

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

TOBIAS BERMUDEZ CHAVEZ, et al.,

Respondents,

-against-

NO. 39

OCCIDENTAL CHEMICAL CORPORATION,

Appellant.

20 Eagle Street
Albany, New York
September 9, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

KENNETH A. MANNING, ESQ.
PHILLIPS LYTTLE LLP
Attorney for Appellant
125 Main Street
Buffalo, NY 14203

JONATHAN S. MASSEY, ESQ.
MASSEY & GAIL LLP
Attorney for Respondents
1000 Maine Avenue SW, Suite 450
Washington, DC 20024

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 39, Chavez v.
3 Occidental Chemical Corporation.

4 Counsel?

5 MR. MANNING: May it please the court, Your
6 Honor. May I remain seated?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. MANNING: Thank you.

9 Ken Manning from Phillips Lytle, Your Honor,
10 arguing today on behalf of Occidental Chemical Corporation,
11 the appellant. I'm arguing on the briefs previously
12 submitted by Vinson & Elkins.

13 There are two certified questions. While they're
14 of first impression to this court, there are prior
15 decisions of this court that we think guide the court
16 toward a direction. In particular, the court's decision in
17 the King case and the Snyder case laid out the rules. At
18 the time this case in Texas was first begun in 1993, Judge
19 Kaye, speaking for a unanimous court, indicated that "time
20 limitations created by statute" - - - and here we have a
21 statute, CPLR 213, the three-year statute of limitations -
22 - - "are not tolled in the absence of statutory authority",
23 and the courts "may not themselves create such exceptions."

24 Judge Simons, three years later, in '93, the year
25 this case was commenced, said that the court "has been



1 reluctant to modify the law concerning limitations, even
2 when a party's case seems particularly compelling" - - -

3 JUDGE STEIN: Counsel, did you - - - do you
4 recognize that many of our Appellate Division courts have
5 recognized tolling domestically or within the state courts?
6 Do you recognize that?

7 MR. MANNING: Yeah - - - yes, Your Honor. The -
8 - -

9 JUDGE STEIN: Okay. And are you suggesting that
10 - - -

11 MR. MANNING: But I - - -

12 JUDGE STEIN: - - - we should overrule those
13 cases now?

14 MR. MANNING: Well, this court, Your Honor, has
15 not been presented with an intra-jurisdictional tolling
16 case yet to my knowledge.

17 JUDGE STEIN: Okay.

18 MR. MANNING: And - - -

19 JUDGE STEIN: So then - - -

20 MR. MANNING: And that's - - -

21 JUDGE STEIN: Go ahead. Sorry.

22 MR. MANNING: If I may finish, Your Honor? Thank
23 you.

24 JUDGE STEIN: Of course.

25 MR. MANNING: So that's actually been assumed, it



1 seems to me, in the Second Circuit's decision, but hasn't
2 been presented to this court. What's being asked today is,
3 do to something completely different.

4 JUDGE STEIN: Well, that's - - - that's really my
5 question is, is it that different? So if we - - - if we
6 recognize it intra-jurisdictionally, why - - - why don't
7 the same underlying principles for doing that apply cross-
8 jurisdictionally?

9 MR. MANNING: If I may, Your Honor? First of
10 all, within a system, for example, when this first started
11 with American Pipe, there were cases within the system, the
12 same court system, the same types of claims, and it was a
13 matter of judicial efficiency and economy, whether to let
14 the individual cases sit while the class action proceeded.

15 Here, it's quite different. A citizen, whether
16 it be in New York or some other state, is relying on
17 someone in a completely different jurisdiction, under a
18 different set of laws, different set of facts, different
19 set of pleadings - - -

20 JUDGE STEIN: But - - - but - - -

21 MR. MANNING: - - - different court of evidence.

22 JUDGE STEIN: But what it does - - - doesn't it
23 have the same effect? In other words - - -

24 MR. MANNING: No.

25 JUDGE STEIN: - - - the defendant gets notice by



1 virtue of that other class action, and it - - - it enables
2 that class action to truly serve as a representative action
3 for those who are present and those who are absent, and it
4 - - - it minimizes the number of - - - of placeholder
5 actions that have to be filed. Why aren't all those things
6 consistent domestically and cross-jurisdictionally?

