CROSSING THE TOLL BRIDGE: *AMERICAN PIPE* AND THE FATE OF STATE LAW CLAIMS AFTER CLASS CERTIFICATION DENIAL IN FEDERAL COURT

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Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure (FRCP) provides that, "At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action." In American Pipe & Construction Co. v. Utah*, the U.S. Supreme Court addressed the interplay of this FRCP 23(c)(1)(A) class certification decision and statutes of limitations, holding that the commencement of a putative class action suspends the statute of limitations for putative class members while class certification is pending. Over the last fifty years, the* American Pipe *tolling doctrine has provided putative class members with statute of limitations protection for federal law claims later pursued as individual actions in federal court. However,* American Pipe*'s application "cross-jurisdictionally"—specifically, its applicability to state law claims pursued as individual actions in state court following the denial of class certification in a federal court putative class action—remains highly controversial.*

As an initial matter, this Note considers whether state courts should apply American Pipe *cross-jurisdictionally. However, recognizing that cross-jurisdictional tolling has not been adopted in most states, this Note focuses on several alternative mechanisms—namely, 28 U.S.C. § 1367(d), state savings statutes, and private tolling agreements—that plaintiffs can invoke to achieve cross-jurisdictional tolling in effect, if not in name. Ultimately, this Note concludes that (1) cross-jurisdictional tolling should be embraced in states that have adopted state law analogs to FRCP 23, the federal class action rule; and (2) a broad reading of 28 U.S.C. § 1367(d), robust application of state savings statutes, and greater reliance on private tolling agreements can help ensure that putative class plaintiffs who relied on the federal class action mechanism are not unfairly time-barred from subsequently pursuing state law claims individually in state court.*

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INTRODUCTION

"I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time."[1] Representative John D. Dingell's cynical wisdom, tailored perfectly to scholars of legal procedure, reflects an oft-overlooked reality: Procedure, rather than substance, is time and again the ultimate determinant in the outcome of litigation.

Class action lawsuits, whereby one or a few people (the "class representatives") sue on behalf of a larger group of individuals (the "class"), play a central role in modern civil litigation by allowing courts to efficiently resolve disputes involving numerous similarly situated plaintiffs.[2] Critical to the early stages of a class action is the process of class certification. Rule 23 of the Federal Rules of Civil Procedure[3] (FRCP) provides that, "At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action."[4] In other words, the court must decide whether the class action mechanism is the appropriate procedural vehicle for litigating the claim(s) at issue.[5]

In *American Pipe & Construction Co. v. Utah*,[6] the U.S. Supreme Court addressed the interplay of class certification and statutes of limitations, holding that the commencement of a putative class action suspends the statute of limitations for putative class members—all those encompassed by the class complaint prior to class certification[7]—while the certification decision is pending under FRCP 23.[8] During the fifty-plus years since the Court established what is now known as "*American Pipe* tolling," the doctrine has provided putative class members with statute of limitations protection for

1. Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 889 n.57 (2011) (quoting *Regulatory Reform Act: Hearing on H.R. 2327 Before the H. Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John D. Dingell)).

2. *See* BRYAN L. ADKINS, CONG. RSCH. SERV., IF12763, CLASS ACTION LAWSUITS: AN INTRODUCTION 1 (2024); Hansberry v. Lee, 311 U.S. 32, 41 (1940). For the purposes of this Note, any discussion of the class action mechanism refers to the plaintiff class action, in which a class of plaintiffs sues one or a few defendants, rather than the less frequently employed defendant class action, in which one or a few plaintiffs sue(s) a class of defendants. *See* Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1323 (2000) (describing defendant class actions as a "rare breed").

3. The FRCP are rules which "govern the procedure in all civil actions and proceedings in the United States district courts." FED. R. CIV. P. 1. That said, "[t]hese rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." FED. R. CIV. P. 82.

4. FED. R. CIV. P. 23(c)(1)(A).

5. *See id.*

6. 414 U.S. 538 (1974).

7. *See infra* note 25 and accompanying text.

8. *See Am. Pipe*, 414 U.S. at 554.

federal law claims later pursued as individual actions in federal court.[9] However, *American Pipe*'s application cross-jurisdictionally—specifically, its applicability to state law claims pursued as individual actions in state court following the denial of class certification in a federal court putative class action[10]—remains controversial.[11]

As an initial matter, this Note considers whether state courts should apply *American Pipe* cross-jurisdictionally. However, recognizing that cross-jurisdictional tolling has *not* been adopted in most states,[12] this Note focuses on several alternative mechanisms—namely, 28 U.S.C. § 1367(d),[13] state savings statutes,[14] and private tolling agreements[15]—that putative class plaintiffs can invoke to help ensure that reliance on the federal class action device does not leave them time-barred from subsequently pursuing state law claims individually in state court.

Part I of this Note provides an overview of class actions, *American Pipe* and its progeny, and statutes of limitations. It also introduces the concept of cross-jurisdictional tolling and surveys the history and application of 28 U.S.C. § 1367(d), state savings statutes, and private tolling agreements.

Next, Part II examines this Note's core issues. First, it analyzes how *American Pipe* applies to federal law claims brought in federal court, while extending the doctrine to state law claims filed in state court remains highly contested. Second, it considers whether 28 U.S.C. § 1367(d), state savings statutes, or private tolling agreements can be invoked by plaintiffs to achieve cross-jurisdictional tolling in effect, if not in name.

Finally, Part III argues that state courts in states that have enacted analogs to FRCP 23 should apply *American Pipe* cross-jurisdictionally. However, acknowledging that most states do not do so,[16] Part III recommends (1) a broad reading of 28 U.S.C. § 1367(d), (2) robust application of state savings statutes, and (3) greater reliance on private tolling agreements to help ensure that putative class plaintiffs who relied on the federal class action mechanism are not unfairly time-barred from subsequently pursuing state law claims individually in state court.

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9. *See* China Agritech, Inc. v. Resh, 584 U.S. 732, 735 (2018) ("This case concerns the tolling rule first stated in *American Pipe* . . . that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint.").

10. *See infra* notes 79, 113 and accompanying text.

11. *See, e.g.*, James M. Beck, *Why Cross-Jurisdictional Class Action Tolling Is Such a Bad Idea*, DRUG & DEVICE L. (Apr. 2, 2018), https://www.druganddevicelawblog.com/2018/04/why-cross-jurisdictional-class-action-tolling-is-such-a-bad-idea.html [https://perma.cc/FCR5-E7MJ].

12. *See infra* note 115 and accompanying text.

13. This is the fourth provision of the supplemental jurisdiction statute, enacted by Congress in 1990 and codified at 28 U.S.C. § 1367. *See infra* Part I.D.

14. *See infra* Part I.E.

15. *See infra* Part I.F.

16. *See infra* note 115 and accompanying text.

I. CLASS ACTIONS, *AMERICAN PIPE*, CROSS-JURISDICTIONAL TOLLING, AND POSSIBLE ALTERNATIVES

To provide the proper doctrinal foundation for the issues considered in this Note, an overview of the class action device is necessary. Part I begins by explaining the structure and purpose of class actions and the process and significance of class certification.[17] This part then turns to *American Pipe* and its progeny,[18] and situates the tolling doctrine within the broader law of statutes of limitations.[19] Finally, Part I introduces the concept of cross-jurisdictional tolling[20] and surveys the history and application of 28 U.S.C. § 1367(d),[21] state savings statutes,[22] and private tolling agreements.[23]

A. Class Actions, FRCP 23, and Class Certification

Pursuant to FRCP 23, one or more representatives may file an action in federal court on their own behalf and on behalf of all others similarly situated.[24] This is referred to as a putative class action lawsuit.[25] The word "putative" is used to clarify that all those who are "similarly situated" are not formally recognized as parties to the litigation until the court certifies the suit as a class action.[26]

Under FRCP 23(a), a putative class action may be certified only if the following prerequisites are met: (1) the proposed class is so numerous that joinder of all members under the federal rules is impracticable, (2) there are common questions of law or fact shared among the proposed class, (3) the claims of the proposed class representatives are typical of those of the rest of the proposed class, and (4) the proposed class representatives will adequately protect the interests of the entire proposed class.[27] Furthermore, pursuant to FRCP 23(b), the putative class action must fall into one of the following categories: (1) cases in which prosecuting separate actions by individual class members would create a risk of inconsistent or varying adjudications,

17. *See infra* Part I.A.
18. *See infra* Part I.B.
19. *See infra* Part I.C.
20. *See infra* Part I.C.
21. *See infra* Part I.D.
22. *See infra* Part I.E.
23. *See infra* Part I.F.
24. *See* FED. R. CIV. P. 23; *see also* Courtney T. Welch, Note, *Federal Courts, Class Actions, and the Jurisdictional Void*, 94 FORDHAM L. REV. 1215, 1224 (2025).
25. *See Class*, BLACK'S LAW DICTIONARY (12th ed. 2024). The class action mechanism "has roots in early English law," but the modern American class action "was created in Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in federal courts." ADKINS, *supra* note 2, at 1; *see also* Welch, *supra* note 24, at 1224.
26. *See* Molock v. Whole Foods Mkt. Grp., 952 F.3d 293, 298 (D.C. Cir. 2020) ("Putative class members become parties to an action . . . only after class certification."); *see also* Welch, *supra* note 24, at 1224.
27. *See* FED. R. CIV. P. 23(a).

or would, as a practical matter, dispose of or impair the interests of parties not before the court; (2) cases in which the party opposing the class has acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief appropriate for the class as a whole; or (3) cases in which common questions of law or fact predominate over individual issues and a class action is the superior method for fairly and efficiently adjudicating the controversy.[28]

As described in FRCP 23(c), the federal court in which the putative class action is filed must determine whether the suit is to be certified as a class action "[a]t an early practicable time after a person sues . . . as a class representative."[29] Importantly, the rule provides "flexibility in determining the appropriate time to consider the issue of class certification."[30] Once the court makes its certification decision—however long that may take—the putative class action either becomes a certified class action, or, if certification is denied, the class claims are dismissed and the proposed class representatives may pursue their claims individually.[31]

In recent decades, the language governing the FRCP 23(c) class certification decision has largely remained the same.[32] However, plaintiffs in the last two decades have faced increased difficulty certifying a class in federal court.[33] At the same time, the passage of the Class Action Fairness Act[34] (CAFA) in 2005 "expand[ed] federal jurisdiction over class actions,"[35] leading to an increase in putative class actions in federal court.[36]

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28. *See id.* 23(b).

29. *Id.* 23(c)(1)(A).

30. David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 785 (2003); *see also* 3 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 7:5 (5th ed. 2013) (describing how the current language of FRCP 23 provides courts with "more time to address certification," in line with "de facto practice"); STEFAN BOETTRICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW 23 (2017) (reporting that the median time at which the class certification decision was made in securities class action lawsuits from January 2000 to December 2016 was about two-and-a-half years after the complaint was first filed).

31. *See* Welch, *supra* note 24, at 1225; *see also infra* note 200 and accompanying text.

32. *See* Edward M. Spiro, *New Amendments to the Federal Rules of Civil Procedure*, N.Y.L.J., Dec. 2003, at 2 (highlighting the most recent substantive change to the language of FRCP 23(c)(1)(A) back in 2003, instructing courts to issue the class certification decision at an "early practicable time" rather than "as soon as practicable").

33. *See* James J. Mayer, Note, *Rejecting the Class Action Tolling Forfeiture Rule*, 94 N.Y.U. L. REV. 899, 900 (2019) (describing how courts over the past two decades have "heightened the requirements of [FRCP] 23 to get a class certified" and "required that plaintiffs prove substantial portions of their arguments about the merits at the certification stage").

34. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

35. *See* Michael R. Pennington & Robert J. Campbell, *The Class Action Fairness Act and the New Federal e-Discovery Rules: To Remove or Not to Remove?*, FED. LAW., Feb. 2009, at 42, 42 (emphasizing that the aim of CAFA was to expand federal jurisdiction over class actions).

