

No. 13-640

IN THE
Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
OF MISSISSIPPI

Petitioner,

v.

INDYMAC MBS INC., ET AL.,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**AMICUS CURIAE BRIEF OF THE
AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice respectfully submits this brief as amicus curiae in support of Petitioner Public Employees' Retirement System of Mississippi. Letters from the parties giving consent to file amicus briefs in support of either (or neither) party are on file with the Clerk of Court.¹

The American Association for Justice is a voluntary national bar association with trial lawyer members who represent investors in private securities litigation. It appears here because it disagrees with, and is alarmed by, the lower court's ruling that tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is inapplicable in the securities context. For reasons to be discussed, the American Association for Justice does not believe Congress intended that result.

SUMMARY OF ARGUMENT

Retracing this Court's logic and reasoning in *American Pipe & Construction Co. v. Utah* all but suffices to decide this case. In *American Pipe*, this Court concluded that commencement of a class action filed pursuant to the federal Clayton Act suspended the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been certified. Tolling was appropriate

¹ Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

because it was consonant with Rule 23's aggregation policies, the policies underlying the statutory time limitation at issue there, and the overall federal legislative scheme.

A straightforward application of *American Pipe*'s logic and reasoning in this case leads to the conclusion that commencement of a class action asserting claims under the Securities Act of 1933 suspends the Act's three-year time limit as to all asserted class members. As in *American Pipe*, here tolling is consonant with Rule 23 policies and the federal securities law scheme, including the Private Securities Litigation Reform Act of 1995 (PSLRA). In enacting particularized class action procedures for private securities fraud claims, Congress evinced its preference for efficiency and economy of litigation; specifically, Congress wanted these suits to be resolved in the aggregate, and to be managed by sophisticated counsel representing the largest stakeholders. Not allowing tolling, by contrast, will result in a multiplicity of needless protective filings, thereby frustrating Rule 23's and the PSLRA's aims. It is hard to imagine, then, that Congress would have wanted to bar tolling, especially when this outcome would do nothing to promote the repose and certainty purposes underlying the Securities Act's three-year limitation period.

This Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), stated that the Securities Act's three-year limitation period is not subject to equitable tolling, but it did not address *American Pipe* tolling. The Court has never definitively typed the *American Pipe* tolling rule as legal or equitable. Rather than focus on such labels, however, the Court should follow its longstanding

approach in determining whether tolling is available by asking: Is it consonant with the legislative scheme? That approach obviates any Rules Enabling Act concern.

ARGUMENT

THE REAFFIRMATION OF *AMERICAN PIPE'S* LOGIC AND REASONING ALL BUT SUFFICES TO DECIDE THIS CASE.

American Pipe's logic and reasoning all but doom the argument that commencement of a class action asserting claims under the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (2012), does not suspend the Act's three-year time limitation for all asserted class members. *See id.*, § 77m. To see why, consider the analytical path *American Pipe* traveled; then walk that path again in this case, and arrive in the same place: tolling is available here, as it was in *American Pipe*, because it is consonant with Rule 23 policies and the applicable federal scheme.

1. *American Pipe* concerned a putative class action asserting claims under the Clayton Act, 15 U.S.C. §§ 12-27, 52-53 (2012). After the district court refused, on numerosity grounds, to certify the class, non-party class members filed motions to intervene as individual plaintiffs. 414 U.S. at 543-44. The district court denied these motions. *Id.* at 544. The Clayton Act's limitations period, it concluded, had run as to all these plaintiffs. *Id.* The commencement of a class action, it further concluded, had not suspended the limitations period. *Id.*

This Court ultimately held that "the 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.” *Id.* at 554; accord *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); see *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (confirming that “all asserted members” means “all”—intervenor and class members who file individual suits). If tolling were unavailable, the Court reasoned, then potential class members would be encouraged to file motions to intervene in order to guard against the possibility that certification would be denied. *American Pipe*, 414 U.S. at 553-54. Such protective filings would frustrate the class action procedure’s twin aims: to promote the efficiency and economy of litigation. *Id.*

