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For Whom the Statute Tolls? Not Even the Sacred Heart: Florida Class Action Jurisdiction and the Need for Savings Statute to Toll the Limitations Period

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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

*Laura Liles**

Abstract

Class actions are common litigation tools that plaintiffs use to efficiently adjudicate their rights. However, with the passage of the Class Action Fairness Act and the Florida Capacity to Sue statute, class plaintiffs could very quickly find their claims traveling from state to federal court, or simply being dismissed for lack of jurisdiction if originally filed in federal court. While this may not initially suggest an issue, CAFA and the Florida Capacity to Sue statute are creating tremendous traffic in federal courts. When considered with Florida's strict application of the statute of limitations for class actions, a plaintiff's limitations period may run while the lawsuit waits its turn to be heard in federal court. This Note explores the reluctance of both Florida and federal courts, interpreting Florida law, to apply any form of class action tolling, either through the *American Pipe* rule or equitable tolling, and the consequences of this choice on Florida lawsuits. While the court in *Sacred Heart Health System v. Humana Military Healthcare Services* came close to solving the tolling issue in Florida, the problem was never ultimately resolved. Following this almost groundbreaking case, the court in *Dineen* interpreted Florida law to not permit class action tolling, and left the plaintiffs without any means of relief. This Note then looks to other jurisdictions that have solved the tolling issue with savings statutes and explains why this is the best method for addressing the tolling issue in Florida. After considering this issue in light of the unique policy concerns underlying class actions and statutes of limitations, this Note argues that the Florida Legislature must adopt a savings statute to toll the limitations period for class actions that are denied relief because of jurisdictional issues.

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INTRODUCTION

With the passage of the Class Action Fairness Act of 2005 (CAFA),¹ federal jurisdiction for class actions greatly expanded. However, even before CAFA, class actions frequently made their way to federal court, through either diversity or federal question jurisdiction. In response to the expansive federal jurisdiction created by CAFA, some states, like Florida, took action and created legislation to narrow the scope of claims permitted as class actions in Florida state courts.² Plaintiffs were therefore paradoxically found filing their class actions initially in federal court by satisfying the requirements of § 1332(d)(3) or (4),³ or by simply filing initially in state court, then being removed to federal court due to

1. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).
 2. 2006 Fla. Laws 1419 (codified as amended at FLA. STAT. § 768.734 (2016)).
 3. 28 U.S.C. § 1332 (d)(3)–(4) (2012).

the CAFA revised removal statute,⁴ and dismissed or remanded back to state court.⁵

Whether we are examining a class of plaintiffs in either category, the issue discussed in this Note becomes pressing—what happens to the rights of class members when their class action is either dismissed completely or remanded to state court, and the statute of limitations has run by the time the plaintiffs attempt to re-file? Because these class members deserve to have their substantive claims heard and their rights adjudicated, it seems logical that courts would toll the limitations period during this time. While federal courts have adopted this interpretation of tolling in *American Pipe & Construction Co. v. Utah*⁶ and its progeny,⁷ this is not the established law in some jurisdictions, including Florida. Not only did Florida courts reject *American Pipe*,⁸ but they have also rejected equitable tolling,⁹ thus essentially denying relief for a class in this situation. The Florida Legislature has also chosen not to enact a savings statute.

This Note proposes a solution to this problem in the form of suggested Florida legislation, which mirrors the legislation of other states that have adopted savings statutes for class actions like those discussed herein. Part I discusses the important policy considerations underlying the class action lawsuit. It then provides a comprehensive overview of CAFA and discusses the consequences that this statute has had on expanding federal jurisdiction for class actions. Part I then discusses Florida's own statute governing class action jurisdiction in federal courts, and analyzes its effect, in conjunction with CAFA, on class action jurisdiction.

Part II presents a hypothetical situation to begin the analysis of what happens to the limitations period upon a determination of improper jurisdiction. Part II then engages in a brief analysis of *American Pipe* and its progeny, to identify the existence of federal class action tolling. Within Part II, this Note then delves into a discussion of Florida law concerning tolling. In doing so, this section begins with an analysis of the Florida tolling statute.¹⁰ This Note then examines Florida case law interpreting and rejecting *American Pipe*. Equitable tolling is identified as a potential

4. 28 U.S.C. § 1453.

5. See, e.g., Jeffrey L. Roether, Note, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 *FORDHAM L. REV.* 2745, 2783 (citing *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1165 (11th Cir. 2006)).

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

7. See, e.g., *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

8. See *Becnel v. Deutsche Bank, AG*, 507 Fed. App'x 71, 73 (2d Cir. 2013) (citing FLA. STAT. § 95.051(2) (2012)) (determining that "Florida does not allow tolling during the pendency of class action lawsuits no matter where they are filed").

9. See, e.g., *HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094, 1098–99 (Fla. Dist. Ct. App. 2004).

10. FLA. STAT. § 95.051.

solution to the statute of limitations issue, and its rejection in Florida is discussed. Part II concludes with an analysis of *Sacred Heart*, a Florida case that almost altered Florida's long history of rejecting limitations tolling, except in the specific instances specified in the Florida tolling statute.

Part III engages in an analysis of several different jurisdictions that have enacted savings statutes to allow for tolling of the statutes of limitations. Finally, Part IV urges the Florida Legislature to adopt a savings statute, similar to the one proposed by this Note, to remedy the problem of class action tolling in Florida. With the increased likelihood that class action plaintiffs will be left without remedy after their lawsuit is denied jurisdiction, Florida's adoption of a savings statute would ensure that the effects of CAFA and the Florida class action statute do not strip class plaintiffs of their viable claims merely on procedural grounds.

I. THE CLASS ACTION FAIRNESS ACT OF 2005 AND EXPANDED FEDERAL JURISDICTION

As a vehicle to vindicate the rights of many at once, the class action lawsuit has proven itself to be an extremely useful tool in the American justice system. However, such positive results have not come without complications, including the sometimes illusory nature of true adjudication of class members' rights. This portion of the Note will begin by briefly addressing the role of the class action lawsuit, the effects that CAFA has had on its use and function within federal courts, and Florida's legislation furthering CAFA's goals.

A. *The Class Action and Expansion of Federal Jurisdiction*

With the protection of public rights in mind, class actions were formed to "enable those with small claims for whom individual litigation would be economically irrational to band together in group litigation against a common adversary."¹¹ Proponents of class action lawsuits argue that they allow consolidation of claims, which decreases the plaintiffs' time in court and expense.¹² Therefore, in instances where an individual plaintiff alone could not justify the expense of bringing a lawsuit, the class action gives this individual the opportunity to seek justice.¹³ However, this positive notion of the class action also reveals one of its flaws, in that the increased ability of plaintiffs to bring their lawsuits through the class

11. Nan S. Ellis, *The Class Action Fairness Act of 2005: The Story Behind the Statute*, 35 J. LEGIS. 76, 76 (2009) (quoting Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1487 (2008)).

12. *Id.*

13. *See id.*

action has contributed to the greatly increased number of lawsuits filed.¹⁴ While opponents criticize the increased filing for various reasons,¹⁵ it is important to note that for the purposes of this Note, this initial influx in filing represents the beginning of the issue, which was only complicated by CAFA.

After February 18, 2005, when CAFA was signed into law,¹⁶ even greater opportunities were created to increase class action filing. In fact, following Congress's expansion of federal jurisdiction for class actions meeting minimal diversity and over five million dollars in controversy, CAFA has been labeled as a "Class Action Federalization Act."¹⁷ Accordingly, the Legislature insists that CAFA was intended to accomplish three goals: (1) to expand federal diversity jurisdiction for class actions; (2) to facilitate the removal of class actions from state to federal court; and (3) to alter federal procedures for settling class actions.¹⁸ Because of the need to keep state court judges from certifying truly nationwide class actions where they believe a federal judge would not,¹⁹ as well as the increased objectivity desired for class certification issues, which many believe better comes from federal judges with more institutional experience in handling such lawsuits,²⁰ CAFA emerged as federal legislation to solve these issues.

14. *See id.* (describing this increase in filing as a "skyrocketing number").

15. While this Note is not intended to explore the vast policy implications and concerns of the class action lawsuit, it should be further noted that the small amount that each plaintiff individually often has at stake in the lawsuit gives rise to concerns about disproportional lawyer gain. *Id.* (citing John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1442 (2005) (describing this gain as a "money generator" for lawyers)).

16. Linda Pissott Reig et al., *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TORT TRIAL & INS. PRAC. L.J. 1087, 1087 (2005).

17. Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 416 (2007). When considered in light of other recent federal legislation, such as the Multiparty Multiforum Trial Jurisdiction Act of 2002, tort reform is likely also a driving factor in increasing federal jurisdiction for class action lawsuits, "based on the assumption that federal courts will be less sympathetic to mass tort and innovative tort claims than the state courts." *Id.* However, for the purposes of this Note, it is important to simply appreciate the vast increase in federal jurisdiction for these claims, which certainly plays a role in backing up the federal court system.

18. Reig, *supra* note 16, at 1087; *see also* Mallory A Gitt, Comment, *Removal Jurisdiction over Mass Actions*, 90 WASH. L. REV. 453, 468 (2015) (listing Congress's three primary goals to give federal courts control over more aggregate litigation as "[1] to assure fair and prompt recoveries for class members with legitimate claims; [2] to restore the intent of the Framers by expanding federal jurisdiction over inter-state class actions; and [3] to benefit society by encouraging innovation and lowering consumer prices" (quoting S. REP. NO. 109-14, at 30 (2005))).

