

United States Court Of Appeals
for the Ninth Circuit

WESTERN AND SOUTHERN LIFE INSURANCE COMPANY; WESTERN-
SOUTHERN LIFE ASSURANCE COMPANY; COLUMBUS LIFE
INSURANCE COMPANY; INTEGRITY LIFE INSURANCE COMPANY; and
FORT WASHINGTON INVESTMENT ADVISORS, INC., on behalf of FORT
WASHINGTON ACTIVE FIXED INCOME, LLC,

Plaintiffs-Appellants,

— v. —

COUNTRYWIDE FINANCIAL CORP.; COUNTRYWIDE HOME LOANS,
INC.; COUNTRYWIDE CAPITAL MARKETS LLC; COUNTRYWIDE
SECURITIES CORP.; CWALT, INC.; CWABS, INC.; CWMBS, INC.; CWHEQ,
INC.; BANK OF AMERICA CORP.; BAC HOME LOANS SERVICING, LP; NB
HOLDINGS CORP.; ANGELO MOZILO; DAVID SAMBOL; ERIC SIERACKI;
RANJIT KRIPALANI; STANFORD KURLAND; DAVID A. SPECTOR; N.
JOSHUA ADLER; JENNIFER SANDEFUR; and BANK OF AMERICA, N.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-
APPELLEES AND IN SUPPORT OF AFFIRMANCE**

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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.

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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.¹ SIFMA’s members include the principal securities firms and banks involved in the underwriting of securities of United States issuers, as well as asset managers involved in the purchase of securities in United States issuances. As such, its members frequently are involved in, and are targets of, securities class action litigation. As an organization, SIFMA has interests in fostering certainty and efficiency, as well as fairness, in the capital-raising process. Those interests are furthered by rules, such as Section 13 of the Securities Act, that require purchasers in public offerings to prosecute claims promptly if they were damaged by a misstatement or omission in an offering document, and provide repose to the participants in public offerings if claims are not promptly prosecuted. They are also furthered by the establishment of clear rules regarding the actions that must be taken to preserve a claim and the time after which a participant is

¹ SIFMA hereby certifies that no counsel for a party authored this brief in whole or in part; no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and 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. All parties have consented to the filing of this brief.

entitled to repose. SIFMA routinely appears as *amicus curiae* in appeals that implicate these concerns.

Whether the filing of a putative class action lawsuit by purchasers in one offering can toll the statute of limitations for purchasers in another, and whether such a filing can toll the statute of repose for any absent plaintiff, raise issues important to the administration of the federal securities laws and to Rule 23. The positions advocated by Appellants would undermine principles that support the effective and efficient functioning of the securities markets, increase the costs and risks of capital formation, invite the filing of overbroad lawsuits, and leave to the pens of plaintiffs and their counsel—rather than Congress—the time periods in which market participants are subject to litigation under the securities laws.

PRELIMINARY STATEMENT

This appeal raises three questions critical to the securities industry and the market as a whole: (1) whether claims that Congress mandated could “in no event” be brought after three years can nevertheless be brought months or years later under the *American Pipe* tolling doctrine; (2) whether the filing of a class action lawsuit by a plaintiff who lacks standing to prosecute a claim tolls the statutes of limitations and repose for purchasers of other securities—a group whose membership does not include the named plaintiff; and (3) whether plaintiffs who purchased one security and therefore may themselves obtain recovery only based

upon a wrong with respect to the sale of such security nonetheless possess standing to assert claims on behalf of persons who purchased other securities. SIFMA—whose members are frequent targets of securities litigation who experience first-hand the dramatic costs imposed by the sweeping rules advocated by Appellants—respectfully submits that the answer to all three questions is (and should be) “no.”

First, the *American Pipe* tolling doctrine applies only to statutes of limitations; extending it to statutes of repose—where Congress has fixed a clear, outside date within which a claim must be brought—would defeat Congress’s objective in providing repose and add to the costs of the capital formation process by extending the life of contingent liabilities. At the same time, declining to toll a statute of repose would not be unfair. The *American Pipe* rule benefits only litigants who would have the motivation and ability to prosecute an individual action if class certification were denied. But, by definition, those very same investors—if they were to file an individual action after a class certification ruling—could file an action to give the defendant notice and preserve their rights before the class certification ruling. Particularly in light of modern case management approaches, such placeholders would not produce inefficiency.

