REJECTING THE CLASS ACTION TOLLING FORFEITURE RULE

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This Note analyzes a circuit split over the application of the Forfeiture Rule, which holds that plaintiffs forfeit American Pipe *tolling when they file individual actions before class certification has been resolved in the underlying putative class action. This Note rejects the Forfeiture Rule and argues that it misunderstands the purpose and rationale of* American Pipe *and class action tolling. Given the increased uncertainty facing class action plaintiffs, the policy and equity interests that motivated courts to adopt the Forfeiture Rule now require courts to abandon it. This is the first article to analyze the Forfeiture Rule's history and evolution, to explore the impact of changes in class action jurisprudence on statutes of limitations on the Forfeiture Rule, and to argue against the continued viability of the Forfeiture Rule across the federal judicial system.*

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INTRODUCTION

Over the past twenty years, it has become increasingly difficult for plaintiffs to bring class action lawsuits.[1] During this time, courts have heightened the requirements of Rule 23[2] to get a class certified,[3] required that plaintiffs prove substantial portions of their arguments about the merits at the certification stage,[4] and upheld arbitration that precludes aggregate resolution of claims.[5] While the class action is not facing imminent extinction,[6] especially in the multidistrict litigation

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[1] *See, e.g.*, Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, 165 U. PA. L. REV. 1495, 1522 (2017) (arguing that Supreme Court decisions on class actions from 1997 to 2013 "have changed or destabilized class action law to the detriment of plaintiffs"); Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 880 (2017) ("The private enforcement class action faces strong 'headwinds' in the form of class certification, subject-matter jurisdiction, and arbitration." (quoting Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 499 (2016))); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 734–35 (2013) [hereinafter Klonoff, *The Decline*] (explaining that the Supreme Court and the federal circuits have made it increasingly difficult for plaintiffs to litigate class actions). *But see* Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 974 (2017) [hereinafter Klonoff, *A Respite*] (noting that the Supreme Court's outright hostility to the class action has paused, but cautioning that with "the election of Donald Trump as President, and the likelihood that he will appoint jurists who may embrace further limits on class actions, there is reason for concern about the future" of class actions from a plaintiff's perspective).

[2] FED. R. CIV. P. 23.

[3] *E.g.*, Comcast Corp. v. Behrend, 569 U.S. 27, 35–36 (2013) (heightening Rule 23(b)(3)'s predominance requirement); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (heightening Rule 23(a)(2)'s commonality requirement).

[4] *E.g.*, *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12, 320 (3d Cir. 2008) (requiring plaintiffs to prove the requirements of Rule 23 by a preponderance of the evidence standard, even if doing so necessitates resolution of merits issues); Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001) (holding that "[b]efore deciding whether to allow a case to proceed as a class action . . . a judge should make whatever factual and legal inquiries are necessary under Rule 23" even if it means resolving disputes on the merits).

[5] *E.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (holding that the Federal Arbitration Act required plaintiffs to waive class arbitration).

[6] *See, e.g.*, Klonoff, *A Respite*, *supra* note 1, at 975 (arguing that there is currently a reprieve "from years of court decisions curtailing class actions"); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 306 (2014) (noting that "there are some rays of light that indicate [the class action] will survive" despite recent developments which suggest the "death of aggregate litigation by a thousand paper cuts").

context,[7] these developments have made achieving class certification under Rule 23 of the Federal Rules of Civil Procedure more difficult,[8] raising the stakes for class action plaintiffs.[9] Because increased difficulty in getting a class certified has intersected with another development—increased ambiguity as to whether the statute of limitations tolls—plaintiffs may not ever get a "day in court."

In the 1970s, the Supreme Court established a generous rule to "toll" the statute of limitations during the pendency of a putative class action, ensuring that plaintiffs' claims did not become untimely while the class action worked its way through the courts. In *American Pipe & Construction Co. v. Utah*[10] and *Crown, Cork & Seal Co. v. Parker*,[11] the Supreme Court established a rule tolling the statute of limitations for all putative class members for the duration of the class action.[12] The reasoning behind this rule, commonly called *American Pipe* tolling, is to further the goals of judicial efficiency and class litigation, while balancing the concerns of fair notice and closure embedded in statutes of limitations.[13] However, in recent years, the Supreme Court has chipped away at *American Pipe* tolling, narrowing the circumstances in which it applies and creating uncertainty as to when it applies.[14] The upshot of the Court's recent class action and tolling jurisprudence is that it is more difficult to get a class certified and more difficult to get the benefit of tolling if class certification is denied.

Although *American Pipe* tolling clearly applies when an individual plaintiff files suit after the district court makes a decision on class certification, the Supreme Court has never addressed whether

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[7] *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846 (2017) (describing the rise of mass tort settlement class actions in the context of multidistrict and aggregate litigation).

[8] *See Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting) ("To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

[9] *See* Klonoff, *The Decline*, *supra* note 1, at 734–35 (detailing the many ways in which courts have made it more difficult for plaintiffs to get class certification); *see also* Marcus, *supra* note 1, at 498 (arguing that although the "imminent demise of American class actions" is not upon us, class plaintiffs still face "increasing headwinds").

[10] 414 U.S. 538 (1974).

[11] 462 U.S. 345 (1983).

[12] *Id.* at 353–54.

[13] *See, e.g.*, Odle v. Wal-Mart Stores, Inc., 747 F.3d 315, 323 (5th Cir. 2014) (explaining that *American Pipe* tolling reflects a "careful balancing of the competing goals of class action litigation on the one hand and statutes of limitation[s] on the other").

[14] *See, e.g.*, China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018) (rejecting the application of *American Pipe* tolling for successive class actions); Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017) (holding that *American Pipe* tolling does not apply to statutes of repose).

tolling applies when a plaintiff brings an individual action *before* the district court has ruled on class certification in the underlying putative class action.[15] Some courts have concluded that the purpose of *American Pipe* tolling is not furthered when plaintiffs file separate actions before a decision on the issue of class certification, reasoning that to allow tolling when a putative class action is pending does not further judicial economy and leads to duplicative suits. Following this rationale, the First and Sixth Circuits, along with numerous district courts, have applied what is called the "Forfeiture Rule,"[16] holding that *American Pipe* tolling does not extend to members of the putative class who file individual suits before the class certification motion is decided.[17]

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[15] *See* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1230 (10th Cir. 2008) (explaining that "[t]he Supreme Court has not addressed this question squarely, leaving it to percolate in the lower courts").

[16] *See, e.g.*, Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 788 (6th Cir. 2016).

[17] *See id.* at 791 ("[T]his Court [has] declined to extend *American Pipe* tolling to plaintiffs who file individual actions before the district court rules on class certification . . . ."); Wyser–Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568 (6th Cir. 2005) ("[A] plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine."); Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) ("The policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing."); *In re* Refrigerant Compressors Antitrust Litig., 92 F. Supp. 3d 652, 660–61 (E.D. Mich. 2015) (collecting cases applying the Forfeiture Rule); *In re* Enron Corp. Sec., 465 F. Supp. 2d 687, 716 (S.D. Tex. 2006) (same); Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000) ("[B]y filing an individual suit before class certification was determined, [Plaintiff] frustrated the purpose of the class action tolling doctrine and should not now be able to reap its benefits."); Chinn v. Giant Food, Inc., 100 F. Supp. 2d 331, 335 (D. Md. 2000) (holding that *American Pipe* "does not apply 'to protect the individual plaintiff who files an independent action after the statute of limitations has expired but before a certification decision has been rendered in a timely class complaint which supposedly includes the plaintiff'" (quoting Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 404 (S.D. Ind. 1996))); *Stutz*, 947 F. Supp. at 404 (applying the Forfeiture Rule in the Seventh Circuit, but explicitly stating that Plaintiff could still take advantage of *American Pipe* tolling after the class certification decision); Pulley v. Burlington N., Inc., 568 F. Supp. 1177, 1179–80 (D. Minn. 1983) (applying the Forfeiture Rule in the context of a Title VII employment discrimination claim); Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp., 461 F. Supp. 999, 1011–12 (D.D.C. 1978) (holding that plaintiffs who decline to participate in a class action forfeit the benefits of the class action, including *American Pipe* tolling), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980); *see also* Gold v. Ocwen Loan Servicing, LLC, No. 2:17-cv-11490, 2017 WL 6342575, at *2 (E.D. Mich. Dec. 12, 2017) (applying the Forfeiture Rule); Cataldi v. Ocwen Loan Servicing, LLC, No. 17-11487, 2017 WL 5903440, at *3 (E.D. Mich. Nov. 30, 2017) (same); Knight v. Ocwen Loan Servicing, LLC, No. 17-cv-11491, 2017 WL 4918531, at *5 (E.D. Mich. Oct. 31, 2017) (same); Keyes v. Ocwen Loan Servicing, LLC, No. 17-CV-11492, 2017 WL 4918530, at *5 (E.D. Mich. Oct. 31, 2017) (same); Molesky v. State Collection & Recovery Servs., LLC, No. 3:12 cv 2639, 2014 WL 4794455, at *7 (N.D. Ohio Sept. 25, 2014) (same); Soroko v. Cadle Co., Civil Action No. 10-11788-GAO, 2011 WL 4478479, at *2 (D. Mass. Sept. 23, 2011) (same);

The Forfeiture Rule is now the minority rule because over the last decade, the Second, Ninth, and Tenth Circuits, and numerous district courts, have rejected it.[18] The courts that have rejected or declined to adopt the Forfeiture Rule have relied on textual and policy-driven

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Hubbard v. Corr. Med. Servs., Inc., Civil Action No. 04–3412 (SDW), 2008 WL 2945988, at *7 (D.N.J. July 30, 2008) (same); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, MDL 997, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998) (same); Chemco, Inc. v. Stone, McGuire & Benjamin, No. 91 C 5041, 1992 WL 188417, at *2 (N.D. Ill. July 29, 1992) (same). District courts in the Second Circuit previously applied the Forfeiture Rule. *E.g.*, *In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 431, 451 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003); Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 514 (S.D.N.Y. 2001), *abrogated by* Casey v. Merck & Co., 654 F.3d 95 (2d Cir. 2011); Wahad v. City of New York, No. 75 Civ. 6203 (AKH), 1999 WL 608772, at *6 (S.D.N.Y. Aug. 12, 1999); 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 9:63 nn.3–4 (5th ed. 2011) (collecting cases). However, in 2007, the Second Circuit rejected the Forfeiture Rule. *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007); *see also infra* Section I.C.2.

[18] *Stein*, 821 F.3d at 789 (acknowledging that the First and Sixth Circuits are now in the minority); *see Boellstorff*, 540 F.3d at 1224 (holding that tolling also "applies when an individual member of a putative class pursues an independent, individual claim before the district court has decided the class certification issue"); *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1008 (9th Cir. 2008) (affirming that "*American Pipe* also permits tolling for a plaintiff who files a separate action pending class certification."); *In re WorldCom*, 496 F.3d at 256 (rejecting the Forfeiture Rule); Christianson v. Ocwen Loan Servicing, LLC, 338 F. Supp. 3d 989, 993 (D. Minn. 2018) (holding that "the policy rationale underlying the [Forfeiture Rule] is unpersuasive" and refusing to apply it); Howard v. Gutierrez, 571 F. Supp. 2d 145, 156 (D.D.C. 2008) (rejecting the Forfeiture Rule in the context of an administrative complaint filed while class certification is pending); Lehman v. United Parcel Serv., Inc., 443 F. Supp. 2d 1146, 1151 (W.D. Mo. 2006) ("There is nothing in [*Crown, Cork & Seal*'s] language that suggests the statute of limitations is only tolled for those plaintiffs who wait to file suit until there is a ruling on class certification."); Rochford v. Joyce, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990) (holding that, although "the application of the *American Pipe* tolling rule to actions filed prior to the denial of class certification could create a multiplicity of suits which *American Pipe* sought to avoid," the Supreme Court's "directive is clear: the limitations period remains tolled until class certification is denied" and thus the Forfeiture Rule did not apply); *see also* Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Civil Action No. 15-6480, 2019 WL 130535, at *7–8 (E.D. Pa. Jan. 8, 2019) (rejecting the Forfeiture Rule); Aguilar v. Ocwen Loan Servicing, LLC, No. 3:17-CV-1165-B, 2018 WL 949225, at *5 (N.D. Tex. Feb. 20, 2018) (same); Wagener v. Ocwen Loan Servicing, LLC, No. CV 17-1531, 2017 WL 6988969, at *4 (D. Minn. Nov. 15, 2017), *report and recommendation adopted*, Civ. No. 17-1531, 2018 WL 471782 (D. Minn. Jan. 18, 2018) (same); Santiago v. Fischer, No. 09CV1383MKBST, 2017 WL 9481023, at *5 (E.D.N.Y. June 7, 2017), *report and recommendation adopted*, No. 09CV1383MKBST, 2017 WL 4349378 (E.D.N.Y. Sept. 29, 2017) (applying the Forfeiture Rule); Broadway Gate Master Fund, Ltd. v. Ocwen Fin. Corp., No. 16-80056-CIV-WPD, 2016 WL 9413421, at *11 (S.D. Fla. June 29, 2016) (same); *In re* Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 9 CV 3690, 2015 WL 3988488, at *29 (N.D. Ill. June 29, 2015) (same); *In re* BP p.l.c. Sec. Litig., No. 4:13-CV-1393, 2014 WL 4923749, at *3–4 (S.D. Tex. Sept. 30, 2014) (same); *In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2012 WL 6645533, at *7–8 (E.D. Pa. Dec. 20, 2012) (same); McDavitt v. Powell, No. 3:09–CV–0286, 2012 WL 959376, at *3 (M.D. Pa. Mar. 21, 2012) (same); Mason v. Long Beach Mortg. Co., No. 07 C 6545, 2008 WL 4951228, at *2 (N.D. Ill. Nov. 18, 2008) (same);

