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United States Court of Appeals, Third Circuit.

Bahaa ALY; Tina Davis; Phillip
Garland; Erinch Ozada, Appellants,

v.

VALEANT PHARMACEUTICALS
INTERNATIONAL INC, n/k/a Bausch
Health Companies Inc.; J. Michael Pearson;
Robert L. Rosiello; Deborah Jorn; Ari S.
Kellen; Tanya Carro; Howard B. Schiller

No. 19-3326

Argued October 20, 2020

(Opinion Filed: June 16, 2021)

On Appeal from the United States District Court for the
District of New Jersey, 3:18-cv-17393, District Judge: Hon.
Michael A. Shipp

Attorneys and Law Firms

Hung G. Ta [ARGUED], JooYun Kim, Hung G. Ta, Esq.
PLLC, 250 Park Avenue, 7th Floor, New York, NY 10177,
Peter Safirstein, Elizabeth Metcalf, Safirstein Metcalf LLP,
14 Penn Plaza, 9th Floor, New York, NY 10122, Counsel for
Appellants

Paul C. Curnin, Craig S. Waldman [ARGUED], Simpson
Thacher & Bartlett LLP, 425 Lexington Ave., New York,
NY 10017-3954, Richard Hernandez, McCarter & English,
LLP, Four Gateway Center, 100 Mulberry Street, Newark,
NJ 07102, Benjamin Sokoly, Winston & Strawn LLP, 200
Park Avenue, New York, NY 10166-4193, Joseph L. Motto,
Winston & Strawn, LLP, 35 W. Wacker Drive, Chicago, IL
60601, Matthew Petrozziello, Elliot Greenfield, Debevoise
& Plimpton LLP, 919 Third Avenue, New York, NY 10022,
Barry A. Bohrer, Schulte Roth & Zabel LLP, 919 Third
Avenue, New York, NY 10022, Counsel for Appellees

Michael J. Hampson [ARGUED], Mark B. Kramer,
Lawrence M. Rolnick, Rolnick Kramer Sadighi, 1251 Avenue
of the Americas, 18th Floor, New York, NY 10020, Shelia A.
Sadighi, Rolnick Kramer Sadighi, 300 Executive Drive, Suite
275, West Orange, NJ 07052, Counsel of Amicus Appellant

Before: GREENAWAY, JR., COWEN, and FUENTES,
Circuit Judges.

OPINION

FUENTES, Circuit Judge.

*1 This is an appeal from the District Court's order dismissing the complaint filed by individual shareholders of Valeant Pharmaceuticals Inc. ("Valeant" or the "Company") as untimely. A class action (the "Class Action") was filed against Valeant on behalf of investors who purchased its stock between February 23 and October 20, 2015 (the "Relevant Period").¹ Appellants were putative members of that class, but by December 2018, the District Court had still not ruled on class certification. Rather than wait for a decision, Appellants filed the present "opt-out" complaint bringing the same claims in their individual capacities (the "Individual Complaint"). The District Court dismissed the Individual Complaint as untimely under the applicable two-year limitations period, concluding that the tolling doctrine established in  *American Pipe & Construction Company v. Utah* did not apply.² That doctrine is central to this appeal.

¹ The Class Action, *In re Valeant Pharms. Int'l Inc. Sec. Litig.*, No. 15-cv-7658, was filed in the District Court of New Jersey.

²  414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

Putative class members may recover as part of the class or seek individual recourse, but they generally cannot do both.³ Complications tend to arise, however, around the class-certification stage. Members may initially intend to proceed as part of a class, but certification may be denied months or years later for reasons outside their control.⁴ Alternatively, during the pendency of a class action, members may discover that their individual claims are more valuable than those of the class and decide to pursue them in an opt-out complaint even if certification is likely. In either case, members are generally allowed to initiate an individual action, but may run into limitations issues given the delay. This is where  *American Pipe* comes in.

³ See  Fed. R. Civ. P. 23(c)(2)(B) (noting the binding effect of a class judgment unless a member requests to be excluded).

⁴ See  Fed. R. Civ. P. 23(b)(3) (setting forth certification criteria).

When a class complaint is filed,  *American Pipe* tolls the limitations period governing the individual claims of putative members. In the absence of such a rule, members may feel compelled to file duplicative individual suits bringing the same claims to protect their rights in the event certification is later denied. Otherwise, members would risk allowing their individual limitations periods to expire, potentially leaving them with no recourse in the long run. The doctrine is therefore intended to protect the rights of putative members while simultaneously avoiding needless identical lawsuits.