Second, tolling claims that named plaintiffs lacked standing to assert would be inconsistent with *American Pipe* and breed abuse in securities litigation. *American Pipe* held that the filing of a class action by named plaintiffs with

standing would toll the statute of limitations as to persons who would have been parties had a class been certified under Rule 23. Because the decision whether to grant class certification rests in the district court's discretion and is frequently determined by facts that only appear after the filing of a complaint, any contrary rule would have led to "needless" and "duplicat[ive]" filings by persons who would opt to remain part of the class if the court were to exercise that discretion in favor of certification but who are forced to file claims for fear the court will choose not to so exercise its discretion. When the named plaintiffs lack standing, by contrast, the filings by the absent class members are not "needless"—they will ultimately be needed if a claim is to be prosecuted—and the question whether the named plaintiff has standing is a matter of law. Indeed, in the absence of standing, there is no "case" and therefore no Article III power for pleadings filed in that case to affect substantive rights. Moreover, tolling in the absence of standing would invite abuse in securities litigation, incentivizing plaintiffs to file placeholder cases for claims the named plaintiffs lack standing to prosecute, in the hope of belatedly finding investors who might agree to champion those claims—thereby dramatically increasing the costs of the capital-raising process.

Third, named plaintiffs who did not invest in a security are not injured in connection with the sale of that security and therefore lack standing to assert claims on behalf of persons who did purchase that security. This conclusion is

compelled by Article III principles and controlling precedent, as well as the text and purposes of the securities laws. Appellants’ contrary rule—which would permit named plaintiffs (and their lawyers) to purport to seize claims in which they have no cognizable interest and wield them in litigation—would discourage plaintiffs with standing from stepping forward on a timely basis, foster the very abusive, lawyer-driven litigation that Congress attempted to prevent with the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), exponentially increase the size and costs of securities litigation, and intensify the hydraulic pressure on defendants to settle such litigation regardless of the merits, to the detriment of the investing public and the national economy. Appellants’ rule would also increase uncertainty concerning the scope of securities class actions, delaying the resolution of such litigation and discouraging participation in the capital formation process—at considerable expense to defendants, their shareholders, and the judicial and financial systems.

ARGUMENT

I. SECTION 13’S STATUTE OF REPOSE IS NOT SUBJECT TO *AMERICAN PIPE* TOLLING

A. Applying *American Pipe* To Section 13’s Repose Period Would Defeat Congress’s Objectives and Impede Capital Formation

By its terms, and for the reasons stated in the brief of Countrywide Financial Corporation, *American Pipe* applies only to toll statutes of limitations; it

does not apply to statutes of repose. The Supreme Court in *American Pipe* repeatedly described the rule it was applying as one of tolling. It stated: “We hold that in this posture . . . the commencement of the original class suit tolls the running of the statute for all purported members of the class.” *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-53 (1974). And, the Supreme Court held in *Lampf v. Gilbertson*, 501 U.S. 350, 363 (1991), that Section 13’s three-year limit is a statute of repose to which “tolling principles do not apply.” It follows that *American Pipe* does not toll the statute of repose.

The distinction between Section 13’s statute of limitations and its statute of repose furthers the salutary purposes of the securities laws. It is well-established that there is “a crucial distinction in the law between ‘statutes of limitations’ and ‘statutes of repose.’” *Munoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003). As this Court recognized in *Munoz*, “[a] statute of repose is a fixed, statutory cutoff date, usually independent of any variable.” *Id.* Statutes of repose thus seek to provide “certainty and finality as to the time within which [defendants] could be subjected to a liability claim.” *Marchesani v. Pellerin-Milnor Corp.*, 269 F.3d 481, 489 (5th Cir. 2001). They reflect a legislative judgment that, after an objectively determinable period of time, the “economic best interests of the public as a whole” are better served by providing defendants with a right to be free from additional litigation than by allowing plaintiffs to pursue even meritorious claims.

First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989). Whereas “a statute of limitations does not take away rights” and instead “merely precludes the plaintiff from proceeding,” a statute of repose “has a more substantive effect” and “can be said to destroy the right itself.”

Underwood Cotton Co. v. Hyundai Merch. Marine (Am.), Inc., 288 F.3d 405, 408 (9th Cir. 2002).