36. *See* THOMAS E. WILLGING & EMERY G. LEE III, FED. JUD. CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005: SECOND INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2006). Importantly, "[i]ncreases in

Since the inception of the class action device, courts and commentators have recognized that class actions serve a multitude of purposes, including promoting efficiency and economy of litigation, enforcing legal rights, and securing consistency and finality in adjudication.[37] More than that, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[38] Yet, when the proposed class representatives are not able to satisfy the "rigorous analysis"[39] FRCP 23(c) decisions require, putative class members risk losing the ability to subsequently pursue their claims individually, regardless of whatever incentive may or may not exist to bring them.[40] Against this backdrop, the Supreme Court's decision in *American Pipe* emerged as a pivotal doctrinal safeguard, preserving the rights of putative class members who rely on the pendency of a federal court putative class action up and until the court resolves the class certification decision.[41]

B. American Pipe *and Its Progeny*

In 1974, the Supreme Court, in *American Pipe*, addressed the interplay of FRCP 23(c) class certification decisions and statutes of limitations.[42] On May 13, 1969, the state of Utah filed a putative class action in the U.S. District Court for the District of Utah on behalf of itself and putative class members eleven days prior to the expiration of the relevant statute of limitations.[43] The suit was subsequently transferred to the U.S. District Court for the Central District of California.[44] On December 4, 1969, that court denied class certification, dismissing the class claims.[45]

Eight days after certification was denied, members of the putative class that Utah had attempted to represent moved to intervene in Utah's now-individual action.[46] Given that the statute of limitations had elapsed as

class action activity during the post-CAFA period occurred primarily in the nature-of-suit categories likely to include state-law claims." *Id.*

37. *See* ADKINS, *supra* note 2, at 1.

38. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

39. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 161 (1982)) (explaining that the FRCP 23(c) class certification decision requires a "rigorous analysis").

40. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974) ("[A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions.").

41. *See id.* at 554.

42. *See id.* For a detailed overview of statutes of limitations, see *infra* Part I.C.

43. *See Am. Pipe*, 414 U.S. at 541. The suit was for treble damages for violations of the first section of the Sherman Act, 15 U.S.C. §§ 1–7. *See Am. Pipe*, 414 U.S. at 540. The state of Utah alleged price-fixing in the sale of concrete and steel pipe. *See id.*

44. *See id.* at 542 ("The transfer and assignment were found appropriate because of the prior concentration of more than 100 actions arising out of the same factual situation in the Central District of California.").

45. *See id.* at 542–43.

46. *See id.* at 543–44.

to these putative class members' claims, the question presented to the court was whether their motions were nonetheless timely.[47] Put another way, did the statute of limitations "toll" (pause) for all those whom Utah sought to represent during the pendency of the court's class certification decision?[48]

On March 30, 1970, the district court answered no, holding that the putative class members' statute of limitations had not tolled during the pendency of the class certification decision; thus, their motions were untimely.[49] On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed.[50] The court explained that if the order denying class certification is treated as reaching back in time, the putative class members whom it affects must be afforded the rights they possessed when the class complaint was first filed; the order cannot leave these individuals "temporally stranded in the present."[51] In response, the Supreme Court granted certiorari "to consider a seemingly important question affecting the administration of justice in the federal courts."[52]

In an opinion authored by Justice Potter Stewart, the Supreme Court affirmed the Ninth Circuit's ruling, holding 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."[53] Justice Stewart reasoned that FRCP 23 does not only protect those who are aware of or actively participating in the putative class action prior to the district court's class certification decision.[54] Instead, up and until this decision, putative class members passively benefit from the putative class action.[55] Justice Stewart emphasized that putative class members are not required to take any notice of—or action in connection with—the putative class action until the court issues its FRCP 23(c) class certification decision.[56] Therefore, he concluded, the rule "most consistent with federal class action procedure" was to toll the limitations period for putative class members while class certification was pending.[57]

With this decision, the Court established "*American Pipe* tolling," allowing the filing of a putative class action to toll the statute of limitations for putative class members during the pendency of the class certification decision.[58] Since *American Pipe*, the Court has clarified the tolling doctrine

47. *See id.* at 544.
48. *See id.*
49. *See id.* at 544–45.
50. *See id.* at 545.
51. *Id.* (quoting Utah v. Am. Pipe & Const. Co., 473 F.2d 580, 584 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974)).
52. *Id.*
53. *Id.* at 554.
54. *See id.* at 552.
55. *See id.*
56. *See id.*
57. *Id.* at 553–54. This interpretation, he wrote, is "necessary to insure effectuation" of the purposes of FRCP 23. *Id.* at 556.
58. *See id.* at 554.

on three occasions.[59] In *Crown, Cork & Seal Co. v. Parker*,[60] the Court held that *American Pipe* tolling extends to subsequent individual lawsuits, not just motions to intervene in the original action.[61] Then, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*[62] (*CalPERS*), the Court limited the tolling doctrine to statutes of limitations, excluding statutes of repose.[63] Most recently, in *China Agritech, Inc. v. Resh*,[64] the Court held that *American Pipe* tolling does not apply to subsequent—otherwise known as "follow-on"—class actions.[65]

C. Statutes of Limitations and American Pipe*'s Reach Across Jurisdictions*

American Pipe is situated within the context of statutes of limitations.[66] Therefore, an overview of limitations periods is necessary to understand *American Pipe*'s scope.

Definition and Purpose. A statute of limitations is a law that establishes "a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)."[67] Limitations periods encourage plaintiff diligence, promote finality and predictability, and prevent stale litigation.[68]

State-by-State and State Versus Federal Variation. Statutes of limitations vary based on claim type and forum.[69] For example, Alaska's statute of

59. *See infra* notes 60–65 and accompanying text.

60. 462 U.S. 345 (1983).

61. *See id.* at 353–54 ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.").

62. 582 U.S. 497 (2017).

63. *See id.* at 515 ("[T]he mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule."). Note that a "statute of repose" is a law "barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered a resulting injury." *Statute of Repose*, BLACK'S LAW DICTIONARY (12th ed. 2024). This is distinct from a "statute of limitations," which is a law "establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." *Statute of Limitations*, BLACK'S LAW DICTIONARY (12th ed. 2024).

64. 584 U.S. 732 (2018).

65. *See id.* at 736 ("*American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.").

66. *See supra* note 63 and accompanying text.

67. *Statute of Limitations*, *supra* note 63.

68. *See id.* ("The purpose of . . . a statute [of limitations] is to require diligent prosecution of known claims, thereby providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.").

69. *See generally* MATTHIESEN, WICKERT & LEHRER, S.C., STATUTES OF LIMITATIONS FOR ALL 50 STATES (2026), https://www.mwl-law.com/wp-content/uploads/2018/02/SOL-CHART-7.pdf [https://perma.cc/KJ8H-7SLS]. Note that the statutes of limitations identified in the text accompanying notes 70–74 are current as of June 11, 2026.

limitations for personal property claims is two years, while its limitations period for real property claims is six years.[70] Kansas's statute of limitations for personal injury claims is two years, while Kentucky's is one year.[71] A final example: Any claim brought in federal court pursuant to the Federal Tort Claims Act[72] has a two-year statute of limitations;[73] the limitations period for most Louisiana tort claims brought in Louisiana state court is the same.[74]

Statutes of Limitations and Cross-Jurisdictional Tolling. Because statutes of limitations vary across states and between the state and federal systems,[75] they reflect a range of policy judgments made by the various state and federal legislatures about how to balance fairness to plaintiffs, finality for defendants, judicial efficiency, and the preference to resolve cases on their merits.[76] The variation in these judgments, together with the Supreme Court's holding in *Guaranty Trust Co. of New York v. York*,[77] help explain why *American Pipe* is applied to *federal law* claims filed in *federal* court following the denial of class certification in a federal court putative class action, but is not necessarily applied to *state law* claims filed in *state* court following the same.[78] This is the terrain of "cross-jurisdictional tolling," which refers to the application of one jurisdiction's class action tolling doctrine in another jurisdiction.[79] The contours of cross-jurisdictional tolling are the focus of Part II.A.[80]

D. Tolling Under 28 U.S.C. § 1367(d)

Beyond the confines of both *American Pipe* and its cross-jurisdictional application—yet highly relevant to statute of limitations tolling—lies the supplemental jurisdiction statute, its tolling provision, and the relevant

70. *See id.* at 3.
71. *See id.* at 15.
72. 28 U.S.C. §§ 1346(b), 2671–2680.
73. *See id.* § 2401(b).
74. *See* MATTHIESEN, *supra* note 69, at 16.
75. *See supra* notes 69–74 and accompanying text.
76. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975) ("Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.").
77. 326 U.S. 99 (1945); *id.* at 109–12 (holding that, under the doctrine espoused in Erie Railroad Co. v. Tompkins, federal courts sitting in diversity must apply state statutes of limitations because such statutes are outcome determinative). The Court's decision in *Guaranty Trust* intersects with *American Pipe* insofar as it underscores the determinative nature of state limitations periods—the very periods plaintiffs seek to toll through the cross-jurisdictional application of the federally created tolling rule announced in *American Pipe*. *See infra* Part II.A.
78. *See, e.g.*, Beck, *supra* note 11.
79. *See* Tanya Pierce, *Improving Predictability and Consistency in Class Action Tolling*, 23 GEO. MASON L. REV. 339, 369 (2016).
80. *See infra* Part II.A.

jurisprudence. Section 1367 of 28 U.S.C., the supplemental jurisdiction statute,[81] codified and refined the concepts of pendent and ancillary jurisdiction expounded in *United Mine Workers of America v. Gibbs*[82] and other Supreme Court jurisprudence.[83] Enacted by Congress in 1990, the statute provides litigants an "opportunity . . . to pursue complete relief in a federal-court lawsuit."[84] Specifically, § 1367(a) states that, except in limited circumstances not relevant here, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[85]

Critical to this Note is 28 U.S.C. § 1367(d), the oft-overlooked tolling provision of the supplemental jurisdiction statute. Section 1367(d) provides that "[t]he period of limitations for any claim asserted under subsection (a) . . . shall be *tolled* while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period."[86] This provision gives plaintiffs the ability to bring supplemental state law claims in federal court without worrying that those claims could later be time-barred if the claim over which the federal court has original jurisdiction is dismissed.[87] In 2003, the Supreme Court addressed § 1367(d)'s constitutionality, holding that the tolling provision is "'conducive to the due administration of justice' in federal court, and is 'plainly adapted' to that end."[88]

E. State Savings Statutes

At the state level, many legislatures have enacted "savings statutes" which "provide a plaintiff with a [prescribed] amount of additional time to refile a claim after the standard limitations period has run."[89] Though these statutes vary in their language and application, to qualify for the additional time codified therein, plaintiffs generally must have timely filed a suit that was dismissed on grounds other than the merits.[90] For example, Ohio's savings

81. 28 U.S.C. § 1367.
82. 383 U.S. 715 (1966).
83. *See generally* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).
84. Arbaugh v. Y&H Corp., 546 U.S. 500, 506 (2006).
85. 28 U.S.C. § 1367(a).
86. *Id.* § 1367(d) (emphasis added).
87. *See* Ruth Vanstory Horger, Note, *For Whom the Bell Tolls: Tolling State Statutes of Limitations and the Constitutionality of 28 U.S.C. § 1367(d)*, 54 S.C. L. REV. 1047, 1051 (2003).
88. Jinks v. Richland County, 538 U.S. 456, 462 (2003) (quoting M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417, 421 (1819)).
89. Laura Liles, Note, *For Whom the Statute Tolls? Not Even the* Sacred Heart*: Florida Class Action Jurisdiction and the Need for a Savings Statute to Toll the Limitations Period*, 69 FLA. L. REV. 989, 1014 (2017).
90. *See id.*; *see also* WILLIAM D. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 1 (1978) (describing how savings statutes "provide that where a party has timely commenced an action which fails for some reason not related to the merits," a second action for the same cause "may be brought within a limited period following dismissal" and "the initial statute of limitations will not be a bar").

statute states, "if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits," the plaintiff can bring a second action for the same cause at any point within the next year and the initial limitations period will not be a bar.[91] As early as 1965, the U.S. Supreme Court identified thirty-one of these statutes among the fifty states;[92] the time periods they prescribed ranged from sixty days to five years.[93]

The primary purpose behind savings statutes is to maximize plaintiffs' opportunity to litigate on the merits.[94] As Justice Benjamin N. Cardozo put it, "The [savings] statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits."[95] Justice Cardozo emphasized that the "broad and liberal purpose" of such statutes is not to be "frittered away by any narrow construction."[96]

F. Private Tolling Agreements

Modern-day civil procedure tends to "lurk[] in the shadow of private law."[97] In support of this proposition, and crucial to this Note, is the use of private tolling agreements in aggregate litigation.[98] These agreements—privately negotiated between the defendant and claimants—toll the statute of limitations for signatories who register their claims with the defendant but refrain from filing suit.[99] They are often invoked to provide for additional time to negotiate a settlement.[100] That said, they also allow the defendant to escape a flood of duplicative lawsuits.[101] For example, throughout the early stages of *In re Vioxx Products Liability Litigation*,[102] thousands of

91. Liles, *supra* note 89, at 1014 (quoting OHIO REV. CODE ANN. § 2305.19(A) (West 2026)).

92. *See* Rhonda Wasserman, *Tolling: The* American Pipe *Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 815 n.44 (2006).

