NO MORE ZOMBIE CLASS ACTIONS: SUPREME COURT STOPS CLASS MEMBERS FROM FILING SUCCESSIVE CLASS CLAIMS AFTER EXPIRATION OF LIMITATIONS PERIOD

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The U.S. Supreme Court has ruled that a plaintiff cannot file a class action outside the applicable statute of limitations merely because an unsuccessful prior class action tolled the limitations period for individual claims. [1] In *China Agritech v. Resh*, [2] the Court held that its prior jurisprudence "does not permit the maintenance of a follow-on class action past expiration of the statute of limitations." [3] Rather, that jurisprudence only tolls the statute of limitations for unnamed class members to intervene in the action "individually or file individual claims if the class fails." [4] In reaching this conclusion, the Court recognized that "[t]he Federal Rules [of Civil Procedure] provide a range of mechanisms to aid courts in" overseeing complex litigation, such as where individual claims are added on after a denial of class certification. [5] But, critically, "[w]hat the Rules do not offer is a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims." [6]

BACKGROUND

In *American Pipe & Construction Co. v. Utah*, the Court's first decision addressing class action tolling, the Court held that the statutes of limitations for putative class members' individual claims are tolled while the question of class certification is determined, such that those persons can intervene in the action, notwithstanding expiration of the limitations period, should class certification be denied. [7] Then, in *Crown Cork & Seal v. Parker*, the Court extended the tolling principle to the filing of subsequent, separate individual actions. [8] In the intervening decades, several federal courts of appeals further extended the principle to allow successive *class* actions to be filed beyond the limitations period, [9] but other courts of appeals ruled the principle did not extend that far. [10]

In *China Agritech*, the plaintiffs argued to the district court that two prior class actions, which the court had dismissed without certifying a class, served to toll the statute for their class action brought outside of the limitations period. [11]The district court disagreed and dismissed the third class action as untimely. [12] On appeal, however, the Ninth Circuit reversed the dismissal, concluding that *American Pipe* dictates the outcome for class claims, as well as individual ones. [13]

THE SUPREME COURT'S DECISION

Justice Ginsburg wrote for the Court, joined by all members save for Justice Sotomayor, who concurred in the judgment only. The Court reversed the Ninth Circuit, ruling that "[t]here is little reason to allow plaintiffs who passed up opportunities to participate in the first (and second) round of class litigation to enter the fray several years after class proceedings first commenced." [14] In doing so, the Court clarified its decisions in *American Pipe*

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and *Crown Cork & Seal*, explaining that those cases "addressed only putative class members who wish to sue individually after a class-certification denial." [15] "Neither decision so much as hints that tolling extends to otherwise time-barred class claims," such that courts like the Ninth Circuit erred in relying upon the prior decisions to support allowance of successive, untimely class actions. [16]

Beyond the jurisprudential reasons, the Court also focused on the "economy of litigation" and policy considerations in reaching its decision. "*American Pipe* tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial," preventing a theoretical flood of filings as the limitations clock expires with the issue of class certification undecided. [17] At the same time, plaintiffs should not be allowed to "piggyback" on timely-filed, but unsuccessful, class actions when they "wait[ed] out the statute of limitations." [18] The Court reasoned, "Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on." [19] Thus, "any additional *class* filings should be made early on, soon after the commencement of the first action seeking class certification." [20] And "efficiency favors early assertion of competing class representative claims" so that class certification can be "litigated once for all would-be class representatives." [21] Ultimately, the Ninth Circuit's "proposed reading [of *American Pipe* and *Crown Cork*] would allow the statute of limitations to be extended time and again," undermining the very purpose of a statute of limitations. [22] As the Court explained, "the time for filing successive class suits, if tolling were allowed, could be limitless." [23]

Concurring in the judgment only, Justice Sotomayor would have drawn a distinction between class actions governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), such as the *China Agritech* matter, and those that are not. [24] Justice Sotomayor noted that "[u]nlike the PSLRA, Rule 23 contains no requirement of precertification notice to absent putative class members; it provides only for postcertification notice." [25] There thus is no mechanism for absent putative class members to learn that a putative class action is pending, much less that they are entitled to seek to displace the named plaintiff in that lawsuit as class representative." [26]

WHY *CHINA AGRITECH* IS IMPORTANT

With the Court's decisive and swiftly-issued ruling in *China Agritech*, federal courts now have a clear directive not to allow untimely, successive class actions merely because an earlier-in-time class action tolled individual claims while the court considered whether to certify a class. Thus, companies involved in class actions have a shield to employ against additional class suits brought by members of the putative class after class certification denial if the statute of limitations applicable to that putative class has expired. That said, the Court's emphasis on early adjudication of class certification under Rule 23, and the need for any plaintiff—or plaintiff's attorney—seeking to lead a class to come forward early, could result in additional, competing class actions being filed prior to the expiration of the limitations period. The Court discounts this possibility, but only time will tell.

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[1] For a discussion of the Court's oral argument, see Of Pipes and Crowns: The Supreme Court Considers Extent of Tolling Statute of Limitations in Putative Class Actions, K&L Gates Alert (May 2018).

[2] No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018).

[3] *Id.* at *3.

[4] *Id.*

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[5] *Id.* at *10.

[6] *Id.*

[7] *See* 414 U.S. 538, 550-51 (1974).

[8] 462 U.S. 345, 350 (1983).

[9] *See* Phipps v. Wal-Mart Stores, Inc., 792 F.3d 637, 640 (6th Cir. 2015); Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 562-64 (7th Cir. 2011); Resh v. China Agritech, Inc., 857 F.3d 994, 1004 (9th Cir. 2017).

[10] *See* 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 (11th Cir. 1994).

[11] Resh v. China Agritech, Inc., No. CV1405083RGKPJWX, 2014 WL 12599849, at *2 (C.D. Cal. Dec. 1, 2014), *rev'd*, 857 F.3d 994 (9th Cir. 2017).

[12] *Id.* at *3-5.

[13] Resh v. China Agritech, Inc., 857 F.3d 994, 1004 (9th Cir.).

[14] *China Agritech*, 2018 WL 2767565, at *2.

[15] *Id.* at *1.

[16] *Id.* at *6.

[17] *Id.*

[18] *Id.*

[19] *Id.* at *7.

[20] *Id.* at *6 (emphasis in original).

[21] *Id.*

[22] *Id.* at *8.

[23] *Id.*

[24] *China Agritech*, 2018 WL 2767565, at *12 (Sotomayor, J., concurring in judgment only).

[25] *Id.*

[26] *Id.*

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