On appeal, the parties dispute whether  *American Pipe* tolling applies to individual claims that are filed before a certification decision is made. Appellants argue that the limitations period is tolled regardless of the point at which individual claims are filed. Appellees respond, and the District Court agreed, that members who wish to benefit from  *American Pipe* must wait to file individual claims until after the court rules on certification, which Appellants did not do. For the reasons that follow, we conclude that  *American Pipe* tolled the limitations period for the claims raised in the Individual Complaint. We will vacate and remand for further proceedings.

I.⁵

⁵ The District Court had jurisdiction under Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. Our review is *de novo*.  *Pension Tr. Fund for Operating Eng'rs v. Mortg. Asset Sec. Trans., Inc.*, 730 F.3d 263, 268 (3d Cir. 2013). Because this is an appeal from a dismissal pursuant to  Federal Rule of Civil Procedure 12(b)(6), the facts in this section are as alleged by Appellants.  *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014) (“We are required

to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant.”) (internal quotation marks omitted).

A.

*2 The issue before us relates solely to the timeliness of the Individual Complaint, but we will provide a brief recitation of the facts for context. Valeant develops and manufactures generic pharmaceuticals. Appellants purchased stock in Valeant during the Relevant Period. Prior to their purchase, the Company changed its business model to focus more on acquiring new drugs from other companies rather than developing its own. This approach was intended to significantly cut research-and-development costs and allow Valeant to market its drugs “more efficiently.”⁶ In the years that followed, Valeant made promising representations about the Company's financial performance based on its new business model and approach. For instance, investors were assured that Valeant's superior marketing and leadership resulted in a sales volume that was “greater than price in terms of [Valeant's] growth,” and that the Company was maintaining “extremely high ethical standard[s]” in the process.⁷

⁶ App. 49 ¶ 5.

⁷ App. 49-50 ¶ 6 (emphasis omitted).

As a result of this and other factors, the price of Valeant stock skyrocketed nearly 350% by the end of the Relevant Period. Appellants argue that this value was artificially inflated, however, and did not accurately represent the Company's financial health. Specifically, they argue that the new business model “relied on a secret, Valeant-controlled pharmacy network” and “deceptive practices that exposed the Company to enormous risks.”⁸ This network purportedly allowed Valeant to charge third-party purchasers and patients much higher prices for its drugs than they were worth. Following a government investigation and private litigation against Valeant, the Company began disclosing its allegedly fraudulent practices in late 2015. A number of Valeant executives were fired, and the value of its stock plummeted almost 90% by August 2016. The Company's shareholders claim to have suffered over \$76 billion in market capitalization losses as a result, which prompted the filing of

numerous class and individual complaints, including the ones relevant to this action.⁹

⁸ Appellants' Br. at 6.

⁹ In December 2019, Valeant announced that the Class Action had been settled with respect to certain defendants, excluding the ones named in the present action, for \$1.2 billion subject to court approval.

B.

The first complaint in the Class Action was filed in October 2015. Several other class complaints alleging the same or similar violations were also filed around this time. Those actions were consolidated, and the operative consolidated complaint was filed on June 24, 2016 (the "Class Complaint"). The Class Complaint alleged violations of Sections 10(b) and 20(a) of the Exchange Act¹⁰ and Rule 10b-5.¹¹ Those claims were governed by a two-year statute of limitations or a five-year repose period, whichever came first.¹² Valeant moved to dismiss the Class Complaint for failure to state a claim, which the District Court denied.

¹⁰  15 U.S.C. §§ 78j(b), 78t(a).

¹¹ 17 C.F.R. § 240.10b-5.

¹² See 28 U.S.C. § 1658(b) (Section 10(b) claims must be brought within "2 years after the discovery of the facts constituting the violation" but, in any event, no later than "5 years after such violation."). A defendant can only be liable under Section 20(a) if there is first a finding of liability under another chapter, such as Section 10(b). See 15 U.S.C. § 78t(a) ("Every person who ... controls any person *liable under any provision of this chapter* ... shall also be liable jointly and severally with and to the same extent as such controlled person.") (emphasis added). The viability of the Section 20(a) claims therefore depends on the viability of the Section 10(b) claims. If the Section 10(b) claims are untimely, the Section 20(a) claims must be dismissed as well.

Prior to a certification decision, on December 19, 2018, Appellants filed the Individual Complaint that is the subject

of this appeal, bringing the same claims under Section 10(b), Rule 10b-5, and Section 20(a), subject to the same two-year limitations and five-year repose periods. Appellees moved to dismiss the Individual Complaint as untimely, arguing that the limitations period began to run in June 2016 when the Class Complaint was filed and had therefore already expired.¹³ They argued that  *American Pipe* could not save the Individual Complaint because it was filed *before* a certification decision was made, and the doctrine was only intended to apply to post-certification individual claims.

¹³ We do not reach this issue today, but the parties dispute whether the Individual Complaint would have been timely even if we were to conclude that tolling does not apply. The District Court concluded that the limitations period began to run when the Class Complaint was filed in June 2016 because at that point, Appellants had sufficient knowledge to file their individual claims with sufficient detail and particularity.

