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Forty Years Later: Unanswered Questions About *American Pipe* Tolling and the Impact of CAFA

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In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that filing a class action in federal court tolls the limitations period for the claims of unnamed members of a putative class. Nearly 40 years later, the precise contours of *American Pipe* tolling are still uncertain.

This uncertainty is compounded by the increasing number of state-law class actions heard in federal court since the passage of the Class Action Fairness Act of 2005 (''CAFA''). The still evolving law applicable to class action tolling has the potential to trap both unwary putative class members and litigants defending against claims filed by members of an uncertified putative class or opt-outs of a certified class.

Supreme Court Recognizes Class Action Tolling in *American Pipe* and *Crown, Cork & Seal*

In *American Pipe*, the State of Utah brought a putative class action on behalf of state and local government agencies against a group of companies for alleged price rigging in violation of the Sherman Act. The trial court ultimately denied class certification, finding that the putative class did not satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). A number of local government agencies that would have been members of the class then moved to intervene, but were denied permission to do so on the ground that their claims were barred by the applicable statute of limitations.

The Supreme Court reversed, holding that ''the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.''[1] The Court reasoned that such tolling was not inconsistent with the policies behind statutes of limitations because defendants are put on notice as to the ''subject matter and size of the prospective litigation'' ''[w]ithin the period set by the statute of limitations.''[2] The Court did not identify the doctrinal basis for the new tolling doctrine, leaving unanswered whether the basis is federal

common law, Federal Rule of Civil Procedure 23,the inherent equitable power of the courts, or some other ground.

Nine years later, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Court extended the *American Pipe* doctrine. The circumstances were similar, except that the plaintiff, rather than moving to intervene in the original case after class certification was denied, filed his own individual suit. The Court held that the plaintiff's claim was tolled by the earlier class action, extending its holding in *American Pipe* to members of the putative class who chose to file their own suits. Once again, the Court did not discuss the doctrinal basis for its holding.

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Application of *American Pipe* Tolling Depends on the Basis of Federal Jurisdiction

The plaintiffs in *American Pipe* and *Crown, Cork & Seal* sought relief under federal law—the Sherman Act and the Civil Rights Act of 1964, respectively. Thus, both cases were brought in federal court based on federal question jurisdiction. One question that subsequently has arisen is whether *American Pipe* tolling applies to state-law class actions in federal court. Put differently, should a federal court sitting in diversity jurisdiction look to federal law or state law in determining whether a putative class action tolls individual or class claims of putative class members?

The answer begins with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts must apply state substantive law in cases where the sole basis for federal jurisdiction is diversity of citizenship. In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), the Supreme Court, applying *Erie,* held that federal courts sitting in diversity jurisdiction must apply the limitations periods that the forum state court would apply.[3]

Consistent with *Erie* and *Guaranty Trust*, most courts that have considered the question have held that state law, not federal law, controls whether a plaintiff's state law claims were tolled during the pendency of an earlier state-law-based putative class action in federal court.[4]

The Eighth Circuit has taken a different approach, holding that federal courts have a sufficiently strong interest in ''the efficiency and economy of the class-action procedure'' to justify the application of *American Pipe* tolling even if the doctrine would not be recognized under the applicable state law.[5] The Eighth Circuit, however, did not refer to any case law or other authority to support its holding.

Significantly, the Supreme Court has held that Congress (as opposed to the courts) has the power to enact legislation governing tolling of state-law claims brought in federal court. In addition to exercising diversity jurisdiction over state-law claims, federal courts may exercise ''supplementary jurisdiction''

over state-law claims that form part of the same case or controversy as a claim for which the court has original jurisdiction.[6] But in certain circumstances—if the federal question claim that formed the basis for federal jurisdiction has been dismissed, for example—the court may decline to exercise supplemental jurisdiction over related state-law claims.

In such cases, Congress has provided that the limitations periods for such claims are tolled until 30 days after dismissal, allowing the parties to re-file those claims in state court.[7] In *Jinks v. Richland County*, the Court upheld the constitutionality of this tolling statute, holding that the provision was within Congress's authority under the Necessary and Proper Clause to establish a federal court system.[8] Congress, however, has not enacted a comparable statute applying *American Pipe* tolling to putative class actions filed in federal court under diversity jurisdiction. Congress's failure to explicitly provide a federal tolling rule for state-law claims brought under diversity jurisdiction suggests that state tolling law, not federal law, should apply to claims brought under diversity jurisdiction.

