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Guest Post: Supreme Court Weighs Whether To Extend American Pipe Tolling

By Kevin LaCroix on April 1, 2018
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*As I noted at the time, in December 2017, the U.S. Supreme Court granted cert in *China Agritech Inc. v. Resh* to take up the question of whether the prior filing of a class action lawsuit tolls statutes of limitation to permit previously absent class members to bring a subsequent class action outside the applicable limitations period.*

Oral argument in the case took place on Monday, October 26, 2018. In the following guest post, Noelle Reed, Austin Winniford, and Caroline Van Zile of the Skadden Arps law firm provide their analysis of the oral argument. I would like to thank the authors for allowing me to publish their article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this blog's readers. Please contact me directly if you would like to submit a guest post. Here is the authors' guest post.

On Monday, March 26, the Supreme Court heard argument in *China Agritech v. Resh*, No. 17-432, in which the Court is poised to decide whether to further extend the equitable tolling doctrine it first adopted in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* held that an “original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.” *Id.* at 552-53. Nearly a decade later, in *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), the Court made clear that *American Pipe* tolling was not limited to the claims of intervenors but also applied to plaintiffs who filed

separate individual suits after certification of a class was denied. *China Agritech* asks whether the *American Pipe* doctrine should be extended yet again to allow plaintiffs to bring subsequent class claims.

The Justices' questions during oral argument reflected the tension between problematic incentives that may arise regardless of how the case is ultimately resolved. On the one hand, the reasoning of *American Pipe* focused in large part on the Court's concern that requiring absent class members to intervene in a putative class action before class certification is denied "would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe*, 414 U.S. at 553. But extending *American Pipe* tolling to successive class actions filed outside the limitations period would promote the filing of repetitious and duplicative pleadings that could lead to a virtually endless series of putative class actions.

Some commentators perceived the Court as reluctant to limit the reach and rationale of *American Pipe*. But with the caveat that predicting Supreme Court decisions based on oral argument questioning is perhaps only slightly more reliable a science than palmistry, the argument on balance suggested that a majority of the Justices may be skeptical of allowing individual beneficiaries of equitable tolling to pursue claims of serially absent class members who take no steps to assert their own claims after class certification is denied.

Justices Kagan and Sotomayor appeared amenable to extending the *American Pipe* doctrine to class claims. As Justice Kagan noted, "the whole theory of *American Pipe* was that for any given individual, we weren't going to make them come forward; we were going to say reliance on a class action is sufficient to show diligence." (Tr. at 6:18-7:3). Why, then, she questioned, should it matter that the class action on which the plaintiff relied "happens to be a second class action?" (Tr. at 6:25) Justice Sotomayor expressed the same concern, pressing China Agritech's counsel to explain why declining to extend *American Pipe* to successive class actions would not be "encouraging the very thing that *American Pipe* was trying to avoid, which is to have a multiplicity of suits being filed and encouraging every class member to come forth and file their own suits."

The Chief Justice and Justice Gorsuch initially appeared to question why absent class members who have filed timely individual claims permitted under *American Pipe* could not also invoke Rule 23 if they met the Rule's requirements for bringing a class action. Justice Gorsuch asked whether China Agritech's counsel could identify any context in which "[an] equitably tolled plaintiff is forbidden from accessing a particular procedural right otherwise available to all litigants." (Tr. at 15:18-22). The Chief Justice questioned whether

China Agritech’s position would “honor[] Rule 23” and suggested that the Court was being asked to “creat[e] an exception to [that] rule.” (Tr. at 5:1-7). Though neither mentioned the case by name, this line of questioning may have reflected a concern with reconciling a decision here with the Supreme Court’s holding in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. 393 (2010), that Rule 23 “creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.”

But when Resh’s counsel later pressed the issue, asserting that *Shady Grove* applied Rule 23 “automatically” to any otherwise properly filed case, he appeared to gain little traction. Justice Ginsburg seemed to reject the argument outright, describing it as “very puzzling” in the context of the court-created doctrine of equitable tolling. “[T]olling questions,” she observed, “are not resolved by the federal rules.” (Tr. at 37:2-3). Justice Alito seemed similarly dubious, observing that equitable tolling is a question of diligence. Justice Gorsuch’s follow-up put a different spin on his earlier questions about an “exception” to Rule 23, as he noted that *American Pipe* represented an “unusual” approach to equitable tolling but concluded that the distinction “may suggest some question about whether *American Pipe* is correct.” (Tr. 34:24 – 35:4). “And if we have doubts about that, why should we extend it so radically here...?” (Tr. 35:5-6).

Perhaps most relevant to any attempt to predict the outcome of the case was the concern expressed to varying degrees by five Justices that extending *American Pipe* to allow successive putative class actions would take the fiction of absent class member “diligence” a step too far, potentially thwarting the Congressional intent inherent in establishing statutes of limitations. Justice Gorsuch and the Chief Justice voiced concerns that expanding *American Pipe* tolling to successive class actions would allow class actions to be “stack[ed] ... forever” until there’s “no end in sight.” (Tr. at 39:19-40:4, 46:4-9). Justice Ginsburg suggested that *American Pipe* is meant to protect “diligent parties who will come in immediately after the class action is denied,” rather than those “tossing notices into the wastepaper basket.” (Tr. 51:23-52:9). Justice Breyer expressed a similar view. (Tr. at 37:18-38:22.) Justice Kennedy answered Resh’s counsel’s rhetorical question, “why would you apply a different equitable principle for tolling to the second [suit],” by suggesting that absent class members “can’t sleep on their rights twice.” (Tr. at 43:7-8). And Justice Alito questioned whether extending *American Pipe* to class actions was consistent with the diligence ordinarily required for equitable tolling.

None of the Justices seemed particularly enthusiastic about the suggestion that comity between courts considering successive class actions would resolve the problem of plaintiffs taking multiple bites at the class action apple. As China Agritech’s counsel wryly observed, the district court below did not even defer to its

own prior class certification rulings. (Tr. at 58:17-18). Nor did a compromise hinted at by Justice Sotomayor, who asked whether the grounds for denying class certification might matter (Tr. at 13:23-14:1), seem to gain much traction.

While the Justices' questions may not reflect their ultimate positions, a decision declining to expand *American Pipe* tolling would also align with a recent trend at the Supreme Court—namely, deferring to the clear text of statutes (such as limitations periods) and circumscribing the equitable powers of courts. Most recently, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), the Court held that statutes of repose (unlike statutes of limitations) cannot be equitably tolled.

Regardless of how the Court ultimately rules, the *China Agritech* decision will likely create new incentives for class action plaintiffs. While an opinion setting a limit on equitable tolling might encourage protective filings by absent class members after a first motion for class certification is denied, extending *American Pipe* tolling to class actions has the potential to effectively eliminate limitations altogether for claims not subject to a statute of repose. The argument suggested on balance that the conservative Justices (perhaps joined by Justice Ginsburg) may find the latter result more palatable.

This article was authored by Skadden partner Noelle Reed and associates Austin Winniford and Caroline Van Zile.

**Not necessarily the views of Skadden Arps or any one or more of its clients.*