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Plumbing the Depths of *American Pipe*

The U.S. Supreme Court in *CalPERS v. ANZ Securities* gave its clearest statement to date that the judiciary should tread carefully—if at all—in the realm of modifying timely filing requirements, attorneys Mark A. Perry and David A. Schnitzer say. The court held that the tolling doctrine announced in *American Pipe* does not apply to the statute of repose in the Securities Exchange Act. More importantly, the court confirmed the equitable nature of the *American Pipe* tolling doctrine, effectively foreclosing its future expansion and casting into doubt its continued existence, the authors say.

By Mark A. Perry and David A. Schnitzer

For the first century and a half following independence, federal courts adhered to the distinction between *law* and *equity* that we Americans had inherited from English legal practice. *See, e.g.*, *In re Sawyer*, 124 U.S. 200, 209-10 (1888) (noting that ''[u]nder the constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained''). In general, legal proceedings were more rigid, rule-based, and governed by exogenous standards such as statutes and contracts; whereas equitable proceedings were more flexible, fairness-based, and subject to context-specific guidance and control provided by the judge or chancellor.

In the 1930s, Congress formally abolished the divided bench, replacing it with ''one form of action—the civil action.'' Fed. R. Civ. P. 2. *See* Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072).

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Yet the law-equity distinction lived on for the remainder of the 20th Century—both for constitutional reasons, such as the Seventh Amendment right to jury trial in federal court in ''[s]uits at common law,'' *i.e.* those ''more similar to cases that were tried in [English] courts of law than to suits tried in courts of equity'' (*Tull v. United States*, 481 U.S. 412, 417 (1987)); and for practical reasons, such as the standards for awarding traditionally equitable relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006); *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999) (''[T]he merger did not alter substantive rights'').

The 21st Century has witnessed a largely unheralded revolution in the law–equity divide, as the Supreme Court has taken it upon itself voluntarily to relinquish some of the powers that equity courts traditionally exercised. Specifically, in a series of cases the Court has disclaimed longstanding judicial authority to adjust timely filing requirements in a variety of contexts, deferring instead to congressional judgment regarding the time in which to bring suit. The Court has even gone so far as to indicate that this approach is dictated by separation-of-powers concerns. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (''The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs [in equity practice]'').

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The revolution has been incremental. It has included the Court's rejection of implicit powers to extend timely filing deadlines (*Gabelli v. S.E.C.*, 568 U.S. 442 (2013)); a renewed emphasis on the distinction between statutes of limitation and statutes of repose (*CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014)); and the wholesale abandonment of the traditional doctrine of laches (*Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014)).

These trends came to a head on the last day of the just-ended Term in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), where the Court gave its clearest statement to date that the Judiciary should tread carefully—if at all—in the realm of modifying timely filing requirements. In *CalPERS*, the Court held that the tolling doctrine announced in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and applied in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), does not apply to the statute of repose in the Securities Act; more importantly, the Court confirmed the equitable nature of the *American Pipe* tolling doctrine—effectively foreclosing its future expansion and casting into doubt its continued existence. *See CalPERS*, 137 S. Ct. at 2049.

The Evolving Practice Of Using Equity Powers To Modify Filing Deadlines

One of the traditional powers of equity courts was to relieve litigants from the perceived rigidity of legal rules—including as to the time in which suit could be brought and maintained. The English courts of equity developed a variety of doctrines, including tolling, estoppel, laches, and waiver, to adjust timely filing requirements on both the front end (in favor of the plaintiff) and the back end (in favor of the defendant). These doctrines were adopted and embraced by the U.S. federal courts in the period following the Founding.

For example, if a plaintiff was under a disability when the statute of limitations began to run on his claim, courts would equitably ''toll'' the limitations period until the end of the disability. Concomitantly, if a plaintiff failed to exercise his rights promptly, courts could cut off claims even if not barred by statute under the doctrine of laches—particularly if the defendant was prejudiced and reasonably relied upon the plaintiff's earlier representations, in which case an estoppel might arise. Courts also developed doctrines such as the ''discovery rule'' (and its cousin, ''fraudulent concealment'') to allow statutorily untimely suits to be brought.

