Circuit courts of appeal are solidifying the reach of the Supreme Court’s June 2018 decision in China Agritech v. Resh[1] and curtailing the availability of equitable tolling in class contexts. The Supreme Court’s decision in China Agritech, which we previously previewed and attended oral arguments for, held that the tolling principles announced in its earlier American Pipe[2] decision do not allow absent class members to file follow-on class action lawsuits where the statute of limitations has otherwise expired on their claims. Recent decisions across several circuit courts of appeal have confirmed our prediction regarding the reexamination of class cases relying upon American Pipe and reigned in plaintiffs’ reliance on tolling in class contexts.

Last month, the First Circuit extended the reach of China Agritech to prevent successive class actions even where the original suit did not reach a decision on class certification.[3] In In re Celexa & Lexapro Mktg. & Sales Practices Litigation, the First Circuit found that Plaintiff Painters was able to sue in its individual capacity, but that “Painters [could ]not parlay that dispensation into the much-delayed filing of a class action.”[4] The case involved a proposed class of third-party payers accusing Defendant Forest of misleading consumers regarding the efficacy of two of its drugs—Celexa and Lexapro—for pediatric use. A prior proposed class action, which likewise alleged putative class claims under RICO and various state consumer protection statutes against Forest, was filed in 2009.[5] On a motion for class certification, that case was instead dismissed in June 2010.

The First Circuit gave effect to the spirit of China Agritech by prohibiting Painters from proceeding as a class irrespective of whether the prior suit reached a substantive ruling on class certification. Although “the Supreme Court granted certiorari in [China Agritech] to answer the narrow question of whether a putative class member may commence a class action beyond the limitations period upon the district court’s denial of a request for class certification filed within the statute of limitations [] the Court proceeded to provide a broader answer: Its precedents do not ‘so much as hint that American Pipe tolling extends to otherwise time-barred class claims.’”[6]

Further, the First Circuit offered pointed language regarding plaintiff’s impermissible attempt to delay the running of the statute of limitations in an effort to save its class claims. Forest argued that Painters was on notice of its potential claims against Forest once the United States unsealed its complaint against Forest regarding similar claims, which unsealing gave rise to the filing of two distinct private class action complaints within the following two weeks.[7] The Court did not sympathize with Painters’ position that the lawsuits did not provide sufficient notice of the claims, admonishing that there is “no case law holding that a statutory limitations period does not start to run until the potential defendant first delivers a gift-wrapped admission of its alleged wrongdoing[, because if] that [were] the rule, very few limitations periods would ever commence, much less conclude.”[8] The First Circuit’s no-nonsense approach echoes the sentiments of China Agritech and further reins in the use of equitable doctrines to sidestep traditional limitations periods.

The Seventh Circuit has also demonstrated its willingness to curtail abuse of tolling doctrines by applying China Agritech to prevent an untimely amended complaint from proceeding as a class action.[9] In Supreme Auto Transportation, LLC, the Court affirmed dismissal of an antitrust suit initiated by a proposed class of indirect purchasers alleging a price-fixing conspiracy, finding the suit was filed outside the permissible limitations period. Although the initial complaint was timely filed, the amended complaint was not because it did not relate back to
the original complaint—and therefore could not be salvaged by tolling. The Seventh Circuit scrutinized the amended complaint and determined that it did not relate back because it was levied by predominantly new plaintiffs and contained wholly distinct claims. The Court went on to clarify that plaintiffs could not avail themselves of American Pipe tolling because the named plaintiffs in the amended complaint were not members of the class defined in the initial complaint, and their claims were not encompassed in the original suit. “If there were any doubt about this (and we have none), the Supreme Court’s recent decision in China Agritech, Inc.—to the effect that upon denial of certification, a putative class member may not commence a new class action beyond the time allowed by the applicable statute of limitations—also supports our reasoning.”[10] The Seventh Circuit’s astute application of tolling principles prevented the use of equitable doctrines to expand the reach of a complaint far beyond the original parties and subject matter.

Relatedly, the Second Circuit recently affirmed Rule 11 sanctions against a plaintiff who filed a successive class action that was clearly time-barred. In this noteworthy win for class action defense counsel—McCabe v. Lifetime Entertainment Services[11]—plaintiffs originally filed a putative TCPA class action suit in August 2013 regarding alleged conduct in August 2009. In 2015, the district court denied class certification due to the lack of ascertainability,[12] which decision was affirmed by the Second Circuit in 2017.[13] One of the named plaintiffs filed individual and class claims only after the denial of class certification was affirmed by the Second Circuit, but this delay was unjustified “because class members can no longer reasonably rely on the named plaintiffs to represent their interests once the district court denies certification.”[14] In affirming Rule 11 sanctions, the Court highlighted that “American Pipe tolling is an exception to the statute of limitations and invites abuse.”[15] Because none of plaintiff’s successive claims were timely filed, the Court did not need to rely on China Agritech in the first instance to dismiss the untimely class claims. Nonetheless, the Court recognized that even if plaintiff had timely filed, he would only have been able to bring his individual claims, and not his asserted class claims, because class certification had previously been denied. The imposition of Rule 11 sanctions for untimely filed claims in this context could pave the way for similar treatment of improvident and successive class claims barred by China Agritech.

Courts continue to limit the scope of unwarranted equitable tolling in class action contexts. While China Agritech has aided in the dismissal of meritless successive class actions, courts of appeal are elevating the import of that ruling. Where class actions are dismissed, class action defendants should have renewed confidence that related class litigation will not continue to proliferate. Further, where a plaintiff’s claims are untimely and plaintiff cannot avail its claims of tolling doctrines, defense counsel should have more tools available when moving to dismiss or negotiating settlements.

[10] 902 F.3d at 742 (internal citation omitted).

[15] Id.

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