19. *See* Reig et al., *supra* note 16, at 1088.

20. *See id.*

B. Overview of CAFA and Its Limitations

CAFA contains nine sections, two of which constitute the table of contents and legislative intent, and four of which constitute enactment and housekeeping matters.²¹ Sections three, four, and five are the substantive provisions of the Act, which accomplish the three goals discussed above.²² Plaintiffs involved in a class action are now able to bypass the previous requirements of complete diversity and \$75,000 per individual claim²³ and instead satisfy the diversity requirement to obtain original jurisdiction in the federal court with an aggregate amount in controversy of five million dollars or more,²⁴ so long as any member of the class of plaintiffs is a citizen of a state or foreign country different from that of any defendant.²⁵

Amidst such a seemingly hospitable environment created by CAFA for classes to file in federal court, the federal Diversity of Citizenship statute still provides the court with many ways to decline jurisdiction and either dismiss the claim or remand it back to state court. Sections 1332(d)(3)²⁶ and (4)²⁷ are responsible for these jurisdictional limitations. Subsection (d)(3) provides that, “in the interests of justice and looking at the totality of the circumstances,” a district court can decline to exercise jurisdiction established by § 1332(d)(2) over a class action “in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of”²⁸ subsections (A)–(F).²⁹

21. *Id.*

22. *See* 28 U.S.C. § 1332(d) (2012) (expanding diversity jurisdiction); *see also id.* § 1453 (allowing class actions to more easily reach federal court by eliminating obstacles); *id.* §§ 1711–15 (adding further procedures to ensure fairness in class action settlements).

23. *See* Reig et al., *supra* note 16, at 1089.

24. 28 U.S.C. § 1332(d)(2).

25. *Id.* § 1332(d)(2)(A)–(C).

26. *Id.* § 1332(d)(3).

27. *Id.* § 1332(d)(4).

28. *Id.* § 1332(d)(3).

29. *Id.* § 1332(d)(3)(A)–(F) (“(A) whether the claims asserted involve matters of national or interstate interest; (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the law of other States; (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction; (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants; (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.”).

Subsection (d)(4) also allows federal courts to decline to exercise jurisdiction established by paragraph 2 over a class action in which three elements are satisfied, in addition to the provisions following these elements: (1) “greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed”;³⁰ (2) at least one defendant is one from whom the class members seek significant relief,³¹ “whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class”³² and “who is a citizen of the State in which the action was originally filed”;³³ and (3) that the principal injuries from the alleged conduct must have occurred in the state in which the action was filed,³⁴ and that “no other class action has been filed asserting the same or similar factual allegations against any of the defendants” on behalf of the same or similar class during the three year period before the action in question was filed.³⁵ The final provision limiting federal diversity jurisdiction provides that jurisdiction will be declined if two-thirds or more of the plaintiff class members and the primary defendants “are citizens of the State in which the action was originally filed.”³⁶ Therefore, under these provisions, if a class desires to ensure that its lawsuit will remain in state court, it must limit its class definition to the forum state and sue forum-state defendants.³⁷

CAFA also increases federal class action traffic by making the removal of lawsuits to federal court easier than it was before the Act. The federal removal of class actions statute³⁸ eliminates the previous ban on diversity removal for class actions if any defendant is a forum-state citizen, does not require all defendants to join the notice of removal, and eliminates the one-year removal requirement.³⁹ Because removal is the means by which many defendants will take the class action to federal court, it follows from the policy concerns of CAFA that this statute be liberal.

30. *Id.* § 1332(d)(4)(A)(i)(I).

31. *Id.* § 1332(d)(4)(A)(i)(II)(aa).

32. *Id.* § 1332(d)(4)(A)(i)(II)(bb).

33. *Id.* § 1332(d)(4)(A)(i)(II)(cc).

34. *Id.* § 1332(d)(4)(A)(i)(III).

35. *Id.* § 1332(d)(4)(A)(i)–(ii).

36. *Id.* § 1332(d)(4)(B).

37. *See* Reig et al., *supra* note 16, at 1089.

38. 28 U.S.C. § 1453(b).

39. *Id.*; *see* Reig et al., *supra* note 16, at 1090. Subsection (c)(1) of the statute also allows for appellate review of a district court’s order on a motion to remand the class action to the state court from which it was removed, as long as the application is made to the appellate court within ten days after the order was entered. 28 U.S.C. § 1453(c)(1).

C. Florida's Furtherance of CAFA Policy Goals

Soon after CAFA was enacted, Florida followed its lead⁴⁰ and enacted the Capacity to Sue statute,⁴¹ which would narrow the scope of permissible class action claims filed in Florida state courts.⁴² Before this statute was enacted, class membership for class action lawsuits filed in Florida state courts was not limited to Florida residents.⁴³ Now, class membership for lawsuits filed in a state court is exclusively limited to Florida residents.⁴⁴ Although this new requirement contains several narrow exceptions,⁴⁵ the new law greatly reduces the ability of class plaintiffs to bring their claims in Florida state court. The statute also imposes another restriction⁴⁶ on Florida claimants who wish to maintain a class action seeking statutory penalties with respect to motor vehicle licenses,⁴⁷ consumer protection,⁴⁸ retail installment sales,⁴⁹ and motor vehicle lease disclosure⁵⁰. If claimants wishing to keep their class action in Florida are unable to show actual loss of a compensatory value resulting from the alleged statutory violation, the claim will be unable to survive in Florida.⁵¹

40. See Adam Feit, *Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 958 (2008) (stating that the new Florida law “certainly complements CAFA and the national trend toward removing cases of national importance to federal courts”).

41. 2006 Fla. Laws 1419 (codified as amended at FLA. STAT. § 768.734 (2016)).

42. Francis X. Rapprich III & Christopher M. Harne, *Cutting Classes: Florida Tightens Its Restrictions on Class Action Lawsuits*, FLA. B.J., Mar. 2007, at 9, 9 (describing the Act as potentially the most dramatic foray of the state legislature into the regulation of class action lawsuits).

43. See *id.* However, even before 2006, Florida courts sometimes imposed their own restrictions on class membership. *Id.*; see, e.g., R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996) (modifying the trial court’s decision to certify a nationwide class of over one million members to limit the class to only Florida residents, as class certification here would have overwhelmed the state court resources and been completely unmanageable).

44. FLA. STAT. § 768.734(1)(a).

45. *Id.* § 768.734(1)(b)(1) (stating that a Florida court can implement this exception for a plaintiff whose claim is recognized within the claimant’s state of residence and not time-barred, and “whose rights cannot be asserted because the claimant’s state of residence lacks personal jurisdiction over the defendant or defendants”). The statute also provides an additional exception that “the claimant class may include nonresidents if the conduct giving rise to the claim occurred in or emanated from this state.” *Id.* § 768.734(1)(b)(2).

46. *Id.* § 768.734(2). However, the statute does not include a requirement for nonmonetary claimants to prove actual damages. See Rapprich & Harne, *supra* note 42, at 9.

47. FLA. STAT. §§ 320.01–95 (2016).

48. FLA. STAT. §§ 501.001–997 (2016).

49. FLA. STAT. §§ 520.01–999 (2016).

50. FLA. STAT. §§ 521.001–006 (2016).

51. See Rapprich & Harne, *supra* note 42, at 9.

As predicted,⁵² the Florida statute has had a great impact on sending class action lawsuits to federal court, especially when considered with CAFA.⁵³ While these “castaway plaintiffs”⁵⁴ could attempt to bring their lawsuit in their home state, assuming they could obtain personal jurisdiction over the defendant,⁵⁵ it remains likely that CAFA’s lenient diversity and removal statutes would easily permit the class action to be either successfully filed in federal court first, assuming the plaintiffs’ attorney is aware of the strict Florida legislation, or simply be removed to federal court after originally being filed in a Florida state court. It is therefore imperative for the class members’ attorney to make a strategic decision about where to originally file the class action, because, as this Note will further discuss, an incorrect decision could be fatal for the lawsuit.

II. CONSEQUENCES OF FILING IN THE WRONG FORUM

To begin, it is beneficial to further develop the issue with a hypothetical situation. Assume a class of 100 plaintiffs, most of whom are Florida residents, obtain a lawyer to represent the class in a lawsuit against Defendant X, who is a corporation with a national presence. While Defendant X is not incorporated in Florida, it maintains several substantial places of business within Florida. However, as with many Florida dwellers, it is not entirely clear whether each class member is actually domiciled in Florida permanently (many of the class members maintain vacation homes in Florida, yet some are not residents of Florida). While the residency complications presented here might resemble a convoluted law school civil procedure exam, it is important to appreciate the complex decisions Florida lawyers face when selecting a forum. If the lawyer believes that the amount in controversy exceeds five million dollars in the aggregate and the corporation can be considered a resident of the state in which it is incorporated (not Florida), diversity jurisdiction could be established under CAFA, because there are at least 100 class members.⁵⁶ However, if the claim brought by plaintiffs includes a nonfederal question, the lawyer may have doubts about successfully obtaining diversity jurisdiction under § 1332.

52. *See, e.g.*, Feit, *supra* note 40, at 958 (predicting that the new law would “certainly reduce the number of complex class actions involving large numbers of nonresidents”); Rapprich & Harne, *supra* note 42, at 9 (stating that the law “could drastically reduce the size and number of class action claims brought in Florida state courts”).

53. Feit, *supra* note 40, at 958 (stating that the new Florida law “certainly complements CAFA and the national trend toward removing cases of national importance to federal courts”).

54. Rapprich & Harne, *supra* note 42, at 12.

55. *See id.* at 9.

