

No. _____

In the Supreme Court of the United States

MICHAEL COLLINS, on behalf of himself and all
others similarly situated,
Petitioner,

v.

VILLAGE OF PALATINE, ILLINOIS,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh
Circuit*

PETITION FOR WRIT OF CERTIORARI

Martin J. Murphy
Counsel of Record
Law Office of Martin J. Murphy
1222 West Arthur Avenue
Chicago, Illinois 60626
(312) 933-3200
mjm@law-murphy.com

Counsel for Petitioner

QUESTIONS PRESENTED

American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) hold that the commencement of a class-action lawsuit tolls the statute of limitations for absent class members until the existence and limits of the class have been established. The First, Third, Fifth, Sixth and Eleventh Circuits interpret that to mean that tolling continues throughout the litigation of the class-complaint including appeals. The Seventh Circuit holds that tolling stops immediately when a district court dismisses a class-action complaint with prejudice before a class certification determination is made and does not continue while the dismissal is appealed.

1. Whether *American Pipe* tolling ceases immediately when a class-action lawsuit is dismissed with prejudice before a determination on class certification is made by the district court.
2. Whether the answer to question number 1 is different if the dismissal was erroneous and reversed on appeal.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. Petitioner is an individual. Respondent is a municipal corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES.....	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
INTRODUCTION.....	1
STATEMENT OF THE CASE	4
Class Allegations.....	4
Procedural History	5
<i>Senne</i> Litigation	5
<i>Murphy</i> Litigation	8
<i>Collins</i> Litigation.....	9
REASONS FOR GRANTING THE PETITION.....	12
I. The Seventh Circuit’s Decision Creates An Irreconcilable Circuit Split With The First, Third, Fifth, Sixth and Eleventh Circuits.....	12
A. The Seventh Circuit Holds That The Statute of Limitations Resumes	

Immediately When A Class Action Lawsuit Is Dismissed Ahead Of A Ruling On Class Certification	12
B. The Third, Fifth, Sixth and Eleventh Circuits Hold That <i>American Pipe</i> Tolling Lasts From The Commencement Of A Class-Action Lawsuit Until An Appeal Is Decided.....	13
C. The First and Sixth Circuits Discourage Filing New Lawsuits Before A Certification Decision Is made.....	16
II. The Seventh Circuit's Decision Conflicts With 43 Years Of Precedent In This And Lower Courts Interpreting <i>American Pipe</i> Tolling	18
A. <i>American Pipe</i> and <i>Crown, Cork & Seal</i> Hold That The Commencement Of A Class Action Tolls The Statute Of Limitations Until Certification is Decided.....	18
B. This Court Held That A District Court's Dismissal With Prejudice Or Even The Denial Of Class Certification Is Not The Death Knell Of A Class-Action.....	20
III. The Seventh Circuit's Rule Is Inconsistent With Rule 23 and Unworkable	26
CONCLUSION	29

APPENDIX

- Appendix A Opinion of the United States Court
of Appeals for the Seventh Circuit
Affirming Dismissal
(November 16, 2017).....App. 1a
- Appendix B Order Granting Defendant’s
Motion to Dismiss in the United
States District Court, Northern
District of Illinois
(August 29, 2016).....App. 17a
- Appendix C Order of the United States Court of
Appeals for the Seventh Circuit
Denying Plaintiff’s Petition for
Rehearing *En Banc*
(December 13, 2017) App. 28a

TABLE OF AUTHORITIES

CASES

<i>American Pipe & Constr. Co. v. Utah</i> , 414 U.S. 538 (1974).....	<i>passim</i>
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978).....	22
<i>Crown, Cork & Seal Co. v. Parker</i> , 462 U.S. 345 (1983).....	<i>passim</i>
<i>Deposit Guaranty Nat. Bank v. Roper</i> , 445 U.S. 326 (1980).....	21
<i>Edwards v. Boeing Vertol Co.</i> , 717 F.2d 761 (3 rd Cir. 1983).....	13
<i>Glater v. Eli Lilly & Co.</i> , 712 F.2d 735 (1 st Cir. 1983)	16
<i>Gomez v. Campbell-Ewald Co.</i> , 768 F.3d 871 (9 th Cir. 2014).....	28
<i>Gonzales V. Cassidy</i> , 474 F.2d 67 (5 th Cir. 1973).....	25
<i>Griffin v. Singletary</i> , 17 F.3d 356 (11 th Cir. 1994).....	14
<i>In re Vertrue Inc. Mktg. & Sales Practices Litigation</i> , 719 F.3d 474 (6 th Cir. 2013).....	15, 16, 17

<i>Murphy v. Village of Palatine</i> , 15 cv 9800 (N.D. Ill.)	8
<i>Resh v. China Agritech, Inc.</i> , 857 F.3d 994 (9th Cir. 2017)	27
<i>Senne v. Village of Palatine</i> , 10 cv 5434 (N.D. Ill.)	5
<i>Senne v. Village of Palatine</i> , 136 S. Ct. 419 (2015)	8
<i>Senne v. Village of Palatine</i> , 6 F. Supp. 3d 786 (N.D. Ill. 2013)	7
<i>Senne v. Village of Palatine</i> , 645 F.3d 919 (7th Cir. 2011)	6
<i>Senne v. Village of Palatine</i> , 695 F.3d 597 (7th Cir. 2012)	6, 8
<i>Senne v. Village of Palatine</i> , 784 F.3d 444 (7th Cir. 2015)	8
<i>Stein v. RMK Select High Income Fund, Inc.</i> , 821 F.3d 780 (6 th Cir.2016), ...	17
<i>Taylor v. United Parcel Service, Inc.</i> , 554 F.3d 510 (5th Cir. 2008)	14
<i>United Airlines, Inc. v. McDonald</i> , 432 U.S. 385 (1977)	23
<i>United States Parole Comm'n v. Geraghty</i> , 445 U.S. 388 (1980)	22

<i>Wyser-Pratte Management Co. v. Telxon Corp.</i> , 413 F.3d 553 (6th Cir. 2005).....	17
---	----

STATUTES

18 U. S. C. §§ 2721-2725.....	5
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1658(a)	1

RULES

Federal Rule Civil Procedure 12(b)(6)	11
Federal Rule of Civil Procedure 23	27

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Collins respectfully petitions this Honorable Court for a writ of certiorari to the Seventh Circuit Court of Appeals.

OPINIONS BELOW

The court of appeals opinion affirming dismissal is reported at 875 F.3d 839 and is reproduced at App. 1a-16a. The district court's opinion granting dismissal is reported at 203 F. Supp. 3d 952 and is reproduced at App. 17a-27a. The Seventh Circuit's order denying rehearing *en banc* is reproduced at App. 28a-29a.

JURISDICTION

On November 16, 2017, the court of appeals issued its opinion affirming the district court. On December 13, 2017, the court of appeals denied the Plaintiff's Petition for Rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1658(a) provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

INTRODUCTION

Citing to trends in its circuit, and in federal courts generally, the Seventh Circuit created the first rule of its kind: that class action tolling ceases not only when class certification is denied, as this Court has held for the last 43 years, but also when a district court dismisses a class action complaint with prejudice ahead of a ruling on class certification. The court, applying this new rule retroactively, upheld the dismissal of petitioner's sequential class action complaint, holding that the statute of limitations was not tolled for the two years the appeal, of the erroneously dismissed first complaint, awaited hearing, rehearing, and eventually reversal in the Seventh Circuit.

Conversely, the Third, Fifth, Sixth, and Eleventh Circuits follow the bedrock rule which holds that the commencement of a class-action lawsuit tolls the statute of limitations during the entire prosecution of the action, including the prosecution of any appeal, otherwise, a plaintiff could not count on an appeal to protect his or her rights.

The First and Sixth circuits go even further and hold that *American Pipe* tolling is unavailable to absent class members that decide to file an individual lawsuit ahead of a decision on class certification. Those courts hold that the purpose of *American Pipe* is not furthered when plaintiffs file independent actions before a decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided. Encouraging the filing of individual lawsuits ahead of a determination on class certification, this Court said

in *American Pipe*, would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.

In addition, a writ is appropriate in this case, because the lower court's decision directly contradicts the basic tolling rules set forth in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) and followed by circuit courts for over 43 years that the commencement of a class-action lawsuit tolls the statute of limitations for absent class members until the existence and limits of the class have been established.