7 MR. MANNING: Well, the key point, Your Honor, is
8 that the - - - by doing this cross-jurisdictionally, New
9 York would be yielding the control of the litigation and
10 what happens in that litigation to foreign - - - to - - -
11 to either other states, or in this case, to foreign
12 countries. This case presents the - - - the prototypical
13 example why cross-jurisdictional tolling can't work.

14 JUDGE RIVERA: Yeah, but the fed - - - federal
15 court is not a state court anyway. You're already ceding -
16 - - under the way you approach it - - - you're already
17 ceding to the federal court as it is.

18 MR. MANNING: Well - - -

19 JUDGE RIVERA: In the intra-jurisdiction. You're
20 already doing that.

21 MR. MANNING: It - - - in this case, Your Honor,
22 what - - - what it is happening in this case, if this court
23 should apply cross-jurisdiction tolling here, the New York
24 courts would be ceding jurisdiction not just to the federal
25 court, but through the return jurisdiction clause. You



1 would be placing control over the effective statute of
2 limitations in the hands of the litigants in foreign
3 nationals.

4 JUDGE STEIN: Well, that's assuming that the
5 return jurisdiction clause prevents the tolling from - - -
6 from ending.

7 MR. MANNING: Well, Your Honor, first of all, the
8 cross-jur - - - if we recognize it in New York, and this
9 court adopts a cross-jurisdictional tolling, fir - - -
10 first of all, it would depend on whatever happens in that
11 other jurisdiction, unless this court should craft a rule
12 for jurisdiction by jurisdiction. And in fact, what the
13 legislature has done in Article 2 is craft an entire
14 section with very carefully drawn limitations periods for
15 particular claims and very particular tolling provisions.

16 And this court in the past has, in its wisdom,
17 deferred to the legislature to create tolling provisions
18 that matched the needs. In - - - in these records for
19 example, there's a lot of dispute over what the impact of
20 cross-jurisdictional tolling would be, both on - - - with
21 the minority jurisdictions who adopted it and the majority
22 of jurisdictions who haven't. All that information could
23 be developed very carefully, rather than on a single
24 record, missing information like you have here.

25 And I suggest that the legislature could



1 determine, first of all, what type of tolling should be
2 involved, what the particulars of it should be, for
3 example, how it should mesh with - - -

4 JUDGE RIVERA: They could, but if they don't, it
5 doesn't necessarily prohibit the court from doing so, which
6 seems to be the position you're taking. But I - - - I
7 still don't really, fully, I think, appreciate your
8 argument about the ceding, because that - - - that's - - -
9 always occurs when a statute of limitations is tolled
10 because of a filing in another court; you're always ceding
11 to that other court.

12 MR. MANNING: Well, in this particular case, Your
13 Honor, we're in the situation, because, if you adopt cross-
14 jurisdictional tolling here, there's actually no effect of
15 statute of limitations at all. Right now, but for the fact
16 that the Costa - - -

17 JUDGE FEINMAN: Well, doesn't that really depend
18 on how you answer the second certified question? I mean, I
19 think that was partially the point that was being made by
20 Judge Stein. You know, if you adopt a bright-line rule in
21 that second certified question, and there's a dismissal,
22 for example, like there was here, on forum non conveniens
23 role - - - grounds, that ends it. The toll ends and, you
24 know, plaintiffs can file if they're still within the time.

25 MR. MANNING: Well, but - - - but to your point,



1 Your Honor, how the end of the toll is designed is also
2 something that typically a legislature can enact. A good
3 example is 205. It's - - - it's on the books now; it's
4 been on the books for a long time. There, the legislature
5 has suggested that in New York, for a New York resident, in
6 a New York case, you get six months after the - - - the
7 commencement and termination of the first action before you
8 - - - within which you can bring your second action.

9 If this court adopts cross-jurisdictional
10 tolling, you will be treating foreign nationals, citizens
11 of other states, far better than you're treating someone
12 who brought a case in New York.

13 JUDGE FAHEY: Yeah, but let - - - Mr. Manning,
14 let - - - let's go - - - let's assume we're going to adopt
15 cross-jurisdictional tolling for the purposes of my
16 question, and - - - and go to the second question. The
17 Second Circuit has had - - - there was some case law from
18 the Second or Fourth - - - in the Fourth Circuit, it talks
19 about the application of the standard, to which they refer
20 to as objectionably - - - objectively reasonable, to make a
21 determination as to whether or not a merits or non-merits
22 dismissal of a class certification would terminate a class
23 action tolling.

