

## The Misunderstood Role of Reliance in *American Pipe* Tolling

Jeremy L. Brown<sup>†</sup>

*The commencement of a class action tolls statutes of limitations for all members of the putative class. This rule, so simply stated by the Supreme Court in American Pipe & Construction Co. v. Utah, has proved complicated in practice. Since American Pipe, lower courts have disagreed about the circumstances under which the tolling rule applies. Though the Court has resolved many of these disagreements, some uncertainties remain. This Comment takes up two of those questions. First, does tolling benefit plaintiffs who sue while class certification is pending? Second, does tolling benefit plaintiffs who opt out of a certified class? My analysis takes advantage of two recent Supreme Court decisions that clarify the legal basis of a doctrine left untouched for over three decades. These decisions make clear that American Pipe is a creature of courts' equitable powers. This fact limits when tolling can apply. Most importantly, the judicially crafted tolling rule must respect the statutory intent of the time bar to be tolled. I argue that class action tolling respects the statutory intent of time bars only when plaintiffs claiming tolling have plausibly relied on the class action proceedings. This general rule, applied to the questions considered in this Comment, yields different answers depending on the exact time bars faced by plaintiffs. In general, plaintiffs facing a statute of limitations should benefit from tolling only if they sue after the class is denied certification or otherwise terminates. But plaintiffs facing two time bars—a statute of limitations and a statute of repose—should, in some cases, benefit from tolling even when they file before the certification ruling.*

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<sup>†</sup> B.S. 2013, University of Pittsburgh; J.D. Candidate 2021, The University of Chicago Law School.

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## INTRODUCTION

Both class actions and statutory time bars increase efficiency in litigation. Class actions do so by allowing the claims of many plaintiffs to be brought and adjudicated together. Plaintiffs benefit from the work of class representatives. Statutory time bars, such as statutes of limitations, enhance litigative efficiency by ensuring that claims are brought promptly. They also protect defendants by barring claims brought after undue delay.

In practice, class actions and time bars can clash. A member of a putative class might hold off suing individually because she anticipates benefiting from a class action. If the class action falls apart—say because class certification is denied or the class representative settles individually—then members of the defunct putative class might then sue separately. By this point, however, plaintiffs’ claims may be untimely because the statute of limitations expired while they relied on the class to press their claims. Absent a special exception for such plaintiffs, they are induced to file their own suits before the statute of limitations expires to preserve the ability to litigate their claims if the class action falls apart. These potentially superfluous lawsuits are often called “protective filings.”

Fortunately for plaintiffs, the Supreme Court recognized class action tolling in *American Pipe & Construction Co. v.*

*Utah*.<sup>1</sup> That case and its progeny set out a rule that tolls putative class members' statutes of limitations during the pendency of class certification, allowing putative class members to sue individually if they cannot proceed with the class. This tolling rule—often called “*American Pipe* tolling” or “class action tolling”—has been the subject of numerous disagreements among the lower courts.

This Comment considers two of the *American Pipe* doctrine's unresolved questions. The first question is whether plaintiffs can claim class action tolling if they file separate, individual suits while class certification is pending. The issue, in other words, is whether plaintiffs must wait for a class certification ruling to take advantage of tolling. Most courts apply tolling irrespective of whether individual plaintiffs sue before or after the certification ruling, but some withhold tolling until after the certification process. The second question is whether tolling extends to plaintiffs who opt out of a certified class. Most courts, relying on Supreme Court dicta, apply tolling to such plaintiffs. But some courts have suggested that *American Pipe* tolling applies only to class members who are deprived of a spot in a class—either because certification is denied or because the class action terminates for another reason.

The Supreme Court recently revisited the *American Pipe* doctrine after leaving it untouched for over three decades. In 2017, the Court held in *California Public Employees' Retirement System v. ANZ Securities, Inc.*<sup>2</sup> (*CalPERS*) that *American Pipe* does not toll statutes of repose—time bars similar to but distinct from statutes of limitations. One year later, in *China Agritech, Inc. v. Resh*,<sup>3</sup> the Court held that the doctrine does not toll the limitations period for successively filed class (as opposed to individual) actions. These decisions provide valuable insight into the doctrine's legal basis and clarify when it is appropriate to apply class action tolling.

In this Comment, I derive guiding principles from *CalPERS* and *China Agritech* to determine the circumstances in which class action tolling applies. The first principle is that *American Pipe* is an equitable tolling doctrine. Equitable tolling rules must yield to legislative commands; accordingly, tolling must comport with the statutory intent of time bars. The second prin-

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<sup>1</sup> 414 U.S. 538 (1974).

<sup>2</sup> 137 S. Ct. 2042 (2017).

<sup>3</sup> 138 S. Ct. 1800 (2018).

ciple is that *American Pipe* serves efficiency and judicial economy by guaranteeing putative class members an opportunity to vindicate their rights without requiring potentially superfluous protective filings within their own limitations periods. Importantly, the doctrine's equitable nature means that it cannot flout statutory commands to promote this efficiency goal.

Using these principles, I argue that plaintiffs should benefit from class action tolling only when the timing of their individual suits suggests that they might have relied on the class proceedings before becoming unable to do so. For ease of exposition, I call this "plausible reliance." Whether courts should find the requisite plausible reliance depends on the precise time bars plaintiffs face. Plaintiffs facing only a statute of limitations should be found to have relied—and thus receive tolling—only if they sue after class certification is denied or the class otherwise falls apart. In contrast, plaintiffs facing a statute of limitations and an additional time bar called a statute of repose should, in some cases, benefit from tolling even if they sue while class certification is pending.

This Comment proceeds in three parts. In Part I, I review the origins of *American Pipe* tolling as well as the doctrine's more recent developments. As I explain, these pronouncements clarify important aspects of the doctrine that were left ambiguous in earlier cases. In Part II, I review the various approaches courts have taken on the question whether tolling applies to suits filed before the certification decision and the question whether tolling applies to opt-out plaintiffs. I also clarify the positions of some courts that are sometimes, I believe, mistakenly said to have taken sides on the first of these issues. Finally, in Part III, I use what we have learned from the Court's recent pronouncements to derive key principles about the doctrine's application. Applying these principles reveals a generally applicable rule: only plaintiffs who have plausibly relied on the class to press their claims should receive tolling. Plausibly relying plaintiffs are those who appear to have delegated their claims to the class proceedings and now sue individually only because they can no longer rely on the putative class. Whether plausible reliance exists—and hence whether tolling should apply—depends on the exact time bars faced by plaintiffs.

## I. THE AMERICAN PIPE TOLLING DOCTRINE

Time bars preclude actions that fail to satisfy specific timing requirements.<sup>4</sup> Statutory time bars, such as statutes of limitations and statutes of repose,<sup>5</sup> require that claims be brought within a defined period of time that begins running at a specified trigger.<sup>6</sup>

Section 13 of the Securities Act of 1933<sup>7</sup> provides examples of both a statute of limitation and a statute of repose. It begins by providing that “[n]o action shall be maintained . . . unless brought within 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.”<sup>8</sup> This time bar is a statute of limitations; it explains that the limitations period endures for one year and accrues (begins running) when the plaintiff discovers, or should have discovered, the claim.<sup>9</sup> The statute then sets out a second time bar, providing that “[i]n no event shall any such action be brought . . . more than three years after the security was bona fide offered to the public.”<sup>10</sup> This time bar, the statute of repose, sets an outside boundary for bringing claims.<sup>11</sup> Under this dual time-bar scheme, the statute of limitations requires a plaintiff to bring her claim within one year of when she discovers or should have discovered her claim. Critically, the statute of repose categorically prohibits claims brought more than three years after the security offering. This means a claim could be lost to the repose bar before the plaintiff even discovers its existence.<sup>12</sup>

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<sup>4</sup> Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Laws*, 40 J. CORP. L. 143, 155 (2014).

<sup>5</sup> Other time bars include jurisdictional time limits and the judge-made doctrine of laches. *Id.* at 156 & n.65.

<sup>6</sup> *See id.* at 155–56.

<sup>7</sup> Ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa).

<sup>8</sup> 15 U.S.C. § 77m; *see CalPERS*, 137 S. Ct. at 2047.

<sup>9</sup> *See CalPERS*, 137 S. Ct. at 2049.

<sup>10</sup> 15 U.S.C. § 77m.

<sup>11</sup> *See CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (“A statute of repose . . . puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant.”).

<sup>12</sup> *See Catalina Ford*, Note, *For Whom the Statute Tolls: American Pipe Tolling and Statutes of Repose in Securities Fraud Class Actions*, 19 FORDHAM J. CORP. & FIN. L. 599, 607–08 (2014).

Importantly, there are excuses plaintiffs can invoke when their filings would otherwise be untimely.<sup>13</sup> One such excuse is tolling of the statutory period.<sup>14</sup> Tolling stops the clock on a time bar, giving a plaintiff more time to file a claim.<sup>15</sup> It may be permitted under circumstances described by statute or by principles of equity applied by courts.<sup>16</sup> As we will see, the source of a tolling rule—equitable and judicially crafted versus legal and based in statute—can be critical in determining whether tolling applies under particular circumstances.

These are the basic mechanics of time bars and tolling. In the next Section, I explicate the *American Pipe* doctrine's origins and early development. Then, in Part I.B, I review the Court's more recent pronouncements on the doctrine. Part I.C distills key insights from these recent cases that will be important in determining when class action tolling applies.

#### A. The Origins of Class Action Tolling

In *American Pipe*, the Supreme Court was asked to recognize a new type of tolling. The state of Utah had filed a class action under Federal Rule of Civil Procedure 23 ("Rule 23") on behalf of itself and purported class members eleven days before the relevant statute of limitations expired.<sup>17</sup> Several months later, the district court denied class certification.<sup>18</sup> Eight days after this ruling, members of the class Utah had putatively represented moved to intervene as individual plaintiffs.<sup>19</sup> The parties disagreed whether the intervenors' motion was timely. If the limitations period had continued to run during the pendency of class

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<sup>13</sup> See Kaufman & Wunderlich, *supra* note 4, at 156.

<sup>14</sup> See Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 813–19 (2006). Other legal excuses for untimeliness include estoppel, forfeiture, and waiver. See Kaufman & Wunderlich, *supra* note 4, at 156.

<sup>15</sup> See Damon W. Taaffe, Comment, *Tolling the Deadline for Appealing in Absentia Deportation Orders Due to Ineffective Assistance of Counsel*, 68 U. CHI. L. REV. 1065, 1068 & n.23 (2001).

<sup>16</sup> See Wasserman, *supra* note 14, at 813–19; see also *CalPERS*, 137 S. Ct. at 2050; *Young v. United States*, 535 U.S. 43, 49 (2002) ("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." (quotation marks and citation omitted) (first quoting *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95 (1990); and then quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998))).

<sup>17</sup> *Am. Pipe*, 414 U.S. at 541–42.

<sup>18</sup> *Id.* at 542–43.

<sup>19</sup> *Id.* at 543–44; see *China Agritech*, 138 S. Ct. at 1804.

certification, then the intervenors' claims were months late. But if the limitations period was suspended from the class filing until the class certification ruling, the intervenors' motion was timely with three days to spare.

The Court found the intervenors' claims timely, holding that the class filing tolled the statute of limitations for putative class members seeking to intervene after the denial of class certification.<sup>20</sup> Notably, tolling was extended to all putative class members, including those that did not rely on or were unaware of the now-defunct class suit.<sup>21</sup>

The Court noted two primary concerns in devising the tolling rule: litigative efficiency and respecting the purposes of statutes of limitations.<sup>22</sup> As to efficiency, the Court sought to prevent needless motions by putative class members. Without tolling, they might file intervening motions within their own limitations period because of the risk that the class will be denied certification after that period's expiration. Such motions "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure."<sup>23</sup> The Court sought to solve this problem by tolling the claims of putative class members suing after the denial of class certification.

The scope of the Court's efficiency justification is unclear. The tolling rule might be justified simply because it relieves individual class members of potentially superfluous protective filings. That is, the Court might have been worried only about the burden on individual litigants. But *American Pipe* can reasona-

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<sup>20</sup> *Am. Pipe*, 414 U.S. at 552–53. More precisely, the Court held that tolling applies when a class is denied certification for failure to meet Federal Rule of Civil Procedure 23's numerosity requirement. *Id.* The Court's subsequent decision in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), implicitly extended *American Pipe* to situations in which class certification is denied for other reasons. Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 19 (2018). Note also that states remain free to craft—or not craft—their own class action tolling rules. David Bober, Comment, *Cross-Jurisdictional Tolling: When and Whether a State Court Should Toll Its Statute of Limitations Based on the Filing of a Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617, 625 (2002). In practice, however, states look to federal case law, and especially the Supreme Court's pronouncements, when creating their own class action tolling rules. See *id.*; Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 370 (2016).

