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Report from Washington

Supreme Court Holds *American Pipe* Does Not Permit Unnamed Class Members to Bring a New Class Action After the Expiration of Applicable Limitations Period

June 13, 2018

Introduction

On June 11, 2018, the Supreme Court in *China Agritech v. Resh*, No. 17-432, unanimously held that the tolling of individual claims established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), does not toll limitations periods for successive class claims. Thus, individual claimants that could invoke *American Pipe* tolling for their individual claims may not bring putative class claims if such class claims would be barred by the applicable statute of limitations.

Background

In February 2011, certain China Agritech shareholders filed a putative class action against the company claiming various violations of federal securities laws. The district court denied class certification in that original suit because plaintiffs failed to satisfy Rule 23(b)(3)'s requirement that common issues predominate over individualized issues. In October 2012, new China Agritech shareholders subsequently filed a putative class action, which was almost identical to the first, but limited its claims in an effort to better position itself for its motion for class certification. Nevertheless, the court again denied the plaintiffs' motion for class certification, this time for failure to satisfy Rule 23(a)'s typicality and adequacy requirements.

In June 2014, Michael Resh, an absent putative class member in the first two class actions, filed a third putative class action against China Agritech and various individual defendants based on the same facts. The district court dismissed Resh's class action complaint as untimely, finding that the application of *American Pipe* tolling to class action claims would "allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to

"We hold that American Pipe does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action."

— Justice Ginsburg

demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence.”

The Ninth Circuit reversed, reasoning that “permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place.” The Ninth Circuit explained that the later class actions would not unfairly surprise defendants because the preceding class action would have alerted defendants to the relevant substantive claims and potential class members.

In so holding, the Ninth Circuit joined the Sixth and Seventh Circuits in finding that the *American Pipe* tolling doctrine applies to subsequent class actions. In contrast, the First, Second, Fifth, and Eleventh Circuits limited the *American Pipe* tolling doctrine to claims by individual plaintiffs. The Third and Eighth Circuits took an intermediary position, only allowing subsequent class actions when class certification was denied for reasons that were unrelated to the validity of the class, such as where the denial was based solely on lead plaintiffs’ deficiencies as class representatives.

Summary of the Court’s Opinion

In an opinion by Justice Ginsburg, the Court held that *American Pipe* tolling does not permit follow-on class actions after the expiration of the relevant statute of limitations. The Court focused heavily on the reasoning behind *American Pipe*, explaining that “[t]he watchwords of *American Pipe* are efficiency and economy of litigation” and that “[e]xtending *American Pipe* tolling to successive class actions does not serve that purpose.” Justice Ginsburg wrote that the “‘efficiency and economy of litigation’ that support tolling of individual claims . . . do not support maintenance of untimely successive class actions.” Instead, the Court noted that class claims should be made soon after the first action seeking class certification begins. The Court reasoned that while economy of litigation favors delaying the limitation period for individual claims until class certification is denied because a certification grant would eliminate the need for individually asserted claims, the opposite is true for competing class representative claims: when class treatment is appropriate, it is best for all possible representatives to be known so the district court can select the best plaintiff.

The Court also analyzed the impact of the Federal Rules and the Private Securities Litigation Reform Act of 1995 (“PSLRA”) on class litigation and securities suits. Rule 23 mandates that class certification be resolved at “an early practicable time,” indicating a preference for the preclusion of untimely class actions. The Court noted that the PSLRA—which governs the *China Agritech* litigation—requires publication of class notices shortly after commencement

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of a securities class action. The Court reasoned that this rule aims to alert all potential class representatives to the litigation and afford them an opportunity to demonstrate their suitability to serve as lead plaintiff.

“What the [Federal] Rules do not offer is a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims.”

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Justice Ginsburg also noted that plaintiffs usually must show that they have been diligent in pursuing their claims to benefit from equitable tolling. In *American Pipe*, the Court noted that tolling was permissible because the intervening individual plaintiffs had not “slept on their rights,” but instead relied on the class representative to protect their interests. Here, however, the “would-be class representative who commences suit after expiration of the limitation period . . . can hardly qualify as diligent in asserting claims and pursuing relief.”

The Court expressed concern that applying *American Pipe* tolling to successive class claims would permit the statute of limitations to be extended indefinitely, noting that “[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*.” Additionally, the Court rejected concerns that its decision would lead to a “needless multiplicity” of class action filings because: (i) there is no showing that the Circuits that declined to apply *American Pipe* to class actions have experienced a disproportionate amount of protective class action filings; and (ii) a plaintiff that wants to lead a class already has incentive to file early and little reason to delay.

The Court also rejected the argument that limiting *American Pipe* tolling to individual claims was contrary to the Rules Enabling Act, noting that claimants have no substantive right to bring untimely claims. Justice Ginsburg explained that Rule 23 does not require class actions to be revived when individual claims are tolled. Indeed, as Justice Ginsburg explained, “the [Federal] Rules do not offer . . . a reason to permit plaintiffs to exhume failed class actions by filing new, untimely class claims.”

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Justice Sotomayor concurred with the outcome, but argued that the majority erred in adopting an unnecessarily broad rule. Justice Sotomayor argued that the *American Pipe* tolling doctrine should still apply to class actions that are not subject to the PSLRA. Justice Sotomayor pointed to the Court’s precedent in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, which held that there must be a special reason for treating class actions as differently from individual claims. 559 U.S. 393, 398 (2010). Here, the PSLRA and its procedural requirements, particularly the requirement to notify potential lead plaintiffs of a pending class action, distinguished securities law class actions from those not governed by the PSLRA. Justice Sotomayor observed that Rule 23 generally lacks a requirement to provide precertification notice to putative class members and “in no way ensures that potential lead plaintiffs know about the putative class action or about their opportunity to

represent the class.” She rejected the majority’s argument that its ruling would encourage class representatives to come forward early in the process to “aid” the court in selecting the best lead plaintiff, arguing that “in suits not covered by the PSLRA, absent class members may not know of the pending class action early enough to ‘aid’ the court, and will likely have to file a completely separate lawsuit if what they seek is lead-plaintiff status.”

Implications

The Court’s decision confirms that defendants will not be exposed to repeated, successive class actions indefinitely. While individual claims can still invoke *American Pipe* tolling, putative class claims brought after a denial of class certification must be brought within whatever time remains under the applicable statute of limitations. As a result, the plaintiffs’ bar may be incentivized to bring numerous class actions during the tolling period to optimize the likelihood of class certification.

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