UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: KATRINA CANAL BREACHES CONSOLIDATED LITIGATION	*	Docket 05-CV-4182-K
	*	New Orleans, Louisiana
	*	January 23, 2008
PERTAINS TO:	*	
	*	2:00 p.m.
ALL LEVEE CASES	*	

TRANSCRIPT OF PROCEEDINGS BEFORE THE
HONORABLE STANWOOD R. DUVAL JR.
UNITED STATES DISTRICT JUDGE

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PROCEEDINGS

(January 23, 2008)

THE DEPUTY CLERK: All rise.

Court is in session. Please be seated.

THE COURT: Good afternoon. Thank you for showing up this afternoon because it would have been rather fruitless this morning. We were busy until 12:30 with criminal stuff.

THE DEPUTY CLERK: The first matter on the docket is In Re: Katrina Canal Breaches Consolidation Litigation. We are dealing with the Sewerage and Water Board's motions to dismiss, documents 9910, 10037, 10039, 10041, 10043, and 10115.

THE COURT: Since the East Jefferson Levee District's motion seems to be the same, we are going to take those up together since the argument is basically the same. Why don't we call that one, as well, Sheena.

THE DEPUTY CLERK: The East Jefferson Levee District's motion to dismiss is record document 10201.

THE COURT: Okay. I don't know if you have talked about who is going to take the laboring oar here because the motions are, in essence, the same. To put it succinctly, it's a question whether I'm going to take the so-called "minority view" as espoused by the Second Circuit or the so-called "majority view," such as it is, espoused by the Sixth and the Ninth. I'm looking at the *Wachovia* case. I'm not sure it's clearly espoused by the D.C. Circuit, 1980.

Only one circuit, the Second Circuit, has clearly held that it does not foster the purposes of *American Pipe* to state that, in essence, the party who files after a class action has been filed, as part of the putative class, forfeits their rights of suspension, as enunciated under *American Pipe*, when they bring suit on their own behalf; if they bring it after the tolling period, they are prescribed.

The Second Circuit says one thing. Clearly, the Sixth and the Ninth say something else. Apparently, the majority of the district courts have held that the tolling period is forfeited. So the question is: Is this Court going to go with the majority view or the minority view, as I'm characterizing it? What's more persuasive to me? That stated, you can commence your arguments.

MR. TULLY: Good afternoon, Your Honor. Kevin Tully and my associate, Nick Dietzen, on behalf of the Sewerage and Water Board.

Your Honor, I'm not going to repeat everything I have said in writing to you. Obviously, it is going to be your decision. The District of Columbia, you're correct, Your Honor --

THE COURT: And maybe the Supreme Court because it's clearly a circuit split.

MR. TULLY: Actually, Your Honor, I think it's one of the more interesting things I've run across in a long time

because, instinctively, you could see both arguments. I concede that. I will point out, Your Honor, the District of Columbia, that was not the basis of their holding except in footnote 7 of that case.

THE COURT: I was rummaging through it this morning.

MR. TULLY: Yes, Your Honor. What they say in footnote 7 is -- the appellant had made that argument and they dispensed with it in a footnote. I won't read the footnote to you, but it's footnote 7, Your Honor, of the opinion. It was a third argument the appellants had made and they addressed why it didn't apply, why the tolling provision didn't apply.

What they said was it didn't apply because the plaintiffs, they didn't await for class certification, they didn't await for class certification opt-out; they had chosen to file their own lawsuit nine months before certification was decided and, therefore, they forfeited any rights they would have had under *American Pipe*. So while it may not be part of the First Circuit's holding, it was an argument that was advanced and the First Circuit addressed. Your Honor is correct, they just talk about it in a footnote as an argument. It wasn't necessary for the holding. I think it's fair to say the First Circuit, reading their footnote, would be in agreement with the Ninth and the Sixth, Your Honor.

THE COURT: Okay.

MR. TULLY: Your Honor, looking back doing the

reply -- and I'm sorry I didn't get it to you-all yesterday. Frankly, we were thinking perhaps everything was -- yes, sir, the reply came in yesterday. I did it yesterday afternoon.

