TOLLING: THE *AMERICAN PIPE* TOLLING RULE AND SUCCESSIVE CLASS ACTIONS

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Abstract:

Timing is everything. Even the most meritorious lawsuit will be dismissed if the statute of limitations has run on the plaintiff's claim. In class action litigation, this hurdle is particularly daunting. Supreme Court precedent makes clear that if a class action complaint is timely filed, then the claims of all class members are deemed timely. Likewise, if a motion to certify the class is denied, absent class members may seek to intervene in the pending action or to file individual actions and either way, the statute of limitations is tolled from the date of filing of the class action complaint until denial of the motion to certify. But what if the absent class members seek to present their claims collectively in the context of a successive class action? Is the statute of limitations tolled in this context as well?

Intuitively, one might think that the same policies that justify tolling in the first two situations also justify tolling in the successive class action context. Yet a majority of the federal Courts of Appeals that have addressed this issue have *denied* tolling in the successive class action context. Given the volume of class action litigation, the lack of control that absent class members have over the timing of the certification decision, and the devastating effect the statute of limitations may have on their claims, it behooves us to understand why the courts have resolved the tolling issue for successive class actions differently and whether such differential treatment is justified.

This Article analyzes three sets of policies that have influenced the courts in this context: the policies underlying statutes of limitations; the policies underlying Rule 23; and the policies underlying preclusion doctrine. A careful analysis of these competing policies calls the majority rule into question in two common circumstances: where certification initially was denied because of a problem with the class representative or because of a problem with the class itself that the successive class action seeks to remedy. Only where there is a problem with the class itself and the

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successive class action fails to address that problem does the combination of relevant policies counsel against tolling.

"Though rarely the subject of sustained scholarly attention, the law concerning statutes of limitations fairly bristles with subtle, intricate, often misunderstood issues . . . ."[1]

I. INTRODUCTION

Timing is everything. Even the most meritorious lawsuit will be dismissed if the statute of limitations has run on the plaintiff's claim. It seems such a simple hurdle to overcome: just file a complaint (or serve the defendant) within the limitations period. But in the context of class action litigation, the statute of limitations hurdle may be more impervious. Assume that a class action complaint is timely filed. What if class certification is denied *after* the statute of limitations has run and the absent class members then seek to press their claims? In determining whether their claims are time-barred, does it matter if the absent class members proceed individually or initiate a successive class action?

For more than thirty years, it has been well accepted that the filing of a class action complaint tolls[2] the statute of limitations applicable to the claims of absent class members. In 1974 in *American Pipe & Construction Co. v. Utah*,[3] the Supreme Court held that the statute of limitations is suspended for the period between the filing of a class action complaint and the denial of a motion to certify the class when, upon denial of class certification for a lack of numerosity, absent class members seek to intervene in the action to press their individual claims.[4] Likewise, in 1983

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1. Wolin v. Smith Barney, Inc., 83 F.3d 847, 849 (7th Cir. 1996).
2. According to the Supreme Court:

> [T]he word "tolling" [means] that during the relevant period, the statute of limitations ceases to run. "Tolling effect" refers to the method of calculating the amount of time available to file suit after tolling has ended. The statute of limitations might merely be suspended; if so, the plaintiff must file within the amount of time left in the limitations period. If the limitations period is renewed, then the plaintiff has the benefit of a new period as long as the original. It is also possible to establish a fixed period such as six months or one year during which the plaintiff may file suit, without regard to the length of the original limitations period or the amount of time left when tolling began.

Chardon v. Fumero Soto, 462 U.S. 650, 652 n.1 (1983).

3. 414 U.S. 538 (1974).

4. *Id.* at 552-53. If state law supplies the statute of limitations, then state law ordinarily determines the particular tolling effect of a prior class action. *See Chardon*, 462 U.S. at 654, 661-62 (holding that Puerto Rican law, under which the one-year statute of limitations period began anew

in *Crown, Cork & Seal Co. v. Parker*,[5] the Court held that the statute of limitations is tolled when, upon denial of class certification, absent class members decline to intervene in the putative class action but seek instead to initiate their own independent lawsuits.[6] But what if, upon denial of certification, absent class members decline to intervene and decline to initiate their own individual lawsuits, but instead seek to press their claims in the context of a successive class action initiated by a new class representative?[7]

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following a denial of class certification, governed a section 1983 action filed in federal court in Puerto Rico). *See also* Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied:* Chardon v. Fumero Soto *and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 687 (1985) (criticizing the *Chardon* Court for "improperly narrow[ing] the scope of *American Pipe*'s interpretation of Rule 23 and expand[ing] the potential for confusion in class action litigation").

5. 462 U.S. 345 (1983).

6. *Id.* at 353-54.

7. Courts have also had to consider whether the statute of limitations is tolled during the pendency of a class action if a new plaintiff seeks to join the existing suit, through intervention or otherwise, and to represent the class upon a determination that the original putative representative fails to present typical claims, proves to be an inadequate representative, or lacks standing. *See, e.g.*, McKowan Lowe & Co. v. Jasmine Ltd., 295 F.3d 380, 383 (3d Cir. 2002); Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083, 1088-89 (3d Cir. 1975); Popoola v. MD-Individual Practice Ass'n, 230 F.R.D. 424, 428-30 (D. Md. 2005); *see also* Recent Case, *Civil Procedure—Class Actions—Third Circuit Holds That the Filing of a Class Action Tolls the Statute of Limitations for a Subsequent Class Action When the Initial Denial of Class Certification Is Unrelated to the Appropriateness of the Underlying Claims for Class Treatment*, 116 HARV. L. REV. 2230 (2003) (discussing McKowan Lowe & Co. v. Jasmine, Ltd., 295 F.3d 380 (3d Cir. 2002)) [hereinafter *McKowan Lowe* Comment]. Such "new representative" cases are not successive class actions because there is only one class action—the suit brought by the original putative representative and sought to be maintained by another. This difference is important because the amended complaint that names a new representative may "relate back" to the date of filing of the original complaint under Rule 15(c) of the Federal Rules of Civil Procedure, a possibility that does not exist in the successive class action context. *See* FED. R. CIV. P. 15(c) (stating the rule on "[r]elation [b]ack of [a]mendments"); 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1501 (2d ed. 1990 & Supp. 2005). This Article does not separately address the "new representative" cases, although the policy analysis undertaken in Part V applies in both the successive class action and "new representative" contexts.

Nor does the Article address the additional considerations that arise when the later action is filed in a different judicial system from the earlier class action. *See, e.g.*, Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999) (concluding that Virginia "would not adopt a cross-jurisdictional equitable tolling rule" because it is not concerned with the efficiency objectives of other jurisdictions and it would not want to face "a flood of subsequent filings" upon the dismissal of class actions in other fora); *see also* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 568 (1996) (arguing that "[f]ederal courts should not rely upon [*American Pipe*] to toll state statutes of limitations applicable to state law claims" and "state courts should recognize that whether the filing of a class action, in a state or federal court, should toll a state limitations period is exclusively a matter of state law"); Angela de Sanctis Myers, Comment, *Civil Procedure*—Maestas v. Sofamor Danek Group, Inc.: *The Tennessee Supreme Court's Rejection of the Doctrine of Cross-Jurisdictional Tolling*, 32 U. MEM. L. REV. 521, 536 (2002) (reviewing state

Intuitively, one might think that the same policies that justify tolling in the first two situations also justify tolling in the successive class action context. Yet as we will see, a majority of the federal Courts of Appeals that have addressed this issue have *denied* tolling in the successive class action context. Given the volume of class action litigation, the lack of control that absent class members have over the timing of the certification decision, and the devastating effect the statute of limitations may have on their claims, it behooves us to understand why the courts have resolved the tolling issue for successive class actions differently and whether such differential treatment is justified.

In deciding *American Pipe* and *Crown, Cork*, the Supreme Court considered two sets of policies: those underlying the statutes of limitations and those underlying Rule 23 of the Federal Rules of Civil Procedure. Statutes of limitations balance several competing interests. These interests include repose for prospective defendants, protection for courts from the obligation to adjudicate stale claims, reduction in the volume of litigation, assurance for prospective plaintiffs of a reasonable period of time in which to sue, and enforcement of the substantive laws underlying the plaintiffs' claims.[8] This set of competing interests will be referred to as the "statute of limitations policies."

Rule 23 of the Federal Rules of Civil Procedure governs class action practice in federal court.[9] Rule 23 is designed both to promote judicial economy and efficiency by permitting the presentation of many claims in a single proceeding (thereby reducing the volume of litigation) and to provide a vehicle for the presentation of claims so small in value that they would not be brought in court unless they could be presented collectively.[10] These interests will be referred to as the "Rule 23 policies."

By tolling the statute of limitations during the pendency of a class action, the Supreme Court in *American Pipe* and *Crown, Cork* took into account both the statute of limitations policies and the Rule 23 policies. It noted that the filing of the class action complaint puts the defendant on notice of the number and nature of the claims against it and the need to

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opinions addressing cross-jurisdictional tolling and arguing that borrowing statutes will protect states from inundation by absent class members whose class claims were denied certification in another state); *cf.* Yang v. Odom, 392 F.3d 97, 112 (3d Cir. 2004) (downplaying the risk of forum-shopping by "'unhappy plaintiffs' lawyers who cannot obtain class certification in the original court of their choosing'" and "hold[ing] that *American Pipe* tolling allows litigants whose individual lawsuits would have been timely with the benefit of tolling due to an earlier class action to aggregate their claims in a substantively identical class suit so long as the denial of certification in the earlier action was based solely on Rule 23"), *cert. denied*, 125 S. Ct. 2294 (2005).

8. *See infra* Part II.B for a more complete discussion of the statute of limitations policies.

9. *See* FED. R. CIV. P. 23. Many states have modeled their class action rule on Rule 23. H.R. REP. NO. 108-144, at 9 (2003) (stating that "[t]hirty-six states have adopted [Rule 23 as their state rule], some with minor revisions").

10. *See infra* Part III.B.1 for a more complete discussion of the Rule 23 policies.

prepare a defense. Moreover, it concluded that the efficiency objective of Rule 23 is served if the statute of limitations is tolled. Such tolling discourages the filing of precautionary lawsuits and motions to intervene by absent class members who were happy to remain behind the scenes as long as the class action proceeded but who do not want to forfeit their claims to a statute of limitations defense in the event class certification is denied.

At first blush, it seems that these same policies are served by tolling the statute of limitations in the successive class action context. The original class action complaint puts the defendant on notice of the claims against it, and tolling discourages the filing of duplicative class actions as a precaution, thereby serving the Rule 23 policies. Yet the Courts of Appeals have *not* been inclined to toll the statute of limitations for successive class actions. Why not?

In declining to toll the statute of limitations in the successive class action context, the lower federal courts have introduced a third set of policies into the analysis, those underlying preclusion law. Preclusion law bars relitigation of claims and issues that already were presented in a prior proceeding.[11] This body of law promotes finality and repose, efficiency and judicial economy, consistency, and respect for the integrity of judicial decisions.[12] These interests will be referred to as the "preclusion policies." This Article will consider whether preclusion doctrine itself bars relitigation of the class claim or the certification issue, and if it does not, whether it is appropriate for courts to consider the preclusion policies in deciding whether to toll the statute of limitations for successive class actions. Put differently, we will seek to resolve whether the preclusion policies justify a denial of tolling in the successive class action context notwithstanding *American Pipe* and *Crown, Cork*.[13]

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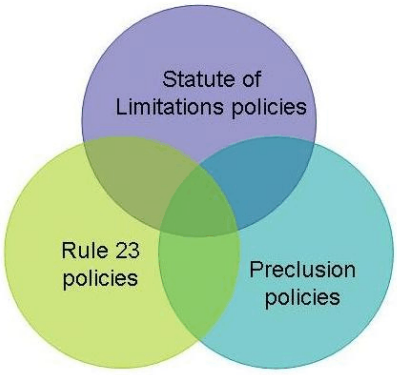
11. *See infra* Part IV.A & B for a discussion of claim and issue preclusion and their application in the context of successive class actions.

12. *See infra* Part IV.A for a more complete discussion of the preclusion policies.

13. This Article employs a three-ring structure in analyzing the policies underlying the statute of limitations, Rule 23 and preclusion doctrine. *Cf.* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 104 (5th ed. 2006) (using a Venn diagram to illustrate the "three rings of civil procedure": personal jurisdiction, subject matter jurisdiction, and venue).



Part II of this Article examines statutes of limitations and the policies they embody. First it introduces the topic of statutes of limitations generally, including the source of the statutes of limitations that govern federal claims. Then it addresses in greater detail the competing policies that statutes of limitations attempt to balance. Part III considers the circumstances in which statutes of limitations are tolled. It identifies a variety of circumstances in which legislatures themselves have tolled statutes of limitations through the enactment of tolling and saving statutes and then it considers the circumstances in which courts invoke equitable principles to toll the statute of limitations. With this background on tolling established, Part III then elaborates upon the Rule 23 policies and the Supreme Court's decisions in *American Pipe* and *Crown, Cork*, which invoked both the statute of limitations policies and the Rule 23 policies to justify tolling in the class action context. Part III also analyzes opinions of the lower federal courts applying the *American Pipe* tolling rule in two different procedural settings. A review of these opinions demonstrates that the lower courts have followed the Supreme Court's lead and have continued to balance the statute of limitations policies and the Rule 23 policies in deciding tolling issues.

Part IV then moves on to the successive class action context. First it introduces preclusion policies generally and then it considers why preclusion doctrine ordinarily does not preclude a successive class action following the denial of class certification in an earlier class action. It then analyzes the opinions of the lower federal courts that have addressed the tolling issue in the successive class action context, demonstrating how these courts have introduced the preclusion policies into the mix of policies considered in determining whether to toll the statute of limitations. Part V undertakes an independent analysis of the three sets of policies that influence the tolling issue in the successive class action context. Finally,

Part VI reaches a conclusion at odds with the approach taken by a majority of the federal Courts of Appeals that have addressed this issue.

II. THE FIRST RING: THE STATUTE OF LIMITATIONS POLICIES

A. *An Introduction to Statutes of Limitations*

All fifty states have enacted statutes of limitations that specify the time periods in which claimants may file suit for civil wrongs, such as torts and breach of contract.[14] Likewise, almost all states have enacted statutes of limitations that prescribe the time periods in which the government may file criminal charges against an alleged wrongdoer.[15] The more serious the offense, the longer the period of time in which the charges may be brought; in many states, there is no time limitation on charges for capital offenses.[16]

The statutes of limitations that govern federal claims derive from a variety of sources. While prosecutions for capital offenses may be commenced at any time,[17] Congress has enacted a general five-year statute of limitations for non-capital criminal offenses.[18] On the civil side, several statutes specify the time period during which claimants may bring suit on particular federal claims.[19] A four-year statute of limitations governs all civil claims arising under federal statutes enacted since December 1, 1990, that do not otherwise specify a statute of limitations.[20] In the absence of an applicable federal statute of limitations, courts usually borrow the most analogous state statute of limitations and the corresponding state tolling

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14. Kerri M. Milliken, *The* Lucas *Exception: Inclusion, Exclusion, and a Statute of Limitation*, 68 GEO. WASH. L. REV. 134, 151 (1999); *see also* THE NATIONAL CENTER FOR VICTIMS OF CRIME, EXTENSIONS OF THE CRIMINAL & CIVIL STATUTES OF LIMITATIONS IN CHILD SEXUAL ABUSE CASES (1998), *at* http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32466 (discussing statutes of limitation on sexual offenses against children) [hereinafter NCVC website]. For a discussion of the origin of statutes of limitations, see WILLIAM D. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 7-47 (1978).

15. *See, e.g.*, 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 202(a), at 462 (1984 & Supp. 2004-05); Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 249-50 & n.223 (1995); NCVC website, *supra* note 14.

16. 2 ROBINSON, *supra* note 15, § 202(a), at 462-63.

17. 18 U.S.C. § 3281 (2006).

18. 18 U.S.C. § 3282(a) (2006); *see also* 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 1.6, at 117-18 (Supp. 1991 & 1993) (citing 18 U.S.C. §§ 3281-87, 3290-92).

19. *See, e.g.*, 12 U.S.C. § 1821(d)(14) (2006) (claims by Federal Deposit Insurance Corporation); 15 U.S.C. § 15b (2006) (antitrust claims); 15 U.S.C. § 77m (2006) (securities claims); 28 U.S.C. § 1658(b) (2006) (securities fraud claims); 31 U.S.C. § 3731(b) (2006) (private rights of action under the False Claims Act).

20. 28 U.S.C. § 1658(a); *see also* Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 382 (2004) (concluding that § 1658(a) applies "if the plaintiff's claim against the defendant was made possible by a post-1990 enactment" that amended a pre-existing statute).

rules,[21] unless state limitations law would "'frustrate or interfere with the implementation of national policies,' or be 'at odds with the purpose or operation of federal substantive law . . . ,'"[22] in which case the courts "look[] for a period that might be provided by analogous federal law, more in harmony with the objectives of the immediate cause of action."[23]

B. *The Statute of Limitations Policies*

Regardless of their source, in the civil litigation context[24] statutes of limitations balance a number of competing interests, several of which counsel in favor of relatively short periods of time in which to sue. First, as long as a risk of litigation lingers, prospective defendants may worry about their potential liability and the need to preserve evidence to defend themselves.[25] Thus, by limiting the time period in which litigation may be brought, statutes of limitations provide prospective defendants with repose.[26] Second, statutes of limitations protect courts from the obligation

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21. *See, e.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 355 (1991); Hardin v. Straub, 490 U.S. 536, 539 (1989); West v. Conrail, 481 U.S. 35, 40 n.6 (1987); Wilson v. Garcia, 471 U.S. 261, 269 (1985); Chardon v. Fumero Soto, 462 U.S. 650, 655-57 (1983); Bd. of Regents v. Tomanio, 446 U.S. 478, 483-84 (1980); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 464 (1975). *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1056, at 273, 278 (3d ed. 2002 & Supp. 2005); 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4519, at 627 (2d ed. 1996 & Supp. 2005); B.H. Glenn, Annotation, *Federal Court's Adoption of State Period of Limitation, in Action to Enforce Federally Created Right, As Including Related or Subsidiary State Laws or Rules as to Limitations*, 90 A.L.R.2d 265 (1963 & 1993 Later Case Service & 2005 Supp.) (discussing cases where the federal courts applied state limitation periods and considered the applicability of related state laws on limitations).

