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Statutes of Limitations and Defendant Class Actions

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NOTES

Statutes of Limitations and Defendant Class Actions

The Federal Rules of Civil Procedure provide that a civil action is commenced[1] in federal court by the filing of a complaint.[2] In cases arising under federal law, this has been interpreted to mean that filing tolls the applicable statute of limitations.[3] Ordinarily, filing tolls the statute only as to parties named in the complaint[4] and new parties must be added by amending the complaint before the statute expires.[5]

Complaints initiating class actions in federal court under rule 23, however, purposefully do not name all parties to the suit.[6] Only class representatives are specified, although all members of the class are bound by the ultimate outcome.[7] The Federal Rules do not indi-

1. Statutes of limitations define a limited period of time during which an action must be brought. "Tolling" is some activity that suspends the running of the statute; when an action is "commenced," the statute is permanently tolled. *See* Recent Developments, *Commencement Rules and Tolling Statutes of Limitations in Federal Court:* Walker v. Armco Steel Corp., 66 CORNELL L. REV. 842, 842 n.2 (1981). *See also Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1220-37 (1950).

2. FED. R. CIV. P. 3.

3. *See, e.g.,* United States v. Wahl, 583 F.2d 285, 287 (6th Cir. 1978); Windbrooke Dev. Corp. v. Environmental Enters., 524 F.2d 461, 463 (5th Cir. 1975); Moore Co. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921, 925 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966); Bomar v. Keyes, 162 F.2d 136, 140-41 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947). In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court reaffirmed that state provisions control tolling in diversity questions, and expressly reserved the question of tolling in federal question jurisdiction, 446 U.S. at 751 & n.11. Nevertheless, subsequent courts and commentators have continued to assume that filing tolls the statute of limitations in federal question suits. *See, e.g.,* Badillo v. Central Steel & Wire Co., 495 F. Supp. 299, 303-04 & n.9 (N.D. Ill. 1980); Recent Developments, *supra* note 1, at 854-56. This Note is concerned only with suits arising under federal law.

4. Miller v. M'Intyre, 31 U.S. 57, 59, 6 Pet. 61, 63 (1832) ("Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them."). This rule is relaxed with respect to parties that the plaintiff seeks to add or substitute sharing an "identity of interest" with the defendant originally named in the complaint. FED. R. CIV. P. 15(c); *see, e.g.,* Staren v. American Natl. Bank & Trust Co., 529 F.2d 1257, 1263 (7th Cir. 1976); Miller v. Cousins Properties, Inc., 378 F. Supp. 711, 714 (D. Vt. 1974); Annot., 8 A.L.R. 2d 6, 112-18, 144-48 (1949); Annot., 11 A.L.R. Fed. 269, 281-82 (1972).

5. California practice permits the plaintiff to substitute named parties for John Doe defendants after the statute has run. *See generally* Hogan, *California's Unique Doe Defendant Practice: A Fiction Stranger Than Truth*, 30 STAN. L. REV. 51 (1977); Annot., 85 A.L.R. 3d 130 (1978). The federal courts have repeatedly rejected such a practice. *See, e.g.,* Sassi v. Breier, 584 F.2d 234, 235 (7th Cir. 1978); Varlack v. SWC Caribbean, Inc., 550 F.2d 171, 174 (3d Cir. 1977); Craig v. United States, 413 F.2d 854, 856-57 (9th Cir. 1969); Molnar v. National Broadcasting Co., 231 F.2d 684, 686-87 (9th Cir. 1956).

6. FED. R. CIV. P. 23(a).

7. *See* Hansberry v. Lee, 311 U.S. 32 (1940) (plaintiff class action); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853) (plaintiff and defendant class action).

cate when the statute of limitations is tolled as to absent, unnamed members of the class. While rule 23 authorizes both plaintiff and defendant class actions,[8] the question of tolling with respect to absent class members typically has arisen in plaintiff class actions.[9] A line of decisions beginning with *American Pipe and Construction Co. v. Utah*[10] has evolved standards to determine when an absent plaintiff will be regarded as having commenced suit within the limitations period.[11] No authoritative line of cases, though, has defined when suit commences against an unnamed defendant,[12] and thus tolls the

8. "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." FED. R. CIV. P. 23(a); *see* Thillens, Inc. v. Community Currency Exch. Assn., 97 F.R.D. 668, 673 (N.D. Ill. 1983).

