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## CROSS JURISDICTIONAL TOLLING OF THE STATUTE OF LIMITATIONS IN ANTITRUST CLAIMS: PLAINTIFFS LOSE THEIR DAY IN FEDERAL COURT

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### INTRODUCTION:

Recently, the Seventh Circuit Court of Appeals decided the issue of whether the filing of a state antitrust class action tolls the statute of limitations for individual members of that class, who after dismissal of their state class action, attempt to file individual federal antitrust claims.<sup>1</sup> State supreme courts have wrestled with the related question of whether the filing of a federal class action tolls the statute of limitations for class members who seek to file subsequent state law claims after their federal class action is dismissed, reaching opposing outcomes.<sup>2</sup> However, the Seventh Circuit's decision in *In re Copper*

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<sup>1</sup>See *In re Copper Antitrust Litig.*, 436 F.3d 782 (7th Cir. 2006).

<sup>2</sup>See *In re Linerboard Antitrust Litig.*, 223 F.R.D. 335 (E.D. Pa. 2004) (finding that Colorado, Indiana, Kansas, South Carolina, and Tennessee would all accept cross jurisdictional tolling); *Vaccareillo v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380 (Ohio 2001) (Ohio Supreme Court adopted cross jurisdictional tolling in an antitrust case); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 807 (Tenn. 2000) (stating Tennessee has adopted cross jurisdictional tolling through its

*Antitrust Litigation*<sup>3</sup> marked the first time a federal Court of Appeals addressed whether members of a state class action whose case had been dismissed could benefit from the cross jurisdictional tolling of the statute of limitations for their subsequent federal claims.

The factual underpinnings of *In re Copper Antitrust Litigation*,<sup>4</sup> where the very same antitrust claims that were dismissed in the state class action were subsequently filed individually by class members in the federal action,<sup>5</sup> forced the Seventh Circuit to address the issue of cross jurisdictional tolling head on. In a 2-1 decision, the court held that the filing of a state class action has no tolling effect on the statute of limitations for subsequently filed federal claims, thereby refusing to adopt the theory of cross jurisdictional tolling.<sup>6</sup>

Initially, this Article discusses the conflicts in class action procedure between the statute of limitations and class certification that necessitated a tolling rule for class members so that their interests could truly be protected in the class action procedure, and then examines the subsequent expansion of the tolling doctrine. Next, this Article recounts the procedural history of the Seventh Circuit's decision in *In re Copper Antitrust Litigation*,<sup>7</sup> where the Plaintiff's asserted state class action antitrust claims and then later filed individual federal antitrust claims presented the possibility that the tolling doctrine could be extended to apply across jurisdictions. The final section of this Article analyzes the rationales asserted by the majority *In re Copper Antitrust Litigation*<sup>8</sup> which refused to extend the tolling doctrine to the cross jurisdictional context and Judge Wood's

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savings statute, TENN. CODE ANN. § 28-1-115 (2000)); *Portwood v. Ford Motor Co.*, 183 Ill.2d 459 (Ill. 1998) (Illinois Supreme Court declined to adopt cross jurisdictional tolling).

<sup>3</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 784-85.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 788.

<sup>6</sup>*Id.* at 796.

<sup>7</sup>436 F.3d 782.

<sup>8</sup>*Id.*

dissent which contended that the parallel state and federal antitrust statutory schemes provided the proper context to apply the tolling doctrine in the cross jurisdictional context.

In order to fully understand the rationale behind the court's decision, the relationship between state and federal antitrust law, as well as the procedural workings of class actions, must be examined.

## I. HISTORY OF CLASS ACTION TOLLING

Antitrust laws have provided fertile ground for the maintenance of class action suits.<sup>9</sup> Specifically, two criteria of the Clayton Act,<sup>10</sup> the federal statutory scheme regulating anticompetitive business practices, enable antitrust claims to grow into complex class action lawsuits: (1) a broad standing requirement,<sup>11</sup> and (2) a grant of diversity jurisdiction irrespective of the amount in controversy.<sup>12</sup> These two characteristics of the Clayton Act<sup>13</sup> create a large pool of prospective plaintiffs with many small claims against a single defendant.<sup>14</sup> Similarly, the purpose of the Sherman Act,<sup>15</sup> which protects against limitations on the free flow of interstate commerce, has been interpreted broadly to allow

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<sup>9</sup>See Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 414 (1997) (“[T]he roots of antitrust class action practice can be traced to the very beginning of the antitrust laws.”).

<sup>10</sup>15 U.S.C. § 15, *et seq.* (2006).

<sup>11</sup>*Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (“[Section 4 of the Clayton Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”).

<sup>12</sup>See HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 18:1 (4th ed. 2002) (“Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy.”) (citing 28 U.S.C. § 1337 (2002); 15 U.S.C.A. § 15 (2002)).

<sup>13</sup>15 U.S.C. § 15, *et seq.* (2006).

<sup>14</sup>See Newberg, *supra* note 10, at § 18:1.

<sup>15</sup>15 U.S.C. § 1, *et seq.* (2006).

private individuals to pursue diverse antitrust claims.<sup>16</sup> However, instead of requiring these prospective plaintiffs to file suits individually, Federal Rule of Civil Procedure 23 allows a single plaintiff to represent all individuals who suffered an antitrust injury through a class action in order to avoid a multiplicity of actions within federal court.<sup>17</sup>

While a class action may improve efficiency by combining numerous claims into one action, it also presents procedural complications for individual class members, such as with the statute of limitations.<sup>18</sup> Initially, after the passage of Rule 23, federal courts dealt with a statute of limitations problem that arose out of the timing of class certification decisions.<sup>19</sup>

Until a class of plaintiffs is certified, the proposed members of the class are typically unaware of the pending suit because they have not yet received notice of the suit.<sup>20</sup> Because class certification decisions are often in-depth and lengthy proceedings, the statute of limitations applicable to the prospective plaintiffs' claims often expire before the court decides whether to certify the class.<sup>21</sup> Therefore, if the court did

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<sup>16</sup>*Paramount Pictures Inc. v. United Motion Picture Theater Owners, Inc.*, 93 F.2d 714, 719 (3d Cir. 1937) (“Congress intended by the anti-trust acts to prevent all combinations and conspiracies, whether composed of employees, employers, producers, users, or consumers, from unreasonably restraining the free flow of interstate commerce”).