Thus by the mid-19th Century, the Court noted that it was ''established'' that ''the running of a statute of limitation may be suspended by causes not mentioned in the statute itself.'' *Braun v. Sauerwein*, 77 U.S. 218, 223 (1869). And until the late 20th Century, the Supreme Court regularly applied these doctrines to adjust timely filing limits to fit the equities of particular cases, regardless of whether the statutes so provided.

For example, in *Honda v. Clark*, 386 U.S. 484 (1967), the Supreme Court ''invoke[ed] the equitable doctrine of tolling'' to allow a suit by Japanese Americans seeking to recover bank deposits that had been seized by the federal government under the Trading with the Enemies Act during World War II. *Id.* at 486-87. The Court found no ''purpose'' in imposing the statute's ''strict 60-day limitation,'' ''especially'' when considering the ''reason for petitioners' delay in bringing suit.'' *Id.* at 498-99.

In *Gardner v. Panama Railroad Co.*, 342 U.S. 29 (1951), the Court chose laches over the ''mechanical application of the statute of limitations,'' allowing a suit by a passenger seeking compensation for injuries sustained onboard a ship in the Panama Canal Zone after the one-year limitations period had expired. *Id.* at 31. Due to shifting law, two earlier suits had failed. *Id.* According to the Court, because there was ''no inexcusable delay in seeking a remedy and . . . no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.'' *Id.*

Turning to the discovery and fraudulent concealment rules, in *United States v. Kubrick*, 444 U.S. 111 (1979), the Supreme Court agreed that under the Federal Tort Claims Act, the rule for medical malpractice cases ''had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause.'' *Id.* at 120. And in 1984, the Court wrote that ''[i]t was true in 1921, as it is today, that the fraudulent concealment of the facts giving rise to a claim tolled the controlling statute of limitations until full disclosure was made.'' *Badaracco v. C.I.R.*, 464 U.S. 386, 402 (1984).

By the latter half of the 20th Century, it had become almost routine for the Supreme Court—and, by extension, lower federal courts—to relieve litigants of the timely filing requirements imposed by statute. *See, e.g.*, *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 302 n.2 (9th Cir. 1989) (B. Fletcher, J., dissenting) (observing that ''[s]tatutes of limitations' explicit language *routinely* is subjected to equitable modification by the application of estoppel, waiver, or equitable tolling'') (emphasis added).

A turning point came in 1991, when the Court ruled 5-4 that equitable tolling was ''fundamentally inconsistent with the 1-and-3-year structure'' of the limitations period in the Securities Exchange Act of 1934. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 350 (1991). The relevant provision, 15 U.S.C. § 78i(e), provided that ''[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.'' In two brief but significant paragraphs, the Court held that as to the one-year period, which is already specifically keyed to discovery, tolling is ''unnecessary.'' 501 U.S. at 363. The companion three-year period then must be seen as a period of repose, which is by its nature ''inconsistent with tolling.'' *Id.*

Lampf leads more or less directly to four important observations regarding the ability (or, perhaps, the willingness) of the modern Judiciary to adjust timely filing requirements, as reflected in more recent decisions:

The *first* is that since Congress knows how to write a discovery rule, the equitable doctrine of discovery is not necessarily available for statutes in which Congress did not provide one. The Court made this clear in 2013 in *Gabelli*, reaching back to its (largely ignored) 1889 statement that ''the cases in which 'a statute of limitation may be suspended by causes not mentioned in the statute itself . . . are very limited in character, and are to be admitted with great caution; otherwise the court would make the law instead of administering it.' '' 568 U.S. at 454 (quoting *Amy v. Watertown (No. 2)*, 130 U.S. 320, 324 (1889) (alteration omitted)). Accordingly, it declined to read a discovery clause into the statute of

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limitations for the government to bring a securities enforcement action. *Id.* (citing ''the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of [28 U.S.C.] § 2462''). The Court did leave undisturbed, at least for now, court-imposed discovery rules in cases of private suits to recover for fraud. *Id.* at 449-50.