The Seventh Circuit's newly minted rule, that tolling ceases immediately when a class action lawsuit is dismissed with prejudice before a ruling on class certification is made, leaves absent class members with three impossible choices: intervene for the purpose of filing a duplicate appeal; file a duplicate of the lawsuit that was just dismissed and risk being sanctioned for filing a frivolous lawsuit; or do nothing and pray that the appeal is decided before the statute of limitations expires and possibly lose any right to have the case heard. This is so under the Seventh Circuit's new rule even if the named representative appeals on behalf of himself and absent class members. But, what purpose would be served by filing a duplicate lawsuit after the original was just dismissed? Why must a putative member intervene for the purpose of taking an appeal when an appeal is already being taken by the named

representative? If the purpose of tolling is to preserve party and court resources in cases where the potential recovery is too small to warrant individual action, then the Seventh Circuit's opinion is the antithesis of that purpose. It invites the filing of duplicate lawsuits after the identical lawsuit has just been dismissed. It gives district courts the final word on which cases may go forward and which ones must fall without affording review.

This case warrants immediate consideration, because the Seventh Circuit's decision conflicts directly with the First, Third, Fifth, Sixth and Eleventh Circuit courts; ignores well settled decisions of this Court; deprives Rule 23 of its purpose to promote efficiency and economies by encouraging the unnecessary filing of wasteful and duplicate lawsuits and unnecessary motions to intervene which will further tax an already overburdened court system and deprive it of much needed resources.

STATEMENT OF THE CASE

Class Allegations

This is the third of three identical sequential class action lawsuits filed in the Northern District of Illinois since 2010 against the Village of Palatine on behalf of the following class:

Each and every individual who received a parking citation left on the windshield of a parked vehicle in the Village of Palatine, Illinois and whose "personal information" was obtained from a "motor vehicle record" and printed on the parking

citation including the individuals name, address, driver identification number, race, date of birth, height, weight and/or sex without the express consent of such individuals, from August 28, 2006 through the date of judgment herein.¹

Excluded from the class are persons who have authorized Palatine in writing to provide third parties with their “personal information” for any purpose.

Each of the complaints allege that the Village violated the Driver’s Privacy Protection Act of 1994 (DPPA or Act), 18 U. S. C. §§ 2721-2725 (1994 ed. and Supp. IV) (“DPPA” or “Act”) by lawfully obtaining personal information from the class’s motor vehicle records and then unlawfully disclosing that information to the general public by printing it on the outside of bright yellow citations and posting the citations to the windshields of their unattended vehicles. The complaints all seek the same relief: statutory damages, attorney fees, and injunctive relief against further disclosures.

Procedural History

***Senne* Litigation**

On August 27, 2010, Jason Senne filed the first putative class action against the Village of Palatine for violating the DPPA. *Senne v. Village of Palatine*, 10 cv 5434 (N.D. Ill.) (“*Senne*”). *Senne* Dkt. 1. On

¹ The end date was later changed to August 30, 2010, the date that Palatine began redacting personal information on copies of citations left on unattended vehicles in response to the lawsuit.

September 22, 2010, in a ruling from the bench, the district court dismissed Senne's class action complaint holding that Palatine did not disclose personal information within the meaning of the Act. *Senne* Dkt 28. Alternatively, the court ruled that any disclosure would be a permitted exception as a use by law enforcement. 18 U.S.C. § 2721(b)(1). The court terminated Senne's motions for class discovery and injunctive relief as moot. *Id.*

A Seventh Circuit panel unanimously agreed that Palatine did disclose personal information within the meaning of the Act, but was divided on whether the disclosures were permitted with the majority holding that the disclosures were permitted for use in connection with the service of process, 18 U.S.C. § 2721(b)(4), and affirmed dismissal. *Senne v. Village of Palatine*, 645 F.3d 919 (7th Cir. 2011). The case was reheard en banc. The full court unanimously agreed that Palatine disclosed personal information within the meaning of the Act, but was again divided over whether the disclosures were permitted. *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012) (en banc). This time the majority held that the disclosures were not permitted unless all of the information was information that was actually used for the claimed purpose. *Id.*

On September 10, 2012, the day the court's mandate issued, Senne filed a motion for class certification. On May 31, 2013, after initial class discovery was conducted, Senne filed an amended motion for class certification. *Senne* Dkt. 91. On July 23, 2013, the motion for class certification was argued. At the conclusion of the motion hearing, the

court directed Palatine to file a motion for summary judgment against Senne and deferred ruling on the motion for class certification. *Senne* Dkt. 107. The district court entered a minute entry stating that:

Hearing held on 7/24/2013 regarding motion to certify class 91. Consideration of motion is deferred pending determination of motion for summary judgment relating to issues other than constitutionality of DPPA statute. Motion for summary judgment to be filed by 8/5/13.

On August 5, 2013, Palatine filed its motion for summary judgment against the only named representative, Jason Senne. *Senne* Dkt. 112. On November 27, 2013, before ruling on the motion for class certification or the class members' claims, the district court granted summary judgment against Senne (alone). *Senne* Dkt. 131. In granting the motion for summary judgment, the court found, contrary to the en banc opinion, that Palatine's disclosures were permitted because some of the information could have been used for a permitted purpose. *Id.* at 9-10 The court found that the "correct reading is that the *ultimate* or *potential* use of personal information qualifies as acceptable use under the DPPA if it is for a permissible purpose listed in section 2721(b)." *Senne v. Village of Palatine*, 6 F. Supp. 3d 786, 795 (N.D. Ill. 2013).

The district court's Memorandum Opinion and Order stated that: "Plaintiff's motion for class certification is terminated as moot [docket no. 91]." However, the judgment did not mention the class

members' claims or the motion for class certification. The Judgment merely stated that:

Judgment is hereby entered in favor of defendant(s) Village of Palatine and against plaintiff(s) Jason M. Senne. Defendants shall recover costs from plaintiff(s). Decided by Judge Mathew F. Kennelly on a motion for summary judgment [112].

On November 27, 2013, "Jason Senne on behalf of himself and all other persons similarly situated" appealed the Judgment. On April 28, 2015, a panel affirmed. *Senne v. Village of Palatine*, 784 F.3d 444 (7th Cir. 2015). Again, Senne petitioned for rehearing en banc which was denied. *Senne*, No. 13-3671 (7th Cir. June 17, 2015). However, "Chief Judge Wood, Judge Rovner, Judge Williams and Judge Hamilton voted to grant the petition for rehearing en banc, viewing the panel decision as inconsistent with the court's earlier decision in this case, *Senne v. Village of Palatine*, 695 F.3d 597 (7th Cir. 2012) (en banc)." *Id.* Thereafter, Senne filed a petition for a writ of certiorari which was denied. *Senne v. Village of Palatine*, 136 S. Ct. 419 (2015).

***Murphy* Litigation**

On the same day that this Court denied Senne's petition, the second class action case was filed. *Murphy v. Village of Palatine*, 15 cv 9800 (N.D. Ill.) ("*Murphy*"). The case was a placeholder lawsuit filed by Martin Murphy, Senne's attorney and a recipient of one of Palatine's citations during the relevant time period. Murphy also filed a motion for leave to take

expedited and limited discovery for the purpose of finding a suitable replacement representative and acknowledging that an attorney for the class cannot also be the named plaintiff. *Murphy* Dkt. 6. Murphy also filed a conditional motion for class certification subject to a proper replacement plaintiff being located. *Id.* at 7. The case was assigned to Judge Shah. Judge Shah denied both motions without prejudice holding that they were premature. *Id.* at 17. Palatine moved to dismiss *Murphy* arguing that Murphy cannot be an attorney and named plaintiff, something Murphy had already acknowledged, and that Murphy, as the attorney in *Senne*, “controlled the litigation” and was also somehow bound by the judgment. *Id.* at 18. Rather than ruling on the motion, Judge Shah transferred *Murphy* to Judge Kennelly, the judge in *Senne*. *Id.* at 26. When the case was in front of Judge Kennelly, Michael Collins sought to intervene as a replacement plaintiff for Murphy. *Id.* at 23. Palatine objected to Collins intervening in *Murphy* arguing that Collins’ claim was time barred. *Id.* at 35. So Collins filed a sequential class action lawsuit and withdrew his motion. *Id.* at 39 and *Collins* Dkt 1. Once Collins filed his lawsuit, Murphy dismissed his complaint without prejudice as intended. *Murphy* Dkt. 39.