*3 The District Court agreed, adopting its reasoning in a related case, and granted Valeant's motion.¹⁴ The District Court explained that judicial efficiency—a primary purpose of  *American Pipe*—"favors delaying individual claims until after a class-certification denial"¹⁵ so that identical class and individual suits are not unnecessarily proceeding at the same time. It feared that extending  *American Pipe* to individual claims filed before a certification ruling would encourage copy-cat suits, forcing the courts to deal with "dispositive [individual] motions rehashing legal and factual issues" that were already resolved in the class context.¹⁶ The District Court also believed its decision did not prejudice Appellants' individual rights because they could have taken several other steps to protect them. For instance, they could have simply filed the Individual Complaint within the initial two-year period to be safe, or "waited until [after] the Court's decision on class certification" to take advantage of  *American Pipe* tolling.¹⁷ This appeal followed.

¹⁴ See App. 10-11 ("In *Northwestern Mutual*, the Court concluded that  *American Pipe* tolling did not apply to the plaintiffs' claims. The Court adopts the rationale articulated in *Northwestern Mutual* and reaches the same conclusion here.") (citing *Nw. Mut. Life Ins. Co. v. Valeant Pharms. Int'l, Inc.*,

No. 18-15286, 2019 WL 4278929 (D.N.J. Sept. 10, 2019)).

15 *Nw. Mut.*, 2019 WL 4278929, at *10 (quoting  *China Agritech, Inc. v. Resh*, — U.S. —, 138 S. Ct. 1800, 1802, 201 L.Ed.2d 123 (2018)).

16 *Id.*

17 *Id.*

II.

A.

Our analysis begins with the history of the  *American Pipe* doctrine. In that case, new parties filed an untimely motion to intervene as plaintiffs in a class action after certification was denied.¹⁸ The lower court denied the intervention motion as untimely.¹⁹ In reversing that decision, the Supreme Court explained 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.”²⁰ It believed that a contrary rule “would deprive ... class actions of the efficiency and economy of litigation which is a principal purpose of [ *Federal Rule of Civil Procedure 23*]” because “[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.”²¹ The Court further explained that this rule was consistent with the function of limitations periods generally, which is to prevent surprise through the revival of old claims.²² But surprise is not an issue here, because the filing of a class complaint notifies the defendant of the substantive claims against it as well as the “number and generic identities of the potential plaintiffs who may participate in the judgment.”²³

18  414 U.S. at 544, 94 S.Ct. 756.

19 See  *id.*

20  *Id.* at 554, 94 S.Ct. 756.

21  *Id.* at 553, 94 S.Ct. 756.

22  *Id.* at 554, 94 S.Ct. 756.

23  *Id.* at 555, 94 S.Ct. 756; see also  *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353, 103 S.Ct. 2392, 76 L.Ed.2d 628 (1983) (“Tolling the statute of limitations ... creates no potential for unfair surprise [in class actions], regardless of the method class members choose to enforce their rights upon denial of class certification.”). The Court also considered the issue briefly in  *Eisen v. Carlisle & Jacquelin*, confirming that  *American Pipe* applied to individual opt-out actions.  417 U.S. 156, 176 n.13, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The Supreme Court extended the doctrine beyond the intervention context in  *Crown, Cork & Seal Company v. Parker*, holding that it also tolled the limitations periods governing the individual claims of class members.²⁴ In doing so, the Court explained 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. At that point, class members may choose to file their own suits.”²⁵ The Court recognized that extending  *American Pipe* in this way could lead to an increase in litigation, but while “a defendant may prefer not to defend against multiple [individual] actions in multiple forums once a class has been decertified, this is not an interest that statutes of limitations are designed to protect.”²⁶ And in any event, “avenues exist by which the burdens of multiple lawsuits may be avoided,” such as consolidation and multidistrict proceedings.²⁷

24  462 U.S. at 350, 103 S.Ct. 2392 (“There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene. The forum in which the class action is pending might be an inconvenient one, for example, or the class member might not wish to share control over the litigation with other plaintiffs once the economies of a class action were no longer available.”).

25  *Id.* at 354, 103 S.Ct. 2392.

26  *Id.* at 353, 103 S.Ct. 2392.

27

Id.; see also *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 389 (3d Cir. 2002) (noting that the Court was “confident of the capacity of district courts to control abuse or ineptitude” that may result as an extension of

American Pipe to certain class claims).