Those are precisely the objectives Congress intended to achieve through Section 13’s repose period. That statute provides—in unambiguous terms—that “[i]n no event shall any such action be brought to enforce a liability created under [Section 11] . . . more than three years after the security was bona fide offered to the public, or under [Section 12(a)(2)] more than three years after the sale.” 15 U.S.C. § 77m (emphasis added). Congress intended to reduce “uncertain[ty]” for defendants by ensuring that all suits would “be brought only within 3 years.” 78 Cong. Rec. 10,186 (1934).

In requiring Securities Act claims to be brought within one year of discovery and “in no event” more than three years after the relevant offering or sale, Congress expressed fear that, with any longer periods, “lingering liabilities would disrupt normal business and facilitate false claims.” *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). Indeed, as originally enacted, these

periods were longer. *Id.* In the face of evidence that longer periods impeded the capital formation process, Congress shortened them to what they are today. *Id.*

Appellants' proposed extension of *American Pipe* to Section 13's statute of repose would undermine and conflict with each of these objectives. Rather than providing certainty and finality within a fixed period of time, it would permit disputes over claims to be deferred indefinitely until a class certification motion is resolved. Under Rule 23, a class certification motion need only be made at "an early practicable time"; it need not be made immediately and will not be decided immediately. Fed. R. Civ. P. 23. The Advisory Committee has recognized that there are "many valid reasons that may justify deferring the initial certification decision." Fed R. Civ. P. 23 advisory committee's note. In the securities context, those circumstances include publishing notice of the action, appointing lead plaintiffs, filing a consolidated complaint, and resolving motions to dismiss. If the complaint survives, months (or years) of discovery will follow, so that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23, and "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).²

² According to a recent study, the median time for resolution of class certification motions in securities class actions filed between 2000 and 2012 was 2.3 years, and more than 30% of class certification decisions came more than three

Creating an exception to the statute of repose would also mean that contingent liabilities would burden corporations and other securities litigation defendants for open-ended periods, fostering uncertainty, inflating reserves and increasing the cost of capital. And it would mean that defendants may not learn until months or years after the expiration of the repose period for an offering which of the many institutional investors who purchased securities in that offering were intending to bear the cost and burden of litigation. The defendant would be kept in the dark as to which purchasers intended to bring suit, and which not, which purchasers it would have to defend against, and with which purchasers it could assume it was at peace.

These are real costs. Opt-out suits are brought by institutional investors with large amounts at stake and the resources to pursue litigation. See Amir Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements*, at 3 (Nov. 19, 2013) (“Cornerstone Opt-Out Study”). As experience shows, such actions can impose significant liability on top of class actions. *Id.* at 2-4; see also John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 311-13 (2010). Yet, if the statute of repose were tolled, each of these would-be plaintiffs could wait until

years after the initial complaint was filed. See Renzo Comolli et al., NERA Economic Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review*, at 21 (Jan. 29, 2013).

after the resolution of class certification before informing the defendants of their decision to file suit, thereby significantly extending the timeframe in which market participants will face the threat of contingent liabilities.

Appellants' proposed rule would therefore eviscerate the certainty and finality statutes of repose confer, by replacing a fixed period that has an objectively determinable end date with an open-ended one dictated by litigants and by the caseload of the district court. Such costs would necessarily have an impact on the economy and the expense of the capital formation process.

B. Tolling the Statute of Repose Would Have Other Pernicious Results

As a practical matter, extending *American Pipe* to Section 13's statute of repose would also have other pernicious effects and be antithetical to the orderly and efficient administration of justice.

First, tolling Section 13's statute of repose would inevitably encourage institutional investors to postpone filing timely actions. By delaying, those investors can let class counsel do the hard (and expensive) work of investigating a complaint and conducting discovery, benefitting from that work if it is helpful with little consequence if it is not, i.e., preserving for themselves the right to take duplicative discovery if they do not like the evidence uncovered by the class. At the same time, those institutional investors could delay discovery of themselves—depriving defendants of the ability to record fresh recollections from

the parties who frequently have the most significant claims. Absent class members are generally not considered “parties” for discovery purposes, *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1309 (9th Cir. 1982), but even if they were, the defendant would not know which institutional investors—many of whom may still be shareholders of the company—intended to sue, and thus were an important subject of discovery, and which did not.

