

JUNE 12, 2018



No second or third bite at the apple: The Supreme Court holds that equitable tolling does not apply to successive class actions

By Carolyn G. Nussbaum, Christopher M. Mason, Daniel Deane and Kierstan E. Schultz

On June 11, 2018, the United States Supreme Court decided *China Agritech, Inc. v. Resh*, No. 17-432, 2018 U.S. LEXIS 3502 (June 11, 2018), holding that the equitable tolling doctrine it had announced over three decades earlier in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), does not apply to successive class actions. This means that if a court denies class certification, a person who would have become a member of the proposed class can claim the benefit of an equitable tolling of the statute of limitations during the pendency of the action so as to be able to promptly join that action, or intervene in another existing lawsuit, or file a new individual action involving the same facts and circumstances.¹ But that person cannot use *American Pipe*'s equitable tolling doctrine to commence an otherwise untimely new class action.

Procedural and factual background

The case before the Court was the third putative class action against China Agritech for securities fraud arising out of the same facts and circumstances. Each of the three successive complaints made materially identical claims that China Agritech had violated the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78a *et seq.* (the "Exchange Act"). The parties agreed that the applicable two-year statute of limitations began to run when the facts constituting the alleged violation were discovered, *see* 28 U.S.C. § 1658(b)(1), on February 3, 2011. *See* 2018 U.S. LEXIS 3502, at *7-8.

The first class action was filed within days. As the Private Securities Litigation Reform Act of 1995 (15 U.S.C. § 78u-4 (the "PSLRA")) requires, plaintiffs' counsel published notice of the filing and six shareholders thereafter sought to be named as lead plaintiff. Ultimately, the district court denied class certification, holding that plaintiffs had failed to establish that China Agritech's stock traded on an efficient market—an essential element for establishing reliance on a class-wide basis in a securities fraud action. Plaintiffs' counsel published a notice informing shareholders that

¹ In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983), the Court extended the equitable tolling rule of *American Pipe* to would-be class members who "prefer to bring an individual suit rather than intervene."

certification had been denied and advising: “You must act yourself to protect your rights. You may protect your rights by joining in the current Action as a plaintiff or by filing your own action against China Agritech.” 2018 U.S. LEXIS 3502, at *9. After the Ninth Circuit affirmed the denial of class certification, the case was settled on an individual basis and dismissed with prejudice on September 20, 2012.

On October 4, 2012—still within the Exchange Act’s two-year statute of limitations—a new set of plaintiffs, represented by the same counsel, filed a second class action asserting virtually identical claims. Again, plaintiffs’ counsel published notice of the filing and, again, additional potential lead plaintiffs came forward. Although plaintiffs produced new market efficiency evidence, on September 26, 2013, the district court again denied class certification. *See Resh v. China Agritech*, 857 F. 3d 994 (9th Cir. 2017). This time, the court held that plaintiffs and their counsel had failed to meet the typicality and adequacy requirements of Federal Rules of Civil Procedure 23(a)(3) and (a)(4) because the new plaintiffs were subject to certain claim preclusion defenses based on their relationship with the original plaintiffs in the first action. 857 F. 3d at 998. Again, the plaintiffs settled their individual claims and the action was dismissed.

Split of authority and grant of certiorari

On June 30, 2014, more than a year after the statute of limitations had expired (but within the five-year statute of repose under the Exchange Act)² a new lawyer filed a third putative class action. There was also a new plaintiff, who had not previously sought lead plaintiff status in either of the two prior class actions. The district court dismissed this third action as untimely, holding that *American Pipe* did not toll the statute of limitations for the purpose of allowing successive class actions.

The Ninth Circuit reversed. It held that *American Pipe* tolling should be applied to successive class actions, because it would cause no unfair surprise to defendants and would promote economy of litigation by reducing the incentive to file multiple class actions. *Resh, supra*, 857 F.3d at 1004.

The Ninth Circuit’s decision deepened a split among the circuits. The Ninth Circuit and the Sixth Circuit would apply *American Pipe* tolling to successive class actions. The First, Second, Fifth and Eleventh Circuits held to the contrary. The Third Circuit would apply tolling to successive class actions where certification had been previously denied for a deficient putative representative, but would not apply tolling where denial was based on a class defect. The Supreme Court granted *certiorari*, *see* 138 S. Ct. 543 (2017), to resolve the split.