<sup>17</sup>*See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974) (purpose of Rule 23 is to prevent a multiplicity of actions).

<sup>18</sup>*See* RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE*, 460 (4th ed. 2004) (class actions create timing problems with the statute of limitations).

<sup>19</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 550 (considering whether statute of limitations for putative class members should be tolled while the court decides class certification); *See also* *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (ED Pa. 1968).

<sup>20</sup>*See Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (no class action may be “dismissed or compromised without [court] approval,” preceded by notice to class members) (quoting Fed. R. Civ. Proc. 23(e)).

<sup>21</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 551 (recognizing that putative class members may not assert claims before the statute of limitations because they are

not toll the statute of limitations for prospective class members, either unaware of their claims or waiting for their claims to be resolved in the commenced class action, foreclosed class members from taking any individual action in the suit.<sup>22</sup> This “black-hole” created by the intersection of the timing of a class certification decision and the expiration of the statute of limitations creates problems when the court ultimately refuse to certify a class.<sup>23</sup>

If the class was eventually certified, prospective class members escaped this black-hole because Rule 23 provides that their claims are asserted on their behalf by the class representative, and thus there was no need for prospective class members to take individual action in the suit.<sup>24</sup> However, if the court ultimately refuses to certify the class, without the benefit of tolling, prospective class members needed to take individual action if they sought to intervene in the suit.<sup>25</sup>

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unaware that the suit existed or anticipated that their interests would be protected if they knew of the commencement of the suit); *see also* Escott v. Barchris Construction Corp., 340 F.2d 731, 735 (2d Cir. 1965) (Friendly, J., concurring) (interplay between statute of limitations and class certification presents a “trap” for putative class members that are unaware of the pending suit until after the statute of limitations has expired and then later seek to protect their interests).

<sup>22</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 551.

<sup>23</sup>*Id.* at 551-52 (although the Court's rationale supports tolling only for claims of putative class members who actually rely on the pendency of a class action, the tolling doctrine adopted by the court also applies to claims of class members who do not rely on, or who were unaware of, a pending class action).

<sup>24</sup>At least with regard to preserving their claims. *Id.* at 550 (“filing of a timely class action complaint commences the action for all members of the class as subsequently determined”).

<sup>25</sup>The Federal Rules of Civil Procedure allow for two types of intervention. Fed. R. Civ. Proc. 24(a)(2) grants an intervention as of right: “(1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.” Fed R. Civ. Proc. 24(b)(2) allows for permissive intervention: “(1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.”

The Supreme Court in *American Pipe & Constr. Co. v. Utah*,<sup>26</sup> addressed this problem involving the relationship between the statute of limitations and class certification by establishing a class action tolling rule, whereby the statute of limitations for intervenors is tolled until the court makes a class certification decision.<sup>27</sup> By tolling the statute of limitations during the class certification process prospective class members no longer lose their right to individual action in the suit before they were even aware of the suit,<sup>28</sup> thereby removing the black-hole from the Rule 23 landscape.

In *American Pipe*,<sup>29</sup> the State of Utah filed a class action in the United States District Court for the District of Utah eleven days before the four year statute of limitations ran under the Sherman Act.<sup>30</sup> After seven months, the district court dismissed Utah's petition for class certification, which sought to represent public agencies in Utah and surrounding states that used concrete and steel.<sup>31</sup> Eight days after the district court dismissed the class action, more than sixty towns, municipalities and water districts in the State of Utah, each of whom had been members of the dismissed class, filed a motion to intervene in the suit.<sup>32</sup> The district court denied the motions to intervene, concluding that the intervenors had no interest in the suit because the statute of limitations, which applied to their Sherman Act<sup>33</sup> claims, had expired.<sup>34</sup> On appeal, the Ninth Circuit reversed the district courts decision, denying the motions to intervene and concluding that the intervenors claims had not expired under the statute of limitations because they were effectively filed when the State of Utah originally filed a class action on behalf of them as members of a class.<sup>35</sup>

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<sup>26</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 538.

<sup>27</sup>*Id.* at 559.

<sup>28</sup>*Id.* at 551.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 541.

<sup>31</sup>*Id.* at 542.

<sup>32</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538 at 543-544.

<sup>33</sup>15 U.S.C. § 1 (2006).

<sup>34</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538 at 544.

<sup>35</sup>*Id.*

The Supreme Court affirmed the Ninth Circuit's decision,<sup>36</sup> but did not limit its decision to the precise time when prospective class members' claims were filed. Instead, the Supreme Court extended the logic of the Ninth Circuit, noting:

[P]otential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practical after the commencement" of the action when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class."<sup>37</sup>

Defining class certification as the point in which class members must decide whether to opt out of a class action, the Supreme Court dismissed the notion that taking individual action in the suit after the statutory limitations has run amounts to a "separate cause of action."<sup>38</sup> The Supreme Court concluded that in light of the amendments to Rule 23, "a federal class action is no longer an invitation to joinder but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."<sup>39</sup> The Supreme Court went on to reason that if it only allowed potential class members to participate in a class action if they filed motions to intervene before the statute of limitations had run, the efficiency principles behind Rule 23, which was designed to allow one plaintiff to file a claim on behalf of numerous similarly situated plaintiffs to avoid repetitious filings,

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<sup>36</sup>*Id.* at 559.

<sup>37</sup>*Id.* at 549 (citing subdivision (c)(1) of Rule 23, which provides "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.").

<sup>38</sup>*Id.* at 550. (specifically overruling the decision in *Athas v. Day*, 161 F.Supp. 916 (Colo. 1958) (holding that claims filed by class members after the expiration of the statute of limitations constituted a "separate cause of action.")).