***Collins* Litigation**

On June 4, 2007, Petitioner was cited by the Village for a “paybox parking violation” (i.e. failing to deposit the required \$2 parking fee into a payment box corresponding to the parking space his vehicle was parked in). *Collins* Dkt. 1:5. Like everyone else

in the class, the bright yellow citation, which also doubles as a payment envelope, had Petitioner's name, address, height, weight, sex, date of birth, and driver's license number printed on the outside. *Id.* The citation was placed under the windshield wiper blade of petitioner's unattended vehicle which was parked in the public way in plain view of any passerby, i.e. unknown members of the public. *Id.*

On March 29, 2016, after Palatine objected to Collins intervening in *Murphy*, Collins filed this third successive class action complaint (alleging the same misconduct in relation to the identical class as *Senne* and *Murphy*). *Collins* Dkt. 1. *Collins* was randomly assigned to Judge Blakey. Palatine filed a motion before Judge Kennelly asking him to claw back the case from Judge Blakey arguing that it was essentially the refiling of *Senne* and *Murphy*. *Murphy* Dkt. 42. Collins objected and Judge Kennelly asked the Executive Committee to transfer the case to him. The Executive Committee entered the following order:

EXECUTIVE COMMITTEE ORDER: It appearing that 16 C 3814, Collins v. Village of Palatine, is currently pending before the Hon. John Robert Blakey; and It further appearing that Hon. Matthew F. Kennelly presided over 15 C 9800, Murphy v. Village of Palatine, Illinois; and It further appearing that after review, the Executive Committee determined that 16 C 3814, Collins v. Village of Palatine, amounts to a refiling of the dismissed case in 15 C 9800, Murphy v. Village of Palatine, Illinois; therefore, It is hereby ordered that 16 C 3814, Collins v.

Village of Palatine, is to be reassigned to Judge Kennelly pursuant to L.R. 40.3(a)(2). Case reassigned to the Honorable Matthew F. Kennelly for all further proceedings.

Collins Dkt. 6.

Once the case was again before Judge Kennelly, Palatine filed its third Rule 12(b)(6) motion to dismiss (arguing that Collins was also bound by the panel's decision in *Senne*) under the doctrine of *stare decisis*; that his complaint failed to state a claim; and that Collins' claim is time barred. *Id.* at 9.

On May 18, 2016, Collins filed his response arguing that the statute of limitations was an improper basis for Palatine's Federal Rule Civil Procedure 12(b)(6) motion, because it would require the court to go outside of the complaint; that the statute of limitations was tolled under *American Pipe* and its progeny; that complaint stated as cause of action as found by the *en banc* Court; and that this was an improper consecutive Rule 12(b)(6) motion to dismiss. *Id.* at 12.

On May 31, 2016, Collins filed a motion to certify the case as a class action. *Id.* at 15. On June 15, 2016, Palatine filed a motion to stay the court's decision on Collins motion to certify a class or alternatively to strike the motion without prejudice to the later refiling until after the court ruled on Palatine's motion to dismiss. *Id.* at On June 22, 2016, the court granted the motion and stayed the filing of a response or ruling on the motion to certify until it ruled on the merits of Palatine's motion to

dismiss first. *Id.* at 20. On August 29, 2016, the district court dismissed Collins' putative class action complaint (again without ruling on the class's claims) as time barred holding that each time it dismissed *Senne* (first on a motion to dismiss and later on a motion for summary judgment): the statute of limitations resumed. (Pet. App 20-26). The court also denied the motion for class certification (without comment) in its order, but not on the judgment form. *Id.* at 20. The judgment entered merely stated that: Judgement entered dismissing this action with prejudice. *Collins* Dkt. 23.

The court declined to address Palatine's other arguments, the class claims, or motion for class certification. Collins appealed the dismissal and denial of class certification. A Seventh Circuit panel affirmed and the petition for rehearing en banc was denied.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for a writ of certiorari for the following reasons:

- I. The Seventh Circuit's Decision Creates An Irreconcilable Circuit Split With The First, Third, Fifth, Sixth and Eleventh Circuits**
 - A. The Seventh Circuit Holds That The Statute of Limitations Resumes Immediately When A Class Action Lawsuit Is Dismissed Ahead Of A Ruling On Class Certification**

The Seventh Circuit held that “[t]he trend in this circuit, and in federal courts generally, points to a unified rule that is “clear and easy to enforce.” An uncertified class-action suit is decidedly not a class action once all class claims have been dismissed. The statute of limitations immediately resumes.” App. 13a-14a (citation omitted).

B. The Third, Fifth, Sixth and Eleventh Circuits Hold That *American Pipe* Tolling Lasts From The Commencement Of A Class-Action Lawsuit Until An Appeal Is Decided

The Third, Fifth, Sixth and Eleventh Circuits all hold that *American Pipe* tolling lasts throughout the appeal, when class certification has not been previously denied. Conversely, the Seventh Circuit has become the only court to adopt a blanket rule that tolling ceases immediately when an uncertified class-action lawsuit is dismissed with prejudice.

The Third Circuit in *Edwards v. Boeing Vertol Co.*, 717 F.2d 761, 766 (3rd Cir. 1983) vacated on other grounds, 468 U.S. 1201, 104 S. Ct. 3566, 82 L.Ed.2d 867 (1984), held that consistency with the policies reiterated in *Crown, Cork & Seal* requires that the tolling of the statute of limitations continue until a final adverse determination of class claims, which occurs after an appeal is decided. Edwards was an absent member of a certified class. The court conducted a trial and determined that a class action could not be maintained. Thereafter, the court entered judgment in favor of some and against other

named plaintiffs. The court held that Edwards was entitled to tolling while the class action was pending, that is from the date the class action was filed until the date the appeal was decided. *Id.*

The tolling rule followed by the Third Circuit in *Edwards* was also followed by the Eleventh Circuit in *Griffin v. Singletary*, 17 F.3d 356, 361 (11th Cir. 1994) which said that:

The class action filed in the *Griffin* litigation put the defendants on notice of adverse claims relating to their use of the written examination; they were made "aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class." Tolling the administrative limitations period will discourage putative class members from needlessly multiplying actions without prejudicing defendants.

Therefore, we hold that the charge-filing period for the individual claims asserted in the *Platt* litigation was tolled during the pendency of the class action in *Griffin*—that is, from the time the lawsuit was filed until this Court published its opinion vacating the order certifying the class on September 23, 1987.

17 F. 3d at 361 (citation omitted).

The Fifth Circuit followed the Third and Eleventh Circuits' decisions. In *Taylor v. United Parcel Service, Inc.*, 554 F.3d 510 (5th Cir. 2008) the court said that the bedrock rule is that: "[A] party who sues

on a cause of action tolls the statute of limitations during the entire prosecution of the action, including the prosecution of any appeal; otherwise, a plaintiff could not count on an appeal to protect his or her rights.” Comparing its rule to the Third Circuit’s decision in *Edwards*, the Fifth Circuit said:

In concluding that tolling continued until September 30, 1981, when the district court’s judgment was affirmed on appeal, the *Edwards* court followed the general rule that tolling continues until the judgment in the case becomes final or until “a final adverse determination” is made. If the judgment is appealed, this occurs when the appeal is decided; if no appeal is taken, the judgment becomes final when the time for appeal ends.

Id. at 520.

In addition to the Third, Fifth and Eleventh Circuits, other circuit courts have also held that *American Pipe* tolling lasts after dismissal and appeal where the district court did not address class certification before dismissing the class action. The Sixth Circuit in the *In re Vertrue Inc. Mktg. & Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013) held that the statute of limitations was tolled for a subsequent class action throughout the entire litigation of the previously filed case including appeals. The court said that the risk of repetitive and indefinite class action lawsuits addressing the same claims is simply not present in a sequentially filed class action where the district court did not rule

on a motion for class certification in the first case. *Id.* at 480. Thus, the court held that the commencement of the original class action lawsuit tolled the statute of limitations under *American Pipe* throughout the entire prosecution and dismissal of that case. *Id.* at 479-480.

C. The First and Sixth Circuits Discourage Filing New Lawsuits Before A Certification Decision Is made

The Seventh Circuit's rule encourages the filing of duplicative lawsuits and motions ahead of class certification where a class action lawsuit is dismissed with prejudice without a ruling on the certification issue. The First and Sixth Circuits take the opposite position and discourage absent class members from filing new lawsuits until the certification issue is decided reasoning that courts would be burdened by multiple lawsuits holding that the purpose of *American Pipe* is not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided.

In *Glater v. Eli Lilly & Co.*, 712 F.2d 735 (1st Cir. 1983), the First Circuit held that "[t]he policies behind Rule 23 and *American Pipe* would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing." *Id.* at 739. In other words, absent class members are prohibited from taking advantage of *American Pipe* tolling unless they first wait for a ruling on class certification.

In *Stein v. RMK Select High Income Fund, Inc.*, 821 F.3d 780 (6th Cir.2016), the Sixth Circuit adopted the same position as the First Circuit in *Glater*. The court explained that under its decision in *Wyser-Pratte Management Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005), “a plaintiff who chooses to file an independent action without waiting for a determination on the class certification issue may not rely on the *American Pipe* tolling doctrine.” *Stein*, 821 F.3d at 789 (quoting *Wyser-Pratte*, 413 F.3d at 568). Concern that courts would be burdened by multiple lawsuits, the court held that “[t]he purposes of *American Pipe* tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided.” *In re Vertrue Inc. Mktg. & Sales Practices Litigation*, 719 F.3d 474, 480 (6th Cir. 2013) quoting *Wyser-Pratte*, 413 F.3d at 569.