93. *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 431–32 n.9 (1965).

94. *See* FERGUSON, *supra* note 90, at 312.

95. Gaines v. City of New York, 109 N.E. 594, 596 (N.Y. 1915).

96. *Id.*; *see also* Williams v. State Farm Mut. Auto. Ins. Co., No. 22 C 1422, 2025 WL 2755318, at *12 (N.D. Ill. Sep. 29, 2025) ("The Illinois Supreme Court has held that the [savings] statute's purpose is to avoid the frustration of litigation upon grounds unrelated to its merits and should be liberally construed in favor of hearing the plaintiff's claim.").

97. David A. Hoffman, *Wither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 389.

98. *See* D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595, 1601 (2023) ("It is not uncommon in mass tort litigation for defendants to enter tolling agreements with plaintiffs' firms.").

99. *See* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 156 (2012).

100. *See* Michael J. Kaufman & John M. Wunderlich, *Leave Time for Trouble: The Limitations Periods Under the Securities Laws*, 40 J. CORP. L. 143, 171 (2014).

101. *See* Grabill, *supra* note 99, at 156 (describing how in one litigation, thousands of individuals entered into tolling agreements with the defendant, allowing their claims to be registered with said defendant without having to file actual lawsuits); *see also* Rave, *supra* note 98, at 1601 n.17 (explaining that in another litigation, fewer than 2,500 claims were filed, while an additional 150,000 were registered but unfiled).

102. No. MDL 1657, 2008 WL 3285912 (E.D. La. Aug. 7), *aff'd sub nom.* AvMed, Inc. v. BrownGreer PLC, 300 F. App'x 261 (5th Cir. 2008). The Vioxx multidistrict litigation concerned defendant Merck's prescription drug Vioxx. *See id.* at *1. Vioxx was approved for sale by the U.S. Food and Drug Administration in 1999 but withdrawn from the market by

individuals entered into tolling agreements with the defendant, Merck; these claimants registered their claims with the defendant, but were not required to file actual lawsuits.[103] Even so, they were able to participate in the eventual settlement agreement,[104] effectively vindicating their rights without having to file duplicative, protective lawsuits—an ode, albeit unintentionally, to *American Pipe*.

II. SHOULD *AMERICAN PIPE* TOLLING APPLY CROSS-JURISDICTIONALLY? WHAT ALTERNATIVES MIGHT EXIST?

As noted in Part I, *American Pipe* tolling provides putative class members with statute of limitations tolling for federal law claims pursued as individual actions in federal court following the denial of class certification in a federal court putative class action.[105] In practice, this means that in cases like *American Pipe* and *Crown*—where both the initial class proceeding and subsequent individual actions[106] involved federal law claims filed in federal court—*American Pipe* tolling applies.[107] However, *American Pipe*'s extension to state law claims individually filed in state court after the denial of class certification in a federal court putative class action[108]—its application cross-jurisdictionally—remains an underdeveloped, controversial question.[109] Part II.A of this Note addresses this issue.[110]

However, the cross-jurisdictional inquiry is only an initial consideration of this Note. Regardless of whether state courts *should* apply the tolling doctrine to state law claims, the reality is that most do not.[111] Embracing this reality, Parts II.B–D enter uncharted waters by considering how 28 U.S.C. § 1367(d), state savings statutes, and private tolling agreements can be invoked by plaintiffs in the many states that reject—or at least do not explicitly embrace—cross-jurisdictional tolling.

Merck in 2004 after studies linked the drug to increased risks of heart attacks and strokes. *See id.* Following the drug's withdrawal, thousands of lawsuits were filed against Merck, stemming from roughly 105 million prescriptions written for an estimated twenty million recipients. *See id.*

103. *See* Grabill, *supra* note 99, at 156.

104. *See id.*

105. *See* China Agritech, Inc. v. Resh, 584 U.S. 732, 735 (2018).

106. In *American Pipe*, intervention in the named plaintiff's action; in *Crown*, separate individual suits. *See generally* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).

107. *See generally Am. Pipe*, 414 U.S. 538; *Crown*, 462 U.S. 345.

108. It is important to reiterate here that plaintiffs in recent decades have faced increased difficulty certifying a class in federal court. *See* Mayer, *supra* note 33, at 900.

109. *See* Pierce, *supra* note 79, at 372 ("[J]urisprudence on cross-jurisdictional tolling is just emerging, and the state of the law is 'not yet thoroughly developed.'" (quoting Quinn v. La. Citizens Prop. Ins. Corp., 118 So. 3d 1011, 1020 (La. 2012))).

110. *See infra* Part II.A.

111. *See infra* note 115 and accompanying text.

A. Applying American Pipe *Cross-Jurisdictionally*

As introduced in Part I.C, cross-jurisdictional tolling refers to the application of one jurisdiction's class action tolling doctrine in another jurisdiction.[112] However, this Note limits the discussion of cross-jurisdictional tolling to the context in which its application has been most widely contested: statute of limitations tolling for state law claims brought in state court after the denial of class certification in a federal court putative class action.[113] Part II.A.1 identifies the various approaches courts have taken to the cross-jurisdictional inquiry, while Part II.A.2 evaluates competing arguments advanced by scholars regarding the same.

1. Divergence Among the Courts

Among the limited number of courts that have considered cross-jurisdictional tolling, conclusions diverge.[114] That said, a recent compilation of decisions indicates that most states have either expressly rejected the doctrine or, at minimum, have not explicitly embraced it.[115]

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112. *See* Pierce, *supra* note 79, at 369.

113. Consider the following scenario:

> A timely class action is filed against Big Corporation in federal court. After extensive motion practice, class certification is denied. The [putative] class members now wish to file individual [related state law] claims in state court, but the two-year statute of limitations . . . has expired. Or has it?

David Bober, Comment, *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, 618 (2002). Note that while cross-jurisdictional tolling may also refer to *federal* law claims asserted in state court after the denial of class certification in a federal court putative class action, this Note focuses on *state* law claims because putative class members with federal law claims can easily moot the cross-jurisdictional issue by individually filing in federal court after the denial of class certification. *See* 28 U.S.C. § 1331. The burden is much higher for state law claims, for which, barring supplemental jurisdiction, (1) complete diversity of citizenship and (2) an amount in controversy exceeding $75,000 are required to individually file in federal court. *See id.* § 1332.

114. *Contrast* Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1105 (Ill. 1998) (rejecting cross-jurisdictional tolling in Illinois), *with* Bermudez Chavez v. Occidental Chem. Corp., 158 N.E.3d 93, 104–05 (N.Y. 2020) (recognizing cross-jurisdictional tolling in New York), *and* Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 163 (Ohio 2002) (recognizing cross-jurisdictional tolling in Ohio). For a scholarly comparison, see also Bober, *supra* note 113, at 618 ("Some courts have been quick to recognize the problems inherent in cross-jurisdictional tolling and have refused to allow it; others have weighed the issues and allowed it, and still others have ignored the problem completely." (footnotes omitted)).

115. *See* Marc Shapiro & Shane McCammon, *A Guide To Determining Class Claim Time Bars*, LAW360 (Aug. 13, 2020) [hereinafter *Cross-Jurisdictional Guide*], https://www.law360.com/articles/1299985/a-guide-to-determining-class-claim-time-bars [https://perma.cc/PA9R-HYZH]; MARC SHAPIRO & SHANE MCCAMMON, CLASS ACTION TOLLING: STATE BY STATE BREAKDOWN (2021) [hereinafter *Cross-Jurisdictional Chart*], https://s3.amazonaws.com/cdn.orrick.com/files/Class-ActionTollingOrrickJurisdictionalChart.pdf [https://perma.cc/EYH8-LW4M]. As of 2021, fifteen states had explicitly rejected cross-jurisdictional tolling, twenty-six states (and Puerto Rico) had not clearly addressed the issue, and only nine states had expressly adopted the doctrine. *See* Shapiro & McCammon, *Cross-Jurisdictional Guide*, *supra*; Shapiro & McCammon, *Cross-Jurisdictional Chart*, *supra*.

For example, in 1998, the Supreme Court of Illinois held that the statute of limitations for state law claims brought in state court by plaintiffs who had been putative class members in a federal court putative class action was not tolled during the pendency of the federal court class certification decision.[116] The court justified its rejection of cross-jurisdictional tolling on the grounds that any other decision would burden the state court system and create a policy that would "bas[e] the length of Illinois limitation periods on the federal courts' disposition of suits seeking class certification."[117] Fourteen years later, the Louisiana Supreme Court reached the same conclusion in *Quinn v. Louisiana Citizens Property Insurance Corp.*,[118] albeit on a different basis.[119] The Louisiana court examined a portion of its state class action rule, article 596 of the Louisiana Code of Civil Procedure.[120] The court noted that this article—which, like *American Pipe*, tolls the statute of limitations during the pendency of the class certification decision[121]—does not contain language expressly limiting its application to class actions filed in Louisiana's state courts.[122] However, the court determined that certain distinctions between article 596 and FRCP 23—specifically, the fact that article 596 was linked to unique provisions of Louisiana law that did not have federal analogs—"reinforce our conviction that the [Louisiana] legislature . . . did not intend to adopt 'cross jurisdictional tolling.'"[123]

On the other hand, in one of the most recent decisions on the issue, the New York Court of Appeals explicitly recognized cross-jurisdictional tolling in 2020.[124] The court stated that article 9 of the New York Civil Practice Law and Rules (NYCPLR) "is closely related to and modeled on [FRCP] 23."[125] Therefore, to reject the cross-jurisdictional application of *American Pipe* "would subvert article 9—the primary function of which is to allow named plaintiffs to bring truly representative lawsuits without necessitating a multiplicity of litigation that squanders resources and undermines judicial economy."[126] The court clarified that both FRCP 23 and NYCPLR Article 9 were designed to prevent wasteful litigation by sparing putative class members from having to file duplicative individual suits to preserve their rights in case class certification is denied.[127] Rejecting cross-jurisdictional tolling would have treated putative class members as if no class action had

116. *See Portwood*, 701 N.E.2d at 1105.
117. *Id.* at 1104.
118. 118 So. 3d 1011 (La. 2012).
119. *See generally id.*
120. LA. CODE CIV. PROC. ANN. art. 596 (2026).
121. *See id.*
122. *See Quinn*, 118 So. 3d at 1018.
123. *Id.* at 1020.
124. *See* Bermudez Chavez v. Occidental Chem. Corp., 158 N.E.3d 93, 104–05 (N.Y. 2020) ("In sum, New York recognizes *American Pipe* tolling for absent class members of putative class actions filed in other state and federal courts.").
125. *Id.* at 101; N.Y. C.P.L.R. art. 9 (McKinney 2026).
126. *Id.*
127. *See id.*

ever been brought, which would "contravene" article 9, New York's analog to FRCP 23.[128]

In her embrace of the doctrine, New York Court of Appeals Judge Leslie E. Stein also pushed back on the notion that cross-jurisdictional tolling presents issues of notice for defendants.[129] Judge Stein reasoned that the notice class actions provide "does not diminish or change depending on the jurisdiction in which the class action is filed."[130] Therefore, defendants are not prejudiced by the extension of class action limitations tolling from one jurisdiction to another.[131]

Beyond the state courts, several federal courts have weighed in on the cross-jurisdictional inquiry.[132] In *Wade v. Danek Medical, Inc.*,[133] for example, the U.S. Court of Appeals for the Fourth Circuit concluded that the Supreme Court of Virginia would not adopt a cross-jurisdictional tolling rule because the state (1) had no interest in furthering judicial efficiency in another jurisdiction, (2) would be flooded with individual filings if it were to adopt such a rule, and (3) would render its limitations periods dependent on the resolution of certification decisions of an outside forum.[134] More recently, in *Clemens v. DaimlerChrysler Corp.*,[135] the Ninth Circuit declined to "import the doctrine" into California state law.[136] The court held that *American Pipe* did not mandate cross-jurisdictional tolling as a matter of state procedure.[137] Therefore, California's interest in managing its own judicial

128. *Id.*

129. *See Bermudez Chavez*, 158 N.E.3d at 106. In doing so, Judge Stein cited to one of the earliest decisions on the cross-jurisdictional issue, *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002), in which the Supreme Court of Ohio recognized cross-jurisdictional tolling in that state. *See id.* at 163. The Ohio court determined that once a putative class action is filed—be it in Ohio state court or federal court—the statute of limitations is suspended for all individuals who would have been part of the class if the case had proceeded as a certified class action. *See id*. The court held that "only those plaintiffs who could have otherwise filed suit in Ohio will be able to file suit pursuant to the tolling rule" it espoused. *Id.* In doing so, the court embraced cross-jurisdictional tolling for all those plaintiffs who could have brought suit in Ohio in the first instance. *See id.*

130. *See Bermudez Chavez*, 158 N.E.3d at 106.

