Nos. 16-1364; 16-1365; 16-1366; 16-1367

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NORTH SOUND CAPITAL LLC, *et al.*,
Plaintiffs-Appellees,

v.

MERCK & CO INC., *et al.*
Defendants-Appellants.

GIC PRIVATE LIMITED,
Plaintiff-Appellee,

v.

MERCK & CO INC., *et al.*
Defendants-Appellants.

GIC PRIVATE LIMITED,
Plaintiff-Appellee,

v.

MERCK & CO., INC., *et al.*
Defendants-Appellants.

NORTH SOUND CAPITAL LLC, *et al.*,
Plaintiffs-Appellees,

v.

MERCK & CO., INC., *et al.*
Defendants-Appellants.

On Appeal Under 28 U.S.C. § 1292(b) from an Order of the U.S. District Court for the District of New Jersey, Aug. 26, 2015, C.A. Nos. 3:14-00242 (FLW); 3:14-00241 (FLW); 3:13-07241 (FLW); 3:13-07240 (FLW)

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, non-stock corporation. It does not have a parent corporation, and, because it issues no stock, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. The enforcement of such laws frequently involves class actions as well as individual lawsuits. Public Citizen has a longstanding interest in preserving the viability of these mechanisms for protecting the rights of consumers and the general public.

Accordingly, Public Citizen has participated as amicus curiae, and its attorneys have served as counsel to a party or amicus curiae, in many cases in the Supreme Court and other federal courts involving class action procedures, including: *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Smith v. Bayer Corp.*, 564 U.S. 299 (2011); *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393 (2010); *Amchem Prods., Inc. v. Windsor*,

[1] Counsel for the parties have consented to the filing of this brief. No counsel to a party authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

521 U.S. 591 (1997); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); and *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013). Most pertinent here, Public Citizen filed a brief as amicus curiae when the issue presented by the appeal in this case was before the Supreme Court in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640.

While recognizing that class actions are often essential tools for remedying violations of class members' rights, Public Citizen has also been concerned with protection of both substantive and procedural rights of absent class members in class actions. Public Citizen attorneys have, in many cases (including the Supreme Court's decisions in *Smith* and *Amchem*), represented class members who objected to a class settlement or otherwise sought to assert their individual due process rights. Of particular concern to Public Citizen have been cases where class counsel and defendants agreed to settlements under Rule 23(b)(1) or (b)(2) to resolve substantial damages claims while eliminating the opt-out rights of absent class members that are provided for in Rule 23(b)(3) and that, in some circumstances, are required by due process.

These concerns are implicated here because the holdings of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)—establishing the principle that class action filings satisfy statutes of limitations for individual members of the putative class even if those individuals are ultimately not included in a certified class—are critical both to the effective functioning of class actions and to the protection of the rights of individual class members, including their right to opt out of a class action and pursue their claims through individual actions if the conduct of the class action is not to their satisfaction. Adoption of the view pressed by Merck & Co. and the other defendants-appellants in this case—that the *American Pipe* rule is inapplicable to the "repose" limitations provisions in the federal securities laws—is not necessary to preserve substantive rights of securities defendants or to fulfill the policy of the limitations statutes, but would significantly impair the rights of class members.

SUMMARY OF ARGUMENT

The plaintiffs-appellees have demonstrated that application of the *American Pipe* tolling rule to the five-years-from-violation "repose" period in 28 U.S.C. § 1658(b)(2) and the parallel five-years-from-

transaction period in 15 U.S.C. § 78t-1(b)(4) is fully consistent with the requirements of those statutes and is necessary for the same reasons that led the Supreme Court to adopt the rule in *American Pipe* and apply it in the subsequent decision in *Crown Cork*. Because, under *American Pipe*, a class action complaint commences the action for each class member, the timely filing of a class action complaint satisfies not only conventional statutes of limitations, but also statutes of repose, regardless of whether the class is ultimately certified or an individual member withdraws from the class to litigate separately. We write not to repeat those arguments, but to emphasis two critical points.

First, Merck asserts that if the *American Pipe* rule were applied here, Merck's substantive rights would be abridged or modified, which would violate the Rules Enabling Act, 28 U.S.C. § 2072, because the *American Pipe* rule is derived from Federal Rule of Civil Procedure 23. In fact, however, it is Merck's position that would make procedural rulings under Rule 23 determinative of class members' right to recover for the violations at issue. The application of *American Pipe* to sections 1658(b)(2) and 78t-1(b)(4) is fully consistent with the Rules Enabling Act because those provisions establish no substantive rights different from

those of other statutes delimiting the time in which actions may be brought, and because the *American Pipe* rule fully preserves the protections afforded by the statutes.