56. *See* 28 U.S.C. § 1332(d)(2)(A) (2016).

Additionally, even if the lawyer believes he can successfully satisfy the three requirements of CAFA, he still must consider the limitations established in paragraphs 3 and 4 of § 1332(d).⁵⁷ Although CAFA's expansion of diversity jurisdiction has increased the likelihood that this lawsuit can successfully satisfy the diversity requirement for federal jurisdiction, the district court still retains many possible avenues through which it can either dismiss the lawsuit or remand it back to a Florida state court.

Perhaps, after considering these possibilities, the lawyer determines that it is more likely that a Florida state court is the proper forum in which to file the class action. In this case, he must be wary of Florida's limitations on the ability of a plaintiff to file a class action in a Florida state court.⁵⁸ If the lawyer determines that Florida Statutes § 768.734 will not inhibit his ability to file, and the issue concerns a nonfederal question, perhaps the Florida court will have proper jurisdiction. However, if this occurs, it is usually likely that Defendant X will work to remove the lawsuit to federal court. Fortunately for the defendant, CAFA has made this easier, as previously discussed.⁵⁹ Therefore, the class could very well find its way to federal court anyway, despite the lawyer's initial deliberations. The possibility always remains that the class action will be remanded back to state court by the district court.

Clearly, such jurisdictional complications present issues with timing, and thus give rise to Defendant X's statutes of limitations defenses. After the class action makes it to federal court (which it likely will, regardless of whether the plaintiffs' attorney originally files it there first), it will have to wait to be heard on a motion to determine jurisdiction. Such waiting period will likely take some time, because of the increased access all class and mass action lawsuits have to federal courts through CAFA. Therefore, upon its initial filing, the statute of limitations period begins to run on the plaintiffs' claim. What will happen if, upon either the Florida court or the district court's determination of improper jurisdiction, the lawsuit is dismissed or remanded, yet the limitations period has run? Will the lawyer have to explain the dismissal to the class as a loss? Or will he have the opportunity to re-file the lawsuit in the proper forum, even though the statute of limitations has run? Unfortunately, for these Florida plaintiffs, the lawsuit will be dead.

57. See *supra* notes 26–36 and accompanying text.

58. See *supra* text accompanying notes 40–51.

59. See *supra* text accompanying notes 36–37.

A. American Pipe and Its Progeny: The Establishment of Federal Tolling

For the hypothetical class of plaintiffs discussed above, federal courts would permit the limitations period to be suspended and thus allow adjudication of their rights. Before the state and federal cases concerning tolling are considered, it should be noted that for the purpose of this Note, a nuanced analysis of *American Pipe* and its progeny is not entirely necessary, as these cases are explored extensively in thousands of other publications.⁶⁰ But to begin a brief survey of these cases, the well-known case that began a trilogy of federal tolling cases is *American Pipe & Construction Co. v. Utah*.⁶¹ In *American Pipe*, the U.S. Supreme Court held that the filing of a class action under Federal Rule 23 would toll the statute of limitations during the pendency of the action.⁶² The Court further held that the same tolling standard should be applied where unnamed class members, who were unaware of the proceedings brought initially in their interest, seek to intervene in the action later on.⁶³

Only nine years later, the Supreme Court held in *Crown, Cork & Seal Co. v. Parker*⁶⁴ that upon denial of class certification, the statute of limitations is tolled when absent members seek to initiate their own, independent lawsuits, rather than intervening in the putative class action,⁶⁵ thereby expanding the instances in which tolling is applied. Following this decision, the Supreme Court reigned in its willingness to toll with *Chardon v. Fumero Soto*,⁶⁶ in holding that *American Pipe* did not actually establish a uniform federal rule of decision mandating suspension, rather than renewal, whenever a federal class action tolls a statute of limitations.⁶⁷ These three cases establish the acceptance of class

60. More useful to this Note will be the subsequent analysis of class actions interpreting Florida state law and the *American Pipe* holding. See Rhonda Wasserman, *Tolling: The American Pipe Tolling Rule and Successive Class Actions*, 58 FLA. L. REV. 803, 805 (2006); see also *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 GEO. WASH. L. REV. 532, 533 (1996) (arguing that in the area of mass tort class actions, state courts have been improperly influenced by federal determinations on tolling the statute of limitations); Kathleen L. Cerveny, Note, *Limitation Tolling When Class Status Denied: Chardon v. Fumero Soto and Alice in Wonderland*, 60 NOTRE DAME L. REV. 686, 701 (1985).

61. 441 U.S. 538 (1974); see Wasserman, *supra* note 60, at 805 (stating that in *American Pipe*, “the Supreme Court held that the statute of limitations is suspended for the period between the filing of a class action complaint and the denial of a motion to certify the class when, upon denial of class certification for a lack of numerosity, absent class members seek to intervene in the action to press their individual claims”).

62. *Am. Pipe & Constr. Co.*, 441 U.S. at 550–51.

63. *Id.* at 551–52.

64. 462 U.S. 345 (1983).

65. *Id.* at 353–54; see Wasserman, *supra* note 60, at 806.

66. 462 U.S. 650 (1983).

67. *Id.* at 662.

action tolling within the federal realm. What follows is an analysis of how this law has been applied by courts interpreting Florida law, the central issue of this Note.

B. Tolling in Florida

While the previously discussed trilogy of case law has helped to clear the issue of when to toll the limitations period for class action lawsuits, it must again be emphasized that these cases involved class actions that were filed in federal court, asserted federal causes of action, and involved federal statutes of limitations. It follows that *American Pipe* is only persuasive for state courts. Therefore, before entertaining a discussion of Florida courts' failure to follow the precedent set forth in *American Pipe*, the Florida tolling statute must be considered.

1. The Florida Tolling Statute and Its Interpretation

The Florida statute defining when statutes of limitations are to be tolled covers any statute of limitations, as delineated by the statute, with some exceptions.⁶⁸ The statute provides for tolling in situations where the individual being sued is absent from the state,⁶⁹ has used a false name and thus avoided service of process,⁷⁰ or has concealed himself so as to avoid service of process.⁷¹ It should be noted that paragraphs (a), (b), and (c) will not apply if service of process or publication can be made to confer jurisdiction in a sufficient manner.⁷² Additional situations relating to minors, incapacitated individuals, and monetary or arbitral proceedings provide specific reasons for tolling the limitations period under the statute.⁷³

68. FLA. STAT. § 95.051 (2016). The statute delineates exceptions for claims arising out of § 95.281 (real property), § 95.35 (termination of contracts to purchase real estate in which there is no maturity date), and § 95.36 (dedications to municipalities or counties for park purposes).

69. *Id.* § 95.051(1)(a).

70. *Id.* § 95.051(1)(b).

71. *Id.* § 95.051(1)(c).

72. *Id.* § 95.051. Additionally, paragraph 2 of the statute does not allow for a disability or any other reason to constitute a reason to toll, except as specified in the Florida Probate Code or Guardianship Law. *Id.* § 95.051(2).

73. The statute permits tolling if the person entitled to sue is adjudicated incapacitated before the cause of action accrued, as long as the action was begun within seven years of the "act, event, or occurrence giving rise to the cause of action." *Id.* § 95.051(1)(d). Likewise, the period is tolled in paternity actions during the time of voluntary payments made by an alleged father, and during any time in which a parent, guardian, or ad litem either does not exist, has an adverse interest to the person entitled to sue, or is himself incapacitated to sue, or for a minor or previously adjudicated incapacitated person entitled to sue. *Id.* § 95.051(1)(e), (i). This section also creates an exception for the statute of limitations for a medical malpractice claim as provided for in section 95.11. *Id.* § 95.051(1)(i). Also, like paragraph (d), the lawsuit must also have begun "within 7 years after the act, event, or occurrence giving rise to the cause of action." *Id.* The tolling

Clearly, there is no provision in this statute providing for tolling of the limitations period for class actions. To compound this issue, Florida courts have been notoriously strict in their interpretation of the statute. Time and time again, both Florida courts and federal courts interpreting state law⁷⁴ have expressly stated that unless the reason for tolling is delineated in the tolling statute, tolling will not be available for the lawsuit.⁷⁵ Additionally, the clear language of the statute in paragraph 2 indicates that tolling is not available for any “disability or other reason,” except those reasons enumerated in paragraph 1.⁷⁶ It follows that because courts are so strict in their interpretation of the Florida tolling statute, class members in need of its relief must simply watch their potentially meritorious lawsuit die if the limitations period expires before they are able to re-file in the proper forum.

2. Florida and *American Pipe*

Because class members will be unable to use the Florida tolling statute to preserve the limitations period, it is important to discuss the role that *American Pipe* tolling has played in courts interpreting Florida law, because if Florida is a jurisdiction in which such common law tolling has been adopted, this is another means by which class plaintiffs could toll

statute delineates two provisions for tolling that deal with monetary proceedings, including allowing tolling when “[t]he payment of any part of the principal or interest of any obligation or liability founded on a written instrument.” *Id.* § 95.051(1)(f). Tolling is permitted during the period of an intervening bankruptcy for the expiration period of a tax certificate. *Id.* § 95.051(1)(h). This portion of the statute also provides for tolling in any proceeding under chapter 197. *Id.* § 95.051(1)(i). Finally, the pendency of an arbitral proceeding “pertaining to a dispute that is the subject of the action” also tolls the limitations period. *Id.* § 95.051(1)(g).

74. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 743 (1980) (stating that state law on tolling the statute of limitations will be applied to an action based on state law, but in federal court).

