

## China Agritech's Positive Implications For Plaintiffs

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(July 3, 2018, 4:58 PM EDT)

The U.S. Supreme Court determined in *American Pipe*[1] and *Crown Cork*[2] that the filing of a class action will toll the applicable statute of limitations to allow putative class members to intervene or bring individual claims. A number of questions have been raised in recent years regarding the scope of these decisions, including whether *American Pipe*'s tolling rule applies to successive "piggyback" class actions. The Supreme Court recently concluded in *China Agritech Inc. v. Resh*[3] that it does not. Although the ruling may impose new stumbling blocks for class actions under certain circumstances, there are things that plaintiffs can do to mitigate such complications to ensure that their right to recovery is not extinguished.

### Case Background

In the *China Agritech* case, the plaintiffs alleged that *China Agritech Inc.*, a holding company that purported to operate through subsidiaries that manufactured and sold organic compound fertilizers to farmers in China, engaged in securities fraud and misleading business practices.[4] The company's stock price plunged when a market research report revealed that the company was "not a currently functioning business that [was] manufacturing products, but instead was simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." [5] In the wake of two previously filed class actions that were ultimately dismissed after class certification was denied, respondent Michael Resh filed his lawsuit — approximately a year and a half after the statute of limitations expired.[6] The district court dismissed Resh's claim as untimely without ever reaching the question of class certification.[7] The Ninth Circuit reversed on appeal, holding that the *American Pipe* tolling rule applied to subsequent class actions.[8] Recognizing a circuit split on the issue, the Supreme Court granted certiorari.[9]

In a unanimous decision, the Supreme Court reversed the Ninth Circuit and held that upon denial of class certification, a putative class member may not commence a class action anew beyond the time allowed by the applicable statute of limitations. The Supreme Court determined that policy considerations that supported *American Pipe* and *Crown Cork* allowed unnamed class members to file an individual action after the applicable statute of limitations had run, but did not extend to plaintiffs who wish to file a



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successive class action. The justices further explained that “efficiency and economy of litigation,” the principal rationale behind Federal Rule of Civil Procedure 23 and the class action mechanism, further supported tolling the statute of limitations for individual claims, but did not support a similar rule for untimely successive class actions.[10]

The Supreme Court reasoned that economy of litigation was best served by using early competition to designate a class representative, and that courts should encourage prospective class representatives to enter the litigation early.[11] The majority explained that although efficiency favors delaying individual claims until after class certification, as they would only need to be adjudicated if class certification is denied, efficiency favors early assertion of competing class representative claims.[12] The Supreme Court also focused on the “diligence” of the would-be class representative who seeks to bring a successive class action after the statute of limitations expires.[13] The majority observed that whether a plaintiff acted diligently is important because “[o]rdinarily, to benefit from equitable tolling, plaintiffs must demonstrate that they have been diligent in pursuit of their claims.”[14] The justices reasoned that plaintiffs cannot “[sleep] on their rights” by failing to apply for lead plaintiff in the timely filed action and then expect that their rights to bring a class action later on are preserved.[15]

The justices also addressed respondents’ argument that “declining to toll the limitations period for successive class suits will lead to a ‘needless multiplicity’ of protective class-action filings.”[16] Justice Ruth Bader Ginsburg, the author of the 15-page opinion, assured the respondents that there would be no “needless multiplicity” of protective class action filings, as there was no evidence of a large number of protective class action filings in circuits that had already denied tolling to piggyback class actions.[17] Moreover, the majority determined that this multiplicity is not “needless,” as it allows district courts to select the best representative.[18]

Justice Sonia Sotomayor concurred in the judgment. In her concurring opinion, she explained that she believes this rule should only apply in the Private Securities Litigation Reform Act, or PSLRA, context, where precertification notice is required, unlike in other class cases.[19] She also proposed the Third Circuit’s rule, which distinguishes between a class certification denial for a reason specific to the lead plaintiff rather than treatment as a class in general, as an alternative to what she termed to be the Supreme Court’s “unnecessarily broad” rule.[20]

## **Implications and Key Takeaways**

The Supreme Court’s reasoning denies American Pipe tolling to successive class actions. However, plaintiffs seeking to bring securities actions need not despair: Several aspects of the decision, and Justice Sotomayor’s concurrence, confirm plaintiffs’ rights in key areas and suggest paths that remain available to ensure that plaintiffs’ rights to pursue claims are not abridged.

