

For Whom The Court Tolls

Law360, New York (June 05, 2012, 1:31 PM ET) -- For some time, parties have — incorrectly — assumed that the filing of a class action complaint in federal court automatically tolls the statute of limitations for all claims asserted, for every member of the proposed class, until a ruling on class certification is issued. This belief has its roots in the United States Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

The U.S. Court of Appeals for the Second Circuit's decision in May 2012 in *Casey v. Merck & Co. Inc.* serves to highlight the problems with this assumption. No. 10-1137-cv(L) (2d Cir. May 1, 2012).

Below is a brief overview of the law in this area and a discussion of why recent decisions provide additional arguments for defendants and a cautionary tale for plaintiffs in class action cases.

American Pipe And Crown, Cork & Seal

The United States Supreme Court first addressed the concept of tolling based on the filing of a class action in *American Pipe*, 414 U.S. at 552-53. The court held 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.” *Id.* at 554 (footnote omitted).

The court later clarified that this rule of tolling applies to those who intervene after the denial of class certification as well as those who file their own actions and that “[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied.” *Crown, Cork & Seal Co. Inc. v. Parker*, 462 U.S. 345, 354 (1983).

Notably, in both *American Pipe* and in *Crown, Cork & Seal*, the claims at issue were based on federal statutory law.

The reasoning of these cases is that any other result would “frustrate the principal function of a class suit ... [by increasing] the multiplicity of activity which rule 23 was designed to avoid in those cases where a class action is found ‘superior to other available methods for the fair and efficient adjudication of the controversy.’” *American Pipe*, 414 U.S. at 551 (quoting Rule 23(b)(3)).

The court also stated that its holding did not create a conflict with any statutes of limitations because the defendant is on notice at the commencement of the class action “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.” *Id.* at 554-55.

A contrary rule would require every putative class member to file his or her own individual action against the defendant, or intervene, in order to ensure that a later decision to deny class certification did not negatively affect his or her right to recovery. See *id.* at 551.

American Pipe Tolling Does Not Automatically Apply To State Law Claims Or Cross-Jurisdictional Filings

Many have assumed that the holdings in *American Pipe* and *Crown, Cork & Seal* apply equally to state law claims in federal court based on diversity jurisdiction. That is not always the case. Federal courts have reached different conclusions as to whether *American Pipe* tolling can be applied in a diversity case when the relevant state law does not recognize this form of tolling.

Some state courts that have considered whether to apply tolling when a class action was initially commenced in federal court or other state have refused to apply *American Pipe*-style tolling to individual claims later pursued in state court. See, e.g., *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998); *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex. App. Amarillo 1995).

Others have adopted American Pipe tolling in court decisions or by statute. See, e.g., *Stevens v. Novartis Pharmaceuticals Corp.*, 247 P.3d 244, 256 (Mont. 2010); *Vaccariello v. Smith & Nephew Richards Inc.*, 763 N.E.2d 160 (Ohio 2002).

Thus, if state law applies to answer this question, the result will depend on the state where the individual action, filed after the class certification, is filed.

Most Federal Courts Look To State Law For Guidance

While American Pipe and Crown, Cork & Seal involved federal claims, the majority view is that state law controls.

In the recent Casey decision, the Second Circuit held that the individual plaintiffs' claims were time-barred under Virginia law, despite the fact that it was assumed that they were members of an earlier — and timely — filed proposed nationwide class action that was not certified.

Had the filing of the earlier class action tolled Virginia's statute of limitations, the plaintiffs would have been permitted to proceed. The Second Circuit reached this conclusion after receiving guidance from the Virginia Supreme Court in response to certified questions.

The Virginia Supreme Court noted that it had upheld "cross-jurisdictional tolling" — where a case is, for example, originally filed in federal court and then later filed in state court — only when there was "identity of the parties in the two lawsuits." *Casey v. Merck & Co. Inc.*, 722 S.E.2d 842, 846 (Va. 2012).

But the court refused to extend such tolling to cases where the parties were not the same or the new plaintiff was not represented by a "qualified" representative. *Id.* "In other words, for the statute of limitations to be tolled for a subsequent action, the party who brought the original action must be the same as the plaintiff in the subsequent action or a recognized representative of that plaintiff asserting the same cause and right of action." *Id.*

In Casey, the putative class representative in the original action could not be a qualified representative because "Virginia jurisprudence does not recognize class actions." *Id.*

Because Virginia state law did not recognize tolling under the circumstances, the Second Circuit in Casey affirmed summary judgment in favor of the defendants.

In doing so, the Second Circuit joined the Fourth and Ninth Circuits in holding that federal courts sitting in diversity jurisdiction must look to the relevant state law on statute of limitations and tolling to determine whether the plaintiff's claims are timely. See, e.g., *Clemens v. DaimlerChrysler Corp.*, 530 F.3d 852 (9th Cir. June 19, 2008); *Wade v. Danek Medical Inc.*, 182 F.3d 281 (4th Cir. 1999).

In Clemens, for example, the Ninth Circuit affirmed the grant of summary judgment as to the plaintiff's California statutory claims because he could not take advantage of tolling based on the American Pipe doctrine. *Id.* at *3-*5.

As the court noted in rejecting application of that doctrine in a diversity jurisdiction case:

"In some instances, a plaintiff can rely on the filing of a prior class action to vindicate the right in question and toll the statute in the event that the class is not ultimately certified. See *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). A handful of states have applied this rule when a class action is filed in another jurisdiction. The California Supreme Court has not adopted such cross-jurisdictional tolling, however, and few states do. ... [S]everal federal courts have declined to import the doctrine into state law where it did not previously exist.

