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Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland

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NOTES

Limitation Tolling When Class Status Denied: *Chardon v. Fumero Soto* and Alice in Wonderland

In 1974 the Supreme Court, in *American Pipe & Construction Co. v. Utah*,[1] held that the filing of a class action under Federal Rule of Civil Procedure 23 tolled the statute of limitations for claims based upon violations of the Clayton Act.[2] The Court further held that the statute would remain tolled during the pendency of the class action, and, upon the trial court's denial of the class status of the action, unnamed class members would be permitted to intervene as plaintiffs during the remainder of the limitations period unexpired at the time the class action was filed. Courts initially viewed *American Pipe* as holding that the filing of a Rule 23 class action suspended the running of the statute of limitations. But nine years later in *Chardon v. Fumero Soto*,[3] originally a Rule 23 class action alleging violations of 42 U.S.C. § 1983, the Supreme Court limited the *American Pipe* rule. According to the *Chardon* Court, *American Pipe* only held that the filing of the class action tolled the statute of limitations and no more.[4] The broadly applied uniform rule of *American Pipe* was restricted to its tolling application. For the *effect* of the tolling, whether the limitations period is suspended only, extended, or renewed,[5] courts must often look to related or analogous federal or state statutes.[6]

To appreciate the effect of *Chardon*, a review of limitations concepts and class action procedures will be helpful. Part I of this note discusses the policy concerns common to statutes of limitation and their tolling rules. Part I also discusses various tolling effects available to carry out those policies. Further, because this note focuses on the relationship between statutes of limitation and the class action device, Part II briefly examines the procedural aspects of class actions under Rule 23 of the Federal Rules of Civil Procedure. Part III focuses on the Court's reasoning in *American Pipe & Construction Co. v. Utah* and *Chardon v. Fumero Soto* and the latter's reliance on

1 414 U.S. 538 (1974).

2 15 U.S.C. § 12 (1982).

3 103 S. Ct. 2611 (1983).

4 The court of appeals concluded that the statute of limitations was tolled as to unnamed class members by the filing of the class action in accordance with *American Pipe* and this ruling was not contested on appeal. *Id.* at 2615. As to the tolling effect, however, the Court found that *American Pipe* did not supply the answer. *Id.* at 2618.

5 *See* text accompanying notes 23-30 *infra*.

6 *See* text accompanying notes 103-15 *infra*.

New York Board of Regents v. Tomanio,[7] a 42 U.S.C. § 1983 case in which the Supreme Court instructed federal courts to look to state statutes when that federal law provides no appropriate rule. Finally, Part IV discusses the impact of *Chardon*, particularly in light of Justice Rehnquist's dissent. This note concludes that the Court improperly narrowed the scope of *American Pipe's* interpretation of Rule 23 and expanded the potential for confusion in class action litigation.

I. Statutes of Limitation: Policy Considerations and Tolling Effects

A. *Statutes of Limitation*

Statutes of limitation,[8] by placing time constraints on the initiation of an action, seek to "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[9] Furthermore, statutes of limitation promote stability for potential defendants because they codify society's belief that individuals should be afforded repose—that is, they should not be forced to live indefinitely with the threat of a lawsuit.[10] These limitations not only permit an individual defendant to plan his daily affairs but, since threats of lawsuits may have an economic impact on a wide range of persons apart from the potential defendant, such limitations help alleviate the disruptive effects of uncertainty in commercial activities.[11]

In addition, requiring claimants to file timely lawsuits and dismissing untimely suits serves a number of administrative goals. For example, limitation statutes help conserve judicial resources by alleviating burdens on overcrowded court dockets,[12] and allow courts

7 446 U.S. 478 (1980).

8 Statutes of limitation define the "limited period of time . . . for the bringing of an action and, if the action is not commenced in time, the lapse of time will constitute a defense to the suit or will deprive the plaintiff of his right." W. FERGUSON, STATUTES OF LIMITATION SAVING STATUTES 1 (1980).

9 Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944). Even though a litigant may have a valid claim, a statute of limitation will bar that claim because the law deems it unjust not to put the adversary on timely notice that he will be called on to defend against the claim. *Id.* at 348-49. Thus, in time, "the right to be free of stale claims . . . comes to prevail over the right to prosecute them." *Id.*

10 Adams v. Woods, 6 U.S. (2 Cranch) 336, 341 (1805); Note, *Limitation Borrowing in Federal Courts*, 77 MICH. L. REV. 1127, 1128 (1979).

11 *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950).

12 Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1016 (1980).

to concentrate on relatively current disputes[13] in which evidence is fresh and witnesses are available. Statutes of limitation also reflect society's view that some actions are worthier than others. By affording longer or shorter limitation periods, statutes of limitation give effect to "social attitudes . . . that express favor or disfavor toward certain classes of claims or parties."[14] Different statutory periods and tolling rules therefore govern torts, frauds, contracts, real property actions, minors, incompetents, members of the armed forces, and other categories of actions and parties.[15]

B. *Tolling Rules*

Tolling rules, conversely, reflect the courts' and legislatures' recognition that under certain circumstances, a plaintiff's right to sue may predominate over the risk that a stale claim will be prosecuted after a defendant reasonably believes his liability has ceased.[16] For example, circumstances beyond a plaintiff's control may prevent him from filing suit during the limitation period.[17] In such a case, a plaintiff's interest in a reasonable opportunity to vindicate his rights outweighs the policy of repose protecting defendants.[18] This policy choice instills public confidence in the judicial system and bolsters its credibility by permitting an injured party to pursue his legal remedies.[19] Tolling may appropriately apply where the plaintiff is under a disability, where the defendant's acts justify the tolling, or where the policy underlying the statute of limitations has been met.[20]

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13 Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 36 (1962).

14 Leflar, *The New Conflicts—Limitations Act*, 35 MERCER L. REV. 461, 471 (1984).

15 *See* Leflar, *supra* note 14, at 471; Special Project, *supra* note 12, at 1084-85.

16 *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Special Project, *supra* note 12, at 1084.

17 Such circumstances may include the incompetency or incarceration of the plaintiff, his inability to get personal jurisdiction over the defendant, or concealment of the fraudulent conduct attributable to the plaintiff's injury. *See* Duncan v. Nelson, 466 F.2d 939, 941-42 (7th Cir. 1972) (applying Illinois tolling period during incarceration to § 1983 claim), *cert. denied*, 409 U.S. 894 (1972); Jolivet v. Elkins, 386 F. Supp. 261, 272 (D. Ind. 1974) (statute of limitation tolled during defendant's absence from forum state); McDonald v. Boslow, 363 F. Supp. 493, 498 (D. Md. 1973) (applying state law tolling period during parties' incompetence to § 1983 claim); Special Project, *supra* note 12, at 1184.