Second, failing to apply *American Pipe* would mean that whether a particular class member had a claim that survived application of the limitations statute would depend on whether the class were certified and whether the class member remained in the class. That result is at odds with the fundamental notion that the rights of class members are not supposed to vary depending on whether they are pursued within or outside of a class. Moreover, depriving class members of the protections of *American Pipe* would render meaningless their right to opt out of the class—a right that serves to square class actions with the requirements of due process and that provides a critical check against abusive class settlements.

ARGUMENT

I. Applying the *American Pipe* Rule to Claims Subject to 28 U.S.C. § 1658(b)(2) and 15 U.S.C. § 78t-1(b)(4) Would Not Modify Substantive Rights.

Merck does not contest that the timely filing of a class action asserting the securities claims at issue satisfied the applicable limitations

periods for all members of the proposed class who remained within the class once it was certified. Merck, however, inconsistently contends that the Supreme Court's holdings in *American Pipe* and *Crown Cork*—that the running of a limitations period is suspended for all class members during the pendency of a proposed class action—is inapplicable to claims subject to the so-called "repose" limitations periods set forth in the federal securities laws. According to Merck, members of a putative class asserting such claims may not receive the benefit of a filing within that period if the class is not certified or if they opt out or are otherwise excluded from the scope of any class ultimately certified. Indeed, Merck asserts that applying *American Pipe* here would violate the Rules Enabling Act by improperly modifying "substantive rights." 28 U.S.C. § 2072. Merck's Rules Enabling Act argument is deeply flawed

A. This Court Should Not Distinguish Limitations and Repose Periods for Rules Enabling Act Purposes.

Merck's argument rests on the false premise that the five-year limitations period set forth in 28 U.S.C. § 1658(b)(2) establishes a substantive limit on the underlying rights at issue by extinguishing them rather than merely denying a remedy for their violation. The reasoning

underlying that view of the statute goes as follows: The five-year limitations period in section 1658(b)(2) is a "statute of repose" because it is triggered by the defendant's conduct rather than the accrual of the plaintiff's right of action; a statute of repose, by definition, extinguishes the underlying right rather than limiting the remedy; therefore, section 1658(b)(2) must extinguish a plaintiff's substantive rights once five years have passed.

We recognize that, in the context of applying the retroactivity analysis of *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), this Court has indicated that statutes of repose are not merely limits on remedies, but define substantive rights. *See Lieberman v. Cambridge Partners, L.L.C.*, 432 F.3d 482, 490–92 (3d Cir. 2005). *Lieberman* held that the repose and limitations periods established by § 1658(b)(2) could not be applied to allow the filing of claims already time-barred at the time of § 1658(b)(2)'s enactment.[2] *Lieberman*'s discussion of the

[2] The two-years-from-discovery and five-years-from-violation limitations and repose periods of § 1658(b)(2) were enacted as part of the Sarbanes-Oxley Act in 2002, and replaced one-year and three-year periods that the Supreme Court had adopted from parallel provisions of the securities laws to govern Securities Exchange Act fraud cases in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). *Lieberman* addressed whether § 1658(b)(2) should be construed

distinction between repose and limitations statutes, however, did not determine its holding, because the Court stated that the same result would apply to "time-barred claims" whether the bar resulted from a limitations or repose period. *See id*. at 492. Indeed, this Court has recently applied *Lieberman*'s analysis to preclude the revival of claims barred by a statute of *limitations*. *MRL Dev. I, LLC v. Whitecap Inv. Corp.*, __ F.3d __, No. 14-4738, http://www2.ca3.uscourts.gov/opinarch/144738p.pdf, slip op. at 22 (3d Cir. May 17, 2016).

Lieberman's analysis thus does not require a distinction between repose and limitations periods even for purposes of the issue it addresses—retroactivity—and its statements should not be extended to form the basis of differentiating the two types of statutes for purposes of determining whether a statute of repose is "substantive" for purposes of the Rules Enabling Act and the application of *American Pipe*.

