OF PIPES AND CROWNS: THE SUPREME COURT CONSIDERS EXTENT OF TOLLING OF STATUTE OF LIMITATIONS IN PUTATIVE CLASS ACTIONS

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U.S. Complex Commercial Litigation and Disputes Alert

The U.S. Supreme Court recently heard argument in *China Agritech Inc. v. Resh*, presenting, yet again, the question of the extent to which a statute of limitations is tolled while a putative class action is pending. Specifically, in *China Agritech*, the Supreme Court will decide whether (1) an absent putative class member can bring a successive class action notwithstanding the intervening expiration of the limitations period, or (2) an earlier class action only tolls an absent class member's individual claims. The Ninth Circuit adopted the former approach, but at oral argument, certain Supreme Court justices expressed concern about extending tolling to subsequent class action litigation. Others, however, appeared inclined to agree with the court of appeals, noting that there are important policies encouraging class actions to avoid duplicative litigation. If the Supreme Court agrees with the Ninth Circuit, the filing of a class action could result in the tolling of all successive claims, including putative class claims.

BACKGROUND

Shareholders brought a class action claim against China Agritech Inc. for alleged violations of the Securities and Exchange Act of 1934 [1]. The defendant moved to dismiss because the two-year statute of limitations had expired [2]. The plaintiffs, however, argued that the statute of limitations had been tolled, under *American Pipe & Construction Co. v. Utah* [3], during the pendency of two prior class actions that had been dismissed. The district court granted China Agritech's motion to dismiss because the "statute of limitations did not toll as to a class action during the pendency" of the previous two class actions [4]. The Ninth Circuit reversed [5]. The three-judge panel found that the class claim was tolled where (1) the current plaintiffs were not named in the previous two class actions, (2) the previous actions were timely, and (3) class certification was denied [6]. In concluding that *American Pipe* extends to class as well as individual claims, the Ninth Circuit emphasized the "policy objectives that led the Supreme Court to permit tolling in the first place." [7]

INTERPRETATION OF AMERICAN PIPE

In *American Pipe*, the Supreme Court held that putative members of a class are parties to the class action and that the statutes of limitations for their individual claims are tolled while the question of class certification is determined [8]. The Supreme Court reaffirmed and extended *American Pipe* in *Crown, Cork & Seal Co. v. Parker* [9], by allowing tolling not just as to individuals who were seeking to intervene in the pending action but to potential members of the class seeking to file individual actions on their own [10]. Both cases had concurring

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opinions that cautioned the ramifications of allowing such tolling. For example, in *Crown, Cork & Seal*, Justice Powell noted the potential abuse that could result because "[i]t preserves for class members a range of options pending a decision on class certification. The rule should read, however, as leaving a plaintiff free to raise *different or peripheral* claims following denial of class status." [11]

Several decades later, a circuit split on the proper interpretation of *American Pipe* caught the attention of the Supreme Court. The Sixth, Seventh, and Ninth Circuits permit tolling for subsequent class actions [12]. On the other hand, the First, Second, Fifth, and Eleventh Circuits do not apply *American Pipe* to subsequent class actions because of the potential for wasted judicial resources and abuse through continuous litigation of whether a class should be certified [13].

SUPREME COURT ORAL ARGUMENTS

On March 26, 2018, the Supreme Court heard argument in *China Agritech* [14]. Notably, some justices appeared hesitant to interpret *American Pipe* in a manner that would extend tolling rights to successive class actions rather than only to individual claims. Justice Gorsuch, along with the Chief Justice, expressed concerns with "stacked" litigation [15]. Justice Gorsuch explained his concern: "can you stack them forever, so that try, try again, and the statute of limitations never really has any force in these cases? What do we do about the congressional judgment that there should be a statute of limitations?" [16] Respondents' counsel emphasized that a repose period, or if there is none, the principle of comity, can limit potential serial class certification motions [17].

On the other hand, Justices Kagan and Sotomayor noted that the underlying policy behind tolling in class actions was to avoid an endless number of individual suits. In questioning petitioner, Justice Sotomayor stated, "[w]hat you're asking us is to write a new *American Pipe* rule," and "your regime is now encouraging the very thing that *American Pipe* was trying to avoid, which is to have a multiplicity of suits being filed and encouraging every class member to come forth and file their own suit." [18] Justice Kagan flagged the policy considerations underlying Rule 23, which was to encourage class actions. Disagreeing, petitioner's counsel explained that "Rule 23's interests would be served because we would have the classes coming forward early." [19] Counsel further noted that they are seeking to have the statute of limitations applied "as written" and that tolling "requires diligence and extraordinary circumstances" due to the fact that it is an equitable remedy [20].

Justice Sotomayor noted another possible approach. Her suggestion—developed by the Third and Eighth Circuits—would allow successive class actions by individuals when there were deficiencies by the lead plaintiff in the original motion for class certification but not under other circumstances [21]. It remains to be seen whether a majority of the justices adopt this approach or prefer one of the other approaches discussed above.

POTENTIAL IMPLICATIONS

If the Supreme Court extends tolling to successive class actions, it may allow a putative class to bring a claim after another class has failed and notwithstanding the fact that the limitations period would have otherwise run. The approach would then extend to all jurisdictions and not just those circuits that have adopted the Ninth Circuit's approach. Absent an unusual turn of events, the Supreme Court will issue a decision by the end of June.

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Notes

[1] 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).
[2] *Id.*
[3] 414 U.S. 538 (1974).
[4] *Resh*, 2014 WL 12599849, at *5.
[5] Resh v. China Agritech, Inc., 857 F.3d 994 (9th Cir.).
[6] *Id.* at 1000-04.
[7] *Id.* at 1004.
[8] 414 U.S. at 550-51 (when a putative class action is filed, "the claimed members of the class [can stand]as parties to the suit until and unless they receive[ ] notice thereof and cho[o]se not to continue").
[9] 462 U.S. 345 (1983).
[10] *Id.* at 350.
[11] *Id.* at 355 (Powell, J., concurring) (emphasis added).
[12] 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, 857 F.3d at 1004.
[13] 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).
[14] The transcript can be found here ("Transcript").
[15] Transcript at 39-40.
[16] *Id.* at 39.
[17] *See id.* at 40-41.
[18] *Id.* at 8-9, 18.
[19] *Id.* at 12.
[20] *Id.* at 18.
[21] *See id.* at 54-55.

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