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Class Action Tolling in Federal Question Cases

As a result of *American Pipe* and *Crown, Cork & Seal*, there is uniformity in at least one aspect of class action tolling: When a federal court declines to certify a class action in a case brought under federal question jurisdiction, the unnamed members of the uncertified class will benefit from tolling if they move to intervene in the lead plaintiff's suit or file their own individual action. However, open issues remain regarding the scope of *American Pipe* tolling.

For example, can a plaintiff whose individual claims were tolled by *American Pipe* file his or her own class action? Where the issue of class certification was already litigated in the prior action, the answer is generally no. Courts normally do not permit follow-on class actions that merely seek to relitigate the same class certification issues, reasoning that to allow such suits would permit endless relitigation of class certification decisions.[9] However, some courts have permitted follow-on class actions where class certification was denied due to the inadequacy of the named plaintiff in the first class action,[10] or where the first class action was dismissed for reasons unrelated to the appropriateness of class certification.[11] Courts are also grappling with the issue of whether to allow follow-on class actions that seek to certify a sub-class of an earlier putative class, where the smaller scope of the sub-class might allow it to avoid the pitfalls that precluded certification of the larger class.[12]

In addition, there is a circuit split as to whether an unnamed class member can take advantage of *American Pipe* tolling if he or she files an individual suit while the class action suit is still pending, but before a decision has been made regarding class certification. The Second, Ninth and Tenth Circuits have applied *American Pipe* tolling in such cases, reasoning that the filing of a class action puts the defendant

on notice of the claims of the unnamed members of the putative class and, therefore, *American Pipe* tolling would not undermine the purposes of statutes of limitation.[13]

By contrast, the First and Sixth Circuits have held that plaintiffs cannot take advantage of *American Pipe* unless class certification has already been denied.[14] These courts have concluded that the efficiency and economy goals of *American Pipe* tolling—which encourages unnamed plaintiffs to forebear from filing individual suits until the court has ruled on class certification—would be disserved by permitting plaintiffs to bring otherwise untimely individual suits while a decision on class certification is still pending.

This minority view leads to an anomalous result: a class member who files an individual suit *before* a class certification ruling will be denied the benefit of tolling, but if the class member waits until *after* the ruling, the class member could proceed with the same claim regardless of whether class certification was granted or denied (i) by participating as a member of a certified class, (ii) by opting out of a certified class and filing a denial of certification.[15]

Courts are also in disagreement as to whether *American Pipe* tolling applies to statutes of repose. Unlike a statute of limitations, which is an affirmative defense that requires that a claim be brought within a specified time after it has accrued, a statute of repose extinguishes a cause of action after the specified time.

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In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991), which did not involve class action tolling, the Supreme Court held that equitable tolling principles were ''inconsistent'' with statutes of repose. Some courts, including the Second Circuit, have held that *American Pipe* tolling cannot apply to a statute of repose, because it is either (i) ''equitable'' tolling, in which case its application to a statute of repose is barred by *Lampf*, or (ii) ''legal'' tolling based on Federal Rule of Civil Procedure 23, in which case its application to a statute of repose would be barred by the Rules Enabling Act, which ''forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.' ''[16]

Other courts, including the Tenth Circuit, have held that *American Pipe* tolling does apply to statutes of repose, reasoning either that *Lampf* does not apply because the class member's suit was ''commenced'' for purposes of the statute of repose when the initial class action suit was filed,[17] or that *American Pipe* is a species of legal tolling.[18]

What if the first action was voluntarily dismissed—do unnamed members of the class still benefit from *American Pipe* tolling? The Seventh Circuit held that they do, stating that ''it does not matter, under federal law, whether the first suit's status as a would-be class action ends by choice of the plaintiff (who may abandon the quest to represent a class or . . . bow out altogether) or by choice of the judge.''[19] The court reasoned that any other rule would force an unnamed class member to intervene in the original

action to protect his or her rights—a requirement that would be at odds with one of the purposes of *American Pipe*, which is to obviate the need for such intervention. At least one court, however, has held that *American Pipe* tolling does not apply where the original claim was voluntarily dismissed, on complaint as if it never had been filed.[20]

Courts are also split as to whether *American Pipe* tolling applies where the named plaintiff in the initial class action lacked standing.[21] The divergent outcomes reflect the difficult policy concerns raised by these cases. On the one hand, courts are reluctant to condone an abuse of the *American Pipe* tolling doctrine by allowing parties who have no standing to toll the limitations period for others, particularly where the initial plaintiff's lack of standing was readily apparent to putative class members. On the other hand, too harsh a rule could undermine the efficiencies of *American Pipe* tolling by causing more putative class members to file their own actions as a protection against any latent deficiencies in the lead plaintiff's standing.

