Clarifying the Scope of Texas's Cross-Jurisdictional Tolling Rule: An Exception for Putative Class Members with Property-Related Claims

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I. INTRODUCTION

Imagine that a large class of Texas mineral owners were underpaid royalties by their lessor, Big Corp. Oil & Gas Co. ("Big Corp."). Seeking redress, these individuals timely file a class action lawsuit in a Texas federal court, asserting breach of contract claims against Big Corp. After extensive motion practice, class certification is ultimately denied. The putative members of that class action lawsuit now file individual breach of contract claims in a Texas state court against Big Corp. However, the four-year statute of limitations applicable to their breach of contract claims has since expired. Or has it?[1] Does a class action lawsuit filed in a federal court located in Texas that asserts Texas property-related claims toll the statute of limitations for the putative members of that class?

This Comment seeks to clarify the scope of cross-jurisdictional tolling in Texas. Although both Texas and federal courts interpreting Texas law have addressed this issue, no Texas court has specifically addressed whether putative members of a class action lawsuit—which was filed in a federal court *located in Texas* and that *asserts Texas property-related claims*—can rely on the class action lawsuit to toll the statute of limitations applicable to their claims. Part I of this Comment provides a brief history of the class action tolling doctrine, specifically describing *American Pipe* and its progeny. Part II discusses recent Texas case law decisions on the *American Pipe* doctrine and their applicability when cross-jurisdictional tolling is involved. Part III briefly discusses the policy concerns behind cross-jurisdictional tolling. Part IV recommends that Texas should adopt cross-jurisdictional tolling in *property-related cases*, especially when the class action lawsuit is filed in a federal court *located in Texas*. Finally, Part V summarizes the points discussed in this Comment.

1. This hypothetical is largely based off a problem presented by David Bober in his article on cross-jurisdictional tolling. *See* David Bober, *Cross-Jurisdictional Tolling: When and Whether a State Court Should Toll Its Statute of Limitations Based on the Filing of a Class Action in Another Jurisdiction*, 32 SETON HALL L. REV. 617, 617–18 (2002).

II. A BRIEF HISTORY OF CLASS ACTION TOLLING: *AMERICAN PIPE* AND ITS PROGENY

The *American Pipe* doctrine provides that the filing of a class action lawsuit tolls the statute of limitations as to all purported members of the class who wait to file suit, not just those who file motions to intervene.[2] This section briefly describes the cases that created (and extended) the *American Pipe* doctrine.

A. *The Case That Started It All: American Pipe & Construction Company v. Utah (1974)*

In *American Pipe*, the Supreme Court of the United States granted certiorari of a case to decide whether the filing of a class action lawsuit tolled the claims of the individual class members.[3] The Supreme Court stated that "[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."[4] If plaintiffs therefore assert claims that are "'typical of the claims or defenses of the class' and would 'fairly and adequately protect the interests of the class,'" they should stand as parties to the suit until they received notice of the suit or chose not to continue in the suit.[5] The Court ruled that the commencement of the class action tolled the statute of limitations for all putative members who might later wish to participate in the suit.[6]

The Court reasoned that "to hold contrary would frustrate the principle functions of the class suit" because it would force putative members to file motions to join or intervene in order to assure their participation in the judgment—"precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.'"[7] The Court then extended this principle 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)" because potential class members are "passive beneficiaries of the action brought on their behalf" during the pendency of the District Court's determination on class certification.[8] Therefore, the Court held that "the later running of the applicable statute of limitations [while waiting on class certification] does not bar

2. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–55 (1974).
3. *Id.* at 545.
4. *Id.* at 545–50.
5. *Id.* at 550–51.
6. *Id.*
7. *Id.*
8. *Id.* at 551–52.

participation in the class," even for asserted members of the class who were unaware of the proceedings brought in their interest.[9]

In adopting the *American Pipe* tolling doctrine, the Supreme Court emphasized that such a tolling rule "is in no way inconsistent with the functional operations of a statute of limitations."[10] Moreover, the Court emphasized that the policies underlying the statute of limitations are not broken when "a named plaintiff who is found to be representative of a class commences a suit and thereby notifies 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."[11] This is because the defendants will have all the information necessary to determine the subject matter and size of the potential litigation, and the manner in which the suit will be tried within the period set by limitations.[12]

B. *American Pipe's Progeny: Crown, Cork & Seal Company, Inc. v. Parker (1983)*

The Supreme Court extended the *American Pipe* doctrine in *Crown, Cork & Seal* ("*Crown*") to include not just members of the putative class and intervenors, but also individuals who timely sought to bring *individual actions* after class certification was denied.[13] The Court began its analysis by explaining that there are numerous reasons why putative class members, after denial of class certification, might prefer to bring an individual suit rather than intervene: (1) inconvenient forums; (2) control over litigation; and (3) the possibility that their motion to intervene would be denied.[14] These putative class members have every incentive to file an individual suit prior to the expiration of their own limitations period.[15] The Court explained that if the *American Pipe* doctrine did not apply in these instances, it would result in "a needless multiplicity of actions being filed—precisely the situation that Federal Rule of Civil Procedure 23 and the *American Pipe* doctrine were designed to avoid."[16]

