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IMPROVING PREDICTABILITY AND CONSISTENCY IN CLASS ACTION TOLLING

Tanya Pierce*

INTRODUCTION

Class action tolling means that when parties in a suit allege federal class treatment, the individual claims of putative class members are tolled in all federal courts while the class action is pending.¹ Commonly referred to as American Pipe tolling, this rule prevents duplicative litigation that would result if plaintiffs were required to intervene or file independent lawsuits to protect their interests while the class action was pending.² Federal courts have long settled the application of American Pipe tolling in scenarios involving later-filed individual actions.³ In other scenarios, however, the application of American Pipe tolling has caused considerable uncertainty.⁴ This Article examines the difficulties caused by conflicting rules in one of

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² Crown, Cork & Seal Co., 462 U.S. at 351; Am. Pipe, 414 U.S. at 554.


⁴ See, e.g., Stevens v. Novartis Pharm. Corp., 247 P.3d 244, 252 (Mont. 2010) (opining, in dicta, that an open question exists as to whether some class actions, like those involving mass torts or securities, should be treated differently for tolling purposes); Jeremy T. Grabill, The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation, 74 LA. L. REV. 433, 442 (2014); Rhonda Wasserman, Tolling: The American Pipe Tolling Rule and Successive Class Actions, 58 FLA. L. REV. 803, 858 (2006) (analyzing underlying policies and concluding successive class action tolling should be allowed in certain instances, such as where certification is denied due to a class representative problem and where certification is denied due to a problem with the class that can be remedied in the successive class action); Caleb Brown, Note, Piped In: The Tenth Circuit Weighs in on Extending American Pipe Tolling in State Farm Mutual Automobile Insurance Co. v. Boellstorff, 62 OKLA. L. REV. 793, 794, 800-04 (2010) (comparing decisions that hold tolling should not apply when class members file individual lawsuits before the certification decision is reached with those that allow such tolling); see also discussion infra Parts II and III.
those scenarios, successive class action tolling, and suggests how courts in a related scenario, cross-jurisdictional tolling, may learn from those difficulties.

In successive class action cases, circuit courts have long applied conflicting tolling rules in incompatible ways. The subclass actions filed in the wake of Wal-Mart Stores v. Dukes dramatically illustrate the unfairness and inefficiencies that can result. There, six years after the nationwide class certification, the Supreme Court changed Rule 23’s commonality standard and decertified the class for lack of commonality. Scrambling to correct this deficiency, some plaintiffs sought leave to amend the original class allegations, and other plaintiffs filed four smaller subclass actions around the country. Before those subclass actions could proceed, however, courts had to find the class claims timely. But some circuit courts categorically refuse to permit tolling in subsequent class actions. Others allow successive class action tolling in limited situations, such as when the court in the earlier alleged class action had not reached the certification decision or when the earlier certification attempt failed based on a problem unrelated to the ability of the action itself to qualify for class action treatment. Still others allow successive class action tolling whenever individual tolling

5 Courts use various terms to refer to later-filed class actions. Compare, e.g., Ewing Indus. Corp. v. Bob Wines Nursery, Inc., 795 F.3d 1324, 1326 (11th Cir. 2015) (referring to “the ‘piggybacking’ of class actions”), and Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994) (explaining the non-piggyback rule for class actions), with Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 642 (6th Cir. 2015) (referring to a “follow-on class action”). For consistency, this article refers to attempts to toll limitations for a purported class action that is filed after an earlier class action has failed as “successive class action tolling,” borrowing from Professor Wasserman’s reference to these later alleged class actions as “successive class actions.” Wasserman, supra note 4, at 806.

6 Cross-jurisdictional tolling involves whether a class action filed in one jurisdiction can save limitations for actions later filed in a different jurisdiction. Stevens, 247 P.3d at 252. This article’s introduction to cross-jurisdictional tolling is meant merely to begin a conversation about the complex issues surrounding cross-jurisdictional tolling and set the stage for an in-depth analysis of those issues, which is the subject of a future article.

7 See discussion infra Part II.

8 131 S. Ct. 2541 (2011).

9 Id. at 2556-57.

10 See discussion infra Part II.


13 See, e.g., Yang v. Odom, 392 F.3d 97, 107 (3d Cir. 2004) (problem with the class representative); see also Wasserman, supra note 4, at 849-56 (writing at a time when the majority of circuits that had considered successive class action tolling had rejected it, and arguing courts should allow successive class action tolling when the prior court did not reach the certification question or when the deficiency was unrelated to the propriety of the alleged class).
would have been allowed.\textsuperscript{14} Thus, the courts in the post-\textit{Wal-Mart} subclass actions disagreed as to the timeliness of the later-filed subclass actions. Initially, three district courts held the subclass actions were barred by limitations, and only one district court held a subclass action was timely filed. Then, because the law is in flux, after several appeals ensued, just one of the subclass actions was held barred by limitations, and three were deemed timely filed.

This Article concludes that circuit courts should adopt the approach that treats determinations regarding whether to toll successive class actions the same way it treats determinations regarding whether to toll individual actions. Under this approach, as long as the original class is timely filed, a successive class will be deemed timely as well. This approach is superior to the others for several reasons. First, it is most consistent with the policies underlying the Supreme Court’s adoption of class action tolling in \textit{American Pipe}.\textsuperscript{15} This approach best furthers the primary concerns of efficiency and economy of litigation because it is the approach least likely to result in plaintiffs filing overlapping, protective class actions while the original class action is pending. Without successive class action tolling, plaintiffs would be encouraged to file prophylactic class actions to protect their claims just in case the original class action were not to be certified. Thus, even though this approach could cause more plaintiffs to file successive class actions after original class actions failed, this increase would be likely offset by the fact that fewer plaintiffs would be encouraged to file prophylactic class actions while the original class actions were pending.

The approach that allows successive class action tolling whenever tolling would be allowed for later-filed individual cases would also increase some litigation-related efficiencies by encouraging parties to focus on the viability of an alleged successive class action itself to proceed as a class, rather than encouraging side litigation regarding whether successive class action tolling should apply. This approach to successive class action tolling also provides sufficient notice to defendants because the original class action would have put the parties on notice of the substantive claims, as well as the number and generic identities of the claimants. Indeed, to the extent an original class action provides notice sufficient to allow tolling for later-filed individual actions—and \textit{American Pipe} says it does—the original class provides the same kind of notice to allow tolling for later-filed class actions. Finally, this approach is the one most consistent with two recent Supreme Court cases regarding the application of Rule 23 and the doctrine of preemption.\textsuperscript{16}


Part I of this Article discusses the history and policies underlying the Supreme Court's adoption of the American Pipe tolling rule. Part II analyzes the circuit courts' approaches to successive class action tolling through the lens of the subclass actions that plaintiffs filed in the wake of the Walmart Stores v. Dukes case. With the analysis of successive class action tolling as a backdrop, Part III of this Article introduces the problem of cross-jurisdictional tolling, which courts will face with increasing regularity due to the increased federal jurisdiction over class actions in light of Congress' passage of the Class Action Fairness Act of 2005 ("CAFA"). This increased federal jurisdiction means parties will often be required to litigate state-based class actions in federal courts where it has never been more difficult to certify those actions. And because courts often take years to reach certification decisions, cross-jurisdictional tolling issues will likely become more prominent as those class certification requests ultimately fail.

I. CLASS ACTION TOLLING

The concept of tolling has existed for centuries and is commonly understood to mean a temporary suspension of the running of a time period. Over forty years ago in American Pipe & Construction Co. v. Utah, the Supreme Court adopted the class action tolling rule, holding that because the parties in that case alleged class treatment, the limitations periods for

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18. See discussion infra Part III.
19. See discussion infra Part III.
22. A class action is a suit brought by an individual or group of individuals in which the individual or group serves as a representative in the lawsuit for other members of the class with similar claims. FED. R. CIV. P. 23(a). Thus, it is an exception to the general rule that an individual may pursue his or her own claims in the manner he or she sees fit. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011) (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)). As such, the federal rules require plaintiffs seeking class treatment to prove compliance with Rule 23(a)'s prerequisites and with at least one of Rule 23(b)'s requirements. FED. R. CIV. P. 23(a)-(b); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). Perhaps it is worth mentioning that it has become "fashionable these days to talk about the death of class actions." Jay Tidmarsh, Living in CAFA's World, 32 REV. LITIG. 691, 691 & n.1, 695 (2013) [hereinafter Tidmarsh, Living in CAFA's World] (citing Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 MICH. L. REV. 373, 375 (2005); Myriam Gilles & Gary Friedman, After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion, 79 CHI. L. REV. 623, 627 (2012); Melissa Hart, Will Employment Discrimina-
related individual claims of putative class members who later sought to intervene were tolled while the class action was pending.\textsuperscript{23} There, with days left to run on the applicable statute of limitations, the state of Utah brought a federal antitrust suit on its own behalf and on behalf of public bodies, agencies, and local Utah officials.\textsuperscript{24} Six months later, the district court denied class certification on Rule 23(a)(1) numerosity grounds.\textsuperscript{25} At that point, more than sixty public entities that had been members of the original putative class filed motions to intervene.\textsuperscript{26}

The district court held the attempted interveners' limitations periods had expired, and the Ninth Circuit Court of Appeals agreed.\textsuperscript{27} The Supreme Court, however, reversed.\textsuperscript{28} The Court reasoned that unless the filing of the class action tolled the individual limitations periods of putative class members, absent class members would be induced to intervene in the class action to protect their claims just in case their certification requests were denied after their limitations periods had expired.\textsuperscript{29}

Nearly ten years later, in \textit{Crown, Cork & Seal Co. v. Parker},\textsuperscript{30} the Supreme Court expanded the \textit{American Pipe} tolling rule to include limitations periods for plaintiffs who wished to file separate individual lawsuits rather than to intervene in an existing action.\textsuperscript{31} The Court reasoned that if plaintiffs' later-filed individual actions were not considered timely, many of the inefficiencies it avoided by adopting the class action tolling rule in \textit{American Pipe} would again result.\textsuperscript{32} The Court further recognized putative class