131. *See id.*

132. *See generally* Adams Pub. Sch. Dist. v. Asbestos Corp., Ltd., 7 F.3d 717 (8th Cir. 1993); Wade v. Danek Med., Inc., 182 F.3d 281 (4th Cir. 1999); Clemens v. DaimlerChrysler Corp., 534 F.3d 1017 (9th Cir. 2008); Ackerman v. Arkema Inc., 157 F.4th 715 (5th Cir. 2025).

133. 182 F.3d 281 (4th Cir. 1999).

134. *See id.* at 287. For a response to the floodgates argument, see *Dow Chem. Corp. v. Blanco*, 67 A.3d 392, 397 (Del. 2013) ("The Defendants contend that cross jurisdictional tolling will open the floodgates . . . . But . . . [i]f we do not recognize cross-jurisdictional tolling, putative class members will still be incentivized to file placeholder actions . . . to protect their interests in the event that the putative class is not certified.").

135. 534 F.3d 1017 (9th Cir. 2008).

136. *Id.* at 1025. The type of language used in *Clemens* has been invoked elsewhere. *See, e.g.*, Patterson v. Novartis Pharms. Corp., 909 F. Supp. 2d 116, 130 (D.R.I. 2012).

137. *See Clemens*, 534 F.3d at 1025. *But see* Stephen B. Burbank & Tobias Barrington Wolff, *Class Actions, Statutes of Limitations and Repose, and Federal Common Law*, 167 U. PA. L. REV. 1, 51 (2018) (arguing that the Supremacy Clause of the U.S. Constitution mandates that states apply *American Pipe* cross-jurisdictionally when the initial action is a federal court putative class action).

system, coupled with the weight of authority from other states rejecting cross-jurisdictional tolling, counseled against embracing the doctrine in the California state courts.[138]

Wade and *Clemens* notwithstanding, not all federal courts considering the issue have rejected cross-jurisdictional tolling.[139] A notable counterexample is *In re Linerboard Antitrust Litigation*.[140] In that case, a federal district court in Pennsylvania predicted that both Colorado and South Carolina would embrace cross-jurisdictional tolling.[141] In doing so, the court employed the same logic that the New York Court of Appeals would use sixteen years later: Because both Colorado and South Carolina have analogs to FRCP 23,[142] rejecting cross-jurisdictional tolling in those states would frustrate those states' class action rules, which were carefully drafted to track FRCP 23.[143]

To recap, some courts have embraced the cross-jurisdictional application of *American Pipe* to advance the goals of FRCP 23 and state analogs,[144] as well as to promote efficiency and judicial economy.[145] Others have rejected cross-jurisdictional tolling for several reasons: to avoid burdening the state court system,[146] to prevent state limitations periods from becoming dependent on the federal forum's class certification decision,[147] to account for differences between a state's class action rule and FRCP 23,[148] to reflect a lack of interest in furthering the judicial efficiency and economy of another jurisdiction,[149] or to avoid importing cross-jurisdictional tolling into state law.[150] Accordingly, the jurisprudence on this issue reveals little consensus.

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138. *See Clemens*, 534 F.3d at 1025.

139. *See In re* Linerboard Antitrust Litig., 223 F.R.D. 335, 349–50 (E.D. Pa. 2004); *see also* Mbadiwe v. Amazon.com, Inc., No. 22-CV-9542, 2025 WL 2675937, at *16 (S.D.N.Y. Sep. 18, 2025) (adopting a rebuttable presumption that states that have embraced *American Pipe* would apply the doctrine cross-jurisdictionally).

140. 223 F.R.D. 335 (E.D. Pa. 2004).

141. *See id.* at 349–50.

142. *See id.* (quoting Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522, 531 (Colo. App. 1994), *aff'd in part, rev'd in part,* 908 P.2d 1095 (Colo. 1995)) (explaining that both Colorado and South Carolina have state class action rules that are "drawn principally from" and "virtually identical" to FRCP 23).

143. *See id.* (discussing Rule 23 of the Colorado Rules of Civil Procedure and Rule 23 of the South Carolina Rules of Civil Procedure).

144. *See* Bermudez Chavez v. Occidental Chem. Corp., 158 N.E.3d 93, 104–05 (N.Y. 2020); *see also In re* Linerboard Antitrust Litig., 223 F.R.D. 335, 349–50 (E.D. Pa. 2004).

145. *See* Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 162 (Ohio 2002) ("[B]lind application of statutes of limitations would frustrate '[t]he principal purposes of the class-action procedure—promotion of efficiency and economy of litigation.'" (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 349 (1983))).

146. *See* Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1104 (Ill. 1998); *see also* Wade v. Danek Med., Inc., 182 F.3d 281, 287 (4th Cir. 1999).

147. *See* Portwood, 701 N.E.2d at 1104; *see also Wade*, 182 F.3d at 287.

148. *See* Quinn v. La. Citizens Prop. Ins. Corp., 118 So. 3d 1011, 1020 (La. 2012).

149. *See Wade*, 182 F.3d at 287.

150. *See* Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1025 (9th Cir. 2008); *see also* Patterson v. Novartis Pharms. Corp., 909 F. Supp. 2d 116, 130 (D.R.I. 2012). *But see* Mbadiwe v. Amazon.com, Inc., No. 22-CV-9542, 2025 WL 2675937, at *16 (S.D.N.Y. Sep. 18, 2025).

2. Divergence Among Scholars

Cross-jurisdictional tolling has not yet received much academic attention.[151] To the extent that scholars have considered the issue, consensus remains elusive.[152] Ultimately, the answer for scholars comes down to whether *American Pipe*'s roots lie in federal common law[153] or narrowly tailored equitable considerations.[154]

David Bober authored the first piece of scholarship to comprehensively delve into the cross-jurisdictional inquiry.[155] Notably, Bober's comment was published fifteen years before the Supreme Court rendered a decision in *CalPERS*, which marked the first time the Court had addressed *American Pipe* tolling since 1983.[156] Emphasizing concerns about notice to litigants, Bober argued that "courts should allow cross-jurisdictional tolling only with great reluctance, and in limited circumstances."[157] Bober reasoned that to apply *American Pipe* across jurisdictions, the proposed class in the initial putative class action must have been definable and ascertainable.[158] Furthermore, class certification must have been denied on a basis that a plaintiff could not have reasonably predicted.[159] Such an approach, Bober maintained, would ensure that cross-jurisdictional tolling is only permitted in situations where (1) plaintiffs have justifiably relied on the class action mechanism, (2) there is not a major concern of forum shopping, and (3) defendants are not unfairly prejudiced.[160]

More recently, with the Supreme Court's decisions in *CalPERS* and *China Agritech*, scholars have parsed through *American Pipe* jurisprudence and, to a lesser extent, connected it to the cross-jurisdictional inquiry.[161] For example, in 2018, just after both of these decisions were rendered, Professors

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151. *See* Pierce, *supra* note 79, at 372.

152. *Compare* Bober, *supra* note 113, at 652 ("[C]ross-jurisdictional tolling should be allowed only in limited circumstances."), *with* Burbank & Wolff, *supra* note 137, at 51 ("The Supremacy Clause requires [cross-]jurisdictional tolling.").

153. *See, e.g.*, Burbank & Wolff, *supra* note 137, at 2 ("*American Pipe* tolling is a federal common-law rule that aims to carry into effect the provisions and policies of [FRCP] 23 . . . . *American Pipe* is not an 'equitable tolling doctrine.'").

154. *See, e.g.*, Jeremy L. Brown, Comment, *The Misunderstood Role of Reliance in* American Pipe *Tolling*, 88 U. CHI. L. REV. 685, 685 (2021) (arguing that *American Pipe* tolling is "a creature of courts' equitable powers"); Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied:* Chardon v. Fumero Soto *and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 694 (1985) (describing *American Pipe* as an equitable interpretation of FRCP 23).

155. At the time of his Comment's publication, Mr. Bober was a J.D. candidate at Seton Hall University School of Law. *See* Bober, *supra* note 113, at 617. As of the writing of this Note, Mr. Bober is the Director and Senior Staff Attorney for the United States Court of Appeals for the Second Circuit. *See* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, https://www.ca2.uscourts.gov/staff_attorneys/sao_about.html [https://perma.cc/4JRY-3RG9] (last visited July 27, 2026). *See generally* Bober, *supra* note 113.

156. *See generally CalPERS*, 582 U.S. 497 (2017).

157. Bober, *supra* note 113, at 651.

158. *See id.* at 653.

159. *See id.*

160. *See id.*

161. *See infra* notes 162–79 and accompanying text.

Stephen B. Burbank and Tobias Barrington Wolff argued that *American Pipe* tolling is a federal common law rule that aims to carry into effect the provisions and policies of FRCP 23.[162] This conclusion, they claimed, follows from the fact that "there is federal lawmaking power to fashion limitations law" in both the federal and state forums.[163] Invoking *Erie Railroad Co. v. Tompkins*,[164] Professors Burbank and Wolff reasoned that the Supreme Court's holding in *Guaranty Trust*—that federal courts sitting in diversity must apply state statutes of limitations because such statutes are outcome determinative[165]—was not a requirement of *Erie*.[166] Instead, they proclaimed, the Court in *Guaranty Trust* was merely trying to effectuate the policies underlying *Erie*; it was not rendering a decision that was required by *Erie*'s constitutional holding.[167] Tethering these arguments to tolling jurisprudence, Professors Burbank and Wolff emphasized that so long as the initial putative class action is filed in federal court, the federal common law tolling rule established in *American Pipe* governs in subsequent proceedings, displacing contrary state law in both federal and state courts.[168]

Professors Burbank and Wolff advanced their argument in stark contrast to the Supreme Court's conclusion one year earlier that *American Pipe* is an equitable tolling doctrine.[169] Building on their contrarian theory, they addressed the cross-jurisdictional inquiry:

> [F]ederal common law would be a 'craven watchdog' of [FRCP] 23 policies . . . if state courts were free to apply a no-tolling (or no cross-jurisdictional tolling) rule . . . . [A]lthough states remain free to deny 'cross-jurisdictional tolling' to litigants who were the members of class actions brought in the courts of other states, they have no such power with respect to a pertinent and valid federal common-law rule emerging from a federal court . . . . *The Supremacy Clause requires interjurisdictional tolling*.[170]

In making this claim, Professors Burbank and Wolff took the position that state courts are *required* to embrace cross-jurisdictional tolling for plaintiffs

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162. *See* Burbank & Wolff, *supra* note 137, at 18 ("Contrary to . . . *CalPERS* and some passages in [*China Agritech*], none of the Court's reasoning in *American Pipe* 'reveals a rule based on traditional equitable powers' . . . . The source of *American Pipe* tolling is federal common law." (quoting *CalPERS*, 582 U.S. 497, 510 (2017))).

163. *Id.* at 43.

164. 304 U.S. 64 (1938).

165. *See supra* note 77 and accompanying text.

166. *See* Burbank & Wolff, *supra* note 137, at 43.

167. *See id.* at 43–44.

168. *See id.* at 51.

169. *See CalPERS*, 582 U.S. 497, 509 (2017) ("[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions."); China Agritech, Inc. v. Resh, 584 U.S. 732, 745–46 (2018) (reiterating that *American Pipe* is an equitable tolling doctrine, and emphasizing that, barring the application of the judicially-crafted *American Pipe* tolling rule—which does not abridge, enlarge, or modify any substantive right—plaintiffs have no right to bring their claims once the limitations period has elapsed).