<sup>39</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 550.

would be defeated.<sup>40</sup> Therefore, to best protect the efficiencies of Rule 23, the Supreme Court adopted a tolling rule which dictates that the commencement of a class action suit suspends the applicable statute of limitations for all proposed members of the class,<sup>41</sup> including absent class members.<sup>42</sup> By adopting a class action tolling rule, the Supreme Court gave considerable power to absent class members to extend the time period in which to file claims.<sup>43</sup>

The tolling doctrine established in *American Pipe*<sup>44</sup> plays an important role in assuring that members of a class can actually participate in the class action litigation, especially when they believe the class representative has not adequately represented their interests.<sup>45</sup> However, the tolling doctrine grew to encompass a far greater power for class members, the ability to have the statute of limitations tolled for any subsequent individual claims when a class action status is not granted.<sup>46</sup> After appellate courts began to limit the *American Pipe* tolling doctrine strictly to putative class members who filed motions to

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<sup>40</sup>*Id.* at 553-554.

<sup>41</sup>*Id.* at 554.

<sup>42</sup>*Id.* at 551-52 (“We think no different standard should apply to 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) and thus cannot claim that they are refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit”).

<sup>43</sup>See e.g., Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 540 (1996) (“*American Pipe* thus invested civil litigants with unusual power. Merely by filing a pleading labeled a ‘class action,’ the Court enabled individual litigants to alter the otherwise applicable limitations period affecting asserted claims.”).

<sup>44</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538.

<sup>45</sup>*Am. Pipe & Constr. Co.*, 414 U.S. at 544, n.8 (providing the requirements for intervention as of right which allows for intervention when the class member’s interests are not adequately represented).

<sup>46</sup>See *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 354-55 (1983) (“Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.”).

intervene after class action status was denied,<sup>47</sup> the Supreme Court expanded the scope of the tolling doctrine.

In order to justify expanding the tolling doctrine to subsequent individual claims asserted by class action members, the Supreme Court in *Crown, Cork & Seal Co., Inc. v. Parker*,<sup>48</sup> reiterated its previous holding in *American Pipe*<sup>49</sup> that a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations.<sup>50</sup> Noting that the primary purposes of limitations periods were met when a class action is commenced,<sup>51</sup> the Court determined that class members that do not file independent suits while the class action is still proceeding are not “sleeping on their rights,” specifically because Rule 23 encourages class members to allow the named plaintiffs to pursue their claims.<sup>52</sup> Combined with the view that class complaints adequately put defendants on notice of the claims sought against them and that they should preserve appropriate evidence, the Court stated that tolling the statute of limitations presents no element of unfair surprise to defendants who are later faced with either a motion to intervene or a latter individual suit by an absent class member.<sup>53</sup> The Supreme Court concluded that if the tolling rule did not also apply to individuals filing an individual suit, such an application would prejudice class members who do not wish to intervene, but rather opt out of the class action all together.<sup>54</sup>

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<sup>47</sup>*Id.* at 348-49 (citing *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982); *Stull v. Bayard*, 561 F.2d 429, 433 (2d Cir. 1977); *Arneil v. Ramsey*, 550 F.2d 774, 783 (2d Cir. 1977).

<sup>48</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>49</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538.

<sup>50</sup>*See Crown, Cork & Seal Co., Inc.*, 462 U.S. at 352 (“Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights, but these ends are met when a class action is commenced.”)(citations omitted).

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 350-51. Class members may prefer to opt out of the class action entirely and file an individual suit as opposed to intervening based on the

While the majority in *Crown*<sup>55</sup> readily extended the tolling doctrine to class members subsequent individual claims, the concurrence offered by Justice Powell cautioned that the “tolling rule of *American Pipe* is a generous one, inviting abuse.”<sup>56</sup> In light of the new expansive tolling rule Justice Powell warned district courts that they should only apply the tolling doctrine to a class members individual lawsuit if that “suit raises claims that concern the same evidence, memories, and witnesses as the subject matter of the original class suit so that the defendant will not be prejudiced.”<sup>57</sup>

Although the tolling doctrine is established law within the federal courts, there remains a parallel question of whether the Supreme Court’s rationale in *American Pipe*<sup>58</sup> and *Crown*<sup>59</sup> can be applied to toll the statute of limitations in a completely different jurisdiction. Much litigation and scholarship has addressed whether the filing of a federal class action tolls the statute of limitations for individual class members in state court claims.<sup>60</sup> The intricacies and individual preferences of state courts have created a split in state courts over whether they will accommodate cross jurisdictional tolling.<sup>61</sup> Despite the relative frequency with which state courts have addressed cross jurisdictional tolling, the Seventh Circuit recently became the first federal Appellate

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inconvenience of the forum the class action is situated in, a desire to maintain complete control over the litigation, or as a result of the court’s refusal to grant intervention. *Id.* at 351-352.

<sup>55</sup> *Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>56</sup> *Id.* at 354.

<sup>57</sup> *Id.* at 355 (internal quotations omitted).

<sup>58</sup> *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

<sup>59</sup> *Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>60</sup> *See In re Linerboard Antitrust Litig.*, 223 F.R.D. 335 (finding that Colorado, Indiana, Kansas, South Carolina, and Tennessee would all accept cross jurisdictional tolling); *Vaccareillo v. Smith & Nephew Richards, Inc.*, 94 Ohio St. 3d 380 (Ohio 2001) (Ohio Supreme Court adopted cross jurisdictional tolling in an antitrust case); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805, 807 (Tenn. 2000) (stating Tennessee has adopted cross jurisdictional tolling through its savings statute, TENN. CODE ANN. § 28-1-115 (2000)); *Portwood v. Ford Motor Co.*, 183 Ill.2d 459 (Ill. 1998) (Illinois Supreme Court declined to adopt cross jurisdictional tolling).

<sup>61</sup> *See supra* note 58.

Court to decide whether the principals of *American Pipe*<sup>62</sup> and *Crown*<sup>63</sup> allow a member of a state class action to receive the benefit of tolling for their subsequently filed individual federal claims.<sup>64</sup>

The warnings of Justice Powell's concurrence in *Crown*<sup>65</sup> seemingly predicted the debate over whether cross jurisdictional tolling should extend to federal courts.<sup>66</sup> The majority's opinion in *In re Copper Antitrust Litigation*<sup>67</sup> relied on Justice Powell's trepidation that the court's precedent of extending tolling from intervenors to class members who assert subsequent independent claims was inviting abuse of Supreme Court precedent, and denied cross jurisdictional tolling as an abuse of the *American Pipe*<sup>68</sup> tolling doctrine that over extends its logic.<sup>69</sup> The dissent, however, asserted Justice Powell's "same evidence, memories, and witnesses" test<sup>70</sup> as a rationale to allow cross jurisdictional tolling, contending that the state class action anti-trust claims alleged by the plaintiffs were exactly the same as the claims subsequently they later alleged individually in federal court.<sup>71</sup>

The interplay between state and federal antitrust laws provided a particularly good landscape for the Seventh Circuit to address cross jurisdictional tolling. Many state courts have adopted the federal antitrust scheme in their state antitrust laws, thereby creating nearly identical state and federal remedies for antitrust claims.<sup>72</sup> Because the

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<sup>62</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538.