Indeed, the proposition that a statute of repose is substantive because it extinguishes a right is incompatible with the Supreme Court's

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to allow the filing of claims that were time-barred under *Lampf* at the time of the statute's enacted; it held that Congress did not intend retroactive application of the statute, and that such application would be impermissibly retroactive.

decisions, which teach that whether a statute limits rights or remedies is dependent not on the application of extra-statutory labels such as "statute of repose" but on the specific language enacted by Congress. As the Supreme Court explained in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), whether a statute extinguishes a right or merely bars a remedy is a matter of what "Congress intended"—an issue that, like all questions of statutory intent, depends in the first instance on the "plain language" of the relevant statute. *Id*. at 416.

In *Ocwen*, the Supreme Court explained that statutes whose terms provide that an action must be brought within a certain time, or that provide that it may not be brought after that time, are "typical statute[s] of limitation" that do not extinguish substantive rights. *Id*. By contrast, the Court construed the statute at issue in *Ocwen* as extinguishing rights rather than limiting remedies because it "says nothing in terms of bringing an action" but "instead provides that the [underlying] 'right … shall expire' at the end of the time period." *Id*. at 417. That is, the statute "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id*.

Section 1658(b)(2), by contrast, talks *only* of a suit's commencement and says nothing about a right's duration. Entitled "Time limitations on the commencement of civil actions arising under Acts of Congress," it frames not only the general four-years-from-accrual limitations period for statutory rights of action based on Acts of Congress, but also *both* the two-years-after-discovery limitations period and the five-years-from-sale "repose" period applicable to claims based on the Securities Exchange Act, in terms of when an action "may" or "may not" be "commenced" or "brought." 28 U.S.C. § 1658(a), (b)(2). Specifically, with respect to Securities Exchange Act claims, the statute provides: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." *Id.*[3] The statute says nothing about the extinguishment or expiration of

[3] Similarly, 15 U.S.C. § 78t-1(b)(4), headed "Statute of limitations," provides straightforwardly that "[n]o action *may be brought* under this

the liabilities created by the relevant regulatory requirements. To paraphrase *Ocwen*, the statute addresses a suit's commencement in terms so straightforward as to render any characterization of it as addressing the expiration of the underlying rights untenable.

Of course, to the extent that the "statute of repose" label applies to any limitations period measured solely from the time of the defendant's conduct rather than from the discovery or accrual of the plaintiff's claim, it applies to the five-year period in section 1658(b)(2). *See*, *e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014) ("A statute of repose … puts an outer limit on the right to bring a civil action[,] … measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant."). But whether the label fits for that reason is an entirely different question from whether the five-year period functions to extinguish substantive rights rather than to limit the time for bringing an action. The conclusion that the statute must extinguish rights merely because it can be called a "statute of repose" on the basis of the events that trigger it is a non sequitur.

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section more than 5 years after the date of the last transaction that is the subject of the violation" (emphasis added).

What the limitations period *does* is a matter of what the statute *says*, and the plain language of the statute establishes that what it does is limit the time for bringing an action. Indeed, this Court has recognized that, under *Ocwen*'s analysis, "*statutes of limitations and statutes of repose alike* … typically refer either to causes of action or the commencement of a civil action" and thus "circumscribe the *time for bringing suit*." *Sherzer v. Homestar Mort. Servs.*, 707 F.3d 255, 259 (3d Cir. 2013) (emphasis added).

Contrary to Merck's suggestion, the Supreme Court's decision in *CTS Corp*. does not indicate that statutes of repose are necessarily "substantive" limits on liability. Rather, the Supreme Court stated in *CTS Corp*. that, like statutes of limitations, statutes of repose typically function by limiting "the right to *bring a civil action*." *Id*. (emphasis added). That is, in *Ocwen*'s terms, they function principally as a limit on the remedy. 523 U.S. at 417. As *CTS* explains, that limit is more categorical than a statute of limitations because, under a repose statute, the time in which an action can be brought is not triggered by "accrual," which depends on when the claim reasonably could have been discovered, but strictly on when underlying events occurred. *See* 134 S. Ct. at 2182.