24 Where are you on that?

25 MR. MANNING: Our answer is very simple, Your



1 Honor. We contend that any determination, any dismissal of
2 the action or any denial of class certification for any
3 reasons - - -

4 JUDGE FAHEY: So for any reason?

5 MR. MANNING: Any - - -

6 JUDGE FAHEY: Any procedural reason at all, you
7 would say that you've lost your right to go forward?

8 MR. MANNING: Yes, Your Honor. And here's why.
9 Because the fundamental nature of class actions, either
10 under Rule 23 in federal court or Article 9 in state court,
11 is the obligation of the class representative to protect
12 the interests of the absent class members. If the motion
13 for certification is denied for any reason, that obligation
14 ceases. Similarly, if the action is dismissed for any
15 reason, that obligation ceases, and the absent class
16 members have no reasonable basis for relying on a named
17 representative - - -

18 JUDGE FAHEY: So let me give you an example, and
19 it's - - - tell me what you think about this. A court
20 dismisses a putative class action for failure to state a
21 cause of action, but gives expressed permission to replead
22 within thirty days. Would that be a dismissal?

23 MR. MANNING: That's a dismissal, Your Honor.

24 JUDGE FAHEY: I see.

25 JUDGE FEINMAN: But that doesn't - - -



1 JUDGE FAHEY: So then does it - - - excuse me - -
2 -

3 JUDGE FEINMAN: - - - doesn't happen until the
4 thirty days has elapsed?

5 JUDGE FAHEY: Well, that's not what he's saying.
6 That's not what I hear what he's saying, Judge.

7 JUDGE FEINMAN: Well, I want to be clear about
8 that.

9 JUDGE FAHEY: Is that - - - that what you're
10 saying?

11 MR. MANNING: But that - - - that takes us back
12 to the first point, Your Honor, which is - - -

13 JUDGE FAHEY: We need you to stay on this point.

14 MR. MANNING: No, I - - - I am on this point,
15 Your Honor, if I may. It depends on how the judge words
16 that order and how it's being handled.

17 JUDGE FAHEY: Well, it's pretty straightforward.
18 You get to replead in thirty days. Are you saying that
19 that's an outright dismissal or not?

20 MR. MANNING: Of that case, Your Honor? I guess,
21 having reflected on it, at that stage of the litigation,
22 no, that would not be an outright dismissal.

23 JUDGE FAHEY: So, all right. I - - - I accept
24 that; that's a reasonable response. But the reason I ask
25 this is because there are procedural postures that can be



1 taken that as - - - just as the example I just used - - -
2 which - - - which would be a procedural dismissal, but
3 really, in practical terms, aren't - - - aren't an
4 dismissal, and a bright-line rule might not apply, and
5 that's why I'm asking you about the objectively reasonable
6 standard that the Second Circuit has applied and the Fourth
7 Circuit has applied.

8 JUDGE WILSON: And so how does the return
9 jurisdiction provision affect your last answer, if it does?

10 MR. MANNING: Well, on - - - on the return
11 jurisdiction answer, it - - - it - - - it's - - - it
12 actually depends on how you interpret the return
13 jurisdiction clause. How we interpret it is the same as
14 the Eastern District of Louisiana. And that is, on the
15 return jurisdiction clause, we - - - we contend that did
16 not - - - it was not written to, and in fact, did not
17 protect the rights of absent class members as written.

18 However, we understand that both the State of
19 Delaware, and the lower court in this case, has read into
20 it, although it's not in the order itself, protections for
21 the absent class members.

22 But - - - but this whole conversation and
23 argument, if I may, points to the issue of - - - all the
24 issues that a legislature in enacting a statute would
25 consider in - - - in dealing with the situation.



1 JUDGE FAHEY: You know what? I paid attention to
2 the legislative argument, and it's an argument that's used
3 every time and in every le - - - in every state. I think
4 there are nine states that have had this issue come before
5 them, and they've split four in favor of cross-
6 jurisdictional tolling, and five against. And the
7 legislative argument comes up each time.

8 As I recall, in - - - in the original class - - -
9 that Congress itself never actually ruled on this issue or
10 legislated on this issue originally. Is that correct?

