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## **A Broader Scope For American Pipe Tolling Doctrine**

Law360, New York (November 25, 2008) -- On Sept. 12, 2008, in *State Farm Mutual Automobile Insurance Co. v. Boellstorff*, the U.S. Court of Appeals for the Tenth Circuit held that the class action tolling doctrine established by the U.S. Supreme Court in *American Pipe & Construction Company v. Utah*<sup>[1]</sup> applies when an individual member of a putative class action pursues an independent claim, otherwise time-barred, before the issue of class certification has been decided.<sup>[2]</sup>

In ruling the class action tolling doctrine allows a litigant to file an individual suit before the class certification decision, the Tenth Circuit concurred with the Second and Ninth Circuits, and split with the First and Sixth Circuits, which have reached the opposite conclusion.<sup>[3]</sup>

Under *American Pipe* and its progeny, the Supreme Court has held that the filing of a class action tolls the running of a statute of limitations for all members of the purported class, and the statute of limitations remains tolled until the class certification issue is resolved or the party chooses not to continue as a member of the class.<sup>[4]</sup>

As the Tenth Circuit observed, “*American Pipe* incarnates the principle that the class action is a representative creature” and, deploying “a classic legal fiction,” treats members of a purported class as if they had filed their own actions for as long as they are members of the class.<sup>[5]</sup>

The tolling doctrine applies whether the class is ultimately certified or not.<sup>[6]</sup> It also applies to class members seeking to intervene or to bring individual actions following the denial of a class certification motion.<sup>[7]</sup>

Although the Supreme Court has squarely addressed the right of a litigant to intervene or file an individual suit after a class certification ruling, it has yet to address the right of a litigant to do so before a class certification ruling.

Thus far, the Supreme Court has been content to let the issue simmer in the federal courts. *Boellstorff*, however, could provide the required impetus for taking up the issue.

More than four years after being injured in a car accident, plaintiff Leslie Boellstorff brought suit against State Farm, alleging that the insurer had failed to offer her enhanced personal injury insurance protection (PIP) benefits in violation of Colorado’s now-repealed Auto Accident Reparations Act.<sup>[8]</sup>

Even before Ms. Boellstorff’s car accident, a putative class action suit had been brought against State Farm on behalf of all people injured under a State Farm automobile insurance policy whom had not been offered enhanced PIP benefits.<sup>[9]</sup>

State Farm moved for summary judgment, arguing that Ms. Boellstorff's individual action was barred because it was brought beyond the applicable three-year statute of limitations.[10] Ms. Boellstorff responded that the class action tolling doctrine saved her.[11]

In response, State Farm - who did not dispute that Ms. Boellstorff was a member of the putative class - argued that she had forfeited her rights under American Pipe by pursuing her individual suit before the district court resolved the class certification issue.[12]

The Tenth Circuit ruled in Ms. Boellstorff's favor, agreeing with the Second Circuit that it "should take at face value the Court's repeated assertion that 'the 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.'"[13]

This broad language suggested to the 10th Circuit "that the statute of limitations applicable to Boellstorff's claim remained tolled while the putative ... class remained in limbo." [14]

The Tenth Circuit then aptly observed the tolling doctrine, as a practical matter, does not involve true "tolling." [15]

"The class action mechanism's inherent representativeness means that each putative class member has effectively been a party to an action against the defendant since a class action covering him was filed." [16]

Thus, by filing her own action, Ms. Boellstorff merely changed the management of the proceedings by "taking the reins" from the putative class representative. [17]

State Farm had also realized the benefit of the statute of limitations, the purpose of which was to provide notice to State Farm of the claims against it before the underlying evidence had become stale. [18]

The Tenth Circuit found that State Farm had adequate notice of Ms. Boellstorff's claim as the class action "put State Farm on notice of the 'substantive claims being brought against' it as well as the 'number and generic identities of the potential plaintiffs.'" [19]

As noted above, Boellstorff is at odds with prior rulings of the Sixth and First Circuits. According to the Sixth Circuit, "freezing the situation until a class certification decision has been issued ensures that the 'courts will not be burdened by separate lawsuits which, in any event, may evaporate once a class has been certified.'" [20]

The First Circuit has similarly concluded that "American Pipe says nothing about [the plaintiff's] ability to maintain a separate action while class certification is still pending," and that the efficiency goal of class actions "would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." [21]

Noting its disagreement, the Tenth Circuit observed that at the "macrocosmic level," its ruling does not decrease efficiency, as most litigants who file individual actions have claims worth pursuing independently and would, in the end, have opted out of the class. [22]

Boellstorff simply permits them to opt out at an earlier stage of the proceedings, if they either "(1) deem their own claims valuable enough or (2) decide that class certification is doubtful." [23]

This ruling is also more fair to litigants who might otherwise have to wait years for a class certification motion to be decided.[24]

Boellstorff is an insightful decision and likely to persuade the Supreme Court to clarify that the class action tolling doctrine of American Pipe protects litigants who file independent claims both before and after the resolution of a class certification motion.

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[1] 414 U.S. 538 (1974).

[2] 540 F.3d 1223, 1224, 1227 (10th Cir. 2008).

[3] Compare *id.* at 1235; *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1009 (9th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3101 (U.S. Aug. 15, 2008) (No. 08-210); *In re WorldCom Securities Litigation*, 496 F.3d 245, 256 (2nd Cir. 2007) and *Wyser-Pratte Mgmt. Co. Inc. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 739 (1st Cir. 1983).

[4] Boellstorff, 540 F.3d at 1228-30.

[5] *Id.* at 1229.

[6] *Id.* at 1229-30 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 n. 13 (1974)).

[7] Boellstorff, 540 F.3d at 1230 (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983)).

[8] Boellstorff, 540 F.3d at 1225-26.

[9] *Id.* at 1226.

[10] *Id.* at 1227.

[11] *Id.*

[12] *Id.* at 1226-27.

[13] *Id.* at 1230 (quoting *In re WorldCom*, 496 F.3d 245, 254 (2nd Cir. 2007) (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983))).

[14] Boellstorff, 540 F.3d at 1232.

[15] *Id.* at 1232-33.

[16] *Id.* at 1233.

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting *American Pipe v. Utah*, 414 U.S. 538, 555 (1974)).

[20] Boellstorff, 540 F.3d at 1231 (quoting *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 569 (6th Cir. 2005)).

[21] *Glater v. Eli Lilly Co.*, 712 F.2d 735, 739 (1st Cir. 1983).

[22] Boellstorff, 540 F.3d at 1233.

[23] *Id.*

[24] *Id.*