arguments.[19] First, courts rejecting the Forfeiture Rule argue that the policy rationales behind *American Pipe* justify permitting tolling for plaintiffs who file individual suits before certification. Second, they argue that the language deployed by the Court in *American Pipe* and its progeny is broad, clearly authorizing tolling in situations where the Forfeiture Rule applies. Third, they explain that a "non-forfeiture rule"[20] is consistent with the reliance and representation interests of class action tolling. Fourth, these courts hold that allowing tolling for these plaintiffs does not undermine the purpose of statutes of limitations.

This Note analyzes the circuit split over the application of the Forfeiture Rule and argues that plaintiffs should not forfeit *American Pipe* tolling when they file individual actions before class certification has been resolved in the underlying putative class action. It concludes that given the increased uncertainty facing class action plaintiffs, the policy and equity interests that motivated courts to adopt the Forfeiture Rule now require courts to abandon it. This is the first article to analyze the Forfeiture Rule's history and evolution, to explore the impact of changes in class action jurisprudence on statutes of limitations on the Forfeiture Rule, and to argue against the continued viability of the Forfeiture Rule across the federal judicial system.[21]

This Note proceeds in three parts. Part I traces the development of *American Pipe* tolling and examines several Supreme Court cases to discuss the doctrine. It also describes how the Forfeiture Rule was established, traces its historical development, sketches its doctrinal underpinnings, and demonstrates the evolution of the rationale offered to support the rule over time. Part I explores the rationales offered in favor of and against the Forfeiture Rule by offering in-depth analysis of the key cases that both support and reject the rule. In doing so, it lays out a framework for analyzing the continued viability of the Forfeiture Rule.

In re Katrina Canal Breaches Consol. Litig., No. 05-4182, 2008 WL 2692674, at *2 (E.D. La. July 2, 2008) (same); 3 RUBENSTEIN, *supra* note 17, § 9.63 n.6 (collecting cases).

[19] *See, e.g.*, *In re WorldCom*, 496 F.3d at 255–56; *see also infra* Section I.C.2.

[20] 3 RUBENSTEIN, *supra* note 17, § 9.63.

[21] Very few scholars have focused on the Forfeiture Rule. Two treatises give a short overview of the circuit split but neither offers in-depth analysis nor calls for an end to the Forfeiture Rule. *See* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 3:15 (7th ed. 2011); 3 RUBENSTEIN, *supra* note 17, § 9.63. Indeed, one argues the Forfeiture Rule is preferable. 1 MCLAUGHLIN, *supra*, § 3:15. In addition, one student note analyzes the Tenth Circuit's decision in *Boellstorff*, 540 F.3d at 1223, and argues the decision to reject the Forfeiture Rule was correct. *See* Caleb Brown, Note, *Piped In: The Tenth Circuit Weighs In on Extending* American Pipe *Tolling in* State Farm Mutual Automobile Insurance v. Boellstorff, 62 OKLA. L. REV. 793 (2010).

Part II discusses recent developments in class action and *American Pipe* tolling case law that have exacerbated the practical and theoretical problems with the Forfeiture Rule. Specifically, Part II explores new rules regarding the requirements of Rule 23,[22] the creation of splits of authority among district courts in several circuits over the application of the Forfeiture Rule,[23] the Supreme Court's decision that *American Pipe* tolling does not apply to statutes of repose[24] or successive class actions,[25] and uncertainty regarding the impact of interlocutory appeals on *American Pipe* tolling.[26] Part II illustrates how these developments add urgency to the call to end the circuit split over this rule.

Part III argues that the Forfeiture Rule misunderstands the purpose of *American Pipe* tolling, that it creates serious practical problems, and that it should be rejected. This Part asserts that the Forfeiture Rule is incompatible with the policy underlying *American Pipe* tolling and explains that rejecting the Forfeiture Rule does not compromise the countervailing purposes of statutes of limitations. First, it argues that the rationale offered by courts rejecting the Forfeiture Rule is correct. It ties together the examples from Part II to explain how increased uncertainty in class litigation—as well as recent developments in *American Pipe* tolling jurisprudence—has altered the calculus underlying the continued applicability of the Forfeiture Rule. This Note concludes with a call for the Supreme Court to resolve the circuit split by rejecting the Forfeiture Rule or, in the alternative, for the circuits still deploying the Forfeiture Rule to abandon it.

I
American Pipe Tolling and the Forfeiture Rule

Part I explores the history, development, and key rationales of *American Pipe* tolling and the Forfeiture Rule. Section I.A sets the scene by discussing the establishment and evolution of *American Pipe* tolling and analyzing the rationales that have shaped this doctrine. Next, Section I.B explains what is at stake for plaintiffs when the Forfeiture Rule is applied by briefly highlighting the impact of the

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[22] *E.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[23] *Compare, e.g.*, *Howard*, 571 F. Supp. 2d at 156 (holding that *American Pipe* tolling applies to administrative claim filed while class certification decision was still pending), *with In re* Federal National Mortg. Ass'n Sec., 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007) (stating, in a footnote, that the D.C. Circuit applies the Forfeiture Rule). *See also infra* Section II.B.

[24] Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017); *see also infra* notes 150–53 and accompanying text (defining statutes of repose).

[25] China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018).

[26] *E.g.*, Giovanniello v. ALM Media, LLC, 726 F.3d 106, 118 (2d Cir. 2013).

Forfeiture Rule from the perspective of hypothetical individual class members. Then, Section I.C discusses the creation of the Forfeiture Rule, surveys key cases to explore the development of the rule, and offers an in-depth explanation of the rationales offered by courts both in favor of and against the Forfeiture Rule.

A. The Creation and Policy Goals of American Pipe *Tolling*

Class action tolling emerged from two important Supreme Court decisions: *American Pipe & Construction Co. v. Utah*[27] and *Crown, Cork & Seal Co., Inc. v. Parker*.[28] The Court's first look at class action tolling, *American Pipe*, concerned a putative federal antitrust class action brought by the state of Utah just eleven days before the statute of limitations was set to expire on the antitrust claims.[29] Eight days after the district court denied class certification on numerosity grounds, several of the putative class plaintiffs moved to intervene in Utah's suit.[30] The district court rejected the motions as time-barred, reasoning that the statute of limitations continued running for non-named plaintiffs even after Utah filed suit.[31] On appeal, the Ninth Circuit reversed,[32] and the Supreme Court granted certiorari.[33]

In *American Pipe*, the Supreme Court held that the filing of a class action tolls the statute of limitations for putative class members that later try to intervene in the original suit after class certification is denied.[34] Two considerations were crucial to the Court's reasoning: (1) the conclusion that tolling the statute of limitations serves judicial efficiency by preventing putative class members from filing a torrent of lawsuits during the pendency of the motion for class certification, and (2) that tolling still preserves the policies underlying limitations periods.[35] The Court explained that, if it refused to toll the statute of limitations,

> [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. In cases . . . where the determination to disallow the class action was made upon *considerations that may vary* with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful antici-

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27 414 U.S. 538 (1974).
28 462 U.S. 345 (1983).
29 *American Pipe*, 414 U.S. at 541.
30 *Id.* at 544.
31 *Id.*
32 Utah v. Am. Pipe & Constr. Co., 473 F.2d 580, 584 (9th Cir. 1973).
33 *American Pipe*, 414 U.S. at 545.
34 *Id.* at 553.
35 *Id.* at 553–54.

> pation of the determination of the viability of the class would breed needless duplication of motions.[36]

In essence, as part of this interest in judicial efficiency and economy, the Court was concerned with avoiding a rule that would force plaintiffs to file protective suits to safeguard their rights should certification be denied in the underlying putative class action, especially because the prospect of certification was so unpredictable.

The Court then noted that tolling the statute of limitations for putative class members would not undermine the purpose or policy goals of a statute of limitations, which is designed "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[37] The Court explained that the putative class action fulfilled the policy goal of "ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,'"[38] by putting the defendant on 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."[39] The Court concluded that its new tolling rule was "consistent both with the procedures of Rule 23 and with the proper function of the limitations statute" and implied that class action tolling was not judicially created but instead was rooted somewhere in Rule 23.[40]

In *Crown, Cork & Seal*, the Supreme Court extended *American Pipe* tolling to putative class members who file individual lawsuits after certification is denied, not just those who attempt to intervene.[41] The Court reasoned that the same policy concerns embedded in *American Pipe*—judicial economy and preventing duplicative suits to safeguard plaintiffs' rights—apply with equal force to a plaintiff who seeks to bring an individual suit after certification is denied. In expanding the reach of *American Pipe* tolling, the Supreme Court noted that doing so would not violate the principles embedded in statutes of limitations because class action tolling does not subject the

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[36] *Id.* (emphasis added) (footnotes omitted).

[37] *Id.* at 554 (quoting Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944)).

[38] *Id.* (quoting Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965)).

[39] *Id.* at 555.

[40] *Id.* at 555–56 ("[T]his interpretation of [Rule 23] is nonetheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve."). *But see* Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 14 (2018) (arguing that Rule 23 is not the source of power to create *American Pipe* tolling).

[41] Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983).

defendant to unfair surprise nor encourage plaintiffs to sleep on their rights. On the contrary, the Court emphasized that the representative nature of Rule 23 encouraged tolling because absent class members are expected to rely on the named plaintiff to represent their interests.[42] The Court in *Crown, Cork & Seal* explicitly rejected a narrow reading of *American Pipe*, using expansive language to hold that the "filing of a class action tolls the statute of limitations 'as to *all asserted members of the class*,' not just as to intervenors."[43] *Crown, Cork & Seal* reinforced that the key considerations in determining whether *American Pipe* tolling applies in a particular situation requires balancing the efficiency and economy goals of Rule 23 against the fairness and equity interests of a statute of limitations.

The Supreme Court has offered additional guidance on the nature of class action tolling in recent years. In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Court clarified that *American Pipe* tolling is an equitable remedy, "designed to modify a statutory time bar where its rigid application would create injustice."[44] However, in this same case, the Court cut back on the reach of the doctrine by holding that it does not apply to statutes of repose.[45]

While *American Pipe* and *Crown, Cork & Seal* set the basic theoretical framework for class action tolling, they left many questions unanswered, including whether putative class plaintiffs benefit from *American Pipe* tolling when they file a suit before class certification is resolved. Lower courts have been filling in the gaps ever since, and in doing so they often look to the reasoning and policy goals offered by the Supreme Court in *American Pipe* and its progeny for guidance. On the one hand, courts seek to honor the purpose of statutes of limitations by ensuring the defendant has notice and that plaintiffs don't sleep on their rights. On the other hand, courts seek both to further the interests of judicial efficiency and to avoid forcing plaintiffs to file duplicative suits to protect their rights. Furthermore, courts are wary of plaintiffs who try to manipulate the system by attempting to retain

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[42] *Id.* at 352–53 ("Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims.").

