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Split Over Successive Class Action Tolling Isn't Going Away

By **Justin Hawal** (March 9, 2021, 5:25 PM EST)

Justin Hawal

Class action defendants have hailed the U.S. Supreme Court's 2018 decision in China Agritech Inc. v. Resh as a major victory — limiting the ability of the plaintiffs bar to file "serial class action complaints against companies in order to game the statute of limitations."[1] But the Supreme Court's decision could have very negative consequences for consumers' ability to hold companies accountable for corporate misconduct.

China Agritech's actual scope and reach, however, is far from clear. Indeed, in recent weeks, the U.S. District Court for the Southern District of New York, in Famular v. Whirlpool Corp., and the U.S. District Court for the District of New Jersey, in Williams v. Tech Mahindra (Americas) Inc., have reached opposite conclusions with respect to China Agritech's reach — widening a current split in authority.[2]

These recent cases come on the heels of nearly a dozen decisions issued by courts around the U.S. addressing — but disagreeing about — the appropriate scope of China Agritech, suggesting that the split in authority is far from being resolved.[3] Thus, for class action practitioners, how courts interpret China Agritech's scope and reach will continue to have broad implications for the foreseeable future.

For example, it's not uncommon for complex class action lawsuits involving serious corporate misconduct to remain pending for several years prior to class certification. In many cases, the statute of limitations may run during the course of the litigation, while the parties are conducting discovery and litigating various precertification issues.

Class representatives, who may not have a large personal stake in the outcome of the case, often begin to experience litigation fatigue, and decide to settle their individual claims — or worse, opportunistic defendants pick off class representatives by offering them more than their claims are worth to settle. The case is dismissed, and the merits are never decided.

Do the Supreme Court's 1974 decision in American Pipe & Construction Co. v. Utah, and its progeny, toll the statute of limitations for absent class members — who relied on the prior lawsuit and may not have the incentive, means or wherewithal to file individual claims — to file a new class action lawsuit based on the same misconduct? Or are they left high and dry, unable to hold the corporate defendant accountable for its behavior?

Under China Agritech, the answers to these questions are presently unclear. But how courts decide the current split in authority will have broad implications for American jurisprudence, and consumers' ability to hold corporate wrongdoers accountable for their actions and deter future misconduct.

In American Pipe, the Supreme Court addressed whether the filing of a class action lawsuit tolls the statute of limitations for absent class members' individual claims.[4] The court held that the filing of a class action suspends the applicable statute of limitations for all members of the class who would have been parties had class certification been granted.[5]

Absent class members that wished to intervene after the court found the case could not be maintained as a class action thus had whatever time was remaining on the statute of limitations prior to the filing of the class action lawsuit to assert their individual claims.[6]

Nine years later, in 1983's Crown, Cork & Seal Co. v. Parker decision, the Supreme Court extended the American Pipe doctrine beyond motions to intervene. The court expanded the rule, and held that all members of a putative class may file separate individual actions in the event that class certification is denied, provided that those actions are instituted within the time that remains on the limitations period.[7]

In the years that followed, many courts applied American Pipe tolling to permit successive class action lawsuits to be filed when the initial suit was dismissed prior to the court's class certification decision.[8] But, to prevent the endless filing of class action lawsuits, many courts also instituted a no-piggybacking rule, which prevented a plaintiff from "piggybacking" one class action onto another, and tolling the statute of limitations indefinitely when class certification had already been denied.[9]

In China Agritech, the Supreme Court addressed American Pipe tolling for the first time in the context of successive class action lawsuits.[10] The plaintiffs in China Agritech filed a class action lawsuit on behalf of purchasers of the defendant's common stock, alleging materially identical violations of the Securities Exchange Act as two previous class action lawsuits.[11]

Class certification had twice been denied in the previously filed suits, and they were subsequently dismissed.[12] After the second case was dismissed, a new named plaintiff filed a third class action after the statute of limitations expired, arguing that it was tolled under American Pipe.[13]

The Supreme Court, in an opinion for an eight-justice majority written by Justice Ruth Bader Ginsburg, held that "[u]pon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations."[14]

The court's reasoning was the same as those courts that had previously applied a no-piggybacking rule: As each case is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation, resulting in endless tolling of the statute of limitations.[15]

Based on the plain language of its holding and its reasoning, the Supreme Court in China Agritech likely intended to simply institute the no-piggybacking rule that other courts had previously applied to American Pipe tolling involving successive class actions.

And many courts — including those in the Ninth and Second Circuits — have since interpreted its holding that way, because concerns regarding the endless tolling of the statute of limitations don't exist

under a no-piggybacking rule.[16]

Other courts, however — including the U.S. Court of Appeals for the First Circuit and the U.S. Court of Appeals for the Third Circuit — have reached the opposite conclusion, and have overextended the reach of China Agritech to prevent the filing of successive class actions, even when the original suit did not reach a decision on class certification.

These courts have reasoned that, although the Supreme Court framed its holding narrowly, it proceeded to provide a broader answer to the issue presented, stating its precedents do not suggest that American Pipe tolling extends to class claims that would otherwise be time-barred.[17]

The First and Third Circuits' approach creates an unnecessary technical loophole in favor of corporate defendants at the expense of individuals who have been wronged. Absent class members are left with only individual claims to pursue and, in many cases, the value of those claims are not worth the cost of pursuing them.