The *second* is that when Congress includes an absolute ''cutoff'' or repose period, courts will not extend the time for filing suit beyond that point. In 2014, the Supreme Court explained in *CTS Corp. v. Waldburger* that such statutes run ''from the date of the last culpable act or omission of the defendant,'' in contrast to a statute of limitations, which runs from the date a claim *accrues*. 134 S. Ct. at 2182. Writing for the Court, Justice Kennedy explained that when Congress has chosen a statute of repose, it is an ''absolute . . . bar on a defendant's temporal liability.'' *Id.* at 2183 (alterations original; quotation omitted). Accordingly, such a period ''may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.'' *Id.*

And on the last day of the just-ended Term, the Supreme Court reiterated in *CalPERS* that a statute of repose ''admits of no exception and on its face creates a fixed bar against future liability.'' *CalPERS*, 137 S. Ct. at 2049. According to the Court, ''[t]he unqualified nature of [Congress's] determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles.'' *Id.* at 2051. Thus, *American Pipe* tolling, which it confirmed was an equitable doctrine, cannot extend the time to file a suit under such a statute. *Id.* at 2055. (More on *CalPERS* shortly.)

The *third*, and perhaps least intuitive, is that courts will defer to legislative judgments regarding timely filing even in circumstances where courts had traditionally exercised their equitable prerogative. Illustratively, the Court has all but abandoned the venerable defense of laches, as made clear by two recent decisions.

To start, in *Petrella v. MGM*, the Court held that the ''essentially gap-filling, not legislation-overriding, office of laches'' cannot be used to ''to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period.'' 134 S. Ct. at 1974. As Justice Breyer lamented in his dissent, the decision ''disable[d]'' the ''equitable doctrine'' of laches, which historically ''help[ed] courts avoid the unfairness that might arise were legal rules to apply strictly to every case no matter how unusual the circumstances.'' *Id.* at 1979. Thus, under the Copyright Act's provision allowing recovery for infringements counting back three years from the date of suit, it was irrelevant whether there had been 10, 15, or 50 years of infringement already on the books. *Id.* at 1976.

The *Petrella* Court allowed but one caveat, explaining that *equitable* relief could be ''curtailed'' based on laches when it would ''work an unjust hardship upon the defendants and innocent third parties.'' *Id.* at 1978 (quotation omitted). Such use of an equitable limitation to offset an equitable *remedy* appears to be perfectly logical (or at least congruent); what remains to be seen is whether the Court will actually apply such a limitation in a case where the issue is actually presented, and whether there is any daylight between whatever remains of the laches doctrine and the formerly separate doctrine of equitable estoppel.

Then, earlier this year, the Court held that *Petrella*'s reasoning applied equally to a similar provision in the Patent Act, and left little doubt that laches was unavailable wherever Congress has enacted a statute of limitations. (That, of course is the case as to the overwhelming majority of federal rights of action.) This outcome was mandated, the Court explained, because in such instances Congress has decided that ''timeliness . . . is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific'' analysis undertaken by courts of equity considering a defense of laches. *SCA Hygiene Prods.*, 137 S. Ct. at 959.

Fourth, and finally: What's left after the recent revolution is equitable tolling (on the front end) and equitable estoppel (on the back end), but even these doctrines may be limited where Congress speaks clearly, as with a discovery rule or a statute of repose. Moreover, traditionally both of these doctrines have required a showing of prejudice by the party invoking the doctrine. *See, e.g., Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 323 (1936) (''Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities'').

