subjected to Wal-Mart's challenged pay and management track promotions and policies and practices."[9]

II. The District Court's Decision

Following discovery, briefing, and a seven-hour oral argument, the district court certified the proposed class in most respects. It held that the class satisfied the requirements of Rule 23(a), including commonality, typicality, and adequacy of representation. It also held that the plaintiffs' claim for punitive damages, although potentially worth billions of dollars, did not predominate over their injunctive claims. The court further held that, despite the massive size of the class, it could successfully manage a trial of the plaintiffs' equal pay claim as to both liability and all forms of requested relief and a trial as to liability (including liability for punitive damages) and injunctive and declaratory relief on the plaintiffs' promotion claim. With respect to an actual determination of lost pay and punitive damages for the plaintiffs' promotion claims, however, the court held that the class, as proposed, was unmanageable. The plaintiffs could pursue those remedies on a classwide basis, the court held, only where "objective applicant data is available to document class member interest" in the challenged promotion.[10]

A. Commonality: "Excessive Subjectivity" and Statistics

Several aspects of the district court's ruling are worth noting, beginning with its analysis of the Rule 23(a) commonality requirement. The district court concluded that the plaintiffs had successfully raised "an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in

continued page 14

The Problem of Class Action Tolling in Mass Tort Personal Injury Litigation

by Jessica Davidson Miller & Geoffrey Wyatt

A news story breaks. A drug manufacturer has announced the surprising results of a recent study suggesting a dangerous side effect to a popular drug. Newspapers, television shows, and websites trumpet the story for days, even weeks, and speculation swirls about how many people might already have been affected. The drug is withdrawn from the market or distributed with new labeling. Lawyer advertisements continue the story as the news stories taper off. Within a month, lawsuits have been filed across the country. A mass tort has begun. But when does it end?

Many mass torts end in settlement, but a settlement is typically difficult to reach until there is some certainty about the number of claims. That number, in turn, depends greatly on when it is too late for new plaintiffs to file claims. Thus, statutes of limitations play an important role in mass tort litigation.

Just when a limitation period is over is not a simple calculation to make, however. Two doctrines are particularly important—the discovery rule and so-called *American Pipe* tolling.

In most states, a cause of action for personal injury accrues when a plaintiff discovers his claim—*i.e.,* when he knows, or should know, based on readily available information, that he has suffered an injury potentially attributable to the tortious act of another. This is referred to as the discovery rule. Once a mass tort unfolds, the information most putative plaintiffs need to be on notice of their claims is likely widely available. Such litigation is often accompanied by news reports in various media, and, if nothing else, advertisements by plaintiff lawyers seeking to enroll clients are frequently widespread. Courts often accept arguments that this kind of publicity is enough to begin the limitations clock.

A party defending a mass tort might thus be tempted to believe that the litigation would have a built-in deadline for new claims. Assuming the defendant can point to a seminal moment that triggered mass filings, the defendant could rely on that date as the "discovery" date for all prospective plaintiffs, and calculate filing deadlines in all relevant jurisdictions.

But if someone brought a class action against the defendant before time ran out, the limitations analysis becomes more complicated. That is because of *American Pipe & Construction Co. v. Utah*, a Supreme Court case that is often cited as a basis for tolling limitations periods while a putative class action is pending.[1] Many state courts, as well as federal courts applying state law, have accepted such tolling in the mass-tort context, notwithstanding the very different context in which *American Pipe* itself was decided. The predictable result has been to turn the filing of essentially frivolous class actions in personal injury mass torts into a stock tool for plaintiffs' lawyers to substantially prolong limitations

periods. This prolongation in turn negatively affects the ability of the parties to settle, because it delays the date on which the door is finally shut to new claims. As this article explains, *American Pipe* was never intended to allow this practice, and courts should not permit its use in this manner.

I. The Discovery Rule

The first question in the statute of limitations analysis is when the clock starts ticking. A cause of action accrues when a plaintiff incurs an injury, but the date of injury does not necessarily constitute *accrual* for statute of limitations purposes. For personal injury cases, most states have adopted a discovery rule. Under a typical discovery rule, a claim accrues and the limitations period begins ticking once a plaintiff is aware, or should reasonably be aware, that he has been injured, and that the injury was caused by the tortious act of another.[2] As the Tennessee Supreme Court explained in *Foster v. Harris*, the discovery rule has been deemed necessary because "no judicial remedy [i]s available to [a] plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty."[3]

The discovery rule is consistent with the basic purposes of statutes of limitations. As the Supreme Court has explained, "[s]uch statutes '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.... [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation.'"[4] Enforcement of limitations periods serves institutional purposes as well. "[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."[5] These purposes are not frustrated by the discovery rule because a plaintiff cannot fairly be accused of "sleeping on his rights" when he does not even know that he has been injured, or when it is truly impossible to determine that an injury was caused by another's negligence.