Second, extending *American Pipe* to statutes of repose would also inevitably make settlement at an early stage more difficult. When the statute of repose is permitted to run its course without interruption or tolling, all parties—the defendant, lead plaintiff, and lead counsel—are able to determine (within a defined and finite period of time) the size of a dispute and the extent of the parties’ exposure. They will know whom lead counsel represents and for whom it can exercise settlement authority, and who has preserved the right to pursue individual claims. The defendant thus can evaluate its liability, and resolve it. On the other hand, permitting institutional investors to delay filing complaints until after class certification makes class settlements harder to achieve. Defendants would not know until after class certification who has the intent to file a solo action and who does not. In any case where there is the potential for large opt-outs, any rational defendant would be fearful that a settlement negotiated with class counsel before

class certification—and before those opt-outs are forced to come out of the shadows—would merely set a floor for future settlements.

Third, 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 12-13, to subsidize the much larger recoveries received by sophisticated investors with the resources to strategically file individual actions. *See* Cornerstone Opt-Out Study at 5; *cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 860 n.35 (1999) (recognizing that opt-outs who “maintain costly individual actions” can “unfairly diminish[] the eventual recovery of other class members”).

C. Application of *American Pipe* to the Statute of Repose is Not Necessary to Serve the Purposes of Rule 23

Even were courts in the business of re-writing legislation, there is no need to do so here. Rule 23 is not primarily designed to achieve judicial efficiency or to avoid the filing of multiple motions. Rather, the Supreme Court has stated 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 prosecuting his or her rights.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).³

Interpreting “in no event” to mean what it says would not undermine that policy. Investors whose “small recover[y]” does not provide sufficient incentive to “bring a solo action” do not benefit from *American Pipe*. If such an investor does not have the resources to file a solo placeholder complaint prior to class certification, she will not suddenly have those resources when class certification is denied. Rather, *American Pipe* generally benefits those entities who have the resources and interest to bring a solo action after certification is denied. But, if those investors can file after certification is denied, they can also make a filing before class certification. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (“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.”). Thus, fidelity to congressional intent would not achieve a harsh result: it would merely require institutional investors who have the ability to file their own actions to do so within three years. *See, e.g., Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) (rejecting argument that declining to toll Section 13’s statute of repose would

³ *Accord Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091 (9th Cir. 2011) (“the aggregation of similar, small, but otherwise doomed claims” is “Rule 23’s core concern”).

“disrupt the functioning of class action litigation” because, “[g]iven the sophisticated, well-counseled litigants” in securities actions, “it is not apparent that such adverse consequences will inevitably follow”). Indeed, filing such a lawsuit does not disqualify those investors from enjoying the benefit of a class action if a class is certified: the filing of a solo suit does not preclude an investor from electing to participate in the class action. *See Bowman v. UBS Fin. Servs., Inc.*, 2007 WL 1456037, at *2 (N.D. Cal. May 17, 2007).

Declining to extend *American Pipe* to the statute of repose also would not impair judicial efficiency. In the four decades since *American Pipe* was decided, courts have developed mechanisms to reduce the cost and burden of “protective motions to intervene.” A wide range of case management techniques exist, including deferring answers and dispositive motion practice in individual actions, appointing “liaison counsel” for individual plaintiffs, providing individual plaintiffs with access to discovery from the class action, permitting (but not requiring) counsel from the individual actions to participate in depositions, and allowing all counsel to participate in settlement discussions. *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217 (9th Cir. 2006).

If anything, extending *American Pipe* to the statute of repose would disserve judicial efficiency, including by preventing the consolidation necessary to apply the case management techniques described above. Such a rule would create

incentives for absent class members to sit on the sidelines until a class certification decision, only to impose duplicative discovery and motion practice after that decision. The expense such cases impose on the defendant can lead to the same undue need to settle even questionable claims that led to the adoption of the PSLRA in the first place. *See infra* at 27.

II. CLASS ACTION CLAIMS ASSERTED BY PLAINTIFFS WITHOUT STANDING DO NOT TOLL ABSENT CLASS MEMBERS' CLAIMS

A. Tolling in the Absence of Standing Would Be Inconsistent With *American Pipe*

The District Court held that “*American Pipe* will only toll a claim that the named plaintiff had standing to assert.” ER42. That ruling was correct and is supported by both the language and the logic of *American Pipe* itself.

