Oklahoma Law Review

Volume 62 | Number 4

2010

Piped In: The Tenth Circuit Weighs In on Extending American Pipe Tolling in *State Farm Mutual Automobile Insurance Co. v. Boellstorff*

Caleb Brown

NOTES

Piped In: The Tenth Circuit Weighs In on Extending *American Pipe* Tolling in *State Farm Mutual Automobile Insurance Co. v. Boellstorff*

I. Introduction

Class action lawsuits present a variety of challenging issues to the legal system. Among these is the effect that class actions have on the running of statutes of limitations. Both statutes of limitations and the class action suit share the goal of promoting judicial efficiency.[1] Yet legal scholars recognize that because of the large number of plaintiffs—each with an individual cause of action—joined in a single suit, "class actions and statutes of limitation[s] do not interact harmoniously."[2] The Supreme Court of the United States first addressed this often fractious interaction in *American Pipe & Construction Co. v. Utah* by formulating the class action tolling doctrine.[3] The Court held that when class certification is denied, "the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[4] The Court later extended this doctrine to potential

1. Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 533-34 (1996).

2. *Id.* at 535.

3. *See* 414 U.S. 538, 553 (1974).

4. *Id.* at 553. The Court's ruling in *American Pipe* led some circuit courts to conclude that tolling was only available to plaintiffs who sought to intervene in the pending action after it was determined that the suit could not proceed as a class action, but did not allow plaintiffs to file their own individual and independent suits. *See* Pavlak v. Church, 681 F.2d 617, 618 (9th Cir. 1982), *vacated*, 463 U.S. 1201 (1983); Stull v. Bayard, 561 F.2d 429, 433 (2d Cir. 1977); Arneil v. Ramsey, 550 F.2d 774, 783 (2d Cir. 1977), *superseded by statute on other grounds*, Securities Acts Amendments of 1975, Pub. L. No. 94-29, sec. 4, § 6, 89 Stat. 97, 104 (amending 15 U.S.C. § 78f (1970)), *as recognized in* Brawer v. Options Clearing Corp., 663 F. Supp. 1254 (S.D.N.Y. 1986). This interpretation was rejected by the Supreme Court in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983). The choice of whether to intervene or file an independent suit is now merely a procedural or tactical decision. As a procedural consideration, putative class members may not meet the requirements for intervention under Federal Rule of Civil Procedure 24(a). *See id.* at 350 n.4. They might prefer to file an independent action rather than risk a denial of permission to intervene under Rule 24(b), which is left to the discretion of the court. *See id.* From a tactical standpoint, putative class members may desire to exert the greater individual control over their cases that only filing an individual lawsuit would provide. *See id.* at 350.

plaintiffs wishing to file independent suits after the denial of class certification.[5] But the Court has declined to address whether the rule might apply where a potential member of a putative class seeks to file an independent lawsuit *before* the trial court's denial or certification of the class.[6]

The circuit courts of appeals that have addressed this issue have come to differing conclusions.[7] The United States Courts of Appeals for the First and Sixth Circuits, the first circuit courts to consider the issue, held that extending tolling to individual suits filed by putative class members prior to a decision on class certification was contrary to the goal of judicial efficiency underpinning the Court's opinion in *American Pipe*.[8] These circuits observed that judicial efficiency would be hindered by allowing individual plaintiffs to file independent but duplicative suits while a class action was pending.[9] But more recently, courts have begun to adopt the view that tolling is appropriate in such situations.[10] Most recently, in *State Farm Mutual Automobile Insurance Co. v. Boellstorff*, the United States Court of Appeals for the Tenth Circuit joined the growing trend by determining that class action tolling applies to independent suits filed before class certification.[11]

This note argues that the Tenth Circuit was correct in ruling that the class action tolling doctrine should apply to members of a putative class prior to a decision on class certification. Under a proper interpretation of the Supreme Court's holdings in *American Pipe* and *Crown, Cork & Seal*, combined with the understanding that a class action suit is a truly representative action in which all putative class members are parties to the suit (albeit unnamed parties), the statute of limitations governing all class members' claims should be understood as tolled from the commencement of the class action until the denial of certification. Whether putative members seek to file independent actions after

5. *See Crown, Cork & Seal*, 462 U.S. at 350.

6. *See In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008) (holding that "members of the plaintiff-class who have filed individual suits are entitled to the benefits of *American Pipe* tolling"), *cert. denied sub nom.* E.I. du Pont de Nemours & Co. v. Stanton, 129 S. Ct. 762 (2008).

7. *Compare* Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 569 (6th Cir. 2005) (holding that tolling does not apply to plaintiffs filing suit before class certification is decided), *and* Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) (same), *with* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1230-35 (10th Cir. 2008) (holding that tolling does apply to such plaintiffs), *In re Hanford*, 534 F.3d at 996, 1009 (same), *and In re* WorldCom Sec. Litig., 496 F.3d 245, 254-56 (2d Cir. 2007) (same).

8. *Wyser-Pratte*, 413 F.3d at 569; *Glater*, 712 F.2d at 739.

9. *See Wyser-Pratte*, 413 F.3d at 569; *Glater*, 712 F.2d at 739.

10. *See, e.g.*, *In re Hanford*, 534 F.3d at 996; *In re WorldCom*, 496 F.3d at 254-56.

11. *See* 540 F.3d at 1230-35.

a denial of class certification or prior to a ruling on certification, the timeliness of these suits should date to the filing of the initial class action.

Part II of this note outlines the development of the class action tolling doctrine and the reasons behind its development. It also examines the initial denials to extend tolling to potential class members who seek to file independent actions prior to class certification. Part III discusses the facts, issue, and holding of *State Farm Mutual Automobile Insurance Co. v. Boellstorff*. Part IV sets forth the Tenth Circuit's reasons for extending the tolling doctrine to an individual plaintiff who seeks to leave the class action and file an independent suit before class certification. Part V examines the Tenth Circuit's analysis and argues that the court's decision properly applied the reasoning behind the class action tolling doctrine to the circumstance of an individual case filed prior to class certification. This note concludes in Part VI.

II. The Origin and Development of the Class Action Tolling Doctrine

A. Setting the Stage: The Purposes of Statutes of Limitations

Understanding the class action tolling doctrine first requires an examination of the basic, underlying purposes of statutes of limitations. "Statutes of limitation[s] . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[12] Thus, one purpose of statutes of limitations is to increase judicial efficiency by saving the courts the difficulty of adjudicating stale claims.[13] Statutes of limitations' primary purpose, however, is to protect *defendants* from surprise litigation and the difficulties of defending against stale claims.[14]

B. The Birth of Class Action Tolling: American Pipe & Construction Co. v. Utah

In March 1964, a group of individuals and companies were indicted for conspiring to fix the prices of steel and concrete pipe in violation of the Sherman Act.[15] The defendants entered nolo contendere pleas on June 19, 1964.[16] On June 23, 1964, the United States filed civil actions against the same

12. Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

13. *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945); *see also* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 811-12 (2006).

