

New York Court of Appeals Recognizes Cross-Jurisdictional *American Pipe* Tolling Under State Law

In a pair of decisions decided approximately 40 years ago, the Supreme Court of the United States held that the commencement of a putative class action lawsuit in federal court tolls the running of the statute of limitations applicable to federal claims for all purported members of the class until entry of an order denying class certification or otherwise dismissing the litigation. See *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983). Until recently, it remained an open question under New York law as to whether so-called “*American Pipe* tolling” applied in New York courts where the earlier-filed class action was filed in a jurisdiction other than New York. That question recently was answered by the New York Court of Appeals in *Bermudez Chavez v. Occidental Chemical Corp.*, 35 N.Y.3d 492 (N.Y. 2020),¹ where that court held that *American Pipe* tolling applies to “absent class members of a putative class action in another jurisdiction.” The Court of Appeals further held that “a non-merits dismissal of class certification’ can terminate such cross-jurisdictional tolling.”

I. Factual Background and Procedural Posture

The Court of Appeals’ decision in *Occidental Chemical* arose out of a long-running products liability suit. In 1993, a group of plaintiffs from several countries filed a putative class action in Texas state court, alleging that defendant chemical company Occidental used harmful pesticides in food crops that caused cancer and infertility. Before the Texas court resolved the plaintiffs’ motion for class certification, the defendants impleaded two subsidiaries of a parent company owned by the government of Israel and successfully removed the case to a Texas federal district court under a provision in the Foreign Sovereign Immunities Act of 1979 (FSIA).

In 1995, the district court granted Occidental’s motion to dismiss on *forum non conveniens* grounds, holding that the plaintiffs’ home countries could serve as adequate fora for the litigation. The court’s order included a “return jurisdiction clause,” which permitted the plaintiffs to return to the district court if courts in their home countries dismissed the case for lack of personal jurisdiction. In April 1996, certain plaintiffs asked the district court to reinstate their action after the Costa Rican Supreme Court dismissed the case for lack of personal jurisdiction.

In 2003, the Supreme Court of the United States held that the FSIA did not provide a basis for removal as to the two Israeli companies.² Following the Supreme Court’s decision, the Texas plaintiffs asked the district court to

¹Unless otherwise cited, all quotations in this memo are taken from this decision.

²See *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477-80 (2003).

vacate its order of dismissal, arguing that the action was improperly removed to federal court. The district court remanded the action back to Texas state court, which reinstated the case. The Texas state court then denied the plaintiffs' motion for class certification.

In 2011, certain absent class members commenced a new action in Delaware, which was ultimately transferred to the U.S. District Court for the Southern District of New York, where Occidental is incorporated. Occidental moved for judgment on the pleadings, arguing that the statute of limitations for the claims had expired and that New York did not recognize cross-jurisdictional tolling. The court denied the motion but certified an interlocutory appeal to the United States Court of Appeals for the Second Circuit. On appeal, the Second Circuit certified the following questions to the New York Court of Appeals: (1) whether New York recognized cross-jurisdictional class tolling; (2) whether a non-merits dismissal of class certification can terminate class action tolling; and, if so, (3) whether the dismissal by the Texas district court in 1995 terminated class tolling in the instant case.

II. The Court of Appeals' Decision

The New York Court of Appeals answered all of the questions in the affirmative. With respect to cross-jurisdictional tolling, the Court of Appeals observed that article 9 of New York's Civil Practice Law and Rules (CPLR)—the state court rule allowing for class actions—was modeled after Federal Rule of Civil Procedure 23, which formed the basis of the U.S. Supreme Court's decision in *American Pipe*. The Court of Appeals reasoned that both rules were designed to “avoid wasteful and duplicative litigation by eliminating the need—during the pendency of the class action—for putative class members to initiate individual claims to protect their rights....” A decision foreclosing the application of cross-jurisdictional class action tolling, the court observed, would prompt “putative class members to initiate parallel individual claims in New York and other jurisdictions nearing expiration of the statute of limitations in order to protect against the risk of a subsequent denial of class certification or other non-merits termination—the very result article 9 was created to avoid.” The Court of Appeals reasoned that recognizing cross-jurisdictional tolling was consistent with New York's legislative framework because it does not excuse late filings by plaintiffs who have “slept on their rights.” Rather, plaintiffs who invoke cross-jurisdictional tolling “have not slept on their rights and such tolling involves no exercise of judicial discretion—it turns entirely upon the existence of a class action.” Therefore, consistent with the express purpose of CPLR article 9, the Court of Appeals held that cross-jurisdictional class action tolling applied under New York state law.³

The Court of Appeals also formally recognized intra-jurisdictional *American Pipe* tolling—“confirming nearly forty years of Appellate Division case law acknowledging the same”—such that there is no ambiguity that New York plaintiffs may avail themselves of tolling provided by an earlier-filed class action in New York state or federal court. The court emphasized that any tolling (intra- or cross-jurisdictional) “applies only if a defendant receives fair notice of all claims that might arise under New York law” and that it remains an open question whether “cross-jurisdictional tolling is available with respect to putative class actions commenced in courts other than United States federal or state courts.”

³Other jurisdictions that have recognized cross-jurisdictional tolling include, but are not limited to, Delaware, Ohio, Hawaii, and Montana. See *Dow Chem. Corp. v. Blanco*, 67 A.3d 392 (Del. 2013); *Vaccariello v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380 (Ohio 2002); *Patrickson v. Dole Food Co.*, 137 Haw. 217 (Haw. 2015); *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282 (Mont. 2010). A majority of other states appear either to have declined to adopt cross-jurisdictional tolling or have not yet formally recognized it. See, e.g., *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459 (Ill. 1998); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000); *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa. Super. Feb. 25, 2002).

As to the potential tolling implications of a non-merits dismissal, the Court of Appeals observed that both parties agreed that “tolling terminates when it is no longer objectively reasonable for absent class members to rely upon the putative class action to vindicate their rights.”⁴ Seeking to adopt a bright-line rule “to provide clarity to all parties in understanding their rights and obligations and, in fairness ... to balance the interests of both plaintiffs and defendants,” the court held that a non-merits dismissal of a putative class action—or denial of class certification for any reason—ends the tolling under *American Pipe*. The court reasoned that either type of order puts future plaintiffs on notice that they must actively take steps in litigation to protect their rights and avoid the running of applicable statutes of limitations. Therefore, the court held that the 1995 Texas orders dismissing the action on *forum non conveniens* grounds ended any class action tolling. This ruling likely will extinguish the plaintiffs’ claims once the case is returned to the United States Court of Appeals for the Second Circuit for final disposition.

In dissent, Judge Jenny Rivera confirmed her agreement with the majority’s determination that tolling ceases when a potential class member can no longer rely on a putative class action to address her interests. She disagreed, however, with the majority’s bright-line rule that any non-merits dismissal can end tolling. Because tolling should terminate with the expiration of reasonable reliance, Judge Rivera argued, a “standard of reasonableness requires flexibility and discretionary analysis.” Under this view, tolling “should end only upon a dismissal that is unconditional, meaning that the court leaves potential plaintiffs without any expectation of an opportunity for future class certification.” Although a denial of class certification on the merits would signal unambiguously to potential plaintiffs that they could not rely on a class, the dissent argued that other, non-merits dismissals might offer less clarity. In those situations, Judge Rivera contended, whether or not class action tolling terminates should “depend[] on how that order would affect the reasonable expectations of potential class members.” Judge Rivera cautioned that the majority’s bright-line rule may, as the expiration of a statute of limitations nears, “encourag[e] class members to act prematurely by filing individual suits that may prove unnecessary,” which would frustrate the goals of efficiency and judicial economy underlying *American Pipe*.

III. Implications

The *Occidental Chemical* decision represents New York’s formal adoption of *American Pipe* tolling. The decision makes clear that such class action tolling applies regardless of whether the earlier class action was filed in New York or some other United States jurisdiction. Whether the dissent’s prediction, that *Occidental Chemical* will precipitate a slew of protective filings in New York State courts near the expiration of a statute of limitations, will come to pass remains to be seen. Parties also are cautioned that the availability of cross-jurisdictional *American Pipe* tolling differs among the various states. Both plaintiffs and defendants must apprise themselves of the local precedent when evaluating how (and where) to proceed following the dismissal of (or denial of class certification in) an earlier-filed class action.

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⁴See *China Agritech v. Resh*, 138 S. Ct. 1800, 1808 (2018).

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