The legislative policy such a limit reflects is inconsistent with equitable tolling notions that excuse delays in suing if they do not reflect a lack of diligence on the part of the plaintiff. *See id.* at 2183. A repose period thus may function as the "equivalent" to a "cutoff" of the plaintiff's "temporal" ability to impose liability, *id*., but it remains fundamentally a remedial rather than substantive limit.[4]

B. The *American Pipe* Rule Does Not Modify Substantive Rights.

Even if the five-year "repose" period could be characterized as establishing "substantive rights" in some sense, however, it would not follow that Federal Rule of Civil Procedure 23 modifies substantive rights in violation of the Rules Enabling Act just because the filing of a class action under the Rule determines the timeliness of the claims of class members. There is no question that Rule 23 satisfies the Enabling Act's basic criterion that a Federal Rule of Civil Procedure "must 'really regulat[e] procedure" by governing "'the manner and the means' by

[4] Of course, the nature of a particular statute of repose might indicate that it involves substantive rights. The state statute in *CTS*, for example, did not provide merely that a plaintiff's action could not be brought after a particular date, but that the action could not "accrue" after that date, and state decisional law indicated that such a statute constituted an "additional element of the claim." 134 S. Ct. at 2187 (citations omitted).

which the litigants' rights are 'enforced.'" *Shady Grove*, 559 U.S. at 407 (plurality); *Interfaith Commun. Org. v. Honeywell Int'l, Inc.*, 726 F.3d 403, 409 (3d Cir. 2013); *Knepper v. Rite Aid. Corp.*, 675 F.3d 249, 265 (3d Cir. 2012). That proceedings under Rule 23 may have an effect on rights that are arguably substantive does not violate the Rules Enabling Act: "The test is not whether the rule affects a litigant's substantive rights; most procedural rules do." *Shady Grove*, 559 U.S. at 407; *accord Interfaith Commun. Org.*, 726 F.3d at 403.

In particular, a federal procedural rule does not improperly modify substantive rights merely because it may affect the determination whether an action has been commenced on behalf of a litigant in satisfaction of relevant limitations periods. Thus, the Supreme Court held in *West v. Conrail*, 481 U.S. 35 (1987), that Federal Rule of Civil Procedure 3 determined whether an action had been timely commenced for purposes of federal limitations periods. *See id.* at 38–39; *see also Jackson v. Nat'l Maritime Union of Am.*, 822 F.2d 15 (3d Cir. 1987). If

federal procedural rules could not validly affect the determination of when a limitations period stops running, *West* would be inexplicable.[5]

In the class action context, no less than in *West*, recognizing that the Federal Rules may affect the determination of whether the relevant limitations periods have run does not modify substantive rights. By creating a procedural mechanism through which the claims of multiple class members may be brought in a single action by a representative plaintiff, Rule 23 creates a vehicle through which many individuals can simultaneously *satisfy* the relevant statute of limitations or repose by commencing an action within the time in which the statute provides that an action may be brought. *See American Pipe*, 414 U.S. at 550. But Rule 23 does not impair defendants' rights because it does not permit anyone

[5] In the context of the interplay of federal and state law implicated by federal diversity actions, the Supreme Court has held that Rule 3 does not control the question of satisfaction of a state statute of limitations when state law provides that the running of the statute is tolled only by service, as opposed to filing, because Rule 3 was not *intended* to address that subject. See *Walker v. Armco Steel Corp.,* 446 U.S. 740, 752–753 (1980). However, even when such state laws are at issue, federal procedural law controls what forms of service are valid in an action in federal court, *see Hanna v. Plumer*, 380 U.S. 460 (1965), which in turn may determine whether an action has been timely served in satisfaction of state limitations laws. *See*, *e.g.*, *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984).

to proceed with claims that were time-barred at the time the class action was commenced: It "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights," but "leaves the parties' legal rights and duties intact[.]" *Shady Grove*, 559 U.S. at 408. Thus, as the Supreme Court held in *American Pipe*, construing Rule 23 to provide that the filing of a class action satisfies a limitations statute for any class member even if the class is ultimately not certified or the class member is excluded from the class does not violate the Rules Enabling Act, regardless of "whether a time limitation is 'substantive' or 'procedural.'" 414 U.S. at 557–58.

II. Not Applying *American Pipe* Would Make Class Members' Right to Recover Dependent on Class Certification and Substantially Impair the Due Process Protection Provided by the Right to Opt Out of a Class Action Seeking Monetary Relief.

Merck contends that the filing of a class action stops the running of the "repose" period only for class members included in a class that is ultimately certified. A decision not to certify the class, or a decision to exclude from the class as certified someone whose claims were encompassed by the complaint as filed, would, under Merck's view, bar claims that could have been pursued had the class been certified or the

claimant remained within the class. Merck's view would thus have the anomalous effect of making the putative class members' legal entitlement to the recovery they seek, and the success of the defendants in asserting a statute of limitations defense, dependent on the outcome of the class certification decision or on a particular plaintiff's exercise of the procedural opt-out right under Rule 23.