It is not uncommon for a news event to supply the critical information that gives rise to a mass tort. These news events are often cited by courts as putting

continued page 24

FACTA Truncation: Applicable to the Digital World?

by Shawn J. Organ

Since December 2006, much has been written about the truncation provisions in the Fair and Accurate Credit Transactions Act (FACTA), including an article in the September 2007 issue of *Class Action Watch*, and others I have penned.[1] The writings all generally identify the truncation requirement—that is, that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."[2] But an interesting and foreseeable battleground has emerged as a subset of these FACTA cases: does FACTA apply to internet transactions? These cases present a host of new and interesting issues, and federal courts decisions are just starting to emerge.

The General Truncation Requirement

By way of background, FACTA was enacted as part the Fair Credit Reporting Act on December 4, 2003. There are several aspects to FACTA, but the primary focus for our purposes will be on the truncation requirement, 15 U.S.C. § 1681c(g)(1), because it is that provision that has spawned over 300 class action lawsuits, filed throughout the country. The truncation requirement, set forth above, was phased in over time to allow large and small businesses to conform to the requirements and update the cash registers and/or Payment Card Industry ("PCI") terminals in service. It became fully phased-in as of December 4, 2006. Once fully phased-in, the class action lawsuits quickly followed.

Virtually every lawsuit leveled the same allegations: that the retailer at the checkout provided the plaintiff with a receipt with an expiration date in violation of FACTA.[3] These cases were not brought as a single plaintiff case. Rather, the lawsuits were filed seeking class certification on a state, regional, or national basis. And these class claims were not filed pursuant to § 1681o, claiming the defendant acted negligently, because under a negligence claim the plaintiff must prove actual damages, which is tough to prove and rarely amounts to much. Rather, the class allegations are always coupled with a § 1681n claim that the defendant's conduct was a "willful violation" of FACTA, thereby allowing the plaintiff class to seek statutory damages of $100 to $1,000 for each alleged violation. Although the plaintiff and any purported class experienced no actual damages, the potential damages

Class Action Tolling in Mass Tort Personal Injury Litigation

Continued from page 4

plaintiffs on notice of their claims. One Pennsylvania court, for example, held that events giving rise to extensive media coverage of a medical device triggered discovery as a matter of law because the coverage would have put anyone exercising "due diligence" on notice of his or her claims.[6] In *Martin v. Dalkon Shield Claimants Trust*, the plaintiff brought a product liability lawsuit over an allegedly defective contraceptive device, and the defendant moved for summary judgment on the ground that the plaintiff's claim was time-barred. In granting the defendant's motion, the court observed that the plaintiff failed to make any inquiry regarding the cause of her injury in the face of, *inter alia*, "published news accounts, articles in medical journals and reports by the Food and Drug Administration" confirming a link between IUDs and spontaneous abortions.[7] Accordingly, the court refused to apply the discovery rule, reasoning that where "a plaintiff fails to obtain information which is readily available, she has not acted with reasonable diligence."[8]

Some courts have been careful to emphasize that the plaintiff need not have actually been aware of the news coverage. Because the discovery rule is an objective test, what is relevant is whether the coverage was so substantial as to put a *reasonable* plaintiff on notice.[9] Thus, the same media event that precipitates a mass tort might also trigger accrual for statute-of-limitations purposes. But the statute-of-limitations inquiry will usually not stop there. Once a plaintiff files the first class action in a nascent mass tort—an event that not uncommonly transpires within days of media coverage—a question of tolling arises. In mass-tort personal injury cases, such tolling should not be available. But in order to explain why this is so, it is first necessary to explain the origin and application of the *American Pipe* doctrine.

II. The *American Pipe* Doctrine as Originally Conceived

In *American Pipe & Construction Co. v. Utah*, the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[10] Under the *American Pipe* rule, former members of a putative class can toll limitations periods to preserve their right to file suit in the event that their class is not certified.[11] The Court reached that conclusion after considering the purposes of statutes of limitations and of Rule 23, the federal class action rule.