22. North Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) (quoting DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 161 (1983)); *see, e.g.*, Reed v. United Transp. Union, 488 U.S. 319, 334 (1989); Wilson v. Garcia, 471 U.S. 261, 280 (1985); *Johnson*, 421 U.S. at 462.

23. *North Star Steel Co.*, 515 U.S. at 34. Even when state law supplies the statute of limitations, federal law usually determines when a federal claim accrues. 19 WRIGHT ET AL., *supra* note 21, § 4519, at 622; *accord* Alexander v. Oklahoma, 382 F.3d 1206, 1215 (10th Cir. 2004).

24. For a discussion of the policies underlying statutes of limitations in the criminal context, *see* 2 ROBINSON, *supra* note 15, § 202(b); Toussie v. United States, 397 U.S. 112, 114-15 (1970).

25. *See, e.g.*, 1 CORMAN, *supra* note 18, § 1.1, at 11-13; FERGUSON, *supra* note 14, at 43; *see also* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 290-91 (describing procedural and substantive functions of limitations law).

26. *See, e.g.*, 1 CORMAN, *supra* note 18, § 1.1, at 11; Sun Oil Co. v. Wortman, 486 U.S. 717, 736 (1988) (Brennan, J., concurring in part and concurring in the judgment); Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 MICH. L. REV. 399, 413 (1982) [hereinafter Michigan Note]. A "subsidiary aim of the statute of limitations [is] promptly to resolve disputes in order that commercial and other activities can continue unencumbered by the threat of litigation." Elkins v. Derby, 525 P.2d 81, 86 n.4 (Cal. 1974) (citations omitted); *accord* Cerveny, *supra* note 4, at 687. In real property actions, where the defendant may have possessed property for a lengthy period of time and made improvements on it, the statute of limitations protects the "defendant's

to adjudicate stale claims with the attendant risks of lost evidence, absent witnesses, fading memories, and ultimately, inaccurate fact-finding.[27] Third, by limiting the amount of time in which plaintiffs may bring claims, statutes of limitations protect the judicial system "by reducing the volume of litigation."[28] Fourth, statutes of limitations "prevent plaintiffs from sleeping on their rights. . . ."[29] In other words, they provide plaintiffs with a strong incentive to pursue their claims expeditiously.[30] Finally, short statutes of limitations may reflect legislative skepticism about particular claims.

Of all the interests that counsel in favor of relatively short periods of time in which to sue, protection of the defendant predominates.[31] This predominance is demonstrated by the fact that the statute of limitations is a defense that may be raised only by the defendant.[32] If the defendant declines to raise it, the statute of limitations defense is waived and the court has no independent means to raise the statute of limitations to protect itself from stale claims or voluminous litigation.[33]

Balanced against these interests are several competing interests that counsel in favor of providing plaintiffs with relatively long periods of time in which to sue. First, injured claimants need a reasonable period of time in which to recover from their injuries, consult with counsel, assess the merits of their claims and consider alternatives to litigation before their opportunity to commence suit expires.[34] Second and related, the substantive policy objectives that underlie the plaintiff's claim (for example, to deter negligence or price fixing or discrimination) demand that

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possession, improvements and labors . . . ." FERGUSON, *supra* note 14, at 43.

27. *See, e.g.*, *Sun Oil*, 486 U.S. at 730 (describing "[a] State's interest in . . . determining when a claim is too stale to be adjudicated"); *id.* at 736 (Brennan, J., concurring in part and concurring in the judgment) (describing a State's "procedural interest in freeing its courts from adjudicating stale claims"); Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944); 1 CORMAN, *supra* note 18, § 1.1, at 16-17.

28. Lowenthal & Feder, *supra* note 7, at 534 (footnotes omitted); *see also Sun Oil*, 486 U.S. at 730 (mentioning "State's interest in regulating the workload of its courts").

29. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352 (1983) (citations omitted); *see also* 1 CORMAN, *supra* note 18, § 1.1, at 13.

30. Professor William Ferguson has argued that absent concern for the defendant or the public, this concern would not justify statutes of limitations because "[i]f plaintiff wished to assume the risk that his witnesses would die or his evidence be lost, it does not seem appropriate to say he cannot run that risk." FERGUSON, *supra* note 14, at 42.

31. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (stating that "[s]tatutes of limitations are primarily designed to assure fairness to defendants").

32. *See, e.g.*, FED. R. CIV. P. 8(c).

33. FERGUSON, *supra* note 14, at 42.

34. *Burnett*, 380 U.S. at 428 (noting that "the policy of repose . . . is frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights"); 1 CORMAN, *supra* note 18, § 1.1, at 14.

the plaintiff be afforded a reasonable period of time in which to sue. In other words, if the statute of limitations were unreasonably short, not only would the prospective plaintiff be unfairly denied an opportunity to seek compensation for her injuries, but the policy objectives underlying her claim would be frustrated and neither specific nor general deterrence would be achieved.[35]

III. THE SECOND RING: THE RULE 23 POLICIES AND TOLLING IN THE CLASS ACTION CONTEXT

A. *An Introduction to Tolling*

1. Tolling Statutes

Even though the balance of the statute of limitations policies ordinarily justifies limiting the period of time in which plaintiffs may file suit, other considerations occasionally require a tolling of the statutory period.[36] In other words, other factors may dictate that the time period in which the plaintiff has to commence suit may be either suspended or stopped and restarted anew in certain circumstances.[37] In some cases, the legislature itself specifies the circumstances in which the statute of limitations may be tolled. For example, many statutes provide that if the prospective claimant is a child at the time the claim accrues, then the statute of limitations is tolled until the person reaches the age of majority.[38] Many statutes also toll

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35. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 736 (1988) (Brennan, J., concurring in part and concurring in the judgment) (describing the state's "substantive interest in vindicating substantive claims").

36. For a discussion of tolling of the limitations period in the criminal context, see 2 ROBINSON, *supra* note 15, at § 202(d). A tolling rule is distinguishable from "[a] discovery rule [, which] delays the accrual of a cause of action. . . . [U]nder a typical discovery rule, the statute of limitations begins to run at the time the plaintiff knew or with reasonable diligence should have known of the damage and the cause of the damage." Sawtell v. E.I. du Pont de Nemours & Co., 22 F.3d 248, 250 (10th Cir. 1994). *See generally* 4 WRIGHT & MILLER, *supra* note 21, § 1056, at 239 (discussing the "blurred distinction between accrual of the plaintiff's cause of action and . . . tolling of the limitations period"); Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 502-03 (2004) (characterizing both discovery and tolling rules as "'equitable exceptions'" to the statute of limitations but arguing that each different type of equitable relief should be addressed on its own) (footnote omitted); *id.* at 502-07 (describing different equitable exceptions); Cerveny, *supra* note 4, at 689 (explaining that "tolling should cease when a plaintiff knows or should know of the fraud or tort committed against him").

37. Chardon v. Fumero Soto, 462 U.S. 650, 661-62 (1983) (applying the state rule that "after tolling comes to an end, the statute of limitations begins to run anew"). *See* Cerveny, *supra* note 4, at 689-90 (explaining the suspension and renewal effects of tolling).

38. *See, e.g.*, ALA. CODE § 6-2-8 (2005); CAL. CIV. PROC. CODE § 352(a) (West 2006); 735 ILL. COMP. STAT. 5/13-211 (2006); N.Y. C.P.L.R. 208 (Consol. 2005); *see also* ADOLPH J. LEVY,

the running of the statute of limitations for the period of time in which a potential claimant suffers from a mental disability or a legal disability, such as imprisonment.[39] And at least one state statute tolls the statute of limitations for the period of time during which an estate is unrepresented.[40]

In all of these instances, the claimants are incapable of filing suit during the period provided by the otherwise applicable statute of limitations.[41] Even though the defendants are not responsible for the plaintiffs' incapacity, the legislatures have readjusted the balance struck by the standard statutes of limitations and have afforded these prospective plaintiffs additional time in which to sue. The tolling provisions are designed to ensure that potential claimants have a reasonable opportunity *after* they are capable of suing to gather evidence and to determine whether a lawsuit is in their best interests, and to ensure that the policies embodied in the substantive laws underlying their claims may be vindicated through private litigation. Even though the defendants are deprived of repose during this additional period of time and even though the courts may have to adjudicate stale claims, the legislatures have made the judgment that in these circumstances affording the plaintiff a reasonable opportunity to sue outweighs these other concerns.[42]

SOLVING STATUTE OF LIMITATIONS PROBLEMS §§ 4.23 & 6.27 (1987 & Cum. Supp. 1992).

39. *See, e.g.*, D.C. CODE § 12-302 (2006); 735 ILL. COMP. STAT. 5/13-211 (2005); N.Y. C.P.L.R. 208 (Consol. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (Vernon 2004); *see also* LEVY, *supra* note 38, §§ 4.22 & 4.24; Michigan Note, *supra* note 26, at 404-05 n.21 (stating that "[m]any statutes of limitations explicitly provide for suspension of the statute for the traditional disabilities"); *cf.* 42 PA. CONS. STAT. § 5533(a) (2004) (stating that "[e]xcept as otherwise provided by statute, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter").

40. GA. CODE ANN. § 9-3-92 (West 2004). In most other states, the courts toll the statute of limitations until an administrator is appointed to represent the state. *See generally* F.V. Lapine, Annotation, *Statute of Limitations: Effect of Delay in Appointing Administrator or Other Representative on Cause of Action Accruing At or After Death of Person in Whose Favor It Would Have Accrued*, 28 A.L.R.3d 1141 (1969 & Supp. 2005); Wade R. Habeeb, Annotation, *Tolling or Interruption of Running of Statute of Limitations Pending Appointment of Executor or Administrator for Tortfeasor in Personal Injury or Death Action*, 47 A.L.R.3d 179 (1973 & Supp. 2005).

41. The incapacitated claimant, through a representative, may file her claim during the period provided by the statute of limitations, but the law ordinarily relieves her of the obligation to do so. If the incapacitated claimant has a legal representative (such as a guardian, conservator or next friend) at the time her claim accrues, or one is appointed after the claim accrues but before termination of the disability, "some courts adopt[] the view that the appointment of a legal representative triggers the running of the statute of limitations, and others hold[] that, notwithstanding the appointment of a legal representative, the toll continues." Michele Meyer McCarthy, *Effect of Appointment of Legal Representative for Person Under Mental Disability on Running of State Statute of Limitations Against Such Person*, 111 A.L.R.5th 159, § 2(a) (2003).

42. *Accord* FERGUSON, *supra* note 14, at 42 (stating that the "disability provisions of the statutes . . . clearly show that the public interest that controversy come to an end gives way to the

If state legislatures are willing to toll the statute of limitations where the plaintiffs' need for additional time is not the defendants' fault, it is no surprise that they also are willing to toll the statute of limitations where the defendants' conduct gives rise to the need for additional time. For example, most states toll the statutes of limitations for the period of time during which the defendant is absent from the state and not amenable to service of process.[43] It would be unfair to deprive the plaintiff of an opportunity to pursue her claim if the defendant left the only jurisdiction in which service of process could be made until after the statute of limitations had run.

2. Saving Statutes

In addition to tolling statutes, many state legislatures have enacted saving statutes, which afford the plaintiff a period of time in which to refile a claim (beyond the standard statutory period) if she commenced a timely suit that was terminated on procedural grounds or if she obtained a final judgment in her favor that was reversed on appeal on procedural grounds.[44] These statutes protect the plaintiff's claim and vindicate the substantive policies underlying it, while recognizing that the initial lawsuit provided the defendant with notice of the claim and a reasonable opportunity to gather and preserve evidence needed in its defense.[45]

3. Equitable Tolling Principles

Even in the absence of express tolling or saving statutes, the courts have tolled the statute of limitations where equity so demands "unless tolling would be 'inconsistent with the text of the relevant statute.'"[46] Such

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desire for fairness to enable plaintiff to protect his interest"); *id.* at 44.

43. *See, e.g.*, CAL. CIV. PROC. CODE § 351 (West 2005); N.M. STAT. ANN. § 37-1-9 (West 2005); N.Y. C.P.L.R. 207 (Consol. 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 16.063 (Vernon 2005). *See also* 2 CORMAN, *supra* note 18, §§ 9.3, 9.4, at 46-47 (noting that "recent cases hold that when [substituted service of process] is available, the statute of limitations will not be tolled during the absence of the departing, or already absent, party"); LEVY, *supra* note 38, § 4.28.

44. LEVY, *supra* note 38, § 6.32, at 248 & n.108; 4 WRIGHT & MILLER, *supra* note 21, § 1056, at 273; Cerveny, *supra* note 4, at 690. In a 1965 opinion, the Supreme Court identified thirty-one state saving statutes. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 431-32 n.9 (1965); *see, e.g.*, 28 U.S.C. § 1367(d) (2006); CONN. GEN. STAT. ANN. § 52-592 (West 2006); N.Y. C.P.L.R. 205(a) (Consol. 2006); *see also* FERGUSON, *supra* note 14, at 55-56 (discussing saving statutes).

45. FERGUSON, *supra* note 14, at 44, 55-59.

46. Young v. United States, 535 U.S. 43, 49 (2002) (quoting United States v. Beggerly, 524 U.S. 38, 48 (1998)); *see also* Bain & Colella, *supra* note 36, at 493 (advocating "a comprehensive interpretive approach for determining when Congress intends to include (or exclude) equitable considerations in a statute of limitations"). *See generally* 4 WRIGHT & MILLER, *supra* note 21, § 1056, at 255-62 (discussing "the doctrine of equitable tolling").

equitable tolling is designed "to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice."[47]

The United States Supreme Court has framed the equitable tolling issue as "one of 'legislative intent whether the right shall be enforceable . . . after the prescribed time.'"[48] Put differently, the Court has asked "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances."[49] To determine legislative intent, the Court considers the policies underlying the statute of limitations, the policies underlying the substantive law that the plaintiff relies upon, and the remedial scheme developed to enforce the rights granted by the substantive law.[50] The Court has gone so far as to state that "Congress must be presumed to draft [statutes of] limitations" with background equitable tolling principles in mind.[51]

In *Holmberg v. Armbrecht*,[52] a case involving a discovery rule of accrual,[53] the Supreme Court discussed the paradigmatic case for equitable relief from the statute of limitations:

> [W]here a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."[54]

A related but distinct doctrine, equitable estoppel, bars the defendant from invoking the statute of limitations if the defendant's conduct induced the plaintiff to refrain from filing suit within the period provided by the statute of limitations.[55]

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47. Jones v. Blanas, 393 F.3d 918, 928 (9th Cir. 2004) (quoting Lantzy v. Centex Homes, 73 P.3d 517, 523 (Cal. 2003)).

48. Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 426 (1965) (quoting Midstate Horticultural Co. v. Pa. R. Co., 320 U.S. 356, 360 (1943)).

49. *Id.* at 427.

50. *Id.*; *accord* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982).

51. *Young*, 535 U.S. at 49-50.

52. 327 U.S. 392 (1946).

53. *See id.* at 397; *see also supra* note 36 (discussing the distinction between a discovery rule and a tolling rule).

54. *Holmberg*, 327 U.S. at 397 (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1875)); *see also* Varner v. Peterson Farms, 371 F.3d 1011, 1016-17 (8th Cir. 2004); 2 CORMAN, *supra* note 18, § 8.2, at 3. Some state statutes expressly adopt discovery rules for cases involving fraudulent concealment. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-203 (West 2006); IDAHO CODE ANN. § 5-219(4) (2006), *cited in* LEVY, *supra* note 38, § 4.30, at 142-43.

55. *See, e.g.*, Lantzy v. Centex Homes, 73 P.3d 517, 521, 532-35 (Cal. 2003); *see also* Glus

Even in the absence of fraud, concealment or other misconduct on the part of the defendant, courts have tolled the statute of limitations for the period of time during which the plaintiff pursued administrative remedies or prosecuted a lawsuit on the same claim that was ultimately dismissed on procedural grounds.[56] Just as legislatures have enacted saving statutes to toll the statute of limitations during the pendency of prior litigation on the same claim, courts have equitably tolled the statute of limitations in these circumstances. According to one state supreme court:

> The . . . requirements for the equitable tolling doctrine are as follows: 1) timely notice to the defendant in filing the first claim; 2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; [and] 3) reasonable and good faith conduct by the plaintiff in prosecuting the first action and diligence in filing the second action.[57]

Consider an illustrative case. In *Elkins v. Derby*,[58] the plaintiff had been attacked by a performing timber wolf while working at Animal Kingdom, the defendant's premises.[59] The plaintiff filed a timely claim for worker's compensation benefits.[60] After several months, the board determined that the plaintiff had not been an employee of the defendant at the time of the

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v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 235 (1959) (stating that plaintiff has the burden of proving that defendant's conduct resulted in plaintiff's delay in filing suit); LEVY, *supra* note 38, § 1.23, at 21; 4 WRIGHT & MILLER, *supra* note 21, § 1056, at 263-66 (describing equitable estoppel doctrine); Bain & Colella, *supra* note 36, at 503-05 (describing equitable estoppel as an "equitable principle that one may not take advantage of one's own wrong") (footnote omitted); Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797, 809 (2000) (describing the "distinction between equitable tolling and equitable estoppel [as] . . . elusive"); *cf.* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (explaining that the federal courts have allowed equitable tolling "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass") (footnote omitted).

56. *See, e.g.*, LEVY, *supra* note 38, § 6.32 at 248; *see also* Bain & Colella, *supra* note 36, at 504-05 (listing situations where courts have applied equitable tolling). The Court has tolled the statute of limitations in other appropriate cases. *See, e.g.*, Young v. United States, 535 U.S. 43, 50-51 (2002); Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984) (declining to toll the statute of limitations on the facts of the case, but identifying a variety of circumstances in which the statute had been tolled).

57. Hosogai v. Kadota, 700 P.2d 1327, 1333 (Ariz. 1985) (citation omitted). Similar considerations underlie Rule 15(c) of the Federal Rules of Civil Procedure, which permits an amended pleading to relate back to the date of the original pleading. *See supra* note 7.

58. 525 P.2d 81 (Cal. 1974).

59. *Id.* at 83.

60. *Id.*

injury, so it denied benefits.[61] A month later, the plaintiff filed a civil suit against the defendant in state court seeking damages for the same injury.[62] Since the civil suit was filed more than one year after the accident had occurred, the defendant raised the statute of limitations as a defense.[63]

While recognizing that the plaintiff could have preserved his right to sue by filing the civil complaint during the pendency of the worker's compensation proceeding, the California Supreme Court concluded that "an awkward duplication of procedures is not necessary to serve the fundamental purpose of the limitations statute, which is to insure timely notice to an adverse party so that he can assemble a defense when the facts are still fresh."[64] Since the filing of the worker's compensation claim put the defendant on notice, tolling the statute of limitations in these circumstances would not frustrate its primary purpose.[65] Tolling, moreover, would obviate the need for duplicative proceedings, which "would entail the filing of cases in our heavily burdened superior courts that would be mooted whenever the board decided it had jurisdiction to grant relief."[66] Likewise, tolling the statute of limitations (and thereby avoiding the need for a precautionary lawsuit during the pendency of a worker's compensation proceeding) would relieve the plaintiff of the need to file inconsistent pleadings (alleging before the worker's compensation tribunal that he was an employee injured during the course of his employment, and alleging before the court that he was not).[67] The court concluded "that regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled '[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one.'"[68] Thus, the court tolled the statute of limitations because the statute's primary purpose already had been achieved and a denial of tolling would have denied the injured plaintiff a remedy and would have created a perverse incentive to engage in "inequitable, burdensome [and] dysfunctional" duplicative filings.[69]

As we will see in the section that follows, similar concerns have

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 82-83.
65. *Id.* at 83.
66. *Id.*
67. *Id.*
68. *Id.* at 84 (quoting Myers v. County of Orange, 6 Cal. App. 3d 626, 634 (Cal. Ct. App. 1970)) (rest of citations omitted).
69. *Id.* at 88; *see also* Hosogai v. Kadota, 700 P.2d 1327, 1332 (Ariz. 1985) (considering whether the remedial policies underlying the plaintiff's substantive claim would be furthered if the statute of limitations were tolled).

prompted the United States Supreme Court to toll the statute of limitations on federal claims held by absent class members for the period of time between the filing of a class action complaint on their behalf and the denial of class certification. Since the Court discussed these concerns in light of the Rule 23 policies, it will be helpful to delineate those policies in somewhat greater depth before turning to an analysis of the Court's decisions in *American Pipe* and *Crown, Cork.*

B. *Tolling in the Class Action Context*

1. The Rule 23 Policies

Rule 23 of the Federal Rules of Civil Procedure, which authorizes the filing of class actions by (or against) a named representative on behalf of a larger group of similarly situated members, serves several important objectives.[70] First, where the plaintiffs' claims are large enough to justify individual lawsuits, Rule 23 fosters judicial economy and efficiency. By providing a vehicle for the prosecution of many individual claims in a single positive-value class action, Rule 23 avoids duplicative litigation, thereby conserving judicial resources.[71] Of course, often the value of absent class members' claims are so small that it would not make sense for them to sue unless an aggregation vehicle like the class action were available. With respect to such negative-value class actions, Rule 23 does not conserve judicial resources at all but rather authorizes the filing of a class action, the prosecution of which may consume significant resources (whereas in the absence of the Rule, few if any lawsuits would be filed and few if any judicial resources would be expended).[72]

Second, Rule 23 affords claimants access to the courts by providing a vehicle whereby they may pool their resources and spread litigation costs among a large group of claimants.[73] Typically the lawyer representing the class advances the costs of litigation and in the event the class recovers a monetary award, these costs and the attorney's fees are paid from the

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70. *See* FED. R. CIV. P. 23(a) (stating the "[p]rerequisites to a [c]lass [a]ction").

71. 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 5:46, at 463 (4th ed. 2002); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.1, at 757-58 (4th ed. 2005); 5 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 23.02, at 23-23 (3d ed. 2002); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 509 (1987).

72. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.20, at 642 (5th ed. 2001); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 52 (1975).

73. 2 CONTE & NEWBERG, *supra* note 71, § 5:7, at 428, § 5:48, at 466; *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997); FRIEDENTHAL ET AL., *supra* note 71, § 16.1, at 758 n.1; JAMES ET AL, *supra* note 72, § 10.20, at 642; 5 MOORE, *supra* note 71, § 23.02, at 23-24.

recovery.[74] Thus, the availability of the class action vehicle furthers an interest in compensating the victims of wrongdoing who otherwise would lack the resources or incentive to sue individually.[75]

Third, Rule 23 not only provides access to the courts for those with small claims, but it ensures that the substantive law underlying their claims is enforced.[76] Without a class action vehicle, if absent class members could not afford to press their claims and if governmental agencies were unable to enforce the underlying substantive law, then wrongdoers who violated the law would not be sued, their unlawful conduct would not be deterred, and the law they violated would not be enforced.[77]

Fourth, by combining all or many of the claims against the defendant into a single proceeding, Rule 23 protects the defendant from the burden of defending multiple lawsuits and from the risk of potentially inconsistent judgments.[78]

Finally, Rule 23 attempts to balance these objectives with the due process rights of the absent class members by providing procedural fairness, including notice, the opportunity to opt out,[79] and other safeguards to ensure that the interests of the absent class members are adequately protected.[80]

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74. JAMES ET AL., *supra* note 72, § 10.20, at 642 (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).

75. *See* Dam, *supra* note 72, at 53. Professor Dam notes that since class actions consume significant judicial resources, a decision to certify a class (with the objective of compensating the absent class members) may delay the resolution of other claims for compensation. *Id.*

76. 2 CONTE & NEWBERG, *supra* note 71, § 5:49, at 468; *see also id.* § 5:51, at 470-71; JAMES ET AL., *supra* note 72, § 10.20, at 643-44.

77. Dam, *supra* note 72, at 54-56, 60-61; *see also* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (stating that "a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all").

78. *See* 2 CONTE & NEWBERG, *supra* note 71, § 5:47, at 465; 5 MOORE, *supra* note 71, § 23.02, at 23-37.

79. The Federal Rules of Civil Procedure guarantee class members a right to opt out of the class only if the class is certified under Rule 23(b)(3). FED. R. CIV. P. 23(c)(2)(B). In classes certified under Rule 23(b)(1) or (b)(2), notice and the opportunity to opt out are in the court's discretion. FED. R. CIV. P. 23(c)(2)(A), 23(d)(2). In class actions where the relief sought is wholly or predominately money damages, due process guarantees absent class members who are beyond the court's jurisdictional reach "an opportunity to remove [themselves] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). "[I]t is not clear whether due process guarantees a right to opt out to class members who seek declaratory or injunctive relief, and if so, whether this protection is enjoyed only by absent class members who lack minimum contacts with the forum state or by *all* absent class members regardless of connection to the forum state." RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 183 (2004).

80. *See* 5 MOORE, *supra* note 71, § 23.02, at 23-38; FED. R. CIV. P. 23 advisory committee's

2. The Supreme Court's Balance of the Statute of Limitations Policies and the Rule 23 Policies

In *American Pipe* and *Crown, Cork*, the Supreme Court carefully considered both the statute of limitations policies and the Rule 23 policies to support its conclusion that the statute of limitations is tolled when absent class members seek to intervene in an action denied class certification to press their individual claims[81] or to file their own independent lawsuits upon denial of class certification.[82] An analysis of these cases and the Court's policy discussions therein will guide our consideration of whether the statute of limitations should likewise be tolled when absent class members seek to press their claims in a successive class action once certification in the initial class action has been denied.

a. *American Pipe & Construction Co. v. Utah* (1974)

American Pipe involved a conspiracy to restrain trade in steel and concrete pipe during the early 1960s.[83] The procedural history is somewhat complex. In 1964, the federal government filed criminal charges against several individuals and corporations that sold concrete and steel pipe, alleging that they had violated the Sherman Act.[84] The defendants entered pleas of nolo contendere, or no contest, and the court entered judgments of guilt.[85] Shortly thereafter, the federal government filed a civil action against the same defendants seeking injunctive relief, and in 1968 the court entered a consent decree "enjoining . . . future violations of the antitrust laws."[86]

Following this litigation by the federal government, in 1969 the state of Utah filed a civil action in the United States District Court for the District of Utah against some of the same defendants, claiming that they had conspired to rig prices in violation of the Sherman Act.[87] Utah "purported to . . . represent [] [a class of] 'public bodies and agencies [within] the state . . . [that] acquired [pipe] from the defendants'" as well as other western states that had not previously filed suit against the defendants.[88]

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note (1966 & 2003).

81. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974).

82. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 351-54 (1983).

83. *Am. Pipe*, 414 U.S. at 540; *see also* 5 CONTE & NEWBERG, *supra* note 71, § 17:19, at 366-67; 5 MOORE, *supra* note 71, § 23.65[1][a]; 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1795, at 45-49 (3d ed. 2005).

84. *Am. Pipe*, 414 U.S. at 540.

85. *Id.*

86. *Id.* at 540-41 (footnote omitted).

87. *Id*. at 541.

88. *Id.*

Utah's action was timely (with eleven days to spare) because a provision of the Clayton Act tolls the running of the four-year statute of limitations during the pendency of "'civil or criminal proceeding[s] . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . and for one year thereafter . . . .'"[89] In other words, the Clayton Act tolled the running of the statute of limitations for the period during which the federal government's criminal prosecution and civil injunctive action were pending.

The Judicial Panel on Multidistrict Litigation transferred Utah's action to the United States District Court for the Central District of California,[90] where many other lawsuits arising out of the same facts were pending.[91] Ultimately, in December 1969, the district court denied class certification, finding that the numerosity requirement of Rule 23(a)(1) was not met.[92] Subsequently, more than sixty absent class members — "towns and cities, and water and sewer districts in Utah"—moved to intervene in Utah's action.[93] The district court denied leave to intervene, concluding that the statute of limitations on the absent class members' claims had run and had not been tolled by the class action proceeding.[94]

While agreeing that the absent class members "had no right to interven[e] under Rule 24(a) since, as a practical matter, they would not be affected by any potential recovery by Utah,"[95] the Ninth Circuit Court of Appeals concluded that the district court erred both in denying permissive intervention under Rule 24(b) and in concluding that the statute of limitations had not been tolled during the pendency of Utah's purported class action:

> [A]s to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. . . . Suit having been commenced by a filing of the complaint, members of the class were safely in court and their claims protected against the bar of [the statute of limitations] until, by order of the court, they were ejected from the suit. The statute thus was tolled by commencement of suit and did not again commence to run

89. 15 U.S.C. § 16(b) (1974), *quoted in Am. Pipe*, 414 U.S. at 541-42.

90. *In re* Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 509 (J.P.M.L. 1969).

91. *Id.* at 508.

92. Utah v. Am. Pipe & Constr. Co., 49 F.R.D. 17, 20-21 (C.D. Cal. 1969).

93. Utah v. Am. Pipe & Constr. Co., 50 F.R.D. 99, 100-01 (C.D. Cal. 1970), *aff'd in part, remanded in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974).

94. *Id.* at 108.

95. Utah v. Am. Pipe & Constr. Co., 473 F.2d 580, 582 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974) (citing FED. R. CIV. P. 24(a)(2)).

until entry of the order denying class action.[96]

The Supreme Court granted certiorari[97] and unanimously affirmed in an opinion by Justice Stewart.[98] After distinguishing between pre-1966 "'spurious'" class actions and class actions certified under the modern Rule 23, the Court found "no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined."[99] The Court noted that if the filing of the class action were not deemed to satisfy the statute of limitations for the absent class members, then the "principal function" of the class action would be frustrated "because then the sole means by which members of the class could assure their participation in the judgment . . . would be to file . . . individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid . . . ."[100] Thus, invoking one of the Rule 23 policies, the Court held that "at least where [certification is] denied solely [for] . . . failure to [satisfy the numerosity requirement of Rule 23(a)(1)], 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,"[101] even those who previously were unaware of the existence of the class action.[102] A contrary rule, the Court added, would frustrate the efficiency and judicial economy objectives of Rule 23.[103]

The Court considered the effect of this tolling rule on the policies underlying the statute of limitations but concluded that the filing of the class action complaint by the named representative before expiration of the statute of limitations provided the defendant with "the essential information necessary to determine both the subject matter and size of the prospective litigation" regardless of whether the suit ultimately proceeded as "a class action, as a joint suit or as a . . . suit with [multiple] intervenors."[104] The Court explained:

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96. *Id.* at 584.

97. Am. Pipe & Constr. Co. v. Utah, 411 U.S. 963 (1973).

98. Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 561 (1974).

99. *Id.* at 549-550.

100. *Id.* at 551.

101. *Id.* at 552-53 (emphasis added).

102. *Id.* at 551 (stating that "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"); *see also* Tosti v. City of Los Angeles, 754 F.2d 1485, 1489 (9th Cir. 1985).

103. *Am. Pipe*, 414 U.S. at 553.

104. *Id.* at 554-55 (footnote omitted).

> [The] policies of ensuring essential fairness to defendants and of barring a plaintiff who "has slept on his rights" are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.[105]

Thus, the tolling rule would not frustrate the statute of limitations policies.

In his concurrence in *American Pipe*, Justice Blackmun emphasized the need to protect the defendant from surprise. He suggested that following denial of class certification, the district court should deny permission to intervene to those who seek to press "claims for which [the defendant] has received no prior notice."[106] Again, we see express concern for one of the statute of limitations policies, providing repose for the defendant.

The Court did not squarely address whether Rule 23 itself supplies the tolling rule announced in *American Pipe* or whether the tolling rule is a federal common law rule. Nor did the opinion clearly state whether the *American Pipe* tolling rule applies only to class actions presenting federal law claims or to all class actions filed in federal court (even those presenting state law claims). To the extent that the Court considered whether tolling abridges or modifies a substantive right—a limitation imposed by the Rules Enabling Act[107]—the Court may have implied that Rule 23 itself supplies the tolling rule.[108] Since Rule 23 itself addresses neither limitations nor tolling directly, this conclusion is subject to debate.[109]

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105. *Id.* (citation omitted); *cf.* Lowenthal & Feder, *supra* note 7, at 536-37 (arguing that the "inherent uncertainty regarding whether the second court will find the notice contained in the failed class action to be adequate" will prompt class counsel "to file the [very] protective suits the *American Pipe* class action tolling doctrine was created to avoid"). The lower federal courts have cited the need to afford notice to the defendant in holding that a class action against one defendant does not toll the statute of limitations on class members' claims against a different defendant. *See, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 567-68 (6th Cir. 2005); Arneil v. Ramsey, 550 F.2d 774, 782 n.10 (2d Cir. 1977); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 518-19 (N.D. Tex. 2001), *aff'd w/o pub. op.*, 35 Fed. Appx. 390 (5th Cir. 2002).

106. *Am. Pipe*, 414 U.S. at 562 (Blackmun, J., concurring).

107. 28 U.S.C. § 2072 (2006) (stating that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

108. *Accord* Lowenthal & Feder, *supra* note 7, at 548-49.

109. *See, e.g.*, Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1027 (1989); Carrington, *supra* note 25, at 317-19; Lowenthal & Feder, *supra* note 7, at 546-68; Chardon v. Fumero Soto, 462 U.S. 650, 664 (1983) (Rehnquist, J., dissenting) (stating that "the source of the

If Rule 23 *is* the source of the *American Pipe* tolling rule, then one may ask whether it is consistent with the Rules Enabling Act. The legislative history of the Act suggests that a Federal Rule regarding limitations of actions would be beyond the scope of the Act.[110] Moreover, to the extent that the tolling rule lengthens the period of time during which a defendant may be sued, it "strikes at the substantive heart of limitations policy."[111] The Court in *American Pipe*, however, disclaimed any violation of the Rules Enabling Act: "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."[112] Given that the legislative history of the Clayton Act stated that its limitations period was "strictly a procedural limitation," the Court found no abridgement or modification of a substantive right in violation of the Rules Enabling Act.[113]

Even if Rule 23 does not supply the tolling rule, it nevertheless may influence the content of a judicially-crafted common law rule. As Professor Burbank has stated:

> Even though Rule 23 does not and could not validly provide a tolling rule, in devising such a rule "not inconsistent with the legislative purpose," the Court was not required to ignore the policies exogenous to limitations that animate Rule 23, including in particular the policy against "multiplicity of activity."[114]

A footnote to this passage adds: "Even when legal regulation in a certain area is forbidden to the Rules, the policies underlying valid Rules may help to shape valid federal common law."[115] Thus, the Rule 23 policies animate the *American Pipe* tolling rule regardless of whether Rule 23 itself supplies the tolling rule or the Court crafted it as federal common law.[116]

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tolling rule applied by the Court was *necessarily* Rule 23"); *see also* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 796 (2005) (stating that "Rule 23 . . . is not an appropriate authority to look to for the type of robust interest in aggregate relief that is necessary here").

110. *See* Burbank, *supra* note 109, at 1016, 1032; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1083-87 (1982).

111. Carrington, *supra* note 25, at 316 (discussing Rule 3); *cf. id.* at 319 (concluding that "nothing in the Rules Enabling Act" bars the *American Pipe* tolling rule).

112. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 557-58 (1974).

113. *Id.* at 558 n.29 (citation omitted).

114. Burbank, *supra* note 109, at 1027-28 (footnotes omitted).

115. *Id.* at 1028 n.100 (quoting Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 774 (1986)).

116. I do not mean to suggest that the source of the *American Pipe* tolling rule—Rule 23 or

b. *Crown, Cork & Seal Co. v. Parker* (1983)

While *American Pipe* made clear that the statute of limitations is tolled for the benefit of absent class members who seek to intervene in the litigation brought by the would-be representative,[117] it left open the question whether the statute also is tolled for the benefit of absent class members who seek to file individual lawsuits following denial of class certification. That issue was raised less than a decade later in *Crown, Cork & Seal Co. v. Parker*.[118]

Crown, Cork involved an employment discrimination class action filed in the United States District Court for the District of Maryland on behalf of African Americans who were denied employment opportunities by Crown, Cork & Seal Co. on the basis of race.[119] The district court denied the plaintiffs' motion to certify the class, concluding that the numerosity, typicality, and adequacy of representation requirements of Rule 23(a) were not satisfied.[120]

Within ninety days[121] after the district court denied certification, but almost two years after he had received his right-to-sue letter from the EEOC, Theodore Parker, an absent class member, filed a Title VII action against Crown, Cork, alleging race discrimination in employment.[122] The district court granted the defendant's motion for summary judgment, holding "that the tolling rule of *American Pipe* is applicable only to Title VII class members who seek intervention in the original suit," not those like Parker who seek to sue individually.[123] The United States Court of Appeals for the Fourth Circuit reversed, declining to "exalt form over substance" and concluding that "*American Pipe* should be read to toll

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federal common law—is irrelevant. In determining whether the *American Pipe* tolling rule governs federal class actions presenting state law claims, the source of the tolling rule may influence the analysis. *See, e.g.*, Vaught v. Showa Denko K.K., 107 F.3d 1137, 1146 (5th Cir. 1997) (viewing the *American Pipe* tolling rule as "a judge-made practice," not a Federal Rule); *see also* Lowenthal & Feder, *supra* note 7.

117. *Am. Pipe*, 414 U.S. at 552-53.

118. 462 U.S. 345, 349-50 (1983); *see also* 5 CONTE & NEWBERG, *supra* note 71, § 17:19, at 367; 5 MOORE, *supra* note 71, § 23.65[1][a] & n.2; 7B WRIGHT, *supra* note 83, § 1795, at 49-50.

119. *Crown, Cork*, 462 U.S. at 347.

120. *Id*. at 347-48.

121. *See* 42 U.S.C. § 2000e-5(f)(1) (2006) (allowing a person ninety days, after the receipt of a right-to-sue letter, in which to commence litigation). The Supreme Court had previously rejected the argument that the ninety-day time limit is jurisdictional and therefore cannot be tolled or waived. *See* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982); Mohasco Corp. v. Silver, 447 U.S. 807, 811, 811 n.9 (1980).

122. *Crown, Cork*, 462 U.S. at 347.

123. Parker v. Crown, Cork & Seal Co., 514 F. Supp. 122, 126 (D. Md. 1981), *rev'd*, 677 F.2d 391 (4th Cir. 1982), *aff'd*, 462 U.S. 345 (1983).

limitations with respect to a new suit as well as to a motion to intervene."[124]

The Supreme Court granted certiorari[125] and, in a unanimous opinion written by Justice Blackmun, affirmed.[126] The Court invoked the same Rule 23 policy regarding efficiency and judicial economy that it had relied upon in *American Pipe*: If the statute of limitations were not tolled during the pendency of the class action:

> [A] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.[127]

The Court noted that absent class members might prefer to sue separately, rather than seek to intervene as the absent class members in *American Pipe* had.[128] Specifically, the Court believed that absent class members might find a different forum more convenient, or they might want personal control over their suit (once the possibility of a class action was eliminated), or they might worry that permission to intervene could be denied.[129] The Court referred to an earlier opinion, *Eisen v. Carlisle & Jacquelin*,[130] where the Court had assumed that the *American Pipe* tolling rule would apply to individual lawsuits filed by absent class members who opted out of a class action.[131]

As it had in *American Pipe*, the Court in *Crown, Cork* assured itself that tolling in this context would not frustrate the statute of limitations policies.[132] The class complaint itself would put the defendant on notice of the substantive claims against it, the number of potential plaintiffs, and "the need to preserve evidence and witnesses"[133] that could help defend against the claims of all members of the class. "Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the

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124. Parker v. Crown, Cork & Seal Co., 677 F.2d 391, 393-94 (4th Cir. 1982), *aff'd*, 462 U.S. 345 (1983).

125. Crown, Cork & Seal Co. v. Parker, 459 U.S. 986 (1982).

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

127. *Id.* at 350-51.

128. *Id.* at 350.

129. *Id.*

130. 417 U.S. 156 (1974) (addressing notice requirements in the class action context).

131. *Crown, Cork*, 462 U.S. at 351 (citing *Eisen*, 417 U.S. at 176 n.13).

132. *Id.* at 352-53.

133. *Id.* at 353.

method class members choose to enforce their rights upon denial of class certification."[134] While recognizing that the number of individual lawsuits filed against a particular defendant might be reduced if the *American Pipe* rule were limited to intervenors, the Court went on to note that "this decrease in litigation would be counterbalanced by an increase in protective filings in all class actions."[135] Thus, to the extent that statutes of limitations are designed, in part, to reduce the volume of litigation, this objective actually is furthered by tolling during the pendency of class actions even for absent class members who choose to sue individually when class certification is denied.

While noting that "a defendant may prefer not to defend against multiple actions in multiple forums once a class has been decertified," the Court concluded that "this is not an interest that statutes of limitations are designed to protect."[136] Although protecting the defendant from multiple lawsuits *is* one of the Rule 23 policies, the Court apparently did not consider it relevant to the tolling analysis once the possibility of a class action had been ruled out.

In a concurring opinion in *Crown, Cork*, Justice Powell expressed concern that the *American Pipe* tolling rule "is a generous one, inviting abuse [because] [i]t preserves for class members a range of options pending a decision on class certification."[137] Justice Powell cautioned that "[t]he rule should not be read . . . as leaving a plaintiff free to raise different or peripheral claims following denial of class status,"[138] but rather should permit the plaintiff to raise only the same claim that the would-be class representative sought to raise in the context of the class action.[139] This limitation serves the statute of limitations policies by ensuring that the earlier class action puts the defendant on notice of the substance of the absent class member's later individual action, before the statute of limitations has run.[140]

3. The Lower Courts' Balance of the Statute of Limitations Policies and the Rule 23 Policies

In determining whether to toll the statute of limitations in class actions presenting procedural circumstances not considered by the Court in *American Pipe* or *Crown, Cork*, the lower federal courts, too, have had to balance the statute of limitations policies and the Rule 23 policies. We will

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 354 (Powell, J., concurring).
138. *Id.*
139. *Id*. at 355.
140. *Id.* at 354-55.

examine two different sets of circumstances addressed by the lower courts: absent class members seeking to opt out and file individual lawsuits after class certification has been granted, and absent class members filing individual lawsuits before the district court has ruled on a motion for class certification. Once we have a better understanding of how the lower courts have balanced the statute of limitations policies and the Rule 23 policies in these two scenarios, we will be in a better position to introduce the third set of policies, the preclusion policies, that are relevant in the successive class action context.

First, the lower federal courts have considered whether the *American Pipe* tolling rule applies when absent class members choose to sue separately *after* a class has been certified (either having opted out before resolution of the class claims or by suing separately on individual claims after the class has lost the liability phase of a pattern and practice class action). Although "there appears to be a very real controversy as to whether . . . *American Pipe* [extends] to situations in which a class action member opts out and files separate suit,"[141] most of the federal courts addressing this issue have held that the *American Pipe* tolling rule applies in this circumstance.[142] As a result, the statute of limitations is tolled from the date the class action is filed until the class member opts out (or otherwise sues separately).[143]

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141. Wood v. Combustion Eng'g., Inc., 643 F.2d 339, 346 (5th Cir. 1981).

142. *See, e.g.*, Realmonte v. Reeves, 169 F.3d 1280, 1284 (10th Cir. 1999); Adams Pub. Sch. Dist. v. Asbestos Corp., 7 F.3d 717, 718 n.1 (8th Cir. 1993); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 519-20 (N.D. Tex. 2001), *aff'd*, 35 Fed. Appx. 390 (5th Cir. 2002); *see also* Edwards v. Boeing Vertol Co., 717 F.2d 761, 766 (3d Cir. 1983) (tolling the statute of limitations where a class action was certified to resolve a "pattern or practice" discrimination claim on a class-wide basis but the plaintiff pressed his individual claim separately), *vacated for reconsideration*, 468 U.S. 1201 (1984), *reinstated*, 750 F.2d 13 (3d Cir. 1984); Brewton v. City of Harvey, 285 F. Supp. 2d 1121, 1125-27 (N.D. Ill. 2003) (same). *But see* Chazen v. Deloitte & Touche, LLP, 247 F. Supp. 2d 1259, 1272 (N.D. Ala. 2003) (declining to toll the statute of limitations where "plaintiff consciously cho[se] not to participate in the class action"; it is unclear whether the plaintiff opted out after certification or filed an individual suit before the certification issue was decided); Orleans Parish Sch. Bd. v. U.S. Gypsum Co., 892 F. Supp. 794, 804 (E.D. La. 1995) (questioning "whether under federal law the tolling benefits members of a federal class action who opt out"), *aff'd*, 114 F.3d 66 (5th Cir. 1997), *cert. denied*, 522 U.S. 995 (1997); Pulley v. Burlington N., Inc., 568 F. Supp. 1177, 1179 (D. Minn. 1983) (declining to toll the statute of limitations "for individual actions brought by members of the class while the class still exists [and] . . . for individual actions which are distinct from class claims"). *See generally* Michigan Note, *supra* note 26, at 403-04 (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").

143. *See, e.g.*, Ballen v. Prudential Bache Sec., Inc., 23 F.3d 335, 337 (10th Cir. 1994) (citing *Crown, Cork*, 462 U.S. at 354); *cf.* Tosti v. City of Los Angeles, 754 F.2d 1485, 1488 (9th Cir. 1985) (stating that "when certification has been granted, the statute begins running anew from the date when the class member exercises the right to opt out"); 5 MOORE, *supra* note 71, § 23.65[2] (discussing tolling for members who opt out); 2 JAMES WM. MOORE ET AL., MOORE'S MANUAL:

Just as the Supreme Court in *American Pipe* considered the Rule 23 policies to support its conclusion that the statute of limitations is tolled when absent class members intervene following a denial of certification, the lower courts have invoked the Rule 23 policies to support their conclusion that the limitations period is tolled when absent class members opt out and sue separately following certification. Tolling in this context "prevent[s] the 'needless duplication of motions' and protective filings by parties seeking to preserve their rights . . . ."[144] In other words, if the statute of limitations were not tolled in these circumstances, class members would have the incentive to sue separately even before a ruling on the certification decision. Such a result would be at odds with the efficiency objectives of Rule 23.[145] On the other hand, if the statute of limitations is tolled, class members do not have to file precautionary individual suits and instead can wait to see whether the class is certified, retaining the (efficient) option of continuing as absent class members. At least one district court that tolled the statute of limitations on individual discrimination claims following a defense verdict in a pattern or practice class action also noted that the policies underlying the statute of limitations are not frustrated by tolling, holding that the original class action put the defendants on notice of the class members' "claims against them, and [the] plaintiffs [could not] be accused of sleeping on their rights when a class action was proceeding on their behalf."[146]

FEDERAL PRACTICE AND PROCEDURE § 14A.05, at 14A-20 (2005); 7B WRIGHT ET AL., *supra* note 83, § 1795, at 52 (stating that "the few courts that have addressed this issue have ruled that the limitations statute is tolled until a class member opts out, when it begins running anew").

144. *Realmonte*, 169 F.3d at 1284 (quoting *Am. Pipe*, 414 U.S. at 553-54); *see also Brewton*, 285 F. Supp. 2d at 1126 (drawing on Rule 23 policies).

145. *See Edwards*, 717 F.2d at 766 (stating that "[r]eliance on the pendency of a certified class action is more reasonable than the reliance on an uncertified class action"); *see also* 5 MOORE, *supra* note 71, § 23.65[2].

These decisions tolling the statute of limitations when a class member opts out following certification are consistent with the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). There, the Court considered the sufficiency of notice provided in a massive class action. *Id.* at 172-80. The plaintiff argued that individual notice to the absent class members would have been useless because none of them would have opted out and sued separately because the statute of limitations already had run on their claims. *Id.* at 175-76, 176 n.13. The *Eisen* Court rejected this argument, noting that "commencement of a class action tolls the applicable statute of limitations as to *all* members of the class," *id*. at 176 n.13 (emphasis added) (citation omitted), including, the Court implied, those who opt out following certification. *Id.* at 176. The Supreme Court in *Crown, Cork* read *Eisen* as "conclud[ing] that the right to opt out and press a separate claim remained meaningful because the filing of the class action tolled the statute of limitations under the rule of *American Pipe*." *Crown, Cork*, 462 U.S. at 351-52.

146. *Brewton*, 285 F. Supp. 2d at 1126-27. A more complicated tolling issue arises when class members exercise "back-end" opt-out rights at the settlement stage of a class action and file claims at that time. *See generally* George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 258 (1996) (suggesting a new rule

Second, the lower federal courts have considered whether the *American Pipe* tolling rule applies when individuals file separate suits *before* the district court rules on a motion to certify a class. The two federal Courts of Appeals to have addressed this issue have concluded that the *American Pipe* tolling rule does not apply in these circumstances.[147] Virtually all of the federal district courts that have addressed it agree.[148]

In declining to permit tolling in these circumstances, the lower courts invoked the same Rule 23 policies relied upon by the Supreme Court in *American Pipe* and *Crown, Cork*.[149] In *American Pipe* and *Crown, Cork*, the Court recognized that if the statute of limitations were not tolled, class members would not be able to rely on the class action to protect their rights and would have to file duplicative individual suits to protect their

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allowing "(b)(3) class members [] the right to opt out at the settlement stage"). Likewise, unique concerns arise when plaintiffs file a bilateral class action and defendant class members do not receive actual notice of the filing of the class action until after the limitations period has run. *See* Appleton Elec. Co. v. Graves Truck Line, Inc., 635 F.2d 603, 609-10 (7th Cir. 1980) (discussing "the issue of tolling in the context of a class action suit in which there is a class of unnamed defendants" and concluding that "'effectuation of the purpose of litigative efficiency and economy,' (which Rule 23 was designed to perform) transcends the policies of repose and certainty behind statutes of limitations").

147. *See* Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 569 (6th Cir. 2005) (concluding that "[t]he purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification"); Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980) (concluding that *American Pipe* tolling was unavailable where the plaintiffs "filed their own action nine months before the district court granted certification").

148. *See, e.g.*, Fezzani v. Bear, Stearns & Co., 384 F. Supp. 2d 618, 632 (S.D.N.Y. 2004); Shaffer v. Combined Ins. Co. of Am., No. 02 C 1774, 2003 U.S. Dist. LEXIS 20689, at *7, *9 (N.D. Ill. Nov. 18, 2003); *In re* WorldCom, Inc. Secs. Litig., 294 F. Supp. 2d 431, 453 (S.D.N.Y. 2003); *In re* Heritage Bond Litig., 289 F. Supp. 2d 1132, 1149-50 (C.D. Cal. 2003); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 221 (E.D.N.Y. 2003); Primavera Familienstiftung v. Askin, 130 F. Supp. 2d 450, 513-14 (S.D.N.Y. 2001); Prohaska v. Sofamor, 138 F. Supp. 2d 422, 433 (W.D.N.Y. 2001); Rahr v. Grant Thornton LLP, 142 F. Supp. 2d 793, 799-800 (N.D. Tex. 2000); Chinn v. Giant Food, Inc., 100 F. Supp. 2d 331, 334-35 (D. Md. 2000); Wahad v. City of New York, No. 75 Civ. 6203, 1999 U.S. Dist. LEXIS 12323, at *20-21 (S.D.N.Y. Aug. 12, 1999); *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1998 U.S. Dist. LEXIS 12534, at *32-33 (N.D. Ill. Aug. 4, 1998); Stutz v. Minn. Mining Mfg. Co., 947 F. Supp. 399, 403-04 (S.D. Ind. 1996); Chemco, Inc. v. Stone, McGuire & Benjamin, No. 91 C 5041, 1992 U.S. Dist. LEXIS 11657, at *4-6 (N.D. Ill. July 28, 1992); Wachovia Bank and Trust Co. v. Nat'l Student Marketing Corp., 461 F. Supp. 999, 1011-12 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342, 346 (D.C. Cir. 1980) (concluding that to hold otherwise and extend tolling to plaintiffs' separate action "would sanction duplicative suits and violate the policies behind *American Pipe*"); *see also* Warren Consol. Sch. v. U.S. Gypsum Co., 518 N.W.2d 508, 511 (Mich. Ct. App. 1994) (finding "no public policy reason" to extend tolling to the plaintiffs' separate "stale cause of action"). *But see* Amati v. City of Woodstock, No. 92 C 20347, 1997 U.S. Dist. LEXIS 14281, at *15-17 (N.D. Ill. Aug. 7, 1997).

149. *Supra* note 148.

interests.[150] Where the plaintiff chooses to file suit *before* the court rules on a motion to certify the class, however, she affirmatively evinces her intent *not* to rely on the class action and therefore should not benefit from the tolling rule.[151] Moreover, the plaintiff who sues separately rather than relying on the class action "create[s] the very inefficiency that *American Pipe* sought to prevent—he generate[s] more litigation and expense concerning the same issues that were litigated by a class of which he was a member."[152] Put differently, "plaintiffs who elect to individually pursue their own claims cannot 'reap the benefits of a doctrine which is designed for a group—the class and its putative members.'"[153]

Indeed, the lower courts have viewed as manipulative the efforts by class members who file individual suits before certification and nevertheless claim the benefits of the *American Pipe* tolling rule:

> [T]he class action tolling doctrine is intended to avoid the injustice and judicial inefficiency of requiring putative class members to file individual suits or to lose their claims. It is not intended to be a tool to manipulate limitations periods for parties who, intending all along to pursue individual claims, assert reliance on the proposed class action just long enough to validate their otherwise time-barred claims.[154]

Realize, however, that opportunities for manipulation are not eliminated by declining to toll the statute of limitations in these circumstances. As one group of plaintiffs and amici in the *WorldCom* litigation argued:

> [W]ithout access to the *American Pipe* tolling doctrine, institutions intending to file their own suits will simply

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150. Am. Pipe & Constr. Co. v. Utah, 414 U.S. at 551; *Crown, Cork*, 462 U.S. at 350; *see also* 7B WRIGHT ET AL., *supra* note 83, § 1795, at 46; *id.* § 1800, at 263; *cf. supra* note 102 and accompanying text (discussing the application of the tolling rule to class members who did not rely on the pending class action).

151. *See, e.g.*, *Wahad*, 1999 U.S. Dist. LEXIS 12323, at *20; *see also In re WorldCom*, 294 F. Supp. 2d at 453 (concluding that "plaintiffs who choose . . . to pursue separate litigation may not enjoy the benefits of [it] . . . without bearing its burdens . . . . [such as] the obligation to commence their actions within the applicable statute of limitations").

152. *Wahad*, 1999 U.S. Dist. LEXIS 12323, at *20; *accord In re WorldCom*, 294 F. Supp. 2d at 451; *Rahr*, 142 F. Supp. 2d at 800.

153. *Shaffer*, 2003 U.S. Dist. LEXIS 20689, at *8 (quoting *In re* Brand Name Prescription Drugs Antitrust Litig., 1998 U.S. Dist. LEXIS 12534, at *33).

154. *Rahr*, 142 F. Supp. 2d at 800 (citing *Wachovia*, 461 F. Supp. at 1012). Another court clarified that tolling "should not . . . appl[y] 'when a plaintiff attempts to manipulate the rule in a way that frustrates its underlying purpose.'" *In re* Brand Name Prescription Drugs Antitrust Litig., 1998 U.S. Dist. LEXIS 12534, at *33 (citing *Stutz*, 947 F. Supp. at 404).

> forbear doing so until it is time to opt out of the class. . . . [T]here will be a "bizarre gap" from the filing of a class action until a decision on certification, and an "onslaught of individual actions" by plaintiffs who wish to preserve their right to pursue individual actions.[155]

Notwithstanding this argument, the district court concluded that a denial of tolling in these circumstances would protect the courts from separate lawsuits at least until after the certification decision was made, at which point absent class members would be "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."[156]

The foregoing analysis of *American Pipe* and *Crown, Cork* demonstrates that in deciding to toll the statute of limitations during the pendency of a class action, the Supreme Court assured itself that tolling would not frustrate the statute of limitations policies and would further the Rule 23 policies regardless of whether absent class members intervened in the class action to press their individual claims or filed independent actions upon the denial of class certification. Likewise, lower federal court decisions have applied the same sets of policies in deciding whether to toll the statute of limitations when absent class members file individual actions after a class has been certified or before a ruling on the certification motion. Now we must consider whether the same policies justify the tolling of the statute of limitations if absent class members seek to bring another class action raising the same claims or if other considerations complicate the analysis.

IV. THE THIRD RING: THE PRECLUSION POLICIES AND TOLLING IN THE SUCCESSIVE CLASS ACTION CONTEXT

When absent class members seek to press their claims in the context of a successive class action, several obstacles may impede their path,[157] two of which are salient here. First, preclusion doctrine may foreclose the prosecution of their claims or the relitigation of issues decided against the class in an earlier suit.[158] Second, the statute of limitations may bar their

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155. *In re Worldcom*, 294 F. Supp. 2d at 452 (footnote omitted).

156. *Id.*

157. *See* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470-97 (2000) (discussing other "problems that plague dueling class actions: duplication of effort, waste of judicial resources, inordinate pressure on class counsel to settle and difficult preclusion problems").

158. *See id.* at 484-97. For a discussion of the historical development of preclusion doctrine in the class action context, see Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998). For a discussion of the conflicts of interest that may arise when applying preclusion doctrine to class actions (in the Title VII and tort contexts

claims as untimely. If preclusion law forecloses successive class actions, it is not necessary even to reach the statute of limitations question. Thus, we will begin our analysis of successive class actions by examining the policies underlying preclusion doctrine generally and the reasons why preclusion doctrine often fails to preclude successive class actions presenting the same claims.

Since successive class actions typically survive the preclusion doctrine hurdle, we will then consider whether the *American Pipe* tolling doctrine applies in the successive class action context. Regarding the tolling issue, the Ninth Circuit noted that "[s]trictly speaking, this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions."[159] Notwithstanding this insight, most of the lower courts handling these cases have characterized the issue as a tolling question. In resolving it, not only have they invoked the statute of limitations policies and the Rule 23 policies that informed the Supreme Court's analysis in *American Pipe* and *Crown, Cork*, but they also have raised a number of policies underlying preclusion law. Thus, notwithstanding (or perhaps because of) the failure of preclusion doctrine to forestall successive class actions, the lower courts have invoked some of the policies underlying preclusion law to conclude that the statute of limitations was not tolled and therefore that successive class actions were time-barred.

A. *The Preclusion Policies*

The doctrines of claim and issue preclusion determine the binding effect of judgments. Under the doctrine of claim preclusion, or "res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."[160] The judgment forecloses further litigation of the same claim whether the plaintiff wins or loses.[161] If a "judgment is rendered in

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in particular) and the extent to which rendering courts in class action litigation should attempt to constrain the preclusive effects their judgments will have upon future litigation, see Wolff, *supra* note 109. Wolff does not explore the preclusive effects, if any, of a denial of class certification.

159. Catholic Soc. Servs., Inc. v. INS, 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc).

160. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 466 n.6 (1982) (citations omitted); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) (discussing effects of merger or bar on a claim); FRIEDENTHAL ET AL., *supra* note 71, § 14.1, at 646 (defining res judicata); JAMES ET AL., *supra* note 72, § 11.2, at 674-75; *id.* § 11.16, at 702 (stating that a judgment need not be on the merits to be preclusive as long as "the procedure in the first action afforded plaintiff a fair opportunity to get to the merits"); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402, at 7-9 (2d ed. 2002 & Supp. 2005) (discussing res judicata terminology).

161. *Supra* note 160.

favor of the plaintiff[,] [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof. . . ."[162] Put differently, the plaintiff cannot split her claim, pursuing part of it in one lawsuit and the rest of it in another suit; the entire claim merges into the judgment rendered in the first action.[163] This aspect of claim preclusion doctrine, referred to as merger, provides the plaintiff with a powerful incentive to present her entire claim in a single lawsuit, thereby promoting efficiency and judicial economy.[164] Thus, to the extent that both preclusion doctrine and Rule 23 seek to promote efficiency and judicial economy, they overlap in their policy objectives.

If a judgment is rendered against the plaintiff, claim preclusion bars her from bringing another action on the same claim.[165] Thus, a losing plaintiff cannot sue the defendant again and again, each time hoping for another chance to prevail. This aspect of claim preclusion doctrine, referred to as bar, not only conserves judicial resources, but, by mandating finality and repose, also protects the defendant from the burden, cost and vexation of relitigating the same claim.[166] To the extent that both preclusion doctrine and statutes of limitations seek to provide the defendant with repose, they also overlap in their policy objectives.

Claim preclusion serves several objectives in addition to the primary policies of efficiency and repose for the defendant. It protects the unsuccessful plaintiff "against his own folly in risking a second try."[167] Claim preclusion also serves a broader public interest in stability and repose. "In some cases, the public at large also has an interest in seeing that

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162. RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 18(1) (1982).

163. FRIEDENTHAL ET AL., *supra* note 71, § 14.1, at 646; JAMES ET AL., *supra* note 72, § 11.3, at 676; 18 WRIGHT ET AL., *supra* note 160, § 4402, at 16-17.

164. *See Kremer*, 456 U.S. at 466 n.6 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979); FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 653-54; 18 WRIGHT ET AL., *supra* note 160, § 4403, at 21, 24-25. *But see* 18 WRIGHT ET AL., *supra* note 160, § 4403, at 25 (questioning whether preclusion doctrine actually does much to protect overworked courts).

165. *See* RESTATEMENT (SECOND) OF THE LAW OF JUDGMENTS § 19 (1982); FRIEDENTHAL ET AL., *supra* note 71, § 14.1, at 646; JAMES ET AL., *supra* note 72, § 11.3, at 675-76; 18 WRIGHT ET AL., *supra* note 160, § 4402, at 7-9.

166. *Kremer*, 456 U.S. at 467 n.6 (quoting *Allen*, 449 U.S. at 94); *Parklane Hosiery*, 439 U.S. at 326; Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 330 (9th Cir. 1995) (stating that claim preclusion "has at its fundamental base the vindication of private litigants' interest in repose"); FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 653; JAMES ET AL., *supra* note 72, § 11.2, at 675; 18 WRIGHT ET AL., *supra* note 160, § 4403, at 26-30 (characterizing repose as the core value of preclusion doctrine).

167. 18 WRIGHT ET AL., *supra* note 160, § 4403, at 26 n.10 (quoting Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 338 (1971) (noting that a plaintiff that sought to relitigate a claim it lost in an earlier suit "is expending funds on litigation" to press a claim "which is by hypothesis invalid. These moneys could be put to better use . . . .").

rights and liabilities once established remained fixed. If a court quiets title to land, for example, everyone should be able to rely on the finality of that determination."[168] And claim preclusion fosters consistency of results by precluding relitigation of claims,[169] thereby preserving "the moral force of . . . judgments. . . . "[170]

The doctrine of issue preclusion, or collateral estoppel, precludes relitigation by the same party[171] of issues that were "actually litigated and determined by a valid and final judgment" and were necessary to support the judgment.[172] Thus, even where claim preclusion does not foreclose a second suit, issue preclusion may preclude relitigation of issues that actually were decided in the first action. To some extent, like claim preclusion, issue preclusion promotes efficiency and judicial economy by barring relitigation of issues already determined, thereby shortening the length of trials, and encouraging plaintiffs to join multiple defendants in a single lawsuit.[173] Because nonmutual defensive issue preclusion precludes a plaintiff from relitigating an issue that she previously lost in a prior suit against a different defendant, the plaintiff has an incentive to sue both defendants together.[174] To the extent, however, that parties can anticipate the future consequences of judicial resolution of an issue, issue preclusion may create an incentive for "exhaustive litigation," thereby

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168. FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 654.

169. *Kremer*, 456 U.S. at 467 n.6 (quoting *Allen*, 449 U.S. at 94); FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 653-54; 18 WRIGHT ET AL., *supra* note 160, § 4403, at 23-24.

170. JAMES ET AL., *supra* note 72, § 11.3, at 675.

171. For a statement of the circumstances in which a party may be precluded from relitigating an issue vis-à-vis a nonparty, see RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982). *See also Parklane Hosiery*, 439 U.S. at 329-30 (distinguishing between offensive and defensive nonmutual collateral estoppel); JAMES ET AL., *supra* note 72, § 11.25; 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4464 at 692-713 (2d ed. 2002 & Supp. 2005) (discussing the evolution of nonmutual issue preclusion).

172. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see also Kremer*, 456 U.S. at 467 n.6 (explaining collateral estoppel); JAMES ET AL., *supra* note 72, § 11.3, at 676 (exlpaining "[t]he effect of issue preclusion"); *id.* § 11.17, at 703 (stating that "even though [a later action] involves a different claim or cause of action[,]" issue preclusion may affect the later action); 18 WRIGHT ET AL., *supra* note 160, § 4402, at 9 (explaining that issue preclusion "effectuate[s] the public policy in favor of minimizing redundant litigation"); *id.* § 4416, at 390-93 (discussing the requirements of issue preclusion). The term issue preclusion encompasses both direct and collateral estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. b (1982). "Issue preclusion in a second action on the same claim is sometimes [referred to] as direct estoppel" while issue preclusion in a "second action brought on a different claim . . . is [referred to] as collateral estoppel." *Id.*; *see also* FRIEDENTHAL ET AL., *supra* note 71, § 14.1, at 646-47 (discussing the two types of estoppel); 18 WRIGHT ET AL., *supra* note 160, § 4416, at 393 (explaining the two types of estoppel).

173. 18 WRIGHT ET AL., *supra* note 160, § 4403, at 30; 18A WRIGHT ET AL., *supra* note 171, § 4464, at 710-11.

174. *See, e.g.*, *Parklane Hosiery*, 439 U.S. at 329-30 (stating that "defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible").

frustrating this efficiency objective.[175] Put differently, parties may spend more time, energy, and money litigating an issue than the current litigation merits because they fear that the determination will be binding upon them in later litigation where more will be at stake.

In addition to promoting judicial economy in at least some cases, issue preclusion affords repose to a party that already litigated an issue (and, in cases of nonmutual defensive issue preclusion, even to a nonparty who never litigated an issue).[176]

More importantly, issue preclusion seeks to "preserv[e] the acceptability of judicial dispute resolution against the corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results."[177] Put differently, by eliminating opportunities to relitigate issues that already were decided, issue preclusion reduces the risk of inconsistent results and the concomitant risk that citizens would lose confidence in the integrity and efficacy of the judicial process.[178]

Issue and claim preclusion are affirmative defenses that may be raised by the defendant in its answer.[179] If the defendant fails to raise the defense, it is waived.[180] "The waiver principle 'suggests that the needs of judicial administration are, at best, of subsidiary value' in justifying the rules of preclusion."[181] Ordinarily the court will not raise preclusion *sua sponte*, although in recent years, as courts have faced greater docket pressure and have evinced a heightened interest in judicial economy, some courts have raised the preclusion issue on their own motion.[182]

Before considering the extent to which preclusion policies affect the tolling analysis in the successive class action context, one must first understand why a decision denying class certification ordinarily does not preclude a successive class action.

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175. 18 WRIGHT ET AL., *supra* note 160, § 4416, at 400; *see also* JAMES ET AL., *supra* note 72, § 11.18, at 704-05; 18A WRIGHT ET AL., *supra* note 171, § 4464, at 712.

176. 18 WRIGHT ET AL., *supra* note 160, § 4403, at 30 (noting that "nonparties breathe freer"); 18A WRIGHT ET AL., *supra* note 171, § 4464, at 711 (noting that "[t]he vital need to foster repose and reliance on judgments that supports general preclusion doctrine is greatly diluted in addressing nonmutual issue preclusion").

177. 18 WRIGHT ET AL., *supra* note 160, § 4403, at 23; *see also id.* § 4416, at 393 (stating that issue "preclusion prevents the risk of the clearest and most embarrassing inconsistencies"); 18A WRIGHT ET AL., *supra* note 171, § 4464, at 710 (same argument for nonmutual issue preclusion).

178. *See, e.g.*, Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 330 (9th Cir. 1995) (citing 78 WRIGHT ET AL., *supra* note 160, § 4403, for the same proposition).

179. FED. R. CIV. P. 8(c).

180. FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 655-56; 18 WRIGHT ET AL., *supra* note 160, § 4405, at 83.

181. 18 WRIGHT ET AL., *supra* note 160, § 4405, at 85 (quoting Technograph Printed Circuits, Ltd. v. United States, 372 F.2d 969, 977 (Ct. Cl. 1967)).

182. FRIEDENTHAL ET AL., *supra* note 71, § 14.3, at 655, 655 n.10; 18 WRIGHT ET AL., *supra* note 160, § 4405, at 85-86.

B. *The Application of Preclusion Doctrine in the Successive Class Action Context*

If a decision denying class certification had claim preclusive effect, it would bar absent class members from pursuing their claims in a second lawsuit, either individually or as part of a successive class action even if there were no statute of limitations issues. Intuitively, such a result seems unfair because the would-be representative never presented the substantive claims of the absent class members for adjudication and never even had an opportunity to do so. Preclusion doctrine accommodates this intuitive reaction by according claim preclusive effect only to final judgments that are "'on the merits.'"[183] Although few judicial opinions expressly address the claim preclusive effect of a decision denying class certification, it is clear that denials of class certification do not adjudicate the underlying merits of the class members' claims and have no claim preclusive effect.[184] Thus, denials of class certification do not preclude absent class members from suing on the claims raised in the class action complaint, either individually or in the context of another class action.

Judgments that lack claim preclusive effect because they are not "'on the merits'" nevertheless may have issue preclusive effect and therefore may preclude the parties from relitigating issues already adjudicated.[185] Thus, we must consider whether a decision denying class certification bars absent class members from relitigating issues decided against the class in the earlier action, such as a lack of numerosity or the unmanageability of the class action. If denials of class certification are accorded issue preclusive effect, then successive class actions essentially are precluded because no court may certify a class unless all of the statutory requirements (such as numerosity and adequacy of representation) are satisfied.

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183. 18 WRIGHT ET AL., *supra* note 160, § 4402, at 20; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 20 (1982) (identifying valid and final judgments that do not bar another action by the plaintiff on the same claim).

184. *See, e.g.*, Canady v. Allstate Ins. Co., 282 F.3d 1005, 1019 n.9 (8th Cir. 2002) ("recogniz[ing] that denial of class certification alone does not constitute a final judgment on the merits sufficient to satisfy the res judicata principles underlying the relitigation exception to the Anti-Injunction Act") (citations omitted); Waltrip v. Sidwell Corp., 678 P.2d 128, 133 (Kan. 1984) (stating that "[t]he determination that the proposed class . . . would not be certified as a class was tantamount to a dismissal otherwise than on the merits at to these plaintiffs"); *cf.* Guenter v. Lomas & Nettleton Co., 189 Cal. Rptr. 470, 474 (Cal. Ct. App. 1983) (stating that "the denial of class certification . . . was on the merits" and therefore "was an appealable order").

185. 18 WRIGHT ET AL., *supra* note 160, § 4402, at 20; RESTATEMENT (SECOND) OF JUDGMENTS §§ 13 cmt. d, 20 cmt. b (1982); *see, e.g.*, Dozier v. Ford Motor Co., 702 F.2d 1189, 1191, 1194 (D.C. Cir. 1983) (holding that even though the prior dismissal for lack of subject matter jurisdiction was not on the merits and did not have claim preclusive effect, it did have issue preclusive effect and precluded relitigation of the amount in controversy).

Examined solely as a policy matter, one might expect that a denial of class certification *would* preclude a successive class action filed on behalf of the same class. After all, if one court already has decided that the action cannot be presented on behalf of a class, it seems (at least at first blush) inefficient and wasteful to ask another court to decide the same question again. Moreover, it seems unfair to compel the defendant to incur the cost and hassle of defending against another class action when it already has convinced one court that class treatment is inappropriate. And permitting relitigation of the certification question runs the risk that the second court may decide the issue differently, causing the public to lose confidence in the integrity and accuracy of judicial decisions.

Even though it appears that the policies underlying preclusion law might well be served by a decision to preclude a successive class action, in fact, the hurdle posed by issue preclusion doctrine to successive class actions is more illusory than real. Let us understand why issue preclusion is not likely to bar the prosecution of a second class action following denial of class certification.

First, ordinarily, only parties to a prior suit or their privies are bound by a judgment against them.[186] The Supreme Court has held that absent class members may be bound by a class action judgment, but only when the named representative has been adequately representing their interests.[187] Thus, if the class counsel or putative representative in the suit in which class certification was denied was not adequately representing the absent class members, then the absent class members could not be bound by the judgment.[188] The Seventh Circuit Court of Appeals in *In re Bridgestone/Firestone* held that if the rendering court found the representation to be adequate, but declined to certify a class for other reasons, the absent class members would be bound by the ruling and precluded from bringing a successive class action.[189] This conclusion

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186. *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793, 798-99 (1996) (quoting Martin v. Wilks, 490 U.S. 755, 761 (1989)); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940); *see also* 18A WRIGHT ET AL., *supra* note 171, § 4449, at 330 (stating the basic premise that only parties to prior action are bound); Wasserman, *supra* note 157, at 484-85 (same).

187. *See, e.g.*, *Hansberry*, 311 U.S. at 41-43 (explaining the general rule when absent class members may be bound). *See generally* 18A WRIGHT ET AL., *supra* note 171, § 4455 (discussing preclusion in the class action context).

188. *See, e.g.*, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 663 (7th Cir. 2004); *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 768 (7th Cir. 2003).

189. *In re Bridgestone/Firestone*, 333 F.3d at 768-69 (holding that absent class members were bound by a denial of class certification where the rendering court had found that the class representatives and their attorneys furnished adequate representation); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.10 cmt. c (Prelim. Draft No. 3, 2005) (stating that "[a] mere cosmetic change in the proposed class representative . . . should not defeat same-party status where the class for which certification is now being sought is the same as the one for which class

appears to conflict with the Second Restatement of Judgments: Since class representatives are authorized to represent the absent class members only if the court in fact certifies a class,[190] absent class members may not be bound by an order *denying* class certification.[191]

Second, even if the successive class action were brought by the same putative class representative and even if she would be bound by a decision rendered against her, an order denying class certification might lack the requisite finality to be given preclusive effect in a second class action.[192] A judgment that is "merely tentative in the very action in which it was rendered" is not to be given preclusive effect in a subsequent action.[193] According to the Second Restatement of Judgments, a prior adjudication is deemed a final judgment if it "is determined to be sufficiently firm to be accorded conclusive effect."[194] Factors that support a conclusion of finality include "that the parties were fully heard, that the court supported its decision with a reasoned opinion, [and] that the decision was subject to appeal or was in fact reviewed on appeal. . . ."[195] Applying these factors, some courts, including the Seventh Circuit in *Bridgestone/Firestone*, have held that denials of class certification are "'sufficiently firm'" for purposes of issue preclusion.[196]

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certification was previously denied . . .").

190. RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) & cmt. e (1982).

191. *See, e.g.*, Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 879-82 (6th Cir. 1997); Roberts v. Am. Airlines, Inc., 526 F.2d 757, 762-63 (7th Cir. 1975); Furey v. Geriatric & Med. Ctrs., Inc., Civil Action No. 92-5113, 1993 U.S. Dist. LEXIS 10299, at *3 (E.D. Pa. July 19, 1993) (stating that "[t]he fact that the plaintiffs named in that complaint have been precluded from seeking recovery on behalf of the putative class does not—indeed, could not lawfully—preclude other members of the class from bringing an action on behalf of the class"); *see also* 18A WRIGHT ET AL., *supra* note 171, § 4455, at 458; Wasserman, *supra* note 157, at 484-85.

192. *See, e.g.*, Canady v. Allstate Ins. Co., 282 F.3d 1005, 1019 n.9 (8th Cir. 2002)); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 146 (3d Cir. 1998) (stating that "denial of class certification . . . lacks sufficient finality to be entitled to preclusive effect"); J.R. Clearwater Inc. v. Ashland Chem. Co., 93 F.3d 176, 179 (5th Cir. 1996) (similar); Wethington v. Purdue Pharma LP, 218 F.R.D. 577, 583 (S.D. Ohio 2003); Carter v. Gen'l Motors Corp., No. 7:99-CV-230-R, 2001 U.S. Dist. LEXIS 581, at *5 (N.D. Tex. Jan. 16, 2001); Yasgur v. Aegis Mortg. Corp., 98-CV-121, 1999 U.S. Dist. LEXIS 20989, at *6-7 (D. Minn. Mar. 9, 1999); Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 367 (Tex. App. 1994); *see also* 18A WRIGHT ET AL., *supra* note 171, § 4455, at 458; Wasserman, *supra* note 157, at 484-85.

193. RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. a (1982).

194. *Id.* § 13; *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.10 cmt. c (Prelim. Draft No. 3, 2005) (stating that "[t]he court in a subsequent proceeding . . . should consider whether the earlier denial of aggregate treatment is sufficiently definite as to warrant issue-preclusive effect"); 18A WRIGHT ET AL., *supra* note 171, § 4434 (describing a more relaxed and "practical view of finality" adopted by some courts).

195. RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. g (1982).

196. *In re Bridgestone/Firestone*, 333 F.3d at 767 (holding that an appellate court's decision that no nationwide class could be certified was sufficiently final for purposes of issue preclusion);

Not all courts and commentators agree. According to Rule 23 of the Federal Rules of Civil Procedure, an order determining whether to certify a class action "may be altered or amended before final judgment."[197] Courts have cited this language in support of the conclusion that denials of class certification are not sufficiently final to be accorded issue preclusive effect, at least where the underlying action is not dismissed upon the denial of class certification.[198] But even where the putative representative voluntarily dismisses the action following the denial of certification, the judgment may lack the requisite finality to be given preclusive effect.[199]

Finally, since issue preclusion bars relitigation only of the identical issue previously litigated, the class representative would not be precluded from relitigating the propriety of class certification in a second putative class action if the size or definition of the class presented in the second action were different,[200] or if the standards for certification under the governing procedural rules of the first and second courts were different,[201] or if for some other reason the issue raised in the second class action were not the same as the issue decided in the first.[202] Even if the language of the two rules was identical, if the courts were in different systems—e.g., if the first court was a state court and second court is a federal court—the two systems might interpret the same language in their procedural rules differently.[203]

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see also Rehoreg v. Stoneco, Inc., No. 04CA008481, 2005 Ohio App. LEXIS 6, at *6-7 (Ohio Ct. App. Jan. 5, 2005).

197. FED. R. CIV. P. 23(c)(1)(C).

198. *See, e.g.*, *J.R. Clearwater*, 93 F.3d at 179 n.2; *Morgan*, 889 S.W.2d at 367.

199. *In re* Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 219-20 (8th Cir. 1977); *cf. In re* Dalkon Shield Punitive Damages Litig., 613 F. Supp. 1112, 1115 (E.D. Va. 1985); *see also* 18A WRIGHT ET AL., *supra* note 171, § 4455, at 458 (noting that "a denial of certification may not be sufficiently 'final' to support preclusion").

200. *See, e.g.*, Yasgur v. Aegis Mortg. Corp., 98-CV-121, 1999 U.S. Dist. LEXIS 20989, at *8 (D. Minn. 1999) (declining to apply issue preclusion because the definitions of the putative classes were not identical).

201. *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698, 732-33 (2d Cir. 1987); *cf.* Canady v. Allstate Ins. Co., 282 F.3d 1005, 1016-17 (8th Cir. 2002) (finding procedural differences irrelevant).

202. 18A WRIGHT ET AL., *supra* note 171, § 4455, at 457-58 & n.13; *see also* Oshana v. Coca-Cola Co., 225 F.R.D. 575, 579 (N.D. Ill. 2005); Wasserman, *supra* note 157, at 485-86 (discussing the effect of different issues and standards); *cf.* Scarvey v. First Fed'l Sav. & Loan Ass'n, 98-CVS 204, 2000 NCBC LEXIS 2, *10-17 (N.C. Super. Ct. Feb. 23, 2000) (finding that the claims in both actions were identical). *See generally* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1114 n.206 (1996) (explaining that a denial of certification in one court generally has "no collateral estoppel effect on the ability of a second court in a different jurisdiction to consider certifying the class").

203. *See, e.g.*, Morgan v. Deere Credit, Inc., 889 S.W.2d 360, 367-68 (Tex. App. 1994) (noting the different application of the same rules in the state and federal systems); *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.10(a) cmt. b & illus. 1 (Prelim. Draft No. 3, 2005); Wasserman, *supra* note 157, at 486.

C. *Tolling in the Successive Class Action Context: The Lower Courts' Balance of the Three Sets of Policies*

As Part IV.B demonstrated, the decision by a trial court declining to certify a class is not likely to preclude absent class members from filing a second class action on behalf of the same class pressing the same claim. If, however, months or years pass between the filing of the first class action complaint and the denial of class certification, the defendant may raise the statute of limitations as a defense when an absent class member files a complaint in a second class action. Thus, if preclusion doctrine fails to bar the filing of successive class actions, then the application of the *American Pipe* tolling rule is squarely presented: If, following a denial of class certification, the statute of limitations is tolled for absent class members who seek to intervene in the original class action, and if it is tolled for absent class members who seek to file individual lawsuits to press their claims, is the statute of limitations also tolled for absent class members who seek to press their claims in the context of a successive class action? Let us begin by analyzing how the lower federal courts have addressed this issue, and then, in Part V, we will consider how the three sets of relevant policies—the statute of limitations policies, the Rule 23 policies, and the preclusion policies—should influence analysis of this issue.

1. The Majority View: No Tolling

Most of the federal Courts of Appeals that have addressed this issue, including the First, Second, Fifth, Sixth and Eleventh Circuits, have held that the statute of limitations is not tolled for a putative class representative who seeks to bring a successive class action upon the denial of class certification in an initial class action (or upon the certification of a narrow class, followed by the filing of a successive class action on behalf of a broader class that was denied certification in the initial action).[204] In support of this conclusion, the Courts of Appeals have invoked three policy concerns. First, they have raised the policy of repose, which underlies both the statute of limitations and preclusion doctrine: If class members in

204. *See* Basch v. Ground Round, Inc., 139 F.3d 6, 10-11 (1st Cir. 1998); Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994); Andrews v. Orr, 851 F.2d 146, 149-50 (6th Cir. 1988); Korwek v. Hunt, 827 F.2d 874, 876-79 (2d Cir. 1987) (narrow class certified); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985); *see also* Robbin v. Fluor Corp., 835 F.2d 213, 213-14 (9th Cir. 1987); Catholic Soc. Servs., Inc. v INS (*CSS VI*), 232 F.3d 1139, 1147 (9th Cir. 2000) (en banc) (stating, in dicta, that "if plaintiffs [in a class action sought] to relitigate the correctness of [a] denial" of certification in an earlier class action, "we would not permit plaintiffs to bring a class action"). *See generally* 7B WRIGHT ET AL., *supra* note 83, § 1795, at 51-52 (discussing the barring of successive class actions); 5 MOORE, *supra* note 71, § 23.65[1][b] (discussing the lack of tolling for successive class actions where certification is denied).

successive class actions were to receive the benefit of the *American Pipe* tolling rule, then the statute of limitations would be tolled "indefinitely"[205] or "perpetually"[206] and the defendant would be denied the repose promised by the statute of limitations.[207] In other words, if successive class actions were deemed timely due to application of the *American Pipe* tolling rule, the defendant would have to defend against repetitive class actions and worry about its potential liability for an even longer—indeed indeterminate—period of time. Such tolling would "extend [] the statute of limitations beyond the wildest dreams of those who enacted it."[208]

Second, at least one Court of Appeals raised concerns about judicial economy—concerns that underlie both Rule 23 and preclusion doctrine. The Second Circuit suggested that successive class actions would consume scarce judicial resources,[209] while a decision declining to toll the statute of limitations in a successive class action arguably would conserve them.

Third, the same court expressed concern that tolling might engender a lack of respect for prior judicial decisions, one of the policy concerns underlying preclusion law. For example, if a court denied certification because it concluded that a class action would be unmanageable, a decision to toll the statute of limitations in a later-filed class action brought on behalf of the same class and raising the same claim would "afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints."[210] Such reargument would invite a decision at odds with the first decision denying certification. Thus, by declining to toll the statute of limitations in the successive class action context, courts seek to foster respect for prior decisions.

In addition to invoking the three sets of policies that we have highlighted, the federal Courts of Appeals have expressed concern that application of the *American Pipe* tolling rule in the successive class action context would invite abuse. They quote from Justice Powell's concurrence in *Crown, Cork*, where he noted that the *American Pipe* tolling rule "'is a generous one, inviting abuse'"[211] or they label tolling in the successive

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205. *Basch*, 139 F.3d at 11; *Salazar-Calderon*, 765 F.2d at 1351.

206. *Basch*, 139 F.3d at 11; *see also* Andrews v. Orr, 614 F. Supp. 689, 692 (S.D. Ohio 1985), *vacated on other grounds*, 851 F.2d 146 (6th Cir. 1988).

207. *See CSS VI*, 232 F.3d at 1154-55 (Kozinski, J., dissenting) (discussing the defendant's interest in repose); *Griffin*, 17 F.3d at 359 (bemoaning the possibility of "endless rounds of litigation").

208. *CSS VI*, 232 F.3d at 1154 (footnote omitted) (Kozinski, J., dissenting).

209. *See Korwek*, 827 F.2d at 879 (distinguishing a "motion for amendment under Rule 23(c)(1), . . . which protects scarce administrative resources while ensuring" an opportunity to revisit the certification question).

210. *Id.*

211. *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring), *quoted in* Basch v. Ground Round, Inc., 139 F.3d 6, 17 (1st Cir. 1998); Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988);

class action context as "'abusive.'"[212] In a similar vein, one court expressed concern about litigants' efforts to "circumvent" earlier rulings.[213]

Like the holdings of the Courts of Appeals for the First, Second, Fifth, Sixth and Eleventh Circuits, several district courts have held that the statute of limitations is not tolled in the successive class action context.[214] In addition to the policy concerns discussed above,[215] the district courts have relied upon language in *Crown, Cork*—which discussed the availability of tolling when absent class members "file *individual* actions"[216] or "*separate* suits"[217] in "*multiple* forums"[218]—to support the conclusion that tolling is unavailable in the successive class action context.[219]

2. The Minority View: Tolling in Limited Circumstances

Two of the federal Courts of Appeals, the Third and Ninth Circuits, have permitted tolling in sequential class actions in limited

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Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985). *See also* Fleming v. Bank of Boston Corp., 127 F.R.D. 30, 36 (D. Mass. 1989), *aff'd sub nom.* Fleming v. Lind-Waldock & Co., 922 F.2d 20 (1st Cir. 1990).

212. *Robbin*, 835 F.2d at 214 (quoting *Korwek*, 827 F.2d at 879).

213. *CSS VI*, 232 F.3d at 1147 (en banc) (citing *Robbin*, 835 F.2d at 214).

214. *See* Hunter v. Am. Gen. Life & Accident Ins. Co., 384 F. Supp. 2d 888, 893 (D.S.C. 2005) (declining to extend tolling where the earlier class action "voluntarily narrow[ed] . . . the class definition"); *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 261 F. Supp. 2d 188, 219-21 (E.D.N.Y. 2003) (finding, in dicta, that tolling would not extend to a successive class action); Vinson v. Seven Seventeen HB Phil. Corp., No. 00-6334, 2001 U.S. Dist. LEXIS 25295, at *26 (E.D. Pa. 2001); Warden v. Crown Am. Realty Trust, Civ. Action No. 96-25J, 1998 U.S. Dist. LEXIS 16194, at *24 n.9 (W.D. Pa. Oct. 15, 1998) (dicta); *In re* Westinghouse Secs. Litig., 982 F. Supp. 1031, 1033-35 (W.D. Pa. 1997); Phillips v. Kidder, Peabody & Co., 933 F. Supp. 303, 311-12 (S.D.N.Y. 1996); *In re* Cypress Semiconductor Secs. Litig., 864 F. Supp. 957, 959 (N.D. Cal. 1994); Smith v. Flagship Int'l, 609 F. Supp. 58, 63-64 (N.D. Tex. 1985); Burns v. Ersek, 591 F. Supp. 837, 840-41 (D. Minn. 1984); *see also* Krinsk v. Fund Asset Mgmt., Inc., No. 85 Civ. 8428, 1986 U.S. Dist. LEXIS 25691, at *7-15 (S.D.N.Y. May 9, 1986) (holding that the statute of limitations was not tolled in the successive fund shareholder's action context); 5 CONTE & NEWBERG, *supra* note 71, § 16:11, at 186.

215. *See, e.g.*, *Vinson*, 2001 U.S. Dist. LEXIS 25295, at *25 (refusing to condone "abusive tactics"); *In re Westinghouse*, 982 F. Supp. at 1034 (declining to "permit . . . abusive manipulations"); *In re Cypress*, 864 F. Supp. at 959 (discussing "needless, 'abusive' litigation") (quoting *Korwek*, 827 F.2d at 879); *id.* at 960 (viewing second class action as "an attempt to circumvent a court order"); *Smith*, 609 F. Supp. at 64 (discussing "potentially endless succession of class actions"); *Burns*, 591 F. Supp. at 840, 842 (expressing concern over the "perpetual tolling" of class claims).

216. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 346 (1983) (emphasis added).

217. *Id.* at 352 (emphasis added).

218. *Id.* at 353 (emphasis added).

219. *See, e.g.*, *In re Ciprofloxacin*, 261 F. Supp. 2d at 221; *Smith*, 609 F. Supp. at 63-64 (citations omitted); *Burns*, 591 F. Supp. at 841 (citations omitted).

circumstances.[220] In *Catholic Social Services, Inc. v. INS*,[221] the Ninth Circuit sitting en banc adhered to its earlier position that the statute of limitations is not tolled "when the second [class] action is no more than an attempt to relitigate the correctness of the earlier class certification decision";[222] but on the unusual facts presented, it held that class members in a successive class action *could* invoke the *American Pipe* tolling rule.[223] The case has a long and complicated history. In 1988, the district court certified a class of aliens who sought to challenge an INS policy as being inconsistent with a federal immigration statute.[224] The court concluded that the INS policy was unenforceable and granted relief to the class.[225] The Ninth Circuit affirmed.[226] On a writ of certiorari, the Supreme Court questioned the ripeness of the claims and vacated the judgment.[227]

On remand, the plaintiffs filed an amended complaint and the district court certified a narrower class whose claims were ripe and granted relief to the class.[228] While an appeal from this order was pending, Congress passed a law that denied jurisdiction over the claims of the class representatives.[229] The Court of Appeals thereafter vacated the district court's orders and remanded the case with instructions to dismiss for lack of jurisdiction.[230]

Less than a month later, plaintiffs filed a second class action on behalf of two groups of aliens: those whose claims were subject to jurisdiction under the new federal statute and those whose claims did not satisfy the statute but who challenged its constitutionality.[231] The district court

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220. In addition, an early Second Circuit opinion assumed *sub silentio* that the *American Pipe* tolling rule applies in the successive class action context. Cullen v. Margiotta, 811 F.2d 698, 719-21 (2d Cir. 1987). But the court later disavowed that ruling, noting that "a *sub silentio* holding 'is not binding precedent' . . . ." *Korwek*, 827 F.2d at 877 (citation omitted).

221. *CSS VI*, 232 F.3d 1139 (9th Cir. 2000) (en banc); *see also* Recent Case, *Civil Procedure—Class Actions—Ninth Circuit Holds That Prior Class Action Tolled the Statute of Limitations for New Class Action Claim*, Catholic Soc. Servs. v. INS, 232 F.3d 1139 (9th Cir. 2000) (en banc), 114 HARV. L. REV. 2576, 2576 (2001) (criticizing the court's "particularistic pragmatism" as providing "an unsatisfactory analytical alternative to guide future decisions"); 2 CONTE & NEWBERG, *supra* note 71, § 6:3, at 491-93.

222. *CSS VI*, 232 F.3d at 1147 (citation omitted); *accord Robbin*, 835 F.2d at 214.

223. *CSS VI*, 232 F.3d at 1149.

224. Catholic Soc. Servs., Inc. v. Meese (*CSS I*), 685 F. Supp. 1149, 1159 (E.D. Cal. 1988).

225. *Id*. at 1159-60.

226. Catholic Soc. Servs., Inc. v. Thornburgh (*CSS II*), 956 F.2d 914, 923 (9th Cir. 1992), *vacated sub nom.* Reno v. Catholic Soc. Servs., Inc. (*CSS III*), 509 U.S. 43, 67 (1993).

227. *CSS III*, 509 U.S. 43, 59 & 67 (1993).

228. Catholic Soc. Servs., Inc. v. Reno (*CSS IV*), 134 F.3d 921, 923 (9th Cir. 1997) (per curiam).

229. 8 U.S.C. § 1255a(f)(4)(c) (2000); *see also CSS IV*, 134 F.3d at 923-26.

230. *CSS IV*, 134 F.3d at 928.

231. *CSS VI*, 232 F.3d at 1144. Although the court's opinion is not crystal clear on this point, it appears that the named representatives in the second class action were different from the named

certified a class of aliens whose claims were subject to jurisdiction under the new statute and concluded that the governing "statute of limitations had been tolled during the pendency of the [first] class action."[232] On appeal from an order granting relief to the class, a panel of the Ninth Circuit reversed, holding that the claims presented in the second class action were time-barred and rejecting the plaintiffs' argument that "this second class action [was] not an 'abusive' attempt to reargue the denial of class certification."[233] The full court voted to hear the case en banc.[234]

Sitting en banc, the Ninth Circuit picked up on the plaintiffs' argument, noting that the statute of limitations would not have been tolled if the court in the first action had denied certification and the class representatives in the second action merely sought to relitigate the correctness of that decision.[235] Thus, like the Courts of Appeals that denied tolling, the Ninth Circuit acknowledged the preclusion policies. But here, the court noted that the classes in the earlier action had been properly certified and had been narrowed "for reasons unrelated to Rule 23 certification."[236] The plaintiffs in the second class action "d[id] not seek to cure any procedural deficiencies in the classes under Rule 23 certified in the first action because there were none."[237] On these unusual facts, the court concluded that the statute of limitations on the claims presented in the second class action were tolled during the pendency of the first class action:

> We hold that under the doctrine of *American Pipe* and *Crown, Cork & Seal* the statute of limitations was tolled during the pendency of the first class action for the class members and would-be class members in the action now before us, and that plaintiffs in this case may aggregate their individual actions into a class action. Plaintiffs in this case are not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class. Both the class members challenging the [INS] . . . policy as inconsistent with [the federal immigration statute] and the would-be class members challenging [the statute that limited jurisdiction] . . . were members of the classes certified in the earlier action.[239]

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representatives in the first class action.

232. *Id.* at 1144-45.

233. Catholic Soc. Servs., Inc. v. INS (*CSS V*), 182 F.3d 1053, 1059 (9th Cir. 1999), *modified en banc*, 232 F.3d 1139 (9th Cir. 2000).

234. *CSS VI*, 232 F.3d at 1145.

235. *Id.* at 1147.

236. *Id.* at 1149.

237. *Id.*

239. *Id.*

The Third Circuit, too, has concluded that the statute of limitations may be tolled for successive class actions. The procedural history of *Yang v. Odom*[240] is less complicated than *Catholic Social Services* and the fact pattern is a more common one. *Yang* involved consolidated class actions filed against World Access, Inc. (WAXS) and several of its former managers and directors in the United States District Court for the Northern District of Georgia.[241] The consolidated amended complaint identified three subclasses: those who acquired their WAXS stock (1) on the open market; (2) in connection with the Telco merger; and (3) in connection with the NACT merger.[242] The district court appointed lead plaintiffs to represent each of the three subclasses.[243] It later denied their joint motion for class certification with prejudice, concluding that the putative class representatives for the first two of the subclasses would not adequately represent the interests of those subclasses and failed the typicality requirement, and that the third subclass failed the numerosity requirement.[244] The Eleventh Circuit declined interlocutory review.[245]

Several months later, three new plaintiffs (each a member of one of the subclasses in the first class action) filed a "substantively identical" class action in the District Court of New Jersey against the same defendants.[246] The plaintiffs acknowledged that they might have sought to intervene as new representatives in the Georgia litigation, but they had declined to do so because they believed the Eleventh Circuit would not have tolled the statute of limitations in those circumstances.[247] The district court in New Jersey dismissed the class complaint, concluding that the class claims were time-barred.[248]

On appeal, the Third Circuit reversed in part, framing the question as "the extent to which the suits contemplated in *Crown, Cork & Seal*—i.e., those brought by individuals following a denial of class certification—can be aggregated in a subsequent substantively identical class action."[249] In approaching this question, the court focused on the reason the trial court in the first action denied class certification.[250] Distinguishing between

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240. 392 F.3d 97 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2294 (2005).

241. *Id*. at 99-100.

242. *Id*. at 100.

243. *Id*.

244. *Id.* at 108-11; *see also* Yang v. Odom, 265 F. Supp. 2d 469, 471 (D.N.J. 2003), *aff'd in part, rev'd in part*, 392 F.3d 97 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2294 (2005).

245. *Yang*, 392 F.3d at 100.

246. *Id.*

247. *Id.* at 100-01; *see* Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994).

248. *Yang*, 392 F.3d at 101.

249. *Id.* at 103-04.

250. *Id*. at 104.

problems with the class—such as a lack of numerosity—and problems with the putative representative—such as a lack of typicality—the court held that:

> *American Pipe* tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative. *American Pipe* tolling will not apply to sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself.[251]

Reviewing the case law in the other circuits, the Third Circuit agreed with the "unanimous" view that plaintiffs may not benefit from *American Pipe* tolling in the successive class action context where the court in the first class action denied certification due to "a Rule 23 deficiency in the class itself,"[252] such as a lack of numerosity or a failure of the common questions to predominate over the individual questions.[253]

The Third Circuit, however, distinguished cases in which the first court denied certification due to a "deficiency of the lead plaintiff as class representative. . . ."[254] Noting that the Eleventh Circuit bars tolling in *all* successive class actions, even where certification of the first action is denied because of a problem with the named representative,[255] the Third Circuit rejected this approach as inconsistent with the Rule 23 policies.

> Given that *American Pipe* tolling would unquestionably apply were the plaintiffs here to bring individual actions, it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus [deny them] the class action mechanism, when no defect in the class itself has been shown.[256]

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251. *Id.* at 104. The court drew upon its prior "new representative" cases: McKowan Lowe & Co. v. Jasmine Ltd., 295 F.3d 380 (3d Cir. 2002); Haas v. Pittsburgh Nat'l Bank, 526 F.2d 1083 (3rd Cir. 1975). *Yang*, 392 F.3d at 104 & n.5; *see also supra* note 7.

252. *Yang*, 392 F.3d at 104.

253. *McKowan Lowe* Comment, *supra* note 7, at 2234 (calling these Rule 23 requirements "'claim specific'").

254. *Yang*, 392 F.3d at 105.

255. *Id.* at 105-06 (discussing *Griffin*, 17 F.3d 356 (11th Cir. 1994)).

256. *Id.* at 106. For a discussion of the Third Circuit's distinction between Rule 23's "representative-specific" and "claim-specific" requirements as well as the differing approaches taken by the Third Circuit, on the one hand, and the Second and Eleventh Circuits, on the other, see *McKowan Lowe* Comment, *supra* note 7, at 2233-34; *see also* 5 MOORE, *supra* note 71, § 23.65[1][c], at 23-325 (concluding that the anti-stacking rule "makes sense when the initial denial

In dicta, another federal Court of Appeals left open the possibility that it, too, might toll the statute of limitations in certain successive class actions. In *Korwek v. Hunt*,[257] the Second Circuit held that the statute of limitations was not tolled in a successive class action filed on behalf of a broad class of commodities traders.[258] In an earlier class action, the district court had declined to certify the same broad class, concluding that there would be "significant problems of manageability and intraclass conflict,"[259] and instead had drastically limited the scope of the class certified.[260] Although the Court of Appeals declined to toll the statute of limitations in the successive class action filed on behalf of the broader class that had been rejected earlier, "it le[ft] for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*."[261] In other words, the court acknowledged the possibility that the statute of limitations and Rule 23 policies, taken together, might justify tolling in a case where the putative representative in the successive class action was not seeking to have certified a class that already had been rejected.

V. A RECOMMENDED ANALYSIS

With this discussion of case law as a backdrop, let us reexamine the issue of tolling in the successive class action context with an eye to all three rings: the statute of limitations policies, the Rule 23 policies, and the preclusion policies.

A. *Analysis of the Statute of Limitations Policies*

As the Supreme Court recognized in *American Pipe*, the filing of a class action complaint within the statutory period provides the defendants with notice "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."[262] Thus, the defendants are in a position

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of class certification is a determination that the underlying claims are not appropriate for class treatment . . . . A different result is appropriate when the first court . . . rules only that the currently named class representatives are unsuitable") (citation omitted).

257. 827 F.2d 874 (2d Cir. 1987).

258. *Id.* at 876.

259. *Id.*

260. *Id.* at 875-76.

261. *Id.* at 879.

262. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974) (citation omitted). The lower federal courts have cited the need to afford notice to the defendant in holding that a class action against one defendant does not toll the statute of limitations on class members' claims against a different defendant. *See, e.g.*, Wyser-Pratte Mgmt. Co. v. Telxon Corp., 413 F.3d 553, 567 (6th

to gather documents, depose witnesses and otherwise prepare their defense vis-à-vis all members of the class. If the court in the first action declines to certify the class and another class member commences a substantively identical successive class action, the defendants cannot claim surprise or lack of notice of the claims presented. The defendants may claim that their interest in putting the entire dispute behind them is frustrated if the statute of limitations is tolled, but the same argument was available in *American Pipe*, where the Court concluded that the "polic[y] of ensuring essential fairness to defendants . . . [is] satisfied . . . ." as long as "the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation" within the statutory period.[263] Thus, the primary purpose of the statute of limitations—to provide repose to the defendant—is no more frustrated in a second class action than in the procedural settings presented in *American Pipe* and *Crown, Cork*.

Nor are the other statute of limitations policies likely to be undermined if the statute is tolled in the successive class action context. Since the filing of the initial class action complaint within the statutory period affords the defendant an opportunity to preserve necessary evidence, the court entertaining the second class action should be in no worse a position adjudicating the claim (in terms of the "freshness" of the evidence) than a court entertaining either an intervenor's claim presented in the context of the original action or an absent class member's individual action filed after denial of class certification. The evidence may not be as fresh as it would have been had the first action, filed within the statutory period, proceeded to trial; but it should be no less fresh than it would be in the *American Pipe* and *Crown, Cork* settings.

To the extent that statutes of limitations are designed to reduce the volume of litigation, there will be *less* litigation if absent class members who wish to press their claims following denial of class certification proceed together in the context of a successive class action than if they sue individually. Of course, there would be even less litigation if their claims were too small to provide an incentive to sue separately and a successive class action were dismissed on statute of limitations grounds; but that result would be at odds with the Rule 23 policies to be discussed shortly.

Finally, absent class members who wait until resolution of the certification issue in the original class action before pursuing other litigation options can hardly be accused of sleeping on their rights.[264] To the extent they refrain from filing an individual action or a competing class

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Cir. 2005); Arneil v. Ramsey, 550 F.2d 774, 782 n.10 (2d Cir. 1977); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 518-19 (N.D. Tex. 2001), *aff'd w/o pub. op.*, 35 Fed. Appx. 390 (5th Cir. 2002).

263. *Am. Pipe*, 414 U.S. at 554-55.