\textsuperscript{23} \textit{Am. Pipe & Constr. Co. v. Utah}, 414 U.S. 538, 554 (1974) (holding that attempted intervenors claims were not time-barred).
\textsuperscript{24} \textit{Id.} at 541-43.
\textsuperscript{25} \textit{Id.} at 542-43.
\textsuperscript{26} \textit{Id.} at 543-44.
\textsuperscript{27} \textit{Id.} at 544.
\textsuperscript{28} \textit{Id.} at 550-51.
\textsuperscript{29} \textit{Am. Pipe}, 414 U.S. at 551.
\textsuperscript{30} 462 U.S. 345 (1983).
\textsuperscript{31} \textit{Id.} at 354.
\textsuperscript{32} \textit{Id.} at 350.
members could have reasons after the denial of a certification request to prefer to bring individual actions rather than to intervene in the ongoing action.\footnote{For example, a plaintiff might conclude that the forum in which a class action were pending was not a convenient one or that the shared control over a lawsuit might not be desirable once the economies of proceeding as a class no longer existed. Id.}

In adopting class action tolling, the Court in these cases balanced the policy concerns underlying Rule 23 with those underlying statutes of limitations.\footnote{Am. Pipe, 414 U.S. at 554.} Regarding Rule 23, the Court identified efficiency and economy of litigation as the primary motivation underlying both the class action rule itself and the class action tolling rule.\footnote{Crown, Cork & Seal Co., 462 U.S. at 350-52; Am. Pipe, 414 U.S. at 550; see also Chardon v. Fumero Soto, 462 U.S. 650, 659 (1983).} Without tolling, the Court reasoned, “needless multiplicity of actions” would result, which was “precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of American Pipe were designed to avoid.”\footnote{Crown, Cork & Seal Co., 462 U.S. at 351.}

While neither opinion discussed other Rule 23 concerns, the adoption of class action tolling clearly implicates those as well.\footnote{See Wasserman, supra note 4, at 824-25.} For example, the availability of class treatment can allow claimants in negative-value class actions the ability to pursue their claims by spreading the costs of litigation;\footnote{A “negative value” class action is one in which the value of each individual claim is so insignificant in comparison to the costs of litigating the claim that absent class treatment, a plaintiff would lack incentive or means to pursue the claim. See 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:87, at 363 & n.3 (5th ed. 2012).} it can ensure the substantive laws underlying such negative-value claims are enforced; it can protect defendants from the need to defend multiple lawsuits that could result in inconsistent judgments; and it can protect the due process rights of absent class members.\footnote{Id. §§ 4:66-67.} Indeed, scholars have often applauded the class action device for not only rendering possible compensation to victims who suffer relatively small injuries from the actions of a single defendant, but also for potentially holding accountable defendants who would otherwise not be held accountable\footnote{See, e.g., Barry Sullivan & Amy Kobelski Trueblood, Court Rules—Rule 23(f): A Note on Law and Discretion in the Courts of Appeals, 246 F.R.D. 277, 277 (2008) (citing Jonathan M. Landers, Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma, 47 S. CAL. L. REV. 842, 857-58, 860 (1974); Michael E. Solimine & Christine Oliver Hines, Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f), 41 WM. & MARY L. REV. 1531, 1534 (2000)); see also Klonoff, supra note} and for leveling the playing
field between the parties. In fact, Rule 23 has become a "primary vehicle" for enforcement in certain areas of law, such as antitrust, securities, and discrimination laws.

In addition to carefully considering the concerns underlying Rule 23 in both American Pipe and Crown, Cork & Seal Co., the Court considered whether tolling would be "inconsistent" with the policies underlying statutes of limitations. In adopting class action tolling, the Court made clear that it did not consider its decisions to be "breaking new ground." To illustrate, the Court in American Pipe examined other cases in which it had allowed plaintiffs to file suits outside of applicable limitations periods. Those cases, the Court concluded, supported the long-held conclusion that federal courts have the power to hold that statutes of limitations are tolled "under certain circumstances not inconsistent with legislative purposes," and the adoption of class action tolling was not inconsistent with the policies of "repose and certainty inherent" in statutes of limitations.
In both *American Pipe* and *Crown, Cork & Seal Co.*, the Court reasoned that class action tolling was consistent with the limitations' policies of providing notice, avoiding unfair surprise, and preventing plaintiffs from sleeping on their rights. When plaintiffs filed purported class actions, the alleged class actions would put defendants on notice of the substantive claims, as well as the number and general identities of the individuals likely to have those claims and alert defendants that they must preserve all evidence related to the asserted claims. And because tolling would apply only to those claims for which the original class action reasonably put the defendant on notice, class action tolling also would be consistent with the policy of promoting justice and preventing unfair "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Therefore, the Court reasoned that, like Rule 23, statutes of limitations are also meant to promote judicial efficiency. In the absence of class action tolling, that goal would be frustrated.

Of the class action tolling rule, however, courts and commentators alike also have noted frequently that the *American Pipe* tolling rule "is a generous one, inviting abuse." And lawyers should not treat the rule as encouragement to frame their pleadings as class actions in attempts to attract plaintiffs, to save members of purported class actions when those members have slept on their rights, or to try to raise claims not covered by the original class action.

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49 *Crown, Cork & Seal Co.*, 462 U.S. at 355 (Powell, J., concurring) ("Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations.").


54 *Crown, Cork & Seal Co.*, 462 U.S. at 355 (Powell, J., concurring) (quoting *Am. Pipe*, 414 U.S. at 562 (Blackmun, J., concurring)).
II. SUCCESSIVE CLASS ACTION TOLLING

The typical application of *American Pipe* tolling covers only plaintiffs' later attempts to intervene or to file individual claims in federal courts after an earlier alleged class action fails. While this application of *American Pipe* tolling is well settled, federal circuit courts are split as to whether class action tolling should apply to later-filed class actions in their courts, and they have articulated conflicting approaches to answering this question. Successive class action tolling issues can arise in several scenarios. These scenarios can be grouped into those cases in which courts did not reach a certification decision and those in which earlier courts denied certification. In addition, where earlier courts denied certification, those cases can be grouped into cases in which certification failed due to a deficiency that could be addressed by a successive class action and those in which certification failed due to the class's inability to qualify for class treatment. Some circuits refuse to apply *American Pipe* tolling to later-filed class actions no matter what happened in the earlier alleged class action. Other circuits apply *American Pipe* tolling to later-filed class actions only in limited situations depending on what happened in the earlier alleged class action. Still others conclude class action tolling always applies to later-filed class actions the same way it applies to later-filed individual actions.

The subclass actions filed in the wake of the Supreme Court's decision in *Wal-Mart Stores v. Dukes* dramatically illustrate the unfairness and inefficiencies the circuit courts' conflicting approaches to successive class action tolling can have. An analysis of the various approaches to successive class action tolling, the conflicting decisions reached in the post-*Wal-Mart* successive subclass actions, and the Supreme Courts' decisions in *Shady Grove* and *Bayer* suggest courts should treat successive class action tolling just as they treat tolling in the typical scenario involving later-filed individual actions. As explained below, the resulting benefits in terms of increased

55 Wasserman, supra note 4, at 805-07.
57 Compare Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 563-64 (7th Cir. 2011) (finding that the question involves a false conflict since preclusion is the real issue and remanding for an initial certification determination), and *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637, 649 (6th Cir. 2015) (holding that a subsequent class action is not time barred if the district court has not previously denied class certification), with *Ewing Indus. Corp.* v. *Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1328 (11th Cir. 2015) (holding that subsequent class action suits are time barred to avoid "endless rounds of litigation" (quoting *Griffin v. Singletary*, 17 F.3d 356, 358 (11th Cir. 1994))).
58 See discussion infra Section II.C.
59 See discussion infra Section II.C.
62 See, e.g., *Phipps*, 792 F.3d at 652; *Sawyer*, 642 F.3d at 564.
predictability, consistency, and efficiency outweigh the risks, which are quite similar in any event to those involved in the application of American Pipe tolling in the typical scenario.

A. Wal-Mart Stores Initial Class Action

In Wal-Mart Stores, Inc. v. Dukes, a full decade after the plaintiffs first filed suit, the Supreme Court decertified the nationwide class.63 Plaintiffs alleged that Wal-Mart had discriminated against them on the basis of their sex in violation of Title VII.64 As a result, the plaintiffs sought class treatment of their claims for injunctive relief, declaratory relief, and back pay.65 In 2004, a California district court certified a nationwide class of plaintiffs.66 Nearly six years later, after several related hearings and re-hearings, in a divided en banc opinion, the Ninth Circuit largely upheld the nationwide class certification.67 In March 2011, however, a divided Supreme Court decertified the nationwide class.68

The majority characterized the Wal-Mart case as "one of the most expansive class actions ever."69 The putative class consisted of 1.5 million current or former employees of the approximately 3,400 Wal-Mart stores nationally.70 Wal-Mart divided its stores among forty-one geographic regions around the country, and each region contained approximately eighty to eighty-five stores.71 Emphasizing the size and scope of the alleged class, the dissimilarities between the putative class members, and the lack of evidence regarding a company-wide discriminatory policy, the majority held that the alleged nationwide class failed to meet Rule 23(a)'s commonality

64 Id. at 2547.
65 Id.
67 Wal-Mart Stores, Inc., 131 S. Ct. at 2549. The Ninth Circuit upheld class certification except as to inclusion of punitive damages claims, and opined that putative members who were not Wal-Mart employees at the time that the complaint was filed lacked standing to seek injunctive or declaratory relief. Wal-Mart Stores, Inc., 603 F.3d at 616, 625.
68 Wal-Mart Stores, Inc., 131 S. Ct. at 2561. Justice Antonin Scalia wrote the opinion for the Court. Justices Ginsburg, Breyer, Sotomayor, and Kagan concurred in part and dissented in part. They agreed that the class should not have been certified under Rule 23(b)(2), but disagreed with the Court's conclusion that the plaintiffs could not satisfy the "commonality" requirement in Rule 23(a). Id. at 2561, 2565 (Ginsburg, J., concurring in part and dissenting in part). They would have remanded the case for consideration of whether the class the plaintiffs described may be certified as a class pursuant to Rule 23(b)(3). Id. at 2561-62.
69 Id. at 2547 (majority opinion).
70 Id.
71 Id.
requirement.\textsuperscript{72} To meet the commonality requirement, the majority stated plaintiffs must have shown significant proof of a general policy of discrimination at Wal-Mart, which they failed to do because they did not show that the Title VII claims of all putative class members would depend on answers to common questions.\textsuperscript{73} Thus, the class failed for lack of commonality.\textsuperscript{74}