11 MR. MANNING: I - - - I believe that to be so,
12 Your Honor.

13 JUDGE FAHEY: Yeah. So you see my difficulty
14 with it.

15 MR. MANNING: Well, I do, Your Honor. I see I'm
16 out of time. I - - - thank you, Your Honor.

17 JUDGE FAHEY: The Chief Judge is - - - is - - -
18 she's - - - she's a softie on these things.

19 CHIEF JUDGE DIFIORE: I'm listening carefully,
20 and you'll have your two minutes of rebuttal, sir.

21 MR. MANNING: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel?

23 MR. MASSEY: May it please the court, is it
24 permitted for me to sit as well?

25 CHIEF JUDGE DIFIORE: Yes, sir.



1 MR. MASSEY: Thank you, Your Honor.

2 Good morning. My name is Jonathan Massey,
3 representing the respondents in this case.

4 I'll start on the first issue, but I also wanted
5 to address the second issue as well. The - - - the first
6 issue, I think, the - - - the legislative argument, Your
7 Honors' questions illuminate the weakness in it. The - - -
8 the cross-jurisdictional tolling, we think, is animated by
9 the same policies and the same concerns as intra-
10 jurisdictional tolling.

11 JUDGE GARCIA: Well, for - - -

12 MR. MASSEY: Yes - - - yes, sir?

13 JUDGE GARCIA: On that note, two things. One,
14 each state that's looked at this, and I think Virginia
15 comes to mind, looks at their own statutory scheme to
16 determine, can we do this? And I think Virginia said no.
17 But we have rules in Article 2 of the CPLR saying we can't
18 extend the statute of limitations, which makes us a
19 slightly different jurisdiction.

20 And - - - and two, with respect to the intrastate
21 tolling, to me, the federal rule here seems more like
22 intrastate toll, where the federal courts are playing
23 federal question, and there's a different proceeding and
24 they apply this toll. I've only found two cases where a
25 federal court was looking at a state court action and



1 determining whether or not they would give a cross-
2 jurisdictional toll to the state. They're both out of the
3 Seventh Circuit.

4 And what they really looked at there - - - and
5 they came to two different decisions, based on the claims
6 that were made in the state court action. And it seems to
7 me the intra - - - that's a good way of looking at, one
8 way, the very different concerns that an inter-
9 jurisdictional toll had raised, because the federal system,
10 where it's a federal question here, and a federal - - -
11 they're all playing by the same rules. They're playing by
12 the same claims, and we're not.

13 So do you think if we were to do this, should we
14 limit it in any way related to the claims that are brought
15 in the different state?

16 MR. MASSEY: Well, Your Honor, I think,
17 certainly, it is limited to the same plaintiffs and the
18 same claims. It's a transaction and occurrence kind of
19 thing. Here, I think, the claims are all essentially
20 negligence claims, and so the subject matter - - - the
21 allegations are all identical in the different states.

22 But let me add - - - also respond - - -

23 JUDGE GARCIA: And should that be part of our
24 test if we adopt cross-jurisdictional tolling?

25 MR. MASSEY: Yes, I do think that you should



1 limit it to claims that fall within the same transaction or
2 occurrence; they wouldn't be broader than that. And it has
3 to be the same plaintiffs like as in the - - -

4 JUDGE GARCIA: What if there was an additional
5 element required in the individual claim?

6 MR. MASSEY: Well, I think that's still part of
7 the same - - - there's a, you know, established transaction
8 or occurrence test that you wouldn't have to reinvent, that
9 covers res judicata and many other principles. And I think
10 you could just adopt that here, but - - - and - - - and so
11 I don't think that you would need to write on a clean
12 slate.

13 The - - - the New York situation, I think, is
14 different, but maybe for a separate reason, which is, New
15 York has been a leader in class action tolling. It adopted
16 it in Brinckerhoff in 1885, so a century before. And then
17 in the Sutton Carpet Cleaners case, which was in 1947, the
18 Supreme Court treated it as settled, and this court
19 affirmed.

20 Then when the legislature - - - I think the
21 legislature has left this issue very clearly to the courts,
22 because then in 1975, when the legislature expanded - - -
23 greatly expanded - - - the role of class actions under
24 Article 9, it did not disturb this principle at all.

