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The Erosion Of American Pipe Tolling

By **Meghan Summers** (June 26, 2018, 11:32 AM EDT)

Meghan Summers

The U.S. Supreme Court's decisions in California Public Employees' Retirement System v. ANZ Securities Inc.[1] and China Agritech Inc. v. Resh,[2] in which the court held that American Pipe class action tolling applies only to statutes of limitation and not statutes of repose, and only for purposes of filing an individual suit rather than a subsequent class action, have significantly diminished American Pipe's utility to absent class members. In the wake of these decisions, absent class members can no longer rely on the filing of a class action to safeguard their interests. Rather, it is now necessary for them to make opt-out decisions early in the litigation process, and to file individual suits in order to ensure that they have a viable avenue for recovery.

American Pipe Tolling

In American Pipe & Construction Co. v. Utah,[3] the Supreme Court held that the filing of a timely class action complaint commences the action for all class members and tolls the running of the statute of limitations.[4] Once a class action is commenced, this doctrine, known as American Pipe tolling, pauses the statute of limitations on the claims of all purported class members until either (a) class certification is denied, or (b) the class member in question opts out of the class.[5]

In crafting the American Pipe tolling rule, the Supreme Court determined that such tolling was necessary for the proper application of Rule 23 of the Federal Rules of Civil Procedure. Specifically, the court reasoned that Rule 23 was designed to "avoid, rather than encourage, unnecessary filing of repetitious papers and motions,"[6] and therefore, requiring absent class members to "individually meet the timeliness requirements" would result in "precisely the multiplicity of activity which Rule 23 was designed to avoid."[7] Notably, the court also held that as a result of American Pipe tolling, absent class members need not "take note of the suit ... or exercise any responsibility with respect to it" until a decision on class certification has been rendered.[8]

American Pipe Tolling and Statutes of Repose

In the 37 years following American Pipe, courts routinely applied American Pipe tolling to all limitations periods, including the subset of limitations periods known as statutes of repose.[9] This was the case despite the Supreme Court's 1991 decision in Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson,[10] in which the court held that statutes of repose could not be equitably tolled.[11] In doing so, courts

reasoned that Lampf's bar on equitable tolling of statutes of repose was inapplicable because unlike the tolling at issue in Lampf, American Pipe tolling was legal or statutory, rather than equitable in nature, because it was based on an interpretation of the statutorily enacted Rule 23.[12]

However, in 2011, the Southern District of New York became the first to reject the premise that American Pipe was legal tolling and refused to apply such tolling to the Securities Act's repose period.[13] In the years that followed, the circuit courts became divided over the issue, with the Tenth and Federal Circuits permitting American Pipe tolling of statutes of repose,[14] and the Second, Sixth and Eleventh Circuits forbidding it.[15]

On June 26, 2017, in ANZ Securities,[16] the Supreme Court resolved the circuit split, holding that American Pipe tolling is a form of equitable tolling based on "the judicial power to promote equity, rather than to interpret and enforce statutory provisions."[17] Thus, the court determined that while the filing of a class action tolls the statute of limitations on class members' claims, the statute of repose on those claims continues to run. It so held despite arguments that refusing to apply American Pipe tolling to statutes of repose would lead to an increase in protective filings, thus creating the exact inefficiencies that American Pipe and Rule 23 were designed to avoid.[18]

American Pipe Tolling and Subsequent Class Actions

Another question that has divided the circuits over the years is whether American Pipe tolling can be used to toll the statute of limitations when a plaintiff files a subsequent class action (rather than an individual suit) following denial of class certification. The First, Second, Fifth, and Eleventh Circuits have held that American Pipe cannot be used to toll the statute of limitations in a subsequently filed class action.[19] The Third and Eighth Circuits, however, have held that American Pipe can toll the statute of limitations in a subsequently filed class action, but only where certification has been denied due to the lead plaintiff's deficiencies and not where certification has been denied because the claims are unsuitable for class treatment.[20] More recently, the Sixth, Seventh, and Ninth Circuits adopted an even broader view, holding that American Pipe tolling permits the filing of any subsequent class action, regardless of the reason for the court's denial of class certification.[21]