Merck's position boils down to the assertion that an individual's entitlement to relief is different inside and outside of a class action. That proposition is, to say the least, in tension with the fundamental reason why class actions are permissible under the Rules Enabling Act: They neither "change plaintiffs' separate entitlements to relief nor abridge defendants' substantive rights; they alter only how the claims are processed." *Shady Grove*, 559 U.S. at 407 (plurality);[6] *see also Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 335 (3d Cir. 2011) (quoting *Shady Grove*, 559 U.S. at 408). Although class actions undoubtedly, as a practical matter, increase the number of plaintiffs whose rights are

[6] Although the quoted language is from the plurality portion of *Shady Grove*, it was subsequently endorsed in Justice Ginsburg's dissenting opinion in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 696 (2010). Thus, five sitting Justices have explicitly endorsed it.

asserted in court, they do not affect the defendant's "aggregate liability" because they do not permit assertion of the claims of any class member who could not (in theory, at least) "bring a freestanding suit asserting his individual claim." *Shady Grove*, 559 U.S. at 408. By seeking to supplant the *American Pipe* rule with a regime in which there will be outcome determinative legal differences between the claims available to plaintiffs depending on whether the class is certified, Merck's position runs "contrary to the bedrock rule that the sole purpose of classwide adjudication is to aggregate claims that are individually viable." *Brown v. Plata*, 563 U.S. 493, 552 (2011) (Scalia, J., dissenting).

Making the entitlement of plaintiffs to recover dependent on whether they are part of a class would substantially impair the efficacy of a key feature of Rule 23—the right of class members to opt out of class actions seeking damages or other monetary relief under Rule 23(b)(3). The Supreme Court has held that because of the strong interest of individuals in controlling the prosecution of their own claims for damages, the opt-out right is necessary to ensure that class actions satisfy due process norms. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 846–48 (1999);

Amchem, 521 U.S. at 614–15, 617; *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985).

The importance of the opt-out right has led the Supreme Court and those federal courts of appeals that have considered the issue to give the benefit of the *American Pipe* rule not only to members of a putative class that is not certified, or is certified in a way that excludes them from the class definition, but also to class members who exclude themselves by opting out. *See Crown Cork*, 462 U.S. at 351–52; *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 176 n.13 (1974); *Realmonte v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) (citing cases). A "consistent line of circuit court cases hold[s] that the *American Pipe* tolling doctrine applies to plaintiffs who opt out of a class action in federal district court." *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 (1st Cir. 2004).

Holding *American Pipe* inapplicable to actions subject to the five-year limitations period of section 1658(b)(2) would effectively negate the opt-out rights of class members who must rely on the timely filing by the class representative to satisfy the statute, as they would be barred from pursuing their claims individually if they were to opt out. Thus, "the notice and opt-out provision of Rule 23(c)(2) would be irrelevant without

tolling because the limitations period for absent class members would most likely expire, 'making the right to pursue individual claims meaningless.'" *Joseph v. Wiles*, 223 F.3d 1155, 1167 (10th Cir. 2000) (quoting *Realmonte*, 169 F.3d at 1284). As the Supreme Court put it in *Crown Cork*, the *American Pipe* tolling rule ensures that "the right to opt out and press a separate claims remain[s] meaningful." 462 U.S. at 351. Adoption of Merck's position, by contrast, would hold class members hostage to a class action unless they were willing to abandon their claims completely.

That consequence would be particularly unfortunate in the context of settlement. Although most class settlements reflect a fairly negotiated compromise based on both sides' reasonable views of the potential value of the class's claims, that is regrettably not always the case: Class settlements also pose significant potential for abuse in circumstances where defendants' interests in extinguishing as many claims as possible as cheaply as possible may coincide with class counsel's interests in benefiting themselves (through fee awards) and small segments of the class at the expense of the class as a whole. *See*, *e.g.*, *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173–74 (3d. Cir. 2013); *In re Gen. Motors*

Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784–800 (3d Cir. 1995); *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717–18 (6th Cir. 2013) ; *Staton v. Boeing Co.*, 327 F.3d 938, 952–53, 959–65 (9th Cir. 2003).