170. Burbank & Wolff, *supra* note 137, at 51 (emphasis added) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010)).

individually asserting state law claims in state court after the denial of class certification in a federal court putative class action.[171]

Three years later, Jeremy Brown[172] used what he referred to as "guiding principles" from *CalPERS* and *China Agritech* to argue that *American Pipe* tolling is clearly a "creature of courts' equitable powers," a fact that necessarily limits the doctrine's scope.[173] Brown emphasized that in both *CalPERS* and *China Agritech*, the Supreme Court chose to narrow the circumstances in which *American Pipe* tolling applies.[174] Per Brown, the Court's language in these cases "confirms that *American Pipe* is not a tool intended to serve the policies of [FRCP] 23 class actions."[175] Instead, Brown argued, the tolling doctrine merely "serves efficiency and economy—goals of [FRCP] 23 as well—by not inducing putative class members to make protective filings."[176] Brown argued that *American Pipe*'s pursuit of efficiency must be construed narrowly.[177] Referencing Professors Burbank and Wolff, Brown framed his restrictive understanding of *American Pipe* as one that "pushes back" on the view that the doctrine is federal common law.[178] While Brown did not explicitly confront the cross-jurisdictional inquiry, he did cite to Bober in support of the proposition that states remain free to enact, or not enact, their own class action tolling rules.[179]

Accordingly, scholarly commentary—like the case law—reveals little consensus on the cross-jurisdictional question or, more generally, on the best way to understand *American Pipe* tolling.

B. 28 U.S.C. § 1367(d) and Cross-Jurisdictional Tolling

Regardless of a state's position on the cross-jurisdictional inquiry, the fact remains that the tolling doctrine exists alongside 28 U.S.C. § 1367(d).[180] This provision—part of the supplemental jurisdiction statute—tolls the statute of limitations for claims filed in federal court pursuant to supplemental jurisdiction.[181] In comparison to the rest of the statute, very little attention has been paid to § 1367(d).[182] In fact, the Supreme Court has only considered the provision on three occasions.[183]

171. *See id.*
172. *See* Brown, *supra* note 154, at 685.
173. *Id.* at 687, 701.
174. *See id.* at 702.
175. *Id.*
176. *Id.*
177. *See id.* at 713.
178. *Id.*
179. *See id.* at 691 n.20.
180. *See supra* note 81 and accompanying text.
181. *See* 28 U.S.C. § 1367(d).
182. *See* Horger, *supra* note 87, at 1051 (noting "scarce" case law and scholarship addressing § 1367(d)).
183. *See generally* Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002); Jinks v. Richland County, 538 U.S. 456 (2003); Artis v. District of Columbia, 583 U.S. 71 (2018).

Relevant to this Note are the Court's holdings in *Jinks v. Richland County*[184]—confirming § 1367(d)'s constitutionality[185]—and *Artis v. District of Columbia*[186]—clarifying the manner in which § 1367(d) tolling operates.[187] Critically, however, neither of these cases addressed whether § 1367(d) applies in the context of class certification denial.[188] More specifically, the Supreme Court has never considered whether putative class members in a federal court putative class action asserting state law claims pursuant to § 1367(a)[189] have themselves asserted "claims" within the meaning of § 1367(d), or whether the denial of class certification in that federal action constitutes a "dismissal" that triggers § 1367(d) tolling.[190] As of the writing of this Note, the U.S. Court of Appeals for the Sixth Circuit is the only circuit court to have addressed either of these questions, considering the former in 2013 and concluding that putative class members in a federal court putative class action have in fact asserted "claims" within the meaning of § 1367(d).[191] In coming to its decision, the court in *In re Vertrue Inc. Marketing & Sales Practices Litigation*[192] pointed to *American Pipe* jurisprudence in which the Supreme Court repeatedly referred to the "claims" of putative class members in a putative class action lawsuit.[193] The court held that these cases demonstrate that putative class members have indeed asserted "claims" within the meaning of § 1367(d) when a putative class action lawsuit is filed.[194]

Several years later, the Sixth Circuit received support from the U.S. District Court for the Eastern District of Pennsylvania in *Romero v. Allstate*

184. 538 U.S. 456 (2003).

185. *See id.* at 462.

186. 583 U.S. 71 (2018).

187. *See id.* at 75, 92.

188. For explicit recognition of this issue, see *Cain v. Midland Funding, LLC*, 256 A.3d 765, 803 (Md. 2021).

189. Importantly, most class complaints filed in federal court assert federal law claims and invoke federal question jurisdiction in doing so. *See* WILLGING & LEE, *supra* note 36, at 11. In these federal question class actions, § 1367 can serve as a jurisdictional hook for state law claims that form part of the same case or controversy as the federal law claim(s). *See* 28 U.S.C. § 1367(a). And in the smaller number of diversity class actions, § 1367 permits federal courts to exercise supplemental jurisdiction over related state law claims that do not satisfy the amount-in-controversy requirement. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005). These are the contexts in which § 1367(d) tolling may overlap with federal court putative class actions. *See infra* Part III.B.

190. For further recognition of this issue, see *In re Vertrue Inc. Mktg. & Sales Pracs. Litig.*, 719 F.3d 474, 481–82 (6th Cir. 2013).

191. *See id.* at 482 ("[E]ven putative class members have 'claims' for purposes of 28 U.S.C. § 1367(d)."). Because the putative class action in *Vertrue* had been dismissed prior to a class certification decision, the court did not need to address whether denial of certification qualifies as a dismissal for purposes of § 1367(d) tolling. *See id.* at 477.

192. 719 F.3d 474 (6th Cir. 2013).

193. *See id.* at 481 ("In *Crown*, the Court noted that 'a class member would be unable to 'press his claim separately' if the limitations period had expired while the class action was pending.' . . . In explaining *American Pipe* tolling, the Court has noted that putative class members had 'claims' they would want to preserve." (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 351 (1983))).

194. *See id.* at 482.

Insurance. Co.[195] The *Romero* court focused on the role that supplemental jurisdiction played in the case before it: "The issue is how we reconcile Pennsylvania's unwillingness to allow cross-jurisdictional tolling . . . with Congress's tolling mandate in creating supplemental jurisdiction."[196] The court emphasized that there was a lack of authority extending state law tolling analysis—as opposed to applying § 1367(d)—when a federal court had exercised supplemental jurisdiction over state law claims asserted as part of a federal court putative class action.[197] Judge Mark A. Kearney held that the former putative class members had asserted "claims" from the time the class complaint was filed up and until the judge overseeing the putative class action denied class certification.[198] At that point, the putative class members "knew they could no longer rely upon their state law claims preserved in the class action."[199] For these individuals—unlike the named plaintiffs—their claims were no longer before the court.[200] Therefore, their state law claims were tolled pursuant to § 1367(d).[201] Against this backdrop, Part III.B of this Note considers whether plaintiffs can invoke § 1367(d) as a functional, though not formal, equivalent to cross-jurisdictional tolling.[202]

C. State Savings Statutes and Cross-Jurisdictional Tolling

Unlike § 1367(d) and the *American Pipe* tolling doctrine, state savings statutes do not typically toll statutes of limitations.[203] Instead, they merely "provide that where an action is timely brought and dismissed other than on the merits, a new action may be commenced within a designated period following the dismissal."[204] That said, the Supreme Court explicitly recognized the link between savings statutes and *American Pipe* tolling in the 1983 case, *Chardon v. Fumero Soto*.[205] The procedural posture of *Chardon*

195. No. 01-CV-3894, 2018 WL 2325405 (E.D. Pa. May 22, 2018); *see id.* at *1.
196. *Id.* at *5.
197. *See id.*
198. *See id*. at *6.
199. *Id.*
200. *See* 7AA WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 1785 (3d ed.), Westlaw (database updated Apr. 2026) ("If class certification is denied, the individual plaintiffs may continue the action on an individual basis and the nonparty members of the alleged class may be joined to the extent permitted by the principles governing [FRCP 20] or they may be allowed to intervene under [FRCP 24]." (footnotes omitted)).
201. *See Romero*, 2018 WL 2325405, at *9.
202. The Maryland court in *Cain v. Midland Funding, LLC*, 256 A.3d 765 (Md. 2021), alluded to this functional equivalence: "Given our holding that Maryland recognizes cross-jurisdictional class action tolling, we do not need to determine whether the federal supplemental jurisdiction statute, § 1367(d), applies to later filed individual claims after a nonmerits dismissal of class action certification." *Id.* at 804.
203. *See* FERGUSON, *supra* note 90, at 1.
204. *Id.* at 55. As a part of his analysis, scholar William D. Ferguson concludes that courts have been "solicitous of plaintiffs" in applying savings statutes when the dismissal of the first action is technical and involuntary. *See id.* at 353. Ultimately, he argues, this stems from the goal of these statutes: to provide plaintiffs the opportunity to litigate on the merits, not on procedure. *See id.*
205. 462 U.S. 650 (1983).

was unique: The Court, following the denial of class certification in a federal court putative class action alleging violations of 42 U.S.C. § 1983, was dealing with multiple claims brought individually by former putative class members alleging the same violations.[206] And in a related federal statute, 42 U.S.C. § 1988, Congress instructed the federal courts to borrow analogous state law limitations periods for federal law causes of action that did not prescribe their own statutes of limitations, such as § 1983.[207] Thus, the main dispute in *Chardon* was not about which statute of limitations to apply, but about which tolling rule governed: the federal rule (established in *American Pipe*) or the rule from the state (or, in this instance, the territory) in which the case originated, Puerto Rico.[208]

Writing for the majority, Justice John Paul Stevens stated that *American Pipe* addresses a federal interest in assuring "the efficiency and economy of the class action procedure," and that "[a]fter class certification is denied, that federal interest is vindicated as long as each [putative] plaintiff is given as much time to intervene or file a separate action as [they] would have under a *state savings statute*."[209] Justice Stevens went on to hold that the U.S. Court of Appeals for the First Circuit correctly rejected the argument that *American Pipe* establishes a "uniform federal rule of decision" that mandates *suspension* of a statute of limitations for putative class members from the time a class complaint is filed until the certification decision is made.[210] Instead, Congress's instruction that federal courts look to state limitations periods for claims brought under 42 U.S.C. § 1983 meant that they must also look to state law for the appropriate savings statute; in this case, that was Puerto Rico's tolling rule.[211] The distinction was dispositive: Contrary to the rule that emerged from *American Pipe*, under Puerto Rico law, the limitations period for putative class members begins to *run anew* upon the denial of class certification.[212] Therefore, by applying Puerto Rico's tolling rule in lieu of *American Pipe*, "the plaintiff[s] benefit[ted] from the full length of the applicable limitations period" after class certification was denied.[213] This distinction rendered their claims timely.[214]

Justice Stevens's decision drew a sharp dissent from Chief Justice William H. Rehnquist.[215] Joined by Justices Byron R. White and Lewis F. Powell Jr., Justice Rehnquist argued that the decision in *American Pipe* created a uniform federal rule.[216] Justice Rehnquist implied that this uniform rule

206. *See id.* at 652–53.
207. *See id.* at 657.
208. *See id.* at 655; Fernandez v. Chardon, 681 F.2d 42, 49 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983).
209. *Chardon*, 462 U.S. at 661 (emphasis added).
210. *Id.* at 662.
211. *See id.* at 661.
212. *See id.* at 655; *Fernandez*, 681 F.2d at 49.
213. *Chardon*, 462 U.S. at 655.
214. *See id.* at 662.
215. *See id.* at 663–68 (Rehnquist, J., dissenting).
216. *See id.* at 665–66.

would govern no matter the source of the cause of action.[217] As a result, the dissent argued, the Court erred by applying the Puerto Rico tolling rule instead of *American Pipe* because the putative class action in *Chardon* was brought pursuant to FRCP 23.[218]

The Court's holding in *Chardon* built on existing class action tolling jurisprudence: Putative class members have not "slept on their rights" during the pendency of the class certification decision.[219] Up and until certification is denied, their claims are being pursued by the proposed class representatives.[220] Therefore, upon denial of certification, "it is as if [a putative] class member's claims have been dismissed—but not on the merits."[221] As a result, putative class members should be treated as though they are named plaintiffs until the class certification decision has been made,[222] and they should be said "to have suffered a procedural dismissal of their claims with the denial of class certification."[223]

Applying this jurisprudence to the case before them, the Court in *Chardon* established that when federal law instructs courts to look to state law for the limitations period, they can also look to state savings statutes[224] as a means by which to treat putative class members as though they had been named plaintiffs during the pendency of the class certification decision.[225] In issuing this ruling, however, the Court was necessarily limited to federal proceedings; the Court did not address when or how state courts should look to or construe their own state's savings statute, be it in the context of class certification denial or otherwise.[226] Critical to this Note, then, is that *Chardon* did not resolve whether putative class members asserting state law claims in state court following the denial of class certification in a federal court putative class action can invoke state savings statutes to toll the relevant statute of limitations and timely file their claims.[227] In other words, *Chardon* did not answer whether plaintiffs can invoke state savings statutes as a

217. Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 545 (1996).

218. *Chardon*, 462 U.S. at 667–68 (Rehnquist, J., dissenting).

219. Lowenthal & Feder, *supra* note 217, at 544.

220. *See id.*

221. *Id.* at 544–45.

