ALERT MEMORANDUM

Supreme Court Holds That *American Pipe* Tolling Does Not Apply to Successive Class Actions

June 14, 2018

On June 11, 2018, the U.S. Supreme Court issued a nearly unanimous opinion in *China Agritech, Inc. v. Resh*,[1] determining whether the tolling rule established by the Court's *American Pipe* decision—which allows putative class members to file new *individual* lawsuits if class certification is denied and the statute of limitations has run—permits a person to file a new, otherwise untimely *class* claim.[2] Resolving a circuit split, the Court said no: the follow-on class action would be untimely and cannot be maintained.[3] Cleary Gottlieb submitted an amicus brief in *China Agritech* on behalf of the Securities Industry and Financial Markets Association,[4] which was cited in the Court's decision.[5]

The Court's decision is a victory for class action defendants, as it reduces the likelihood that, once they have successfully defeated a class action, they will have to face another (and another). It remains to be seen, however, whether defendants (and the courts) will have to deal with a surge of protective class-action filings and novel techniques to re-litigate class certification issues.

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1 584 U.S. __, 2018 WL 2767565 (June 11, 2018) (hereinafter "Supreme Court Decision").

2 *Id.* at *3.

3 *Id.*

4 Brief for the Securities Industry and Financial Markets Association as *Amicus Curiae* Supporting Petitioner, *China Agritech*, 584 U.S. __, 2018 WL 2767565 (No. 17-432).

5 Supreme Court Decision at *7.

Background

American Pipe Tolling

In *American Pipe & Construction Co. v. Utah*, the Supreme Court held that the timely filing of a class action tolls the statute of limitations for absent plaintiffs, such that, if class certification is denied, each of those plaintiffs may intervene in the still-pending action.[6] The Court extended *American Pipe* in *Crown, Cork & Seal Co. v. Parker*, where it held that tolling allows absent plaintiffs to file new individual suits, as well as intervene in the still-pending action, after class certification is denied.[7]

Neither decision considered the question presented in *China Agritech*—whether *American Pipe* tolling applies not only to individual claims, but also to successive class actions. With no clear guidance from the Court, the circuits were split on the issue—some said yes,[8] some said no,[9] and some took a hybrid position.[10] The Ninth Circuit's ruling below (a yes) prompted the Supreme Court to weigh in.

Factual Background and Procedural History

In 2011, a China Agritech shareholder brought a putative class action against the company, alleging violations of the Securities Exchange Act of 1934 ("Exchange Act").[11] The suit alleged that China Agritech had engaged in fraud and misleading business practices, and that the company's stock price had plummeted when this misconduct came to light. Class certification was denied because the plaintiffs failed to show market efficiency. Thereafter, the defendants settled with the named plaintiff, terminating his claims and ending that suit. In 2012, still within the two-year limitations period, a different shareholder filed a new lawsuit asserting the same class claims. Class certification was again denied, this time on the ground that the plaintiff was an inadequate class representative. Again, the defendants settled that second named plaintiff's individual claims, ending that litigation.[12]

In 2014, shareholder Michael Resh filed a third lawsuit against the company, asserting class claims based upon the same alleged wrongdoing. This suit—unlike the first two—was filed outside the limitations period. The lower court rejected tolling and granted China Agritech's motion to dismiss the complaint as untimely.[13] The Ninth Circuit reversed, holding that *American Pipe* tolling permits plaintiffs to file a successive class action outside the limitations period.[14]

The Supreme Court granted China Agritech's petition for a writ of certiorari in December 2017 to resolve the question of whether, upon denial of class certification, "a putative class member [may], in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations."[15]

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6 414 U.S. 538, 553 (1974).

7 462 U.S. 345, 354 (1983).

8 The First, Second, Fifth, and Eleventh Circuits rejected *American Pipe* tolling for class actions. *See, e.g.*, *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar–Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Griffin v. Singletary*, 17 F.3d 356, 359–60 (11th Cir. 1994).

9 Along with the Ninth Circuit, the Sixth and Seventh Circuits permitted *American Pipe* tolling for class actions. *See, e.g.*, *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 564 (7th Cir. 2011); *Phipps v. Wal–Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015), *abrogated by China Agritech*, 584 U.S. __, 2018 WL 2767565.

10 The Third and Eighth Circuits allowed tolling for successive class actions only where class certification was denied due to a representative-specific, rather than a class-specific, defect. *See, e.g.*, *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004), *abrogated by China Agritech*, 584 U.S. __, 2018 WL 2767565; *see also Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (following *Yang*).

11 15 U.S.C. §§ 78a–78qq.

12 Supreme Court Decision at *4.

13 *Id.*; *see also Resh v. China Agritech, Inc.*, No. CV 14-05083-RGK (PJWx), 2014 WL 12599849 (C.D. Cal. Dec. 1, 2014).

14 Supreme Court Decision at *4; *see also Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017).

15 Supreme Court Decision at *3.

The Supreme Court's Decision

The Majority Opinion

In a nearly unanimous decision authored by Justice Ginsburg, the Supreme Court held that *American Pipe* tolling does not apply to successive class actions. The Court gave three primary reasons for its decision.

First, the Court grounded its holding in the "watchwords of *American Pipe*"—"efficiency and economy of litigation."[16] The Court observed that, while these interests weigh in favor of delaying *individual* claims until after a district court denies class certification, they support the early assertion of competing *class* claims, well before any decision on class certification is reached. Under the Court's efficiency rationale, only a denial of class certification would make it necessary to file individual claims; if class certification is granted, the claims can proceed as a class. In contrast, when it comes to competing class claims, the Court reasoned that district courts should have the "full roster of contenders" in front of them when selecting the most adequate plaintiff to represent the class;[17] thus, in contrast to early individual filings, early class filings should be encouraged.[18]

Second, the Court reasoned that applying *American Pipe* tolling to successive class actions would, in many cases, allow class action litigation to continue indefinitely—which was "not a result envisioned by *American Pipe*."[19] Though the Court acknowledged that, in some cases (like Resh's), statutes of repose mitigate concerns about endless re-litigation,[20] it pointed out that statutes of repose are relatively rare in federal statutes. Thus, expanding *American Pipe* to permit successive class claims would mean that most cases would allow for the possibility of serial class litigation with all its attendant abuses.[21]

Third, the Court reasoned that the Private Securities Litigation Reform Act of 1995 ("PSLRA") shows a preference against permitting "piggyback" class actions.[22] The PSLRA provides that the first to file a class action must give early notice to members of the proposed class of their right to move the court to lead the class, thereby encouraging other persons who want to serve as lead plaintiff to come forward early and file a motion or compliant in the first-filed matter.[23] The Court concluded that there is little reason to allow plaintiffs who had "notice and the opportunity to participate" in a timely-filed class action, but sat on the sidelines, to come forward years later.[24]

Notably, in reaching this conclusion, the Court reaffirmed its holding from last Term's decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.* (*CalPERS*) that *American Pipe* tolling is grounded in equitable principles.[25] The Court observed that *American Pipe* tolling permits those plaintiffs who otherwise would timely file individual claims to forbear from doing so during the limitations period in reliance on the understanding that a class certification motion will be granted. When these plaintiffs later pursue individual claims, they cannot be said to have slept on their rights. By contrast, a would-be class representative who files suit after the statute of limitations has run has done exactly that—this plaintiff had notice and the opportunity to

16 *Id.* at *11.

17 Pursuant to the "lead plaintiff" provision of the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.) ("PSLRA"), district courts are required to select a lead plaintiff to represent a class; the class representative is not necessarily the first to file suit. *See* 15 U.S.C. § 78u-4(a)(3).

18 Supreme Court Decision at *6.

19 *Id.* at *8.

20 Exchange Act claims are governed by a two-year statute of limitations. *See* 28 U.S.C. § 1658(b)(1). Exchange Act claims are also governed by a five-year statute of repose—which, unlike a statute of limitations, is a non-tollable time bar. *See* 28 U.S.C. § 1658(b)(2); *see also Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.* (*CalPERS*), 582 U.S. __, 137 S. Ct. 2042 (2017).

21 Supreme Court Decision at *8.

22 *Id.* at *6.

23 15 U.S.C. § 78u-4(a)(3)(A).

24 Supreme Court Decision at *7.

25 *See* 582 U.S. at __, 137 S. Ct. at 2052.

participate, but chose not to prosecute his claims until it was too late.[26]

In light of these points, the Court was unpersuaded by Resh's argument that declining to expand *American Pipe* would lead to a "needless multiplicity" of protective class-action filings.[27] In rejecting this argument, the Court reiterated that a "multiplicity" of class action filings is not necessarily "needless," but rather, something to be *encouraged*, as multiple filings may aid a district court in determining, early in the litigation, whether class treatment is appropriate and, if so, who is the most adequate class representative.[28] The Court also explained that empirical evidence belies this claim, as the Second and the Fifth Circuits barred stacked class actions almost thirty years ago and yet have not been plagued by deluges of duplicative filings.[29]

Justice Sotomayor's Concurrence

Justice Sotomayor filed the only separate opinion, where she concurred with the majority but only in the judgment. She argued that, instead of adopting a blanket rule against successive class action tolling, the Court should have limited its holding to securities class actions subject to the PSLRA. In such actions, a would-be class representative who files suit after the statute of limitations has run has clearly "bypassed [the governing] statutory process"—despite notice of the initial class filing, this individual did not seek to be chosen lead plaintiff and, as the majority concluded, "can hardly qualify as diligent" in asserting class claims.[30] However, outside of this limited universe of securities class actions, there is no requirement of precertification notice, no process for a district court to choose a lead plaintiff from among a group of contenders, and, accordingly, no basis for concluding that the plaintiff was not diligently pursuing its rights.[31]

Justice Sotomayor also challenged the majority's contention that cabining *American Pipe* was necessary to prevent "limitless" litigation. She observed that, in some cases, statutes of repose would bar re-litigation of identical issues and that, in all other cases, comity principles that the Court announced in *Smith v. Bayer Corp.*,[32] which bar re-litigation of class certification issues that have already been decided, were a sufficient "existing safeguard."[33]

Finally, Justice Sotomayor suggested that, if principles of comity proved to be insufficient, the Court could permit tolling in circumstances "where the only problem with the first suit was the identity of the named plaintiff."[34] She concluded by suggesting that, where class certification was denied simply because the wrong plaintiff was selected to assert class claims, the lower courts might avert the result of denying putative class members any class action remedy by "liberally permit[ting] amendment of the pleadings or intervention of new plaintiffs and counsel" where appropriate.[35]

Impact and Open Questions

Takeaways from Both Sides of the "v."

The Court's decision is a victory for class action defendants. It provides additional comfort that, if they successfully defeat a class action, they will not have to face another one based on the same claims after the statutory deadline has expired. Of course, the decision does not *entirely* eliminate the possibility of having to fight a second (or third) identical class action lawsuit after successfully staving off the first one—as the procedural history of *China Agritech* itself

26 Supreme Court Decision at *7.

27 *Id.* at *9 (quoting Brief for Respondents William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V., at 32–34, *China Agritech*, 584 U.S. __, 2018 WL 2767565 (No. 17-432)).

28 *Id.* at **6–7, 10.

29 *Id.* at *9.

30 Supreme Court Decision at *11 (Sotomayor, J., concurring) (quoting in part majority at *7).

31 *Id*. at *12.

32 564 U.S. 299 (2011).

33 Supreme Court Decision at *13.

34 *Id.*

35 *Id.* at *14.

demonstrates, some successive class actions can be timely—but it does assure defendants that class action whack-a-mole will eventually come to an end. So, too, does it assure class action defendants that they will be able to mount the best defenses to class claims with evidence that is still fresh.

For the defense bar, *China Agritech* is indicative of a few favorable trends. Viewed in tandem with *CalPERS*, which held that *American Pipe* tolling does not apply to statutes of repose, *China Agritech* suggests that the Court is unlikely to extend *American Pipe* any further than it did in its *Crown, Cork* decision, and may support arguments against applying tolling where the class plaintiff lacks standing or where different claims are asserted. The ruling is also in line with other recent decisions narrowing class and collective actions.[36]

As for plaintiffs, *China Agritech* means that they will have to keep a close eye on the limitations period to ensure that their interests are being protected. While *American Pipe* tolling obviated the need for plaintiffs to file protective motions to intervene or protective individual actions, plaintiffs with the desire to pursue class claims will now need to consider whether to file protective class actions. Based upon the experience in two circuits that previously adopted the rule *China Agritech* now embraces, the Court believes that its decision will not lead to a flood of such filings. Time will tell. Even if the flood of protective suits is unleashed, however, class action defendants have plenty of tools to stem the tide, including consolidation of related actions and the multi-district litigation procedure.

Additionally, *China Agritech* will encourage plaintiffs to put their best foot forward at the class certification stage, and come armed with their best evidence and most well-developed theories. Plaintiffs will not have the luxury of litigating class certification again and again, until they find a court willing to certify the class; they may only have one shot, with in the near term only discretionary interlocutory appellate review.

Open Questions

While—in the words of Justice Sotomayor—the Court's "blanket no-tolling-of-class-claims-ever rule"[37] reads as a solid bar against untimely follow-on class actions, the majority opinion raises some questions about whether it will ultimately serve as an impenetrable barrier to re-litigation of untimely class claims.

— By asking district courts to "help mitigate the potential unfairness" of the Court's decision by permitting the intervention of new plaintiffs where class certification was denied due to a defect with the named plaintiff,[38] Justice Sotomayor seems to be inviting class members to move to intervene in the *existing action*, rather than file a new complaint, and then move for class certification. On its face, *China Agritech* could be read to address only a new action, not a renewed motion for class certification by a new party in an existing action. It remains to be seen whether courts will view this tactic as falling within or outside the court's blanket bar against "commenc[ing] a class action *anew* beyond the time allowed by the applicable statute of limitations."[39]

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[36] *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 584 U.S. __, at __, 2018 WL 2292444, at *17 (May 21, 2018) (holding that arbitration agreements providing for individualized proceedings must be enforced); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 35 (2013) (reaffirming that district courts must undertake a "rigorous analysis" of whether a putative class satisfies the predominance criterion of Federal Rule of Civil Procedure 23(b)(3) (quoting *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011)); *Wal–Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 342, 350–51, 367 (2011) (declining to certify "one of the most expansive class actions ever" on commonality grounds, and emphasizing the "rigorous analysis" district courts must undertake before certifying a class); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–52 (2011) (holding that states must enforce an arbitration agreement even if the agreement requires that complaints be arbitrated individually, instead of on a class-action basis).

[37] Supreme Court Decision at *13 (Sotomayor, J., concurring).

[38] *Id.* at *14.

[39] *Id.* at *3 (majority opinion) (emphasis added).

— Relatedly, while Justice Sotomayor was more concerned with the potential unfairness of the Court's decision in the general Rule 23, rather than the PSLRA, context, it is conceivable that even the most thorough vetting of the lead plaintiff contenders at the outset of a case could result in a class representative later being revealed to be inadequate during class discovery or otherwise. In those cases, could the other contenders—each of whom would have already filed a timely class action—move the court for class certification of their actions? Again, it remains to be seen whether such a move would violate a blanket bar against "commenc[ing] a class action *anew*" once the statute of limitations has expired.

China Agritech may also curtail the application of tolling to individual suits. Specifically, it may provide a basis for challenging untimely individual actions filed *before* a decision on class certification is made. While some courts have held that *American Pipe* tolls the statute of limitations for all putative class members, regardless of whether they file an individual action *before or after* a motion for class certification is decided,[40] *China Agritech* stresses judicial efficiency as the animating basis for *American Pipe* tolling and as a result emphasizes—on numerous occasions—that *American Pipe* allows a putative class member to file an otherwise untimely individual suit only *after* class certification is denied.[41] Only through that sequence are plaintiffs encouraged to rely on the class action rather than burdening the courts with a proliferation of individual actions. Indeed, the contrary sequence perversely rewards the individual plaintiff for a lack of diligence with the opportunity to be part of *two lawsuits* if the class is ultimately certified. Thus, *China Agritech* may mean that an individual action filed outside the limitations period—but before a certification decision in the class case—is time-barred, overruling decisions in several circuits.[42]

In the final analysis, *China Agritech* is a welcome win for class action defendants, typically companies, encouraging class plaintiffs to diligently prosecute known claims, courts to rule on class certification issues early in the litigation, and defendants to breathe a sigh of relief should they defeat class certification, knowing that class litigation will eventually come to an end.

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[40] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1230–35 (10th Cir. 2008); *Phillips v. E.I. DuPont de Nemours & Co. (In re Hanford Nuclear Reservation Litig.)*, 534 F.3d 986, 1008 (9th Cir. 2007, *amended* 2008); *Cal. Pub. Emps.' Ret. Sys. v. Caboto-Gruppo Intesa BCI (In re WorldCom Sec. Litig.)*, 496 F.3d 245, 256 (2d Cir. 2007).

[41] *See, e.g.*, Supreme Court Decision at *3 (stating that *American Pipe* applies "to putative class members who, *after denial of class certification*, 'prefer to bring an individual suit'" (emphasis added) (quoting *Crown, Cork*, 462 U.S. at 350)); *id.* ("*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims *if the class fails*." (emphasis added)).

[42] *See supra* note 40.