I guess, from a public policy point of view, Your Honor -- and I'm not trying to take Peter's argument away from him, but it seems to me the majority view -- and I'll keep calling it the majority view because that's the view I'm espousing, and I think by numbers we win on that. In rereading the cases, I was trying to find a theme of the majority cases. The majority's theme, it seems to me, Your Honor -- and this is just my view of the case law. The majority's theme is a focus on the public policy rationale for not allowing someone who opts out of a class action beforehand -- in other words, decides to go their own way. The public policy rationale, it seems to me the majority view is to focus on the court, Your Honor.

The courts all talk about the concept of judicial efficiency, and that is one of the foremost purposes of a class action, so Your Honor isn't going to deal with 395,000 individual claims asserted by the citizens of New Orleans. That's the point. When Your Honor rereads the cases with this in mind, I think you will see that to be the underlying theme --

THE COURT: I agree that is them.

MR. TULLY: -- it's the court. What it is, it's a

very broad policy. It's a broad policy that we do not want to waste judicial resources with endless copycat cases brought before this Court decides whether something should be correctly certified as a class action or not. That public policy is very important not only for the resources of this Court -- and, Your Honor, I think I can say, having been in your Court a number of times on the Katrina litigation, Your Honor is quite busy as it is and doesn't really need another 150, 200, however many suits are going to start coming down the pike on this basis.

So if you look at it that way, I think conceptually the majority view is right, if you're going to focus on the court and the purpose for having a class action procedure in the first place. Plus, it also should focus on the parties because, quite frankly, this litigation is expensive for everybody involved. Now, if Your Honor holds to the contrary, I guess I will be running around drafting 150 more answers, electronically filing them. There's just a lot of busywork involved in this.

The minority view, it seems to me, reading the cases again, they focus on the historic concept of statutes of limitations and prescription being: Well, as long as the defendant got adequate notice, it's no harm, no foul. I think that's the theme of those cases.

"Why is the defendant complaining? He already

knew." I'm not trying to anticipate what Peter is going to say, but he will say, "Well, what is Mr. Tully complaining about?" I think they made it one of the things. "He knew perfectly well. All my clients lived in Orleans Parish. It's no surprise because they were in the class action." Well, of course, they opted out of the class action. They are not in it anymore. Certainly, I cannot argue that I am surprised because there happens to be more people. I don't even know how many people would be in the putative class. The population of New Orleans is still not very clear to me.

So I understand that argument in the concept of old-fashioned prescription. But my suggestion, Your Honor, in weighing which of the public policies to adopt, quite frankly, I think for the purposes underlying a class action and for the very important purpose of conserving judicial resources, the majority view is the better view from the perspective of the Court. That, to me, if I were tipping the balance -- and I'm not being presumptuous enough to suggest I'm the judge. But were I the judge, that would be the balance that would tip because conserving judicial resources is to me a fundamentally important public policy decision to make.

In looking at the two stream of cases, I suggest to the Court that that -- assuming, intellectually, you could see both sides of the coin, but that tips the balance in favor of the majority opinion. On that basis, I would urge the Court

to adopt the majority view and hold that these plaintiffs cannot take the benefit of the class action tolling that *American Pipe* provides when they have consciously chosen to pursue their own litigation in this Court. With that said, Your Honor, I can answer any questions.

THE COURT: No. You have set it out. Thank you very much.

MR. TULLY: Thank you very much, Judge.

MR. BEARDEN: Joseph Bearden for the East Jefferson Levee District. I just have a few things to say that would follow up.

Obviously, the East Jefferson Levee District believes that the appropriate course of action here is for these actions to be deemed prescribed. I don't want to repeat the arguments Mr. Tully made, but obviously we have four reasons why we believe the plaintiffs' arguments fail to support the position of the majority of these cases.

First, the plaintiffs don't address the stated efficiency goals of *American Pipe* and *Crown, Cork*, the other district court cases. In their memos they say that the lawsuits were filed to protect their interests, but they don't explain how their interests weren't protected by the pending class actions.

We can't quite figure out exactly what they gain by filing these lawsuits. Had the Court decided class

certification, they could opt out later. If the Court denied class certification, they could file their own individual lawsuits under the tolling provisions provided by *American Pipe*. So what were they worried about? Were they worried about missing notice of the class certification decision and then not receiving the benefits of the tolling provision if they filed too late? So there's a fundamental flaw in their argument here of what are the efficiency reasons for allowing them to file these cases now.