18 *Burnett*, 380 U.S. at 428 ("[the] policy of repose, designed to protect defendants, is frequently outweighed . . . where the interests of justice require vindication of plaintiff's rights.").

19 Special Project, *supra* note 12, at 1085.

20 *See generally Developments in the Law*, *supra* note 11, at 1220-32. Three broad areas exist in which tolling may apply. If the plaintiff is under a disability—for example, a minor, incompetent or prisoner—his disability should not prevent him from submitting his claim for adjudication. Second, acts on the part of the defendant may justify tolling of the statute of limitation. For example, the defendant may depart from the jurisdiction and be beyond the reach of process. In such case it is unfair to deny the plaintiff the right to prosecute his

Generally, once the statute has been tolled, the commencement of the tolling and its duration are measured by the term of the plaintiff's inability to initiate suit.[21] Thus, tolling should cease when a plaintiff knows or should know of the fraud or tort committed against him, when the plaintiff attains majority or his disability is removed, or the defendant returns to the jurisdiction.

C. *Available Tolling Effects*

Once the tolling has ceased, a question still remains as to the effect of the tolling, that is, the "method of calculating the amount of time available to file suit after tolling has ended."[22] Three general tolling effects are possible: 1) suspension, 2) extension, and 3) renewal or revival. Under suspension,[23] the plaintiff must file suit within the amount of time left in the limitation period on the day tolling took place.[24] For example, if a defendant commits a tort which normally has a two year limitations period and the defendant a year later absconds to Brazil for three years, the plaintiff still has one year to file suit if the defendant returns to the jurisdiction. The suspension rule promotes stability and certainty because all parties know when an action must be filed and when repose may be enjoyed.

Second, the limitation period may be extended. The extension rule establishes fixed periods during which the plaintiff may file suit without regard to the length of the original limitation period or the

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action since the plaintiff has not "slept on his rights" but has been thwarted in pursuing his claim by an act of the defendant. This same policy governs when a defendant has concealed the plaintiff's harm or has acknowledged the underlying debt and led the plaintiff to believe that suit was unnecessary. And finally, tolling may be required when the purposes underlying the statute of limitation have been met, so that the plaintiff should not thereafter be barred from pursuing his claim. For example, if a defendant had been adequately notified of the extent and nature of the plaintiff's claim, usually through a previous lawsuit, he should be estopped from asserting the defense of the statute of limitations out of fairness to the plaintiff.

21 *Id.*

22 Chardon v. Fumero Soto, 103 S. Ct. 2611, 2613 n.1 (1983).

23 Suspension generally occurs because of one of the following: fraudulent concealment, estoppel, waiver, absence of the defendant from the jurisdiction, disability of the plaintiff including infancy, insanity, imprisonment, or death of either party. Note, *supra* note 10, at 1144 n.111.

24 If only a short time remained on the limitation period when tolling occurred, a hardship may be imposed on the plaintiff. For instance, in *American Pipe*, only 11 days remained on the limitation period. In order to preserve his right of action, the unnamed class member must have learned of denial of class certification, evaluated the prospect of recovery, and taken the appropriate action. With little time for evaluation, the plaintiff is compelled to move to intervene, the result being the multiplicity of intervention motions which the Supreme Court condemned in *American Pipe*. Note, *Class Actions and Statutes of Limitations*, 48 U. CHI. L. REV. 106, 118 (1981). Suspension may adversely affect defendants as well when, as in *American Pipe*, suspension continues for many years. *Id.* at 118-19.

amount of time left when the tolling began.[25] "Savings statutes" are a common device used to implement a state's decision to afford this additional period of time.[26] The Kentucky savings statute[27] illustrates the operation of the extension rule. Under that statute, if the plaintiff's action is timely filed but dismissed because the court lacks jurisdiction, the plaintiff may commence a new action in the proper court within ninety days from the dismissal. Because the defendant has been afforded notice during the original statutory period, the underlying policies of the statute of limitation are deemed satisfied. Thus, policies of fairness to the plaintiff, preservation of judicial system credibility, and avoidance of rigid rules prevail.[28]

Third, tolling may renew or revive the limitation period, giving the plaintiff the benefit of an entirely fresh time period.[29] Typically, a defendant's affirmative act during or even after the running of the limitation period is necessary to trigger renewal.[30]

II. Class Actions

A plaintiff class action is a suit brought by one or more members of a group or class on behalf of all members of that group or class who have suffered injury from the alleged wrong of the defendant.[31] The purpose of the class suit is to adjudicate common disputes in one action where it is not feasible to join all members of the class as named parties.[32]

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25 *See* W. FERGUSON, *supra* note 8, at 55-56.

26 Savings statutes generally provide that "when an action is timely brought and dismissed other than on the merits, a new action may be commenced within a designated period following the dismissal." *Id.* In Gaines v. City of New York, 215 N.Y. 533, 109 N.E. 594 (1915), Judge Cardozo emphasized that in interpreting savings statutes timely notice to the defendant as well as diligence of the plaintiff must be considered:

> The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.

Id. at 539, 109 N.E. at 596. Other courts have also looked at both timely notice to the defendant and the diligence of the plaintiff. *See, e.g.*, Lamson v. Hutchings, 118 F. 321 (7th Cir. 1902).

27 KY. REV. STAT. ANN. § 413.270 (Baldwin 1981).

28 *See generally* W. FERGUSON, *supra* note 8.

29 *See* Special Project, *supra* note 12, at 1085 n.342.

30 *Id.*

31 *See* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 561, at 254 (rev. ed. Wright 1961); FED. R. CIV. P. 23(c)(1).

32 *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting) (commenting on the value of the class action litigation). In addition, class actions are a recognized supplement to law enforcement, the plaintiff serving as a private attorney general. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (class actions provide a corporate therapeutic which is essential to effective law enforcement). Critics of the procedure, how-

Federal Rule of Civil Procedure 23 requires that the court determine "as soon as practicable after the commencement of an action" whether it may be maintained as a class action.[33] The class certification process, however, may take many months or even years;[34] accordingly, the limitations period applicable to the cause of action may expire during the certification process.

In certifying a class under Rule 23, the court must determine that the prerequisites of 23(a) and the elements of 23(b) have been fulfilled.[35] Also, 23(c) requires that unnamed class members in Rule 23(b)(3) class actions be afforded the opportunity to "opt out" of the class.[36] The judgment rendered, whether favorable or not, will be binding on those class members who choose not to be excluded.[37]

If the court determines that the action should not proceed as a class action, an individual class member may move to intervene under Rule 24.[38] Or, the claimant may file an individual action

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ever, have labelled it a form of legalized blackmail, and it has been dubbed a "Frankenstein Monster." Chief Judge Lumbard of the Second Circuit first used the term "Frankenstein Monster" in Eisen v. Carlisle & Jacquelin, 491 F.2d 555, 572 (2d Cir. 1968) (Lumbard, C.J., dissenting) to describe the case but it has been applied generally to class actions. *See, e.g.*, San Antonio Tel. Co. v. American Tel. & Tel. Co., 68 F.R.D. 435, 436 (W.D. Tex. 1975); *see also* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976).

