



UPDATE: Class Actions are Back at the Supreme Court: Statutory Time Limits and “Serial Relitigation” of Class Certification

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UPDATE: On June 11, 2018, the Supreme Court unanimously reversed the Ninth Circuit in [China Agritech, Inc. v. Resh](#). In an [opinion](#) by Justice Ginsburg for eight of the Justices, the Court concluded that equitable tolling of statutes of limitation should not apply to subsequent class actions. The Court explained that the [American Pipe](#) rule, which provides that a class suit will toll the running of a statute of limitations for members of the class that either intervene in existing class suits or file individual suits after the court has found a suit inappropriate for class treatment, does not [apply](#) to subsequent class actions. The Court [noted](#) that a contrary rule would undermine judicial efficiency by allowing class claimants to serially re-litigate class actions, allowing class plaintiffs “limitless bites at the apple.” Justice Sotomayor [concurred](#) in the judgment, but argued that the Court’s limitation on American Pipe tolling should only have been applied to cases governed by the [Private Securities Litigation Reform Act of 1995](#), as such cases are [subject](#) to significant procedural requirements that justify precluding plaintiffs who do not file suit within the initial limitations period.

The original post from March 12, 2018, follows below.

Class action lawsuits – i.e., lawsuits by [representative parties](#) on behalf of all members of a class of similar plaintiffs that have aggregated their claims in one case— have been a major focus of both Congress and the courts of late. [The House of Representatives](#), for example, last year passed the Fairness in Class Action Litigation Act (H.R. 985), proposing significant changes to the device. Meanwhile, the Supreme Court has given class actions similar attention, issuing [dozens](#) of decisions over the past decade impacting prospective class plaintiffs and defendants alike.

One particularly thorny issue that has arisen with respect to class actions is what happens the first time a class action fails. Often, plaintiff’s counsel or a new attorney will try again with new class

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representatives, possibly before a new judge. This issue, which some analysts refer to as “[serial relitigation of class certification](#),” could allow multiple “bites at the apple” for would-be class action litigants. The “serial relitigation” issue almost necessarily requires an examination of the interplay between class actions and statutes of limitation. Normally, parties that do not act on their rights can find their claims time-barred as a result of a statute of limitations. But the class action procedure encourages the vast majority of potential class members to *not* act on their rights based on the theory that those rights can be best vindicated by a single action through a class representative as opposed to hundreds or thousands of individual suits. However, if a court, at the initial stage of a class action proceeding, declines to certify (i.e., approve) a class and allow the class action to proceed, strict adherence to a statute of limitations could limit the ability of potential class members to seek relief in a future case.

A new case at the Supreme Court, *China Agritech, Inc. v. Resh*, presents an opportunity for the Supreme Court to address these issues. Specifically, the question before the Court is whether a plaintiff can bring a successive class action if the new case would otherwise be barred by the statute of limitations. The underlying issue in *China Agritech* has split the lower courts and is a product of the Court’s fairly complicated class action jurisprudence.

China Agritech is scheduled for oral argument before the Court on March 26, 2018. This Sidebar explores the history behind the existing rules that apply with respect to statutes of limitations and class actions (the *American Pipe* rule), before discussing the specifics of *China Agritech* and the importance of the case for Congress.

Background. *China Agritech* centers on two legal concepts: class actions and statutes of limitations. The class action device, by allowing a single named plaintiff to assert claims on behalf of all similarly situated persons, enables the [aggregation](#) of relatively low value claims into large lawsuits worth millions—or more. Many [commentators](#) have [complained](#) that the class action device as currently used by the courts enables plaintiffs’ lawyers to generate expensive settlements and obtain huge fees while accomplishing relatively little of value for class members. According to one [estimate](#), businesses across the United States spent \$2.7 billion class action litigation in 2016 alone. Other [commentators](#) [argue](#) that class actions serve a necessary function by holding defendants accountable for wrongs that, because they are widely distributed and small, tend to not be worth pursuing on an individual basis and would otherwise go unaddressed. In this vein, class actions are at the heart of broader debates over the reform of the American litigation system.

Statutes of limitations represent the legislature’s judgment regarding the finality that should apply to certain claims. As the Court noted in an [opinion](#) released this January, “statutes of limitations are fundamental to a well-ordered judicial system.” The Supreme Court has [cited](#) the purpose of statutes of limitations as “promot[ing] justice by preventing surprises through [plaintiffs’] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” They also “[encourage the plaintiff to pursue his rights diligently](#).” Lastly, statutes of limitations offer “[certainty](#)” and “[repose](#).” But this logic can be difficult to apply in the context of a class action. It takes time to approve a class, raising the issue of what happens if the statute of limitations passes while the class proceeding is pending.