<sup>63</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>64</sup>*In re Copper Antitrust Litig.*, 436 F.3d 782.

<sup>65</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>66</sup>*Id.* at 354-55 ("the tolling rule of *American Pipe* is a generous one, inviting abuse [and should be limited to situations involving] the same evidence, memories, and witnesses as the subject matter of the original class suit so that the defendant will not be prejudiced.").

<sup>67</sup>*In re Copper Antitrust Litig.*, 436 F.3d 782.

<sup>68</sup>*Am. Pipe & Constr. Co.*, 414 U.S. 538.

<sup>69</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 796 (citing Judge Meskill's dissent in *Cullen v. Margiotta*, 811 F.2d 698 (2d. Cir. 1987)).

<sup>70</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S. at 355.

<sup>71</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 799.

<sup>72</sup>*See, e.g.*, *Odom v. Lee*, 999 P.2d 755, 761 (Alaska 2000); (Claims brought under Alaska Stat. § 45.50.562 are analogous to claims brought under § 1 of the

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state and federal antitrust schemes are so similar, the plaintiffs in *In re*

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Sherman Act, 15 U.S.C.S. § 1, and federal cases construing § 1 of the Sherman Act will be used as a guide); *Brooks Fiber Communications v. GST Tucson Lightwave*, 992 F. Supp. 1124 (Ariz. 1997) (ARIZ. REV. STAT. §§ 44-1401-16 mirrors federal antitrust law; where summary judgment is inappropriate on federal claims under the Sherman Act, it is also inappropriate on state law claims under this article.); *Oakland-Alameda County Builders' Exch v. F.P. Lathrop Constr. Co.*, 4 Cal. 3d 354 (Cal. 1971)( California's antitrust statute the Cartwright Act is patterned after the federal Sherman Act, and "federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act"); *Kukui Nuts of Haw., Inc. v. R. Baird & Co.*, 789 P.2d 501, (Haw. Ct. App. 1990), (HAW. REV. STAT. §§ 480-1 provides restraints on anticompetitive business activity, must be construed in accordance with judicial interpretations of similar federal antitrust statutes); *Onat v. Penobscot Bay Medical Center*, 574 A.2d 872, 876 (Me. 1990) (evidence that defendant violated Sherman Act would support a violation of ME. REV. STAT. ANN. tit. 10, § 1101, Maine's antitrust provision); *General Aviation, Inc. v Garrett Corp.*, 743 F. Supp 515 (W.D. Mich. 1990)(Federal precedents interpreting Sherman act are authoritative in considering virtually identical provisions in Michigan antitrust reform act); *Metts v. Clark Oil & Refining Corp.*, 618 S.W.2d 698, 701 (Mo. Ct. App. 1981)("[Missouri's Antitrust Statutes are] analogous to and derived from § 1 of the Sherman Act, 15 U.S.C. § 1. Section 416.141 of Missouri's Antitrust Statutes requires that §§ 416.011 to 416.161 be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes"); NEV. REV. STAT. §§ 598A.050 (1997) (construction of the Nevada antitrust statute "shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes"); *Smith Mach. Co. v. Hesston Corp.*, 878 F.2d 1290,1292-93 (10th Cir. 1989), *cert. denied*, 493 U.S. 1073, 110 (1990) ("[New Mexico's antitrust statute] is patterned after § 1 of the federal Sherman Act, 15 U.S.C.S. § 1 et seq., and mandates a construction in harmony with judicial interpretations of the federal antitrust laws."); *Anheuser-Busch, Inc. v Abrams*, 71 NY. 2d 327, (N.Y. 1988) ("the Donnelly Act ..., often called a 'Little Sherman Act,' should generally be construed in light of Federal precedent and given a different interpretation only where State policy, differences in the statutory language or the legislative history justify such a result."); *Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436, 441 (Tx. App. 1994) (citing TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 1987) and stating that "the [Texas] state Antitrust Act should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes,"); *Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F. Supp. 759, 767, n.10 (E.D. Va. 1982) ("The wording of the Virginia restraint-of-trade provision is virtually identical to that of its federal counterpart").

*Copper Antitrust Litigation*<sup>73</sup> attempted to adopt the rationale in *Crown*<sup>74</sup> that tolling is proper where former class members assert claims individually that are identical to their previous class action claims, and argue that their federal antitrust claims should be tolled during the pendency of their state antitrust class action.<sup>75</sup>

## II. THE *IN RE COPPER ANTITRUST LITIGATION* DECISION:

### A. Cases Leading to *In re Copper Antitrust Litigation*

The Seventh Circuit's decision *In re Copper Antitrust Litigation*<sup>76</sup> resulted from an intriguing intersection between antitrust law and class action procedures.<sup>77</sup> As mentioned *supra*, antitrust law is not only useful for providing the basis for class action claims, but also the interplay between state and federal class action laws provides the unique opportunity for plaintiffs to seek nearly identical claims in either state or federal court.<sup>78</sup> As a result, a complex series of interrelated cases can develop, as seen in *In re Copper Antitrust Litigation*.<sup>79</sup> Two series of cases underlying *In re Copper Antitrust Litigation*<sup>80</sup> need to be dissected in order to understand the Seventh Circuit's decision that state class action members cannot benefit from tolling when they file subsequent individual federal claims. The first case is the underlying federal suit, where the plaintiffs in *In re Copper*

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<sup>73</sup>*In re Copper Antitrust Litig.*, 436 F.3d 782.

<sup>74</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S. 345.

<sup>75</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 798.