The Supreme Court further stated that this rule would not be an aberration of the policies underlying the statute of limitations—charging defendants with notice of adverse claims and preventing plaintiffs from sleeping on their rights—because "these ends are met when a class action is commenced."[17] This is because the class complaint "notifies the defendants not only of the substantive claims being brought

9. *Id.* at 552.
10. *Id.* at 554.
11. *Id.* at 554–55.
12. *Id.* at 555.
13. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349–52 (1983).
14. *Id.* at 350.
15. *Id.* at 350–51.
16. *Id.* at 351.
17. *Id.* at 352–53.

against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment."[18]

III. *AMERICAN PIPE* Tolling in Texas and Its Discord with Cross-Jurisdictional Tolling

Both *American Pipe* and *Crown* involved class action lawsuits that were filed in federal court, and asserted federal causes of action.[19] However, these cases did not decide the issue of cross-jurisdictional tolling—whether a state's statute of limitations is tolled pending a class certification decision in another jurisdiction (state or federal).[20] This Section briefly explains the case that brought the *American Pipe* doctrine to Texas, and subsequent cases that attempted to rely on *American Pipe* for cross-jurisdictional tolling.

A. *Bringing American Pipe to Texas: Grant v. Austin Bridge Construction Company (1987)*

In *Grant*, property owners alleged that Austin Bridge contracted with the State of Texas to build a highway south of Huntsville, Texas.[21] Heavy rains caused sediment from the construction site to pour into a subdivision and nearby lake that the property owners had the exclusive right to occupy for recreational use.[22] The property owners claimed this exclusive right to occupy was damaged and brought a class action lawsuit against Austin Bridge.[23] Austin Bridge claimed that, during the pendency of the case, the statute of limitations ran on the cause of action of the unnamed class members.[24] The court held that even though the statute of limitations on a class member's individual cause of action would expire during the pendency of the class action, the statute of limitations remained tolled for all members of the class until certification was denied.[25] The court came to this conclusion by reasoning that Rule 42 of the Texas Rules of Civil Procedure was patterned after Rule 23 of the Federal Rules of Civil Procedure, and any federal decisions interpreting class action procedures provided authoritative guidance for the court.[26]

The decision in *Grant*, therefore, brought the *American Pipe* doctrine to Texas courts by holding that "a state class action lawsuit seek-

18. *Id*.
19. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–55 (1974); *Parker*, 462 U.S. at 347–49; Gerald D. Jowers, Jr., *The Class Stops the Clock*, 41–NOV TRIAL 18, 25 (Nov. 2005).
20. Jowers, *supra* note 19, at 25.
21. Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 367–68 (Tex. App.—Houston [14th Dist.] 1987, no writ).
22. *Id.* at 368.
23. *Id.*
24. *Id.* at 370.
25. *Id.*
26. *Id.*

ing property damages tolled the statute of limitations for all potential class members' individual claims, pending a decision on class certification."[27]

B. *The Struggle Between the American Pipe Doctrine and Cross-Jurisdictional Tolling*

After the Texas Supreme Court adopted the *American Pipe* doctrine for use in Texas courts, several Texas and federal cases began exploring the reach of this doctrine. This Subsection explains the cases that have shaped Texas law on cross-jurisdictional tolling. Although the following cases indicate Texas does not permit cross-jurisdictional tolling, they do suggest that this thought is not without exceptions.

1. *Bell v. Show Denko K.K.* (1995)

In *Bell*, an individual brought a personal injury lawsuit in a Texas court against Showa Denko, K.K. ("Denko") on September 16, 1992 for injuries she attributed to her ingestion of a dietary supplement.[28] Denko filed for summary judgment, claiming that Bell's suit was not timely filed.[29] Relying on the decision in *Grant*, Bell argued that a mass personal injury class action lawsuit filed in a federal court located in New Mexico—and predicated on New Mexico law—tolled the statute of limitations.[30] The Court held that *Grant* did not go so far as to hold that "the filing of a mass personal injury suit, in federal court, in another state, *with the variety of claims* necessarily involved in such a case, entitled a plaintiff to a tolling of the limitations period such as in *American Pipe*," and that such a holding was not warranted by the *Grant* decision.[31] The court reasoned that in *Grant*, the suit was filed in a Texas state court and involved "a readily discernable group of people *claiming injury to certain property rather than personal injury*," and that such a distinction is important in determining whether the defendants have fair notice of the existence of a claim by filing the class action lawsuit.[32]

2. *Vaught v. Showa Denko K.K.* (1997)

In *Vaught v. Showa Denko K.K.*, Vaught brought a products liability action in Texas state court against the same defendant as in *Bell,* Showa Denko, K.K. ("Denko") on April 28, 1993 for injuries she at-

27. In re Enron Corp. Sec., 465 F. Supp. 2d 687, 720 (S.D. Tex. 2006) (explaining Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. App.—Houston [14th Dist.] 1987, no writ)).

