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U.S. Supreme Court Holds *American Pipe* Does Not Permit Repeat Filing of Class Claims After Limitations Period

The United States Supreme Court's June 11, 2018 decision in *China Agritech, Inc. v. Resh*,¹ clarified the scope of a decades-old equitable tolling rule for class actions, holding that the Court's 1974 opinion in *American Pipe & Construction Company v. Utah*² does not permit the filing of successive class claims after the expiration of the applicable statute of limitations. Following *China Agritech*, after the limitations period has run, unnamed class members may seek to intervene in a case in which class certification has been denied or may separately file their own individual suits, but they may not seek to reboot the claims on behalf of the class. The *China Agritech* decision is a significant development that will have important implications in class action litigation of all types.

BACKGROUND

In *American Pipe*, the Supreme Court held that the timely filing of a class action tolls the statute of limitations for members of the putative class.³ Thus, putative class members may timely seek to intervene in a pending case in which class certification has been denied, even after the applicable statute of limitations has expired.⁴ In 1983, the Court further clarified the scope of this tolling rule in *Crown, Cork & Seal Co. v. Parker*, holding that, under *American Pipe*, the statute of limitations is also tolled as to putative class members who "prefer to bring an individual suit rather than intervene."⁵ Last year, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Court again examined the scope of *American Pipe* tolling, holding that such tolling does not apply to a statute of repose—specifically, the three-year repose period specified by Section 13 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77m.⁶

This week, in *China Agritech*, the Court again considered the application of *American Pipe* tolling in the context of a securities class action—this one brought under the Securities Exchange Act of 1934 (the "Exchange Act"). The Court addressed a question left unresolved by its prior precedents:



“Upon denial of class certification, may a putative class member, 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?”⁷ Although *American Pipe* and *Crown, Cork* addressed tolling for “putative class members who wish to sue individually after a class-certification denial,” the Court found neither decision determined whether a putative class member may bring his claims “as a new class action” after expiration of the limitations period.⁸

China Agritech was the third successive class action suit brought under the Exchange Act alleging fraud and misleading business practices that purportedly harmed purchasers of the company’s common stock.⁹ The first two suits were filed within the two-year statute of limitations period for such Exchange Act claims.¹⁰ The district court denied class certification in the first suit, finding that the plaintiff had failed to demonstrate that China Agritech’s shares traded on an “efficient” market, as needed to establish the claim element of reliance on a classwide basis.¹¹ In the second suit, the district court again denied class certification, this time because the proposed class representative failed to satisfy typicality and adequacy requirements imposed by Federal Rule of Civil Procedure 23.¹² On June 30, 2014, Respondent Michael Resh, “who had not sought lead-plaintiff status in [the earlier proceedings] and was represented by counsel who had not appeared in the earlier actions,” filed the third class action.¹³ Resh’s suit, however, was filed over a year after the two-year statute of limitations had expired. The district court dismissed the complaint as untimely, but the Ninth Circuit reversed, holding that *American Pipe* tolled the statute of limitations so as to allow Mr. Resh to bring his claims on behalf of the putative class despite the expiration of the limitations period.¹⁴

The Ninth Circuit’s decision deepened a split of authority among the Circuit Courts of Appeals.¹⁵ Whereas the Sixth Circuit also had applied *American Pipe* to allow for the filing of successive class actions after the expiration of limitations periods, the First, Second, Fifth, and Eleventh Circuits had held that *American Pipe* does not toll the limitations period as to successive class (as opposed to individual) claims.¹⁶ The Third Circuit had fashioned yet another approach, under which *American Pipe* tolling applied to successive class claims in cases where class certification was denied based on some deficiency specific to the putative class representative, but not where the denial of class certification was based on other grounds.¹⁷ The *China Agritech* decision has resolved this Circuit split.

THE SUPREME COURT’S OPINION

In *China Agritech*, the Supreme Court reversed the Ninth Circuit and held that *American Pipe* “does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action.”¹⁸ While *American Pipe* may toll the statute of limitations so as to allow a putative class member to sue individually after class certification is denied, it does not allow a putative class member to bring another class action in reliance on the tolling rule.¹⁹

The Court reasoned that considerations of “efficiency and economy of litigation” that support tolling of individual claims under *American Pipe* do not support application of the tolling rule to class claims.²⁰ Delaying the filing of individual claims until after class certification is denied is efficient, the Court said, because “[i]f certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually.”²¹ On the other hand, “efficiency favors early assertion of competing class representative claims,” as this allows the district court to “select the best plaintiff with knowledge of the full array of potential class representatives and class counsel,” and to make the determination regarding class certification “at the outset of the case, litigated once for all would-be class representatives.”²²

The Court noted that similar considerations are “embodied” in the Private Securities Litigation Reform Act of 1995 (“PSLRA”),²³ which governs class actions brought under the Exchange Act like *China Agritech* and requires early public notice of the filing of such actions and court appointment of a “lead plaintiff” pursuant to a defined process.²⁴ The Court observed that these provisions “aim[] to draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint.”²⁵ As these PSLRA procedures provided the



respondent in *China Agritech* “[w]ith notice and the opportunity to participate in the first (and second) round of class litigation,” the Court found “little reason to allow [a] plaintiff[] who passed up those opportunities to enter the fray several years after class proceedings first commenced.”²⁶

