

Cross-Jurisdictional Tolling Certified

Wednesday, August 17, 2011

Cross-jurisdictional class action tolling. Even though Bexis invented the phrase, we hate it. We've lambasted that concept many times on this blog, see [here](#). Basically: (1) the law should not reward the filing of meritless class actions by tolling the statute of limitations; (2) lawyers and courts in one jurisdiction should not be allowed to manipulate the statutes of limitations of other jurisdictions; and (3) each state is a sovereign, and should be able to set its own tolling (and other) rules without outside interference. In fact, we're so anti-cross-jurisdictional class action tolling that we maintain a [scorecard](#) concerning this rather arcane legal topic.

Another peeve that we've [occasionally petted](#) is the tendency of some courts – particularly in the Second Circuit – to assume that they know more about the law of other states than do those other states' courts.

Those two threads come together in Casey v. Merck & Co., ___ F.3d ___, 2011 WL 3375104 (2d Cir. Aug. 5, 2011), where for once the Second Circuit decided not to play the “New Yorkers know best” card and instead certified the cross-jurisdictional class action tolling question to the Virginia Supreme Court.

Once again, the issue in dispute goes back to our Bone Screw days – when we first learned to hate cross-jurisdictional class action tolling. The Bone Screw MDL plaintiffs filed an unsuccessful nation-wide class action (which back then was a lot less futile than personal injury class actions have [since become](#)). Despite losing class certification, tardy Bone Screw plaintiffs around the country still claimed that their states' statutes of limitations should be considered tolled by the unsuccessful MDL class action.

They lost.

One of the places they lost was in Virginia. In Wade v. Danek Medical, Inc., 182 F.3d 281 (4th Cir.1999), the federal circuit court with jurisdiction over Virginia took a look at Virginia law and held, essentially, that there was no way that the Virginia Supreme Court would tolerate a bunch of damnyankee class action lawyers from Pennsylvania mucking around with the Old

Dominion's statute of limitations, particularly since Virginia **doesn't even have** a state-law equivalent to Rule 23. Of course Wade didn't phrase it exactly that way, holding instead:

"Having considered these cases – most of which do not discuss the issue in any detail – we conclude that the Virginia Supreme Court would not adopt a cross-jurisdictional equitable tolling rule. First, and most importantly, the Commonwealth of Virginia simply has no interest, except perhaps out of comity, in furthering the efficiency and economy of the class action procedures of another jurisdiction, whether those of the federal courts or those of another state. Second, if Virginia were to adopt a cross-jurisdictional tolling rule, Virginia would be faced with a flood of subsequent filings once a class action in another forum is dismissed, as forum-shopping plaintiffs from across the country rush into the Virginia courts to take advantage of its cross-jurisdictional tolling rule, a rule that would be shared by only a few other states. . . . Third, if Virginia were to allow cross-jurisdictional tolling, it would render the Virginia limitations period effectively dependent on the resolution of claims in other jurisdictions, with the length of the limitations period varying depending on the efficiency (or inefficiency) of courts in those jurisdictions. And Virginia has historically resisted such dependency."

182 F.3d at 287-88 (various citations omitted).

Since Wade, however, some pro-plaintiff lower courts have seized upon an intervening Virginia Supreme Court decision – Welding, Inc. v. Bland County Service Authority, 541 S.E.2d 909 (2001), which had nothing whatever to do with class actions – for the proposition that Virginia would extend its tolling statute to out-of-state federal class actions, notwithstanding the Wade precedent. See Torkie-Tork v. Wyeth, 739 F. Supp.2d 887, 893-94 (E.D. Va. 2010); Shimari v. CACI International, Inc., 2008 WL 7348184, at *2 (E.D. Va. Nov. 25, 2008). We think that's hooey as (1) Virginia does not even allow class actions, except where specifically authorized by statutes, and (2) is a generally conservative place legally (no strict liability; no crashworthiness, things like that). But those cases are out there, as our [scorecard](#) points out.

In the Fosamax MDL, the court followed Wade. In re Fosamax Products Liability Litigation, 694 F. Supp.2d 253, 258 (S.D.N.Y. 2010), and found that a meritless Tennessee class action involving that drug – rejected in the wake of In re Fosamax Products Liability Litigation, 248 F.R.D. 389 (S.D.N.Y. 2008) (asserting medical monitoring, another legal theory Virginia does not recognize) – did not serve to toll the Virginia statute of limitations.

It took more than two years for the court in the Fosamax MDL to get around to denying class certification, so the upshot of the plaintiffs' argument was that all this out-of-state maneuvering would have more than doubled Virginia's statute of limitations for every Fosamax plaintiff in that state.

With the opportunity to certify, the Second Circuit punted. Instead, it has certified the following questions to the Virginia Supreme Court:

"(1) Does Virginia law permit equitable tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?"

(2) Does Va. Code Ann. § 8.01-229(E)(1) permit tolling of a state statute of limitations due to the pendency of a putative class action in another jurisdiction?"

Casey, 2011 WL 3375104, at *8. That's better than "New Yorkers know best," at least.

As our [scorecard](#) (which provides precedent on both sides) demonstrates, cross-jurisdictional class action tolling is a distinct minority rule – particularly in tort cases. We're hoping that the Virginia Supreme Court reiterates the state's conservative approach to tort litigation and follows the majority rule.