

# China Agritech May Have Limited Practical Effect

By **Noelle Reed and Austin Winniford** (June 15, 2018, 5:47 PM EDT)

On Monday, June 11, the U.S. Supreme Court decided in *China Agritech v. Resh* that a pending class action does not toll the statute of limitations for absent class members who bring a subsequent class action. Although a clear victory for class action defendants, the holding itself may have limited practical effects. The Supreme Court's decision, however, is in line with its recent decisions narrowing the availability of equitable tolling and limiting class actions, which may have broader favorable implications for defendants.

The dispute in *China Agritech* centered on the reach of the equitable tolling doctrine established in the Supreme Court's 1974 decision in *American Pipe & Construction Co. v. Utah*. *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." Nearly a decade later, in *Crown Cork & Seal Co. v. Parker*, 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.

In *China Agritech*, the court considered whether *American Pipe* tolling should extend beyond individual actions brought after the limitations period expired to toll the limitations period for subsequent class actions. The underlying case involved the third of three successive and substantially similar putative class actions alleging that the petitioner, a manufacturer of organic fertilizer, engaged in securities fraud in violation of the Securities Exchange Act. The district court denied class certification in the first two actions. The respondents — absent class members of the first two putative classes — then filed a third class action after the applicable two-year statute of limitations had expired. After the district court dismissed the respondents' action as time-barred, the U.S. Court of Appeals for the Ninth Circuit reversed, holding that *American Pipe* tolling applied to late-filed class actions, and thus that the limitations period for the respondents' successive class action had been tolled for the duration of the prior two class actions. The Ninth Circuit's decision deepened a circuit split as to the scope of *American Pipe*. The Supreme Court resolved that split definitively and reversed the Ninth Circuit in a majority opinion penned by Justice Ruth Bader Ginsburg and joined by all but Justice Sonia Sotomayor, who concurred in the judgment but would have limited the ruling to class actions under the Private Securities Litigation Reform Act.



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## The Supreme Court's Decision

In its opinion, the Supreme Court returned to the rationale underlying American Pipe tolling and concluded that it did not support extending the doctrine to class action claims. Noting that efficiency and economy are "the watchwords of American Pipe" and a principal purpose of Rule 23, the court observed that the doctrine promotes those aims when applied to the individual claims of unnamed class members by relieving them of the need to file protective motions or suits while a putative class action is pending. In the context of class actions, however, the court recognized that efficiency favors the opposite result. The assertion of competing class claims "soon after the commencement of the first action seeking class certification" allows a district court to "select the best plaintiff with knowledge of the full array of potential class representatives and class counsel." The court also observed that encouraging early class filings would help ensure that class certification decisions are timely made within the limitations period to allow plaintiffs time to adjust if certification is denied.

Drawing on equitable tolling principles generally, the court also noted that extending American Pipe to class actions would be inconsistent with general tolling principles, which typically require that a plaintiff act diligently to pursue her claims. "A would-be class representative who commences suit after expiration of the limitation period, however, can hardly qualify as diligent."

The court drew further support from the text of the PSLRA, which applied to the securities fraud claims asserted in the underlying case. The PSLRA requires the named plaintiff in a putative class action to notify putative class members of the existence of the action and of their right to seek appointment as a lead plaintiff. Although the court did not limit its holding to suits subject to the PSLRA (as Justice Sotomayor in her concurrence would have done), it reasoned that in light of the PSLRA notice provisions and the associated opportunity to participate in the first round of class litigation, "there is little reason to allow plaintiffs who passed up those opportunities to enter the fray several years after class proceedings first commenced."

While the China Agritech decision is clearly a win for class action defendants, one might fairly question how broad an application the decision itself may have. Is the filing of serial, duplicative class actions a widespread phenomenon in need of a solution? And will the decision prove a double-edged sword for class action defendants?

On the one hand, defendants can now be assured that the limitations period provides a clearly defined cutoff for potential liability on a classwide basis. But some commentators predict that the decision will lead to a groundswell of protective class action filings by class action plaintiffs anxious about impending limitations deadlines. The Supreme Court discounted the latter concern, observing that the federal circuits that had previously declined to extend American Pipe tolling to class actions had not experienced a disproportionate number of protective class action filings. Of course, it is possible that plaintiffs filing successive class actions outside the limitations period strategically avoided filing in those jurisdictions. On balance, though, the Supreme Court likely has the better argument. It is already typical to see an initial class action filing followed by one or more follow-on suits, with plaintiffs jockeying early on for lead plaintiff status. China Agritech may preclude latecomers from joining the fray, but it seems unlikely to result in a dramatic increase in competing suits.

While the direct impact of the China Agritech decision may not easily be ascertained, its real significance more likely lies in what it conveys when viewed together with the court's other recent decisions restricting the availability of both equitable tolling and class actions. Just last month in *Epic Systems Corp. v. Lewis*, for instance, the Supreme Court held that class actions are unavailable where an employee agrees to resolve employment disputes in individualized arbitration. And last year in *California Public Employees' Retirement System v. ANZ Securities Inc.*, the Supreme Court declined to extend American Pipe tolling to

statutes of repose. The unanimous judgment in China Agritech may portend more rough seas ahead for plaintiffs hoping to push the boundaries in class action litigation.

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