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

BRIEF OF CIVIL PROCEDURE AND SECURITIES LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID FREEMAN ENGSTROM
Lead Amicus Curiae and Counsel of Record
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 721-5859
(dfengstrom@law.stanford.edu)

May 28, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose scholarship and teaching focus on civil procedure and/or the federal securities laws. *Amici* have devoted substantial parts of their professional careers to studying those subjects, including conducting theoretical and empirical analyses of how different procedural orderings shape enforcement of the securities laws and other litigation and regulatory schemes.

This brief reflects the consensus of the *amici* that this Court should reverse the Second Circuit's decision and hold that the rule announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), protects petitioner from the three-year time-bar in § 13 of the Securities Act. *Amici* are as follows:

Professor Janet C. Alexander is the Frederick I. Richman Professor of Law at Stanford Law School.

Professor Stephen B. Burbank is the David Berger Professor for the Administration of Justice at the University of Pennsylvania Law School.

Professor Kevin M. Clermont is the Robert D. Ziff Professor of Law at Cornell University Law School.

Professor John C. Coffee, Jr., is the Adolf A. Berle Professor of Law at Columbia Law School.

Professor James D. Cox is the Brainerd Currie Professor of Law at Duke University School of Law.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have filed with the Court a blanket consent authorizing such a brief.

Professor Scott Dodson is the Harry & Lillian Hastings Professor of Law at the University of California Hastings College of the Law.

Professor David Freeman Engstrom is an Associate Professor of Law at Stanford Law School.

Professor Jonah B. Gelbach is an Associate Professor of Law at the University of Pennsylvania Law School.

Professor Alexandra D. Lahav is the Joel Barlow Professor of Law at the University of Connecticut School of Law.

Professor David Marcus is a Professor of Law at the University of Arizona Rogers College of Law.

Professor Norman W. Spaulding is the Nelson Bowman Sweitzer and Marie B. Sweitzer Professor of Law at Stanford Law School.

Professor A. Benjamin Spencer is a Professor of Law and Director of the Frances Lewis Law Center at the Washington & Lee University School of Law.

SUMMARY OF THE ARGUMENT

In *American Pipe*, this Court wisely rationalized class action law and policy under Rule 23 by ensuring that asserted class members need not file protective actions in order to protect their rights and avoid being time-barred in the event class certification is subsequently denied. This case threatens to undo that wise decision, inviting a wave of wasteful and burdensome protective filings that will drain federal court resources without any countervailing benefit. More concretely, the empirical estimates (and accompanying graphical summaries) presented below show that a decision by this Court restricting *American Pipe*'s reach could induce putative class members to make protective filings, either intervening in the underlying case or filing an entirely separate action

in the same or a different court, in nearly *half* of securities class actions that reach a court order on class certification and at least *one-quarter* of all filed securities class actions. The Second Circuit's decision, if allowed to stand, would thus undermine "a principal purpose" of the *American Pipe* rule: to promote the "efficiency and economy of litigation." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974).

ARGUMENT

I. APPLYING *AMERICAN PIPE* TO § 13'S THREE-YEAR LIMITATIONS PERIOD WILL PROMOTE SOUND JUDICIAL ADMINISTRATION OF CLASS ACTION PRACTICE UNDER THE SECURITIES ACT

A. Empirical Evidence Shows That Limiting *American Pipe*'s Reach Would Result in Substantial Numbers of Wasteful Protective Filings

In *American Pipe*, the Court held that the filing of a class action complaint "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."[2] 414 U.S. at 554. A contrary rule, the Court warned, would impair the "efficiency and economy of litigation" by inducing potential class members who want to proceed independently if class certification is subsequently denied to move to intervene or file entirely separate but essentially duplicative actions. *Id.* at

[2] The Court subsequently clarified that *American Pipe*'s protective rule applies not just to class members who intervene in the would-be class representative's original suit but to "all members of the putative class," including those who file individual lawsuits after certification is denied. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983).

