

Supreme Court to Consider Whether Subsequent Class Actions May Benefit from *American Pipe* Tolling

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In an appeal arising out of a securities class action, the Supreme Court announced on Friday that it will take up the question of whether class action tolling applies to subsequent class actions, or is limited to subsequent individual actions. Under the class action tolling rule established by *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) (“*American Pipe*”), the timely filing of a class action tolls the statute of limitations as to individual putative class members. Appellate courts have divided over whether and in what circumstances class actions may also benefit from *American Pipe* tolling. In *China Agritech*, the Supreme Court is poised to resolve this circuit split.

The Supreme Court’s decision to grant the *China Agritech* petition demonstrates its continued interest in the proper scope of class action tolling. Just last term, in *California Pub. Employees’ Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) (“*CalPERS*”)—a case litigated by Cleary Gottlieb—the Court clarified that the *American Pipe* rule is a rule of equitable tolling and held that class action tolling does not apply to statutes of repose. The *China Agritech* case presents another opportunity for the Court to address the outer bounds of the class action tolling rule.

The issue before the Supreme Court in *China Agritech* is one that several circuits have recognized can invite abuse and repetitive class actions. Under the Ninth Circuit’s holding that class action tolling applies to subsequent class actions, plaintiffs can file serial class actions and re-litigate adverse decisions on a motion to dismiss or class certification motion, which would expose defendants to protracted liability and uncertainty.

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Background

China Agritech involves three securities class actions on behalf of materially identical putative classes against China Agritech, Inc. and its managers and directors concerning alleged misstatements in the company's SEC filings.¹ A February 3, 2011 market research report first alleged fraudulent conduct by the company.²

Securities fraud claims under the Exchange Act "may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."³ While the latter five-year bar is a statute of repose to which class action tolling is inapplicable,⁴ the former two-year bar is a statute of limitations that may be subject to equitable tolling.

On February 11, 2011, plaintiff Theodore Dean timely filed the first purported securities class action (the "*Dean* Action") before Judge Klausner in the United States District Court for the Central District of California, which asserted claims under both the Exchange Act and the Securities Act.⁵ The court granted China Agritech's motion to dismiss the Securities Act claims, but allowed the Exchange Act claims to proceed.⁶

The *Dean* plaintiffs filed a motion for class certification, which the court denied.⁷ The *Dean* plaintiffs subsequently settled their individual actions, which were dismissed with prejudice on September 20, 2012.⁸

As described by the Ninth Circuit in the decision below, "three weeks after the *Dean* Action settled, Kevin Smyth filed an almost identical class-action complaint on behalf of the same would-be class

against China Agritech in federal District Court for the District of Delaware" (the "*Smyth* Action").⁹

The *Smyth* Action was eventually transferred to the Central District of California and assigned to Judge Klausner.¹⁰ The *Smyth* plaintiffs filed a motion for class certification, which the court denied.¹¹ On January 8, 2014, the parties agreed to dismiss the action with prejudice as to the named plaintiffs.¹²

On June 30, 2014, Michael Resh filed yet another action (the "*Resh* Action"), which was again assigned to Judge Klausner.¹³ The *Resh* Action asserted Exchange Act claims "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions."¹⁴

The District Court Dismisses the *Resh* Action as Untimely

The *Resh* Action was filed more than two years after the initial market research report alleging that China Agritech had committed fraud, and would thus be untimely unless *American Pipe* tolling applied.¹⁵ Defendants filed a motion to dismiss the claims as untimely, which the court granted. The court rejected plaintiffs' argument that *American Pipe* tolling could save the class action, reasoning that a contrary ruling "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence."¹⁶

In support of its holding, the district court relied on the Ninth Circuit's prior decision in *Robbin v. Fluor Corporation*, 835 F.2d 213 (9th Cir. 1987), which rejected the application of *American Pipe* tolling to class actions and endorsed the Second Circuit's view that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls

¹ See *Resh v. China Agritech, Inc.*, 857 F.3d 994, 996 (9th Cir. 2017).

² *Id.*

³ 28 U.S.C. § 1658(b).

⁴ See, e.g., *N. Sound Capital LLC v. Merck & Co. Inc.*, No. 16-1364, 2017 WL 3278886, at *1 (3d Cir. Aug. 2, 2017).

⁵ *Resh*, 857 F.3d at 997.

⁶ *Id.*

⁷ *Id.* at 997-98.

⁸ *Id.* at 998.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *id.* at 999.

¹⁶ *Id.* (citation omitted).

beyond its carefully crafted parameters into the range of abusive options.”¹⁷

The Ninth Circuit Reverses

The Ninth Circuit reversed the district court, holding that *American Pipe* tolling applies to class actions as well as to individual actions.¹⁸ The court reasoned that this would promote the policy goals underlying *American Pipe* “by reducing incentives for filing duplicative, protective class actions.”¹⁹

The Ninth Circuit dismissed its earlier decision in *Robbin* rejecting *American Pipe* tolling for class actions as “a short opinion published thirty years ago” that had been modified by a later decision.²⁰ The Ninth Circuit further reasoned that “general tolling principles” were not the proper analytical focus.²¹ Instead, the availability of a subsequent class action depends “on the operation of preclusion and preclusion-related principles,” which may bar named plaintiffs from re-litigating adverse rulings before class certification, but which would generally not bar absent class members from doing so.²²

The Ninth Circuit dismissed concerns that its holding could “lead to abusive filing of repetitive class actions”²³ The court reasoned that costs and financial risks would dissuade plaintiffs and attorneys from filing new suits where there was “little to gain.”²⁴ Moreover, the court stated that “ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification.”²⁵

¹⁷ *Id.* at 999, 1001 (citation omitted).

¹⁸ *Id.* at 996.

¹⁹ *Id.* at 1004.

²⁰ *Id.* at 1001.

²¹ *Id.* at 1002.

²² *Id.*

²³ *Id.* at 1004–05.

²⁴ *Id.* at 1005.

²⁵ *Id.*

China Agritech filed a petition for a writ of certiorari after the Ninth Circuit denied requests for rehearing and rehearing *en banc*.²⁶

The Petition: Asking the Supreme Court to Resolve a Three-Way Circuit Split

In its petition for a writ of certiorari, China Agritech identified a three-way circuit split on the applicability of *American Pipe* tolling to class actions.

In the decision below, the Ninth Circuit joined the Sixth and Seventh Circuits in concluding that *American Pipe* tolling is permissible for class actions.²⁷

On the other end of the spectrum, the First, Second, Fifth, and Eleventh Circuits have rejected *American Pipe* tolling for class actions based on the potential for abuse and considerations of judicial economy.²⁸ These courts have reasoned that *American Pipe* tolling is not intended to permit serial re-litigation of class certification and indefinite extensions of statutes of limitations. China Agritech argued that this was the correct position because a contrary rule would circumvent statutes of limitations and undermine their purpose of cutting off stale claims.²⁹ Moreover, the company argued that a contrary rule is at odds with Supreme Court precedent and noted that the Supreme Court has repeatedly described *American Pipe* tolling as applicable to individual actions only, including most recently in *CalPERS*.³⁰

In between these two poles, the Third and Eighth Circuits have held that *American Pipe* tolling can apply to subsequent class actions in certain circumstances, namely, “where class certification

²⁶ Br. of Pet’r at 10, *Resh v. China Agritech, Inc.*, No. 17-432 (Sept. 22, 2017).

²⁷ *Id.* at 15–16 (citing *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015); *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011)).

²⁸ *Id.* at 11–14 (citing *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998); *Korwek v. Hunt*, 827 F.2d 874 (2d. Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334 (5th Cir. 1985); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994)).

²⁹ *Id.* at 2–4.

³⁰ *Id.* at 21 (citing *CalPERS*, 137 S. Ct. at 2054–55).

has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment."³¹

On December 8, 2017, the Supreme Court granted the petition for a writ of certiorari.³²

Significance of *China Agritech*

The *China Agritech* appeal presents the Supreme Court with an opportunity to end an abusive application of the class action tolling rule, under which plaintiffs can file new class actions well after the expiration of the statute of limitations in an attempt to re-litigate unfavorable rulings on motions to dismiss and class certification motions. As then-Third Circuit Judge Alito has observed, without at least certain restrictions on class tolling, "lawyers seeking to represent a plaintiff class could extend the statute of limitations almost indefinitely until they find a district court judge who is willing to certify the class. The lawyers could simply file a new, substantively identical action with a new class representative as soon as class certification is denied in the last previous action."³³ The Supreme Court's decision will provide much needed guidance on this significant issue.

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³¹ *Id.* at 14 (quoting *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004); and citing *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007)).

³² *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017), *cert granted*, No. 17-432 (U.S. Dec. 8, 2017).

³³ *Yang*, 392 F.3d at 113 (Alito, J., concurring in part and dissenting in part).