IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE DOW CHEMICAL CORPORATION,	§	No. 492,2012
Defendant Below, Appellant	§	Court Below-Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. N11C-07-149-JOH
JOSE RUFINO CANALES BLANCO,	§	
Plaintiff Below, Appellee.	§	

CONSOLIDATED WITH

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DOLE FOOD COMPANY, INC., DOLE FRESH FRUIT COMPANY, STANDARD FRUIT COMPANY, AND STANDARD FRUIT & STEAMSHIP COMPANY,	§	No. 493,2012
Defendant Below, Appellant	§	Court Below-Superior Court of the State of Delaware, in and for New Castle County
v.	§	C.A. No. N11C-07-149-JOH
JOSE RUFINO CANALES BLANCO,	§	
Plaintiff Below, Appellee.	§	

APPELLANT'S REPLY BRIEF IN SUPPORT OF INTERLOCUTORY APPEAL

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REPLY IN SUPPORT OF INTERLOCUTORY APPEAL

This is defendant-appellant The Dow Chemical Company's ("TDCC") Reply Brief in Support of its Interlocutory Appeal from the Superior Court's August 8, 2012 decision, denying TDCC's Motion for Judgment on the Pleadings.

SUMMARY OF THE REPLY

Plaintiff-Appellee ("Plaintiff or Blanco") raises three principal points in his Answering Brief on Interlocutory Appeal ("Answering Brief"): (1) the entire concept of "cross-jurisdictional" tolling creates an "arbitrary limitation" on *American Pipe & Constr. Co v. Utah*, 414 U.S. 538 (1974); (2) cross-jurisdictional tolling is consistent with Delaware law; and (3) defendants have suffered no prejudice by the 16-year delay between plaintiff's June 9, 1995 *Abarca* lawsuit in Florida and his July 21, 2011 Delaware lawsuit. All three arguments offer meager support for the cross-jurisdictional tolling principle announced in the Superior Court's August 8, 2012 decision (the "August 8 Opinion"), and several are in tension with the Superior Court's reasoning.

Taking each of Blanco's arguments in turn, to quibble that the concept of "cross-jurisdictional tolling" creates some kind of fictional distinction on which *American Pipe* does not rely deliberately ignores the fact that it is other *courts*, not TDCC, that have made this distinction. Indeed, this includes the court below, which noted the case involved the question of whether the intra-jurisdictional *American Pipe* rule "should apply to allow a plaintiff to file suit in a jurisdiction different from that in which the putative class action was first filed and had been pending."[1] Second, as the Superior Court also recognized, the question of cross-

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[1] Superior Court opinion at page 17. The opinion is Exhibit A to TDCC's opening brief and it will be cited herein as "Opinion at __."

jurisdictional tolling is a "question of first impression" and cannot be, as Blanco suggests, grounded in Delaware law. (Opinion at 1). Finally, while offering no explanation for the 16-year delay between the 1995 *Abarca* action and this one, Blanco asserts there was no prejudice to defendants. (Answering Brief at 23). This, however proves TDCC's larger point: even if this Court were inclined to adopt cross-jurisdictional tolling in some other case, it should not do so under these facts, where the lengthy, and wholly unexplained, delay effectively eviscerates any statute of limitations.

ARGUMENT

I. NOTHING IN *AMERICAN PIPE* MANDATES CROSS-JURISDICTIONAL TOLLING.

Blanco, as have other plaintiffs represented by Mr. Hendler in Hawai'i and Louisiana, claims that defendants-appellants "seek to create a legal fiction" by drawing a distinction between "cross" and "intra" jurisdictional tolling. (Answering Brief at 8) But, in fact, it is the majority of courts who have considered and rejected cross-jurisdictional tolling that have adopted this distinction, not TDCC. *E.g.*, *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (California rejects cross-jurisdictional tolling, *i.e.*, "when a class action is filed in another jurisdiction"). Indeed, even the courts accepting cross-jurisdictional tolling have recognized that "states are free to fashion their own class action tolling rules and are not bound by *American Pipe.*" *Stevens v. Novartis Pharmaceuticals Corp.*, 358 Mont. 474, 483 (2010).

