THE
NATIONAL LAW REVIEW

Will The Supreme Court Allow Class Action Stacking?

Wednesday, March 21, 2018

Article By Jennifer M. Keas
Jay N. VaronFoley & Lardner LLP

Litigation / Trial Practice
Consumer Protection
All Federal

Parties have long argued over whether the filing of a class action tolls the statute of limitations for absent class members so that they can pursue a separate class action if the initial action fails to be certified for any reason. Most courts have been understandably wary of the notion that statutory limitations periods can be extended indefinitely by a series of absent class members filing successive (*i.e.*, "stacked") class actions until certification is achieved. Now, the U.S. Supreme Court will examine that issue in *China Agritech, Inc. v. Resh*,[1] which is slated for oral argument on March 26, 2018.

American Pipe tolling

In 1974, in *American Pipe & Construction Co. v. Utah*, the Supreme Court held that the filing of a class action in federal court tolls the statute of limitations "for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status."[2] In a concurrence, however, Justice Blackmun warned that the majority decision "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."[3]

Almost ten years later, in *Crown, Cork & Seal Co. v. Parker*, the Supreme Court reaffirmed the *American Pipe* tolling rule and extended it to apply not only to plaintiffs who seek to intervene in the pending action, but also to would-be class members who file individual actions of their own.[4] Again, a concurring opinion (this one by Justice Powell, joined by two other members of the court) cautioned that "the tolling rule of *American Pipe* is a generous one, inviting abuse," of which the courts should be wary.[5]

One of the reasons for tolling in those cases was to avoid, based on the successful operation of Federal Rule of Civil Procedure 23, the need for thousands of absent class members to file a multiplicity of suits just to preserve their individual claims in case the class was not certified for any reason.[6]

Attempts to use *American Pipe* tolling to save otherwise untimely successive class actions

Although the Supreme Court's focus in *American Pipe* and *Crown, Cork & Seal* was the ability of putative class members to intervene in the case or to file their own *individual* action following a denial of class certification, some courts have permitted identical or very similar subsequent claims to be brought under Rule 23 on the theory that *American Pipe* applies to successive class actions. This approach permits class counsel to assert a new class case using a previously absent putative class member—and, if unsuccessful, another and another—effectively "piggybacking" class actions and allowing the applicable limitations periods to be extended indefinitely until certification can be achieved.

Most recently, in *China Agritech*, the Ninth Circuit held that *American Pipe* tolling was available to save an otherwise untimely class action where the plaintiffs were unnamed plaintiffs in two earlier would-be class actions against many of the same defendants based on the same underlying events.[7] Many other courts of appeal have

rejected class action stacking efforts.[8] To resolve the conflict and clarify this issue, the Supreme Court granted China Agritech's petition to review the case.

Facts and previous legal maneuvering in *China Agritech*

China Agritech is a securities fraud case brought under the Private Securities Litigation Reform Act (PSLRA) with an all too common procedural history. The underlying claim was that China Agritech—a Chinese holding company listed on the NASDAQ stock exchange, which supposedly sold fertilizers and related products to farmers in Chinese provinces through various subsidiaries—was really a fraud. In early 2011, a market research company issued a report to this effect, claiming that revenue was grossly inflated and that the company had no real production in the market. Although China Agritech denied the report, an additional critical report followed, leading NASDAQ to halt trading in the stock and to initiate delisting proceedings.

The *Dean* action. The first securities fraud class action (*Dean*) was filed in California federal court shortly after the initial report questioning the company's viability.[9] After making requisite notice under the PSLRA and amending the complaint to name more plaintiffs, the *Dean* plaintiffs moved for class certification in January 2012. The trial court denied the motion, concluding that, while the Rule 23(a) elements were satisfied, Rule 23(b)(3) predominance was lacking because the plaintiffs had failed to establish fraud on the market, such that reliance would not be presumed for the class. After the district court's denial of class certification was affirmed on a Rule 23(f) appeal, the *Dean* plaintiffs settled their individual claims.

The *Smyth* action. In October 2012, three weeks after *Dean* settled, a virtually identical class case (*Smyth*) was filed by a new class representative, represented by the same counsel as the *Dean* plaintiffs, in Delaware federal court.[10] The case was soon transferred to California where it was deemed related to the *Dean* action and assigned to the same judge that had heard *Dean*. The *Smyth* plaintiffs moved for class certification. The district judge denied the motion, but rather than issuing a decision based on the predominance grounds cited in *Dean*, the court based its denial on concerns about typicality and adequacy. In January 2014, the parties agreed to dismiss the *Smyth* action with prejudice as to the named plaintiffs.