The decision suggested, however, that plaintiffs conceivably could satisfy the commonality requirement if the plaintiffs could prove that an employer operated under a general policy of discrimination that manifested itself in hiring and promotion practices in the same general fashion.\textsuperscript{75} Likewise, in an opinion concurring in part and dissenting in part, Justice Ruth Bader Ginsburg opined that a "putative class of this type may be certifiable under Rule 23(b)(3), if the plaintiffs show that common class questions 'predominate' over issues affecting individuals . . . and that a class action is 'superior' to other modes of adjudication."\textsuperscript{76} Observing that the question of whether the class plaintiffs met the specific requirements of Rule 23(b)(3) was not before the Court, however, Justice Ginsburg stated that she would reserve that issue for consideration on remand.\textsuperscript{77}

After the Court decertified the nationwide class, the plaintiffs scrambled to try to save their claims. As one district court aptly noted, the plaintiffs could hardly "be faulted for failing to anticipate a significant development in the Supreme Court's class-action jurisprudence."\textsuperscript{78} Indeed, the case appears to have "given new meaning to commonality," which had previously been "rarely an impediment to class certification."\textsuperscript{79} Limitations periods for plaintiffs' individual actions were clearly subject to \textit{American Pipe} tolling. But, unsurprisingly, several groups of plaintiffs also sought to save their class claims by attempting to cure the commonality defects the Supreme Court identified. Thus, the original plaintiffs moved to amend the class allegations,\textsuperscript{80} and a several groups of plaintiffs filed narrower subclass actions around the country.\textsuperscript{81} District courts, therefore, had to decide wheth-

\textsuperscript{72} Id. at 2554-55.

\textsuperscript{73} Id. at 2554-57.

\textsuperscript{74} \textit{Wal-Mart Stores, Inc.}, 131 S. Ct. at 2557.

\textsuperscript{75} Id. at 2553 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 159 n.15 (1982)).

\textsuperscript{76} Id. at 2561 (Ginsburg, J., concurring in part and dissenting in part).

\textsuperscript{77} Id.

\textsuperscript{78} Dukes v. Wal-Mart Stores, Inc., No. C 01-02252 CRB, 2012 WL 4329009, at *3 (N.D. Cal. Sept. 21, 2012); see also Ladik v. Wal-Mart Stores, Inc., 291 F.R.D. 263, 264-65 (W.D. Wis. 2013) (concluding that although \textit{American Pipe} tolled plaintiffs' subsequent class action, the narrowed class still failed for lack of Rule 23 commonality and lamenting that "even the most serious problems cannot always be resolved by a class action lawsuit").

\textsuperscript{79} Klonoff, supra note 22, at 773-74; see also A. Benjamin Spencer, \textit{Class Actions, Heightened Commonality, and Declining Access to Justice}, 93 B.U. L. REV. 441, 443 (2013).

\textsuperscript{80} Dukes, 2012 WL 4329009, at *1.

er tolling also applied to save limitations for plaintiffs’ successive subclass actions.

Starting with the original nationwide class, the district court allowed the amendment but in doing so highlighted the difference between amending an already existing class action and filing a new class action lawsuit. The Ninth Circuit, the court emphasized, found it significant when a successive class was “not seeking to relitigate any prior adverse decision,” and the district court concluded that the plaintiffs were not seeking to do that because the newly alleged class claims contained a subset of the claims of which defendants had notice through the original class action. Thus, the court reasoned that American Pipe’s “goals of avoiding multiplicitous litigation and unfair surprise” would be served by allowing the amendment. In dicta, however, the court implied that the outcome might be different if the plaintiffs had sought to file a separate, successive class action rather than to amend the original class action.

B. Wal-Mart Stores Later Alleged Subclass Actions

Of course, several former class plaintiffs did file separate subclass action lawsuits in federal district courts around the country: (1) the Odle case in Texas; (2) the Love case in Florida; (3) the Phipps case in Tennessee; and (4) the Ladik case in Wisconsin. In each of these cases, Wal-Mart moved to dismiss, arguing, among other things, that the successive class actions were time-barred. Because of the circuit court split on successive class action tolling, the district courts reached conflicting conclusions, with just one concluding that the subclass allegations were timely, and three
concluding that they were time-barred. Appeals were taken in three of the district court cases, and at the end of the day, in part because the law on successive class actions is evolving, three were considered timely, and just one was time-barred.

C. Evolution of Successive Class Action Approaches

Ten years ago, the majority of circuit courts that had considered successive class action tolling had rejected it outright. Those courts tended to use broad, bright-line language that suggested they would never allow such tolling. Over time, however, many courts, including some that had originally articulated what appeared to be bright-line prohibitions, moved away from that rigid approach. Indeed, a trend has developed in federal courts of allowing American Pipe tolling to apply to later-filed subclass actions, at least in some instances. But the law is in flux, and not all circuits agree.

1. Bright-Line Prohibition Approach

Courts that have articulated a bright-line prohibition have invoked several policy concerns for doing so. Primarily, they have raised the policy of repose. If successive class action tolling were allowed, for example, these courts suggest statutes of limitations could be extended indefinitely, and the repose promised by statutes of limitations would never be reached.

91 Wasserman, supra note 4, at 842 & n.204 (citing cases in the First, Second, Fifth, Sixth, and Eleventh Circuits). As discussed later in this Section, several of these circuit courts have since allowed successive class action tolling in some situations. See discussion infra Part II.C.


93 Hershey, 278 F.R.D. at 622.


95 Wasserman, supra note 4, at 842-43.

96 Id.

97 Id.
Instead, the adoption of successive class action tolling would force defendants to endlessly defend against the same class allegations.98 One of these decisions also expressed judicial efficiency concerns, suggesting that allowing successive class action tolling "would consume scarce judicial resources, while a decision declining to toll the statute of limitations in a successive class action arguably would conserve them."99 That decision also suggested that tolling could result in a lack of respect for prior judicial decisions by allowing plaintiffs to "argue and reargue the question of class certification by filing new but repetitive complaints."100 Indeed, the Eleventh Circuit recently warned that allowing successive class action tolling could result in allowing a "purported class almost limitless bites at the [certification] apple."101

Bright-line prohibition cases have tended to include broad and absolute language. For example, one court categorically stated, "the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class."102 And another stated, "plaintiffs may not 'piggyback one class action onto another' and thereby engage in endless rounds of litigation" over the propriety of the prior denial of certification.103 Three groups of post-Wal-Mart plaintiffs filed successive subclass actions in Texas, Tennessee, and Florida. These courts are in Fifth, Sixth, and Eleventh circuits, which at least at the time, appeared to follow bright-line prohibitions to successive class action tolling.104 Thus, the district courts held that plaintiffs' class allegations were barred by limitations.105

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98 See, e.g., Ewing Indus. Corp., 795 F.3d at 1328 (citing Griffin, 17 F.3d at 359); Basch v. Ground Round, Inc., 139 F.3d 6, 10-11 (1st Cir. 1998); see also Wasserman, supra note 4, at 843.
99 Wasserman, supra note 4, at 843 (citing Korwek v. Hunt, 827 F.2d 874, 879 (2d Cir. 1987)).
100 Korwek, 827 F.2d at 879; Wasserman, supra note 4, at 843.
101 Ewing Indus. Corp., 795 F.3d at 1326.
102 Andrews v. Orr, 851 F.2d 146, 149 (6th Cir. 1988). The Sixth Circuit has since moved away from the bright-line prohibition approach. See Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 652 (6th Cir. 2015); In re Vertrue Inc. Mktg. & Sales Practices Litig., 719 F.3d 474, 479-80 (6th Cir. 2013); see also discussion infra Parts II.C.2-3.
103 Ewing Indus. Corp., 795 F.3d at 1328 (quoting Griffin, 17 F.3d at 359).
104 See id.; Griffin, 17 F.3d at 359; Andrews, 851 F.2d at 149; Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985). The Sixth Circuit has since rejected the bright-line prohibition. See Phipps, 792 F.3d at 652; In re Vertrue Inc. Mktg. & Sales Practices Litig., 719 F.3d at 479-80.
In the *Odle* case filed in Texas, the court agreed with Wal-Mart that the Fifth Circuit's decision in *Salazar-Calderon v. Presidio Valley Farmers Ass'n* meant the Fifth Circuit followed a "no piggyback rule," which prohibited the court from applying *American Pipe* tolling to plaintiffs' later-filed class action claims. Similarly, in the *Love* case filed in Florida, the district court dismissed as untimely the plaintiffs' successive subclass action claims because "[t]he Eleventh Circuit categorically refuses to toll the limitations period for subsequent class actions by members of the original class once class certification is denied in the original suit."  

While the Texas and Florida district courts in the post-*Wal-Mart* subclass actions readily concluded the successive class actions were time-barred, the Tennessee district court made clear when it joined them that it did so reluctantly. That the court struggled is clear from the fact that the opinion spans over thirty pages, most of which describe the various reasons successive class action tolling should apply, before the court concluded the Sixth Circuit's holding in *Andrews v. Orr* required it to reject plaintiffs' class action allegations as untimely. In the *Andrews* case, decided over twenty-five years earlier, the Sixth Circuit refused to extend the tolling principle enunciated in *American Pipe* and *Crown, Cork & Seal* to the initiation of a new class action. And it declared the existence of "unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class."  

