CROSS-JURISDICTIONAL TOLLING: WHEN AND WHETHER A STATE COURT SHOULD TOLL ITS STATUTE OF LIMITATIONS BASED ON THE FILING OF A CLASS ACTION IN ANOTHER JURISDICTION.

David Bober*

Imagine two scenarios. In the first, a large class of people is injured by a widget manufactured by Big Corporation. A timely class action is filed in state court in the state of incorporation of Big Corporation, asserting state law claims. After extensive motion practice, class certification\(^1\) is ultimately denied (or, alternatively, class certification is initially granted, but reversed on appeal). The absent class members,\(^2\) perhaps having relied on their class representation, now wish to file individual claims in state court against the manufacturer, but the two-year statute of limitations on the personal injury claims has expired. Or has it? Is the statute of limitations for the absent class members tolled during the pendency of the class action?

---

* J.D. 2002, Seton Hall University School of Law; B.A. 1999, University of Pennsylvania. I would like to thank Professor Timothy Glynn for his helpful edits and suggestions on this piece, Mitchell Lowenthal for getting me thinking about this topic, and Professor Howard Erichson for getting me interested in procedure in the first place. I would also like to thank my family for their support throughout law school.

1 Most states have a procedure for certifying class actions that is similar to the federal rule. For example, in New Jersey, the relevant rule provides: “Order Determining Maintainability: As soon as practicable after the commencement of an action brought as a class action, the court shall determine whether it is to be so maintained. An order under this subdivision may be conditioned, and may be altered or amended before the decision on the merits.” N.J. COURT RULES, 1969 R. 4:32-2 (2001).

This is nearly identical to Federal Rule of Civil Procedure 23(c), which provides: “(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.” FED. R. CIV. P. 23(c)(1).

This is the procedure known as class certification.

2 By “absent class members,” I mean those plaintiffs who were a member of the class but not named class representatives.
Whether or not it is appropriate to allow tolling in this situation is a matter that has been vigorously debated, with no clear-cut resolution. But, now imagine a second scenario: the same class of people is injured by the same widget manufactured by the same Big Corporation. A timely class action is filed against Big Corporation in federal court. After extensive motion practice, class certification is denied. The absent class members now wish to file individual claims in state court, but the two-year statute of limitations on the personal injury claims has expired. Or has it? Does (or should) the state court toll the statute of limitations for absent class members during the pendency of this extra-jurisdictional class action?

This second scenario presents some unique issues that make the tolling of the statute of limitations for the individual action somewhat problematic. Some courts have been quick to recognize the problems inherent in this cross-jurisdictional tolling and have refused to allow it; others have weighed the issues and allowed it, and still others have ignored the problem completely. This Comment discusses methods in which several states have recently dealt with this issue, and analyzes the issues presented by cross-jurisdictional tolling in light of these decisions.

Part I of this Comment provides a history of tolling rules in class actions in general, dealing primarily with the Supreme Court’s ruling in the American Pipe case and its progeny. Part II gives a background of how the states have generally reacted to the American Pipe decision. Part III discusses recent state-law decisions on cross-jurisdictional tolling, which is different from American Pipe tolling. Part IV

---


4 Cross-jurisdictional tolling has been defined as “a rule whereby a court in one jurisdiction tolls the applicable statute of limitations based on the filing of a class action in another jurisdiction.” Primavera Familienstiftung v. Askins, 130 F. Supp. 2d 450, 515 (S.D.N.Y. 2001).


addresses the various policy concerns that defendants and plaintiffs typically have in the area of cross-jurisdictional tolling. Finally, Part V recommends that cross-jurisdictional tolling should only be allowed in very limited circumstances, such as when the class is knowable and definable, and the class action provides the defendant with actual notice of the claims against it.

I. BACKGROUND OF CLASS ACTION TOLLING: AMERICAN PIPE

A. American Pipe & Construction Company v. Utah

Any discussion of tolling in class actions must necessarily begin with American Pipe & Construction Company v. Utah and its progeny. American Pipe was an antitrust action in which the defendants in the case had been the subject of both criminal and civil complaints filed by the United States. The civil action resulted in a consent judgment, in which the defendants agreed to stop engaging in certain antitrust violations. Thereafter, eleven days before the running of the statute of limitations, the State of Utah filed a civil antitrust action against the defendants. Utah purported to represent a class that consisted of “public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from the defendants.” The trial court denied class certification for failure to satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a).

Eight days after the decision denying class certification, a group of towns and municipalities in the State of Utah moved to intervene

---

10 American Pipe, 414 U.S. at 540.
11 Id. at 540-41.
12 Id. at 541.
13 Id.
14 Id. at 542-44. The opinion of the district court can be found at 49 F.R.D. 17 (C. D. Cal. 1969).
15 The rule provides: “(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Interestingly, although the complaint alleged that the class contained over 800 members, the district court judge, “relying on his extensive experience in dealing with litigation involving the same defendants and similar causes of action, concluded that the number of entities which ultimately could demonstrate injury from the trade practices of the petitioners was far lower.” American Pipe, 414 U.S. at 543.
in Utah’s case.\textsuperscript{16} The district court denied their motion, but the Ninth Circuit Court of Appeals reversed.\textsuperscript{17} The Supreme Court granted certiorari to decide “a seemingly important question affecting the administration of justice in the federal courts,”\textsuperscript{18} whether the filing of the class action by Utah acted as a toll on the claims of the individual class members. The Supreme Court affirmed the decision of the Ninth Circuit,\textsuperscript{19} holding that the statute of limitations on the federal claims of individual class members is tolled during the pendency of a federal class action.\textsuperscript{20}

The primary reason for the Court’s decision in \textit{American Pipe} was efficiency.\textsuperscript{21} The Court stated: “[a] federal class action is no longer an invitation to joinder but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.”\textsuperscript{22} The Court added that a holding to the contrary would force absent class members to file individual actions—“precisely the multiplicity of activity which Rule 23 was designed to avoid.”\textsuperscript{23} Thus, the impetus for the \textit{American Pipe} holding was that a contrary holding would burden an already overburdened court system with needless duplicative litigation.\textsuperscript{24} Absent class members would be forced to file individual actions as the expiration of the period of limitations drew near, or risk losing their right to sue if the class was not ultimately certified. Furthermore, the Court extended its holding to cover those absent class members who were not even aware of the

\textsuperscript{16} \textit{American Pipe}, 414 U.S. at 543-44.
\textsuperscript{17} \textit{Id.} at 544.
\textsuperscript{18} \textit{Id.} at 545.
\textsuperscript{19} \textit{Id.} at 561.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{See Crouch, Cork & Seal}, 462 U.S. at 349 (stating that one reason for holding in \textit{American Pipe} was “promotion of efficiency and economy of litigation”); \textit{Chardon}, 462 U.S. at 661 (“\textit{American Pipe} simply asserts a federal interest in assuring the efficiency and economy of the class action procedure”); \textit{see also Comment, Failure of Named Representatives in a Class Action to Satisfy the Statute of Limitations}, 67 U. Chi. L. Rev. 805 (2000) (“The \textit{American Pipe} tolling rule promotes the efficiency goals of Rule 23: if the statute of limitations continued to run for putative class members after the filing of the action, putative class members would need to file duplicative and wasteful individual actions to preserve their legal rights.”).
\textsuperscript{22} \textit{American Pipe}, 414 U.S. at 550 (internal quotation marks omitted).
\textsuperscript{23} \textit{Id.} at 551.
\textsuperscript{24} \textit{See American Pipe}, 414 U.S. at 553-54. The Court wrote:
A contrary rule allowing participation 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 the principal purpose of the procedure. . . . [A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.
pendency of a class action, reasoning that Rule 23 is designed to provide relief to all class members, regardless of their awareness of the ongoing action. Absent class members can therefore file individual actions after the passing of the statute of limitations and rely on a previous class action to toll their current statute of limitations, even if they were never aware of the existence of such a class action when the statute of limitations expired. This gives plaintiffs a remarkable power to extend the life of their claims.


In American Pipe, the Supreme Court held that the time in which an absent class member can intervene is tolled during the pendency of the class action. In the years that followed, the Ninth and Second Circuits held that tolling should only apply to absent members who seek to intervene, and not to those who seek to file individual actions. In response to these decisions, the Supreme

---

25 See American Pipe, 414 U.S. at 551-52. The Court wrote:
We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit. Rule 23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action.

26 Id.

27 See, e.g., Lowenthal and Feder, supra note 3, at 540 (“American Pipe thus invested civil litigants with unusual power. Merely by filing a pleading labeled a ‘class action,’ the Court enabled individual litigants to alter the otherwise applicable limitations period affecting asserted claims. This is heady stuff where the limitations period is selected by a court . . . but even more so when the period of limitations is set by Congress – as was the case in American Pipe.”) (footnotes omitted).

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

29 See Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982) (Kennedy, J.), vacated and remanded, 463 U.S. 1201 (1983).

30 Stull v. Bayard, 561 F.2d 429 (2d. Cir. 1977); Arneil v. Ramsey, 550 F.2d 774 (2d. Cir. 1977).

31 The decision in Pavlak provides a good basis for the reasoning of the Ninth and Second Circuits in this regard. In Pavlak, the plaintiff sued the Boise police department and others, alleging violations of 42 U.S.C. § 1983. Pavlak, 681 F.2d at 618. The complaint sought damages and injunctive relief for alleged “unauthorized surveillance of [plaintiff’s] private telephone conversations.” Id. The plaintiff’s claim would have been barred by the applicable statute of limitations, but the plaintiff relied on American Pipe in arguing that the plaintiff’s inclusion in a previous class action on substantially the same issue should act as a toll on the statute of limitations, thus allowing her to go forward with her claims. Id. The Ninth Circuit,
Court decided *Crown, Cork & Seal*, an employment discrimination case. The plaintiff in *Crown, Cork & Seal* was a black male who had received a right-to-sue letter from the Equal Employment Opportunity Commission. He filed suit in federal district court, but the case was dismissed because he had not filed within the required ninety-day period after receiving his right-to-sue letter. The United States Court of Appeals for the Fourth Circuit reversed. Relying on *American Pipe*, the court of appeals held that the ninety-day period was tolled during the pendency of a putative class action that had been filed before the plaintiff had received his right-to-sue letter. The Supreme Court noted that this created a circuit split with the Second and Ninth Circuits, which had held that the statute of limitations was tolled only for interveners, and not for individual filers. The Court stated that it granted certiorari to resolve the conflict.

