The U.S. Supreme Court Takes on the Timeliness of Later-Filed Class Actions

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Under the tolling rule first established by the Supreme Court's decision in *American Pipe and Construction Company v. Utah*, the filing of a class action suspends the statute of limitations as to absent class members until the motion for class certification is denied.[35] But if those absent class members re-file when, without *American Pipe* tolling, their claims would be time-barred, must they do so in an individual capacity or may they bring their claims on behalf of a second putative class?

In December 2017, the United States Supreme Court granted certiorari in a case which may decide precisely that question. Perhaps the most interesting issue raised by the briefing in that case, *China Agritech, Inc. v. Resh*,[36] is whether the case presents the Court with a vehicle for resolving a three-way circuit split, as petitioners urged, or whether it presents an opportunity to confirm, as respondents argued and the recent trend in the appellate courts would suggest, that no conflict at all exists among the circuits as to how to analyze the timeliness of later-filed class actions.

I. THE CASE AT BAR

Resh arises out of a sequence of three separate shareholder class actions against petitioner China Agritech, Inc. ("China Agritech") under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"). As described in the Ninth Circuit decision currently under review by the Supreme Court, all three cases involved the same underlying facts and theory of liability.

The first such case (the "*Dean* Action") was filed in February 2011, eight days after a market research company published a report alleging that China Agritech was no more than a scam that had concealed its "idle factories, minimal investments, and fictitious contracts."[37] According to the report, China Agritech was "not a currently functioning business that was manufacturing products," but rather existed "simply [as] a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management."[38]

[35] 414 U.S. 538 (1974).
[36] No. 17-432.
[37] *Resh v. China Agritech, Inc.*, 857 F.3d 994, 996-97 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 543 (2017)(mem.).
[38] *Id.* at 996.

In May 2012, the district court denied class certification in the *Dean* Action, holding that although the plaintiffs had satisfied the prerequisites of Rule 23(a), they had not established the predominance requirement of Rule 23(b)(3).[39] The district court concluded that, because the plaintiffs in the *Dean* Action had not made the showing of market efficiency required to establish a fraud-on-the-market presumption of reliance, they had to establish individualized reliance to support their claims.[40] After the Ninth Circuit affirmed that decision on appeal, plaintiffs in the *Dean* Action pursued their case as individualized claims until reaching a settlement in September 2012.[41] Following settlement, the district court dismissed the *Dean* Action with prejudice on September 20, 2012.[42]

On October 4, 2012, a second class action complaint (the "*Smyth* Action"), nearly identical to the one in the *Dean* Action, was filed.[43] The district court ultimately denied the plaintiff's motion for class certification in the *Smyth* Action on September 26, 2013, finding a number of deficiencies under Rule 23(a). Specifically, the district court in the *Smyth* Action found that the plaintiffs were not "typical" under Rule 23(a)(3) because their prior relationship with named plaintiffs in the *Dean* Action presented the possibility of a claim preclusion defense that did not apply to unnamed class members, and that the plaintiff and counsel in the *Smyth* Action did not provide adequate representation under Rule 23(a)(4) due to certain procedural issues in the case.[44] On January 8, 2014, the parties agreed to dismiss the *Smyth* Action with prejudice.[45]

In the case now at bar, plaintiff Michael Resh filed a third class action complaint against China Agritech on June 30, 2014 (the "*Resh* Action"), alleging the same Exchange Act claims and the same underlying facts as the plaintiffs in the *Dean* and *Smyth* Actions.[46] China Agritech and an individual defendant moved to dismiss, contending that the Exchange Act's two-year statute of limitations barred the *Resh* Action's class claims.[47] Plaintiffs in the *Resh* Action argued that their class claims were timely because, under the tolling doctrine of *American Pipe* and the subsequent opinion of the Supreme Court in *Crown, Cork & Seal*,[48] the statute of limitations had been tolled during the *Dean* and *Smyth* Actions, such that only 439 days of the two-year statute of limitations had elapsed.[49] The district court disagreed, holding that while the statute of limitations had been so tolled for any *individual* claims brought by the named plaintiffs in the *Resh* Action, the Supreme Court had not addressed whether the same tolling doctrine applied to otherwise untimely *class* claims,[50] and the

[39] *Id.* at 997-98.
[40] *Id.* at 998.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id.* at 999.
[48] *Crown, Cork & Seal Co., Inc. v. Parker* , 462 U.S. 345 (1983).
[49] *Resh*, 857 F.3d at 999.
[50] *Id*.

district court in the *Resh* Action held that such tolling did not apply.[51] Plaintiffs in the *Resh* Action sought reconsideration, arguing that the denials of class certification in the *Dean* and *Smyth* Actions had been the result of individual defects in those cases' putative class representatives, and were not the result of problems relating to the suitability in principle of the class for class treatment.[52] The district court denied the motion for reconsideration and dismissed the remaining defendants.[53]

The Ninth Circuit reversed on appeal, holding that where plaintiffs' individual claims are timely under a tolling doctrine, so too are their same claims brought on behalf a class: "So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action."[54] The Ninth Circuit's conclusion is at the heart of the petition taken up by the Supreme Court.