Prejudice is important because the doctrinal motivation for the Court's increasing reluctance to adjust timely filing requirements is the separation of powers—the jurisprudential understanding that Congress, not the courts, is better positioned to establish broad classes of cases and persons when suit must or may (or must not or may not) be brought. Courts *might* retain powers to make case-specific exceptions, upon a proper showing of prejudice; but courts will not exempt broad classes of cases (or litigants) from otherwise applicable legislative rules. Indeed, that is one way to describe the holdings of all of the cases discussed above. As thus understood, this line of decisions has—or could have—significant ramifications for the *American Pipe* tolling doctrine.

***American Pipe*: An Anachronism On Shaky Ground** On May 13, 1969, the State of Utah filed a putative class action against American Pipe and Construction Co., alleging antitrust violations. *Am. Pipe*, 414 U.S. at 542. The suit was timely, but barely, filed 11 days before the statute of limitations ran. *Id.* Later that year, the district court denied class certification for lack of numerosity, eight days after which former members of the class moved to intervene. *Id.* at 543-44. The trial judge ruled against intervention, concluding that the statute of limitations was not tolled between the original filing of the suit and the class order, and thus had run 11 days after the complaint was filed. *Id.*

The Supreme Court reversed and—in what has become known as the *American Pipe* tolling doctrine—ruled 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 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 554. According to the Court, this was ''in no way inconsistent with the functional operation of a statute of limitations'' because the initial filing ''notifies the defendants not only of the substantive claims being brought against them'' and of ''the number and generic identities of the potential plaintiffs who may participate in the judgment.'' *Id.* at 554-55. It mattered not ''whether the actual trial is conducted in

the form of a class action, as a joint suit, or as a principal suit with additional intervenors.'' *Id.* at 555. The Court further observed that this approach would avoid the ''multiplicity of activity which Rule 23 was designed to avoid'' in the form of similar individual filings. *Id.* at 551.

In 1983, the Court extended *American Pipe* tolling to also allow the filing of a *new* action by former class members, not just intervention. *Crown, Cork & Seal Co.*, 462 U.S. at 351-52 (concluding that *American Pipe* would not ''serve the purpose assigned to it'' if it did not also ''apply to class members who choose to file separate suits''). In *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the Court summarized the doctrine thusly: ''[A] putative member of an uncertified class may wait until after the court rules on the certification motion to file an individual claim or move to intervene in the suit.'' *Id.* at 313 n.10.

Until the Term just ended, the Supreme Court's *American Pipe* tolling jurisprudence was set forth in just three cases: *American Pipe* itself; *Crown Cork*; and footnote 10 of *Smith v. Bayer*. Yet *American Pipe* has spawned dozens if not hundreds of decisions, and more than a few controversies, in the lower federal courts.

It seems highly dubious that *American Pipe* would be decided the same way today as it was in 1974. The Court then was more willing to ''legislate from the bench''—and it cannot be seriously argued that *American Pipe* was anything other than judicial legislation. The tolling principle announced in *American Pipe* did not even have the grounding in equity practice that doctrines such as laches and the discovery rule had; the modern Court's rejection of those ancient doctrines indicates that *American Pipe* tolling could be next in line.

Already, in *CalPERS*, the Court has declined to extend *American Pipe* tolling to statutes of repose. 137 S. Ct. at 2055. But while the plaintiffs' bar would like to limit *CalPERS* to statutes of repose, *CalPERS*, together with recent case law on the Rules Enabling Act and equitable doctrines generally, puts *American Pipe*'s continued applicability to even ordinary statutes of limitations very much in doubt.

The *CalPERS* Court was very clear that it was considering two issues: The timeliness of the suit, the Court explained, ''turns on the nature and purpose of the 3-year bar [in the Securities Act] and of the tolling rule that petitioner seeks to invoke [*i.e.*, *American Pipe*].'' 137 S. Ct. at 2048-49. The Court devoted a section of its opinion to each; and the exegesis of *American Pipe* contains some important clues as to the potential future of this tolling doctrine.