The Court affirmed the decision of the Fourth Circuit, holding that the statute of limitations on an individual action is tolled just as the period in which to intervene is tolled. The Court rejected the reasoning of the Ninth and Second Circuits, stating that “[t]here are many reasons why a class member, after denial of class certification, might prefer to bring an individual suit rather than intervene.” Accordingly, the Court stated that “[t]he filing of a class action tolls the statute of limitations as to all asserted members of the class.”

Justice Powell, joined by Justices Rehnquist and O’Connor,

in an opinion authored by then-Judge Kennedy, disagreed. *Id.* The court first acknowledged that there are two primary reasons for the tolling rule announced by *American Pipe*: (1) fairness to plaintiffs who relied on the class action and expected it to continue as such, and (2) judicial economy and efficiency. *Id.* at 620. Judge Kennedy declared, however, that neither reason avails a plaintiff who chooses to file an individual suit, rather than intervene. *Id.* Judge Kennedy reasoned that when a class member relies on a class action, equity and fairness should allow him to intervene in the lawsuit in the event the class is not certified. *Id.* However, according to the Ninth Circuit, those same principles should not operate to allow the class member to file a separate action after the limitations period has expired, because the plaintiff should not be allowed to benefit from the filing of a class action that she has purposely opted out of. *Id.* Thus, the Ninth Circuit reasoned that its decision would promote judicial economy by encouraging intervention over the filing of individual actions. *Id.*

*32* *Crown, Cork & Seal*, 462 U.S. at 347.

*33* *Id.* at 348.

*34* *Id.*

*35* *Id.*

*36* *Id.*

*37* *Id.* at 349.

*38* *Id.* at 353-54.

*39* *Id.* at 350.

*40* *Id.* at 350 (citing *American Pipe*, 414 U.S. at 554) (quotation omitted)).
conceded. The concurrence noted that the American Pipe rule "is a generous one, inviting abuse." Justice Powell was concerned that the rule could be interpreted to allow plaintiffs to bring claims that were only tangentially related to the class action, and he warned that those claims of which the defendant was not placed on notice should not benefit from tolling under American Pipe and should be barred by the statute of limitations.

In Chardon v. Fumero Soto, the Court dealt with the question of what statute of limitations a federal court should apply when Congress has not created a federal one. In Chardon, a class action was filed against the defendants on behalf of Puerto Rican education officials, alleging violations of 42 U.S.C. § 1983. The class action was filed shortly before the expiration of the applicable statute of limitations. Class certification was denied on August 21, 1978 because the class failed to satisfy the requirement of numerosity. In January 1979, several individuals who would have been class members filed individual actions. The parties agreed that the statute of limitations was tolled during the pendency of the class action, but they disagreed on the exact effect of the tolling. Under Puerto Rican law, the one-year statute of limitation would have begun to run anew after the denial of class certification, and thus the individual actions would have been timely. By contrast, under federal law, the running of the statute of limitations was merely suspended by the filing of the class action, and began to run again when class certification was denied. Thus, the individual actions would have been untimely had federal tolling law applied. The Court of Appeals for the First Circuit noted the difference between the Puerto Rican tolling convention and the federal common law rule of

41 Id. at 354 (Powell, J., concurring).
42 Justice Powell wrote: "[t]he rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims . . . [C]laims as to which the defendant was not fairly placed on notice by the class suit are not protected under American Pipe and are barred by the statute of limitations." Id. (Powell, J., concurring).
43 Chardon, 462 U.S. 650.
44 Id. at 651-52.
45 Id. at 651.
46 Id. at 652.
47 See supra note 15.
48 Id. at 652-53.
49 Id. at 654.
50 Id. at 653.
51 Id.
52 Id.
suspension.\textsuperscript{55} The court concluded that application of the Puerto Rican law would not violate any federal policy, and would be consistent with the policies of repose and federalism that the Supreme Court had emphasized in statutes-oflimitations cases.\textsuperscript{54}

The petitioners in the Supreme Court urged a reversal of the First Circuit, arguing that \textit{American Pipe} had established a uniform federal rule of decision requiring suspension of the statute of limitations, rather than renewal.\textsuperscript{55} The Court rejected this argument.\textsuperscript{56} The Court explained that in \textit{American Pipe}, "federal law defined the basic limitations period, federal procedural policies supported the tolling of the statute during the pendency of the class action, and a particular federal statute provided the basis for deciding that the tolling had the effect of suspending the limitations period."\textsuperscript{57} The Court distinguished \textit{American Pipe} from \textit{Chardon} by noting that \textit{Chardon} dealt with a § 1983 violation, where Congress had not provided a statute of limitations.\textsuperscript{58} Nonetheless, the Court stated that 42 U.S.C. § 1988\textsuperscript{59} directed federal courts to borrow state statutes of limitations and state tolling rules unless such rules are "inconsistent with the Constitution and laws of the United States."\textsuperscript{60}

Accordingly, the Court affirmed the decision of the First Circuit, holding that the lower court "correctly rejected the argument that \textit{American Pipe} establishes a uniform federal rule of procedure that

\begin{itemize}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 654.
\item \textsuperscript{55} \textit{Id.} at 656.
\item \textsuperscript{56} \textit{Id.} at 662.
\item \textsuperscript{57} \textit{Id.} at 660-61.
\item \textsuperscript{58} \textit{Id.} at 661.
\item \textsuperscript{59} The statute provides, in pertinent part:
\begin{itemize}
\item (a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of title 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the case, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.
\end{itemize}
\item \textsuperscript{59} 42 U.S.C.A. § 1988(a) (West 1995).
\item \textsuperscript{60} \textit{Chardon}, 462 U.S. at 661.
\end{itemize}
mandates suspension rather than renewal whenever a class action tolls a statute of limitations.\textsuperscript{64} The Court concluded by stating that Congress had provided that § 1983 class actions brought in different states will be subject to different statutes of limitations and different tolling rules, and that federal courts must continue to borrow state law until Congress decided otherwise.\textsuperscript{62} Chardon thus established that when a class action is based on federal law, and that law does not provide the law either on the statute of limitations or on tolling, a federal court should look to state law to decide those questions.\textsuperscript{63}

II. AMERICAN PIPE IN THE STATES

The rule established by American Pipe and its progeny applies to federal claims brought in federal court, and therefore should not affect whether the individual states choose to adopt a similar tolling rule.\textsuperscript{64} Nonetheless, state courts have often looked to American Pipe for guidance in deciding whether tolling should be allowed under their own class action rules, often adopting an American Pipe rule for the state, based on the similarity between state and federal class action rules.\textsuperscript{65}

As a preliminary matter, several commentators have argued that American Pipe should not apply universally to all class actions.\textsuperscript{66} Such commentators argue that whether tolling is appropriate in any case filed after a class action depends on whether the first action provided

\textsuperscript{64} Id. at 662.

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{64} When federal courts sit in diversity on state-law claims, their decisions on tolling are governed by state law under the Erie doctrine. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Byrd v. Blue Ridge, 356 U.S. 525 (1958); Hannah v. Plummer, 380 U.S. 460 (1965). The Erie doctrine requires federal courts to apply state statutes of limitations when sitting in diversity, as well as state tolling rules. See 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1056 (2002) ("In diversity of citizenship cases . . . state law governs the tolling of the statute of limitations under the doctrine of Erie Railroad Company v. Tompkins and its progeny."); In re Norplant Contraceptive Prods. Liab. Litig., 173 F.R.D. 185, 189 n.10 (E.D. Tex. 1997) ("[A]pplication of an equitable tolling doctrine in a diversity action is an issue of state law.").

\textsuperscript{66} For examples of such cases, see infra note 75.

\textsuperscript{66} See, e.g., Lowenthal & Feder, supra note 3; Ian Gallacher, Representative Litigation in Maryland: The Past, Present, and Future of the Class Action in State Court, 58 Md. L. Rev. 1510, 1550-51 (1999) ("The rule of American Pipe is not without its critics, and should not be blindly adopted."); Note, Statutes of Limitations and Opting Out of Class Actions, 81 Mich. L. Rev. 999, 403-04 (1982) (arguing that "one who opts out of a class action should not benefit from tolling for the time during which the individual was a class member.").
the defendant with notice of the claims against it, which, in turn, depends on the circumstances of the class action.\textsuperscript{67} There is a considerable difference, for example, between a securities fraud class action based on fraud or misrepresentation and a mass tort product liability class action. In the first type of class action, the identity of the named plaintiffs is often unimportant or immaterial.\textsuperscript{68} The filing of the class action puts the defendant on notice that it should preserve the information it has regarding the particular securities offering in question, as the case will most likely turn upon the materiality of the alleged misrepresentations. Tolling the statute of limitations for absent class members in a case such as this makes some sense, as protective filings by individual class members could lead to truly duplicative litigation. That the substance of the case will turn on actions by the defendants, coupled with the lack of a requirement that plaintiffs show actual reliance, has allowed this type of class action to satisfy the predominance and superiority requirements of Rule 23(b)(3).

Securities fraud actions, however, are a different matter than the typical mass tort/product liability class action.\textsuperscript{70} In these cases, while

\textsuperscript{67}See sources cited in note 66, supra.

\textsuperscript{68}This is especially true due to the fraud-on-the-market theory, by which plaintiffs do not have to show reliance on the misrepresentations. See Basic, Inc. v. Levinson, 485 U.S. 224 (1988). The Supreme Court in Levinson adopted a fraud-on-the-market theory for all 10b-5 actions, by which plaintiffs need not show actual reliance on alleged misrepresentations. Id. A plaintiff need only show that that misrepresentations were material and that a reasonable shareholder would consider it important in making decisions. Id. The causal connection is presumed, because "an investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price." Id. at 247. Thus, any buyer or seller of stock can bring suit, regardless of whether he relied on the alleged misrepresentations. In that sense, it really does not matter who the plaintiff is, because the case will turn on the alleged misrepresentations by the defendant, and not anything that the plaintiff did.

\textsuperscript{69}The predominance and superiority requirements are set forth in Federal Rule of Civil Procedure 23(b)(3), which states, in pertinent part: "An action may be maintained as a class action if . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient resolution of the controversy." Fed. R. Civ. P. 23(b)(3).

