

First Circuit Confirms *American Pipe* Tolling Does Not Apply to Successive Class Claims

Last year, the Supreme Court of the United States, in *China Agritech, Inc. v. Resh*,¹ resolved the question of whether, after the dismissal of a putative class action, an absent class member could rely on the tolling doctrine established in *American Pipe & Construction Co. v. Utah*² to file a successive putative class action claim after the statute of limitations had lapsed. The Court held that plaintiffs could not do so because *American Pipe* tolling applies only to a subsequently-filed individual claim, *not* a class action claim. Uncertainty remained, however, as to whether the bar on successive class action claims was limited to situations where the previous class action was dismissed at the class certification stage, as was the case in *China Agritech*. On January 30, 2019, in *In re Celexa and Lexapro Marketing and Sales Practices Litigation*,³ the United States Court of Appeals for the First Circuit, the first federal appellate court to address this question, confirmed that *China Agritech*'s bar on successive class actions is not so limited and that it imposes a categorical bar on successive class actions.

I. Background

The Supreme Court established in *American Pipe* that the filing of a putative class action tolls the statute of limitations for all absent class members so that they may intervene if the class fails to gain certification. In *Crown, Cork & Seal Co. v. Parker*, the Court clarified that *American Pipe*'s tolling rule also applies to putative class members who, after denial of class certification, "prefer to bring an individual suit rather than intervene."⁴ The Court left unresolved the question of whether *American Pipe* tolling applies to subsequently-filed class claims, and a split developed within the Courts of Appeals on this point.⁵ To resolve the issue, the Supreme Court granted certiorari in *China Agritech*.⁶

In *China Agritech*, plaintiff Michael Resh sought to bring a putative class action on behalf of purchasers of China Agritech's common stock, alleging violations of the Securities Exchange Act of 1934.⁷ Although Resh filed his lawsuit after the two-year statute-of-limitations period had lapsed, he argued his claims were tolled by the filing of two earlier, materially identical lawsuits that had been denied class certification.⁸ The District Court dismissed Resh's claims on statute-of-limitations grounds reasoning that *American Pipe* did not apply to a successive putative class action.⁹ The Ninth Circuit Court of Appeals reversed and found that the reasoning of *American Pipe* extends not only to individual claims

¹ ___ U.S. ___, 138 S. Ct. 1800, 201 L.Ed.2d 123 (2018).

² 414 U.S. 538 (1974).

³ ___ F.3d ___, 2019 WL 364019 (1st Cir. Jan. 30, 2019) ("*In re Celexa*").

⁴ *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

⁵ *China Agritech*, 138 S. Ct. at 1805-06.

⁶ *Id.* at 1805.

⁷ *Id.* at 1804.

⁸ *Id.* at 1805.

⁹ *Resh v. China Agritech, Inc.*, 2014 WL 12599849, at *3-5 (C.D. Cal. Dec. 1, 2014).

but to putative class claims too.¹⁰ The Supreme Court granted certiorari and overruled the Ninth Circuit holding that upon the denial of class certification, a member of the putative class may not file a putative class action anew if the claims are untimely.¹¹

The Supreme Court relied on two policy reasons for distinguishing between the ability of an absent class member to file a successive individual claim as opposed to a putative class claim.

First, the efficiency and economy-of-litigation concerns that guided the Court’s decision in *American Pipe* were not present in the context of a successive putative class action. As the Court explained, “*American Pipe* tolls the limitation period for individual claims because economy of litigation favors delaying those claims until after a class-certification denial. If certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually. If certification is denied, only then would it be necessary to pursue claims individually.”¹² In contrast, “efficiency favors early assertion of competing class representative claims” because it allows “the district court [to] select the best plaintiff with knowledge of the full array of potential class representatives and class counsel.”¹³

Second, the Court was concerned that were it to extend *American Pipe* tolling to successive class action claims, it would lead to indefinite extensions of the statute of limitations. As the Court explained, “[t]he time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless.”¹⁴ This is because “as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation,” which “would allow the statute of limitations to be extended time and again.”¹⁵

II. *In re Celexa*

After *China Agritech*, lower courts were presented with the question of whether the bar on successive class actions applied only where a prior class action had been dismissed after class certification. The ambiguity appears to have arisen, in part, because of the way the Supreme Court framed the issue. While the question presented in *China Agritech* was limited to whether *American Pipe* tolling applies to successive putative class actions filed upon the denial of class certification,¹⁶ the Court’s opinion suggested its holding applied regardless of whether a putative class was dismissed prior to certification. As the Court explained, it granted certiorari in order to address “a division of authority among the Courts of Appeals” on the issue of “whether otherwise-untimely successive class claims may be salvaged by

¹⁰ *Resh v. China Agritech, Inc.*, 857 F.3d 994, 1004 (9th Cir.).

