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Although Resh v. China Agritech only tells the federal side of the equitable tolling story, the California Supreme Court thinks it requires reexamination of a state equitable tolling ruling

by John Neeleman

Takeway: In *China Agritech, Inc. v. Resh*, a federal securities case, the U.S. Supreme Court clarified the scope of *American Pipe* tolling, holding it does not permit "class action stacking." In other words, while the rule operates to toll limitations periods for subsequent individual actions, it does not preserve the timeliness of subsequently-filed ***class*** actions. Since this ruling, *Resh* has been applied in fairly straightforward way in putative class actions alleging violations of federal statutes. But what about class actions based on violations of state law? While many states follow *American Pipe* or use their own equitable tolling principles, class action practitioners must be careful to stay current on state equitable tolling decisions. A recent decision of the California Supreme Court vacating an intermediate California appellate court ruling in light of *Resh* shows that the Supreme Court's reasoning may more broadly permeate state tolling law.

In *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), the Supreme Court reversed the Ninth Circuit and held that a pending class action does not toll the statute of limitations for absent class members who bring subsequent ***class*** actions. As we discussed in June 2017 [*Ninth Circuit extends tolling doctrine to allow successive class actions, subject only to preclusion and "comity" defenses*], the Ninth Circuit's decision in *Resh* had extended the *American Pipe* tolling rule, under which the statute of limitations would be tolled for claims of unnamed members of a putative class during the pendency of a class action. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). The Ninth Circuit's ruling authorized the "stacking" of successive class actions through the suspension (the equitable tolling) of applicable statutes of limitation.

The Supreme Court rejected the Ninth Circuit's reasoning that, because Rule 23 constitutes only a procedural and not a substantive rule, new class actions should be treated similarly to individual claims of unnamed class members. *See Resh*, 138 S. Ct. at 1809. The Court reasoned that because it had created the tolling rule (founded on equitable principles in the common law, and based on efficiency and economy in litigation), federal courts remain free to apply this "judicially crafted tolling rule" based on the policies animating the rule. *Id*. at 1809-1811.

Last December, when we reported on the Supreme Court's certiorari grant [*The Supreme Court Grants*

Class Defendants' Petition for Certiorari in Resh v. China Agritech], we predicted that, given the political makeup of the Supreme Court and its recent decision in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), a reversal seemed a good bet. Political makeup turned out to be beside the point: the Court reversed in a unanimous decision. Justice Ruth Bader Ginsburg wrote the majority opinion, which was joined in by all but Justice Sonia Sotomayor. Justice Sotomayor concurred in the judgment, but would have limited the ruling to class actions under the Private Securities Litigation Reform Act.

The Ninth Circuit had relied on *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), where the Supreme Court held that a federal diversity action could proceed under Rule 23 despite a state law prohibiting class treatment of a particular statutory claim. The Ninth Circuit reasoned that, since Rule 23 is a procedural rule that should not impact the merits, and because the *American Pipe* tolling rule provides that the statute of limitations is tolled for claims of unnamed members during the pendency of a class action, there is no principled legal or public policy basis for distinguishing between subsequent individual actions from subsequent class actions instituted by unnamed class members.

The Supreme Court in *Resh* made quick work of the Ninth Circuit's reliance on *Shady Grove*: "Plaintiffs have no substantive right to bring their claims outside the statute of limitations. That they may do so, in limited circumstances, is due to a judicially crafted tolling rule that itself does not abridge, enlarge, or modify any substantive right." 138 S. Ct. at 1810. In contrast to *Resh*, "*Shady Grove* addressed a case in which a Rule 23 class action could have been maintained absent a contrary state-law command." *Id*. at 1809. In *Resh*, however, the only contrary "command" was the judicially-created *American Pipe* tolling rule. Because a tolling rule does not abridge, enlarge, or modify any substantive right, and because "Rule 23 itself does not address timeliness of claims or tolling and nothing in the Rule calls for the revival of class claims if individual claims are tolled," the Supreme Court remained free to limit the tolling rule that it itself created. *Id*. And that is just what the Court did in *Resh*.

But *Resh* tells only part of the story, in that it dealt with the federally-created *American Pipe* tolling rule in a case alleging federal statutory claims (federal securities laws claims). Since the advent of the Class Action Fairness Act, federal courts now commonly deal with putative class actions asserting claims under state law that are governed by state limitations statutes and state equitable tolling rules. Take California, for example. The Ninth Circuit has observed that "*American Pipe* tolling and California's equitable tolling are not congruent doctrines, and therefore, even if *American Pipe* did not apply, [California's] equitable tolling might." *Asberry v. The Money Store*, Case No. 2:18-CV-01291-ODW (PLAx), 2018 WL 3807806, at *8 (C.D. Cal. Aug. 8, 2018) (citing *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009)). Moreover, as a general matter, "equitable tolling does not apply cross-jurisdictionally" (*id*. at *9), such as from one state to the other.

In a case decided on April 26, 2018, California's Fourth District Court of Appeal applied California's tolling rules to authorize tolling of the limitations period for a later-filed class action alleging violations of

California wage and labor laws. *Fierro v. Landry's Restaurant Inc.* , 23 Cal. App. 5th 325, 232 Cal. Rptr. 3d 651 (4th Dist. 2018). There, the appellate court observed: "the policies we are to consider in deciding whether to apply *American Pipe* tolling to this case lead to different results under federal and California law." *Id*. at 339, 232 Cal. Rptr. 3d at 662-63.

But then, on June 11, 2018, the Supreme Court issued *Resh*. On August 29, 2018, the California Supreme Court issued a "GVR" order in response to the defendants' petition for certiorari: it granted the petition, vacated the decision, and remanded the case back to the Fourth District with directions to reconsider the tolling issue in light of *Resh*. *Fierro v. Landry's Restaurant* , 237 Cal. Rptr. 3d 597, 425 P.3d 585 (Cal. 2018). Thus, it remains to be seen whether and the extent to which California courts will modify their equitable tolling doctrines based on *Resh*.