25 And - - - and you might think, well, how could



1 the legislature have been thinking about that in 1975?
2 American Pipe was the year before. It was 1974. So this
3 issue of class action tolling was actually, I think, in - -
4 - in a very real sense, something that the legislature
5 could have addressed, but did not, because it left it to
6 the courts, which is consistent with the way the federal
7 system treats it in every state. They have to address this
8 question about - - -

9 JUDGE WILSON: Can - - - can I ask you about this
10 - - - can I ask you about the period of time during which
11 the Costa Rican plaintiffs are litigating in Costa Rica?
12 Is it your position that that - - - it is your position, I
13 assume, that that period of time is tolled?

14 MR. MASSEY: Yes.

15 JUDGE WILSON: And is it tolled because of the
16 action of the federal court or because of the pendency of
17 the similar claims in Costa Rica?

18 MR. MASSEY: I think, it's tolled because of the
19 federal court, because Judge Lake retained jurisdiction,
20 and he said that the - - - the return jurisdiction clause
21 said that the claims would be reinstated if - - -

22 JUDGE WILSON: So if - - - so if instead, the
23 court had simply dismissed on forum non grounds, without a
24 return jurisdiction provision, and the Costa Rican
25 plaintiffs immediately went to Costa Rica, you're not



1 arguing that the pendency of the Costa Rican action, as a
2 class action, tolled anything here?

3 MR. MASSEY: We're not having to make that
4 argument here. If the facts were different, a different
5 set of plaintiffs might be - - - if there were no return
6 jurisdiction clause, it - - - it might be different. But I
7 - - -I think - - -

8 JUDGE WILSON: But so why?

9 MR. MASSEY: Well, because this juris - - -
10 return jurisdiction clause - - -

11 JUDGE WILSON: Why would we pay attention to the
12 federal court's order and not the pendency in a foreign
13 country?

14 MR. MASSEY: You - - - you may very well might.
15 I'm not dis - - - I'm not trying to disagree on the Costa
16 Rican point. It - - - it could be that - - -

17 JUDGE WILSON: No, I'm trying to probe the
18 analytical consistency - - -

19 MR. MASSEY: Right. Well, I - - -

20 JUDGE WILSON: - - - right - - - between intra-
21 and inter-jurisdictional tolling.

22 MR. MASSEY: I - - - I see. I think that that
23 essentially when - - - when you have a federal court, and
24 when Judge Lake said, I will retain jurisdiction, and the
25 case, if you reinstate it, will be reinstated as though it



1 had never been dismissed, and that occurred against the
2 backdrop of the plaintiffs predicting to him that there was
3 going - - - there was a doctrine of preempted jurisdiction
4 in Latin America. And so five months later, that's only -
5 - - the gap in this case was only five months between the
6 October dismissal and their return to Judge Lake, they
7 plaintiffs' return to Judge Lake asking them to reinstate -
8 - -

9 JUDGE WILSON: That's the - - - that's the Costa
10 Rican plaintiffs, and there's plenty in the record about
11 them. The present complaint involves also Ecuadorian and
12 Panamanian.

13 MR. MASSEY: That is true.

14 JUDGE WILSON: What is - - - how - - - what
15 happened there? Where is that in the record?

16 MR. MASSEY: Well, with the - - - what happened
17 was Judge Lake re - - - the case had no geographic
18 subclasses, and so there was no reason for any other
19 plaintiffs. He didn't draw it up that way. And he said,
20 Judge Lake - - - when the plaintiffs - - - defendants made
21 this argument back in Texas in 2010, they said only the
22 Costa Rican plaintiffs have applied for reinstatement,
23 nobody else.

24 Judge Lake said take that up with the Texas state
25 courts. They did, and they lost. So the Texas state



1 courts re - - - reinstated the cases as putative class
2 actions, as they'd always been captioned. So the
3 defendants had the opportunity to make this argument, and -
4 - - and they didn't prevail.

5 And so we think, frankly, that the court should
6 take the Texas rulings on their face, reinstating the class
7 action, and also take Judge Lake's orders on their face.
8 He understood what he meant, and he said the - - - when the
9 case came back, he said this was a direct continuation of
10 the prior action.

11 So that's why I think this - - - the thirty-days
12 example on question 2, I think is very problematic for the
13 defendants, because if they say as - - - as Betances
14 against Fischer, the Badzio, Second Appellate - - - Second
15 Department appellate case from 2019, and the Scott against
16 D.C. case. All of those involved dismissals for mootness,
17 or dismissal with a - - - with leave to replead.