<sup>76</sup>*In re Copper Antitrust Litig.*, 436 F.3d 782.

<sup>77</sup> *In re Copper Antitrust Litig.*, 436 F.3d at 784 (Justice Wood noting that “[a]lthough this appeal arises out the extensive alleged conspiracy to fix price in various copper markets....the issues that concern us here would find a more comfortable home in a civil procedure class than an anti-trust class.”); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983).

<sup>78</sup> See *supra* notes 7, 8, and 40.

<sup>79</sup> *In re Copper Antitrust Litig.*, 436 F.3d 782.

<sup>80</sup> *Id.*

*Antitrust Litigation*<sup>81</sup> filed individual federal antitrust claims based on allegations of price fixing in copper markets.<sup>82</sup> The statute of limitations for the plaintiff's federal antitrust claims had expired, but the plaintiffs contended that the previous filing of a state antitrust class action tolled the statute of limitations for the federal suit.<sup>83</sup> Accordingly, the Seventh Circuit also examined the plaintiff's claims in the previously filed state class action to determine the availability of tolling in the underlying federal suit.<sup>84</sup>

1. *The Federal Suit: Loeb Indus., Inc. v. Sumitomo Corp.*

The underlying federal suit, *Loeb Indus., Inc. v. Sumitomo Corp.*, dealt with price fixing in copper markets.<sup>85</sup> In *Loeb*, Southwire Company, a manufacturer and distributor of electrical quality copper rod, wire and cable, sued three defendants (Morgan, Sumitomo and Global) based on alleged violations of the Sherman Act<sup>86</sup> and the Clayton Act<sup>87</sup> for conspiring to fix the price of copper.<sup>88</sup> The district court determined that Southwire's claim against the defendants accrued on July 23, 1996 after a press release implicated each of the three defendants in a price fixing scheme.<sup>89</sup> Using this date for the beginning of the statute of limitations, the district court found that the Sherman Act and Clayton Act's four year statute of limitations had expired before Southwire actually filed suit against the defendants on December 30, 2002, and therefore dismissed Southwire's claims.<sup>90</sup>

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<sup>81</sup>*Id.*

<sup>82</sup>*Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 477 (7th Cir. 2002).

<sup>83</sup>*Id.*

<sup>84</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 787-88.

<sup>85</sup>*Loeb Indus., Inc.*, 306 F.3d 469.

<sup>86</sup>15 U.S.C. § 1, *et seq.* (2006).

<sup>87</sup>15 U.S.C. § 15, *et seq.* (2006).

<sup>88</sup>*Loeb Indus., Inc.*, 306 F.3d at 474-78.

<sup>89</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 786-88.

<sup>90</sup>*Id.*

Southwire contended that the statute of limitations under the Sherman Act<sup>91</sup> and the Clayton Act<sup>92</sup> should have been tolled because while the statute of limitations was running for its federal claims, it was involved in a state class action against both Sumitomo and Morgan for the very same antitrust violations it was alleging in the federal suit.<sup>93</sup> In order to determine whether the Southwire was entitled to the benefit of tolling the court examined Southwire's antitrust claims in the previously filed state class action.<sup>94</sup>

## 2. *The Previous State Class Actions: The Heliotrope Cases*

Southwire originally was an unnamed class member in a class action filed in California state court on July 8, 1996, asserting state law antitrust violations against Sumitomo and Global, in which Morgan was later added as a defendant.<sup>95</sup> This case, *Heliotrope General, Inc v. Sumitomo Corp.*,<sup>96</sup> (Heliotrope I) established a class of businesses that “purchased copper-based products and paid prices for such copper-based products that were inflated due to the defendants' manipulative and unlawful actions,” but was later abandoned by the plaintiffs in June of 2000.<sup>97</sup> A second class action, *Heliotrope General, Inc., v. Credit Lyonnais Rouse Ltd.*,<sup>98</sup> (Heliotrope II) was filed on June 5, 2000 and asserted the same antitrust claims under California law against Sumitomo, Global, and Morgan as Heliotrope I.<sup>99</sup> Three months after the California Superior Court certified the

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<sup>91</sup>15 U.S.C. § 1, *et seq.* (2006).

<sup>92</sup>15 U.S.C. § 15, *et seq.* (2006).

<sup>93</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 785-87.

<sup>94</sup>*Id.* at 787 (“in order to benefit from the tolling rule for plaintiffs covered by a class action announced in *American Pipe*, the court ruled identical legal theories must be involved in both cases.”) (citations omitted).

<sup>95</sup>*Heliotrope General, Inc v. Sumitomo Corp.*, No. 701679 (Cal. Sup. Ct. 1996).

<sup>96</sup>*Id.*

<sup>97</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 787.

<sup>98</sup>*Heliotrope General, Inc.*, No. 749280 (Cal. Super. Ct. 2000).

<sup>99</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 787.

class on January 22, 2003, Southwire opted out of the class, pursuing its previously filed individual federal claims against the defendants.<sup>100</sup>

### 3. *The District Court's Analysis of Southwire's Individual Federal Antitrust Claims*

The district court rejected Southwire's argument that the time from which the second California state class action was commenced until Southwire exercised its right to opt out, (June 5, 2000 through March 22, 2003) should have tolled the statute of limitations for its individual federal antitrust claims asserted in *Loeb*.<sup>101</sup> The district court completely rejected the notion of cross jurisdictional tolling, finding that "because the [state class action] did not involve the same causes of actions as those in [the federal suit] against defendants, plaintiffs may not claim any tolling benefit from the [state class action]."<sup>102</sup> With this ruling, the district court refused to recognize the similarity between state and federal antitrust laws by emphasizing that the federal claims were different causes of action. In doing so, it dismissed the entire concept of cross jurisdictional tolling by requiring identical causes of action to facilitate tolling, a much more stringent standard than expressed by Justice Powell in *Crown*, which required only "the same evidence, memories, and witnesses as the subject matter" to facilitate tolling.<sup>103</sup>

## B. THE SEVENTH CIRCUIT'S ANALYSIS OF CROSS JURISDICTIONAL TOLLING

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<sup>100</sup>*Id.* at 787-788. (Southwire was the last plaintiff to opt-out of the class action on March 22, 2003).

