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PERSPECTIVE

Supreme Court to weigh tolling for absent class members

By James N. Kramer, Alex Talarides and Michael Wood

Over four decades ago in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties" of a defective class action "had the suit been permitted to continue." Left unclear, however, was whether the statute of limitations is tolled only with respect to individuals' claims or whether a previously absent class member may bring a subsequent class action that would otherwise be time-barred. In the intervening years, the circuits have split, with the 6th, 7th and 9th U.S. Circuit Courts of Appeals holding that *American Pipe* tolls future class actions and the 1st, 2nd, 2rd, 5th, 8th and 11th finding that *American Pipe* tolls only individual claims.

In December of last year, the Supreme Court agreed to review the 9th Circuit's decision in *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017), which held that that statute of limitations was tolled for unnamed members to bring a third putative class action during the pendency of two prior putative class actions. The district court in *Resh* concluded that permitting the *Resh* plaintiffs to bring a third successive class action "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." In reversing the district court, the 9th Circuit emphasized that in allowing individuals like the *Resh* plaintiffs — who were unnamed members of a class that was never certified — to bring what would otherwise be an untimely successive class action was appropriate because there would be "no unfair surprise to defendants" who were on notice not only to the substantive claims at issue but also to the "number and generic identities of the potential plaintiffs." Moreover, the 9th Circuit noted that allowing such individuals to bring a third class action would promote economy of litigation because potential class members could wait to bring their own action, even if they feared that certification may be denied in the then-pending action. The 9th Circuit rejected concerns of "abusive filing of repetitive class actions," which it concluded would be mitigated by hesitation by plaintiffs' counsel to pursue meritless successive suits and by ordinary principles of preclusion and comity.

The Supreme Court's decision in *Resh* could have a profound impact on class actions — particularly in the 1st, 2nd, 3rd, 5th, 8th and 11th Circuits where *American Pipe* is interpreted narrowly.

In contrast, other circuits have focused on the possibility of never-ending class actions effectively eliminating the statute of limitations through a succession of do-overs by would-be named plaintiffs. Two decades ago in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), the 1st Circuit reasoned that "respect for Rule 23 and considerations of judicial economy — which animated [the Supreme Court's decisions in *American Pipe and Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)] dictate[d] that the tolling rules ... not permit plaintiffs to stretch out limitations periods by bringing successive class actions." The court went on to explain that "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely. Permitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants regardless of how many times a court declines to certify the class. This simply cannot be what the *American Pipe* rule was intended to allow, and we decline to embrace such an extension of that rule." Over a decade earlier in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), the 5th Circuit similarly explained that there was "no authority for [the] contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely."

The Supreme Court's decision in *Resh* could have a profound impact on class actions — particularly in the 1st, 2nd, 3rd, 5th, 8th and 11th Circuits where *American Pipe* is interpreted narrowly. Those circuits could see a clear increase in successive class actions should the Court reverse sometimes decades-old circuit precedent.

However, a decision issued a month after the 9th Circuit's *Resh* opinion may, to an extent, lessen *Resh*'s potential impact if it is adopted by the high court. In *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017), the Supreme Court held that *American Pipe*'s tolling rule did not apply to the Securities Act of 1933's threeyear statute of repose — somewhat mitigating the impact — at least for securities claims — of *Resh*. In contrast to statute of limitations, "statutes of repose are enacted to give more explicit and certain protection to defendants" and, in the case of the Securities Act, run from the date of the last culpable act or omission of the defendant. As result, the greatest impact of *Resh* — should it be upheld — may be felt most acutely in other areas, such as in the antitrust and civil-rights context.

But it's important to not overstate the potential "backstop" provided by statutes of repose, given that they are "relatively rare" and equitable tolling is available absent clear congressional intent to the contrary. *Dekalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 397 (2d Cir. 2016). And although *Resh*'s biggest impact may be felt outside of the securities field, ANZ by no means immunizes securities defendants from successive class actions. As *Resh* itself demonstrates, the five-year statutes of repose found in the Securities Exchange Act of 1934 did not protect China Agritech and its managers and directors from the third successful class action at issue because it did not run until 2016 and the *Resh* plaintiffs brought their action in 2014. Nor do statutes of repose provide any comfort to defendants in areas where Congress and many state legislatures have not imposed a limitations period that constitute an absolute bar to new suits, most notably for consumer class actions.

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