Furthermore, Blanco's argument here appears to be grounded in a misreading of *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), which he cites for the proposition that "[n]either *American Pipe* nor Delaware decisions restrict tolling to the intra-jurisdictional context." (Answering Brief at 9) (citing *Sawyer* at 562)("it does not follow that any rule or policy prohibits what [defendant] Atlas Heating calls "cross-jurisdictional tolling"). Because, however, in *Sawyer*, both the putative class action and the subsequent individual lawsuit began in Wisconsin state court, there was no cross-jurisdictional tolling issue in that case. *Sawyer*, 462 F.3d at 561 (the first lawsuit was filed "in state court in

Wisconsin;" the second was "also in state court"). As explained in *Phillips v. WellPoint, Inc.*, 2012 WL 4490688, at *10 (S. D. Ill. 2012), because Sawyer involved a situation where both suits began in state court (even if one is later removed to federal court) that situation is not properly termed "cross-jurisdictional."

In any event, there is no dispute that the Texas *Delgado* lawsuit was filed in Texas, i.e., a different jurisdiction from Delaware, which the Superior Court recognized. (Opinion at 17.) (defining "cross-jurisdictional tolling" as "the issue of whether *American Pipe's* ruling on intra-jurisdictional tolling…should apply to allow a plaintiff in a different jurisdiction to file suit in a jurisdiction different from [the pending putative class action].) And, in *American Pipe*, the Supreme Court narrowly held that the filing of a federal court antitrust putative class action tolled limitations for those individuals who wanted to intervene individually *in the federal class action itself* after denial of certification. *American Pipe*, 414 U.S. at 554. Blanco suggests that the same rationale applies blindly to the cross-jurisdictional context, without any examination of the varying policy rationales. However, it is clear that "the policies underlying *American Pipe*…simply do not apply in the cross-jurisdictional context." *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006).

Finally, Blanco contends that *American Pipe's* rationale would be violated without a cross-jurisdictional tolling rule because only such tolling would further Delaware's interest "in avoiding duplicative litigation in its own courts." (Answering Brief at 17).

In fact, those policy rationales were recently discussed by the Louisiana Supreme Court, which rejected cross-jurisdictional tolling as inconsistent with the concepts underlying statutes of limitation, or prescription. *Quinn v. Louisiana Citizens Property Ins. Corp.*, 2012 WL 5374255 (La. 2012). The *Quinn* court reasoned that absent a cross-jurisdictional tolling rule, any "protective filings" would be dispersed throughout the country and not limited solely to one state. *Id.* at *9. Conversely, if Delaware were to become one of the few states to allow such tolling, it would be flooded with stale claims, as the "fruit" of the Superior Court's decision here has proven. *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998) ("Unless all states simultaneously adopt the rule of cross-jurisdictional class action tolling, any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused to certify as class actions after the statute of limitations has run.").[2]

In short, there is nothing in *American Pipe* requiring cross-jurisdictional tolling and there are solid policy reasons for any state to reject it. Indeed, *American Pipe* was concerned with the "functional operation of a statute of limitations," 414 U.S. at 554, and by indefinitely suspending the commencement of limitations, that "undermin[es] [the] very purpose" of limitations. *Quinn*, 2012 WL 5374255, at *9.

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[2] Blanco contends that this State must give "respect and deference to the judicial proceedings of sister states." (Answering Brief at 10). However, nothing in the Full Faith and Credit Clause requires a state to give the same effect to a *pending action* as it does to a judgment. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 (1988).