[43] *Id.* at 350 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).

[44] 137 S. Ct. 2042, 2052 (2017). In holding that *American Pipe* tolling is equitable and not legal, the Supreme Court foreclosed the ability for courts to allow tolling when confronted with a mandatory time limit set by statute, such as a statute of repose. *But see* Burbank & Wolff, *supra* note 40, at 8 (arguing that *American Pipe* tolling is a federal common law rule, not an equitable or legal tolling doctrine).

[45] *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2052–53; *see also infra* Section II.C (discussing the impact of this decision on the Forfeiture Rule).

the benefits of the class action (like tolling) while avoiding being bound by the class litigation. Thus, a deep concern for doing justice and ensuring equity for all parties lies at the root of *American Pipe* tolling. Indeed, these very same interests gave rise to the Forfeiture Rule, yet they now require a repudiation of the same rule.

B. Individual Plaintiffs and the Forfeiture Rule

Before exploring the development of the Forfeiture Rule, it is useful to understand what exactly *American Pipe* tolling sought to protect and how a class member's decisionmaking is impacted by the Forfeiture Rule. At its most basic level, this Note is concerned with the Supreme Court's recognition of the "deep-rooted historic tradition that everyone should have his own day in court."[46] In the context of class actions, guaranteeing a plaintiff's day in court means ensuring they don't lose their individual claims while they wait for a class action to work its way through the courts. It also means ensuring plaintiffs are not forced to participate in a class action that will not adequately vindicate their rights.

The Supreme Court has recognized that a right to "opt out" of participation in class litigation is protected by the Due Process Clause.[47] When plaintiffs file individual suits before the decision on class certification, they are asking for their day in court by "ret[aking] the reins" of their claim.[48] Why might a plaintiff choose to exercise this right before a decision on certification? A plaintiff may not be able to wait for many years while a large class action winds its way through the courts, or a plaintiff's claim may be significant enough that pursuing litigation alone will lead to a remedy that leaves the plaintiff more whole.[49] In these situations, plaintiffs may pursue individual suits either to have their claims adjudicated on the merits while the class action slowly winds its way towards certification, or—more likely—to settle their claims.

How would the Forfeiture Rule impact plaintiffs who are weighing these concerns? As an illustration, consider a plaintiff who is

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[46] Richards v. Jefferson Cty., 116 S. Ct. 1761, 1766 (1996) (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

[47] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (holding that where "the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law," due process requires "an opportunity to remove himself from the class"). *But see* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789.1 (noting that some courts have restricted *Shutts* to Rule 23(b)(3) class actions).

[48] State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1233 (10th Cir. 2008).

[49] *See* Steven T.O. Cottreau, Note, *The Due Process Right to Opt Out of Class Actions*, 73 N.Y.U. L. REV. 480, 486–87 (1998) (discussing several reasons why a plaintiff may choose to opt out of a class action after certification).

a member of a putative class action because of exposure to asbestos.[50] Several major asbestos class actions have fallen apart after years of litigation and settlement negotiations, leaving plaintiffs with stale claims and no relief.[51] At best, asbestos class actions can take decades to reach a settlement.[52] Because of the nature of asbestos exposure, there is a significant chance that individual plaintiffs die before they ever receive redress for their injuries.[53] For this kind of plaintiff—typically low-income to begin with and more deeply impoverished by medical expenses arising from asbestos-related illness—waiting for the class certification decision may not be a viable option. This plaintiff should not be locked into class litigation for decades, without an option to pursue a remedy alone.[54] Yet, ex ante, this plaintiff cannot make an informed decision to pursue an individual suit because he faces considerable uncertainty over the application of the Forfeiture Rule.[55] He cannot wait for the class action to work its way through the courts, and he cannot risk having his individual claim thrown out under the Forfeiture Rule.

Alternatively, consider a plaintiff in a complex putative antitrust class action, with claims worth a significant amount of money.[56] Given increased uncertainty over getting a class certified, this plaintiff may be concerned that class counsel has selected an expert witness whose testimony will be insufficient to demonstrate predominance.[57] This plaintiff will want bring an individual suit because she has a valuable claim at stake, faces years of waiting with certification unlikely at the end, and may not be able to wait to recover from a defendant who may no longer be solvent. In both scenarios, the Forfeiture Rule causes plaintiffs to lose valuable claims.

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[50] This hypothetical is loosely based on the facts underlying *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297 (5th Cir. 1998).

[51] *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[52] *See, e.g.*, Press Release, Provost Umphrey Law Firm, L.L.P., Arbitrators' Award Boosts Asbestos Case Settlement to $178.5 Million for Refinery, Chemical Workers (Dec. 10, 2018), https://www.prnewswire.com/news-releases/arbitrators-award-boosts-asbestos-case-settlement-to-178-5-million-for-refinery-chemical-workers-300760929.html (announcing an arbitration award ending a thirty-year-old asbestos class action).

[53] *See id.* (noting that "less than 3 percent of the original asbestos plaintiffs [were] alive" when plaintiffs received their final payment).

[54] This example just illustrates why a plaintiff may want to file an individual suit before a certification decision. This Note does not address whether mandatory class litigation is preferable as a policy or normative matter for mass torts.

[55] *See infra* Part II.

[56] This hypothetical is based on the facts in *In re* Rail Freight Fuel Surcharge Antitrust Litig., 292 F. Supp. 3d 14 (D.D.C. 2017).

[57] *See infra* notes 131–32 and accompanying text.

C. The Development of the Forfeiture Rule

This Section discusses the establishment and evolution of the Forfeiture Rule by analyzing the key cases to address this issue.[58] In doing so, it focuses on the rationale, policy goals, and legal arguments offered to justify the rule. Section I.C.1 discusses the reasoning employed by courts that have applied the Forfeiture Rule, while Section I.C.2 addresses the rationale applied by courts that have rejected it. This Section illustrates the chronological development of the Forfeiture Rule and highlights key arguments in favor of and against it.

1. In Favor of the Forfeiture Rule

In creating and implementing the Forfeiture Rule, courts have primarily relied on two main arguments. First, courts utilize the Forfeiture Rule because they believe it furthers judicial economy by preventing a proliferation of duplicative suits.[59] Second, courts worry that plaintiffs who file individual suits before certification is resolved are trying to strategically manipulate class action rules.[60]

The primary motivation behind the Forfeiture Rule is a belief that it promotes judicial economy, which (according to courts deploying the Forfeiture Rule) is the primary purpose of *American Pipe* tolling. The first court to consider whether class action tolling applied to plaintiffs who filed suit before the class certification question is resolved relied heavily on this rationale to create the Forfeiture Rule. In *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, plaintiffs were members of a putative class action who jointly filed an individual suit before the court ruled on the motion for class

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[58] By key cases, I mean circuit court cases that directly address the Forfeiture Rule and foundational district court cases that discuss the legal arguments in some depth when determining whether to apply the rule. While this Note will not analyze or identify every case to directly consider the Forfeiture Rule in detail, it identifies most of these cases to squarely rule on this issue at the time of publication. *See supra* notes 17, 18 (collecting cases).

[59] *See, e.g.*, Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) (explaining that the policies behind Rule 23 and *American Pipe*—"efficiency and economy"—would be disserved without the Forfeiture Rule); *see also* Soroko v. Cadle Co., Civil Action No. 10-11788-GAO, 2011 WL 4478479, at *2 (D. Mass. Sept. 23, 2011) (endorsing *Glater*'s rationale for applying the Forfeiture Rule and noting that it is still binding precedent in the First Circuit).

[60] *See, e.g.*, Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 403 (S.D. Ind. 1996) (explaining that the *American Pipe* tolling should not be applied "when a plaintiff attempts to manipulate the rule in a way that frustrates its underlying purpose" by filing an individual suit before certification is resolved).

certification in the underlying class action.[61] The *Wachovia* court rejected an argument that *American Pipe* tolling applied and held that the plaintiffs could not benefit from class action tolling. The court explained that allowing plaintiffs to benefit from tolling "would sanction duplicative suits and violate the policies behind *American Pipe*."[62] The D.C. Circuit reversed on other grounds, but it explicitly endorsed the district court's application of what is now called the Forfeiture Rule.[63]

The next court to address the question presented by the Forfeiture Rule was the First Circuit, which concluded that the efficiency goals of Rule 23 and *American Pipe* required it to apply the rule. In *Glater v. Eli Lilly & Co.*, the plaintiff's motion to intervene in a putative class action against the defendant was granted in 1980, and, roughly a year later, the plaintiff filed an individual action against the defendant.[64] As an intervener, plaintiff was a resident of New Hampshire, but a year later, when she filed her individual suit, she was a resident of Massachusetts. The plaintiff cited *American Pipe* to argue that tolling should apply in order to extend her residency in New Hampshire for the purpose of preserving personal jurisdiction in her individual suit.[65] In upholding the district court's rejection of this argument, the First Circuit highlighted the importance of the "efficiency and economy . . . goals of Rule 23," embedded in *American Pipe*, which would not be served by allowing plaintiffs to bring individual suits before certification.[66] In fact, the court explained that these goals "would be disserved[ ] by guaranteeing a separate suit at

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[61] 461 F. Supp. 999, 1011–12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980).

[62] *Id.* at 1012; *see also id.* at 1011 ("As members in the earlier filed class action proceedings the [plaintiffs] could not exclude themselves from the class and then file lawsuits which otherwise would be time-barred.").

[63] Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) ("The district court correctly ruled that appellants fail[ed] to qualify for the *American Pipe* tolling rule. Here, certification of the class was granted . . . . [A]ppellants filed their own action nine months before the district court granted certification, and preferred to pursue their own case rather than seek class relief."). Despite the D.C. Circuit's decision in *Wachovia*, there is an intracircuit split on this issue in the D.C. Circuit. *See also infra* Section II.B (discussing the uncertainty over the current applicability of the Forfeiture Rule in the D.C. Circuit). *Compare* Howard v. Gutierrez, 571 F. Supp. 2d 145, 156 (D.D.C. 2008) (holding that *American Pipe* tolling applied to an administrative claim filed while class certification decision was still pending), *with In re* Fed. Nat'l Mortg. Ass'n Sec., Derivative, and "ERISA" Litig., 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007) (stating, in a footnote, that the D.C. Circuit applies the Forfeiture Rule).

[64] 712 F.2d at 736, 739.

[65] *Id.* at 739.

[66] *Id.*

the same time that a class action is ongoing."[67] However, while stressing the importance of the efficiency goals embedded in Rule 23 and *American Pipe*, the First Circuit noted the purpose of tolling is to ensure plaintiffs do not have to file protective suits to preserve their rights.[68]

Early district court cases in the Second Circuit also applied the Forfeiture Rule,[69] and, in doing so, relied on an understanding of *American Pipe* that privileged efficiency above all else. The most influential of these district court opinions was *In re WorldCom, Inc. Securities Litigation*.[70] The district court in *In re WorldCom* explained:

> Many good purposes are served by [the Forfeiture Rule] . . . . The parties and courts will not be burdened by separate lawsuits which, in any event, may evaporate once a class has been certified. At the point in a litigation when a decision on class certification is made, investors usually are in a far better position to evaluate whether they wish to proceed with their own lawsuit, or to join a class, if one has been certified.[71]

This case bears mentioning because subsequent courts found this articulation of the efficiency rationale compelling,[72] even though the Second Circuit ultimately reversed this decision.[73]

The Sixth Circuit became the third circuit court to rule squarely on the issue when it decided *Wyser-Pratte Management Co. v. Telxon Corp.*, again emphasizing the judicial efficiency rationale of the Forfeiture Rule.[74] Heavily influenced by the district court decision in *In re WorldCom*, the Sixth Circuit applied the Forfeiture Rule.[75] The court reasoned that "[t]he purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification."[76] The *Wyser-Pratte* court made a point

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[67] *Id.*

[68] *Id.* ("[W]ithout such [class action] tolling potential members could only protect themselves by filing individual motions to join or intervene in the class action.").

[69] *See, e.g.*, *In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 431, 453 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007) (applying the Forfeiture Rule); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003) (same); Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450, 514 (S.D.N.Y. 2001) (same), *abrogated by* Casey v. Merck & Co., 654 F.3d 95 (2d Cir. 2011); Wahad v. City of New York, No. 75 Civ. 6203 (AKH), 1999 WL 608772, at *6 (S.D.N.Y. Aug. 12, 1999) (same).