II. THE CIRCUIT SPLIT—OR LACK THEREOF

The Ninth Circuit is the most recent of the U.S. Courts of Appeal to address the impact of *American Pipe* tolling to subsequently filed class claims. Such cases have followed three "waves" of interpretation, with each successive wave taking a more nuanced approach.

In the first wave of cases, which began shortly after the Supreme Court's decision in *Crown, Cork & Seal* interpreting *American Pipe* tolling, the First,[55] Second,[56] Fifth,[57] and Eleventh[58] Circuits have held (or at least strongly suggested) that the tolling doctrine applies only to subsequently filed individual actions, not to class claims. Those courts have expressed concern that allowing subsequent plaintiffs to "piggyback one class action onto another and thus toll the statute of limitations indefinitely" would invite abuse.[59] For example, the First Circuit explained that if plaintiffs could "stack one class action on top of another and continue to toll the statute of limitations indefinitely," then lawyers would be able "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

[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Id.* at 1005.
[55] *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998).
[56] *Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987). Notably, in *Korwek*, the Second Circuit declined to extend the tolling doctrine to a subsequent class that was identical to a previously proposed class that had been denied certification by the district court, based on anticipated problems of manageability and intraclass conflict. *Id*. at 876. The Second Circuit, however, did not otherwise rule on the specific question of whether a "potentially proper subclass" would be entitled to *American Pipe* tolling and in doing so, left open this possibility. *Id.* at 879.
[57] *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985).
[58] *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994).
[59] *Salazar-Calderon*, 765 F.2d at 1351; *see also Griffin*, 17 F.3d at 359 (quoting *Salazar-Calderon*); *Korwek*, 827 F.2d at 878 (same); *Basch*, 139 F.3d at 11 (same).

how many times a court declines to certify the class. This simply cannot be what the *American Pipe* rule was intended to allow."[60] Consequently, those courts have held that the tolling doctrine under *American Pipe* does not "suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification."[61]

The first appellate court to diverge from the blanket rule suggested by that earliest wave of cases was the Third Circuit, with its 2004 decision in *Yang v. Odom*.[62] In *Yang*, the circuit court held that "*American Pipe* tolling applies to would-be class members who file a class action following the denial of class certification due to Rule 23 deficiencies of the class representative," but not to "sequential class actions where the earlier denial of certification was based on a Rule 23 defect in the class itself."[63] The Third Circuit rejected a more categorical rule against applying *American Pipe* tolling to subsequent class claims because "*American Pipe* tolling would unquestionably apply were the plaintiffs here to bring individual actions, [and] it would be at odds with the policy undergirding the class action device, as stated by the Supreme Court, to deny plaintiffs the benefit of tolling, and thus the class action mechanism, when no defect in the class itself has been shown.[64] In reaching its decision, the *Yang* court found "[p]ertinent" the Supreme Court's own observation in *Crown, Cork & Seal* that "because the filing of a class complaint puts a defendant on notice 'of the need to preserve evidence and witnesses respecting the claims of all of the members of the class, . . . tolling the statute of limitations thus creates no potential for unfair surprise, *regardless of the method class members choose to enforce their rights upon denial of class certification*.[65] The Third Circuit's rationale in *Yang* was adopted three years later by the Eighth Circuit.[66]

A third wave of cases, which are yet more permissive in applying *American Pipe* tolling to subsequently filed class actions, intertwines with recent Supreme Court precedent concerning Rule 23 more generally.

In 2011, the Seventh Circuit ruled in *Sawyer v. Atlas Heating and Sheet Metal Works, Inc.* that the appellate courts' previous decisions on the issue are not properly understood as tolling cases at all, but rather concern "the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23."[67] In other words, the Seventh Circuit views the first two waves of cases as posing issues of collateral estoppel and comity, in which "a decision declining to certify a class in the first suit binds all class members, who cannot try to evade that decision by asking for a second opinion from a different judge" and

[60] *Basch*, 139 F.3d at 11. In *Basch*, the First Circuit proceeded to quote Justice Blackmun's concurrence in *American Pipe*, in which he stressed the Court's tolling rule "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." *Id*. at 12 (quoting *American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring)).
[61] *Korwek*, 827 F.2d at 879.
[62] 392 F.3d 97 (3d Cir. 2004).
[63] *Id.*at 104.
[64] *Id*. at 106.
[65] *Id*. at 103 (quoting *Crown, Cork & Seal*, 462 U.S. at 353 (modification, ellipsis, and emphasis in *Yang*)).
[66] *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986 (8th Cir. 2007).
[67] 642 F.3d 560, 563 (7th Cir. 2011).