The second point is they say that they're still class members. In one of the memos, they specifically point out they have not opted out of the class yet. Your Honor, the *Hanford Nuclear* decision specifically states that filing a case like this indicates opting out. If this isn't opting out, what is opting out? If they still are a member of the class, all they have done is filed the type of interventions that *American Pipe* and *Crown, Cork* were designed to prohibit from being filed.

Third, they cite *Schimmer v. State Farm* as distinguishing *Wyser-Pratte*. *Wyser-Pratte* is one of the circuit court decisions that specifically come out and say that these types of cases are prescribed. In the quote at the bottom of page 7 of one of the memos -- this one was filed by Omega -- it says:

"If the putative class member knew about the

class litigation but elected to proceed separately, then disallowing application of the class action tolling penalizes him for his informed decision. On the other hand, if the putative class member did not know about the class litigation and simply commenced a separate action for purposes of protecting his rights, the disallowing application of class action tolling penalizes him for being aware of the class action litigation and awaiting a ruling on class certification."

Your Honor, this logic is fundamentally flawed. The first part, "If the putative class member knew about the class litigation, but elected to proceed separately," all they are doing are filing the duplicative lawsuits that *American Pipe* and *Crown, Cork* are designed to prohibit from being filed.

THE COURT: Where do you see that in *American Pipe*?

MR. BEARDEN: I'm sorry?

THE COURT: I've got it right here. Where do you see in *American Pipe* that the rationale of the case is to inhibit other suits from being filed?

MR. BEARDEN: *Crown, Cork* interpreting *American Pipe*.

THE COURT: All right.

MR. BEARDEN: The second portion, "On the other hand, if the putative class member did not know about the class litigation and simply commenced a separate action for purposes of protecting his rights," Your Honor, if that's the case, all

the plaintiff has done is filed a lawsuit that he should have known or already knew was prescribed; because he didn't know about the class litigation, so he can't get the benefits of the pending class litigation, so he filed a lawsuit that he already knew was prescribed. The logic in *Schimmer* is flawed and plaintiffs rely upon it.

Finally, Your Honor, the plaintiffs talk about relying upon this Court's -- I believe it was August of 2007 -- admonition to protect your interests and file your own lawsuits. Your Honor, in August of 2007, these cases were already prescribed. Under the *American Pipe, Crown, Cork* doctrines and circuit court decisions interpreting them, these cases were already prescribed.

THE COURT: You mean when I was talking about the Federal Tort Claims Act or the AEA?

MR. BEARDEN: One of the memos -- I believe it's Omega's -- says, "The individual suits were filed by Omega in response to the advice of the Court." This is roman numeral V, page 8, of the Omega memo. It cites an August 24, 2007 order where the Court said -- and I'm quoting -- "By this order, all claimants who have not filed suit are put on notice that the validity of this order may well be challenged."

THE COURT: That was in reference to the Federal Tort Claims Act and the AEA and there were two different prescriptive periods. It had nothing to do with -- in other

words, there's a different statute of limitations applying to the federal government. That has nothing to do with filing suit against the East Jefferson Levee District or the Sewerage and Water Board.

MR. BEARDEN: Then plaintiffs' reliance upon it is misplaced.

THE COURT: I agree it has nothing to do with it.

MR. BEARDEN: Thank you, Your Honor.

MR. HILBERT: Good afternoon, Judge Duval. Peter Hilbert and John Balhoff of Sher Garner for a number of plaintiffs. I think we have 82 separate cases. Just for convenience, I'll refer to them as the "Adler cases" since a number of our plaintiffs are members of the Adler family.

Judge, as I understand the defendants' position, they start with the *American Pipe* and the *Crown, Cork & Seal* case, where the Supreme Court said, "A timely filed class action suit during the pendency of class action litigation tolls the statute of limitations." From that point they hop to the *Wyser-Pratte* line of cases where those courts, we are going to submit to Your Honor, wrongly interpreted *American Pipe* and *Crown, Cork* and came up with this judicial efficiency theory.

As Your Honor knows, the *American Pipe* and the *Crown, Cork* case said nothing at all about a plaintiff filing a suit during the pendency of a class action suit, whether that case is time barred or not. It is totally in opposite to that,

has nothing to do with that particular scenario. The defendants point to you the *Wyser* cases, where the courts enunciated this judicial economy theory, and said that if you file a separate suit during the pendency of a timely filed class action case but after the statute of limitations has otherwise passed and before the court decides class action issues, your case is prescribed, it's toll barred.