\textsuperscript{70}The differences between securities-type class actions and mass tort class actions have been written about extensively. It is generally recognized that the two different types of class actions seek to achieve different purposes. Securities class actions are thought to promote deterrence, whereas the primary justification for mass tort class actions is compensation. See John C. Coffee, Jr., Class Wars, The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343 (1995). Professor Coffee explains that "[i]n [securities and antitrust] contexts, commentators largely have agreed that deterrence, not compensation, should be the rationale for the class action, and they have doubted that compensation is likely to be achieved. . . . In the mass tort context, however, the participants at least perceive compensation to be the primary
the filing of a class action does put the defendant on notice that there may be claims against it for harm allegedly caused by a particular product, or by a particular occurrence, the defendant is often unaware of the identities of the plaintiffs, and in most cases has no way of knowing. 71 While the defendant should do all it can to preserve its discoverable information about the manufacture of the product, the class action in no way puts it on notice of the individual nature of the absent class members' claims: the capacity in which the absent plaintiffs used the product, aggravating or mitigating factors, damages, and a host of other factors that are specific to each individual plaintiff. 72 If the statute of limitations for the absent class members is tolled, and certification is ultimately denied, the defendant will potentially have to face a barrage of stale claims. 73 These are the exact types of claims that the doctrine of statute of limitations is designed to prevent. As such, tolling is arguably

objective." Id. at 1355 (footnotes omitted). The rationale behind this idea is that often the claims in securities and antitrust actions are too small to permit any individual litigant to go through the time and expense of filing an individual action. On the other hand, in the context of mass torts, each individual claimant usually has an injury that is serious enough to warrant an individual lawsuit. See, e.g., id.

71 Mass torts were originally thought to be presumptively incapable of treatment in a class action. The comment of the Rules Advisory Committee stated:

A mass accident resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.


72 In fact, certification is often denied in this type of case for the very same reasons noted above: a class action is not superior to individual actions because plaintiffs' claims are too particular to justify class treatment. A host of federal cases have denied certification on this basis. See, e.g., Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); In re Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996); In re General Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Lit., 55 F.3d 768 (3d Cir.); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir.). See also supra note 71.

73 See, e.g., Brenner Group v. Seaboard Surety Co., No. 00 C 306, 2001 U.S. Dist. LEXIS 6638 (N.D. Ill. May 15, 2001) ("By refusing to toll the statute of limitations . . . courts are spared the task of litigating a difficult question based on very stale evidence.").
inappropriate in the context of any mass tort class action.\textsuperscript{74}

The differences between types of class actions notwithstanding, some state courts, rightly or wrongly, have seen wisdom in \textit{American Pipe}'s tolling rule, and have universally applied it to all actions filed after class actions, no matter the type.\textsuperscript{75} Others are more ambiguous

\begin{itemize}
\item[\textsuperscript{74}] For an argument that courts should never allow tolling after a mass tort class action, see Lowenthal & Feder, \textit{supra} note 3. They write:
\begin{quote}
The costs of class action tolling are exorbitant, at least when applied to modern mass tort litigation. The individual nature of the personal injuries that lie at the core of most mass tort actions prevents the class action defendant from gathering the evidence necessary to test and challenge absent plaintiffs' claims. Indeed, the defendants generally do not even know the identity of the absent class members and, therefore, are unable to discover evidence about that claimant, or marshal appropriate medical, economic, and other witnesses to comment on that claimant's circumstances.
\end{quote}

Lowenthal & Feder, \textit{supra} note 3, at 537.
\item[\textsuperscript{75}] One good and recent example is \textit{Grimes v. Housing Auth. of New Haven}, 698 A.2d 302 (Conn. 1997). There, the plaintiffs filed an action for personal injuries stemming from the defendants' failure to provide their apartment with hot water. \textit{Id.} at 304. Specifically, seven-year-old Delores Grimes alleged she was badly scalded by hot water she was transporting from the stove to the bathroom, and that she would not have been injured but for the negligence of the defendants in failing to provide the Grimeses with hot water. \textit{Id.} at 305. Grimes and her mother filed the action six years after the injury, arguing that the Connecticut Supreme Court should adopt an \textit{American Pipe} rule for Connecticut and hold that the period for filing had been tolled by the pendency of a class action that had been filed a year before their injuries. \textit{Id.} The previous class action contained no allegations of negligence or personal injuries; rather, it merely sought the equitable remedy of an injunction ordering the defendants to provide the building with sufficient heat. \textit{Id.} at 306. Moreover, the class in the class action was limited to "those tenants who resided at Elm Haven between November 1, 1981 and March 31, 1982," while the Grimes did not move in until September 4, 1982. \textit{Id.} Nevertheless, the Connecticut Supreme Court adopted \textit{American Pipe} and allowed the individual personal injury suit to proceed, even though the previous class action had not sought any damages for personal injuries, but rather only for "compensatory damages" stemming from the lack of hot water. \textit{Id.} at 307-08. The court theorized that the defendants were on notice of the personal injury claims, because general damages need not be specifically pleaded. \textit{Id.} Responding to Justice Powell's concern in his concurrence in \textit{Crown, Cork & Seal} that the \textit{American Pipe} rule "should not be read . . . as leaving a plaintiff free to raise different or peripheral claims," \textit{Crown, Cork & Seal}, 462 U.S. at 354, the court stated it chose to construe the class action complaint "broadly and realistically, rather than narrowly and technically." \textit{Grimes}, 698 A.2d at 310 (citation omitted).

The court in \textit{Grimes} also found validation in stating that Connecticut's class action rules, "like [federal] rule 23, are designed to increase efficiencies in civil litigation by encouraging multiple plaintiffs to join in one lawsuit." \textit{Id.} at 306. For other state highest court decisions adopting \textit{American Pipe} tolling rules in part because of the identity between the state class action rule and the federal rule, see, e.g., Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1041 (Alaska 1981) (adopting \textit{American Pipe} rule "in light of the identity between [Alaska's] Civil Rule 23 and the federal rule"); Riddle v. State ex rel. State Firefighters Pension & Ret. Sys., 2001 Ok. LEXIS 50, *22 n.30 (Ok. May 8, 2001) (noting that allowance of toll "comports" with
\end{itemize}
on the question,\textsuperscript{76} and still others have outright rejected an overarching application of \textit{American Pipe}.\textsuperscript{77} A good example of the latter is California. In \textit{Jolly v. Eli Lilly & Co.},\textsuperscript{78} the plaintiff, Christine Jolly, alleged that she was injured by her mother’s ingestion of estrogen diethylstilbestrol (DES) while she was \textit{in utero}.\textsuperscript{79} Jolly was born in 1951, did not discover she was a DES daughter until 1972,

\begin{flushright}
\end{flushright}

\textsuperscript{76} In New York, for example, there is at least some support for the position that New York state courts would follow something similar to the \textit{American Pipe} rule and toll the period in which to bring individual claims. In \textit{Sutton Carpet Cleaners v. Fireman’s Ins. Co.}, 68 N.Y.S.2d 218 (Sup. Ct. 1947), aff’d, 78 N.Y.S.2d 565 (App. Div. 1948), aff’d, 299 N.Y. 646 (1949), the Bronx Supreme Court asserted “the law undoubtedly is that a representation action timely brought saves all represented claims from the running of the statutory or contractual period of limitations.” \textit{Id.} at 224. A leading treatise on New York practice has cited \textit{Sutton Carpet Cleaners} for the tolling proposition, and asserts that the claims of absent class members are indeed tolled, as if it were a matter of black letter law. See 1-7 \textsc{Weinstein et al.}, CPLR MANUAL § 7:07 (“the personal claim of a class member will not be time barred because the statute of limitations is tolled by the class action”) (citing \textit{Sutton Carpet Cleaners}); see also Cullen v. Margiotta, 811 F.2d 698, 719 (2d Cir. 1987) (“New York courts . . . have long embraced the principles of \textit{American Pipe}”) (citing \textit{Sutton Carpet Cleaners}). This position seems a bit dubious, given that \textit{Sutton Carpet Cleaners} has only been cited four times in fifty-three years by New York state courts. See \textit{Clifton Knolls Sewerage Disposal Co. v. Aulenbach}, 451 N.Y.S.2d 907, 908 (App. Div. 1982); \textit{O’Brien v. Provident Loan Soc’y}, 302 N.Y.S.2d 889, 894 (Civ. Ct. 1969); \textit{Soffer v. Glickman}, 209 N.Y.S.2d 743, 749 (Sup. Ct. 1961); \textit{McCord v. Broadcast Music, Inc.}, 84 N.Y.S.2d 185, 187 (Sup. Ct. 1948). Indeed, one of the four cases that have cited \textit{Sutton Carpet Cleaners}, only one citation is even remotely for the proposition that the individual claims of class members are tolled. See \textit{Clifton Knolls}, 451 N.Y.S.2d at 908 (“Since the statute of limitations on each of plaintiff’s claims against defendants was tolled during the pendency of this class action . . .”) (citing \textit{Sutton Carpet Cleaners}). Even this case does not really stand for the proposition that the statute of limitations is tolled for absent plaintiffs, because it involved a defendant class. Similarly, \textit{American Pipe} itself has only been cited twelve times by New York state courts (twice by the New York Court of Appeals), and never for the proposition that New York adopts the \textit{American Pipe} rule. See \textit{O’Hara v. Bayliner}, 679 N.E.2d 1049, 1054 (N.Y. 1997); \textit{New York City Health & Hosps. Corp. v. McBarnette}, 639 N.E.2d 740, 746 (N.Y. 1994); \textit{Altman v. Fortune Brands, Inc.}, 701 N.Y.S.2d 615, 615 (App. Div. 2000); \textit{Singer v. Eli Lilly & Co.}, 549 N.Y.S.2d 654, 655 (App. Div. 1990); \textit{Hoerger v. Bd. of Educ.}, 471 N.Y.S.2d 139, 143 (App. Div. 1983); \textit{Yollin v. Holland Am. Cruises, Inc.}, 468 N.Y.S.2d 873, 875 (App. Div. 1983); \textit{Douglas v. Arthur Anderson & Co.}, 416 N.Y.S.2d 751, 752 (App. Div. 1979); \textit{Lincoln First Bank v. Rupert}, 400 N.Y.S.2d 618, 620 (N.Y. App. Div. 1977); \textit{Campos v. Asbestos Spray Corp.}, 527 N.Y.S.2d 683, 685 (Sup. Ct. 1988); \textit{Huebner v. Caldwell & Cook, Inc.}, 526 N.Y.S.2d 356, 359 (Sup. Ct. 1988); \textit{Public Loan Co. v. Hyde}, 990 N.Y.S.2d 971, 973 (Sup. Ct. 1977). There is no controlling New York case that unequivocally adopts an \textit{American Pipe} rule for the State of New York, and as such it should remain an open question.

