

## NEW YORK COURT OF APPEALS ROUNDUP

### DECISION CLARIFIES CLASS ACTION TOLLING IN NEW YORK

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We note that Judge Leslie E. Stein recently announced that she will be retiring from the Court of Appeals in June 2021 after having served on the court since February 2015 and after more than 20 years of distinguished judicial service overall. It is only fitting, then, that this month's column focusses on a decision for which Judge Stein wrote the majority opinion.

In *Chavez v. Occidental Chemical Corporation*, the Court of Appeals answered questions certified by the Second Circuit regarding the extent to which New York recognizes the class action tolling principles set forth in *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974) and its progeny providing that the statute of limitations is tolled as to absent class members as long as a putative class action is pending. The court unanimously agreed that New York recognizes "cross-jurisdictional" tolling with respect to putative class actions brought in other states. The Judges split, though, on the issue of whether that tolling terminates upon a non-merits dismissal of class certification.

This case has a complex and lengthy procedural history. The plaintiffs filed individual lawsuits against Occidental Chemical Corporation in federal court in Delaware in 2012. Plaintiffs alleged injuries arising out of Occidental's manufacture and distribution to banana plantations in Latin America of a chemical called dibromochloropane. The cases were consolidated and the action was transferred to the Southern District of New York in 2017. After the transfer, Occidental moved for judgment on the pleadings on the grounds that plaintiffs' claims were time-barred under New York's three year statute of limitations. Plaintiffs opposed the motion and argued that the statute had been tolled pursuant to the doctrine set forth in *American Pipe* by virtue of a putative class action that had been filed in Texas state court back in 1993.

The 1993 Texas action was brought by a group of plaintiffs from several Latin American countries including Costa Rica, Ecuador and Panama, who alleged claims that were identical to the claims in the instant action. The 1993 plaintiffs moved for class certification. While that motion was pending, Occidental impleaded two subsidiaries of a company owned by the State of Israel and then removed the action to the U.S. District Court for the Southern District of Texas on the grounds that the impleaded subsidiaries implicated the Foreign Sovereign Immunities Act of 1979 (the FSIA). Occidental then moved to dismiss the case based on forum non conveniens and argued that the claims should be heard in each plaintiff's home country. The 1993 plaintiffs opposed the motion on the grounds that the courts in their home countries would lack personal jurisdiction over Occidental.

The District Court granted Occidental's forum non conveniens motion, but included in its decision a return jurisdiction clause providing that if the plaintiffs' cases were dismissed in their home countries, they could

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return to the District Court and “upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed.” *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1375 (S.D. Tex. 1995). The court entered a “Final Judgment” in October 1995 dismissing the action and enjoining the named plaintiffs and any intervenors from commencing or intervening in any new case arising from the same underlying facts. The Fifth Circuit affirmed the decision.

While the Fifth Circuit appeal of the final judgment was pending, certain of the 1993 plaintiffs sought relief in Costa Rica, but the Costa Rica Supreme Court determined that its courts lacked personal jurisdiction over Occidental. Accordingly, in April 1996 a number of the Costa Rican plaintiffs sought reinstatement in the Southern District of Texas pursuant to the return jurisdiction clause. Because the Fifth Circuit appeal was still pending, the District Court denied the motion to reinstate, without prejudice, pending resolution of the appeal.

Meanwhile, the U.S. Supreme Court ruled in a related case that because Israel did not own a majority of the stock of the impleaded subsidiaries, the FSIA did not authorize removal to federal court. The 1993 plaintiffs then moved in the Southern District of Texas to vacate the prior order of dismissal. The District Court vacated its injunction preventing the named plaintiffs and intervenors from bringing any new litigation but it denied the request to vacate the forum non conveniens dismissal. In light of the Supreme Court decision, the District Court determined that it lacked jurisdiction to reinstate the case and, instead, remanded the case to Texas state court.

In 2006, the Texas state court granted the motion to reinstate, and, after four years of motion practice, the state court denied a motion for class certification in 2010 and then granted plaintiff’s motion to voluntarily dismiss the action.

Certain absent class member then commenced the instant action in Delaware which, as noted above, was transferred to the Southern District of New York where Occidental moved for judgment on the pleadings on statute of limitations grounds and plaintiffs opposed the motion by arguing that the statute had been tolled by virtue of the Texas putative class action. Occidental argued that New York does not recognize cross-jurisdictional tolling and, even it did, plaintiffs’ claims would still be untimely because the Texas federal court had denied class certification back in 1995 before the state court’s reinstatement and subsequent denial of class certification in 2010. The District Court rejected both arguments and denied the motion but, because there is a split in authority in the Southern District as to whether New York recognizes cross-jurisdictional tolling, the District Court certified an interlocutory appeal to the Second Circuit. The Second Circuit, in turn, certified to the Court of Appeals the questions of: (1) does New York recognize cross-jurisdictional class action tolling, and (2) can a non-merits dismissal of class certification terminate class action tolling and, if so, did the orders in the Texas proceedings do so here.

In a majority opinion written by Judge Stein and joined by Chief Judge DiFiore and Judges Garcia and Feinman, the Court of Appeals answered both questions in the affirmative. The majority explained that *American Pipe* and its progeny provide that the filing of a class action in federal court tolls the statute of limitations as to all members of the putative class, and that this rule is designed to avoid an unnecessary multiplicity of suits brought by absent class members solely to preserve their claims in the event that class certification is denied after the statute of limitations had run.

New York’s class action procedures are codified in Article 9 of the Civil Practice Law and Rules and are modeled on Rule 23 of the Federal Rules of Civil Procedure. The majority found that recognizing cross-jurisdictional tolling among United States federal and state courts is consistent with the policy goal underlying both statutory mechanisms of avoiding wasteful parallel litigation brought by absent class members to preserve their rights. In addition to recognizing cross-jurisdictional tolling under *American Pipe*, the majority also expressly recognized

intra-jurisdictional tolling which had been acknowledged in almost forty years of Appellate Division jurisprudence but which had not been the subject of a Court of Appeals ruling.

The majority then addressed the second question certified by the Second Circuit. Judge Stein's opinion noted the general acceptance of the principle that "tolling terminates when it is no longer objectively reasonable for absent class members to rely upon the putative class action to vindicate their rights," and concluded that a non-merits dismissal or denial of class certification can effect such a termination. Stressing the need for a bright line rule in order to provide clarity to all parties in understanding their rights, the majority concluded that tolling is terminated as a matter of law when there is a clear dismissal of a putative class action or a denial of class certification for any reason. Once that occurs, according to the majority, it is no longer objectively reasonable for absent class members to rely upon the putative class action to vindicate their rights.

The dissent, in an opinion written by Judge Jenny Rivera and joined by Judges Wilson and Fahey, agrees with the majority that the principles underlying class action jurisprudence require the recognition of intra- and cross-jurisdictional tolling, but eschews the bright line rule adopted by the majority as to when that tolling terminates. The dissent would adopt a more flexible approach where tolling is only terminated where the dismissal of the putative class action or denial of class certification is unconditional. Where, as here, the Texas federal court left open the possibility that plaintiffs could return if jurisdiction could not be obtained in their home countries, the dissent would not find absent class members' continued reliance objectively unreasonable.

Regardless of whether one favors the majority's bright line rule or is persuaded by the dissent's argument concerning the benefits or a more flexible standard, it is now clear that New York recognizes intra- and cross-jurisdictional tolling under *American Pipe* and that this tolling terminates upon any dismissal of the putative class action or denial of class certification.

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