75. *See, e.g., Foxworth v. Kia Motors Corp.*, 377 F. Supp. 2d 1196, 1203 n.9 (N.D. Fla. 2005) (“Florida law does not allow the tolling of statutes of limitation for any reasons other than those specifically enumerated in Fla. Stat. § 95.051.”); *Senger Bros. Nursery v. E.I. Dupont de Nemours & Co.*, 184 F.R.D. 674, 685 (M.D. Fla. 1999) (“Florida Statute § 95.051 does not permit tolling of statutes of limitation for any reason, other than those specifically included in the statute.”); *In re Se. Banking Corp.*, 855 F. Supp. 353, 357 (S.D. Fla. 1994) (“Only those circumstances expressly provided by the statute will toll the statute of limitations.”); *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) (“Section 95.051 delineates an exclusive list of conditions that can ‘toll’ the running of the statute of limitations”); *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000) (deferring to legislative intent that no tolling exceptions exist to § 95.051); *HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094, 1098 (Fla. Dist. Ct. App. 2004) (“[T]he legislature has made clear its intent to exclude all tolling exceptions not listed in the statute . . . [and] unlike the majority of states, Florida has chosen not to adopt a ‘savings statute’ that allows a plaintiff whose case has been dismissed otherwise than on the merits to pursue the action even though the statute of limitations has run.”).

76. FLA. STAT. § 95.051(2).

the statute of limitations. Few Florida courts have discussed *American Pipe*, and none have adopted it as the law.⁷⁷ As the following cases illustrate, any analysis of Florida law has unmistakably been interpreted as not allowing for *American Pipe* tolling.

In 2013, the U.S. Court of Appeals for the Second Circuit faced this issue while interpreting Florida law in *Becnel v. Deutsche Bank*.⁷⁸ Here, Plaintiffs brought a diversity suit against defendants, alleging fraud, breach of contract, breach of fiduciary duty, and other claims related to Plaintiff's purchase of a tax shelter.⁷⁹ In his complaint, the Plaintiff pled that he was a resident of Florida.⁸⁰ Therefore, the court applied the Florida statute of limitations for fraud and fiduciary duty claims,⁸¹ which is four years, and the Florida statute of limitations for contract claims,⁸² which is five years.⁸³ The court reasoned that the statute of limitations period for the fraud-based claims should have been discoverable through due diligence, and therefore began when the facts giving rise to the claims were discoverable.⁸⁴ Further, for both of the claims at issue, the time for filing suit started to run from the date of accrual of the claim.⁸⁵

The court determined that, because the Plaintiff's accounts with Defendant were closed on or about May 15, 2015, and the lawsuit was filed on March 9, 2011, Plaintiff's contract and fiduciary claims were time-barred.⁸⁶ The court also found Plaintiff's fraud-based claims to be time-barred.⁸⁷ Because a discovery rule governed, the Plaintiff's claim would only have been timely if he did not have constructive notice, before March 9, 2007, of the facts giving rise to this claim.⁸⁸ As the lead Plaintiff in a class action lawsuit alleging claims based in fraud against the defendant, amongst others, filed on January 28, 2005, the Plaintiff had actual notice of the facts that gave rise to the lawsuit.⁸⁹ Therefore, the

77. See Answer Brief of Mosaic Fertilizer, LLC at 19 n.11, *Anderson v. Mosaic Fertilizer, LLC*, 160 So. 3d 419 (Fla. Dist. Ct. App. 2015) (No. 2D13-5828), 2014 WL 1399210 (citing *Hromyak v. Tyco Int'l, Ltd.*, 942 So. 2d 1022 (Fla. Dist. Ct. App. 2006) (explaining that the *Hromyak* "court applied *American Pipe* tolling to a federal statute of limitations, and thus has 'little persuasive value' on the issue of Florida law")) (stating that only five Florida court decisions have discussed *American Pipe*).

78. 507 Fed. App'x 71 (2d Cir. 2013).

79. *Id.* at 72.

80. *Id.*

81. FLA. STAT. § 95.11(3)(j) (2016).

82. *Id.* § 95.11(2)(b).

83. *Becnel*, 507 Fed. App'x at 72–73.

84. *Id.* at 73.

85. *Id.*

86. See *id.*

87. See *id.*

88. *Id.*

89. *Id.*

court found each element of the lawsuit to be time barred, as the statutes of limitations had run.⁹⁰ In its reasoning, the court explicitly stated that “Florida does not allow tolling during the pendency of class action lawsuits no matter where they are filed.”⁹¹ The court made it clear that *American Pipe* tolling should not be applied in Florida law and that after a federal court denies a class action lawsuit leave to proceed within that forum, tolling will not be recognized for individual claims brought in state court after such remand or dismissal.⁹²

Additionally, the plaintiff requested the Second Circuit to certify to the Florida Supreme Court the question of whether Florida would recognize cross-jurisdictional tolling.⁹³ The court declined to do so, again, because of the clarity found in the Florida tolling statute,⁹⁴ and because it determined that “any request to the Florida courts to accept certification would almost certainly be rejected.”⁹⁵ The Second Circuit made this determination because even if the statute of limitations began to run on May 2000, the lawsuit would still be barred if Florida applied cross-jurisdictional tolling.⁹⁶ Therefore, because Florida’s application of cross-jurisdictional tolling was not determinative in *Becnel*, the Florida Supreme Court never resolved this issue.

Another case illustrating the role, or lack thereof, of the *American Pipe* rule in Florida class actions is *In re Vitamins Antitrust Litigation*.⁹⁷ This lawsuit began when Southeast Milk, Inc., an indirect purchaser of vitamin products, filed a price fixing lawsuit in a Florida state court against several vitamin manufacturers.⁹⁸ Defendants subsequently removed the lawsuit from Florida state court to federal court based on diversity.⁹⁹ After removal, the case was transferred to the U.S. District Court for the District of Columbia.¹⁰⁰ Defendants then filed a motion to dismiss, alleging that the four-year statute of limitations barred the plaintiff’s claim, which the district court granted.¹⁰¹ The court reasoned that this ruling was appropriate, because the lawsuit filed on December

90. *See id.* at 72–73 (stating appellant’s suit was time barred under either Florida or New York’s statute of limitations).

91. *Id.* at 73 (citing FLA. STAT. § 95.051(2) (2016)).

92. 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 3:15 (13th ed. 2016) (interpreting *Becnel v. Deutsche Bank, AG*, 507 Fed. Appx. 71 (2d Cir. 2013)).

93. *See Becnel*, 507 Fed. App’x at 73 n.2.

94. *See id.*

95. *Id.*

96. *See id.*

97. *In re Vitamins Antitrust Litig.*, 183 Fed. App’x 1 (D.C. Cir. 2006).

98. *Id.* at 1.

99. *Id.*

100. *Id.*

101. *Id.*

1, 2003 did not include allegations of any relevant facts occurring after March 1999.¹⁰² Because Florida law mandates that the statute of limitations begins to run when a cause of action accrues, meaning “when the last element constituting the cause of action occurs,”¹⁰³ the motion to dismiss was granted.¹⁰⁴

On appeal, the plaintiff alleged that the limitations period was tolled during the pendency of a related class action, of which the plaintiff had been a class member from June 1999 to 2001, because of the *American Pipe* rule.¹⁰⁵ However, the court disagreed with the plaintiff’s argument and found that the statute of limitations was not tolled during this period.¹⁰⁶ In its reasoning, the court looked to the Florida tolling statute to determine that the statute clearly allows for tolling in only eight enumerated scenarios.¹⁰⁷ The court also looked to the case law mentioned earlier in this Note,¹⁰⁸ and reasoned that the Florida Supreme Court has made it plainly clear that the list enumerated in the Florida tolling statute is exclusive.¹⁰⁹ The court further found that the case law presented by the plaintiff did not support a contention “that Florida courts would contravene the straightforward statutory language,” especially considering the Florida Supreme Court’s earlier determination that courts generally will not write in exceptions to statutes of limitations where the legislature has not done so.¹¹⁰ Therefore, an application of the *American Pipe* rule to Florida law was denied, the statute of limitations was not tolled, and the plaintiff’s request for certification to the Florida Supreme Court was denied.¹¹¹

The final case that demonstrates Florida’s reluctance to adopt the *American Pipe* tolling rule is *In re Rezulin Products Liability Litigation*.¹¹² Here, the plaintiff sustained a Rezulin-induced liver injury in October 1999, yet did not commence the lawsuit until March 22, 2004.¹¹³ Because this case was governed by Florida’s four-year statute of limitations, the defendants moved for summary judgment to dismiss the complaint on the ground that it was barred by the statute of limitations.¹¹⁴

102. *Id.*

103. FLA. STAT. § 95.031(1) (2016).

104. *Vitamins Antitrust Litig.*, 183 Fed. App’x at 1.

105. *Id.* at 2 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)).

106. *See id.*

107. *See id.* (citing FLA. STAT. § 95.051(1)).

108. *See supra* note 75 and accompanying text.

109. *See Vitamins Antitrust Litig.*, 183 Fed. App’x at 2.

110. *Id.* (citing *Fed. Ins. Co. v. Sw. Fla. Ret. Ctr., Inc.*, 707 So. 2d 1119, 1122 (Fla. 1998)).