Fast-forward a quarter of a century, however, and the successive class action tolling landscape had changed dramatically. That "unanimous
agreement” had evaporated so much that by 2011, the Seventh Circuit, which follows the opposite approach and allows successive class action tolling, opined that the circuit court decisions on successive class actions were not in conflict. But Sixth Circuit law did not evolve quickly enough for the post-Wal-Mart plaintiffs in Tennessee.

## 2. Limited Exceptions Approach

Aside from the Seventh Circuit, and more recently the Sixth Circuit, courts that have applied class action tolling to later-filed class actions have done so only in limited circumstances. The Third, Seventh, Eighth, and Ninth Circuits have all allowed American Pipe tolling to apply if the prior court did not reach the class certification decision or if the prior court rejected class certification due to a deficiency unrelated to the propriety of the proposed class. In addition, while the Second, Third, and Tenth Circuits have not expressly adopted successive class action tolling, districts courts in each of these circuits as well as in the District of Columbia have also allowed tolling of successive classes in some situations.
These courts have rejected the rigidity of a bright-line prohibition against successive class action tolling, despite that approach’s apparent “virtue of clarity and ease of application.”\[124\]

Some courts that allow successive class action tolling base their decisions on the fact that the original class action did not result in a certification decision.\[125\] Because no court had previously denied a class certification request, these courts reason, tolling limitations for the later class action does not encourage repetitive and indefinite class action lawsuits.\[126\] Some courts also allow successive class action tolling even when a court denies an earlier certification request, as long as the reasons for the first certification’s failure does not have to do with “a Rule 23 deficiency in the class itself,” such as a lack of numerosity or a failure of the common questions to predominate over the individual questions.\[127\] For example, these courts permit successive class action tolling if the earlier certification denial resulted from deficiencies of a class representative.\[128\] In this type of case, the risk that plaintiffs might otherwise indefinitely file repetitive class actions addressing the same claims is not as high.\[129\]

Courts adopting the limited exceptions approach to successive class action tolling observe that to not allow tolling in any circumstance could totally undermine the American Pipe class tolling rule, which encourages class members to rely on a class action to protect their interests as to claims that are covered by the class action.\[130\] Unnamed class members have no control over whether named plaintiffs decide to abandon the class actions or over whether they are appropriate lead plaintiffs.\[131\] A bright-line prohibition, according to these courts, would thus be arbitrary and would deny “many class plaintiffs with small, potentially meritorious claims the opportunity for redress simply because they were unlucky enough to rely upon an inappropriate lead plaintiff.”\[132\] A bright-line prohibition would also encourage class members to file protective class actions, which would frustrate the

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124 Yang, 392 F.3d at 106.
125 See, e.g., In re Vertrue Inc. Mktg. & Sales Practices Litig., 719 F.3d 474, 479-80 (6th Cir. 2013).
126 See, e.g., id. at 480.
127 Wasserman, supra note 4, at 848 (footnote omitted) (quoting Yang, 392 F.3d at 104). Of course, in Wal-Mart Stores, Inc. v. Dukes, the Supreme Court held the class did not satisfy commonality requirement, and the later-filed subclass actions attempted to remedy this defect.
128 Id. (suggesting courts follow this approach at a time when the majority of circuit courts that had considered successive class action tolling had rejected it).
129 See, e.g., Yang, 392 F.3d at 107.
130 See, e.g., id. at 110-11
132 Yang, 392 F.3d at 111.
efficiency and economy of litigation the American Pipe tolling rule was designed to protect.\textsuperscript{133}

In \textit{In re Vertrue Inc. Marketing and Sales Practices Litigation},\textsuperscript{134} the Sixth Circuit pulled back from the bright-line prohibition approach it had articulated in \textit{Andrews}\textsuperscript{135} and allowed successive class action tolling because class certification had not been decided in the earlier case.\textsuperscript{136} It distinguished \textit{Andrews} because the earlier court in \textit{In re Vertrue} had dismissed the prior putative class action on grounds of standing, as opposed to on grounds related to the class certification, so the danger of serial relitigation of the certification decision was not present.\textsuperscript{137}

Returning to the post-\textit{Wal-Mart} subclass actions, immediately after the Sixth Circuit decided \textit{In re Vertrue}, the Tennessee district court certified an interlocutory appeal of its "reluctant" decision.\textsuperscript{138} In doing so, it noted the Sixth Circuit's jurisprudence on the question was evolving, and the district court had earlier "expressed serious reservations about the propriety of applying \textit{Andrews} to follow-on subclass actions without providing for case-specific exceptions, including those recognized in various other federal trial and appellate court decisions."\textsuperscript{139} The Tennessee district court concluded that \textit{Andrews} invited refinement and tailoring so courts could fairly balance considerations of (1) whether applying tolling would further American Pipe's concern for judicial economy and notice to defendants; and (2) whether plaintiffs were attempting to abuse the benefit of tolling by perpetually re-litigating certification or by asserting new claims not covered by the earlier action, or whether they were attempting simply to obtain a definitive, merits-based ruling on class certification.\textsuperscript{140} Thus, granting the interlocutory appeal was appropriate.\textsuperscript{141}

\textsuperscript{133} See id.
\textsuperscript{134} 719 F.3d 474 (6th Cir. 2013).
\textsuperscript{135} \textit{Andrews v. Orr}, 851 F.2d 146, 149 (6th Cir. 1988).
\textsuperscript{136} \textit{In re Vertrue Inc.}, 719 F.3d at 479-80.
\textsuperscript{137} Id.
\textsuperscript{139} Id. at *1 (recognizing the Sixth Circuit's recent decision in \textit{In re Vertrue Inc. Marketing and Sales Practices Litigation} may have eroded the bright-line prohibition against tolling successive class actions).
\textsuperscript{140} Phipps v. Wal-Mart Stores, Inc., 925 F. Supp. 2d 875, 897 (M.D. Tenn. 2013), rev'd, 792 F.3d 637 (6th Cir. 2015).
\textsuperscript{141} Phipps, 2013 WL 2897961, at *4. As discussed below, in its decision in \textit{Phipps}, the Sixth Circuit embraced the Seventh Circuit's satisfaction approach to successive class action tolling, the approach for which this Article advocates. \textit{Phipps}, 792 F.3d at 652.
3. Satisfaction Approach

The Seventh and more recently the Sixth Circuit have adopted an approach that treats tolling limitations for later-filed class actions the same way it treats tolling limitations for later-filed individual actions. While the failure of an earlier class action may have implications for future attempts to certify the alleged class, according to this approach, "the statute of limitations is not one of them." The issue, as framed by these circuits, is not whether tolling should apply to the later-filed class action, but rather whether the later-filed class action meets the requirements of Rule 23. This approach interprets earlier decisions that rejected successive class action tolling as having held the original certification decisions continued to apply in the later-filed class actions; thus, even though the later-filed class actions were timely, class members could not evade the earlier certification decisions by filing successive class actions. In other words, the decisions that had appeared to adopt the bright-line prohibition approach had instead merely ruled on the preclusive influence of earlier decisions that had declined to certify the class actions. Under this approach, later-filed class actions are deemed timely filed if under American Pipe the claims would not be time-barred if brought as individual actions.

The rationale underlying this approach is that refusing to apply American Pipe tolling to subsequent class actions would undermine the efficiency that class action tolling rule was meant to promote. Specifically, it would encourage plaintiffs to file protective lawsuits when they should instead be encouraged to wait to see if the first class action would protect their rights. "The weight of individual filings would strain the federal courts. This is precisely the scenario that 'Rule 23 was designed to avoid' in cases where adjudication of claims by class action is a fair and efficient method of resolving a dispute." Encouraging protective filings is inconsistent with the Supreme Court's adoption of the American Pipe class action

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142 See Phipps, 792 F.3d at 653 (holding plaintiffs' subsequent successive Rule 23(b)(2) subclass action was timely filed, even though the Supreme Court had earlier decertified the original alleged 23(b)(2) class action); Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011) (holding successive class action tolling allowed in case where earlier court had not reached a decision on class certification, but opining in dicta regarding the state of the law on successive class action tolling in other circuits).


144 Phipps, 792 F.3d at 651-52.

145 Id. at 652; Sawyer, 642 F.3d at 564.

146 Phipps, 792 F.3d at 651-52 (quoting Judge Easterbrook's opinion in Sawyer, 642 F.3d at 563).

147 Ladik, 291 F.R.D. at 268.

148 Id. at 268.

rule. Considering the purposes underlying statutes of limitations, these courts reason that the original class action provides defendants with notice of the claims against them and the generic identities of the members of the alleged class. Although courts following this approach generally recognize that there are "legitimate concerns about re-litigating class issues," they conclude that limiting the application of American Pipe tolling to individual suits is not the proper way to address those concerns.

Returning again to the post-Wal-Mart subclass actions, one group of plaintiffs filed in Wisconsin, which is in the Seventh Circuit. Thus, following the satisfaction approach, the district court held plaintiffs' subclass action timely because the original plaintiffs had timely filed the original class action against Wal-Mart.

Going back to the Tennessee case, adopting the satisfaction approach to successive class action tolling, the Sixth Circuit held the Tennessee plaintiffs' subclass action claims were timely as well.

