

Supreme Court: Grants Certiorari to Consider Whether the *American Pipe* Tolling Doctrine Permits an Unnamed Class Member to File a New Class Action After the Expiration of the Applicable Limitations Period

12.18.17



(Article from *Securities Law Alert*, November/December 2017)

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On December 8, 2017, the Supreme Court granted certiorari to decide whether the tolling rule established in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) allows an unnamed class member to file a new class action after the applicable limitations period has expired. *China Agritech v. Resh*, No. 17-432. The *American Pipe* Court held that “the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” The Supreme Court subsequently held, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), that the *American Pipe* tolling doctrine applies not only to intervenors but also to class members who file individual actions.

In *Resh v. China Agritech*, 857 F.3d 994 (9th Cir. 2017), the Ninth Circuit held that the *American Pipe* tolling doctrine permits plaintiffs to bring a new class action after the expiration of the statute of limitations if they were unnamed plaintiffs in a timely-filed putative class action, even if class certification was denied in the prior action on substantive grounds and the new action asserts similar class claims.

The Ninth Circuit found that “permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place.” The Ninth Circuit reasoned that this “rule creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them ‘not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment.’” *Id.* (quoting *American Pipe*, 414 U.S. 538). As to the possibility that this rule might “lead to abusive filing of repetitive class actions,” the Ninth Circuit stated that “ordinary principles of preclusion and comity will ... reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification.”

The Ninth Circuit’s decision is in line with the approach taken by the Sixth and Seventh Circuits.^[1] However, in *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987), the Second Circuit expressly held that *American Pipe* “does not apply to permit a plaintiff to file a subsequent class action

following a definitive determination of the inappropriateness of class certification.” The First, Fifth, and Eleventh Circuits have held that *American Pipe* only tolls the *individual* claims of absent class members, and does not permit absent class members to bring a class action after the expiration of the statute of limitations.^[2] The Third and Eighth Circuits have held that a class member may file a subsequent class action only if class certification was denied for reasons unrelated to the validity of the class itself.^[3]

The Supreme Court granted defendant’s petition for a writ of certiorari to review the Ninth Circuit’s decision in *China Agritech* to address the question of whether *American Pipe* tolls the class claims of unnamed class members, in addition to their individual claims.

^[1] *Sawyer v. Atlas Heating & Sheet Metal Works*, 64 2 F.3d 560 (7th Cir. 2011) (holding that whether or not a class member can bring a subsequent class action does not depend on “the statute of limitations or the effects of tolling, but the preclusive effects of a judicial decision in the initial suit applying the criteria of Rule 23”); *Phipps v. Wal-Mart Stores*, 792 F.3d 637 (6th Cir. 2015) (“subsequent class actions timely filed under *American Pipe* are not barred”).

^[2] *See Basch v. Ground Round*, 139 F.3d 6 (1st Cir. 1998) (“Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. ... This simply cannot be what the *American Pipe* rule was intended to allow, and we decline to embrace such an extension of that rule.”); *Salazar-Calderon v. Presidio Valley Farmers Ass’n*, 765 F.2d 1334 (5th Cir. 1985) (“Plaintiffs have no authority for their contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely, nor have we found any.”); *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994) (“the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class”).

^[3] *Yang v. Odom*, 392 F.3d 97 (3d Cir. 2004) (“where class certification has been denied solely on the basis of the lead plaintiffs’ deficiencies as class representatives, and not because of the suitability of the claims for class treatment, *American Pipe* tolling applies to subsequent class actions”); *Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986 (8th Cir. 2007) (following *Yang* and explaining that “[w]hether the *American Pipe* rule applies to subsequent class actions ... depends on the reasons for the denial of certification of the predecessor action”).

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