18 If you can - - - if you're going to concede that
19 those cases do not interrupt tolling, because they're not
20 definitive and they don't provide the kind of objective - -
21 - they don't meet the objective reasonableness standard, or
22 they're not even meeting the bright-line standard, whatever
23 rationale also applies when you have a five-month delay in
24 this case, when the plaintiffs had told Judge Lake - - -

25 JUDGE STEIN: But Counsel, what - - - what if we



1 disagree with that proposition and - - - and - - - because
 2 I - - - if we - - - if - - - if we were to assume, and I -
 3 - - as I understand it, I think both parties here agree to
 4 the, you know - - - is it reason - - - is - - - is reliant
 5 - - - continued reliance objectively reasonable or is it -
 6 - - is it reasonable? And the - - - the more - - - the
 7 more, you know, assumptions that go on, the more
 8 contingencies that are involved, it seems to me, it's less
 9 and less reasonable.

10 So if - - - here, even with the return
 11 jurisdiction clause, you've got the named plaintiffs only,
 12 right, and - - - who went - - - who are litigating in Costa
 13 Rica. And - - - and you have to assume that if - - - when
 14 they lose in Costa Rica, they're going to want to come back
 15 here, and - - - and pursue jurisdiction back here, as
 16 opposed to possibly settling the case, which is what many
 17 of them did, maybe all of them eventually.

18 You have to assume that the federal court would
 19 again remand to the state court. You have to assume that
 20 the state court would - - - would accept reinstatement as a
 21 class action with the intervenors and - - - rather than the
 22 named plaintiffs. And on and on and on.

23 So how - - - how - - - how is that reasonable
 24 reliance, even with the return jurisdiction clause that
 25 existed here?



1 MR. MASSEY: Because the plaintiffs told Judge
2 Lake that's exactly what was going to happen. They said,
3 we are going to be back in - - - because the Latin American
4 courts will not accept jurisdiction under this preemptive
5 jurisdiction doctrine. And so - - -

6 JUDGE STEIN: Well, that's what they believed
7 would happen, but - - -

8 MR. MASSEY: That's what their brief said to
9 Judge Lake, and so that was - - - everybody, sort of, on
10 the plaintiffs' side, everybody said, that's - - - that's
11 what's going to happen.

12 JUDGE STEIN: And you talk about it being five
13 months here, but if - - - if that's the rule that - - - you
14 know, that - - - that all of this stuff can be going on, it
15 could be five years; it could be ten years.

16 MR. MASSEY: Well, I - - - I don't - - - I mean,
17 I think that the - - - the reason to have the rules that we
18 favor is that that will incentivize the defendants to avoid
19 delaying tactics. I mean, the reason for all these gaps
20 and delays were that they acted within their rights. They
21 weren't - - - this is not sanctionable conduct that they
22 engaged in - - - that's kind of our point. If it were
23 sanctionable conduct, you wouldn't need these rules, but -
24 - -

25 JUDGE STEIN: Again, you - - - that you - - - you



1 assume that it's - - - you know, we're just looking at this
2 case. But if we're making a rule, it could be a country
3 where it takes years for anything to get through the court
4 system.

5 MR. MASSEY: Well, to make a rule, I would use
6 just the objectively reasonableness - - - the objective
7 reasonableness standard. That's if - - -

8 JUDGE STEIN: That's the - - - that's the
9 standard that I'm suggesting.

10 MR. MASSEY: Yes.

11 JUDGE STEIN: How is all - - - how are all of
12 these contingencies - - - how do they make it objectively
13 reasonable to sit back and wait to see what happens?

14 MR. MASSEY: Well - - -

15 JUDGE STEIN: Is - - - doesn't - - - isn't that
16 people sitting on their rights?

17 MR. MASSEY: I mean, the only - - - really the
18 gap is at the beginning, the five-month delay. I don't
19 think with - - - with the - - - then the people knew they
20 were going to be back in a putative class action before
21 Judge Lake. The - - - the idea that - - - that then it
22 would be remanded is, I think - - -

23 JUDGE STEIN: But the point is, is that when it
24 went to Costa Rica, nobody knew whether it would be five
25 days, five months, five years.