14. *See* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965); *Order of R.R. Telegraphers*, 321 U.S. at 348-49.

15. Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 540 (1974).

16. *Id.*

defendants, seeking "to restrain further violations of the Sherman Act and violations of the Clayton and False Claims Acts."[17] A final judgment regarding these civil claims was entered against the defendants in May of 1968.[18]

A year later, the State of Utah filed a civil suit against some of the same defendants, likewise claiming that they had violated the Sherman Act by conspiring to fix pipe prices.[19] Utah styled this suit as a class action on behalf of "public bodies and agencies of the state and local government in the State of Utah who [were] end users of pipe acquired from the defendants," as well as similarly situated, unnamed plaintiffs.[20] Utah's proposed class action rested on 15 U.S.C. § 16(b), which at the time provided that

> [w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . .[21]

Utah had filed its proposed class action suit eleven days before the one-year statute of limitations had run; thus, the district court declared the action timely.[22]

Six months later, on December 4, 1969, the district court entered an order denying class certification on the grounds that the class was not "so numerous that joinder of all members [was] impracticable," as required by Federal Rule of Civil Procedure 23(a)(1).[23] Eight days after denial of class certification, "more than 60 towns, municipalities, and water districts in . . . Utah" sought to intervene as named plaintiffs.[24] The district court denied these motions to intervene as untimely.[25] The court held that the initial filing of Utah's class action had not tolled the statute of limitations and that the limitations period had thus run.[26] On appeal, the United States Court of Appeals for the Ninth Circuit

17. *Id.*
18. *Id.*
19. *Id.* at 541.
20. *Id.*
21. *Id.* at 541-42 (citing 15 U.S.C. § 16(b) (1968) (current version at 15 U.S.C. § 16(i) (2006))).
22. *Id.* at 542.
23. *Id.* at 543.
24. *Id.* at 543-44.
25. *Id.* at 544.
26. *Id.*

reversed the denial of permissive intervention.[27] The court of appeals held that the initial class action served as the initiation of suit as to all members of the putative class, and thus the intervenors had filed a timely action.[28]

The Supreme Court unanimously affirmed the Ninth Circuit's judgment.[29] The Court ruled that "where class action status has been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene" after denial of class action certification.[30] The Court reasoned that a contrary rule would endanger judicial efficiency, because it would induce potential class members to file "protective motions to intervene" for fear that class certification would be denied after the statute of limitations for an action had run.[31] Such a rule would lead to a "needless duplication" of such motions.[32] The Court also noted that its holding did not frustrate the primary purpose of statutes of limitations.[33] Class actions are representative suits; therefore, the initial filing of the suit provides notice to the defendants and thereby ensures that they are not required to defend against stale claims or surprise litigation.[34]

C. The Extension of Class Action Tolling to Plaintiffs Who File Individual Suits: Crown, Cork & Seal Co. v. Parker

The Supreme Court extended the *American Pipe* tolling doctrine in *Crown, Cork & Seal Co. v. Parker*, determining that a plaintiff may also take advantage of class action tolling when filing an individual and independent suit after class

---

27. *Id.* at 544-45.

28. *See id.* at 545.

29. *Id.* at 539, 561.

30. *Id.* at 552-53 (quoting FED. R. CIV. P. 23(a)(1)). While the Court's language seemed to suggest that tolling would only apply when the class was denied for failing to meet the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1), the courts that have since addressed the question have found that tolling applies after the denial of class certification for any of the Rule 23(a) requirements. *See* Bridges v. Dep't of Md. State Police, 441 F.3d 197, 210-11 (4th Cir. 2006) (noting that the Court's decision in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983), contained no such limiting language); Smith v. Pennington, 352 F.3d 884, 892 (4th Cir. 2003) (same); Barbieri v. United States, 15 Cl. Ct. 747, 751 (Cl. Ct. 1988) (holding that the efficiency concerns of *American Pipe* tolling would be undermined by limiting tolling to only those situations in which class denial was based on a failure to meet the numerosity requirement).

31. *American Pipe*, 414 U.S. at 553.

32. *Id.* at 554.

33. *See id.* at 554-55.

34. *See id.* at 550, 554-55; *see also* discussion *infra* Part V.B-C.

certification has been denied.[35] In July 1977, Theodore Parker filed a claim with the Equal Employment Opportunity Commission (EEOC) against his former employer for racial discrimination.[36] The EEOC determined that there was "no reasonable cause to believe" Mr. Parker's charge of discrimination and notified Mr. Parker of its determination by letter issued on November 9, 1978.[37] In compliance with Title VII of the Civil Rights Act of 1964,[38] the EEOC's letter also notified Mr. Parker of his right to sue under the Civil Rights Act within ninety days of the notice.[39]

In the time between Mr. Parker's filing of a complaint with the EEOC and the EEOC's issuance of the decision letter, two other employees of Crown, Cork & Seal filed a class action suit alleging discrimination.[40] They claimed "to represent a class of black persons who ha[d] been, continue[d] to be and who in the future [would] be denied equal employment opportunities by defendant."[41] The court denied class certification over a year later on September 4, 1980.[42] The next month, on October 27—"within 90 days after the denial of class certification"—Mr. Parker filed an independent suit.[43]

The United States District Court for the District of Maryland granted summary judgment to Crown, Cork & Seal.[44] The court held that Mr. Parker's action was not timely because he had failed to file within the ninety-day statute of limitations after receiving notice of his right to sue in 1978.[45] The United States Court of Appeals for the Fourth Circuit reversed this ruling, holding that *American Pipe* class action tolling had taken effect with the filing of the class action suit in 1978.[46]

The Supreme Court affirmed the Fourth Circuit and ruled that class action tolling was available "to all asserted members of the class who would have been parties" to the suit had certification been granted.[47] Thus, after certification of a class is denied, class members may choose either to intervene or file their own

35. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54 (1983).
36. *Id.* at 347.
37. *Id.*
38. 42 U.S.C. §§ 2000e to 2000e-17 (2006) (originally enacted as Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253).
39. *Crown, Cork & Seal*, 462 U.S. at 347-48 (citing 42 U.S.C. § 2000e-5(f)(1)).
40. *Id.* at 347.
41. *Id.*
42. *Id.*
43. *Id.* at 348.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 353-54.

suits.[48] The Court noted a variety of reasons why a member of a denied class might wish to file an independent action rather than intervene. First, the class member might wish to litigate in a forum different from the one chosen by the named plaintiffs in the original class action.[49] Alternatively, the class member might wish to exercise control over the litigation rather than share it with the named plaintiffs of the original class action.[50] Likewise, class members might fear that their motions to intervene will be denied on grounds "wholly unrelated to the merits" of their cases.[51]

Whatever reasons a plaintiff might have for filing an independent suit rather than intervening, the Court determined that the essential justifications for class action tolling carry the same weight in both contexts.[52] Without a rule allowing for the tolling of the statute of limitations, the Court worried that members of putative classes might feel pressure to preserve their independent causes of action by filing individual suits for fear that the class would not be certified.[53] While "[r]estricting the [tolling] rule [articulated in] *American Pipe* to intervenors might reduce the number of individual lawsuits filed against a particular defendant[,] . . . this decrease in litigation would be counterbalanced by an increase in protective filings in all class actions."[54] Additionally, the Court concluded that "although a defendant may prefer not to defend against multiple actions . . . , this is not an interest that statutes of limitations are designed to protect."[55]

---

48. *Id.* at 354.

