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ARTICLES

Three Circuits Say *Shady Grove* Requires *American Pipe* Tolling for Serial Class Actions: Are They Right?

By Brian Troyer – July 31, 2017

For more than 30 years, it has been settled that filing a putative class action tolls the statute of limitations for putative absent class members' individual claims. *See* *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). With some exceptions, however, courts did not extend tolling to repeated attempts at class certification. *See, e.g.*, *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015); *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994).

That has changed. Since 2011, three U.S. courts of appeals have held that *American Pipe* tolling applies to subsequent putative class claims the same way it applies to individual claims: *Resh v. China Agritech, Inc.*, 2017 U.S. App. LEXIS 9029 (9th Cir. May 24, 2017), *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015), and *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011). These courts interpreted earlier cases as disallowing subsequent class actions on preclusion rather than tolling grounds. In effect, these courts treat *Amerian Pipe* tolling as indivisible: If a court determines that a new plaintiff's individual claim is timely filed, the statute of limitations cannot prevent certification of a class.

This article submits that those courts' analysis is flawed because *American Pipe* tolling is itself judicial interpretation of Rule 23. The U.S. Supreme Court adopted the tolling rule to further Rule 23's efficiency purposes, and courts can define its scope. In any event, a circuit split has ripened, with the Sixth, Seventh, and Ninth Circuits adopting tolling for subsequent class actions and the Eleventh, on the other end of the spectrum, rejecting such tolling. The U.S. Supreme Court should resolve this split, especially in light of *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011), which held that absent class members are not bound by a prior class-certification denial. Narrow preclusion combined with broad tolling threatens defendants with more repetitive class litigation in the Sixth, Seventh, and Ninth Circuits.

Background

The U.S. Supreme Court held in *American Pipe* that filing a putative class action tolls the statute of limitations until class certification is denied for claims of absent class members who subsequently file their own claims. To the Court, "[a] contrary rule allowing participation [in subsequent litigation] only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." Thus, the tolling rule is an interpretation and application of Rule 23 itself, "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." In *Crown, Cork & Seal Co.*, the Court clarified that this rule applies to plaintiffs who file separate suits in addition to those who intervene.

American Pipe and *Crown* considered only individual claims filed after denial of class certification and not whether tolling would benefit a plaintiff who subsequently attempts to represent the same class. Beginning with *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), most courts held that *American Pipe* tolling did not apply to a subsequent putative class action. *E.g.*, *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988). The Eleventh Circuit has taken the strongest position against tolling, holding that there is no tolling for another class action, regardless why class certification previously failed. *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994). Other courts have held that tolling applies to putative class actions if the previous class-certification denial or other disposition was not based on a defect in the proposed class itself. *Great Plains Tr. Co. v. Union Pac. R.R.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1147-49 (9th Cir. 2000) (*en banc*).

There things stood for years, without a determination by the U.S. Supreme Court of how *American Pipe* tolling should apply, if at all, to subsequent putative class actions. Parties could, however, expect that tolling would render individual claims timely but would not apply to repetitive class actions following definitive denial of class certification (for example, for a lack of commonality).

Three Circuits Have Now Adopted Tolling for Subsequent Class Actions

But three circuits—the Sixth, Seventh, and Ninth—have now held that tolling applies to subsequent class claims, irrespective of why class certification previously failed. The split began with *Sawyer*, in which the Seventh Circuit held that a putative class action filed in state court (on federal claims) tolled the statute of limitations for a second putative class action filed after the first was voluntarily dismissed. The court rejected the argument that the *Korwek* line of cases established that tolling does not apply to subsequent class actions. Instead, the court read the *Korwek* line as rejecting subsequent class actions on grounds of issue preclusion:

> The opinions that Atlas Heating reads as holding that a plaintiff who relies on *American Pipe* to toll the statute of limitations cannot represent a class actually hold instead that a decision declining to certify a class in the first suit binds all class members, who cannot try to evade that decision by asking for a second opinion from a different judge. Class members must abide by the first court's understanding and application of Rule 23.

Sawyer, 642 F.3d at 563–64.

Under *Sawyer*, therefore, repeated attempts to pursue class actions in the Seventh Circuit were limited by a broad application of issue preclusion.

When *Sawyer* was decided (and it acknowledges this fact), *Smith v. Bayer Corp.* was pending before the U.S. Supreme Court, and the Court ultimately held, among other things, that absent members of a putative class are *not* bound by the denial of class certification from attempting certification of the same class in another case. The Seventh Circuit's dicta explanation in *Sawyer* that members of a class denied certification are bound by the denial thus did not survive long, as that court promptly recognized. *See Smentek v. Dart*, 683 F.3d 373 (7th Cir. 2012) (holding that a third class action was not precluded by comity under *Smith*).

The Seventh Circuit's broad view of tolling, however, did not die with its broad view of preclusion. Citing *Sawyer*, the Sixth Circuit held that tolling applies to a subsequent class action in *Phipps*. It reinterpreted its own precedent (*Andrews*) as barring a subsequent class action based on preclusion rules:

> The principle we draw from *Andrews* and the current case law we have discussed is that subsequent class actions timely filed under *American Pipe* are not barred [by the statute of limitations]. Courts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation [i.e., collateral estoppel], but we would eviscerate Rule 23 if we were to approve the blanket rule advocated by Wal-Mart that *American Pipe* bars all follow-on class actions.

Phipps, 792 F.3d at 652.

Recently, in *Resh*, the Ninth Circuit joined the Sixth and Seventh, holding that "the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred." The court also recognized that preclusion apply narrowly in subsequent class actions after *Smith* and that this leaves only practical restraints like financial incentives and comity on serial class actions. But the court found these factors adequate to address any potential problems of abuse.