<sup>21</sup> *Am. Pipe*, 414 U.S. at 551.

<sup>22</sup> See Charles F. Sawyer, Comment, *Class Actions and Statutes of Limitations*, 48 U. CHI. L. REV. 106, 108–09 (1981).

<sup>23</sup> *Am. Pipe*, 414 U.S. at 553.

bly be read more expansively: grounded in Rule 23 and intended to further its policies.<sup>24</sup> This ambiguity presages later disagreements among lower courts as to whether the *American Pipe* doctrine is one of equitable tolling or statutorily based legal tolling.<sup>25</sup>

Turning to the Court's second concern, statutes of limitations, the Court explained that tolling was consistent with the policies underlying these time bars.<sup>26</sup> This was chiefly because the class filing put defendants on notice of the claims and generic identities of potential plaintiffs.<sup>27</sup> The Court also stated, though without explanation, that tolling was consistent with the policy of preventing plaintiffs from sleeping on their rights.<sup>28</sup> For these reasons, the Court determined it appropriate to toll the intervenors' limitations periods. As noted above, the Court extended tolling to all putative class members, including those who did not rely on the now-defunct class suit.<sup>29</sup> This is interesting given that some of the *American Pipe* plaintiffs had submitted affidavits to the district court attesting to their reliance on the class action.<sup>30</sup>

Following *American Pipe*, a circuit split soon developed on the question whether the tolling doctrine applies only to those intervening in the existing action, or, additionally, to separate actions for the same claims.<sup>31</sup> The Court resolved this split in *Crown, Cork & Seal Co. v. Parker*,<sup>32</sup> where it extended class ac-

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<sup>24</sup> Compare *id.* ("A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure."), with *Crown*, 462 U.S. at 350 ("The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights.").

<sup>25</sup> See *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535 (9th Cir. 2011) (exploring this disagreement).

<sup>26</sup> *Am. Pipe*, 414 U.S. at 554–55.

<sup>27</sup> *Id.*

<sup>28</sup> See *id.* The purposes of statutes of limitations are discussed further in greater detail in Part III.A.

<sup>29</sup> *Id.* at 551.

<sup>30</sup> See *Utah v. Am. Pipe & Constr. Co.*, 50 F.R.D. 99, 101–02 (C.D. Cal. 1970), *aff'd in part, rev'd in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).

<sup>31</sup> For one commentator's contemporary account of the circuit split, see Sawyer, Comment, *supra* note 22, at 120–22. Intervening in the existing action or filing a separate action both allow plaintiffs to proceed individually. The primary difference is that separate actions can be brought in different courts than that of the first action. See *id.* at 122–23.

<sup>32</sup> 462 U.S. 345 (1983).



tion tolling to separate actions brought after the denial of class certification.<sup>33</sup>

As in *American Pipe*, the Court's analysis centered on litigative efficiency and the purposes of statutes of limitations. The Court explained that putative class members who "fear[] that class certification may be denied" would file separate actions prior to the expiration of their own limitations periods.<sup>34</sup> "The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid."<sup>35</sup> Turning to the purposes of statutes of limitations, the Court again focused on notice to defendants and whether plaintiffs had slept on their rights. Notice to defendants was satisfied because the class filing puts defendants on notice of the potential claims against them.<sup>36</sup> And plaintiffs who bring individual suits after class certification is denied, the Court explained, "cannot be accused of sleeping on their rights" because "Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."<sup>37</sup>

This discussion shows that the *Crown* Court considered tolling justified, at least in part, by putative class members' reliance on the class proceedings. Yet, as in *American Pipe*, it did not require plaintiffs to prove that they actually relied on the class proceedings. It is not clear why *American Pipe* and *Crown* forewent this requirement.<sup>38</sup> One possibility is that the burden of proving reliance might unfairly induce preemptive protective filings by those who fear that the class proceedings will fall apart.<sup>39</sup> Another theory is that *American Pipe* is intended to affirmatively protect those putative class members who are una-

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<sup>33</sup> *Id.* at 350.

<sup>34</sup> *Id.* at 350–51.

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 352–53 (explaining that class action defendants "will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class").

<sup>37</sup> *Crown*, 462 U.S. at 352–53.

<sup>38</sup> *See* Kenneth S. Prince, Case Note, 15 B.C. INDUS. & COM. L. REV. 1010, 1028 (1974) (arguing that plaintiffs should have to prove past awareness of class proceedings in order to benefit from class action tolling).

<sup>39</sup> *Cf.* *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000) ("[T]he class action tolling doctrine is intended to avoid the injustice and judicial inefficiency of requiring putative class members to file individual suits or to lose their claims.").

ware of a class action.<sup>40</sup> These competing perspectives may be at the root of the unresolved issues considered in this Comment.

The Court has never decided whether class action tolling applies to those who opt out of a certified class.<sup>41</sup> Importantly, both *American Pipe* and *Crown* concerned suits brought after the denial of class certification.<sup>42</sup> But some courts have read *Eisen v. Carlisle & Jacquelin*,<sup>43</sup> a Supreme Court case about Rule 23's notice requirement, to extend tolling to plaintiffs who opt out of certified classes.<sup>44</sup>

Understanding the notice issue in *Eisen* is necessary to understand how courts have read it to extend tolling to opt-out plaintiffs. There, names and addresses were readily available for many of the class's individual members.<sup>45</sup> But the district court, wary of substantial notice costs, did not require individual notice to these class members.<sup>46</sup> The Supreme Court determined that this ruling contravened Rule 23's clear requirement of "individual notice to all members who can be identified through reasonable effort."<sup>47</sup>

Tolling came up only indirectly. The *Eisen* class representative argued that individual notice was not worthwhile because class members could not opt out, as their limitations periods had expired.<sup>48</sup> The Court dismissed this argument in a footnote by explaining that the class action had tolled the class members' statutes of limitations.<sup>49</sup> This suggestion that tolling applies to

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<sup>40</sup> Cf. *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 607 (3d Cir. 2018) (explaining that *American Pipe* tolling "protects unnamed class members who may have been unaware of the class action"); *In re WorldCom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (explaining that, under *American Pipe*, "members of the asserted class are treated for limitations purposes as having instituted their own actions").

<sup>41</sup> See *In re Copper Antitrust Litig.*, 436 F.3d 782, 800 (7th Cir. 2006) (Wood, J., dissenting in part) (acknowledging the open question and opining that class action tolling applies to opt-out plaintiffs); Wasserman, *supra* note 14, at 829 & n.142 (recognizing the open question and collecting cases on both sides).

<sup>42</sup> See *Crown*, 462 U.S. at 347–48; *Am. Pipe*, 414 U.S. at 543–44.

<sup>43</sup> 417 U.S. 156 (1974).

<sup>44</sup> See, e.g., *WorldCom*, 496 F.3d at 250.

<sup>45</sup> *Eisen*, 417 U.S. at 166.

<sup>46</sup> See *id.* at 166–67.

<sup>47</sup> *Id.* at 173 (emphasis omitted) (quoting FED. R. CIV. P. 23(c)(2)).

<sup>48</sup> See *id.* at 176 n.13.

<sup>49</sup> *Id.* ("This contention is disposed of by our recent decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class." (citation omitted)).

those opting out of a certified class is dicta.<sup>50</sup> But it has been used by some courts to conclude that tolling benefits plaintiffs who opt out of certified classes.<sup>51</sup> Other courts, however, have questioned *Eisen's* intimation that plaintiffs can benefit from tolling even when class certification is granted.<sup>52</sup> Indeed, as I explain in Part III.B.1, other pronouncements from the Court suggest that tolling is not intended to apply to those who opt out of a certified class.<sup>53</sup>

A pending class certification motion does not always end in grant or denial, of course. Sometimes the class action terminates before that ruling occurs. For example, the class representative might drop the suit or settle her claims individually. Courts agree that the duration of tolling continues until class certification is denied or the class action ends for any other reason.<sup>54</sup> Thus, it is not quite right to say that some courts apply tolling only if class certification is denied. Instead, these courts would

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<sup>50</sup> See *Concordia Coll. Corp. v. W.R. Grace & Co.*, 999 F.2d 326, 332 n.6 (8th Cir. 1993); see also John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 33 n.169 (1983); William A. Jonason, Note, *The American Pipe Dream: Class Actions and Statutes of Limitations*, 67 IOWA L. REV. 743, 753 (1982); Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 MICH. L. REV. 399, 402 (1982).

<sup>51</sup> See, e.g., *WorldCom*, 496 F.3d at 250, 253; *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985). Some have argued that *Crown* confirmed *Eisen's* dicta that tolling applies even if class certification is granted. See, e.g., James J. Mayer, Note, *Rejecting the Class Action Tolling Forfeiture Rule*, 94 N.Y.U. L. REV. 899, 915 n.90 (2019). *Crown* did rely on the *Eisen* dicta, but only to explain that *American Pipe* applies to separate (rather than just intervening) filings. *Crown*, 462 U.S. at 351–52. *Crown* itself was a case in which a separate suit was brought after the denial of class certification. *Id.* at 347–48. Moreover, the *Crown* Court explained from the outset that it was considering the question whether *American Pipe* “permits all members of the putative class to file individual actions in the event that class certification is denied.” *Id.* at 346–47 (emphasis added).

<sup>52</sup> See, e.g., *Concordia Coll.*, 999 F.2d at 332 n.6; *Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339, 346 (5th Cir. 1981); *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1271–72 (N.D. Ala. 2003); *Orleans Par. Sch. Bd. v. U.S. Gypsum Co.*, 892 F. Supp. 794, 804–05 (E.D. La. 1995); cf. *Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp.*, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (explaining, without discussing *Eisen*, that tolling does not apply where “certification of the class was granted, not denied”). Some state courts have similarly questioned whether their state-law analogues to *American Pipe* tolling apply when class certification is granted. See, e.g., *Rader v. Greenberg Traurig, LLP*, 352 P.3d 465, 470 (Ariz. Ct. App. 2015).

<sup>53</sup> See *infra* notes 188–91 and accompanying text.

<sup>54</sup> See, e.g., *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011). This means that the tolling period continues even if class certification is granted. This is because the class could still terminate for another reason or be decertified in the future (on appeal, for example). See *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520–21 (5th Cir. 2008).

simply withhold tolling until the class terminates—because certification is denied or for any other reason.<sup>55</sup>

## B. Recent Developments

The previous Section covered the Supreme Court's early development of the *American Pipe* doctrine.<sup>56</sup> That history teaches us that tolling applies to plaintiffs intervening as individuals in an existing action and to individual plaintiffs filing separate actions. The duration of the tolling period endures from the class filing until the class is denied certification or otherwise ceases to exist. Left unclear, however, are several other aspects of the doctrine's application.

The Supreme Court recently revisited the doctrine, resolving two disagreements that had arisen in the lower courts. In *CalPERS*, the Court held that *American Pipe* does not toll statutes of repose—time bars similar to but less flexible than statutes of limitations.<sup>57</sup> One year later, in *China Agritech*, the Court held that *American Pipe* does not toll successive class (as opposed to individual) action filings. These decisions helpfully elucidate the Court's understanding of the doctrine's legal basis. This insight will prove valuable in resolving whether tolling applies to plaintiffs who sue before a class certification decision and whether tolling applies to plaintiffs who opt out of certified classes.

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<sup>55</sup> See *Pulley v. Burlington N., Inc.*, 568 F. Supp. 1177, 1179 (D. Minn. 1983) (explaining that tolling does not apply if the class “still exists”). This view of the doctrine, if correct, would not be the only tolling rule under which the tolling period may increase in duration but remain unavailable to plaintiffs until some future event. Under 28 U.S.C. § 1367(d), for example, state law claims for which supplemental jurisdiction is sought are tolled while they are pending in federal court. Yet tolling is not available for such claims until they are actually dismissed from federal court. See *Centaur Classic Convertible Arbitrage Fund Ltd. v. Countrywide Fin. Corp.*, 878 F. Supp. 2d 1009, 1019 (C.D. Cal. 2011) (explaining that “§ 1367(d) applies only where . . . a federal court declines to exercise supplemental jurisdiction over state law claims after dismissing the federal claims”); *Parrish v. HBO & Co.*, 85 F. Supp. 2d 792, 795–97 (S.D. Ohio 1999).