28. Bell v. Showa Denko K.K., 899 S.W.2d 749, 752 (Tex. App.—Amarillo 1995, writ denied).

29. *Id.*

30. *Id.* at 756–57.

31. *Id.* at 758 (emphasis added).

32. *Id.* (emphasis added).

tributed to her ingestion of a nutritional supplement.[33] Vaught's case was removed to federal court, and a Multidistrict Litigation ("MDL") Panel subsequently ordered the action transferred to the United States District Court for the District of South Carolina to be joined with similar pending lawsuits.[34] Denko moved for summary judgment on limitations grounds, and Vaught claimed that her potential membership in two mass personal injury federal class action lawsuits filed in Maryland, and subsequently transferred to the same MDL panel in which Vaught's suit was pending, tolled the statute of limitations.[35] The court reasoned that "[w]hether a *state* statute of limitations would be tolled by a *federal* class action" was a question of state law[36] and that Texas's tolling rule operates as follows:

> A state (Texas) class action that raises property damage-type claims tolls a Texas statute of limitations pending a certification ruling. And, consistent with our understanding of this Texas tolling rule, it is unclear whether, under this rule, a *federal* class action filed in Texas or in any other State would ever toll a Texas statute of limitations, regardless of the type of claims raised.[37]

Thus, the court held that cross-jurisdictional tolling was not permissible.[38]

3. *Prieto v. John Hancock Mut. Life Ins. Co.* (2001)

In *Prieto v. John Hancock Mutual Life Insurance Company*, an independent insurance agent sold a life insurance policy belonging to John Hancock Mutual Life Insurance Company ("Hancock") to Brett Davis and convinced him to put it in a trust managed by Angelo Prieto.[39] Based on the insurance agent's representations, Brett continued to make premium payments.[40] When interest rates declined in the 1980s, a federal class action lawsuit was filed in Maryland against Hancock—in which plaintiffs[41] were members—because dividends to policy holders were reduced.[42] After a proposed settlement was reached, plaintiffs subsequently opted out of the class and filed an individual lawsuit against Hancock, alleging injuries categorized as "economic loss."[43] The plaintiffs contended that the statute of limitations should be tolled by the filing of the federal class action lawsuit filed in

33. Vaught v. Showa Denko K.K., 107 F.3d 1137, 1139–40 (5th Cir. 1997).
34. *Id.* at 1140.
35. *Id.* at 1143.
36. *Id.* at 1147 (emphasis in original).
37. *Id.* (emphasis in original).
38. *Id.*
39. Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 509–11 (N.D. Tex. 2001), *abrogated by* Newby v. Enron Corp., 542 F.3d 463, 463 (5th Cir. 2008).
40. *Prieto*, 132 F. Supp. at 511.
41. Plaintiffs were Brett Davis and Angelo Prieto. *Id.*
42. *Id.* at 511.
43. *Id.* at 517, 518 n.14.

Maryland.[44] The court stated in dicta that Texas courts, if presented with the issue, would likely interpret the class action tolling rule of *Grant* and *Bell* as extending to all property damage claims, regardless of the forum in which the class action was filed.[45] The court therefore reasoned that because the class's claims for "economic loss" were similar to property damage claims in that the type and potential number of claims can easily be determined, the class action lawsuit tolled the statute of limitations.[46]

4. *Newby v. Enron Corp.* (2008)[47]

In *Newby*, Fleming & Associates ("Fleming") filed seven securities-related lawsuits in Texas state courts against various Enron-related defendants seeking restraining orders to prevent defendants from destroying Enron-related documents.[48] Because the district court had already issued a similar order against the same defendants,[49] the district court issued a memorandum enjoining Fleming from filing any new Enron-related actions without leave of court.[50] Fleming filed a motion for leave to file two Enron-related actions and a motion to lift the injunction; the former was granted, and the latter was denied.[51] Meanwhile, the district court certified the *Newby* class action.[52] Fleming subsequently moved for leave to file thirty-four Enron-related lawsuits in Texas courts, but the district court denied the motion, stating that the statute of limitations had run.[53] Relying on *Grant*, *Vaught*, and *Bell*, the court held that the district court was correct in concluding that the *Newby* federal securities fraud class action lawsuit filed in Texas did not toll plaintiffs' Texas law securities claims.[54] The court further stated that claimants were "free to pursue this argument with Texas courts," so the state courts can clarify the reach of Texas's tolling rules.[55]

