2015



Data sourced from United States Courts, *supra* 16.

Figure 2. Implied Individual Securities Actions Commenced (in hundreds), 2004-2015



Sources: Federal Judicial Caseload Statistics and Stanford Law School, Securities Class Action Clearinghouse.

Data sourced from United States Courts, *supra* 16; Stanford Law School, Securities Class Action Clearinghouse, <http://securities.stanford.edu/index.html> (last visited Apr. 8, 2016).

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE
OF APPELLATE PROCEDURE 32(a)(7)(B)**

I, Lewis J. Liman, counsel for amicus curiae, certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4815 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

In preparing this certificate, I relied on the word count program in Microsoft Word 2010.

Dated: April 13, 2016

/s/ Lewis J. Liman
Lewis J. Liman

**CERTIFICATE OF COMPLIANCE WITH THIRD CIRCUIT
LOCAL APPELLATE RULE 31.1(c)**

I, Lewis J. Liman, counsel for amicus curiae, certify that the text of the electronic version of this brief filed on the CM/ECF system is identical to the text of the paper copies that will be sent by Federal Express overnight delivery to the Clerk of the Court on April 13, 2016.

I, Lewis J. Liman, counsel for amicus curiae, further certify that a virus detection program has been run on the file using Kaspersky Endpoint Security 10, Version 10.2.1.23 (a), and that no virus was detected by that program.

Dated: April 13, 2016

/s/ Lewis J. Liman
Lewis J. Liman

**CERTIFICATE OF BAR MEMBERSHIP PURSUANT TO
THIRD CIRCUIT LOCAL APPELLATE RULE 46.1(e)**

I, Lewis J. Liman, counsel for amicus curiae, certify that I am a
member in good standing of the bar of this Court.

Dated: April 13, 2016

/s/ Lewis J. Liman
Lewis J. Liman

CERTIFICATE OF SERVICE

I, Lewis J. Liman, counsel for amicus curiae, certify that on April 13, 2016, I caused a true and correct copy of the foregoing Brief of the Securities Industry and Financial Markets Association as *Amicus Curiae* in Support of Appellants, Urging Reversal to be served by filing on the appellate CM/ECF system with the Clerk of the Court. All counsel of record in this case are registered CM/ECF users.

Dated: April 13, 2016

/s/ Lewis J. Liman
Lewis J. Liman