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# Litigation

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## NINTH CIRCUIT APPLIES CALIFORNIA'S EQUITABLE TOLLING DOCTRINE TO REVIVE A SECURITIES CLASS ACTION FILED MORE THAN EIGHT YEARS AFTER THE CAUSES OF ACTION AROSE

### *Background*

The United States Court of Appeals for the Ninth Circuit recently reversed a district court's ruling that had dismissed as untimely a putative securities class action brought by investors in a privately-held English building society.<sup>1</sup> The dispute arose from a June 1997 transaction that converted the entity into a publicly traded company called Halifax PLC ("Halifax"). The Ninth Circuit's decision in *Hatfield v. Halifax PLC*<sup>2</sup> revived Plaintiff Judith Hatfield's claims that she and a class of similarly situated United States investors were deceived into believing that the company's private-to-public conversion would entitle them to free shares in Halifax. Hatfield's complaint, filed in district court in California eight-and-a-half years after her causes of action arose, alleged that the company promised the free shares to garner support for its conversion plan and then unlawfully limited the shares to investors with United Kingdom addresses. Hatfield alleged that she and others were wrongfully deprived of their rights to share in the proceeds from the conversion transaction.

The Ninth Circuit applied California's equitable tolling doctrine to conclude that a nearly identical class action filed in 2003 in New Jersey state court tolled the applicable six-year statute of limitations. Because the Court concluded that Hatfield had not run afoul of the statute of limitations, the subsequent class action filed in California federal court remained timely.

California's equitable tolling doctrine had not previously been applied to toll a statute of limitations based on a prior class action. Instead, California courts and the Ninth Circuit have applied the United States Supreme Court's decision in *American Pipe & Construction Co. v. Utah*.<sup>3</sup> The *American Pipe* tolling doctrine and its progeny stand for

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<sup>1</sup> A building society is a member-owned financial institution that typically specializes in mortgage lending.

<sup>2</sup> *Hatfield et al. v. Halifax PLC and HBOS PLC*, NO. 07-55790, D.C. No. CV-05-08790-SGL(PLAx) (9th Cir. May 8, 2009).

<sup>3</sup> 414 U.S. 538 (1974).

the proposition that, in certain circumstances, a class action's commencement operates to suspend the applicable statute of limitations as to all *individual* actions filed by asserted members of the class who would have been parties to the first suit if it had been permitted to continue.<sup>4</sup> Unlike the majority of federal Courts of Appeals,<sup>5</sup> the Ninth Circuit has extended *American Pipe* to apply beyond successive *individual* actions to also toll the statute of limitations for subsequently filed *class* actions as long as the successive case does not re-litigate an earlier denial of class certification.<sup>6</sup>

But rather than analyzing Hatfield's claims within the *American Pipe* rubric, the Court concluded that an entirely separate doctrine, California's equitable tolling rule, applied to toll Hatfield's individual and class action claims. Significantly, the Court's application of the equitable tolling doctrine served to allow cross-jurisdictional tolling between the New Jersey and California actions. The decision thus stands in contrast to the Court's 2008 decision in *Clemens v. DaimlerChrysler Corporation*<sup>7</sup> that had denied cross-jurisdictional tolling for a successive class action in California where the first class action had been filed in another state. Few states or federal courts allow cross-jurisdictional class action tolling due to concerns that, without all states simultaneously adopting the rule, any state that does so independently could become a refuge for claims that had been unsuccessful in other jurisdictions.<sup>8</sup> Partly in response to that fear, the Court expressly limited its decision to California residents.

### *Procedural History*

In 2004, a New Jersey state court dismissed Hatfield's first class action suit in its entirety. On appeal, the New Jersey Appellate Division reversed the dismissal as to a New Jersey resident plaintiff, but upheld the dismissal as to the non-New Jersey resident plaintiffs, reasoning that it did not have personal jurisdiction over them. In 2005, on the same day that the New Jersey Appellate Division issued its decision, Hatfield, a California resident, filed essentially the same putative class action in California federal court on behalf of herself and all other similarly situated investors.

In 2007, the California district court agreed with Halifax's arguments and dismissed the action as untimely. Hatfield appealed the decision to the Ninth Circuit, arguing that the six-year statute of limitations had been tolled through the pendency of the action by the filing of the New Jersey state court action.

### *The Ninth Circuit's Analysis*

#### *Hatfield's Individual Claims*

The Ninth Circuit first considered Hatfield's individual claims and concluded that California's equitable tolling doctrine applied to toll the action from the time Hatfield filed her first class action in New Jersey state court in 2003—on the last day of the applicable six-year statute of limitations—to her subsequent filing in California federal court in 2005.

<sup>4</sup> *Id.* at 554; *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 934-35 (Cal. 1988).

<sup>5</sup> The First, Second, Fifth, Sixth, and Eleventh circuits have generally declined to apply *American Pipe* to toll the statute of limitations for subsequently filed class actions. See Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 Fla. L. Rev. 803, 843 (2006).

<sup>6</sup> *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139, 1147-49 (9th Cir. 2000) (en banc).

<sup>7</sup> 534 F.3d 1017 (9th Cir. 2008) (holding that the *American Pipe* tolling doctrine does not extend to cross-jurisdictional tolling).

<sup>8</sup> *Ravitch v. Pricewaterhouse*, 793 A.2d 939, 943-44 (Pa. Super. 2002) (collecting cases regarding cross-jurisdictional tolling and declining to adopt the doctrine).

