

Can't We All Just Tag-Along? The Supreme Court Shuts Down Untimely Class Actions

JUNE 15, 2018

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Source: *Array*

For over forty years it has been well-known that the filing of a class action tolls the statute of limitations for all members of the putative class. This doctrine stemmed from the United States Supreme Court's decision in *American Pipe & Construction Co. v. Utah*. The rationale of *American Pipe* decision was to prevent a multitude of filings, effectively defeating the ostensible efficiencies gained by a class action in the first place. If there were no tolling, then plaintiffs would have to file prophylactically in case the class action did not pan out for whatever reason.

Since *American Pipe*, a lingering question has been whether the rule in *American Pipe* tolls the statute of limitations for *class actions*, or simply subsequent individual actions. In other words, could a subsequent plaintiff seeking to file a class action take advantage of the tolling or would the tolling merely preserve the individual claim. Defendants have long argued that the tolling applied only to individual claims, and that the plaintiffs should not be able to take advantage of *American Pipe* to-upon the denial of class certification-file additional otherwise untimely class cases hoping to find a judge willing to grant class certification.

Enter China Agritech. In 2011, one shareholder filed a class action against it on behalf of shareholders asserting violations of the Securities and Exchange Act of 1934, which has a two-year statute of limitations. Class certification was denied and that action settled in 2012. The next month, another class action was filed, and again class certification was denied. In 2014-beyond the statute of limitations-a third plaintiff filed a class action.

Though the district court dismissed the class action as untimely, the Ninth Circuit reversed, holding that the statute of limitations was tolled during the pendency of the two prior class actions under *American Pipe*, even for the filing of class actions.

On June 11, 2018, the Supreme Court issued its ruling in *China Agritech v. Resh*, disagreeing wholeheartedly with the Ninth Circuit's approach, holding:

American Pipe tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.

With class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential

class representatives and class counsel. And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.

The Court thus concluded that the statute of limitations for all class actions remains running during the pendency of a class action. The Court refused to permit a rule that “would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation.”

Though the ruling is narrow in application, its impact is significant. It is commonplace today for plaintiffs’ counsel to wait until near the end of a statute of limitations to file a class action, hoping that the class will become as big as possible in the interim. It is likewise commonplace for plaintiffs’ counsel to wait and see how a pending class action turns out before determining whether to file themselves (*i.e.*, wait to see if class certification is denied). Both of these tactics wreak havoc on defendants who have to deal with successive class actions extending the statute of limitations indefinitely.

The practical impact of the *China Agritech* decision is that plaintiffs’ counsel must file their class actions timely, and—frankly—quickly or not at all. While this may result in a multitude of class action filings, that is neither unheard of nor unwelcome. In major class action litigation, like data breach cases, a dozen or more class actions are filed within a week of the breach announcement anyway. And multiple class filings allow defendants to take advantage of consolidating cases through the Judicial Panel on Multidistrict Litigation. So rather than spending years defeating class certification just to see a second (or third or fourth) case pop up, the multiple filings will be consolidated at the outset.

And, for cases already pending where the statute of limitations would have expired, defendants can now rest assured that the floodgates will be shut.

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