II. CROSS-JURISDICTIONAL TOLLING IS UNSUPPORTED BY DELAWARE LAW.

Although the Superior Court clearly recognized this question of law to be one of first impression, Blanco still purports to ground it in Delaware law. In support, Blanco cites a line of tolling cases and claims that Delaware "tolling principles support cross-jurisdictional tolling here." (Answering Brief at 22) However, Delaware's limited body of tolling rules allows courts to toll known claims only when a "paramount authority prevents the exercise of a legal remedy." *E.g.*, *Mergenthaler v. Asbestos Corp. of America*, 500 A.2d 1357, 1363 (Del. Sup. Ct. 1985) (in turn citing *Braun v. Sauerwein*, 10 Wall 218 (1870)).[3] In *Braun*, a taxpayer was unable to bring suit within the limitations period because an act of Congress required that first a decision be made by the Commissioner of Internal Revenue. In suspending limitations, this Court held that the "creditor has been disabled to sue, by a superior power, without any default of his own." *Braun*, 10 Wall at 222-223. Similarly, in *Mergenthaler*, it was a court-imposed stay that prevented the plaintiff from discovering the identity of a defendant. *Mergenthaler*, 500 A.2d at 1365. Most obviously, none of these cases apply here because Blanco has never asserted a single reason why he could not have filed suit in any of the sixteen years between his first filing in Florida in 1995 and this 2011 action.

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[3] This case does not involve the separate tolling principle that applies when an injured party is blamelessly unaware of his injury.

III. DEFENDANTS HAVE SUFFERED PREJUDICE BY THIS DELAY.

Following the court below, Blanco also contends that "it was Defendants' delaying tactics that were chiefly responsible for the delay," so no prejudice arose. (Answering Brief at 23). But neither the Superior Court nor Blanco explain why Blanco was able to file suit in Florida in 1995 and not in Delaware until 2011. But putting that aside, that sixteen year delay is itself sufficient reason to reverse the Superior Court's August 8 Opinion. For example, as the Montana Supreme Court found, even while allowing cross-jurisdictional tolling, *Stevens v. Novartis Pharm. Corp.*, 247 P.3d 244 (Mont. 2010), if the tolling were alleged to be over a decade, the court "might find the principles of notice and fairness to defendants not met." *Id.* at 491.

Lastly, while Blanco attempts to characterize TDCC's argument as outside the scope of this Interlocutory Appeal, TDCC respectfully submits that a threshold question remains whether there existed a putative class action on which Blanco could rely for tolling. *Chaverri v. Dole Food Co*, 2012 WL 4097216, at *12 (E.D. La. 2012). In *Chaverri*, another case where Mr. Hendler represented the plaintiffs, the Eastern District of Louisiana recently held that any *American Pipe* tolling ceased on July 11, 1995, when class certification was denied in the *Delgado* action. *Id.* at *8. If not then, the final judgment entered in *Delgado* terminated any reasonable reliance on that action to toll claims. *Id.* Far from being outside the questions posed in this Interlocutory Appeal, TDCC respectfully submits that it is a prerequisite to *American Pipe* tolling and observes that courts routinely scrutinize various aspects of the

putative class action. *E.g.*, *Footbridge Limited Trust v. Countrywide Financial Corp.*, 770 F.Supp.2d 618, 627 n.1 (S.D. N.Y. 2011)(analyzing whether named defendants were the same in both actions as a prerequisite to *American Pipe* tolling). Thus, the undisputed fact that final judgment was entered and certification denied in *Delgado* in 1995 is a threshold reason to reverse the Superior Court order.

CONCLUSION

For the foregoing reasons, TDCC[4] respectfully requests that this Court reverse the denial below and grant TDCC's Motion for Judgment on the Pleadings.

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[4] TDCC has been asked by defendant-appellant Occidental Chemical Corporation ("Occidental") to inform the Court that it joins in and adopts the arguments set forth in this Reply Brief.

CERTIFICATE OF SERVICE

I, Donald E. Reid, hereby certify that on the 20th day of December, 2012, a copy of Appellant's Reply Brief In Support Of Interlocutory Appeal was served via Lexis/Nexis File and Serve upon the following counsel of record:

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