THE COURT: I note that the *Wyser-Pratte* case, which is 413 F.3d 553, the Sixth Circuit case, referred to the district court case in *WorldCom*.

MR. HILBERT: Right. Exactly.

THE COURT: However, that case was decided and filed June 28, 2005 -- "that case" meaning *Wyser-Pratte* -- whereas the Second Circuit overturned that ruling on July 26, 2007. So it apparently --

MR. HILBERT: Exactly. That's exactly where I was going.

THE COURT: That was in your brief.

MR. HILBERT: The *WorldCom* case, however, looked at the *Wyser-Pratte* line of cases and said the *American Pipe* and *Crown, Cork* decisions were not trying to foster this judicial efficiency theory that *Wyser-Pratte* latched on to. What it says is:

> "While reduction of the number of suits may be an incidental benefit of the *American Pipe* doctrine, it was not

the purpose of *American Pipe* either to reduce the number of suits filed or to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative. Nor was the purpose of *American Pipe* to protect the desire of a defendant not to defend against multiple actions in multiple forums. The *American Pipe* tolling doctrine was created to protect class members from being forced to file individual suits in order to preserve their claims. It was not meant to induce class members to forego their rights to sue individually."

THE COURT: I did note that the Ninth Circuit in *In Re: Hanford Nuclear Reservation Litigation*, which was filed August 14, 2007, took what we are calling the majority view, the *Wyser-Pratte* view, but I don't recall it discussing the Second Circuit's opinion in *WorldCom*.

MR. HILBERT: Correct.

THE COURT: It may have, but I don't think it did.

MR. HILBERT: I think you are absolutely right on that.

THE COURT: It clearly is contrary to the Second Circuit.

MR. HILBERT: Right. Absolutely. Then, Your Honor, if you take this judicial efficiency theory and apply it to the very unique situation in Katrina, this is what would have happened. We have a timely filed suit of the *Berthelot v.*

Boh Bros. class action suit against the Sewerage and Water Board and others. It's filed in June of 2006. We have the issue with suits against the government, where the plaintiffs had to go through the administrative proceeding first. They had to file their claims. And after the claims weren't acted upon by the federal government, then there was 180 days for the claimants to file their suit, which was past the first anniversary when all that would have occurred.

This is what would have happened. Applying the defendants' judicial economy theory, the plaintiffs would have been forced to file suit against the Sewerage and Water Board and other similar Louisiana tort defendants within the first anniversary, and then after the Form 95 issues had worked themselves out then come right back and file a second suit against the government. So where is the judicial efficiency in this case, applying what the defendants want you to do? Two suits would have been filed. It would have been absolutely necessary for the plaintiffs to file two separate suits.

Now, let's take one step further and ask: What's the primary policy of the statute of limitations? Undoubtedly, it has to be to force plaintiffs to file timely suits so that the defendants are on notice that suits are being filed, claims are being filed against them, give the defendants a timely opportunity to preserve evidence and start forming their defenses. These defendants had that opportunity when

Berthelot was timely filed, and the proposed class in *Berthelot* is obviously big enough to include the Adler plaintiffs.

So applying what they just presented to you, no judicial efficiency would have been realized in this Court, and these defendants cannot really show you how they have been detrimentally prejudiced in this case. The most Mr. Tully could say is that electronically he would have to file another answer. There's no prejudice in this case.

We submit that if you look at *American Pipe* and the *Crown, Cork & Seal* case, the Adler cases were timely filed and that the better side of the argument is that the *Berthelot* case gave a legal tolling to the Adler plaintiffs and their cases are timely.

THE COURT: Thank you, sir.

MR. HILBERT: Thank you, Judge.

THE COURT: Do you want just a couple minutes?

MR. TULLY: Yes, Your Honor. Just a few points. Like Your Honor, I think this is a very fascinating area of law. I wanted to point out to the Court -- for reasons I don't know, and I could stand to be corrected. I kept thinking, in reading the Second Circuit's opinion in *WorldCom*, they would discuss the other view. I can't find where they recognize that there was a contrary view to theirs. I could be mistaken, but I don't see where they discuss --

THE COURT: Hold on. I have the case right here.

MR. TULLY: I just couldn't find it. Maybe I didn't catch it, because I don't always catch everything. It was just curious to me because it seems like it's such an interesting issue.