1 MR. MASSEY: Well - - -

2 JUDGE STEIN: So the - - -

3 MR. MASSEY: I - - -

4 JUDGE STEIN: - - - but there has to be, it seems
5 to me, for a reasonable reliance, there has to be some
6 cutoff point at which, okay, this is - - - this is what's
7 going to happen next.

8 MR. MASSEY: That might be so, Your Honor, but I
9 think five - - - thirty days is in it - - - if you have
10 leave to replead within thirty days - - - I think five
11 months is in it - - -

12 JUDGE RIVERA: But I - - - I - - - I thought your
13 point wasn't really that. I mean, I - - - I understand
14 that five months seems to tilt in your favor, but as you
15 can see, as Judge Stein - - -

16 MR. MASSEY: Yes.

17 JUDGE RIVERA: - - - correctly points out, the
18 rule is going beyond your case, right, so in other cases,
19 it may be much more time. But I thought the essence of
20 your point was that the reliance is, if you can't proceed
21 in that court, you get to come back here - - -

22 MR. MASSEY: Yes.

23 JUDGE RIVERA: - - - and then I'm going to rule
24 on this. And that's what they're relying on.

25 MR. MASSEY: That's correct.



1 JUDGE RIVERA: And whether or not it's five days,
2 five months, five years, twenty years.

3 MR. MASSEY: That - - - that is - - - that is
4 correct, Your Honor. I mean, I do think that - - -

5 JUDGE FAHEY: I - - - I had thought that - - -

6 JUDGE RIVERA: So my follow-up question to that
7 is, if that's your point, how - - - how does the - - - how
8 does - - - whether it's your analysis or case law support
9 that that's what the reasonable reliance is, that that's
10 what you're focused on?

11 MR. MASSEY: Well, I - - -

12 JUDGE RIVERA: This opportunity to return, right?

13 MR. MASSEY: Right, I mean, that's what the
14 Delaware Supreme Court Judge Engelmayer, I think, canvassed
15 the record and went through all of the facts. I think, the
16 - - - for example, here, the - - - the expressed
17 reservation of - - - of - - - of jurisdiction by Judge
18 Lake, the - - - the language of it'll be reinstated as
19 though it's never been dismissed, the fact that the Texas
20 courts - - -

21 JUDGE RIVERA: So - - -so it's the anticipation
22 of these putative class members that they have an
23 opportunity to get back into a U.S. court?

24 MR. MASSEY: Yes. It's a - - - well, it's a
25 reasonableness objective task - - -



1 JUDGE RIVERA: Yes, yes.

2 MR. MASSEY: - - - obviously, and yes - - -

3 JUDGE FAHEY: Isn't it - - -

4 MR. MASSEY: - - - and - - - and - - -

5 JUDGE FAHEY: Isn't the - - - the core analysis
6 behind your test, I think, is enhanced by the questions
7 that Judge Stein was asking, because she pointed to a
8 series of circumstances that are unknowable, and that
9 happened in the course of litigation, and makes each - - -
10 each case that comes before the court individual in its own
11 merits, and - - - and creates these procedural scenarios
12 that we could never predict.

13 And it seems we have one of two ways to go.
14 Either we can say, you have to look at each case and say
15 what's reasonable in this circumstance given this
16 procedural posture, or we have another way to go, say, this
17 is the line, you're done, and no matter what, no matter
18 what it is. So if - - - if you - - - we said you could
19 replead in thirty days, and you were done in fifteen days,
20 boom, you're out. And - - - and those seem to be our only
21 kind of options here. Is that - - - is that a fair
22 characterization then?

23 MR. MASSEY: Yes, I think that the - - - I think
24 that's right. I think the defendants have argued for a
25 very strong bright line, and our position is that the



1 objective reasonableness test that's been in the Second
2 Circuit - - -

3 JUDGE FAHEY: Yeah.

4 MR. MASSEY: And I - - - I do think our test is
5 better, because it mirrors the policies behind American
6 Pipe. I mean, Judge Leval said in the WorldCom Securities
7 case, this is not a gotcha test. The idea is to ali - - -
8 is to en - - - encourage absent class members to rely on
9 the pendency of a class action; that's how you achieve the
10 efficiency benefits that the test - - - that the whole
11 class action tolling rule is designed to achieve.

12 That's why the Third Circuit said it's not the
13 job of class members to look through the glass darkly. The
14 Delaware Supreme Court had the same kind of language,
15 because if you have a bright-line test, and you tell people
16 any dismissal or question about the case should lead you to
17 file placeholder actions, then New York and Delaware and
18 New Jersey are all going to be hit with additional cases
19 because they are the home turf for many corporations.

