NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1621

OLIN LORY, JR.

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY

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Judgment Rendered: March 23, 2012

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2008-16829

THE HONORABLE WILLIAM J. KNIGHT, JUDGE

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents with reasons.

McDONALD, J.

This is an appeal from a judgment sustaining defendant-appellee Louisiana Farm Bureau Mutual Insurance Company's (Farm Bureau's) peremptory exception of prescription against the plaintiff-appellant, Olin Lory, Jr.

Mr. Lory is a resident of Slidell. His home was substantially damaged on August 29, 2005, by Hurricane Katrina. He filed a claim with his insurer, Louisiana Farm Bureau Mutual Insurance Company (Farm Bureau), but was not satisfied with the resulting payment of his claim. Thereafter, Mr. Lory joined in a mass-joinder complaint, **Rafael & Dioigna Acevedo, et al. v. AAA Insurance, et al.**, docket number 07-5199, filed in the United States District Court for the Eastern District of Louisiana on August 29, 2007 against a number of insurers, including Farm Bureau. The **Acevedo** case was later dismissed.[1]

Mr. Lory filed a petition for damages against Farm Bureau on January 5, 2009. His petition asserted that prescription in his suit had been interrupted by the filing of the mass–joinder cases of **Abram, et al. v. AAA Insurance, et al.**, docket number 07-5205, and **Acevedo,** in the United States District Court for the Eastern District of Louisiana, on August 29, 2007, both cases in which he was a putative class member.[2] Mr. Lory asserted that Farm Bureau had made only partial payment for his damages and owed him additional policy benefits.

In response to Mr. Lory's suit, Farm Bureau filed peremptory exceptions of prescription, peremption, and no cause of action, as well as affirmative defenses. After a hearing, the district court sustained Farm Bureau's peremptory exception of

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[1] Mr. Lory is a Louisiana resident and Farm Bureau is a Louisiana business entity doing business solely in the state of Louisiana; thus, **Acevedo** was dismissed because it was filed in a court of incompetent jurisdiction.

[2] Act 802 of the 2006 Louisiana Legislature Regular Session provided that all claims under insurance policies seeking recovery for damages sustained by Hurricane Katrina had to be filed by August 30, 2007.

prescription, and dismissed Mr. Lory's claims with prejudice. Farm Bureau's exceptions of peremption and no cause of action were rendered moot.

In its reasons for judgment, the district court found that La. C.C.P. art. 596 provided a clear and unambiguous mechanism for a plaintiff who is a putative class member to participate in a potential class action suit, while also preserving any individual rights that he may have if the class certification is redefined to exclude him, denied to all putative members, or the action is dismissed in its entirety. The district court determined that when Mr. Lory chose to pursue his own individual claims prior to a determination of class certification, he effectively opted out of the pending class actions, and therefore he waived the suspensive benefit provided by La. C.C.P. art. 596. Mr. Lory is appealing the district court judgment.

The issues raised in this appeal are the same issues addressed by this court in **Wilkienson v. Louisiana Farm Bureau Mutual Insurance Company**, 2011 CA 1421 (La. App. 1st Cir. __/__/__) (unpublished), also handed down this same date, and for the reasons assigned in **Wilkienson**, we find no manifest error in the district court judgment sustaining the peremptory exception of prescription in favor of Farm Bureau and against Mr. Lory, and we affirm the district court judgment. Costs of the appeal are assessed against Mr. Lory.

AFFIRMED.

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HUGHES, J., dissenting.

I respectfully dissent from the majority decision to affirm, on the basis of liberative prescription, the trial court's dismissal of the plaintiffs' claim, because it is my opinion that the analysis of the U.S. Eastern District Court in **In re Katrina Canal Breaches Consolidated Litigation**, No. 05-4182, 2008 WL 2692674 (E.D. La. July 2, 2008) (adopting the holding expressed in **In re WorldCom Securities Litigation**, 496 F.3d 245 (2nd Cir. 2007) that the tolling of prescription required by **American Pipe & Construction Co. v. Utah**, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), for members of a class on whose behalf a class action is filed, applies also to class members who file individual suits before class certification is resolved), produces the correct result in maintaining the actions of plaintiffs faced with the circumstances presented herein.[1]

[1] The Louisiana Supreme Court, recognizing that Louisiana's class action statute is largely derived from Federal Rule of Civil Procedure 23, has stated that reference to cases that interpret the federal class action statute is appropriate where there is a lack of Louisiana jurisprudence on a particular issue. **Banks v. New York Life Insurance Co.**, 98-0551 (La. 12/7/98), 722 So.2d 990, 994, cert. denied, 528 U.S. 1158, 120 S.Ct. 1168, 145 L.Ed.2d 1078 (2000).

The application of LSA-C.C.P. art. 596[2] is at issue in this case and provides in pertinent part:

> A. Liberative prescription on the claims arising out of the transactions or occurrences described in a petition brought on behalf of a class is suspended on the filing of the petition as to all members of the class as defined or described therein. Prescription which has been suspended as provided herein, begins to run again:
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> (1) As to any person electing to be excluded from the class, thirty days from the submission of that person's election form;
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> (2) As to any person excluded from the class pursuant to Article 592, thirty days after mailing or other delivery or publication of a notice to such person that the class has been restricted or otherwise redefined so as to exclude him; or
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> (3) As to all members, thirty days after mailing or other delivery or publication of a notice to the class that the action has been dismissed, that the demand for class relief has been stricken pursuant to Article 592, or that the court has denied a motion to certify the class or has vacated a previous order certifying the class.
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> B. The time periods in Subparagraphs (A)(2) and (3) of this Article commence upon the expiration of the delay for taking an appeal if there is no appeal, or when an appeal becomes final and definitive. The notice required by Subparagraphs (A)(2) and (3) of this Article shall contain a statement of the delay periods provided herein.

In **In re Katrina Canal Breaches Consolidated Litigation**, 2008 WL 2692674 (E.D. La. 2008) (unpublished), the district court judge declined to dismiss an individual plaintiff's case, filed *before* the certification issue in the class action suit in which he had been a putative plaintiff had been decided. Rather, the court found the class action suspended the running of prescription as to the putative plaintiff's individual suit, though filed early. The **In re Katrina** court recognized the federal basis for suspension of prescription by a class action suit, as stated by the Supreme Court in **American Pipe & Construction Co. v. Utah**, 414 U.S. 538 (1974), wherein it was held: "We are convinced that the rule most consistent with federal

[2] We quote herein Article 596, as amended by Acts 2010, No. 185, § 1, which added paragraph (B), and inserted "thirty days" in (A)(1); however, these amendments were declared by the legislature to be interpretive. See LSA-C.C.P. art. 596, 2010 Revision Comments.

class action procedure must be that the 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." The **In re Katrina** court further discussed **American Pipe**'s progeny: **Eisen v. Carlisle & Jacquelin**, 417 U.S. 156, 176 n. 13 (1974) (noting again that the filing of a class suit tolled the statute of limitations for class members who sought to intervene after the class certification motion was denied for failure to demonstrate numerosity); and, **Crown, Cork & Seal Co. v. Parker**, 462 U.S. 345 (1983) (wherein the Supreme Court remarked that **American Pipe** was not limited to intervenors, and relative to post-class certification filings, stated that the filing of a class action tolls the statute of limitations as to all asserted members of the class).

With respect to the issue before the **In re Katrina** court, the federal district court judge framed the issue before the court, as being whether the **American Pipe** tolling of prescription is applicable to suits filed after a case would be prescribed, but for a pending class action upon which a decision as to class certification had not been made. As to this issue, the **In re Katrina** court acknowledged that federal appellate court decisions were split on this issue; however, the court found the rationale expressed in **In re WorldCom Securities Litigation** persuasive and decided in accordance therewith, quoting the Second Circuit decision as follows: "This court has not yet faced the question whether the tolling required by **American Pipe** for members of a class on whose behalf a class action is filed applies also to class members who file individual suits before class certification is resolved . . . . We now conclude that it does." In so holding, the **In re Katrina** court reasoned:

> The theoretical basis on which **American Pipe** rests is the notion that class members are treated as parties to the class action "until and unless they received notice thereof and chose not to continue." . . . Because members of the asserted class are treated for limitations purposes as having instituted their own actions, at least so long as they continue to be members of the class, the limitations period does not run against them during that time. Once they cease to be members of the class-for instance, when they opt out or when the certification decision excludes them-the limitation period begins to run again on their claims.
>
> Nothing in the Supreme Court decisions described above suggests that the rule should be otherwise for a plaintiff who files an individual action before certification is resolved. To the contrary, the Supreme Court has repeatedly stated that "'the 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.'" . . . We see no reason not to take this statement at face value.
>
> It would not undermine the purposes of statutes of limitations to give the benefit of tolling to all those who are asserted to be members of the class for as long as the class action purports to assert their claims. As the Supreme Court has repeatedly emphasized, the initiation of a class action puts the defendants on notice of the claims against them. *See, e.g.*, **American Pipe**, 414 U.S. at 554-55, 94 S.Ct. 756 (noting that the purposes of statutes of limitations "are satisfied when ... a named plaintiff who is found to be representative of a class commences a suit and thereby 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"). A defendant is no less on notice when putative class members file individual suits before certification. The Supreme Court explained that "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights," **Crown**, 462 U.S. at 352, 103 S.Ct. 2392; the same is certainly true of class members who file individual suits before the court decides certification.

After a thorough review of the facts and procedural history presented in the instant matter, I would find the rationale expressed in **In re Katrina** and **In re WorldCom Securities Litigation** equally applicable herein,[3] and

[3] While the Fourth and Fifth Circuit appellate courts of this state have previously decided the issue herein under consideration to the contrary, I do not find those decisions persuasive and this court is not bound by the rulings in those cases. See **Lester v. Exxon Mobil Corporation**, 2009-1105 (La. App. 5 Cir. 6/29/10), 42 So.3d 1071, writ denied, 2010-2244 (La. 12/17/10), 51 So.3d 14, and **Katz v. Allstate Ins. Co.**, 2004-1133 (La. App. 4 Cir. 2/2/05), 917 So.2d 443, writ denied, 2005-0526 (La. 4/29/05), 901 So.2d 1069. We further note that the Louisiana Supreme Court, while not specifically ruling on the issue presented herein, interpreted a one-year contractual limitation on the filing of suit, in an insurance policy, as invoking the

I would conclude that the running of prescription in the plaintiff's suit was tolled by the filing of the federal class action in which he was a putative party. Further, I note that no intent was proven, as to the plaintiff's filing of his individual state court action, on the part of the plaintiff to "opt out" of the federal class action. To the contrary, the plaintiff stated in his petition that prescription on his action had been tolled by the filing of federal class actions **Acevedo v. AAA Insurance**, No. 07-5199 (E.D. La.), filed August 29, 2007, and **Abram v. AAA Insurance**, No. 07-5205 (E.D. La.), filed January 5, 2009. Also, in opposition to the exception of prescription filed by the defendant herein, the plaintiff asserted that when it became obvious that there was a lack of diversity present in the federal class action suit, he filed the instant suit, and he opposed the defendant's contention that the subsequent filing of the individual suit in state court constituted an opting out of the class action.[4] Therefore, under the circumstances of the instant case, and in accordance with the views expressed in **In re Katrina** and **In re WorldCom Securities Litigation**, I would uphold the plaintiff's suit and conclude that prescription was not been established.

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prescription laws of the state and therefore subject to statutory suspension of prescription principles, in **Taranto v. Louisiana Citizens Property Insurance Corporation**, 2010-0105 (La. 3/15/2011), 62 So.3d 721. The **Taranto** court then concluded that the filing of a lawsuit designated as a class action pursuant to LSA-C.C.P. art. 591, suspended prescription for all members of the putative class until the district court ruled on the motion to certify the class; the trial court dismissal of the case on the basis of prescription was reversed. See **Taranto**, 2010-0105 at p. 21, 62 So.3d at 735. The issue we decide in the instant case has not previously been decided by the Louisiana Supreme Court.

[4] Louisiana Code of Civil Procedure Article 592(B) directs that in a class action the judge shall forward to the members of the class the best notice practicable under the circumstances, which shall be given early enough that a delay provided for the class members to exercise an option to be excluded from the class will have expired before commencement of the trial on the merits of the common issues. The notice is required to inform a potential class member of his right to be excluded from the action "by submitting an election form," and the notice must state "the manner and time for exercising the election." See LSA-C.C.P. art. 592(B)(2)(b). Under Federal Rules of Civil Procedure, Rule 23, applicable to class actions, the notice directed to the class must inform a potential class member of his right to be excluded from the class if he "requests exclusion" and the notice must provide the "time and manner for requesting exclusion." See Fed. R. Civ. P. Rule 23(c)(2)(B)(v) and (vi). To opt out of a class action, a putative class member sends notice, so stating, to the clerk of court, as directed by the court in its notice to class members. See **Orleans Parish School Board v. U.S. Gypsum Co.**, 892 F.Supp. 794, 797 (E.D. La. 1995), affirmed, 114 F.3d 66 (5th Cir.), certiorari denied, 522 U.S. 995, 118 S.Ct. 557, 139 L.Ed.2d 399 (1997). In the instant case, there was no indication in the record on appeal as to what directions the federal district court, in either the **Acevedo** or the **Abram** class actions, provided in its notice to the class members regarding how to opt out of the class, and there was no indication in the appellate record that the plaintiff herein, in fact, opted out of the class in accordance with those directions. Therefore, I would ***not*** conclude that the filing of the state district court suit constituted an election to opt out of the federal class action.