33 FED. R. CIV. P. 23(c)(1).

34 *See* Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1141-43 (1974), *cited in* Note, *Class Actions and Statutes of Limitations*, 48 U. CHI. L. REV. 106 (1981). *See also* Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977) (class suit pending for two years before denial of class certification), *cert. denied*, 434 U.S. 1035 (1978).

35 Class actions in federal courts are permitted under Rule 23(a) when the following conditions are met: (1) the class is so numerous that joinder of all members is impractical; (2) there are law or fact questions common to the class; (3) the claims or defenses of the representative parties are typical of those of the class; and (4) the representative parties will protect the interests of the class. Rule 23(b) establishes additional requirements for determination by the court whether the class action is appropriate under varying circumstances. FED. R. CIV. P. 23.

36 Rule 23(c) provides in pertinent part as follows:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion.

FED. R. CIV. P. 23(c)(2).

37 The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. FED. R. CIV. P. 23(c)(3).

38 Rule 24(a) allows intervention as of right when a federal statute confers an unconditional right to intervene or when the outcome may impair or impede the applicant's ability

when intervention has been denied, when the class action forum is inconvenient, or when he wishes to control his own litigation.[39]

The present rule extends the res judicata effect of a class action judgment, whether favorable or unfavorable, to all identifiable class members.[40] Equity requires, therefore, that all class members be protected by the tolling of the statute of limitations.[41] Filing the class action tolls the limitations period as to all asserted members of the class.[42] The effect of that tolling for class members who choose to be excluded from the class action or for those eliminated upon denial of class certification, however, raises other questions.

III. The Uniform Rule of Suspension

The issue presented upon denial of certification[43] is whether

to protect his interest in the property or transaction. Rule 24(b) provides permissive intervention in two situations at the discretion of the district court, namely, when a federal statute confers a conditional right to intervene or when the applicant's claim or defense and the main action have a question of law or fact in common. Intervention may be denied when it will "unduly delay or prejudice the adjudication of the rights of the original parties." FED. R. CIV. P. 24(b).

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

40 Prior to the extensive amendment of Rule 23 in 1966 there were no procedural means for determining before final judgment which of the putative members of the class would be bound by the judgment. *American Pipe*, 414 U.S. at 546. *See also* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.10[1], at 23-2603 (2d ed. 1985). When a class action had been filed, an unnamed member of the class could wait and observe the development of the case or even await the judgment. *Id.* If the trial or the judgment indicated or reached an adverse result, the class member could choose not to intervene or join as a party and thereby not be bound by the final judgment. This potential for abuse attracted considerable criticism. Critics maintained that it was unfair to allow members of a class to benefit from a favorable judgment without being bound by an unfavorable one. *American Pipe*, 414 U.S. at 547; BARRON & HOLTZOFF, *supra* note 31, § 568. *Cf.* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir.), *cert. denied*, 371 U.S. 810 (1962). These class actions were deemed mere "invitations to joinder" allowing "one-way intervention." 3B MOORE & KENNEDY, *supra*, ¶ 23.10[1], at 23-2603. The courts reached varying results in cases where class members, after expiration of the limitations periods, sought intervention or joinder in class actions commenced before the statute had run. A majority of the federal courts addressing the issue concluded that intervention was proper because of the representative nature of the suit. *See American Pipe*, 414 U.S. at 549. Other courts stressed the individual nature of the joinder or intervention and required each individual to satisfy the limitation period. *Id.* at 549-50. The Supreme Court decisions never resolved this confusion. *Id.* at 550. Rule 23, however, was extensively rewritten to achieve that purpose. *See* FED. R. CIV. P. 23 advisory commitee note.

41 The statute of limitations must not have run on the absentee member's claim prior to filing of the class action. Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 VILL. L. REV. 370, 373 (1968). Class members whose claims are barred when the class action was instituted will be excluded from the class. Coppotelli v. Howlett, 76 F.R.D. 20 (E.D. Ill. 1977). Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287 (D. Del. 1975).

42 Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353 (1983); *American Pipe*, 414 U.S. at 553.

43 Although the action is "stripped of its character as a class action" on denial of certification, the case is not thereafter treated as if there never was a class action. United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 (1977).

the limitation period governing the unnamed members' claims ought to be suspended only, extended, or entirely renewed.[44] From 1974 when the Supreme Court decided *American Pipe & Construction Co. v. Utah* until the Court's 1983 decision, *Chardon v. Fumero Soto*, the courts applied *American Pipe's* suspension only rule.[45] Under that rule, unnamed members were allowed to seek intervention or file individual actions for a period not to exceed the time remaining on the original limitation period on the day the class action was filed.

A. American Pipe & Construction Co. v. Utah

In *American Pipe*[46] the Supreme Court held that the original filing of a class action suspends the statute of limitations on behalf of all asserted members of the class who make timely motions to intervene after denial of class certification.[47] Because *American Pipe* was the first definitive ruling concerning application of the new Rule 23[48] and the subsequent tolling effect on the statute of limitations as to unnamed class members, a close examination of the facts and holding is warranted.

In *American Pipe* the State of Utah, on behalf of itself and various state and local agencies, brought a class action[49] against American Pipe for antitrust violations under the Clayton Act.[50] The court denied class certification for lack of numerosity.[51] Eight days later,

44 *See* notes 22-30 *supra* and accompanying text.

45 Courts have applied the *American Pipe* suspension rule to a wide variety of federal causes of action, regardless of whether the federal statute supplied the limitations period or whether it was borrowed from state statutes. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (Title VII action); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (Title VII action); Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984) (§ 1983 action); Wood v. Combustion Eng'g, 643 F.2d 339 (5th Cir. 1981) (securities act case); Appleton Elec. Co. v. Graves Truck Line, Inc., 635 F.2d 603, (7th Cir. 1980) (ICC rate refund enforcement), *cert. denied*, 451 U.S. 976 (1981); Stull v. Bayard, 561 F.2d 429 (2d Cir. 1977) (securities acts case), *cert. denied*, 434 U.S. 1035 (1978); Arneil v. Ramsey, 550 F.2d 724, (2d Cir. 1977) (securities acts case); Haas v. Pittsburg Nat'l Bank, 526 F.2d 1003 (3d Cir. 1975) (state and federal banking statutes).