[70] 294 F. Supp. 2d at 453.

[71] *Id.* at 452.

[72] *See, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 569 (6th Cir. 2005) (quoting the *In re WorldCom* court's efficiency rationale).

[73] *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007); *see also infra* Section I.C.2 (discussing the Second Circuit's rejection of the Forfeiture Rule).

[74] *See Wyser-Pratte*, 413 F.3d at 568–69.

[75] *Id.* at 569.

[76] *Id.*

of noting that "this limitation on class action tolling has taken hold in a number of district courts, with no courts rejecting it," and concluded that "[t]he reasoning supporting this approach is both sound and persuasive,"[77] referring to the rationale that the Forfeiture Rule furthers judicial efficiency.

Although the Second Circuit reversed *In re WorldCom* shortly after *Wyser-Pratte* was decided, the Sixth Circuit has continued to apply the Forfeiture Rule.[78] In 2016, the Sixth Circuit revisited and reaffirmed its decision to apply the Forfeiture Rule in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*[79] In its justification for continuing to apply the Forfeiture Rule in *Stein*, the Sixth Circuit explained that the court in *Wyser-Pratte* "invoked judicial economy as the basis for its rule."[80] Additionally, the *Stein* court noted that it was bound by the Sixth Circuit's earlier decision in *Wyser-Pratte*, "even though we may have doubts about its holding."[81] Nevertheless, despite casting doubt on the viability of the Forfeiture Rule in its decision in *Stein*, the Sixth Circuit has not reconsidered the issue en banc. Furthermore, district courts in the circuit continue to apply the Forfeiture Rule.[82]

The second factor motivating courts to apply the Forfeiture Rule is a skepticism toward plaintiffs who file individual suits before a resolution of the certification question.[83] In these situations, courts are often concerned that plaintiffs are attempting to get the benefits of class litigation, such as tolling, without any of the burdens.[84] In

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[77] *Id.*

[78] *See, e.g.*, Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 644 (6th Cir. 2015) (explaining that the "litigation efficiency and economy of Rule 23 would be lost for the parties and the court if class members . . . filed independent protective actions before the court has the opportunity to rule on the viability of a putative class action").

[79] 821 F.3d 780, 794–95 (6th Cir. 2016) (holding that *American Pipe* tolling does not apply to statutes of repose).

[80] *Id.* at 789.

[81] *Id.*

[82] *See, e.g.*, Gold v. Ocwen Loan Servicing, LLC, No. 2:17-cv-11490, 2017 WL 6342575, at *2 (E.D. Mich. Dec. 12, 2017); Cataldi v. Ocwen Loan Servicing, LLC, No. 17-11487, 2017 WL 5903440, at *3 (E.D. Mich. Nov. 30, 2017); Knight v. Ocwen Loan Servicing, LLC, No. 17-cv-11491, 2017 WL 4918531, at *5 (E.D. Mich. Oct. 31, 2017); Keyes v. Ocwen Loan Servicing, LLC, No. 17-CV-11492, 2017 WL 4918530, at *5 (E.D. Mich. Oct. 31, 2017).

[83] *See* 1 MCLAUGHLIN, *supra* note 21, § 3:15 (arguing that the Forfeiture Rule is "sound" because "putative class members who actually file a separate lawsuit cannot credibly maintain they have relied on the pendency of the class action, the underpinning of American Pipe[sic] tolling").

[84] *See In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 431, 453 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007) ("Plaintiffs who choose, as is their right, to pursue separate litigation may not enjoy the benefits of that separate litigation without bearing its burdens. One of the burdens plaintiffs bear is the obligation to commence their actions within the applicable statute of limitations.").

Wachovia, the court explained with disapproval that plaintiffs "appear[ed] to have been manipulating the tolling doctrine and other class action procedures" in filing an individual suit before the certification question was resolved.[85] Particularly "noteworthy" to the *Wachovia* court was that the "plaintiffs filed th[e] action before class certification had been decided," and the court said plaintiff's tolling argument "might be more persuasive" if, immediately following certification, they had "determined that the class action strategy would not protect their rights and had then promptly filed a separate action."[86]

While subsequent courts have found *Wachovia*'s rationale in establishing the Forfeiture Rule convincing, few have addressed the elements of the court's reasoning that militate against interpreting this rationale to require a bright-line Forfeiture Rule.[87] For example, the court's rationale in *Wachovia* was premised on an argument that the claims advanced by the plaintiffs in their individual suit were potentially different from the class claims,[88] raising issues with whether defendants were on notice, a key concern behind the policy goals of a statute of limitations.[89] Further, by the time the court addressed plaintiffs' claims, plaintiffs had already opted out of the underlying class action—which had been certified—heightening the sense that plaintiffs were trying to get the benefits of class actions while opting out of the drawbacks.[90] Thus, while the reasoning of the *Wachovia* court was sound on the facts presented, it did not require subsequent courts to interpret the Forfeiture Rule so broadly.

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[85] Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp., 461 F. Supp. 999, 1012 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980).

[86] *Id.*

[87] *See, e.g.*, *In re WorldCom Inc.*, 294 F. Supp. 2d at 451 (applying the Forfeiture Rule); Rahr v. Grant-Thornton LLP, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000) (same); Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 404 (S.D. Ind. 1996) (same). *But see* Scott v. District of Columbia, 87 F. Supp. 3d 291, 297–98 (D.D.C. 2015) (rejecting argument that *Wachovia* requires a bright line application of the Forfeiture Rule).

[88] *See Wachovia*, 461 F. Supp. at 1011–12 (noting that plaintiffs justified their independent suit by "assert[ing] that their status as institutional purchasers made their complaint dissimilar to the earlier class actions").

[89] *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring) ("When thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit.").

[90] *See supra* note 85 and accompanying text. The *Wachovia* court was on the wrong side of a circuit split in its interpretation of a Supreme Court case, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 n.13 (1974), which suggested that *American Pipe* tolling extends to class members who opt out. *Compare Wachovia*, 461 F. Supp. at 1012 (rejecting plaintiffs' argument that *Eisen* extended class action tolling to all putative class members), *with Crown, Cork & Seal Co.*, 462 U.S. at 351–52 (clarifying that the Court's dicta in *Eisen* established that *American Pipe* tolling did not only apply to intervenors).

In sum, courts rely on two primary rationales to justify the Forfeiture Rule. First, many courts base their decisions on an understanding of *American Pipe* that prioritizes notions of judicial efficiency and seeks to prevent an onslaught of duplicative protective suits. Second, courts also find that equity concerns require the application of the Forfeiture Rule, and they have used the rule against plaintiffs who seek to retain the benefits of class action tolling while proactively choosing to forego class litigation. However, as discussed in the following Section, neither of these considerations compels courts to deploy a bright-line Forfeiture Rule. Subsequent courts have addressed these arguments and still allowed tolling when plaintiffs file individual suits before the class certification decision is resolved in the underlying putative class action.

2. *Against the Forfeiture Rule*

The Forfeiture Rule reigned supreme for almost thirty years: nearly unquestioned from the D.C. Circuit's approval of its application in *Wachovia* in 1980[91] until the Second Circuit rejected the rule in a decision in 2008.[92] Some have christened the Second Circuit's position the "non-forfeiture rule,"[93] and it now constitutes the majority position.[94] Courts that reject the Forfeiture Rule have done so

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[91] *See supra* note 63 and accompanying text.

[92] *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007). Two exceptions are a district court case from 1990 and another from 2006. *See* Lehman v. United Parcel Serv., Inc., 443 F. Supp. 2d 1146, 1149–52 (W.D. Mo. 2006) (rejecting the Forfeiture Rule); Rochford v. Joyce, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990) (same).

[93] 3 RUBENSTEIN, *supra* note 17, § 9:63.

[94] Three circuits have rejected the Forfeiture Rule, while two have adopted it. *Compare* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1235 (10th Cir. 2008) (rejecting the Forfeiture Rule), *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008) (same), *and In re WorldCom*, 496 F.3d at 256 (same), *with* Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 788–89 (6th Cir. 2016) (applying the Forfeiture Rule), *and* Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) (same). The Forfeiture Rule is also arguably binding precedent in the D.C. Circuit as well, which would make it an even split. *See supra* note 63. However, there is currently a split among district courts in the D.C. Circuit over the Forfeiture Rule. *See infra* notes 139–42. The Eighth Circuit has explicitly declined to adopt or reject the Forfeiture Rule. *See* Concordia Coll. Corp. v. W.R. Grace & Co., 999 F.2d 326, 332 n.6 (8th Cir. 1993) ("We note that there is a sub-issue here that we do not decide . . . . There is some question whether a putative class member can enjoy the benefits of tolling merely by opting out, even though the class action is still pending. The Supreme Court in dicta has intimated as much . . . ."). Subsequent district court cases in the circuit have interpreted the Eighth Circuit's decision in *Concordia College* as a de facto rejection of the Forfeiture Rule. *See, e.g.*, Christianson v. Ocwen Loan Servicing, LLC, 338 F. Supp. 3d 989, 993 (D. Minn. 2018) (noting that "while there is no Eighth Circuit precedent, a recent decision in this district applied the *American Pipe* tolling doctrine" to reject the Forfeiture Rule); Wagener v. Ocwen Loan Servicing, LLC, No. CV 17-1531, 2017 WL 6988969, at *4 (D. Minn. Nov. 15, 2017) ("While the law in the Eighth Circuit is undecided on this point, the footnote in

because they disagree with the premise that allowing these plaintiffs to benefit from class action tolling violates the rationale of *American Pipe*.[95] In reaching this conclusion, courts rely on four major arguments. First, the primary purpose of *American Pipe* is to protect plaintiffs' claims, not judicial efficiency.[96] Second, the text of *American Pipe* and *Crown, Cork & Seal* is consistent with a non-forfeiture rule.[97] Third, a non-forfeiture rule is consistent with the reliance and representation interests of class action tolling.[98] And fourth, a non-forfeiture rule does not defeat the purpose of statutes of limitations.[99]

The primary argument deployed by courts that reject the Forfeiture Rule is that the purpose of *American Pipe* tolling is to protect plaintiffs' claims, which is vindicated by allowing plaintiffs to benefit from tolling even if they file individual suits before certification is resolved. This understanding of *American Pipe* rebuts the argument that had convinced previous courts—nearly unanimously—to apply the Forfeiture Rule[100]: that without it, individual plaintiffs could bring duplicative suits, thereby undermining the efficiency concerns of *American Pipe*.

The Second Circuit became the first circuit to reject the Forfeiture Rule when it decided *In re WorldCom Securities Litigation*, resting on the rationale that *American Pipe* aims to protect plaintiffs' claims.[101] As noted above, district courts in the Second Circuit had applied the Forfeiture Rule for nearly half a decade, reasoning that doing so furthers the efficiency goals of *American Pipe*.[102] However, the Second Circuit confidently rejected the Forfeiture Rule, holding that tolling in this situation was consistent with *American Pipe* because the primary purpose was not efficiency.[103] The Second Circuit

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Concordia [*College*] suggests an inclination to follow the majority rule applying *American Pipe* tolling to individual actions filed during the pendency of a class action."), *report and recommendation adopted*, No. 17-CV-1531, 2018 WL 471782 (D. Minn. Jan. 18, 2018).

95 *See, e.g.*, 3 RUBENSTEIN, *supra* note 17, § 9:63.

96 *See In re WorldCom Sec. Litig.*, 496 F.3d at 256.

97 *See, e.g.*, *id.* at 255 (citing Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983)).

98 *See, e.g.*, 3 RUBENSTEIN, *supra* note 17, § 9:63 (explaining that when a putative class plaintiff brings an individual suit, they are not choosing to reject reliance on the class action mechanism, but are instead "'re[taking] the reins' from the individual who filed the initial class complaint" (alteration in original) (quoting *Boellstorff*, 540 F.3d at 1233)).

99 *See In re WorldCom Sec. Litig.*, 496 F.3d at 255 ("It would not undermine the purposes of statutes of limitations to give the benefit of tolling to all those who are asserted to be members of the class for as long as the class action purports to assert their claims.").

100 *See supra* Section I.C.1 (describing courts that apply the Forfeiture Rule and their rationales).

101 496 F.3d at 256.

102 *See supra* notes 69–71 and accompanying text.