<sup>56</sup> Prior to 2017, the Court last visited the doctrine in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983), decided just one week after *Crown*. See Burbank & Wolff, *supra* note 20, at 21. *Chardon* held that, in § 1983 cases, federal courts must look to state tolling rules to determine the effect (for example, suspension versus renewal of the limitations period) of class action tolling. *Chardon*, 462 U.S. at 660–62.

<sup>57</sup> See *supra* text accompanying notes 10–12.

1. *California Public Employees' Retirement System v. ANZ Securities, Inc.*

In *CalPERS*, a class action was brought against various financial firms for alleged Securities Act violations.<sup>58</sup> One putative class member, California Public Employees' Retirement System (CalPERS), sued the defendants individually after the Securities Act's three-year time bar—the longer of two time bars in the relevant statute—had run.<sup>59</sup> CalPERS argued that its suit was nonetheless timely because this time bar was tolled under *American Pipe*.<sup>60</sup> After the Second Circuit affirmed the district court's dismissal for untimeliness, the Supreme Court granted certiorari to decide if *American Pipe* tolled this second statutory time bar.<sup>61</sup>

The Court began by analyzing the two statutory time bars relevant to CalPERS's claim, both found in 15 U.S.C. § 77m.<sup>62</sup> The first time bar is triggered when the plaintiff discovers (or reasonably should discover) the violation and endures for one year.<sup>63</sup> This, the Court explained, is a statute of limitations and is meant to induce plaintiffs to diligently pursue claims once they become aware of them.<sup>64</sup> The other time bar begins running at the defendant's last culpable act—rather than the plaintiff's discovery of her claim—and endures for three years.<sup>65</sup> The Court emphasized the provision's command that “[i]n no event” may a suit be brought after its expiration.<sup>66</sup> This, the Court said, was the statute of repose and allowed no exceptions, providing a complete bar on liability.<sup>67</sup> This was the stringent time bar for which CalPERS sought tolling.

The distinct “nature and purpose” of the statute of repose would be critical in determining whether it was tolled under *American Pipe*.<sup>68</sup> Tolling is permissible only where the time bar anticipates its prolongment, either through statutory authoriza-

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<sup>58</sup> *CalPERS*, 137 S. Ct. at 2047–48.

<sup>59</sup> *Id.* at 2048; see 15 U.S.C. § 77m.

<sup>60</sup> See *CalPERS*, 137 S. Ct. at 2048.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 2048–49. For further discussion of this statute, see *supra* text accompanying notes 8–12.

<sup>63</sup> *CalPERS*, 137 S. Ct. at 2049.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (quoting 15 U.S.C. § 77m).

<sup>67</sup> *Id.*

<sup>68</sup> *CalPERS*, 137 S. Ct. at 2048–49.

tion or the traditional equitable powers of courts.<sup>69</sup> The statute of repose itself contained no express exceptions. And the very purpose of the repose bar, the Court explained, was to override any customary, equitable tolling rules.<sup>70</sup> The critical question thus became whether *American Pipe* was equitable tolling or, rather, rooted in some other legislative enactment that might allow for tolling.<sup>71</sup>

The statute of repose could not be tolled because the *American Pipe* doctrine, the Court announced clearly for the first time, is equitable tolling.<sup>72</sup> The *American Pipe* rule was crafted so that putative class members could rely on class actions without being induced to make protective motions.<sup>73</sup> Importantly, the *American Pipe* Court had deemed the tolling rule consistent with the statutes of limitations that it tolled.<sup>74</sup> These considerations made clear that “the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions.”<sup>75</sup>

CalPERS argued alternatively that it did not need to rely on tolling because the representative class action had effectively and timely “brought” CalPERS’s separate suit for it.<sup>76</sup> Four dissenting justices would have held for CalPERS under this theory.<sup>77</sup> Importantly, the dissent did not argue for tolling, but rather argued that tolling was unnecessary because CalPERS was effectively a party to the class action from the time it was filed.<sup>78</sup>

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<sup>69</sup> See *id.* at 2050.

<sup>70</sup> *Id.* at 2051.

<sup>71</sup> See *id.* (“If *American Pipe* had itself been grounded in a legislative enactment, perhaps an argument could be made that the enactment expressed a legislative objective to modify the 3-year period.”).

<sup>72</sup> *Id.* at 2051–52. Even before *CalPERS*, others had suggested that *American Pipe* set out an equitable tolling doctrine. See, e.g., Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 520–21 (2004). But see, e.g., Burbank & Wolff, *supra* note 20, at 29–33 (arguing that *American Pipe* is better understood as federal common law than as equitable tolling).

<sup>73</sup> See *CalPERS*, 137 S. Ct. at 2051.

<sup>74</sup> See *id.*

<sup>75</sup> *Id.*; see *id.* at 2052 (“The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.”).

<sup>76</sup> See *id.* at 2054 (quoting 15 U.S.C. § 77m).

<sup>77</sup> *Id.* at 2058 (Ginsburg, J., dissenting).

<sup>78</sup> See *CalPERS*, 137 S. Ct. at 2057 (Ginsburg, J., dissenting) (“When CalPERS elected to pursue individually the claims already stated in the class complaint against the same defendants, it simply took control of the piece of the action that had always belonged to it.”); accord *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1232–33 (10th Cir. 2008); *WorldCom*, 496 F.3d at 255.

In the dissent's view, the policy underlying the statute of repose was satisfied because defendants were put on notice of the claims against them within the repose period.<sup>79</sup> The dissent also pointed out that the Court's decision would have inequitable and inefficient consequences: putative class members who feared that class certification might be denied after the repose period runs would file early protective motions to preserve their claims.<sup>80</sup>

The majority rejected this view based on the statute of repose's express terms. The provision barred all new actions brought outside the three-year period; even if a class representative timely sued, CalPERS sought to bring an additional action after the repose period had expired.<sup>81</sup> This is sensible, the Court explained, because the statute of repose protects interests beyond notice to defendants.<sup>82</sup> Moreover, the *American Pipe* doctrine would be unnecessary altogether if all putative class members' individual actions were commenced as of the date of the class filing.<sup>83</sup> The Court acknowledged the potential inequity and inefficiency of protective filings, but explained that it could not ignore the statute of repose's clear terms.<sup>84</sup>

I pause here to note insights from *CalPERS* about the *American Pipe* doctrine that were not immediately apparent in earlier cases. First, the Supreme Court understands the doctrine to be one of equitable tolling. As I will explain, this limits the circumstances in which it may apply. Relatedly, we learned that the doctrine does not pursue efficiency at all costs. The more efficient result in *CalPERS*, as the dissent urged and the Court acknowledged, would have been to toll the statute of repose. I revisit these insights in more detail in Part I.C after reviewing *China Agritech*.

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<sup>79</sup> See *CalPERS*, 137 S. Ct. at 2056 (Ginsburg, J., dissenting).

<sup>80</sup> See *id.* at 2057–58. For two researchers' estimates of the number of inefficient protective filings caused by *CalPERS*, see generally David Freeman Engstrom & Jonah B. Gelbach, *American Pipe Tolling, Statutes of Repose, and Protective Filings: An Empirical Study*, 69 STAN. L. REV. ONLINE 92 (2017).

<sup>81</sup> *CalPERS*, 137 S. Ct. at 2054.

<sup>82</sup> See *id.* at 2053 (“By permitting a class action to splinter into individual suits, the application of *American Pipe* tolling would threaten to alter and expand a defendant's accountability, contradicting the substance of a statute of repose.”).

<sup>83</sup> See *id.* at 2054–55.

<sup>84</sup> *Id.* at 2053–54.

## 2. *China Agritech, Inc. v. Resh.*

*China Agritech* considered the application of class action tolling to successively filed class—as opposed to individual—actions. The plaintiff, Michael Resh, filed a class action against China Agritech for alleged Exchange Act violations.<sup>85</sup> He did so more than a year after the limitations period had run and argued that it had been tolled during the pendency of two prior dismissed class actions against China Agritech.<sup>86</sup> The Ninth Circuit agreed with Resh, deepening a split of authority among the courts of appeals as to whether *American Pipe* tolls successive class filings.<sup>87</sup> The Supreme Court granted certiorari to resolve the division among the lower courts.

The Court declined to apply the tolling doctrine to successively filed class actions. Its analysis centered on efficiency and judicial economy, the “watchwords” of the *American Pipe* doctrine.<sup>88</sup> The Court explained that these ends would not be served by allowing class filings to benefit from tolling. Instead, efficiency and economy would be better served by incentivizing potential class representatives to file or intervene early so that courts can decide as soon as possible whether class treatment is appropriate.<sup>89</sup> Importantly, that defendants were put on notice within the limitations period by the prior class filings was not enough to justify tolling.<sup>90</sup>

The Court also explained that tolling for class actions would allow them to be filed indefinitely. An original class filing would toll the limitations period until it terminated, at which point a second class filing would toll the period further until it terminated, and so on.<sup>91</sup> As some have pointed out, perpetual tolling would impinge on defendants’ interest, embodied in statutes of limitations, to be free from old claims.<sup>92</sup>

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<sup>85</sup> *China Agritech*, 138 S. Ct. at 1805.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 1805–06.

<sup>88</sup> *Id.* at 1811.

<sup>89</sup> *Id.* at 1807. The Court also explained that Rule 23 and the Private Securities Litigation Reform Act, which governed the litigation, evinced a preference for early intervention of potential class representatives. *See id.* at 1807–08.

<sup>90</sup> The Ninth Circuit, in the decision below, wrote that it was appropriate to toll Resh’s class suit because defendants were put on notice by the prior class filings. *See China Agritech*, 138 S. Ct. at 1805.

<sup>91</sup> *See id.* at 1808–09.

<sup>92</sup> *See, e.g.,* Wasserman, *supra* note 14, at 842–43.



### C. Understanding the Legal Basis of *American Pipe* Tolling

The *CalPERS* and *China Agritech* decisions are significant because they clear up some of the *American Pipe* doctrine's ambiguities. Most importantly, they clarify the doctrine is, at root, a creature of courts' equitable powers. At first blush, *China Agritech* might appear to depart from *CalPERS* on this point. *CalPERS* focused on the statutory intent of the time bar in question, stressing that *American Pipe* set out a limited, equitable tolling rule. *China Agritech*, in contrast, focused on efficiency and judicial economy. Upon closer inspection, however, the two cases are easily reconciled.

A close read of *China Agritech* reveals that the doctrine's efficiency justification dovetails with its equitable nature. Individual plaintiffs can put off filing individual claims so that they can rely on class proceedings.<sup>93</sup> The promotion of efficiency for individual litigants is thus itself the promotion of equity. Conversely, those truly wishing to represent a class would efficiently file or intervene early. As the *China Agritech* Court put it, "[a] would-be class representative who commences suit after expiration of the limitation period [ ] can hardly qualify as diligent in asserting claims and pursuing relief."<sup>94</sup>

Hence, both *CalPERS* and *China Agritech* decidedly establish *American Pipe* tolling as an equitable doctrine. This is significant because the legal basis of the doctrine can affect when it applies. For example, some courts had previously tolled statutes of repose because they determined that *American Pipe* was "legal tolling," rooted in and intended to further the policies of Rule 23.<sup>95</sup> As these courts had explained, a tolling rule derived from a statute could toll a statute of repose, whereas a rule based in equity, limited to remedying unfairness or excusable

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<sup>93</sup> See *China Agritech*, 138 S. Ct. at 1808 (explaining that, in *American Pipe*, individual "plaintiffs reasonably relied on the class representative, who sued timely, to protect their interests in their individual claims").

<sup>94</sup> *Id.*; see also *id.* ("Ordinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims."). *China Agritech*'s recognition of *American Pipe* tolling's equitable nature is significant because it shows a consensus on the matter that was not apparent in *CalPERS*. See *id.*; *id.* at 1814 n.2 (Sotomayor, J., concurring in the judgment).

<sup>95</sup> See, e.g., *Joseph v. Wiles*, 223 F.3d 1155, 1166–67 (10th Cir. 2000); see also *Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) (explaining that some courts use the term "legal tolling" to describe a tolling rule "derived from a statutory source" (quotation marks omitted) (quoting *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009))).

mistake, could not.<sup>96</sup> Indeed, the Supreme Court itself recognized that a tolling rule grounded in another statute might toll a statute of repose, but one based in courts' equitable powers could not.<sup>97</sup>

*CalPERS* and *China Agritech* also clarify another ambiguity from the tolling doctrine's early development: How far does the tolling rule go in promoting efficiency and judicial economy?<sup>98</sup> Efficiency alone may have demanded the opposite result in *CalPERS*, yet this did not allow the Court to "ignore [the] plain import" of the statute of repose.<sup>99</sup> This, again, puts to rest explanations from lower courts that *American Pipe* is legal (rather than equitable) tolling based in Rule 23 and intended to further its policies.<sup>100</sup>

It must instead be that the doctrine is justified only because of the benefit to individual plaintiffs who are equitably allowed to put off filing their own claims. In other words, the precise efficiency served is not that of Rule 23 class actions or the court system in general; it is only the efficiency that comes with equitably relieving putative class members from making individual filings. This is confirmed by a careful read of *China Agritech's* statement that "[t]he watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well."<sup>101</sup> This statement confirms that *American Pipe* is not a tool intended to serve the policies of Rule 23 class actions. Rather, it serves efficiency and economy—goals of Rule 23 as well—by not inducing putative class members to make protective filings.