First, the Court noted that Rule 23 was adopted to improve the efficiency of the class action device, in part "to avoid, rather than encourage"—as the old class-action rule had done—"unnecessary filing of repetitious papers and motions."[12] But because class certification decisions could often linger beyond the end of limitations periods—as had happened in the *American Pipe* case itself—this efficiency purpose of Rule 23 would be undermined unless plaintiffs could count on the pendency of the action to toll their claims. Otherwise, "class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable."[13]

Second, the Court found it important that the class members had acted reasonably in relying upon the pendency of the class action. It explained that certification had been denied (1) "'not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy);'" (2) "'not for lack of standing of the representative;'" and (3) not "'for reasons of bad faith or frivolity.'"[14] Rather, class certification had been denied by the district court "solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable.'"[15] "[A]t least where class action status has been denied" on these grounds, the Court held, tolling is appropriate.[16] Otherwise, in cases "where the determination to disallow the class action [is] made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions."[17]

Third, the Court noted that its tolling rule would not, as applied in *American Pipe*, disturb the purposes of the statutes of limitations. "The policies of ensuring essential fairness to defendants and barring a plaintiff who 'has slept on his rights'... are satisfied when" the class action is such that it "notifies the defendants not only of the substantive claims being brought against them, but also the number and generic identities of the potential plaintiffs who may participate in the judgment."[18] Thus, the Court was satisfied that such class actions provide defendants with "the essential information necessary to determine both the subject matter and size of the

prospective litigation," the primary concerns addressed by limitations rules.[19]

Justice Blackmun, joining the opinion and concurring in the judgment, nonetheless issued a word of caution. "Our decision... must not be regarded as an encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."[20] He also noted that tolling would be limited to cases like the one before the Court, where the claims "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit,"[21] a sentiment that would later be echoed by other justices on the Court.[22]

III. American Pipe in Mass Tort Cases

Most courts have assumed that *American Pipe* tolling principles apply to any pending class action, regardless of the nature of the substantive claims raised. This reading of *American Pipe* is too uncritical. Savvy plaintiff lawyers are aware of the benefits of this approach to the doctrine, and have exploited it precisely to serve this purpose of extending limitations periods by filing class actions that in truth have no hope of certification.[23] The problem for both sides is that the oftentimes successful attempt to expand limitation periods delays resolution of mass torts, to the detriment of plaintiffs who did file their suits in a timely manner and defendants who seek to put a mass tort behind them.

The reasoning of the *American Pipe* decision does not translate well to the mass-tort context. First, because mass-tort cases are almost never certified, they are not the kinds of cases that present certification decisions that hinge on subtle distinctions. Parties on both sides can safely predict that certification will be denied; the only question is when. Reliance on a pending class is thus unreasonable in the mass tort context. The case in *American Pipe*, by contrast, was one of a genre of cases whose prospects for certification entailed "considerations that may vary with... subtle factors" and thus made difficult "successful anticipation of the determination of the viability of the class,"[24] making reliance on the possibility of certification reasonable.

Furthermore, the individualized nature of personal injury claims is such that a defendant is not fairly put on notice of all the claims against him by the filing of a class action. Such cases typically involve widely varying facts with respect to the nature of the injury, the character and duration of exposure to the harmful product, family and medical history, the content of any warning read by or available before or at the time of injury, and a host of other factors unique to each plaintiff. Not surprisingly, each case in a mass tort requires extensive individualized discovery, involving "evidence, memories, and witnesses" that are unique to each case, including, by way of example, family members, treating physicians, and other witnesses and documents to which defendants cannot possibly have access without knowing the actual identity of each plaintiff. Defendants have no way of knowing the number of claims that would be encompassed by such an action, let alone the identities of the witnesses or their evidence. Personal injury suits in the mass tort context are thus unlike the *American Pipe* case, in which the Court noted the "probability of common issues of law and fact,"[25] and in which there could be no doubt that individual claims "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit."[26]

In addition, as previously discussed, extending the doctrine to mass-tort personal injury cases has encouraged plaintiff lawyers to file class actions merely to achieve an illegitimate tolling benefit for unnamed members of the purported class. They are thus precisely the kinds of cases Justices Blackmun and Powell warned about in their concurring opinions in *American Pipe* and *Crown, Cork*. In mass tort personal injury cases, tolling serves no efficiency purpose—the solitary virtue of *American Pipe* tolling—because the vast majority of plaintiffs file individual complaints notwithstanding the hypothetical availability of class-action tolling. Indeed, in many cases *American Pipe* is all the more unnecessary in light of tolling agreements reached by parties which waive limitations defenses for those plaintiffs who sign up before the time on their claims has run out. By saving the courts from excess filings, plaintiffs who sign such agreements serve the purposes of *American Pipe*. It would thus be redundant at best and counterproductive at worst to apply *American Pipe* tolling to the mass tort context.