who must instead "abide by the first court's understanding and application of Rule 23."[68] The Seventh Circuit further held that a more categorical rule, such as the Eleventh Circuit's opinion in *Griffin*, could not be reconciled with the Supreme Court's 2010 decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[69] which held that Rule 23 alone governs whether an otherwise viable claim may be maintained under the class action device.[70]

In *Phipps v. Wal-Mart Stores, Inc.*, the Sixth Circuit adopted the Seventh Circuit's view that no true conflict exists among the circuits on the question of whether a second case may proceed as a class action after class certification is denied in the first case.[71] Like the Seventh Circuit, the *Phipps* court relied on the Supreme Court's *Shady Grove* decision that Rule 23 alone controls whether a claim viable on an individual basis may also be maintained on behalf of a class.[72] But the *Phipps* court relied on two additional bases for its decision. First, it explained that under the Supreme Court's reaffirmation of the rule against non-party preclusion in *Smith v. Bayer Corp.*,[73] which was decided shortly after *Sawyer*, the *Phipps* defendants' concerns about re-litigation of issues "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling."[74] The *Phipps* court "follow[ed] the Supreme Court's lead [in *Smith* to] trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing" concerns about serial relitigation.[75] Second, it reasoned that any result to the contrary would result in multiplicative litigation and motion practice incompatible with the efficiency policy goals underlying Rule 23.[76]

Finally, in reaching the decision now under review by the Supreme Court, the Ninth Circuit in *Resh* relied not just on the Supreme Court's decisions in *Shady Grove* and *Smith*, but also its 2016 decision in *Tyson Foods, Inc. v. Bouaphakeo*.[77] In *Tyson*, the Supreme Court held that, under the Rules Enabling Act's "pellucid instruction that use of the class device cannot 'abridge . . . any substantive right,'" a plaintiff who could use statistical sampling

[68] *Id*. at 563-64.
[69] 559 U.S. 393 (2010).
[70] *Sawyer*, 642 F.3d at 564; *see also Shady Grove*, 559 U.S. at 398-99 ("By its terms [Rule 23] creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action.").
[71] *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015) ("[S]ubsequent class actions timely filed under *American Pipe* are not barred. Courts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation, but we would eviscerate Rule 23 if we were to approve the blanket rule advocated by Wal-Mart that *American Pipe* bars *all* follow-on class actions.").
[72] *Id*.
[73] 564 U.S. 299 (2011).
[74] *Phipps*, 792 F.3d at 653.
[75] *Id*.; *see also Smith*, 564 U.S. at 317 ("[O]ur legal system generally relies on principles of *stare decisis* and comity among courts to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs. We have not thought that the right approach (except in the discrete categories of cases we have recognized) lies in binding nonparties to a judgment.").
[76] *Phipps*, 792 F.3d at 652-53 ("If each unnamed member of a class that is not certified were barred from ever again proceeding by class action, each class member would have an incentive to multiply litigation by filing protective suits or motions to intervene at the outset of the initial class action suit. The weight of individual filings would strain the federal courts. This is precisely the scenario that 'Rule 23 was designed to avoid' in cases where adjudication of claims by class action is a fair and efficient method of resolving a dispute." (quoting *American Pipe*, 414 U.S. at 551)).
[77] 136 S. Ct. 1036 (2016).

evidence to prove an individual claim could also use such evidence to prove liability on behalf of a class.[78] Although the *Resh* court recognized that "statutes of limitation occupy a no-man's land between substance and procedure," and therefore did not treat *Bouaphakeo* as dispositive, that decision "nonetheless reinforce[d the court's] conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred."[79]

III. CONCLUSION

The approach adopted by the Sixth, Seventh, and Ninth Circuits would harmonize case law among the circuits and the Supreme Court's recent decisions addressing Rule 23 more generally. At the same time, this more permissive approach would heighten concerns among defendants that the protections offered by *stare decisis*, collateral estoppel, and comity will be unable to control the potential costs presented by serial class litigation. Alternatively, if the petitioners in *Resh* succeed in persuading the Court to view the existing case law as three disparate, irreconcilable lines of interpretation among the courts of appeal, the Court will face the difficult task of reconciling petitioners' preferred approach with the Court's own more recent interpretations of Rule 23.

[78] *Id*. at 1046 (quoting 28 U.S.C. § 2072(b)).
[79] *Resh*, 857 F.3d at 1004.