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## Litigation & Arbitration Group Client Alert: Supreme Court Holds That *American Pipe* Tolling Does Not Apply to Successive Class Action Claims

On June 11, 2018, the United States Supreme Court issued its much anticipated decision in *China Agritech, Inc. v. Michael H. Resh, et. al.*, holding that upon denial of class certification, a putative class member may not commence a class action anew beyond the time allowed by the applicable statute of limitations. *China Agritech, Inc. v. Michael H. Resh, et. al.*, No. 17-43, slip op. 2. The Supreme Court's decision clarifies its prior decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), in which it held that the statute of limitations is tolled for *individual* claims of purported class members while a class action is pending, by making clear that its holding in *American Pipe* does not apply to successive class actions.

### BACKGROUND TO THE DECISION

In *American Pipe* the Court held that the commencement of a class action tolls the running of the statute of limitations for all purported members of a class that make timely motions to intervene after a denial of class certification. 414 U.S., at 553. This doctrine, known as *American Pipe* tolling, was designed to promote efficiency by removing the need for individual class members "to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.*

The Court's subsequent ruling in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) clarified the tolling rule, holding that it applies not only to those who move to intervene, but also to class members filing subsequent individual claims, thus avoiding "a needless multiplicity of actions" by class members seeking to preserve their claims. *Id.* at 351.

*American Pipe* and *Crown, Cork*, however, only addressed whether *individual* claims of putative class members were tolled. The Courts of Appeal had since split on whether *American Pipe* tolling applied to untimely *class actions* brought subsequent to denial

of class certification. Compare e.g. *Philpps v. Wal-Mart Stores, Inc.*, 792 F. 3d 637, 652-653 (6th Cir. 2015) (*American Pipe* tolling applies to subsequent class actions) with *Korwek v. Hunt*, 827 F. 2d 874, 849 (2d Cir. 1987) (*American Pipe* does not apply to subsequent class actions).

**CHINA AGRITECH, INC. V. MICHAEL H. RESH, ET. AL.**

*China Agritech* involved three class actions brought on behalf of purchasers of petitioner China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934. All three actions included materially identical allegations that China Agritech engaged in fraud and misleading business practices, causing the company's stock price to plummet when brought to light. The Exchange Act has a two-year statute of limitations, and a five-year statute of repose. 28 U.S.C. §1658(b).

The first class action complaint was filed in February 2011, at the start of the two-year limitation period. In May 2012, the district court denied class certification. In September of 2012, the action settled, and the lawsuit was dismissed.

In October 2012, the same counsel that brought the first lawsuit filed a new complaint with a new set of plaintiffs. Again, the District Court denied certification, the individual plaintiffs settled their claims, and the case was voluntarily dismissed.

In June 2014, a year and a half after the expiration of the statute of limitations period, Respondent Michael Resh filed a third class action. Resh had not sought lead-plaintiff status in either of the prior litigations. The District Court dismissed Resh's action, holding that it was untimely because the prior actions did not toll the limitations period for class claims. The Ninth Circuit reversed, holding that tolling successive class actions would, among other things, advance the objectives of *American Pipe* and would not cause unfair surprise to defendants.

The Supreme Court, recognizing the Circuit split, granted *certiorari* to determine whether successive class claims that were otherwise untimely, could be salvaged by *American Pipe* tolling. The Court unanimously held they could not, reversing the Ninth Circuit. Justice Ginsburg wrote the opinion of the Court, joined by seven other justices. Justice Sotomayor concurred in the judgment.

Reasoning that "efficiency favors early assertion of competing class representative claims" so that the district court can select the best plaintiff to be a class representative, the Court explained that "any additional class filings should be made early on, soon after the commencement of the first action seeking class certification." *China Agritech*, No. 17-43, slip op. 6-7. The Court further explained that Fed. R. Civ. P. 23, which applies to class actions, encourages requests for class certification sooner rather than later, and that district courts have sufficient mechanisms to allow them to manage

multiple proposed class plaintiffs. *China Agritech*, No. 17-43, slip op. 14. In contrast, the opposite result—permitting tolling for successive class claims—“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[,]” essentially creating a risk that plaintiffs’ lawyers could extend a statute of limitations almost indefinitely until they found a court willing to certify a class. *Id.* at 10.

Justice Sotomayor’s concurrence joined in the result, although she noted that she would have limited the decision to class actions arising under the Private Securities Litigation Reform Act—which governed the underlying case in *China Agritech*—and not all class actions.

### IMPLICATIONS

While the full implications of *China Agritech* remain to be seen, two observations are worth noting.

*First*, *China Agritech* may encourage additional parties to file protective class actions or intervene early on in purported Class Actions in an attempt to be named the lead plaintiff or co-lead plaintiff and preserve the timeliness of their claims, should the initial filing plaintiff later be found to be an inadequate representative of the class. Note that the Supreme Court addressed the potential for procedural complexity under this rule, but found there was “little reason to think that protective class filings will substantially increase” because several Circuits have previously prohibited *American Pipe* tolling for successive class actions, and there had been no showing that courts in those Circuits experienced a disproportionate number of duplicative filings. *Id.* at 12-13.

*Second*, *China Agritech* should provide some protection to defendants in class actions. Defendants will now face a lower risk of follow-on class actions that, prior to the Supreme Court’s decision, would have otherwise been permitted to proceed in certain jurisdictions despite their untimeliness. While *American Pipe* tolling will still apply for parties seeking to bring successive individual claims, successive class plaintiffs will have applicable statutes of limitations measured from the date of the successive complaint, potentially reducing both liability and the scope of claims brought.

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Please feel free to discuss any aspects of this Alert with your regular Milbank contacts or any of the members of our Litigation and Arbitration Group.

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