111. *Id.*

112. No. 00Civ.2843LAK, 2006 WL 695253, at *1 (S.D.N.Y. Mar. 15, 2006).

113. *Id.*

114. *Id.*

However, the plaintiff maintained that her action was timely filed based on the tolling rule established in *American Pipe*, as she was a putative member of a class seeking recovery for Rezulin-induced injuries.¹¹⁵ While interpreting Florida law, the Southern District of New York rejected this argument.¹¹⁶

In its reasoning, the court plainly differentiated the toll that was adopted in *American Pipe* from the toll that would have to be adopted in this case, as *American Pipe* represented a toll of the federal statute of limitations for a federal claim, brought through a federal class action.¹¹⁷ The court made it clear that the instant case represented an entirely different situation, with the plaintiff requesting that the state statute of limitations be tolled for a purely state law claim.¹¹⁸ Therefore, the court succinctly rejected *American Pipe*, holding, “Florida law governs the question whether the statute was tolled by the filing of one or more other class actions. Florida does not permit class action tolling.”¹¹⁹

3. Florida Law and Equitable Tolling

Because neither statutory tolling nor the *American Pipe* rule are available to class action plaintiffs under Florida law, class plaintiffs who find themselves in a situation like the one discussed above¹²⁰ are forced to make an alternative argument as to why the court should toll the statute of limitations. This is when, as a last ditch effort of sorts, plaintiffs argue that equitable tolling should suspend the statute of limitations, as equitable arguments can be made in the absence of express savings or tolling statutes.¹²¹ In situations where equity so demands, the U.S. Supreme Court has tolled the statute of limitations, unless such an interpretation of tolling would be “inconsistent with the text of the relevant statute.”¹²² While the Supreme Court has stated that legislative intent must be considered when an equitable tolling issue is being decided,¹²³ the presence of “fraud, concealment, or other misconduct on

115. *Id.* (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)).

116. *See id.*

117. *See id.*

118. *See id.*

119. *Id.* (citing *Senger Bros. Nursery, Inc. v. E.I. DuPont de Nemours & Co.*, 184 F.R.D. 674, 680 (M.D. Fla. 1999)) (rejecting the plaintiff’s similar reliance on *American Pipe* and *Crown, Cork & Seal*, and finding that under the Florida tolling statute, the claims were time-barred).

120. *See supra* Part II.

121. *See Wasserman, supra* note 60, at 815.

122. *Young v. United States*, 535 U.S. 43, 49 (2002) (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)).

123. *See Wasserman, supra* note 60, at 816 (describing the issue of equitable tolling as “one of ‘legislative intent whether the right shall be enforceable . . . after the prescribed time’” (alteration in original) (quoting *Burnette v. N.Y. Cent. R.R.*, 380 U.S. 424, 426 (1965))).

the part of the defendant”¹²⁴ have all served as reasons to toll the statute of limitations. However, even in the absence of these factors, some courts have room to toll the statutes of limitations as they deem equity would require, and consequently have done so.¹²⁵

In Florida, precedent makes it clear that equitable tolling is not a viable means for class action plaintiffs to re-file their lawsuit in the proper forum after it has been dismissed from federal court for lack of jurisdiction, even after the statute of limitations has run.¹²⁶ In *HCA Health Services of Florida, Inc. v. Hillman*,¹²⁷ Florida’s Second District Court of Appeal held that the doctrine of equitable tolling could not be applied in civil actions.¹²⁸ The defendants challenged the final judgment awarding damages to the plaintiffs, who were critical care nurses in one of the defendant’s hospitals.¹²⁹ The nurses brought a whistleblower action pursuant to Florida Statutes § 448.103 against the defendant, their employer, because they were disciplined after complaining about deficient nursing care.¹³⁰ Under § 448.103, aggrieved employees can institute a civil action within two years after discovering the retaliatory personnel action, or within four years after the personnel action was taken, whichever occurs earlier.¹³¹ In this case, each cause of action could have accrued no later than either May 27, 1999, or July 2, 1999.¹³² The plaintiffs filed this lawsuit on July 9, 2001, followed by the defendant’s filing of a motion to dismiss, or summary judgment in the alternative, based on the statute of limitations.¹³³

In response to the defendant’s motion, the plaintiffs maintained that the doctrine of equitable tolling should be applied to sustain their claims, even though the complaint was clearly filed after the limitations period

124. *Id.* at 817 (discussing equitable tolling principles).

125. *See id.* Like legislatures that have enacted savings statutes to toll the limitations period during the same claim’s pendency of previous litigation, the Arizona Supreme Court has outlined the three circumstances in which it will equitably toll the statute of limitations, all of which must be met for tolling to apply. *Id.* at 817 (“The . . . requirements for the equitable tolling doctrine are as follows: 1) timely notice to the defendant in filing the first claim; 2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; [and] 3) reasonable and good faith conduct by the plaintiff in prosecuting the first action and diligence in filing the second action.” (alteration in original) (quoting *Hosogai v. Kadota*, 700 P.2d 1327, 1333 (Ariz. 1985))).

126. 35 FLA. JUR. 2D *Limitations and Laches* § 91 (2016) (“Other courts, however, have declined to apply equitable tolling outside the administrative law context, and these courts include a Florida district court of appeals and federal district courts construing Florida law.”).

127. 906 So. 2d 1094 (Fla. Dist. Ct. App. 2004).

128. *Id.* at 1099.

129. *Id.* at 1095.

130. *Id.*

131. FLA. STAT. § 448.103(1)(a) (2016).

132. *See HCA Health Servs.*, 906 So. 2d at 1095.

133. *Id.*

had run.¹³⁴ The plaintiffs based their argument on *Machules v. Department of Administration*,¹³⁵ and contended that they had been “lulled into inaction” by their original and timely assertion of their rights in the wrong forum.¹³⁶ While the court recognized that generally, the doctrine of equitable tolling has been applied in situations where the plaintiff was “misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum,” the court declined to extend this line of reasoning to the civil action at hand, as it distinguished *Machules* from the instant case.¹³⁷ In doing so, the court stated that in *Machules*, the Florida Supreme Court held that the doctrine of equitable tolling could be applied to extend a time limit for a pro se plaintiff to seek review under an administrative rule, because the plaintiff was misled and lulled into inaction by his employer.¹³⁸ Therefore, the Florida’s Second District Court of Appeal interpreted the *Machules* decision as only laying the foundation for applying the equitable tolling doctrine in administrative law cases.¹³⁹ Remaining loyal to legislative intent, the court further noted that this decision aligns with previous case law,¹⁴⁰ where the Florida Supreme Court “declined to create additional tolling exceptions to those listed in the statute and instead deferred to the legislative directive that there be no tolling exceptions other than those declared by the legislature.”¹⁴¹ Because *Machules* did not address the application of equitable tolling to any of the provisions of chapter 95 of the Florida Statutes, and because the plaintiffs were unable to cite to any case law in which the Florida Supreme Court applied the equitable tolling doctrine outside of the administrative law context, the court held that equitable tolling was not available to the plaintiffs.¹⁴²

For the purposes of this Note, it is important to recognize that the court also found it significant that, unlike the majority of states, Florida has not

134. *Id.*

135. 523 So. 2d 1132 (Fla. 1988).

136. *HCA Health Servs.*, 906 So. 2d at 1095.

137. *Id.* (quoting *Machules*, 523 So. 2d at 1134) (“The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period . . . [E]quitable tolling . . . ‘focuses on the plaintiff’s excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant.’” (alteration in original) (quoting *Machules*, 523 So. 2d at 1133–34)).

138. *Id.* at 1098 (citing *Machules*, 523 So. 2d at 1135–37).

139. *See id.*

140. *See id.* at 1099 (citing *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1075 (Fla. 2001) (“Section 95.051 delineates an exclusive list of conditions that can ‘toll’ the running of the statute of limitations”); *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000) (deferring to legislative intent that no tolling exceptions exist to § 95.051)).

141. *Id.*

142. *See id.* at 1100.

adopted a savings statute which would permit a plaintiff to pursue his or her action after the statute of limitations had run, as long as the lawsuit was dismissed otherwise than on the merits.¹⁴³ Generally speaking, a savings statute would allow a plaintiff's lawsuit to be reinstated in the proper state court, notwithstanding the running of the limitations period, after it is dismissed from federal court for lack of jurisdiction.¹⁴⁴ It is also significant to take notice of the plaintiffs' subsequent argument, that the Florida Legislature's failure to adopt a savings statute is immaterial to the instant application of equitable tolling, because the Florida Constitution gives the "judiciary, not the legislature, the power to establish rules for the transfer of cases from a court without jurisdiction to a court with jurisdiction."¹⁴⁵ While this is accurate, the court's reliance on case law's interpretation of the Florida tolling statute allowed it to decline to extend *Machules*'s ruling as a general rule of common law.¹⁴⁶

Accordingly, in *Pierson v. Orlando Regional Healthcare Systems, Inc.*,¹⁴⁷ the U.S. District Court for the Middle District of Florida followed *Machules* and *HCA Health Service*'s lead and determined that equitable tolling was not available to plaintiffs outside of an administrative action.¹⁴⁸ In this lawsuit, the plaintiff filed untimely tort claims against the institution where he previously practiced medicine.¹⁴⁹ Similar to the rationale in *HCA Health*, the district court reasoned that the Florida Statute expressly delineates instances where tolling is appropriate¹⁵⁰ and that equitable tolling cannot be extended outside of the administrative context in Florida courts.¹⁵¹ Therefore, the doctrine of equitable tolling was held to be unavailable to the plaintiff, and his allegations were time-barred.¹⁵²

Another instance where a court, interpreting Florida law, found that the equitable tolling doctrine was unavailable as a method to suspend the statute of limitations occurred in *Foxworth v. Kia Motors Corp.*¹⁵³ There, the court addressed the concept of equitable tolling, without it having

143. *Id.* at 1098.

