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STATUTE OF LIMITATIONS

Two Covington & Burling LLP attorneys discuss the recent unanimous U.S. Supreme Court ruling that held that plaintiffs can't file follow-on class actions after the statute of limitations in the original case expires.

INSIGHT: The End of Stacked Actions—Implications Of the Supreme Court's *China Agritech* Decision



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Under the doctrine of “*American Pipe* tolling,” the statute of limitations is tolled during the pendency of a class action for all members of the putative class identified in the complaint. (*American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).) *American Pipe* tolling promotes efficiency and economy of litigation, avoiding the need for putative class members to file a multiplicity of protective motions to intervene in the event class certification is denied.

On June 11, 2018, the U.S. Supreme Court issued a decision clarifying that *American Pipe* tolling applies only to individual claims—not to new putative class claims asserted by would-be class representatives. (*China Agritech Inc. v. Resh*, No. 17-432, 2018 BL 205360 (U.S. June 11, 2018) (“Op.”).) In other words, while the statute of limitations is tolled with respect to class members’ individual claims during the pendency of a class action, it is not tolled with respect to any claims they may wish to assert on a class-wide basis. A plaintiff desiring to represent a class in pursuing claims must therefore file his or her complaint before the limitations period lapses, even if another putative class action is already pending.

We glean four key implications from this ruling: After *China Agritech*:

(1) an order denying class certification, especially one based a failure of adequacy or typicality, may have greater value to the defendant than it had previously;

(2) there is now greater incentive for plaintiffs to seek class certification at “an early practicable time” (Fed. R. Civ. P. 23(c)(1)(A));

(3) plaintiffs’ lawyers face stronger incentives to identify suitable class representatives at the outset of a class action; and

(4) district courts may increasingly be called upon to coordinate multiple timely class actions and to formulate standards for determining “which of the contenders would be the best representative.” (Op. at 9.)

Background

In *American Pipe*, the Supreme Court held that the timely filing of a class action tolls the applicable statute of limitations for all putative class members. (414 U.S. at 554.) If class certification is denied, class members may then intervene as individual plaintiffs in the still-pending action (shorn of its class character) or may file their own individual actions. (*Id.* at 552-53; *Crown, Cork & Seal Co. Inc. v. Parker*, 462 U.S. 345, 350 (1983).) As the *American Pipe* court explained, without such tolling “[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.” (414 U.S. at 553.) Such an outcome would “deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” (*Id.*)

In *China Agritech*, the Supreme Court considered whether *American Pipe* tolling applies not only to indi-

vidual claims but also to successive class actions. A circuit split had developed on this question following *American Pipe*. (Compare, e.g., *Phipps v. Wal-Mart Stores Inc.*, 792 F.3d 637, 652-653 (6th Cir. 2015) (applying *American Pipe* tolling to successive class action), with, e.g., *Basch v. Ground Round Inc.*, 139 F.3d 6, 11 (1st Cir. 1998) (“Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.”), and *Yang v. Odom*, 392 F. 3d 97, 112 (3d Cir. 2004) (applying *American Pipe* tolling only when certification was denied based on the putative representative’s deficiencies).)

China Agritech concerned the timeliness of the third of three successive class action lawsuits filed against China Agritech by its stockholders, each asserting materially identical securities claims against the company. In the first class action, the district court denied class certification on the ground that the plaintiffs failed to establish that China Agritech’s stock traded in an efficient market, as required to prove reliance on a class-wide basis. After class certification was denied, the case settled. A new set of plaintiffs represented by the same counsel then filed a second class action. The district court again denied class certification, this time on typicality and adequacy grounds, and that case then also settled. (Op. at 3-4.)

Then, a year and a half *after* the statute of limitations would otherwise have expired, a new plaintiff filed a third class action, relying on *American Pipe* for tolling of the statute of limitations during the pendency of the first two lawsuits. The district court dismissed the action as untimely, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that the reasoning of *American Pipe* extended to successive class claims. (*Id.* at 4-5.)

The Supreme Court’s Decision

On June 11, 2018, the Supreme Court reversed the Ninth Circuit, holding unanimously that “*American Pipe* does not permit a plaintiff who waits out the statute of limitations to piggyback on an earlier, timely filed class action.” (*Id.* at 6.) Any other reading “would allow the statute of limitations to be extended time and again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation.” (*Id.* at 7.) “Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*,” the Supreme Court held. (*Id.* at 8.)

In reaching this decision, the court reasoned that while a plaintiff does not fail to act diligently in pursuing her individual claims when she relies on the pendency of a putative class action that purports to include those claims, a “would-be class representative” who does not commence suit until after expiration of the limitations period cannot be considered diligent. (*Id.* at 7.) “The plaintiff who seeks to preserve the ability to lead the class—whether because her claim is too small to make an individual suit worthwhile or because of an attendant financial benefit—has every reason to file a class action early, and little reason to wait in the wings, giving another plaintiff first shot at representation.” (*Id.* at 9 (footnote omitted).)

Furthermore, the court reasoned, while economy of litigation may favor delaying individual claims until after a class-certification denial, efficiency favors early assertion of competing class representative claims: “If

class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel.” (*Id.* at 6.) “And if the class mechanism is not a viable option for the claims, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives.” (*Id.*)

The Supreme Court found support for its ruling in the 2003 amendment to Rule 23(c) of the Federal Rules of Civil Procedure, which changed the recommended timing for district courts to issue certification rulings from “as soon as practicable” to “an early practicable time.” (*Id.*) This alteration was made, the court explained, to “allow greater leeway, more time for class discovery, and additional time to explore designation of class counsel and consider additional class counsel applications rather than deny class certification, thus affording the best possible representation for the class.” (*Id.* at 6 (internal marks omitted).) Affording district courts time to consider competing claims for class representation, the high court explained, “advance[s] the likelihood that lead plaintiff or class counsel deficiencies will be discovered and acted upon early in the litigation.” (*Id.* at 8 n.5.) Although the court found little reason to think that protective class filings would substantially increase as a result of its holding, it reasoned that any such outcome would not necessarily be a bad thing; a multiplicity of class-action filings could “aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative.” (*Id.* at 9.)