American Pipe held that when “a named plaintiff who is found to be representative of a class commences a suit,” the filing of the class action “suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” 414 U.S. at 554-55. The Court went out of its way to emphasize that the named plaintiff in *American Pipe* had claims that were “typical of the claims . . . of the class and would fairly and adequately protect the interests of the class,” and that class certification was denied based on Rule 23 factors and not for “lack of standing of the representative.” *Id.* at 550-51, 553-55. Indeed, the concurrence

explicitly noted that tolling “must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.” *Id.* at 561 (Blackmun, J., concurring). It would be entirely inconsistent with *American Pipe* itself to hold that the tolling rule applies not only when a named plaintiff with standing files a class action complaint but also when a plaintiff without standing files such a complaint.

Not only is the language of *American Pipe* inconsistent with its application in a case where the named plaintiff lacks standing, but so too is its logic. The *American Pipe* Court based its ruling on the fact that the named plaintiff had standing and was representative of the putative class and that class certification was denied only on the basis of the discretionary application of Rule 23 principles. That ruling, and the rule established by the Court, makes sense in the context of Rule 23. The decision whether or not to certify a class under Rule 23 is committed to the district court’s discretion and may be based on facts that arise after the filing of the complaint. It is not a matter of law, reviewed de novo. *See, e.g., Yokoyama v. Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010) (applying abuse of discretion standard of review to class certification decision and stating “the ultimate decision as to whether or not to certify the class, must, at least in any non-frivolous putative class action, involve a significant

element of discretion”). Different courts can come to different results on precisely the same facts. *See N.J. Carpenters Health Fund v. RALI Series 2006-Q01 Trust*, 477 Fed. App’x 809, 814 (2d Cir. 2012) (summary order) (noting that different judges have reached different certification decisions in MBS actions and stating “both grants and denials of certification in MBS litigation may fall within the range of a district court’s discretion”). No putative class member can determine for certain in advance whether the Court will decide, for example, that the class is sufficiently numerous that joinder of all members is impracticable or that a class action is superior to all other methods for fairly and efficiently adjudicating the controversy. Thus, it makes sense that the filing of a putative class action by a party with standing would suspend the running of the statute of limitations until the court—in its discretion—determined whether Rule 23 was satisfied. For the Court to have held otherwise would have required absent plaintiffs to take an “extraordinary” action inimical to and “[in]consistent with federal class action procedure”: filing separate lawsuits or motions for intervention that—in the event the class was certified—would have been wholly unnecessary. 414 U.S. at 554; *see also Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012) (“a litigant seeking equitable tolling” must establish “that he has been pursuing his rights diligently, and . . . some extraordinary circumstances stood in his way”).

By contrast, unlike class certification, standing is a “threshold *jurisdictional* question” that is decided as a matter of law. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998) (emphasis added). There is no extraordinary obstacle preventing an absent class member from determining that a named plaintiff who purports to represent him lacks standing. The absent class member can exercise the same judgment that all persons are required to do when determining their rights; in most instances, that determination can be made from the face of the complaint, which in PSLRA cases must include a certification of the named plaintiff’s purchases and sales and is publicized nationwide. *See* 15 U.S.C. § 77z-1(a). If there are any questions about standing, the PSLRA encourages those questions to be raised early and publicly. *Id.* If no PSLRA certification is filed or there appears to be a standing defect, there is no obstacle to a putative class member contacting the named plaintiff and asking about her standing and making its own legal judgment, or filing his own motion to be lead plaintiff. And, if—in the face of such questions—the absent class member files a competing motion or opt-out action, that is not an action that is to be decried. It is precisely the objective that the law encourages. *Id.*; *see also In re Netflix, Inc. Sec. Litig.*, 2012 WL 1496171, at *5 (N.D. Cal. Apr. 27, 2012) (considering standing during lead plaintiff appointment).

Standing also goes to the power of the tribunal. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co.*, 523 U.S. at 94. A suit brought by named plaintiffs without standing is therefore not a juridical case, and can have no legal effect. *See Walters v. Edgar*, 163 F.3d 430, 432-33 (7th Cir. 1998) (Posner, J.) (where class plaintiffs “never had standing to bring this suit . . . federal jurisdiction never attached” and “there was no case” for absent plaintiffs to join).⁴ As compelled by this principle, a class action whose named plaintiffs lack standing to assert certain claims does not toll the limitations periods for those claims. Appellants’ contrary argument confers power on a pleading to affect substantive rights—even where the court in which it is filed has no power to adjudicate that claim because the plaintiff has no standing to pursue it.