144. *Id.* at 1099.

145. *Id.* (citing FLA. CONST. art. V, § 2(a)).

146. *Id.*

147. No. 6:08-cv-466-Orl-28GJK, 2010 WL 1408391 (M.D. Fla. Apr. 6, 2010).

148. *See id.* at *15 (finding that this court was "bound by the holding of the Second District Court of Appeal in *HCA Health*").

149. *See id.* at *1, *15.

150. *Id.* at *15 (citing FLA. STAT § 95.051 (2016)) (finding, like the cases interpreting the statute itself, the express wording of the statute also expressly prohibits tolling based on subsection 2 of the statute).

151. *See id.*

152. *See id.*

153. 377 F. Supp. 2d 1196 (N.D. Fla. 2005).

been alleged by the plaintiffs.¹⁵⁴ After filing suit against Kia Motors after a car accident, the defendants received a judgment of dismissal on forum non conveniens grounds, which included the plaintiffs consent to a waiver of statutes of limitations defenses.¹⁵⁵ The court found that the defendants did nothing to coax the plaintiffs into any “disadvantageous legal position,” and therefore, contrary to the plaintiffs’ contention, the defendants could not be equitably estopped from asserting a statute of limitations defense.¹⁵⁶ Interestingly, the court stated that, even though the plaintiffs did not argue for equitable tolling of the statute of limitations, the limitations period should not be statutorily or equitably tolled in this instance, because “Florida law does not allow the tolling of statutes of limitation for any reasons other than those specifically enumerated in Fla. Stat. § 95.051.”¹⁵⁷ Therefore, case law makes it explicitly apparent that Florida courts are unwilling to apply the doctrine of equitable tolling to statutes of limitations.

4. No Tolling for the *Sacred Heart*

While a denial of equitable tolling is the established rule in Florida, within the complex realm of class actions, the concept of equitable tolling must be further discussed with respect to a case that could have altered Florida law—*Sacred Heart Health System v. Humana Military Healthcare Services*.¹⁵⁸ There, the plaintiffs filed a diversity action individually and as a class, asserting breach of contract claims against the defendant.¹⁵⁹ The plaintiffs also individually sued the defendant for fraud in the inducement.¹⁶⁰ Because the class certification hearing was scheduled to occur soon after the hearing at issue, the court had to determine whether there was any basis, under Florida or federal law, to toll the plaintiffs’ limitations period for their individual claims.¹⁶¹ While still in the trial court, the U.S. District Court for the Northern District of Florida held that the statute of limitations could be equitably tolled through an application of the *American Pipe* tolling rule.¹⁶² In making this determination, the trial court applied Florida law, and reasoned that, as *HCA Health Services* illustrated, Florida is unlike many other states, which have adopted a savings statute to allow plaintiffs to pursue their

154. *See id.* at 1203 n.9.

155. *Id.* at 1203.

156. *Id.* (quoting *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1076 (Fla. 2001)).

157. *Id.* at n.9.

158. No. 3:07cv62/MCR, 2008 WL 2385506, at *1 (N.D. Fla. June 9, 2008).

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.* at *3.

claims after they are dismissed, other than on the merits, after the limitations period has run.¹⁶³ The court also agreed with *HCA Health Services* and *Major League Baseball*, and stated that Florida Statutes § 95.051 outlines an exclusive list of the eight conditions that can toll the limitations period, and accordingly, none of the plaintiffs' claims fell within these conditions.¹⁶⁴ The court then determined that equitable tolling principles would apply to the individual claims.¹⁶⁵

Remarkably, the court made a swift departure from the previously identified case law and looked to the overarching purpose of the class action suit, which is to "save a multiplicity of suits, to reduce the expense of litigation, to make legal processes more effective and expeditious, and to make available a remedy that would otherwise not exist."¹⁶⁶ The court then applied case law from the U.S. Court of Appeals for the Fourth Circuit to reason that, where the state's class action rule is "similar or virtually identically to" Federal Rule 23, *American Pipe* tolling has been adopted, because both state and federal courts possess similar interests in "detering 'protective' filings of potentially redundant individual suits during the pendency of a class action"¹⁶⁷ The court concluded that because Florida's class action rule is modeled after Federal Rule 23,¹⁶⁸ Florida has an interest similar to the federal interest in equitably tolling class actions, which promotes economy and efficiency of class action procedures.¹⁶⁹

Upon finding a sufficient policy rationale for why the limitations period should be tolled, the court looked to Florida case law to bolster its reasoning. In doing so, the court first looked to *Raie v. Cheminova, Inc.*,¹⁷⁰ which stated that "[t]here is no dispute that *American Pipe* has been followed in Florida state courts."¹⁷¹ However, the court in *Raie* provided no citation for this statement, and therefore supplied no examples of cases in which Florida courts followed the *American Pipe* rule. The court then stated that at the time of its decision, only two Florida courts have cited *American Pipe*, which both offered little persuasive value for the instant case.¹⁷² While *Hromyak* offered no value to the

163. *See id.* at *1.

164. *See id.*

165. *See id.*

166. *Id.* (quoting *Tenney v. City of Miami Beach*, 11 So. 2d 188, 189 (Fla. 1942)).

167. *Id.* (quoting *Wade v. Danek Med., Inc.*, 182 F.3d 281, 286–87 (4th Cir. 1999)).

168. *Compare* FLA. R. CIV. P. 1.220, with FED. R. CIV. P. 23.

169. *Sacred Heart Health Sys.*, 2008 WL 2385506, at *1.

170. *Raie v. Cheminova, Inc.*, 336 F.3d 1278 (11th Cir. 2003) (interpreting Florida law).

171. *Id.* at 1282.

172. *See Hromyak v. Tyco Int'l Ltd.*, 942 So. 2d 1022, 1023 (Fla. Dist. Ct. App. 2006) (possessing little persuasive value, as it applied *American Pipe* to a federal statute of limitations); *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699, 704 (Fla. Dist. Ct. App. 2000) (finding that

instant case, the court determined that *Latman* was relevant in its illustration of how Florida class action plaintiffs are treated differently than non-class plaintiffs with respect to the limitations period.¹⁷³ This allowed the court to reason that, as a general matter, both federal and Florida class actions function to benefit plaintiffs in some circumstances while operating to their detriment in others.¹⁷⁴

Therefore, the court reasoned that *American Pipe* and its progeny best illustrate the difference in equitable treatment of class plaintiffs functioning under a federal statute of limitations.¹⁷⁵ By linking these equitable principles to the reasoning underlying two Florida Supreme Court decisions, which did not specifically mention *American Pipe*, its progeny, or even the phrase “equitable tolling,” the court concluded that based on the treatment afforded to these plaintiffs, “the doctrine of common law equitable tolling as outlined in *American Pipe* appears to have been effectively applied in Florida, even though not identified by that specific rubric.”¹⁷⁶ Such a “de facto” application of *American Pipe* tolling was deemed sufficient by the trial court to hold that the plaintiffs were permitted to apply the doctrine of equitable tolling to their individual claims.¹⁷⁷

Following this decision, the plaintiffs’ motion for class certification was granted under Federal Rule 23.¹⁷⁸ Interlocutory review was then granted for review of the certification of this class of approximately 260 hospitals, located in six states.¹⁷⁹ The defendants challenged the district court’s determination that the common questions would predominate over the individual ones—which makes the class action the appropriate method of resolving the dispute—regarding whether the federal government forced Humana to pay the hospital’s lower rates.¹⁸⁰ While a

to meet the prerequisite for suit under Florida law, class members were not required to have submitted individual claims).

173. *Sacred Heart Health Sys.*, 2008 WL 2385506, at *2.

174. *Id.*

175. *See id.*

176. *Id.* Here, the court discusses both *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), and *Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984). Without mentioning *American Pipe*, the court in *Engle* allowed plaintiffs to proceed with their individual claims within one year after their claims were remanded following decertification. *Engle*, 945 So. 2d at 1277. Similarly, the court in *Lance* allowed plaintiffs to proceed individually within a reasonable time, after having relied on a class action. *Lance*, 457 So. 2d at 1011.

177. *Sacred Heart Health Sys.*, 2008 WL 2385506, at *3.

178. *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, No. 3:07cv62/MCR, 2008 WL 9359957 (N.D. Fla. Sept. 25, 2008) (granting motion for class certification), *rev’d*, 601 F.3d 1159 (11th Cir. 2010).

179. *Sacred Heart Health Sys. v. Humana Military Healthcare Servs.*, 601 F.3d 1159, 1164 (11th Cir. 2010).

