

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

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## 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*<sup>1</sup> 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*<sup>2</sup> and *Crown Cork*,<sup>3</sup> 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.<sup>4</sup>

The Supreme Court explained that such a holding promoted "efficiency and economy of litigation, which is a principal purpose of the procedure."<sup>5</sup> 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.' " <sup>6</sup> 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' ".<sup>7</sup>

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. <sup>8</sup> "Once the statute of limitation period has been tolled, it remains tolled for all members of the putative class until class certification is denied." <sup>9</sup>

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*,<sup>10</sup> 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.*,<sup>11</sup> 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:

[T]he plaintiffs who choose to file an independent action without waiting to consider the determination of class certification are not entitled to enjoy the benefits of the tolling rule. Applying the tolling doctrine to separate actions filed prior to class certification would create the very inefficiency that American Pipe sought to prevent.<sup>12</sup>

Judge Cote held that the benefits of class tolling should only be enjoyed by those who wait until the class certification decision. Although no federal circuit court of appeals had decided the issue, Judge Cote followed several district courts that had reached the same conclusion.<sup>13</sup>

Since WorldCom, at least one circuit court of appeal and several district courts have also concluded that the American Pipe tolling doctrine does not apply if an individual files suit before the class certification decision.<sup>14</sup>

#### **IV. The *In Re WorldCom* Opinion Creates a Strange Gap and Potential Pitfall**

Counsel who represent potential opt-out plaintiffs now must be particularly vigilant by the strange gap that is created in which plaintiffs may be both too late and too early. If there is any statute of limitations issue presented by the potential opt-out plaintiff's individual claims, the plaintiff is best served to wait for the class certification decision before deciding to file a separate complaint. If not, the plaintiff's claims may be time-barred and not protected by the tolling rules of American Pipe and Crown Cork. In WorldCom, a number of plaintiffs in similar positions decided to dismiss their case without prejudice to try to avoid the limitation bar. Indeed, Judge Cote, perhaps intending to force the large number of individual cases back in the class, decided to allow plaintiffs to dismiss without prejudice even where plaintiffs did not have an absolute right of dismissal.

#### **V. *In re WorldCom* Runs Contrary to Certain Policies Promoted by Class Action Tolling and Limitation Periods**

*In re WorldCom* is consistent with one of the purposes of American Pipe and Crown Cork to the extent that it promotes efficiency by encouraging a classwide resolution while limiting litigation of individual cases. However, it is inconsistent with many of the purposes of class action tolling of individual statutes of limitation.

As noted in American Pipe, one purpose of a limitation period is to prevent surprises by preserving evidence that is lost or stale, preserving witnesses, and preventing the loss of memory through time.<sup>15</sup> The class action tolling rule effectively preserves this goal by alerting the defendant of the class claims and likely evidence. The rule announced in WorldCom is contrary to that purpose.

From the defendant's perspective, the defendant is on notice of the claims and potential evidence when it is named in a proposed class complaint. To that extent, it does not matter if the defendant is named in one case or several hundred. The individual evidence in any particular class plaintiff's case may be slightly different. Under WorldCom, however, the potential opt-out plaintiff is encouraged to delay the filing of his complaint until after the class certification decision, even if that is several years after the limitation period expired. The plaintiff who files after the limitation period has expired, but before class certification, is barred. However, the plaintiff that waits past the limitation period and after the class certification decision is not barred. The second plaintiff is less likely to preserve evidence and memory because of the longer passage of time, but is allowed to get the benefit of the tolling period. This obviously runs contrary to the general purpose of tolling of statutes of limitation.

The WorldCom decision also runs counter to another policy promoted by limitation periods and mentioned in American Pipe. American Pipe noted that limitation periods promote fairness by barring a plaintiff who has "slept on his rights[.]"<sup>16</sup> WorldCom, however, encourages the plaintiff to sleep longer. The individual plaintiff who sleeps on his rights past the limitation period, but files before class certification, is barred. The plaintiff who sleeps even longer and files later, and after class certification, is not barred.

WorldCom ultimately favors trying to limit individual litigation and force more potential opt-out plaintiffs to wait longer to consider whether to join the litigation. This may promote classwide goals of efficiency. It is not, however, consistent with most of the purposes of class tolling of limitation periods.

WorldCom is also inconsistent with some of the other class action case law on related issues not mentioned in the opinion. For instance, Newberg correctly notes that "[i]t is well established that 'pendency of an individual action does not excuse a class member from filing a valid request for exclusion.'<sup>17</sup> If the filing of an individual action does not function as an opt out from the class action then the class member would presumably still be protected by the class action tolling procedures even after it filed its individual lawsuit. In *re WorldCom*, however, holds that the individual is not protected by the traditional protections of the class as soon as it chooses to file an individual lawsuit. Perhaps these cases should be re-examined, but their underlying theory—that all potential class members continue to be part of the potential class until the class certification decision, even if they file an individual case—is called into question by *In re WorldCom*.