The *Resh* action. Some six months later, a third class action was filed by Michael Resh, an unnamed plaintiff in both of the previous actions, now represented by different counsel.[11] The defendants moved to dismiss *Resh* as time-barred under the applicable statute of limitations. The *Resh* plaintiffs opposed, arguing that the *Dean* and *Smyth* actions had tolled the limitations period under *American Pipe.* The district court granted the motion to dismiss, reasoning that while *American Pipe* permitted tolling of subsequent *individual* actions, the Supreme Court had not determined that it permitted class action tolling, and that acceptance of the plaintiffs' approach "would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence."[12] The *Resh* plaintiffs sought reconsideration, arguing that certification had been denied in the *Dean* and *Smyth* actions because of issues with the lead plaintiffs' suitability as class representatives, rather than the suitability of the underlying claims for class treatment. The district court denied the motion for reconsideration.[13] The *Resh* plaintiffs appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit's ruling in *Resh*, now on review by the Supreme Court

The Ninth Circuit reversed the dismissal. It believed the application of *American Pipe* and *Crown, Cork & Seal* to subsequent class actions was an open question that should be resolved according to the operation of narrow preclusion and preclusion-related principles.[14] In the Ninth's Circuit's view, if plaintiffs in the current class action suit had been named plaintiffs in an earlier class action suit and an issue relating to the propriety of that class action had been resolved against them, resulting in dismissal of the suit with prejudice, then any new effort to bring a subsequent class action raising the same issue would be barred.[15] The Ninth Circuit reasoned that three recent Supreme Court decisions—*Shady Grove*,[16] *Smith*,[17] and *Tyson Foods*[18]—each supported its analysis.

However, although the *Resh* plaintiffs opposed China Agritech's bid for Supreme Court review by arguing that there is no circuit split—ostensibly based on *Shady Grove*, *Smith*, and two other recent court of appeals cases that they claimed adopted the analysis contained in those Supreme Court cases[19]—the Supreme Court granted *certiorari* nonetheless. This suggests possible doubt about whether *Shady Grove* and *Smith* truly are dispositive, or at least a belief by the Supreme Court that the overall issue requires clarification.

Key issues that will likely affect the Supreme Court's analysis

Whether *American Pipe* tolling for class actions is inconsistent with general equitable tolling

requirements

In 2017, in *Cal. Pub. Emps. Ret. Sys. v. ANZ Securities, Inc.*, the Supreme Court held that, based on the plain language of the Securities Act of 1933, the filing of a putative class action does not toll the statute of repose in the securities law for an individual plaintiff's claims.[20] Significantly, the Supreme Court held that the suspension of limitation periods authorized by *American Pipe* is a form of equitable tolling, not a right granted either by statute or Federal Rule of Civil Procedure 23.[21] This appears to undercut the stated basis of the Ninth Circuit's decision, which had reasoned that the availability of subsequent class actions did not depend on tolling principles but rather on the operation of issue preclusion.

Indeed, in its merits brief to the Supreme Court, China Agritech (as well as a number of *amici*) emphasize the fact that equitable tolling is a "rare remedy"[22] that requires that the plaintiffs have pursued their rights diligently as well as a showing of some "extraordinary circumstances" that nevertheless prevented the plaintiffs from timely filing the action.[23] China Agritech argues that extending *American Pipe* tolling to class cases would impermissibly allow equitable tolling absent diligence, and that the extraordinary circumstances articulated in *American Pipe* to justify tolling for individual actions do not apply to tolling for class actions.

By contrast, respondents (the *Resh* plaintiffs) argue that under the circumstances and existing *American Pipe* jurisprudence, putative class members who rely on tolling cannot be fairly accused of sleeping on their rights because they are entitled to rely on the class action device to protect those rights. They assert that in securities class actions, perpetual tolling is impossible because the statute of repose serves as an absolute cutoff. In addition, respondents argue, the Supreme Court has recognized that some tolling is necessary for Rule 23 class actions to function and that absent such tolling, absent class members would be induced to make duplicative individual filings that would impair judicial efficiency.

Interplay with the Rules Enabling Act

Respondents contend that a decision holding that a would-be class member's claim would be timely if brought individually (under the *Crown, Cork & Seal* holding) but time-barred if asserted under Rule 23 would violate the Rules Enabling Act, given that Rule 23 entitles a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.[24] They point to the Supreme Court's refusal in *Shady Grove* to give effect to a state law prohibiting class actions seeking certain penalties or damages, based on that law's tension with Rule 23.