I will argue in Part III that these insights—that *American Pipe* is an equitable tolling doctrine and that its promotion of efficiency is limited by its equitable nature—help resolve unsettled questions concerning when class action tolling applies. But first, I turn to the present state of the law on two of those unsettled questions.

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<sup>96</sup> See, e.g., *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 177 (D. Mass. 2009) ("The differences between the forms of tolling is crucial because the animating principles of legal tolling are compatible with tolling a statute of repose, while the reasoning behind equitable tolling is not.")

<sup>97</sup> See *supra* note 71.

<sup>98</sup> See *supra* note 24 and accompanying text.

<sup>99</sup> *CalPERS*, 137 S. Ct. at 2053–54.

<sup>100</sup> See, e.g., *Joseph*, 223 F.3d at 1166–67; *Arivella*, 623 F. Supp. 2d at 176.

<sup>101</sup> *China Agritech*, 138 S. Ct. at 1811.

## II. UNRESOLVED QUESTIONS: WHEN DOES TOLLING APPLY?

The first unresolved issue considered in this Comment is whether tolling applies to plaintiffs who sue individually before a class certification decision. Specifically, courts disagree whether plaintiffs who file individual suits while class certification is pending receive class action tolling. I explore this disagreement in Part II.A. The second unresolved issue is whether tolling applies to plaintiffs who opt out of certified classes. This issue is taken up in Part II.B.

### A. Does Tolling Apply to Suits Filed Before the Class Certification Ruling?

Four federal courts of appeals have squarely decided the question whether plaintiffs who sue while class certification is pending receive *American Pipe* tolling. Three circuits extend tolling to such plaintiffs, while one circuit withholds tolling while certification is pending. I call these two positions the majority and minority positions, respectively.

#### 1. The majority rule: sue now or sue later.

Three federal courts of appeals have squarely adopted the majority rule: putative class members may benefit from class action tolling even if they sue while class certification is pending. The majority circuits advance various rationales for this rule, highlighted in the three cases discussed below.

The Second Circuit was the first federal court of appeals to adopt the majority rule. In *In re WorldCom Securities Litigation*,<sup>102</sup> pension funds brought individual securities suits against several bond underwriters.<sup>103</sup> Separately, a class suit was brought against an underwriter not initially sued by the individual pension funds.<sup>104</sup> After the applicable one-year statute of limitations period had run, the pension funds sought to add claims against this additional underwriter.<sup>105</sup> They argued that this claim against the new defendant was timely because the limitations period was tolled by the parallel class action.<sup>106</sup>

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<sup>102</sup> 496 F.3d 245 (2d Cir. 2007).

<sup>103</sup> *Id.* at 246–47.

<sup>104</sup> *Id.* at 247.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 252.

The Second Circuit agreed with the plaintiffs, holding that class action tolling applies even when plaintiffs “file an individual action before resolution of the question whether the purported class will be certified.”<sup>107</sup> The court provided three reasons for extending class action tolling to those who sue before the certification decision. The court first noted the “theoretical basis” by which “class members are treated as parties to the class action ‘until and unless’” they opt out.<sup>108</sup> This explanation does not appear to survive *CalPERS*, where the Supreme Court rejected the argument that individual plaintiffs’ suits were effectively brought, in a timely manner, by a class representative.<sup>109</sup>

Next, the court relied on what it saw as straightforward language from *American Pipe* and *Crown*: “[T]he commencement of a 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.”<sup>110</sup> The court apparently read “the commencement of a class action suspends the applicable statute of limitations” to apply tolling as soon as the class action is filed. But, as one commentator has pointed out, the qualification “who would have been parties had the suit been permitted to continue as a class action” can be read as withholding tolling until the denial of class certification.<sup>111</sup>

Last, the court determined that extending tolling to plaintiffs who sue before the certification decision is consistent with statutes of limitations. Because defendants receive notice from the class filing, “[a] defendant is no less on notice when putative class members file individual suits before certification.”<sup>112</sup> The court also explained, quoting *Crown*, that class members who file individual suits before the certification decision “cannot be accused of sleeping on their rights.”<sup>113</sup> The court did not, however, explain why *Crown*—in which a separate suit was brought after the denial of class certification—can be freely applied to suits brought before the certification ruling.

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<sup>107</sup> *WorldCom*, 496 F.3d at 247.

<sup>108</sup> *Id.* at 255 (quoting *Am. Pipe*, 414 U.S. at 551).

<sup>109</sup> See *supra* text accompanying notes 81–84.

<sup>110</sup> *WorldCom*, 496 F.3d at 255 (quoting *Crown*, 462 U.S. at 353–54).

<sup>111</sup> See Caleb Brown, Note, *Piped In: The Tenth Circuit Weighs in on Extending American Pipe Tolling in State Farm Automobile Insurance Co. v. Boellstorff*, 62 OKLA. L. REV. 793, 810 (2010) (emphasis omitted) (quoting *Am. Pipe*, 414 U.S. at 554).

<sup>112</sup> *WorldCom*, 496 F.3d at 255.

<sup>113</sup> *Id.* (quoting *Crown*, 462 U.S. at 352).

The Ninth Circuit followed the Second Circuit's lead one year later in *In re Hanford Nuclear Reservation Litigation*.<sup>114</sup> In that case, the plaintiff sued various plutonium producers after living near a nuclear facility and being diagnosed with thyroid cancer.<sup>115</sup> A putative class of which she was a member—those living near the nuclear facility—was pending certification at the time she sued.<sup>116</sup> Though she waited more than three years—the duration of the applicable statute of limitations—from her diagnosis to sue, she argued that her limitations period was tolled by the putative class action.<sup>117</sup> The Ninth Circuit agreed, adopting *WorldCom's* reasoning and noting specially that this rule was consistent with the purposes of statutes of limitations because defendants were put on notice of the potential claims against them by the class filing.<sup>118</sup>

The Tenth Circuit is the most recent federal court of appeals to join the majority camp. In *State Farm Mutual Automobile Insurance Co. v. Boellstorff*,<sup>119</sup> the plaintiff, Leslie Boellstorff, was injured in an automobile accident and was allegedly not offered enhanced personal injury protection benefits as required by state law.<sup>120</sup> Her suit was commenced four years after the three-year statute of limitations began running.<sup>121</sup> Boellstorff argued, however, that her limitations period was tolled by a putative class action for which certification was still pending.<sup>122</sup>

The Tenth Circuit sided with the Second and Ninth Circuits, extending tolling to plaintiffs who sue before a certification ruling.<sup>123</sup> The court offered several reasons for adopting this rule, most of which were the same as or variations on rationales provided by the Second and Ninth Circuits. First, the court looked to the Supreme Court's language. It explained that *Crown's* statement that “[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied” was clear and should be

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<sup>114</sup> 534 F.3d 986 (9th Cir. 2008).

<sup>115</sup> *Id.* at 995, 1008.

<sup>116</sup> *Id.* at 1008.

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at 1009.

<sup>119</sup> 540 F.3d 1223 (10th Cir. 2008).

<sup>120</sup> *Id.* at 1224–26.

<sup>121</sup> *Id.* at 1226–27.

<sup>122</sup> *Id.* at 1228.

<sup>123</sup> *Id.* at 1232.

accepted at face value.<sup>124</sup> But as one commentator has pointed out, the quoted language is followed immediately by “[a]t that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.”<sup>125</sup> This can reasonably be read as withholding tolling until certification is denied.<sup>126</sup>

The court turned next to the representative nature of class actions. Putative class members, the court explained, were “effectively” a party to the suit from the class filing.<sup>127</sup> In this sense, such cases “do[] not involve tolling at all.”<sup>128</sup> As with similar reasoning from the Second Circuit in *WorldCom*, this likely does not survive *CalPERS*.

Like the Second and Ninth Circuits, the court next explained that the statute of limitations was respected because State Farm received the benefit of the statute of limitations when it was put on notice by the class filing.<sup>129</sup> Notably, the court’s analysis forewent any discussion of whether plaintiffs had slept on their rights.

The *Boellstorff* court’s last two rationales concerned equity and efficiency. As to equity, the court sought to avoid “locking putative class members” into a class while certification is pending, a process that can take several years.<sup>130</sup> Putative class members, the court explained, should not be forced to “wait out” the class certification decision.<sup>131</sup> It is important to note, however, that class members are free to bring individual claims before the certification decision so long as they do so within their own limitations period.<sup>132</sup> Thus, only when a putative class member’s own limitations period has expired must she “wait out” the certification decision if tolling is not available.

<sup>124</sup> *Boellstorff*, 540 F.3d at 1232 (quoting *Crown*, 462 U.S. at 354).

<sup>125</sup> See Brown, Note, *supra* note 111, at 810–11 (alteration and emphasis in original) (quoting *Crown*, 462 U.S. at 354).

<sup>126</sup> See *id.*

<sup>127</sup> *Boellstorff*, 540 F.3d at 1232–33 (quotation marks omitted) (quoting Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000)).

<sup>128</sup> *Id.* at 1232 (quotation marks omitted) (quoting Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000)).

<sup>129</sup> See *id.* at 1233.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* A similar argument has been put forth in commentary. James Mayer has argued that putative class members should not be forced to decide within their own limitations period whether to rely on the class or go it alone. Mayer, Note, *supra* note 51, at 935–36. He argued that this problem has become more concerning in recent years as the uncertainty and difficulty of class certification has increased. See *id.* at 922–24. I discuss this worry further in Part III.B.2.

<sup>132</sup> The Tenth Circuit implicitly recognized as much. See *infra* note 134.

As to efficiency, the court determined that the majority rule would not lead to too many filings because those who would sue separately while certification was pending would likely do so in any case.<sup>133</sup> That is, the court did not expect the number of suits to increase under the majority rule because individual plaintiffs will bring their claims within their own limitations periods or else will wait for the certification decision to do so.<sup>134</sup> For all of these reasons, the Tenth Circuit joined the majority camp.

## 2. The minority rule: sue later.

Among the courts of appeals, only the Sixth Circuit has squarely held that a plaintiff who files a separate action while certification is pending may not benefit from *American Pipe* tolling.<sup>135</sup> In *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*,<sup>136</sup> a plaintiff sought to bring a fraud action outside of the applicable two-year statute of limitations.<sup>137</sup> The plaintiff argued that its limitations period was tolled by a class action, for which certification was still pending at the time it sued, for fraud against the same defendant.<sup>138</sup>

The Sixth Circuit declined to extend class action tolling to plaintiffs who sue before the certification ruling.<sup>139</sup> The court explained that “[t]he purposes of *American Pipe* tolling” are furthered only “when plaintiffs delay until the certification issue

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<sup>133</sup> See *Boellstorff*, 540 F.3d at 1233.

<sup>134</sup> See *id.* (“[M]ost litigants with claims valuable enough to pursue separately will likely have filed their individual claims before the end of their own limitations period.”). The court added that, in theory, the minority rule might actually backfire and lead to an increased number of suits. If putative class members are considering relying on the class to press their claims, but are unsure how long the certification process will take, they may file premature “placeholder suits rather than risk placing their individual actions on ice during a potentially prolonged class certification process.” *Id.* at 1234.

<sup>135</sup> Many district courts have also withheld tolling while class certification is pending. See, e.g., *Nw. Mut. Life Ins. Co. v. Valeant Pharm. Int’l Inc.*, No. 18-15286 (MAS) (LHG), 2019 WL 4278929, at \*7–12 (D.N.J. Sept. 10, 2019); *In re Enron Corp. Sec.*, 465 F. Supp. 2d 687, 716 (S.D. Tex. 2006); *Chinn v. Giant Food, Inc.*, 100 F. Supp. 2d 331, 335 (D. Md. 2000); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000); *Stutz v. Minn. Mining Mfg. Co.*, 947 F. Supp. 399, 403–04 (S.D. Ind. 1996).

<sup>136</sup> 413 F.3d 553 (6th Cir. 2005).