553. An important question in this case, as the Second Circuit itself noted below, is thus the quantity of protective filings that can be expected if *American Pipe* does not apply to the three-year limitations period in § 13 of the Securities Act.[3]

The best way to answer that question and to gain a sense of the efficiency costs of a decision by this Court restricting *American Pipe*'s reach is to estimate the proportion of securities class actions producing an order on a motion for class certification in which the court's order granting or denying certification – or, in cases producing multiple certification orders, the last such order – came after § 13's three-year limitations period had expired. More specifically, one could calculate the elapsed number of days between the first day of the class period specified in the operative complaint during class certification proceedings and either: (i) the date of the district court's order on a motion for certification (or, in multi-certification-order cases, the last certification order); or (ii) the date of the district court's order preliminarily approving the settlement class.[4] This calculation would in turn permit an estimate of the

---

[3] *See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109-10 (2d Cir. 2013) [Pet. App. 20a-21a] (asserting, without empirical support, that limiting *American Pipe* would not have "adverse consequences" and then citing a district court decision that itself lacks empirical support in claiming that "many class actions are resolved or reach the certification stage within the repose period" (quoting *Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 627 (S.D.N.Y. 2011))).

[4] Keying this calculation to the start of the class period is consistent with § 13's language, which states that the limitations period begins to run when the security was "bona fide offered to the public" (§§ 11 and 12(a)(1) claims) or upon the security's "sale" (§ 12(a)(2) claims). 15 U.S.C. § 77m.

number of cases in which one or more potential plaintiffs whose class or sub-class certification had yet to be adjudicated would have needed to take protective action, whether moving to intervene or filing a separate lawsuit in the same or a different court, in order to preserve the right to proceed independently if class certification were subsequently denied.

FIGURE 1. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING ONLY §§ 11 OR 12 CLAIMS, 2002-2009

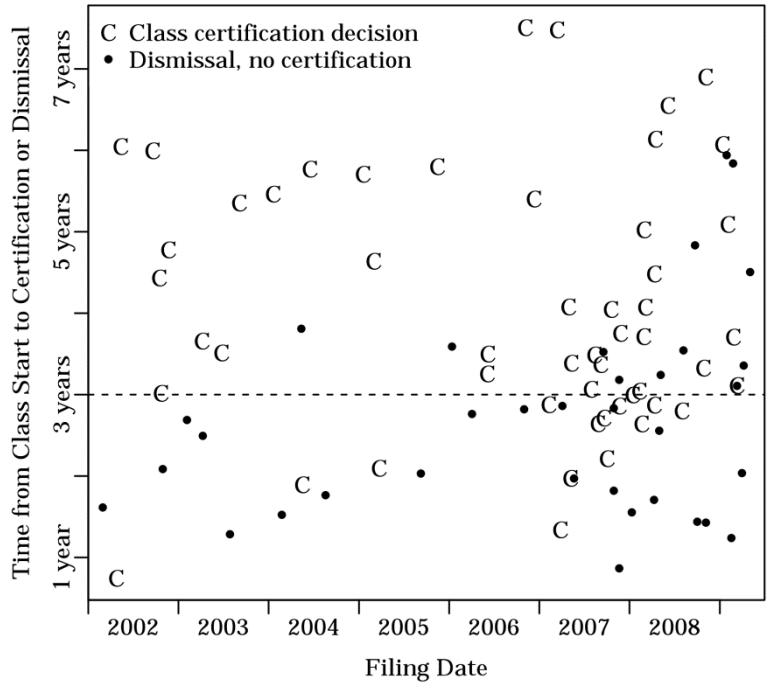


Figure 1 offers a graphical summary of such an analysis, as performed on a dataset of all 86 securities class actions filed during 2002-2009 asserting, as did petitioner here, claims only under §§ 11 or 12 of

the Securities Act.[5] The results are striking: Section 13's three-year limitations period, denoted in the Figure as a horizontal dashed line, would have expired prior to a certification decision in 73 percent (38 of 52) of cases that reached a certification decision and prior to a certification decision in 44 percent (38 of 86) of all filed cases.[6] To provide more detail on the 52 cases depicted in the Figure that reached a certification decision, § 13's three-year limitations period would have expired before an order on a motion for class certification in 11 of the 12 cases reaching such an order. And that period would have expired before an order preliminarily approving a pro-

[5] The data used for this analysis were provided by Stanford Securities Litigation Analytics, which tracks securities class action litigation. The year 2002 was used as the front-end of the study window because data were not available for cases filed earlier. The year 2009 was chosen as the window's back-end because it is the most recent year for which nearly the entire inventory of filed cases has been conclusively resolved, thus permitting a clean assessment of whether each sample case produced an order on certification beyond the limitations period.