46 414 U.S. 538 (1974).

47 *Id.* at 552-53.

48 For discussion of case law prior to the 1966 amendment of Rule 23, see Comment, *supra* note 41, at 375-80.

49 The state of Utah purported to represent "public bodies and agencies of the state and local government in the state of Washington who are end users of pipe acquired from the defendants" as well as states in the "Western Area" which had not previously filed suit. *American Pipe*, 414 U.S. at 541.

50 The complaint alleged violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1982), claiming that petitioners had conspired to rig prices in the sale of concrete and steel pipe. 414 U.S. at 541.

51 Although the purported class exceeded 800 members, the district judge, based on previous experience, concluded that those entities which would be able to show injury would be far lower and that joinder was not impracticable, so that the requirements of Rule 23(a)(1) had not been met. The district judge found that Utah's suit, but for lack of numer-

over sixty purported class members sought to intervene; the district court denied intervention on the ground that the limitation period under section 4B of the Clayton Act[52] had not been tolled by Utah's filing of the class action.[53] The basic limitations period under the Clayton Act is four years except when the United States commences any proceeding to restrain antitrust violations. During the pendency of the government suit and for one year thereafter the statute of limitations is suspended as to related private actions.[54] Because the class action was filed eleven days before the one year anniversary of the consent judgment in the government suit, intervention would have been timely if the Clayton Act's one year limitations period[55] had been suspended for the interval between filing of the class action and the order denying certification.[56]

The Supreme Court held that the commencement of the class action suspended the applicable statute of limitations for all asserted class members who would have been parties had the class been certified. Furthermore, the limitations period continued to be suspended during the class certification process.[57]

American Pipe is an equitable interpretation of Rule 23.[58] *Ameri-*

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osity, was otherwise certifiable as a class action, all the other prerequisites for a class action having been fulfilled. 414 U.S. at 543.

52 15 U.S.C. § 15(b) (1982). Section 4B provides in part: "Any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued."

53 414 U.S. at 544.

54 15 U.S.C. § 16(i) (1982).

55 When the government institutes a civil or criminal proceeding, the limitations period is extended one year after the government proceedings are terminated. It was this one year limitation that was at issue in *American Pipe*. The wrongful acts occurred prior to June 23, 1964, when the government proceeding was commenced. The government litigation terminated May 24, 1968, so the plaintiffs had one year thereafter to file suit. 414 U.S. at 540.

56 The original class action was filed 11 days short of a year after the conclusion of government litigation, namely, on May 13, 1969. On December 4, 1969, the order denying class status was entered. Eight days later, the respondents filed motions to intervene as plaintiffs under Rules 24(a)(2) and 24(b)(2). Three days remained on the one year limitation period if suspension applied.

57 414 U.S. at 551-52.

58 Although the majority in *Chardon* read *American Pipe* as an interpretation of the Clayton Act, the Court in *American Pipe* repeatedly stressed that its decision was an interpretation of Rule 23: "This case involves an aspect of the relationship between a statute of limitation and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U.S. at 540. Part I of the opinion discussed the history of Rule 23. *Id.* at 545-52. The Court found the suspension rule to be the rule "most consistent with federal class action procedure." *Id.* at 554-55. The Court believed that "this interpretation of the Rule is . . . necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve." *Id.* at 555-56. Finally, discussing the precise effect of the filing of the class action on the limitations period, the Court noted that under the Clayton Act, commencement of a government suit suspended the statute of limitations. It found that "[t]he same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitation period only during

can Pipe[59] held "that the commencement of a class action *suspends* the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[60] The Court found that "[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of [that] procedure."[61] Arguably, *American Pipe* established a federal rule applicable to all Rule 23 class actions involving federal claims: as to identical claims, the running of the limitations statute is suspended during the pendency of the class action.

B. Chardon v. Fumero Soto

In *Chardon*,[62] the plaintiffs held nontenured supervisory positions in the Puerto Rico public school system. Beginning in June of 1977, the claimants were demoted because of their political affiliations.[63] Just short of a year after the wrongful demotions, a Rule 23 class action was filed on their behalf alleging a violation of 42 U.S.C. § 1983. Section 1983 contains no express statute of limitation but is subject to 42 U.S.C. § 1988 which reads in part:

> [The federal civil rights statutes] shall be exercised and enforced in conformity with the laws of the United States *so far as such laws are suitable to carry the same into effect*, but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held . . . shall be extended to and govern the said courts in the trial and dispo-

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the pendency of the motion to strip the suit of its class action character." *Id.* at 561. *See also* Chardon v. Fumero Soto, 103 S. Ct. 2611, 2620 (1983) (Rehnquist, J., dissenting):

> Despite the silence of the Clayton Act, the Court concluded that § 4B had been tolled. Since the Clayton Act plainly did not address the question before it, and since the Court made no reference at all to state law, the source of the tolling rule applied by the Court was *necessarily* Rule 23.

(emphasis in original). *See also* Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982), *vacated and remanded* in light of *Chardon*, 103 S. Ct. 3529 (1983) ("Although *American Pipe* concerned a cause of action under the federal antitrust laws, this was in our view an accidental feature of the case; the rule of tolling adopted there was an equitable incident of federal procedure.")

59 The Supreme Court's language left no doubt that it was establishing a rule applicable to Rule 23 class actions generally: "We are convinced that the *rule* most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations." *American Pipe*, 414 U.S. at 554 (emphasis added).

60 *Id.*

61 *Id.* at 553.

62 103 S. Ct. 2611 (1983).

63 *Id.* at 2613.

sition of the cause . . . .[64]

The United States Court of Appeals for the First Circuit determined that section 1988 required use of Puerto Rico law for the limitation period, the tolling rule, and the effect of tolling. Accordingly, the court of appeals applied the one year limitation period specified in the Puerto Rico Code[65] and the Puerto Rico tolling rule requiring that the limitations period is tolled when an action is instituted in court.[66] Finally, the court of appeals examined Puerto Rico law to determine the effect of tolling.[67] Under Puerto Rico case law, if an action is discontinued, the limitation period begins to run anew from discontinuance.[68] Thus, if an action is commenced one day before the limitation period expires and later discontinued without prejudice, the plaintiff has the full limitation period in which to refile the case.

