June 12, 2018

U.S. Supreme Court Rules That Class Action Tolling Does Not Extend to Successive Class Actions Filed After Running of the Statute of Limitations

Introduction

On June 11, 2018, the U.S. Supreme Court held in *China Agritech, Inc.* v. *Resh*, No. 17-432, 584 U.S. __ (2018), that the class action tolling rule established more than four decades ago does not extend to successive class actions filed after expiration of a statute of limitations. This issue may arise where class certification has been denied and another putative class representative seeks to bring a follow-on class action after the limitations period has run. Courts nationwide have diverged sharply as to whether the follow-on class is entitled to tolling of the statute of limitations by piggybacking on the earlier putative class action. The Supreme Court's ruling in *China Agritech* answers that question in the negative.

In *American Pipe & Construction Co.* v. *Utah*[1] and *Crown, Cork & Seal Co.* v. *Parker*,[2] the Supreme Court held that the filing of a timely class action complaint tolls a statute of limitations for absent class members during the pendency of the class action, allowing them to bring otherwise untimely individual claims once class certification has been denied.[3] The question in *China Agritech* was whether the *American Pipe* doctrine tolls a statute of limitations for putative class members in a successive class action who do not bring an individual claim within the statute of limitations.

The Supreme Court's decision in *China Agritech* clarifies that statutes of limitation are not tolled by the filing of a class action complaint for the benefit of a successive class action—even if the statute of limitations expires during the pendency of the first class action, and regardless of the reasons for denial of class certification in the first action. This decision is likely to encourage the most capable class representatives and counsel to surface earlier when a class action is first filed, to foreclose plaintiffs from being able to pursue potentially endless class action "do-overs" until certification is granted, and to protect defendants from class action litigation that Congress has determined to be stale.

---

1 414 U.S. 538 (1974).

2 462 U.S. 345 (1983).

3 Last Term, the Supreme Court decided that *American Pipe's* equitable tolling rule does not extend to the statute of repose under the Securities Act of 1933. *See Cal. Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017).

© 2018 Paul, Weiss, Rifkind, Wharton & Garrison LLP. In some jurisdictions, this publication may be considered attorney advertising. Past representations are no guarantee of future outcomes.

Factual and Procedural Background

Once China's leading manufacturer and distributor of organic fertilizers, China Agritech, Inc. was branded a fraud in a market research report published on February 3, 2011. Shareholders promptly filed a putative class action against China Agritech in the U.S. District Court for the Central District of California (the "Dean action"). The Dean action asserted claims, among other things, under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"). After discovery, the district court denied class certification under Federal Rule of Civil Procedure 23(b)(3)—holding that the plaintiffs failed to establish that questions of law or fact common to class members predominated over questions affecting only individual members. Specifically, the district court concluded that the plaintiffs' expert did not demonstrate that China Agritech's stock traded in an efficient market, thereby precluding a "fraud-on-the-market" presumption of class-wide reliance under *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988).[4]

Within the two-year statute of limitations, a second set of plaintiffs filed a substantively identical complaint against China Agritech on behalf of the same putative class (the "Smyth action"), offering new market efficiency evidence.[5] After discovery in the Smyth action, the district court again denied class certification—this time on the ground that the named plaintiffs were subject to unique defenses and thus were neither "typical" nor "adequate" class representatives under Federal Rule of Civil Procedure 23(a)(3)-(4).[6]

A year and a half after expiration of the statute of limitations, a China Agritech shareholder who had never appeared in either of the first two putative class actions filed a third substantively identical putative class action (the "Resh action").[7] China Agritech moved to dismiss the Resh action as barred by the Exchange Act's statute of limitations, which lapses "2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1). The same district judge who had presided over the Dean and Smyth actions granted China Agritech's motion to dismiss. The district court concluded that *American Pipe* tolling permitted the Resh plaintiffs to bring only individual claims—not a class action—more than two years after discovering the alleged violation.[8]

---

4 *See* slip op. at 3; *Resh* v. *China Agritech, Inc.*, 857 F.3d 994, 997-98 (9th Cir. 2017). The Ninth Circuit affirmed denial of class certification in the Dean action under Federal Rule of Civil Procedure 23(f), and the individual claims were eventually settled. *See id.*

5 *See* slip op. at 3-4. The Smyth action was filed in the U.S. District Court for the District of Delaware but was subsequently transferred to the Central District of California, where it was assigned to the same judge who had decided the Dean action.

6 *See* slip op. at 4; *Resh*, 857 F.3d at 998.

7 *See* slip op. at 4.

8 *See Resh*, 857 F.3d at 999. In so ruling, the district court rejected plaintiffs' argument that the statute of limitations should be tolled because class certification was denied due to "the particular lead plaintiffs' experts' deficiencies" as opposed to an

The U.S. Court of Appeals for the Ninth Circuit reversed, holding that *American Pipe* tolling extends to follow-on class actions filed more than two years after discovery of the alleged violation. The Ninth Circuit opined that tolling class claims "promotes economy of litigation by reducing incentives for filing duplicative, protective class actions," and that *American Pipe* tolling "creates no unfair surprise to defendants" who were alerted to the nature of the claims and generic identities of potential class members through the prior putative class suit.[9]

The U.S. Supreme Court granted *certiorari* to resolve a circuit split as to whether, or how, *American Pipe* tolling applies to successive class actions filed after the applicable limitations period has run.[10]

The Supreme Court Rejects *American Pipe* Tolling of Successive Class Actions

In a unanimous decision authored by Justice Ginsburg, the Supreme Court reversed the Ninth Circuit's ruling. The Supreme Court held that the *American Pipe* tolling doctrine does not permit a plaintiff to file a successive class action after the statute of limitations has run by piggybacking on an earlier, timely filed class action.

First, the Court reasoned that the "efficiency and economy of litigation" that supports tolling of individual claims under *American Pipe* does not support maintenance of untimely successive class actions. The Court observed that tolling of individual claims may avoid needless individual protective filings during the pendency of a class action. With class claims, however, efficiency favors early assertion of competing class representative claims so that the district court can select the best class representatives and class counsel to make the case for class certification at the outset of the litigation. The Court noted that Federal Rule of Civil Procedure 23(c) itself encourages would-be class representatives to come forward early, and that the 2003

inherent class deficiency. The court reasoned that such a distinction "would allow tolling to extend indefinitely." *Resh* v. *China Agritech, Inc.*, No. 14-cv-05083, 2014 WL 12599849, at *5 (C.D. Cal. Dec. 1, 2014).

9 *See Resh*, 857 F.3d at 1002-05; *see also* slip op. at 4.

10 Four circuits had ruled that *American Pipe* tolling is categorically inapplicable to successive class actions. *See Basch* v. *Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (age discrimination case); *Griffin* v. *Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (racial discrimination case); *Korwek* v. *Hunt*, 827 F.2d 874, 879 (2d Cir. 1987) (futures price manipulation case); *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985) (labor and employment case). Three circuits, including the Ninth Circuit on appeal, had concluded that *American Pipe* tolls individual and class actions alike. *See Resh* v. *China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017) (securities fraud case); *Phipps* v. *Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015) (gender discrimination case); *Sawyer* v. *Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011) (telephone consumer protection case). Two more circuits had adopted an in-between approach, allowing tolling for successive class actions when certification of the earlier class was denied due to a deficiency with the named plaintiff, but not when class certification was denied based on a class-wide deficiency. *See Great Plains Trust Co.* v. *Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (breach of contract case); *Yang* v. *Odom*, 392 F.3d 97, 111 (3d Cir. 2004) (securities fraud case).

amendments to Rule 23 sought to front-load class discovery with the best possible representation for the class before a certification decision is made.[11] The Court added that the Private Securities Litigation Reform Act of 1995 ("PSLRA") evinces a similar preference for grouping all potential lead plaintiffs at the inception of private securities litigation, so that the district court will have the full roster of contenders before appointing representation for the class.[12] The Court concluded: "With notice and the opportunity to participate in the first (and second) round of class litigation, there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced."[13]

Second, the Court suggested that extending *American Pipe* tolling to successive class actions would be inconsistent with the requirement of plaintiff diligence, a traditional element for equitable tolling.[14] Unlike an individual class member who reasonably relies on a timely filed class action and who has only a "finite" period of time to file individually once the class action ends, putative class representatives who commence suit after the limitations period has run do not act diligently on behalf of the class and should not be given limitless bites at the certification apple.[15]

Third, the Court rejected Resh's arguments in defense of the Ninth Circuit's ruling. The Court noted that the Resh class action could not have been maintained under Rule 23 (absent *American Pipe* tolling), and thus was not subject to the principle that a class action that satisfies Rule 23 may be maintained as a civil action in any district court.[16] Similarly, the Court held that its clarification of the scope of *American Pipe* tolling did not run afoul of the Rules Enabling Act, 28 U.S.C. § 2072(b), by abridging or modifying a substantive right. The Court reasoned that plaintiffs have no substantive right to bring claims outside the statute of limitations, and that the judicially crafted tolling rule in *American Pipe* does not extend to an untimely successive class action.[17] Nor did the Court foresee a substantial increase in protective class-action filings given that several courts of appeals (including the Second and Fifth Circuits) have declined to entertain untimely class actions since the 1980s, and those circuits have not experienced a disproportionate

---

[11] *See* slip op. at 7-8 (quoting Advisory Committee's 2003 Note on Fed. R. Civ. P. 23(c)(1)(A) and (g)(2)(A)).

[12] *See id.* at 8 (noting that after publication of the PSLRA notice in the Dean and Smyth actions against China Agritech, six shareholders applied to be lead plaintiff in the first putative class action, and eight shareholders applied to be lead plaintiff in the second putative class action).

[13] *Id.* at 9.

[14] *See id.* (citing *McQuiggin* v. *Perkins*, 569 U.S. 383, 391 (2013)).

[15] *See id.* at 9-10 ("as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation."). The Court acknowledged that the Resh class was subject to a five-year statute of repose, but emphasized that most statutory schemes provide only a single statute of limitations without an outside statute of repose. *See id.* at 10-11.

[16] *See id.* at 11 (distinguishing *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393 (2010)).

[17] *See id.* at 12.

number of protective class-action filings.[18] Even if there were multiple class-action filings, the Court commented, this would help determine early on whether class treatment is appropriate under Rule 23, and district courts have ample tools under the Federal Rules of Civil Procedure to stay, consolidate, transfer, and manage parallel proceedings.[19]

Justice Sotomayor's Concurrence

Concurring in the judgment, Justice Sotomayor agreed that in cases governed by the PSLRA, a plaintiff who seeks to bring a successive securities class action may not rely on *American Pipe* tolling. She did not, however, join the Court's opinion that the same holds true for other class actions.

Justice Sotomayor emphasized that the PSLRA requires publication of a nationwide notice to all putative class members within twenty days of filing the complaint, followed by competing motions to the district court for appointment as a lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3). Thus, plaintiffs who fail to participate in the lead-plaintiff selection process, such as the Resh plaintiffs in *China Agritech*, cannot be considered "diligent" and should not receive the benefit of *American Pipe* tolling.

Justice Sotomayor distinguished PSLRA cases from other Rule 23 cases that neither require "pre-certification notice" to the class, nor provide for a lead plaintiff selection process. In her view, *American Pipe* tolling should extend to successive class actions outside of the PSLRA context, at least where class certification is denied for reasons purely unique to the putative representative and not for lack of suitability of class treatment under Rule 23. Given the Court's extraordinarily broad rule, however, Justice Sotomayor invited district courts to "liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel" for late-coming class representatives in cases not subject to the PSLRA.

Implications of the Supreme Court's Decision

The *China Agritech* ruling is significant in four key respects.

First, the Supreme Court's refusal to apply *American Pipe* tolling to class actions filed after the running of a statute of limitations reaffirms Congress' central role in prescribing temporal limits on liability. Although judge-made "equitable tolling" is presumed to apply to all statutes of limitations, *China Agritech* may signal an effort by the Court to give greater teeth to enforcing statutory time bars as written. Indeed, the Court refused to toll the two-year statute of limitations for absent class members even though China Agritech was shielded by an outer five-year statute of repose under the Exchange Act that can never be tolled. Further, the Court did so in a case where class certification had been denied due to deficiencies particular to the named plaintiffs, rather than for lack of suitability of the class action vehicle. This suggests that the Court

[18] *See id.* at 12-13.

[19] *See id.* at 14.

may be less willing than it has been in the past to permit judicial adjustment of legislative time bars based on case-by-case equitable considerations or policy grounds.[20]

Second, by disallowing "do-overs" until plaintiffs are able to secure class certification, *China Agritech* forecloses class counsel from lying-in-wait and claiming that class certification was wrongly denied after the limitations deadline. Moreover, in keeping with the PSLRA's early notice requirements and the class certification rules embodied in Federal Rule of Civil Procedure 23, this decision incentivizes the most capable lead plaintiffs and would-be class counsel to surface at the outset of the litigation, promoting better representation for all class members.[21]

Third, the *China Agritech* decision spares defendant corporations, their officers and directors, and their shareholders (and insurers) exposure to perpetual "stacking" of class action litigation. Without a temporal limit on shareholder suits, even defendants with strong merits cases would face hydraulic pressure to settle class action claims to avoid prohibitive defense costs and litigation risks. The *China Agritech* fact pattern is instructive of the potential for abuse. There, the defendants faced three class actions based on the same nucleus of operative fact, even though denial of class certification in the first action had been affirmed on appeal by the Ninth Circuit under Rule 23(f).

Finally, the Supreme Court's decision in *China Agritech* logically applies to *all* class actions—and may have its greatest impact in contexts outside of the securities class actions where there is no statute of repose to cut off new lawsuits by a date certain. Importantly, eight Justices declined to join Justice Sotomayor's concurrence urging that the Court's ruling be limited to securities class actions governed by the PSLRA. As Justice Sotomayor observed, the Court issued a "blanket no-tolling-of-class-claims-ever rule" that "foreclose[s] the possibility of a more tailored approach."[22] All of this indicates that the Court is taking seriously the need to give meaning to statutory time bars that seek to promote predictability and finality in business affairs.

---

[20] Indeed, at oral argument, some Justices expressed reservations as to whether *American Pipe* had been correctly decided in the first place, and whether tolling should apply even to individual class members who affirmatively intervene or file their own opt-out suits. The *China Agritech* opinion does not, however, endorse that view.

[21] Justice Sotomayor's invitation to district courts to allow belated amendment of pleadings or intervention in pending cases would, if widely adopted, undermine the Rule 23 policy objective of encouraging class representative candidates to surface early.

[22] Sotomayor, J., concurring in the judgment, at 5-6.

* * *

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Susanna M. Buergel +1-212-373-3553 sbuergel@paulweiss.com	Andrew J. Ehrlich +1-212-373-3166 aehrlich@paulweiss.com	Brad S. Karp +1-212-373-3316 bkarp@paulweiss.com
Daniel J. Kramer +1-212-373-3020 dkramer@paulweiss.com	Walter Rieman +1-212-373-3260 wrieman@paulweiss.com	Richard A. Rosen +1-212-373-3305 rrosen@paulweiss.com
Audra J. Soloway +1-212-373-3289 asoloway@paulweiss.com	Charles E. Davidow +1-202-223-7380 cdavidow@paulweiss.com	Daniel J. Juceam +1-212-373-3697 djuceam@paulweiss.com

Kristina Bunting and Adam Ross Mandelsberg contributed to this client memorandum.