In a concurring opinion, Justice Sonia Sotomayor suggested that tolling should remain available for future class claims if class certification is denied because of the lead plaintiff’s inadequacy as a class representative. But the majority rejected this suggestion, reasoning that Rule 23 “contains no instruction to give denials of class certification different effect based on the reason for the denial.” (*Id.* at 8 n.5.)

Implications of the *China Agritech* Decision

While it is difficult to predict fully how *China Agritech* will affect class actions going forward, we see at least four potential implications of the decision.

First, after *China Agritech*, orders denying class certification will often have far greater value to defendants. Up until now, an order denying class certification based on a failure of typicality or adequacy of representation often had little practical value, as another, more suitable, named plaintiff could come forward with a nearly identical set of claims for the same class. Even a class certification denial based on factors other than the suitability of the proposed class representative carried no certainty, given that the order would have no formal preclusive effect on a new class plaintiff presenting the same or similar theories. Although defendants could invoke principles of comity to urge courts to deny successive bids to certify classes previously found to lack commonality or predominance, peace could not be assured. In those circuits that applied *American Pipe* broadly, class actions could thus “stack” on top of one another indefinitely until plaintiffs’ counsel located a district judge willing to certify the class. After *China Agritech*,

an order denying class certification will be conclusive after expiration of the limitations period, and other putative class representatives cannot seek additional bites at the apple.

Second, there will now be more pressure on plaintiffs to assure that class certification is decided at “an early practicable time,” as Rule 23 provides. This requirement is often honored in the breach, with class certification motions filed many months, if not years, after the early stage contemplated by Rule 23. Reasons for this may vary; they may include a desire to see how motions to dismiss play out before investment is made in the costly exercise of seeking class certification and/or the need to pursue extensive discovery to obtain the evidence needed to survive the “rigorous analysis” that a district court is supposed to undertake in considering a class certification motion. (*Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 351 (2011)). But it is now clear that during any such delays, the clock on the statute of limitations for class claims will continue to tick—thus limiting the time within which plaintiffs’ counsel may seek to replace deficient class representatives or otherwise fix deficient class certification motions. As the Supreme Court explained, “[e]ncouraging early class filings will help ensure sufficient time *remains* under the statute of limitations” for complaints to be amended or new plaintiffs to intervene; plaintiffs may no longer wait until *after* the statute has run to seek substitution of new class representatives through motions to amend the pleadings or to intervene. (Op. at 6 n.2 (emphasis added).) Thus, while plaintiffs may in some cases still have reason to defer class certification motions, the risks of doing so are now increased.

Third, and relatedly, plaintiffs’ lawyers face stronger incentives after *China Agritech* to identify and select suitable class representatives as early as possible in a case—while defendants now have greater incentive to challenge a plaintiff’s suitability for representative status. It is now clear that class counsel cannot essentially roll the dice on the first identified class representative and, if she fails on typicality or adequacy grounds, simply find a new named plaintiff to fix the problem after expiration of the limitations period. With a greater need to maximize the chances of winning on class certification the first time, plaintiffs’ counsel may be expected to focus more carefully on selecting suitable class representatives who can survive typicality and adequacy challenges.

The importance of identifying suitable class representatives is heightened by the fact that defendants, after *China Agritech*, have a greater incentive to attack class certification on typicality and adequacy grounds. In those lower courts that previously applied *American Pipe* tolling to new class actions as well as to individual claims, adequacy and typicality issues alone could not definitively defeat class certification in those situations

in which such defects could be cured through the addition of a new plaintiff. Defendants accordingly tended to focus on the other Rule 23 factors, including the absence of commonality or predominance, even when significant typicality and adequacy issues existed. Now that an order denying class certification on *any* ground will effectively defeat class claims permanently once the statute of limitations period has lapsed, defendants may reassess their priorities in resisting class certification.

Fourth, district courts may increasingly be called upon to coordinate multiple timely class actions filed across jurisdictions, and to formulate standards for determining “which of the contenders would be the best representative.” (*Id.* at 9.) In some instances, this could present a considerable administrative challenge. The Supreme Court recognized the possibility that its decision could spur an increase in class action filings, and that such actions might not “line up neatly.” (*Id.* at 10.) Multiple class actions could, for example, be filed in different jurisdictions at different times or on behalf of only partially overlapping classes. Yet the high court suggested that in such circumstances district courts should still consider “the full array of potential class representatives and class counsel” across such actions and “select the best plaintiff.” (*Id.* at 6.)

In *China Agritech*, the Private Securities Litigation Reform Act provided a built-in mechanism for this process, requiring notice of a pending action to all putative class members, encouraging all potential lead plaintiffs to come forward, and requiring the court to select leads. But as Sotomayor noted in her concurrence, “Rule 23 contains no process for a district court to choose from among the various candidates for lead plaintiff, nor does it specify what would make a person the most adequate representative of the class.” (*Id.* at 11.) The majority’s only answer to this was to observe that “district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings.” (*Id.* at 10.) Thus, post-*China Agritech*, district courts may increasingly be called upon to formulate mechanisms for coordinating multiple timely class actions and for comparing and potentially selecting among would-be class representatives.

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