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44. *Id.* at 517.
45. *Id.* at 518.
46. *Id.* at 518 n.14.
47. Providing no reasoning as to why, *Newby* effectively overruled *Prieto*. Newby v. Enron Corp., 542 F.3d 463, 463 (5th Cir. 2008).
48. *Id.* at 466–67.
49. The district court had jurisdiction over the various Enron-related cases as part of the Enron Multidistrict Litigation proceeding and the "*Newby*" consolidated cases. *Id.* at 467.
50. *Id.*
51. *Id.*
52. *Id.* The *Newby* class action involved similar Enron-related securities claims and was certified by the United States District Court for the Southern District of Texas. In re Enron Corp. Sec., 236 F.R.D. 313, 320 (S.D. Tex. 2006), *rev'd sub nom.* Regents of Univ. of Cal. v. Credit Suisse First Bos. (USA), Inc., 482 F.3d 372 (5th Cir. 2007).
53. *Newby*, 542 F.3d at 467–68.
54. *Id.* at 472; *see also* In re Enron Corp. Sec., 465 F. Supp. 2d 687, 722 (S.D. Tex. 2006).
55. *Newby*, 542 F.3d at 472.

5. *In re BP P.L.C. Secs. Litigation* (2014)

The United States District Court for the Southern District of Texas recently addressed the scope of Texas's views on cross-jurisdictional tolling in a case involving negligent misrepresentation claims.[56] The *In re BP* court, looking to the analysis in *Bell*, stated that the availability of tolling appears to depend on the following context-specific questions: (1) whether the same defendant involved in both the class action and the later-filed suit; (2) whether the class action gave the defendant sufficient notice of the type of claim(s) asserted in the later-filed individual suit; and (3) whether the class action gave defendant sufficient notice of the potential number of claims that could be asserted against it.[57] The court further stated that although "the Fifth Circuit has cited *Bell* for the proposition that a federal class action lawsuit likely *cannot* toll the state statute of limitations for a claim filed in state court—i.e., that Texas does not recognize 'cross-jurisdictional tolling,'"[58] the court "ha[d] some doubts that *Bell* reaches as far as the Fifth Circuit has intimated."[59] However, the court ultimately held that cross-jurisdictional tolling did not apply because it was "bound to adopt and apply the Fifth Circuit's reasoning."[60]

IV. THE POLICY CONCERNS COURTS HAVE WITH TEXAS'S CROSS-JURISDICTIONAL TOLLING RULE

Although the analyses in the aforementioned cases do not shed much light on the policy concerns of cross-jurisdictional tolling, it is helpful to examine these concerns in order to understand why states are so hesitant to adopt such a doctrine. This Section briefly describes those policy concerns.

A. *Judicial Efficiency and Economy*

The primary reason for the Supreme Court's decision in *American Pipe* was judicial efficiency and economy.[61] The Court stated that refusing to allow potential class members to join after limitations had expired "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principle purpose of the procedure."[62] This "would breed needless duplications of motions" as it would require "[p]otential class members . . . to file protective motions to intervene or to join in the event that the class was later found unsuitable."[63] As such, *American Pipe* tolling is a logical solution to

56. In re BP P.L.C. Sec. Litig., 51 F. Supp. 3d 693, 698–700 (S.D. Tex. 2014).
57. *Id.* at 699–700.
58. *Id.* at 700 (emphasis added).
59. *Id.*
60. *Id.*
61. Bober, *supra* note 1, at 620, 620 n.21.
62. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).
63. *Id.* at 553–54.

this problem "when both the class and the individual action are brought in the same court system."[64]

"However, in the cross-jurisdictional context, it is uncertain what interests in judicial efficiency a forum state would gain by tolling its statute of limitations based on the filing of a class action outside the jurisdiction."[65] If a state permits class members to use cross-jurisdictional tolling, plaintiffs are incentivized to stay in the class.[66] Plaintiffs would remain in the class because they could always file an individual action in the state if class certification was ultimately denied because the statute of limitations applicable to their claims would be tolled by the out-of-state action.[67] This would further the efficiency and economy of both the forum state and the extra-jurisdictional state by preventing mass filings of protective motions to intervene or join.[68] If, however, certification is ultimately denied, the forum state would experience an inundation of motions from all over the country by individuals who wish to bring their claim as the state's cross-jurisdictional laws would permit the statute of limitations to be tolled by the out-of-state class action.[69] Such a result would obliterate the reasoning behind the *American Pipe* doctrine as it "would breed needless duplications of motions."[70]

B. *Notice to Defendants*

In adopting the *American Pipe* doctrine, the United States Supreme Court emphasized that such a tolling rule "is in no way inconsistent with the functional operations of a statute of limitations"[71]—charging defendants with notice of adverse claims and preventing plaintiffs from sleeping on their rights. Cross-jurisdictional tolling has been criticized by defendants because it has been said to provide them with inadequate notice of the existence, type, and potential number of the claims asserted against them.[72] Specifically, the *Bell* and *Vaught* courts noted that the defendants were not given fair notice because plaintiffs were alleging a personal injury claim from a product that the companies had put into mass production all over the United States.[73]

64. Bober, *supra* note 1, at 640–41.
65. *Id.* at 641.
66. *Id.* at 641–42.
67. *Id.* at 642.
68. *Id.*
69. *Id.*; *see, e.g.*, Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998) ("Tolling a state statute of limitations during the pendency of a federal class action, however, may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule.").
70. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974).
71. *Id.* at 554.
72. Bober, *supra* note 1, at 645.
73. Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. App.—Amarillo 1995, writ denied); Vaught v. Showa Denko K.K., 107 F.3d 1137, 1144–47 (5th Cir. 1997).