180. *Id.*

comprehensive review of the court's reasoning for denying class certification is unimportant for the purposes of this Note, it must be mentioned that the U.S. Court of Appeals for the Eleventh Circuit concluded that the existence of many uncommon questions raised by the litigations rendered the cause unsuitable for class treatment.¹⁸¹

Because the trial court decision regarding tolling only dealt with the plaintiff's existing individual claims, and class certification of this lawsuit was ultimately denied, the waters of Florida equitable tolling and class actions have been muddied. However, even in light of the trial court's decision in *Sacred Heart*, it remains likely that Florida courts would generally be unwilling to extend the *American Pipe* rule to class plaintiffs' statutes of limitations. While a Florida court has not yet interpreted the potential role that *Sacred Heart* could play in the future of class actions,¹⁸² the U.S. District Court for the District of South Carolina, while interpreting Florida law, rejected the plaintiffs' attempt to use *Sacred Heart* as a means to toll the limitations period for a class action filed in the Middle District of Florida based on diversity jurisdiction.¹⁸³ In determining whether the period could be tolled during the pendency of an earlier class action filed in the Northern District of Illinois, the court first stated what has been made abundantly clear throughout this Note—that *American Pipe* only applies to a “subsequently filed federal question action . . . during the pendency of a federal class action.”¹⁸⁴ The court then looked to the Florida tolling statute and engaged in an analysis very similar to that of the cases discussed earlier in this Note.¹⁸⁵ Based on the directness of the Florida tolling statute and an analysis of this case law, the court determined that the Florida tolling statute clearly precludes class action tolling.¹⁸⁶

181. *See id.*

182. While not very useful for this Note's analysis of Florida law, it should be noted that the court in *Pierson v. Orlando Regional Healthcare Systems* rejected the plaintiff's argument that equitable tolling should apply to his entirely individual claim. No. 6:08-cv-466-Orl-28GJK, 2010 WL 1408391, at *5 n.19 (M.D. Fla. Apr. 6, 2010). In doing so, the court distinguished the instant case from *Sacred Heart* because, unlike the instant case, *Sacred Heart* was, in part, a class action lawsuit. *Id.* The *Pierson* court further distinguished its case by citing to *HCA Health's* statement that “class actions are treated differently under Florida Law,” and therefore any form of class action tolling could not be applied. *Id.* Therefore, with respect to *Sacred Heart*, Florida law simply tells us that class actions receive different treatment than individual claims, which does not manifest the nonambiguous rule this Note seeks regarding *American Pipe* tolling in Florida.

183. *Dineen v. Pella Corp.*, No. 2:14-mn-00001-DCN, 2015 WL 6688040 (D.S.C. Oct. 30, 2015).

184. *See id.* at *3 (alteration in original) (quoting *Wade v. Danek Med., Inc.*, 182 F.3d 281, 286 (4th Cir. 1999)).

185. *See id.*

186. *See id.*

The court thus rejected the plaintiffs' reliance on *Sacred Heart*. The court explained that *Sacred Heart*'s holding was based solely on the two Florida Supreme Court cases that do not discuss the Florida tolling statute or class action tolling.¹⁸⁷ The court stated that this precedent only permits putative class members to file individual state law claims within a proscribed amount of time, after the class action is dissolved.¹⁸⁸ The court reasoned that because the precedent relied on by *Sacred Heart* did not indicate that cross-jurisdictional tolling was adopted, Florida law does not allow cross-jurisdictional tolling and therefore the plaintiffs' claims were not tolled by the pendency of the prior action.¹⁸⁹ Even after considering the ambiguities created by *Sacred Heart*, it is clear that Florida law does not offer class action tolling in any form—through statute or equity.

III. TOLLING SOLUTIONS: AN ANALYSIS OF OTHER JURISDICTIONS

While an in depth analysis of how every state and federal jurisdiction has handled class action tolling is well beyond the scope of this Note, it is beneficial to take a brief look at how several states have incorporated *American Pipe* tolling into their laws. Of the states that have addressed class action tolling, the “overwhelming majority” have adopted it in their own jurisdictions.¹⁹⁰ However, significantly fewer states have addressed the issue of cross-jurisdictional tolling.¹⁹¹ Therefore, one way that states have addressed the tolling issue is through the common law. Ohio serves as an example of a jurisdiction that has resolved this issue in favor of cross-jurisdictional tolling, with the Ohio Supreme Court's decision in *Vaccariello v. Smith & Nephew Richards, Inc.*¹⁹² Here, the court determined that because Ohio's class action rule was virtually identical to Federal Rule 23, a class action filed in either state or federal court served the same purpose.¹⁹³ Therefore, the defendant was put on equal notice, regardless of whether the class action was first filed in state or federal court.¹⁹⁴ The court found that permitting this federal class action

187. *See id.* at *4.

188. *See id.*

189. *See id.*

190. Gerald D. Jowers, Jr., *The Class Stops the Clock: Some Injured People Don't Consider Litigation Until It Seems Too Late. But a Decades-Old Supreme Court Decision May Help You Save an Apparently Time Barred Claim*, TRIAL, Nov. 2005, at 18, 22.

191. *Id.* The issue of cross-jurisdictional tolling arises in two contexts—“whether a federal class action involving state law claims can toll a state's statute of limitations and whether a class action pending in one state can toll the statute of limitations in another.” *Id.*

192. 763 N.E. 2d 160 (Ohio 2002).

193. Jowers, *supra* note 190, at 23.

194. *Id.*

to toll the state limitations period did not defeat Ohio's purposes in its own class action rule.¹⁹⁵ Therefore, tolling was permitted.

Beyond the policy rationales discussed by the court in favor of tolling,¹⁹⁶ it is important to note that the similarity of Ohio's class action rule to Federal Rule 23 weighed heavily on the court's decision.¹⁹⁷ This contrasts with the Fourth Circuit's interpretation of Virginia law, which determined that the lack of an analogous state class action statute to Federal Rule 23 pointed to the state's reluctance to adopt federal tolling.¹⁹⁸ Additionally, unlike Ohio, the Fourth Circuit noted that Virginia law disfavored equitable tolling and required courts to strictly construe its statutes of limitations.¹⁹⁹ Finally, and of utmost importance for the proposed solution of this Note, Ohio has a savings statute²⁰⁰ that permits plaintiffs to bring a new action within one year.²⁰¹

Many state legislatures have enacted savings statutes, in addition to tolling statutes, which provide a plaintiff with a proscribed amount of additional time to refile a claim after the standard limitations period has run.²⁰² However, to be eligible for this additional time, the plaintiff must have either originally filed a timely suit that was terminated on procedural grounds or obtained a favorable final judgment that was reversed on appeal for procedural grounds.²⁰³ In pertinent part, section (A) of the Ohio savings statute provides that in any action that is commenced, "if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits," then plaintiff, or his representative if he dies, can "commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits."²⁰⁴ Section (A) also states that it applies to any claim asserted by the defendant in a pleading.²⁰⁵ Section (B) of the Ohio savings statute provides for the appropriate action to take if the defendant described in

195. *Id.*

196. *Id.* at 23–25. The court also stated that forum shopping would not become an issue after its holding, because allowing for tolling was now only permitted for plaintiffs who could have originally filed in Ohio. *Id.* Additionally, the court reasoned that a contrary holding would discourage Ohio class action members from relying on the original action, as well as encourage the class members to file protective lawsuits in Ohio state courts. *Id.*

197. *Id.* at 25.

198. *Id.* at 23 (citing *Wade v. Danek Med., Inc.*, 182 F.3d 281, 287 (4th Cir. 1999)).

199. *See id.* at 25.

200. OHIO REV. CODE ANN. § 2305.19 (LexisNexis 2016).

201. Jowers, *supra* note 190, at 25.

202. *See Wasserman, supra* note 60, at 815. "In a 1965 opinion, the Supreme Court identified thirty-one state savings statutes." *Id.* at 815 n.44 (citing *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 431–32 n.9 (1964)).

203. *Id.* at 815.

204. OHIO REV. CODE ANN. § 2305.19(A).

205. *Id.*

section (A) is a foreign or domestic corporation.²⁰⁶ Section (C) of the statute provides for sections of the Ohio code that are not affected by the savings statute.²⁰⁷

The New York Legislature has also enacted a savings statute, which similarly provides that “[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits,” the plaintiff can commence a new action within six months of the termination.²⁰⁸ Section (b) of the statute provides for the timeliness of a defendant’s assertion of a cause of action or defense when the action is terminated in any manner, as long as the assertion was timely made in the original action.²⁰⁹ Finally, section (c) provides that the savings statute is applicable to claims brought under workers’ compensation law.²¹⁰

The Connecticut Legislature has also enacted a savings statute²¹¹ similar to that of Ohio and New York. Like the other two savings statutes examined, section (a) provides that if any action, originally commenced in a timely manner, has been dismissed for want of jurisdiction, the plaintiff may commence a new action “for the same cause at any time within one year after the determination of the original action.”²¹² Section (b) of the statute decreases the additional limitations period to six months for an action brought or continued against an executor after the death of the defendant.²¹³ Section (c) provides for a limitation on additional time allotted for an appeal from a judgment from the Supreme Court or Appellate Court.²¹⁴ Section (d) applies the statute’s provisions to defendants who file a cross complaint, to actions between the same parties, and to an action brought to the U.S. circuit or district court for the District of Connecticut that was dismissed “without trial upon its merits or because of lack of jurisdiction in such court.”²¹⁵ Either the date of dismissal or the determination of the appeal commences the time period to bring the action in state court.²¹⁶ Finally, the last section of the Connecticut savings statute permits it to apply to timely filed claims against the state.²¹⁷

206. *Id.* § 2305.19(B).

207. *Id.* § 2305.19(C).

208. N.Y. C.P.L.R. 205(a) (McKinney 2016).

209. *Id.* § 205(b).

210. *Id.* § 205(c).

211. CONN. GEN. STAT. § 52-592 (2016).

212. *Id.* § 52-592(a).

213. *Id.* § 52-592(b).

214. *Id.* § 52-592(c).

215. *Id.* § 52-592(d).

216. *Id.*

217. *Id.* § 52-592(e).