[6] These estimates are slightly lower than those presented in the *amicus* brief submitted in support of certiorari. *See* Brief of Civil Procedure & Securities Law Professors as *Amici Curiae* in Support of Petition for a Writ of Certiorari at 8, *Public Emps.' Ret. Sys. of Miss. v. IndyMac MBS, Inc.*, No. 13-640 (U.S. Dec. 26, 2013) (reporting estimates of 83 percent and 48 percent, respectively). The difference reflects the inclusion of six cases reaching certification prior to the running of § 13's three-year limitations period that were inadvertently excluded from the prior analysis. Note, however, that their inclusion does not alter the bottom-line conclusion of the earlier analysis: A decision refusing to apply *American Pipe* to § 13's three-year limitations period could induce protective filings in nearly half of all filed cases asserting only §§ 11 or 12 claims. *Id.*

posed class settlement in 29 of the 42 cases reaching such an order.[7]

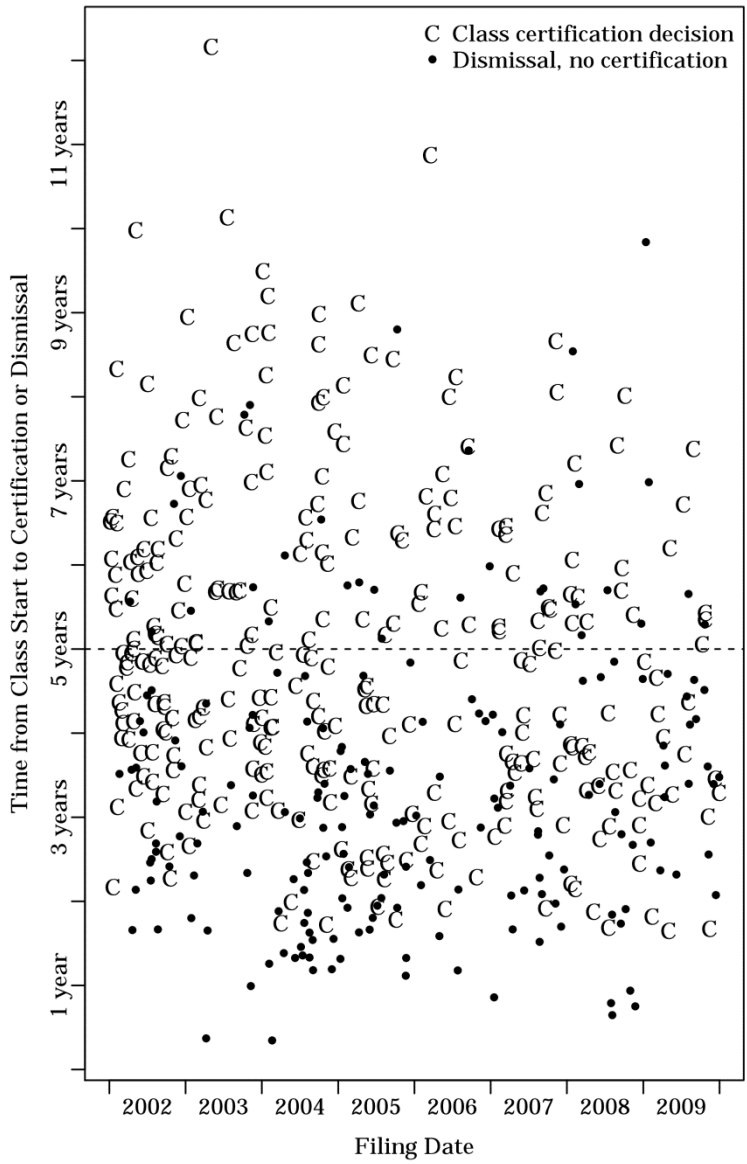
This same approach also permits characterization of the efficiency costs if a decision by the Court limiting *American Pipe*'s reach were to apply not just to claims brought under §§ 11 and 12 of the Securities Act and governed by § 13's three-year limitations period, but also to the more numerous claims brought under § 10(b) of the Securities Exchange Act and SEC Rule 10b-5, as governed by the arguably analogous five-year limitations period Congress has prescribed for such claims.[8]

---

[7] Two of the cases in the sample of §§ 11 and 12 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the three-year limitations period, which explains why the numbers reported for cases falling into each category sum to 40 (11 + 29) rather than 38.

[8] *See* 28 U.S.C. § 1658(b) (requiring securities fraud cases brought under § 10(b) and Rule 10b-5 to be brought within "5 years after such violation").