California courts consider three factors when applying the equitable tolling doctrine: (1) whether the defendant received timely notice regarding the filing of the first claim; (2) whether the defendant will be prejudiced in gathering evidence to defend against the second claim; and (3) whether the plaintiff acted reasonably and in good faith when filing the second claim. As with other equitable doctrines, the Ninth Circuit balanced the possible injustices to the parties versus the effect upon the public policy expressed by the statute. The Court concluded that: (1) the nearly identical New Jersey suit provided Halifax with timely notice of the claims; (2) Halifax was not prejudiced in defending the second suit because it was so similar to the first; and (3) Hatfield's filing was timely because she filed it the same day that the New Jersey Appellate Division affirmed the dismissal of her claim.

Importantly, the Court did not address the *American Pipe* tolling doctrine in its discussion of Hatfield's individual claims, even though *American Pipe* and its progeny are directly on point. As part of its discussion of Hatfield's individual claims, the Court alluded to the cross-jurisdictional issue presented by noting that a 1984 Ninth Circuit decision had suggested equitable tolling might apply when another action was first filed in a different jurisdiction.<sup>9</sup> By considering that decision vis-à-vis a 1991 California Supreme Court decision<sup>10</sup> that had applied *American Pipe* to permit intra-jurisdictional tolling for an *individual* action that followed a class action while also mentioning that "equities [could] demand that tolling be permitted," the Court reasoned that California's equitable tolling doctrine should apply to toll the statute of limitations for Hatfield's *individual* claims based on the prior class action filed in New Jersey.<sup>11</sup>

### *The Class Action Claims*

With its decision regarding Hatfield's individual claims firmly in place, the Court had laid the groundwork to address the more difficult question of whether it should extend California's equitable tolling doctrine to the other class members' claims. The Court acknowledged that "there is no California precedent directly on point," but concluded that "based on closely analogous precedent, we see no reason why California's equitable tolling doctrine would not also apply to the claims of its unnamed putative class members, who, like Hatfield, are California residents."

The Court first recognized the California Supreme Court's general agreement with *American Pipe* tolling principles<sup>12</sup> but acknowledged that its own recent application of *American Pipe* in 2008 would foreclose allowing the cross-jurisdictional tolling sought by Hatfield.<sup>13</sup> Not viewing that decision an obstacle to reaching a contrary conclusion, the Court instead applied California's equitable tolling doctrine to the class claims in much the same way as it had with Hatfield's individual claims. The Court reasoned that the two tolling doctrines are in fact different, observing that while "California courts have treated [the two types of tolling] at times as interchangeable, they are not congruent," and that California's equitable tolling doctrine covers situations beyond those covered by *American Pipe*.

<sup>9</sup> *Mayer v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984) (the case did not involve class actions).

<sup>10</sup> *Becker v. McMullin Construction Co.*, 277 Cal. Rptr. 491 (Ct. App. 1991).

<sup>11</sup> The Court also dismissed Halifax's arguments that Hatfield's motivation in filing her New Jersey action on the last day of the statute of limitations suggested bad faith, or that the New Jersey action could not be the basis for equitable tolling because it was dismissed for lack of personal jurisdiction.

<sup>12</sup> *See Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 934-35 (Cal. 1988).

<sup>13</sup> The Court squarely rejected Halifax's contention that its 2008 decision in *Clemens v. DaimlerChrysler Corporation*, 534 F.3d 1017 (9th Cir. 2008) barred Hatfield's class action. In facts incredibly similar to Hatfield's, the Court considered *American Pipe* and concluded that "the weight of authority and California's interest in managing its own judicial system" counseled against allowing cross-jurisdictional where a successive class action in California followed a class action brought in another state. *Id.* at 1026. Notably, the *Clemens* decision did not address whether California's equitable tolling doctrine would have applied to toll the action.

Explaining that prior California decisions had limited the *American Pipe* doctrine to situations where the class action and the later action are based on the same claims and subject matter (so as to give the defendant sufficient notice of the litigation), the Court reasoned that Hatfield's two virtually identical actions were in accord with that precedent.<sup>14</sup> The Court also concluded that Hatfield's claim did not present a situation where the new action would simply re-litigate a previously denied class certification issue, which prior cases had held would be an inappropriate use of *American Pipe* tolling and the class action device.<sup>15</sup>

Despite its 2008 decision that foreclosed tolling in a similar situation to Hatfield's and the fact that California's equitable tolling doctrine had not previously been applied in the class action context, the Court nevertheless relied on the *American Pipe* precedent combined with general equity principles to conclude that its review of the California and Ninth Circuit precedent gave "every indication [ ] that California would at least apply equitable tolling to claims made by its own residents." Using California's borrowing statute (which prevents non-residents from prosecuting an action in a California court if the action would be barred under the statute of limitations that would otherwise govern) as an example of limits imposed on non-residents, the Court reasoned that while California law supported applying the equitable tolling doctrine to its own residents, it did not suggest similar support for extending the doctrine to non-resident class members. The Court further concluded that if it were to do so, it might place a significant and unwelcome burden on California courts.

### ***Conclusion***

By extending California's equitable tolling doctrine to California resident class members only, the Ninth Circuit sought to protect the interests of California residents—including those who might have relied on the filing of a case in another jurisdiction to have tolled their claims—while attempting to avoid making California a forum shopping destination for class actions that have been unsuccessful in other jurisdictions. What remains to be seen is whether the Court's decision will have made California a destination forum of last resort for class actions suits seeking a "second bite at the apple" on behalf of their California resident class members.

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<sup>14</sup> See *Jolly*, 751 P.2d 923 at 937 (Cal. 1988); see also *Becker*, 277 Cal. Rptr. at 495-96.

<sup>15</sup> See *Catholic Social Services, Inc.* at 1147-49.

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