<sup>101</sup>*Id.* at 788. The district court did conclude that Southwire could benefit from tolling from the federal class action antitrust suit filed against Morgan, but that time period was not great enough to make a difference. *Loeb Indus., Inc. v. J.P. Morgan & Co.*, No. 00-C-274-C (W.D. Wis. 2000).

<sup>102</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 788.

<sup>103</sup>*Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 355 (1983).

Judge Cudahy issued the opinion for the court regarding the tolling of Southwire's federal antitrust claims based on its previously filed state court class action.<sup>104</sup> Confronting the issue of cross jurisdictional tolling head on, Judge Cudahy stated, "Not only is there no suggestion in *American Pipe*, or in *Crown* that these decisions construing [Rule 23] have any direct application to parallel state procedures, but the policies underlying *American Pipe* and like precedents simply do not apply in the cross-jurisdictional context."<sup>105</sup>

*1. Does Cross Jurisdictional Tolling Promote Judicial Efficiency?*

Judge Cudahy advanced two arguments to undermine the notion of cross jurisdictional tolling. First, Judge Cudahy relied on the procedural aspects of Rule 23 to distinguish between cross and intra-jurisdictional tolling.<sup>106</sup> Noting that plaintiffs who seek cross jurisdictional tolling never face the potential to be "forced by the federal statute of limitation to file duplicative claims" to protect their interests, Judge Cudahy argued that the essential rationale behind *American Pipe* could not apply to former members of a state class action that later seek to sue individually in federal court.<sup>107</sup> Through this argument, Judge Cudahy contends that the federal courts do not derive any efficiency from tolling the statute of limitations based on

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<sup>104</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 793. The majority rendered a two part opinion, the first dealing with question of the accrual date of Southwire's claims which is beyond the scope of this article, and the second which specifically addressed Southwire's tolling argument. *Id.* at 788-793.

<sup>105</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 793-94 (citing *Am. Pipe & Constr. Co.*, 414 U.S. 538; *Crown, Cork & Seal Co., Inc.*, 462 U.S. 345).

<sup>106</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 794 ("The situation contemplated by the plaintiffs here is, however, quite different [from traditional tolling]. Here plaintiffs have become members of a class in a state class action but want the federal statute of limitations governing a factually similar federal claim to be tolled").

<sup>107</sup>*Id.* ("The essential rationale of *American Pipe* is that members of a class whose claims are embodied in a class action should not be required by the exigencies of the statute of limitations to clutter the courts with duplicative lawsuits as long as their claims are encompassed by the class action.).

state court actions. This lack of efficiency became Judge Cudahy's overarching concern throughout his opinion.<sup>108</sup> Contrary to tolling within a jurisdiction, which is intended to prevent class members from presumptively filing individual actions to preserve their claims if their class is not certified, tolling between jurisdictions would not prevent presumptive filings because plaintiffs who previously filed their claims in state court must file a claim in federal court as a means to entering the federal system.<sup>109</sup>

However, Judge Cudahy's conclusion that tolling would not prevent presumptive filings is only applicable if you view the plaintiff's decision to file in federal court from the perspective of the federal court. Judge Cudahy's limited perspective fails to acknowledge efficiency concerns of cross jurisdictional tolling beyond that slight chance that some state filed claims would reach federal court if the tolling was limited to "the same cause of action."<sup>110</sup> However, there is a dual efficiency served by allowing cross jurisdictional tolling that Judge Cudahy's opinion ignores. While prospective state class action members have an incentive to sit on the sidelines and wait until a certification decision is made, or to see how the case is proceeding before deciding to opt out, they have no incentive to hold off on any federal claims they could also assert. Under *In re Copper Antitrust Litigation*,<sup>111</sup> these state class members will file suit as soon as possible to meet the federal statute of limitations. Judge Cudahy is correct that the timing of this individual federal suit does not implicate any efficiency concerns for the federal court *once a suit is filed*, but it certainly does have an effect on whether the state class member decides to file an individual federal claim in the first place. If cross jurisdictional tolling were allowed,

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<sup>108</sup>*Id.* at 794-795.

<sup>109</sup>*Id.* at 794 ("Since filing in federal court is a prerequisite to pursuing a federal remedy regardless of the state class action, there will be no efficiency gain whether the federal filing is made while the claimant is part of the state class action or later [or never]").

<sup>110</sup>*Id.* at 794-795.

<sup>111</sup>*Id.*

state class members would not feel the pressure to concurrently file their individual federal antitrust claims, which would provide for an identical remedy as the state claim, because they could at least wait and see if their claims were satisfied at the state level first.

Simply put, Judge Cudahy's opinion assumes that prospective state class action members will not file suit in federal court if they are satisfied with the outcome in state court, without similarly assuming that without the benefit of tolling, state class members will presumptively file a federal claim as a safeguard to protect their identical federal interests in case the class is not certified or because they are not being adequately represented. This is the reason that the same transaction and similar claims test is so important to the calculus of extending the tolling doctrine, because it forces the court to view the decision to file a federal suit from the plaintiff's position. Judge Cudahy is quite correct when he states that to the federal courts a federal antitrust claim is distinct from a state antitrust claim simply because of the separate jurisdictions,<sup>112</sup> but then over extends the logic of his statement. Judge Cudahy contends that whatever similarities exist between the state and federal antitrust laws that create an interest for the federal courts in the outcome of state court class actions; that interest is not significant enough to extend *American Pipe*<sup>113</sup> to allow cross jurisdictional tolling. However, when Judge Cudahy's limits his view to how the federal court perceives a subsequent individual federal suit as only necessary to enter into the federal system, he overlooks the potential that state class members may never want to pass through the gate in the first place. To the antitrust plaintiff the state and federal remedies are identical. As a result, plaintiffs are just as content to resolve their claims in state court as they would be in federal court. State plaintiffs have no incentive to file a federal suit until they determine whether or not the state suit is protecting their interests.

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<sup>112</sup>*Id.* at 794.

<sup>113</sup>*Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974).