B. Tolling in the Absence of Standing Would Breed Abuse in Securities Litigation

Applying tolling where named plaintiffs lack standing would also breed securities litigation abuse, by encouraging persons who are not part of the class (more pointedly, their attorneys) to assert the broadest possible claims so as

⁴ There is a similar lack of judicial power over *claims* that the named plaintiffs lack standing to assert. *See IndyMac*, 721 F.3d at 111. Thus, judicial power cannot be conferred over a claim asserted by a plaintiff who only has standing to bring *other* claims.

to preserve them for others. *See Cunningham v. Ins. Co. of N. Am.*, 530 A.2d 407, 410 (Pa. 1987). This would exacerbate a problem that is already of dramatic proportions. The stakes at issue in securities litigation, including litigation concerning MBS offerings in particular, are staggering. Financial institutions, including those with only limited involvement in the mortgage market, have faced—and continue to face—scores of lawsuits concerning MBS offerings worth tens or hundreds of billions of dollars. Creating a perverse incentive for class plaintiffs and their lawyers to assert even broader claims would therefore unfairly enhance a class action’s settlement value by artificially increasing its *in terrorem* leverage—a concern that is particularly acute in securities cases, where class actions “present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006).

At the same time that it would increase the scope and costs of securities class actions, tolling in the absence of standing would also delay the filing of individual actions by institutional investors with large amounts at stake—even though the claims of these investors could never be represented by the named plaintiffs in the class action. These individual investors could bide their time through class certification, and wait to file their individual actions until doing so would impose the highest costs on defendants, thereby increasing the settlement

leverage of their individual actions. Tolling in the absence of standing would therefore increase potential liability in both class and individual actions, imposing a significant burden on the capital formation process.

III. NAMED PLAINTIFFS LACK STANDING TO PROSECUTE CLAIMS CONCERNING SECURITIES THEY DID NOT PURCHASE

A. Under Article III, Named Plaintiffs Do Not Have Standing To Assert Claims With Respect To Securities They Did Not Purchase

Appellants argue that, even if *American Pipe* tolling were limited to cases filed by plaintiffs with standing, the District Court erred because, having purchased securities in one or more than one Countrywide MBS offering, the named plaintiffs in the Countrywide MBS class actions had “class standing” to represent and bring a claim on behalf of purchasers in every other tranche of every other MBS offering. *See* Appellants’ Br. at 18. They contend that the Second Circuit’s decision in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 164 (2d Cir. 2012), supports that unusual proposition. That argument runs roughshod over Article III principles and is fundamentally inconsistent with the purposes and functioning of the federal securities laws.

Appellants argue that “the standing inquiry in the class action context” only requires any case or controversy “vis-à-vis the named parties,” with all other questions concerning the scope of the class “determined not by Article III standing requirements, but rather by the traditional class action criteria.” Appellants’ Br. at

17-18.⁵ However, Appellants’ proposed rule is irreconcilable with the Supreme Court’s decision in *Lewis v. Casey*, 518 U.S. 343 (1996). There, the Supreme Court held that named plaintiffs who suffered injuries from one type of conduct (and who possessed standing to challenge that conduct) nonetheless lacked *standing* to assert claims on behalf of persons injured by other conduct, regardless of class certification considerations, because “[t]he standing determination is quite separate from certification of the class.” *Id.* at 358 & n.6. In reaching this conclusion, *Lewis* directly rejected the dissent’s contention (identical to Appellants’ here) that the named plaintiffs’ injuries were “sufficient to satisfy any constitutional standing concerns,” because “standing is not dispensed in gross.” *Id.*

It is likewise not relevant if there are similarities between the securities purchased by the named plaintiffs and others—as Appellants contend, Appellants’ Br. at 18—because “a plaintiff who has been subject to injurious conduct of one kind [does not] possess[] by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.” *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982).⁶

⁵ Appellants’ position is inconsistent with *NECA*, which dismissed certain claims on standing grounds prior to class certification. 693 F.3d at 163-64.