20 So plaintiffs worried about personal jurisdiction
21 will come to those kinds of states. So I think it's
22 telling that New Jersey and Delaware have both adopted
23 class action tolling.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 MR. MASSEY: Thank you.



1 CHIEF JUDGE DIFIORE: Counsel?

2 MR. MANNING: Yes, first Your Honor, may I
3 suggest that New York, through the Brinckerhoff case, did
4 not establish cross-jurisdictional tolling. It was an
5 intervention case, under the Field Code, and even before
6 the class action statute was enacted, and I don't - - - I
7 don't think it particularly provides guidance in this
8 matter.

9 To Judge Stein's point about what the absent
10 class members and objective class member would be thinking
11 at the time, we haven't talked at all about the trip to
12 Hawaii for another class action during the pendency of
13 this. How could an absent class member be relying on Texas
14 for an independent class action brought in Hawaii? That
15 was among the variety of things that we contend make the
16 absent class members' reliance upon the class members in
17 Texas unreasonable.

18 The Costa Rican plaintiffs, when they came back
19 to Judge Lake, they came back with their own claims. They
20 didn't protect the absent class members. They dealt for
21 their own claims at that point. That's because the return
22 jurisdiction clause was directed only to the plaintiffs,
23 and not to the absent class members.

24 You can look at the lengthy period of time, some
25 of which were court delays, some of which were precipitated



1 by plaintiffs, and some of which were precipitated by
2 defendants. But you wind up with this case, twenty-seven
3 years later, at the pleading stage in New York because the
4 plaintiffs advocate for twenty-seven years of tolling for a
5 case that would have been brought and tried in New York
6 decades ago.

7 JUDGE RIVERA: So throughout that whole process,
8 you knew the nature of the claims; you're in control of all
9 of what has gone in - - - in your companies, right, and
10 your clients. They - - - they know the nature of the
11 claims; they know what - - - in many ways, what their
12 exposure is. And that's really, I think, the - - - what
13 makes the argument so weak, in addition to much else that
14 goes on.

15 You're really are on notice. You understand.
16 And that - - - the whole point of - - - or one of the
17 points of statute of limitations is to make sure that the
18 defendant has some notice, and you don't have stale claims
19 and all of that.

20 MR. MANNING: But if I may, Your Honor, some
21 notice is the key word. There are 16,000 plaintiffs, we
22 think. We haven't heard from the other twenty-four
23 companies, not - - - the other twenty-four countries
24 haven't come back to Judge Lake.

25 JUDGE RIVERA: Um-hum.



1 MR. MANNING: So what do we know about those
2 claims? What do we know about those people? Now, Judge -
3 - - in this Eastern District of Louisiana, the trial judge
4 there took - - -

5 JUDGE RIVERA: But didn't the companies make a
6 poisonous product that injured lots of people?

7 MR. MANNING: The company has denied that, Your
8 Honor.

9 JUDGE RIVERA: Sure.

10 MR. MANNING: And - - - and - - -

11 JUDGE RIVERA: But - - - but you're aware that -
12 - - obviously, there's more nuance to that, the - - -

13 MR. MANNING: Yes, of course.

14 JUDGE RIVERA: Please don't take me seriously in
15 that way, but you know the heart and soul of these claims.

16 MR. MANNING: Well, if - - - if - - -

17 JUDGE RIVERA: And - - - and as he's already
18 conceded, should there be filings in the state court that
19 involve some other elements of claims that really could not
20 have been perceived -- they don't arise out of the same
21 occurrences or transactions -- then you might have grounds
22 to say that tolling cannot apply to those kinds of claims.

23 MR. MANNING: Well, if we were all in one system,
24 Your Honor, I would agree with what you're saying, but - -
25 - but we're not. We're in a completely different system,



1 and I think it's objectively unreasonable for an absent
2 class member to have relied upon what was going on in Texas
3 during the twenty-seven years.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MR. MANNING: Thank you.

6 CHIEF JUDGE DIFIORE: Thank you.

7 (Court is adjourned)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



C E R T I F I C A T I O N

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Tobias Bermudez Chavez, et al. v. Occidental Chemical Corporation, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: September 14, 2020