*4 The Supreme Court has since declined to apply the doctrine in other contexts. In *CalPERS v. ANZ Securities*,²⁸ the Court held that *American Pipe* does not toll statutes of repose. Unlike limitations periods, which generally begin to run when the plaintiff has sufficient knowledge to file a complaint, repose periods begin to run when the wrongdoing occurs, regardless of the plaintiff’s knowledge.²⁹ While limitations periods discourage plaintiffs from sleeping on their rights, repose periods reflect a policy determination that defendants “should be free from liability after the legislatively determined period of time.”³⁰ Repose periods are therefore not generally subject to equitable tolling, and the Court saw no reason to make an exception under *American Pipe*.³¹

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— U.S. —, 137 S. Ct. 2042, 198 L.Ed.2d 584 (2017).

29

Id. at 2049.

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Id. (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014)).

31

See *id.* at 2051 (“The purpose and effect of a statute of repose ... is to override customary tolling rules arising from the equitable powers of courts. ... [T]he Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling.”). The Court in *ANZ* also rejected the plaintiffs’ constructive-filing argument—i.e., that the timely filing of a class complaint actually “brings” a plaintiff’s individual suit for purposes of statutory deadlines. *Id.* at 2054-55. While the filing of a class complaint may put a defendant on notice as to the substance of the claims against it, it does not actually commence or “bring” the individual action. If it did, there would be no need for a “tolling” rule at all, as the individual

complaint would have been deemed filed on the same date the class action was commenced.

Id. at 2055. To the extent Appellants raise a constructive-filing argument here, see Appellants’

Br. at 14, we find it unavailing under *ANZ*.

Later, in *China Agritech, Inc. v. Resh*, the Supreme Court added that *American Pipe* does not permit “follow-on class action[s]” to be filed “past expiration of the statute of limitations.”³² There, the plaintiffs sought to file a new untimely class complaint after certification was denied in the previous attempt. They argued that *American Pipe* applies equally to class complaints as it does to individual claims. In rejecting this theory, the Court reasoned that “*American Pipe* tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. ... With class claims, on the other hand, efficiency favors early assertion” so that the appropriate representatives can be named.³³ It continued that “[t]he time to file individual actions once a class action ends is finite,” but “the time for filing successive class suits, if tolling were allowed, could be limitless.”³⁴ The plaintiffs’ view would have “allow[ed] the statute of limitations to be extended time and again; as each class [was] denied certification, a new named plaintiff could file a class complaint [to] resuscitat[e] the litigation.”³⁵ The Court declined to construe the doctrine in this way, which would certainly not promote the efficiency of litigation contemplated by *American Pipe*.³⁶

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— U.S. —, 138 S. Ct. 1800, 1804, 201 L.Ed.2d 123 (2018).

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Id. at 1806-07 (emphasis added).

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Id. at 1809.

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Id. at 1808.

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Id. at 1811.

B.

Though the Supreme Court has not yet done so, several other Courts of Appeals have considered the question before us.

Appellants ask us to join the view of the Second, Ninth, and Tenth Circuits, which have held that  *American Pipe* tolls the limitations period for individual claims filed both before and after the certification stage. As the Second Circuit explained:

 *American Pipe* rests [on] the notion that class members are treated as parties to the class action “until and unless they received notice thereof and chose not to continue.” Because members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time. Once they cease to be members of the class—for instance, when they opt out or when the certification decision excludes them—the limitation period begins to run again on their claims. *Nothing in the Supreme Court decisions ... suggests that the rule should be otherwise for a plaintiff who files an individual action before certification is resolved.*³⁷

*5 The Second Circuit further reasoned that though  *American Pipe* was concerned with judicial economy, the doctrine was primarily “created to protect class members from being *forced* to file individual suits in order to preserve their claims.”³⁸ The doctrine was not intended to prioritize convenience over its core equitable purpose.³⁹

³⁷  *In re Worldcom Sec. Litig.*, 496 F.3d 245, 255 (2d Cir. 2007) (quoting  *American Pipe*, 414 U.S. at 551, 94 S.Ct. 756) (emphasis added and internal citations omitted).

³⁸  *Id.* at 256.

³⁹  *Id.* (explaining that the doctrine was “not meant to induce class members to forgo their right to sue individually”).

The Ninth and Tenth Circuits have followed the Second Circuit’s lead. In  *In re Hanford Nuclear Reservation Litigation*, the Ninth Circuit held that pre-certification individual claims were subject to tolling, noting that class members “have a right to file at the time of their choosing[,] and denying tolling would diminish that right.”⁴⁰ The Tenth Circuit also saw no reason to deny tolling, as doing so would

essentially “lock[] putative members into the class” until certification in some cases, which makes particularly little sense in light of how long it can take to reach that stage.⁴¹ In fact, the Tenth Circuit believed that restricting  *American Pipe* in this way “ha[d] the potential to backfire” and could “compel individual class members to make a choice as the limitations period for their individual claim approaches: file an individual action now or sit tight for a class certification decision, no matter how long it might take.”⁴² The court anticipated that “[l]itigants in this bind might file placeholder suits rather than risk placing their individual actions on ice during a potentially prolonged class certification process.”⁴³

⁴⁰  534 F.3d 986, 1009 (9th Cir. 2008).