⁶ See also *Wal-Mart*, 131 S. Ct. at 2550 (class actions are only appropriate where the class representations “possess the *same* interest and suffer the *same* injury as the class members”) (emphases added).

The MBS cases are illustrative of these general principles. In those cases, each security is backed by mortgages with different characteristics—often issued at different times by different originators or pursuant to different underwriting standards, and described in separate offering documents. An investor in a security backed by one set of loans therefore lacks a cognizable interest in challenging disclosures concerning other securities backed by different loans. For example, a plaintiff who invested in a security backed by fixed rate, prime mortgages issued in 2005 simply has no valid interest in whether there were misstatements made in connection with a different security backed, for example, by adjustable-rate, subprime mortgages issued in 2007, even if the same originator issued all of the mortgages and both certificates were sold by the same underwriters. This conclusion is borne out by experience in MBS litigation, where plaintiffs routinely attempt to establish wrongdoing by analyzing the specific loans underlying the securities at issue. *See In re Wash. Mut. Mortg.-Backed Sec. Litig.*, 2012 WL 2995046, at *4 (W.D. Wash. July 23, 2012).

B. The Second Circuit Standard Will Also Breed Uncertainty That Will Impede the Capital-Raising Process

In arguing that a person who did not purchase a security and would not have individual standing to bring a claim with respect to misrepresentations regarding that security nonetheless does have standing to assert claims on behalf of others, Appellants rely primarily on the Second Circuit's decision in *NECA*. In

that case, the court held that whether a named plaintiff has standing to assert claims on behalf of others that he does not have standing to assert on behalf of himself turns on whether the two sets of claims rest on a “sufficiently similar set of concerns” or on “fundamentally different set of concerns” or, in other words, whether the injuries and proof with respect to the two sets of claims would be “very different.” 693 F.3d at 163-64. For the reasons stated by Countrywide, SIFMA agrees that the District Court properly rejected that holding as inconsistent with the law of the Supreme Court and this Circuit. In addition, the rule advocated by Appellants would also disserve the clarity embodied in the Securities Act and that is critical to the efficiency of the capital-raising process.

The Supreme Court has emphasized over and over again that securities litigation is “an area that demands certainty and predictability.” *Pinter v. Dahl*, 486 U.S. 622, 652 (1988). “[A] shifting and highly fact-oriented disposition . . . is not a satisfactory basis for a rule of liability imposed on the conduct of business transactions.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994); *see also Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991). Nowhere are those principle more important than with respect to the Securities Act. The provisions of Sections 11 and 12(a)(2) of the Securities Act are “notable both for the limitations on their scope as well as the *in terrorem* nature of the liability they create.” *NECA*, 693

F.3d at 156. As the *NECA* Court noted, Section 11 “imposes strict liability on issuers and signatories, and negligence liability on underwriters. . . . Neither scienter, reliance, nor loss causation is an element of § 11.” *Id.* Accordingly, the Securities Act contains several limitations that narrowly circumscribe its scope. *See Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 495 (5th Cir. 2005). Among these limitations is that Section 11 limits plaintiffs to “any person acquiring such security,” 15 U.S.C. § 77k(a), that Section 12(a)(2) is likewise limited to “the person purchasing such security,” 15 U.S.C. § 77l(a), and that both Section 11 and Section 12(a)(2) require claims to be brought “one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence” and “[i]n no event . . . more than three years after the security was bona fide offered” or sold. 15 U.S.C. § 77m. The rules thus encourage—and permit—issuers and underwriters, in deciding whether to conduct (or participate in) a particular securities offering, to make a careful assessment of the potential risks associated with that offering, including potential liability for violations of the securities laws. A person subject to Section 11 can assess in connection with each underwriting or offering decision the size of the offering, the exposure to which the participant is subjecting itself, and the likelihood that a claim will be brought within the three-year period.

