

Chicago Daily Law Bulletin®

Volume 164, No. 135

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Time appears to be running out in class-action tolling requirements

Rule 23 of the Federal Rules of Civil Procedure governs class litigation in federal courts; however, Rule 23 does not address issues concerning the timeliness of claims, tolling of the applicable limitation periods or the revival of class claims if individual claims are tolled.

Pursuant to U.S. Supreme Court case law dating back four decades, a timely filed class-action lawsuit tolls the statute of limitations for all individuals covered by the class complaint. And class members of a class that is subsequently denied certification may join the pending litigation outside of the class setting.

Commonly referred to as the *American Pipe* tolling rule, this doctrine also protects individuals who elect to bring their own lawsuits after the denial of class certification of a class they had been covered by in a timely filed class-action lawsuit. What has remained in flux over the years is whether the *American Pipe* tolling rule applies to successive class actions as well.

In *China Agritech Inc. v. Resh*, the U.S. Supreme Court held that the endless tolling of an applicable statute of limitations period is not a result envisioned by *American Pipe*.

In reaching that conclusion, the U.S. Supreme Court ruled that its clarification of the scope of *American Pipe* did not conflict with Rule 23 by abridging or modifying a substantive right because the class plaintiffs possessed no substantive right to assert claims outside the statute of limitations.

Citing litigation trends in federal appellate courts that had similarly interpreted the *American Pipe* tolling rule, U.S. Supreme Court also ruled that its holding was unlikely to result

in an increase of class filings as a protective mechanism.

By way of background, in *China Agritech Inc. v. Resh*, shareholder plaintiffs in 2011 filed a securities fraud class action alleging fraudulent and misleading business practices against China Agritech Inc. in connection with a significant drop in the company's stock value.

Ultimately, the named plaintiffs settled their respective individual claims in 2012 after the U.S. District Court denied class certification.

While the underlying claims were still within the applicable statute of limitations period, a new set of named plaintiffs filed a different class action asserting almost identical claims: The district court denied class certification in that litigation as well, and once again, the named plaintiffs ultimately settled their respective individual claims with the company.

Michael Resh, who was not party to either of the previously mentioned class-action suits, filed a third class action asserting similar claims about a year and a half

BY JOSEPH GAGLIARDO AND BRIAN JACKSON

Joseph Gagliardo and Brian Jackson are lawyers at Laner Muchin Ltd.

In reaching that conclusion, the 9th Circuit found that applying the *American Pipe* tolling rule in this manner would (1) advance the policy objectives that led the U.S. Supreme Court to permit tolling in the first place and (2) promote economy of litigation by reducing incentives for filing protective class suits during the pendency of an initial certification motion.

The U.S. Supreme Court rejected the 9th Circuit's reasoning in holding that the *American Pipe* tolling rule does not permit a plaintiff to piggyback on an earlier, timely filed class action to file a class action outside of the applicable limitations period.

In reaching that conclusion, the Supreme Court concluded that the efficiency and economy of litigation that support the application of tolling individual

class certification denial. If certification is granted, the claims will proceed as a class, and if class certification is denied, the individual claims are addressed immediately. By comparison, allowing the *American Pipe* tolling rule to apply to later filed class actions could result in a limitless filing period.

Finally, the Supreme Court rejected arguments that the failure to apply the *American Pipe* tolling rule to class-action lawsuits would lead to an influx of duplicative litigation during the class certification process.

The court found that the 2nd and 5th U.S. Circuit Courts of Appeal, which both rejected the application of the *American Pipe* tolling rule to class actions in the 1980s, have not seen significant class-action filing activity in their respective jurisdictions as a result of not applying the *American Pipe* tolling rule to class actions.

In another highly anticipated class-action decision, the Supreme Court ruled that class- and collective-action waivers contained in arbitration agreements do not violate employees' concerted rights secured by the National Labor Relations Act and must be enforced when brought pursuant to the Federal Arbitration Act.

Contrary opinions had relied on the Federal Arbitration Act's savings clause permitting the rejection of mandatory arbitration upon grounds that exist at law or in equity for the revocation of contracts in general.

The Supreme Court disagreed, finding that the savings clause enforcement exceptions related only to general contract defenses, such as fraud, duress and unconscionability, not a right to engage in class or collective actions as a Section 7 right under the NLRA.

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outside of the applicable limitations period. That lawsuit was dismissed by the district court as untimely because the prior class actions did not toll his claims on a class basis.

However, the 9th U.S. Circuit Court of Appeals disagreed, reversing the district court on the basis that the *American Pipe* tolling rule applied to both individual and class claims.

claims do not support maintenance of untimely successive class actions; rather, any additional class filings should be made early on — soon after the commencement of the first action seeking class certification.

Whereas, *American Pipe* appropriately tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a