The Court’s unanimous opinion

In a unanimous decision, with a majority opinion penned by Justice Ginsburg (with Justice Sotomayor filing an opinion concurring only in the judgment, as discussed below), the Court emphasized that the overriding goals of equitable tolling are efficiency and economy of litigation, the “watchwords of *American Pipe*” as well as “a principal purpose of Rule 23[.]” 2018 U.S. LEXIS 3502, at *23. The Court found that while the application of equitable tolling as permitted by *American Pipe* can promote economy and efficiency by avoiding a multiplicity of potentially unnecessary individual actions by members of a putative class, successive putative class actions do

² In *California Public Employees Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), the Supreme Court held a year ago that *American Pipe* does not toll statutes of repose. See our Alert, “Supreme Court holds that class action-equitable tolling does not apply to statute of repose in Securities Act case” available [here](#).

not further these aims. Where multiple putative class actions are filed during the statute of limitations period, the Federal Rules of Civil Procedure provide the district courts with a number of mechanisms, including multi-district litigation, to manage those filings for economy and efficiency. *Id.* at *22-23. Allowing a plaintiff to wait out the statute of limitations and then file another class action would undercut the effective use of those tools. Moreover, encouraging early filing of all possible class actions allows the district court to see all the claims at once and to select the best representative or lead plaintiff for the class. There is no corresponding advantage to encouraging an early flurry of individual lawsuits, which can be discouraged by equitable tolling.

Furthermore, according to the majority, a plaintiff seeking class representative status who waits to file until after the expiration of a statute of limitations “can hardly qualify as diligent in asserting claims and pursuing relief.” *Id.* at *17. The majority also decried the potentially limitless extension of limitations periods if such tolling were applied to allow successive class actions. In this case, a plaintiff’s ability to bring securities fraud claims, individually or on behalf of a class, would be cut off by a five-year statute of repose, see 28 U.S.C. § 1658(b)(2), but not all class claims are subject to such an outer limit. Endless tolling is “not a result envisioned by *American Pipe*.” 2018 U.S. LEXIS 3502, at *18.

The majority also rejected concerns based on the Rules Enabling Act, 28 U.S.C. § 2071, which gives the Supreme Court the power to prescribe general rules of practice and procedure so long as they do not “abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). In the Court’s view, equitable tolling under *American Pipe* is not a substantive right to bring otherwise untimely claims, but rather is a “judicially crafted doctrine that itself does not abridge, enlarge[] or modify any substantive right.” 2018 U.S. LEXIS 3502, at *19-20.

Sotomayor concurs in the judgment

Justice Sotomayor authored the only separate opinion, concurring solely in the judgment. Citing the plurality opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 398 (2010), to the effect that class claims are not categorically different from individual claims, and therefore should not be treated differently without a special reason for doing so. In her view, the substantial procedural requirements imposed by the PSLRA—including nationwide notice of the filing of a putative class action to encourage prospective class representatives to come forward—was such a sufficient reason. As Justice Sotomayor reasoned, absent class members in a non-securities action might not even be aware of the lawsuit, and so “the majority’s conclusion that absent class members were not diligent because they failed to ask to be the class representative in a prior suit makes sense only in the PSLRA context.” 2018 U.S. LEXIS 3502, at *28-29. However, given the lack of precertification notice in non-securities cases, she concluded that the majority’s opinion should have been limited to the facts of the PSLRA case before the Court, and not extended to *all* class actions of every kind.

As a result, according to Justice Sotomayor, *American Pipe* should permit equitable tolling whenever class certification is denied because of deficiencies of the lead plaintiff as class representative, or because of some other “nonsubstantive defect.” 2018 U.S. LEXIS 3502, at *30 (citing *Yang v. Odom*, 392 F. 3d 97, 112 (3d Cir. 2004)). Equitable tolling would remain unavailable when certification is denied for a reason that “bears on the suitability of the claims for class treatment.” *Id.*

None of this persuaded the other eight justices. Justice Ginsburg noted, for example, that Rule 23 does not distinguish between class certification denials based on the reasons for the denial. *Id.* at *18, n. 5. In the end, rules encouraging the prompt commencement of competing claims for class representation better serve the overriding interests of efficiency and economy in class litigation. *Id.* at *23-24.

Conclusion

The decision to limit *American Pipe* is not surprising in the wake of the Court's similar, but more contentious, holding in the *CalPERS* case last year that courts cannot apply equitable tolling doctrines to avoid an explicit statute of repose. What may be surprising is that the decision was 8 to 1 and was authored by Justice Ginsburg, a dissenter in *CalPERS*.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Carolyn G. Nussbaum at cnussbaum@nixonpeabody.com or 585-263-1558
- Christopher M. Mason at cmason@nixonpeabody.com or 212-940-3017
- Daniel Deane at ddeane@nixonpeabody.com or 603-628-4047
- Kierstan E. Schultz at kschultz@nixonpeabody.com or 603-628-4031