<sup>137</sup> *Id.* at 568.

<sup>138</sup> *Id.* at 559, 568.

<sup>139</sup> See *id.* at 569. The refusal to extend *American Pipe* to plaintiffs filing before the class certification decision is often called the “forfeiture rule,” as such filers forfeit the benefit of class action tolling under the rule. See Mayer, Note, *supra* note 51, at 902.

has been decided.”<sup>140</sup> Withholding tolling from such plaintiffs would likely reduce the total number of suits because plaintiffs may choose not to sue if they wait until the class certification ruling is made.<sup>141</sup> The Sixth Circuit also noted that, at the time, all district courts to consider the issue had come to the same conclusion.<sup>142</sup>

Some commentators have suggested that the First<sup>143</sup> and D.C. Circuits<sup>144</sup> also withhold tolling while certification is pending. While both circuits have made statements consistent with this position, neither have, in fact, squarely adopted it. The First Circuit’s only statement on the issue is dicta.<sup>145</sup> It is also possible that the court was not aware, at the time it wrote on the issue, that *Crown* had recently extended *American Pipe* to separate ac-

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<sup>140</sup> *Wyser-Pratte*, 413 F.3d at 569; see also Bober, Comment, *supra* note 20, at 642–44 (advancing a similar argument in the context of cross-jurisdictional class action tolling).

<sup>141</sup> See *Wyser-Pratte*, 413 F.3d at 569 (“At the point in a litigation when a decision on class certification is made, investors usually are in a far better position to evaluate whether they wish to proceed with their own lawsuit, or to join a class, if one has been certified.”) (quoting *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 452 (S.D.N.Y. 2003), *vacated and remanded*, 496 F.3d 245 (2d Cir. 2007)).

<sup>142</sup> *Id.* (“[T]his limitation on class action tolling has taken hold in a number of district courts, with no courts rejecting it.”). Indeed, the courts to first consider the issue took what later became the minority position among the courts of appeals. See Mayer, Note, *supra* note 51, at 911–16.

<sup>143</sup> See Mayer, Note, *supra* note 51, at 912–13; Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 466 n.130 (2014); Kevin Welsh, Comment, *Collision Course: How Federal Rule of Civil Procedure 23(f) Has Silently Undermined the Prohibition on American Pipe Tolling During Appeals of Class Certification Denials*, 73 LA. L. REV. 1183, 1222 & n.281 (2013); Brown, Note, *supra* note 111, at 794 n.7.

<sup>144</sup> See, e.g., Mayer, Note, *supra* note 51, at 911–12; Wasserman, *supra* note 14, at 831 & n.147.

<sup>145</sup> In *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983), the plaintiff sought to invoke *American Pipe* to cure a jurisdictional defect. The court rejected the notion that the tolling rule could solve the jurisdictional problem and then added, in dicta, that “*American Pipe* says nothing about [the plaintiff’s] ability to maintain a separate action while class certification is still pending.” *Id.*; see *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 789 (6th Cir. 2016) (describing *Glater*’s statement as dicta); *Schimmer v. State Farm Mut. Auto. Ins. Co.*, No. 05-cv-02513-MSK, 2006 WL 2361810, at \*5 n.5 (D. Colo. Aug. 15, 2006). Indeed, *Wyser-Pratte* did not even mention the First Circuit’s treatment of the issue. See *Wyser-Pratte*, 413 F.3d at 568 (explaining that, at the time, only district courts had considered the issue). *But see Soroko v. Cadle Co.*, No. 10-11788-GAO, 2011 WL 4478479, \*2 (D. Mass. Sep. 23, 2011) (citing *Glater* for the proposition that *American Pipe* does not apply to suits filed while certification is pending).



tions.<sup>146</sup> As for the D.C. Circuit, its decision is better read as withholding tolling for different reasons.<sup>147</sup> Indeed, the district court in that circuit does not invariably follow the minority rule.<sup>148</sup>

To reiterate, the Sixth Circuit is the only federal court of appeals to squarely hold that plaintiffs cannot benefit from *American Pipe* tolling if they sue while class certification is pending. The Second, Ninth, and Tenth Circuits, in contrast, allow individual plaintiffs to benefit from tolling even if they file while certification is pending.

#### B. Does Tolling Apply to Opt-out Plaintiffs?

Courts are even more lopsided on the question whether *American Pipe* tolling applies to plaintiffs who opt out of certified classes. Notably, all four of the circuits to decide whether tolling applies to suits filed before a certification ruling extend tolling to plaintiffs who opt out of a certified class.<sup>149</sup> They get here by relying on the Supreme Court's *Eisen* dicta.<sup>150</sup> For courts in the majority camp, this is a sensible result. If plaintiffs benefit from tolling even when certification is granted, it makes little sense to make them wait out the certification ruling. But this reasoning does not apply to the Sixth Circuit's minority rule. Under that scheme, plaintiffs can benefit from tolling if they sue

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<sup>146</sup> Although the Supreme Court had extended *American Pipe* tolling to plaintiffs bringing separate actions just one month earlier in *Crown*, reference to *Crown* and its holding are absent from *Glater*.

<sup>147</sup> In *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342 (D.C. Cir. 1980), the court declined to apply *American Pipe* tolling where "appellants filed their own action nine months before the district court granted certification." *Id.* at 346 n.7. Importantly, however, the court emphasized that "no intervention was ever attempted"; instead, plaintiffs filed a separate action. *Id.* Hence, the lack of intervention, rather than the timing of the action, is likely what led the court to withhold tolling. *Crown*, which extended tolling to separate actions three years later, likely abrogates *Wachovia Bank's* reasoning on this issue. Additionally, the D.C. Circuit distinguished the case from *American Pipe* because "certification of the class was granted, not denied." *Id.*

<sup>148</sup> See *Howard v. Gutierrez*, 571 F. Supp. 2d 145, 156 (D.D.C. 2008) (following the majority rule). *But see In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, & "ERISA" Litig.*, 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007) (citing *Wachovia* for the proposition that *American Pipe* does not toll claims filed before the class certification decision).

<sup>149</sup> See *Stein*, 821 F.3d at 788; *Boellstorff*, 540 F.3d at 1229–30; *WorldCom*, 496 F.3d at 250; *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985).

<sup>150</sup> See *supra* text accompanying notes 41–51. Some other federal courts of appeals have similarly concluded that class action tolling applies even when plaintiffs opt out of a certified class. See, e.g., *Adams Pub. Sch. Dist. v. Asbestos Corp.*, 7 F.3d 717, 718 n.1 (8th Cir. 1993).

separately the day class certification is granted, but oddly cannot do so if they sue one day earlier.<sup>151</sup>

The lopsided authority notwithstanding, some courts have suggested that tolling does not apply to opt-out plaintiffs.<sup>152</sup> These courts do not always provide reasons for declining to extend *American Pipe* besides explaining that *American Pipe* itself did not concern an opt-out plaintiff.<sup>153</sup> Those that go further emphasize that plaintiffs who disavow an ongoing class action by filing their own actions forfeit their tolling rights.<sup>154</sup> It is not immediately clear why disavowal of an ongoing class action is inconsistent with class action tolling. Given what we now know about the *American Pipe* doctrine, however, the possibility that plaintiffs have relied on a class action turns out to be quite important. I next explain why this is so.

### III. APPLYING RECENT DEVELOPMENTS TO UNRESOLVED QUESTIONS

I now turn to resolving the two unresolved questions outlined in Part II: whether plaintiffs who sue while certification is pending benefit from tolling and whether plaintiffs who opt out of a certified class benefit from tolling. I begin in Part III.A by deriving guiding principles from the Supreme Court's recent pronouncements in *CalPERS* and *China Agritech*. The key principle is that, as equitable tolling, *American Pipe* applies only when consistent with the statutory intent of time bars. The second principle is that *American Pipe* should allow putative class members to safely rely on the class without making protective filings. Critically, however, this efficiency goal is limited by the fact that courts' ability to promote equity is bound by statutory enactments.

Part III.B applies these principles to cases in which only one time bar—a statute of limitations—is present. This analysis reveals a more general rule: plaintiffs should benefit from tolling only if they have plausibly relied on a class to press their claims.

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<sup>151</sup> The Sixth Circuit is not alone in reaching this result. Some other courts have likewise allowed a plaintiff to benefit from class action tolling regardless of the certification outcome despite withholding tolling until the certification decision is made. *See, e.g., Enron*, 465 F. Supp. 2d at 716.

<sup>152</sup> *See supra* note 52 and accompanying text.

<sup>153</sup> *See, e.g., Wachovia Bank*, 650 F.2d at 346 n.7.

<sup>154</sup> *See, e.g., Orleans Par. Sch. Bd. v. U.S. Gypsum Co.*, 892 F. Supp. 794, 803–05 (E.D. La. 1995) (applying Louisiana law but noting uncertainty as to whether opt-out plaintiffs receive tolling under federal law).

I argue that plaintiffs facing a statute of limitations have plausibly relied on the class—and thus should receive tolling—only when they sue after a class has been denied certification or otherwise terminates.

Finally, Part III.C considers cases in which plaintiffs face both a statute of limitation and a statute of repose.<sup>155</sup> These plaintiffs, like those facing only a statute of limitations, should receive tolling after the class is denied certification or otherwise terminates. Of course, *CalPERS* ensures that tolling will not apply after the statute of repose runs. For this reason, I argue that my test of plausible reliance allows plaintiffs facing both time bars to receive tolling under one additional circumstance: while class certification is pending but before the statute of repose runs.

#### A. Guiding Principles from *CalPERS* and *China Agritech*

The *CalPERS* Court held that *American Pipe* does not toll statutes of repose because doing so would contravene the statutory intent of these time bars. This is because class action tolling is judicially crafted equitable tolling, rather than legislatively based legal tolling.<sup>156</sup> As a corollary, *American Pipe* should toll statutes of limitations only when doing so is consistent with the time bar's "statutory intent."<sup>157</sup> To be sure, statutes of repose provide a clear legislative command that they may not be tolled. Even before *CalPERS*, the Court had held repeatedly that statutes of repose are not subject to equitable tolling.<sup>158</sup> Nonetheless, equitable tolling of statutes of limitations is likewise restrained by statutory intent.<sup>159</sup>

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<sup>155</sup> Statutory time bars, like all types of legislation, vary. For example, some might include express tolling exceptions. Thus, tolling rules cannot apply uniformly to all time bars. See *CalPERS*, 137 S. Ct. at 2050 (emphasizing the "statute-specific nature" of tolling analysis). Still, time bars often share general qualities, and my analyses assume generic statutory time bars. See, e.g., *supra* text accompanying notes 7–12 (discussing 15 U.S.C. § 77m).

<sup>156</sup> See *CalPERS*, 137 S. Ct. at 2051–52.

<sup>157</sup> *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014); see also *CalPERS*, 137 S. Ct. at 2050; *Lozano*, 572 U.S. at 11 ("We [] presume that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute.").

<sup>158</sup> *CalPERS*, 137 S. Ct. at 2051.

<sup>159</sup> See *Lozano*, 572 U.S. at 10–11; Note, *Statutes of Limitations and Defendant Class Actions*, 82 MICH. L. REV. 347, 351 (1983) (arguing that class action tolling must further efficiency without violating "defendants' interests in notice and repose"); Sawyer, Comment, *supra* note 22, at 111 (arguing that "[t]he *American Pipe* Court clearly recog-

Understanding the statutory intent of statutes of limitations, of course, requires an inquiry into the policies underlying these time bars. This inquiry is less precise for statutes of limitations than for statutes of repose, as courts and commentators are uncertain as to the exact policies motivating limitations bars.<sup>160</sup>

Two purposes of time bars commonly referenced by courts—and, indeed, those mentioned in *American Pipe* and *Crown*—are to provide notice to defendants and prevent plaintiffs from sleeping on their rights.<sup>161</sup> Of course, the policies of statutes of limitations have been articulated in many different ways: it has been said that statutes of limitations avoid deterioration of evidence,<sup>162</sup> promote defendants' repose,<sup>163</sup> encourage the prompt enforcement of substantive law,<sup>164</sup> and reduce burdens on courts.<sup>165</sup> Preventing plaintiffs from sleeping on their rights, therefore, might simply be a way of promoting some of these un-

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nized that the basic policies of the statute of limitations must be satisfied before tolling benefits may be granted”).

<sup>160</sup> See Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 497 (2015) (“[S]cholars do not agree always about why statutes of limitations exist.”); Sawyer, Comment, *supra* note 22, at 111 n.24 (“Legislatures and courts have not clearly expressed what the real function of a statute of limitations is.”).