THE COURT: I just had it out.

MR. TULLY: The discussion starts and they go on and -- whether they overturned the district court or not, one of the majority circuits that liked the district court's things said, "We find the reasoning persuasive." Now, they adopted that reasoning, and I think it's persuasive. Whether the Second Circuit ultimately decided it wasn't, we know that one circuit, quoting the district court, thought it was persuasive and that's the law of that circuit. Whether the Second Circuit agrees or not, it was still persuasive and it still is persuasive.

The idea -- and Peter hit upon it, and I'm just curious what he means by this. He keeps saying that his poor plaintiffs would have had to make an early decision to file suit. Well, in Louisiana we have a year to file suit against somebody, so I don't know why this is different. He said they would have been forced to file an early suit. I dare say, as good a lawyer as Peter is, I bet he hasn't learned anything about Hurricane Katrina in this additional year that he didn't know in the prior year, when he could have counseled his clients to file suit.

The issue before this Court isn't whether *American Pipe* and *Crown* prevent someone from filing an individual suit. I would agree with Peter. I see nothing in that opinion that says if Kevin Tully wants to file his own suit against the world over Katrina he --

THE COURT: Within the appropriate statute of limitations.

MR. TULLY: Within the appropriate statute of limitations.

THE COURT: I understand.

MR. TULLY: That's where it is. In other words, "Mr. Tully, if you don't like the way Joe Bruno is handling that class action, there is nothing stopping you from filing your suit. Judge Duval's courtroom is open to you," but you have to do it within the applicable time. You can't say, "I'm not going along with Mr. Bruno anymore. I'm going on my own. But by the way, I want to use Mr. Bruno's timely filing to protect my untimely filing." That's the underlying issue.

You know, Your Honor, I talked about that I would have to file more answers. That's going back to the unfairness and the notice to the defendant, and Peter went back to that, but it isn't just the burden on me. In the scheme of things, I get paid for that. I'm not complaining. It goes back to the Court. You have to decide as a public policy reason -- and that's what I think we are really going down to.

That's what I suspect Your Honor is going to focus on and I suspect ultimately the Fifth Circuit is going to focus on. We may be making arguments and law that the Supreme Court, I would think, is ultimately going to decide on.

As a matter of public policy, it seems to me -- and I said it before and I'm going to say it again -- you have two, I think, intellectually interesting approaches to a question I frankly never thought existed. You could make good arguments for each side. The one extra pebble to me that is going to tip it or should tip it in favor of what I call the majority opinion is the notion of judicial economy and one of the underlying principles behind a class action. To me, all intellectual arguments aside, that little pebble extra tips the balance in favor of ruling with the majority.

THE COURT: Thank you, sir.

MR. TULLY: Thank you, Your Honor.

MR. HILBERT: Your Honor, could I have just --

THE COURT: He gets the last word since it's his motion. He will have to talk again, so we are going to have to wrap it up.

MR. MILLER: May I say something, Your Honor? They have filed motions against my clients as well.

THE COURT: Again, they get the last word.

MR. MILLER: Sure. Can I make a couple points?

THE COURT: Go ahead.

MR. TULLY: Your Honor, I didn't mean to cut him off.

THE COURT: I understand.

MR. TULLY: I apologize.

MR. MILLER: Kerry Miller on behalf of Murphy Building Corp., Rault Resources, and Joe Rault, Your Honor. We would like to adopt what Mr. Hilbert said on behalf of his plaintiffs. There are a couple points we wanted to make, though, Your Honor, and one is the application of Louisiana prescription law to this particular issue against these defendants. It's something that was identified in all of our memoranda on this side of the aisle. We do think that Louisiana prescription law would apply with respect to the claims the plaintiffs have against the Levee District and the Sewerage and Water Board.

All the cases, I think, that we have been discussing -- *WorldCom, Wachovia*, what have you -- the substantive law in those cases is federal securities law and so those would have been clearly 1331 jurisdictional cases. Here we think that under the *Erie* doctrine you look to Louisiana prescriptive law. Article 595 of the Code of Civil Procedure sets forth that there's no way that prescription could have run. So that's an issue, Your Honor.

The other issue that was made in their reply brief last night deals with whether or not filing suit during the pendency of a class action in which you are a member opts

you out. I think the majority of cases on a whole different issue says no. You have to opt out to opt out; filing a lawsuit doesn't. They cite one case that says that it does, but there are cases that hold otherwise.

