

Supreme Court limits tolling for class actions in securities case

(June 12, 2018) - A unanimous U.S. Supreme Court has determined that class-action lawsuits cannot be filed beyond the applicable limitations period even if certification was denied in a prior related class-action suit.

China Agritech Inc. v. Resh et al., No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018).

The ruling reverses and remands the 9th U.S. Circuit Court of Appeals decision to revive a 2014 class-action lawsuit alleging China Agritech Inc. fraudulently overstated its earnings in 2011 in violation of the Securities Exchange Act of 1934. *Resh v. China Agritech Inc.*, 857 F.3d 994 (9th Cir. 2017).

The Exchange Act has a two-year limitations period and a five-year statute of repose, 28 U.S.C.A. § 1658(b).

The appeals panel had held that, under the top court's ruling in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), uncertified class-action lawsuits tolled the limitations period for the proposed class-action.

In *American Pipe* the Supreme Court held that under certain circumstances, the filing of a class action tolls the limitations period for later-filed individual actions brought by prospective class members.

In a June 11 opinion, the nation's highest court disagreed with the 9th Circuit, finding that *American Pipe* does not apply to proposed class actions filed after the limitations period.

"*American Pipe* 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," Justice Ruth Bader Ginsburg's wrote for eight members of the court. "But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations."

Justice Sonya Sotomayor agreed with the result in a concurring opinion that, but said the ruling should not apply to class actions that are not subject to the Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 78u-4.

"Tolling of a statute of limitations is the exception to the rule," **Anthony Lathrop**, a partner with **Moore & Van Allen PLLC** and unaffiliated with the case, said in a statement. "Statutes of limitations exist for a reason # to ensure the timely pursuit of legal claims while evidence and witnesses are readily available and to close the door on potential liability within a timeframe that the legislature deemed appropriate for a particular issue."

"If the class action plaintiffs in China Agritech had prevailed, companies would have faced the possibility of never-ending class-action litigation based on the same issues, even after they successfully defeated class certification," he added.

Ben Feuer of the **California Appellate Law Group LLP** said the decision marks a continued narrowing of class actions. He also was not affiliated with the case.

"*China Agritech v. Resh*, continues the Roberts' court's general hostility to class actions, which the majority of justices view as a boondoggle for lawyers and an unfair drain on corporate resources due to settlement pressures," Feuer said.

"A generation ago, though, class actions were seen as a way of punishing unlawful corporate behavior that unjustly enriched companies by damaging consumers in individually trifling ways, and as a method of reducing caseloads by joining together substantially similar litigation," he noted.

SEC earnings reports

Michael Resh and three other China Agritech investors filed a class-action suit in the U.S. District Court for the Central District of California alleging the fertilizer maker fraudulently overstated earnings reports to the Securities and Exchange Commission from November 2009 to March 2011.

The company's share price dropped almost 10 percent, closing Feb. 3, 2011, at \$9.85 in the wake of a financial analyst report that revealed the alleged earnings overstatements, the suit said.

About two weeks later, hedge fund Bronte Capital issued its own report echoing the earnings allegations, according to the suit. China Agritech's shares fell 15 percent in response, closing at \$7.44 on Feb. 15, 2011, the complaint said.

The suit alleged the company and several officers and directors violated Sections 10(b) and 20(a) of the Exchange Act, [15 U.S.C.A. §§ 78j\(b\) and 78t\(a\)](#).

China Agritech moved to dismiss Resh's suit, arguing it was time-barred because it was filed more than two years after the reports provided notice of the alleged fraud to investors. The reports were published in February 2011, and Resh and the other investors did not sue the company until June 2014.

The plaintiffs countered that two previous lawsuits filed in 2011 and 2013 effectively tolled the limitations period in their case. *Dean v. China Agritech Inc.*, No. 11-cv-1331, *stipulated order of dismissal with prejudice issued* (C.D. Cal. Sept. 20, 2012); *Smyth v. Chang*, No. 13-cv-3008, *stipulated order of dismissal with prejudice issued* (C.D. Cal. Jan. 9, 2014).

American Pipe tolling

U.S. District Judge R. Gary Klausner, citing *American Pipe*, said tolling a limitations period is appropriate in a class action so that potential class members may timely intervene after the court has determined the original plaintiffs are not suitable class representatives.

The judge also noted that the high court, in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), had expanded the tolling principle to include not only those who intervened, but also anyone who filed a new action as an individual plaintiff.

The Resh plaintiffs, however, did not intervene or file a new individual action, the judge said. Instead, they filed a new class-action lawsuit after the limitations period had expired.

The investors appealed the decision to the 9th Circuit, claiming Judge Klausner had incorrectly dismissed the suit as untimely.

The appeals court agreed with the shareholders.

"Permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place," the panel said.

American Pipe limits

China Agritech petitioned the Supreme Court, arguing that the 9th Circuit improperly expanded *American Pipe's* tolling.

The high court agreed and ruled that the investors' suit could not be tolled.

American Pipe tolls individual actions because it is economical to delay them until class certification has been denied, Justice Ginsburg's majority opinion said. Tolling class actions, however, would reduce efficiencies as it is better to have all would-be class representatives come forward early so that the district court can select the best representative, the justices reasoned.

In addition, expanding *American Pipe* tolling to class actions could result in endless litigation, the opinion said.

"Respondents' proposed reading 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," Justice Ginsburg wrote.

By Peter H. Hamner, Esq.

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Date: October 4, 2017

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