

Update on Class Action Tolling for “Early Filers”: The Supreme Court Denies Certiorari in *In Re Hanford Nuclear Reservation Litig.* and Leaves Unresolved a Key Dispute Regarding the Tolling Rules for Statutes of Limitations Provided by Class Actions

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In the March-April 2006 issue of this journal appeared an article by Robert Stoll¹ and Scott Shorr entitled “Too Late and Too Early: The Inconsistent Tolling Rules for Statutes of Limitations Provided by Class Actions.”² The subject of that article was the tolling of individual statutes of limitation through the filing and maintenance of a class action. A pair of United States Supreme Court cases from 1974 and 1983, respectively – *American Pipe*³ and *Crown Cork*⁴ – established the general proposition that, when a class action is filed, it tolls the statute of limitations on the individual claims for putative class members until the time a court issues a decision regarding class certification. Another Supreme Court case, *Eisen v. Carlisle & Jacquelin*,⁵ seemed to extend tolling to actual class members who decide to opt out after a class is certified.

Late last fall, the Supreme Court appeared poised to fill in a gap that has only become apparent in the last ten years or so. The defendants in *In re Hanford Nuclear Reservation Litig.*⁶ had appealed a decision by the Ninth Circuit in which, among other things, the court held that *American Pipe* tolling applies to putative class members who elect to file separate suits prior to a determination on class certification. One of the questions presented by the defendants in their petition for certiorari was: “Whether the Ninth Circuit erred, and deepened an acknowledged circuit split, by holding that a putative class member who files an individual lawsuit while a motion for class certification is pending is nonetheless entitled to class action tolling.”⁷ On December 15, 2008, the Supreme Court denied certiorari, leaving unresolved an issue that appears to have created a split among the circuit courts.

As the 2006 article noted, since the late 1990s there have been an increasing number of courts, including the

U.S. District Court for the Southern District of New York in *In re WorldCom, Inc. Sec. Litig.*⁸ (later reversed by the Second Circuit), that have interpreted *American Pipe* and *Crown Cork* in such a way as to deny the benefits of class tolling to those who file individual actions prior to the class certification decision. According to the Southern District of New York’s Judge Cote in *WorldCom*, “[a]pplying the tolling doctrine to separate actions filed prior to class certification would create the very inefficiency that *American Pipe* sought to prevent.”⁹ The 2006 article explained that, however well-intentioned this particular interpretation may be, it is inconsistent with many of the purposes of class action tolling of individual statutes of limitation, as well as other, related class action jurisprudence.

Not surprisingly, the law has continued to develop – and rapidly so – since the spring of 2006. At that point in time, a number of district courts¹⁰ and the First and Sixth Circuits¹¹ had weighed in, almost universally against tolling for early filers. One of the few exceptions was the 1990 decision by the Northern District of Illinois in *Rochford v. Joyce*.¹² This trend appeared to shift beginning in August 2006 when the Western District of Missouri held in *Lehman v. United Parcel Servs., Inc.* that it could find “no basis in either Supreme Court or Eighth Circuit precedent for ruling that the statute of limitations should not be tolled because Lehman chose to sue sooner than he had to.”¹³ The District of Colorado came to the same conclusion in *Schimmer v. State Farm Mut. Auto. Ins. Co.*, also decided in August 2006.¹⁴ Then, in July 2007, the Second Circuit reversed the Southern District of New York’s 2003 decision in *WorldCom*.¹⁵ The Ninth Circuit in *In re Hanford* initially sided with the Sixth Circuit in a decision handed down in August 2007,¹⁶ apparently unaware of the Second Circuit’s then-recent decision,¹⁷ but reversed itself the following year.¹⁸ The Second and Ninth Circuits were later joined by the Tenth Circuit in *State Farm Mut. Auto. Ins. Co. v. Boellstorff*.¹⁹

As it stands now, there appears to be a split between the Second, Ninth and Tenth Circuits on the one hand, and the First and Sixth Circuits on the other.