The Seventh Circuit’s holding puts it in direct conflict with the First and Sixth Circuits and leaves absent class members with another impossible choice. Once a class action complaint is dismissed with prejudice, absent class members must choose sides and follow the Seventh Circuit’s rule and file a duplicate lawsuit or follow the First Circuit, Sixth Circuit and this Court and wait for a final decision on class certification as advised to do in *American Pipe* and *Crown, Cork & Seal*.

Accordingly, a writ of certiorari is warranted and necessary to resolve the true circuit split over an important question with the First, Third, Fifth, Sixth

and Eleventh Circuit Courts of Appeals created by the Seventh Circuit's new rule.

II. The Seventh Circuit's Decision Conflicts With 43 Years Of Precedent In This And Lower Courts Interpreting *American Pipe* Tolling

A. *American Pipe* and *Crown, Cork & Seal* Hold That The Commencement Of A Class Action Tolls The Statute Of Limitations Until Certification is Decided

This case warrants consideration and underscores the need for the Court's urgent resolution of these issues, because the Seventh Circuit's decision directly contradicts the straight-forward holding and basic tolling rules set forth by this Court in *American Pipe & Constr. Co. v. Utah*, 94 S. Ct. 756, 38 L.Ed.2d 713 (1974) and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) and followed by this and lower courts for over 43 years. A writ of certiorari is urgently needed to preserve this Court's and lower court's decisions and to protect valuable party and court resources from the unnecessary replication of motions and legal filings sure to come from defense attorneys pushing the courts to follow the Seventh Circuit's flawed rule and plaintiff's attorneys responding out of an abundance of caution and confusion from the conflicting decisions.

American Pipe informs absent class members that:

[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action [and] [n]ot until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it...

414 U.S. 554, 552.

Crown, Cork & Seal reiterates that point by holding that:

Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.”

462 U.S. 350.

In both *American Pipe* and *Crown, Cork & Seal*, the controlling question is: when did the court deny class certification? At that point, automatic tolling ceases, and absent class members are advised by those cases that they need to take action. Conversely, when a district court refuses to address the merits of

class certification and the representative is taking every possible action to protect the rights of the absent class members, the cases advise the putative class that they need not take any action.

A straight-forward reading of those cases makes it abundantly clear that absent members do not have to take any action until an order granting or denying class certification is made in the district court in the first instance. Because the district court never ruled on the merits of class certification, tolling never resumed. The absent class members did exactly what *American Pipe* advises them to do. The Seventh Circuit's new rule punishes absent class members for something they have no control over and encourages the unnecessary filing of new motions and lawsuits. Neither the absent class members nor the court of appeals can be faulted for the time it takes for an appeal to be decided, because an appeal requires mandatory mediation, briefing, arguing and a decision. In *Senne*, the court also reheard the case en banc which extended the time it took for the appeal to conclude. The Seventh Circuit's new rule advocating the needless refiling of a dismissed class complaint or filing thousands of individual claims, based upon an erroneously dismissed complaint, before an appeal can be decided, is an invitation to file frivolous claims and clog the courts instead of the more economic and desirable action of letting the case play out as *American Pipe* advises.

B. This Court Held That A District Court's Dismissal With Prejudice Or Even The

**Denial Of Class Certification Is Not The
Death Knell Of A Class-Action**

American Pipe and *Crown, Cork & Seal* are authoritative decisions of this Court and binding on the lower courts. The Seventh Circuit disregarded the plain and unambiguous language of those authoritative decisions when it ruled that: “An uncertified class-action suit is decidedly not a class action once all class claims have been dismissed.” App. 13a-14a. A dismissal with prejudice without a decision on the merits of class certification does not end the litigation, because “a decision that is “final” for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run.” *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)

The Seventh Circuit’s decision wrongly states that it doesn’t matter for tolling purposes whether a suit is dismissed with or without prejudice. App. 11a. Actually, it matters a lot. A case dismissed without prejudice is treated as though it was never filed and the dismissal is not a final and appealable order. Conversely a dismissal with prejudice is “final” for the purpose of taking an appeal. So for purposes of tolling, a dismissal without prejudice is final because it cannot be appealed; and a dismissal with prejudice is not final because it can be appealed. Accordingly, there is a huge difference between a case dismissed with prejudice and one dismissed without prejudice.

The Seventh Circuit's new rule that: "An uncertified class-action suit is decidedly not a class action once all class claims have been dismissed," ignores this Courts numerous decisions to the contrary. App. 13a-14a. This Court has repeatedly stated that the denial of class status will not necessarily be the "death knell" of a class-action, since there still remains "the prospect of prevailing on the merits and reversing an order denying class certification." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 400, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978) this Court held that:

There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation. Thus, if the "death knell" doctrine has merit, it would apply equally to the many interlocutory orders in ordinary litigation—rulings on discovery, on venue, on summary judgment—that may have such tactical economic significance that a defeat is tantamount to a "death knell" for the entire case.

Id.

Thus, under this Court's holding in *Livesay*, the dismissal of a class action complaint with prejudice does not, in and of itself, end the litigation unless the representative throws in the towel and no one willing to step forward. As long as there is the prospect of an appeal, a dismissal with prejudice of a class-action complaint ahead of a ruling on class certification is not the death-knell of the class's claims or the class-action.

In *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S. Ct. 2464, 53 L. Ed. 2d 423 (1977) this Court held that a putative class member may intervene, after the statute of limitations for the class's claims expired, for the purpose of appealing the denial of a class certification motion, after the named plaintiffs' claims were satisfied and judgment entered in their favor. Again, that decision was based on the recognition that a district court's refusal to certify a class was subject to appellate review after final judgment by the representative or by an absent class member who seeks to intervene when it becomes apparent that the representative is unwilling or unable to act on behalf of the unnamed plaintiffs. *Id.*, at 393. In *McDonald*, this Court found that dismissal with prejudice of the named representative's claim did not mean that the case was conclusively not a class action even where the named representative, herself, was precluded from taking an appeal.

In *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980) this Court held that named plaintiffs whose claims were

satisfied through entry of judgment over their objections may nonetheless appeal the denial of a class certification ruling, on behalf of and in the name of the unnamed members of the class, even though they have no personal stake in the outcome except perhaps in the sharing of expenses. The District Court denied respondents' motion to certify the class and certified the order denying class certification. *Id.* at 329. The Fifth Circuit denied respondents' motion for interlocutory appeal and the bank then tendered to each named plaintiff, in the form of an "Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability," the maximum amount that each could have recovered, including interest and court costs. *Id.* Respondents declined to accept the tender and made a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling. *Id.* The counteroffer was declined by the bank. *Id.*

The District Court entered judgment in respondents' favor, over their objection, and dismissed the action. *Id.* at 330. The bank deposited the amount tendered into the registry of the court, where it remained throughout the appeal. *Id.* At no time did any putative class member seek to intervene either to litigate the merits or to appeal the certification ruling. *Id.* By the time the district court entered judgment and dismissed the case, the statute of limitations had run on the individual claims of the absent class members. *Id.*

This Court held that “the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' *individual* interest in the litigation—as distinguished from whatever may be their representative responsibilities to the putative class was sufficient to permit their appeal of the adverse certification ruling. *Id.* at 340.

Likewise, Senne appealed the dismissal of the class complaint “on behalf of himself and all others similarly situated,” including petitioner (an unnamed member of the putative class). Senne prevailed in the appeal. The Seventh Circuit's new holding that the case was conclusively not a class action when it was dismissed with prejudice, even though that dismissal was erroneous, conflicts with the authoritative decisions of this Court that all district court orders are reviewable.

Prior to the Seventh Circuit's holding in this case, there has never been a case (class action or otherwise) that has held that the statute of limitations resumes while a controversy is still being litigated. The other circuit courts and this Court have all said that the failure of a named representative to file an appeal means that the person is not an adequate representative of the class. See, for e.g., *Gonzales V. Cassidy*, 474 F.2d 67, 76 (5th Cir. 1973) (“It is axiomatic that an appeal is a significant element in the judicial process. Gaytan's failure to prosecute an appeal deprived the members of his class, whose rights were not vindicated by the three-judge court's decision, of full participation in

this process.”); [I]t is the responsibility of the class representative to protect the interests of all class members. That responsibility does not end at the district court because “[i]t is axiomatic that an appeal is a significant element in the judicial process.” *Id.*

As set forth above, most circuit courts agree that consistent with this Court’s decisions in *American Pipe* and *Crown, Cork & Seal*, tolling continues throughout the prosecution of a case from the date of filing to the date any appeal is decided as long as class certification was not previously denied. If class certification was denied, that decision itself could also be appealed and tolling would not have ceased for the absent class members. Accordingly, a writ of certiorari is warranted because the Seventh Circuit’s opinion conflicts with the authoritative decisions of this Court and involves a matter of extreme importance and this Court’s guidance is necessary to assure Plaintiffs’ attorneys and lower courts that *American Pipe* tolling is still good law, to preserve judicial resources, and prevent unnecessary duplicate filings.