⁴¹  *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1233-34 (10th Cir. 2008) (noting the seven-year period between the filing of the class complaint and certification, and the potential costs associated with further delay).

⁴²  *Id.* at 1234.

⁴³  *Id.*

We are aware of only one federal appellate court that has held otherwise.⁴⁴ In  *Wyser-Pratte Management Company v. Telxon Corporation*, the Sixth Circuit held that the plaintiffs had forfeited the benefit of  *American Pipe* by filing individual claims before a certification decision had been made.⁴⁵ The court believed its conclusion was consistent with cases like  *Crown*, which described  *American Pipe* as tolling the limitations period “until class certification is denied.”⁴⁶ This characterization arguably supports the conclusion that  *American Pipe* tolling is contingent on a certification denial. The Sixth Circuit, which was the first to decide this issue, has since called its conclusion into question, noting that  *Wyser-Pratte* “represents the minority rule” and that the court “ha[s] doubts about its holding.”⁴⁷

⁴⁴ The parties appear to disagree as to whether the First Circuit has squarely reached this issue.  *Glater v. Eli Lilly & Company* involved a personal-jurisdiction issue where the plaintiff was

party to a class action and related individual suit.  712 F.2d 735 (1st Cir. 1983). The plaintiff commenced her individual action before certification was resolved. She argued that her citizenship in the individual case should have been determined as of the date the class action was filed and, in doing so, attempted to invoke  *American Pipe* principles.  *Id.* at 739. In rejecting this theory, the First Circuit noted that “[e]ven assuming that  *American Pipe* may have some relevance [in this context, it] ... says nothing about [plaintiffs] ability to maintain a separate action while class certification is still pending. The policies behind ...  *American Pipe* ... would be disserved[] by guaranteeing a separate suit at the same time that a class action is ongoing.”  *Id.* Though the First Circuit invoked  *American Pipe* principles in dicta, its holding was confined to the personal-jurisdiction question before that court, and we find its reasoning unpersuasive in any event for the reasons described below.

45  413 F.3d 553, 569 (6th Cir. 2005).

46  *Id.* (quoting  *Crown*, 462 U.S. at 354, 103 S.Ct. 2392).

47  *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821 F.3d 780, 789 (6th Cir. 2016).  *Wyser-Pratte* also relied somewhat heavily on the district court's reasoning in  *In re Worldcom*, which the Second Circuit later reversed. *See supra* (discussing the Second Circuit's approach);  *Wyser-Pratte*, 413 F.3d at 569 (citing  *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 452 (S.D.N.Y. 2003), *rev'd*,  496 F.3d 245 (2d Cir. 2007)).

*6 With this in mind, we now turn to the merits.

III.

A.

Appellants argue that the District Court misapplied  *American Pipe*, and that class members should not be forced to wait until after a certification decision to benefit from the doctrine. We agree, and adopt the reasoning of the Second, Ninth, and Tenth Circuits.  *American Pipe* makes clear that the filing of a class action is the operative event that tolls the limitations period, and that once the period is tolled, it remains tolled for all putative members until they are no longer part of the class.⁴⁸ The Court has not held that anything further, such as a certification denial, is required to benefit from tolling. Like the majority of our sister circuits, we see no reason not to take the Supreme Court's words at face value.⁴⁹

48  *American Pipe*, 414 U.S. at 553, 94 S.Ct. 756.

49 *See*  *In re Worldcom*, 496 F.3d at 255 (“[T]he Supreme Court has repeatedly stated 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.’ We see no reason not to take this statement at face value.”) (quoting  *Crown*, 462 U.S. at 353-54, 103 S.Ct. 2392); *see also* *Weitzner v. Sanofi Pasteur Inc.*, 909 F.3d 604, 611 (3d Cir. 2018) (noting that  *American Pipe* “included no express restrictions in the broad language it used to describe the claims to which tolling would apply”).

Tolling was primarily intended to benefit putative or unidentified members of the class, who are considered “mere passive beneficiaries of the action brought [on] their behalf.”⁵⁰ Our conclusion that  *American Pipe* is triggered automatically upon the filing of a class complaint is consistent with the well-founded principle that members need not actively monitor case developments to benefit from  *Rule* 23 protection.⁵¹ The approach we adopt today is also consistent with the function of limitations periods generally. As the Supreme Court affirmed in both  *American Pipe* and  *Crown*, statutes of limitations are intended to prevent the “surprise” revival of old claims that plaintiffs failed to

diligently pursue.⁵² But surprise is not an issue in this context.⁵³ This is particularly so under the facts before us, where the Appellees were undisputedly aware of the substantive claims at issue for more than two years before the Individual Complaint was filed. Appellees will not be prejudiced if they are required to defend themselves against claims they have known about since 2016.⁵⁴

50 *American Pipe*, 414 U.S. at 552, 94 S.Ct. 756.