\textsuperscript{77} See, e.g., \textit{Jolly v. Eli Lilly Co.}, 751 P.2d 923 (Cal. 1988).

\textsuperscript{78} 751 P.2d 925 (Cal. 1988).

\textsuperscript{79} \textit{Id.} at 925.
and brought suit in 1981. Relying on American Pipe, she argued that the filing of a previous class action against DES manufacturers should toll the statute of limitations on her individual action. The California Supreme Court disagreed.

The court began its opinion by briefly surveying the Supreme Court’s decision in American Pipe. The court stated that there were “two major policy considerations” present in American Pipe. The first was the protection of the class action device . . . a rule that failed to protect putative class members from the statute of limitations after denial of certification would induce potential class members to file protective motions to intervene or to join in the event that a class was later found unsuitable. . . . The second consideration involved the effectuation of the purposes of the statute of limitations.

The court noted that these two policy considerations, protection of putative class members and protection of the purposes of the statute of limitations, are in inherent conflict. The court stated that some state courts deciding the issue have concentrated on the protection of the class action device, holding that “litigative efficiency . . . transcends the policies of repose and certainty behind statutes of limitations.” Others, wrote the court, have focused on protection of the statute of limitations, and “thus inquire whether the defendant

---

80 Id. at 925-26.
81 Id. at 933.
82 Id.
83 Id.
84 Id. at 934.
85 Id. at 935 (citations and quotations omitted). The “purposes” of the statutes of limitations to which the court refers were well stated by the Supreme Court in 1913, in terms equally applicable today: “The policy of statutes of limitation is to encourage promptness in the bringing of actions that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory.” Missouri, Kansas, & Texas Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913); see also Comment, Failure of Named Representatives in a Class Action to Satisfy the Statute of Limitations, 67 U. Chi. L. Rev. 805, 827 (2000) (“The American Pipe tolling rule simultaneously preserves the traditional purposes of statutes of limitations. When a named representative commences a class action within the statutory period, she notifies the defendants of the type of claim being brought and the approximate scope of those claims. This notice prevents unfairness to the defendant and gives the defendant an opportunity to preserve relevant evidence.”); Comment, Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants, 40 EMORY L.J. 611, 634 (1991) (arguing, in context of defendant class actions, that when tolling is allowed after filing of class action, “defendant absentees are denied the very purposes of the statute of limitations: notice and repose”).
86 Jolly, 751 P.2d at 935.
87 Id. (citations and quotations omitted).
received notice of a subsequent plaintiff’s claim from the prior class suit.\footnote{\textit{Id.} (citations omitted).} Still others, stated the court, simply hold that the statute of limitations is tolled in all circumstances, “eliminating discussion of the reason for denial of class status or the notice issue.”\footnote{\textit{Id.} (citations omitted).}

Finally, the court, taking both policy concerns into consideration, declined to extend the \textit{American Pipe} rule to Jolly’s case.\footnote{\textit{Id. at 955-36.}} The court was concerned that, in the context of a mass tort, neither policy consideration would be served by allowing tolling.\footnote{\textit{Id. at 936.}} The court seemed principally concerned with the issue of notice to the defendant.\footnote{\textit{Id.}} The court wrote:

because personal-injury mass-tort class-action claims can rarely meet the community of interest requirement in that each member’s right to recover depends on facts peculiar to each particular case, such claims may be presumptively incapable of apprising defendants of “the substantive claims being brought against them,” a prerequisite, in our view, to the application of \textit{American Pipe}.\footnote{\textit{Id. at 937 (citations omitted).}}

The court continued:

This being so, putative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. The presumption, rather, should be to the contrary — i.e. that lack of commonality will defeat certification and preclude application of the \textit{American Pipe} tolling doctrine.\footnote{\textit{Id. at 937-38.}}

The court was also concerned with the individual nature of the plaintiff’s claims.\footnote{\textit{Id. at 936.}} In this particular case, the court noted “differences in issues of fact and law — plaintiff’s action for damages puts into issue the prenatal treatment of her mother, the specific form of DES prescribed . . . the dosage taken, her mother’s obstetrical history and many other issues necessarily involved in proving causation, damages and defenses . . . .”\footnote{\textit{Id. at 936.}} The \textit{Jolly} case thus stands as an example of a court inquiring into the type of class action that was previously filed before allowing the individual claims of a plaintiff to be tolled.

\footnote{\textit{Id.}}
The application of the American Pipe tolling rule to individual actions filed after class actions when the two cases are in the same forum, however, is different from a situation where the actions are filed in different forums, and states have accordingly analyzed the issues somewhat differently. 97 This is the issue of cross-jurisdictional tolling.

III. DECISIONS ON CROSS-JURISDICTIONAL TOLLING

A. Courts That Have Rejected Cross-Jurisdictional Tolling

Some courts that have addressed the issue recently have rejected a cross-jurisdictional tolling rule for their respective states. For example, in Portwood v. Ford Motor Co., 98 the Illinois Supreme Court specifically dealt with the issue of cross-jurisdictional tolling under the following circumstances: In 1981, nearly two decades before the Portwood decision, a putative class action against the Ford Motor Company was filed in federal court for the District of the District of Columbia, alleging property damage as a result of a faulty transmission mechanism in certain Ford automobiles. 99 The district court originally certified the class, only to be reversed on appeal. 100 The district court then found class certification was improper, and also dismissed the case for lack of federal jurisdiction. 101

Ten years after the suit was originally filed, the plaintiffs again filed a putative class action, this time in Illinois state court. 102 The plaintiffs argued that the applicable statute of limitations was tolled by the pendency of the federal class action, but the trial court granted Ford's motion to dismiss the claims as untimely. 103

---

97 See, e.g., Steven Glickstein & Lori Leskin, For Whom the Statute of Limitations Tolls, NEW JERSEY LAW JOURNAL, December 3, 2001 ('In deciding the equitable tolling question, some courts have distinguished between 'intra-jurisdictional' and 'cross-jurisdictional' tolling. . . . Some states allow intra-jurisdictional tolling but do not permit cross-jurisdictional tolling.”).
98 701 N.E. 2d 1102 (III. 1998).
99 Portwood, 701 N.E. 2d at 1102.
100 Id. at 1102 (citing Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986)).
101 Id. at 1102-03 (citing Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990)).
102 Id. at 1103. This differs from the typical cross-jurisdictional tolling case in that the second case here is a class action instead of an individual action. The propriety of allowing a piggyback class action such as this is a completely different issue, which will not be discussed here. For purposes of this Comment, however, the analysis by the Illinois Supreme Court of the propriety of allowing cross-jurisdictional tolling is not affected by the fact that the second action was a class action, rather than an individual one.
103 Id. at 1103.
Illinois appellate division affirmed. Thus, the Illinois Supreme Court had occasion to consider whether the filing of a class action complaint in federal court should toll the applicable Illinois statute of limitations for individual actions filed in Illinois state court after the dismissal of the federal complaint. The Illinois Supreme Court began its analysis by noting that very few states had even considered the issue of cross-jurisdictional tolling, and even fewer had adopted it. The court nevertheless undertook an analysis of the issue and affirmed the decision of the appellate court, holding that the filing of a class action in federal court does not toll the Illinois statute of limitations during the pendency of that complaint. The court began its analysis by noting that Illinois adopted the American Pipe rule in 1977. The court reaffirmed its commitment to the American Pipe tolling doctrine, but limited its endorsement of the rule by stating that tolling the statute of limitations is only “sound policy” when the two class actions are brought in the same court system. The court was not convinced, however, that the rule of American Pipe was such sound policy when the two actions are brought in different forums. The court reasoned that in such a situation tolling could have the effect of actually increasing the burden on Illinois’s court system, in that plaintiffs whose claims have expired elsewhere may seek to file individual claims in Illinois to take advantage of the tolling rule. The court concluded, “[b]y rejecting cross-jurisdictional tolling, we ensure that the protective filings predicted by plaintiffs will be dispersed throughout the country rather than concentrated in Illinois.”

The Tennessee Supreme Court dealt with the issue in a manner similar to that of Illinois. The case of Maestas v. Sofamor Danek Group, Inc. was one of many that arose following the denial of class certification on February 24, 1995 of a conglomeration of cases that

---

104 Id. at 1103.
105 Id. at 1102.
106 Id. at 1105.
107 Id.
108 Id. at 1103 (citing Steinberg v. Chicago Med. Sch., 371 N.E. 2d 634 (Ill. 1977)).
109 Id. at 1104.
110 Id.
111 Id.
112 Id. at 1105.
113 33 S.W.3d 805 (Tenn. 2000).
had been consolidated via the federal multi-district litigation statute.\footnote{28 U.S.C. § 1407. Section 1407 is the multi-district litigation statute, which allows cases to be transferred to any district if the cases "involv[e] one or more common questions of fact." 28 U.S.C. § 1407(a).} The plaintiffs in Maestas had undergone back surgery during the early 1990s, in which pedicle screws were implanted into their backs.\footnote{Maestas, 33 S.W.3d at 807.} Later, in 1993, a television news program aired a story alleging the pedicle screws were defective.\footnote{Id. at 807-08.} A class action was filed against various manufacturers, including the Sofamor Danek Group.\footnote{Id. at 808.} Maestas and other plaintiffs in the Maestas case were putative members of that class action, and when certification was denied, they filed suit in their individual capacities.\footnote{Id.}

The Maestas court, like the court in Portwood, began its analysis with a brief discussion of American Pipe and Crown, Cork & Seal, and noted that those cases dealt with cases where the second action was filed in the same jurisdiction as the first.\footnote{Id.} The court stated that the plaintiffs in the case at bar were seeking cross-jurisdictional tolling, because they sought the tolling of the Tennessee statute of limitations based on the filing of a class action in federal district court in the Eastern District of Pennsylvania.\footnote{Id.} Like the Portwood court, the Tennessee Supreme Court acknowledged that "few states have addressed the issue."\footnote{Id.}