4. Continued Adherence to a Bright-Line Prohibition

Taking stock of the four post-Wal-Mart successive subclass actions, the decisions had gone from three classes being held untimely and one being held timely to three classes being held timely and one being held untimely. These decisions strikingly illustrate the lack of consistency and predictability in successive class action tolling cases. Analyzing these decisions, it is clear that the articulations of bright-line prohibitions against applying American Pipe tolling to successive class actions made it more, rather than less, difficult for courts to reach coherent conclusions. After so many courts had moved away from bright-line prohibitions against succes-

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151 Id. at 268-69 (citing Gomez, 622 F. Supp. 2d at 722).
152 Id. at 269; see also Phipps, 792 F.3d at 652. In its discussion of this issue, the Sixth Circuit relies largely on the Fifth Circuit's reversal in Odle. Phipps, 792 F.3d at 648 (citing Odle v. Wal-Mart Stores, Inc., 747 F.3d 315 (5th Cir. 2014)). In the Odle appeal, however, Ms. Odle pursued only her individual claims against Wal-Mart. Odle, 747 F.3d at 319 & n.20 (limiting appeal of tolling decision to timeliness of individual claims). Thus, the Fifth Circuit's discussion of the successive class claims in that case is mere dicta.
153 Ladik, 291 F.R.D. at 263.
154 Id. at 268. While the court in Ladik ultimately held plaintiffs' successive class claims failed for lack of commonality, it nevertheless made clear that limitations did not bar those successive class action claims. Id. at 264-65.
155 Phipps, 792 F.3d at 653. In doing so, as to the class allegations on which certification had not been decided, the Sixth Circuit followed In re Vertrue to allow successive class action tolling. Id. As to the class that had been decertified by the Supreme Court, it adopted a satisfaction approach to class action tolling that was first articulated by the Seventh Circuit. See id. at 652-53 (citing Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 564 (7th Cir. 2011)).
sive class action tolling, and the Sixth and Seventh Circuits had characterized those bright-line prohibition decisions as having merely applied the original certification decisions to the later-filed class actions, it appeared federal jurisprudence on successive class action tolling was becoming more cohesive.

But after these developments, the Eleventh Circuit decided the *Ewing Industries Corp. v. Bob Wines Nursery, Inc.* case in which it again stated, "the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative class members of the original asserted class." In the opinion, the court made clear it disagreed with other circuits that had distinguished, criticized, or declined to follow its earlier decision in *Griffin v. Singletary*, where it had refused to toll limitations when the earlier class action had failed because of a deficiency related to the class representative. *Griffin* concluded it did not matter whether certification of the earlier class action had failed because of the inadequacy of the class representative or because of deficiencies in the alleged class itself. Instead, the Eleventh Circuit cited concerns about "the potential for multiple rounds of litigation as the class seeks an adequate class representative" and refused to toll limitations for the later-filed class action.

But perhaps some slight movement away from the bright-line prohibition approach may be taken from the *Ewing* opinion. After reaching its conclusion, the court stated that the merits of the earlier case were not before it. In addition, it pointed out that the Eleventh Circuit’s prior precedent rule did not allow one panel to overrule another panel’s holding. While the court did not say more, these sentences can be interpreted to imply a less than total embrace of *Griffin*’s articulated bright-line prohibition approach.

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156 Phipps, 792 F.3d at 652; Sawyer, 642 F.3d at 564.
157 795 F.3d 1324 (11th Cir. 2015).
158 *Id.* at 1327 (quoting *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994)) (internal quotation marks omitted).
159 17 F.3d 356 (11th Cir. 1994).
160 *Ewing Indus. Corp.*, 795 F.3d at 1328 (quoting *Sawyer*, 642 F.3d at 564) (citing *In re Vertrue Inc. Mktg. & Sales Practices Litig.*, 719 F.3d 474, 480 n.2 (6th Cir. 2013); *Great Plains Trust Co. v. Union Pac. R.R.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang v. Odom*, 392 F.3d 97, 106 (3d Cir. 2004); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1148-50 (9th Cir. 2000)).
161 *Id.* (interpreting *Griffin*, 17 F.3d at 359).
162 *Id.*
163 *Id.*
164 *Id.* (citing United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (en banc)).
5. *Shady Grove and Bayer*

While the recent Supreme Court decisions in the 2010 and 2011 cases of *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*\(^\text{165}\) and *Smith v. Bayer Corp.\(^\text{166}\) did not involve class action tolling, they provide relevant context. Indeed, with varying degrees of success, three groups of post-*Wal-Mart* plaintiffs argued *Shady Grove* and *Bayer* required the district courts to apply *American Pipe* tolling to their later-filed class actions.\(^\text{167}\) Thus, a brief description of these cases is helpful.

*Shady Grove* is a federal preemption case in which the Supreme Court, in a plurality opinion, held that Rule 23 of the Federal Rules of Civil Procedure prevailed over a conflicting New York statute that prohibited plaintiffs from proceeding as a class action when they sought recovery of a penalty.\(^\text{168}\) In a part of the opinion in which a majority joined, Justice Scalia characterized the issue, simply, as whether the plaintiff's suit could proceed as a class action, and he concluded that Rule 23 had to provide the answer.\(^\text{169}\) Rule 23 allows class action treatment if two conditions are met: the class meets the requirements set forth in subdivision (a), and the class fits into one of the three categories set forth in subdivision (b).\(^\text{170}\) Rule 23, therefore, "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."\(^\text{171}\) In other words, Rule 23 is "a one-size-fits-all formula for deciding" whether a plaintiff may maintain a class action in federal court.\(^\text{172}\)

Rejecting the argument that the New York statute and Rule 23 addressed the different questions of whether a particular cause of action is eligible for class treatment and whether the cause of action may be certified as a class action, Justice Scalia wrote, "the line between eligibility and certifiability is entirely artificial."\(^\text{173}\) If the "prescribed preconditions" of

\(^{165}\) 559 U.S. 393 (2010) (plurality opinion).

\(^{166}\) 131 S. Ct. 2368 (2011).


\(^{169}\) *Shady Grove*, 559 U.S. at 398-99.

\(^{170}\) Id. at 398.

\(^{171}\) Id.

\(^{172}\) Id. at 399.

\(^{173}\) Id.
Rule 23 are satisfied, plaintiffs have discretion to bring their claims as class actions if they wish because, "like the rest of the Federal Rules of Civil Procedure, Rule 23 automatically applies in all civil actions and proceedings in the United States district courts."

Like the *Shady Grove* case, the *Bayer* case also does not directly address class action tolling. Rather, in *Bayer*, the Court considered whether a federal court could, consistent with the Anti-Injunction Act,\(^\text{175}\) enjoin a state court from certifying an essentially identical class action in state court after the federal court had declined to certify a nearly identical class action in federal court.\(^\text{176}\) The defendant argued that the federal court's denial of class certification precluded the state court from certifying what was basically the same class.\(^\text{177}\) Finding the relitigation exception to the Anti-Injunction Act gave it authority, the federal district court issued the injunction.\(^\text{178}\) The eighth circuit affirmed, but again the Supreme Court reversed.\(^\text{179}\)

The Court framed the issue as follows: "whether the federal court’s rejection of [the] proposed class precluded a later adjudication in state court of [the class action] certification motion."\(^\text{180}\) For the injunction to have been proper, two requirements had to have been met.\(^\text{181}\) First, the issue decided by the federal court had to be the same as the issue presented to the state court.\(^\text{182}\) Second, the plaintiffs in the state case had to also be parties to the federal action, or otherwise subject to one of the narrow exceptions that would allow binding nonparties.\(^\text{183}\) Neither requirement was met in *Bayer*.\(^\text{184}\) While the first requirement is not implicated in the context of successive class actions where both actions are filed in federal court, as discussed below, the second is.

In its holding, the Supreme Court opined that *Bayer*'s strongest argument for enjoining certification of the state class action was rooted in policy concerns related to the use of the class action device and not in legal princi-
ples of preclusion. The Court acknowledged, for example, the theoretical danger that class counsel could repeatedly attempt to certify the same class by changing the named plaintiff and thus effectively forcing defendants to settle. It further recognized that, in theory, its approach could lead to class counsel repeatedly attempting to certify the same class with different named plaintiffs, resulting in a “world of ‘serial relitigation of class certification’” in which defendants “would be forced in effect to buy litigation peace by settling.” The Court, however, reasoned that it had earlier confronted a similar problem in Taylor v. Sturgell. There, after successfully resisting a Freedom of Information Act (FOIA) request, the government sought to bind nonparties from seeking identical requests in the future, under a theory of “virtual representation.” The Court, however, refused to expand preclusion in this way, even though it acknowledged a single successful FOIA suit could subsume all prior losses just like “a single successful class certification motion could do.” Despite characterizing the potential costs related to this concern as “substantial,” the Court concluded that principles of stare decisis would outweigh the risks of repeated litigation.

D. Analysis and Recommendations

Successive class action tolling cases can arise in a number of ways. Sometimes the original class action ends before a certification decision is reached. Other times, certification may fail for reasons that can be corrected, such as when named plaintiffs are not qualified to represent the class. Still other times, certification may fail for reasons inherent to the alleged class action’s ability to proceed as a class, which cannot be corrected, such as when the number of claimants is not sufficiently large to meet the numerosity requirement. As illustrated by the post-Wal-Mart subclass actions, applying different approaches, some of which depend on the way in which the successive class action tolling cases arise and some of which do

185 Id. at 2381.
186 Id. (quoting Brief for Respondent at 47-48, Bayer, 131 S. Ct. 2368 (No. 09-1205)). The Court also noted the Seventh Circuit’s earlier objection “to an ‘asymmetric system in which class counsel can win but never lose’ because of their ability to relitigate the issue of certification.” Id. (quoting In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 767 (7th Cir. 2003)).
187 Id. (quoting Brief for Respondent, supra note 186, at 2, 12).
188 Bayer, 131 S. Ct. at 2381 (citing Taylor v. Sturgell, 553 U.S. 880 (2008)).
189 Id. at 2380 (quoting Taylor, 553 U.S. at 901) (internal quotation marks omitted).
190 Id. at 2381.
191 Id.
not, can result in inconsistent and unpredictable outcomes. For example, in cases in which certification decisions had not have been reached in the earlier cases, both the limited exceptions and satisfaction approaches would allow tolling for the later alleged class action, but the bright-line prohibition approach would not. Under the bright-line prohibition approach, whether the earlier court reached a certification decision or not would not matter as tolling would not be allowed either way.

