

In re Celexa and Lexapro – The First Circuit Weighs in on China Agritech and American Pipe Tolling

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The Supreme Court meant what it said in [China Agritech, Inc. v. Resh](#) – that is the primary lesson from the First Circuit's January 30th decision in [In re Celexa and Lexapro Marketing and Sales Practices Litigation](#). As my partner, Don Frederico, explained in a [blog post](#) last year, the Supreme Court observed in *China Agritech* that its prior ruling in [American Pipe & Constr. Co. v. Utah](#) “tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails.” *China Agritech* went on to hold that “*American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.” The First Circuit, in *In re Celexa and Lexapro*, rejected a plaintiff's attempt to read *China Agritech* narrowly.

In re Celexa and Lexapro involved consolidated prescription drug marketing cases. Plaintiffs asserted RICO and state-law claims, alleging that defendants fraudulently promoted antidepressant drugs for uses the FDA had not approved – referred to as “off-label” uses. The same defendants had previously been named in a qui tam action that was unsealed in February 2009. One of the plaintiffs, Painters, and Allied Trades District Council 82 Health Care Fund (“Painters”), sought certification of two classes of third party-payors that had paid for or reimbursed off-label prescriptions of Celexa or Lexapro. The district court denied class certification.

On appeal, the First Circuit – while brushing aside the district court's concerns about individual issues of causation and injury – nevertheless affirmed the denial of class certification. Judge Kayatta, writing for a unanimous panel, concluded that Painters had put forward evidence that could establish causation and injury on a class-wide basis. He went on, however, to find that the class action was time-barred.

The Court first found that Painters' individual claims were timely. The Court concluded that the four-year statute of limitations was subject to the discovery rule and held that, as a matter of law, the limitations period began running in March 2009 after the qui tam action was unsealed. Painters' claim was timely because the running of the limitations period was stayed for eight months by a prior class action (the “*N.M. UFCW* case”). Because Painters was a putative class member of that prior class action, *American Pipe* tolling applied to its claim during the pendency of the *N.M. UFCW* case.

Even though Painters' own claim was timely, the Court nevertheless held that Painters' class action

was not. As Judge Kayatta wrote,

China Agritech clarified that [*American Pipe*] tolling has limits: While a putative class member may join an existing suit or file an individual action upon denial of class certification, a putative class member may not commence a class action anew beyond the time allowed by the untolled statute of limitations.

The Court refused to limit *China Agritech* to situations in which class certification was denied in the earlier-filed class action. Painters had argued that, unlike *China Agritech*, there was no substantive ruling on class certification in the *N.M. UFCW* case that had preceded Painters' own action. The First Circuit, however, held that the decision in *China Agritech* stood for the broad proposition that the "tolling effect of a motion to certify a class applies only to individual claims, no matter how the motion is ultimately resolved. To hold otherwise would be to allow a chain of withdrawn class-action suits to extend the limitations period forever." The Court, therefore, affirmed the denial of class certification.

After *In re Celexa and Lexapro*, there is no doubt that *China Agritech* is no paper tiger in the First Circuit. The rule is clear: a class action does not toll the statute of limitations for subsequent class actions.

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National Law Review, Volume IX, Number 50

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