III. The Seventh Circuit’s Rule Is Inconsistent With Rule 23 and Unworkable

The Court in *Crown, Cork & Seal* explained that: “[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. The result would be a needless multiplicity of actions — precisely the situation that Federal Rule of Civil

Procedure 23 and the tolling rule of *American Pipe* were designed to avoid.” 462 U.S. at 349-350. Likewise, if the statute of limitations is not tolled when a case is dismissed with prejudice, as the Seventh Circuit now holds, putative class members will have every incentive to file a separate action prior to a certification decision out of fear that their claim may expire. This too is inconsistent with Rule 23.

As set forth above, *American Pipe* and its progeny hold that statute of limitations tolling applies until class certification is denied. The Seventh Circuit erred in extending that exception to cases which are dismissed with prejudice. This Court has never held that the statute of limitations expired while a case was on appeal in the circuit courts or this Court. In fact, it is clear that such a rule is unworkable in the real world.

In almost every case the Court hears, the statute of limitations would have expired while the case was on appeal if the statute were allowed to continue to run after the class’s claims were dismissed with prejudice ahead of a ruling on class certification. A prime example of this is *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017) (cert. granted 17-432). In *Resh*, the plaintiff filed a third consecutive class action complaint after the previous two cases were dismissed with prejudice. The third case was dismissed with prejudice as time barred before a motion for class certification was filed. According to the plaintiffs in that case, there were 291 days left on the statute of limitations when it was filed. *Id.* at

999. Dismissal of the uncertified class-action complaint became final on February 23, 2015. *Id.* The Ninth Circuit decided the appeal in favor of the absent class members on May 24, 2015, which was too late under the Seventh Circuit's decision, because 720 days elapsed between the date when the judgment became final and the date when the decision was reversed. In other words, the decision came 409 days too late. Thus, under the Seventh Circuit's decision, the appeal was moot before it was decided and long before this Court agreed to hear the case. Clearly the Seventh Circuit's new rule is severely flawed.

Another example is *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014). *Gomez* was filed with 53 days left on the statute of limitations. On February 22, 2013, and before Gomez filed a motion for class certification, the district court entered summary judgment in favor of the defendant. Five hundred and seventy-four days later on September 19, 2014, the Ninth Circuit reversed summary judgment and also ruled that the unaccepted offer of judgment made to Gomez did not moot his or the class's claims. However, under the Seventh Circuit's rule, the Ninth Circuit's reversal came more than 500 days too late to save the absent member's claims. This Court granted a petition for a writ of certiorari and affirmed the Ninth Circuit. Again, under the Seventh Circuit's new rule, this Court's decision was also too late to save the class's claims.

The above cases are just two of a number of examples that demonstrate that the Seventh

Circuit's decision is an outlier that conflicts with the decisions of its sister courts of appeals and the authoritative decisions of this Court. As the above cases demonstrate, there is no rational basis for the Seventh Circuit's rule and a writ of certiorari is necessary to correct this obviously flawed decision.

CONCLUSION

This Honorable Court should grant the petition.

Respectfully submitted,

Martin J. Murphy
Counsel of Record
 Law Office of Martin J. Murphy
 1222 West Arthur Avenue
 Chicago, IL 60626
 (312) 933-3200
 mjm@law-murphy.com

Attorney for Petitioner

April 13, 2018

APPENDIX

TABLE OF CONTENTS

Appendix A	Opinion of the United States Court of Appeals for the Seventh Circuit Affirming Dismissal (November 16, 2017).....	1a
Appendix B	Order Granting Defendant's Motion to Dismiss in the United States District Court, Northern District of Illinois (August 29, 2016).....	17a
Appendix C	Order of the United States Court of Appeals for the Seventh Circuit Denying Plaintiff's Petition for Rehearing <i>En Banc</i> (December 13, 2017).....	28a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-3395

[Filed November 16, 2017]

MICHAEL COLLINS, on behalf	)
of himself and all others similarly	)
situated	)
<i>Plaintiff-Appellant,</i>)	
	)
v.	)
	)
VILLAGE OF PALATINE, IL,	)
<i>Defendant-Appellee.</i>	)

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 16 C 3814 — **Matthew F. Kennelly**, *Judge*.

ARGUED FEBRUARY 7, 2017
DECIDED NOVEMBER 16, 2017

Before BAUER, POSNER,* and SYKES, *Circuit Judges*.

* Circuit Judge Posner retired on September 2, 2017,
and did not participate in the decision of this case,
which is being resolved by a quorum of the panel
under 28 U.S.C. § 46(d).

SYKES, *Circuit Judge*. When a plaintiff files a complaint on behalf of a proposed class, the statute of limitations for the claim is tolled for each member of the class. *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974). The tolling continues until the case is “stripped of its character as a class action.” *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393 (1977) (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment). This “stripping” occurs immediately when a district judge denies class certification, dismisses the case for lack of subject-matter jurisdiction without deciding the class-certification question, or otherwise dismisses the case without prejudice. The question before us is whether a dismissal *with* prejudice also strips a case of its class-action character. The district court concluded that it does. We agree and adopt a simple and uniform rule: Tolling stops immediately when a class-action suit is dismissed—with or without prejudice—before the class is certified.

I. Background

On a summer day in June 2007, a police officer in the Village of Palatine issued a parking ticket to Michael Collins. When Collins returned to his car later that day, he found the bright yellow ticket under his car’s windshield wiper blades. The ticket listed personal information about him, including his name, address, driver’s license number, date of birth,

sex, height, and weight. Collins claims that the display of his personal information violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. §§ 2721 *et. seq.* So on March 29, 2016, he sued the Village of Palatine on behalf of himself and a proposed class.

Ordinarily the long delay in filing suit—almost nine years—would be fatal to his claim; the DPPA's statute of limitations is four years. But the timeliness of Collins's claim is complicated by the earlier filing of a nearly identical class complaint against Palatine.

Jason Senne faced a similar ticketing scenario. He left his car illegally parked overnight, and a Palatine police officer placed a parking ticket displaying his personal information on the car's windshield. On August 27, 2010, Senne sued on behalf of himself and all similarly situated individuals alleging that Palatine violated the DPPA. Because the law-suit was brought as a class action, the filing of the complaint tolled the DPPA's statute of limitations for everyone in the proposed class.

Senne's case had a short life in the district court. On September 22, 2010, before Senne filed a motion to certify a class, the district court granted Palatine's motion to dismiss for failure to state a claim. A panel of this court affirmed the dismissal, but the full court reheard the case and reversed. *See Senne v. Village of*

Palatine, 695 F.3d 597, 599–600 (7th Cir. 2012) (en banc).

On remand Senne moved to certify a class. The district judge heard argument on the motion but deferred ruling, instead inviting Palatine to file a motion for summary judgment. Palatine complied. The judge entered summary judgment for the Village and “terminated” the motion for class certification as moot. *See Senne v. Village of Palatine*, 6 F. Supp. 3d 786, 797 (N.D. Ill. 2013). We affirmed, *Senne v. Village of Palatine*, 784 F.3d 444 (7th Cir. 2015), and on November 2, 2015, the Supreme Court denied certiorari, 136 S. Ct. 419 (2015).

On the day the Supreme Court denied certiorari, Senne’s attorney, Martin Murphy, filed a successor class action on behalf of himself and a proposed class. His complaint was just a placeholder to preserve the class’s claims. Murphy later filed this suit naming Collins as the class representative; he then sought voluntary dismissal of his own complaint.

Palatine moved to dismiss, arguing that Collins’s claim was time-barred because the statute of limitations resumed when the district court dismissed Senne’s lawsuit. Collins responded (through Murphy, his counsel) that the dismissal on timeliness grounds was inappropriate at the pleadings stage, and even if procedurally proper, the suit was timely because the limitations period was

tolled until the Supreme Court denied Senne's petition for certiorari. He also separately moved to certify a class.

The judge agreed with Palatine that Collins's claim was time-barred and granted the motion to dismiss. The judge summarily denied the motion for class certification, apparently on mootness grounds, though he did not give a reason. This appeal followed.

II. Discussion

Although the statute of limitations is an affirmative defense, dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is appropriate if the complaint contains everything necessary to establish that the claim is untimely. *See Bonnstetter v. City of Chicago*, 811 F.3d 969, 974 (7th Cir. 2016). Moreover, judicial notice of public court documents is appropriate when ruling on a Rule 12(b)(6) motion to dismiss. *White v. Keely*, 814 F.3d 883, 885 n.2 (7th Cir. 2016). Because the complaint and court documents contain every-thing necessary to decide the timeliness issue here, it was procedurally proper at the pleadings stage for the judge to consider whether Collins's claim was barred by the statute of limitations.