In *Chardon* the original class action was commenced June 19, 1978.[69] The trial court denied class certification[70] sixty-three days after the filing. Thirty-seven plaintiffs then filed their individual suits under section 1983 on January 10, 1979, or later. All individual suits were filed more than one year plus sixty-three days after the actions accrued. Subtracting the sixty-three days extension for the decertification process, every suit was filed more than one year after the violation and too late if the *American Pipe* suspension rule applied.[71] The court of appeals recognized that in *American Pipe* the Supreme Court had interpreted Rule 23 to permit tolling of a federal statute of limitation upon filing of a class action.[72] It also found that the Puerto Rico Supreme Court would hold that the statute of limitation was so tolled.[73] The court of appeals, however, did

64 42 U.S.C. § 1988 (1982) (emphasis added). The Respondents argued that "laws of the United States" refers to federal statutory law, so that if "*American Pipe's* tolling rule of suspension . . . is a *judicial* tolling rule" Puerto Rico law governs since a judicial tolling rule is not a "law of the United States." Brief of Respondents at 5, Chardon v. Fumero Soto, 103 S. Ct. 2611 (1983).

65 *See* Chardon v. Fumero Soto, 103 S. Ct. 2611, 2615 (1983). The parties agreed that P.R. LAWS ANN. tit. 31, § 5298(2) (1968) supplied the limitations period. *Id.*

66 P.R. LAWS ANN. tit. 31, § 5303 (1968) provides: "Prescription of actions is interrupted by their institution before the courts . . . ."

67 *Chardon*, 103 S. Ct. at 2615.

68 When tolling ceases the plaintiff benefits from the full length of the limitations period. *Chardon*, 103 S. Ct. at 2615 (citing Feliciano v. Puerto Rico Aqueduct & Sewer Auth., 93 P.R. 638, 644 (1966); Heirs of Gorbea v. Portilla, 46 P.R. 279, 284 (1934)). These cases did not involve class actions. 103 S. Ct. at 2615.

69 *Chardon*, 103 S. Ct. at 2614.

70 *Id.* Certification was denied because membership of the class was not so numerous that joinder was impracticable, as required by Rule 23(a)(1). *Id.*

71 *Id.*

72 *Id.* at 2615.

73 The court of appeals noted that although the Supreme Court of Puerto Rico had not ruled on the question whether a class action would toll the statute for unnamed plaintiffs'

not apply the *American Pipe* suspension rule.[74] Rather, it borrowed from Puerto Rico case law and found that the full one year limitation period commenced anew upon denial of certification.[75] According to the court, the individual plaintiffs had one year from August 21, 1978 to file their individual complaints, although at least in one case the plaintiff's cause of action had accrued 364 days before the filing of the class action and actually 469 days or more before the filing of the individual complaint in January of 1979.[76]

The defendants in *Chardon* argued that the court of appeals' application of the Puerto Rico renewal rule violated the Court's decision in *American Pipe*. According to the defendants, *American Pipe* established a federal rule requiring suspension whenever a federal class action is discontinued.[77] Justice Stevens, however, writing for the majority, found that such an argument read "more into [the] decision in *American Pipe* than the Court actually decided" and failed "to give full effect to *Tomanio*."[78] The Supreme Court affirmed the court of appeals' decision, holding that under section 1988 courts are required to apply state law, including state law on the effect of tolling, in the absence of applicable federal law.[79]

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identical claims, Puerto Rico had modeled its class action procedures after the federal practice. *Id.*

74 The court of appeals departed from the *American Pipe* rule and found that Puerto Rico law applied as to the length of the statute of limitations, whether the period would be tolled during the class action suit, *and as to the effect of the tolling*. *Id.*

75 *Id.* at 2614-15. Under the Puerto Rico statute, *see* note 98 *infra*, the filing of an action in court tolls the statute as to that party's identical causes of action. *See id.* at 2615.

76 Brief of Petitioners at 10-11, Chardon v. Fumero Soto, 103 S. Ct. 2611 (1983).

77 103 S. Ct. at 2615-16. Petitioners argued that "in *American Pipe* this Court established a uniform federal procedural rule applicable to class actions brought in the federal courts, and it has consistently been so interpreted and applied." Brief of Petitioners at 13, Chardon v. Fumero Soto, 103 S. Ct. 2611 (1983).

78 103 S. Ct. at 2616. Under New York Bd. of Regents v. Tomanio, 446 U.S. 478 (1980), federal courts are to apply state statutes of limitation as well as state tolling rules. *Id. See* text accompanying notes 80-86.

79 The Court recognized that its decision would cause problems but contended that modifying the law is a legislative function, noting:

> Until Congress enacts a federal statute of limitations to govern § 1983 litigation, comparable to the statute it ultimately enacted to solve the analogous problems presented by borrowing state law in federal antitrust litigation, federal courts must continue the practice of "limitations borrowing" outlined in *Tomanio*.

103 S. Ct. at 2619. *But see* Wilson v. Garcia, No. 83-2146 (Supreme Court Apr. 17, 1985) (available Apr. 26, 1985, WESTLAW, Genfed library, Supreme Court database) (characterizing all § 1983 actions as personal injury actions as a matter of federal law). In this § 1983 action the Court construed § 1988 as "a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims" rather than to apply the statute of limitations from the most closely analogous state statute on a case by case basis. Justice O'Connor, dissenting, pointed out that the Court, in legislating uniformity, despite Congress' recent rejection of amending legislation, has not only "coopt[ed] federal legislation," but also "effectively foreclose[d] legislative creativity on the part of the States." *Wilson* did not involve the question of the *effect* of tolling on the statute of limitations merely the question of the *length* of the limitations period.

C. Board of Regents v. Tomanio

In 1980, the Court had considered whether an earlier state court filing tolled the statute of limitations for a subsequent section 1983 federal action. In *Board of Regents v. Tomanio*,[80] Tomanio had originally sued the Board of Regents of the University of the State of New York in a state court proceeding alleging the arbitrary and capricious refusal of her application for a chiropractic license.[81] Three years after the license refusal, the New York Court of Appeals denied her appeal from the adverse order on her suit.[82] Seven months later, three years and seven months after the Board's refusal, she filed suit in federal district court under 42 U.S.C. § 1983, alleging that the Board's refusal violated the due process clause under the fourteenth amendment.[83] Although Tomanio prevailed in the district court and the court of appeals, the Supreme Court reversed. Justice Rehnquist, writing for the majority, found that Tomanio's federal action was barred under the New York three year statute of limitations.[84] Codified New York tolling rules did not extend the time for filing an action while the claimant pursued another related but independent action. The Court therefore found that Tomanio's state court action had not tolled the statute for her federal action.[85]

The Court in *Tomanio* necessarily referred to state law for the limitations period and tolling rule. Neither section 1988 nor any comparable civil rights statute contains a limitations period or tolling rule. Thus under the mandate of section 1988, the Court applied New York's limitations and tolling rules.[86]

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80 446 U.S. 478 (1980).