222. *See Chardon*, 462 U.S. at 659; *see also* Hemenway v. Peabody Coal Co., 159 F.3d 255, 266 (7th Cir. 1998) ("What *American Pipe* . . . establish[es] is that until class certification is denied, the members of the putative class receive the same treatment . . . as do the named plaintiffs who seek to represent the class.").

223. Lowenthal & Feder, *supra* note 217, at 545.

224. In this case, Puerto Rico's tolling rule and the surrounding case law. *See Chardon*, 462 U.S. at 655; Fernandez v. Chardon, 681 F.2d 42, 49 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983).

225. *See Chardon*, 462 U.S. at 661.

226. *See generally id.*

227. *See generally id.*

functional, though not formal, substitute for cross-jurisdictional tolling.[228] Part III.C of this Note considers this question.[229]

D. Private Tolling Agreements and Cross-Jurisdictional Tolling

As noted in Part I.F, civil procedure is not limited to the FRCP or its state analogs.[230] Private tolling agreements are one of many ways in which parties can contract around the rules of procedure.[231] Given the private nature of these agreements, courts have rarely provided input as to their use, purpose, or effectiveness.[232] However, the few that have commented—be it on tolling agreements specifically or on arrangements that more generally waive defenses regarding statutes of limitations or repose—tend to conclude that so long as the agreement is reasonable, it does not run afoul of any procedural rule or public policy.[233] One court has even gone so far as to explicitly recognize the benefits these tolling agreements provide: "Tolling agreements allow parties to extend statutory periods while they evaluate their claims and defenses . . . . [S]uch agreements can serve the interests of the parties, the public, and the courts."[234]

Private tolling agreements exist outside the bounds of court-ordered tolling (such as *American Pipe*) and statutory mandates (such as § 1367(d) or state

228. For recognition of this functional equivalence, see Angela De Sanctis Myers, Comment, *Civil Procedure*—Maestas v. Sofamor Danek Group, Inc.*: The Tennessee Supreme Court's Rejection of the Doctrine of Cross-Jurisdictional Tolling*, 32 U. MEM. L. REV. 521, 532 n.77 (2002) (acknowledging that Tennessee has adopted cross-jurisdictional tolling through its savings statute, which extends to actions first filed in federal court); *see also* Mbadiwe v. Amazon.com, Inc., No. 22-CV-9542, 2025 WL 2675937, at *24 (S.D.N.Y. Sep. 18, 2025) (approving the use of Iowa's saving statute as a means by which to achieve cross-jurisdictional tolling); Behrens v. JPMorgan Chase Bank, N.A., 792 F. Supp. 3d 902, 916 (N.D. Iowa 2025) (holding that because cross-jurisdictional tolling does not apply, Iowa's savings statute "likewise does not save plaintiffs' claims").

229. *See infra* Part III.C.

230. *See supra* Part I.F.

231. *See, e.g.*, Grabill, *supra* note 99, at 156; *see also* Cange v. Stotler and Co., Inc., 826 F.2d 581, 596 (7th Cir. 1987) (explaining private parties' ability to contract around statutory rights).

232. *See* Hoffman, *supra* note 97, at 396. "Such bargains, because they are uncontested, will rarely be adjudicated." *Id.* However, to the extent they are, "enforcement seems likely." *Id.* Therefore, "the enforceability of statute of limitation[s] tolling agreements is generally appreciated." *Id.* at 396–97.

233. *See* First Interstate Bank of Denv., N.A. v. Cent. Bank & Tr. Co. of Denv., 937 P.2d 855, 863 (Colo. App. 1996) ("[T]he public policy arguments that militate against equitable estoppel or equitable tolling do not support a denial of waiver by express agreement."); *see also* Collins v. Env't Sys. Co., 3 F.3d 238, 241–42 (8th Cir. 1993) (describing how a contract that prescribes a shorter or longer period for bringing suit than that codified in the statute of limitations must be reasonable).

234. *In re* Lehman Bros. Sec. & ERISA Litig., No. 09 MD 2017, 2012 WL 6584524, at *2 (S.D.N.Y. Dec. 18, 2012). For an example of support for tolling agreements in the legislative setting, see ADVISORY COMM. ON CIV. PRAC., REPORT TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 13 (2023) (requesting an amendment to the New York General Obligations Law to facilitate flexible tolling agreements).

savings statutes).[235] That said, the practical effects of these agreements neatly align with the goals of limitations periods and with what the Supreme Court sought to achieve in *American Pipe*, such as preventing wasteful protective filings.[236] Therefore, given the use,[237] acceptance,[238] and support[239] for these agreements, their availability as a functional substitute for cross-jurisdictional tolling is ripe for consideration.

At the same time, analyzing private tolling agreements through the lens of *American Pipe* raises difficult questions. Such agreements are completely voluntary and only confer tolling benefits on those parties who are signatories[240]; this necessarily limits their use and scope.[241] Therefore, private tolling agreements embody both promise and limitation as substitutes for cross-jurisdictional tolling. The question, then, is whether such agreements can serve as an adequate proxy, or if their contractual, party-specific nature makes them too narrow a tool to serve as a meaningful alternative. Part III.D considers this question.[242]

III. APPLYING *AMERICAN PIPE* TOLLING CROSS-JURISDICTIONALLY AND ALTERNATIVES FOR PLAINTIFFS

Part III of this Note addresses (1) whether state courts should apply *American Pipe* cross-jurisdictionally; and (2) the extent to which plaintiffs can invoke 28 U.S.C. § 1367(d), state savings statutes, and private tolling agreements to functionally, though not formally, achieve cross-jurisdictional tolling. First, Part III.A argues that state courts in states that have enacted analogs to FRCP 23 should apply *American Pipe* cross-jurisdictionally.[243]

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235. *See* Hoffman, *supra* note 97, at 396 (noting that it is the parties' *lawyers*, rather than the court or the legislature, that determine whether the parties should privately enter into any sort of tolling agreement).

236. *See* Kaufman & Wunderlich, *supra* note 100, at 145 ("Instead, the parties themselves can accomplish the laudable aims of limitations periods . . . by entering into tolling agreements."); *see also* Rave, *supra* note 98, at 1601 n.17 (highlighting how the use of tolling agreements allows defendants to avoid mass filings).

237. *See, e.g.*, Rave, *supra* note 98, at 1601 n.17, 1610 n.52.

238. *See, e.g.*, First Interstate Bank of Denv., N.A. v. Cent. Bank & Tr. Co. of Denv., 937 P.2d 855, 863 (Colo. App. 1996).

239. *See In re Lehman Bros*, 2012 WL 6584524, at *2; *see also* ADVISORY COMM. ON CIV. PRAC., *supra* note 234, at 13.

240. This is unlike *American Pipe* tolling, which requires no affirmative action on the part of putative class members in order for such class members to later benefit from the tolling doctrine. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554 (1974); *see also infra* note 241.

241. *See Toll-Free Legal Strategy: The Benefits of a Tolling Agreement*, LEWITT HACKMAN (Mar. 19, 2025), https://www.lewitthackman.com/toll-free-legal-strategy-the-benefits-of-a-tolling-agreement/ [https://perma.cc/S2MG-DUVJ] ("Both (or all) parties must sign the tolling agreement to acknowledge acceptance and confirmation that applicable statute(s) of limitation[s] are . . . tolled."); *see also* Brown v. Google LLC, 172 F.4th 1128, 1137 (9th Cir. 2026) ("The . . . plaintiffs knew that they were not parties to the [tolling] agreement and did not argue that they believed it would also apply to their claims.").

242. *See infra* Part III.D.

243. *See infra* Part III.A.

Second, recognizing the lack of cross-jurisdictional tolling in many states, Parts III.B–D urge (1) a broad reading of 28 U.S.C. § 1367(d), (2) robust application of state savings statutes, and (3) greater reliance on private tolling agreements.[244] These sections proffer that, while not perfect proxies, each of these alternatives can function as a practical substitute for cross-jurisdictional tolling under certain circumstances.[245] Together, they provide plaintiffs who relied on the federal class action mechanism with options to avoid being unfairly time-barred from individually pursuing their state law claims in state court following the denial of class certification in a federal court putative class action.

A. States Should Apply American Pipe *Cross-Jurisdictionally in Certain Circumstances*

This part frames the cross-jurisdictional inquiry as follows: Applying *American Pipe* cross-jurisdictionally comes down to (1) whether *American Pipe* tolling is based in equitable considerations or federal common law, and (2) the extent to which states have adopted FRCP 23 analogs. First, this part argues that *American Pipe*, as the Supreme Court has repeatedly indicated, is an equitable tolling doctrine. This interpretation limits the doctrine's application beyond the federal forum. Second, this part contends that in states that have adopted analogs to FRCP 23,[246] courts should apply *American Pipe* cross-jurisdictionally for the same reasons the Supreme Court articulated in 1974[247] and reaffirmed in *Crown*,[248] *CalPERS*,[249] and *China Agritech*.[250]

1. *American Pipe* Is an Equitable Tolling Doctrine, Not Federal Common Law

In his majority opinion establishing *American Pipe* tolling, Justice Stewart clarified that "the rule most consistent with federal class action procedure" is to toll the statute of limitations for putative class members during the pendency of the class certification decision.[251] Forty-three years later, the Court in *CalPERS* built on Justice Stewart's reasoning, plainly stating that "the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions."[252] This Note submits that *CalPERS* fully clarified the issue:

244. *See infra* Parts III.B–D.
245. *See infra* Parts III.B–D.
246. *See, e.g.*, *supra* note 125 and accompanying text.
247. *See generally* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).
248. *See generally* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983).
249. *See generally CalPERS*, 582 U.S. 497 (2017).
250. *See generally* China Agritech, Inc. v. Resh, 584 U.S. 732 (2018).
251. *Am. Pipe*, 414 U.S. at 554; *see supra* note 57 and accompanying text.
252. *CalPERS*, 582 U.S. at 509; *see supra* note 169 and accompanying text; *see also* Kelly v. United States, No. 2024-2042, 2026 WL 2066092, at *5 (Fed. Cir. July 17, 2026) ("*CalPERS* established that *American Pipe* tolling is *equitable*." (emphasis added)).

American Pipe tolling is grounded in equity; therefore, any petition for its extension must come up against the limits of equitable tolling. This jurisprudence was confirmed one year later in *China Agritech*, in which Justice Ruth Bader Ginsburg reiterated that *American Pipe* is an equitable tolling doctrine and emphasized that plaintiffs have no right to bring their claims beyond the prescribed limitations period; rather, they may do so only in limited circumstances due to the judicially crafted *American Pipe* tolling rule, which does not abridge, enlarge, or modify any substantive right.[253]

By clarifying that *American Pipe* is an equitable tolling doctrine—not federal common law—the Supreme Court limited the tolling rule's application beyond the federal courts, at least to a certain extent. To be more precise, the Court made clear that, because *American Pipe*'s roots lie in equity, state courts are not required to cross the toll bridge and apply *American Pipe* to state law claims filed in state court following the denial of class certification in a federal court putative class action. This limitation is doctrinally sound—statutes of limitations (and the tolling rules that accompany them) are determinative matters of law that reflect policy judgments made by each state's legislature.[254] Accordingly, when claims are brought in state court under state law, there is no basis for requiring that court to apply a tolling rule fashioned by the federal judiciary in the name of equity. The correct conclusion, as the *Clemens* court noted,[255] is that cross-jurisdictional tolling is not mandated as a matter of state procedure.

2. Embracing Cross-Jurisdictional Tolling

Part III.A.1 establishes that the cross-jurisdictional question is exactly that—a *question*—rather than a mandate imposed on the states by the federal judiciary.[256] The next step is to determine the circumstances under which states *should* embrace cross-jurisdictional tolling. Part III.A.2 argues that state courts in states that have adopted FRCP 23 analogs should apply *American Pipe* cross-jurisdictionally. This part also addresses counterarguments that were introduced in Part II.A.2.

a. States That Have Analogs to FRCP 23 Should Embrace Cross-Jurisdictional Tolling

The Supreme Court established and reaffirmed the *American Pipe* tolling doctrine in the name of judicial efficiency and on the basis that such an interpretation is the one most consistent with FRCP 23.[257] This rationale, however, need not be limited to federal courts. In states that have modeled their class action procedures on the federal rule—New York, for

253. *See China Agritech*, 584 U.S. at 745–46; *see also supra* note 169 and accompanying text.
254. *See supra* notes 76–77 and accompanying text.
255. *See supra* note 137 and accompanying text.
256. *See supra* Part III.A.1.
257. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974).

example[258]—the same "animating policies" apply.[259] Accordingly, the application of *American Pipe* in those states is warranted for the same reasons it is warranted in the federal forum.