First, the Supreme Court affirmed, and both respondents and petitioners conceded in argument, that American Pipe still applies to subsequently filed individual actions.[21] That means that even if class certification is denied after the applicable limitations period has run, as long as the repose period has not run, putative class members may still pursue an individual action to seek recovery for their losses. In a time when we are seeing more plaintiffs exercising their right to bring individual and opt-out litigation, this is an important avenue for plaintiffs to consider, especially in a situation like the China Agritech case where they may have no other options for recovery.

Second, plaintiffs can file class certification motions early enough to enhance their chances that there will remain sufficient time before the statute of limitations runs to address any infirmity in the class

certification motion. The Supreme Court's decision suggests that doing so gives plaintiffs continued opportunities to amend their pleadings, plead subclasses or intervene if there is a deficiency preventing class certification.[22]

Third, Justice Sotomayor's concurrence also provides direction to district court judges and litigants to avoid the extinguishment of plaintiffs' rights in cases where class claims are not subject to the PSLRA. Justice Sotomayor advised that in the face of what she described as "an unnecessarily broad rule," "[w]here appropriate, district courts should liberally permit amendment of the pleadings or intervention of new plaintiffs and counsel." [23] The majority's opinion similarly recognized that plaintiffs might use the tools of amendment and intervention in the event that it becomes clear that there are weaknesses in the class theory or the adequacy of the class representative. [24] Given the majority's decision and Justice Sotomayor's concurrence, district courts may be more inclined to allow these mechanisms to be used in light of the finality and potentially devastating effects of a decision to deny class certification absent a chance to cure such deficiencies.

Finally, there are still further actions that plaintiffs and their counsel can take to address the Supreme Court's holding. Class counsel should keep in mind the statute of limitations for each of the claims asserted and factor that into its consideration of when the most appropriate time is to file for class certification. Class counsel may also start to give more consideration to moving for lead plaintiff with more than one movant. The Supreme Court itself noted that "[d]istrict courts often permit aggregation of plaintiffs into plaintiff groups, so even a small shareholder could apply for lead-plaintiff status, hoping to join with other shareholders to create a unit with the largest financial interest." [25] Even if class counsel does not bring in more than one movant at the lead plaintiff stage, once appointed, class counsel should consider whether there is any reason to include an additional "named plaintiff" in any amended complaint filed, in order to move with any such "named plaintiff" as an additional class representative if needed to address certification challenges. Filing for certification with multiple named representatives may lower the chances of the court finding a deficiency that would result in a denial of class certification.

## **Conclusion**

Despite some of the commentary thus far, the Supreme Court's decision here is not a game changer for plaintiffs. Both the majority opinion and Justice Sotomayor's strongly worded concurrence counsel for allowing amendment and intervention when faced with apparent challenges to certification and give plaintiffs ample support for making such a request in the district courts. Such language should go a long way to protecting the class' rights, especially when class certification motions are made early enough so that there remains sufficient time before the statute of limitations expires to address any issues. And, if all else fails, the Supreme Court makes clear that direct or individual litigation can still be pursued with the benefit of American Pipe tolling, giving plaintiffs another powerful option for recovery.

*Update: This article has been updated to include a disclosure and an additional author.*

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***Disclosure: David Goldsmith contributed to an amicus curiae brief filed on behalf of AARP and AARP Foundation in China Agritech Inc. v. Resh.***

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[1] American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).

[2] Crown Cork & Seal Co. Inc. v. Parker, 462 U.S. 345 (1983).

[3] 138 S. Ct. 1800 (2018).

[4] Resh v. China Agritech Inc., 857 F.3d 994, 996 (9th Cir.), cert. granted, 138 S. Ct. 543 (2017), and rev'd and remanded, 138 S. Ct. 1800 (2018).

[5] Id. (internal quotation marks omitted).

[6] China Agritech, 138 S. Ct. at 1804–05.

[7] Id. at 1805.

[8] Id.

[9] Id.

[10] Id. at 1806–07.

[11] Id.

[12] Id.

[13] Id. at 1808.

[14] Id.

[15] Id.

[16] Id. at 1810.

[17] Id.

[18] Id. at 1811.

[19] Id. at 1811–13 (concurrency).

[20] Id. at 1814.

[21] Id. at 1810–11 (majority).

[22] *Id.* at 1807 n.2.

[23] *Id.* at 1815 (concurrency).

[24] *Id.* at 1807 n.2 (majority).

[25] *Id.* at 1807 n.3.