49. *Id.* at 350.

50. *Id.*

51. *Id.* As the Court explained,

> Putative class members frequently are not entitled to intervene as of right under Federal Rule of Civil Procedure 24(a), and permissive intervention under Federal Rule of Civil Procedure 24(b) may be denied in the discretion of the District Court. In exercising its discretion the District Court considers "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," and a court could conclude that undue delay or prejudice would result if many class members were brought in as plaintiffs upon the denial of class certification. Thus, permissive intervention may well be an uncertain prospect for members of a proposed class.

Id. at 350 n.4 (citations omitted) (quoting FED. R. CIV. P. 24(b)).

52. *See id.* at 350-53.

53. *Id.* at 350-51.

54. *Id.* at 353.

55. *Id.* Recall that statutes of limitations are designed to promote judicial efficiency and provide defendants with sufficient notice to protect them from defending stale claims. *See* discussion *supra* Part II.A.

D. Circuit Courts Confront the Question of Whether Tolling Applies to Putative Class Members Who File Otherwise Time-Barred Suits Prior to a Class Certification Ruling

The Supreme Court rulings left open the question whether potential plaintiffs in a putative class can take advantage of class action tolling if they choose to file individual suits *before* certification is confirmed or denied. Initially, the district and circuit courts that addressed this question ruled that tolling is not available before the issue of class certification is decided.[56] These courts held that allowing putative class members to file individual suits prior to a denial of class certification would hinder judicial efficiency by allowing duplicative, individual suits to be filed while the class action that supplied the potential justification for tolling was still pending as a class action.[57]

1. The Initial Circuit Court Decisions Held That Tolling Should Not Apply to Putative Class Members Who File Individual Suits Prior to a Ruling on Class Certification

The first circuit court to consider the issue determined that tolling did not apply to a plaintiff who sought to file an independent suit while class certification was still pending.[58] The First Circuit reasoned that allowing a plaintiff to file suit prior to a class certification decision would frustrate, rather

56. *See, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553 (6th Cir. 2005); Glater v. Eli Lilly & Co., 712 F.2d 735 (1st Cir. 1983); Puttick v. Am. Online, Inc., No. MDL 1500(SWK), 05 Civ. 5748(SWK), 2007 WL 1522612 (S.D.N.Y. May 23, 2007); *In re* Enron Corp. Sec., 465 F. Supp. 2d 687 (S.D. Tex. 2006); Irrer v. Milacron, Inc., No. 04-72898, 2006 WL 2669197 (E.D. Mich. Sept. 18, 2006); Kozlowski v. Sheahan, No. Civ.A. 05 C 5593, 2005 WL 3436394 (N.D. Ill. Dec. 12, 2005); Calvello v. Elec. Data Sys., No. 00CV800, 2004 WL 941809 (W.D.N.Y. Apr. 15, 2004); Fezzani v. Bear, Stearns & Co., 384 F. Supp. 2d 618 (S.D.N.Y. 2004); Shaffer v. Combined Ins. Co. of Am., No. 02 C 1774, 2003 WL 22715818 (N.D. Ill. Nov. 18, 2003); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188 (E.D.N.Y. 2003); Chazen v. Deloitte & Touche, LLP, 247 F. Supp. 2d 1259 (N.D. Ala. 2003), *aff'd in part, rev'd in part*, No. 03-11472, 2003 WL 24892029 (11th Cir. Dec. 12, 2003); *In re* Heritage Bond Litig., 289 F. Supp. 2d 1132 (C.D. Cal. 2003); Prohaska v. Sofamor, S.N.C., 138 F. Supp. 2d 422 (W.D.N.Y. 2001); Primavera Familienstifung v. Askin, 130 F. Supp. 2d 450 (S.D.N.Y. 2001), *amended by* 137 F. Supp. 2d 438 (S.D.N.Y. 2001); Chinn v. Giant Food, Inc., 100 F. Supp. 2d 331 (D. Md. 2000); Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793 (N.D. Tex. 2000); Wahad v. City of New York, No. 75 Civ. 6203(AKH), 1999 WL 608772 (S.D.N.Y. Aug. 12, 1999); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, MDL 997, 1998 WL 474146 (N.D. Ill. Aug. 6, 1998); Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399 (S.D. Ind. 1996); Chemco, Inc. v. Stone, McGuire & Benjamin, No. 91 C 5041, 1992 WL 188417 (N.D. Ill. July 29, 1992); Pulley v. Burlington N., Inc., 568 F. Supp. 1177 (D. Minn. 1983); Wachovia Bank & Trust Co. v. Nat'l Student Mktg. Corp., 461 F. Supp. 999 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980).

57. *See, e.g.*, *Rahr,* 142 F. Supp. 2d at 799-800; *see also* cases cited *supra* note 56.

58. *See Glater*, 712 F.2d at 739.

than further, the goals of *American Pipe*.[59] Instead of increasing judicial efficiency and economy, the Court determined that allowing individual suits to be filed before class certification would lead to a greater number of lawsuits.[60]

Likewise, the Sixth Circuit found that class action tolling was not available to an institutional investor who sued PriceWaterhouseCoopers, LLP for federal securities fraud.[61] Wyser-Pratte Management Company brought suit on June 11, 2002, for claims arising no later than February 23, 1999.[62] The plaintiff argued that the action was timely under a two-year statute of limitations since a previous class action suit against the defendant had tolled the statute.[63] At the time Wyser-Pratte filed suit, class certification in the earlier suit was still pending.[64]

The Sixth Circuit ruled that Wyser-Pratte could not avail itself of the class action tolling doctrine.[65] The court cited the rationale of judicial efficiency and observed that "[t]he purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification."[66] Once again, the concern was that allowing an individual plaintiff to file an independent suit prior to a decision on class certification would lead to an increase, rather than a decrease, in filings.[67] Moreover, the Sixth Circuit noted that independent lawsuits filed prior to class certification "may evaporate once a class has been certified."[68] The court further explained that "[a]t the point in a litigation when a decision on class certification is made, [parties] usually are in a far better position to evaluate whether they wish to proceed with their own lawsuit, or to join a class, if one has been certified."[69]

---

59. *Id.*

60. *See id.*

61. *See Wyser-Pratte*, 413 F.3d at 554, 568-69.

