

Second Circuit Finds 1993 Toxic Tort

Class Actions on Life Support, But Still

Alive.

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Dozens of agricultural workers from Costa Rica, Ecuador and Panama alleged that 1960s to 1980s pesticide exposures on banana plantations caused numerous health problems. Plaintiffs initially filed class action suits in Texas and Hawaii which thereafter had tortured procedural histories, including dismissals in the United States, refilings and dismissals in other nations, refilings in Texas, a trip to the United States Supreme Court by the Hawaii litigants, and continuing litigation in Hawaii. In the meantime, several of the Texas plaintiffs voluntarily dismissed, refiled in Louisiana and then Delaware which transferred the litigation to the Southern District of New York. Those refiled and transferred cases were before the Second Circuit which had before it certified questions from the district court: (1) whether New York law recognized cross-jurisdictional class action tolling; and (2) whether the non-merits denial of a class certification motion terminated class action tolling.

Cross-jurisdictional class action tolling takes place when a second jurisdiction recognizes class action tolling because of the earlier filing of a class action case in another jurisdiction. The issue arose in *Chavez* because that litigation originated in Texas, then went to Costa Rica, then back to Texas federal court, was remanded to Texas state court, was refiled in Louisiana, and was then refiled in Delaware federal court which transferred it to the Southern District of New York. The district court realized that New York law on the issue was not clear and so certified tolling related questions to the Second Circuit.

The Second Circuit, also recognizing a lack of clarity in New York law, decided to certify the questions to the highest New York state court asking it whether New York would recognize cross-jurisdictional class action tolling. The second issue the Second Circuit certified was whether the non-merits denial by the Texas federal court of the class certification motion terminated class action tolling. That issue was also unclear under New York law.

Although New York courts had adopted the *American Pipe* equitable tolling rule for class action cases filed in New York courts, the New York courts had not decided whether to recognize cross-jurisdictional class action tolling. Although multiple courts in the Second Circuit had predicted how the New York courts would rule on the issue, those predictions were inconsistent. Furthermore, nationwide the federal and state courts which had evaluated whether other states would recognize cross-jurisdictional tolling came to conflicting conclusions.

Even assuming that New York courts would adopt cross-jurisdictional tolling, it was not clear whether those courts would conclude that a non-merits denial of a class certification motion terminated cross-jurisdictional tolling. When the federal court in Texas had dismissed the case on *forum non conveniens* grounds, it denied all other pending motions as moot; that mootness ruling included the motion for class certification. Not surprisingly, the defendant concluded that was a class certification denial which terminated the tolling, but the plaintiff's disagreed. Plaintiffs took the position that only "a clear and unambiguous" class certification denial ended tolling. The Second Circuit panel reviewed the few courts across the country that had addressed the issue in some way which, unsurprisingly, came up with different conclusions. Given the lack of New York law on the issue and the inconsistent rulings by courts across the country, the Second Circuit chose to ask New York's highest court what its law is on that issue.

The *Chavez v. Occidental Chemical Corporation* case is worthy of attention by class action litigators nationwide. Not only was the *Chavez* litigation international in scope, the litigation history of that case and related cases in Texas, Hawaii, Louisiana, and Delaware suggests the importance of the issues raised to class action litigators nationwide. Furthermore, the court identifies multiple conflicting federal and state rulings on these tolling issues; it serves as a useful primer for litigators confronting these somewhat novel and increasingly important issues.

Case citation: *Chavez v. Occidental Chemical Corporation*