The final question, then, is whether it makes any difference that the subsequent state court action stems from the denial of class certification in a putative class action that was filed in federal court rather than in the courts of that state. The answer is no. For the purpose of statute of limitations tolling, the only difference between a putative class action filed in federal court and one filed in state court is exactly that: where the action was filed. To the extent that a state has chosen to model its class action procedure and the interests stemming from that procedure on that of the federal forum,[260] that filing difference should not matter. As New York's high court emphasized, "[T]he notice that class actions provide defendants does not diminish or change depending on the jurisdiction in which the class action is filed."[261] The same can be said for maintaining judicial efficiency via tolling. Unless putative class members are able to independently file their state law claims in federal court, denying them cross-jurisdictional tolling on those claims forces them to file duplicative protective suits in state court at the time the original class complaint is filed, burdening the state court.[262] Put another way, just as *intra*-jurisdictional tolling of state law claims promotes judicial efficiency within a state court system by preventing duplicative protective filings in that state's courts, *cross*-jurisdictional tolling of state law claims does the same for that state's court system. Therefore, as the New York Court of Appeals has recognized, states that have enacted FRCP 23 analogs should embrace cross-jurisdictional tolling as a means by which to preserve judicial efficiency and other interests that stem from their class action procedures.

b. Responses to the Rejection of Cross-Jurisdictional Tolling

One of the more frequently asserted counterarguments to cross-jurisdictional tolling is that whichever state adopts the doctrine opens the floodgates to litigation that would be time-barred elsewhere.[263] The answer to this issue is clear: As the Supreme Court of Ohio noted in 2002, cross-jurisdictional tolling in any given state should only be available to those who would have been able to bring suit in that state in the first instance.[264] This limitation alleviates the floodgates concern by ensuring that putative class members from disparate parts of the country cannot flock to a

258. *See supra* notes 125–28 and accompanying text.

259. Bermudez Chavez v. Occidental Chem. Corp., 158 N.E.3d 93, 101 (N.Y. 2020) (emphasizing that "the same animating policies the United States Supreme Court discussed in *American Pipe* and its progeny" underlie NYCPLR article 9).

260. *See, e.g.*, *supra* notes 142–43 and accompanying text.

261. *See supra* note 130 and accompanying text.

262. *See supra* notes 127–28 and accompanying text.

263. *See supra* note 146 and accompanying text.

264. *See supra* note 129.

state to which their claims bear no relation, just because that state embraces cross-jurisdictional tolling. Another concern is that states should scrutinize cross-jurisdictional tolling if their class action procedures differ from those of the federal forum.[265] This Note agrees. To the extent that states have not prioritized the same interests in their class action procedures as the federal forum has with FRCP 23, there is less of a reason to readily embrace cross-jurisdictional tolling.

A third, closely related counterargument is that states simply have no incentive to further the efficiency of litigation in another jurisdiction, such as the federal forum.[266] This notion is belied by the argument asserted above: Those states that mirror their class action procedures on FRCP 23 logically adopt the interests stemming from FRCP 23. Because the interests overlap, comity dictates that these states have an incentive to further the interests of the federal forum.[267] Another contention stems from when a state court system has not clearly addressed the cross-jurisdictional inquiry; in these situations, federal courts have been hesitant to "import" the doctrine into state law.[268] The solution offered above directly responds to this issue: To resolve the uncertainty before them, federal courts should carefully determine whether the relevant state's class action procedure mirrors FRCP 23. If it does, there is no issue with importing cross-jurisdictional tolling into that state's law.[269]

A final counterargument is that of notice to the defendant, most clearly articulated by David Bober.[270] In addition to Judge Stein's rebuttal to this concern,[271] this Note harkens back to Justice Stewart's emphasis that the federal class action device is meant to protect not only those who actively participate in—or are even aware of—the putative class action, but also those who are passive beneficiaries up and until the class certification decision.[272] To the extent that a state's class action rule is based on the federal rule, this same logic applies, superseding any concerns of notice to defendants.

Whether to apply *American Pipe* cross-jurisdictionally should turn on its equitable foundations and on state-by-state procedural alignment with FRCP 23. This conclusion, however, is only an initial consideration of this Note.

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265. *See supra* note 148 and accompanying text.

266. *See supra* note 149 and accompanying text.

267. The court in *Wade*—which asserted that Virginia had no interest in furthering another jurisdiction's judicial efficiency, see *supra* note 149 and accompanying text—downplayed the importance of comity amid the fact that Virginia had no class action provision similar to FRCP 23. *See* Wade v. Danek Med., Inc., 182 F.3d 281, 287 n.7 (4th Cir. 1999). This Note submits that in states that do in fact have FRCP 23 analogs, comity must not be brushed aside so easily.

268. *See supra* note 150 and accompanying text.

269. This Note does not support a rebuttable presumption in favor of or against cross-jurisdictional tolling, as seen in *Mbadiwe v. Amazon.com, Inc.*, No. 22-CV-9542, 2025 WL 2675937, at *16 (S.D.N.Y. Sep. 18, 2025). Instead, the decision should be made by assessing whether a state's class action rule mirrors FRCP 23—such as the rules in New York, Colorado, and South Carolina—or if it contains provisions unique to state law, such as the rule in Louisiana. *See supra* notes 123, 125, 142 and accompanying text.

270. *See supra* note 158 and accompanying text.

271. *See supra* note 130 and accompanying text.

272. *See supra* notes 54–55 and accompanying text.

Recognizing that most states have not embraced the doctrine, Part III now turns to several alternative mechanisms—namely, 28 U.S.C. § 1367(d), state savings statutes, and private tolling agreements—and assesses the extent to which plaintiffs may invoke each to achieve cross-jurisdictional tolling in effect, if not in name.

B. 28 U.S.C. § 1367(d) Provides Plaintiffs with an Alternative to Cross-Jurisdictional Tolling

Part II.B highlights that the Supreme Court has never considered whether 28 U.S.C. § 1367(d) can be invoked in the context of class certification denial.[273] To frame the issue in terms of § 1367(d)'s language, the Court has never considered whether putative class members in a federal court putative class action have asserted "claims" within the meaning of § 1367(d), or whether the denial of class certification in that federal action constitutes a "dismissal" that triggers § 1367(d) tolling.[274] This part argues that both of these questions should be answered in the affirmative, allowing putative class members to invoke § 1367(d) in state court proceedings brought after the denial of class certification in a federal court putative class action that included state law claims pursuant to § 1367(a). By doing so, these plaintiffs can functionally achieve cross-jurisdictional tolling and ensure that their state law claims are timely filed in state court.

Putative Class Members Have Asserted "Claims" Within the Meaning of § 1367(d). To obtain the benefit of tolling under 28 U.S.C. § 1367(d), putative class members must first demonstrate that they have asserted "claims" within the meaning of § 1367(d).[275] As Part II.B notes, the Supreme Court has not yet addressed this issue, but the Sixth Circuit did in 2013.[276] The court looked to *American Pipe* jurisprudence regarding the "claims" of putative class members,[277] concluding that such individuals have in fact asserted "claims" within the meaning of § 1367(d).[278] The court emphasized that there is "no indication that Congress intended to exclude putative class members from the tolling available through operation of § 1367(d)."[279] This Note agrees with and supports the Sixth Circuit's interpretation. To hold otherwise would contradict and undermine well-established class action tolling jurisprudence that putative class members should be treated as though they are named plaintiffs until the class certification decision has been made.[280]

273. *See supra* note 188 and accompanying text.
274. *See supra* notes 189–90 and accompanying text.
275. *See* 28 U.S.C. § 1367(d).
276. *See supra* note 191 and accompanying text.
277. *See supra* notes 193–94 and accompanying text.
278. *See supra* notes 193–94 and accompanying text.
279. *See In re* Vertrue Inc. Mktg. & Sales Pracs. Litig., 719 F.3d 474, 482 (6th Cir. 2013).
280. *See supra* note 222 and accompanying text.

The Denial of Class Certification Constitutes a "Dismissal" That Triggers § 1367(d) Tolling. The second step to obtaining § 1367(d) tolling is that the claim asserted under § 1367(a) must be "dismissed."[281] This Note argues that for putative class members of a federal court putative class action that asserts state law claims pursuant to § 1367(a), the denial of class certification should be considered a "dismissal" of these state law claims for the purposes of § 1367(d) tolling.

The Sixth Circuit in *Vertrue* did not have to answer whether § 1367(d) reaches class certification denial because the putative class action in that case was dismissed prior to a ruling on certification.[282] However, the district court in *Romero*—examining a previous denial of class certification—held that when the judge in the initial putative class action did not certify the class, the state law claims of the putative class members were no longer before that court.[283] The *Romero* court came to the only logical conclusion: Because those claims were no longer before that court, § 1367(d) mandated tolling.[284]

This Note agrees with the *Romero* court's decision to interpret the denial of class certification as a "dismissal" of the claims of putative class members, thereby triggering § 1367(d) tolling. Such an interpretation is consistent with the purposes underlying the tolling provision[285] and *American Pipe* and its progeny.[286] Furthermore, reading § 1367(d) to reach class certification denial allows putative class members to participate in the federal class action mechanism without fear that their state law claims could be time-barred if the court decides, for reasons unrelated to the merits, that those claims are no longer before the court.

Section 1367(d) as a Functional Equivalent to Cross-Jurisdictional Tolling. The jurisprudence considered in this part demonstrates that once a putative class action is filed, putative class members have asserted "claims" within the meaning of § 1367(d).[287] Furthermore, when class certification is denied, these claims are "dismissed" from the federal action.[288] Accordingly, when such individuals later pursue their state law claims in state court, § 1367(d) should be read to preserve their ability to do so. In other words,

281. *See* 28 U.S.C. § 1367(d).
282. *See supra* note 191.
283. *See supra* notes 198–200 and accompanying text.
284. *See supra* note 201 and accompanying text.
285. *See* Jinks v. Richland County, 538 U.S. 456, 463 (2003) (describing how § 1367(d) "eliminates a serious impediment to access to the federal courts on the part of plaintiffs pursuing federal- and state-law claims that 'derive from a common nucleus of operative fact.'" (quoting United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966))).
286. *See* Lowenthal & Feder, *supra* note 217, at 544–45 (explaining that when class certification is denied, a putative class member's claim has functionally been dismissed, but not on the merits; therefore, under the jurisprudence of *American Pipe* and *Chardon*, putative class members should be deemed to have suffered a procedural dismissal of their claims with the denial of class certification).
287. *See supra* Part III.B.
288. *See supra* Part III.B.

§ 1367(d) should toll the statute of limitations for state law claims asserted in a federal court putative class action pursuant to § 1367(a) from the time the class complaint is filed until thirty days after class certification is denied.[289] This interpretation gives putative class members time to individually file their state law claims in the applicable state court after class certification is denied in the federal court putative class action, ensuring that they receive the intended protection of § 1367(d) and *American Pipe*. By reading § 1367(d) to reach this scenario, the tolling provision effectively affords putative class members the benefits of cross-jurisdictional tolling, so long as the federal court putative class action invokes supplemental jurisdiction.[290] Thus, § 1367(d) can function as an effective alternative to cross-jurisdictional tolling; more importantly, the provision can be applied regardless of whether the relevant state has embraced the cross-jurisdictional doctrine.

C. Savings Statutes Provide Plaintiffs with a Functional Equivalent to Cross-Jurisdictional Tolling

This part explores whether state courts in states that have enacted savings statutes should construe these statutes to reach putative class members individually asserting state law claims in state court following the denial of class certification in a federal court putative class action. The arguments set forth below closely track the preceding analysis of 28 U.S.C. § 1367(d)[291]: Because putative class members have (1) asserted "claims" with the filing of a putative class action, and (2) suffered a non-merits "dismissal" with the denial of class certification, they should be able to invoke savings statutes when they subsequently file state law claims individually in state court. In doing so, these plaintiffs can functionally achieve cross-jurisdictional tolling, albeit to a limited extent.

Putative Class Members Have Asserted "Claims" Within the Meaning of Savings Statutes. The argument that putative class members have asserted "claims"—or brought "actions"—within the meaning of savings statutes[292] closely tracks the notion that these same individuals have asserted "claims"

289. *See* 28 U.S.C. § 1367(d) ("(d) The period of limitations for any claim asserted under subsection (a) . . . *shall be tolled while the claim is pending and for a period of 30 days after it is dismissed* unless State law provides for a longer tolling period." (emphasis added)).