¹¹ *China Agritech*, 138 S. Ct. at 1804.

¹² *Id.* at 1806-07.

¹³ *Id.* at 1807.

¹⁴ *Id.* at 1808-09.

¹⁵ *Id.* at 1808.

¹⁶ *Id.* at 1804-05.

American Pipe tolling.”¹⁷ And it answered that question, by finding that “*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. But *American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations.”¹⁸ Justice Sotomayor’s concurring opinion was consistent with this reading, stating the Court had established “a blanket no-tolling-of-class-claims-ever-rule.”¹⁹

The First Circuit addressed the issue in *In re Celexa*, the first Court of Appeal to do so.²⁰ In *In re Celexa*, plaintiff Painters and Allied Trades District Council 82 Health Care Fund (“Painters”) brought a class action lawsuit against Forest Pharmaceuticals, Inc. and Forest Laboratories, Inc. (“Forest”) on behalf of health-insurance companies and health plans that had paid for or reimbursed off-label pediatric prescriptions of specific drugs.²¹ Forest moved to dismiss Painters’ claims on the ground that the statute of limitations had passed, but Painters argued that the statute of limitations was tolled under *American Pipe* by two class actions that had previously been filed by other plaintiffs but dismissed prior to class certification.²² The District Court found that the previous lawsuits tolled Painters’ claims,²³ but declined to certify Painters’ proposed class on the ground that Forest’s limitations defense would require plaintiff-specific evidence and individualized inquiries.²⁴

The First Circuit, in a unanimous decision, upheld the District Court’s denial of class certification but for different reasons. Relying on *China Agritech*, the First Circuit held that *American Pipe* tolling does not apply to successive putative class actions and, therefore, “a putative class member may not commence a class action anew beyond the time allowed by the untolled statute of limitations.”²⁵ The First Circuit rejected Painters’ argument that *China Agritech*’s limit on *American Pipe*’s tolling rule applies only to class action lawsuits that were brought after the denial of class certification. The Court explained that although “the Supreme Court granted certiorari in that case to answer the narrow question of whether a putative class member may commence a class action beyond the limitations period upon the district court’s denial of a request for class certification filed within the statute of limitations, the Court proceeded

¹⁷ *Id.* at 1805-06.

¹⁸ *Id.* at 1804.

¹⁹ *Id.* at 1814 (Sotomayor, J., concurring).

²⁰ Prior to *In re Celexa*, at least one district court addressed the same question and reached the same conclusion as the First Circuit. See *Practice Management Support Services, Inc. v. Cirque du Soleil Inc.*, 2018 WL 3659349, at *3-5 (N.D. Ill. Aug. 2, 2018) (“If the Supreme Court wanted to make its holding contingent on the reason why the earlier class action was dismissed, it would have done so. . . . Nor do the Supreme Court’s two policy rationales supporting its distinction between successive individual and class lawsuits depend on class certification having been decided in the predecessor class action.”). One other district court also concluded that *American Pipe* tolling does not apply to a successively filed putative class action where the prior putative class action was dismissed rather than denied class certification. See *Dormani v. Target Corp.*, 2018 WL 3014126, at *2 (D. Minn. June 15, 2018).

²¹ 2019 WL 364019, at *3.

²² *Id.* at *10.

²³ *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 65 F. Supp. 3d 283, 289 (D. Mass. 2014).

²⁴ *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 315 F.R.D. 116, 130 (D. Mass. 2016).

²⁵ *In re Celexa*, 2019 WL 364019, *10.

to provide a broader answer: Its precedents do not so much as hint that *American Pipe* tolling extends to otherwise time-barred class claims.”²⁶ Moreover, to limit *China Agritech* in the way that plaintiff suggested, “would be to allow a chain of withdrawn class-action suits to extend the limitations period forever.”²⁷

III. Potential Implications

The First Circuit in *In re Celexa* read *China Agritech* to impose a categorical bar on all successive putative class actions filed after the expiration of a statute of limitations. The holding in *In re Celexa*, if followed, has the potential to foreclose successive class action claims regardless of the reasons why the prior class action was dismissed.

However, other issues flowing from *China Agritech* remain. The lower courts are likely to address soon whether after *China Agritech* it is permissible to add a named plaintiff to a pending putative class action to revive a previously dismissed and otherwise time-barred putative class claim.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; or Adam S. Mintz at 212.701.3981 or amintz@cahill.com.

²⁶ *Id.*

²⁷ *Id.*