Shady Grove **and Tolling**

The Seventh Circuit reasoned in *Sawyer* that the application of tolling to subsequent class actions is required by the Supreme Court's holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), that a state law bar against class actions for statutory penalties did not apply when the same claims were brought in federal court. The Sixth and Ninth Circuits, in *Resh* and *Phipps*, also adopted that reasoning.

This reasoning is unpersuasive given that the *American Pipe* tolling rule is itself a court-fashioned rule intended to promote Rule 23's efficiency purpose, not a conflicting rule of law against class actions; courts can define its scope. The U.S. Supreme Court called the tolling rule an interpretation of Rule 23, itself a rule of procedure adopted by the Court under the Rules Enabling Act. The tolling rule is not, however, a *mandatory* application of Rule 23, and the

Court could overrule *American Pipe* if it decided the rule was imprudent or inefficient. It follows that the Court should be able to determine the scope of its own rule, including limiting it to individual claims but not to repetitive putative class actions, if doing so is consistent with Rule 23's purpose and intent. The courts are, in this context, interpreting and applying their own rules to balance efficiency with due process.

This is very different from what happened in *Shady Grove.* The issue there was a conflict between a state law rule (no class actions for statutory penalties) and federal Rule 23. Four justices concluded that because Rule 23 was adopted under the Rules Enabling Act, it alone governed class certification, and New York's statutory prohibition did not apply in federal court. Justice Stevens concurred more narrowly after determining that the New York rule was procedural in nature and thus had to give way to Rule 23 in federal court. (For more on *Shady Grove*, see Matthew M.K. Stein's article in the Summer 2015 issue of this newsletter, "Under the *Shady Grove* of an Alabama Pine".)

There is no similar conflict between Rule 23 and "some other law" when the question is whether *American Pipe* tolling should apply to serial class actions. There is only a question of when, where, and how far the courts should extend the court-made tolling rule. In a tolling case, the claim is barred by the statute of limitations unless the court finds that allowing claims to be pursued serves Rule 23's purposes. Thus, when a court must decide whether *American Pipe* tolling permits a subsequent class action, it looks only at Rule 23, as interpreted in *American Pipe*, and asks what the tolling effect of the filing of the first action is *under Rule 23*.

Sawyer, *Phipps*, and *Resh* instead cast the issue as a conflict between Rule 23 and a statute of limitations. It isn't. If a plaintiff files an initial putative class action that is untimely, no one says Rule 23 prevents its dismissal, because Rule 23 determines whether a class action may be maintained. There is no conflict in that case between Rule 23 and a statute of limitations, and there is no reason to see the situation differently when *American Pipe* tolling is invoked to allow a plaintiff to pursue his or her individual claim—no reason why it follows that the second plaintiff must have a second attempt at representing a class. In that case, the refusal to extend tolling to subsequent class actions does not mean that Rule 23 has been ignored; to the contrary, an attempt to certify the claims under Rule 23 has already failed. In short, because the tolling rule is itself the U.S. Supreme Court's interpretation of Rule 23, it seems incongruous to say that courts cannot decide whether tolling for further attempts at class certification serves the same efficiency purposes as tolling for individual claims.

The Ninth Circuit implicitly recognized this issue in *Resh*. Notwithstanding the court's conclusion that tolling applies to subsequent class actions equally with individual claims, the last part of the court's opinion addresses whether "permitting future class action named plaintiffs" to benefit from the tolling rule "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." If tolling were the all-or-nothing rule the court concludes it is in its opinion up to that point, that should end the inquiry. The court could simply conclude,

without further analysis, that tolling applies. Instead, the court justifies the application of tolling to subsequent class actions as consistent with the purposes served by tolling. Thus, the Ninth Circuit implicitly acknowledges that tolling for subsequent class actions does not automatically follow tolling for individual claims. Its analysis of that question, however, is cursory at best.

The Preclusion Theory and *Smith*

What, then, about issue preclusion as a bar to serial class actions? It is debatable whether the Seventh Circuit was correct in explaining the *Korwek* line of cases on this basis. It is clearer that, after *Smith*, preclusion rules will rarely bar subsequent claims in typical circumstances. The Seventh Circuit's reasoning that putative absent class members are bound by a previous class-certification denial did not survive *Smith*'s holding that they are *not* bound. Thus, either preclusion rules do not explain the *Korwek* cases or, if those cases were based on preclusion rules, many of them would have to be decided differently after *Smith*.

Conclusion

Together, these developments represent a significant shift in the landscape of class litigation, leaving it more favorable to plaintiffs in the Sixth, Seventh, and Ninth Circuits. A few years ago, defendants could expect that statutes of limitations and preclusion rules generally would make serial putative class actions difficult to pursue. But that appears no longer to be the case, in these courts at least. *Smith* limits the application of preclusion rules, and now these courts have reinterpreted the tolling cases as preclusion cases and found that class tolling follows from individual tolling. The Ninth Circuit shrugged off the prospect of repetitive, protracted class litigation with assurances that plaintiffs and their attorneys "at some point will be unwilling to assume the financial risk of bringing successive suits." That is cold comfort to defendants in the real world, where seemingly unending wars of attrition are commonplace, as cases like *Phipps* and *Resh* themselves seem to prove. In courts like the Eleventh Circuit, by contrast, tacking of class actions under *American Pipe* will not be permitted. Because the split between circuits is now clear and well developed, and the consequences are significant, this issue seems ripe for U.S. Supreme Court review and clarification.

Brian Troyer is a partner at Thomson Hine LLP in Cleveland, Ohio.