Lastly, Your Honor, just to recap one of Peter's points, and that is that proper joinder of the claims by the plaintiffs against the United States and these defendants -- there's been no allegation there's improper joinder, so in fact this is the most efficient vehicle to bring these claims, Your Honor.

THE COURT: Thank you, sir.

I'll let you speak to that and it will be the last word.

MR. TULLY: Again, it may be the lateness, Your Honor, of my filing reply. If you haven't seen it, I apologize. I think the discussion of *Erie* --

THE COURT: I know you did discuss that.

MR. TULLY: -- it's irrelevant. I reread every one of the complaints -- not every one of the individual complaints Peter filed, but Murphy and everybody else. Nowhere do they allege diversity jurisdiction. That's not a basis for the jurisdiction they raise; the state law claims they raise under supplemental jurisdiction. I cited *Hanna v. Plumer* and the progeny. I agree with him that Louisiana prescription law applies and it's one year, but he says when you look to

Louisiana law and then he harkens to the Louisiana Code of Civil Procedure on class actions. That is a procedural law and, Your Honor, *Hanna v. Plumer* and all the progeny of those cases, that simply doesn't apply. We are looking to the class action provisions of --

THE COURT: Rule 23.

MR. TULLY: -- Rule 23 of the Rules of Civil Procedure. So I think he is making a non sequitur argument on that even if *Erie* had some application to this.

Your Honor, addressing the issue of against the United States, the fact of the matter is if they believe they needed to file -- in fact, some might say that if the government hasn't responded to their Form 95 they may not even have to file suit yet. That is perhaps a discrete issue here. If they thought that, in light of whatever discussion there was, that they needed to file their own individual suit against the United States -- assuming that they had gotten their 95 rejection back -- there's nothing stopping them from filing a suit against the United States. They could have filed this suit against the United States without adding everyone else. That, to me, is they're piggybacking. They are saying, "Well, okay, we want to use that as our excuse." Frankly, Your Honor, that's an issue, but I don't think that's the issue at hand.

Going back, the rule you are going to make -- assuming the Fifth Circuit agrees with you and the

Supreme Court agrees with the Fifth Circuit -- is going to apply to all class actions henceforth in all permutations. There are cases where you might have a longer statute of limitations against one defendant and not the other. Those are all permutations that we are going to deal with. The fact of the matter is, the simple issue before us is: In the interest of the class action proceeding and this Court's resources, what is the better rule to apply?

As I keep repeating myself -- and I hate to do it, but I'm going to do it one more time. That pebble, I believe, weighs in favor of the majority intellectual view versus the minority intellectual view and I would urge the Court to adopt that view.

THE COURT: Thank you. Thank you for your arguments. I'm going to make a ruling from the bench and it's going to be a rather straightforward ruling.

I agree that this is a policy decision. I further agree that it appears the majority of courts that have addressed this have held that when a putative plaintiff files its own suit after the applicable prescriptive period that the tolling period enunciated in *American Pipe* is lost or forfeited some say. However, the Court does not see embedded in *American Pipe* that policy, which is the Supreme Court decision, or in the *Crown* case mentioned by the parties as well.

The Court is, by virtue of its oath, bound to

follow Supreme Court precedent; that being absent, Fifth Circuit precedent; and, of course, upon all of that superimposed the will of Congress. Well, the will of Congress is not clearly enunciated in Rule 23. It's been explicated by the Supreme Court in *American Pipe*. I think this is obviously something that certainly warrants appeal. The circuit court is going to make the ultimate decision and perhaps the Supreme Court, since there is a circuit split, no question.

Let me give you my reasons. One, I do not see the notion of forfeiture embedded in *American Pipe* and *Crown*. The notion of forfeiture really comes, as counsel for defendants so eloquently put it, in judicial economy. It is certainly not economical and not efficient judicial policy to allow a plethora of suits to be filed after a class action is filed. It becomes unwieldy. It defeats the purpose of the class action.

However, it is also the individual right to look and see how the class action is going and not be particularly satisfied with it. There may be individual nuances or permutations that don't quite "gee and haw" with the class. A person may make a decision to file the suit with the understanding that that person has been protected by virtue of *American Pipe* until the suit is filed and the statute of limitations, whatever it may be, has been tolled.