"Accordingly, the weight of authority and California's interest in managing its own judicial system counsel us not to import the doctrine of cross-jurisdictional tolling into California law." *Id.* at *4-*5 (some citations omitted).

Some Courts Will Permit American Pipe Tolling To Trump Inconsistent State Law

The Eighth Circuit has, on the other hand, twice suggested that it would take a different approach.

In *Adams Public School District v. Asbestos Corporation Ltd.*, 7 F.3d 717 (8th Cir. 1993), the court stated in dicta that "we view the federal interest here[, discussed in *American Pipe*,] as sufficiently strong to justify tolling in a diversity case when the state law provides no relief."

In *Adams Public School District*, the court did not need to reach the issue because North Dakota law changed during the pendency of the appeal to permit tolling based on the earlier filed class action.

More than 10 years later, the Eighth Circuit reiterated its belief that "the federal interest in 'the efficiency and economy of the class-action procedure' outweighs any state interest and therefore justifies tolling in diversity cases where the otherwise-applicable state law provides no relief." *In re: General American Life Insurance Co. Sales Practices Litigation*, 391 F.3d 907, 915 (8th Cir. 2004).

In that case, the Eighth Circuit remanded to the district court to consider whether there was sufficient notice "to toll any or all of the applicable statutes of limitations" based on *American Pipe* tolling, even though Pennsylvania law would not have permitted tolling. *Id.*; see also *Sacred Heart Health Sys. Inc. v. Humana Military Healthcare Services Inc.*, No. 3:07cv62/MCR, (N.D. Fla. June 9, 2008) (following *American Pipe* reasoning even if Florida law would not provide relief).

In short, whether *American Pipe* tolling applies may depend heavily on the applicable state law.

Other Limitations On American Pipe Tolling

In addition to the restrictions based on state law discussed above, there are other limitations on *American Pipe* tolling with which counsel should become familiar. While not an exhaustive list, they include the following:

- Individual plaintiffs must demonstrate that they were a member of the originally proposed class for tolling to apply. See *Am. Pipe*, 414 U.S. 554-55; *Crown, Cork & Seal*, 462 U.S. at 353. The Fourth Circuit has refused to allow an overbroad class definition to dictate the tolling analysis. Indeed, the class definition in the complaint is not always determinative of the scope of the class for the purposes of tolling the statute of limitations. *Smith v. Pennington*, 352 F.3d 884, 893 (4th Cir. 2003). Rather, "[t]he scope of the plaintiff's asserted class for tolling purposes is that class for which there was 'fair notice' as to both 'the substantive claims' and the 'number and generic identities of the potential plaintiffs' that might 'participate in the judgment' if the plaintiff's desired class was, in fact, certified." *Id.* (quoting *Davis v. Bethlehem Steel Corp.*, 769 F.2d 210, 212 (4th Cir. 1995)). Such a class may be considerably narrower than a vague class definition appearing in the complaint. In addition, "[i]t is the named plaintiffs' claims which define the parameters of the class claims ... a previous class action which puts the defendants on notice that many persons have a generalized grievance" of some type is not sufficient to give fair notice for tolling purposes. *Davis v. Bethlehem Steel Corp.*, 600 F. Supp. 1312, 1318-19 (D. Md. 1985), *aff'd*, 769 F.2d 210 (4th Cir. 1985).
- The original class action complaint must also have been filed prior to expiration of the statute of limitations for the new individual plaintiff's claim. See, e.g., *Weston v. AmeriBank*, 265 F.3d 366, 368-69 (6th Cir. 2001).
- Tolling usually will not apply to new claims or defendants in the new individual action. See, e.g., *Wade*, 182 F.3d at 288 n.9, *Robinson v. Fountainhead Title Group Corp.*, 447 F. Supp. 2d 478, 484 (D. Md.

2006). The key issue is whether the defendants were on sufficient notice. *Raie v. Cheminova Inc.*, 366 F.3d 1278, 1283 (11th Cir. 2003) (“It is not enough for Appellants to rely on only that ambiguous class definition to support their argument for tolling under American Pipe; they must demonstrate that their [claim] was included in the [original] class action.”)

- A class action case filed and maintained in state court will not toll the limitations period for federal law claims for an individual case filed in federal court. See, e.g., *In Re: Copper Antitrust Litig.*, 436 F.3d 782, 793-97 (7th Cir. 2006).

- American Pipe tolling applies only to “individual” lawsuits. In other words, the doctrine does not permit filings of later class actions in an attempt to “stack” class actions to inevitably extend the statute of limitations. See, e.g., *Great Plains Trust Co. v. Union Pacific R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (“The American Pipe rule has been extended to purported members of the class who later file individual suits rather than intervene.”); *Korwek v. Hunt*, 827 F.2d 874, 876 (2d Cir. 1987). The Korwek rule, as it is sometimes called, “is based on the principle that the statute of limitations for class claims should not be tolled indefinitely as successive class actions are brought but class certification is denied.” *Basch v. Ground Round Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (“Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.”); see also *Employers-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920 (9th Cir. 2007).

Conclusion

In short, both counsel for plaintiffs and defendants should be well aware of the limitations of American Pipe tolling. Depending on the jurisdiction, and a variety of other factors, plaintiffs’ counsel may find their claims time-barred. Defendants, on the other hand, may find they have more ammunition to defeat claims.

--By Michael D. Leffel, Foley & Lardner LLP

Michael Leffel is the chairman of Foley & Lardner LLP’s class action working group and a partner in the firm’s Madison, Wis., office.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Reprinted with permission from [Portfolio Media, Inc.](#)