81 After failing the special examinations for a New York chiropractic license on seven separate occasions between 1964 and 1971, she applied to the New York Board of Regents for a waiver of the examination requirement. The Board thereafter notified her of its decision to deny her application. Although the Board did not grant her an evidentiary hearing or give a statement of its reasons she did not raise the constitutional challenge in the state court proceeding. *Id.*

82 *Id.*

83 *Id.* at 482.

84 *Id.* at 492.

85 The Court stated:

> Here New York has expressed by statute its disfavor of tolling its statute of limitations for one action while an independent action is being pursued. Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983. . . . But the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature."

Id.

86 446 U.S. at 486. The New York statute did not contain a provision tolling the statute of limitation during the pendency of a related, but independent, case.

D. *Comparison of the Cases*

The petitioners in *Chardon* contended that the respondents' claims which were filed more than one year after the claims accrued were barred by the statute of limitations, because the statute of limitations was merely suspended during the pendency of the class action in accordance with the *American Pipe* rule. Respondents, however, relying on *Tomanio*, urged that because no federal statute of limitations applied to the section 1983 claims, Puerto Rico's statute of limitations and tolling rules applied. The issue before the Supreme Court in *Chardon*, therefore, was whether any federal law was "adapted to the purposes of the civil rights laws," within the meaning of section 1988. The majority and dissenters disagreed as to whether the "rule" of *American Pipe* constituted federal law. The *Chardon* majority narrowly interpreted *American Pipe* to apply only to Clayton Act cases and other cases in which a federal statute contains a suspension provision.[87] Therefore, according to the majority, the *American Pipe* suspension rule was not federal law adaptable to section 1983.

The dissenters believed that, while the majority's reading was plausible, *American Pipe* should be more broadly interpreted as establishing a uniform rule which applied to all federal class actions.[88] Justice Rehnquist concluded that *American Pipe* "recognizes a federal rule of tolling applicable to class actions brought under [Rule 23], and that this rule is made applicable by § 1988 to claims brought under § 1983."[89] Because *American Pipe* supplied an applicable federal rule, section 1988 required a "depart[ure] from the general rule of reference to state law."[90]

Justice Stevens' majority opinion relied heavily on *Board of Regents v. Tomanio*,[91] as did the court of appeals.[92] But Justice Rehnquist referred to *Tomanio* only once in his dissent, and then only in a footnote where he commended the majority opinion, perhaps with

87 *Chardon*, 103 S. Ct. at 2618. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).

88 *Chardon*, 103 S. Ct. at 2619-20 (Rehnquist, J., dissenting).

89 103 S. Ct. at 2620 (Rehnquist, J., dissenting). A tolling rule was necessarily established since the Clayton Act did not address the class action question and the Court made no reference to state law. Not only did the Court give a "lengthy discussion of the history, purposes, and intent of the rule," but subsequent decisions have "reflected this understanding." *Id.*

90 *Id.* at 2619. Rehnquist also noted that in other areas the Court "has recognized federal tolling rules apply to state statute of limitations. Holmberg v. Armbrecht, 327 U.S. 392 (1946) (general federal principles of equity must be applied by federal courts in actions involving federal claims, even where state statutes of limitation are borrowed)." *Id.* at 2621.

91 446 U.S. 478 (1980).

92 *See* Chardon v. Fumero Soto, 103 S. Ct. 2611, 2616 (1983). *See also* Fernandez v. Chardon, 681 F.2d 42, 49 (1st Cir. 1982) (application of state tolling rules to § 1983 claims is required by 42 U.S.C. § 1988).

tongue in cheek, for recognizing that *Tomanio* was distinguishable from *American Pipe* because Rule 23 was not involved in *Tomanio*.[93]

American Pipe concerned an equitable tolling and its effect, an issue not relevant in *Tomanio*. *Tomanio* established that Congress, by enacting section 1988, "plainly instructed the federal courts to refer to state law when federal law provides no rule of decision for actions brought under section 1983."[94] However, the only common questions in *Tomanio* and *Chardon* were whether state law should supply the applicable limitations period and whether the filing of a prior action tolled the statute of limitations. In *Chardon*, all parties agreed that the Puerto Rico limitations period applied and that the filing of the class action tolled the running of the statute.[95] The issue in *Chardon* was the effect of the tolling, whether there should be suspension only or renewal of the entire limitations period, an issue not present in *Tomanio*. In *Tomanio* the prior state action did not toll the statute of limitations applicable to the section 1983 action because the prior cause of action and the section 1983 action were substantively distinct. Certainly, the court in *Tomanio* should have applied the New York limitation period which was found to have run. It was also entitled to give weight to the New York legislative requirement that a plaintiff either "obtain a judicial stay of the time for commencing an [alternative] action or to litigate at risk."[96] But, other than borrowing the period of limitation, the Court in *Tomanio* need not have applied New York law at all; that the section 1983 action was time barred was "virtually foreordained" by prior decisions of the Court.[97]

On the other hand, *American Pipe* and *Chardon* were structurally identical; both were Rule 23 class actions with unnamed class members intervening or filing individual actions after denial of certifica-

93 *Chardon*, 103 S. Ct. at 2621 n.1 (Rehnquist, J., dissenting):

> The Court correctly recognizes that [*Tomanio*] . . . is distinguishable. That case did not involve a class action, and, thus the Court had no occasion to consider whether Rule 23 creates a federal tolling rule, or the character of that rule. Thus, there was "a void . . . in federal statutory law, . . . and state law was called upon to fill the void. Owing to *American Pipe* and its interpretation of Rule 23, there is no comparable void in this case, and federal law is therefore applicable.

In *American Pipe* had the class been certified, a decision on the merits in the class action would have been res judicata as to the causes of action of those who in actual fact intervened after decertification, assuming those intervenors would have chosen to remain in the hypothetically certified class action. In *Tomanio* the decision in the state case would not have been res judicata as to the later § 1983 action. This is because the claims asserted were not identical. No constitutional issues were litigated in the state court proceedings. Both the district court and the court of appeals rejected that defense. *Tomanio*, 446 U.S. at 482.

94 *Chardon*, 103 S. Ct. at 2616.

95 *Id.* at 2614-15.

96 *Tomanio*, 446 U.S. at 486-87.

97 *Id.* at 480.

tion, both groups claiming the limitations period had been tolled during the certification process, both claiming violations of federal laws, both subject to one year statutes of limitation.[98] There were factual differences, however. *American Pipe* involved violations under the Clayton Act, *Chardon* under 42 U.S.C. § 1983.[99] Furthermore, under the suspension rule, the *American Pipe* intervenors filed within the one year limitations period, giving credit for time during which the statute was tolled.[100] In *Chardon* the claimants filed more than one year net after the limitations period commenced.[101] Also, *American Pipe* involved no state law; *Chardon* involved a federal statute which failed to provide a limitation period, so that a state limitations period applied.[102] The factual differences between *Chardon* and *American Pipe*, however, are not as significant as their identities as class actions under Rule 23.