The court then declined to adopt cross-jurisdictional tolling for Tennessee.\footnote{Id.} The court stated that the rationale behind tolling individual claims when a class action is filed is to enhance the efficiency of the judicial system by preventing the filing of duplicative claims.\footnote{Id.} This rationale, according to the court, evaporates when the actions are filed in different court systems.\footnote{Id.} Allowing for cross-jurisdictional tolling in Tennessee, the court stated, might serve to increase the efficiency of the federal system, but would do nothing to further the interests of Tennessee.\footnote{Id. The court wrote:}
The federal courts have also addressed cross-jurisdictional tolling. The case of *Wade v. Danek Med., Inc.*\(^{127}\) arose out of the same denial of certification that gave rise to the *Maestas* case in Tennessee. After the denial of class certification, Wade brought suit against Danek in the Eastern District of Virginia.\(^{128}\) The trial court granted Danek’s motion for summary judgment on the grounds that Virginia’s two-year statute of limitations had run, thereby rejecting the plaintiffs’ argument that the period of limitations should be tolled while the federal class action was pending.\(^{129}\)

The Fourth Circuit, sitting in diversity, had occasion to consider whether Virginia would adopt an equitable tolling rule that would allow for cross-jurisdictional tolling.\(^{130}\) The court stated that because the Virginia Supreme Court had never dealt with this issue directly, it would look to the practices of other states when attempting to predict how the Virginia Supreme Court would decide.\(^{131}\) The court noted that a number of other states, often relying on *American Pipe*, had adopted tolling rules during the pendency of a class action in their own courts.\(^{132}\) The court noted, however, that this case presented “a

---

We can find no comparable benefit from cross-jurisdictional tolling. . . . Our adoption of cross-jurisdictional tolling could, in a general sense, benefit the federal court system in its disposition of class actions. Nevertheless, Tennessee simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or of another state.

*Id.* (internal quotation marks omitted) (citing *Wade v. Danek Med., Inc.*, 182 F.3d 281 (4th Cir. 1999)).

The Tennessee Supreme Court also appeared to have federalism concerns. The court wrote that the adoption of a cross-jurisdictional tolling rule.

. . . would essentially grant to federal courts the power to decide when Tennessee’s state of limitations begins to run. Such an outcome is contrary to our legislature’s power to adopt statutes of limitations and the exceptions to those statutes, and would arguably offend the doctrines of federalism and dual sovereignty. If the sovereign state of Tennessee is to cede such power to the federal courts, we shall leave it to the legislature to do so.

*Id.*

\(^{127}\) 182 F.3d 281 (4th Cir. 1999).

\(^{128}\) *Id.* at 284.

\(^{129}\) *Id.*

\(^{130}\) *Id.*

\(^{131}\) *Id.* at 286.

slightly different question," because the class action was pending in a forum other than Virginia state courts. The court observed that few states had dealt with the exact question at issue here—cross-jurisdictional tolling.

The court decided that the Virginia Supreme Court would not adopt a cross-jurisdictional tolling rule. The Court enunciated three reasons for its decision. First, the court stated that Virginia had no interest in furthering the economy of class action procedures in another jurisdiction. Second, the court expressed concern that if Virginia were to adopt such a rule, it would be flooded with subsequent filings when class action certification was denied elsewhere. Third, the adoption of such a rule would "render the Virginia limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period varying depending on the efficiency (or inefficiency) of courts in those jurisdictions."

B. Courts That Have Permitted Cross-Jurisdictional Tolling

In Vaccariello v. Smith & Nephew Richards, a sharply divided Ohio Supreme Court reached the opposite conclusion of the Illinois and Tennessee Supreme Courts in Portwood and Maestas. The Vaccariello case arose out of the same pedicle screw litigation that gave rise to the decision in Maestas. However, the Ohio Supreme Court expressly disagreed with the holdings of Portwood and Maestas, and instead held that the filing of a federal class action does indeed toll the statute of limitations for an individual action in Ohio state


Wade, 182 F.3d at 287.


Wade, 182 F.3d at 287.

Id.

Id.

Id. at 288.

763 N.E.2d 160 (Ohio 2002).

Id. at 161.
The Ohio Supreme Court began its decision by noting that the court had already decided in *Howard v. Allen* that the Ohio savings statute only operated to toll plaintiffs’ statutes of limitations if the previous action had been filed in Ohio. However, the court noted that *Howard* was thirty years old, and that the United States Supreme Court had decided *American Pipe* and its progeny in the interim, which basically trumped the decision in *Howard*. The court noted the holding of *American Pipe*, and also noted the near identity between the Ohio and federal class action rules. The court stated that “[t]his congruity convinces us that a class action filed in federal court serves the same purpose as a class action filed in Ohio.” Accordingly, the court decided that “it is more important to ensure efficiency and economy of litigation than to rigidly adhere to the rule of *Howard*.”

Addressing the concerns of the *Portwood* court that a cross-jurisdictional tolling rule would burden Illinois’s court system, the Ohio Supreme Court was “not persuaded that this is a realistic potential problem.” The court limited its holding to those plaintiffs who could have originally filed suit in Ohio. The court also stated that although it was relying heavily on the reasoning of *American Pipe*, it was reaching its holding on its own and independent of the federal precedents.

*Vaccariello* produced two strong dissents. Justice Cook, while concurring in the judgment, wrote separately to dissent from the court’s holding on cross-jurisdictional tolling. Justice Cook chastised

---

142 Id. at 163 (“We hold that the filing of a class action, whether in Ohio or the federal court system, tolls the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”).
143 283 N.E.2d 167 (Ohio 1972).
144 *Vaccariello*, 763 N.E.2d at 162.
145 Id.
146 Id.
147 Id.
148 Id. at 163.
149 Id.
150 Id.
151 Id. (citing Michigan v. Long, 463 U.S. 1032 (1983)). Although the rationale is unclear, it would seem the court expressly disconnected its holding from *American Pipe* and federal cases in order to assure independent and adequate state grounds in the event of a petition for *certiorari* to the United States Supreme Court.
152 Although the Ohio Supreme Court reversed the decision of the Ohio Court of Appeals with regard to the cross-jurisdictional tolling issue, it ultimately affirmed the decision of the appeals court on other grounds that are not relevant here.
the court for relying so heavily on *American Pipe* and federal precedents, which he asserted were not binding on the Ohio Supreme Court. Justice Cook also stated that "cross-jurisdictional tolling is a public policy matter involving issues of a forum's control over its own judicial proceedings . . . [u]nderlying this policy choice is the premise that states 'simply have no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state.'" The justice argued that although, as the majority found, class actions in Ohio and in the federal system may serve the same purpose, the importance of Ohio's efficiency and economy of litigation versus that of other courts was a policy choice that was properly in the hands of the legislature. Justice Cook would have adhered to the principles of *stare decisis*, followed *Howard*, and rejected cross-jurisdictional tolling.

Justice Lundberg Stratton also dissented from the cross-jurisdictional tolling holding. The justice asserted that statutes of limitations and tolling rules are areas of exclusive state control that should be determined by the state legislature. The justice argued that the court's holding would allow Ohio's statutes of limitations to be decided according to court cases pending in other jurisdictions, which would have the effect of augmenting, rather than avoiding, the "inconveniences of litigation engendered by delay, and it would be patently unfair to defendants." The justice argued that the rule of the majority would "encourage the filing of stale claims in Ohio courts as plaintiffs from across the country elect to file in Ohio because of such a liberal tolling rule." The justice also chastised the majority for ignoring the many other states that had rejected cross-jurisdictional tolling.

The federal courts have also had cases rejecting cross-jurisdictional tolling. In *Primavera Familienstifung v. Askins*, the

---

155 *Vaccariello*, 763 N.E.2d at 167 (Cook, J., concurring in part and dissenting in part).
154 *Id.* at 167-68 (Cook, J., concurring in part and dissenting in part) (quoting *Wade*, 182 F.3d at 288).
155 *Id.* at 168 (Cook, J., concurring in part and dissenting in part).
156 *Id.*
157 *Id.* at 169 (Lundberg Stratton, J., concurring in part and dissenting in part).
158 *Id.* at 170 (Lundberg Stratton, J., concurring in part and dissenting in part).
159 *Id.* at 171 (Lundberg Stratton, J., concurring in part and dissenting in part).
160 *Id.* at 172 (Lundberg Stratton, J., concurring in part and dissenting in part).
161 *Id.*
Southern District of New York had occasion to consider the question of cross-jurisdictional tolling in litigation brought by investors against their investment manager, in which the investors explicitly relied on a previously-filed class action against the defendants to save their claims from the statute of limitations. \(^{163}\) The investors relied on *American Pipe*, and some conceded that their claims were time-barred unless tolling applied. \(^{164}\) The defendants argued that the investors were seeking cross-jurisdictional tolling to unfairly benefit from the filing of a class action in a foreign jurisdiction. \(^{165}\)

The district court, in an opinion by Judge Sweet, first noted several cases discussed above. \(^{166}\) The defendants pointed to *Portwood* as an example of a state court refusing to toll its statute of limitations based on the filing of a class action in another jurisdiction. \(^{167}\) The court distinguished *Portwood* by observing that there the plaintiffs relied on a federal case to toll the statute in a state court, as opposed to here, where both cases were in federal court. \(^{168}\) The court then discussed *Wade*, noting that in *Wade* the court determined the issue to be whether the state would have any interest in applying a tolling rule, since *Wade* was a diversity case. \(^{169}\)

Judge Sweet, though, pointed out that despite the opinion in *Wade* and similar cases, it was unclear what interest the state had in not having its tolling rule applied. \(^{170}\) Judge Sweet argued that absent application of tolling in circumstances such as this, there would be a great incentive for individual members of purported federal classes involving state law causes of action to initiate independent actions in federal and/or state court, since they could not be sure of their ability to pursue those state law claims even in federal court. \(^{171}\)

Concluding with the statement that “[t]hese are difficult, barely charted waters,” \(^{172}\) the court allowed one of the plaintiffs to rely on cross-jurisdictional tolling, in light of Connecticut’s lack of interest in having tolling barred under the circumstances. \(^{173}\)

\(^{163}\) *Id*. at 513.
\(^{164}\) *Id.*
\(^{165}\) *Id*. at 514.
\(^{166}\) *Id.*
\(^{167}\) *Id*. at 513.
\(^{168}\) *Id*. at 515.
\(^{169}\) *Id.*
\(^{170}\) *Id.*
\(^{171}\) *Id*. at 515-16.
\(^{172}\) *Id*. at 516.
\(^{173}\) Another rationale for the court’s decision was what it termed “counter-
IV. POLICY CONCERNS AND ANALYSIS

The overarching theme of cross-jurisdictional tolling, like that of any tolling, is the balancing of the interests of the judicial system in the efficient and economical performance of its functions with the purposes of notice and repose embodied in the essence of statutes of limitations. This section will discuss the competing policy goals of efficiency and fairness that clash at the confluence of class actions and statutes of limitations.