103 *In re WorldCom*, 496 F.3d at 256.

recognized that the Forfeiture Rule may reduce the number of lawsuits, but reasoned:

> 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. Nor was the purpose . . . to protect the desire of a defendant "not to defend against multiple actions in multiple forums." The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually.[104]

In this analysis, the Second Circuit cut to the heart of the problem with a bright-line Forfeiture Rule. The *WorldCom* court argued that applying the Forfeiture Rule mistakes one of the benefits of class action tolling (efficiency) for the chief concern of *American Pipe* tolling (protecting plaintiffs' claims). The court explained that *American Pipe* is primarily a doctrine that seeks to protect plaintiffs' rights, not one that seeks to reduce the total number of lawsuits. It does not seek efficiency for efficiency's sake but rather pursues justice for plaintiffs by ensuring they are not forced to file individual suits to preserve the timeliness of their claims. The upshot of the Forfeiture Rule's misunderstanding of *American Pipe*, according to the Second Circuit, is that the Forfeiture Rule "induce[s] class members to forgo their right to sue individually."[105]

Three days after the Second Circuit rejected the Forfeiture Rule, the Ninth Circuit followed suit. In *In re Hanford Nuclear Reservation Litigation*,[106] the Ninth Circuit reviewed both the Sixth Circuit's decision in *Wyser-Pratte* and the Second Circuit's analysis in *In re WorldCom* and found the latter persuasive.[107] The *Hanford* court agreed with the Second Circuit's characterization of the goal of *American Pipe* tolling, explaining that although tolling "protects plaintiffs from being forced to file suit before the certification decision, that doesn't mean that plaintiffs who file before certification are not entitled to tolling."[108]

A few months later, the Tenth Circuit also adopted a nonforfeiture rule in *State Farm Mutual Automobile Insurance Co. v.*

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104 *Id.* (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353 (1983)).

105 *Id.* at 256.

106 534 F.3d 986, 1009 (9th Cir. 2008) (applying Washington state law).

107 *Id.* at 1008–09.

108 *Id.* at 1009.

Boellstorff.[109] Building on the Second Circuit's rationale that *American Pipe* aims to protect plaintiffs, the Tenth Circuit focused on how the Forfeiture Rule undermined this understanding of *American Pipe*. The *Boellstorff* court highlighted two issues not previously addressed by courts rejecting the Forfeiture Rule. First, "locking putative class members into the class until the class certification decision makes little sense and could adversely affect certain individuals" by forcing them to wait for long periods of time while the putative class action unfolds, which is inequitable and unjust.[110] Second, the Tenth Circuit argued that rejecting the Forfeiture Rule will not lead to an increased burden on the courts, because the class members likely to file individual suits prior to a class certification decision would be those likely to opt out of a class after certification is granted.[111] The Tenth Circuit tied these two issues together by arguing that the Forfeiture Rule may actually increase inefficiency because it forces plaintiffs to file protective actions in order to preserve the right to bring their individual claims before class certification, which could take years.[112] Thus, in addition to misunderstanding the purpose of *American Pipe*, which is to protect plaintiffs, the Forfeiture Rule also arguably undermines judicial efficiency as well.

The second argument in favor of tolling for plaintiffs that file individual actions before certification is resolved is that the best understanding of the text of *American Pipe* and progeny supports tolling. After an in-depth examination of the Supreme Court's class action tolling decisions, the Second Circuit concluded that it should take "at face value"[113] the Court's repeated assertion 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."[114]

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[109] 540 F.3d 1223, 1235 (10th Cir. 2008) (applying Colorado state law); *see also* Brown, *supra* note 21, at 794–95 (offering an in-depth analysis of this case and arguing the Tenth Circuit's decision to reject the Forfeiture Rule was correct).

[110] *Boellstorff*, 540 F.3d at 1233 (explaining that class actions can take years to get to the certification question, time which not all plaintiffs can afford to wait). Further, the court explained that making plaintiffs "wait out a class certification decision makes even less sense when we consider the costs of delay," which includes "the possibility that the evidence will grow stale and added time the plaintiff must go without recovery." *Id.*

[111] *See id.* ("The courts' case-load will likely remain the same; the only difference is *when* those cases show up on the dockets.").

[112] *Id.* at 1234 (arguing that the Forfeiture Rule "compel[s] individual class members to [choose to] file an individual action now or sit tight for a class certification decision, no matter how long it might take. Litigants . . . might file placeholder suits rather than risk placing their individual actions on ice").

[113] *In re* WorldCom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007).

[114] *Id.* (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353–54 (1983)).

Citing the same text from *American Pipe* and *Crown, Cork & Seal*, the Tenth Circuit explained that "[f]irst and foremost" the Supreme Court's language required it to "give effect to the broad language of those cases."[115] The *Boellstorff* court added: "Once the statute of limitations has been tolled, *it remains tolled for all members of the putative class until class certification is denied*."[116] In rejecting the Forfeiture Rule, numerous other courts have found the language of *American Pipe* and *Crown, Cork & Seal* controlling.[117]

The third reason that courts cite in rejecting the Forfeiture Rule is that doing so is consistent with the representational nature of class actions. According to this rationale, a putative class plaintiff's claim has *already been timely filed*—even before bringing an individual suit—because "class members are treated as parties to the class action" until they opt-out or a court declines to certify the class.[118] Because the "theoretical basis" of tolling requires that putative class members' claims are timely filed by their representative (the named plaintiff),[119] courts have said that *American Pipe* tolling really "does not involve 'tolling' at all."[120] Indeed, the representative nature of the class action *requires* that class members rely on the putative class action to toll the statute of limitations.[121] This logic applies regardless of when the plaintiff chooses to pursue claims in an individual capacity. Thus, courts that focus on the representative nature of class actions reason that the plaintiff has been a party to the underlying class action since it was first brought, and the claim is not rendered untimely simply because it was also brought in a separate action before the decision on certification. Rather, as the Tenth Circuit explained, the named plaintiff essentially "pre-file[s]" the claim, which allows the individual plaintiff to "simply ret[ake] the reins" from the named plaintiff by bringing an individual suit.[122]

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115 *Boellstorff*, 540 F.3d at 1232 ("This broad language suggests that the statute of limitations applicable to Boellstorff's claim remained tolled while the putative . . . class remained in limbo.").

116 *Id.* (emphasis added) (quoting *Crown, Cork & Seal Co.*, 462 U.S. at 354).

117 *See, e.g.*, Lehman v. United Parcel Serv., Inc., 443 F. Supp. 2d 1146, 1151 (W.D. Mo. 2006) (referencing the language of *Crown, Cork & Seal*); Rochford v. Joyce, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990) (same).

118 *In re WorldCom*, 496 F.3d at 255 (citing *American Pipe*, 414 U.S. at 551).

119 *Id.*

120 *Boellstorff*, 540 F.3d at 1232 (quoting Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000)).

121 *See id.* at 1233 ("*American Pipe* made much of this principle, positing that the class action tolling doctrine would apply regardless of the reliance or awareness of putative class members." (citing *American Pipe*, 414 U.S. at 551–52)).

122 *Id.*

The fourth point offered to rebut the Forfeiture Rule is that a non-forfeiture rule does not defeat the purpose of statutes of limitations. The earliest articulation of this rationale came from a district court in the Eighth Circuit.[123] In rejecting the Forfeiture Rule, the court explained that allowing tolling would not violate the principles embedded in statutes of limitations,[124] and argued that applying the Forfeiture Rule would actually "turn the purpose of the statute of limitations on its head" by requiring individual plaintiffs to wait until the class certification question is resolved and their claims are "more stale."[125] The Second Circuit also addressed this rationale and concluded that rejecting the Forfeiture Rule would not undermine the purposes of statutes of limitations.[126] The *WorldCom* court explained that the goals of statutes of limitations are not violated (as long as the class action purports to assert the same claims) when a plaintiff brings an individual action before certification because "the initiation of a class action puts the defendants on notice of the claims against them," regardless of whether the individual plaintiff files suit before certification.[127]

In sum, courts that reject the Forfeiture Rule focus on four factors. First, the purpose of *American Pipe* tolling is not efficiency per se, but a concern that plaintiffs, without tolling, would experience injustice because they would be forced to intervene or file suit before certification to protect their rights. Second, the text of *American Pipe* and its progeny suggests that class action tolling applies to all plaintiffs, including those who file individual suits before certification is resolved. Third, the reliance and representation interests of *American Pipe* tolling are consistent with a non-forfeiture rule. And fourth, a non-forfeiture rule does not undermine the concerns of statutes of limitations. However, while these arguments have made the Forfeiture

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123 Lehman v. United Parcel Serv., Inc., 443 F. Supp. 2d 1146, 1149–52 (W.D. Mo. 2006).

124 *Id.* at 1151 ("The class action puts the defendant on notice that many plaintiffs may have claims against it. . . . [T]here can be no surprise if an individual plaintiff files her own claim before certification is decided. The defendant would still be on notice and . . . have had every incentive to preserve evidence.").

125 *Id.* With respect to judicial efficiency, the court reasoned that the "defendant might now be required to defend itself in multiple cases in different fora but there is no guarantee against such contingencies even if the individual plaintiffs waited until after certification were decided." *Id.*

126 *In re* WorldCom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007).

127 *Id.* ("The Supreme Court explained that '[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights,' . . . ; the same is certainly true of class members who file individual suits before the court decides certification." (alteration in original) (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983))); *see also Boellstorff*, 540 F.3d 1223, 1233 (10th Cir. 2008) (explaining that the "application of the tolling doctrine here would not undermine the policy choices embodied by [the] statute of limitations").

Rule the minority rule, recent developments in the law have brought new urgency to this issue. As discussed in the next Part, when weighed along with the legal rationale and practical goals of class actions, statutes of limitations, and *American Pipe*, these developments require that courts reject the Forfeiture Rule.

II
Changes in the Law Demonstrate Where the Forfeiture Rule Can Lead to Injustice

As discussed in Part I, there is a healthy debate over the purpose and goals of *American Pipe* tolling, which—over the last ten years—has led to a split in authority over the application of the Forfeiture Rule. Part II lays out why the circuit split over the application of the Forfeiture Rule is untenable. From the perspective of class plaintiffs, the developments discussed below lead to new uncertainties, forcing them to file individual suits to protect claims without knowing whether the Forfeiture Rule will apply.

First, Section II.A shows how changes to class action doctrine since the establishment of the Forfeiture Rule makes certification less certain and explains how this alters the calculus behind applying the Forfeiture Rule. Then, Section II.B discusses how the development of splits in authority over the Forfeiture Rule among district courts in several circuits creates an unacceptable level of uncertainty for plaintiffs. Section II.C demonstrates how the Supreme Court's decision that *American Pipe* tolling does not apply to statutes of repose[128] leaves plaintiffs in situations where they are unable to pursue their claims. Section II.D explains how the Supreme Court's decision that *American Pipe* tolling does not apply to successive class actions[129] unfairly closes the courthouse door to plaintiffs with low-value claims. Finally, Section II.E explores how uncertainty regarding the applicability of *American Pipe* tolling to interlocutory appeals of a class certification decision creates uncertainty that forces plaintiffs to choose between risking the application of the Forfeiture Rule and having the statute of limitations run before the appeal is resolved.

A. Class Certification Is More Uncertain

One major factor operating in the background of most recent developments in class action jurisprudence is that achieving class certification is much more difficult now than when the Forfeiture Rule was

[128] Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017).
[129] China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018).

first established.[130] For example, to achieve class certification, plaintiffs previously had only to provide "some showing" that the requirements of Rule 23 will be met without investigating the merits of the claim.[131] However, plaintiffs are now required to prove by a preponderance of the evidence any fact necessary to meet the requirements of Rule 23, even if it also goes to the merits.[132] The Supreme Court furthered this development in *Wal-Mart Stores, Inc. v. Dukes*, in which it heightened Rule 23(a)(2)'s commonality requirement,[133] explaining that what matters for class certification—despite the language of Rule 23(a)(2)—is not "common questions" but rather the capacity "to generate common *answers*," which may require an inquiry into the merits.[134] Another development that has made certification more uncertain is the rise of an "ascertainability" requirement for small-claims consumer class actions, which requires proof that the named representative can provide a list of injured plaintiffs to meet Rule 23(b)(3)'s manageability, predominance, or notice and opt-out standards.[135] Finally, the application of these standards to settlement

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130 *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 658–60 & n.166 (2012) (summarizing developments in class action law that has made class certification increasingly more difficult and uncertain); *see also supra* notes 1–5 and accompanying text. For a general description of changes in the law that have made class action litigation more difficult for plaintiffs, see Klonoff, *The Decline*, *supra* note 1, at 729–30. But see *supra* notes 6–9 and accompanying text for contrary accounts arguing that the impact of these changes has been overstated.