62. *See id.* at 554-55.

63. *Id.* at 560-61. There were two pending class actions on which Wyser-Pratte sought to base its argument that the statute of limitations had been tolled as to its claims against PriceWaterhouseCoopers. *See id.* at 558. The court ruled that a shareholder class action against Telxon Corp. did not toll the statute as to a claim against PriceWaterhouseCoopers because PriceWaterhouseCoopers was not a named defendant in that suit and thus had not been provided notice by the suit's filing. *See id.* at 567-68. Thus, only the shareholder class action against PriceWaterhouseCoopers was relevant to the question of whether a putative class member could claim the benefit of tolling prior to a class certification decision. *See id.* at 568-69.

64. *Id.* at 560.

65. *Id.* at 568-69.

66. *Id.* at 569.

67. *See id.*; *see also supra* text accompanying notes 53-54.

68. *Wyser-Pratte*, 413 F.3d at 569 (quoting *In re* WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d 431, 452 (S.D.N.Y. 2003), *vacated*, 496 F.3d 245 (2d Cir. 2007)).

69. *Id.* (quoting *In re WorldCom*, 294 F. Supp. 2d at 452).

A comparison of the First and Sixth Circuit cases reveals that the primary argument against allowing class action tolling for individual suits filed prior to class certification centers on judicial efficiency.[70] If the purpose of the *American Pipe* doctrine is to reduce the number of suits filed in federal courts, allowing members of a putative class to file individual suits prior to class certification would achieve the opposite result of that sought by the Court in *American Pipe*.[71] The Supreme Court provided strong indicators of such a goal by stating in *American Pipe* that "efficiency and economy of litigation . . . is a principal purpose of the [class action] procedure."[72] Nevertheless, recent circuit court decisions have begun to find that class action tolling *should* be allowed for members of a putative class who file suit before class certification, on the grounds that tolling under such circumstances does not frustrate the goals of statutes of limitations.[73]

2. The More Recent Trend in the Federal Circuits Is to Find That Tolling Does Apply to Putative Class Members Who File Individual Suits Prior to Class Certification Decisions

The United States Court of Appeals for the Second Circuit was the first appellate court to determine that class action tolling could apply to an individual suit filed by a member of a putative class prior to class certification.[74] In the case of *In re WorldCom Securities Litigation*, the court reasoned that judicial efficiency was not the purpose of the *American Pipe* decision—it was merely "an incidental benefit."[75] Likewise, the court determined that protecting potential defendants from "multiple actions in multiple forums" was not the goal of *American Pipe*.[76] According to the Second Circuit, the real purpose of *American Pipe* was "to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually."[77] The court found that because the plaintiffs were represented by the initial filing of the class action, this filing tolled the statute of limitations for them.[78] Moreover, the filing of the

70. *Compare id.*, *with* Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983).

71. *See Glater*, 712 F.2d at 739.

72. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

73. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1230-35 (10th Cir. 2008); *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008), *cert. denied sub nom.* E.I. du Pont de Nemours & Co. v. Stanton, 129 S. Ct. 762 (2008); *In re* WorldCom Sec. Litig., 496 F.3d 245, 254-56 (2d Cir. 2007).

74. *See In re WorldCom*, 496 F.3d at 254-56.

75. *Id.* at 256.

76. *Id.* (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353 (1983)).

77. *Id.*

78. *Id.*

class action satisfied the primary purpose of the statute of limitations by placing the defendants on notice of the plaintiffs' claims.[79]

In the case of *In re Hanford Nuclear Reservation Litigation*, the Ninth Circuit expressed its agreement with the *WorldCom* court.[80] The court observed that "[s]tatutes of limitations are intended to provide notice to defendants of a claim before the underlying evidence becomes stale."[81] Apparently drawing on the Supreme Court's description of class actions as representative suits,[82] the Ninth Circuit noted that the "filing of a timely class action provides defendants with notice of the claim, so a follow-on individual suit cannot surprise defendants."[83]

In extending the class action tolling doctrine to plaintiffs seeking to file individual actions prior to class certification, the Second and Ninth Circuits emphasized different considerations than the First and Sixth Circuits. These courts did not focus solely on the judicial efficiency aspect of statutes of limitations and class action suits, but emphasized the representative nature of the actions and the notice provided to defendants.[84] The Supreme Court has identified both of these apparently conflicting goals as purposes behind class action tolling.[85] In *State Farm Mutual Automobile Insurance Co. v. Boellstorff*, the Tenth Circuit would balance these two goals to determine that class action tolling should be available to plaintiffs filing independent suits prior to class certification.[86]

III. State Farm Mutual Automobile Insurance Co. v. Boellstorff

A. The Facts

In 1973, the Colorado Legislature enacted the Colorado Auto Accident Reparations Act (CAARA).[87] CAARA mandated that all automobile liability policies include minimum personal injury protection (PIP) benefits with "time and dollar" limitations.[88] Moreover, CAARA required that all "insurers offer

79. *Id.* at 255; *see also supra* text accompanying note 14.

80. *In re* Hanford Nuclear Reservation Litig., 534 F.3d 986, 1009 (9th Cir. 2008), *cert. denied sub nom.* E.I. du Pont de Nemours & Co. v. Stanton, 129 S. Ct. 762 (2008).

81. *Id.*

82. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974); *see also supra* note 34 and accompanying text.

83. *In re Hanford*, 534 F.3d at 1009.

84. *See id.*; *see also In re WorldCom*, 496 F.3d at 254-56.

85. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350-53 (1983); *American Pipe*, 414 U.S. at 554-55; *see also* discussion *supra* Part II.B-C.

86. *See* 540 F.3d 1223, 1230-35 (10th Cir. 2008).

87. *Id.* at 1224-25 (citing COLO. REV. STAT. §§ 10-4-701 to -726 (2002) (repealed 2003)).