V. CLARIFYING THE SCOPE OF TEXAS'S CROSS-JURISDICTIONAL TOLLING RULE

Several circuit courts from across the country, including one federal court interpreting Texas law, have identified five factors that are generally examined in determining whether a state will permit claimants to use cross-jurisdictional tolling. The factors discussed in these cases, along with the established Texas law on cross-jurisdictional tolling, suggest that Texas would permit cross-jurisdictional tolling in limited circumstances. This Subsection explains that applying cross-jurisdiction tolling in these limited circumstances would not create the policy concerns that states struggle with in deciding to adopt cross-jurisdictional tolling.

A. *The Factors Weigh in Favor of Adopting a Limited Form of Cross-Jurisdictional Tolling*

In determining whether a federal class action lawsuit filed in a state court will toll that particular state's statute of limitations, courts generally consider the following factors: "(1) whether a class action rule modeled after Federal Rule of Civil Procedure 23 has been adopted by the state; (2) whether the state allows class action tolling in its jurisdiction; (3) whether the state permits cross-jurisdictional tolling for individual cases; (4) whether the state applies common law tolling; and (5) the state's policies."[74]

1. Texas Rule of Civil Procedure 42 Is Modeled After Federal Rule of Civil Procedure 23

One key factor courts consider in applying the *American Pipe* doctrine to effectuate cross-jurisdictional tolling is whether the state's

74. In re Enron Corp. Sec., 465 F. Supp. 2d 687, 719 (S.D. Tex. 2006) (citing Jowers, *supra* note 19, at 25); *see, e.g.*, In re Linerboard Antitrust Litig., 223 F.R.D. 335, 345 (E.D. Pa. 2004) (examining, in an anti-trust action, the issue of cross-jurisdictional class action tolling, the court discussed "(1) the federal interest in tolling the state statutes of limitations; (2) whether the highest court of the state has or would adopt cross-jurisdictional class action tolling for antitrust class actions filed in federal courts; (3) whether plaintiffs' state law claims are sufficiently similar to plaintiffs federal claims to toll the state statutes of limitations; and (4) the prejudice suffered by defendants if the Court tolls the statutes of limitations."); Wade v. Danek Medical, Inc., 182 F.3d 281, 287 (4th Cir. 1999) (concluding that because Virginia had not adopted class action tolling, did not have a state class action rule analogous to FED. R. CIV. P 23, and did not favor common law equitable tolling, Virginia would not apply cross-jurisdictional tolling and the plaintiff's claims were time-barred); In re Vitamins Antitrust Litig., 183 Fed. Appx. 1, 2 (D.C. Cir. 2006) (affirming district court ruling denying *American Pipe* tolling of limitations in a price-fixing action where a related class action was pending because Florida law specifies exclusive list of conditions that can toll running of statute of limitations and makes clear that "*[n]o disability or other reason* shall toll the running of any statute of limitations").

class action rule is modeled after the federal class action rule.[75] It is evident that Texas Rule of Civil Procedure 42 ("TRCP 42") was modeled after Federal Rule of Civil Procedure 23 ("FRCP 23").[76] In fact, even *Grant*—the case that brought the *American Pipe* doctrine to Texas—began its reasoning with the fact that "[r]ule 42 of the Texas Rules of Civil Procedure is patterned after Rule 23 of the Federal Rules of Civil Procedure" and that "federal decision interpreting class action procedures [should therefore] provide authoritative guidance for Texas courts."[77]

In fact, TRCP 42 was amended to conform to the subsequent amendments to FRCP 23.[78] Because the two rules are almost identical, authority regarding FRCP 23 should be persuasive on questions involving TRCP 42.[79] Therefore, Texas courts should adopt the *American Pipe* doctrine to effectuate cross-jurisdictional tolling. The *American Pipe Doctrine* should be applied narrowly, such as in the circumstances presented in the hypothetical at the beginning of this Article: a federal class action lawsuit filed in Texas asserting Texas law breach of contract claims arising from royalty interests located in Texas, to which Texas limitations apply.

75. Jowers, *supra* note 19, at 25; *see also* Boone v. Citigroup, Inc., 416 F.3d 382, 393 (5th Cir. 2005) (declining to permit tolling, noting among other things that "Mississippi does not have class actions").

