

[Securities Regulation Daily Wrap Up, SUPREME COURT DOCKET—U.S.: High court will consider American Pipe's application to stacked class actions, \(Dec. 11, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Rodney F. Tonkovic, J.D.](#)

The Supreme Court has granted certiorari to consider whether *American Pipe* tolling allows previously absent class members to bring a new class action. The petition observes that a new class action brought by previously absent class members would have been dismissed as untimely in at least six circuits. The Ninth Circuit, however, has construed *American Pipe* to toll the limitations period for class action plaintiffs who were unnamed class members in previously uncertified classes (*China Agritech, Inc. v. Resh*, September 21, 2017).

Three strikes? The case involves the third substantially identical securities fraud class action brought by shareholders of the petitioner, China Agritech, Inc. Class certification for both previous actions was denied, and the respondents did not seek to participate as named plaintiffs or appear in those actions. The action was filed 17 months after the applicable two-year statute of limitations had lapsed, and the district court dismissed the new complaint as time-barred.

The Ninth Circuit [reversed, holding](#) that the statute of limitations was tolled during the pendency of two prior class actions. Permitting unnamed class members in previously uncertified classes to avail themselves of *American Pipe* tolling "would advance the policy objectives that led the Supreme Court to permit tolling in the first place," the panel concluded. Further, the pendency of the prior actions would alert defendants to the substantive claims, so there would be no unfair surprise, and the rule promotes economy of litigation. The appellate court subsequently denied both rehearing and rehearing *en banc*.

The petition. The petition asks whether the *American Pipe* rule tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period. Until now, the petition says, appellate courts have uniformly rejected attempts to extend *American Pipe* to permit absent class members to bring claims on behalf of a class. The First, Second, Third, Fifth, Eighth, and Eleventh Circuits have held that *American Pipe* tolling does not apply to serial class actions, particularly when an attempt to certify a materially identical class has already been rejected, while the Sixth, Seventh, and Ninth Circuits have adopted rules that would extend the statute of limitations for class actions indefinitely, the petition says.

The Ninth Circuit's decision, the petition argues, will permit "endless relitigation" of class certification determinations. In this case, the Ninth Circuit has applied *American Pipe* where certification of an identical class had already been denied, leading to forum-shopping and inviting "endless, vexatious litigation" of the sort Congress intended to prevent in enacting statutes of limitations.

Chamber amicus brief. In the same [order](#), the Court granted the U.S. Chamber of Commerce and the Retail Litigation Center leave to file a brief as amici curiae. In its [motion](#) for leave to file the brief in support of the petitioner, the Chamber argued that the Ninth Circuit's decision would effectively eliminate the statutes of limitations in a recurring class action scenario. This approach, taken by a minority of the circuits, is wrong, the Chamber flatly states, because post-*American Pipe*, the Court's decisions have shown that extending the *American Pipe* doctrine to stacked class actions is "unwarranted, inequitable, and unlawful."

Read the docket. This case, and others pending before the Court, can be referenced in the latest version of the [Supreme Court Docket](#). Cases are listed separately, along with a brief summary of the questions raised and the status of the appeal.

The petition is [No. 17-432](#).

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