Yet China Agritech and various supporting *amici* turn that argument on its head, pointing out that it is the respondents' requested expansion of *American Pipe* that would be problematic under the Rules Enabling Act, because it would give plaintiffs different rights in a class proceeding than they would have had individually. China Agritech argues that if a putative class member following denial of class certification failed to bring a timely individual action or a motion to intervene, her individual claim would be denied—yet under the Ninth Circuit's approach, an untimely individual claim could be salvaged simply by asserting it under Rule 23, a result that cannot be squared with the Rules Enabling Act.

Whether *Shady Grove, Tyson,* and *Smith* are controlling

China Agritech maintains that *Shady Grove*, *Tyson*, and *Smith* have no applicability to the class action stacking debate. None of these cases addressed equitable tolling and the sole reference to *American Pipe* tolling in *Smith* related to the ability of a class member to file an *individual* action.[25] China Agritech argues that the Ninth Circuit's analysis of *Shady Grove* as requiring *American Pipe* tolling to extend to class actions was incorrectly premised on the notion that all class members are automatically entitled to *American Pipe* tolling, when that notion is inconsistent with the nature of equitable tolling being a rare and exceptional remedy requiring diligent action and extraordinary circumstances.

The respondents, by contrast, continue to assert that *Shady Grove* and *Smith* are dispositive, and that the ability of class members to rely on the initial class filing in effect satisfies both the equitable tolling requirements.

Real World Effects of Applying *American Pipe* to Class Actions

Are concerns about class action stacking abuses warranted?

China Agritech urges the Supreme Court to hold that extending *American Pipe* tolling to class actions would undermine the policies embodied in statute of limitations and result in significant potential adverse consequences. It argues that the tolling rule embodied by the Ninth Circuit's ruling below could extend the statute of limitations indefinitely, tolling it every time a new class action is filed—a result that Justice Samuel Alito, then a Third Circuit judge, found to be a concern in *Yang v. Odom*.[26] Such a rule could practically eviscerate

limitation provisions in class actions, undermining the very principles of diligence, fairness to defendants, and the avoidance of stale claims that limitation provisions are intended to foster.

The respondents characterize these concerns as overstated. They note that in *Smith v. Bayer*, the question of successive class action litigation in federal court technically was not at issue, but the Supreme Court noted it as a troublesome prospect and indicated that traditional principles of *stare decisis* and comity among courts should "generally suffice" to mitigate harm to defendants.[27]

In many class cases, however, there appears to be real doubt as to the viability of such a safety net for defendants facing class action stacking. As China Agritech points out, the district judge in this very case did not apply comity to his own decision in the *Dean* Action; rather, he dismissed the *Smyth* Action on other grounds. Moreover, comity is often considered to be more honored in the breach than in the observance, with district courts often taking very different approaches on important issues.

As many courts have observed, the defense of even a single class action is expensive and time consuming. The litigation costs are asymmetrical, especially in consumer class cases, because the named class representative plaintiffs typically have scant documents to search and produce (and class discovery of absent class members is rarely permitted), whereas corporate defendants have substantial repositories of electronic documents and data that are targeted for discovery. Hence, the pressure to settle even non-meritorious successive class litigation is both real and significant. The *Resh* action itself is the third virtually identical class action filed in the case, undercutting the Ninth Circuit's assurance that belief that "[a]ttorneys who are going to be paid on a contingency fee basis . . . at some point will be unwilling to assume the financial risk in bringing successive suits."[28]

Do the sorts of concerns that led to *American Pipe* tolling for individuals apply to successive class cases?

One rationale originally articulated in support of *American Pipe* tolling for individuals was that *not* permitting such tolling would frustrate the goal of Rule 23 to promote economy in litigation because, absent 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."[29] The implied assumption is that such individual filings would be burdensome and potentially unworkable. In *China Agritech*, the respondents implicitly advance the same argument, that absent the extension of *American Pipe* tolling to class actions, putative class members will file duplicative, protective class actions to protect their interests and that this should be avoided.

Yet, as China Agritech notes, multiple class actions—often dozens upon dozens of them—already are filed fairly routinely and may be consolidated or subjected to a multidistrict litigation proceeding. Moreover, as the U.S. Chamber of Commerce observed in its amicus brief in the case, circuits that have resisted piggyback class actions have not found the result to be unworkable or even experienced any marked increase in the filing of protective class cases.

Finally, as regards judicial economy, under Federal Rule of Civil Procedure 23, the need for courts to make a certification decision at an "early practicable time," as well as the requirements concerning adequate class representatives and class counsel,[30] encourages the early filing of class actions. Likewise, the PLSRA notice requirements also are clearly intended to encourage named class representatives to come forward early.[31]

Will the Supreme Court split the baby?

