

Too Late and Too Early: The Inconsistent Tolling Rules for Statutes of Limitation Provided by Class Actions

by **N. Robert Stoll, Esq. and Scott Shorr, Esq.**

I. Introduction

Is it possible both to be too late to file a complaint and too early? In a word, yes. While it sounds impossible, this is the unusual result produced by some recent cases that consider class action tolling rules. In these cases, the courts consider the question of whether a potential class member is barred by the statute of limitations when he files an individual complaint after the proposed class action has been filed and after the running of the statute of limitations on the individual claims, but before the class is certified. The individual may have been given false hope that the claims were tolled by the rule in *American Pipe*¹ that the filing of the proposed class action tolls the statute of limitations for all potential class members as of the filing date of the proposed class complaint. However, the courts, largely at the district court level, hold that the benefits of *American Pipe* and later Supreme Court case law do not apply if the individual files the complaint before the class is certified or denied. Thus, the individual could be too late to file the complaint if he files after the statute has run on his individual claims. He is also too early because he could have still timely filed an individual case if he had waited for the class certification decision.

The courts in these cases have grappled with the conflicting purposes of the class action tolling rules and the statutes of limitation. On the one hand, the class action tolling rules are designed to promote efficiency and limit the number of cases against class action defendants by having most claims resolved in one case. On the other hand, statutes of limitation are also designed to give notice to defendants, prevent the loss of evidence through delay, and punish those who wait to assert their claims. To date, the courts have consistently favored the efficiency rationale of class action rules over what some may consider the countervailing purposes served by statutes of limitation. This article suggests that a putative class complaint should toll all statutes of limitation for all individuals in the putative class for all purposes.

This article also discusses the conflicting nature of these rules and serves as a reminder to individual counsel who are considering opting out to examine closely the statute of limitations and class action issues and not blindly expect that the statute will always be tolled by the pendency of a class action.

II. *American Pipe* and *Crown Cork*

Class action practitioners are certainly familiar with the United States Supreme Court's rulings in *American Pipe*² and *Crown Cork*,³ but a brief reminder sets the stage. In *American Pipe*, the State of Utah filed an antitrust class action lawsuit against various sellers of concrete and steel pipe eleven days before the antitrust statute of limitations expired. Utah's lawsuit was filed as a proposed class action on behalf of itself and other state and local governments that were end users of the concrete and steel pipe at issue. Within a year of the litigation, the defendants moved for an order that the case could not be maintained as a class action; the motion was granted based on failure to demonstrate numerosity. Eight days after the denial of class certification, various individual local governments moved to intervene in the Utah case. The trial court denied the motions to intervene, ruling that the statute of limitations had run on the antitrust claims. The United States Supreme Court eventually overruled:

We hold that in this posture, at least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," 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.⁴

The Supreme Court explained that such a holding promoted "efficiency and economy of litigation, which is a principal purpose of the procedure."⁵ If a contrary rule existed, potential class members would be induced to file protective motions to intervene. The Court also believed that the tolling rule was consistent with the purposes of statutes of limitation, which are " '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.' " ⁶ In addition, the Court concluded that the rule was consistent with the purpose of statutory limitation periods that serve fairness by putting defendants on notice of claims and bar plaintiffs who have " 'slept on ... [their] rights' ".⁷

In *Crown Cork*, the United States Supreme Court extended the tolling rule to apply not just to plaintiffs who moved to intervene after the denial of class certification, but to those who filed separate individual lawsuits after the proposed class action had been denied class certification. ⁸ "Once the statute of limitation period has been tolled, it remains tolled for all members of the putative class until class certification is denied."⁹

Both *American Pipe* and *Crown Cork* involved denials of class certification. Neither expressly held that the statute of limitations would be tolled to benefit those who opt out after the approval of the class certification. In *Eisen v. Carlisle & Jacquelin*,¹⁰ the Supreme Court stated in a footnote that putative plaintiff class members who opt out to file individual actions following certification also enjoy the tolling privileges of *American Pipe*.

III. *In Re WorldCom Securities Litigation*

The *American Pipe* and *Crown Cork* cases left open a number of issues with respect to class actions and the tolling rules for statutes of limitation. The primary issue that has arisen is whether the tolling rule applies to individuals that file a separate suit prior to the class certification decision. This came up most prominently in the recent *WorldCom* securities litigation.

In *In re WorldCom, Inc. Sec. Litig.*,¹¹ the Alaska Department of Revenue and State Pension Board purchased bonds directly from *WorldCom* in a number of bond offerings and later filed individual 1933 Securities Act claims against the underwriters of the bond offerings for misrepresentations made in connection with those offerings. Judge Cote of the Southern District of New York concluded that the Alaska plaintiffs had filed their Section 11 and 12 claims under the 1933 Act a few months after the short one-year limitation period ran. The Alaska plaintiffs argued that they were nevertheless timely because their claims had been asserted in an earlier proposed class action that tolled all 1933 Act claims as of the filing of the proposed class complaint. Judge Cote disagreed and held that *American Pipe* and *Crown Cork* apply only to individuals who wait to file their lawsuits after the class certification decision:

