

## [Products Liability Law Daily Wrap Up, TOP STORY—STATUTES OF LIMITATIONS AND REPOSE—S.D. N.Y.: Class action suit against pesticide maker not time-barred by New York law, \(Jan. 11, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Susan Engstrom

Product liability and negligence claims brought by foreign nationals against a U.S. pesticide manufacturer were not untimely under New York law, a federal court in that state determined. Although similar claims had been brought against the company by other plaintiffs in a putative class action in Texas in 1993, the court predicted that New York's highest court would adopt the doctrine of cross-jurisdictional tolling and hold that New York law tolls the statute of limitations for purported class members during the pendency of a class action filed in another state. Thus, the manufacturer's motion for judgment on the pleadings was denied. However, because this case involved a question of substantial significance to New York public policy, the court certified it for interlocutory appeal (*Chavez v. Occidental Chemical Corp.*, January 10, 2018, Engelmayer, P.).

In 1993, a group of individuals from Costa Rica, Ecuador, and Panama filed a putative class action in Texas state court against several chemical manufacturers, including Occidental Chemical Corporation. The plaintiffs, who had lived or worked on banana plantations, alleged that they sustained adverse health consequences as a result of exposure to a chemical pesticide called dibromochloropropane (DBCP). Their suit was removed to a Texas federal court but eventually found its way back to state court, which denied their motion for class certification in 2010. At that point, the plaintiffs voluntarily dismissed their claims.

**Current action.** The current case was filed in Delaware federal court in 2012 and then transferred to this court. It involved similar claims against most of the same defendants, including Occidental. However, the plaintiffs were not parties to the 1993 action. Rather, they were absent members of the putative class: foreign nationals from Costa Rica, Ecuador, and Panama who alleged tortious exposure to DBCP between the early 1960s and early 1980s. Occidental moved for judgment on the pleadings, asserting that the plaintiffs' claims were time-barred under New York law.

**Statute of limitations.** The parties agreed that each claim was subject to New York's three-year statute of limitations for personal injury suits. Under New York law, personal injury claims accrue upon a plaintiff's discovery of his or her injury. Here, it was undisputed that the claims were discovered—and, thus, accrued—by 1993 with the filing of the original class action complaint. Absent a toll, therefore, that suit would have become untimely in 1996, nearly 16 years before the plaintiffs in this case filed suit in 2012. The plaintiffs asserted that the limitations period was tolled from 1993 (when the first suit was filed) through 2010, when the Texas state court denied class certification. The plaintiffs invoked a doctrine recognized in some states as "cross-jurisdictional class action tolling," under which a limitations period is tolled at all times while a complaint based on the same underlying facts is pending in another state on behalf of a putative class that includes plaintiffs as absent members.

**Cross-jurisdictional tolling.** The court first determined that it was most likely that New York would apply cross-jurisdictional tolling. This doctrine derives from a rule announced by the U.S. Supreme Court in *American Pipe & Construction Co. v. Utah* (414 U.S. 538 (1974)): "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Under that rule, the limitations period remains tolled for all members of the putative class until class certification is denied. At that point, class members can file their own suits.

According to this court, the fact that New York courts have extended the principle of *American Pipe* tolling to cover suits originally filed in New York suggested that the state's highest court likely would adopt cross-jurisdictional tolling. *American Pipe* tolling derives primarily from three principles: "a class complaint gives fair notice of claims to defendants; a putative class member acts reasonably when he relies on a class action to vindicate his rights; and run-of-the-mill individual suits are disfavored when a class action is viable because too many individual suits would subvert the modern class-action mechanism." In the court's view, those principles applied with equal force in the context of cross-jurisdictional tolling. In the case at bar, for example, the injuries allegedly sustained by the class were experienced abroad at the hands of several U.S. chemical manufacturers based in different states. As long as the named plaintiffs pursued a live putative class action on behalf of a nationwide class against those companies, the absent class members reasonably anticipated vindicating their rights in that lawsuit. Thus, it was reasonable for the absent class members to hold off filing individual actions against each particular manufacturer, whether in New York or in the other states in which those entities were based.

In addition, some lower New York courts already have applied a particular tolling statute—one that tolls plaintiffs' claims following certain kinds of non-merits dismissals—in the cross-jurisdictional, class action context. These cases indicated that New York is not categorically averse to tolling based on a class action pending in another state.

The court rejected Occidental's argument that adopting cross-jurisdictional tolling would open the floodgates to New York litigation. Indeed, the contrary rule of *not* recognizing a toll in deference to a pending class action elsewhere risks a profusion of duplicative "placeholder" suits intended to preserve as broadly as possible plaintiffs' rights while other class actions remain pending in other states. Moreover, even if out-of-state plaintiffs were drawn to New York because of a cross-jurisdictional tolling rule, the state's borrowing rule provides that claims accruing outside New York cannot be commenced within the state after the expiration of the accrual state's statute of limitations. Thus, an out-of-state class plaintiff would not have a special incentive to bring his or her claim in New York without a sound factual basis for doing so. The court also was unpersuaded by Occidental's assertion that cross-jurisdictional tolling would invite "unending" tolling. As a court in another jurisdiction has observed, a regime that does not recognize cross-border tolling may incent a defendant to pursue delay so as to run out the clock on the claims of absent class members.

**Tolling in this action.** The U.S. Court of Appeals for the Second Circuit has held that only a decision definitively disallowing class status terminates *American Pipe* tolling. Under New York law, however, a dismissal of class claims may definitively disallow class status. The key question is whether, under the circumstances, the absent plaintiffs' continued reliance on the class action to advance their claims would be unreasonable.

Here, although a Texas federal court had dismissed the original action in 1995 on grounds of *forum non conveniens*, it specifically permitted the named plaintiffs to pursue the same suit in a more convenient forum and expressly informed absent class members that the class action would either proceed in a foreign forum or, if jurisdiction there proved lacking, remain within the federal court's jurisdiction. Thus, the order anticipated that the action would continue to be pursued, albeit potentially in a different judicial forum. Likewise, a "final judgment" issued by the Texas federal court (also in 1995) did nothing to undermine the reasonableness of absent class members' reliance on the maintenance of the putative class action as protecting their rights. Accordingly, their claims were tolled until class certification was actually denied in 2010. As such, the 2012 complaint was timely filed.

**Certification.** Finally, the court acknowledged that the issue of whether New York law permits cross-jurisdictional class action tolling is both a disputed question of law in the state and an issue whose resolution in plaintiffs' favor is a necessary predicate to the continued survival of this litigation. Because its decision involved a question of substantial significance to New York public policy, the court *sua sponte* certified its order for interlocutory appeal.

The case is No. [17 Civ. 3459 \(PAE\)](#).

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