It is possible that the Supreme Court, at least for purposes of this case, will simply hold that *American Pipe* tolling is not available for a class action where class certification was denied based on the failure of the claims to satisfy Rule 23 standards. However, two circuits, the Third and the Eighth, have developed a narrower rule. They appear to deny *American Pipe* tolling of class actions when the failure of the initial class action was based on a defect relating to the suitability of the underlying claims for class treatment (*i.e.*, predominance, superiority, or numerosity) but permit *American Pipe* tolling of class actions where the denial of class certification was based on a deficiency of the named plaintiff representatives (*i.e.*, typicality and adequacy).[32] Indeed, China Agritech proffers this as a secondary argument, noting that certification was denied in the *Dean* Action based on a fundamental lack of *predominance* relating to the need to show individualized reliance, and hence that dismissal is required even under this narrower view.[33]

Yet it is far from clear that the proffered distinction between Rule 23 deficiencies with the class representative and Rule 23 deficiencies with the class claims is viable. Indeed, numerous courts have observed that the commonality (common questions) and typicality requirements are integrally related,[34] as both requirements serve as guideposts for determining whether the class claims are so interrelated with those of the named plaintiff that the interests of the class members will be fairly and adequately protected in their absence.

Indeed, in *China Agritech*, the respondents assert that the denial of class certification in the *Dean* Action was not based on a ruling that the claims were unsuitable for class treatment despite the finding that predominance of common questions was lacking; rather, they argue it was merely a result of a specific failure of proof in the *Dean* plaintiffs' expert report which was remedied in the subsequent *Smyth* and *Resh* Actions, such that principles of comity do not apply.

Moreover, mixed-approach cases like the Eighth Circuit's *Great Plains* decision and the Third Circuit's *Yang* decision do not heed the warnings of Justices Blackmun and Powell in *American Pipe* and *Crown, Cork & Seal* about potential abuses that can arise by virtue of inviting class counsel to intentionally frame their pleadings to attract and save putative class members for stacking purposes. Plaintiff's counsel, for example, may craft unnecessarily broad class definitions to preserve options for pursuing future, narrower classes if necessary,[35] or even file claims based on inadequate class representatives who lack standing to assert some or all of the underlying claims but who are used as placeholders to satisfy a looming statute of limitations deadline with the aim of locating and swapping in other better class representatives later.[36] While a common response to this concern is that the filing of the first class action puts the defendant on notice so that it is not prejudiced, the absence of unfair surprise or prejudice is not an independent basis for invoking tolling. Rather, the absence of prejudice is only a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify tolling is identified.[37]

Conclusion

The *China Agritech* case has the potential to clarify a long-standing split among the circuit courts of appeals on the propriety and wisdom of permitting class action stacking. However, as was the case with the Supreme Court's 2016 *Spokeo* opinion,[38] it is also possible that we will see a narrow decision that does not resolve the broader questions.

We look forward to the argument on March 26th, and will report further on future developments.

[1] Docket No. 17-432, on appeal from *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017).

[2] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553-54 (1974).

[3] *Id.* at 561 (Blackmun, J., concurring).

[4] *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

[5] *Id.* at 354 (Powell, J., Rehnquist, J, and O'Connor, J. concurring).

[6] *See id.* at 349-51.

[7] *Resh*, 857 F.3d at 1004.

[8] *See, e.g., Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F. 3d 1324, 1326 (11th Cir. 2015) (rejecting effort to piggyback class actions one after another in an attempt to find an adequate class representative); *Angles v. Dollar Tree Stores, Inc.,* 494 Fed. App'x 326, 331 (4th Cir. 2012) (*American Pipe* tolling applies when a class action is commenced by the filing of a complaint and tolls an *individual's* statute of limitations, not the statute of limitations for the proposed class); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11-12 (1st Cir. 1998) ("We do not believe the tolling rules were meant to permit the stacking of class actions."); *Salazar-Calderon v. Presidio Valley Farmers Assoc.*, 765 F.2d 1334, 1351 (5th Cir. 1985) (declining to allow putative class members to piggyback one class action onto another and thus toll the statute of limitations indefinitely); *Korwek v. Hunt*, 827 F. 2d 874, 877 (2d Cir. 1987) (declining to apply the *American Pipe* tolling doctrine to to permit a plaintiff to file a subsequent class action).

[9] *Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK-PJW (C.D. Cal.) (the "*Dean* Action").

