

Justices Scrutinize the Pros and Cons of Extending American Pipe Tolling

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[As we previewed last week](#), the Supreme Court is considering 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.

In Monday's oral argument of [China Agritech, Inc. v. Resh](#),^[i] a few key issues emerged which we highlight below.

1. Should absent class members be deemed to have satisfied the diligence and unusual circumstances elements of equitable tolling by virtue of their continued reliance on the class action to prosecute the class?

The satisfaction of equitable tolling's diligence and extraordinary circumstances requirements is likely the critical issue in the case. This question assumes added importance because of the *ANZ Securities* case last term, which held that the suspension of limitation periods under *American Pipe* is a form of equitable tolling and not a right granted by F.R.C.P. 23 or a statute.^[2] Thus, an early question posed by Justice Kagan indicated skepticism that diligence and extraordinary circumstances are satisfied when an absent class member relies on the initially filed class action to relieve them of the need to file their own individual lawsuit during the pendency of the class case, yet the threshold is not met if a second similar class action is filed.^[3] Indeed, the thrust of that question is the essence of Respondent's primary position—that the filing of the class action relieves, or is deemed to satisfy, absent class members' obligation to act.^[4]

Petitioner *China Agritech* presented a different view—namely, that *American Pipe*'s tolling of limitations is not automatic and that absent class members' ability to file a later class action depends on whether the applicable limitations period has run and, if it has, whether equitable tolling is justified. Petitioner argues that *American Pipe*'s established tolling principle requires diligence in that once certification is denied, absent class members must act diligently by promptly moving to intervene in the action for which certification was denied or by filing a new action. In Petitioner's

view, absent class members who do nothing other than to supposedly rely on a second class action do not act diligently; they take no action at all.^[5]

Justice Breyer illustrated Petitioner's concern by noting that the "common person" who receives class action notices often won't even open the letter or likely will just ignore the notice. If this behavior is repeated in the second class case or even a third, it would be difficult to demonstrate the requisite level of class member diligence.^[6] Justice Gorsuch went further, casting doubt on whether *American Pipe*'s initial tolling ruling itself comported with equitable tolling principles, and questioning whether the Court should in effect extend *American Pipe* tolling if there were reservations about the initial ruling.^[7] Indeed, in earlier remarks Justice Kagan likewise suggested that "there was always a question in *American Pipe* that we were doing something extraordinary, that we were saying it doesn't matter that the statute of limitation has run on you."^[8]

Respondent's response, echoed to an extent in questions raised by certain Justices, was that if an absent class member had a timely individual claim, he/she should be able to utilize all the Rules of Civil Procedure including Rule 23. Petitioner's rejoinder was that such a claimant could use all the procedural rules including Rule 23, except where Rule 23 was used to make absent class members' lapsed claims timely without satisfying the elements of equitable tolling as per the following example:

If a class claim was brought for a class of 10,000 people and eventually not certified, and 1,000 of those absent class members then filed individual suits or intervened in the case, one of those 1,000 formerly absent class members could file a class claim for the other 999, but could not file one for the other 9,000 who did not act and whose class therefore could not be subject to equitable tolling.^[9]

2. Should the result depend on why class certification was denied in the initial case?

While the circuits are split on whether *American Pipe* tolling should be applied to successive class actions,^[10] at least two of the circuits^[11] believe that *American Pipe* tolling should not be extended to a successive class action where certification is denied because the class claim is not suitable for certification. However, those courts would extend *American Pipe* tolling where the certification denial was based on the named plaintiffs not being suitable or adequate representatives.^[12]

The question, however, that was not thoroughly explored was how distinctive those two categories of class denials really are. Is a class representative not suitable only when he or she is deemed an inadequate representative, or does it count when the class representative's claim isn't typical? Indeed, typicality, commonality, and adequacy are often related concepts,^[13] and atypical claims are often also ones where common questions don't predominate.^[14] Indeed, in the briefing in this case, Respondents argued that their failure to show a fraud on the market did not demonstrate that the class was ill-suited for certification and therefore, *American Pipe* tolling should apply. While the court found that individualized questions predominated, Respondent contended that this was necessarily an error of the class representative and class expert and therefore not the type of claim that should be disqualified from having *American Pipe* tolling applied.^[15]