It seems counterintuitive to me that if

something is tolled it can be forfeited. We are not dealing with the concept of interruption of prescription, which is discussed in Louisiana law, but suspension. So how do you unsuspend it? It seems to me that if it's tolled, it's tolled. Unless Congress would speak to it clearly or the Supreme Court, I'm not sure where I, as a district court, have the power to say, "You just forfeited these rights, but I do it because I don't like the way my docket is." That's simply not enough for me to throw somebody out of court that may have thought they were protected, especially since there's no Fifth Circuit law on this.

So I'm going to adopt what I will call the minority view, and that certainly will help the defendants on their appeal since this Court is adopting the minority view rather than the majority view, perhaps. I feel that if I'm going to make any kind of policy decision -- which I really, as a district court, certainly try not to do -- it would be my policy that, unless I have a clear mandate, I'm not going to have somebody forfeit their rights unwittingly by filing suit.

Now, insofar as the management of my docket, I can issue a stay; simply, all tagalongs, if they are filed, they are stayed and no action can be done. I have issued a stay, by the way, a day ago or so. I'm going to stay these things because I think counsel has a point. I can't manage all of these cases. So I'm going to stay them, with the idea that

someone, if they want to file something, can get permission from the Court, and it has to be good cause. Otherwise, we are going to go with the class actions in Levee and MRGO as it is right now.

I might say, defense counsel, you made a good argument and a good point. You have a lot of case law on your side. I just have difficulty with the concept of forfeiture of a suspension. If the Supreme Court says their right is suspended, I don't know how it's unsuspended by the filing of suit. That's a trap for the unwary that I'm not willing to do just in the name of judicial economy.

To quote from the Second Circuit, which is the only circuit that has talked about this that agrees with the plaintiffs -- and I happen to be agreeing with it. It is the minority view. In the *WorldCom Securities Litigation*, 496 F.3d 245 (2nd Cir. 2007), the court stated:

"This Court has not yet faced a question whether the tolling required by *American Pipe* for members of the class on whose behalf a class is filed applies also to class members who filed individual suits before class certification was resolved. We now conclude that it does.

"The theoretical basis on which *American Pipe* rests is the notion that class members are treated as parties to the class action 'until and unless they receive notice thereof and chose not to continue.' *American Pipe*,

414 U.S. 551, 94 S.Ct. 756. Because members of the asserted class are treated for limitation purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time. Once they cease to be members of the class -- for instance, when they opt out or when the certification decision excludes them -- the limitation period begins to run again on their claims.

"Nothing in the Supreme Court decisions described above suggest that the rules should be otherwise for a plaintiff who files an individual action before certification is resolved. To the contrary, the Supreme Court has repeatedly stated 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.' *Crown*, 462 U.S. at 353-54, 103 S.Ct. 2392 (quoting *American Pipe*, 414 U.S. at 554, 94 S.Ct. 756). We see no reason not to take this statement at face value.

"It would not undermine the purposes of statutes of limitations to give the benefit of tolling to all those who are asserted to be members of the class for as long as the class purports to assert their claims. As the Supreme Court has repeatedly emphasized, the initiation of a class action puts the defendants on notice of the claims against them.

See, e.g., American Pipe, 414 U.S. at 554-55, 94 S.Ct. 756 (noting that the purposes of statutes of limitations 'are satisfied 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 the number and the generic identities of the potential plaintiffs who may participate in the judgment'). A defendant is no less on notice when putative class members file individual suits before certification. The Supreme Court explained that 'class members who did not file suit while the class action is pending could not be accused of sleeping on their rights,' *Crown*, 462 U.S. at 352, 103 S.Ct. 2392; the same is certainly true of class members who filed individual suits before the court decides certification.

"In concluding that the appellants could not benefit from *American Pipe* tolling, the district court stated that the goal of avoiding a 'needless multiplicity of actions' is undermined when class members file individual suits before a certification motion is decided. The district court reasoned that the class members who wait to sue individually until after the class certification decision will be in a 'better position to evaluate whether they wish to proceed with their own lawsuit.' Moreover, class members' desire to sue separately may 'evaporate' once they have a chance to assess the class representatives' performance.

