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Tolling Issues in Class Actions

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This article addresses the practical issues that arise when a class action defendant, in fact, wins a challenge to the named plaintiff's Article III standing in federal court. How does such a ruling affect absent class members and specifically the tolling of their claims under the U.S. Supreme Court's decisions in *American Pipe* and *China Agritech*? Can absent class members refile otherwise time-barred class claims in federal court? That answer may depend on when dismissal occurred relative to any decision on class certification. Further, can absent class members whose claims would otherwise be time barred refile class claims in state court? That answer likely depends on applicable state law and knotty issues of cross-jurisdictional tolling and state-specific saving statutes. Ultimately, a "win" on Article III standing grounds could cause unintended chaos in state courts with a myriad of still-developing laws, where sometimes even courts within the same jurisdiction arrive at competing conclusions.

Imagine that you represent a defendant in a class action case in federal court. You have litigated the case vigorously for two years. Finally, you have the necessary evidence to put on a factual challenge to subject matter jurisdiction, showing that the named plaintiff lacks an injury in fact to support Article III standing. You make your case and win. The client is elated. So are you. Two weeks later, you receive a notice that the case has been refiled by one of the absent class members in a less defendant-friendly state court. What happens then?

When a case is dismissed on the basis of a federal court's lack of subject matter jurisdiction, the dismissal is without prejudice because it is not an adjudication on the merits. *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017). Necessarily, this means that dismissed claims may be re-brought in a new case, unless the claims are barred by the statute of limitations. This raises the following question: When does the statute of limitations begin to run on absent class member claims?

The answer likely depends on applicable state law and complex issues of cross-jurisdictional tolling and state-specific saving statutes. In short, a "win" on Article III standing grounds *could* still permit refiling in state courts, although that analysis is subject to a myriad of still-developing state laws.

Refiling in Federal Court Likely Depends on Whether the Case Was Dismissed prior to Class Certification or after a Denial of Class Certification on the Merits

Under *American Pipe* and its progeny, whether putative class members can refile class claims in federal court will likely depend on whether the case was dismissed *prior* to class certification or *after* a denial of class certification on the merits.

The U.S. Supreme Court first announced the doctrine of class action tolling in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Articulating what is now frequently referred to as "*American Pipe* tolling," the Supreme Court held that a statute of limitations for a *federal* claim was tolled during the pendency of a federal class action for putative class members who intervened in the pending federal case *after* the denial of class certification. *Id.* at 552–53. Several years later, the U.S. Supreme Court extended *American Pipe* tolling to putative class members who later filed individual suits and separate actions. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983). Finally, in 2018, the Supreme Court provided long-anticipated clarification in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), holding that—after denial of class certification—subsequent class actions were *not* entitled to *American Pipe* tolling. *Id.* at 1804.

Based on the facts before it, the Supreme Court in *American Pipe* limited the tolling of absent class member claims in at least two ways: (1) to cases in which class certification had been denied and (2) to cases in which the denial of class certification was *not* for lack of standing by the named plaintiff. *American Pipe*, 414 U.S. at 552–53. While *American Pipe* noted these limitations, courts have struggled with both restrictions because they can appear to lead to inequitable results and be inconsistent with the reasoning behind *American Pipe*. This has led some courts to allow tolling in both exceptions: cases without denial of class certification and case in which dismissal was based on the named plaintiff's lack of standing. This has created conflict among lower courts. *See, e.g.*, *Pac. Life Ins. Co. v. Bank of N.Y. Mellon*, No. 17 CIV. 1388, 2018 WL 1382105, at *8 (S.D.N.Y. Mar. 16, 2018).

Courts Have Split on Whether Denial of Class Certification Is Necessary to Toll the Absent Class Members' Subsequent Class Claims

Courts have struggled with whether denial of class certification is necessary to toll the absent class members' subsequent class claims, particularly in light of *China Agritech*'s strong language disapproving tolling for a subsequent class case.

Several courts, notably the First and Third Circuits, have interpreted *China Agritech* to provide a broad, uniform rule that tolling does not apply to any subsequent federal court class action, regardless of whether the original case ever reached a decision on the merits of class certification. *E.g.*, *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 915 F.3d 1, 17 (1st Cir. 2019); *Blake v. JP Morgan Chase Bank NA*, 927 F.3d 701, 709 (3d Cir. 2019); *Williams v. Tech Mahindra (Ams.), Inc.*, No. 3:20-cv-04684, 2021 U.S. Dist. LEXIS 17727, at *17 (D.N.J. Jan. 29, 2021).

Other courts, including in the Second and Ninth Circuits, have distinguished *China Agritech* by its facts to hold that *American Pipe* tolling can apply when class certification was not decided. *E.g.*, *Famular v. Whirlpool Corp.*, No. 16 CV 944 (VB), 2021 U.S. Dist. LEXIS 21432, at *4 (S.D.N.Y. Feb. 3, 2021); *Betances v. Fischer*, 403 F. Supp. 3d 212, 223 (S.D.N.Y. 2019); *In re Snap Inc. Sec. Litig.*, 334 F.R.D. 209, 223 (C.D. Cal. 2019); *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship*, No. 8:16-CV-1622-T-AEP, 2019 WL 4751799, at *13 (M.D. Fla. Sept. 30, 2019).

In short, if a named plaintiff's claims are dismissed *prior* to the denial of class certification, some courts may allow putative class members to file new class claims despite *China Agritech*.

Courts Appear Inclined to Limit Tolling to Situations with a *Substantive* Denial of Class Certification—i.e.,

the Denial Was Not for Lack of the Named Plaintiffs' Standing

Courts further split based on whether class certification was substantively denied as opposed to denied based on the named plaintiff's lack of standing.