88. *Id.* at 1225.

to their policyholders the option of purchasing enhanced PIP benefits."[89] Enhanced PIP benefits did not place time or dollar limitations on medical expense claims.[90] Enhanced PIP benefits also offered expanded coverage for lost-wage reimbursements.[91] "PIP benefits were payable to . . . the person named . . . in the [insurance] policy, household relatives of the named insured," occupants in the insured vehicle with permission of the named policyholder, and "pedestrians injured in . . . accident[s] involving the insured vehicle."[92] Though PIP benefits were payable to all four classes of injured persons, CAARA did not specify whether enhanced PIP benefits had to be offered for all categories.[93] Any claims arising under CAARA were subject to a three-year statute of limitations.[94]

By 1998, Colorado courts had clarified the contested obligations of insurance companies under CAARA, ruling that CAARA required insurers to offer enhanced PIP benefits covering injured persons in all four categories mentioned in CAARA, rather than just the named insured.[95] "[A] slew of litigation" ensued, initiated by "policyholders . . . and individuals in the other three . . . categories" covered by policies that had not offered the option of purchasing enhanced PIP coverage for categories of people other than the named policyholder.[96] These suits sought the retroactive reformation of disputed policies to provide enhanced coverage instead of the PIP time and dollar minimums.[97]

The action upon which Boellstorff's tolling argument depended was filed in August 2000, when Ricky Clark brought a class action suit in Colorado state court against State Farm Mutual Automobile Insurance Company.[98] Mr. Clark was a pedestrian injured by a driver whose insurance policy had not offered enhanced PIP benefits for anyone other than the named insured.[99] Mr. Clark

89. *Id.*

90. *Id.* (citing Clark v. State Farm Mut. Auto. Ins. Co., 319 F.3d 1234, 1238 (10th Cir. 2003)).

91. *See id.* (citing *Clark*, 319 F.3d at 1238).

92. *Id.* (citing COLO. REV. STAT. § 10-4-707).

93. *See Clark*, 319 F.3d at 1239 (citing Brennan v. Farmers Alliance Mut. Ins. Co., 961 P.2d 550, 553-54 (Colo. App. 1998)).

94. Boellstorff v. State Farm Mut. Auto. Ins. Co., No. 05-CV-02192, 2006 WL 2594490, at *1-2 (D. Colo. Sept. 11, 2006) (citing COLO. REV. STAT. § 13-80-101(1)(j) (2005)), *aff'd*, 540 F.3d 1223.

95. *Boellstorff*, 540 F.3d at 1225. The court relied on the 1998 *Brennan* decision for the clarification of the obligations of insurance companies under CAARA. *See id.* (citing *Brennan*, 961 P.2d at 554).

96. *See id.*

97. *See id.* at 1225 & n.6.

98. *See Clark*, 319 F.3d at 1237, *cited in Boellstorff*, 540 F.3d at 1226.

99. *See id.*

filed "on behalf of all injured persons covered by a State Farm policy who were not offered and paid extended PIP benefits" under CAARA.[100] Clark's putative class action suit sought retroactive reformation of Colorado-issued State Farm policies, including increased PIP benefits payable to people other than the named insured, in accordance with a Colorado appellate court's construction of CAARA.[101]

In May of 1998, Brian Boellstorff, whose wife would later become a putative member of the *Clark* class, bought a State Farm car insurance policy.[102] The policy Mr. Boellstorff purchased included only the required minimum level of PIP benefits.[103] On September 21, 2001, Mr. Boellstorff's then wife, Leslie Boellstorff, was involved in an accident while driving Mr. Boellstorff's insured Ford Explorer.[104] As a result of the accident, Ms. Boellstorff suffered serious injuries.[105] The parties did not dispute that Ms. Boellstorff was covered by the policy her husband had purchased.[106]

On September 25, 2001, State Farm sent Ms. Boellstorff a letter that notified her of the statutorily required minimum level of PIP benefit coverage provided by her husband's insurance policy.[107] Within a few months of the accident, Ms. Boellstorff hired a law firm "to represent her in a suit against another driver involved in [the] accident."[108] There was no dispute that Ms. Boellstorff fit the description of the putative class described in the *Clark* class action.[109] Nevertheless, on October 31, 2005, Ms. Boellstorff filed an individual claim against State Farm for alleged violations of CAARA.[110] Her complaint comprised essentially the same allegations set out in the still-pending *Clark* class action.[111] State Farm argued that the case should be dismissed as untimely because it was filed more than three years after the accrual of any cause of action Ms. Boellstorff might have had under CAARA, which provided only a

100. *Id.* at 1240.

101. *See id.* at 1240-41 (citing, inter alia, Brennan v. Farmers Alliance Mut. Ins. Co., 961 P.2d 550 (Colo. App. 1998)). Though Clark initially filed his class action suit in Colorado state court, State Farm removed the case to the United States District Court for the District of Colorado. *Id.* at 1237.

102. *Boellstorff*, 540 F.3d at 1224, 1228.

103. *Id.* at 1224.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1227.

108. *Id.* at 1225.

109. *Id.* at 1226 & n.7.

110. *Id.* at 1226.

111. *Id.* Ms. Boellstorff, like Clark, "sought (1) reformation of the insurance policy to include enhanced PIP benefits, and (2) damages for alleged breach of contract." *Id.*; *see also supra* text accompanying note 101.

three-year statute of limitations.[112] Ms. Boellstorff replied that her case remained timely because the three-year statute of limitations had been tolled by the filing of the *Clark* class action.[113]

B. The District Court Proceedings

The U.S. District Court for the District of Colorado found that Ms. Boellstorff's action had "accrued on September 25, 2001, the date on which State Farm . . . inform[ed] her of the PIP benefits to which she was entitled."[114] The court therefore found Ms. Boellstorff's action to be untimely under the statute of limitations provided by Colorado law.[115] Nevertheless, the court accepted Ms. Boellstorff's argument that the *Clark* action—still pending at the time she filed suit—triggered class action tolling and thereby protected her claim.[116] The district court rejected State Farm's contention "that [Ms.] Boellstorff had forfeited the benefits of the . . . [*American Pipe*] tolling doctrine by filing her" individual action before a ruling by the *Clark* court on the proposed class certification.[117] In response, State Farm moved that the question be certified for appellate review.[118] The district court then amended its order to certify for review the question "whether the opportunity to invoke the class action toll of *American Pipe* is lost by a putative class member who commences an individual action prior to a decision as to class certification."[119]

C. The Tenth Circuit's Ruling on the Certified Question

The Tenth Circuit affirmed the district court's ruling on the question whether *American Pipe* tolling applied to Ms. Boellstorff's claim.[120] The court found that the justifications for class action tolling articulated in *American Pipe* applied with equal force to Ms. Boellstoff's situation.[121] The court began by noting that "*American Pipe* incarnates the principle that the class action is a representative creature."[122] Therefore, "members of a putative class are treated as if they were parties to the action itself."[123] The Tenth Circuit also drew attention to the pragmatic goal of judicial efficiency embodied in the class

112. *Boellstorff*, 540 F.3d at 1226-27.
113. *See id.* at 1227.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1235.
121. *See id.* at 1232-34.
122. *Id.* at 1229; *see also supra* note 34 and accompanying text.
123. *Boellstorff*, 540 F.3d at 1229.

action tolling doctrine.[124] Drawing on the representative nature of class action suits and the Supreme Court's efficiency justification for the class action tolling doctrine, the Tenth Circuit set forth five primary reasons for extending tolling to members of a putative class who file suit before a decision on class certification.[125]