[10] *Smyth v. Chang*, Case No.1:12-cv-01262-RGA (D. Del.)(the "*Smyth* Action").

[11] *Resh v. China Agritech, Inc.*, Case No. 2:14-cv-05083-RGK-PJW (C.D. Cal.) (the "*Resh* Action").

[12] *Resh*, 857 F.3d at 999.

[13] *Id.*

[14] *Id.* at 1002.

[15] *Id.* at 1001-1005; *see also Sawyer v. Atlas Heating & Street Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011) (adopting similar preclusion analysis).

[16] *Shady Grove Orthopedics Associates, P.A. v. Allstate Ins. Co.*; 559 U.S. 393 (2010).

[17] *Smith v. Bayer Corp.*, 564 U.S. 299 (2011).

[18] *Tyson Foods, Inc. v. Bouaphakeo, 136 S.Ct. 1036 (2016).*

[19] *See Sawyer*, 642 F.3d at 563-64; *see also Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-653 (6th Cir. 2015).

[20] 137 S.Ct. 2042, 2051 (2017).

[21] *Id.*

[22] *Wallace v. Kato*, 549 U.S. 384, 396 (2007).

[23] *Menominee Indian Tribe of Wisc. v. United States*, 136 S. Ct. 750, 755 (2016).

[24] The Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, gave the judicial branch the power to promulgate the Federal Rules of Civil Procedure, including Rule 23. *See also Tyson Foods, 136 S.Ct. at 1096 (the Rules Enabling Act instructs that use of the class device cannot abridge any substantive right of a litigant).*

[25] *See 564 U.S. 313 n.10.* The *Smith* case itself simply held that the denial of a class certification motion in federal court did not permit the court to use the re-litigation exception of the Anti-Injunction Act to enjoin a state court from granting class certification in a similar case brought by different plaintiffs who were not parties to the federal action.

[26] 392 F.3d 97, 113 (3d Cir. 2004) (Alito, J. concurring in part).

[27] *See Resh*, 857 F.3d at 1003.

[28] *Id.* at 1005.

[29] *American Pipe*, 414 U.S. at 553.

[30] *See* Fed. R. Civ. P. 23(c)(1), (a)(4), (g)(4).

[31] The PSLRA requires “early notice to class members” once a class action is filed, which notice must be provided to class members concerning the “pendency of the action, the claims asserted therein, and the purported class period.” 15 U.S.C. § 78u-4(a)(3)(A)(i)(I). This enables other putative class members to promptly move to participate as lead plaintiffs. *Id.* § 78u-4(a)(3)(B).

[32] *See, e.g.*, *Great Plains Tr. Co. v. Union Pac R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang*, 392 F.3d at 111.

[33] Another unusual feature of the *China Agritech* securities fraud case is the Private Securities Litigation Reform Act notice requirement, designed to inform class members of the securities claim and to invite shareholders to come forward to be lead plaintiffs. China Agritech argues that because the respondents never took advantage of this opportunity, it would be inconsistent with the due diligence requirements of equitable tolling to find that respondents’ delay in filing this class action could justify tolling.

[34] *See General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982) (“The commonality and typicality requirements of Rule 23(a) tend to merge . . . Those requirements . . . also tend to merge with the adequacy-of-representation requirement.”).

[35] *See, e.g., Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 890-94 (D.S.C. 2005) (criticizing tolling for successive class actions where, as per the facts of that case, doing so encourages the filing of initial class actions with overly broad (or vague) class definitions because all later class actions falling within the original definition might benefit from tolling so long as the definition in the first action was voluntarily narrowed by counsel (or by the court) before a final class certification decision).

[36] *See In re Dairy Farmers of Am., Inc. Cheese Antitrust Litig.*, No. 9-CV-3690, 2015 U.S. Dist. LEXIS 84152, at *82-93 (N.D. Ill. June 29,

2015) (refusing to toll state antitrust claims where original named plaintiff lacked standing to assert them); *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 934 F. Supp. 2d 1219, 1229 (C.D. Cal. 2013) ("When a class action plaintiff lacks standing with respect to certain claims, jurisdiction does not attach for those claims, meaning that federal courts have no power to extend the statutorily defined limitation periods.").

[37] *See Baldwin Cty. Welcome Center v. Brown*, 466 U.S. 147, 152 (1984); *see also Menominee Indian Tribe of Wis.*, 136 S.Ct. at 757 n.5.

[38] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

© 2019 Foley & Lardner LLP

Source URL: https://www.natlawreview.com/article/will-supreme-court-allow-class-action-stacking