FIGURE 2. TIME FROM THE START OF THE CLASS PERIOD TO A CERTIFICATION DECISION OR A DISMISSAL WITHOUT CERTIFICATION IN CASES ASSERTING § 10(b) CLAIMS, 2002-2009



To that end, Figure 2 presents a graphical summary of the same basic analysis as above, this time performed on a random sample of 500 cases drawn from the roughly 1,200 securities class actions asserting § 10(b) claims filed during 2002-2009.[9] The results are again striking: The five-year limitations period that applies to § 10(b) claims would have expired prior to a certification decision in 44 percent (135 out of 307) of cases that reached a certification decision and prior to a certification decision in 27 percent (135 out of 500) of all filed cases in the sample.[10] To pro-

---

[9] As with the prior analysis, keying the calculation of elapsed time to the start of the class period is consistent with the weight of authority among lower courts that § 1658(b)'s five-year limitations period is subject to an event-accrual rule – *i.e.*, the date of the misrepresentation or the completion of (or commitment to complete) the purchase or sale of the security. *See*, *e.g.*, *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 932 (7th Cir. 2011) (holding that the five-year limitations period starts upon misrepresentation); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 200 (3d Cir. 2007) (same); *see also Arnold v. KPMG LLP*, 334 Fed. App'x 349, 351 (2d Cir. 2009) (explaining that the limitations period starts when parties commit to purchase or sell).

[10] The margin of error for these estimates, calculated at the standard 95 percent confidence level, is ±5.5 percent for the first and ±3.9 for the second. In other words, we can be 95 percent confident that the actual proportions lie somewhere between roughly 38 and 50 percent for the first estimate and between 23 and 31 percent for the second. Note that these estimates are both lower and higher than those reported previously. *See* Brief of Civil Procedure & Securities Law Professors, *supra* note 6, at 9 (reporting point estimates of 76 percent and 25 percent, respectively). The differences reflect the prior miscoding of a number of cases reaching a certification decision. Note, however, that the correction of these errors does not materially alter the bottom-line conclusion reported in the earlier analysis: A decision precluding application of *American Pipe* to the five-year limitations period that applies to § 10 claims could induce

vide more detail on the 307 cases depicted in Figure 2 that reached a certification decision, the five-year limitations period that applies to such claims would have expired prior to an order on a certification motion in 42 of 86 cases reaching such an order. And that period would have expired prior to an order preliminarily approving a settlement class in 97 of 227 cases reaching such an order.[11]

Using the above estimates and extrapolating to the 3,200 securities class actions filed since 1997 provides a more general estimate: Plaintiffs seeking to preserve their rights without *American Pipe*'s protection would have filed protective actions in as many as 850 cases.[12] Had even a handful of potential class members in each case done so as the end of the relevant three- or five-year limitations period approached, total filings, whether interventions or separate lawsuits, would have easily numbered in the thousands.

---

protective filings in more than a quarter of all filed securities class action lawsuits. *Id.*

[11] Four of the cases in the sample of § 10 cases produced both an order on a motion for certification and a preliminary order approving a class settlement beyond the five-year limitations period, which explains why the numbers reported for cases falling into each category sum to 139 (42 + 97) rather than 135.

[12] *See* Alexander Aganin, Cornerstone Research, *Securities Class Action Filings: 2013 Year in Review* 3 fig.2 (2014), *available at* http://securities.stanford.edu/research-reports/1996-2013/Cornerstone-Research-Securities-Class-Action-Filings-2013-YIR.pdf (reporting more than 3,200 securities class action lawsuits between 1997 and 2013, an average of nearly 200 per year). The "850 cases" figure was derived by multiplying the 3,200 cases filed since 1997 by the above-reported 27 percent estimate of the proportion of cases in the 500-case sample that reached a certification order after the five-year limitations period.

B. The Analysis Presented Herein Provides, If Anything, A Conservative Estimate Of The Efficiency Costs Of Limiting *American Pipe*'s Reach

While the above empirical analyses might raise the concern that the analyzed sample of securities class actions filed during 2002-2009 is somehow idiosyncratic, or that a sea-change in the composition of the case pool going forward will render any backward-looking estimate an uncertain guide to the future, several considerations suggest that the above estimates are actually lower-bound measures. That is, a decision by this Court restricting *American Pipe*'s reach would impose an efficiency toll in the federal courts that is likely to be, if anything, *higher* than the estimates imply.