The ability of absent class members to opt out (provided their time to do so has not run out before a settlement is reached)[7] is an important check against such abuses, as it allows class members to reject inadequate settlements by withdrawing to pursue their claims through alternative means, whether individual or class actions. *See Gen. Motors*, 55 F.3d at 792. The possibility of opt-outs also provides significant incentives to defendants and class counsel to negotiate fair settlements: The benefit to defendants of settling will be lost if too many class members opt out, while class counsel may face cuts in their fees if large

[7] When, as here, a class action is certified for litigation and later settles, the opt-out deadline may have expired before a settlement is reached, though—as this case demonstrates—the opt-out period sometimes will still be open when a settlement is first announced. By contrast, class members *always* retain opt-out rights after the announcement of a settlement if the certification of the class occurs only as the result of the settlement. As the Advisory Committee Notes to the 1983 revision of Rule 23 note, when "the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement…, the basic opportunity to elect exclusion applies without further complication."

portions of the class walk away and thus receive no share of the settlement.

For these reasons, courts have, particularly since the Supreme Court's decisions in *Amchem* and *Ortiz*, been unwilling to accept settlements of class members' damages claims that involve certification on a non-opt-out basis or otherwise fail adequately to protect opt-out rights.[8] Indeed, the Supreme Court's due process holding in *Wal-Mart* likely forecloses certification of a settlement class for substantial individual damages claims without providing absent class members the ability to opt out under Rule 23(b)(3). *See* 564 U.S. at 363. And as this Court has emphasized, "due process concerns" weigh heavily against "restrict[ing] class members from pursuing individual claims." *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293, 308 (3d Cir. 2004).

[8] *See*, *e.g.*, *In re Dry Max*, 724 F.3d at 717–18; *Hecht v. United Collection Bur., Inc.*, 691 F.3d 218, 222 (2d Cir. 2012); *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 191–99 (5th Cir. 2010); *Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

The 2003 revisions to Rule 23 underscored the importance of opt-out rights to a fair settlement process by allowing judges to order a second opt-out opportunity at the settlement stage even if the class was certified before settlement and an opt-out right had already been provided at that time. *See* Fed. R. Civ. P. 23(e)(4). Both the judicial insistence that classwide damages claims be certified and settled through Rule 23(b)(3) opt-out classes and the rulemakers' addition of the second opt-out possibility reflect the importance of opt-out rights to prevent settlement abuses as well as the fundamental principle that the ability to opt out is essential to the legitimacy (and constitutionality) of a system in which the settlement of class members' claims is agreed to by other people—that is, class counsel and defendants. Contrary to Merck's suggestion that opting out after the existence or terms of a settlement become known is comparable to the disfavored practice of "one-way intervention," Merck Br. 46, the addition of Rule 23(e)(4) reflects an explicit determination by the rulemakers that an opt-out opportunity following a settlement is in many cases fair because "[a] decision to remain in the class is likely to be more carefully considered and is better

informed when settlement terms are known." Fed. R. Civ. P. 23, Advisory Comm. Notes to 2003 Revision.

Abandoning the *American Pipe* rule in cases governed by section 1658(b)(2) and similar "repose" provisions elsewhere in the securities laws would mean that, when the time came for settlement, class members would have nowhere else to go: They would face the Hobson's choice of accepting whatever settlement class counsel negotiated with the defendants (unless it were disapproved by the court) or taking nothing. That result would not only invite unfairness and abuse, but also significantly affect the balance of power in settlement negotiations conducted by class counsel in perfect good faith, as the price of settlement would necessarily be affected because class members, deprived of their ability to opt out, would be effectively "disarmed." *Amchem*, 521 U.S. at 621.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court.

Respectfully submitted,

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May 31, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, composed in Century Schoolbook BT using Microsoft Word 2010, consists of 5,136 words, excluding the portions not required to be counted under applicable rules, and that it complies with the requirements of FRAP 32(a)(7)(B) and 29(d).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief was served on May 31, 2016, on all parties by ECF.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF BAR MEMBERSHIP

I certify that Scott L. Nelson and Allison M. Zieve, counsel for amicus curiae, are members of the Bar of this Court.

/s/ Scott L. Nelson
Scott L. Nelson

/s/ Allison M. Zieve
Allison M. Zieve

LOCAL RULE 31.1(C) CERTIFICATIONS

I certify that the text of the electronic brief is identical to the text of the ten paper copies mailed to the Court pursuant to Local Rule 31.1(b)(3). I further certify that the electronic file of this brief was scanned with Microsoft Defender anti-virus software and that no virus was detected.

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