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District court cases in the Third,²⁰ Fourth²¹ and Eleventh Circuits²² have also refused to apply *American Pipe* tolling to early filers, while at least one district court case from the Eighth Circuit – *Lehman*²³ – has gone the other way. There is a split among district courts in the Fifth Circuit,²⁴ and there are splits within the Northern District of Illinois²⁵ and within the District of Columbia.²⁶

The division among these courts results from their differing perceptions of the main purpose of the *American Pipe* tolling doctrine. Those courts that deny tolling to plaintiffs who file early argue that the primary objective of tolling is to reduce the total number of lawsuits filed. Quoting the later-reversed *WorldCom* decision, the Sixth Circuit held in *Wyser-Pratte Mgmt.*: “The parties and courts will not be burdened by separate lawsuits which, in any event, may evaporate once a class has been certified. At the point in a litigation when a decision on class certification is made, investors usually are in a far better position to evaluate whether they wish to proceed with their own lawsuit, or to join a class, if one has been certified.”²⁷

The courts that allow tolling for early filers, in contrast, view the reduction in lawsuits as merely “an incidental benefit of the *American Pipe* doctrine,” and focus on what they contend are the more significant interests at stake: the defendant’s right to notice; and an individual’s right to sue. Where an individual files an action prior to the certification decision, the defendant’s right to notice is unaffected, since the filing of the putative class action provided whatever notice was required. Moreover, giving individual plaintiffs the benefit of tolling preserves their right to sue at the time of their choosing. As the Second Circuit explained in *WorldCom*, “[t]he *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually.”²⁸ In the authors’ view, this is the correct rule and may signify the emerging trend.

The Tenth Circuit in *Boellstorff* also squarely addressed the multiplication-of-lawsuits argument advanced by some courts (and defendants), noting that a rule denying *American Pipe* tolling to early filers “has the potential to backfire:”

The rule would compel individual class members to make a choice as the limitations period for their individual claim approaches: file an individual action now or sit tight for a class certification decision, no matter how long it might take. Litigants in this bind might file placeholder suits rather than risk placing their individual actions on ice during a potentially prolonged class certification process.

Thus, ... [such a] rule might well precipitate a “needless duplication” of actions that would “deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” *American Pipe*, 414 U.S. at 553-54, 94 S.Ct. 756.²⁹

It is entirely possible that, if given the chance to revisit the issue, those courts that have thus far denied *American Pipe* tolling to early filers would change their position. After all, those courts have relied to a significant extent (although not exclusively) on district court cases from California and New York that are no longer good law. In fact, despite having denied tolling for early filers in two previous decisions – *Wachovia Bank & Trust Co.* and *In re Federal Nat’l Mortgage Assoc. Sec.*, – in August 2008 the District of Columbia in *Howard* bucked the prevailing trend in its district and adopted the reasoning of the Second and Ninth Circuits.³⁰

Despite the Supreme Court’s refusal to review *In re Hanford*, if the rift between the circuits continues to grow, the Court may soon have to resolve the issue once and for all. For now, whether a putative class member gets the benefit of *American Pipe* tolling where he or she files an individual action prior to a class certification decision all depends on where the individual case is filed.

ENDNOTES

1. Robert Stoll is a shareholder at Stoll Berne and co-author of the 2006 article. He is also a member of the *Class Action Reports* Editorial Board.

2. N. Robert Stoll and Scott Shorr, “Too Late and Too Early: The Inconsistent Tolling Rules for Statutes of Limitations Provided by Class Actions,” *Class Action Reports*, Vol. 27, No. 2 (March-April 2006).

3. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974).

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

5. 417 U.S. 156, 176 b. 13 (1974).

6. *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986 (9th Cir. 2008), cert. denied sub nom. E.I. du Pont de Nemours and Co. v. Stanton, No. 08-210, ___ S.Ct. ___, 2008 WL 3857665 (Dec. 15, 2008).