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Class Action Tolling in Cases Under CAFA and Diversity Jurisdiction

Prior to CAFA's enactment in 2005, class actions premised entirely on state-law claims were relatively rare in federal court due to the exacting requirements of the diversity jurisdiction statute. In particular, *each* named plaintiff had to satisfy the ''complete diversity'' requirement, and the value of *each* putative class member's claim had to meet the $75,000 amount-in-controversy requirement.[22]

CAFA relaxed these requirements. Now, a class action can be brought in federal court if the total amount in controversy exceeds $5 million and there is minimal diversity of citizenship (subject to certain exceptions).[23] CAFA also made class actions easier to remove by eliminating the requirements that all defendants consent to removal and that removal occur within one year of filing.[24] As a result, more state-law class actions can be brought in or removed to federal court. And, in turn, more federal courts are confronting class action tolling issues where state law, not federal law, supplies the rule of decision.

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A majority of states have adopted *American Pipe* tolling for suits brought in state court.[25] However, the states do not apply it consistently. One key difference is that some state courts do not recognize ''crossjurisdictional'' tolling. That is, the courts do not apply *American Pipe* tolling to state law claims where the original class action was filed in another state court or in federal court,[26] a situation that, as explained above, is becoming more common as a result of CAFA.

The lack of cross-jurisdictional tolling under state law can render a claim untimely even if the original class action and the subsequent individual suit were both brought in federal court. For example, in *Casey v. Merck & Co.*,[27] a putative nationwide products liability class action was filed in federal court in Tennessee. Before the court ruled on class certification, four individuals, each a resident of Virginia, filed separate individual suits in federal court under diversity jurisdiction. The suits were dismissed as untimely. In one of these suits, which had been filed in New York, on appeal, the Second Circuit certified a question to the Virginia Supreme Court regarding the availability of cross-jurisdictional tolling under Virginia law. The Virginia Supreme Court answered that such tolling was not recognized under Virginia law, and the Second Circuit accordingly affirmed dismissal of the plaintiffs' claims.

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Conclusion

Forty years after *American Pipe*, the law of class action tolling continues to evolve. The increasing need to apply state tolling law in federal court as a result of the passage of CAFA and the application of *Erie* will only add to the complexity, particularly given the states' inconsistent recognition of cross-jurisdictional tolling and Congress's failure to date to provide uniformity in tolling in actions grounded in diversity jurisdiction.

As a result, potential class members should pay careful attention to the tolling rules that may apply to their claims in the event that class certification is denied in a pending putative class action.

By the same token, class action defendants should carefully consider the tolling law in the jurisdiction in which the putative or certified class action is pending in making litigation judgments, including such basic decisions as whether to remove under CAFA, whether to settle with the named plaintiffs individually (because, depending on the law, the claims of putative class members may or may not be tolled), or whether to agree to a settlement class.

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[1] *Am. Pipe & Constr. Co v. Utah*, 414 U.S. 538, 553 (1974).

[2] *Id.* at 555.

[3] Notably, many state courts consider statutes of limitations to be procedural and, absent a borrowing statute, will apply their own state's statute of limitation regardless of which state's law applies to the underlying legal claim. *See, e.g.*, *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177, 194 (Ill. 2002); *Fleeger v. Wyeth*, 771 N.W.2d 524, 528 (Minn. 2009). *But see*, *e.g.*, *Warriner v. Stanton*, 475 F.3d 497, 500 n.2 (3d Cir. 2007) (''New Jersey 'borrows' the statute of limitations of the state whose substantive law applies to the case.''); *New England Tel. & Tel. Co. v. Gourdeau Constr. Co.*, 647 N.E.2d 42, 46 (Mass. 1995) (''[T]his court's treatment of the application of statutes of limitations as procedural will no longer be continued.'').

[4] *E.g.*, *Casey v. Merck & Co.*, 653 F.3d 95, 100 (2d Cir. 2011); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 567 (6th Cir. 2005); *Wade v. Danek Med., Inc.*, 182 F.3d 281, 288–90 (4th Cir. 1999); *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 265 (7th Cir. 1998).

