

PUBLICATIONS

Supreme Court Rejects *American Pipe* Tolling For Class Actions

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The Supreme Court rejected a lower court ruling that would have permitted a securities class action to be filed after the statute of limitations would have expired but for the commencement of an earlier punitive class action which had been dismissed. Such a rule could indefinitely extend the statute of limitations for commencing a class action the Court reasoned. In reaching its conclusion, the Court refused to extend the rule of *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) which concerned the application of the statute of limitations to claims brought by individuals subsequent to the dismissal of a timely filed punitive class action. *China Agritech, Inc. v. Resh*, No. 17-432 (S.Ct. Decided June 11, 2018).

Background

Respondent – plaintiff Michael Rush filed the third securities class action brought on behalf of the purchasers of petitioner-defendant China Agritech's common stock. Mr. Resh's complaint alleged violations of Exchange Act Section 10(b) and rule 10b-5 thereunder. Specifically it claimed that the firm had engaged in fraud and misleading business practices. The firm's stock price plummeted as a result, according to the complaint.

The first complaint had been filed by shareholder Theodore Dean. It made essentially the same allegations as the one filed by Mr. Resh. It had been filed at the outset of the two year statute of limitations period. The required Private Securities Litigation Reform Act ("PSLRA") notices were given to other potential plaintiffs. The district court dismissed the complaint, finding that the shares did not trade in an efficient market, an essential element in securities class actions. The second complaint was also brought within the two

year statute of limitations period. Again the PSLRA notice was given. The complaint was dismissed by the district court. In this instance the district court concluded that the typicality and adequacy grounds were wanting.

The complaint brought by Mr. Resh was filed about a year and a half after the expiration of the statute of limitations. The district court again dismissed the complaint, concluding that it was not timely because the earlier two complaints had not tolled the statute of limitations. The Ninth Circuit Court of Appeals reversed, holding that there was tolling under *American Pipe*. The Supreme Court granted certiorari to resolve a split in the circuits on the question.

The opinion

In an opinion written by Justice Ginsburg, and joined as to the conclusion by all of the Justices but as to its reasoning by all except Justice Sotomayor, the Court reversed. *American Pipe* held that “the commencement of the original class suit tolls the running of 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.” (Internal citations omitted). A contrary rule would undermine the efficiencies and economy which are key to Rule 23 regarding the use of the class actions. Indeed, absent the *American Pipe* rule, and its extension to class members who filed separate actions in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), there would be a multiplicity of actions filed by class members to preserve their status.

In contrast, there is nothing in *American Pipe* or *Crown, Cork* that suggests such a rule should apply to the third complaint filed in this action. Each of those rulings dealt solely with the filing of individual claims by those who were involved in the dismissed class actions. In contrast, the case brought by Mr. Resh is not an individual action for one of the former punitive class members. To the contrary, it is a new class action based largely on the same theory as the earlier actions, but filed one and one half years after the statute of limitations.

Permitting the action by Mr. Resh to move forward would be contrary to the rationale of *American Pipe*, the Court concluded. Rule 23 evidences a preference for “preclusion of untimely successive class actions by instructing that class certification should be resolved early on.” The PSLRA, which governs securities class actions such as this case, reflects a “similar preference.” Indeed, the PSLRA directs that a notice be given on filing to “draw all potential lead plaintiffs into the suit so that the district court will have the full roster of contenders before deciding which contender to appoint.” Given the notice and opportunity to participate, there is little reason to permit those who did not participate.

In contrast, Respondent’s proposed rule would extend *American Pipe* and “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.” Essentially this would give plaintiffs “limitless bites at the apple.” (Internal quotations omitted). While there would in fact be a limitation in securities cases because of the five year statute of repose, in many other actions there is no such limitation.

Respondents are correct that under rule 23 where the requirements of the provision are met, plaintiffs are entitled to maintain a class action, the Court noted. This fact does not dictate a different result here. This is because “Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled. In fact . . . Rule 23 prescribes the opposite result,” the Court concluded.

In the end, the “watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23 as well. Extending *American Pipe* tolling to successive class actions does not serve that purpose. The contrary rule, allowing no tolling for out-of –time

class actions, will propel putative class representatives to file suit well within the limitations period and seek certification promptly.” Accordingly, the determination of the Court of Appeals is reversed and the case remanded for further proceedings.

Justice Sotomayor concurred in the judgment but not the opinion. The PSLRA is an essential component to the reasoning of the Court. That statute, however, only applies in securities actions. In other potential class actions it does not. In those situations, rather than adopting a blanket rule that *American Pipe* tolling does not apply it would be more prudent to provide, for example, that “as a matter of equity . . . tolling only becomes unavailable for future class claims where class certification is denied for a reason that bears on the suitability of the claims for class treatment. Where, by contrast, class certification is denied because of the deficiencies of the lead plaintiff as a class representative, or because of some other non-substantive defect, tolling would remain available.”

Comment

American Pipe and *Crown, Cork* toll the statute of limitations for those involved in securities class actions and other putative class actions which are timely filed but dismissed. The tolling permits those individuals to file individual claims under such circumstances. This approach, as the Court notes, is consistent with the underlying theory of bringing class actions which at least in part is efficiency coupled with economy.

In contrast, permitting the filing of subsequent and untimely class actions is not consistent with the goals of Rule 23 or the PSLRA where that statute applies. Rather, as the Court indicates, applying *American Pipe* in effect undermines those goals.

While the separate opinion offered by Justice Sotomayor is correct that the PSLRA does not apply outside the securities context, the efficiency and economy goals of Rule 23 are consistent with not extending *American Pipe* to untimely class actions. To the contrary, the rule urged by Justice Sotomayor appears to be little more than a slippery slope that would mire the statute of limitations issue in potentially endless rounds of litigation which could only serve to further undermine any notion of economy and efficiency.