76. Compaq Comput. Corp. v. Lapray, 135 S.W.3d 657, 663 n.6 (Tex. 2004) ("Texas Rule of Civil Procedure 42 is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."); Sw. Refining Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000) ("Rule 42 of the Texas Rules of Civil Procedure governs class certification. TEX. R. CIV. P. 42. The rule is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."); American Express Travel Related Servs. Co. v. Walton, 883 S.W.2d 703, 708 (Tex. App.—Dallas 1994, no writ) ("Rule 42 is patterned after Federal Rule of Civil Procedure 23. Federal rule 23 and the cases interpreting it are persuasive authority when we interpret rule 42.").

77. Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. App.—Houston [14th Dist.] 1987, no writ).

78. Ford Motor Co. v. Sheldon, 22 S.W.3d 444, 452 (Tex. 2000) ("Texas Rule 42, adopted in 1941 and patterned after the federal rule, was also revised in 1977 to conform to the 1966 federal amendments.").

79. *Lapray*, 135 S.W.3d at 663 n.6 ("Texas Rule of Civil Procedure 42 is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."); *Bernal*, 22 S.W.3d at 433 ("Rule 42 of the Texas Rules of Civil Procedure governs class certification. TEX. R. CIV. P. 42. The rule is patterned after Federal Rule of Civil Procedure 23; consequently, federal decisions and authorities interpreting current federal class action requirements are persuasive authority."); *Walton*, 883 S.W.2d at 708 ("Rule 42 is patterned after Federal Rule of Civil Procedure 23. Federal rule 23 and the cases interpreting it are persuasive authority when we interpret rule 42.").

2. Texas Allows Class Action Tolling

In *Grant*, the court held that the statute of limitations remained tolled for all members of the class until certification was denied.[80] The court came to this conclusion by reasoning that Rule 42 of the Texas Rules of Civil Procedure was patterned after Rule 23 of the Federal Rules of Civil Procedure, and any federal decisions interpreting class action procedures provided authoritative guidance for the court. *Id.* The decision in *Grant* therefore brought the *American Pipe* doctrine to Texas courts by holding that "a state class action lawsuit seeking property damages tolled the statute of limitations for all potential class members' individual claims, pending a decision on class certification."[81]

3. Texas Has Not Yet Fully Developed Cross-Jurisdictional Tolling Law

Although Texas courts and courts applying Texas law have ruled that cross-jurisdictional tolling is not permitted in certain types of cases, they have also stated that there is not an outright bar to cross-jurisdictional tolling and that claimants are "free to pursue this argument with Texas courts," so the state courts can clarify the reach of Texas's tolling rules.[82] Thus, Texas has indicated that its rule on cross-jurisdictional tolling is not yet fully developed. The reason Texas's law is not yet fully developed is because it left open the possibility that claimants who have Texas property-related claims may rely on a federal class action lawsuit filed in Texas that asserts similar property related claims.[83]

4. Texas's Adoption of Common-Law Tolling Demonstrates the Acceptance of Equitably Proposed Procedural Devices Like Cross-Jurisdictional Tolling

If state courts are hospitable to applying equitably proposed procedural devices in determining whether the statute of limitations is

80. *Grant*, 725 S.W.2d at 370.

81. In re Enron Corp. Sec., 465 F. Supp. 2d 687, 720 (S.D. Tex. 2006) (explaining *Grant*, 725 S.W.2d at 370).

82. Newby v. Enron Corp., 542 F.3d 463, 472 (5th Cir. 2008); In re BP P.L.C. Sec. Litig., 51 F. Supp. 3d 693, 700 (S.D. Tex. 2014).

83. *See Grant*, 725 S.W.2d at 370 (holding that *American Pipe* tolling was appropriate when property damage claim was involved); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 518 (N.D. Tex. 2001) (stating in dicta that Texas courts, if presented with the issue, would likely interpret the class action tolling rule of *Grant* and *Bell* as extending to all property damage claims, regardless of the forum in which the class action was filed), *abrogated by* Newby v. Enron Corp., 542 F.3d 463 (5th Cir. 2008); *Newby*, 542 F.3d at 472 (stating that claimants are "free to pursue this argument with Texas courts," so the state courts can clarify the reach of Texas's tolling rules); *In re BP P.L.C. Sec. Litig.*, 51 F. Supp. 3d at 700 (stating that the court "ha[d] some doubts that *Bell* reaches as far as the Fifth Circuit has intimated.").

tolled or deferred, then it is more likely that states will accept cross-jurisdictional tolling as it is also an equitably proposed procedural device to toll the statute of limitations.[84] Texas does just that. Texas follows common-law tolling principles such as the discovery rule and the doctrine of fraudulent concealment[85] to defer the accrual of a cause of action until the plaintiff either knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim.[86] Because Texas is hospitable to equitably proposed procedural devices—such as the discovery rule and the doctrine of fraudulent concealment—it should be more inclined to adopt cross-jurisdictional tolling, but in very limited circumstances, like the hypothetical posed in this Article.[87]

5. The State's Policies Are in Favor of Applying the American Pipe Doctrine to Class Action Lawsuits Filed in Texas Federal Courts and Applying Texas Property Law

