

Supreme Court Declines to Clarify Tolling Effect of Mass Tort Class Actions

June 2, 2011 by [Sean Wajert](#)

Earlier this week, the Supreme Court declined to take a case raising the tricky issues of cross-jurisdictional class action tolling. *Novartis Pharmaceuticals Corp. v. Stevens*, No. 10-1196 (U.S., certiorari denied 5/31/11).

The question presented in the [cert petition](#) was whether tolling the statute of limitations for individual claimants based on the pendency of a mass personal injury class action violates fundamental federal due process protections where the class action provides no notice to a defendant of the identity of unnamed class members, thus absolutely precluding the timely preservation of evidence and testimony critical to presenting an effective defense.

Defendant/petitioner has been involved for several years in litigation claiming that the drug Zometa is linked to osteonecrosis of the jaw or "ONJ." Plaintiff below obtained a jury verdict on such a claim, affirmed by the Montana Supreme Court. 358 Mont. 474, 247 P.3d 244 (2010). The sole aspect of the Montana Supreme Court's opinion at issue here was its ruling that the pendency of a never-certified federal class action on ONJ acts to resurrect respondent's otherwise time-barred personal injury claims. The Montana Supreme Court determined as a matter of first impression in Montana that federal class action tolling should apply to render timely respondent's complaint against petitioner. The Montana court noted that the concept of federal class action tolling was articulated by the Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Court held that in some contexts, the commencement of the class action suit satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. One reason was concerns of judicial economy, as a contrary holding might invite a multiplicity of activity that the federal rules of procedure were designed to avoid, as individual plaintiffs would be forced to file preventative motions to join or intervene as parties if the class action status was still pending at the expiration of the statute of limitations.

The problem is that in the specific context of a personal injury mass tort, the application of *American Pipe* federal class action tolling seems to infringe on a defendant's ability to defend itself -- in violation of due process principles. Suspending statutes of limitation indefinitely for all purported members of the kinds of "worldwide" classes we see of personal injury plaintiffs, based on nothing more than the filing a Rule 23 federal class action, introduces systemic unfairness to defendants.

A pharmaceutical personal injury case may be an especially poor vehicle for federal class action tolling. Virtually no pharmaceutical personal injury class action has been certified over opposition and survived appeal in the federal system for a decade now. See, e.g., *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 933-38 (Cal. 1988) (en banc) (rejecting tolling due to pending personal injury class action because such torts are not susceptible to class action certification). Tolling individual actions based on a pending personal injury class action renders limitations periods impermissibly uncertain and invites unnecessary litigation by giving plaintiffs' counsel

everywhere an incentive to add putative class relief to every federal complaint just to toll statutes of limitations to the benefit of unknown future plaintiffs -- knowing there will never be a certified class. Some lower courts have thus concluded that class action tolling should not be applied in the mass tort context unless the defendant had actual notice of the identities of unnamed class members.

Petitioner argued that tolling the limitations period for all purported members of the class during the pendency of class certification proceedings – which in a mass class action can take years – creates an unacceptable risk that by the time the claims of unnamed individuals are adjudicated, evidence critical to defending claims of that individual plaintiff will have been lost. Issues relating to exposures, learned intermediaries, concurrent risk factors, specific (as opposed to general) causation, proximate causation regarding warnings, and assumption of the risk, all involve evidence that can be both peculiar to the individual plaintiff, and turn out to be the central evidence in the action.

Perhaps because of unique procedural issues below (involving fictitious parties), however, the Court passed on the opportunity to address these serious issues.