A. Efficiency and Economy of Litigation

The typical justification for American Pipe tolling is that it is “most consistent with federal class action procedure,” presumably in that class actions are intended to promote efficiency by reducing the duplication inherent in individual filings when there are common issues in each individual lawsuit. It is thought that, absent such a rule, absent class members would be forced to become individual plaintiffs by instituting so-called “protective filings” as the period of limitations nears an end. This may be the case. If so, American Pipe

balancing federal interests.” Id. Apparently, as part of an Erie analysis, the court believed that federal interests in judicial economy could outweigh a state’s interest in having its tolling rule applied. Id. This Comment is primarily concerned with whether cross-jurisdictional tolling is sound policy for a state to adopt. As such, federal cases discussing the policy concerns of cross-jurisdictional tolling are helpful, but a discussion of the Erie issues presented is beyond the scope of this Comment.

It should be noted that other courts have allowed cross-jurisdictional tolling without so much as discussing the issues involved. For example, in Staub v. Eastman Kodak Co., 726 A.2d 955 (N.J. Sup. Ct. App. Div. 1999) (discussed infra), the New Jersey Appellate Division allowed cross-jurisdictional tolling without discussing the matter, simply noting “we see no reason for tolling to depend on whether the class action is pending in state or federal court.” Id. at 967 n.4. The court in Hyatt Corp. v. Occidental Fire & Casualty Co., 801 S.W.2d 382 (Mo. Ct. App. 1990), similarly allowed cross-jurisdictional tolling with no discussion. The court in Lee v. Grand Rapids Bd. of Educ., 384 N.W.2d 165 (Mich. Ct. App. 1986), did note that the “origin of this lawsuit reaches back in time and across jurisdictional boundaries,” id. at 167, but did not include any discussion of the cross-jurisdictional nature of the tolling when it allowed limited tolling.

174 American Pipe, 414 U.S. at 554.
175 See, e.g., American Pipe, 414 U.S. at 550 (“A federal class action is no longer an invitation to joinder, but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitive papers and motions.”); Fed. R. Civ. P. Advisory Committee Note on 1966 Amendments (“Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”); Note, Statutes of Limitations and Opting Out of Class Actions, 81 Mich. L. Rev. 399, 418 (1982) (“The [class action] procedure promotes economies of time, effort, and expense by resolving the claims of an entire class in one lawsuit.”).
176 See American Pipe, 414 U.S. at 553 (“Potential class members would be induced
makes sense when both the class and the individual action are brought in the same court system.\textsuperscript{177} In such a situation there is no concern of forum shopping, and it may be that in some circumstances the individual filing is truly duplicative. The \textit{American Pipe} rule would thus save the forum from the waste of time inherent in duplicative litigation.\textsuperscript{178}

However, in the cross-jurisdictional context, it is uncertain what interests in judicial efficiency a forum state would gain by tolling its statute of limitations based on the filing of a class action outside the jurisdiction.\textsuperscript{179} By tolling, the state allows the extra-jurisdictional
to file protective motions to intervene or to join in the event that a class was later found unsuitable.

\textsuperscript{177} See, \textit{e.g.}, \textit{Portwood}, 701 N.E.2d at 1104 ("Tolling the statute of limitations for purported class members who file individual suits within the same court system after class status is denied therefore serves to reduce the total number of filings within that system.").

\textsuperscript{178} The inefficiency inherent in duplicative litigation has been a common concern and oft-repeated justification for the class action device. See, \textit{e.g.}, John C. Coffee, Jr., \textit{Class Wars, The Dilemma of the Mass Tort Class Action}, 95 COLUM. L. REV. 1343, 1345 (1995) ("[T]he debate may seem to pose the usual clash between efficiency and fairness, between those concerned with the high public and private costs of duplicative litigation and those committed to an individual's right to control litigation involving important personal interests."); Edward F. Sherman, \textit{Class Actions and Duplicative Litigation}, 62 IND. L.J. 507, 507 (1987) ("Thus a principal objective of the class action is to avoid having members of the class file individual suits, or, to use the term which that phenomena has come to be known, to avoid duplicative litigation. . . . Duplicative litigation is a constant problem in the class action context, but there is a peculiar lack of agreement as to both the availability of legal devices to avoid it and the policy considerations at stake.").

\textsuperscript{179} At least one court has argued that the forum state has no interest in tolling whatsoever. In \textit{Barda v. Showa Denko}, K.K., No. CV 93-1469, 1996 WL 316544 (D.N.M. 1996), the federal district court, sitting in diversity, had to consider whether the New Mexico Supreme Court would adopt cross-jurisdictional tolling. The court wrote:

\begin{quote}
[I]t is certainly not unlikely that the New Mexico Supreme Court could find that it has an overriding interest in furthering the efficiency and economy underlying its state class action procedure. Thus, it might well toll the statute of limitations for putative members of New Mexico Class Actions who move to intervene or bring individual suit following denial of certification.
\end{quote}

This, however, is not the question before this Court. The issue here is whether the New Mexico Supreme Court would toll the New Mexico statutory period during the pendency of a class action brought outside its judicial system — in another state or in the federal courts. \textit{In this instance, any interest by the New Mexico courts in furthering the economy afforded by the New Mexico class action procedure is absent.} This Court has been presented no reason to believe that New Mexico would or should toll the statutory period under these circumstances.

1996 WL 316544 at *3-*4 (emphasis added).
action to proceed at maximum efficiency. Plaintiffs will be encouraged to stay in the class action, knowing that they can file individually if certification is denied, because the statute of limitations will be tolled. 180 That may be advantageous for the forum of the extra-jurisdictional class action, and it does somewhat further the economy of the forum state, in that it could be saved some amount of protective filings. But consider the result of the opposite rule. If certification is ultimately denied, the forum state may find itself with an avalanche of individual filings, precisely because its statute was tolled, thereby undermining the efficiency that the class action vehicle was designed to promote. It would therefore appear that whatever the forum state gains in efficiency by tolling its statute of limitations based on an extra-jurisdictional class action is outweighed by the risk of an avalanche of filings should the class not be certified. Indeed, it has been on precisely this basis that some courts have rejected cross-jurisdictional tolling. 181

1. Individual Filings before the Decision on Class Certification

Even if cross-jurisdictional tolling is permitted in some circumstances, it has been argued that it, or even any tolling at all, should not be allowed when the individual filings are made before a decision on class certification is rendered. 182 The rationale is that whatever benefits in efficiency are attained by any tolling are not present when a plaintiff chooses to opt out before a decision on class

180 See, e.g., Note, Statutes of Limitations and Opting Out of Class Actions, 81 Mich. L. Rev. 399 (1982) (arguing that not tolling statute of limitations for those plaintiffs who opt out will encourage potential opt outs to stay in class action, thus increasing efficiency of device).

181 See, e.g., Portwood, 701 N.E.2d at 1104 (“Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state’s court system, because plaintiffs from across the country may elect file a subsequent suit in that state solely to take advantage of the generous tolling rule.”).

182 See, e.g., Note, Statutes of Limitations and Opting Out of Class Actions, 81 Mich. L. Rev. 399 (1982). The author argues that the filing of the class action, while putting the defendant on notice of the claims, does nothing to prevent an absent class member from opting out and filing an individual suit. As such, the absent class member, who remains free to file an individual suit at any time, should not be accorded the benefit of tolling the length of time in which to bring the individual claim. The author further argues that refusing to allow tolling will encourage those who would opt out to stay in the class action, thus promoting judicial economy. The author writes: “Tolling the statute of limitations [for opt-outs], then, would undermine the class action policies. By encouraging separate suits, it would encourage precisely the multiplicity of suits and waste of judicial resources which the American Pipe court wanted to avoid.” Id. at 431.
certification is made. The *Askins* court dealt with this exact question. Even though the court in *Askins* allowed cross-jurisdictional tolling for members of the class that had not opted out of the previous class action, it refused to do so for those members that chose to file individual actions before a decision on certification had been made. In denying the tolling, the court stated that those plaintiffs who filed individual actions before the denial of certification "created the very inefficiency that *American Pipe* sought to prevent—[the plaintiff] generated more litigation and expense concerning the same issues that were litigated by a class of which he was a member. Accordingly, plaintiff is not entitled to the benefit of a toll under *American Pipe*."

If one of the purposes behind tolling (and class actions) is to increase the efficiency of the court system, this purpose is not served by allowing the plaintiff who opts out of a putative class by filing his own action to benefit from the filing of that class action. The plaintiff is entitled to opt out and have his day in court, but he should not benefit from the filing of a class action in which he willfully chooses not to participate.

The significance of this opt-out principle in the cross-jurisdictional context is that such a rule would effectively allow the plaintiff to forum shop. For example, if a class action is filed in federal district court for the Northern District of California, and a state or states were to allow cross-jurisdictional tolling, a putative class

---

185 See id.
184 For background on *Askins*, see infra notes 162-173.
185 *Askins*, 150 F. Supp. 2d at 516.
186 Id. at *20 (citing Wahad v. City of New York 1999 U.S. Dist. LEXIS 12323 (S.D.N.Y. Aug. 12, 1999)).
187 See supra note 175; see also Eisen & Carlisle v. Jacqueline, 417 U.S. 156, 185 (1974) ("[A] class action serves not only the convenience of the parties but also prompt, efficient judicial administration. I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it.") (Douglas, J., dissenting in part).
188 See, e.g., Note, Statutes of Limitations and Opting Out of Class Actions, 81 MICH. L. REV. 399, 432 (1982) (arguing that "[t]he lack of an affirmative reason justifying tolling, and the deleterious effects of tolling on class action policies, mandate that courts refuse to toll for opt-out plaintiffs for the period during which they remain class members"); Ian Gallacher, Representative Litigation in Maryland: The Past, Present, and Future of the Class Action in State Court, 58 MD. L. REV. 1510, 1551-52 (1999) ("[T]hose plaintiffs who have chosen to assert individual claims against a defendant, thereby eschewing the benefits of class litigation, should not be allowed to enjoy the tolling benefits of class filing.").
189 See id.
member would be able to sit back and observe the proceedings of the class action. If they were not to his liking, he could simply opt-out (or protectively file) and file an individual action in any state that he chose (provided that state allowed tolling). Granted, prior to the expiration of the statute of limitations, this is the effect of the opt-out provisions of Rule 23 anyway, and that is a good thing.\textsuperscript{190} The choice to opt out allows the plaintiff to be the master of his claim. But cross-jurisdictional tolling would allow the plaintiff to extend the life of his state claim while waiting for the proceedings in federal court to unfold. Thus, the hypothetical defendant in the class action in California, having resolved the class action and now thinking it has gained some repose, may be forced to defend against individual claims that are many years old in states where the statute of limitations is only one or two years. Thus, if there is to be any cross-jurisdictional tolling at all, it arguably should not operate where the plaintiff creates inefficiency in the judicial system by opting out.