On June 11, 2018, in China Agritech,[22] the Supreme Court further reduced American Pipe's scope, holding that American Pipe can never be used to toll statutes of limitation for purposes of filing subsequent class suits after the limitations period has expired.[23] Rather, American Pipe only tolls the statute of limitations insofar as a putative class member sues individually after denial of class certification.[24] In so holding, the Supreme Court reasoned that absent class members who commence a new class suit after the limitations period expires cannot be considered "diligent," and therefore cannot avail themselves of American Pipe tolling.[25] This new diligence requirement represents a marked departure from American Pipe itself, in which the Supreme Court expressly refused to apply a different rule to class members "who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings" in failing to file suit.[26]

Implications for Absent Class Members

Taken together, the ANZ Securities and China Agritech decisions mean that absent class members can no longer do as the American Pipe court instructed and wait until a decision on class certification has been rendered to opt out and pursue their claims individually. Rather, they must be "diligent" and file individual suits early on in the class litigation. Those who do not run the risk that their claims will be time-barred by the time class certification is decided. Indeed, approximately 45 percent of the class

certification decisions in securities class actions between 2000 and 2017 were reached more than three years after the suit's commencement.[27] In those cases, therefore, any Securities Act claims, which carry a one-year limitations period and a three-year repose period,[28] would have been time-barred by the time class certification was decided. Moreover, any Section 10(b) claims, which carry a two-year limitations period and a five-year repose period,[29] would have been time-barred for purposes of filing a subsequent class suit, and would also likely have been time-barred, in whole or in part, for purposes of filing an individual suit as well.[30]

Accordingly, where a securities class action is strong on the merits, it is crucial for absent class members with significant losses to consider opting out as soon as possible. Although the Supreme Court downplayed concerns that limiting American Pipe's reach would lead to an increase in protective filings, many investors have already begun to file individual cases long before the opt-out deadline in order to protect their rights. For example, in In re Petrobras Securities,[31] approximately 500 investors filed individual cases alongside the class action complaint because the statute of repose period was already expiring on many of the otherwise actionable misstatements.[32] Moreover, at least 29 individual suits have been filed since 2016 alongside a pending securities class action against Valeant Pharmaceuticals International Inc. in the District of New Jersey. Going forward, investors must continue to file opt-out cases early on in the class litigation in order to adequately protect their interests.

Meghan Summers is a partner at Kirby McInerney LLP.

Disclosure: The author was counsel for the plaintiffs in North Sound Capital LLC v. Merck & Co. Inc., in which the defendants appealed the district court's decision to apply American Pipe tolling to the Exchange Act's statute of repose. While the appeal was pending, the Supreme Court handed down its decision in ANZ Securities and the Third Circuit thereafter granted the defendants' appeal.

[1] 137 S. Ct. 2042 (2017).

[2] No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018).

[3] 414 U.S. 538 (1974).

[4] See id. at 550, 553.

[5] See Crown Cork & Seal Co. Inc. v. Parker, 462 U.S. 345, 353-54 (1983); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 & n.13 (1974).

[6] 414 U.S. at 550.

[7] Id. at 550-51.

[8] See id. at 552; see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809-11 (1985) ("[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course."); McKowan Lowe & Co. Ltd. v. Jasmine Ltd., 295 F.3d 380, 384 (3d Cir. 2002) (American Pipe is

"protective of passive, even unwitting, members of the class").

[9] Statutes of repose are generally considered to be a subset or subcategory of statutes of limitation. See Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan Inc., 764 F.3d 1199, 1235 (10th Cir. 2014); Caviness v. DeRand Res. Corp., 983 F.2d 1295, 1300 n.7 (4th Cir. 1993); Fed. Hous. Fin. Agency v. UBS Ams. Inc., 712 F.3d 136, 142-43 (2d Cir. 2013). However, unlike ordinary statutes of limitation, which run from accrual or discovery of a plaintiff's cause of action, statutes of repose run from the occurrence of a specific event, and mandate that no cause of action exists beyond a certain point, even if the cause of action has not yet accrued. See CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2187 (2014). Accordingly, statutes of repose are often referred to as "substantive" because they affect the availability of the underlying right, whereas ordinary statutes of limitation are considered "procedural" because they merely limit a plaintiff's remedy. See P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004).