The purpose of a statute of limitations is "to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights."[88] In analyzing *Grant*, both the *Vaught* and *Bell* courts placed particular emphasis on the fact that the defendant must be put on notice of the "type and potential number of claims against it" in order for the *American Pipe* doctrine to apply.[89] The *Vaught* and *Bell* courts determined that the *American Pipe* doctrine applied in *Grant* because the class action lawsuit was filed in Texas, interpreting Texas property law, and involving a Texas statute of limitations.[90] Although the reasoning in *Grant* does not apply to a class action lawsuit filed in federal court in another state, or in a federal court in Texas applying non-property related claims,[91] it should apply to class action lawsuits filed

84. Jowers, *supra* note 19, at 25.

85. Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 367 n.6 (Tex. 1990) (Doggett, J., dissenting) (referring to "common-law tolling principles such as the doctrine of fraudulent concealment and the discovery rule.").

86. Comput. Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 455 (Tex. 1996).

87. Jowers, *supra* note 19, at 25.

88. Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 352 (1983); Little v. Smith, 943 S.W.2d 414, 418 (Tex. 1997).

89. Vaught v. Showa Denko K.K., 107 F.3d 1137, 1144 (5th Cir. 1997); Bell v. Showa Denko K.K., 899 S.W.2d 749, 758 (Tex. App.—Amarillo 1995, writ denied).

90. *Vaught*, 107 F.3d at 1144; *Bell*, 899 S.W.2d at 758.

91. *See* Grant v. Austin Bridge Constr. Co., 725 S.W.2d 366, 370 (Tex. Ct. App.—Houston [14th Dist.] 1987, no writ) (applying the *American Pipe* doctrine to use a *property-related* class action lawsuit filed *in Texas* to toll a *similar property-related claim* filed in Texas state court); *Bell*, 899 S.W.2d at 758 (refusing to apply the *American Pipe* doctrine to a *mass personal injury* federal class action lawsuit filed in *New Mexico* to toll a *similar personal injury claim* filed in Texas state court); *Vaught*, 107 F.3d at 1147 (refusing to apply the *American Pipe* doctrine to multiple *mass tort* federal class action lawsuits filed in *Maryland* to toll a *product liability claim* filed in Texas state court); Newby v. Enron Corp., 542 F.3d 463, 472 (5th Cir. 2008) (refusing

in federal courts *located in Texas* and applying Texas property law claims because such an action would put defendants on notice of the "type and potential number" of adverse claims against it.

B. *Reconciling Previous Cases*

Grant, the seminal case that brought the *American Pipe* tolling doctrine to Texas, concerned individual property owners with property damage claims who sought to use a class action lawsuit filed in Texas that asserted similar property damage claims to toll the Texas statute of limitations.[92] Allowing Texas property owners who have property-related claims to use a federal class action lawsuit *filed in Texas* that asserted similar Texas property-related claims to toll the Texas statute of limitations is almost identical to the tolling concept in *Grant*. The only difference is that the Texas property owners in the latter scenario are relying on a class action lawsuit filed in another jurisdiction—a federal court—to toll their state-law claims. However, this distinction is immaterial because the federal court the claimants are relying on would be located *in Texas* and "federal courts apply state statutes of limitations and related state law governing tolling of the limitations period" in diversity cases.[93]

This distinction should further be considered immaterial because class action lawsuits are almost futile in Texas, and claimants are therefore forced to file their class action lawsuits in federal court.[94] After all, filing a class action lawsuit in a federal court located in Texas is about as close as claimants can come to filing their class action lawsuit in Texas while still having a reasonable opportunity at seeing the class certified.[95]

In addition to the similarities with the *Grant* case, the hypothetical presented in this Article eliminates the concern discussed in the *Bell* and *Vaught* cases: that the defendants were not given fair notice of the type and potential number of claims asserted against them because the plaintiffs were alleging personal injury claims from a product the companies put into mass production all over the United States.[96] However, courts addressing Texas's rule on cross-jurisdictional tolling

to apply the *American Pipe* doctrine to a *securities* federal class action lawsuit filed in *Texas* to toll a *similar securities claim* filed in Texas state court).

92. *Grant*, 725 S.W.2d at 367–70.

93. Hensgens v. Deere & Co., 869 F.2d 879, 880 (5th Cir. 1989).

94. *See* Alistair Dawson & Geoff Gannaway, *In Memoriam: Texas Class Actions*, 72 TEX. B.J. 366, 367 (2009) ("The balance has tipped so far against Texas class actions that cases either are not filed at all, or are filed in alternative forums—across state borders in Oklahoma and Arkansas, and even in federal courts.").