IV. The Tenth Circuit's Reasoning for Extending the Class Action Tolling Doctrine

First, the Tenth Circuit observed that the Supreme Court's language in *American Pipe* and its progeny supported the extension of tolling to individual suits filed prior to class certification.[126] The Tenth Circuit quoted *Crown, Cork & Seal*'s statement that

> "[t]he commencement of a class action suspends the applicable 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." Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied.[127]

In the Tenth Circuit's opinion, this language did not support the contention that the denial of class certification is necessary for tolling to take effect.[128] Rather, the court interpreted this language as an explanation of the mechanics of tolling—the filing of the class action begins the toll, and the denial of class certification restarts the running of the limitations period.[129]

Second, the Tenth Circuit observed that a case like Ms. Boellstorff's is not properly viewed as one involving tolling per se, but as one in which the action was timely because Ms. Boellstorff was a party (albeit unnamed) in the initial *Clark* action and had thus satisfied the statute of limitations because the class action was filed before her statutory period elapsed.[130] Given that the class action mechanism is inherently a representative action, "each putative class member 'has effectively been a party to an action' against the defendant 'since a class action covering him' was filed."[131] The Tenth Circuit found this

---

124. *See id.*; *see also supra* text accompanying notes 31-32.

125. *See Boellstorff*, 540 F.3d at 1232-34.

126. *Id.* at 1232.

127. *Id.* (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54 (1983) (quoting Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974))).

128. *See id.*

129. *See id.*

130. *Id.* at 1232-33 (quoting Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000)).

131. *Id.* (quoting *Joseph*, 223 F.3d at 1168).

conclusion reinforced by the fact that the Supreme Court had ruled that tolling would apply regardless of whether the putative class member had relied on, or even been aware of, the prior class action to which he was a party.[132] Thus, the court reasoned that Mr. Clark had already effectively "pre-filed" an action against State Farm on Ms. Boellstorff's behalf, and she was essentially taking control of her claim by filing an independent suit.[133]

Third, the court found that the application of the tolling doctrine to Ms. Boellstorff's suit would not frustrate the policy decisions made by the Colorado Legislature in creating the three-year statute of limitations for CAARA actions.[134] The filing of the *Clark* class action had already "put State Farm on notice of the 'substantive claims being brought against' it as well as the 'number and generic identities of the potential plaintiffs.'"[135] State Farm had thus already received the benefit of CAARA's three-year statute of limitations when the *Clark* action put it on notice of suit in 2000.[136]

Fourth, the Tenth Circuit found that "locking putative class members into the class until the class certification decision . . . could adversely affect" individual plaintiffs,[137] and even frustrate the goal of statutes of limitations by allowing potential claims to grow more stale.[138] Federal Rule of Civil Procedure 23(c)(1)(A) requires certification of the putative class "[a]t an early practicable time."[139] In practice, however, class certification might take years, as illustrated by the *Clark* action.[140] The court determined that extending tolling to plaintiffs who wish to file individual actions prior to a class certification ruling would allow plaintiffs who "deem their own claims valuable enough . . . or decide that class certification is doubtful" to bring individual suits without potentially waiting years for a class certification ruling.[141] Moreover, the court was concerned that forcing plaintiffs to wait for a class certification ruling before filing their individual suits would frustrate the purpose of statutes of limitations

132. *See id.* at 1233 (citing *American Pipe*, 414 U.S. at 551-52).

133. *Id.*

134. *Id.* (citing *In re* WorldCom Sec. Litig., 496 F.3d 245, 255 (2d Cir. 2007)).

135. *Id.* (quoting *American Pipe*, 414 U.S. at 555).

136. *Id.*

137. *Id.*

138. *See id.*

139. *Id.* (citing FED. R. CIV. P. 23(c)(1)(A)).

140. *Id.* The *Clark* action was filed in August 2000, but no motion for class certification was filed until almost seven years later in May 2007, nearly two years after Ms. Boellstorff brought her individual claim in October 2005. *See id.*; *see also supra* text accompanying note 110.

141. *Beollstorff*, 540 F.3d at 1233 (citing *In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007)).

in guarding against stale claims.[142] The longer plaintiffs were forced to wait, the greater the chance that evidence would grow stale.[143]

Finally, the Tenth Circuit rejected the concern that extending class action tolling to potential members of putative classes before a court ruling on class certification would result in an increased burden on the courts.[144] The court reasoned that the only class members likely to file individual suits prior to a class certification decision would be those most likely to opt out of a class even if certification were granted.[145] Thus, the court saw little threat to efficiency in permitting "litigants with claims valuable enough to pursue" individual actions to file independent claims before class certification.[146] "The courts' case-load [would] likely remain the same; the only difference [would be] *when* those cases show up on the dockets."[147]

Furthermore, the court expressed concern that not extending class action tolling would have a negative impact on the efficiency of the courts. Potential plaintiffs would be forced to choose whether to file independent suits before the untolled limitations period for their individual claims expired.[148] Uncertain about how long class certification might actually take, these plaintiffs might choose to file "placeholder suits" as a means of preserving their right to sue.[149] That practice would increase the burden on the judiciary rather than decrease it, as the *American Pipe* doctrine sought to do.[150]

V. Evaluating the Tenth Circuit's Reasons for Extending the Class Action Tolling Doctrine

A close examination of the reasons enumerated by the Tenth Circuit for extending class action tolling reveals that, though the question is difficult, *American Pipe* tolling should be extended to cover independent suits filed prior to class certification. The Supreme Court's language in *American Pipe* and its progeny is open to multiple interpretations, but the representative nature of class action suits suggests that the Tenth Circuit was correct to conclude that a class member's cause of action is tolled during the time she is a part of the putative class. This understanding of class action tolling is consonant with the primary purpose of statutes of limitation—because the defendant is provided with

142. *See id.*
143. *See id.*
144. *See id.*
145. *Id.*
146. *See id.*
147. *Id.*
148. *See id.* at 1234.
149. *Id.*
150. *See id.*

sufficient notice of the individual's claim—and poses little threat to judicial efficiency.

A. The Supreme Court's Language

The Tenth Circuit's decision to apply *American Pipe* tolling to plaintiffs who file individual suits prior to a class certification decision was based in part on the court's belief that this practice was supported by Supreme Court language. Admittedly, however, a close reading of *American Pipe* and *Crown, Cork & Seal* reveals that the Supreme Court's language can support multiple interpretations. But contrary to what the Sixth Circuit suggested,[151] the language of *American Pipe* did not foreclose decisions like the Tenth Circuit's. The *American Pipe* Court found that the statute of limitations was tolled "as to *all* asserted members of the class."[152] This language seems to suggest that once tolling begins with the filing of the class action, the limitations period is tolled for all class members.