We review the dismissal order de novo, accepting all well-pleaded facts in the complaint as true. *See*

McCauley v. City of Chicago, 671 F.3d 611, 615–16 (7th Cir. 2011). Here, timeliness turns on the question of tolling. If tolling ended and the limitations clock resumed when the *Senne* suit was dismissed, Collins’s claim is untimely. But if tolling continued until the appeals in *Senne* were exhausted, then Collins’s claim is still live. This is a pure question of law: At what point does class-action tolling end?

A. Tolling the Statute of Limitations

To determine what starts and stops the limitations clock in the class-action context, we begin with the seminal case, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, Utah sued several companies alleging that they colluded to drive up the price of steel and concrete pipe in violation of the Sherman Act. *Id.* at 541. The suit was filed as a class action with just 11 days left under the applicable statute of limitations. *Id.* Six months later the district judge held that the suit could not be maintained as a class action. *Id.* at 542. Within eight days of that order, more than 60 towns, municipalities, and water districts claiming to be members of the original class moved to intervene as plain-tiffs. *Id.* at 543–44. The question facing the Supreme Court was whether those motions to intervene were time-barred or whether Utah’s class

complaint tolled the statute of limitations for the class.

The Supreme Court first clarified that when federal law supplies the period of limitations, federal courts have the “power to toll statutes of limitations.” *Id.* at 558. The Court then moved to the main event, holding that “the commencement of the original class suit toll[ed] the running of the statute for all purported members of the class who ma[d]e timely motions to intervene after the court ... found the suit inappropriate for class action status.” *Id.* at 553. In other words, members of the putative class still had live claims and could intervene because the filing of the class action tolled the statute of limitations for each of their claims.

The Supreme Court grounded its decision on concerns about judicial efficiency in the class-action context. The Court explained that without tolling, only “those potential members of the class who had earlier filed motions to intervene in the suit” could participate, which would incentivize all potential class members “to file protective motions to intervene or to join in the event that a class was later found unsuitable.” *Id.* If every class member rushed to intervene, class actions would lose the “efficiency and economy of litigation[,] which is a principal purpose of the procedure.” *Id.* On the other hand, the twin policies underlying statutes of limitations—“ensuring

essential fairness to defendants and ... barring a plaintiff who has slept on his rights”—would not be undermined by tolling. *Id.* at 554 (internal quotation marks omitted). That is so, the Court said, because the commencement of a class suit “notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.” *Id.* at 555.

In the years following *American Pipe*, appellate courts considered whether its tolling rule applies only to class members seeking intervention after the denial of class certification or if it also applies to class members who file separate actions. See *Parker v. Crown, Cork & Seal Co.*, 677 F.2d 391 (4th Cir. 1982), *aff’d* 462 U.S. 345 (1983); *Pavlak v. Church*, 681 F.2d 617 (9th Cir. 1982), *vacated and remanded*, 463 U.S. 1201 (1983); *Stull v. Bayard*, 561 F.2d 429 (2d Cir. 1977). In *Crown, Cork & Seal Co. v. Parker*, the Supreme Court resolved that important question, refusing to confine the *American Pipe* rule to intervenors and instead making clear that tolling also “appl[ies] to class members who choose to file separate suits.” 462 U.S. at 352. Any other rule, the Court said, would diminish the efficiency of class actions by creating “an increase in protective filings in all class actions.” *Id.* at 353.

B. Resuming the Limitations Clock

Together, *American Pipe* and *Crown, Cork & Seal* explain that the filing of a proposed class action immediately pauses the running of the statute of limitations for all class members. But neither opinion addresses whether tolling continues during the pendency of an appeal after the suit is dismissed or class certification is denied.

As a general matter, the consensus view among the circuits is that once certification is denied, the limitations clock *immediately* starts ticking again.¹

¹ *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 650 (6th Cir. 2015) (“When the district court denied class certification ... , *American Pipe* tolling ended”); *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 116 (2d Cir. 2013) (“We now take this opportunity to join our sister circuits and hold that [*American Pipe*] tolling does not extend beyond the denial of class status.”); *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 519 (5th Cir. 2008) (“Therefore, it is clear from these cases that if the district court denies class certification under Rule 23, tolling of the statute of limitations ends.”); *Bridges v. Dep’t of Md. State Police*, 441 F.3d 197, 211 (4th Cir. 2006) (“[T]he statute of limitations ‘remains tolled for all members of the putative class until class certification is denied for whatever reason.’” (quoting *Crown, Cork & Seal v. Parker*, 462 U.S. 345, 354 (1983))); *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000) (“[T]olling ends with the district court’s dismissal of the class action”); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 (11th Cir. 1998) (en banc) (“[W]e hold that the tolling of the statute of limitations ceases when the district court enters an interlocutory order denying class certification.”); *Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 (3d Cir. 1995) (concluding that “the tolling period ended when the district court denied certification of the class”); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985) (“The statute begins running anew from the date of notice that certification has been

We've been emphatic on this point: "Resumption is automatic...." *Lewis v. City of Chicago*, 702 F.3d 958, 961 (7th Cir. 2012). The circuits also agree that the limitations clock resumes at other procedural intervals as well, such as when a class member opts out of a certified class,² when the class component of a suit is voluntarily dismissed,³ or when the court

denied."); *Fernandez v. Chardon*, 681 F.2d 42,48 (1st Cir. 1982) ("[T]he statute will resume running when class certification is denied.").

² See, e.g., *Realmonde v. Reeves*, 169 F.3d 1280, 1284 (10th Cir. 1999) ("[W]e hold that the fact that the Realmontes' participation in the class action terminated with a decision to opt out of a certified class rather than with the denial of class certification is irrelevant to the applicability of the *American Pipe* tolling rule."); *Adams Pub. Sch. Dist. v. Asbestos Corp.*, 7 F.3d 717, 718 n.1 (8th Cir. 1993) ("The fact that this participation ended with a decision to 'opt out' rather than with denial of class certification is irrelevant to the applicability of the *American Pipe* rule."); *Tosti*, 754 F.2d at 1488 ("[T]he statute begins running anew from the date when the class member exercises the right to opt out"); *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 610 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) ("[W]e hold that the statute is tolled as to any particular defendant until such time as he is notified of the suit and chooses to opt out.").

³ See, e.g., *Glidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 627 (7th Cir. 1986) ("The voluntary dismissal of the class component of a suit also must restart the time."); *Torkie-Tork v. Wyeth*, 739 F.Supp.2d 887, 895 (E.D. Va. 2010) ("Thus, the prior class action suit operated to toll the applicable statute of limitations for the ten-month period between filing and voluntary dismissal."); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 689 (N.D. Ga. 1997) ("[A]lthough the filing of a class action complaint tolls the

dismisses an uncertified class-action suit for lack of subject-matter jurisdiction.⁴ In other words, the statute of limitations resumes for putative class members of an uncertified class “when the suit is dismissed without prejudice or when class certification is denied.” *Culver v. City of Milwaukee*, 277 F.3d 908, 914 (7th Cir. 2002).

Here we face a slightly different scenario. The question of class certification was never addressed because the district court (1) initially dismissed the case *with* prejudice and (2) later entered summary judgment. Does it matter for tolling purposes whether a suit is dismissed with prejudice or not?

We’ve suggested before that it doesn’t. See *In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006). The plaintiff in *In re Copper* argued that tolling continued through appeal of an order dismissing an earlier putative class action with prejudice. *Id.* We rejected that approach, holding that the plaintiff was “not entitled to take advantage

applicable statute of limitations for absent class members, a voluntary dismissal would start the statute of limitations running again.”).

⁴ *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 266 (7th Cir. 1998)(“Well, then, should it matter that *Kelce* was dismissed for want of subject-matter jurisdiction rather than because class status was inappropriate?”).

of tolling ... beyond the date when the district court dismissed” the earlier suit. *Id.* “At that point,” we said, “the parties are on notice that they must take steps to protect their rights or suffer the consequences.” *Id.*

We are not aware of any federal court that has reached a contrary conclusion. The Fifth Circuit has held that tolling continues on appeal from a dismissal with prejudice but *only* when a class has been certified. See *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 520–21 (5th Cir. 2008). The court explained that “members of the certified class may continue to rely on the class representative to protect their interests throughout the entire prosecution of the suit, including appeal.” *Id.* But, the court observed, “[t]he same result does not flow for members of a putative class that has not been certified,” noting a “distinction between putative members of an uncertified class and members of a certified class in determining the application of tolling principles.” *Id.* at 517. The Fifth Circuit’s reasoning in *Taylor* is fully consistent with a rule that the limitations clock resumes when a noncertified class claim is dismissed with or without prejudice.