51 See *id.* (“ Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings.”).

52 See *id.* at 554, 94 S.Ct. 756; *Crown*, 462 U.S. at 353, 103 S.Ct. 2392.

53 *Crown*, 462 U.S. at 353, 103 S.Ct. 2392.

54 As *Crown* makes clear, a defendant's desire not to defend against similar claims in multiple proceedings is not one that statutes of limitations are designed to protect. *Id.* Appellees' potential need to do so here does not constitute prejudice.

We also conclude that denying tolling in this context, i.e., where members filed individual claims after the initial limitations period expired but before a certification decision, would serve no compelling purpose. In this posture, the District Court's rule would essentially “lock” putative members into the class until after certification.⁵⁵ Class members, even those intent on proceeding individually, would be forced to delay filing their claims indefinitely just to take advantage of *American Pipe*. Such a requirement is potentially costly, and certainly inefficient.⁵⁶ It can take years for a class action to reach the certification stage, and, in the meantime, members may “deem their own claims valuable enough” to pursue in an opt-out complaint, or otherwise decide that “class certification is doubtful.”⁵⁷ The approach we adopt today will allow members in either situation to promptly file their individual actions, rather than indefinitely delay the resolution of those claims for no good reason.

55 *State Farm*, 540 F.3d at 1233 (“[L]ocking putative class members into the class until the class certification decision makes little sense and could adversely affect certain individuals.”).

56 See *id.*

57 *Id.*

*7 We disagree with the District Court that Appellants would not be prejudiced if their Individual Complaint is dismissed as untimely because there were technically other options available to them.⁵⁸ Appellees do not dispute that *American Pipe* applies to individual claims filed after certification, and they suggest that Appellants could have simply waited until that point if they wanted to avoid any tolling and timeliness issues. But this approach makes little sense for the reasons we have already articulated—it would leave members who decide to proceed individually *after* the limitations period would have normally run but *before* certification in limbo for an indefinite period of time.⁵⁹ Appellees also suggest that Appellants could have assumed tolling did not apply and brought the Individual Complaint within the initial two-year period to be safe. But the doctrine would serve no purpose if members were expected to file their individual claims within the first two years regardless. In fact, suggesting that members should do so—just to avoid timeliness problems—tends to encourage the duplicative “just in case” litigation that *American Pipe* seeks to prevent.

58 See *Nw. Mut.*, 2019 WL 4278929, at *10 (“Given that Northwestern Mutual's claims would be timely if [it] had pursued a different course of action, the Court cannot conclude that failing to expand *American Pipe* in this instance would result in an injustice.”).

59 This approach is especially untenable because of the competing repose period in this case, as discussed *infra*.

B.

Appellees respond that we should not be swayed by the Second, Ninth, and Tenth Circuits' approach because those

decisions pre-date [ANZ](#) and [China Agritech](#). We recognize that the Supreme Court's recent jurisprudence tends to underscore the importance of judicial economy, but we cannot construe the doctrine in a way that would undermine its primary purpose—to protect the individual rights of putative members. While [American Pipe](#) was established in part to avoid duplicative filings, it is, at its core, an equitable doctrine.⁶⁰ That doctrine was “created to protect class members from being *forced* to file individual suits in order to preserve their claims.”⁶¹ The District Court's view would surely cause at least certain members to forfeit their individual rights, simply (and ironically) because they filed too early.⁶²

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See [ANZ](#), 137 S. Ct. at 2052 (“The balance of the Court's reasoning [in [American Pipe](#)] ... reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice”); see also [In re Worldcom](#), 496 F.3d at 256 (“The district court may be correct that its conception of the [American Pipe](#) rule would reduce the number of individual suits filed by class members. But this is beside the point. While reduction in the number of suits may be an incidental benefit of the [American Pipe](#) doctrine, it was not the purpose of [American Pipe](#) either to reduce the number of suits filed, or to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative.”).

61

[In re Worldcom](#), 496 F.3d at 256 (emphasis in original).

62

See [id.](#) at 255 (“As the Supreme Court has repeatedly emphasized, the initiation of a class action puts the defendants on notice of the claims against them. A defendant is no less on notice when putative class members file individual suits before certification. ... [T]he same is certainly true of class members who file individual suits before the court decides certification”) (internal citation omitted); see also [In re Hanford](#), 534 F.3d at 1009 (explaining that plaintiffs “have a right to file

at the time of their choosing and denying tolling would diminish that right”).