#### **VI. Paradox With State Law Claims**

Attorneys who represent institutions or individuals who are considering whether to participate in a class action must consider another complicating wrinkle. Let us assume that the attorney discovers that a class action has been filed that factually duplicates the claims of her client. The attorney learns, however, that the class action asserts only federal law claims while she is aware that there are state law claims that are far more favorable to her client. The attorney may want to wait for the class certification decision, particularly if the class is certified through a settlement class, to evaluate her client's potential benefit through participation in the class. However, there may be substantial risks in such an approach if the federal class action does not toll the limitation period for her state law claims. Even though the majority rule appears to be that a class action in federal court tolls the statute of limitation for state law claims based on identical facts that are asserted in state court,<sup>18</sup> an attorney with strong state law claims may not want to rely on any presumed tolling provided by the federal class action and may want to assert the state law claims "too early" because she may never have an opportunity to file the state law claims "too late" and after class certification.

#### **VII. Conclusion**

Although the ruling in the WorldCom litigation regarding lack of tolling statutes of litigation may seem unusual, many courts have similarly ruled. While those rulings might result in more "efficiency" in preventing individual actions by forcing more plaintiffs to remain within classes, or lose their rights, those rulings are not consistent with the policies previously enunciated by the Supreme Court and appellate courts in tolling statutes of limitation. Once a class action has been filed, a defendant should be on notice that he has potential exposure to all members of the putative class and should preserve evidence relevant thereto. A defendant cannot say that a new claim has arisen simply because some individual putative class members file individual cases later (after the statute of limitations would usually run), but before class certification is determined.

In the end, these issues still remain ripe for consideration by many circuit courts of appeal and there will likely be more law to come on these tolling issues.

ENDNOTES

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1 American Pipe & Construc. Co. v. Utah, 414 U.S. 538, 554 (1974).

2 Id.

3 Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54 (1983).

4 American Pipe, 414 U.S. at 552-53. The express holding of American Pipe limits the benefit of class tolling to circumstances where the prior class action is denied based on numerosity. There is no apparent reason that a denial based on other F.R.C.P. 23(a) factors, e.g., commonality, typicality or adequate representation, would not also support the tolling of the limitation period until the denial of class certification for a subsequent individual case. But see *Cunningham v. Ins. Co of North America*, 530 A.2d 407, 411 (Pa. 1987) (under Pennsylvania law that there was no tolling provided by a proposed class action where the lead plaintiff lacked standing to pursue the class action and the lack of standing was apparent on the face of the complaint). However, there has been conflicting case law in the context of a subsequent proposed class action seeking to obtain the tolling benefits of a prior denied class action. See e.g., *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004) (holding that where the denial of the earlier class relates to the deficiency of the lead plaintiff, a subsequent identical class will be tolled; however, the limitation period for the subsequent class action will not be tolled where the denial of the initial class action related to numerosity or other class-related attributes).

5 American Pipe, 414 U.S. at 553.

6 Id. at 554 (citation omitted).

7 Id. (citation omitted).

8 Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 353-54 (1983).

9 Id.

10 417 U.S. 156, 176 n.13 (1974).

11 294 F. Supp. 2d 431, 436-38 (S.D.N.Y. 2003).

12 Id. at 451.

13 See, e.g., *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003); *Chinn v. Giant Food, Inc.*, 100 F. Supp. 2d 331, 335 (D. Md. 2000); *Rahr v. Grant Thornton LLP*, 142 F. Supp. 2d 793, 800 (N.D. Tex. 2000); *Stutz v. Minn. Mining & Mfg. Co.*, 947 F. Supp. 399, 404 (S.D. Ind. 1996); *Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 461 F. Supp. 999, 1012 (D.D.C. 1978), rev'd on other grounds, 650 F.2d 342, 346 n.7 (D.C. Cir. 1980).

14 See, e.g., *Wyser-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 568-69 (6th Cir. 2005); *Calvello v. EDS*, 2004 WL 941809 at \*4 - \*5 (W.D.N.Y. Apr. 15, 2004); *Kozlowski v. Sheahan*, 2005 WL 3436394 at \*3 (N.D. Ill. Dec. 12, 2005).

15 American Pipe, 414 U.S. at 554.

16 Id. (citation omitted).

17 *Newberg on Class Actions*, § 16.15 (4th Ed. 2002), quoting *Berman v. L.A. Gear, Inc.*, 1993 WL 437733 at \*5 n.1 (S.D.N.Y. 1993), aff'd mem., 29 F.3d 621 (2d Cir. 1994). See also *In Re Prudential Securities Inc., L.P. Litig.*, 164 F.R.D. 362 (S.D.N.Y. 1996), aff'd, 107 F.3d 3 (2d Cir. 1996) (unpublished) (holding same); *Supermarkets General Corp v. Grinnell Corp.*, 59 F.R.D. 512 (S.D.N.Y. 1973), aff'd, 490 F.2d 1183 (2d Cir. 1974) (holding same).

18 See e.g., *In re Lineboard Antitrust Litig.*, 223 F.R.D. 335, 344-352 (E.D. Pa. 2004) (holding under Colorado, Indiana, Kansas and South Carolina law that state antitrust claims were tolled by class action asserting similar federal antitrust claims); *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967 (N.J. Super. Ct. App. Div. 1999) (tolling individual claims that are "substantially the same" as the class claims). However, this is a state by state inquiry and some states hold that the state law claims are not tolled by the federal class action. See e.g., *Wade v. Danek Medical Inc.*, 182 F.3d 281, 290 (4th Cir. 1999) (holding that Virginia law would not support "cross-jurisdictional tolling" and concluding that the federal class action did not toll the similar Virginia law claims).

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