In her dissent, Judge Wood recognizes that plaintiffs are largely disinterested in filing a federal suit in federal court until they realize their interests are not being represented or until the case is dismissed. Unlike Judge Cudahy, who concentrated on the difference between state and federal jurisdiction to conclude that cross-jurisdictional tolling is an over extension of the principles set forth in *American Pipe*<sup>114</sup> and *Crown*,<sup>115</sup> Judge Wood relies on the similarities between the state and federal jurisdictions in the antitrust class action context.<sup>116</sup> Judge Wood's dissent highlights the common ground between the state and federal jurisdictions through three comparisons.

Judge Wood challenged Judge Cudahy's contention that cross-jurisdictional tolling would not further the efficiency of the federal courts. Noting, that if tolling is limited to identical causes of actions, it "would encourage absent state class members to file protective claims to assert their new legal theories," as opposed to waiting to see if their claims were resolved in the class action.<sup>117</sup> These claims would not necessarily remain in state court as diversity or federal subject matter jurisdiction may place them in federal court. As a result of this possibility, Judge Wood contended that cross jurisdictional tolling would allow for the efficient resolution of class actions as contemplated by Rule 23.<sup>118</sup>

Clearly the federal system loses efficiency when it adopts a tolling rule that encourages every single state plaintiff involved in an antitrust class action to file a simultaneous federal suit, despite the fact they could obtain the exact same remedy in the state system. The parallel state and federal antitrust schemes allows this case to fall into Justice Powell's "same evidence, memories, and witnesses as the subject

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<sup>114</sup>*Id.*

<sup>115</sup>*Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983).

<sup>116</sup>*See In re Copper Antitrust Litig.*, 436 F.3d at 803 ("Tolling here would recognize the near-identity of claims and transactions and at the same time further the goals of [Rule 23] to promote the fair and efficient adjudication of a controversy").

<sup>117</sup>*Id.* at 803.

<sup>118</sup>*Id.*

matter of the original class suit”<sup>119</sup> test indicating that in this context tolling is not only an appropriate extension of the tolling doctrine, but that cross jurisdictional tolling can promote judicial economy without harming defendants in the proper context.

Judge Cudahy’s conclusion that tolling between jurisdictions merely lengthens the time available for plaintiffs to assert their claim in federal court<sup>120</sup> highlights the paradox of cross jurisdictional tolling. By increasing the time in which state antitrust class members can file individual federal antitrust claims, the federal court can remove the incentive for every state class action member to presumptively filing federal claims, and thus promote judicial efficiency.

## 2. *Do Significant Harms Exist to Offset a Gain in Judicial Efficiency?*

Judge Cudahy also refused to adopt cross jurisdictional tolling on the basis that Rule 23 allows class action litigants to stand aside and let the class representative maintain their claims for them.<sup>121</sup> In other words, absent class members’ claims for purposes of Rule 23 are functionally asserted when the class action is filed by the representative. Therefore, tolling the statute of limitations until the class is certified, and class members are given the opportunity to opt out, merely recognizes that the representative tends to the class members’ claims.<sup>122</sup> Judge Cudahy emphasized that this formalistic rationale behind tolling, which recognizes the “ordinary Rule 23 situation”<sup>123</sup> where the class members claims are pursued by a representative on their behalf is distinct from Southwire’s situation,

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<sup>119</sup>*Crown, Cork & Seal Co., Inc.*, 462 U.S at 355.

<sup>120</sup>*See In re Copper Antitrust Litig.*, 436 F.3d at 795 (“If the requirements of the statute of limitations result in the federal suit’s being brought while the state class action is pending, there is no inefficiency or unfairness”).

<sup>121</sup>*Id.* at 794 (Rule 23 is “in accordance with the theory that someone else is making identical claims on behalf of the silent class members”).

<sup>122</sup>*Id.* (“As long as [class members] are in effect passively tendering their claim through inclusion in the class action, they should not be forced to proceed individually, whether by intervention or otherwise”).

<sup>123</sup>*Id.*

where no one had filed a lawsuit in federal court on its behalf, and no one may ever file a federal suit at all.<sup>124</sup>

Judge Cudahy also went on to challenge what he deemed Judge Wood's "functional equivalence" standard,<sup>125</sup> echoing that the separateness of state and federal jurisdictions overrides any benefits of tolling the statute of limitations simply because federal and state antitrust laws are similar.<sup>126</sup>

In light of the undeniable need for a state class action litigant to avail themselves to federal antitrust laws by filing a suit in the federal courts, Judge Cudahy held that Southwire's participation in the California state class action should have no effect on the tolling of the statute of limitations for federal antitrust claims.<sup>127</sup>

While Judge Cudahy's appeal to the distinct nature of the state and federal jurisdictions is a powerful formalistic argument, it fails to account for the gain in judicial efficiency associated with cross jurisdictional tolling in this context. Significantly, Judge Cudahy fails to identify any significant harm that would result from the expansion of the tolling doctrine that would offset these gains in efficiency.<sup>128</sup> Judge Cudahy does contend that refusing to adopt cross jurisdictional tolling would allow defendants to be free from stale claims in due time,<sup>129</sup> but this concern contradicts Judge Cudahy's acceptance of Judge Wood's conclusion that the maintenance of a state class action asserting a state claim that is similar to federal claims puts defendants

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<sup>124</sup>*Id.*

<sup>125</sup>*Id.* at 796.

<sup>126</sup>*Id.* at 794 ("However similar or dissimilar the function of federal antitrust law may be with respect to state law, the federal claim is part of a distinct that must be pursued in a wholly different court system").

<sup>127</sup>*Id.*

<sup>128</sup>The only harm identified by Judge Cudahy is that defendants in federal court should not be expected to be on notice of claims from state court proceedings "two, five, ten, or even more years down the road" *Id.* at 797. However, it is unlikely that if the court adopted cross jurisdictional tolling the tolling period would ever reach five years, let alone ten or more. The plaintiffs in *In re Copper Antitrust Litig.* sought a tolling period of two and a half years. *Id.* at 788.