Prior to *China Agritech* in 2018, a number of courts analyzed how *American Pipe* tolling applied when the putative class claims were dismissed because the named plaintiff lacked standing. Courts reasoned that if a court considered class certification and denied it on an issue specific to the named plaintiff—*e.g.*, *Cunningham v. Insurance Co. of North America*, 515 Pa. 486, 492–93 (1987) (standing), and *Shields v. Washington Bancorporation*, No. CIV. A. 90-1101(RCL), 1992 WL 88004, at *2 (D.D.C. Apr. 7, 1992) (conflict of interest)—the putative class was still entitled to consideration of the class claims, which could be asserted by a new representative plaintiff. *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011). These courts held that when class certification was not denied on substantive grounds—but instead on a plaintiff-specific technicality or Rule 23 factor—intervenors or subsequent litigants were "entitled to tolling of the statute of limitations from the date the complaint was filed to the date the class certification was rejected." *Marable v. Dist. Hosp. Partners, L.P.*, No. 01-CV-02361 (HHK), 2007 WL 9697846, at *3 (D.D.C. May 29, 2007).

Other courts, such as the Eleventh Circuit, disagreed—reasoning that allowing endless tolling of class actions in search of a qualified class representative would defeat the purpose of the statute of limitations. *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994).

China Agritech did not resolve this tension. Based on the handful of cases mentioning "standing" in the context of *China Agritech*, it appears that courts are inclined to find that putative class member claims were *not* tolled when the representative plaintiff's claims were dismissed for lack of standing. *See, e.g.*, *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG*, 409 F. Supp. 3d 261, 271 (S.D.N.Y. 2019); *Evans v. Wal-Mart Stores, Inc.*, No. 2:10-CV-1224-JCM-VCF, 2019 WL 3325806, at *5 (D. Nev. July 23, 2019).

These cases reflect the tension between *American Pipe*'s limitation excluding tolling of claims dismissed for lack of standing and courts, such as the Third Circuit, practically reasoning that "[g]iven that *American Pipe* tolling would unquestionably apply were the plaintiffs here to bring individual actions, it would be at odds with the policy undergirding the class action device, as stated by the U.S. Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown." *Yang v. Odom*, 392 F.3d 97, 106 (3d Cir. 2004), *abrogated by China Agritech*, 138 S. Ct. at 1800.

In summary, if a court dismisses the named plaintiff for lack of standing, it is unclear how other courts may treat the claims of absent plaintiffs. The most recent trend seems to indicate that courts would find that the claims were *not* tolled, but this is a small sample set that could easily change as new cases are decided.

Refiling in State Court Likely Depends on Varying State Law

Like the unsettled questions regarding refiled claims in federal court, whether putative class members can refile otherwise time-barred class claims in *state* court likely depends on evolving state law rules regarding cross-jurisdictional tolling and applicable saving statutes.

Because *American Pipe* tolling applies to *federal* claims in *federal* courts, as a general rule, filing a class action in federal court generally does *not* automatically toll the limitations period for a subsequently filed diversity action or state court action alleging state law claims. 16 *Fed. Litigator* No. 3, 65, 66. Tolling of limitations periods applicable to state claims—whether subsequently alleged in state or federal court—based on a prior class action in federal court under diversity jurisdiction is, however, a question of state law. *Id.*; *Senger Bros. Nursery v. E.I. Dupont de Nemours & Co.*, 184 F.R.D. 674, 682 (M.D. Fla. 1999). There is a different rule for state law claims in federal court brought under supplemental jurisdiction that is beyond the scope of this article.

The state law doctrine of cross-jurisdictional tolling tolls the statute of limitations during the duration that a claim was pending before a different jurisdiction but not resolved on the merits. *See Vincent v. Money Store*, 915 F. Supp. 2d 553, 569–70 (S.D.N.Y. 2013). When a claim had previously been filed in another jurisdiction but was not resolved on the merits, a saving statute may also extend the statute of limitations a set number of days, *e.g.*, Kan. Stat. § 60-518, or extend the statute of limitations for the amount of time that the previous action had been pending, *e.g.*, Va. Code § 8.01-229(E)(1).

Recent case law suggests that the majority of state and territorial courts considering cross-jurisdictional tolling have applied some combination of cross-jurisdictional tolling or state saving statutes to preserve absent class members' claims. *Castillo v. St. Croix Basic Servs., Inc.*, 72 V.I. 528, nn.11–14 (Super. Ct. 2020) (collecting cases). But this is far from uniform. *E.g.*, *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 945 (Pa. Super. Ct. 2002) ("[W]e hold that the filing of a class action in another state does not toll the statute of limitations as to a subsequent action filed in Pennsylvania's state court system."); *Portwood v. Ford Motor Co.*, 183 Ill. 2d 459, 467 (1998) ("[W]e affirm the circuit and appellate courts' holding that the Illinois statute of limitations is not tolled during the pendency of a class action in federal court.").

In short, the issue is evolving, and often courts are inconsistent or use creative means to distinguish apparently conflicting legal precedent to achieve the desired outcome. *Compare Grimes v. Hous. Auth. of the City of New Haven*, 242 Conn. 236, 242–43 (1997) ("[W]e now adopt the rule set forth in *American Pipe & Construction Co.* . . ."), *with In re Syngenta AG Mir 162 Corn Litig.*, No. 14-MD-2591-JWL, 2018 WL 5620657, at *4 (D. Kan. Oct. 30, 2018) (holding that Connecticut would not apply *American Pipe* tolling).

Conclusion

Winning on a motion to dismiss for lack of subject matter jurisdiction does not necessarily mean that the case is finished. Wise and wary defense counsel will carefully consider how class claims may be relitigated as part of decisions on global case strategy.

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