The Court also observed that extending *American Pipe* tolling to successive class actions could permit lawyers representing plaintiffs asserting claims not subject to any statute of repose to extend the statute of limitations indefinitely: “[A]s each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation.”²⁷ Whereas, under *American Pipe*, the time for filing individual claims is finite and “extended only by the time the class suit was pending,” the time for filing successive class suits could be limitless if tolling of class claims were allowed.²⁸ Although the claims asserted in *China Agritech* were subject to a five-year statute of repose that would have prevented such a result in that particular case, the Court noted that many other statutory schemes do not have statutes of repose and held that “[e]ndless tolling of a statute of limitations [for class claims not subject to a repose period] is not a result envisioned by *American Pipe*.”²⁹

In reaching its ruling in *China Agritech*, the Court also dismissed arguments that the decision would lead to a “needless multiplicity” of protective class action filings.³⁰ The Court noted the absence of any showing that such protective class filings had plagued Circuits that previously held *American Pipe* tolling inapplicable to class claims and further stated that “a multiplicity of class-action filings is not necessarily ‘needless’”; to the contrary, “multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative.”³¹ While acknowledging that complications arising from the filing of overlapping suits at different times and/or in multiple forums could present challenges to the efficient management of such actions, the Court expressed faith in district courts’ ability to use the “ample tools at their disposal . . . , including the ability to stay consolidate, or transfer proceedings” to address such challenges.³²

KEY TAKEAWAYS

Companies and individuals who have been (or might be) targeted as defendants in putative class action litigation will welcome the limitation *China Agritech* imposes on plaintiffs’ ability to take repeated shots at class certification. The decision’s impact will be significant in cases asserting claims under Section 10(b) of the Exchange Act and/or Sections 11 and/or 12 of the Securities Act, which are subject to limitations periods of two years and one year, respectively.³³ Although most securities class actions are resolved prior to any ruling on class certification, recent statistics suggest that the median time from case filing to a ruling on class certification (in cases that reach such a ruling) is 2.5 years and that roughly 70% of cases that reach a class certification ruling take at least two years to do so.³⁴ Where class certification is denied after the statute of limitations has expired, *China Agritech* will bar a new plaintiff from thereafter making a fresh attempt at certifying the class. *China Agritech* will also have significant implications in class cases that, unlike those brought under the Securities Act and Exchange Act, are not bound by statutes of repose and thus might have been subject to potentially infinite relitigation of class certification issues had the Supreme Court affirmed the Ninth Circuit’s ruling in *China Agritech*.

It remains to be seen, though, how effectively the *China Agritech* ruling will foster the aims of “efficiency and economy of litigation,” discussion of which pervades the Court’s opinion. Will *China Agritech* spur a deluge of protective class action filings? And, if so, will courts successfully use the “tools at their disposal to manage the suits” (including by staying, consolidating, or transferring proceedings as appropriate)?³⁵ As the Supreme Court observed, the PSLRA’s provisions requiring early public notice of the filing of claims and court appointment of a lead plaintiff pursuant to a clearly defined process incentivize would-be class representatives to file claims or seek lead plaintiff appointment at the outset of such cases. These provisions also promote the efficient organization and management of suits governed by the PSLRA.



How *China Agritech* will impact the volume of filings and courts' management and coordination of multiple class suits outside of the PSLRA context is somewhat less clear.

One area that securities practitioners will watch with special interest is the extent to which federal and state courts faced with dueling Securities Act class actions (the likelihood of which has increased following the Supreme Court's *Cyan, Inc. v. Beaver County Employees Retirement Fund*³⁶ ruling earlier this year; which was covered [here](#)) will efficiently coordinate the management of such parallel multi-forum litigation.

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¹ Slip. Op. No. 17-432 (U.S. June 11, 2018).

² 414 U.S. 538 (1974).

³ See *id.* at 554.

⁴ See *id.* at 552-53.

⁵ 462 U.S. 345, 350 (1983).

⁶ See 137 S. Ct. 2042, 2052 (2017).

⁷ *China Agritech*, Slip Op. at 2.

⁸ See *id.* at 6.

⁹ See *id.* at 2.

¹⁰ See *id.* at 3-4.

¹¹ *Id.* at 3.

¹² See *id.* at 4. This time, the Court did not address the market efficiency issue.

¹³ *Id.*

¹⁴ See *id.*

¹⁵ See *id.* at 4-5.

¹⁶ Compare *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017); *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-653 (6th Cir. 2015) with *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *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).

¹⁷ *Yang v. Odom*, 392 F.3d 97, 112 (3d Cir. 2004) (holding *American Pipe* tolling does not apply to successive class actions where "a substantially identical class suit was denied certification due to a Rule 23 defect in the class itself," but does apply where "denial of certification in the earlier action was based solely on Rule 23 deficiencies of the putative representative").

¹⁸ *China Agritech*, Slip Op. at 6.

¹⁹ See *id.*

²⁰ See *id.* at 15.

²¹ *Id.* at 6.

²² *Id.* at 7.



²³ 15 U.S.C. § 78u-4 *et seq.*

²⁴ *See China Agritech*, Slip Op. at 8 (citing 15 U.S.C. § 78u-4(a)(3)).

²⁵ *Id.* at 8.

²⁶ *Id.* at 9.

²⁷ *Id.* at 10.

²⁸ *Id.*

²⁹ *Id.* at 10-11 (citing 28 U.S.C. § 1658(b)(2)).

³⁰ *See id.* at 12-14.

³¹ *See id.* at 12-14.

³² *Id.* at 14.

³³ *See* 28 U.S.C. § 1658(b); 15 U.S.C. § 77m.

³⁴ Stefan Boettrich & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review*, NERA ECONOMIC CONSULTING, Jan. 29, 2018, at 21.

³⁵ *China Agritech*, Slip Op. at 14.

³⁶ 138 S. Ct. 1061 (2018).