\textit{B. Fairness to the Litigants}

1. Defendants' Concerns

a. Stale Claims

Apart from cross-jurisdictional tolling, an argument can be made that tolling in any case is unfair to the defendant, because it can cause it to face outdated claims.\textsuperscript{191} This problem can be exacerbated in a cross-jurisdictional context. Consider the \textit{Portwood}\textsuperscript{192} case. There, the first class action was filed in 1981 in federal district court for the District of Columbia.\textsuperscript{193} After a series of denials of class certifications, dismissals, and refilings, the individual plaintiffs filed actions in Illinois state court, \textit{ten years} after the class action had been originally filed, arguing that the various class actions filed along the way had tolled the period for their individual claims.\textsuperscript{194} The Illinois Supreme Court rejected that argument, noting that

\textsuperscript{190} See, \textit{e.g.}, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809-11 (noting that opt-out provision of Federal Rule of Civil Procedure 23 is one safeguard for protection of absent class members).

\textsuperscript{191} See, \textit{e.g.}, Lowenthal & Feder, \textit{supra} note 3, at 580 ("[T]he principle effects of applying class action tolling to mass torts will be to encourage stale claims and to burden the judiciary by making it hear motions to dismiss, or if those motions are denied, to permit stale actions to proceed to judgment on the merits.").

\textsuperscript{192} For background on \textit{Portwood}, see \textit{supra} notes 98-112.

\textsuperscript{193} \textit{Portwood}, 701 N.E.2d at 1102.

\textsuperscript{194} \textit{Id.}
because state courts have no control over the work of the federal judiciary, we believe it would be unwise to adopt a policy basing the length of Illinois limitation periods on the federal courts’ disposition of suits seeking class certification. State courts should not be required to entertain stale claims simply because the controlling statute of limitations expired while a federal court considered whether to certify a class action.\textsuperscript{195}

The \textit{Portwood} court was particularly concerned with the protracted delay and staleness of claims occasioned by cross-jurisdictional tolling.\textsuperscript{196} The court stated what the plaintiffs sought was “the fourth incarnation of this action in Illinois [that] follows three unsuccessful forays by plaintiffs elsewhere, spanning a period now approaching two decades.”\textsuperscript{197}

No matter what one thinks of the underlying merits in a given lawsuit, defendants would argue, there must be a point at which the repose of the defendant and the court system becomes more important than the right to bring a claim.\textsuperscript{198} As the Supreme Court has noted, “[statutes of limitations] are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost.”\textsuperscript{199} A rejection of the cross-jurisdictional tolling rule would effectuate the policies that led to the creations of statutes of limitations: fairness and repose to the defendant, and the efficiency of the courts.

\begin{itemize}
  \item b. Notice to the Defendant

Another concern that courts have had with cross-jurisdictional tolling is the issue of notice to the defendant.\textsuperscript{200} A good example is
\end{itemize}

\textsuperscript{195} \textit{Id.} at 1104 (emphasis added).
\textsuperscript{196} \textit{Id.} at 1105.
\textsuperscript{197} \textit{Id.} (emphasis added).
\textsuperscript{198} “The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” \textit{Order of Railroad Telegraphers v. Ry. Express Agency, Inc.}, 321 U.S. 342, 349 (1944) (emphasis added).
\textsuperscript{200} \textit{See}, e.g., \textit{Wade}, 182 F.3d at 288 n.9 (stating that “we believe that, even were the Virginia Supreme Court to adopt a cross-jurisdictional tolling more generally, it would not apply such a rule in a case such as this one . . . because the federal class action did not place those defendants on sufficient notice of appellants’ claims. One of the purposes of statutes of limitations is to put a defendant on notice of the claims against him within the specified period.”) (citing \textit{Order of R.R. Telegraphers v. Ry. Express Agency}, 321 U.S. 342 (1944)).
Bell v. Showa Denko, K.K. In that case, Savannah Bell filed suit against various manufacturers of the drug L-Tryptophan, alleging it caused her to contract a condition known as Eosinophilia Myalgia Syndrome. Showa Denko moved for summary judgment based on the statute of limitations, and Bell, like other plaintiffs before her, relied primarily on American Pipe in arguing that the statute of limitations on her case should be tolled because a class action had been filed in the interim. The Texas Court of Appeals first rejected an overarching application of American Pipe, but it seemed primarily concerned with the issue of whether the class action gave the defendant notice of the claims against it. The court distinguished American Pipe and Texas cases that had relied on it in allowing tolling, on the basis that those cases involved “plaintiffs who were a readily discernible group of people claiming injury to certain property rather than personal injury.”

The court stated:

The distinction is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit. For us to hold that the filing of a mass personal injury suit, in a federal court, in another state, with the variety of claims necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in American Pipe, would be an extension not warranted . . . and we refuse to do so.

Other courts, however, while clearly concerned with the nature of the notice defendants received in the earlier suit, see no reason that it should matter whether the previously-filed class action was cross-jurisdictional. In Staub v. Eastman Kodak Co., the court allowed for cross-jurisdictional tolling in a case where the plaintiffs alleged

---

201 899 S.W.2d 749 (Tex. Ct. App. 1995).
202 Id. at 752.
203 Id. at 756.
204 The court wrote:
We do not agree that American Pipe operates to toll our statute of limitations. That case involved an interpretation of Rule 23 of the Federal Rules of Civil Procedure and concerned the question of whether a federal statute of limitations was tolled for the purpose of filing a federal claim. Under the doctrine of the hoary case of Erie Railroad Company v. Tompkins and its progeny, where a claim is derived from state law, as is appellant’s suit, state law governs the tolling of the statute of limitations.
Id. at 757.
205 Id. at 758.
206 Id. at 758.
207 Id. (emphasis added).
personal injuries from being injected with Pantopaque, a dye used in X-ray procedures.\textsuperscript{209} The case was filed after class certification was denied in a putative class action filed in federal court in New Jersey.\textsuperscript{210} The court was troubled by the difference between a product liability class action and other class actions in which the absent plaintiffs are identifiable.\textsuperscript{211} It stated:

The only difficult question . . . is whether the same tolling rule should apply in a case, like the present one, where the putative class action asserts a products liability claim or other mass tort on behalf of a class the identity of whose members was not known or readily ascertainable and where, therefore, the defendants did not have specific notice of the claim of the individual plaintiff on whose behalf tolling is sought.\textsuperscript{212}

Despite finding that the defendants did not have “specific notice of the claim of the individual plaintiff,” the court allowed the tolling, reasoning that the filing of the class action put the defendant on notice that individual actions would follow if class certification were denied, and that equitable tolling was more important than the staleness of the claims.\textsuperscript{213}

While it was troubled by the issue of notice to the defendant due to the nature of the previous class action, the court was hardly bothered by the cross-jurisdictional nature of the tolling sought.\textsuperscript{214} Although the previous class action had been filed in federal court, and the plaintiff was seeking to use this to toll his state-court action, the court dismissed this concern without any discussion, merely stating “we see no reason for tolling to depend on whether the class action is pending in state or federal court.”\textsuperscript{215} This is quite a divergence from the treatment of the same issue in \textit{Bell v. Showa Denko, K.K.}, in which the cross-jurisdictional nature of the tolling seemed to be a primary reason for the denial of the plaintiff’s

\textsuperscript{209} \textit{Id.} at 956.
\textsuperscript{210} \textit{Id.} at 958.
\textsuperscript{211} \textit{Id.} at 966.
\textsuperscript{212} \textit{Id.}
\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.} at 167.
\textsuperscript{215} \textit{Id.} at 967 n.4.
2. Plaintiffs’ Concerns

Defendants would argue that allowing cross-jurisdictional tolling would allow plaintiffs to extend their otherwise stale claims without properly putting the defendants on notice of the claims against them. Plaintiffs would respond, however, with their own concerns that a rejection of the cross-jurisdictional tolling rule would open the door to the potential of abuse by the defendant.

a. Undue Delay

Were a particular state to reject a cross-jurisdictional tolling rule, it would arguably create an incentive for the defendant to engage in tactics that would lead to undue delay of the decision by the court on class certification.\textsuperscript{217} For example, a defendant facing a multi-state or nationwide class, knowing that the vast majority of the class will not be able to re-file individually in their various jurisdictions that do not allow cross-jurisdictional tolling, would have an incentive to engage in delay tactics, hoping that a majority of the class will not seek to go through the trouble of filing an individual action after the statute of limitations has expired in the jurisdiction it would prefer.

Despite the fact that class actions have been called the “great equalizer,”\textsuperscript{218} in that they have the power to put a lowly plaintiff on equal footing with a powerful defendant, commentators have noted the potential for abuse of the system by defendants who seek to make the cost and delay of bringing a class action prohibitive. However, although this potential for delay exists, it is generally thought that the beneficial equalizing effects of the system outweigh the disadvantages, since class actions in some circumstances will give plaintiffs their only real bargaining chip against a powerful

\textsuperscript{216} See supra note 207 and accompanying text.

\textsuperscript{217} One such delay tactic, for example, would be the taking of numerous interlocutory appeals, in a jurisdiction that allows such appeals. In fact, the Third Circuit has noted that one of the benefits of the final judgment rule is that it prevents well-financed defendants from engaging in precisely this kind of delay tactic. See Bryant v. Sylvester, 57 F.3d 308, 312 n.4 (3d Cir. 1995) (“[W]here litigants may have unequal economic resources, the final judgment rule protects the judicial process and its participants from the delay which can prove advantageous to a well-financed litigant, and fatal to the less well endowed.”).

