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SCOTUS RULES AMERICAN PIPE TOLLING DOES NOT APPLY TO CLASS CLAIMS

July 2018 - Mandy Brown

The U.S. Supreme Court has restricted the tolling principle in *American Pipe & Construction Co. v. Utah* (414 U.S. 538 (1974)), which established that filing a timely class action will toll the applicable statute of limitations for putative class members who later join an existing action or file otherwise time-barred individual claims. This tolling provision, however, does not apply to otherwise untimely class action claims, the Court ruled unanimously. (*China Agritech, Inc. v. Resh*, 2018 WL 2767565 (U.S. June 11, 2018).)

In February 2011, it was discovered that China Agritech engaged in fraud and misleading business practices when a market research company published a report asserting that the company was not manufacturing products but was simply a vehicle for transferring wealth from shareholders to company insiders. After its stock price plummeted following the report's publication, a shareholder sued the company for violating the Securities Exchange Act of 1934, alleging the company had materially misstated its net revenue and income on Securities and Exchange Commission filings in 2008 and 2009.

Notice of the action was provided to all shareholders, and six shareholders sought appointment as lead plaintiff under the Private Securities Litigation Reform Act of 1995 (PSLRA), which governs the procedure for selecting class representatives and other procedural aspects of pleading and litigating securities class actions. Class certification was denied and then denied again in 2012 in a separate suit.

In June 2014—after the applicable two-year statute of limitations had expired relating to the alleged misconduct—a third shareholder class action was filed. A district court dismissed this suit as untimely, ruling that the

previous lawsuits had not tolled the statute of limitations. The Ninth Circuit reversed, holding that applying the *American Pipe* tolling principle to allow the class claims would “advance . . . policy objectives” by promoting “economy of litigation” without causing any “unfair surprise to defendants.”

Granting the defendant’s petition for a writ of certiorari, the Supreme Court reversed, resolving a circuit split over the application of *American Pipe*. Justice Ruth Bader Ginsburg, writing for the unanimous Court, criticized the lead plaintiffs for not asserting their claims earlier, despite published notice of the previous two class actions. Reviewing *American Pipe* and Federal Rule of Civil Procedure 23, the Court identified a “preference” for evaluating class claims early, which it found supported not applying the tolling rule in this context. While the “efficiency and economy of litigation” favored delaying individual claims until class certification was determined, class actions should be brought early to allow courts to select the best class representative and evaluate the claims, the Court held.

Justice Sonia Sotomayor concurred in the judgment but filed a separate opinion noting that—although she agreed that the tolling principle did not apply here—she did not join the majority in holding that “the same is true for class actions not subject to the PSLRA.” Concerned about the “potential unfairness of denying *American Pipe* tolling to [other] class claims” not governed by the PSLRA’s unique procedural requirements, Justice Sotomayor advised district courts to help mitigate the effects of the Court’s decision by “liberally permit[ing] amendment of the pleadings or interventions of new plaintiffs and counsel,” when appropriate.

Jeffrey White—senior counsel at AAJ, which filed an amicus brief in support of respondents—emphasized that the *American Pipe* rule is one of equitable tolling. “Under traditional rules of equity, a person does not have both an individual claim and a class claim: There is a single claim for remedy that may be processed by federal courts individually or as part of a class. The Court, however, focused almost entirely on policies of efficiency and economy that support tolling individual claims but not class claims, stating that efficiency favors forcing class plaintiffs to file early even if that leads to the filing of a multiplicity of class complaints. Unfortunately, those efficiencies, as Justice Sotomayor pointed out in her concurrence, are the consequences of requirements that Congress has imposed on shareholder class actions under the PSLRA. In the context of injured consumers or employees, early filing of multiple potential class actions is not practical or even desirable.”

New York City attorney David J. Goldsmith, who contributed to the amicus brief filed by AARP and AARP Foundation also in support of respondents, said, “The Court’s decision effectively permits members of a class to pursue only individual claims following an initial denial of class certification, regardless of the type of class action, the reason for the denial, or the ability to cure whatever is precluding class treatment. This new limitation will be bad for courts because absent class members will likely file protective class complaints as a hedge against denial of the named plaintiffs’ class certification motion, and it will be bad for plaintiffs (especially plaintiffs of modest means) because if they do not protect themselves in this manner, they will be left with individual claims that often will be economically infeasible to pursue.”

Goldsmith added that the only absent class members that will continue to benefit from *American Pipe* tolling are “big entities with claims and resources sufficiently large to justify individual litigation. Institutional investors should also be mindful of *California Public Employees’ Retirement System v. ANZ Securities, Inc.* [137 S. Ct. 2042 (U.S. 2017)], in which the Court held that the three-year repose period for claims brought under the Securities Act of 1933 cannot be tolled under *American Pipe*.”

While this decision restricts the ability to bring class claims, White highlighted one aspect that supports plaintiffs’ rights. “Notably, none of the Justices called the *American Pipe* tolling doctrine into doubt, despite considerable urging on the part of the U.S. Chamber of Commerce and other amici supporting the petitioner.”

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