7. *E.I. du Pont de Nemours and Co. v. Stanton*, No. 08-210, Petition for Writ of Certiorari, 2008 WL 3862709, *1 (U.S. Aug. 15, 2008).
8. *In re WorldCom, Inc. Sec. Litig.*, 294 F.Supp. 2d 431, 451 (S.D.N.Y. 2003).
9. *Id.*
10. E.g., *id.*; *Kozlowski v. Sheahan*, 2005 WL 3436394, *3 (N.D. Ill. Dec. 12, 2005); *Calvello v. EDS*, 2004 WL 941809, *4-*5 (W.D.N.Y. Apr. 15, 2004); *In re Heritage Bond Litig.*, 289 F.Supp. 2d 1132, 1150 (C.D. Cal. 2003); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F.Supp. 2d 188, 221 (E.D.N.Y. 2003); *Rahr v. Grant Thornton, LLP*, 142 F.Supp. 2d 793, 799-800 (N.D. Tex. 2000); *Chinn v. Giant Food, Inc.*, 100 F.Supp. 2d 331, 335 (D.Md. 2000); *Stutz v. Minn. Mining & Mfg. Co.*, 947 F.Supp. 399, 404 (S.D. Ind. 1996); *Wachovia Bank & Trust Co. v. Nat’l Student Marketing Corp.*, 461 F.Supp. 999, 1012 (D.D.C. 1978), *rev’d on other grounds*, 650 F.2d 342 (D.C. Cir. 1980).
11. *Wyser-Pratte Mgmt. Co., Inc. v. Telxon*, 413 F.3d 553, 568-69 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983).
12. 755 F.Supp. 1423, 1428 (N.D. Ill. 1990).
13. 443 F.Supp. 2d 1146, 1151 (W.D. Mo. 2006).
14. 2006 WL 2361810, *6 (D. Colo. Aug. 15, 2006).
15. *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254-56 (2d Cir. 2007).
16. *In re Hanford Nuclear Reservation Litig.*, 497 F.3d 1005, 1026-27 (9th Cir. 2007).
17. Although the Ninth Circuit issued its decision more than two weeks after the Second Circuit reversed *WorldCom*, the court asserted that “the only circuit to have addressed the issue directly” was the Sixth Circuit in *Wyser-Pratte Mgmt.*, *supra* n. 12. *In re Hanford*, 497 F.3d at 1026.
18. *In re Hanford Nuclear Reservation Litig.*, 521 F.3d 1028, 1052-53 (9th Cir.), opinion amended and superseded, 534 F.3d 986 (9th Cir. 2008).
19. 540 F.3d 1223, 1232 (10th Cir. 2008).
20. E.g., *Ferguson v. Merck & Co., Inc.*, 2008 WL 205224, *14 n. 13 (E.D. Pa. Jan. 23, 2008); *Hubbard v. Correctional Med. Servcs., Inc.*, 2008 WL 2945988, *7-*8 (D.N.J. July 30, 2008).
21. *Chinn v. Giant Food, Inc.*, *supra* n. 11.
22. E.g., *McMillian v. AMC Mortgage Servcs., Inc.*, 560 F.Supp. 2d 1210, 1214-15 (S.D. Ala. 2008).
23. *Supra* n. 14.
24. Compare *Rahr v. Grant Thornton, LLP*, *supra* n. 11, and *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 465 F.Supp. 2d 687, 715-16 (S.D. Tex. 2006), with *In re Katrina Canal Breaches Consolidated Litig.*, 2008 WL 2692674, *3-*4 (E.D. La. July 2, 2008).
25. Compare *Rockford v. Joyce*, *supra* n. 13, and *Mason v. Long Beach Mortg. Co.*, 2008 WL 4951228, *2 (N.D. Ill. Nov. 18, 2008), with *Kozlowski v. Sheahan*, *supra* n. 11.
26. Compare *Wachovia Bank & Trust Co. v. Nat’l Student Marketing Corp.*, *supra* n. 11, and *In re Federal Nat’l Mortgage Assoc. Sec., Derivative and ERISA Litig.*, 503 F.Supp. 2d 25, 33 n. 7 (D.D.C. 2007), with *Howard v. Gutierrez*, 571 F. Supp.2d 145, 156 (D.D.C. 2008).
27. 413 F.3d at 569.
28. 496 F.3d at 256 (emphasis in original).
29. 540 F.3d at 1234.
30. See note 27, *supra*.