The entire sentence, however, stated that tolling was applicable "to all asserted members of the class who would have been parties *had the suit been permitted to continue as a class action*."[153] This language could be interpreted, as it was by the Sixth Circuit, as standing for the proposition that tolling is not available to members of the asserted class until there is a denial of class certification.[154] As a result, the Court's language could be construed as not supporting the extension of tolling to putative class members who choose to pursue independent litigation before class certification when there is no indication that the initial class action will not be permitted to continue as a class action.

The language of *Crown, Cork & Seal* can give rise to the same kind of interpretive battle. *Crown, Cork & Seal* held that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied."[155] Again, this may be read as support for the Tenth Circuit's interpretation that tolling begins for all class members with the filing of the class action and ends upon the denial of class certification. Even a court that held that tolling should not be extended to individual suits prior to class certification once found that this language supports the reasoning later articulated by the Tenth Circuit.[156]

---

151. *See* Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 568-69 (6th Cir. 2005).

152. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974) (emphasis added).

153. *Id.* (emphasis added).

154. *See Wyser-Pratte*, 413 F.3d at 569.

155. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 354 (1983).

156. *See In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, MDL 997, 1998 WL 474146, at *8 (N.D. Ill. Aug. 6, 1998).

But the Supreme Court followed this inclusive statement by noting that "*[a]t that point*, class members may choose to file their own suits or to intervene as plaintiffs in the pending action."[157] This statement may easily be read to support the contention that class members must wait until class certification is denied before filing independent suits. Therefore, it is doubtful that *Crown, Cork & Seal*'s language is quite as "clear" as the Tenth Circuit claimed,[158] but it does not absolutely foreclose the Tenth Circuit's interpretation either.

B. The Representative Nature of the Class Action Suit

The Tenth Circuit's second reason for extending *American Pipe* tolling is more persuasive. In considering the representative nature of the class action suit, the court observed that a putative member of a class has effectively filed an action with the commencement of the class action and has therefore been a party to the suit all along.[159] The Supreme Court noted in *American Pipe* that the class action was initially designed as "an invitation to joinder" extended to potential class members.[160] This design led to abuses, however, in that it allowed class members "in some situations [to] await developments in the trial or even final judgment on the merits in order to determine whether participation [in the class action] would be favorable to their interests."[161] Federal Rule of Civil Procedure 23 was amended in part to rectify this problem.[162] In its current form, Rule 23 makes the final judgment in any class action binding on all members of the class who have not requested exclusion from the class.[163] Judgments are binding on all class members whether or not they have been provided notice of the action.[164]

---

157. *Crown, Cork & Seal*, 462 U.S. at 354 (emphasis added).

158. *See* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1232 (10th Cir. 2008).

159. *See id.* at 1232-33.

160. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 545-46 (1974).

161. *Id.* at 547.

162. *Id.*

163. *See* FED. R. CIV. P. 23(c)(3). Only members of a class certified under Federal Rule of Civil Procedure 23(b)(3) have the option to request exclusion from the class after the class is certified. *See id.* 23(c)(2)(B)(v). If members of a 23(b)(3) class do not request exclusion, the judgment in the action will bind them. *See id.* 23(c)(3)(B). For classes certified under Federal Rule of Civil Procedure 23(b)(1) and 23(b)(2), once the class is certified, judgment in the action will be binding on all members. *See id.* 23(c)(3)(A).

164. *See id.* 23(c)(3). There is no requirement that members receive notice of an action certified under Federal Rule of Civil Procedure 23(b)(1) or 23(b)(2). For these types of classes, whether notice should be provided to members and the form it should take if it is provided are left to the discretion of the judge. *Id.* 23(c)(2)(A). For members of a class certified under Rule 23(b)(3), the rule calls for the court to order the "best notice that is practicable under the circumstances." *Id.* 23(c)(2)(B).

The Court concluded that these changes mean that a class action is "no longer 'an invitation to joinder' but a truly representative suit."[165] This representative nature of the class action suit has been integral to the Court's development of the tolling doctrine. Because a class action is representative, "the commencement of [a class] action satisfie[s] the purpose of the limitation provision as to all those who might subsequently participate in the suit."[166] Class members are not required to rely on or have knowledge of the class action proceeding before the commencement of the suit to satisfy the purpose of the statute of limitations.[167]

The Tenth Circuit's reasoning fits well with the Supreme Court's observations on the nature of the class action suit. Given that members of a class are bound by the judgment in an action unless they opt to be excluded from the class,[168] and that they stand "as parties to the suit until and unless they receive[] notice thereof and [choose] not to continue,"[169] it would be an odd rule that would find their burden of filing within the statute of limitations unmet by the filing of the class action.

C. Class Action Suits and Notice to Defendants

The Supreme Court has recognized that there is a relationship between the representative nature of the class action suit and the requirement that defendants receive notice of pending litigation.[170] As the Tenth Circuit correctly noted, when the underlying *Clark* class action was filed, State Farm was put "on notice of the 'substantive claims being brought against' it as well as the 'number and generic identities of the potential plaintiffs.'"[171] When the *Clark* class action against State Farm was filed, State Farm could not have known that Ms. Boellstorff specifically would be a party to the suit, but it should have been able to foresee that many similarly situated plaintiffs would assert claims. Thus, State Farm was in a position to start gathering the evidence required for

165. *American Pipe*, 414 U.S. at 550.
166. *Id.* at 551.
167. *See id.* at 552.
168. *See* FED. R. CIV. P. 23(c)(3); *see also supra* note 163.
169. *American Pipe*, 414 U.S. at 551.
170. *See id.* at 554-55.
171. *See* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1233 (10th Cir. 2008) (quoting *American Pipe*, 414 U.S. at 555); *see also supra* text accompanying note 135. Recall that notice to defendants is the primary purpose of statutes of limitations. *See* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944); *see also supra* text accompanying note 14.

preparing its defense.[172] It had therefore already been provided the benefit of the statute of limitations set by the Colorado Legislature.[173]

D. Adverse Effects of Nontolling on Plaintiffs and Increased Chances of Stale Evidence

The Tenth Circuit found further support for extending the class action tolling doctrine by considering the adverse effects that nonextension would have on both plaintiffs and defendants. The Tenth Circuit noted that "locking . . . class members into the class" action suit until a certification decision could force plaintiffs to wait years before obtaining the relief they seek.[174] As the court pointed out, seven years had passed between the filing of the *Clark* action and the filing of the motion for class certification.[175] Often, in fact, the "time between the commencement of a class action to its certification can be indefinite."[176] Moreover, forcing class members to await a certification decision would make plaintiffs "dependent on the pace set by attorneys and the [c]ourt[s] alike."[177] While *American Pipe* couched its justification for class action tolling largely in terms of judicial efficiency and the avoidance of duplicative suits,[178] the purpose of *American Pipe*, as the Second Circuit observed, was not to force "class members to forgo their right to sue individually."[179]

Declining to extend the tolling doctrine appears even more problematic in light of the detrimental effects on defendants of requiring plaintiffs to wait for a decision on class certification before filing an independent suit.[180] One purpose of statutes of limitations is to ensure that defendants do not have to defend against stale claims, where there is a risk that evidence will have been lost.[181] Requiring plaintiffs to wait until a class certification decision has been rendered, which could take years, would only increase the danger that claims and evidence would become stale.[182]

---

172. *See Boellstorff*, 540 F.3d at 1233.