290. Just as cross-jurisdictional tolling would have a state court toll the statute of limitations on a state law claim brought in a federal court putative class action during the pendency of the federal court's class certification decision, this Note's preferred interpretation of § 1367(d) would have a state court toll the statute of limitations on a state law claim brought in a federal court putative class action pursuant to § 1367(a) during the pendency of the federal court's class certification decision.

291. *See supra* Part III.B.

292. This Note refers to Ohio's savings statute to demonstrate the language used in these types of statutes: "In any *action* that is commenced." OHIO REV. CODE ANN. § 2305.19(A) (West 2026) (emphasis added).

within the meaning of 28 U.S.C. § 1367(d).[293] In either context, the question is the same: Have putative class members asserted "claims" upon the filing of a putative class action? Regardless of whether the statutory text stems from § 1367(d) or a state's savings statute, the Supreme Court's class action tolling jurisprudence[294] is convincing: Because putative class members are to be treated as named plaintiffs until the class certification decision, they should be deemed to have asserted "claims" when the putative class complaint is filed.[295]

The Denial of Class Certification Constitutes a Non-Merits "Dismissal" Under Savings Statutes. As with the "claims" inquiry, the question of whether the denial of class certification constitutes a non-merits "dismissal" is the same for savings statutes as it is for § 1367(d). Therefore, the same jurisprudence that was the subject of Part III.B[296] can be applied to savings statutes: The denial of class certification functions as a non-merits "dismissal" for putative class members because a failure to certify the class means that their claims are no longer before the court.[297]

However, with regard to savings statutes specifically, this Note also refers to scholar William D. Ferguson's discussion of the termination of the first action in applying a savings statute to the second action.[298] Ferguson concludes that absent a *voluntary* dismissal, courts have been wise to afford plaintiffs the benefits of savings statutes.[299] This Note submits that the denial of class certification is clearly distinguishable from a voluntary dismissal; at the very least, it is not a decision made by putative class members on their own accord. As a result, this Note argues for a logical extension of Ferguson's conclusion: For putative class members, the denial of class certification is among the types of initial action termination that justify applying a savings statute to the second action.

Applying Savings Statutes to Putative Class Members Aligns with the Purpose of These Statutes. Because savings statutes vary in language and application, this Note's argument that these statutes should reach class certification denial must include a purposivist analysis. To that end, this Note submits that applying savings statutes in response to the denial of class certification aligns with their purpose.

The main reason for savings statutes is to allow plaintiffs an opportunity to litigate on the merits.[300] And while the primary purpose behind *American*

293. *See supra* Part III.B.
294. *See supra* notes 219–23 and accompanying text.
295. *See supra* note 222 and accompanying text.
296. *See supra* Part III.B.
297. *See supra* notes 198–200 and accompanying text.
298. *See* FERGUSON, *supra* note 90, at 273 (asking whether the manner in which the first action was terminated should hold any significance in determining whether a savings statute applies to the second action).
299. *See id.* at 352–53.
300. *See supra* notes 94–95 and accompanying text.

Pipe and its cross-jurisdictional application is to preserve efficiency in litigation, the doctrine also reflects a desire to reach merits-based proceedings: A putative class member who timely relied on the class action device should still be able to individually pursue the merits of their claim if the class device fails at the certification stage, notwithstanding the lapse of the limitations period. By robustly applying savings statutes so that they provide similar protections to those afforded by *American Pipe* and its cross-jurisdictional application, state courts can formalize the conventional understanding that such statutes have a "broad and liberal purpose" and are not to be "frittered away by any narrow construction."[301]

The Limits of Savings Statutes. Even if states choose to apply their savings statutes as robustly as this Note would prefer, the ability of such statutes to serve as proxies for cross-jurisdictional tolling is more limited than 28 U.S.C. § 1367(d). For starters, unlike § 1367(d) or *American Pipe*, savings statutes do not typically *toll* statutes of limitations.[302] Instead, the protection they offer is generally limited to a fixed time period following a non-merits dismissal.[303] As the Supreme Court highlighted, these periods can range from sixty days to five years.[304] Accordingly, this Note acknowledges that even under its preferred interpretation, putative class members will only be able to invoke savings statutes for the duration prescribed in the relevant statute. Therefore, savings statutes offer a functional alternative to cross-jurisdictional tolling, but only for an inflexible period of time that will usually not involve tolling in any way.

D. Private Tolling Agreements as a Narrower Alternative to Cross-Jurisdictional Tolling

This part argues that private tolling agreements are a valid and enforceable means by which to achieve many of the same aims of *American Pipe*.[305] That said, because such agreements are (1) completely voluntary, and (2) only confer tolling benefits on those parties who are signatories, they are necessarily limited in use and scope.[306] Therefore, private tolling agreements embody both promise and limitation as substitutes for applying *American Pipe* cross-jurisdictionally.[307]

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301. Gaines v. City of New York, 109 N.E. 594, 596 (N.Y. 1915); *see* FERGUSON, *supra* note 90, at 352–53; *see also* Liles, *supra* note 89, at 1017 n.219 (acknowledging the possibility of a savings statute containing a provision for limitations tolling following class decertification).

302. *See* FERGUSON, *supra* note 90, at 1. *But see supra* notes 211, 224 and accompanying text.

303. *See* FERGUSON, *supra* note 90, at 1.

304. *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 431–32 n.9 (1965).

305. *See infra* Part III.D.1.

306. *See infra* Part III.D.2.

307. *See infra* Part III.D.2.

1. Private Tolling Agreements Can Achieve the Goals of *American Pipe*

Part II.D examines the ability of parties to contract around statutory rights, such as statutes of limitations.[308] It makes clear that courts' oversight of these contracts is mainly limited to assessing the reasonableness of the agreement.[309] In certain instances, such agreements are even encouraged.[310] Applying this jurisprudence to the ideas considered in this Note, private tolling agreements—so long as they are deemed reasonable—offer a valid means by which to achieve many of the same goals as *American Pipe*.

First and foremost, these agreements can prevent wasteful filings by eliminating the need to file duplicative claims. Such an effect is easier to identify in the nonclass context than in the putative class action context.[311] Nonetheless, in the class action setting, private tolling agreements can eliminate the need for putative class members to file individual protective suits to safeguard their rights in the event that class certification is denied. Second, by requiring putative class members to register their claims—as is typical of private tolling agreements[312]—defendants can obtain notice of the scope of their potential liability at an early stage. Finally, the use of such agreements in the class context can provide putative class members with confidence that the limitations periods attached to their claims—state or federal—will not expire amid their reliance on FRCP 23 litigation. Not only does this provide putative class members with the protection they deserve, it also encourages their participation in the class action mechanism, thereby improving the efficiency and economy of litigation.

2. Private Tolling Agreements Are Necessarily Narrow and Limited

The previous section argues that private tolling agreements are a valid way to achieve many of the goals of *American Pipe*.[313] Framed in terms of the cross-jurisdictional inquiry, Part III.D.1 argues that there is no reason why putative class members cannot enter into private tolling agreements with defendants in order to ensure that they can timely file their state law claims in state court following the denial of class certification in a federal court putative class action. However, the mere ability of these agreements to serve

308. *See supra* note 231 and accompanying text.
309. *See supra* note 233 and accompanying text.
310. *See supra* note 234 and accompanying text.
311. *See infra* Part III.D.2. This may explain why private tolling agreements are most often used when FRCP 23 is not invoked. For example, see Grabill, *supra* note 99, at 156 n.149 (describing how in one nonclass aggregate litigation, 14,100 claimants had entered into tolling agreements with the defendant); *see also* Rave, *supra* note 98, at 1601 n.17 (explaining that in another nonclass aggregate litigation, only 2,500 claims were filed, while an additional 150,000 were registered but unfiled).
312. *See* Grabill, *supra* note 99, at 156.
313. *See supra* Part III.D.1.

as an alternative to cross-jurisdictional tolling does not necessarily mean they are an effective proxy in the states that reject the doctrine.

The first reason to scrutinize the utility of private tolling agreements as replacements for cross-jurisdictional tolling is that these agreements only bind signatories.[314] This is a major difference from *American Pipe*, its cross-jurisdictional application, and the extension of 28 U.S.C. § 1367(d) and state savings statutes to putative class members after the denial of class certification. Under this Note's preferred interpretations, putative class members may rely on any one of these mechanisms to obtain the benefits of limitations tolling without needing to take any affirmative action before class certification is denied. The same cannot be said for private tolling agreements. To reap the benefits of cross-jurisdictional tolling via one of these agreements, a putative class member must affirmatively sign on to an agreement with the defendant to later benefit from limitations tolling.[315] This requirement may not mean much for putative class members who are aware of the pending class action, but it imposes an insurmountable burden on the "passive beneficiaries"[316] who have no knowledge of the putative class action at the time these tolling agreements need to be signed. *American Pipe* tolling, its cross-jurisdictional application, and this Note's preferred interpretations of § 1367(d) and state savings statutes all extend tolling protections to these passive beneficiaries, whom the Supreme Court has explicitly stated are protected by FRCP 23.[317] Private tolling agreements, due to their contractual nature, are simply incapable of doing the same.

The second reason to question the usefulness of private tolling agreements is that defendants will likely be reluctant to sign on to them in the class action setting. Unlike in the nonclass aggregate setting, where large numbers of related claims are individually asserted by plaintiffs,[318] a putative class action is filed to collectively assert the rights of many and to avoid a needless flood of individual lawsuits.[319] In other words, the filing of a putative class action mitigates the concern of a flood of individual lawsuits that would motivate the defendant to enter into tolling agreements in the first place. Therefore, to the extent that defendants are unbothered by a few duplicative protective filings, they may regard the use of tolling agreements in the class action setting as a needless favor to putative class members. In sum, the lack of defense-side incentives to enter into private tolling agreements when a putative class action has been filed undermines the ability of such agreements to serve as an adequate proxy to cross-jurisdictional tolling.

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314. *See supra* note 241 and accompanying text.
315. *See supra* note 241 and accompanying text.
316. *See* Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 552 (1974).
317. *See id.*
318. For example, the *Vioxx* litigation. *See In re* Vioxx Prods. Liab. Litig., No. MDL 1657, 2008 WL 3285912 (E.D. La. Aug. 7), *aff'd sub nom.* AvMed Inc. v. BrownGreer PLC, 300 F. App'x 261 (5th Cir. 2008).
319. *See supra* Part I.A.

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Private tolling agreements are fundamentally different from 28 U.S.C. § 1367(d) or state savings statutes. That said, these contractual agreements have a place in this Note, even if they offer a considerably narrower alternative to cross-jurisdictional tolling. Putative class members should seek out private tolling agreements with defendants to preserve the timeliness of their claims should class certification fail. In exchange, defendants gain a better understanding of the scope of their potential liability and avoid duplicative protective filings. The importance of the party-specific nature of these agreements and defendants' likely reluctance to enter into them in the class action setting cannot be overstated. However, these limits do not change the fact that these agreements remain a valid means by which putative class members can timely file their state law claims in state court following the denial of class certification in a federal court putative class action. The ability of private tolling agreements to function as an alternative to cross-jurisdictional tolling is narrow and limited; nonetheless, it exists.

CONCLUSION

The class action mechanism is a marvel of modern civil litigation. In a system that values "justice for all,"[320] FRCP 23 alters an incentive structure that may otherwise preclude the pursuit of justice.[321] But when a timely filed putative class action fails under the FRCP 23(c) class certification decision, putative class members should not be prevented from pursuing their claims individually because of a lapse in the limitations period, be it in state or federal court. However, because cross-jurisdictional tolling has not been embraced in many of the fifty states, plaintiffs may well suffer from this procedural injustice. In response, this Note has sought to (1) identify the circumstances under which cross-jurisdictional tolling should be embraced, and (2) evaluate potential alternatives for putative class members proceeding individually in states that reject the doctrine. In doing so, this Note has advocated for, and provided guidance to, plaintiffs who have relied on the federal class action device—a device that has markedly improved efficiency and economy of litigation and lowered the barriers for seeking justice.

Ultimately, two conclusions emerge. First, cross-jurisdictional tolling should be embraced by state courts in states that have adopted FRCP 23 analogs. Second, a broad reading of 28 U.S.C. § 1367(d), robust application of state savings statutes, and greater reliance on private tolling agreements can help ensure that putative class plaintiffs who relied on the federal class action mechanism are not unfairly time-barred from subsequently pursuing state law claims individually in state court. For putative class members, jurists, and scholars of legal procedure alike, these conclusions embody what it means to provide justice for all.

320. 4 U.S.C. § 4.
321. *See supra* note 38 and accompanying text.