Nevertheless, while these issues were not directly raised, neither side seemed thrilled with the prospect of a compromise position. Respondents cautioned that a middle ground would be difficult in practice, stating, "you would have to look hard at what were the various factors that went into that adequacy" and that this "becomes a much more complicated question."^[16] Petitioner argued that where the statute of limitations has already passed, the adequacy distinction is irrelevant. Petitioner further argued that simply enforcing *American Pipe*'s actual language would in effect moot this issue because it would encourage all class representatives to come forward in the beginning of the case,

and if one representative failed, another would already be in the case to take over.^[17]

3. Won't the other side's position lead to anomalous results?

As is frequently the case, proponents of each side's arguments raise questions about the implications and potentially anomalous results that might be caused by adoption of the other's position.. For example, one series of questions hypothesized a case in which the potential aggregate damages were high but individual damages of any one class member would be quite low (*i.e.*, \$32.00). The questioning Justices wondered whether requiring all individual class members to intervene or file new cases was practical in this type of situation, which in many ways was the prototypical situation for proceeding via class action.^[18] Petitioner shared its view that class actions of this type are still appropriate if timely brought, and that encouraging anyone who wants to bring a class claim to do so at the beginning of the case, rather than after certification was denied, will ultimately strengthen the class representatives' positions, as well as any class actions that might proceed.^[19]

On the other hand, several questions were posed about whether a rule that continues to provide tolling would lead to defendants facing repeated class cases with the same allegations being filed time and time again until the case either settled or finally got a positive certification result.^[20] Respondents asserted that the principle of comity, also referenced in the Supreme Court's decision in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in a similar context, could obviate this concern.^[21] But Petitioner, and at least a few Justices, questioned whether comity could really preclude this result and whether a failure of a district judge to follow and accord comity to a different district judge's class certification decision would qualify as an abuse of discretion—suggesting that relying on comity in this context would provide an ineffective solution.^[22]

CONCLUSION

It is difficult to predict how the U.S. Supreme Court will come out on this complex case, especially given the strong policy arguments for preserving the continued viability of class actions for low value claims, on the one hand, and a desire on the other not to abrogate Congressional judgments about the practical applicability of statutes of limitations. In light of the Court's decision last term in *ANZ Securities*, which emphasized that tolling under *American Pipe* was based on equitable principles, the outcome here may well be driven by the degree to which the Court believes the Ninth Circuit's decision and Respondent's position comport with equitable tolling principles. In any event, we look forward to the Court's decision and the resolution of this important procedural issue.

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

[2] *Cal. Pub. Emps. Ret. Sys. v. ANZ Securities, Inc.*, 137 S.Ct. 2042, 2051 (1917)

[3] TR at 5-6.

[4] TR at 33-34, "[T]he way you synthesis and rationalize these principles is that you say the *American Pipe* Rule does satisfy the classic instances of due diligence [and] extraordinary circumstances, but they do it in a somewhat different way because we are trying to incentivize people not to bring

duplicative claims."

[5] See TR at 6-7.

[7] TR at 34-35.

[8] TR at 11.

[9] See TR at 21-24.

[10] Compare 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

AgriTech, Inc., 857 F.3d 994 (9th Cir. 2017); *Sawyer v. Atlas Heating & Street Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011) (adopting similar preclusion analysis to *Resh*).

[11] See, e.g., *Great Plains Tr. Co. v. Union Pac R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007); *Yang v. Odom*, 392 F.3d 97,111 (3d Cir. 2004).

[12] *Id.*

[13] 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.").

[14] See e.g., *In re SFPP Right-Of-Way Claims*, No. SACV 15-00718 JVS (DFMx), 2017 U.S. Dist. LEXIS 85973, at *50 (C.D. Cal. May 23, 2017) (denying class certification because of typicality and adequacy and noting that in any event, predominance would not be met in connection with the

previously-mentioned deficiencies).

[15] Respondents Br. at 5 ("The failure to establish predominance was a plaintiff-specific failure in an expert report rather than an incurable classwide defect.").

[16] TR at 56.

[17] TR at 14. See also TR at 49 (Justice Gorsuch opining that by ruling against Respondent the effect might be that we would encourage more protective filings that would solve the problem and such that the court would not have to create extraordinary rules extending American Pipe; instead a

new incentive structure would be created to ensure that there were backup class actions available.)

[18] TR at 26-28.

[19] *Id.*

[20] See, e.g., TR at 39.

[21] TR at 40.

[22] TR at 47-48 and 51.

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