IV. PROPOSAL

As has been extensively discussed, Florida courts reject *American Pipe* tolling. Although *Sacred Heart* provides a glimmer of hope for tolling, its decision does not encompass the class action tolling needed to remedy the statutes of limitations issues that were created by CAFA and the Florida class action statutes, which expanded federal jurisdiction for these claims. Even if *Sacred Heart* represented the current law in Florida, this decision only stands for tolling of the individual class members' claims, not for the class action as a whole. Additionally, the recent rejection of *Sacred Heart*'s holding by a court interpreting Florida law indicates that class tolling, except as specifically enumerated by the Florida tolling statute, is not the law in Florida. Florida law has also never addressed the issue of cross-jurisdictional tolling, which if addressed by a court could solve this issue. A major problem exists for the justice system any time a plaintiff is left without his or her rights adjudicated. Because Florida courts have failed to assimilate any form of *American Pipe* or equitable tolling into Florida law, the Florida legislature must consider this issue.

Unique to this issue in Florida is the lack of notice that the issue itself provides to the body that has the capability of fashioning a solution. As discussed in *HCA Health*, the Florida Constitution gives the judiciary the power to establish rules for the transfer of cases from a court without jurisdiction to a court with jurisdiction.²¹⁸ The court in *HCA Health* discussed the impact of this proposition, which is vital to the proposed solution of this Note. Because the power has been in the hands of the judiciary to solve this issue, without piecing together the cases analyzed within this Note, the Legislature has never been confronted with the class action tolling issue. Therefore, it is extremely likely that the Florida Legislature has been without notice of this problem for class plaintiffs. This Note serves as a notice to the Legislature that something must be done to resolve the issue of class action tolling in Florida.

As a solution to this issue, the Florida Legislature should adopt a savings statute, which would toll the limitations period so that plaintiffs could pursue their actions after the statute of limitations has run. This savings statute should specifically allow the class action to be reinstated in the proper state court, notwithstanding the running of the limitations period, after it is dismissed from federal court for lack of jurisdiction. An adequate savings statute could be modeled after another state's savings statute that was enacted to address this same issue. This Note incorporates the three states' savings statutes discussed in Part III, New York, Connecticut, and Ohio, to create a proposed statute for adoption by the

218. See *HCA Health Servs. of Fla., Inc. v. Hillman*, 906 So. 2d 1094, 1099 (Fla. Dist. Ct. App. 2004) (citing FLA. CONST. art. V, § 2(a)).

Florida Legislature. A savings statute, similar to the three analyzed above in Part III, is detailed below for the Legislature's consideration:

- (1) In any action, commenced within the time limited by law, if in due judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, or is terminated in any other manner than by a voluntary discontinuance,²¹⁹ a failure to obtain personal jurisdiction over the defendant, the plaintiff, or if the plaintiff dies and the cause of action survives, the plaintiff's representative or administrator, may continue a new action upon the same transaction or occurrence, or series of transactions or occurrences, within one year²²⁰ after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.²²¹

Moreover, similar to what other states have done, the Florida Legislature could add additional provisions that are particularly applicable to Florida law. Such additional provisions may take the form of limiting the savings statute to address class action lawsuits specifically. This would limit the Legislature's hesitance toward adopting what may be considered an overbroad statute. When considered in light of Florida's tolling statute already in existence, the proposed legislation fulfills the same policy concerns addressed and resolved by the tolling statute—essentially, it is unjust for plaintiffs in a class, who have a valid claim of right under the law, to be limited from pursuing this right because of faults outside of their control. In fact, the proposed statute actually mirrors the underlying motives of several of the provisions of the current Florida tolling statute.

As outlined in Part II of this Note, the Florida statute allows for tolling of the limitations period when a person is absent from the state²²² or concealed so that process cannot be served on the defendant.²²³ In writing

219. It should be noted that if the Legislature chooses to add a direct mention of class action tolling to the statute, this would be an appropriate location to place a statement identifying whether the Legislature wishes to allow for tolling after class decertification. Because class certification is outside the realm of this Note, it should be stated that this Note does not advocate for the tolling of the limitations period when class certification is at issue.

220. This time period should be determined by the Florida Legislature. The suggestion of one year originates from the Connecticut and Ohio savings statutes. CONN. GEN. STAT. § 52-592(a) (2016); OHIO REV. CODE ANN. § 2305.19(A) (LexisNexis 2016). However, as indicated above, New York provides a savings period of six months. N.Y. C.P.L.R. 205(a) (McKinney 2016).

221. This statute is comprised of language originating from the savings statutes of New York, Connecticut, and Ohio.

222. FLA. STAT. § 95.051(1)(a) (2016).

223. *Id.* § 95.051(1)(c).

this statute, the Legislature wished for plaintiffs to have an opportunity to pursue their claims when situations arise that are completely out of their control, such as the absence of the defendant from the state. Similarly, class plaintiffs, when integrated into a class of hundreds or thousands of other individuals, absolutely cannot change the often detrimental impact of situations, completely outside of their control, that alter a litigation plan. The statute of limitations issue can create one such situation. Therefore, the Legislature's adoption of the suggested savings statute will address the same policy concerns that were considered in the creation of the Florida tolling statute.

In its adoption of this savings statute, the Florida Legislature should adopt a line of reasoning similar to that of the Ohio case law analyzed in Part III of this Note. Notably, the court in *Sacred Heart* used this reasoning in an attempt to allow class action tolling in Florida. In its consideration of the proposed savings statute, the Legislature's line of reasoning should follow this progression: Class actions are valuable methods of pursuing causes of actions in both state and federal courts. These lawsuits prevent multiplicity of suits, make legal processes more efficient and effective, and make remedies available to plaintiffs who would otherwise be left without remedy.²²⁴ Both federal courts and Florida state courts share these same values in permitting class action litigation. It follows that the Florida class action rule is very similar to Federal Rule 23. Further, within the federal forum, courts have adopted the *American Pipe* rule to toll the statute of limitations period. Like in the federal forum, Florida values class actions. Because the Florida Legislature has created a statute that further intermingles the federal and state forums when it comes to class action jurisdiction,²²⁵ Florida should thus be obliged to adopt a form of tolling similar to that of *American Pipe* and its progeny. This is especially significant when considering the vast number of cases that flood federal courts, thanks to CAFA and the corresponding Florida statute increasing federal jurisdiction for class actions, which permits the limitations period to run on otherwise meritorious claims. However, because Florida case law has opposed the notion of class action tolling, the Legislature is now responsible for adopting a savings statute to remedy this problem.

Florida's adoption of this proposed savings statute is the best method to solve the statute of limitations issue for many reasons. First, Florida already has a tolling statute, so the addition of a savings statute follows the Legislature's motives of bringing justice to plaintiffs who deserve to have their rights adjudicated. Additionally, this solution should appeal to

224. *Sacred Heart Health Sys. v. Humana Military Healthcare Serv.*, No. 3:07cv62/MCR, 2008 WL 2385506, at *1 (N.D. Fla. June 9, 2008) (quoting *Tenney v. City of Miami Beach*, 11 So. 2d 188, 189 (Fla. 1942)).

225. FLA. STAT. § 768.734.

the Florida Legislature, because it simply advocates for tolling of the limitations period when it has run for *jurisdictional reasons*. Based on the specifics of the Florida tolling statute, the Legislature values tolling the limitations period for policy reasons similar to those underlying class action tolling for a misidentification of proper jurisdiction. Because proper jurisdiction is the only issue, the Legislature will not be required to consider any additional issues in the complex web of class action litigation when deciding whether to adopt this savings statute.

Moreover, it remains important to weigh the considerations of Florida's adoption of a savings statute and the consequences that this might have on the justice system. Statutes of limitations are important in litigation, as they balance many different competing interests.²²⁶ Five important policy reasons underlie statutes of limitations. First, without a statute of limitations, defendants would always worry about their potential liability and constantly have to preserve evidence to defend themselves.²²⁷ Second, "statutes of limitations protect courts from the obligation to adjudicate state claims with the attendant risks of lost evidence, absent witnesses, fading memories, and ultimately, inaccurate fact-finding."²²⁸ Third, statutes of limitations help the judicial system by limiting the amount of claims that can be filed.²²⁹ Fourth, as expressed in the case law analyzed within this Note, statutes of limitations keep plaintiffs from sleeping on their rights.²³⁰ Finally, legislative skepticism may be reflected through the creation of short statutes of limitations.²³¹

This Note agrees that the policy concerns of statutes of limitations are important aspects of the legal system. However, when they merely function as a means to keep plaintiffs from having their legal claims heard because of procedural flaws, the value of statutes of limitations becomes greatly decreased in light of the high value of a plaintiff's right to bring his otherwise meritorious claim into the justice system. Therefore, once the Florida Legislature is made aware of the negative impact that statutes of limitations are having on plaintiffs in class action jurisdiction mishaps, the Legislature should agree that the policy goals it considered with respect to statutes of limitations when creating the Florida tolling statute certainly apply to the class actions described within this Note.

CONCLUSION

After considering the gravity of the issue of stranding class plaintiffs without any means to adjudicate their rights, it seems only logical that the

226. See Wasserman, *supra* note 60, at 811.

227. *Id.*

228. *Id.* at 811–12.

229. See *id.* at 812.

230. See *id.*

231. See *id.*

Legislature should intervene in this area of law where Florida courts are unwilling to do so. As classes become larger, more individuals are at risk of not having their rights adjudicated. When considered with the difficulties that CAFA and the subsequent Florida class action legislation have created in determining a class action's proper jurisdiction from the outset of its filing, the Florida Legislature must enact a savings statute to remedy the limitations issue. Without accounting for class action tolling in the Florida tolling statute or integrating *American Pipe* into Florida law, Florida class action plaintiffs are at a severe risk of losing their otherwise viable claims unless the Florida Legislature finally answers the call to toll for the *Sacred Heart*, and follows the lead of other states that have adopted savings statutes to remedy this procedural issue.