We have previously recognized that while this Court remains “concerned with judicial economy ... it need not be achieved at the expense of litigants for whom the [American Pipe](#) tolling rule was designed.”⁶³ This observation rings equally true here, and we are not convinced that efficiency concerns should trump the doctrine's core equitable purpose.⁶⁴ And though [China Agritech](#) describes “efficiency and economy of litigation” as the “watchwords of [American Pipe](#),”⁶⁵ that decision does not cast any doubt on the approach we adopt today. There, the Supreme Court declined to extend [American Pipe](#) in a way that would have allowed for the constant revival of otherwise untimely *class* claims.⁶⁶ Our conclusion that [American Pipe](#) tolls the limitations period governing pre-certification *individual* claims does not pose the risk of endless tolling.⁶⁷

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[McKowan](#), 295 F.3d at 389.

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In theory, extending [American Pipe](#) to pre-certification individual claims may lead to an increase in litigation. See [Crown](#), 462 U.S. at 353, 103 S.Ct. 2392 (recognizing the risk of increased litigation but noting that this was not an interest limitations periods are designed to protect); see also [ANZ](#), 137 S. Ct. at 2054 (“District Courts, furthermore, have ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion.”). But this risk may not be as high as Appellees suggest. Common sense tells us that when a member determines his or her claims are substantially more valuable than those of the class, he or she is likely to pursue an individual complaint no matter what. See [State Farm](#), 540 F.3d at 1233 (members may decide to proceed individually because they “deem their own claims valuable enough”). Members who file individual claims before certification are likely the same members who—if forced to wait until after certification—would have opted out regardless. 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. As such, the group that would file individual suits during the window at issue here is likely to approximate in number the group that would later opt-out if a class is certified or file individual suits if not.”). Our decision will not prompt an influx of additional suits so much as it will simply avoid an unnecessarily delayed filing of opt-out claims.

65  138 S. Ct. at 1811.

66  *Id.* at 1808.

67 See  *id.* at 1809. Nor does the Court's decision in  *ANZ* compel a different result. In *ANZ*, the Court declined to extend  *American Pipe* to statutes of repose.  137 S. Ct. at 2051. Repose periods are fundamentally different from statutes of limitation like the one before us.  *Id.* The  *ANZ* decision also rejected a “constructive filing” theory that is not dispositive in this case.  *Id.* at 2054-55.

*8 Appellees also suggest that this Court's decision in *Weitzner* is inconsistent with the Second Circuit's approach. *Weitzner* did not involve the issue that is before us, but we observed in passing that “ *American Pipe* is designed to protect individual claims filed after the denial of class certification.”⁶⁸ We recognize that  *American Pipe* tolling may have been anticipated to apply most commonly in the post-certification context, and that this idea is accordingly reflected in the relevant case law.⁶⁹ But nothing in our precedent suggests that  *American Pipe* applies *exclusively* to post-certification claims. What we can discern from the existing jurisprudence, however, is that  *American Pipe* tolling begins, for all putative members, when the class action is commenced. Our decision reflects a straightforward application of this principle.

68 *Weitzner*, 909 F.3d at 610.

69 See, e.g.,  *China Agritech*, 138 S. Ct. at 1804.

C.

Finally, we also find the District Court's holding untenable because it would lead to counterintuitive results. Should we affirm that decision, individual claims filed well *before* certification could be dismissed as untimely, while other claims filed at a much later date would be allowed to proceed. Class members who were “contemplating opting out and filing their own lawsuits would be penalized for giving the defendants and the Court earlier notice.”⁷⁰ We have sought to avoid similar outcomes in other contexts and see no compelling reason not to do so here.⁷¹

70 *Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop.*, No. 15-6480, 2019 WL 130535, at *8 (E.D. Pa. Jan. 8, 2019).

71 See  *Wallach v. Eaton Corp.*, 837 F.3d 356, 374 (3d Cir. 2016) (explaining, in the presumption-of-timeliness context, that “if the presumption of timeliness applied only to certified classes, ... *motions to intervene brought prior to class certification might be deemed untimely, even though those same motions would be timely if brought years later, after a class was certified.* The illogic of such result and the goals of efficiency ... emphasized ... in  *American Pipe* militate that we extend the presumption of timeliness ... to the pre-certification context.”) (emphasis added);  *McKowan*, 295 F.3d at 389 (explaining that there was “no good reason” why the class claims of intervening members “should not be tolled where the district court had not yet reached the issue of the validity of the class”).

