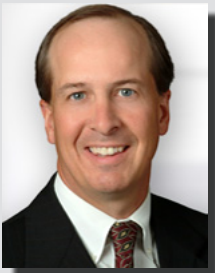




January 2018

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For Whom the Class Action Tolls: *American Pipe* to be Revisited

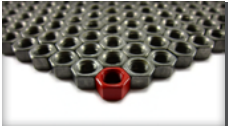
The United States Supreme Court recently granted certiorari in a significant case that will test the limits of class action tolling.

Since 1974, federal courts have held that the filing of a class action tolls the statute of limitations for the individual claims of the putative class members. However, cases have percolated among the federal district courts and circuit courts of appeals—with varying results—addressing the issue whether statutes of limitation were tolled allowing putative class members to bring their own successive class action lawsuit as named plaintiffs. **That is, there is a split of authority whether putative class members from a previously defective or failed class action may then follow with an individual lawsuit, or file a successive class action lawsuit.** The United States Supreme Court appears ready to resolve this division.

The potential resolution of the case, *China Agritech, Inc. v. Resh*, is significant for a number of reasons. Foremost, the fact that courts are split almost certainly creates circumstances of potential forum-shopping. In those district courts and circuits where successive class actions are permitted, *e.g.*, Sixth Circuit, Seventh Circuit, and Ninth Circuit, plaintiffs and their lawyers may enjoy the opportunity to toll indefinitely the statute of limitation. On the other hand, in circuits where the courts permit only individual suits following a failed class action attempt, *e.g.*, First Circuit, Second Circuit, Fifth Circuit, and Eleventh Circuit, the opportunity to continue with a class action is much more limited or even nonexistent. **The different treatment of prospective plaintiffs and defendants, depending upon where suit is filed, is a significant impediment to uniformity among the federal courts.**

Analysis

The First, Second, Fifth, and Eleventh Circuits have held that the principles underlying *American Pipe* tolling for individual actions—*i.e.*, preventing absent class members from having to file protective individual claims for fear of having them dismissed as untimely—have no application to successive *class* actions, particularly when a court had



already rejected an attempt to certify a materially identical class. **Tolling in those circumstances, these courts have explained, would not further any purpose recognized in *American Pipe*. Instead, it would allow plaintiffs to engage in repeated attempts to certify class actions and, thus, undermine both the principles of *American Pipe* and the purpose of statutes of limitations.**

On the other hand, three courts of appeals—Third Circuit, Sixth Circuit, and Ninth Circuit—have rejected that conclusion and interpreted *American Pipe* to toll the limitations period to allow formerly putative class members not only to pursue their own claims but the claims of a putative class. The courts adopted a rule that seemingly would extend the statute of limitations for class actions indefinitely, casting aside Congress’s effort to cut off stale claims through clear time bars and inviting facially abusive litigation without any appreciable benefit to anyone.

The Third and Eighth Circuits have taken a somewhat middle ground and held that *American Pipe* tolling can apply to subsequent class actions in some circumstances, *i.e.*, where class certification has been denied solely on the basis of the lead plaintiffs’ deficiencies as class representatives, and not because of the suitability of the claims for class treatment. But, tolling does not apply when certification was denied based upon deficiencies in the purported class itself.

As a result of the decisional conflict just described, the viability of successive otherwise untimely class actions depends on the jurisdiction in which the plaintiff elects to file suit. Putative members of an uncertified class will be subject to stricter enforcement of statutory time limits in the First, Second, Third, Fifth, Eighth, and Eleventh Circuits. But identically situated putative class members will be able to file successive class actions in the Sixth, Seventh, and Ninth Circuits without regard to statutes of limitations and subject only to whatever constraint principles of “comity” impose on district courts.

In light of the importance of the Supreme Court’s anticipated decision, class action lawyers on both sides of the “v.” will be watching the case closely.

History

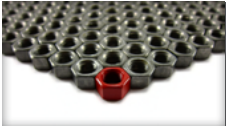
In the case on certiorari, the plaintiffs sued China Agritech for violations of the 1934 Securities Exchange Act and 1933 Securities Act. The first proposed class action alleging that China Agritech violated the Exchange Act was filed in February 2011. In October 2011, the district court dismissed the Securities Act claim on the pleadings but allowed the Exchange Act claims to proceed. Then, in March 2011, the district court denied class certification of the Exchange Act claims on the ground that the proposed class failed to satisfy Rule 23(b)(3)’s predominance requirement. **Specifically, the district court concluded that the plaintiffs had failed to satisfy the preconditions for a fraud-on-the-market theory of reliance and, thus, individual questions of reliance predominated over common ones. After the plaintiffs appealed the class certification decision under Rule 23(f), and the court of appeals affirmed, they settled their individual claims.**

Approximately three weeks later, another plaintiff who had been a putative class member filed a virtually identical class action complaint against China Agritech. The action was filed one year and eight months after plaintiffs’ claims accrued. **In August 2013, the plaintiffs moved for class certification, and the district court again denied the motion, this time for failure to satisfy the typicality and adequate representation requirements** of Rule 23(a)(3) and (4). In January 2014, the plaintiffs dismissed their claims without prejudice.

After the second class certification denial, the putative class members were given notice and an opportunity to intervene under the special notice requirements of the Private Securities Litigation Reform Act (the “PSLRA”). No one did until the plaintiffs finally filed the case on certiorari in June 2014—17 months after the applicable two-year statute of limitations had lapsed. They alleged violations of the Exchange Act based on the same facts and circumstances, and on behalf of the same putative class, as in the previously failed actions.

This time, the district court dismissed the claims as time-barred. Relying on Ninth Circuit precedent, the district court





held that *American Pipe* tolling permitted the plaintiff to bring individual claims, but not another class action. **The district court thus dismissed the class complaint, but permitted the plaintiffs to pursue individual actions.**

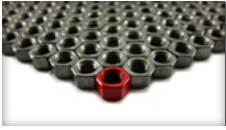
Plaintiffs declined to pursue their individual claims. They instead appealed, and a panel of the Ninth Circuit reversed. The panel held that *American Pipe* tolling permitted absent class members to bring not only their own claims after the statute of limitation lapses, but also claims on behalf of absent class members—even when the district court previously found the identical class deficient. The court of appeals held that, in the Ninth Circuit, *American Pipe* tolls the limitations period for otherwise untimely class actions and the only limits on sequential class actions are preclusion and comity principles. In permitting the successive class litigation, the Ninth Circuit identified three supposed safeguards against such abuse:

1. The panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse
2. The court held that preclusion principles would provide some barrier to serial litigation, despite acknowledging that preclusion does not apply to new class actions brought by previously absent class members (such as these plaintiffs)
3. The panel explained that district courts could reject improper attempts to stack class actions by invoking "comity" to prior decisions denying class certification.

By reaching its conclusion, the Ninth Circuit widened the divide among the federal courts.

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