<sup>129</sup>*Id.* at 797.

on notice that they might be sued federally, and leads to the preservation of evidence and memories.<sup>130</sup>

Judge Wood reached this conclusion by refusing to acknowledge any functional differences between the way California treats state class actions and the way Rule 23 treats federal class actions. Citing that California courts “recognize and preserve the rights of absentee class members even before the issue of certification has been determined,”<sup>131</sup> Judge Wood noted that California’s class action rules adopt the same “representative filing” as Federal Rule 23.<sup>132</sup> Extending this reasoning, Judge Wood asserted that “the fact that the first class action in this case happened to be in California is not enough [alone] to defeat [cross-jurisdictional] tolling.”<sup>133</sup> This premise establishes the basis for the argument that an antitrust suit in state court is functionally equivalent to an antitrust claim in federal court.<sup>134</sup>

Further dismantling the wall erected by Judge Cudahy between state and federal jurisdictions, Judge Wood examined the factual and legal backgrounds of the underlying state and federal suits involved in the litigation.<sup>135</sup> To effectuate this examination, Judge Wood formulated a standard for cross jurisdictional tolling derived from Justice Powell’s “the same evidence, memories, and witnesses as the subject matter” test from *Crown*,<sup>136</sup> which requires that the earlier state court class action arise out of the same transaction or occurrence as the subsequent federal action, and that the same claims be asserted from those transaction and occurrences.<sup>137</sup> To support this formulation, Judge Wood maintained that the purpose of the statute of limitations is

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<sup>130</sup>*Id.* at 796.

<sup>131</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 801-02 (citing *Shapell Indus., Inc. v. Super. Ct. Los Angeles County*, 34 Cal.Rptr.3d 149 (Cal. Ct. App. 2005)).

<sup>132</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 801.

<sup>133</sup>*Id.*

<sup>134</sup>*Id.* at 799-800. (“The claims in the [previous state class action] are functionally the same as those in the federal case”).

<sup>135</sup>*Id.* at 800.

<sup>136</sup>*Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983).

<sup>137</sup>*Id.* at 355; *In re Copper Antitrust Litig.*, 436 F.3d at 798.

“to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”<sup>138</sup>

Accordingly, Judge Wood concentrated on whether the Southwire’s state court class action effectively gave the defendants in the federal suit notice of claims against them.<sup>139</sup> After examining the claims asserted in the California state class action by Southwire, Judge Wood concluded that all relevant interests of the statute of limitations would be served by tolling because “the [previous] California suit and the current suit cover the same ground.”<sup>140</sup> Therefore, the defendants would be aware of the claims asserted against them regardless of tolling. Specifically drawing comparisons between the state and federal suits Judge Wood noted that “[t]he Heliotrope litigation involved the same facts, evidence, and witnesses as the present action,” and that “the two lawsuits also involve virtually identical legal claims, albeit with different statutory labels.”<sup>141</sup>

Judge Wood also recognized that the similarity of the California antitrust laws and the federal antitrust laws could functionally preclude plaintiffs from alleging federal causes of action due to claim preclusion,<sup>142</sup> thereby asserting that it is plaintiffs who are actually harmed by refusing to extend cross jurisdictional tolling, not defendants. Judge Wood cites the California Supreme Court’s decision in *Aguilar v. Atlantic Richfield Co.*, which held that “because [section 1] of California’s Cartwright Act is patterned after the federal Sherman Act and both have their roots in common law, federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act,”<sup>143</sup> to reiterate the fact that had Southwire remained in

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<sup>138</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 798 (citing *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342 (1944)).

<sup>139</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 799-800.

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

<sup>142</sup>*Id.* at 801-02.

<sup>143</sup>*Id.* (citing *Aguilar v. Atl. Richfield Co.*, 107 Cal.Rptr.2d 841 (Cal. 2001)).

the California State class action issues decided there would have been precluded in a subsequent federal antitrust suit. While Judge Wood acknowledged that Southwire's antitrust claims never faced the possibility of being completely barred in a federal action under California's issue preclusion laws,<sup>144</sup> Southwire would have faced the reality of issue-preclusion had it remained in the California class action. Due to the similarities in state and federal antitrust laws,<sup>145</sup> Judge Wood noted that issue preclusion concerning key antitrust questions like relevant market would functionally bar Southwire's federal claims, and thereby unnamed state class action members would lose the very same rights they would lose if there class action was filed in federal court.<sup>146</sup>

Unlike, Judge Cudahy's view of the relation between state and federal court proceedings which are necessarily separate, Judge Wood's examination of issue-preclusion attempts to display the interrelatedness of the state and federal courts within the antitrust context. Appropriately, the closer these two forums become the easier it is to justify cross jurisdictional tolling.

### III. CONCLUSION

It is clear that *American Pipe*<sup>147</sup> simply asserts a federal interest in assuring the efficiency and economy of the class action

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<sup>144</sup>The Supreme Court's decision in *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 375 (1985) dictates that state law principals of claim preclusion are applied in federal courts when deciding whether federal claims are barred by a state court's decision.

<sup>145</sup>Both the Cartwright Act, Cal. Bus. & Prof. Code § 16720 (2006), and the Sherman Act, 15 U.S.C. §1 (2006), require the plaintiff to define the relevant market in which an anticompetitive effect is created, and identify specific antitrust injuries resulting from the defendant's actions.

<sup>146</sup>*In re Copper Antitrust Litig.*, 436 F.3d at 802.

<sup>147</sup>*Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974).

procedure.<sup>148</sup> The intricacies hidden within this broad statement reveal the significance of the Seventh Circuit's decision in *In re Copper Antitrust Litigation*.<sup>149</sup> The dialogue between Judge Cudahy and Wood sets forth a paradigm for other Circuit Courts to debate the question of cross jurisdictional tolling. However, the impact of denying the benefit of tolling to state class action plaintiffs who later assert federal claims creates an otherwise unnecessary incentive for those class members to file concurrent federal action at the commencement of their class action suit. That incentive will directly result in a loss of judicial efficiency for the federal court system, as it will be required to deal with claims that otherwise never would have been filed. In the end, the Seventh Circuit's desire to maintain a rigid separation between the federal and state judicial system by rejecting cross jurisdictional tolling where state and federal claims are functionally identical will only intertwine the two jurisdictions further by instituting a policy of dual filing for antitrust claims.

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<sup>148</sup>Kathleen L. Cerveney, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice In Wonderland*, 60 NOTRE DAME L. REV. 686 (1985).

<sup>149</sup>*In re Copper Antitrust Litig.*, 436 F.3d 782.