One reason is that the estimates do not account for the fact that a case that never produces a certification order, but is not dismissed until *after* the limitations period expires, can still generate protective filings. Figures 1 and 2 both suggest the existence of a non-trivial number of such cases, denoted as dots falling above the horizontal dashed line drawn at the relevant three- or five-year limitations period. In such cases, a motion for certification may have been filed but had not yet been ruled upon when the court granted a pending motion for judgment on the pleadings or summary judgment. An absent class member in such a case would have needed to file a protective action on the eve of the expiration of the relevant limitations period to preserve the right to proceed in the event the court subsequently reached, but denied, class certification.

Nor do the above estimates account for the fact that, under the Second Circuit's approach, a poten-

tial class member's rights can be cut off by the relevant three- or five-year limitations period because of *any* defect that is fatal to a class claim, not just denial of certification. Petitioner's is a case in point, as the attempted intervention came after the district court dismissed some of the class claims on standing grounds because the lead plaintiff had not purchased some of the securities in question. *IndyMac*, 721 F.3d at 103 [Pet. App. 7a]; *see also Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (noting that a potential class member's concern about defects in the named representative's standing to pursue certain class claims may also generate protective filings). Without *American Pipe*'s protective rule, absent class members who lack complete confidence that they have canvassed all possible legal hurdles to recovery may make protective filings even after class certification has been granted.[13]

A final reason the above estimates are likely conservative requires consideration of possible dynamic responses by litigants and judges to a decision by this Court limiting *American Pipe*'s reach. On the one hand, a decision limiting *American Pipe* would create perverse incentives for litigants to delay pre-trial proceedings to cut off potential class members' opt-out rights. Class action defendants could be expected

---

[13] It is also the case that putative class members, having made protective filings without *American Pipe*'s assurance, may ultimately choose not to pursue their claims in cases in which class certification is later denied, perhaps because certification-related discovery or the court's order denying certification reveals weaknesses in the case that were not apparent at the time of the protective filing. This is important, for it shows that the efficiency costs of protective filings following a decision by this Court restricting *American Pipe*'s reach will not be limited to cases in which the district court ultimately grants certification.

to prolong pre-trial and certification proceedings as long as possible to extinguish any remaining live claims against them. After all, once the relevant three- or five-year limitations period has lapsed, a decision denying class certification would become a victory on the merits as to any potential class members who did not take protective action. Even lead plaintiffs might have a disincentive to hurry, since the running of the limitations period would leave absent class members who have not taken protective action with no further chance to opt out, thus preventing any class member who is dissatisfied with the course of the litigation or a proposed settlement from pursuing a separate action.[14] If litigants on either side of the "v." slow-walk the proceedings, more cases could be expected to reach certification decisions beyond the relevant three- or five-year limitations period.

On the other hand, a decision limiting *American Pipe*'s reach might lead district judges to speed up their consideration of securities cases in an effort to preserve the ability of absent class members to make meaningful decisions about how to pursue their rights. To be sure, such prioritization of securities cases would not be costless. A judge could not move securities cases up in the queue without deprioritizing other cases, thus causing other litigants to wait longer for justice. Accelerating pre-

[14] This aligns with the longstanding recognition by courts and commentators of possible agency costs in representative actions and the role Rule 23's opt-out mechanism plays in mitigating those costs. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997); *see also* Am. Law Inst., *Principles of the Law of Aggregate Litigation* § 2.07(a) (2010); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 376 (2000).

certification proceedings would also necessarily shorten the time devoted to briefing and decision on lead-plaintiff and Rule 12(b)(6) motions as well as certification-related discovery, thus potentially eroding the quality of judicial decision-making.[15] But in theory, judicial prioritization of securities cases could place countervailing, downward pressure on the volume of protective filings in the event of a decision limiting *American Pipe*'s reach.

Measuring the relative size of these competing effects is challenging. It is famously difficult, as empirical scholarship in civil procedure shows, to gauge behavioral responses to changes in procedural rules.[16] Still, the graphical presentations provided above give good reason to conclude that the effect of the former (litigant) response will equal or even exceed the effect of the latter (judicial) response. Figure 1 provides especially strong evidence in this regard: Cases that reached a certification decision *before* § 13's three-year limitations period expired tend to cluster just below that cut-off, making strategic delay without *American Pipe* plausible. By contrast, cases that reached a certification decision *after* § 13's three-year limitations period tend to be more diffuse-

---

[15] Shortening pre-certification proceedings might also come at the cost of less time for the litigants to negotiate a settlement in the shadow of the unknown outcome of a certification decision.