The *American Pipe* Rule. The Supreme Court first considered the tensions between a limitations period and the class action vehicle in the 1974 case, *American Pipe & Construction Co. v. Utah*. This case held that a court could equitably toll (i.e., pause) a statute of limitations for an individual who was formerly a potential member of a class for the time that the class action was pending. The Court reasoned that the major rationale for class actions—preventing costly and unwieldy joinder and encouraging efficient litigation— would be undermined if every class member had to file separate filings in order to protect themselves from deadlines in the event the court presiding over the original class action ultimately denied certification. Further, the Court recognized that many of the purposes of statutes of limitations would be served by a tolling rule, as the defendants would be notified of the claims and generic identities of the

claimants by the initial class suit. In so doing, the *American Pipe* Court rejected the argument that the statute of limitations represented a statutory deadline that courts were powerless to extend. Instead, the Court held that its “inherent judicial power” could be applied to toll the statute of limitations during the duration of a class suit. In 1983, the Supreme Court reaffirmed the 1974 ruling in *Crown, Cork & Seal Co. v. Parker*, concluding that both parties who wish to intervene in ongoing lawsuits and parties that bring new, separate lawsuits receive the benefit of the *American Pipe* rule.

China Agritech v. Resh. *China Agritech* presents the question of whether the Supreme Court should further extend the *American Pipe* and *Crown, Cork & Seal* rules to toll the statute of limitations for a party that was formerly a potential class member and wishes to file a *successive class action*. The case specifically involves the third shareholder class action that has been brought against China Agritech arising out of the same alleged fraud. The district court presiding over the previous putative class actions denied certification in both cases. In June 2014, Michael Resh, the named plaintiff in the present action, sought certification for the same class as the previous two actions, asserting that the defects in the original classes could be cured by new class representatives. In December 2014, the district court dismissed this third action based on it being time-barred under the statute of limitations. Under that statute of limitations, the ordinary deadline for claims is two years after the discovery of the alleged fraud, or, in this case, approximately February 2013. Although ordinarily individual claims would have been tolled under *American Pipe*, the district court followed the [First](#), [Second](#), [Fifth](#), and [Eleventh](#) Circuits in reasoning that the equitable tolling rule in *American Pipe* did not apply to new class actions in the same way as it did to individual claims.

The View of the Ninth Circuit. Disagreeing with the district court and aligning with the [Sixth](#) and [Seventh](#) Circuits, the Ninth Circuit reversed, reading *American Pipe* alongside a number of other, more recent class-action-focused Supreme Court precedents, particularly (1) *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, (2) *Tyson Foods, Inc. v. Bouaphakeo* and (3) *Smith v. Bayer Corp.* In particular, the Ninth Circuit [concluded](#) Rule 23 of the Federal Rules of Civil Procedure is the exclusive authority concerning whether a class action can be brought. Because each class member in *China Agritech* had a timely claim if the claim was brought on an individual basis—such non-class claims were undoubtedly tolled by *American Pipe*—the Ninth Circuit reasoned that only Rule 23 should govern whether a class action is available, not some special rule governing when tolling does and does not apply.

Of the three Supreme Court cases relied upon by the appellate court, none clearly speaks to the precise questions raised in this case. Nonetheless, in the view of the Ninth Circuit, the three cases provide the framework for analyzing the question posed in *China Agritech* concerning successive class actions. The first case, *Shady Grove*, concluded that, at least in federal court, a New York statute that limited the types of claims that could lawfully qualify for class treatment conflicted with Rule 23. As the Seventh Circuit [explained](#) in another case reflecting the logic of the lower court in *China Agritech*, it is difficult to square the language in Rule 23 with “a doctrine that knocks out Rule 23 whenever the time to sue has been extended by a tolling rule.” The second case, *Tyson Foods, Inc. v. Bouaphakeo*, held that certain evidence cannot be deemed inadmissible simply because the underlying claim is brought on behalf of a class. As the Court [noted](#), “the use of the class device cannot abridge any substantive right.” In *China Agritech*, the only difference between the class claims and the individual claims is the presence of the class device—which suggested for the Ninth Circuit that forbidding equitable tolling in one but not the other is in tension with the principle of *Tyson Foods*. The last case, *Smith v. Bayer Corp.*, held that a federal court could not enjoin a state court from certifying a class that the federal court had previously refused to certify. In reaching its conclusion in *Smith*, the Court responded to prudential arguments that are similar to those made by China Agritech—i.e., fears of endless relitigation of class actions as plaintiffs hunt for a court that will certify the class. The Court in *Smith* [explained](#) that relitigation was an ordinary problem in the nation’s litigation system: “our legal system generally relies upon principles of *stare decisis* and

comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.”