\textsuperscript{218} Jack B. Weinstein, Adjudicative Justice in a Diverse Mass Society, 8 J.L. & POL’Y 385, 390 (“Much of the opposition to effective class actions — despite their occasional abuses — is based on the fact that they are a great equalizer, enabling those of little political clout or financial means to band together effectively against the most powerful.”).
defendant. It is also worth noting that defendants themselves will sometimes encourage litigation to proceed in the class action form, in order to streamline and minimize the expenses of drawn-out litigation.\textsuperscript{219} Nevertheless, when considering whether to allow a cross-jurisdictional tolling rule, courts should be cautious that a rejection of the rule might create an added incentive for the defendant to engage in delay tactics.

b. Reliance

Defenders of a cross-jurisdictional tolling rule would argue that it allows the absent class member to forum shop by extending the life of his claim in other jurisdictions. However, the plaintiff may have a reason for opting out other than forum shopping,\textsuperscript{220} and prohibiting the use of cross-jurisdictional tolling may raise fairness concerns, at least for those absent class members who willfully rely on their class representation. For example, a class member may receive notice of the class action, be happy with his representation at first, and decide to stay in the class until the resolution of the lawsuit. Somewhere down the line, though, he may become unhappy with his representation, such as if the class representatives and lawyers decide to sign on to a settlement that the class member considers to be unfair. Precluding this class member from opting out of the settlement and filing an individual action in a jurisdiction of his choosing raises concerns of fundamental fairness. After all, the class member sought to streamline the process by remaining a member of the class—which is exactly what aggregation rules seek to achieve. It is arguably unfair to preclude the class member from benefiting from tolling in a later individual action when all he did was knowingly rely on the previous class action—exactly as he was supposed to do.

Opponents of tolling would argue, though, that the class member who relies on the representation is the exception rather than the rule. The much more common case is that of the class member who had no idea he was in a class action at all, and then seeks to rely on the tolling only later when the value of his individual claim becomes more apparent. Secondly, even if a class member

\textsuperscript{219} Id. at 403-04 (noting that defendants may welcome class action device in part because piecemeal litigation often entails "huge transactional costs, delays, the multiplication of suits across many jurisdictions, and difficulties in planning industrial and commercial activity because of a cloud of overhanging litigation.").

\textsuperscript{220} See, e.g., Gallacher, supra note 188, at 1595 ("There are numerous reasons why plaintiffs with positive-value suits opt out of the tort system, including risk aversion to engaging in litigation, privacy concerns, and alternative avenues for medical treatment . . . .").
does rely on the class action and then becomes dissatisfied with the representation, that is the price that he pays for remaining in the suit, where he has the possibility of reaping in the benefits of the litigation with few of the attendant costs. Thirdly, class action procedure provides the aggrieved class member with an avenue to express his grievances in the event he is unhappy with a potential settlement. In most cases, the judge will hold a fairness hearing before approving of the settlement, where any objectors will be free to come forward and state reasons why the settlement may be unfair. Defenders of cross-jurisdictional tolling would argue that all of these are adequate safeguards for the absent class member who relies on his representation and later becomes unhappy.

A different difficult situation arises, however, if the plaintiff relies on the class action, confident in the belief that his individual right to have a court decide his case on the merits will not be affected if he chooses to remain in the class. However, after years of motion practice, class certification is denied. Or, class certification is granted at first, but reversed on appeal, after even more time. The hapless plaintiff now has no class to represent him, and the time for filing his claim in the jurisdiction of his choice has most likely expired. The plaintiff is now forced to file individually in the jurisdiction in which the class action was brought—assuming that jurisdiction has an American Pipe rule. Relying on the initial class action, then, has the potential of depriving the plaintiff of the opportunity to be the master of his claim and bring it in a jurisdiction of his choosing.

V. RECOMMENDATIONS

As noted by the court in Askins, these are "barely charted waters." Cross-jurisdictional tolling presents difficult issues, and there are compelling arguments on both sides. At the heart of the issue is the need to balance the seeming right of the plaintiff to rely on a timely class action with the risk of abuse that may result when plaintiffs use a previous class action to extend the life of otherwise time-barred claims. Though there are some cases where plaintiffs genuinely rely on the filing of a class action with the understanding that they will be able to file individually should certification be denied, there are others where it seems plaintiffs seek to use cross-jurisdictional tolling to resurrect claims that can only be termed as stale. This implicates the purposes behind statutes of repose in general, one of the most primary of which is to provide defendants

\footnote{Askins, 130 F. Supp. 2d at 516.}
with notice of the claims against them, or else repose.

Courts are correct to reject an overarching application of an American Pipe rule to every case that presents a tolling question, because such an approach fails to consider important concerns of notice to the litigants. To guard against this, courts should allow cross-jurisdictional tolling only with great reluctance, and in limited circumstances. Like the courts in Jolly, Bell, Staub, and others, courts should analyze the type of class action upon which the plaintiff seeks to base the tolling, recognizing the differences between classes that provide the defendant with notice of the potential individual claims against it, and those that do not. A small, definable, knowable class that sues for property damage is very different from a large, amorphous class, the members of which are unknown and unknowable. Allowing tolling in the latter case can have the effect of depriving the defendant of its ability to assert and litigate various defenses that are often at the heart of a typical tort case. On the other hand, tolling in the former case may often be appropriate, because the defendant is truly put on notice of the claims against it.

A reluctance to allow cross-jurisdictional tolling could possibly lead to an increase in protective filings. Practitioners with clients who have state-law claims and who are members of putative classes in federal court will not be able to assume that the statute of limitations will be tolled during the pendency of the federal action. As such,

---

222 See supra notes 78-96.
223 See supra notes 201-207.
224 See supra notes 208-215.
225 See Steven Glickstein and Lori B. Leskin, State Law Question, Do Class Actions Toll Product Liability Statutes of Limitations?, PRODUCT LIABILITY LAW AND STRATEGY, Oct. 2000, at 8 ("[C]ourts are more willing to apply equitable tolling when class certification is denied for lack of numerosity as opposed to a failure to demonstrate common issues of fact or law."); see also Bell, 899 S.W.2d at 758 (distinguishing prior tolling case because class was a "readily discernible group of people," and noting "that distinction is important in determining whether the defendants have received fair notice of the existence of a claim by the filing of a class suit").
226 See supra notes 71-72.
227 Consider this admonition to federal litigators:

Since it cannot be assumed that a state statute of limitations will be tolled by a class action in federal court, putative class members who are considering an individual action in state court in the event certification is denied should file protectively if the state statute of limitations is close to expiring. Then request the court to stay proceedings until a certification ruling is made in federal court. If certification is granted, the state action can be voluntarily dismissed. Should certification be denied, state proceedings can be reactivated.

Statute of Limitations – Class Actions – Cross-Jurisdictional Tolling, FEDERAL LITIGATOR, Mar. 2001. This, of course, assumes that the putative class member is even aware the
they will be inclined to file protectively as the expiration of the state statute of limitations draws near. Such filings could have a corresponding negative impact on judicial economy.

However, the opposite rule—one that allowed cross-jurisdictional tolling—could be more detrimental to the economy of a particular judicial system. While it would decrease the amount of protective filings, a jurisdiction that allows cross-jurisdictional tolling could find itself in trouble if it is one of a few jurisdictions that allows such a rule. If class certification is denied in a particular case, that jurisdiction becomes the only place for plaintiffs to seek redress for their injuries. This could result in a flood of individual filings. Were the judicial system of the several states efficient enough, this problem could be avoided if many or all states converted to cross-jurisdictional tolling regimes at the same time. But this is not the case, and any particular state that allows cross-jurisdictional tolling could find itself flooded with individual filings based on an injury only tangentially related to the forum. In any event, it has been argued that protective filings in state court would not necessarily be undesirable.

Accordingly, cross-jurisdictional tolling should be allowed only in limited circumstances. The individual action that follows a mass tort class action should be presumptively ineligible for any tolling benefits, especially cross-jurisdictional tolling. Moreover, courts should be particularly wary of cross-jurisdictional tolling where it

---

class action exists. Given that most states that allow tolling have no reliance requirement, a putative class member who is considering individual action may only decide to do so long after the statute has run. It is his creative lawyer that then argues that the statute should have been tolled while the plaintiff was sitting on his rights. However, one article for practitioners has argued that “an individual plaintiff's lack of knowledge of the pendency of a class action necessarily means that the plaintiff was not relying on the class action in delaying the filing of his own action and equitable tolling is less likely to apply.” Steven Glickstein and Lori B. Leskin, State Law Question, Do Class Actions Toll Product Liability Statutes of Limitations?, PRODUCT LIABILITY LAW AND STRATEGY, Oct. 2000, at 8.

228 See Mitchell A. Lowenthal, Tolling the Statute of Limitations on Class Actions, N.Y. L.J., Dec. 17, 2001, at 1. Lowenthal writes:

Writing on a clean slate, one could strike the balance differently than have the majority of courts. If all (or at least most) states embraced cross-jurisdictional tolling (and class action tolling in fact reduced the number of “protective” suits), then cross-jurisdictional tolling would be cost-beneficial even where the class action was not pending in the state’s own courts. But that train seems to have already left the station.

Id.

229 See Portwood, 701 N.E.2d at 1105 (“[E]arly filings in state court by plaintiffs who are pursuing a class action elsewhere would not be entirely undesirable, as such filings would put that state’s court system on notice of the potential claim. If necessary, the state suit could be stayed pending proceedings elsewhere.”).

230 See Lowenthal & Feder, supra note 3.
appears that the plaintiff is seeking to rely on an unrelated or only tangentially related class action, and the tolling would serve to significantly lengthen what appears to be a stale claim. Tolling in such circumstances unnecessarily burdens the judicial system and unfairly prejudices the defendant, who is forced to defend against an old claim of which it had little or no notice. Cross-jurisdictional tolling should only be appropriate where the previous class action involved a definable, knowable class, and class certification was denied on a basis that the plaintiff could not reasonably predict, such as lack of numerosity. In such a circumstance, there is less concern of forum shopping, as the plaintiff was justified in sitting on his claim in reliance on the class action, the defendant is not unfairly prejudiced, and the efficiency of the court system is only minimally affected.