Unlike the language of the Securities Act which is clear and relatively easy to apply, the “sufficiently similar set of concerns” standard of *NECA* is fundamentally indeterminate. No case law or statutory or regulatory standard exists to tell a court or issuers and underwriters—or even purchasers for that matter—what similarities would make two different claims based on two different offerings “sufficiently similar” or what differences in those two different offerings would make two sets of claims “very different.” *NECA*, 693 F.3d at 162-63 (whether conduct “implicates the same set of concerns . . . is much harder to answer”). An issuer or underwriter would have to guess. And there would be no basis for an issuer or underwriter to make that assessment in advance—before the participant even knows what representations a putative plaintiff will challenge and which representations it will not challenge. The ensuing uncertainty—whether viewed *ex ante* at the time of the underwriting decision or *ex post* at the time of the lawsuit—can only chill the underwriting and capital formation process and upset the careful balance that Congress struck in creating these causes of action.

C. **Allowing Named Plaintiffs to Assert Class Claims Concerning Securities They Did Not Purchase Will Foster Overbroad Class Actions and Frustrate the Purposes of the PSLRA**

Permitting a plaintiff who did not purchase a security and who was not injured in connection with the offering of that security nonetheless to assert a claim based on misstatements made regarding that security also would be

anathema to Congress's purposes in passing the PSLRA. The PSLRA was designed to reduce "abuses of the class-action vehicle in litigation involving . . . securities," *Dabit*, 547 U.S. at 81, "to curb . . . lawyer-driven litigation" by empowering interested investors to direct securities class actions, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-22 (2007), and to decrease the pressure on defendants "to settle even unlikely or frivolous claims" in order to avoid the potentially astronomical costs of discovery and litigation. *In re Bos. Scientific Corp. Sec. Litig.*, 686 F.3d 21, 30 (1st Cir. 2012). In contrast to the District Court's holding, which would further each of these purposes, Appellants' proposed rule would exacerbate the very concerns that led Congress to enact the PSLRA in the first place.

Appellants' proposed rule would encourage plaintiffs' lawyers to draft complaints to assert the broadest possible classes in direct contravention of the concern expressed in the *American Pipe* concurrence, and would permit class actions where named plaintiffs only possess an interest in a small number of the securities at issue. Limiting class actions to the securities purchased by named plaintiffs ensures that there is at least one interested investor involved in the litigation with respect to each security at issue. By contrast, where a named plaintiff asserts claims over which it does not have standing itself, only the

plaintiffs’ lawyers would have an interest in pursuing claims—inviting the very lawyer-driven litigation that the PSLRA was meant to suppress.⁷

Finally, Appellants’ proposed rule would also exponentially increase the size of securities class actions and would allow plaintiffs’ lawyers to pursue even unrelated claims through discovery—further intensifying the pressure on defendants to settle such litigation regardless of the merits. The securities markets increasingly rely on the shelf registration process for the efficient issuance of securities offerings over time. Appellants’ proposed rule would permit—and even encourage—a named plaintiff who invested in only a limited number of those offerings to bring class claims concerning all of the offerings issued pursuant to the common shelf registration statement, even those that were issued at significantly different periods of time and in light of different economic circumstances, so long as those offerings were issued by the same defendants.

The potential consequences of Appellants’ proposed rule would be staggering for the financial markets. The initial decisions applying *NECA* show the dramatic effect that Appellants’ proposed rule would have on securities litigation: those decisions have added back dozens of securities worth tens of

⁷ Notably, there is little burden on an investor to serve as a named plaintiff in securities class actions—*Hevesi v. Citigroup Inc.*, 366 F.3d 70, 82-83 (2d Cir. 2004) (named plaintiffs need not “satisf[y] the rigors of the PSLRA’s lead plaintiff scrutiny”)—so the unwillingness of a single investor in a security to serve as a named plaintiff speaks volumes about the merits of the asserted claim.

billions of dollars that were previously dismissed on standing grounds.⁸ By dramatically increasing the scope of potential liability for financial institutions, Appellants' position and *NECA* would therefore discourage the very capital-raising process that the securities laws are intended to foster.

CONCLUSION

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

Dated: New York, N.Y.
November 22, 2013

Respectfully submitted,

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⁸ See, e.g., *In re IndyMac Mortg.-Backed Sec. Litig.*, 2013 U.S. Dist. LEXIS 103576 (S.D.N.Y. July 23, 2013) (reinstating securities from 42 offerings originally worth more than \$20 billion); *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 2013 WL 1809767 (S.D.N.Y. Apr. 30, 2013) (reinstating securities from 49 offerings originally worth more than \$40 billion).

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/s/ Lewis J. Liman

Lewis J. Liman

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