

## CLIENT ALERT

# Supreme Court Ends ‘Stacked’ Class Actions

June 12, 2018

### AUTHORS

**Elizabeth J. Bower** | **Sameer Advani** | **Cole Wogoman**

---

On June 11, 2018, the United States Supreme Court put an end to perpetual, serial class actions by ruling that the tolling established in *American Pipe v. Utah*, 414 U.S. 538 (1974), does not apply to successive putative class actions commenced after the statutory deadline to bring the claims has passed. While non-named members of a putative class that was denied certification can pursue their own individual claims after the statute of limitations has expired, this ruling prohibits those same individuals from filing another class action.

In *American Pipe*, the Court held that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. Thus, if class certification were denied, members of the failed class could timely intervene as individual plaintiffs in the lawsuit, now pending as an individual action, even after the statute of limitations had run. It reasoned that a contrary rule “would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.” The Court said without tolling, “[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.” In a later decision in 1983, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, the Court extended the *American Pipe* tolling rule to apply to putative class members who wanted to file their own individual lawsuits after denial of class certification. *American Pipe* has been relied upon by many putative class members to justify their late-filed claims. Courts of Appeals for the Sixth and Ninth Circuits<sup>1</sup> interpreted *American Pipe* to allow successive, otherwise stale class actions, while the First, Second, Fifth, and Eleventh Circuits<sup>2</sup> limited *American Pipe* tolling to individual claims.

---

<sup>1</sup> *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652-53 (6th Cir. 2015); *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir. 2017), *rev'd and remanded*, No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018).

<sup>2</sup> *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987); *Salazar Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994).

---

---

## Supreme Court Ends ‘Stacked’ Class Actions

The Supreme Court heard *China Agritech, Inc. v. Resh*, No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018), to resolve this Circuit split. The case presented the third class action brought on behalf of purchasers of China Agritech’s common stock, alleging violations of the Securities Exchange Act of 1934. The first two class actions were timely filed, but both were denied class certification. Respondent Michael Resh, who did not seek lead-plaintiff status in the earlier actions, filed this class action in 2014, a year and a half after the statute of limitations had expired. The District Court dismissed the class complaint as untimely, holding that the earlier two actions did not toll the time to initiate class claims. The Ninth Circuit reversed, holding that the reasoning of *American Pipe* extends to successive class action claims. On appeal to the Supreme Court, the question was whether a member of a failed class action can use the *American Pipe* tolling rule to start a new class action after the statute of limitations had expired.

Justice Ginsburg’s majority opinion, joined by all except Justice Sotomayor,<sup>3</sup> reasoned that allowing unnamed plaintiffs to file successive class actions was not in line with the Court’s rationale in *American Pipe*. “There is little reason to allow plaintiffs who passed up opportunities to participate in the first (and second) round of class litigation to enter the fray several years after class proceedings first commenced.” In comparing the case to *American Pipe*, Justice Ginsburg reasoned, “[t]he ‘efficiency and economy of litigation’ that support tolling of individual claims . . . do not support maintenance of untimely successive class actions; any additional class filings should be made early on, soon after the commencement of the first action seeking class certification.” As opposed to individual claims, in which the economy of litigation favors delaying resolution of the claims until after a court has decided whether the claims should be resolved as a class, the Court held that both Federal Rule of Civil Procedure 23 and efficiency of litigation support early assertion and resolution of claims in which class certification is appropriate. Allowing subsequent assertions that the case should be certified as a class would markedly decrease efficiency, and might even allow the statute of limitations to be extended indefinitely. According to the Court, “[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*.”

In so holding, the Court drew a clear line establishing the limits of the *American Pipe* tolling rule and in doing so clarified the rule’s purpose and objective. The Court’s ruling provides certainty and much-needed clarity on the applicability of the tolling rule for litigants involved in class actions. Following *China Agritech*, the law is now clear that once an action is denied class certification and the statute of limitations has run, individual class members may return to court to pursue their own claims, but will be unable to bring a new class action.

---

<sup>3</sup> Justice Sotomayor concurred with the judgment as it relates to class actions under the Private Securities Litigation Reform Act of 1995.

---

## Supreme Court Ends ‘Stacked’ Class Actions

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

---

**Elizabeth J. Bower**

202 303 1252

[ebower@willkie.com](mailto:ebower@willkie.com)

**Sameer Advani**

212 728 8587

[sadvani@willkie.com](mailto:sadvani@willkie.com)

**Cole Wogoman**

202 303 1167

[cwogoman@willkie.com](mailto:cwogoman@willkie.com)

Copyright © 2018 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at [www.willkie.com](http://www.willkie.com).