264. *Cf. id*. (citation omitted).

action while the motion to certify the class is pending, their forbearance serves the efficiency objectives underlying Rule 23 and should not result in the forfeiture of their claims.

Before we move on to consider the Rule 23 policies, two additional points regarding the statute of limitations policies should be made. First, the statutes of limitations balance not only the policies described above—which counsel in favor of limiting the time in which plaintiffs may file suit—but also several competing policies, which counsel in favor of affording plaintiffs a lengthy period of time in which to sue.[265] If the statute of limitations were not tolled, then absent class members who justifiably relied upon a pending class action to protect their interests would be denied a reasonable opportunity to sue. Likewise, the substantive law underlying their claims would not be enforced and neither specific nor general deterrence would be achieved. Thus, these competing statute of limitations policies are furthered if the statute is tolled during the pendency of the first class action.

Second, the foregoing discussion appears to support tolling when absent class members file a second class action on behalf of the same class presenting the same claims, but we have not yet considered the possibility that a certification motion in the second class action might be denied and absent class members might seek to bring a third (and then a fourth . . .) successive class action. If preclusion doctrine does not bar these successive actions and the statute of limitations is tolled each time, then at least theoretically there could be as many putative class actions as there are class members. Thus, there might well come a point where a court reasonably would conclude that tolling would significantly frustrate the statute of limitations policy of providing the defendant with repose.[266] In fact, it bears mentioning that most of the cases decided by the federal Courts of Appeals that have adopted the majority view involved more than two successive class actions brought on behalf of the same group of plaintiffs. In *Basch v. Ground Round*,[267] *Salazar-Calderon v. Presidio Valley Farmers Ass'n*,[268] and *Griffin v. Singletary*,[269] for example, the Courts of Appeals for the First, Fifth and Eleventh Circuits respectively held that tolling was

265. *See supra* notes 24-35 and accompanying text.

266. *See CSS VI*, 232 F.3d at 1154-55 (noting that "[t]olling the limitations period a second, third or fourth time, dramatically shifts the balance of equities in favor of the plaintiffs—and against the defendants—with respect to the period of repose") (Kozinski, J., dissenting); *see also* FERGUSON, *supra* note 14, at 406 (concluding that "additional suits beyond the saving statute period following dismissal of a suit commenced within the original limitation should not be permitted. To permit such repetitious litigation to repeatedly extend the period defeats the purpose of the statutes of limitations and is contrary to the intent and purpose of the saving statute").

267. 139 F.3d 6 (1st Cir. 1998).

268. 765 F.2d 1334 (5th Cir. 1985).

269. 17 F.3d 356 (11th Cir. 1994).

unavailable in the *fourth* class action filed on behalf of the same class members.[270] In *Andrews v. Orr*,[271] the Sixth Circuit held that tolling was unavailable in the *third* class action filed.[272] Only *Korwek v. Hunt*[273] and *Robbin v. Fluor Corp.*,[274] decided by the Second and Ninth Circuits respectively, involved just two class actions.[275] Finally, although the risk of multiple successive class actions deserves consideration, it is not likely to create a significant problem. If the court entertaining the initial class action denies certification because of a problem with the class itself that cannot be remedied (such as unmanageability), then the preclusion policies to be discussed in Part V.C independently may counsel against tolling in this context. If, on the other hand, the initial court denies certification only because of a problem with the putative class representative, the court should not take many "tries" to find a suitable representative and the risk of repetitive class actions would not be great.[276]

B. *Analysis of the Rule 23 Policies*

When a plaintiff chooses to bring a class action on behalf of a group of similarly situated persons rather than sue individually (or decline to sue because the transaction costs are too high), some or all of the Rule 23 policies identified in Part III.B.1 are advanced. These same policies are advanced when a district court declines to certify a class and an absent member of the would-be class decides to bring a second class action rather than sue individually.

To illustrate, let us imagine a would-be class with 1,000 similarly situated class members. If a district court declines to certify the class when the first would-be representative sues, the remaining 999 class members have several choices. First, some or all of them may decline to press their claims. Second, as in *American Pipe*, some or all of them may seek to intervene in the first plaintiff's action, assuming that action is not dismissed and the original plaintiff proceeds to litigate her individual

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270. *Basch*, 139 F.3d at 7; *Salazar-Calderon*, 765 F.2d at 1349-50; *Griffin*, 17 F.3d at 358-59.

271. 851 F.2d 146 (6th Cir. 1988).

272. *Id.* at 148.

273. 827 F.2d 874 (2d Cir. 1987).

274. 835 F.2d 213 (9th Cir. 1987).

275. *Korwek*, 827 F.2d at 875-76; *Robbin*, 835 F.2d at 213-14.

276. *McKowan Lowe* Comment, *supra* note 7, at 2236 (stating that "[a] plaintiff class that meets the class-specific requirements of Rule 23(a) [i.e., numerosity and commonality] will almost certainly be able to put forth a sufficient representative without too much trouble") (footnote omitted). Likewise, if the initial court denies certification because of a problem with the class that can be remedied, it should not take many "tries" for a representative to re-define the class in such a way as to remedy the problem.

claim.[277] Third, as in *Crown, Cork*, some or all of the 999 remaining class members may commence individual lawsuits.[278] Fourth, one or several of the remaining class members may commence a second class action.[279] In deciding whether to toll the statute of limitations in the context of the successive class action, the court should consider whether the Rule 23 policies would be frustrated if the statute of limitations were not tolled in this context but were tolled in the *American Pipe* and *Crown, Cork* alternative contexts.

A primary Rule 23 policy is efficiency and judicial economy.[280] A successive positive-value class action brought on behalf of the entire class would expend fewer judicial resources than 999 individual lawsuits and would be far more efficient than a lawsuit with 999 individual intervenors. Thus, a decision declining to toll the statute of limitations in the context of the successive class action would appear to frustrate this Rule 23 policy. Of course, if, in the absence of a successive class action, none or few of the absent class members would sue individually or seek to intervene, then a decision declining to toll the statute of limitations for a negative-value class action would conserve the most judicial resources, but other Rule 23 policies would be frustrated.

If the statute of limitations were tolled and absent class members were permitted to proceed together in a successive class action, they could pool their resources and spread the costs of litigation among the class. Otherwise, they might have to forego litigation altogether (and any hope of compensation) or incur the costs of individual litigation or intervention. Thus, a decision declining to toll the statute of limitations in the context of a successive class action could impede access to the courts, at least where the claims are small relative to the costs of litigation.

Likewise, if the claims of the absent class members were so small that it would not be cost-effective to sue individually or even to intervene in the original plaintiff's action, then a successive negative-value class action would be needed to enforce the substantive law underlying the class members' claims. Thus, if the statute of limitations were not tolled and the successive class action alternative were not available, no individual claims would be brought, no wrongdoers would be deterred from violating the law (in the absence of governmental action), and no law would be enforced.

On the other hand, if the claims were worth enough to justify individual suits by some or all of the absent class members, a decision declining to toll the statute of limitations in the positive-value successive class action context would expose the defendant to multiple lawsuits and the risk of

277. *See supra* notes 3-4 and accompanying text.
278. *See supra* notes 5-6 and accompanying text.
279. This list of options may not be exhaustive.
280. *See supra* Part III.B.1.

potentially inconsistent judgments.[281] Thus, another of the Rule 23 policies would be frustrated if the statute of limitations were not tolled. Moreover, because the prosecution of separate actions by individual class members would expose the defendant to the risk of inconsistent orders or impede each class member's ability to protect her interest in a limited fund, the argument for tolling for Rule 23(b)(1) or (b)(2) successive class actions is heightened.

Finally, a decision declining to toll the statute of limitations in this circumstance would invite the very precautionary filing of either individual lawsuits or dueling class actions during the pendency of the original class action that *American Pipe* and *Crown, Cork* sought to discourage.[282] Taken together, then, the first two rings—the statute of limitations policies and the Rule 23 policies—support tolling of the statute of limitations in the successive class action context. Let us now turn to the third ring—the preclusion policies—to understand the role they play in the final analysis.

C. *Analysis of the Preclusion Policies*

As a starting point, it is important to recognize that, for the reasons described in Part IV.B, preclusion doctrine may not bar absent class members from filing a successive class action or even from relitigating issues that were decided against the putative representative in the earlier class action. So the issue is whether the policies that underlie that doctrine nevertheless should influence the tolling question in the successive class action context. One may argue that if preclusion doctrine itself does not bar absent class members from filing a successive class action or from relitigating certification issues, either because the order denying certification was not sufficiently final, or because, in the absence of a certification order, the absent class members were not represented by the putative class representative, or for some other reason, then the policies underlying that doctrine should not influence the tolling decision. In other words, there may be good reasons why preclusion doctrine does not bar relitigation of the certification issue in a successive class action; so courts frustrated by the prospect of relitigation should not circumvent the limits of preclusion doctrine by declining to invoke the *American Pipe* tolling rule in this context. If the courts are sufficiently dissatisfied with the result that preclusion doctrine yields, they should address the problem directly

281. While a decision to certify a class in the successive class action might be inconsistent with the decision of the first court declining to certify the class, the defendant nevertheless would be protected from the risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct. . . ." FED. R. CIV. P. 23(b)(1)(A).

282. *See supra* Part III.B.2.

through a modification of preclusion doctrine itself,[283] rather than indirectly through a denial of tolling that otherwise would be justified by the statute of limitations and Rule 23 policies alone. Under this view, courts would toll the statute of limitations in the successive class action context regardless of whether the initial certification order was denied because of a problem with the class or because of a problem with the representative, as long as the policies underlying the statute of limitations and Rule 23 would be served thereby. None of the Courts of Appeals that have addressed the tolling issue in the successive class action context has adopted this position.

Alternatively, one may argue that even if preclusion doctrine does not itself bar absent class members from filing a successive class action, the policies underlying preclusion doctrine properly may be considered in deciding whether to toll the statute of limitations in this context. After all, the *American Pipe* tolling rule is an equitable doctrine and courts applying it should consider the legitimate policy concerns underlying preclusion doctrine even when preclusion doctrine itself would not preclude relitigation. Under this view, the reason for the district court's denial of certification in the initial class action may prove relevant.

A district court may decline to certify a class for a variety of reasons. In some cases, there may be problems with the class itself—the class may not satisfy the numerosity requirement, the questions that are common to members of the class may not predominate over the individual questions in a putative Rule 23(b)(3) class, great difficulties may likely be encountered in managing the action, or serious conflicts of interest may exist among class members. Unless the class definition is changed or subclasses are employed, these problems are likely to persist in any successive class action.

In other cases, there may be problems with the proposed class representative—her claims may not be typical of the claims held by the class, she may not be an adequate representative of the class because her lawyer lacks experience with class actions, or serious conflicts of interest may exist between the class and the would-be representative. In these cases, if a different prospective class member were to initiate a successive class action, these problems might be overcome. With these differences in mind, let us consider how the introduction of the third ring—the preclusion policies—may affect the tolling analysis.

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283. *See, e.g.*, 18A WRIGHT ET AL., *supra* note 171, § 4434, at 110 (noting that "[r]ecent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings . . . ."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.10 cmt. c (Prelim. Draft No. 3, 2005) (stating that "[a] mere cosmetic change in the proposed class representative . . . should not defeat same-party status where the class for which certification is now being sought is the same as the one for which class certification was previously denied . . .").

To the extent that preclusion doctrine is designed to conserve judicial resources and promote efficiency, it may well be that tolling the statute of limitations in the successive positive-value class action context would better serve these policies than would a large number of individual actions.[284] If certification in the initial proceeding was denied because of a problem with the representative or even a problem with the class that can be corrected—for example, the class as initially proposed suffered from intra-class conflicts, but the new class action complaint proposes subclasses, each to be represented by separate counsel, and other structural changes to avoid intra-class conflicts[285]—then a second class action may be far more efficient than multiple individual lawsuits by the absent class members.[286]

On the other hand, if certification in the initial proceeding was denied because of a problem that cannot be corrected—for example, the class is simply too small to satisfy the numerosity requirement—then repeated relitigation of the certification issue in successive class actions will be unproductive, inefficient, and wasteful of judicial resources. Thus, if it is proper for courts to consider the preclusion policies in resolving the tolling issue, then efficiency concerns would counsel against tolling in cases where the putative representative merely seeks to relitigate the identical issue presented in the earlier class action, rather than to address the problems that resulted in a denial of certification in the first suit.

In gauging the role that the policy objectives of finality and repose should play in this analysis, one must recall that under *American Pipe* and *Crown, Cork*, the statute of limitations is tolled for absent class members who seek to intervene in the original action or file their own individual actions upon denial of a motion for class certification. In those cases, the Court concluded that the defendant's interest in repose was protected as long as the initial class action provided sufficient notice of the subject matter and size of the prospective litigation and an opportunity to gather the materials necessary to put on a vigorous defense.[287] Thus, the real question here is whether the defendant's interests in finality and repose will be compromised more in the successive class action context than in the intervention or individual action contexts contemplated by the Court.

If a defendant defeats a certification motion in an initial class action and

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284. *See supra* Part IV.A (discussing preclusion policies).

285. I do not mean to suggest that the creation of subclasses with separate representation always will solve potential conflicts among class members. *See, e.g.*, Wolff, *supra* note 109, at 783-85.

286. *See supra* text accompanying notes 278-81.

287. *See supra* notes 103-04, 132-33, 261-62, and accompanying text. For the argument that a class action complaint fails to provide such notice in mass tort class actions, see Lowenthal & Feder, *supra* note 7, at 575-77.

the identical issue is raised in a successive class action, the interest in finality is frustrated. Likewise, relitigation of an issue already decided in the initial class action creates a risk of inconsistent results and the concomitant loss of confidence in the accuracy and integrity of the judicial process. These risks are greatest if the complaint in the successive class action alleges the same claims on behalf of the same class, but seeks a different result. Thus, when there is a problem with the class itself as initially defined—for example, it lacks numerosity or the questions common to all class members do not predominate over the individual questions—and the complaint in the successive class action does not seek to remedy those problems, then the threat to finality and the risk of inconsistency counsel against tolling of the statute of limitations.[288]

On the other hand, when the problem in the initial class action is with the putative representative—for example, her claims are atypical—then the risk of inconsistency is eliminated when the successive class action is filed on behalf of a different plaintiff (whose claims may well be typical).[289] Granted, the threat to finality is not eliminated as long as the defendant must relitigate against a new representative an issue upon which the defendant already prevailed.[290] But if the choice is between relitigation of the certification issue one more time in a successive class action or repetitive litigation of the merits in a multitude of individual actions, it is hard to conclude that interests in finality and consistency counsel against tolling in the successive class action context. Of course, if there are a string of repetitive class actions, each brought by a different putative class representative, there might well come a point where tolling would significantly frustrate the preclusion policies of finality and repose and a court reasonably would decline to the toll the statute of limitations.[291]

Finally, even if the problem in the initial class action is with the class itself—for example, there are intra-class conflicts—the risk of inconsistency is eliminated as long as the complaint in the successive class action seeks to "cure the deficiency" identified in the earlier class action.[292]

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288. *See, e.g.*, *Yang*, 392 F.3d at 104 (distinguishing between denial of certification for problems with the class and for problems with the representative) (citations omitted). *But see* Phillips v. Kidder, Peabody & Co., 933 F. Supp. 303, 311 (S.D.N.Y. 1996) (noting that such a no-tolling rule "appears to undermine the utility of class actions, since it permits an erroneous denial of class certification to effectively foreclose the claims of all class members who do not have a sufficient financial stake to warrant their commencing or intervening in an individual action"), *aff'd without op.*, 108 F.3d 1370 (2d Cir. 1997).

289. See, for example, *supra* notes 239-55 and accompanying text, discussing the *Yang* case.

290. Note that the defendant is not really relitigating the issue of the putative representative's adequacy because the question of representative A's adequacy is a different issue from representative B's adequacy.

291. *See supra* text accompanying notes 265-75.

292. *CSS VI*, 232 F.3d at 1147 (distinguishing between cases in which the plaintiffs in the

Put differently, since the issue to be resolved by the court will *not* be identical if the complaint in the successive class action seeks to redefine the class or add structural protections to address the conflicts of interest, there is no risk that the same issue will be resolved differently the second time around. Since the interest in finality is no more compromised here than when the problem is with the named representative, it is hard to conclude that the preclusion policies of finality and consistency counsel against tolling in the successive class action context as long as the plaintiff seeks to remedy the problem that resulted in a denial of certification in the initial class action.

VI. CONCLUSION

A majority of the federal Courts of Appeals have concluded that the statute of limitations should not be tolled in the successive class action context. A careful analysis of the various competing policies at play calls this conclusion into question in at least two common circumstances. First, the statute of limitations typically should be tolled where certification initially was denied because of a problem with the class representative and a new plaintiff who does not suffer from that problem commences the successive class action. Second, the statute of limitations typically should be tolled where certification initially was denied because of a problem with the class itself and the successive class action seeks to remedy that problem. Only where there is a problem with the class itself and the successive class action fails to address that problem does the combination of relevant policies counsel against tolling. Even in this situation, it might be the better course for courts to address directly any perceived limitations in preclusion doctrine itself rather than to tinker with tolling rules in an effort to further the policies underlying preclusion doctrine.

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successive class action seek to relitigate the correctness of the denial of certification and cases in which the later plaintiffs "do [] not disagree with the denial of class certification, but rather tr[y] to cure the deficiency that led to the denial"); *see also Korwek*, 827 F.2d at 879 ("leav[ing] for another day the question of whether the filing of a potentially proper subclass would be entitled to tolling under *American Pipe*").