The history of Rule 23 illuminates these policy goals. As *American Pipe* recounted, prior to 1966, Rule 23’s “invitation to joinder” scheme “allow[ed] members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.” *Id.* at 547. Given this potential for unfairness to defendants, some lower courts “require[d] individualized satisfaction of the statute of limitations by each member of the class.” *Id.* at 550. The 1966 amendments, however, ensured that a federal class action “is no longer ‘an invitation to joinder’ but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.” *Id.* For this reason, the Court in *American Pipe* concluded that it would be inconsistent with revised Rule 23 to require individualized satisfaction of the statute of limitations by each class member. *See id.*

Not only did tolling facilitate Rule 23’s aggregation policies, it was also consonant with the

“functional operation” of the Clayton Act’s statute of limitation. *Id.* at 554. Limitation periods like those set by the Clayton Act, the Court recognized, provide a defendant with notice, within the time specified, of claims that may be asserted against it; when that time expires, the time bar ensures a period of repose from stale claims, even if meritorious. *Id.* The commencement of a timely class action by a named plaintiff who is representative of the class, the Court concluded, satisfies these policies of repose and certainty. *Id.* at 555. Specifically, the bringing of the representative suit “notif[ies] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.” *Id.* Barring nonparty class members from intervening in the action after the limitation period runs would not promote the purposes underlying limitation periods. *Id.*

Resisting this conclusion, the class action defendants in *American Pipe* argued that the Clayton Act’s statute of limitations provided them with a substantive right of repose which could not, consistent with the Rules Enabling Act, be altered by a rule of procedure. *See id.* at 555-56. The Court, however, rejected that argument. “The proper test is not whether a time limitation is ‘substantive’ or ‘procedural,’” the Court explained, “but whether tolling the limitation in a given context is consonant with the legislative scheme.” *Id.* at 557-58. By framing the inquiry in this way, with a focus on tolling’s consonance with the relevant legislative scheme, the Court corrected the class action defendants’ misunderstanding that Rule 23 alone was somehow operating to enlarge the substantive period of repose provided by statute.

2. Does commencement of a timely class action asserting claims under the Securities Act of 1933 suspend the Act's three-year time limitation for all asserted class members? The answer, *American Pipe* teaches, turns on whether tolling the limitation is consonant with the federal securities law scheme.

Consider first whether tolling is consonant with the Securities Act's three-year limitation. The Act provides:

In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

15 U.S.C. § 77m. This language mirrors the “terms of a typical statute of limitation.” *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998) (citing Note, *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1179 (1950) (most statutes of limitation provide either that “all actions . . . shall be brought within” or “no action . . . shall be brought more than” so many years after “the cause thereof accrued” (internal quotation marks omitted)); H. Wood, 1 *Limitation of Actions* § 1, pp. 2-3 (4th ed. 1916) (“[S]tatutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are . . . statutes of limitation.”)).

In this case, a putative class action complaint was “brought,” *i.e.*, filed, within the Act's three-year limitation period. The putative class was defined to include Petitioner. This representative suit provided

Respondents with notice “not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.” 414 U.S. at 555. Barring Petitioner, a nonparty class member, from intervening in this action after the limitation period has run would not promote the repose and certainty purposes underlying the Securities Act’s three-year limitation period.

Consider next whether tolling is consonant with the overarching legislative scheme for private securities litigation. Congress, in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, enacted a series of reforms “to strike the appropriate balance between protecting the rights of victims of securities fraud and the rights of public companies to avoid costly and meritless litigation.” S. Rep. No. 104-98, at 10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 689; *see Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Relevant here, Congress enacted particularized class action procedures for private securities fraud claims. These procedures reveal a congressional policy favoring the aggregation of securities claims.

For instance, the PSLRA requires early notice to putative class members. 15 U.S.C. § 77z-1(a)(3)(A). It also requires appointment of a single lead plaintiff who will manage the litigation on behalf of the class. *Id.* § 77z-1(a)(3)(B). This provision ended the practice of picking lead plaintiffs on a “first come, first serve” basis. *See* H.R. Conf. Rep. No. 104-369 at 33-34, (1995) *reprinted in* 1995 U.S.C.C.A.N. 730, 732-33. Courts instead must appoint as the class leader the “most adequate” plaintiff, § 77z-1(a)(3)(B)(i)—typically, the

person or persons with “the largest financial interest in the relief sought by the class,” § 77z-1(a)(3)(B)(iii)(I)(bb). *See* S. Rep. No. 104-98, at 11, 1995 U.S.C.C.A.N. at 690.