Finally, class action tolling in the context of mass tort proceedings also leads to injustice. If plaintiffs are allowed to slumber and not assert their claims while others have pursued their claims in mass litigation, the parties—plaintiffs and defendants alike—cannot get a grasp of the size or scope of the litigation until years after the deadlines contemplated by the applicable statutes of limitations. Without understanding the size or scope of the litigation, the parties are shackled in searching for ways to resolve the litigation, leaving the claims of individual plaintiffs—some of whom may be ill or elderly, languishing until the doors are deemed closed.

Not every court has been blind to the disconnect between the policy underpinnings of *American Pipe* and the realities of mass tort litigation. Several jurisdictions have held that *American Pipe* tolling is simply unavailable for mass-tort personal injury cases. These courts have looked to the purposes of *American Pipe* and found them to be ill-served by applying the doctrine to such cases, because mass tort personal injury cases are widely recognized as uncertifiable and because the varying nature of personal injury claims are such that the details of one plaintiff's case do not generally put a defendant on notice of the claims of nameless class members. On the basis of these considerations, the more carefully reasoned opinions on the issue have uniformly rejected tolling.[27]

Other courts have limited the application of *American Pipe,* but have thus far refused to discard it fully in the mass-tort context. In New Jersey, for example, an appellate court held that *American Pipe* should be available in mass-tort litigation, but strongly suggested that such tolling should be available only where a plaintiff seeking to avail himself of its tolling benefit could prove that he actually relied upon a pending class action.[28] Other states have limited *American Pipe* tolling to class actions that were filed in courts within the same state, refusing to allow "cross-jurisdictional" tolling.[29] These rulings constrain the application of *American Pipe* tolling in the mass tort context, but they all proceed from the premise that such tolling should be available in the first place. Courts that have not already addressed the issue should go further and bar or substantially limit the application of *American Pipe* tolling in mass tort personal injury cases.

CONCLUSION

The *American Pipe* doctrine is an ill-suited transplant for mass tort personal injury litigation. Although a parallel exists at the most general level between the facts of *American Pipe* and the average mass tort plaintiff defending the timeliness of his or her claim by pointing to a pending personal injury class action—both address the intersection between class actions and statutes of limitations—the reasoning of *American Pipe* simply does not translate in this foreign context. Neither of the purposes served by tolling in *American Pipe*—efficiency of the litigation and fair notice to defendants of the number and nature of claims against them—is served by tolling in the mass tort context. To the contrary, it is the potential abuses warned of, but not present, in *American Pipe* that are facilitated by the application of its tolling rule in the mass tort setting. For these reasons, courts should carefully analyze claims for tolling in mass tort cases and decline the invitation to follow *American Pipe* as a universal rule.

** Jessica Miller is a Partner and Geoffrey Wyatt is an Associate in the Washington, D.C. office of O'Melveny & Myers, LLP.*

Endnotes

1 414 U.S. 538 (1974).

2 *See, e.g.*, Foster v. Harris, 633 S.W.2d 304, 305 (Tenn. 1982).

3 *Id.* Some states observe a stricter rule, under which a claim accrues upon discovery of injury, even if the identity of a tortfeasor is unknown. *E.g.*, Robinson v. Graves, 456 So. 2d 793, 794-95 (Ala. 1984) (holding that tolling of statute of limitations in absence of a known defendant is only possible by filing a claim against a fictional defendant). A shrinking minority of states observe no general discovery rule at all. *E.g.*, Johnston v. Dow & Coulombe Inc., 686 A.2d 1064, 1065-66 (Me. 1996) (explaining discovery rule is recognized only in "three discrete areas: legal malpractice, foreign object, and negligent medical malpractice and asbestosis"); *see also* Griffin v. Unocal Corp., No. 1061214, --- So. 2d ---- (Ala. Jan. 25, 2008) (adopting discovery rule for period during which a plaintiff is unaware of latent injury).