At first blush, the bright-line prohibition approach is attractive because the answer to the successive class action tolling issue appears to be straightforward: no tolling. Indeed, in general, bright-line rules are thought to promote clarity and ease of application. But as illustrated by the district court’s opinion in the post-Wal-Mart subclass action filed in Tennessee, the application of the bright-line prohibition was not at all straightforward there, and instead it gave the court considerable trouble. Unlike situations in which plaintiffs have attempted to relitigate the same certification question over and over, plaintiffs in the post-Wal-Mart cases were attempting to correct a deficiency identified only after a change in the law, which plaintiffs could not have foreseen. Under those circumstances, the Tennessee district court struggled with holding the plaintiffs’ subclass action claims were time-barred.

Indeed, it enumerated several reasons why the application of a rigid-bright-line prohibition could frustrate the policies underlying American Pipe tolling. One reason is that the application of the bright-line prohibition in cases like the post-Wal-Mart subclass actions would likely encourage rather than discourage multiplicitous litigation. Cautious members of putative nationwide classes who reside in jurisdictions that have either adopted the bright-line approach, or have not definitively rejected it, would be encouraged to file protective subclass actions around the country rather than to rely on a nationwide class that could fail to be certified before the applicable limitations periods expired. Indeed, to protect their interests, cautious members might also chose to file protective subclass actions in

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195 So, as long as the later alleged class allegations were covered by the earlier class allegations, the later alleged class action would be timely, unless plaintiffs filed it in a circuit that follows the bright-line prohibition approach. Compare, e.g., Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 651 (6th Cir. 2015), and In re Vertrue, 719 F.3d at 479-80, and Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 563 (7th Cir. 2011), with Ewing Indus. Corp. v. Bob Wines Nursery, Inc., 795 F.3d 1324, 1328 (11th Cir. 2015).

196 See, e.g., Yang, 392 F.3d at 106 (noting bright-line prohibition's "clarity and ease of application").


199 See id. at 895 (quoting Yang, 392 F.3d at 111).
cases in which the original class had been certified so that if the nationwide class were to fail later, these plaintiffs' class claims would be still protected. Although plaintiffs might prefer to rely on the class action, as the California district court in the original Wal-Mart class action suggested, plaintiffs who had timely filed overlapping (but narrower or differently configured) class actions would be in the stronger position of seeking to amend already existing class actions instead of filing a new subclass action that would likely be time-barred.200

A rigid bright-line prohibition can have other undesirable effects as well. In some cases, applying such a rule would frustrate the goal of allowing claimants in negative-value class actions the ability to pursue their claims. Without the availability of class action treatment, claimants in negative-value cases would not be able to spread the costs of litigation among the class.201 Thus, plaintiffs with small, but meritorious, claims could be denied the opportunity to pursue those claims if, for example, they relied on a lead plaintiff who was not found to be inappropriate until after the applicable limitations period had expired.202 If limitations had passed and pursuing an individual action were not feasible, plaintiffs could lose the only viable means to access the courts to seek compensation for those claims.203

Rigid application of bright-line prohibitions could similarly frustrate the goals of ensuring substantive laws are upheld and holding defendants accountable for negative behaviors. Once the applicable limitations periods passed, defendants would have a great deal of power, especially in negative-value cases, because successive class actions would be time-barred. A bright-line prohibition could thus serve to encourage defendants to attempt to delay certification decisions in the hope that they would have increased power once the limitations periods expired. For several reasons, therefore, a strict adherence to a bright-line prohibition against successive class action tolling no matter what takes too seriously the oft-repeated warning that the American Pipe tolling rule "is a generous one, inviting abuse."204

Comparing the limited exceptions and satisfaction approaches, the satisfaction approach is superior, especially in light of Shady Grove and Bayer. If a prior class failed for reasons unrelated to the propriety of the class, both the approaches would allow tolling to save limitations for the

201 See Phipps, 925 F. Supp. 2d at 895 (quoting Yang, 392 F.3d at 111).
202 Id. (quoting Yang, 392 F.3d at 111).
203 Id. (quoting Yang, 392 F.3d at 111); see also HOUSE COMM. ON THE JUDICIARY, DISSENTING VIEWS TO H.R. 3789, CLASS ACTION JURISDICTION ACT OF 1998, H.R. REP. No. 105-702, at 22 (1998) (discussing class treatment's importance in providing redress when negative value claims are involved); cf. Landers, supra note 40, at 857-60 (expressing normative preference that the Supreme Court should not be able to narrow the reach of legislative, class-action remedies through the use of judicial rules).
later alleged class. On the other hand, if the prior class failed because of a Rule 23-related deficiency in the class itself, the limited exceptions approach would not allow tolling, while the satisfaction approach would.

There are some benefits, of course, to the limited exceptions approach. While the satisfaction approach would always allow tolling if the plaintiffs timely filed the earlier alleged class action, the limited exceptions approach appropriately takes into account issues of fairness and allows courts to weigh the benefits and costs of tolling in each particular case. Courts would find later-filed class action timely only if applying tolling would further American Pipe’s concerns for furthering judicial economy while still providing sufficient notice to defendants. This approach allows successive class action tolling in cases in which the class deficiency could be addressed but does not allow it otherwise. Under this approach, plaintiffs could pursue class claims only until a court has definitively determined that the claims are not suitable for class treatment. This approach still protects plaintiffs with small, but potentially meritorious claims, allowing them the ability to seek redress as a class, when those claims would not support individual lawsuits. Indeed the limited exceptions approach would protect all unnamed class members who properly relied on a class action to protect their interests, while at the same time alleviating the risk that plaintiffs might indefinitely file repetitive class actions addressing the same claims.

Prior to Bayer, the limited exceptions approach would likely have made the most sense because it polices for abuse while allowing tolling in appropriate cases. The Supreme Court’s holding in Bayer, however, can be read to undermine the limited exceptions approach to the extent that it requires courts to decline to extend tolling because of an earlier court’s decision to deny class certification. Remember, in Bayer, the Court reiterated preclusion could apply only if the plaintiffs in the later case were also parties to the earlier case or otherwise subject to one of the narrow exceptions that would allow binding nonparties. Thus, the argument would be that in

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205 See discussion supra Parts II.C.2-3.
206 See, e.g., Yang, 392 F.3d at 112.
207 See Phipps v. Wal-Mart Stores, Inc., 925 F. Supp. 2d 875, 897 (M.D. Tenn. 2013), rev’d, 792 F.3d 637 (6th Cir. 2015); see also Wasserman, supra note 4, at 849-50.
208 See, e.g., Phipps, 925 F. Supp. 2d at 895 (quoting Yang, 392 F.3d at 111).
209 See id. at 897; see also Wasserman, supra note 4, at 849.
210 See, e.g., Yang, 392 F.3d at 100-11.
211 See, e.g., id.
212 Smith v. Bayer Corp., 131 S. Ct. 2368, 2382 (2011). The Court in Bayer focused on the relitigation exception to the Anti-Injunction Act. Id. at 2375-76. But its analysis also suggested the denial of certification cannot have a preclusive effect on other plaintiffs’ later attempts to certify a class. Id. at 2380 (quoting Taylor v. Sturgell, 553 U.S. 880, 901 (2008) (rejecting the argument that the public
the context of tolling, an earlier denial of class certification could not bind
absent class members who later file class action lawsuits because, by reason
of the court's decision not to certify the class action, the unnamed class
members would not be considered to have been parties to the earlier ac-
tion.213 Being nonparties, the earlier denial of certification could not apply
to them. Thus, the earlier denial of certification could not be used as justifi-
cation to refuse to apply American Pipe tolling to later-filed class actions if
such tolling would apply to later-filed individual claims.

In addition, to the extent the limited exceptions approach requires later
courts to decide the propriety of the earlier alleged class before deciding
whether tolling should be allowed, the limited exceptions approach can lead
to inefficiencies and encourage side litigation. To decide whether to toll
limitations for later-filed class actions under the limited exceptions ap-
proach, the later court first would have to determine whether the prior court
reached a certification decision. If class certification were denied earlier,
the later court would need to decide why the earlier alleged class failed
before it could decide whether to toll limitations for the later-filed class
action. If the original class failed for a reason that could be corrected, the
court would then toll limitations for the successive class action. Otherwise
it would not. Only after answering these questions would the later court be
able to consider whether the later-filed class met the criteria of Rule 23,
which implicates the Court's decision in Shady Grove.

Shady Grove, can be read to undermine any approach that would fail
to toll limitations for a covered, later-filed class action that could qualify for
class treatment. Shady Grove suggests that when a later class action meets
the criteria of Rule 23, class treatment must be allowed. Although Shady
Grove involved a question of preemption, a majority of the Court in an oth-
ewise plurality opinion agreed that Rule 23 must provide the answer to the
question of whether an action may proceed as a class action in federal
courts.214 The opinion characterizes Rule 23 as a "categorical rule entitling a
plaintiff whose suit meets the specified criteria to pursue his claim as a
class action," and "a one-size-fits-all formula for deciding" whether a plain-
tiff may maintain a class action.215 Therefore, to the extent a later-filed class

213 Id. Some courts have read Bayer narrowly and rejected claims by plaintiffs who clearly had
hoped for an expansive interpretation of Bayer. See Love v. Wal-Mart Stores, Inc., No. 12-61959-Civ,
2013 WL 5434565, at *4 (S.D. Fla. dismissed Sept. 23, 2013) (acknowledging but distinguishing Bayer
and then dismissing the plaintiffs' class claims); Phipps, 925 F. Supp. 2d at 897-900 (finding that nei-
ther Bayer nor Shady Grove overruled Andrews—the relevant Sixth Circuit precedent); Odle v. Wal-
ing Bayer narrowly and rejecting plaintiffs' individual claims).
ion).
215 Id. at 398-99.
action could qualify for class action treatment under Rule 23, *Shady Grove* suggests tolling must apply to save limitations for that class action, as long as such tolling would have applied to a later-filed individual action. Of course, since *Shady Grove* involved preemption rather than tolling, one reasonably could argue that applying the "one-size-fits-all formula" language in this way interprets the Court's decision too broadly.