95. *Id.*

96. *Vaught*, 107 F.3d at 1144–47; *Bell*, 899 S.W.2d at 758.

have explained that this concern is eliminated if the claims asserted involve property located within the state.[97]

C. *Eliminating Policy Concerns*

Moreover, the policy concerns surrounding cross-jurisdictional tolling would be eliminated if Texas allowed cross-jurisdictional tolling only in cases where claimants rely on federal class action lawsuits that assert Texas property-related claims, especially if the class action lawsuit was filed in a federal court located *in Texas*. Such a scenario would reduce the number of people that could file claims because each person's claim must be related to the specific property located within that state. Said another way (and using the hypothetical posed at the beginning of this Article), unless claimants own royalty interests from gas produced within a specific shale formation found in Texas, they cannot later claim the benefit of the tolling doctrine. Because the claims would be based on a finite number of plaintiffs who own property interests in a specific region of the state, there would not be an influx of claims from across the country—like there was in the aforementioned mass torts, securities, and personal injury cases[98]—by individuals who wish to take advantage of Texas's cross-jurisdictional tolling rule. After all, the claims can only belong to property owners located in a specific region within Texas as opposed to any individual from the United States who may have used a specific product.[99]

VI. CONCLUSION AND RECOMMENDATION

Several factors indicate that Texas should adopt cross-jurisdictional tolling in property-related cases: (1) the initial case which brought the *American Pipe* doctrine to Texas involved a property-related class action lawsuit filed in Texas; (2) no Texas case (or federal case interpreting Texas law)[100] has ever specifically addressed whether a property-

97. *See Grant*, 725 S.W.2d at 370 (holding that *American Pipe* tolling was appropriate when property damage claim was involved); Prieto v. John Hancock Mut. Life Ins. Co., 132 F. Supp. 2d 506, 518 (N.D. Tex. 2001) (stating in dicta that Texas courts, if presented with the issue, would likely interpret the class action tolling rule of *Grant* and *Bell* as extending to all property damage claims, regardless of the forum in which the class action was filed), *abrogated by* Newby v. Enron Corp., 542 F.3d 463, 463 (5th Cir. 2008).

98. *See supra* Section II.

99. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 (1974). In any event, the class action lawsuit would have all the information necessary to determine the subject matter and size of the potential litigation. *Id.*

100. *American Pipe*, 542 F.3d at 538. As stated previously, one federal case interpreting Texas law held that Texas courts, ***if presented with the issue***, would interpret the class action tolling rule of *Grant* and *Bell* as extending to ***all property damage claims***, regardless of the forum in which the class action was filed. *Prieto*, 132 F. Supp. 2d at 518, *abrogated by Newby*, 542 F.3d at 472. However, this was merely dicta as the case did not concern property-related class action lawsuits. *Prieto*, 132 F. Supp. 2d at 509–11.

related federal class action lawsuit filed in Texas tolls the statute of limitations applicable to a putative class member's similar property-related claim;[101] (3) the cases addressing *American Pipe* and cross-jurisdictional tolling affirm that property-related cases concern a "readily discernable" group of claimants and that these cases give the defendant notice of the type and potential number of claims against it, unlike the aforementioned mass torts, securities, and personal injury claims;[102] (4) cases examining the scope of cross-jurisdictional tolling in Texas even indicate that claimants are "free to pursue this argument with Texas courts," so the state courts can clarify the reach of Texas's tolling rules (indicating Texas's rule on cross-jurisdictional tolling is not yet fully developed);[103] and (5) the factors weigh in favor of adopting cross-jurisdictional tolling in the limited circumstances where property-related claims are involved, like the hypothetical presented by this Article.[104]

Therefore, Texas should permit putative class members to use cross-jurisdictional tolling to toll their Texas property-related claims when they rely on federal class action lawsuits filed *in Texas federal courts* that assert similar Texas property-related claims against a defendant and to which the Texas statute of limitations applies.

101. *See Bell*, 899 S.W.2d at 758 (refusing to apply the *American Pipe* doctrine to a *mass personal injury* federal class action lawsuit—premised on non-Texas substantive law—filed in New Mexico to toll a personal injury claim filed in Texas state court predicated on Texas substantive law); *Vaught*, 107 F.3d at 1147 (refusing to apply the *American Pipe* doctrine to multiple mass tort federal class action lawsuits—premised on non-Texas substantive law—filed in Maryland to toll a product liability claim filed in Texas state court predicated on Texas substantive law); *Newby*, 542 F.3d at 472 (refusing to apply the *American Pipe* doctrine to a federal securities class action lawsuit filed in Texas to toll a securities claim filed in Texas state court); In re BP P.L.C. Sec. Litig., 51 F. Supp. 3d 693, 699–700 (S.D. Tex. 2014) (stating that although "the Fifth Circuit has cited *Bell* for the proposition that a federal class action lawsuit likely cannot toll the state statute of limitations for a claim filed in state court—i.e., that Texas does not recognize cross-jurisdictional tolling," the court "has some doubts that *Bell* reaches as far as the Fifth Circuit has intimated.").

102. *Bell*, 899 S.W.2d at 758; *Vaught*, 107 F.3d at 1144–47.

103. *Newby*, 542 F.3d at 472.

104. *See supra* Section IV.