Congress adopted these streamlined procedures for aggregating securities fraud claims because it believed that increasing institutional investors’ role in litigation would improve the quality of representation in securities class actions. Institutional investors have the knowledge and financial sophistication necessary to serve as effective litigation monitors, and their stake in the outcome of class actions gives them an incentive to do the job of lead plaintiff well. H.R. Conf. Rep. No. 104-369 at 34, 1995 U.S.C.C.A.N. at 733.

Also, Congress viewed these reforms as good for business. Institutional investors with large stakes in class actions who act as lead plaintiffs have interests aligned with the plaintiff class generally and thus can, consistent with fiduciary obligations, balance the class interests with the long-term interests of the company and its public investors. S. Rep. No. 104-98, at 11, 1995 U.S.C.C.A.N. at 690. And these reforms appear to be good for business in another way: channeling claims of the largest stakeholders into a single action gives a defendant the opportunity to settle a significant number of claims in one fell swoop. Broad settlements of this sort allow defendants to minimize their future liabilities and avoid the transaction costs of future litigation.

The *American Pipe* rule is consonant with these congressional aims. Its application in the securities context allows institutional investors who are nonparty plaintiffs to rely on the commencement of

the representative suit to protect their rights. Conversely, if the rule did not apply in this area, then investors who fear that class certification may be denied would have every incentive to file a protective suit or motion prior to the expiration of the three-year limitations period. This is, assuredly, a legitimate fear: “Offending conduct often comes to light years after the fact, class certification can be a lengthy process, and there is always a risk that certification would be denied.” *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 668 (S.D.N.Y. 2011). Given the PSLRA, it is obvious that Congress would not have wanted the Securities Act’s three-year limitation period to be applied in a manner that encourages a needless multiplicity of protective filings.

3. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), does not compel a different conclusion. In *Lampf*, the Court faced “the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action” that this Court, in an earlier case, had held was implicit in § 10(b) of the Securities Exchange Act of 1934. *Id.* at 359. This Court adopted the express limitations period Congress had adopted for “correlative remedies within the same” Securities Act, including the Act’s three-year limitations period. *Id.* at 362 (adopting § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e)). This three-year limit, the Court said in *Lampf*, “is a period of repose inconsistent with tolling.” *Id.* at 363. Here, *Lampf* was referring to equitable tolling only. *See id.*; accord *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000).

American Pipe itself did not type its tolling rule either as legal, *i.e.*, derived from a statutory source, or

equitable, *i.e.*, judicially created. *See Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 n.6 (2012). These labels—legal/equitable—closely mirror the specific labels—substance/procedure—which the *American Pipe* Court said were immaterial to the “proper” analysis. *See* 414 U.S. at 557-58. Eschewing labels of this sort, *American Pipe* trained on whether tolling was consonant with the legislative scheme. *See id.*

This approach, *American Pipe* itself noted, broke no new ground. *Id.* at 558. This Court’s decisions

fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled *under certain circumstances not inconsistent with the legislative purpose.*

Id. at 559 (emphasis added). And since *American Pipe*, that has remained this Court’s approach. *See, e.g., Beach*, 523 U.S. at 416 (“[t]he ‘ultimate question’ is whether Congress intended that ‘the right shall be enforceable in any event after the prescribed time’”) (quoting *Midstate Horticultural Co. v. Pennsylvania R. Co.*, 320 U.S. 356, 360 (1943)).

* * *

As in *American Pipe*, here federal law (15 U.S.C. § 77m) defines the limitations period; Rule 23’s policies support tolling the limitations period during the pendency of the class action; and a federal statute

(the PSLRA) provides a basis for concluding that Congress would have wanted the limitations period suspended in this circumstance. The Court should therefore hold that commencement of a class action asserting claims under the Securities Act suspends the Act's three-year time limitation for all asserted class members.

CONCLUSION

For the foregoing reasons, the judgment under review should be reversed.

May 28, 2014 Respectfully submitted,

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