Read with *Bayer*, however, *Shady Grove* provides further support for following the satisfaction approach to successive class action tolling. Under the satisfaction approach, as long as the original class action is timely filed, the applicable statutes of limitations for later-filed, covered class actions are considered met. The analysis, therefore, would not offend *Bayer* by rejecting tolling based on an earlier denial of class certification. And consistent with *Shady Grove*, this approach focuses on the propriety of the later alleged class under Rule 23, rather than whether successive class action tolling should apply to the class. Such an approach is not without downsides, of course. Indeed, because it in effect nearly always allows tolling, this approach is the most likely to be seen as an "encouragement to lawyers . . . to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." Thus, an argument could be made that allowing successive class action tolling would rob the defendants of the repose promised by statutes of limitations by theoretically subjecting defendants to endless rounds of litigation over class certification. Nevertheless, despite the risk that "serial re-litigation of class certification" could force defendants "in effect to buy litigation peace by settling," the Court in *Bayer* concluded that "principles of stare decisis and comity among courts" would "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs."

Given that an alleged class action that fails to meet Rule 23's criteria can never be certified, the same principles should apply under the satisfaction approach. Although more successive class actions would be found timely under this approach, stare decises should mitigate the threat of repeated attempt to certify the same class with a new named plaintiff. While plaintiffs may, and the mere existence of successive class action cases suggest they do, take multiple bites at the certification apple, costs should deter repeated attempts to certify the same class action that had earlier failed because of deficiencies inherent to the class rather than because of defects that could be corrected in a later class. If the deficiency were inherent to the class, it would be no surprise that a later class would fail on the same grounds. Plaintiffs, therefore, would lack an economic incentive to

218  Id.
file repetitive class allegations given that if repetitive classes were filed, those classes would repeatedly fail to be certified.

Because the tolling questions will almost always be answered in favor of tolling under this approach, the satisfaction approach is also the one least likely encourage plaintiffs to file prophylactic, overlapping class actions. Such protective filings would not be needed because as long as the earlier class actions were timely, the later ones would be too. Plaintiffs, consistent with *American Pipe*, would be encouraged to rely on the original class to protect their rights. If the original class action failed, plaintiffs could determine why certification failed and make an informed decision about whether to file a later class action based on the likelihood the later alleged class could meet Rule 23's criteria.

The satisfaction approach is also consistent with policies underlying statutes of limitations. Tolling is always limited to substantive claims covered by the original alleged class action; thus, claims that had been allowed to slumber until evidence had been lost, memories had faded, and witnesses had disappeared would not be tolled. Because the filing of the original class action would operate to provide defendants notice of the claims against them, as well as the number and general identities of the individuals likely to have those claims, allowing tolling under this approach would be consistent with the policy of promoting justice and preventing unfair surprise.

Comparing the various approaches to successive class action tolling and considering the underlying policies, along with *Bayer* and *Shady Grove*, the approach of allowing successive class action tolling whenever tolling would be allowed for later-filed individual claims is the most preferable. This approach prevents protracted litigation about tolling and instead allows courts and litigants to focus on the propriety of class certification. Thus, when class action tolling would save limitations for individual claims, rather than litigating the propriety of successive class action tolling in a later alleged class action, litigants and courts should focus on the likely viability of the later-filed class action.

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III. CROSS-JURISDICTIONAL TOLLING

Cross-jurisdictional tolling refers to when courts in one jurisdiction are asked to toll the applicable statutes of limitations relying on class actions filed in other jurisdictions. The analysis of cross-jurisdictional tolling can be incredibly complicated, implicating, among other things, choice of law and federalism issues. Cross-jurisdictional tolling issues may arise when parties file a class action in federal court, and plaintiffs in a state court action attempt to rely on the alleged federal class to toll limitations in the state court. In addition, cross-jurisdictional tolling issues may arise when plaintiffs in federal court attempt to rely on a class action filed in state court to toll limitations in the federal court action. Finally, such issues also arise when plaintiffs in one state attempt to rely on a class action filed in a different state to toll limitations in the other state court action.

Just as the federal rules allow class treatment in certain kinds of cases, the rules in all fifty states and the territories of Guam, Puerto Rico, and the Virgin Islands allow class action treatment, at least in certain kinds of cases. Indeed, most of the states’ rules are modeled after, or even mirror, Federal Rule 23. The class certification standards in various states, however, often differ from the federal standards. In addition, just as federal courts have long recognized the class action tolling rule for plaintiffs’ individual claims, most states have adopted American Pipe-like class action

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222 Some states do not allow tolling of individual’s limitations periods during the pendency of class action lawsuits. See, e.g., Becnel v. Deutsche Bank, 507 F. App’x 71, 73 (2d Cir. 2013) (stating Florida does not allow class action tolling, no matter where the class is filed, and citing FLA. STAT. § 95.051(2) (2012), which does not allow tolling except for reasons specified in the statute). If the state does not recognize tolling in the first place, this discussion does not include them.
224 See Laura J. Hines, Mirroring or Muscling: An Examination of State Class Action Appellate Rulemaking, 58 U. KAN. L. REV. 1027, 1028 (2010) (analyzing whether states had changed their class action appeals rules in light of the adoption of Rule 23(f) of the Federal Rules of Civil Procedure, “given that a majority of states have adopted civil procedural rules based on the model of the federal rules”).
225 See, e.g., Smith v. Bayer Corp., 131 S. Ct. 2368, 2377 (2011) (criticizing the Eighth Circuit’s reliance on the “near-identity” of the text of the West Virginia class action rule to Federal Rule 23 and reasoning that federal and state courts “can and do apply identically worded procedural provisions in widely varying ways”); see also Note, Multistate Plaintiff Class Actions: Jurisdiction and Certification, 92 HARV. L. REV. 718, 718-19 (1979) (pointing out that at that time, most states had already offered class procedures, and in the author’s opinion, “in terms of efficiency and convenience for the class,” the state procedures “may equal or excel those that would otherwise have been available in federal court” (footnotes omitted)).
tolling rules.\textsuperscript{227} But these tolling rules often vary from state to state.\textsuperscript{228} State courts, nevertheless, often rely on the policies underlying American Pipe when analyzing the cross-jurisdictional tolling issues, and the Supreme Court's class action tolling decisions have been characterized as "the foundational analysis" for cross-jurisdictional tolling.\textsuperscript{229}

For a number of reasons, cases involving cross-jurisdictional tolling are likely to arise with increasing frequency. For example, when Congress passed CAFA in 2005, it federalized most of the nation's largest class actions.\textsuperscript{230} Prior to CAFA, parties could file overlapping nationwide class ac-


\textsuperscript{228} See 2 RUBENSTEIN, supra note 38, § 9:66, at 608; see also Gerald D. Jowers, Jr., The Class Stops the Clock, TRIAL, Nov. 2005, at 18, 22.


tions in several state courts as well as in federal courts, and there was no way to consolidate duplicative state and federal cases.231 CAFA, however, loosened the requirement for federal court jurisdiction over nationwide class actions by adopting a minimal diversity provision that requires plaintiffs to bring most of these cases in federal court or allows defendants to remove them to federal court.232 Under this new provision, any alleged class action could be filed in or removed to federal court so long as any member of the class was a citizen of a different state than any defendant and other prerequisites are met.233 Courts, however, face uncertainty in interpreting the extent of CAFA’s jurisdictional provisions—or how to interpret those provisions—when a court declines to certify a class action filed or removed to federal court solely based on CAFA’s minimal diversity jurisdiction provisions.234

What is clear is that the increased federal jurisdiction over class actions provided by CAFA means more and more state-based class actions will be litigated in federal courts, where it often takes years to reach class certification decisions and where it has never been more difficult to certify

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231 Bayer, 131 S. Ct. at 2376; Klonof, supra note 22, at 743.
233 28 U.S.C. § 1332(d)(2). Federal courts have jurisdiction of class actions under CAFA if “minimal diversity” exists; the amount in controversy, which may be aggregated, exceeds $5,000,000; there are at least 100 members in the class; and none of the statutory exceptions to federal jurisdiction apply. Id. § 1332(d)(2)-(5). Minimal diversity exists when “any member of a class of plaintiffs is a citizen of a State different from any defendant.” Id. § 1332(d)(2)(A).
234 See, e.g., Michael P. Daly & Jessica D. Khan, We Got No Class and We Got No Principles: CAFA and the Denial of Class Certification, WESTLAW J. CLASS ACTION, Oct. 2010, at 3, 3 (“[G]iven that CAFA has been on the books for five years, one might... expect that the courts would have reached a consensus” on the question of what effect a denial of certification “would have on jurisdiction that was premised on the existence of a class,” but “[o]ne would be wrong.”); G. Shaun Richardson, Class Dismissed, Now What? Exploring the Exercise of CAFA Jurisdiction After the Denial of a Class Certification, 39 N.M. L. REV. 121, 125 (2009) (“[N]ot only is there a lack of consensus as to whether denial of certification should result in dismissal, but there also is a marked disagreement as to how courts should go about analyzing the question.”); Lonny Sheinkopf Hoffman, Burdens of Jurisdictional Proof, 59 ALA. L. REV. 409, 411 (2008) (analyzing whether CAFA shifted the jurisdictional burden of proof). Thus, while recently a growing number of circuits have taken the position that CAFA jurisdiction continues even after a class certification is denied, the answer is far from certain. See Puerto Rico Coll. of Dental Surgeons v. Triple S Mgmt. Inc., No. 09-1209 (JAF), 2013 WL 4806454, at *1 (D.P.R. Sept. 6, 2013) (observing that while the First Circuit had not ruled on the issue, the Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits had all held that jurisdiction under CAFA continues despite a denial of class certification).
a class action.\textsuperscript{235} This combination of facts means cross-jurisdictional tolling issues will likely only increase in frequency and importance.\textsuperscript{236}

Meanwhile, jurisprudence on cross-jurisdictional tolling is just emerging, and the state of the law is "not yet thoroughly developed."\textsuperscript{237} As the Montana Supreme Court in a case of first impression put it, "So called 'cross-jurisdictional tolling' has rarely been addressed, and the few state courts and secondary sources to have considered the doctrine have expressed widely divergent viewpoints."\textsuperscript{238} Recently, courts in both Delaware and Maryland also recognized that jurisdictions were divided on the issue.\textsuperscript{239} Thus far, however, the majority of states that have considered cross-jurisdictional tolling appear to have rejected it outright.\textsuperscript{240}

\textsuperscript{235} See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553, 2557 (2011) (rejecting class certification under the commonality requirement of Rule 23(a)(2) where proposed class members did not demonstrate that they had "suffered the same injury" and also holding "claims for back pay were improperly certified" under Rule 23(b)(2)); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864-65 (1999) (rejecting proposed limited-fund asbestos-settlement class action under Rule 23(b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622-25 (1997) (rejecting attempt to certify proposed class of present and future asbestos claimants under Rule 23(b)(3)); Klonoff, supra note 22, at 746 (analyzing, among other things, "key areas in which federal courts have made class actions more difficult for plaintiffs to bring"); Tidmarsh, Living in CAFA's World, supra note 22, at 692-93; Vairo, supra note 22, at 513 ("After Amchem, it has been rare for a personal injury mass tort case to be certified."); Stevens Boranian, Statute of Limitations Undoes Class Action That Has No Legs Anyway, DRUG & DEVICE L. BLOG (Mar. 7, 2014, 1:00 PM), http://druganddevicelaw.blogspot.com/2014/03/statute-of-limitations-undoes-class.html (opining that "over the last 15 years," class actions involving drugs and medical devices have become "all but uncertifiable outside of the settlement context").