Appellees respond that “the potential for [anomalous] results exists under any equitable tolling doctrine,” and so we need not worry much about it in this scenario.⁷² Even if that were true, the issue is compounded by the competing statute of repose in this case. As evidenced by the timeline before us, putative members may not become aware of any wrongdoing until after a class complaint is filed or the fraud is otherwise made public.⁷³ But by that point, the repose period is likely to have been already running in the background for some time.⁷⁴ In the event a certification ruling is made more than five years after the wrongdoing took

place, some members would be forced to file individually before certification regardless. If they did, however, the District Court's rule would likely require dismissal of those claims under the *limitations* period because they would have been filed before certification. But if those members waited until after certification to take advantage of  *American Pipe*, their claims could be barred by the *repose* period. We cannot imagine that  *American Pipe* was intended to force plaintiffs into this sort of bind.⁷⁵

⁷² Appellees' Br. at 7.

⁷³ See  *ANZ*, 137 S. Ct. at 2049 (noting that repose periods begin to run when the wrongdoing occurs); see also Br. of *Amicus Curiae* Fir Tree Capital Management LP in Support of Plaintiffs-Appellants at 9 ("Amicus Br.").

⁷⁴ For example, in this case, the first fraudulent misrepresentation is alleged to have been made in 2013, but the Class Complaint was not filed until 2016.

⁷⁵ Nothing in  *ANZ* suggests otherwise. Though the Supreme Court declined to extend tolling to statutes of repose, it did not consider the interplay of repose and limitations periods in this context or the problems likely to arise. See  *ANZ*, 137 S. Ct. at 2049-54.

*9 This issue is perhaps best illustrated by example. Imagine that a company makes a fraudulent statement in 2020. The fraud is not uncovered until 2022, and a class complaint is filed the same year.⁷⁶ As here, the class claims (and corresponding individual claims) are governed by a two-year limitations period and a five-year repose period, whichever comes first. By 2024, the class action is progressing, but there has been no certification ruling. Class members are comforted by the fact that their individual claims are covered by  *American Pipe* and see no reason to file individually at that time. But by early 2025, there is still no certification ruling, and anxious members cognizant of the repose period decide to file their own complaints and proceed individually instead. A class is finally certified in 2026. In this scenario, the District Court's rule would require us to find the individual complaints untimely under the *limitations* period because they would have been filed pre-certification and therefore not

subject to tolling. But if those members waited to file until after certification to take advantage of  *American Pipe*, the *repose* period would have already expired. Members in this position would be without any individual recourse, which is precisely the result  *American Pipe* seeks to avoid.

⁷⁶ For purposes of this illustration, we assume the statute of limitations would have, in the absence of tolling, started to run upon the filing of the class complaint. Appellees argue that this is the case here, though we need not decide that issue today.

Appellees downplay the repose issue by pointing out that it will not be a universal problem. Not every case involves a competing repose period, but that does not change the fact that the one before us does, as will any class action bringing similar securities fraud claims. We also find the analysis of the amicus, which points to 92 recent class actions where certification was not resolved within five years of the beginning class period, persuasive on this point.⁷⁷ Under the District Court's rule, any member whose claims are subject to a repose period may very well have no choice but to file within the initial two years to avoid forfeiting their individual rights. The tolling doctrine would serve no purpose in this context, and we are not convinced that the Supreme Court intended or envisioned such a result.⁷⁸

⁷⁷ The issue of whether the repose period has expired is not before us today. But the timing in this case illustrates the problems that may arise in similar scenarios. Here, the first misrepresentation alleged in the Class Complaint was made in January 2013, but a class was not certified until May 2020. If Appellants had waited until after certification to file their Individual Complaint with the hopes of benefitting from  *American Pipe* tolling, their claims could have been barred by the repose period, and they would have been "forced to participate in the class." Amicus Br. at 10.

⁷⁸ Even where there is a competing repose period at issue, members will generally always have the option to proceed as part of the class or file their individual claims within the initial limitations period without relying on tolling. But  *American Pipe* was intended to protect the individual rights of members while encouraging, but not forcing,

class participation. See  *American Pipe*, 414 U.S. at 551-53, 94 S.Ct. 756;  *Crown*, 462 U.S. at 351-53, 103 S.Ct. 2392 (noting that  Rule 23 encourages class participation but that members must still have a “meaningful” right to opt out and pursue individual claims, which justifies the tolling rule) (citing  *Eisen*, 417 U.S. at 176 n.13, 94 S.Ct. 2140). And for the same reasons we have already expressed, it makes little sense to establish a tolling rule if members are encouraged to file their individual claims within the initial two-year period regardless, under the assumption that tolling may not apply.

IV.

For these reasons, we conclude that the statutes of limitations governing the claims raised in the Individual Complaint are subject to  *American Pipe* tolling. Because we hold that the limitations period has been tolled, we need not decide whether the Individual Complaint was timely in the absence of tolling.

We will vacate the District Court's order and remand the case for further proceedings consistent with this opinion.

All Citations

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