IV. Implications of *Chardon*

Undoubtedly, *Chardon* has broader application than section 1983 cases. After *Chardon*, courts must determine where to find the tolling effect on a case by case basis. When a cause of action is based on a federal statute, the court may find some basis within that statute for the tolling effect, as in the Clayton Act.[103] But should the federal statute fail to supply the tolling effect, there remains only the amorphous logic of analogizing state laws, stare decisis, or perhaps related federal statutes,[104] presumably none of which ap-

98 In *American Pipe*, although the basic limitation period was four years under 15 U.S.C. § 15(b), the government action was pending for four years so that § 5(b) of the Clayton Act, 15 U.S.C. § 16(b), suspending the statute of limitations during the pendency of the class action and for one year thereafter, applied. In *Chardon* the court of appeals borrowed the one year period specified in P.R. LAWS ANN. tit. 31, § 5298(2) (1968).

99 The Clayton Act specified the limitation period and contained a tolling effect provision to suspend the statute during pendency of government action and for one year thereafter. 42 U.S.C. § 1983 contained no limitation period or tolling effect.

100 A final judgment was entered on May 24, 1968. Utah's civil action was filed on May 13, 1969, 11 days short of a year later. *American Pipe*, 414 U.S. at 540-41.

101 The employees received written notices of demotion on June 17, 1977, and the class suit was filed on June 19, 1978. *Chardon*, 103 S. Ct. at 2614.

102 *Id.* at 2615, 2619.

103 *See* text accompanying note 54 *supra*. In determining the "precise tolling effect," the *American Pipe* Court noted that the institution of a government antitrust suit suspends the statute of limitations. As Justice Rehnquist pointed out, however, in *Chardon*, the Court did not rely solely on this provision. *Chardon*, 103 S. Ct. at 2620 (Rehnquist, J., dissenting). The Court found in *American Pipe* that "[t]he same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitation period only during the pendency of the motion to strip the suit of its class action character." *American Pipe*, 414 U.S. at 561.

104 *See, e.g.*, Pavlak v. Church, 727 F.2d 1425 (9th Cir. 1984). The previous court decision was vacated and remanded by the Supreme Court in Pavlak v. Church, 103 S. Ct. 3529 (1983) in light of Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) (*American Pipe* rule applies to actions in which the plaintiff commences an independent action rather than

plies to class actions as such. At best, the application of *Chardon* to limitations determinations after denial of class certification will lead to extraordinary analytical difficulties and encourage ad hoc rulemaking.

After *Chardon*, the Court's tolling rule is that *American Pipe* applies for the *fact*[105] of the tolling. The *effect* of tolling during a Rule 23 class action is, after denial of class certification, no longer governed by a uniform rule. If the substantive claim is based on a federal statute that provides a tolling effect rule,[106] such as the Clayton Act, that rule will control. In section 1983 actions the state law of the forum applies so long as it is not inconsistent with section 1983.[107] However, in other actions based on federal law which include no tolling effect provision, the effect of tolling during the federal class action is found only in the law of the forum or wherever else one must seek to find the analogous law.[108] As Justice Stevens wrote:

> *American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class action procedure. After class certification is denied, that federal interest is vindicated as long as each unnamed plaintiff is given as much time to intervene or file a separate action as he would have under a state savings statute applicable to a party whose action has been dismissed for reasons unrelated to the merits, or, in the absence of a statute,

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moves to intervene in the original action) and Chardon v. Fumero Soto, 103 S. Ct. 2611 (1983). *Pavlak* involved an action under 42 U.S.C. § 1983 (1982), and the Federal Communications Act, 47 U.S.C. § 605 (1982) against a telephone company for aiding an illegal wiretap by providing equipment to the Boise police department. The court declined to apply *American Pipe* to cases in which the plaintiff seeks to file an independent suit rather than moves to intervene in the original action upon denial of class status. Because the statute of limitations was not tolled, plaintiff's cause of action was time barred. On remand, the Ninth Circuit borrowed the Federal Communication Act's two year statute of limitations, 47 U.S.C. § 415(b) (1982), rather than Idaho's three year statute of limitations. The court, without discussion, found that the effect of tolling the two year limitation period was suspension rather than renewal. *Pavlak*, 727 F.2d at 1428-29. The Act extends the limitation period for 90 days under certain circumstances. 47 U.S.C. § 415(d) (1982).

105 There was no disagreement in *Chardon* that the statute of limitations was tolled during the pendency of the class action. *Chardon*, 103 S. Ct. at 2613.

106 For a list of federal statutes providing a suspension rule, see *Chardon*, 103 S. Ct. at 2621 n.2 (Rehnquist, J., dissenting). For a list of statutes providing a variety of tolling effects, see *Chardon*, 103 S. Ct. at 2618 n.13.

107 Schwartz, *Tolling Time Limits in Class Actions*, 190 N.Y.L. J. at 1, col. 1 (Nov. 15, 1983). *See also* Wilson v. Garcia, No. 83-2146 (Supreme Court Apr. 17, 1985) (available Apr. 29, 1985, WESTLAW, Genfed library, Supreme Court database).

108 *See Chardon*, 103 S. Ct. at 2618. Where Congress is silent as to the limitation period, it impliedly leaves to the courts the formulation of remedial details:

> The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the framework of familiar legal principles. *See* Board of Comm'rs v. United States, 308 U.S. 343, 349-50, 351-52.

Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946).

the time provided under the most closely analogous state tolling statute.[109]

Not all states, however, have savings statutes[110] or tolling statutes.[111] The statutes which do exist vary considerably from state to state as to the circumstances of the dismissal and as to the fixed period.[112] All states presumably have "analogous" case law. Accordingly, after a class action has been dismissed, unnamed plaintiffs, located in many states, will face a variety of tolling effects, the "anomalous" results complained of by Justice Rehnquist.

Justice Stevens' solution for determining the tolling effect, that the courts must look to "state savings statute[s] . . . or, in the absence of a statute, . . . the most closely analogous state tolling statute"[113] is an "inquiry," as Rehnquist complained, "more appropriate in Alice in Wonderland."[114] Courts under *Chardon* faced with the requirement of borrowing another "most closely analogous" statute to ascertain tolling effect may even find none to borrow.[115]

Moreover, *Chardon* contravenes several policy concerns underlying statutes of limitations. In some cases it derogates justice by granting strangers to the original action, the unnamed plaintiffs in the class action, the entire limitations period anew in which to file

109 *Chardon*, 103 S. Ct. at 2618.