\textsuperscript{236} Recently a growing number of circuits have taken the position that CAFA jurisdiction continues even after a class certification is denied. See Puerto Rico Coll. of Dental Surgeons, 2013 WL 4806454, at *1. The answer to the continuing jurisdiction question, however, is not certain. Some courts take the opposite view and dismiss or remand after a denial of class certification in cases in which federal jurisdiction depends on CAFA's minimal diversity jurisdiction provision. See, e.g., In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices, 715 F. Supp. 2d 1265, 1274, 1284 (S.D. Fla. 2010). In these cases, cross-jurisdictional tolling issues are even more likely to arise because the plaintiffs will be forced to pursue recovery in state courts when federal courts conclude they lack subject matter jurisdiction over the claims.


\textsuperscript{238} Stevens v. Novartis Pharm. Corp., 247 P.3d 244, 252 (Mont. 2010). Because cross-jurisdictional tolling potentially implicates the laws of different jurisdictions, it is not surprising that courts have reached different conclusions. And this Article does not mean to suggest that courts in all jurisdictions should adopt the same rules regarding cross-jurisdictional tolling.

\textsuperscript{239} Dow Chem. Corp. v. Blanco, 67 A.3d 392, 397-98 n.32 (Del. 2013) (collecting cases showing split); Adedje v. Westat, Inc., 75 A.3d 401, 412 (Md. Ct. Spec. App. 2012) ("[T]he supreme courts of states that recognize class action tolling have split on the issue of whether to adopt cross-jurisdictional tolling." (quoting Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 356 n.9 (Md. 2006))); accord Quinn, 118 So. 3d at 1020-21 (also recognizing a split).

\textsuperscript{240} See, e.g., Vincent v. Money Store, 915 F. Supp. 2d 553, 561 (S.D.N.Y. 2013) ("The plaintiffs cannot rely on American Pipe to toll the statutes of limitations for their state law claims. The plaintiffs must look to any state analogue to American Pipe tolling rather than American Pipe itself."); Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998); Rolwing v. Nestle Holdings, Inc., 437 S.W.3d
One troubling aspect of early cross-jurisdictional tolling cases is that courts have tended to employ bright-line language similar to the bright-line prohibitions articulated by certain circuit courts in the context of successive class action tolling. For example, the Supreme Court of Tennessee has declared broadly, "[W]e decline to adopt the doctrine of cross-jurisdictional tolling in Tennessee. . . . Tennessee 'simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state.'" Likewise, the Fourth Circuit, predicting what the Virginia Supreme Court would do, declared, "The Virginia Supreme Court would not adopt a cross-jurisdictional equitable tolling rule." While further study is needed to determine what approaches to cross-jurisdictional may be preferable, the evolution of the law on successive class action tolling, suggests that courts should, when possible, avoid articulating bright-line prohibitions as they begin to consider this complicated issue.

Avoiding such rules will increase courts' ability to allow class action tolling under appropriate circumstances and prohibit it in others.

CONCLUSION

Over time, class action practice has grown more complicated, both because of rapid expansions in the attempted uses of the class action device and because of responses to the more adventurous of those attempts by lawyers, courts, and legislatures. Whether filed in federal courts or in state courts, it often takes years for courts to reach class certification decisions. Because of that time lag, without the application of American Pipe tolling, plaintiffs would have to intervene in or file their own lawsuits to protect their claims in case a court were to deny certification of the alleged class action. Forty years ago, the Supreme Court recognized this dilemma when it adopted the American Pipe tolling rule. While federal courts have settled the application of the American Pipe tolling rule in the typical scenario in-


241 Maestas, 33 S.W.3d at 808 (quoting Wade v. Danek Medical, Inc., 182 F.3d 281, 287 (4th Cir. 1999)).

242 Wade, 182 F.3d at 287.

243 Of course, if the law in the applicable jurisdiction has rejected class action tolling, cross-jurisdictional tolling cannot apply either. See, e.g., Quinn, 118 So. 3d at 1020 ("[T]he plain language of La. C.C.P. art. 596 dictates that the suspension of prescription provided therein applies only to 'petition[s] brought on behalf of a class' in the state courts of Louisiana." (footnote omitted) (quoting La. CODE CIV. PROC. ANN. art. 596(A) (2010))).
volving a later-filed individual claim, the application of the rule is more complicated in other scenarios, and courts disagree as to its appropriate outer limits.\textsuperscript{244} These disagreements have caused considerable confusion and uncertainty, bringing about significant litigation-related inefficiencies for both plaintiffs and defendants and frustrating the goals of underlying \textit{American Pipe} tolling.

The successive subclass actions filed in the wake of the \textit{Wal-Mart Stores v. Dukes} decision dramatically illustrate the disparities that can result when courts apply conflicting approaches to answer the same question, especially when one of those approaches involves a bright-line prohibition. The district courts there were faced with rules that conflicted—some of which flatly rejected the possibility of tolling any successive class actions and others that required it. Given the unique facts presented by the changed definition of commonality that resulted in a late and unanticipated decertification of plaintiffs’ class action, the balance of law, equities, and efficiencies all weighed heavily in favor of tolling. But following precedent that existed at the time, three of the district courts refused to toll limitations for plaintiffs’ later class allegations, and only one allowed tolling. In part because the law on successive class actions is evolving, after appeals were taken, three of the successive subclass actions were considered timely, and just one was time-barred. Like typical cases involving circuit splits, the outcomes in each of the \textit{Wal-Mart} successive classes depended on the geographic location in which the parties filed the cases. But unlike most typical circuit split situations where different parties file different cases, the \textit{Wal-Mart} successive classes arose out of the same case. Thus, while typical circuit split situations involve distinguishing factors that help explain the different outcomes, in these cases arguably no such distinguishing factors existed.

Such results not only frustrate \textit{American Pipe} tolling’s goals of promoting efficiency and economy and avoiding unfair surprise, they also threaten to undermine the public’s confidence that courts will predictably, fairly, and transparently apply rules in other cases. In addition, in all cases, there exists an “overriding judicial goal of deciding cases correctly, on the basis of their legal and factual merits.”\textsuperscript{245} But when courts reach mutually exclusive answers to the same question arising from the same litigation, the answers cannot all have been decided correctly.

For the reasons discussed in this Article, in the context of successive class action tolling, courts should follow the satisfaction approach adopted by the Sixth and Seventh Circuits and toll limitations when the claimants’ substantive claims are covered by the earlier alleged class actions. Each of the approaches to successive class action litigation has its costs and benefits. The application of first approach, which never allows tolling due to a

\textsuperscript{244} Stevens v. Novartis Pharm. Corp., 247 P.3d 244, 252 (Mont. 2010).

\textsuperscript{245} TCI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 695 (9th Cir. 2001).
bright-line prohibition is straightforward in most cases. As illustrated by the post-Wal-Mart subclass actions, however, this approach lacks flexibility to respond in situations where successive class action tolling would be appropriate. And in those cases, the bright-line prohibition approach is also subject to criticism under Shady Grove and Bayer. Thus, the bright-line prohibition approach is the least supportable of the three.

The limited exceptions approach is better as it allows courts to consider fairness and apply American Pipe tolling only if doing so would further the policies underlying such tolling. This approach also discourages plaintiffs from attempting to abuse the benefits of American Pipe tolling while protecting plaintiffs who properly relied on a class action to protect their interests. In light of the Supreme Court’s decisions in Bayer and Shady Grove, and the policy considerations underlying American Pipe tolling, however, courts should adopt the satisfaction approach to successive class action tolling. Under this approach, as long as the original class action is timely filed, the applicable statutes of limitations are considered met. The analysis, therefore, would be consistent with Bayer in that it would not reject tolling based on an earlier denial of class certification. It would also be consistent with Shady Grove because it focuses on the propriety of the later alleged class under Rule 23, which Shady Grove suggests provides the definitive answer to whether cases can proceed as class actions in federal courts. In addition, because successive class action tolling will nearly always be allowed, the satisfaction approach is also the one least likely encourage plaintiffs to file protective class actions. This approach also prevents protracted litigation about tolling and instead allows courts and litigants to focus on the propriety of class certification.

Moving to the problem of cross-jurisdictional tolling, courts will likely face this issue with increasing regularity. CAFA greatly increased federal jurisdiction over class actions, meaning parties will often be required to litigate state-based class actions in federal courts. Because courts often take years to reach certification decisions, cross-jurisdictional tolling issues will likely become more prevalent. As they do, courts that are faced with cross-jurisdictional tolling issues would be well advised to avoid articulating unnecessarily broad prohibitions while the law in this area develops.