173. *Id.*

174. *See id.*

175. *Id.*; *see also supra* note 140.

176. Mason v. Long Beach Mortgage Co., No. 07 C 6545, 2008 WL 4951228, at *2 (N.D. Ill. Nov. 18, 2008).

177. *Id.*

178. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553-54 (1974); *see also supra* text accompanying notes 31-32.

179. *See In re* WorldCom Sec. Litig., 496 F.3d 245, 256 (2d Cir. 2007).

180. *See Boellstorff*, 540 F.3d at 1233.

181. *See* Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944).

182. *See Boellstorff*, 540 F.3d at 1233.

E. The Effect of Extending Class Action Tolling on Judicial Efficiency

The primary argument against extending class action tolling to members of a putative class prior to a certification ruling is that doing so would frustrate the principal purpose of tolling and lead to an increase in the number of duplicative suits.[183] This argument is not without force. The Supreme Court originally justified the class action tolling doctrine as a means of encouraging judicial efficiency by discouraging the filing of duplicative motions to protect class members' future rights to file independent suits.[184] It should be noted that the number of courts that have been required to address the extension of tolling to class members who file suit prior to class certification is itself evidence that an extension of the doctrine will lead to the filing of some duplicative suits.[185]

Nevertheless, the Supreme Court has recognized that there are reasons why class members might wish to file independent lawsuits rather than participate in the class action.[186] The Court expressed concern that restricting class action tolling to just those class members who want to intervene in the action would create an incentive for class members wishing to pursue individual actions to file protective placeholder suits before the running of the statute of limitations.[187] The same concern would exist if tolling were only available to members of a class after a class certification decision. Putative class members might seek to file independent suits in order to preemptively protect their claims in the event they later become dissatisfied with how the class action suit is progressing. The Tenth Circuit's extension of the tolling doctrine thus seems in step with the Court's reasoning in *Crown, Cork & Seal*.

The Tenth Circuit was also correct to draw attention to the fact that Federal Rule of Civil Procedure 23 already allows members of a class to seek exclusion

183. *See* discussion *supra* Part II.D.1. While the circuits that have declined to apply tolling to class members who choose to file independent suits prior to a class certification decision have identified judicial efficiency as the primary purpose of *tolling*, *see, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 569 (6th Cir. 2005), this is only a secondary purpose of *statutes of limitations*. *See* discussion *supra* Part II.A. The primary purpose of statutes of limitations, as discussed above, is providing notice to defendants of litigation in order to relieve them of the burden of defending against stale claims. *See* Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 428 (1965); *Order of R.R. Telegraphers*, 321 U.S. at 348-49; *see also supra* text accompanying note 14.

184. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983) (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974)).

185. *See, e.g.*, Folks v. State Farm Mut. Auto. Ins. Co., 299 F. App'x 748 (10th Cir. 2008); Mason v. Long Beach Mortgage Co., No. 07 C 6545, 2008 WL 4951228 (N.D. Ill. Nov. 18, 2008); *see also* cases cited *supra* note 56.

186. *See Crown, Cork & Seal*, 462 U.S. at 350.

187. *See id.* at 350-51.

from the class, or opt out, after class certification.[188] The court claimed that any increase in duplicative suits filed under an extended tolling doctrine would thus be offset, because those same litigants filing duplicative suits would choose to opt out of the class after certification anyway.[189] Moreover, statistical studies show that few class members choose to opt out of class litigation.[190]

If the Tenth Circuit is correct—that those who would file independent suits are the same class members who would opt out of certified classes anyhow—then the goal of judicial efficiency is only minimally served by restricting tolling to those who wait for class certification. There are two reasons for this. First, only a small percentage of putative class members would choose to file independent suits before class certification but after their statutes of limitations had run. Second, a restriction on tolling would merely remove suits from dockets today and delay them until a later time.

VI. Conclusion

The Tenth Circuit's *Boellstorff* decision adds to the growing number of cases holding that class action tolling should apply to all members of a putative class, regardless of whether a certification ruling has been made. Though there is a reasonable fear that this practice might increase the amount of litigation filed in federal courts, it is very likely that any increase will be offset, given that the types of litigants who file individual suits before a certification decision would otherwise elect to opt out of the class after certification if they were forced to

188. *See* State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223, 1233 (citing Jahn *ex rel.* Jahn v. ORCR, Inc., 92 P.3d 984, 989 (Colo. 2004)); FED. R. CIV. P. 23(c)(2)(B)(v); *see also supra* note 163.

189. *See Boellstorff*, 540 F.3d at 1233-34.

190. *See* Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004). It should be noted that opting out of a class after certification is only allowed to members of classes certified under Federal Rule of Civil Procedure 23(b)(3). FED. R. CIV. P. 23(c)(2)(B)(v); *see also supra* note 163. The rule fashioned by the Tenth Circuit, however, would not restrict tolling only to classes certified under Rule 23(b)(3). But the court's use of the word "valuable" to describe the claims of those who might elect to opt out indicates that it foresees the tolling doctrine being most attractive to members of putative class actions being pursued under a Federal Rule of Civil Procedure 23(b)(3) classification. *See Boellstorff*, 540 F.3d at 1233; *see also supra* text accompanying note 146. The likelihood of this conclusion is reinforced by the Supreme Court's opinion in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which noted potential constitutional concerns in the certification of a class that does not allow for opting out where significant, individualized monetary damages are sought. *See id.* at 845-48. Thus, any putative class member who is seeking to file an independent suit prior to a class certification decision and who is a member of a class seeking certification as a non-opt-out class is likely a member of a putative class headed for eventual certification denial already.

wait. The extension of *American Pipe* in this manner is still consistent with the Supreme Court's past language. And because the representative nature of class actions means that defendants are put on notice of pending litigation with the filing of a class action, allowing class members to file individual suits prior to class certification does defendants little damage.

Moreover, the length of time that can pass between the initiation of a class action and class certification can often mean that potential plaintiffs must wait for years before they see justice done. This same passage of time can actually frustrate the purposes of statutes of limitations by allowing claims to become stale. By extending the tolling doctrine, the Tenth Circuit's decision in *Boellstorff* helps mitigate both of these concerns. The Supreme Court has yet to consider the issue, but the growing trend among the circuit courts of appeals seems to suggest that an extension of tolling to cover class members who file independent suits prior to certification will become the law of the majority of jurisdictions.

Caleb Brown