110 *See* note 26 *supra*; *see also* FERGUSON, *supra* note 8, at 79. The Supreme Court in Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), rejected application of state savings statutes to extend the limitation period when the plaintiff's Federal Employers' Liability Act action in the Ohio state court was dismissed for improper venue after the statute of limitations had run. "The incorporation of variant state saving statutes would defeat the aim of a federal limitation provision designed to produce national uniformity." 380 U.S. at 433. The Supreme Court therefore held that the limitation provision was tolled until the state court order dismissing the state action became final by the running of the time during which an appeal could be taken or the entry of a final order on appeal. The Court also rejected tolling the federal statute for a "reasonable time" because of the ensuing uncertainty as to when the limitation period would recommence to run. 380 U.S. at 435.

111 It is unclear to what the term "tolling statutes" actually refers in these statutes. *See* note 112 *infra*.

112 For instance, the period is 60 days in Texas, TEX. REV. CIV. STAT. ANN. art. 5539a (Vernon 1958); one year in Delaware, DEL. CODE ANN. tit. 10, § 8117 (1953); and the entire limitations period in Louisiana, LA. CIV. CODE ANN. art. 3462 (West Supp. 1985). Fourteen other states have no general savings statute but do have similar statutes which provide additional time to start a new action upon reversal on appeal or arrest of judgment. FERGUSON, *supra* note 8, at 2. These states are Alabama, California, Florida, Hawaii, Idaho, Minnesota, Nevada, New Jersey, North Dakota, Pennsylvania, South Carolina, South Dakota, Washington and Wisconsin. A few have no savings or similar statutes. Interestingly, two states have enacted the Uniform Class Action Rule which has adopted the Rehnquist view of *American Pipe*; Iowa in 1980 and North Dakota in 1977. Iowa also has a savings statute and North Dakota appears to have a venue transfer statute but no savings statute. *See, e.g.*, IOWA CODE ANN. § 614.10 (West 1950); N.D. CENT. CODE § 28-04-07 (1974).

113 *Chardon*, 103 S. Ct. at 2618.

114 *Id.* at 2622. According to Rehnquist "the inquiry would appear to be, if state law *did* have a class action tolling rule, which it *does not*, what would state law say with respect to one aspect of that rule's effect." *Id.* (emphasis added).

115 This may occur because not all states have savings statutes. *See* note 112 *supra*.

claims that presumably would have been stale at least during the time of the extended period that exceeded the original limitations period. In effect, the filing of an ineffective class action exposes the defendant to a universe of claimants beyond the presumed reasonable time provided under the original statute of limitations. This result was not likely considered in the enactment of the Puerto Rico statutes and the tolling effects decisions relied on in *Chardon*,[116] which involved only disputes between named individuals.

Chardon also denies defendants repose by extending their exposure to liability for what can be twice the statutory limitations period plus the time for determining whether certification is proper, less one day. With respect to conservation of judicial resources, certainly the uniform rule intended under the broad application of *American Pipe* would have foreclosed litigation of tolling effect disputes. *Chardon* opens the floodgates. By substantially extending statutory limitations periods, *Chardon* enables the filing of stale claims to burden already clogged dockets.

V. Conclusion

American Pipe had been uniformly followed.[117] Its broad rule was equitable, logical, coherent, adaptable to the purposes of the statute of limitations, and uniformly predictable.[118] In *American Pipe* the Court interpreted Rule 23 according to equitable tolling principles and suspended the running of the statute and no more. In *Chardon* the Court interpreted section 1988 to mandate borrowing both the limitation period *and* the effect of the tolling from analo-

116 *See* note 68 *supra*.

117 *See, e.g.*, cases cited at note 45 *supra*. *See also* Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983), decided one week prior to *Chardon v. Fumero Soto*, in which the Court applied *American Pipe* to a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1976). The Supreme Court affirmed the Fourth Circuit's finding that the pending class action suspended the limitation period until class certification was denied. *American Pipe* and *Crown, Cork* differed in that the former involved intervenors, while in the latter the claimant had filed an independent action following decertification. Nonetheless, the Court found no difference, under *American Pipe*, between intervention and separate suits: the filing of a class action tolls the statute of limitations " 'as to all asserted members of the class, . . . not just intervenors.' " *Crown, Cork*, 462 U.S. at 350. Justice Blackmun, in *Crown, Cork*, writing the unanimous decision of the Court, reiterated that in *American Pipe* the Court had noted that "a tolling *rule* for class actions is not inconsistent with the purposes served by statutes of limitations." *Id.* at 352 (emphasis added). Blackmum reaffirmed the rule in *American Pipe*: " '[t]he commencement of a class action *suspends* the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.' " *Id.* at 353-54 (quoting *American Pipe*, 414 U.S. at 554) (emphasis added).

118 The suspension rule, however, has been criticized as an "arbitrary and inflexible method of tolling that has no inherent attraction other than its simplicity in application." One author has proposed extension as a more logical and equitable method of tolling because tolling by extension can be tailored to the needs of the parties in the individual case. Note, *supra* note 34, at 119.

gous state (Puerto Rico) case law and narrowly limited the rule of *American Pipe*.

No statute, either federal or state, incorporates provisions governing the tolling and tolling effect of the filing of a class action. Many statutes provide tolling rules for reasons which often are irrelevant to the class action situation. To apply tolling rules and their effects to procedures unrelated to such policies and goals is illogical and thwarts those policies and goals.[119] Suspending the limitations period merely maintains the matter until the court determines whether the class action should proceed. The purposes of the statute of limitations, encouraging the plaintiff to file a timely action and affording the defendant repose, are best served by a uniform rule of "suspension only." A rule permitting renewal of the entire limitation period upon the filing of a class action affords a vindictive plaintiff the opportunity to harass his adversary by undermining his repose with respect to the unnamed parties, who, but for the class action, may not be able to file individual actions. There is no justification for allowing a procedural device, a Rule 23 federal class action, to drastically alter a state statutory limitation period incorporating limitation policies and to thereby thwart the purposes of limitations periods.

Kathleen L. Cerveny

119 This issue was presented to the Fourth Circuit in O'Hara v. Kovens, 625 F.2d 15 (4th Cir. 1980), in which the plaintiffs, suing as individuals and as guardians of their mother, asserted the state statute of limitations which applied to the SEC Rule 10b-5 action should be tolled because their mother was incompetent when the cause of action accrued. The court applied the reasoning of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), that in borrowing a state period of limitation, "the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson*, 421 U.S. at 463-64. The state's tolling rules must also be borrowed. The court recognized the applicability of tolling provisions provided by state law but held that because the applicable Maryland blue sky statute did not provide for tolling on the grounds of incompetency and it was not "empowered to engraft such a provision on the Maryland Code." *O'Hara*, 625 F.2d at 19.