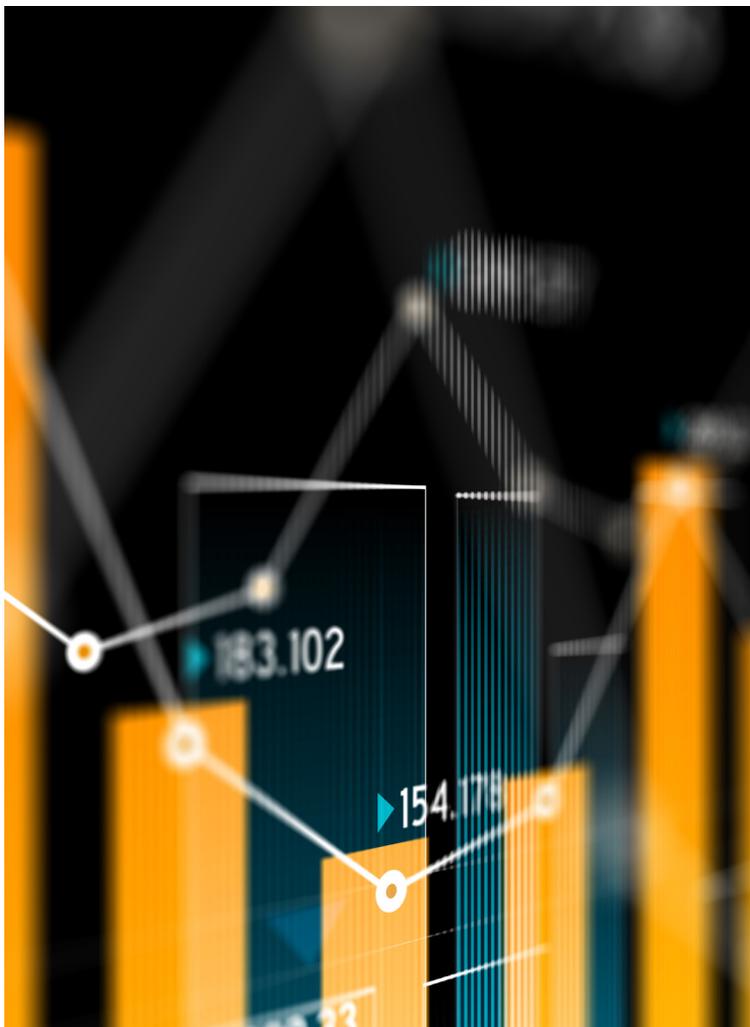


Class Action Lawsuits May Take Longer and Cost More to Resolve: What You Need to Know



Soon after a securities class action lawsuit hits, corporate defendants generally seek to quickly and efficiently resolve the case. They do this in part to avoid rattling investors, facing ongoing business disruptions, and attracting negative media coverage. However, a case before the US Supreme Court may make moving past such lawsuits more difficult and expensive. The Ninth US Circuit Court of Appeals' decision in *Resh v. China Agritech Inc.*¹ extended the deadline for plaintiffs to file new class actions following dismissal of their cases. The Supreme Court has agreed to hear an appeal to determine whether extending the deadline is appropriate.

The Supreme Court's ruling could potentially result in securities class action litigation taking longer to resolve and costing companies significantly more in defense costs and

¹ 857 F.3d 994 (9th Cir. 2017).

settlements. Since such costs can quickly erode available insurance recovery, companies should reexamine their directors and officers (D&O) liability insurance limits to ensure they are adequately protected.

STATUTES OF LIMITATIONS IN SECURITIES CASES

The Securities Exchange Act of 1934, which regulates securities transactions after initial offerings, requires plaintiffs to file lawsuits within two years of learning of a securities violation. Under a longstanding Supreme Court precedent, that two-year limitation is “tolled,” or suspended, while a class action is pending. The Supreme Court has also made clear that putative class members have the right to intervene and pursue individual claims — as opposed to class claims — if the class action is dismissed or a class is not certified. A company could therefore face lawsuits by individual plaintiffs more than two years after a securities violation comes to light.

The Supreme Court’s previous rulings ensured the two-year countdown does not expire for individual claims while the court decides whether to dismiss the class action or certify the class. The Ninth Circuit’s *Resh* decision built on these previous cases and extended tolling for subsequent class claims.

RESH V. CHINA AGRITECH

In 2011, China Agritech’s stock declined in response to the publication of several negative research reports on the company. Securities class action lawsuits followed. After two different district courts denied class certification, Michael Resh filed a third putative class action lawsuit in 2014. The district court dismissed the case because Resh filed it beyond the two-year limitation period. The court held that while the period was tolled for Resh’s individual claims, it was not tolled for class claims.

The Ninth Circuit reversed the dismissal, noting that the limitation period was tolled for individual claims of putative class members during the previous two class actions against China Agritech. And since those class members could file individual claims separately, there was no reason that they should be barred from choosing to prosecute their individual claims jointly through a class action. Although the court acknowledged that this rule would potentially lead plaintiffs to repeatedly file the same claims, it concluded that the concern is overstated.

The Supreme Court is likely to weigh the concerns of potential serial litigation extending beyond the two-year limitation period against the concerns that shareholders should have ample opportunity to obtain relief for alleged securities violations. The Supreme Court granted the petition for review in December 2017 but has yet to schedule oral arguments.



CALPERS V. ANZ SECURITIES, INC.²

Although *Resh* suggests the possibility of endless securities litigation, the Supreme Court recently provided some relief for companies facing securities fraud lawsuits in the wake of *Resh*. In June 2017, in *CalPERS v. ANZ Securities Inc.*, the court held that the three-year statute of repose under the Securities Act of 1933, which regulates stock offerings, was a hard deadline for filing a lawsuit. Although a statute of limitations could be tolled while a class action is proceeding, a statute of repose is not subject to such tolling. Accordingly, companies have some certainty that new securities claims cannot be filed past the statute of repose.



INSURANCE CONSIDERATIONS

While we await the Supreme Court's review of *Resh*, companies that face potential litigation — particularly those in the Ninth Circuit, which includes California, Washington, Oregon, Arizona, Nevada, Hawaii, Idaho, Montana, and Alaska — should consider whether their D&O policy limits are adequate in the event they are subject to serial class action lawsuits.

Although the Ninth Circuit downplayed the potential repercussions of *Resh*, the costs to file a motion to dismiss in a new case can be significant, even if a company can make the same arguments and rely on a previously successful motion. And while *ANZ Securities* provides an outer limit on successive class actions, most securities fraud claims are subject to a five-year statute of repose. Repeated class action litigation over a five-year period could significantly erode insurance policy limits and give plaintiffs leverage in early settlement negotiations. Companies should work with their insurance advisor and reevaluate their D&O insurance needs.

²137 S. Ct. 2042 (2017).

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