131 *See, e.g.*, *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 41–42 (2d Cir. 2006) (explaining and rejecting the "some showing" standard).

132 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320, 307 (3d Cir. 2008) ("Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence. . . . [T]he court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits . . . ."); *see also In re* Initial Pub. Offerings Sec. Litig., 471 F.3d at 41 (adopting a requirement that plaintiffs provide "definitive" proof, "notwithstanding their overlap with merits issues[,]" to establish that "each Rule 23 requirement has been met").

133 564 U.S. 338, 350–51 (2011); *see also id.* at 375 (Ginsburg, J., dissenting) ("The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the (a)(2) inquiry so that it is no longer 'easily satisfied[.]'" (footnote omitted) (quoting 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.23[2] (3d ed. 2011))).

134 *Id.* at 350 (majority opinion) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)); *see also* Comcast Corp. v. Behrend, 569 U.S. 27, 35–36 (2013) (requiring a "rigorous analysis" to determine whether Rule 23(b)(3)'s predominance requirements are met).

135 *E.g.*, *In re* Fresh Del Monte Pineapples Antitrust Litig., No. 1:04-md-1628(RMB), 2008 WL 5661873, at *9–10 (S.D.N.Y. Feb. 20, 2008) (holding that a consumer class action failed Rule 23(b)(3)'s manageability and predominance standards because there was no ascertainable list of class members for distributing damages); Van West v. Midland Nat'l Life Ins. Co., 199 F.R.D. 448, 451 (D.R.I. 2001) (explaining that the ascertainability of class members is necessary to determine "who will receive notice, who will share in any

classes is yet another development that impacts plaintiffs' ability to get relief.[136] Now, even if the class reaches a settlement agreement with the defendant, plaintiffs still face uncertainty over whether the court will approve the settlement.

How do these developments relate to the Forfeiture Rule? The increasing time, cost, and uncertainty that plaintiffs face in trying to get their class certified (or settled), and therefore get relief, raises the stakes for plaintiffs.[137] Plaintiffs in putative class actions have two routes to relief: first, participating in a class action as unnamed class members (including in a settlement class) or, second, foregoing class litigation and pursuing their claims in separate suits. Developments discussed in this Section make option one increasingly more difficult to access, increasing the importance of accessing option two. Thus, plaintiffs must have the tools to preserve their claims should the class fail at certification. One of these tools is *American Pipe* tolling; however, the Forfeiture Rule creates barriers to deploying this tool. The developments discussed below have complicated matters even further because now plaintiffs cannot predict when the Forfeiture Rule will be applied to them.

B. Intracircuit Splits Lead to Uncertainty

Section I.C discussed the historical development of the Forfeiture Rule and explained the rationale used by courts to apply or reject the rule. This Section highlights another development in the law—the growth of splits in authority among district courts *within* several cir-

recovery, and who will be bound by the judgment" (quoting Kent v. SunAmerica Life Ins. Co., 190 F.R.D. 271, 278 (D. Mass. 2000))); *see* Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310 (2010) (summarizing the rise of the ascertainability doctrine and its impact on consumer class actions); *see also* Gilles & Friedman, *supra* note 130, at 659 (describing the ascertainability requirement as a "death knell" for consumer class actions). *But see* Cabraser & Issacharoff, *supra* note 7, at 850–51 (discussing the renaissance of mass harm and mass tort class action settlements in the multidistrict litigation context).

[136] *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 848–50 (1999) (imposing rigorous criteria for certifying limited fund classes under Rule (23)(b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) (holding that the requirements of Rule 23 "demand undiluted, even heightened, attention in the settlement context"). *But see* Cabraser & Issacharoff, *supra* note 7, at 859 (explaining the rise of settlement classes in the aggregate and multidistrict litigation context as a response, in part, to *Amchem* and *Ortiz*).

[137] *See* Klonoff, *The Decline*, *supra* note 1, at 734–35 (summarizing changes to class action doctrine leading to greater uncertainty for plaintiffs); Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After* Wal-Mart v. Dukes, 50 HARV. C.R.-C.L. L. REV. 153, 176 (2015) (explaining that, after *Dukes*, plaintiffs "must conduct aggressive discovery and expect that this process may be contentious and lengthy"). *But see* Klonoff, *A Respite*, *supra* note 1, at 980–83 (arguing that a backlash due to overreaching by business defendants is one possible explanation for a few recent Supreme Court decisions that appear less hostile to class actions).

cuits over the applicability of the Forfeiture Rule. These splits create uncertainty and can cause serious practical problems because plaintiffs are unable to discern ex ante whether their claims are subject to the Forfeiture Rule. To illustrate this development, this Section describes the law a plaintiff in the D.C. Circuit faces when contemplating filing a protective suit before a decision on certification, and then briefly discusses other circuits with similar problems.

Plaintiffs might contemplate bringing individual suits before the class certification decision for many reasons, such as fear that certification is unlikely.[138] Yet plaintiffs who want to do so in a district court in the D.C. Circuit cannot confidently make this decision because—due to an intracircuit split on the issue—they do not know whether the Forfeiture Rule will apply. The D.C. Circuit was the first to rule on the viability of the Forfeiture Rule when it approved the district court's decision that a plaintiff waived *American Pipe* tolling by filing an individual suit before class certification was resolved in the underlying putative class action in *Wachovia*.[139] Since then, district courts in the circuit have inconsistently applied the Forfeiture Rule. In 2007, the district court reaffirmed the continued applicability of the Forfeiture Rule by citing *Wachovia* and other district court cases that had adopted the Forfeiture Rule.[140] Yet just a year later, the same district court—completely ignoring *Wachovia* and the 2007 case—adopted the rationale advanced by the Second and Ninth Circuits, holding that *American Pipe* tolling can apply to an administrative complaint filed while class certification is pending.[141] However, in 2015, the district court reaffirmed the continued viability of the Forfeiture Rule.[142] As demonstrated by this case law, there is no clarity for a plaintiff in the D.C. Circuit. Plaintiffs filing individual suits before a certification decision in the underlying class action are playing Russian roulette with their claims.

The D.C. Circuit isn't the only place where intracircuit splits have created unacceptable uncertainty. The state of the law in the Fifth[143]

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138 *See also supra* note 49 and accompanying text.

139 Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980); *see also supra* notes 61–90.

140 *In re* Fed. Nat'l Mortg. Ass'n Sec., Derivative & "ERISA" Litig., 503 F. Supp. 2d 25, 33 n.7 (D.D.C. 2007).

141 Howard v. Gutierrez, 571 F. Supp. 2d 145, 156 (D.D.C. 2008).

142 Scott v. District of Columbia, 87 F. Supp. 3d 291, 297–98 (D.D.C. 2015) (noting the Forfeiture Rule was still viable but did not apply to the plaintiffs in this case, who were "at no risk of forfeiting anything upon filing their individual case" because the original case "no longer represented class interests").

143 *Compare In re* Enron Corp. Sec., 465 F. Supp. 2d 687, 716 (S.D. Tex. 2006) (finding other courts' application of the Forfeiture Rule for efficiency reasons persuasive), *and* Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000) ("[P]laintiff

and Seventh[144] Circuits is not any clearer. The same is true in the Third,[145] Fourth,[146] Eighth,[147] and Eleventh Circuits,[148] although in

frustrated the purpose of the class action tolling doctrine and should not now be able to reap its benefits."), *with* Aguilar v. Ocwen Loan Servicing, LLC, No. 3:17-CV-1165-B, 2018 WL 949225, at *5 (N.D. Tex. Feb. 20, 2018) (stressing that the goal of the *American Pipe* tolling doctrine is protecting plaintiffs, not efficiency), *In re* BP P.L.C. Sec. Litig., No. 4:13-CV-1393, 2014 WL 4923749, at *3–4 (S.D. Tex. Sept. 30, 2014) (adopting the Second Circuit's reasoning that class action tolling "protect[s] class members from being *forced* to file individual suits in order to preserve their claims" (quoting *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007)), *and In re* Katrina Canal Breaches Consol. Litig., No. 05–4182, 2008 WL 2692674, at *2 (E.D. La. July 2, 2008) (adopting the Second Circuit's reasoning in *WorldCom* to reject the Forfeiture Rule).

144 *Compare In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998) (rejecting tolling because "Plaintiffs made a conscious decision early on to pursue their claims on an entirely separate . . . track from that of the Class case," and thus "it would be inequitable to now allow [them] to reap the benefits of a doctrine which is designed for a group . . . which they have disavowed being a part of from the beginning"), Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 403–04 (S.D. Ind. 1996) ("In the interest of judicial economy, the tolling rule grants purported class members tremendous flexibility and protection in order to avoid duplicative lawsuits. Nonetheless, the tolling rule becomes more demanding when a plaintiff attempts to manipulate the rule in a way that frustrates its underlying purpose."), *and* Chemco, Inc. v. Stone, McGuire & Benjamin, No. 91 C 5041, 1992 WL 188417, at *2 (N.D. Ill. July 29, 1992) (refusing to toll because the "case really falls within the problem of a needless multiplicity of suits that *American Pipe* and *Crown, Cork & Seal Co.* strove to avoid"), *with In re* Dairy Farmers of Am., Inc. Cheese Antitrust Litig., No. 9 CV 3690, 2015 WL 3988488, at *29–30 (N.D. Ill. June 29, 2015) (rejecting the Forfeiture Rule because it induces class members to forgo their right to sue individually), Mason v. Long Beach Mortg. Co., No. 07 C 6545, 2008 WL 4951228, at *2 (N.D. Ill. Nov. 18, 2008) ("If the tolling doctrine applies only to those putative class members who 'stuck it out,' opting out after the certification ruling, then those who could not afford to wait until the ruling was made might have their rights expire in the meantime."), *and* Rochford v. Joyce, 755 F. Supp. 1423, 1428 (N.D. Ill. 1990) (explaining that the Supreme Court clearly authorized *American Pipe* tolling for individual suits filed before denial of class certification).

145 Courts in the Third Circuit first addressed the issue in 2008, when the district court applied the Forfeiture Rule in two cases. *See* Hubbard v. Corr. Med. Servs., Inc., No. 04-3412 (SDW), 2008 WL 2945988, at *7–9 (D.N.J. July 30, 2008); Smart-El v. Corr. Med. Servs., Inc., No. 04-3413 (NLH), 2008 U.S. Dist. LEXIS 44376, at *8–9 (D.N.J. June 5, 2008). However, in 2012 two district courts created an intracircuit split when they adopted the reasoning of the Second, Ninth, and Tenth Circuits and rejected the Forfeiture Rule. *See In re* Processed Egg Prods. Antitrust Litig., No. 08-md-2002, 2012 WL 6645533, at *7–8 (E.D. Pa. Dec. 20, 2012); McDavitt v. Powell, No. 3:09–CV–0286, 2012 WL 959376, at *3 (M.D. Pa. Mar. 21, 2012). It now appears district courts in the Third Circuit may be reaching consensus in rejecting the Forfeiture Rule. *See, e.g.*, Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., No. 15-6480, 2019 WL 130535, at *7–8 (E.D. Pa. Jan. 8, 2019) (finding it persuasive that "two district courts in the Third Circuit have followed suit" in rejecting the Forfeiture Rule). Nevertheless, there is still no definitive ruling on whether the Forfeiture Rule applies in the Third Circuit.

146 One case in the Fourth Circuit has addressed the Forfeiture Rule and, in doing so, adopted it. *See* Chinn v. Giant Food, Inc., 100 F. Supp. 2d 331, 335 (D. Md. 2000).

147 For a discussion of the decisions in the Eighth Circuit, see *supra* note 94.

148 The Eleventh Circuit was the last without at least a district court decision addressing the Forfeiture Rule. In 2016, a district court finally weighed in and rejected the Forfeiture Rule, adopting the Second Circuit's position and reasoning without much further

those circuits at least the district courts appear to be in agreement.[149] Unlike the well-defined application or rejection of the Forfeiture Rule discussed in Section I.C, the development of these intracircuit splits means that plaintiffs have no warning—and no control over—whether the district court will choose to apply or reject the Forfeiture Rule when they file suit. These splits create significant risks for plaintiffs who seek to preserve their claims by filing protective suits and can lead to injustice.