The Ninth Circuit ultimately concluded that together these cases stood for the general proposition that a court should look to Rule 23—and Rule 23 alone—to determine whether a class action should proceed. To do otherwise would, in the view of the lower court, ignore the text of Rule 23 and would treat claims differently by virtue of the attempt to proceed as a class, in violation of *Shady Grove* and *Tyson Foods*. And while relitigation and class action “stacking” might occur under this system, following *Smith*, such concerns are, according to the Ninth Circuit, not an excuse for a court to disregard Rule 23.

The Circuit Split. As China Agritech emphasizes in its [petition](#) and [merits brief](#), several other circuits have, however, concluded that *American Pipe* does not apply to subsequent class actions. The [First](#), [Second](#), [Fifth](#), and [Eleventh](#) Circuits [have](#) all held in one form or another that “[p]laintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely.” There are two main arguments these courts generally make against applying tolling to subsequent class actions.

First, these courts assert that the *American Pipe* rule represents a “careful balancing” of the interests of plaintiffs, defendants, and the court system. As the Second Circuit [stated](#), “[f]lexibility, notice and efficiency are the watchwords” of the *American Pipe* rule. It is not a statutory or categorical rule, and as such, it must be carefully monitored and limited. In line with this view, China Agritech’s merits brief heavily emphasizes the significant [“negative consequences”](#) that could result from allowing tolling to extend to subsequent class actions, primarily focusing on “perpetual stacking of one class action after another.” Second, in refusing to extend the *American Pipe* rule to successive class actions, courts have noted that as a doctrinal matter, the traditional “equitable tolling principle” applies only on a [case-by-case basis](#), as the party seeking tolling must demonstrate diligent pursuit of rights along with extraordinary circumstances. In this vein, China Agritech argues that the fundamental principles of equitable tolling do not seem to apply to subsequent class action plaintiffs. In *American Pipe* and *Crown, Cork & Seal Co.*, it could be argued that the individual beneficiaries of the tolling rule were acting diligently when they intervened or filed their individual suits after the class action was dismissed. But it is unclear how “diligent pursuit” could be established in *China Agritech* where no action whatsoever has been taken by the vast majority of potential class members. As the Court recognized last term in holding that the *American Pipe* rule does not apply to [statutes of repose](#): “[the *American Pipe*] rule [is] based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice.” But, in the view of the petitioner in *China Agritech*, there is no injustice when individuals who received the benefit of tolling take no affirmative action to protect their rights.

Why *China Agritech* Matters. Whatever the Court decides, the impact of the case on class action litigation is likely to be significant. There have [been four](#) amicus briefs filed in support of China Agritech, including one on behalf of the [Chamber of Commerce](#), asking the Court to limit the *American Pipe* rule. These amici [generally](#) argue that there are significant costs imposed by class action, and that businesses need finality and certainty that is provided by the ordinary operation of statutes of limitations. A contrary ruling in *China Agritech*, they argue, would lead to endless uncertainty as claims could be kept alive indefinitely by stacking class actions (absent an applicable statute of repose). In contrast, [eight amici](#) have filed briefs for the Respondents, making a host of arguments for upholding the opinion of the Ninth Circuit, including arguments that a reversal would burden the lower courts with [duplicative filings](#) or would leave thousands of wronged individuals [without a remedy](#).

Beyond its impact on businesses and litigants, *China Agritech* is also of significance to Congress. As the Supreme Court has noted, statutes of limitations are [“fundamental”](#) and represent Congress’s judgment on the deadlines that apply to certain actions and when finality should apply. *American Pipe* and its progeny undoubtedly alter those deadlines under certain circumstances and do so without any explicit statutory

authority. Congress could alter these common law rules, could alter the statutes of limitation at issue, or could alter Rule 23 itself to provide more guidance to the courts in resolving the difficult questions posed by *China Agritech*.