CalPERS began its discussion of *American Pipe* tolling by recounting the bases for the Court's decision in that case:

> [*American Pipe*] held the individual plaintiffs' motions to intervene were timely because ''the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class.'' *American Pipe*, 414 U.S. at 554. The Court reasoned that this result was consistent ''both with the procedures of Rule 23 and with the proper function of the limitations statute'' at issue. *Id.* at 555. First, the tolling furthered ''the purposes of litigative efficiency and economy'' served by Rule 23. *Id.* at 556. Without the tolling, ''[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable,'' which would ''breed needless duplication of motions.'' *Id.* at 553-554. Second, the tolling was in accord with ''the functional operation of a statute of limitations.'' *Id.* at 554. By filing a class complaint within the statutory period, the named plaintiff ''notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.''

Id. at 555.

137 S. Ct. 2051. The Court then clarified the nature of the *American Pipe* tolling doctrine:

> As this discussion indicates, the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions. Nothing in the *American Pipe* opinion suggests that the tolling rule it created was mandated by the text of a statute or federal rule. Nor could it have. The central text at issue in *American Pipe* was Rule 23, and Rule 23 does not so much as mention the extension or suspension of statutory time bars.

Id. at 2051-52.

CalPERS thus held unequivocally that *American Pipe* was ''grounded in the traditional equitable powers of the judiciary.'' 137 S. Ct. at 2052. The *CalPERS* Court acknowledged that ''the *American Pipe* Court did not consider the criteria of the formal doctrine of equitable tolling in any direct manner. It did not analyze, for example, whether the plaintiffs pursued their rights with special care; whether some extraordinary circumstance prevented them from intervening earlier; or whether the defendant engaged in misconduct.'' *Id.* But *CalPERS* concluded that ''[t]he balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.'' *Id.*

The Supreme Court's clarification of the equitable nature of *American Pipe* tolling in *CalPERS* has important ramifications for the continued application, development, and even existence of the *American Pipe* tolling doctrine. There are at least six such considerations that practitioners and judges should take into account:

First, the continued availability of *American Pipe* tolling is difficult, if not impossible, to square with the Court's recent reluctance to use equitable powers to modify statutory deadlines. It is of course conceivable that the Court will retain it, as it has other doctrines of dubious provenance, solely on the basis of *stare decisis*. *See*, *e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408, 2411-13 (2014) (declining to overrule the presumption of reliance established in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), because none of the critiques ''so discredit[ed]'' it ''as to constitute'' the ''special justification'' required to overcome *stare decisis*). On the other hand, the Court has displayed no deference to precedent in its recent dismantling of the venerable laches doctrine. *See Petrella*, 134 S. Ct. 1962, 1982 (Breyer, J., dissenting) (cataloging ''multitude of contexts'' in which the Supreme Court and lower courts had ''read laches into statutes of limitations otherwise silent on the topic of equitable doctrines'').

Second, the *American Pipe* tolling doctrine appears to conflict with the Rules Enabling Act. As the Supreme Court has made clear recently, that Act is violated by any interpretation of a rule of procedure that ''giv[es] plaintiffs and defendants different rights in a class proceeding than they could have asserted in an individual action.'' *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048 (2016). But that is the effect of *American*

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Pipe tolling—it allows a right of action to individuals on the basis of their prior passive involvement in a putative, and failed, class action. Or put another way, as a participant in a class proceeding, they get tolling rights they would not otherwise have, and without the showing of prejudice that equitable doctrines now seem to require.

In fact, this critique echoes in the same misgivings members of the Court expressed from the outset. Concurring in *American Pipe*, Justice Blackmun warned that the decision ''must not be regarded'' as a way to ''save members of the purported class who have slept on their rights.'' 414 U.S. at 561 (Blackmun, J., concurring). And Justice Powell, joined by Justices Rehnquist and O'Connor, concurred in *Crown, Cork* to ''reiterate'' Justice Blackmun's warning, expressing concern that ''[t]he tolling rule of *American Pipe* is a generous one, inviting abuse.'' 462 U.S. at 354 (Powell, J., concurring).