Finally, it’s important to note again that *American Pipe* and *Crown, Cork & Seal* struck a balance between judicial efficiency and the policies

underlying statutes of limitations. Concern for judicial efficiency loomed large in *American Pipe*; without tolling, individual class members would have to file suit in order to protect their claims from becoming time-barred. But continuing to toll the limitations period beyond the dismissal of a noncertified class claim would encroach more severely on the interests underlying statutes of limitations, the purpose of which is “to protect defendants against stale or unduly delayed claims.” *Credit Suisse Secs. (USA) LLC v. Simmonds*, 566 U.S. 221, 227 (2012) (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008)). “[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action ...” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 950 (1997).

The trend in this circuit, and in federal courts generally, points to a unified rule that is “clear and easy to enforce.” *In re Copper*, 436 F.3d at 793. An uncertified class-action suit is decidedly not a class action once all class claims have been dismissed. The statute of limitations immediately resumes.

C. Applying the Rule

The DPPA’s four-year statute of limitations on Collins’s claim commenced on June 14, 2007, when he discovered that personal information was

displayed on his parking ticket. The statute was tolled when Jason Senne filed suit on behalf of a proposed class on August 27, 2010. And it began to run once again when the district court dismissed that case on September 22, 2010. Once the claim was dismissed, *American Pipe*'s tolling rule no longer controlled. The statute of limitations for Collins's claim immediately resumed. The limitations period expired on July 10, 2011, long before he filed this suit.

We note in closing that a district court's dismissal of a class complaint prior to ruling on a class-certification motion may impact the preclusive effect of the court's judgment. Rule 23 encourages an early certification decision: "At an early practicable time ... , the court must determine by order whether to certify the action as a class action." FED. R. CIV. P. 23(c)(1)(A). "[A]s soon as practicable" usually means "before the case is ripe for summary judgment." *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 941 (7th Cir. 1995). But we've explained that the word "'practicable' allows for wiggle room" and "'usually' is not 'always.'" *Id.*

Embracing this "wiggle room" here, the judge dismissed Collins's claim as time-barred and summarily denied the motion for class certification, undoubtedly because it was moot (though, as we've noted, he did not give a reason). Collins challenges

that approach, relying on *Wiesmueller v. Kosobucki*, 513 F.3d 784 (7th Cir. 2008). That case dealt with very different circumstances.

Wiesmueller was a suit by an out-of-state law student challenging Wisconsin's diploma privilege, which waives the bar exam for graduates of the two in-state law schools. The district court dismissed the case and denied the plaintiff's motion to certify the class. The plaintiff appealed, but in the meantime passed the Wisconsin bar exam so his individual claim became moot. We clarified that an appeal from the denial of class certification is not *necessarily* moot simply because the named plaintiff's individual claim is moot, especially when "an unnamed class member ... ha[d] ex-pressed interest in substituting for the plaintiff as class representative." *Id.* at 786. We added, however, that we were "not say[ing] that the district judge may never dismiss a case on summary judgment without first ruling on the plaintiff's motion to certify a class." *Id.* at 787. We have repeatedly affirmed that a judge may do precisely that. *See, e.g., Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1057 n.3 (7th Cir. 2016).

Here, the dismissal of Collins's claim made the class-certification question irrelevant. When the plaintiff's own claim is dismissed, he "can no longer be the class representative. At that point either another class representative must be found or the

suit is kaput.” *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. 1994) (citations omitted). No one stepped forward to “pick up the spear” after Collins’s claim was dismissed. *Cowen*, 70 F.3d at 941. That makes sense. Because the limitations period was not tolled during the pendency of the *Senne* appeal, it’s not likely that any class member has a timely claim. That’s not to say that *no one* could step forward to bring a class claim. If there are class members for whom the statute of limitations has not run, the district court’s summary denial of class certification would not bind them. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011).

The limitations clock on Collins’s claim resumed when the *Senne* class action was dismissed with prejudice prior to class certification. Accordingly, his claim is time-barred. The judgment of the district court is

AFFIRMED.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**Case No. 16 C 3814
Hon. Matthew F. Kennelly
[Filed: August 29, 2016]**

MICHAEL COLLINS, on behalf of	)
himself and all others similarly	)
situated,	)
	)
Plaintiff,	)
	)
v.	)
	)
VILLAGE OF PALATINE,	)
	)
Defendant.	)
	)

MEMORANDUM OPINION AND ORDER

On June 14, 2007, a Palatine police officer placed a traffic citation on the windshield of Michael Collins's car in public view. The citation included Collins's name and driver's license number, as well as his date of birth, gender, height, and weight. A

little under nine years later, on March 29, 2016, Collins sued Palatine. He contended, on behalf of himself and others similarly situated, Palatine had improperly disclosed personal information about him from motor vehicle records, in violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2721(a).

Palatine has moved to dismiss Collins's suit, arguing that it is barred by the four-year statute of limitations that governs DPPA claims. Collins says in his complaint that his case is a "successor" to two other similar putative class actions against Palatine, *Senne v. Village of Palatine* and *Murphy v. Village of Palatine*, both of which alleged the same type of DPPA violation, and both of which were brought by the same lawyer who filed the present case. Palatine prevailed on summary judgment in the *Senne* case, and *Murphy* was voluntarily dismissed. The Court's determination of Palatine's motion to dismiss Collins's suit largely turns on how the *Senne* case affected the running of the limitations period on Collins's DPPA claim.

Facts

The Court takes the following facts from the allegations in Collins's complaint and from public court documents in the *Senne* and *Murphy* cases, of which the Court takes judicial notice. *See, e.g., White v. Keely*, 814 F.3d 883, 885 n.2 (7th Cir. 2016).

Collins lives in Long Grove, Illinois. On the morning of June 14, 2007, he parked his car in a public area at the Metra station in Palatine and boarded a train to Chicago. He says he believed he

had paid the \$2 parking fee. Later that day, a Palatine police officer issued a parking citation stating that the car was illegally parked. When Collins returned to his car that evening, he found the citation on the outside of his windshield, in plain view. The citation contained Collins's name, address, driver's license number, date of birth, gender, height, and weight. Collins alleges that the police officer obtained all of this information from the Illinois Secretary of State and that it came from his driver's license and vehicle title. Collins contends that Palatine's listing of this information on a traffic citation that was left in a publicly accessible place constituted disclosure of personal information from motor vehicle records prohibited by the DPPA.

On August 27, 2010, about three years and two months after Collins received his citation, the *Senne* lawsuit was filed. Senne's complaint, like Collins's, was based on his allegation that Palatine had improperly disclosed personal information from motor vehicle records in violation of the DPPA by including it on a traffic citation left on the windshield of his car on August 20, 2010. The *Senne* suit was filed by attorney Martin Murphy, who is also Collins's attorney in the present lawsuit. The complaint in *Senne* said that the suit was being filed on behalf of a putative class of others who had received parking citations from Palatine. However, Senne's attorney did not file a motion to certify the class prior to the Court's dismissal of the suit for failure to state a claim on September 22, 2010. Senne appealed the dismissal of the suit, and the Seventh Circuit reversed. *See Senne v. Vill. of Palatine*, 695

F.3d 597 (7th Cir. 2012) (en banc). The clerk of the district court received the Seventh Circuit's mandate on September 11, 2012, and that is the date on which this Court reacquired jurisdiction over the case. Discovery then proceeded. Senne filed a motion for class certification on September 10, 2012 when the case came back to this Court, and he filed an amended motion for class certification on May 31, 2013. The class certification motion was briefed and argued, but following argument, the Court determined to defer ruling on the motion pending its consideration of an anticipated but not yet filed motion for summary judgment by Palatine. On November 27, 2013, the Court granted Palatine's motion for summary judgment and terminated Senne's class certification motion as moot. Judgment in Palatine's favor was entered that same day. The Seventh Circuit affirmed this Court's judgment on April 28, 2015, and the Supreme Court denied certiorari on November 2, 2015. *See Senne v. Vill. of Palatine*, 784 F.3d 444 (7th Cir.), *cert. denied*, 136 S. Ct. 419 (2015).