4 Burnett v. N.Y. Cent. R. Co., 380 U.S. 424, 428 (1965) (quoting Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)).

5 *Id.*

6 *See* Martin v. Dalkon Shield Claimants Trust, No. 93-2652, 1994 U.S. Dist. LEXIS 16395, at *11-12 (E.D. Pa. Nov. 20, 1994).

7 *Id.*

8 *Id.* at *11.

9 *E.g.*, Miller v. A.H Robins Co., Inc., 766 F.2d 1102, 1106 (7th Cir. 1985).

10 414 U.S. 538, 554 (1974).

11 Originally, *American Pipe*'s rule applied only to "purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status," *id.* at 553, but the rule was later extended. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983) ("[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors" (quoting *American Pipe*, 414 U.S. at 554)).

12 *Id.* at 550.

13 *Id.* at 553.

14 *Id.* (quoting State v. Am. Pipe & Constr., 473 F.2d 580, 584 (1973)) (omitting footnote).

15 *Id.* at n.9.

16 *Id.* at 552.

17 *Id.* at 553-54.

18 *Id.* at 554-55 (quoting Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965)).

19 *Id.* at 555.

20 *Id.* at 561 (Blackmun, J., concurring).

21 *Id.* at 562.

22 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring) ("[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witness as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.'" (quoting *American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring))).

23 *See* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 573 (1996) ("The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.").

24 414 U.S. at 553-54,

25 *Id.* at 553.

26 *Id.* at 562 (Blackmun, J., concurring).

27 *See, e.g.*, Jolly v. Eli Lilly & Co., 751 P.2d 923, 937-38 (Cal. 1988) (admonishing that personal injury plaintiffs "would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. *The presumption, rather, should be to the contrary*...." (emphasis added)); *see also* Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 358-60 (Md. 2006) (expressing support for *Jolly*'s presumption against tolling in the mass tort context); *In re* Rezulin Prods. Liab. Litig., MDL No. 1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005) (noting that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable"); Barela v. Showa Denko K.K., No. 93-1469 LH/RLP, 1996 U.S. Dist. LEXIS 7830, at *16 (D.N.M. Feb. 28, 1996) (expressing doubt whether a federal court should adopt *American Pipe* tolling for a state that had not adopted the doctrine in a mass-tort personal injury case in light of the fact that "most federal courts... refuse to permit the use of the class-action device in mass-tort cases" (citation and internal quotation marks omitted)).

28 *See* Staub v. Eastman Kodak Co., 726 A.2d 955, 967 (N.J. Supr. Ct. App. Div. 1989).

29 *See, e.g.*, Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1103, 1105 (Ill. 1998).

FACTA Truncation:
Applicable to the Digital World?

Continued from page 5

customer selects the item(s) for purchase and begins the checkout process. The process varies to some extent between retailers, but generally speaking the first step will be to provide identification and contact information such as your name, address, the shipping address (if different than the billing address), an email address for confirming emails, and a retyping of your email address to confirm it and other non-financial information. Often, that non-financial identification information is confirmed with the next screen, identifying either that the information has been input correctly or—as many online shoppers are all too familiar—that the highlighted boxes where the customer has failed to provide the information or input it incorrectly.

Once the name, address, and contact information are conveyed the customer is asked to provide financial information to begin the process of making the purchase. That information includes the type of credit or debit card you are using (VISA, MasterCard, Discover), your credit card number, your expiration date, and your CVV code number (often referring you to the three digits on the back of your card or four digits on the front.)[7] Typically, after inputting the financial information, that information, along with your order, are confirmed on the next screen. Once the order is placed, you may receive any combination of (1) an order confirmation email, (2) an order shipped email, and/or (3) a receipt email. Sometimes, rather than a receipt sent by email, the receipt is shipped with the product.

Comparatively, the online transaction is more complex and contains multiple steps, unlike the simple and routine credit or debit transaction at a brick and mortar retailer. Consequently, the online transaction does not lend itself cleanly and easily to a FACTA analysis—but that has not deterred plaintiffs from seeking its application and courts from wrestling with FACTA's scope.

The Courts Begin to Weigh-In

Three cases in particular have begun to shape the landscape for internet transaction FACTA cases—*Stubhub,*[8] *MovieTickets.com,*[9] and *Bose.*[10]

Stubhub. The *Stubhub* case, decided July 2, 2007, was the first to comment on one of the key issues unique to FACTA internet cases: can the requirement that the