[10] 501 U.S. 350 (1991).

[11] See id. at 363.

[12] See, e.g., Joseph v. Wiles, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (American Pipe is "legal rather than equitable" because it "serves the purposes of Rule 23"); State Farm Mut. Auto Ins. Co. v. Boellstorff, 540 F.3d 1223, 1234 (10th Cir. 2008) (same); Bright v. United States, 603 F.3d 1273, 1279, 1287-88 (Fed. Cir. 2010) (American Pipe is "statutory" tolling based on "the [Supreme] Court's interpretation of Rule 23," not "equitable tolling"); Arctic Slope Native Ass'n Ltd. v. Sebelius, 583 F.3d 785, 791 (Fed. Cir. 2009) (same); Stone Container Corp. v. United States, 229 F.3d 1345, 1354 (Fed. Cir. 2000) (same); Hatfield v. Halifax PLC, 564 F.3d 1177, 1188 (9th Cir. 2009) ("[T]he class-action tolling discussed in American Pipe and Crown is a species of legal tolling, not equitable tolling.").

[13] See Footbridge Ltd. Trust v. Countrywide Fin. Corp., 770 F. Supp. 2d 618, 624-27 (S.D.N.Y. 2011).

[14] See Joseph, 223 F.3d; State Farm Mut. Auto Ins. Co., 540 F.3d; Bright, 603 F.3d; Arctic Slope Native Ass'n, Ltd., 583 F.3d; Stone Container Corp., 229 F.3d.

[15] See Police & Fire Ret. Sys. of Detroit v. IndyMac MBS Inc., 721 F.3d 95 (2d Cir. 2013); Stein v. Regions Morgan Keegan Select High Income Fund Inc., 821 F.3d 780 (6th Cir. 2016); Dusek v. JPMorgan Chase & Co., 832 F.3d 1243 (11th Cir. 2016).

[16] 137 S. Ct. 2042.

[17] Id. at 2051-52.

[18] Id. at 2054-55.

[19] See Basch v. Ground Round, 139 F.3d 6, 11-12 (1st Cir. 1998); Griffin v. Singletary, 17 F.3d 356, 359 (11th Cir. 1994); Korwek v. Hunt, 827 F. 2d 874, 877 (2d Cir. 1987); Salazar-Calderon v. Presidio Valley Farmers Ass'n, 765 F.2d 1334, 1351 (5th Cir. 1985).

[20] See Yang v. Odom, 392 F.3d 97, 111 (3d Cir. 2004); see also Great Plains Trust v. Union Pacific R.R. Co., 492 F.3d 986, 997 (8th Cir. 2007).

[21] See Sawyer v. Atlas Heating & Sheet Metal Works, 642 F.3d 560 (7th Cir. 2011); Phipps v. Wal-Mart Stores Inc., 792 F.3d 637 (6th Cir. 2015); Resh v. China Agritech Inc., 857 F.3d 994 (9th Cir. 2017).

[22] See No. 17-432, 2018 WL 2767565 (U.S. June 11, 2018).

[23] See id. at *3.

[24] See id.

[25] See id. at *7.

[26] See 414 U.S. 538, 552 (1974).

[27] See Stefan Boettrich & Svetlana Starykh, NERA Economic Consulting, Recent Trends in Securities Class Action Litigation: 2017 Full-Year Review 21 (Jan. 29, 2018).

[28] See 15 U.S.C. § 77m.

[29] See 28 U.S.C. § 1658(b).

[30] Section 10(b)'s five-year repose period begins to run on the date of the alleged misrepresentation or omission. See, e.g., In re Exxon Mobil Corp. Secs. Litig., 500 F.3d 189, 201 (3d Cir. 2007). Accordingly, where 10(b) claims are based in whole or in part on misrepresentations or omissions that occurred more than five years before denial of class certification, absent class members are left with no option for recovery.

[31] 862 F.3d. 250 (2d Cir. 2017).

[32] See Brief of Defendants-Appellants Petróleo Brasileiro S.A.-Petrobras at *6, Univs. Superannuation Scheme Ltd. v. Petroleo Brasileiro SA-Petrobras, No. 16 Civ. 1914, 2016 WL 3971814, (2d Cir. filed July 21, 2016).