Attorney Murphy filed a suit against Palatine on his own behalf on November 2, 2015. He likewise alleged on behalf of himself and a putative class that Palatine had violated the DPPA by placing a traffic citation including information from his motor vehicle records on his windshield on August 24, 2010 (interestingly, just three days before attorney Murphy filed the *Senne* lawsuit). *See Murphy v. Vill. of Palatine*, No. 15 C 9800 (N.D. Ill.). Murphy filed a motion for class certification on December 7, 2015. Palatine filed a motion to strike the class action

allegations from Murphy's complaint on January 12, 2016, arguing that Murphy could not appropriately serve as both the class representative and the attorney for the class. On February 15, 2016, Collins, the plaintiff in the present case, filed a motion seeking to intervene in the *Murphy* case and file an amended complaint naming only himself as the named plaintiff in Murphy's stead. Palatine objected to the motion. On March 29, 2016, Collins separately filed the present lawsuit, and the next day, Murphy filed a document in the *Murphy* case entitled "plaintiff's Rule 41 motion for voluntary dismissal without prejudice." The Court entered an order in *Murphy* granting that motion on April 13, 2016, but it is likely that the dismissal of the case was effective on March 30, 2016 upon Murphy's filing of the mistitled "motion" for voluntary dismissal, because Palatine had neither answered the complaint nor filed a motion for summary judgment. *See* Fed. R. Civ. P. 41(a)(1)(A)(i).

Discussion

Palatine contends that Collins's lawsuit is barred by the statute of limitations. Collins argues that because the statute of limitations is an affirmative defense, it is inappropriate to dismiss the case as time-barred on a Rule 12(b)(6) motion. The Court disagrees. Though, generally speaking, affirmative defenses are not properly considered on a motion to dismiss for failure to state a claim—the reason being that a plaintiff is not required to anticipate possible affirmative defenses in his complaint—the law is clear that dismissal under Rule 12(b)(6) is appropriate if the complaint sets forth everything

that is necessary to establish the affirmative defense. *See, e.g., Bonstetter v. City of Chicago*, 811 F.3d 969, 974 (7th Cir. 2016); *Brooks v. Ross*, 578 F.3d 574, 579 (7th Cir. 2009). And as noted earlier, a court addressing a Rule 12(b)(6) motion may consider not just the complaint's allegations but also matters of which it may properly take judicial notice, including official court records. *White*, 814 F.3d at 885 n.2; *Olson v. Champaign Cty.*, 784 F.3d 1093, 1097 n.1 (7th Cir. 2015). The Court also notes that Collins specifically alleged in his complaint that "[t]his is a successor class action complaint to 10 cv 5434 (*Senne v. Village of Palatine, Ill.*) and 15 cv 9800 (*Murphy v. Village of Palatine, Ill.*)," Compl., p. 1, making it doubly appropriate to consider the public-record procedural history of those cases in addressing the present motion.

The Court therefore turns to the merits of Palatine's limitations argument. The general four-year limitations period found in 28 U.S.C. § 1658 governs DPPA claims. *See McDonough v. Anoka Cty.*, 799 F.3d 931, 939 (8th Cir. 2015). Collins's DPPA claim accrued when he found the parking citation on his windshield on June 14, 2007, *see id.* at 943; Palatine so argues, and Collins does not contend otherwise. Thus Collins's claim expired on June 14, 2011 unless a basis for tolling the limitations period exists.

There is no question that *part* of the limitations period is tolled by the pendency of the *Senne* and *Murphy* putative class actions. Collins would have been a member of the putative classes in each of those cases. For this reason, the limitations period

applying to his claim was tolled during the period from the filing of each of those cases until either disposition in the district court or denial of class certification, whichever came first. "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983). And "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown, Cork & Seal Co.*, 462 U.S. at 354.

Collins says that class certification was never denied in either *Senne* or *Murphy* and that, as a result, the tolling provided under the rule of *American Pipe* never stopped. In *Senne*, the Court granted summary judgment in Palatine's favor and, at the same time, terminated the class certification motion as moot. In *Murphy*, the suit was voluntarily dismissed by Murphy prior to any ruling on the motion for class certification. Collins contends that because class certification was never denied in either case, tolling continued, and his suit is timely.

This argument is foreclosed by a series of Seventh Circuit cases, beginning with *Hemenway v. Peabody Coal Co.*, 159 F.3d 255 (7th Cir. 1998). In that case, the earlier putative class action suit was dismissed on jurisdictional grounds without any indication of a ruling directly on class certification. The court posed this question: "should it matter that [the earlier putative class action suit] was dismissed for want of

jurisdiction rather than because class status was inappropriate?" *Id.* at 266. It answered the question no, saying that the putative class action's failure on jurisdictional grounds had to be treated as a failure of class certification for purposes of tolling under *American Pipe* and *Crown, Cork & Seal*. *Id.* The Seventh Circuit reaffirmed this principle in *Culver v. City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), saying that although "[t]he filing of a class action suit tolls the statute of limitations for all members of the class, . . . when the suit is dismissed without prejudice or when class certification is denied the statute resumes running for the class members." *Id.* at 914 (emphasis added; internal quotation marks omitted). And finally, in *Sawyer v. Atlas Heating and Sheet Metal Works*, 642 F.3d 560 (7th Cir. 2011), the court said that "[t]olling lasts from the day a class claim is asserted until the date the suit is conclusively not a class action—which may be because the judge rules adversely to the plaintiff, or because the plaintiff reads the handwriting on the wall and decides not to throw good money after bad" and drops the case. *Id.* at 563.

It was crystal clear that the *Senne* case was "conclusively not a class action" once this Court dismissed it. For this reason, the tolling effect of *Senne* stopped when that case was dismissed—actually, each time it was dismissed—even though the Court did not directly rule on the merits of the motion for class certification as such.

Collins also argues that the tolling effect of *Senne* never stopped because the members of the putative class in that case, including Collins, were not notified

that the case had been dismissed. But nothing in Federal Rule of Civil Procedure 23 requires this.⁵

Were Collins's position on these points taken as the law, the mere filing of *Senne* would continue *to this day and beyond* to toll the statute of limitations for parking citation recipients in Palatine who got their tickets any time after August 26, 2006, four years before *Senne* was filed. In other words, were Collins to lose this case on its merits at any time before ruling on a motion for class certification, attorney Murphy could simply keep finding plaintiffs who had gotten parking citations in Palatine any time after August 26, 2006 and keep filing suits forever. A rule that allowed this would make no sense. It would completely defeat the purpose underlying statutes of limitation. No case in the Seventh Circuit supports Collins's position on this point.

Finally, the pendency of an appeal in *Senne* did not further toll the statute of limitations. Rather, the statute resumed running each time judgment was entered in this Court dismissing the case. *See In re Copper Antitrust Litig.*, 436 F.3d 782, 793 (7th Cir. 2006) (concluding that plaintiff was "not entitled to take advantage of tolling in [the earlier suit] beyond the date when the district court dismissed the case.").

⁵ A rule requiring this would be quite difficult to administer. To note just a few of the issues: Who would pay for the cost of identifying class members (often a difficult and expensive task) and sending the notice? The plaintiff who has just lost his suit? The plaintiff's attorney? Or the defendant who has won the suit?

The upshot of the Court's ruling regarding when the statute of limitations was tolled and when it was not is that Collins's DPPA claim is time-barred. Between June 14, 2007, when Collins's claim accrued, and August 27, 2010, when *Senne* was filed, three years and seventy-four days had run on the four-year limitations period, leaving another 291 days for Collins to file suit. The *Senne* suit was first dismissed by this Court on September 22, 2010, and the limitations clock resumed at that point. It ran out sometime in mid-July 2011, while the case was still pending on appeal. And even were one to disregard the first dismissal-plus-appeal period in *Senne*, perhaps on the theory that because the dismissal was erroneous, the intervening time should not count against absent class members filing their own suits, the clock ran out after the second *Senne* dismissal, long before either Murphy or Collins filed their suits. Specifically, the Court granted summary judgment in Palatine's favor on November 24, 2013, and if the same 291 days were left on the clock at that point, the limitations period expired sometime in mid-September 2014. The *Murphy* suit was not filed until fourteen months after that, on November 2, 2015. In short, Collins filed the present suit long after the statute of limitations had run. The Court dismisses the case on this basis and thus need not address Palatine's additional arguments in support of dismissal.

Conclusion

For the reasons stated above, the Court grants defendant's motion to dismiss [dkt. no. 9] and directs the Clerk to enter judgment dismissing this action

27a

with prejudice. The Court also denies plaintiff's motion for class certification [dkt. no. 15].

MATTHEW F. KENNELLY

United States District Judge

Date: August 29, 2016

APPENDIX C

United States Court of Appeals
For the Seventh Circuit

No. 16-3395

December 13, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge**

DIANE S. SYKES, *Circuit Judge*

MICHAEL COLLINS, on behalf of	)
Himself and all others similarly	)
situated,	)
	)
<i>Plaintiff-Appellant,</i>	)
	)
<i>v.</i>	)
	)
VILLAGE OF PALATINE, ILLINOIS,	)
	)
<u><i>Defendant-Appellee.</i></u>	)

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

29a

No. 16 C 3814

Matthew F. Kennelly, *Judge*.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and both of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

*Circuit Judge Posner retired on September 2, 2017, and did not participate in the decision of this case, which is being resolved by a quorum of the panel under 28 U.S.C. § 46(d).