<sup>161</sup> *Crown*, 462 U.S. at 352; *Am. Pipe*, 414 U.S. at 554–55; see *Pierce*, *supra* note 20, at 346; see also *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (“Statutes of limitations require plaintiffs to pursue ‘diligent prosecution of known claims.’” (quoting *Statutes of Limitations*, BLACK’S LAW DICTIONARY (10th ed. 2014))); *Am. Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (“Our decision [ ] must not be regarded as encouragement to lawyers . . . to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights.”).

<sup>162</sup> See, e.g., *Bell v. Morrison*, 26 U.S. (1 Pet.) 351, 360 (1828) (explaining that statutes of limitations “afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses”); see also *Bain & Colella*, *supra* note 72, at 571–72.

<sup>163</sup> See, e.g., Note, *supra* note 50, at 413–14; Note, *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

<sup>164</sup> See, e.g., *Riddlesbarger v. Hartford Ins. Co.*, 74 U.S. (1 Wall.) 386, 390 (1868) (“The policy of these statutes is to encourage promptitude in the prosecution of remedies.”); *Bell*, 26 U.S. (1 Pet.) at 360 (explaining that statutes of limitations “produce speedy settlements of accounts”).

<sup>165</sup> See, e.g., *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (“[C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.”); see also Tyler T. Ochoa & Andrew Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453, 495–500 (1997); Mitchell A. Lowenthal, Brian E. Pastuszynski & Mark E. Greenwald, Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1016–17 (1980). There are many other contemplated rationales for statutes of limitations than those listed here. For a survey of many such rationales, see Ochoa & Wistrich, *supra*, at 460–500.

derlying policies.<sup>166</sup> In any case, the dual purposes of providing defendants notice and preventing plaintiffs' slumber are a convenient framework encapsulating limitations bars' statutory intent. Accordingly, tolling should apply only when these two policies are satisfied.

A second guiding principle concerns the extent to which the doctrine furthers efficiency and economy of litigation. As explained in Part I.C, tolling serves efficiency by allowing putative class members to forgo wasteful protective filings yet retain the ability to litigate their rights if the class falls apart.<sup>167</sup> This pursuit of efficiency is a narrow one, strictly limited by statutory time bars.<sup>168</sup> Based only in courts' equitable tolling powers, the doctrine cannot flout the statutory intent of time bars to further independent policies. This restrictive understanding of *American Pipe*, critically, pushes back on the views of some that the doctrine is statutorily based legal tolling or federal common law intended to carry into effect the policies of Rule 23 class actions.<sup>169</sup> If that were the case, the tolling doctrine could be used to promote efficiency of class action proceedings in general, perhaps at the expense of statutory time bars.<sup>170</sup> Instead, a careful analysis of the Court's recent pronouncements reveals that *American Pipe* promotes efficiency simply by relieving plaintiffs of protective filings. The furtherance of other policies, such as Rule 23, is but a beneficial byproduct of the doctrine.

## B. Claims Facing a Statute of Limitations

I first consider when class action tolling should apply for cases in which a plaintiff's claim faces a statute of limitations but not a statute of repose.

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<sup>166</sup> See Ochoa & Wistrich, *supra* note 165, at 488–89 (citing Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 981 (1988)). It is not necessarily the case, however, that disincentivizing slumber is intended only to further other policies. Preventing plaintiffs from sleeping on their rights may be an end in itself, furthering normative values of diligence and promptness. See *id.* at 489–91.

<sup>167</sup> See *supra* text accompanying notes 98–101.

<sup>168</sup> Cf. Note, *supra* note 159, at 351 (explaining that tolling should further efficiency “without interfering with defendants’ interests in notice and repose”).

<sup>169</sup> See, e.g., *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009) (explaining that *American Pipe* is legal tolling derived from Rule 23); Burbank & Wolff, *supra* note 20, at 28–37 (arguing that *American Pipe* is a rule of federal common law authorized by Rule 23).

<sup>170</sup> See *CalPERS*, 137 S. Ct. at 2051; Burbank & Wolff, *supra* note 20, at 29.

1. Tolling should apply only after the class has been denied certification or otherwise terminates.

As noted above, *American Pipe* tolling must comport with the statutory intent of the time bar in question. The majority circuits emphasize that defendants have already been put on notice by the class filing when individual plaintiffs sue before the class certification decision.<sup>171</sup> A class action filing connects the defendant, the claims, and the putative class, ensuring that suits by putative class members will not take defendants by surprise.<sup>172</sup> But the same is true regardless of whether separate suits are filed before or after the class certification decision. Defendants are no less on notice when a putative class member sues after the class certification ruling rather than before.<sup>173</sup> Thus, both the majority and minority positions are consistent with the policy of providing notice to defendants.<sup>174</sup>

The majority circuits also claim that their rule is consistent with the policy of preventing plaintiffs from sleeping on their rights.<sup>175</sup> They reach this conclusion based on language from *American Pipe* and *Crown*. They point to the Supreme Court's pronouncement that "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights."<sup>176</sup> They also point to the Court's declaration that "no different a standard should apply to those members of the class who did not rely upon the commencement of the class action."<sup>177</sup> From these Supreme Court pronouncements alone the majority circuits conclude that plaintiffs who sue before the class certification ruling have not slept on their rights.

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<sup>171</sup> See *Boellstorff*, 540 F.3d at 1229; *Hanford*, 534 F.3d at 1009; *WorldCom*, 496 F.3d at 253.

<sup>172</sup> See *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489 (9th Cir. 1985).

<sup>173</sup> See *Wyser-Pratte*, 413 F.3d at 567 (explaining that *American Pipe* tolling depends on the filing of the class action providing notice to defendants).

<sup>174</sup> One might argue that the majority rule better aligns with the policy of notice because it allows individual plaintiffs to bring suits more quickly, before the certification decision. This might allow defendants to better preserve any evidence relating to the specific plaintiff bringing the separate suit. It is not necessarily the case, however, that individual suits will be brought more quickly under the majority rule. Because the minority rule withholds tolling from individual plaintiffs until the class certification decision is made, individual plaintiffs may be more likely to bring individual suits within their own limitations periods. See *supra* note 134.

<sup>175</sup> See, e.g., *WorldCom*, 496 F.3d at 255.

<sup>176</sup> *Id.* (alteration in original) (quoting *Crown*, 462 U.S. at 352).

<sup>177</sup> *Boellstorff*, 540 F.3d at 1229 (quoting *Am. Pipe*, 414 U.S. at 551).

The majority circuits err in applying these statements—both from cases in which separate suits were brought after class certification was denied<sup>178</sup>—to cases in which suit was brought before the certification ruling. Compare the differing circumstances. A plaintiff who does not sue individually until the class action terminates can reasonably assert that she relied on the class to press her claims. Only after the class was denied certification or otherwise fell apart was it necessary for her to sue separately. But a plaintiff who sues separately while class certification is pending is affirmatively separating herself from the class rather than relying on it to press her claims.<sup>179</sup> If she sues separately within her own limitations period, she need not rely on tolling. And if she sues after her own limitations period expires, it is not clear why she should benefit from class action tolling. Such plaintiffs have potentially slept on their rights and can sue separately only because a class action happens to have been filed.

For these reasons, putative class members who sue while certification is pending or after certification has been granted can be accused of sleeping on their rights.<sup>180</sup> Thus, plaintiffs should be eligible for class action tolling only if they sue after the class is denied certification or otherwise terminates. Plaintiffs who sue at that point “anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.”<sup>181</sup> This does not mean that plaintiffs cannot opt out of a certified

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<sup>178</sup> *Crown*, 462 U.S. at 348; *China Agritech*, 138 S. Ct. at 1806 (“*American Pipe* and *Crown, Cork* addressed only putative class members who wish to sue individually after a class-certification denial.”).

<sup>179</sup> See 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 3:15, Westlaw (database updated October 2020) (explaining that putative class members who sue individually while class certification is pending “cannot credibly maintain they have relied on the pendency of the class action”); see also Ian Gallacher, *Representative Litigation in Maryland: The Past, Present, and Future of the Class Action Rule in State Court*, 58 MD. L. REV. 1510, 1551–52 (1999).

<sup>180</sup> One student note analyzed whether applying tolling to plaintiffs opting out of certified classes is consistent with the policies of statutes of limitations. See Note, *supra* note 50, at 414–16. This note recognized that those suing after certification is granted have arguably slept on their rights. See *id.* at 415 n.71. But it argued that plaintiffs who opt out of a certified class and claim tolling have not slept on their rights because the class must be certified “as soon as practicable” and the opt-out occurs within the period set by the court. See *id.* This analysis, however, conflates properly opting out with making a timely claim. See *infra* note 182. Interestingly, the note recognizes elsewhere that opting out and making a timely claim are issues to be treated separately. Note, *supra* note 50, at 426.

<sup>181</sup> *CalPERS*, 137 S. Ct. at 2055.

class and sue—it means only that they cannot rely on *American Pipe* tolling to ensure that their claim is timely.<sup>182</sup>

This analysis can be stated more generally: tolling comports with the statutory intent of limitations periods only when plaintiffs have relied on the class to press their claims. Otherwise, they are able to sue merely because they happened to fall into a putative class.<sup>183</sup> Indeed, reliance on class proceedings as a prerequisite to tolling aligns with the common understanding of equitable tolling. Equitable tolling is commonly said to be available only where a plaintiff has diligently pursued her rights but is frustrated in bringing her claim.<sup>184</sup> It is obviously difficult for a plaintiff who has not relied on a class action to be frustrated by it in attempting to bring her claim. Thus, plaintiffs affirmatively separating themselves from the class—either by suing while certification is pending or by opting out of a certified class—should not benefit from tolling.

Of course, it cannot be that reliance on a class action is necessary to benefit from tolling. Some plaintiffs who actually sleep on their rights will inevitably benefit from tolling. For example, some will sue after class certification is denied despite being unaware of their claims during their own limitations periods. Yet the Supreme Court is clear that a plaintiff claiming tolling need not prove reliance on or awareness of the class proceedings.<sup>185</sup> This is because requiring plaintiffs to prove reliance on the class proceedings would undermine the tolling doctrine's equitable nature. The doctrine relieves putative class members of the need to make a protective filing or otherwise prove reliance on the class proceedings.<sup>186</sup>

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<sup>182</sup> Rule 23(c)(2)(B)(v) provides that class members may opt out of a class. But this provides only a release from the class's binding effect on class members. *See Note, supra* note 50, at 426 ("Tolling . . . is irrelevant to the function of the opt-out rule. The [opt-out] provision merely relieves the plaintiff from the binding effect of the class action suit."). An opt-out plaintiff must establish separately that her action is timely. *See CalPERS*, 137 S. Ct. at 2053 ("It does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute."); *see also Kennedy, supra* note 50, at 33 n.169.

<sup>183</sup> *Cf. Prince*, Case Note, *supra* note 38, at 1026 (explaining that plaintiffs who receive tolling without relying on the class receive an "unexpected windfall").

<sup>184</sup> *See Lozano*, 572 U.S. at 10; *Booth v. United States*, 914 F.3d 1199, 1207 (9th Cir. 2019); *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706 (11th Cir. 1998).

<sup>185</sup> *Am. Pipe*, 414 U.S. at 551.

<sup>186</sup> *See Jonason*, Note, *supra* note 50, at 758 ("The Court allowed tolling to prevent precertification motions at the cost of giving the benefit of such a tolling to members who were unaware of the class action or of their own cause of action.").



Thus, what qualifies a plaintiff for *American Pipe* tolling can be called plausible—not actual—reliance on the class proceedings.<sup>187</sup> What I call “plausible reliance” can be inferred from the timing of the individual and class filings. A class action commenced within an individual plaintiff’s limitations period allows that plaintiff to argue that she would have sued earlier but for the class suit. Only after the class fell apart did she need to file her own suit. In other words, it is plausible that she relied on the class from the outset and continued to do so until the class dissolved.

The Supreme Court has never explained, decisively, that it is the plausibility that a class member has relied on a pending class certification that qualifies her for class action tolling. The Court’s dicta in *Eisen*, in fact, provides support for the opposite conclusion.<sup>188</sup> But several statements from the Court support the theory that plaintiffs’ potential reliance on class proceedings is the linchpin of the doctrine. As early as *Crown*, the Court explained that “unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights.”<sup>189</sup> More recently, the Court explained in *CalPERS* that “tolling as allowed in *American Pipe* may protect plaintiffs who anticipated their interests would be protected by a class action but later learned that a class suit could not be maintained for reasons outside their control.”<sup>190</sup> Similarly, the Court explained in *China Agritech* that “[a]ny plaintiff whose individual claim is worth lit-

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<sup>187</sup> My proposed rule of “plausible reliance” does not inquire into a plaintiff’s actual reliance on a class action. There are, in theory, cases in which a plaintiff might actually rely on a class but not “plausibly rely” in accordance with the timing rules I set. See *infra* text accompanying notes 204–10. As the doctrine has never considered actual reliance, *Am. Pipe*, 414 U.S. at 551, I argue that such plaintiffs should not benefit from traditional *American Pipe* tolling. They might, however, have an argument for equitable tolling in general. See *Lozano*, 572 U.S. at 10 (“As a general matter, equitable tolling pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.”).