C. Statutes of Repose and the Forfeiture Rule Create Rights Without Remedies

One development in class action jurisprudence that causes plaintiffs a great deal of injustice when combined with the Forfeiture Rule is the Supreme Court's 2017 decision that *American Pipe* tolling does not apply to statutes of repose. Statutes of limitations and statutes of repose begin to run at different points in time and attempt to achieve different purposes.[150] A statute of repose begins running immediately from the "date of the last culpable act or omission of the defendant."[151] Because a statute of repose does not depend on whether an injury has been discovered, it serves as "'a cutoff' . . . on a defendant's temporal liability."[152] Statutes of repose are intended to provide finality to defendants and "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'"[153] In the *American Pipe* context, statutes of repose frequently arise in the context of securities class actions. A statute of repose can run separately from a statute of limitations, subjecting a plaintiff to two potential obstacles to get a day in court.

In *California Public Employees' Retirement System v. ANZ Securities, Inc.* (*CalPERS*), the Supreme Court resolved a long-standing circuit split by holding that statutes of repose cannot be

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comment. Broadway Gate Master Fund, Ltd. v. Ocwen Fin. Corp., No. 16-80056-CIV-WPD, 2016 WL 9413421, at *11 (S.D. Fla. June 29, 2016).

149 Nevertheless, with precedent applying the Forfeiture Rule but no definitive appellate decision either way, these district courts still *could* apply the Forfeiture Rule, forcing plaintiffs to risk losing their claim if they choose to pursue their cause of action outside the class action.

150 CTS Corp. v. Waldburger, 573 U.S. 1, 7–8 (2014).

151 *Id.* at 8.

152 *Id.* (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991)). By contrast, statutes of limitations start running when an injury occurred or was discovered, and they are intended to ensure that plaintiffs "pursue 'diligent prosecution of known claims.'" *Id.* at 9 (quoting *Statute of Limitation*, BLACK'S LAW DICTIONARY (9th ed. 2009)).

153 *Id.* (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)).

tolled under *American Pipe*.[154] The Court's decision damages plaintiffs' Due Process rights[155] and endorses an overly formalistic conception of statutes of repose.[156] However, when combined with the Forfeiture Rule, *CalPERS* can cause grave injustice.

After *CalPERS*, plaintiffs' claims will either be time-barred because the statute of repose runs, or they will violate the Forfeiture Rule by attempting to file a protective suit. On its own, the Forfeiture Rule can harm plaintiffs by forcing them to file individual protective suits before the limitations period ends, or else wait (for years) for a ruling on class certification.[157] However, the Forfeiture Rule still allows plaintiffs to vindicate their rights because they retain the benefit of tolling if they can wait until the certification decision. The Court's rule in *CalPERS* closes that door, putting plaintiffs in an untenable situation. Unless plaintiffs have the sophistication, means, and foresight to file an individual suit within the statute of limitations and statute of repose, they face a bind. On the one hand, should plaintiffs try to opt out or bring a suit to vindicate their rights individually, they must do so before the repose deadline. On the other hand, under the Forfeiture Rule, no class member can file between the limitations and repose deadlines if the court has not yet ruled on class certification. Thus, plaintiffs who want to exercise their rights are stuck between forfeiting tolling and having their claim expire if they wait for certification to avoid the Forfeiture Rule because the repose deadline will pass.[158]

To add insult to injury, because getting a class certified is now more uncertain,[159] plaintiffs do not just need to file individual suits to preserve their right to opt out. Rather, plaintiffs must also file protec-

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[154] 137 S. Ct. 2042, 2052–53 (2017).

[155] *See id.* at 2057 (Ginsburg, J., dissenting) ("The harshest consequences will fall on those class members, often least sophisticated, who fail to file a protective claim within the repose period. . . . [T]hose members stand to forfeit their constitutionally shielded right to opt out of the class and thereby control the prosecution of their own claims for damages.").

[156] *See id.* at 2056 (explaining that plaintiffs' claims were "timely launched" because the class representative filed claims "on behalf of all members of the described class" within the statute of repose and noting that the defendant "would have known, within the repose period, of their potential liability to all putative class members[,]" regardless of whether plaintiff opted out).

[157] *See supra* notes 110–12 and accompanying text.

[158] This bind was expressly recognized by the Sixth Circuit in *Stein*, but the court could offer no solution beyond that "a concerned potential plaintiff must file within the limitations period or be out of luck." Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 795 n.6 (6th Cir. 2016); *see also* Recent Cases, Stein v. Regions Morgan Keegan Select High Income Fund, Inc., *821 F.3d 780 (6th Cir. 2016)*, 130 HARV. L. REV. 1760 (2017) (discussing the impact of the Forfeiture Rule when combined with a decision rejecting the applicability of *American Pipe* tolling on statutes of repose).

[159] *See supra* Section II.A.

tive suits to have their claim adjudicated at all. The odds are high that a plaintiff will have to wait for years for a certification decision, only to discover when the court denies certification that the repose deadline has passed. As the Sixth Circuit suggested in *Stein*, this consequence of the Forfeiture Rule expressly "misapprehend[s] the primary motivating concerns of *American Pipe*,"[160] which is "principally concerned with protecting the interests of class members, particularly 'from being *forced* to file individual suits in order to preserve their claims.'"[161] Thus, while the Forfeiture Rule itself may miss the point of *American Pipe*, when combined with the Supreme Court's decision that class action tolling does not apply to statutes of repose, it violates *American Pipe* by privileging efficiency over justice for class plaintiffs.

D. The Forfeiture Rule and Tolling for Successive Class Actions

In *China Agritech, Inc. v. Resh*, the Court struck a blow to small-claims class plaintiffs by holding that, if class certification is denied in a putative class action, none of the class members can benefit from *American Pipe* tolling in filing a subsequent class action.[162] Because class certification in most cases takes so long, by the time certification is denied, the statute of limitations will often have closed.[163] Therefore, *Resh* forecloses the filing of any additional class action after an adverse certification decision. For low-value claims, such as those brought in a consumer class action, it is not economically viable for plaintiffs to pursue their claims individually because the cost of litigating a claim individually outweighs any potential individual recovery.[164] In the context of the Forfeiture Rule, *Resh* matters because it forces plaintiffs to file protective suits before the certification decision in the underlying class action or risk losing their claims altogether.[165]

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160 *Stein*, 821 F.3d at 795 n.6.

161 *Id.* (quoting *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007)).

162 138 S. Ct. 1800, 1811 (2018).

163 *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1233 (10th Cir. 2008) (discussing the excessive time that litigants often wait for a decision on class certification).

164 *See, e.g.*, *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that the "rationale for the [class action] procedure is most compelling" when "individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation").

165 Two circuits—without discussing the Forfeiture Rule—have already interpreted *Resh* to prohibit tolling for any subsequent class action, *regardless of whether there has been a decision on certification in the initial suit*. Blake v. JP Morgan Chase Bank NA, 927 F.3d 701, 709 (3d Cir. 2019) (determining that, after *Resh*, whether or not there was a class certification decision in the original class action "is a distinction without a difference" for plaintiffs seeking to bring a successive class action); *In re* Celexa & Lexapro Mktg. & Sales

For example, if class counsel in the first putative class action botches the pleadings, thus making class certification unlikely, small-claims class plaintiffs will want to file another class action—avoiding the mistakes of the first class action—in order to have their claims heard on the merits. But after *Resh*, where the Forfeiture Rule applies, that may be impossible. Additionally, because class actions have become more difficult to certify,[166] the importance of having this alternate path to the courthouse if certification is denied in the first putative class action is much greater.

Before *Resh*, plaintiffs with low-value class claims had four options to try to have their claims considered on the merits. First, plaintiffs could simply wait and hope for certification of the original class. Second, plaintiffs could file a better-pleaded and better-lawyered class action before the certification decision in the original class action. However, where the Forfeiture Rule applied, this second option was blocked. Third, plaintiffs could file an individual suit after denial of certification of the original class action, although this third option was not economically viable due to the low value of the claims. Fourth, plaintiffs could file another class action after denial of certification of the original class action.

After *Resh*, the fourth path is off the table. Although the third path is still theoretically available, it is not *practically* viable.[167] And when the Forfeiture Rule applies, the second path is not available. Therefore, when the Forfeiture Rule is combined with the Court's holding in *Resh*, plaintiffs with low-value claims have no choice but to pray the first class is certified.

In *Resh*, the Court explained that small-claims plaintiffs who wish to have a voice in how the claims are litigated will have to come forward early. But the Court's characterization does not acknowledge that *Resh* now requires these plaintiffs to come forward early not just to have a voice in how the case is litigated, but rather to have their claims heard on the merits at all. And the question after *Resh* is: How

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Practices Litig., 915 F.3d 1, 16–17 (1st Cir. 2019) ("Though the Supreme Court granted certiorari . . . to answer the narrow question of whether a putative class member may commence a class action beyond the limitations period upon the district court's denial of a request for class certification . . . , the Court proceeded to provide a broader answer . . . ." (internal citations omitted)). If the broad interpretation of *Resh* advanced by these courts wins out, then abolishing the Forfeiture Rule will not help small-claims class plaintiffs who get locked into a doomed class action.

166 *See supra* Section II.A.

167 *See Resh*, 138 S. Ct. at 1810 (explaining that "[a]ny plaintiff whose individual claim *is worth litigating on its own* rests secure in the knowledge that she can avail herself of *American Pipe* tolling if certification is denied to a first putative class") (emphasis added).

early must these plaintiffs come forward?[168] Without the Forfeiture Rule, these plaintiffs at least have until certification is denied in the first class action to file such a protective suit. If the Forfeiture Rule applies, plaintiffs must file before the statute of limitations runs, and many consumer class action plaintiffs are unsophisticated litigants, without the knowledge or resources to navigate the complicated requirements of *American Pipe* after *Resh*. Thus, when combined with the Court's holding in *Resh*, the Forfeiture Rule undermines the goal of *American Pipe*, which is to prevent plaintiffs from having to file protective suits to preserve their claims.

E. Interlocutory Appeals of Class Certification Decisions and the Forfeiture Rule

In 1998, the Advisory Committee on the Federal Rules of Civil Procedure promulgated Rule 23(f), which provides a special mechanism for interlocutory appellate review of class certification decisions.[169] The question of whether *American Pipe* tolling continued during an interlocutory appeal received little attention because—until the establishment of Rule 23(f)—interlocutory review of a district court's class certification decision was extremely rare.[170] However, now that Rule 23(f) makes interlocutory appeals of class certification more common, the Forfeiture Rule can cause confusion and lead to injustice for class plaintiffs.

There is consensus that class action tolling ends when certification is denied,[171] and most courts to consider whether tolling continues during an appeal have followed this rationale to conclude that

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[168] *See id.* at 1810–11 ("The plaintiff who seeks to preserve the ability to lead the class . . . because her claim is too small to make an individual suit worthwhile . . . has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.").

[169] FED. R. CIV. P. 23(f); *see also* Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1535–36 (2000) (discussing the promulgation of Rule 23(f)).

[170] *See* Solimine & Hines, *supra* note 169, at 1535 ("Due to the restraints of the final judgment rule, which permits appeal only at the end of the litigation, courts have not been very receptive to attempts to appeal interlocutory orders."); Kevin Welsh, Comment, *Collision Course: How Federal Rule of Civil Procedure 23(f) Has Silently Undermined the Prohibition on* American Pipe *Tolling During Appeals of Class Certification Denials*, 73 LA. L. REV. 1183, 1192–95 (2013) (discussing the difficulty of getting an interlocutory appeal on a class certification decision before the advent of Rule 23(f)).