Forced with making a choice between holding defendants accountable and pursuing claims with limited value against large corporations with endless resources, corporate defendants are improperly able to escape responsibility without adjudication of the merits. This result contravenes the purpose of Federal Rule of Civil Procedure 23: to provide efficient legal relief to large numbers of individuals who are wronged by a defendant but only suffer relatively small monetary losses.

The Supreme Court likely did not intend such a result — and if it had, certainly would not have done so unanimously. Nevertheless, this appears to be the present state of the law in at least some jurisdictions.

Although it remains to be seen how other circuit courts will decide the issue, one thing is clear: American Pipe still tolls the statute of limitations for absent class members to pursue individual claims. But when it comes to tolling of successive class actions, at the very least, class counsel should be mindful of China Agritech's potential impact, and be sure, when possible, to select multiple class representatives who are strongly suited and highly motivated to lead the class.

Class counsel may also consider pressing for early class certification determinations where practicable, to avoid scenarios where applicable statutes of limitation run prior to a decision on class certification. These and other methods can help protect the rights of absent class members from the uncertainty created in the wake of the Supreme Court's decision in China Agritech.

Justin J. Hawal is an associate at DiCello Levitt Gutzler LLC.

[1] China Agritech Inc. v. Resh, 138 S. Ct. 1800 (2018).
See https://www.chamberlitigation.com/cases/china-agritech-inc-v-resh.

[2] Compare Famular v. Whirlpool Corporation, No. 16 CV 944 (VB), 2021 WL 395468 (S.D.N.Y. Feb. 3, 2021) with Williams v. Tech Mahindra (Americas) Inc., No. 3:20-cv-04684, 2021 WL 302929 (D.N.J. Jan. 29, 2021).

[3] In re Snap Inc. Sec. Litig., 334 F.R.D. 209, 223 (C.D. Cal. 2019); Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG, 409 F. Supp. 3d 261, 271 (S.D.N.Y. 2019); Betances v. Fischer, No. 11-cv-3200, 403 F.Supp.3d 212, 223, 2019 WL 1213146, at *6 (S.D.N.Y. Feb. 21, 2019); Hart v. BHH LLC, No. 15cv4804, 2018 WL 5729294, at *2 (S.D.N.Y. Nov. 2, 2018); Walker v. Life Ins. Co. of the Southwest, No. CV1009198JVSRNBX, 2018 WL 3816716, at *5 (C.D. Cal. July 31, 2018); Cf. In re Celexa and Lexapro Marketing and Sales Practices Litig., 915 F.3d 1 (1st Cir. 2019); Blake v. JP Morgan Chase Bank NA, 927 F.3d 701 (3d Cir. 2019); Porter v. Southern Nevada Adult Mental Health Servs., 788 Fed. App'x 525, 526 (D. Nev. 2019); Torres v. Wells Fargo, No. CV 17-9305-DMG, 2018 WL 6137126, at * 2-3 (C.D. Cal. Aug. 28, 2018); Practice Mgmt. Support Servs. Inc. v. Cirque du Soleil Inc., No. 14 C 2032, 2018 WL 3659349, at *3-4 (N.D. Ill. Aug. 2, 2018); Dormani v. Target Corp., No. 17-cv-4049 (JNE/SER), 2018 WL 3014126, at *2 (D. Minn. June 15, 2018).

[4] See generally American Pipe & Const. Co. v. Utah, 414 U.S. 538 (1974).

[5] Id. at 539.

[6] Id.

[7] See Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 346-47 (1983).

[8] See, e.g., In re Vertrue Inc. Marketing and Sales Practices Litigation, 719 F.3d 474, 477-78 (6th Cir. 2013); Yang v. Odom, 392 F.3d 104, 112 (3d Cir. 2004); Catholic Social Servs. Inc. v. INS, 232 F.3d 1139, 1149 (9th Cir. 2000); Anderson v. Southern Home Care Services Inc., No. 1:23-CV-0840-LMM, 2016 WL 11520824 (N.D. Ga. June 8, 2016).

[9] See, e.g., Anderson, 2016 WL 11520824, at *2; Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994).

[10] See generally China Agritech, 138 S. Ct. 1800 (2018).

[11] Id. at 1801.

[12] Id.

[13] Id.

[14] Id.

[15] Id. at 1802-03.

[16] See, e.g., In re Snap Inc. Sec. Litig., 334 F.R.D. at 223; Sonterra Capital Master Fund Ltd., 409 F. Supp. 3d at 271; Betances, 403 F.Supp.3d at 223 (S.D.N.Y. 2019); Hart, 2018 WL 5729294, at *2; Walker, 2018 WL 3816716, at *5.

[17] See, e.g., In re Celexa and Lexapro Marketing and Sales Practices Litig., 915 F.3d 1 (quoting China Agritech, 138 S. Ct. at 1806); Blake, 927 F.3d 701; Porter, 788 Fed. App'x at 526;Torres, 2018 WL 6137126, at * 2-3; 2018 WL 3659349, at *3-4; Dormani, 2018 WL 3014126, at *2.