[16] A recent example is debate over the effect of this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and its progeny. *See*, *e.g.*, David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 Stan. L. Rev. 1203, 1223-29 (2013); Jonah B. Gelbach, *Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?*, 2 Stan. J. Complex Litig. (forthcoming 2014) (manuscript at 15-20), *available at* http://ssrn.com/abstract=2409778.

ly distributed above that cut-off. Indeed, in more than half (23 out of 38) of these cases, a judge would have needed to accelerate pre-certification proceedings by more than a full year in order to reach a certification decision before § 13's three-year limitations period expired.[17]

II. LIMITING *AMERICAN PIPE*'S REACH WOULD NOT PROVIDE ANY COUNTERVAILING BENEFIT

A potential counter to the clear efficiency concerns raised above is that protective filings, though consuming substantial judicial and private resources, would nonetheless permit defendant entities to gauge their potential liability in the event certification is denied, thus justifying any efficiency cost. In reality, however, protective interventions and filings would offer defendant entities who wish to assess their potential liability if certification is denied strikingly little guidance. The reasons are two-fold.

First, the filing of the class complaint itself provides defendants with sufficient information about the substance of the claims against them and the identities of the claimants to satisfy § 13's purpose of

---

[17] A further reason to doubt district judges' ability to accelerate the certification process is a possible trend toward judicial recognition of enhanced claims of right to substantial discovery prior to certification rulings and the resulting blurring of merits and non-merits discovery. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552-54 (2011) (requiring "significant proof" of "a general policy of discrimination" in order to meet Rule 23's commonality requirement under Title VII); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (noting the need for district courts to "formulate some prediction as to how specific issues will play out" to assess Rule 23's predominance requirement (quoting *In re New Motor Vehicles Can. Exp. Antitrust Litig.*, 522 F.3d 6, 20 (1st Cir. 2008))).

ensuring that defendants have notice of their potential liability within three years of the offering or sale. *Am. Pipe*, 414 U.S. at 554-55; *see also* Pet. Brief 30-32.

Second, many defendants in securities class actions have additional, and even more precise, means of determining their potential legal liability. Large securities holders – who are also most likely to have independently marketable claims – are required by the federal securities laws to make annual, publicly available Form 13F filings describing their investment positions above a certain dollar threshold.[18] And the investor relations offices of larger issuers often track such information for a range of purposes.

But even if defendants do not track Form 13F data in the normal course of business, a variety of free and publicly available online services does it for them. *See*, *e.g.*, *Facebook, Inc. (FB): Major Holders*, Yahoo! Finance, http://finance.yahoo.com/q/mh?s=FB+Major+Holders (last visited May 25, 2014) (cataloging "major holders" of Facebook stock); *Ownership & Insiders: FB*, Fidelity, https://eresearch.fidelity.com/eresearch/evaluate/fundamentals/ownership.jhtml?stockspage=ownership&symbols=FB (last visited May 25, 2014) (same). Thus, a defendant can, with only a few online clicks, learn which among its larger investors were net purchasers or sellers during the class period (*i.e.*, the period the alleged fraud was "live"). The result is an estimate of potential liability that is far more useful than a gross tally of interventions or separately filed actions.[19]

---

[18] *See* 15 U.S.C. § 78m(f)(1).

[19] It is noteworthy that district judges regularly perform a somewhat similar analysis in determining which among the "lead plaintiff" candidates has the "largest financial interest,"

In short, the efficiency toll of a decision limiting *American Pipe*'s reach is not just likely to be significant. It is also entirely unnecessary.

CONCLUSION

The Court should reverse the Second Circuit's decision below and hold that the *American Pipe* rule applies in full to § 13's three-year limitations period.

Respectfully submitted,

DAVID FREEMAN ENGSTROM
Lead Amicus Curiae and Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 721-5859
(dfengstrom@law.stanford.edu)

May 28, 2014

---

as required under the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). *See*, *e.g.*, *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127-28 (S.D.N.Y. 2011) (discussing the methodology district judges employ, including, *inter alia*, examining the "net shares purchased" and "net funds expended" during the class period by lead-plaintiff candidates). And consulting firms have long developed sophisticated models of exposure in securities fraud cases. *See*, *e.g.*, Kenneth R. Cone & James E. Laurence, *How Accurate Are Estimates of Aggregate Damages in Securities Fraud Cases?*, 49 Bus. Law. 505 (1994) (assessing such models as developed by litigation consultant Lexecon Inc. – now Compass Lexecon – and competitor consultancies).