[5] *In re Gen. Am. Life Ins. Co. Sales Practices Litig.*, 391 F.3d 907, 914–15 (8th Cir. 2004); *Adams Pub. Sch. Dist. v. Asbestos Corp.*, 7 F.3d 717, 718–19 (8th Cir. 1993).

[6] 28 U.S.C. § 1367(a).

[7] 28 U.S.C. § 1367(d).

[8] 538 U.S. 456, 462 (2003).

[9] *See, e.g.*, *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (*American Pipe* tolling does not apply to the filing of a ''subsequent class action following a definitive determination of the inappropriateness of class certification.'').

[10] *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004).

[11] *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 478–80 (6th Cir. 2013) (named plaintiffs in prior class action lacked standing); *Catholic Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000) (*en banc*) (prior class action was dismissed after Congress passed a statute divesting the courts of jurisdiction over certain claims).

[12] *E.g.*, *Phipps v. Wal-Mart Stores, Inc.*, 2013 BL 156303 (M.D. Tenn. June 13, 2013) (certifying appeal to determine whether follow-on class action is permitted where the second suit would seek to certify only a subclass of the original suit). The plaintiffs in the *Phipps* case seek to certify a subclass of the employment discrimination class that was the subject of the Supreme Court's landmark ruling in *Wal-Mart Stores, Inc.*

[13] *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254–56 (2d Cir. 2007); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1008–09 (9th Cir. 2008); *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1228–35 (10th Cir. 2008).

[14] *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 568–69 (6th Cir. 2005) (applying Ohio law, which, in turn, looks to federal class action tolling law).

[15] *See, e.g.*, *Realmonte v. Reeves*, 169 F.3d 1280, 1283–84 (10th Cir. 1999) (holding that *American Pipe* tolling applies to class members who opt out of a certified class to file individual suits); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488–89 (9th Cir. 1985). Courts have also applied *American Pipe* tolling where class certification was initially granted, but the class was later decertified or vacated. *See, e.g.*, *Hall v. Variable Annuity Life Ins. Co.*, 2013 BL 213339 (5th Cir. Aug. 15, 2013) (holding that statute of repose was tolled by prior class action until the date on which the court vacated its class certification order, at which point the limitations period began running again).

[16] *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d, 109, 95 (2d Cir. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (quoting 28 U.S.C. § 2072(b)).

[17] *E.g.*, *Joseph v. Wiles*, 223 F.3d 1155, 1166–68 (10th Cir. 2000).

[18] *E.g.*, *Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176–78 (D. Mass. 2009)

[19] *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011).

[20] *In re IndyMac Mortgage-Backed Sec. Litig.*, 718 F. Supp. 2d 495, 503–05 (S.D.N.Y. 2010).

[21] *See Monroe County Employees' Ret. Sys. v. YPF Sociedad Anonima*, 2013 BL 278022, *1 & nn.3–4 (S.D.N.Y. Oct. 8, 2013) (collecting cases).

[22] *Zahn v. Int'l Paper Co.*, 414 U.S. 291, 300–01 (1973); *Snyder v. Harris*, 394 U.S. 332, 340 (1969). Shortly after CAFA was enacted, the Supreme Court interpreted the supplemental jurisdiction statute, 28 U.S.C. § 1367, to provide that if at least one named plaintiff satisfied the amount-in-controversy requirement, then the court would have jurisdiction over the claims of the

other class members, regardless of the value of those class members' claims. *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 545 U.S. 546, 558–67 (2005).

[23] *See* 28 U.S.C. § 1332(d).

[24] *See* 28 U.S.C. § 1453.

[25] *See* 1 *McLaughlin on Class Actions* § 3:15 (9th ed. 2012).

[26] *Compare, e.g.*, *Stevens v. Novartis Pharms. Corp.*, 247 P.3d 244, 255 (Mont. 2010) (recognizing cross-jurisdictional tolling), *with*, *e.g.*, *Maestas v. Sofamor Danek Grp., Inc.*, 33 S.W.3d 805, 808 (Tenn. 2000) (declining to adopt crossjurisdictional tolling).

[27] 653 F.3d 95, 104 (2d Cir. 2011) (certifying question), *certified question answered*, 722 S.E.2d 842 (Va. 2012), *subsequent proceedings*, 678 F.3d 134 (2d Cir. 2012).