<sup>188</sup> See *supra* text accompanying notes 43–49.

<sup>189</sup> *Crown*, 462 U.S. at 350; see also *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 474–75 (1975) (Marshall, J., concurring in part and dissenting in part) (explaining that *American Pipe* tolling applies “after the District Court [finds] class action an inappropriate mechanism for the litigation”).

<sup>190</sup> *CalPERS*, 137 S. Ct. at 2055; see also *Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011) (explaining that *American Pipe* held that “a putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim”).

igating on its own rests secure in the knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class.<sup>191</sup> There is, on balance, ample support for the notion that only plaintiffs who have plausibly relied on the class should benefit from *American Pipe* tolling.

## 2. Responding to counterarguments.

One objection to my analysis is that it places too much weight on the idea that plaintiffs should not sleep on their rights. Tolling is fair to defendants, the argument might go, so long as they are on notice of the claims against them. Yet preventing plaintiffs from sleeping on their rights serves other important policies, such as promoting defendants' repose.<sup>192</sup> Even if a defendant is aware that an action might be brought (notice), she still benefits from knowing that an action cannot be brought (repose).<sup>193</sup> Relatedly, repose interests are impinged on when there is uncertainty as to the number of suits and forums in which a defendant must defend herself.<sup>194</sup> And for evidentiary reasons, defendants benefit from knowing the precise identities of individual plaintiffs earlier rather than later.<sup>195</sup>

Admittedly, the repose interests protected by statutes of limitations are weaker than those protected by statutes of repose. For that very reason, statutes of repose are not subject to equitable tolling at all.<sup>196</sup> But that does not mean that statutes of limitations' repose policies should be overridden where there are insufficient equitable reasons for doing so. This is especially the case where defendants' repose interests are protected entirely by

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<sup>191</sup> *China Agritech*, 138 S. Ct. at 1810; see also *id.* at 1804 (“*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails.”); *id.* at 1806–07 (“If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.”).

<sup>192</sup> See *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944) (“[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.”).

<sup>193</sup> See *id.*; Ochoa & Wistrich, *supra* note 165, at 460–64.

<sup>194</sup> See *CalPERS*, 137 S. Ct. at 2053 (explaining that defendants' repose interests are violated when one class proceeding splinters into many separate proceedings after a statute of repose runs); see also Steven T.O. Cottreau, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 486 n.29 (1998).

<sup>195</sup> See Barney B. Welsh, Comment, *Class Actions under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 381–82 (1968).

<sup>196</sup> See *CalPERS*, 137 S. Ct. at 2051.

a statute of limitations, with no statute of repose backstop.<sup>197</sup> It may be equitable to allow putative class members to bring separate claims after a class action has fallen apart, but it is not equitable to allow a separate suit when plaintiffs' claims are already being vindicated by class proceedings.<sup>198</sup>

In addition to unfairly impinging on defendants' repose interests, applying tolling to those suing before the certification ruling or those opting out of certified classes inappropriately gives plaintiffs strategic advantages on top of an already "generous" tolling rule.<sup>199</sup> Class proceedings already allow class members to free ride on the class's litigative efforts before opting out,<sup>200</sup> and a proposed class settlement provides a proportionate floor for opt-out plaintiffs' settlement negotiations.<sup>201</sup> More generally, the "one-way interventionism" inherent to class actions is exacerbated by an expansive tolling rule.<sup>202</sup> Putative class members can stick with the class if it proceeds favorably or benefit from tolling and opt out if they sense an unfavorable class outcome.<sup>203</sup> An expansive tolling rule needlessly intensifies these plaintiff advantages at defendants' expense. In sum, that defendants are on notice by the class filing is not enough to justify tolling for those that cannot show plausible reliance on the class. Withholding tolling where plaintiffs have slept on their rights

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<sup>197</sup> See *id.* at 2049–50 ("The two periods work together: The discovery rule gives leeway to a plaintiff who has not yet learned of a violation, while the rule of repose protects the defendant from an interminable threat of liability."); *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) (explaining that a statute of repose protected defendants from stale claims that might otherwise be timely because of a statute of limitation's discovery rule); see also *Lewis v. Marshall*, 30 U.S. (1 Pet.) 470, 477 (1831) ("Statutes of limitations have been emphatically and justly denominated statutes of repose.").

<sup>198</sup> Cf. Lowenthal, Pastuszewski & Greenwald, Special Project, *supra* note 165, at 1085 (describing tolling rules as balancing acts between preserving plaintiffs' right to sue and fairness to defendants); Jonason, Note, *supra* note 50, at 756 (explaining how plaintiffs who benefit from tolling when opting out of a certified class receive a "windfall tolling period").

<sup>199</sup> *Crown*, 462 U.S. at 354 (Powell, J., concurring).

<sup>200</sup> See 1 WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 13.05[2][k], LEXIS (database updated Nov. 2019).

<sup>201</sup> See *id.*; cf. John C. Coffee, Jr., *Accountability and Competition in Securities Class Actions: Why "Exit" Works Better than "Voice"*, 30 *CARDOZO L. REV.* 407, 437 (2008) (explaining that plaintiffs who observe a proposed class settlement before opting out can strategically evaluate their prorated share of the settlement).

<sup>202</sup> See Wendy Gerwick Couture, *Class-Action Tolling, Federal Common Law, and Securities Statutes of Repose: A Recommendation*, 45 *LOY. U. CHI. L.J.* 525, 541 (2015).

<sup>203</sup> See Jonason, Note, *supra* note 50, at 762; cf. Couture, *supra* note 202, at 544–45 (making a pre-*CalPERS* argument that statutes of repose should not be tolled when it would allow for greater one-way interventionism by plaintiffs).

vindicates defendants' repose interests and minimizes strategic advantages enjoyed by class members.

A second objection to my restrictive reading of *American Pipe* is that it excludes some plaintiffs who may have actually relied on the class proceedings.<sup>204</sup> For example, suppose that a putative class member had intended to rely on the class but then becomes dissatisfied with the results of a class settlement, class definition, or class representative.<sup>205</sup> Dissatisfaction with one proceeding, however, does not justify equitable tolling so that another proceeding may commence. For one thing, class members already have a right to intervene in the class suit in order to object and rectify any inadequacies.<sup>206</sup> Furthermore, Rule 23 itself envisions binding class members who fail to separate themselves from the class when they have the chance; it does not guarantee class members who have already received notice and chosen to remain in a class a second opportunity to opt out after a settlement is reached.<sup>207</sup> This means that class members who have chosen not to opt out at an earlier date may be bound by a later settlement that they find objectionable.<sup>208</sup> Class members who rely on a class to press their claims accede control to class representatives and rely on the procedural safeguards supplied by courts.

A third objection is that putative class members who wish to sue separately should not be forced to wait out the class certification ruling. This is an argument made by the majority circuits,<sup>209</sup> and one commentator argues that this concern is heightened because the duration and difficulty of class certifica-

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<sup>204</sup> Such plaintiffs might still make ambitious arguments for equitable tolling in general. *See supra* note 187.

<sup>205</sup> *See* Jonason, Note, *supra* note 50, at 756.

<sup>206</sup> FED. R. CIV. P. 23(c)(2)(B) (requiring notice of class certification orders to members of Rule 23(b)(3) classes); *see also* FED. R. CIV. P. 23(d)(1)(B) (authorizing courts to require notice to class members where such notice is required for fairness).

<sup>207</sup> FED. R. CIV. P. 23(e)(4) ("If the class action was previously certified under Rule 23(b)(3), the court *may* refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so." (emphasis added)).

<sup>208</sup> *See, e.g.,* *Low v. Trump Univ., LLC*, 881 F.3d 1111, 1116 (9th Cir. 2018) (recognizing district courts' discretionary authority under Rule 23(e)(4) to allow a plaintiff to opt out after she has already assented to representation by a class); *see also id.* at 1122 n.6 (explaining that Rule 23(e)(4)'s language "anticipates that parties can reach a settlement agreement that does not permit an additional opt-out opportunity"). This can also be framed as a one-way interventionism issue: unhappy with the course of the class proceedings, plaintiffs seek to go it alone.

<sup>209</sup> *See, e.g.,* *Boellstorff*, 540 F.3d at 1233.

tion have increased since the *American Pipe* decision.<sup>210</sup> Yet nothing prevents these plaintiffs from suing within their own limitations period. Those who choose to rely on the class are aware from the outset that they will have to wait for the class proceedings. Furthermore, uncertainty as to the course of litigation is inherent to all suits, including those that putative class members might bring separately. Put simply, delay in one proceeding upon which a plaintiff relies does not justify the commencement of a second proceeding.

Finally, one may object that withholding tolling from plaintiffs who opt out of certified classes frustrates the goal of Rule 23's opt-out provision.<sup>211</sup> Statutes of limitations will often expire before class certification is granted due to the duration of the certification process. Thus, without tolling, class members effectively have no right to opt out.<sup>212</sup> As the Supreme Court has made clear, however, the right to opt out and the timeliness of claims are issues to be treated separately.<sup>213</sup> And even if Rule 23 supports tolling for opt-out plaintiffs, this fact does not implicate *American Pipe*. As explained, the *American Pipe* rule is rooted in courts' equitable powers, not Rule 23, and it is intended to allow putative class members to rely on a putative class that may fall apart. As such, a tolling rule intended to effectuate Rule 23's opt-out policy would have a different purpose and legal basis.

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This Section's analysis has focused on the first guiding principle derived in Part III.A: tolling must comport with the statutory intent of statutes of limitations. Because tolling for those who sue while class certification is pending or who opt out of a certified class is inconsistent with the statutory intent of statutes of limitations, it was unnecessary to implement the second guiding principle: relieving putative class members of potentially unnecessary protective filings. That principle is more important for the scenario encountered in the next Section.<sup>214</sup>

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<sup>210</sup> See Mayer, Note, *supra* note 51, at 922.

<sup>211</sup> See FED. R. CIV. P. 23(c)(2)(B).

<sup>212</sup> See *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437, 452 n.12 (D.N.J. 2007).

<sup>213</sup> See *supra* note 182.

<sup>214</sup> For cases in which claims face only a statute of limitations, it is unclear what rule is most efficient and economical. The Sixth Circuit found its rule more economical because the desire to sue individually "may evaporate once a class has been certified." *Wysler-Pratte*, 413 F.3d at 569 (quoting *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d

### C. Claims Facing Both Limitations and Repose Time Bars

The preceding Section considered cases in which a putative class member's claims face only a statute of limitations and not, additionally, a statute of repose. I concluded that, in such cases, a putative class member who sues separately should benefit from class action tolling only if she sues after the class certification is denied or the class otherwise terminates. Only in such cases has she plausibly relied on the class proceedings—a prerequisite, I argue, to the application of equitable *American Pipe* tolling.

A wrinkle is added to putative class members' decision-making when a statute of repose enters the scene. In this scenario, plaintiffs cannot sue separately if the class is denied certification after the repose period has expired.<sup>215</sup> Under the majority rule, members of a class still awaiting class certification must file before the repose period runs or risk losing their claims. Plaintiffs are in an even worse position under the minority rule (as well as the variation on it proposed in the last Section). They must file even earlier, within their own limitations period, or risk losing their claims.<sup>216</sup> The Sixth Circuit itself has recognized this problem:

We recognize that if a lawsuit asserts causes of action subject both to a statute of limitations and a statute of repose, a putative class member in our Circuit is placed in a bind: beyond the repose period, no putative class member may file an action, even if the district court has yet to rule on class certification. . . . *Wyser-Pratte* imposes an additional hurdle: if a putative class member files a separate action between the lapse of the limitations period and of the repose period, that action is barred because of *Wyser-Pratte's* forfeiture

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431, 452 (S.D.N.Y. 2003), *vacated and remanded*, 496 F.3d 245 (2d Cir. 2007)). The court pointed out that those thinking about bringing individual suits may have a better idea about whether they wish to do so after the class certification decision. *See id.* But as the Tenth Circuit pointed out, the minority rule might actually lead to more total filings. If plaintiffs are forced to choose between filing an individual action within their own limitation period or “sit[ting] tight for a class certification decision,” they may choose the former in anticipation of a protracted class certification process. *See Boellstorff*, 540 F.3d at 1234.