"The district court may be correct that its conception of the *American Pipe* rule would reduce the number of individual suits filed by class members, but this is beside the point. While reduction in the number of suits may be an incidental benefit of the *American Pipe* doctrine, it is not the purpose of *American Pipe* either to reduce the number of suits filed or to force individual plaintiffs to make an early decision whether to proceed by individual suit or rely on a class representative. Nor was the purpose of *American Pipe* to protect the desire of a defendant 'not to defend against multiple actions in multiple forums.' *Crown,* 462 U.S. at 353, 103 S.Ct. 2392. The *American Pipe* tolling doctrine was created to protect class members from being forced to file individual suits in order to preserve their claims. It was not to induce class members to forego their right to sue individually."

I'm quoting from the New York case, *WorldCom*, pages 254 and 255 of that case.

The only other case I will mention is a Colorado case, *Shriners Hospitals for Children v. Quest Communications International, Inc. It's* a district court case, 2007 WL 2801494, out of Colorado. The judge there has a thorough discussion of *American Pipe* tolling. I won't read all of that into the record, but I note the case. The one thing I wanted to point out is this. He does talk about the various line of cases:

"The opposing view of this issue, which holds that *American Pipe* tolling does not apply when a plaintiff files a separate suit before a decision has been made on class certification, has been adopted by several district courts and by the Sixth Circuit. *Wyser-Pratte Management Co., Inc. v. Telxon Corp.,* 413 F.3d 553, 568-569 (6th Cir. 2005). The basic rationale for this position is that the 'purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has just been decided.'

"Having reviewed this issue again, and in light of the Second Circuit's recent position in *In Re: WorldCom Securities Litigation,* I conclude that *American Pipe* tolling is applicable to SHC, even though SHC filed *Shriners I* while the issue of class certification was still pending in *In Re: Quest.* The Supreme Court's repeated statement that the filing of a class action suspends the applicable statute of limitations as to all members of the class should be taken at face value. Further, it is important to note that the filing of a separate lawsuit by a putative class member does not automatically cause that putative class member to be removed from the putative class. In this case, SHC was not treated as having opted out of the *In Re: Quest* class when SHC filed a separate suit. Rather, SHC was treated as having opted out of the putative

class only when it formally opted out of the plaintiff class in *In Re: Quest.* Application of *American Pipe* tolling to a plaintiff who chooses to file a separate suit while the issue of class certification is unresolved does not fundamentally undermine the primary purposes of the *American Pipe* tolling doctrine."

I might add one other note. If you can file the suit while the prescriptive period is extant, if it's tolled, you out to be able to file it, too, because you could have a thousand suits filed during the prescriptive period. It's up to me, then, to manage it. I've taken a long time to issue a stay order, admittedly, but I have issued a stay order. I'm attempting to manage it and will take all suggestions from anyone as to how to more efficiently manage it.

I guess the basis of my decision, in adopting the so-called minority view, is I agree with the logic and reasoning of the cases that I just cited. *American Pipe* was not decided to create a trap, and that's what this would be. We hope to efficiently manage this despite this ruling. Of course, I understand that there's a definitive circuit split and the Fifth Circuit needs to decide it.

I don't know how many cases this affects, frankly. I know it affects these. There may be others out there as well. I simply don't know how many come under this situation, where people filed after the statute of limitations

may apply. I'm not sure what impact it has on the umbrella.

MR. TULLY: Your Honor, if I could just ask -- and I haven't spoken to my partner, Charles Lanier, for the Sewerage and Water Board. Would Your Honor entertain, if the Sewerage and Water Board were to decide to go forward, a motion to certify this as an appealable judgment?

THE COURT: I would certainly entertain it.

MR. TULLY: Okay. I don't know whether they would want to or not, Your Honor.

THE COURT: Right. I will entertain anything, but I assumed you might attempt to do that.

I'll let the other side tell me why I shouldn't certify it. You may want it answered, as well, because you would like to know whether you have a suit or not.

Certainly, I would entertain it, absolutely, because it's certainly one that ultimately is an appellate decision. I'm not making any findings of fact here. It's clearly an appellate decision ultimately.

MR. TULLY: Thank you.

MR. HILBERT: Thank you.

THE COURT: We are adjourned for the day.

THE DEPUTY CLERK: All rise.

(WHEREUPON the Court was in recess.)

* * *

CERTIFICATE

I, Toni Doyle Tusa, CCR, FCRR, Official Court Reporter for the United States District Court, Eastern District of Louisiana, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of the proceedings in the above-entitled and numbered matter.

_____
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter