

U.S. Supreme Court Further Limits Tolling in the Class Action Context in *China Agritech v. Resh*

June 12, 2018

The Supreme Court Holds that *American Pipe* Tolling Does Not Apply to Subsequent Class Actions; Clarifies that Five-Year Period for Section 10(b) Claims Is a Statute of Repose

On June 11, 2018, the United States Supreme Court handed down its decision in *China Agritech v. Resh*,¹ holding that the *American Pipe* equitable tolling rule—which tolls the statute of limitations for *individual* claims while a class action is pending—does not apply to subsequently filed *class action* claims. The Court also clarified that the five-year limit on bringing claims under the Exchange Act is a statute of repose. Accordingly, under the Court's prior decision in *CalPERS v. ANZ Securities, Inc.*, the Exchange Act's five-year statute of repose is not tolled by the filing of a class action lawsuit.

The *China Agritech* decision follows a trend set by other recent Supreme Court decisions limiting the application of equitable doctrines to expand or contract a legislatively enacted statute of limitations.

American Pipe Tolling

In its landmark 1974 decision, *American Pipe and Construction Co. v. Utah*,² the Supreme Court held that the filing of a class action tolls the statute of limitations for putative class members; thus, even if the statute of limitations has run, putative class members are still free to join an existing class action, intervene in the resulting individual action if class certification is denied, or bring an individual action if the class action is dismissed.³

Circuits had split on the issue of whether *American Pipe* equitable tolling applied to subsequently filed *class actions*. For example, the Ninth Circuit held that it did, reasoning that doing so “would advance the policy objectives that led the Supreme Court to permit tolling in the first place.”⁴ In contrast, other Circuits refused to apply *American Pipe* to prospective class actions, reasoning that doing so would allow plaintiffs to “stack one class action on top of another and continue to toll the statute of limitations indefinitely.”⁵

The *China Agritech* Decision

China Agritech involved the third of three class actions brought by purchasers of China Agritech's common stock. The first two class actions were brought within the applicable two-year statute of limitations, but were denied class certification. The third class action was brought after the two-year statute of limitations had run. The issue, therefore, was whether under *American Pipe* the statute of limitations was tolled for the subsequently filed class action while the initial class actions were pending.

¹ 584 U.S. ____ (2018).

² 414 U.S. 538 (1974).

³ While *American Pipe* addressed only the ability for putative class members to later intervene after the statute of limitations had run, the Court later clarified in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), that the equitable tolling rule also applies to putative class members who later brought an individual suit.

⁴ *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017).

⁵ See, e.g., *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998).

The Supreme Court held that *American Pipe* tolling does not apply to class actions. The Court reasoned that the policy rationales supporting the tolling of individual claims do not apply to class claims. While it may be efficient to delay the litigation of individual claims until after the class certification stage, there is no efficiency in delaying future class litigation. Instead, the Court reasoned, Rule 23 and the Private Securities Litigation Reform Act of 1995 (PSLRA) evince a preference to bring in all potential lead plaintiffs and class counsel as soon as practicable so that a court may choose among the best candidates. The Court also expressed concern that applying *American Pipe* tolling to class actions “would allow the statute of limitations to be extended time and again,” essentially allowing for endless class litigation. The Court rejected arguments that its holding would result in duplicative, protective filings (*i.e.*, class actions filed solely to preserve the right to proceed in case the initial class action fails), observing that there was no evidence of such filings in Circuits that had refused to apply *American Pipe* tolling to subsequent class actions.

Justice Sotomayor filed a concurring opinion, arguing that the majority’s holding should be limited to securities class actions under the PSLRA. Justice Sotomayor reasoned that there was no principled grounds for treating individual and class claims differently, but that the tolling of securities class actions was incompatible with the PSLRA’s requirement that prospective lead plaintiffs move the court to serve as lead plaintiff.

In addition to addressing the inapplicability of *American Pipe* tolling to class claims, *China Agritech* also clarified that the five-year limitation period applicable to Section 10(b) claims (and other fraud claims under the Exchange Act)⁶ is a statute of repose that imposes a “finite end” on the time to bring a claim, notwithstanding any toll of the limitation period. The Court foreshadowed that position last year in *CalPERS v. ANZ Securities, Inc.*⁷ by holding that a similarly worded three-year limit under the Securities Act is a statute of repose that is not tolled under *American Pipe*, and in subsequently denying certiorari petitions challenging two Court of Appeals cases holding that the Exchange Act’s five-year period is likewise a statute of repose.

Implications of the Supreme Court’s Decision

The *China Agritech* opinion will provide some certainty to companies facing securities class action lawsuits by preventing the “stacking” of class actions, *i.e.*, new class actions being filed after the statute of limitations period following the failure of an earlier filed class action. While it is possible the opinion will lead to more class actions being filed upfront in an attempt to preserve potential class claims, it seems unlikely there will be a significant increase in activity. As the majority in *China Agritech* pointed out, there is no evidence of increased protective filings in Circuits that had already refused to apply *American Pipe* tolling to class claims. Moreover, federal courts are already well-equipped to handle duplicative litigation.

The opinion is also consistent with the Supreme Court’s recent refusals to expand or contract statutes of limitations through the use of judge-made doctrines. In addition to cases like *China Agritech* and *CalPERS*, the Supreme Court’s decisions in *Petrella v. Metro-Goldwyn-Mayer, Inc.*⁸ and *SCA Hygiene Products v. First Quality Baby Products, LLC*⁹ refused to apply laches to bar copyright and patent claims that fall within a statutory limitations period.

⁶ See 28 U.S.C. § 1658(b) (providing that a “private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . 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”).

⁷ 137 S. Ct. 2042 (2017).

⁸ 134 S. Ct. 1962 (2014).

⁹ 137 S. Ct. 954 (2017).

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