Third, *CalPERS* laid bare a further source of fragility of *American Pipe* by clarifying that it is ''grounded in the traditional equitable powers of the judiciary,'' rather than ''mandated by the text of a statute or federal rule.'' 137 S. Ct. at 2051-52. This puts to rest the oft-repeated claims of the plaintiffs' bar that *American Pipe* tolling is somehow inherent in or required by Rule 23. As a wholly judge-made doctrine, it is wholly subject to judicial modification or abrogation. In the right case, at the right time, the Court could conclude that it took a wrong turn in *American Pipe*.

Fourth, as the Court commented in *CalPERS*, *American Pipe* tolling departs in a marked way from traditional equitable tolling: It ''did not consider the criteria of the formal doctrine of equitable tolling in any direct manner,'' such as diligence, extraordinary circumstances, defendant misconduct, prejudice or any other case-specific inquiry. *Id.* at 2052. *American Pipe* conceded the same point, explaining that it had extended its reasoning to cover even ''those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed).'' 414 U.S. at 551. The modern Court's renewed emphasis on prejudice as a gateway to equitable adjustments could require revisiting at least this aspect of *American Pipe*.

Fifth, the *CalPERS* decision also casts doubt on the conclusion in *American Pipe* that the rule was needed to avoid a ''multiplicity of protective filings'' (414 U.S. at 551), suggesting such concerns are ''likely overstated.'' 137 S. Ct. at 2054. The Court considered the experience of the Second Circuit after that court rejected *American Pipe* tolling under the securities statutes, and found no ''evidence of any recent influx of protective filings.'' *Id.* It further observed that even if such an influx occurred, the courts were armed with ''ample means and methods to administer their dockets and to ensure that any additional filings proceed in an orderly fashion.'' *Id.*

The winds of change are thus blowing strongly against *American Pipe*. Without recognizing this reality (or perhaps without caring), class-action plaintiffs and their lawyers continue to advocate expansion of the tolling doctrine—notwithstanding these clear signs from the Court that the entire concept is on shaky ground.

Sixth, *CalPERS* and the considerations outlined above indicate at the very least that the doctrine should not be extended beyond the limits previously articulated by the Supreme Court itself in *American Pipe* and *Crown Cork*.

To take but one current example, there is an entrenched and deepening circuit split on the ''anti-stacking rule''—whether *American Pipe* extends to allow a second class action after one has failed, rather than just individual actions by former class members. Put another way, does a second class action begin tolling anew for members of the first failed class who have still not taken individual action, or even more extremely, revive claims that have expired in the interim?

The clear majority of the courts of appeals—including the First, Second, Third, Fourth, Fifth, and Eleventh Circuits—enforce the anti-stacking rule and hold that *American Pipe* tolling does not extend past the initial decision on class certification. *See Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Yang v. Odom*, 392 F.3d 97, 104 (3d Cir. 2004); *Angles v. Dollar Tree Stores, Inc.*, 494 F. App'x 326, 331 n.10 (4th Cir. 2012); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1325 (11th Cir. 2015).

But two courts of appeals—the Sixth and the Ninth Circuits—have abandoned their earlier decisions embracing the anti-stacking rule, and in a decidedly expansionary move have allowed *American Pipe* tolling in a successive class action. *See Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 645 (6th Cir. 2015); *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017).

A third court of appeals—the Seventh Circuit—has confused the analysis by casting the debate in terms of preclusion. *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 563 (7th Cir. 2011). This approach did not survive the Supreme Court's decision in *Smith v. Bayer*, 564 U.S. at 314, which held that issue preclusion does not apply in this context.

In light of this established and growing divide, the stacking issue could very well be the Supreme Court's next opportunity to consider the correctness of *American Pipe* tolling. And *CalPERS* strongly suggests that the Court will find stacking to be an unacceptable expansion of the *American Pipe* doctrine—as footnote 10 of *Smith* already previewed. It could even be the case in which the Court goes even farther, and reconsiders the entire doctrine. But only if someone asks.