[171] *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983) ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class *until class certification is denied*."(emphasis added)); Collins v. Vill. of Palatine, 875 F.3d 839, 843 n.1 (7th Cir. 2017) (collecting cases adhering to this rule).

tolling should not extend through an appeal.[172] However, because this rule developed during a time where interlocutory appeals were rare, an adverse decision on class certification was, for all intents and purposes, final. Pre-Rule 23(f), plaintiffs would have to wait years for final judgment before the certification decision could be appealed. Thus, allowing tolling through the pendency of an appeal could potentially extend a claim's timeliness by years. Courts determined that it was unreasonable for a putative class member to continue to rely on the representative nature of the class action after an adverse decision on certification. However, Rule 23(f) was promulgated expressly to allow quick and relatively inexpensive review of certification decisions.[173] And there is uncertainty over whether tolling continues during the course of an interlocutory appeal based on the context of the appeal and the procedural posture of the case.[174]

When combined with the Forfeiture Rule, this uncertainty can force plaintiffs into difficult binds because they cannot determine ex ante if the Forfeiture Rule will apply. On the one hand, plaintiffs may risk violating the Forfeiture Rule if they file a protective suit during the pendency of the appeal. On the other hand, they may risk losing the benefit of tolling during the course of the appeal if they do not file a protective suit. While this posture is quite straightforward, it can become much more challenging for plaintiffs to navigate if there is a more complex procedural posture. For example, imagine our hypothetical antitrust plaintiff.[175] After years of litigation, such that the statute of limitations has closed, the district court certifies the class. The defendant requests and receives a Rule 23(f) appeal, and the circuit court decertifies the class but with specific instructions to the district court to reconsider the certification question to review a new development in the underlying substantive law. Did tolling end when

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[172] *See* Welsh, *supra* note 170, at 1199 nn.126–27 (collecting cases).

[173] *See* FED. R. CIV. P. 23 advisory committee's note to 1998 amendments.

[174] *Compare, e.g.*, Monahan v. City of Wilmington, No. Civ.A. 00–505 JJF, 2004 WL 758342, at *2 (D. Del. Jan. 30, 2004) (explaining that Rule 23(f) allows for tolling pending an appeal of a denial of class certification because "Rule 23(f) provides a reasonable basis for putative class plaintiffs to continue to rely upon a filed class action to redress their individual claims"), *and* Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., No. 98 CV 1492, 2000 WL 1424931, at *1 (E.D.N.Y. Sept. 26, 2000) ("The policies undergirding the adoption of Rule 23(f) suggest, however, that the statute of limitations should be tolled where a party files an interlocutory appeal and the district court grants a stay."), *with* Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372, 376 (5th Cir. 2013) (rejecting tolling during a Rule 23(f) appeal even though "the denial of class certification or the decertification of the class might potentially be reversed on appeal"), *and* Giovanniello v. ALM Media, LLC, 726 F.3d 106, 117 (2d Cir. 2013) (rejecting the claim that Rule 23(f) requires changing the rule that tolling does not extend through an appeal).

[175] *See supra* note 56 and accompanying text.

the circuit court vacated and remanded? A plaintiff seeking to preserve a valuable claim will want to file a protective suit, but in this posture it is unclear if tolling ended: class claims were not extinguished, nor was certification definitively denied. This is another example of how uncertainty over the Forfeiture Rule can force plaintiffs to risk their claims by filing a protective suit.

III
The Forfeiture Rule Should Be Abandoned

Part I offered an in-depth analysis of the rationale deployed by courts both accepting and rejecting the Forfeiture Rule. Part II built on this discussion by discussing how changes in the law increase the risk of injustice when the Forfeiture Rule applies and because plaintiffs may not know in advance if it will apply at all. Part III ties these two threads together by explaining why the Forfeiture Rule must be abandoned. Section III.A discusses the reasoning examined in Part I to argue that the Forfeiture Rule is incompatible with the rationale of *American Pipe*. Section III.B argues that a circuit split over the applicability of the Forfeiture Rule causes serious practical consequences, such as uncertainty in the law and forum shopping.

A. The Forfeiture Rule Violates American Pipe

Courts that reject the Forfeiture Rule do so based on four arguments.[176] First, the primary concern of *American Pipe* tolling is to protect plaintiffs by ensuring they are not forced to file individual suits simply to preserve their claims; it is not judicial efficiency per se. Second, the text of *American Pipe* and *Crown, Cork & Seal* suggests that class action tolling should apply even when a plaintiff files an individual suit before certification is resolved. Third, the theoretical underpinnings of *American Pipe* tolling and the representative nature of class actions means that class members who file an individual suit are exercising their rights to take control of their individual claims. Fourth, rejecting the Forfeiture Rule does not undermine the goals of statutes of limitations. Section III.A applies the rationale behind these arguments to recent developments in class actions and *American Pipe* tolling jurisprudence.

When courts first developed the Forfeiture Rule, one of their primary concerns was that allowing tolling in this situation would undermine judicial efficiency by allowing plaintiffs to file duplicative and

[176] *See supra* Section I.C.2.

unnecessary lawsuits.[177] However, the rise of multidistrict litigation (MDL) helps to alleviate this concern.[178] To the extent that rejecting the Forfeiture Rule leads to duplicative suits, they will be consolidated in an MDL for pretrial proceedings and thus will not create an undue burden on the judicial system. More importantly, as first articulated by the Second Circuit, the primary purpose of *American Pipe* is not judicial efficiency.[179] As explained in a later district court opinion, "*American Pipe* allowed for tolling because, without tolling, plaintiffs would be forced to intervene or file suit before certification to protect their rights."[180]

Because the primary concern of *American Pipe* is to ensure plaintiffs' rights are protected, it does not follow that *American Pipe* should "force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative."[181] This is why the Forfeiture Rule is wrong and should be rejected: It misunderstands the point of *American Pipe*. By forcing plaintiffs to decide whether they want to file individual suits and forego the class action early in the process of class litigation—just to preserve their right to pursue an individual claim later—the Forfeiture Rule itself violates *American Pipe*. Furthermore, new developments in the law, such as intracircuit splits and Rule 23(f), make it difficult for plaintiffs to know ex ante if the Forfeiture Rule will apply to them.

Indeed, the potential for misapplication of *American Pipe* in this vein is especially clear when the Forfeiture Rule is paired with the Supreme Court's decision in *CalPERS* that class action tolling does not apply to statutes of repose.[182] In this scenario, class action plaintiffs are forced to determine very early on whether they will forego the class action in order to protect their claims. As discussed above, the risk of injustice in this scenario is very high. Not only is achieving certification unlikely,[183] but the certification decision may take so long

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177 *See, e.g.*, Wachovia Bank & Tr. Co. v. Nat'l Student Mktg. Corp., 461 F. Supp. 999, 1011 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980).

178 *See* 28 U.S.C. § 1407 (2012) (codifying MDLs). *But see* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 401 (2014) (lamenting the "constellation of complications" caused when individual cases consolidated in an MDL are retained "in hopes of forcing a global settlement").

179 *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007).

180 Aguilar v. Ocwen Loan Servicing, LLC, No. 3:17-cv-1165-B, 2018 WL 949225, at *5 (N.D. Tex. Feb. 20, 2018) ("Although *American Pipe* tolling likely reduces . . . suits duplicating class actions, reducing casework was not the primary goal of *American Pipe*. Thus, reducing . . . the filing of lawsuits is an inadequate justification for restricting *American Pipe* tolling to putative class members who wait for a decision on certification.").

181 *In re* WorldCom Sec. Litig., 496 F.3d at 256.

182 *See supra* Section II.C.

183 *See supra* Section II.A.

that the repose deadline has passed.[184] Thus, rather than furthering *American Pipe*'s goals of protecting plaintiffs' claims, the Forfeiture Rule—when combined with *CalPERS*—leads to injustice. Even the Sixth Circuit, which continues to apply the Forfeiture Rule, has recognized that combining these two rules violates *American Pipe*.[185] Given the increased uncertainty facing class plaintiffs, they should not be barred from filing a protective suit to ensure their claim is considered on its merits simply because the class certification question has not been resolved.

B. The Forfeiture Rule Causes Uncertainty and Injustice

Another major concern among courts that have adopted the Forfeiture Rule is that it allows plaintiffs to "have their cake and eat it too"[186]—in other words, "to rely on a representative suit as a placeholder for purposes of the statute of limitations and then ditch the representative later."[187] However, as discussed in Part II, a bright-line Forfeiture Rule does not prevent injustice; instead, it often causes injustice. For example, it forces plaintiffs to either accept or reject participation in a class action when they do not have enough information to make an informed decision, and it can leave plaintiffs without recourse to pursue their claims at all.

As discussed above, class actions can take years to work their way towards a resolution of the certification question.[188] Some people, like our hypothetical asbestos plaintiff, cannot afford to wait that long for a resolution of their claims and may need to file individual suits at some point before certification to resolve their claims.[189] Others may be worried about their ability to succeed on the merits if they delay until after class certification is resolved because the evidence may go stale, witnesses may become unavailable, or defendants may go bank-

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184 *See supra* note 110 and accompanying text.

185 Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 795 n.6 (6th Cir. 2016).

186 State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1234 (10th Cir. 2008) (citing *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998)).

187 *Id.*

188 *E.g.*, Mason v. Long Beach Mortg. Co., No. 07 C 6545, 2008 WL 4951228, at *2 (N.D. Ill. Nov. 18, 2008) ("The span of time between the commencement of a class action to its certification can be indefinite.").

189 *See id.* ("If the tolling doctrine applies only to those putative class members who 'stuck it out,' opting out after the certification ruling, then those who could not afford to wait until the ruling was made might have their rights expire in the meantime. This seems unfair.").

rupt.[190] Additionally, uncertainty over the applicability of the Forfeiture Rule forces plaintiffs to take unnecessary and potentially costly risks in order to protect their claims. Should a party, like our hypothetical antitrust plaintiff, want to preserve her ability to bring an independent suit in a circuit with an intracircuit split, she has no safe way to protect her claim.

Finally, uncertainty and lack of uniformity creates problems in the judicial system. Uncertainty leads to forum shopping, as plaintiffs looking for clarity will bring suit in circuits that have rejected the Forfeiture Rule. Further, uniformity is desirable because it yields predictability of outcomes, allowing a litigant to make an informed decision ex ante and allowing legislators to create laws against consistent background rules.[191] Uniformity also supports the consistent administration of justice, a cornerstone of the fundamental fairness of the rule of law.

Conclusion

The Forfeiture Rule denies *American Pipe* tolling to plaintiffs in putative class actions who bring individual suits before a decision on the certification question in the underlying class action. There are many reasons why plaintiffs may want to bring individual suits before certification: They cannot wait for the class action to work its way through the courts, face an impending repose deadline, or simply want to exercise their right to control the adjudication of their claim. The Forfeiture Rule prevents plaintiffs from pursuing any of these aims.

Although the Second, Ninth, and Tenth Circuits have rejected the Forfeiture Rule, the Sixth Circuit, First Circuit, and numerous district courts continue to apply it, creating uncertainty and inefficiency in the administration of justice and depriving plaintiffs of their right to get their proverbial "day in court." As this Note has demonstrated, rejecting the Forfeiture Rule does not lead to inefficiency due to duplicative lawsuits,[192] nor does it violate the principles embedded in

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[190] *Cf. Boellstorff*, 540 F.3d at 1233 (noting "the possibility that the evidence will grow stale and added time the plaintiff must go without recovery" as likely consequences of the Forfeiture Rule).

[191] *See, e.g.*, Anthony D'Amato, *Legal Uncertainty*, 71 Calif. L. Rev. 1, 6 (1983) (discussing the relationship between uniformity and legislating); Maurice E. Stucke, *Better Competition Advocacy*, 82 St. John's L. Rev. 951, 1000 (2008) (arguing that the rule of law requires that "enforcement authorities apply the clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly").

[192] *E.g.*, *Boellstorff*, 540 F.3d at 1233–34 (rejecting a claim that a non-forfeiture rule will cause a flood of litigation).

statutes of limitations.[193] Indeed, the Forfeiture Rule is at odds with the purpose and rationale of *American Pipe*. Rather than protecting plaintiffs from being forced to file protective suits, the Forfeiture Rule prevents plaintiffs from filing protective suits, which due to increased uncertainty facing class action plaintiffs, are more vital now than ever before. Because the Forfeiture Rule violates *American Pipe*, this Note argues that it should be rejected. The Supreme Court should resolve this circuit split by abolishing the Forfeiture Rule, or the courts still applying it should abandon it.

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[193] *See, e.g.*, *In re* WorldCom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007) (explaining that "as long as the class action purports to assert their claims," plaintiffs who bring individual suits do not violate the purposes of statutes of limitation because "the initiation of a class action puts the defendants on notice of the claims against them").