<sup>215</sup> *See CalPERS*, 137 S. Ct. at 2053–54.

<sup>216</sup> *See Mayer*, Note, *supra* note 51, at 934–35; Recent Case, 130 HARV. L. REV. 1760, 1766 (2017).

rule. Thus, a concerned potential plaintiff must file within the limitations period or be out of luck.<sup>217</sup>

Our second guiding principle—putative class members should be able to rely on the class without making protective filings—means that the inequity and inefficiency of this situation should be minimized to the extent permissible by the statutory time bars. I argue that this is possible to do under the general rule that plaintiffs are eligible for class action tolling when they have plausibly relied on the class to press their claims.

1. A novel rule: tolling should apply while certification is pending so long as the repose period has not expired.

There is reason to believe that the permissible timing of *American Pipe* tolling changes when both limitations and repose time bars are involved. A plaintiff who files an individual suit after her own limitations period has expired, but before a repose period has run, might reasonably be found to have relied on the class to press her claims. This is because a new obstacle—the repose period—exists to frustrate a plaintiff's ability to bring her claim. She is no longer certain that she will be able to sue separately if class certification is denied. I proffer, therefore, that a putative class member facing both limitations and repose time bars should benefit from class action tolling when class certification is pending but the repose period has not yet run.<sup>218</sup> Of course, this proposed rule holds only if it is consistent with the policies underlying both statutory time bars and serves efficiency and judicial economy to the extent permissible by statute. I argue that these conditions are met.

Allowing a putative class member to file an individual suit up to the point her repose period ends, while class certification is pending, is consistent with the statutory intent of repose bars. Statutes of repose are a legislative judgment about when a defendant should be absolutely free from liability.<sup>219</sup> While a repose period may encourage plaintiffs to bring claims in a timely

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<sup>217</sup> *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 795 n.6 (6th Cir. 2016).

<sup>218</sup> Plaintiffs facing both time bars should, of course, also benefit from tolling when they sue after the class is denied certification or otherwise terminates (so long as the statute of repose has not run). In such cases they have plausibly relied on the class to press their claims. *See supra* Part III.B.

<sup>219</sup> *See CalPERS*, 137 S. Ct. at 2049; *see also id.* at 2050 (“[T]he rule of repose protects the defendant from an interminable threat of liability.”).

manner, this is incidental to the time bar's purpose of providing an absolute bar to liability after a set period of time.<sup>220</sup> Hence, allowing plaintiffs to file individual suits while certification runs and before the repose period expires is consistent with this time bar's statutory intent.

Whether this rule is consistent with statutes of limitations is a closer question. The rule accords with the policy of notice, as the class filing provides notice to the defendant of the claims and potential plaintiffs' generic identities. But statutes of limitations also require that plaintiffs be diligent and avoid sleeping on their rights. Plaintiffs who sue after their limitations period has passed—but before the repose period runs—have arguably slept on their rights in failing to sue within their own limitations period. The same could be said, however, of plaintiffs who sue after the denial of class certification. Yet those plaintiffs receive tolling and “cannot be accused of sleeping on their rights.”<sup>221</sup> As explained in Part III.B.1, this is because those plaintiffs plausibly relied on the class proceedings. Plaintiffs who sue while class certification is pending but before a repose period runs, likewise, have plausibly relied on the class to press their claims. They may have relied on the class but now sue separately because of the looming statute of repose. This is the “extraordinary circumstance”<sup>222</sup> that should qualify such plaintiffs for equitable tolling.

Finally, the proposed rule serves efficiency and judicial economy by equitably allowing putative class members to rely on class proceedings without making protective filings. Without the extension of tolling to filings made before a certification decision, plaintiffs may make unnecessary individual filings just prior to the running of their individual limitations periods.<sup>223</sup> But they can hold off, at least temporarily, if they are given the entire repose period to decide. If the class is denied certification or otherwise terminates before the repose period expires, they will be able to benefit from traditional *American Pipe* tolling. If certification is still pending as the repose period is about to expire, they may then make a protective filing to avoid losing their claims.

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<sup>220</sup> See *CTS Corp.*, 573 U.S. at 9.

<sup>221</sup> *Crown*, 462 U.S. at 352–53.

<sup>222</sup> *Lozano*, 572 U.S. at 10.

<sup>223</sup> See *supra* text accompanying notes 215–17.



For these reasons, putative class members who sue while certification is pending but before the repose period expires should benefit from class action tolling. Such plaintiffs have plausibly relied on the class to press their claims before suing separately, allowing the statute of limitations to be tolled. At the same time, defendants' repose interests are protected so long as suits are filed before the repose period expires. Importantly, this rule furthers efficiency by allowing putative class members to delay their individual filings until they are absolutely necessary.

## 2. Limitations of and challenges to the proposed rule.

The previous Section argued that plaintiffs who sue while certification is pending but before the repose period runs have plausibly relied on the class to press their claims. One can argue this analysis only answers the question of when plaintiffs must file; it does not imply that plaintiffs should benefit from tolling before the class is denied certification or otherwise terminates. Perhaps the separate suit should continue only after—and if—the class falls apart: “[O]nly then would it be necessary to pursue claims individually.”<sup>224</sup>

Remember, though, that the important question is whether tolling comports with the statutory intent of the time bars in question. In dual time-bar schemes, the statute of repose is the primary guarantor of repose while the statute of limitations encourages claims to be brought promptly.<sup>225</sup> Suits brought before the statute of repose expires but while certification is pending do not contravene the repose bar. Nor are statute of limitations policies neglected. Notice was provided by the class filing, and plaintiffs would have brought claims more promptly if they had not relied on the class to press their claims. Accordingly, those who file while certification is pending but before the repose period runs should be able to press their claims separately regardless of whether certification is ultimately granted or denied.

Another difficulty with my proposed rule is that some plaintiffs who never planned to rely on the class still benefit from tolling by filing after their own limitations period expires but before the repose period runs. As explained in Part III.B.1, class action tolling always lets some plaintiffs who have slept on their rights slip through. But such cases may be more obvious

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<sup>224</sup> *China Agritech*, 138 S. Ct. at 1807.

<sup>225</sup> See *supra* note 197 and accompanying text.

under the rule proposed here. For example, suppose that a claim faces a two-year limitations period and a five-year repose period.<sup>226</sup> Suppose that both begin running at the same time, and a class action is filed immediately. A putative class member who brings a separate claim three years later has missed her own limitations period by a year. Yet she files while two years remain on the repose period. Such a plaintiff does not appear to have relied on the class to press her claims and should arguably not benefit from class action tolling.

There are a few ways to attempt to manage this difficulty. One idea is to require plaintiffs to file within a set period—say six months—before the repose period expires. A rule withholding tolling from those who sue long before the repose period expires would seek to reserve tolling only for those relying on class proceedings. One shortcoming of this solution is that the set period would be arbitrary.<sup>227</sup> A bigger issue is that factual uncertainties might make it unclear exactly when the repose period began to run. Plaintiffs would understandably worry about missing the correct time period in which to file.

At the opposite end of the spectrum is a rule requiring a case-by-case assessment of whether a particular plaintiff relied on the class to press her claims before filing a separate action before the repose period runs.<sup>228</sup> But this approach leaves plaintiffs uncertain as well. They will not know for sure, before filing, whether a court will find that they relied on the class. This approach also seems inconsistent with the fact that *American Pipe* extended tolling to all intervenors, regardless of their actual reliance on the class action.<sup>229</sup>

Because of the uncertainty in these solutions, a court adopting my proposed rule would likely apply tolling so long as the

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<sup>226</sup> These time periods are realistic. Claims brought under the Exchange Act, for example, are subject to a two-year statute of limitations and five-year statute of repose. 28 U.S.C. § 1658(b); see *China Agritech*, 138 S. Ct. at 1804.

<sup>227</sup> Cf. *Maryland v. Shatzer*, 559 U.S. 98, 110 (2010) (holding that the effect of a suspect's invocation of his right to counsel lapses after fourteen days); *id.* at 124 n.7 (Stevens, J., concurring in the judgement) ("Today's decision, moreover, offers no reason for its 14-day time period.")

<sup>228</sup> Cf. *Wood v. Combustion Eng'g, Inc.*, 643 F.2d 339, 347 (5th Cir. 1981) (declining, in dicta, to apply *American Pipe* tolling where plaintiffs waited nineteen months after opting out of class to bring their own action); *Chazen v. Deloitte & Touche, LLP*, 247 F. Supp. 2d 1259, 1272 (N.D. Ala. 2003) ("The more persuasive reasoning rests in those cases that have refused to extend the equitable tolling doctrine to cases in which the plaintiff consciously chooses not to participate in the class action.")

<sup>229</sup> *Am. Pipe*, 414 U.S. at 551.

plaintiff sues before the repose period runs and while the certification motion is pending. It would probably not impose a window in which to sue nor undertake a case-by-case analysis. That some nonrelying plaintiffs who sleep on their rights will benefit from tolling is an imperfection that the doctrine tolerates.<sup>230</sup>

I last note that this imperfection might motivate us to rethink altogether the doctrine's lack of a requirement to prove reliance; perhaps only those who have actually relied on a class action should benefit from class action tolling. Such a rule would not be completely unprecedented. Before *American Pipe*, some courts had suggested that class action tolling should be available only to plaintiffs who could prove reliance on a class action.<sup>231</sup> The *American Pipe* Court, of course, squarely rejected any such requirement; it apparently believed that this would be inequitable to plaintiffs (and perhaps burdensome on courts). This calculus has arguably changed with the advent of electronic communications and court filings. The *CalPERS* Court, for example, suggested that putative class members facing a repose bar can easily reserve their claims with protective filings.<sup>232</sup> Limiting the doctrine to those who can affirmatively prove reliance on the class would be a welcome change to defendants as well as some scholars who have questioned the supposed benefits of the tolling rule.<sup>233</sup> Unless and until the Court makes this change, however, plaintiffs should benefit from tolling only if they have plausibly relied on a class to press their claims.

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<sup>230</sup> See *id.*; Jonason, Note, *supra* note 50, at 758.

<sup>231</sup> See *Buford v. Am. Fin. Co.*, 333 F. Supp. 1243, 1251–52 (N.D. Ga. 1971) (allowing members of a defunct class to “present proof of reliance upon the maintenance of the class action sufficient to toll the statute of limitations”); *Phila. Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 461 (E.D. Pa. 1968) (explaining that, in some cases, “an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations”); see also Prince, Case Note, *supra* note 38, at 1028 (arguing that plaintiffs should receive *American Pipe* tolling only if they prove they relied on a class action).

<sup>232</sup> See *CalPERS*, 137 S. Ct. at 2054. The Court also suggested that district court dockets would not become overwhelmed by such filings. See *id.* (“District courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion.”).

<sup>233</sup> See, e.g., Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 572–80 (1996) (questioning the benefits of class action tolling and emphasizing its costs, especially in the mass tort context).

## CONCLUSION

In this Comment, I have analyzed two of the *American Pipe* doctrine's unresolved questions. First, may a putative class member who sues while class certification is pending benefit from class action tolling? Second, does tolling apply to plaintiffs who opt out of a certified class?

To answer these questions, I derived guiding principles from the Supreme Court's recent *American Pipe* jurisprudence. The first guiding principle is that, as equitable tolling, *American Pipe* must comport with the statutory intent of the time bars to be tolled. The second principle is that the tolling doctrine serves efficiency and judicial economy, to the extent permissible by statute, in order to relieve putative class members of making protective filings.

Applying these guiding principles to the two unresolved questions reveals the underpinning of *American Pipe*: separate suits filed by putative class members should benefit from class action tolling only where they have plausibly relied on the class proceedings to press their claims. Only in such cases does tolling comport with the statute of limitation policies of defendant notice and plaintiff diligence, including the underlying policy of defendant repose.

Applying the test of plausible reliance yields different answers to our two unresolved questions depending on the exact time bars faced. When a plaintiff's claim faces only a statute of limitation, she should benefit from *American Pipe* tolling only after the class is denied certification or otherwise terminates. Plaintiffs facing both limitations and repose time bars should, likewise, receive tolling after the class is denied certification or otherwise terminates, so long as the statute of repose has not yet run. But the uncertain position of plaintiffs facing both time bars means that they should also receive tolling in an additional circumstance: when they sue while certification is pending but before the repose period runs.