9. *See, e.g.,* Susman v. Lincoln Am. Corp. 587 F.2d 866 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978) (en banc), *vacated on other grounds*, 445 U.S. 940 (1980); Peritz v. Liberty Loan Corp., 523 F.2d 349 (7th Cir. 1975); Monarch Asphalt Sales Co. v. Wilshire Oil Co., 511 F.2d 1073 (10th Cir. 1975); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *In re* "Agent Orange" Prod. Liab. Litig., 534 F. Supp 1046 (E.D.N.Y. 1982); Duran v. Credit Bureau, 93 F.R.D. 607 (D. Ariz. 1982); Weisman v. Darneille, 89 F.R.D. 47 (S.D.N.Y. 1980); Galloway v. American Brands, Inc., 81 F.R.D. 580 (E.D.N.C. 1978); *In re* Home-Stake Prod. Co. Secs. Litig., 76 F.R.D. 337 (N.D. Okla. 1975); Goldstein v. Regal Crest, Inc., 62 F.R.D. 571 (E.D. Pa. 1974); cases cited at notes 11 & 65 *infra*.

10. 414 U.S. 538 (1974).

11. *See, e.g.,* Chardon v. Soto, 103 S. Ct. 2611 (1983) ("tolling effect" — whether limitations period is suspended or renewed by tolling — is determined by state rules, unless inconsistent with federal law); Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983) (statute tolls upon filing of class action for opt-out plaintiffs pursuing separate suits as well as intervenors); United Airlines v. McDonald, 432 U.S. 385 (1977) (intervention by absent member of purported class permitted after expiration of limitations period to appeal denial of class certification); McCarthy v. Kleindienst, 562 F.2d 1269 (D.C. Cir. 1977) (statute tolled for absent members of class denied certification for failure to satisfy "typicality" requirement provided that complaint fairly notified defendants of their claims); Haas v. Pittsburgh Natl. Bank, 526 F.2d 1083 (3d Cir. 1975) (lack of proper representative plaintiff with respect to a particular defendant did not undermine sufficiency of notice provided that defendant by complaint).

12. Defendant class actions are much less common than plaintiff class actions. *See* Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 630 (1978). An extensive list of cases involving defendant class actions is found in Wolfson, *Defendant Class Actions*, 38 OHIO ST. L.J. 459, 459-60 n.4 (1977).

Although less numerous than plaintiff class actions, defendant class actions may have a longer history. In the chancery courts of 17th and 18th century England, the bulk of class actions and their early counterparts, bills of peace, were directed against classes of defendants. Such actions typically sought to adjudicate the rights of the lord of the manor against his tenants, the parson against his parishioners, or the creditor against members of a joint stock enterprise. 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 1148, at 250 (1977).

The Supreme Court in Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), approved the use of defendant class actions in American courts, stating:

> The rule is well-established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest.

57 U.S. (16 How.) at 302. Authorization for defendant class actions was later embodied in the Federal Rules of Equity: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue *or defend* for the whole." Fed. Equity R. 38 (1912), *quoted in* Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 HARV. L. REV. 664, 669 n.24 (1979) (emphasis added).

statute of limitations.[13]

This Note argues that in defendant class actions the statute of limitations should be tolled as to all named and absent class members upon informal notice given by the plaintiff at the beginning of the suit.[14] Part I examines the purposes of statutes of limitations and

13. *See* Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 609 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) ("*American Pipe*, of course, is not dispositive of this case, for the application of the tolling doctrine to a defendant class was not an issue there.").

Four courts have considered tolling in defendant class actions: Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981); Kerney v. Fort Griffin Fandangle Assn., 624 F.2d 717 (5th Cir. 1980); Chevalier v. Baird Sav. Assn., 72 F.R.D. 140 (E.D. Pa. 1976); *In re* Bestline Prods. Secs. & Antitrust Litig., [1974-75 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 95,070, at 97,750 (S.D. Fla. 1975).

14. Tolling questions may arise in defendant class actions in two situations. First, certification of the class may be denied. FED. R. CIV. P. 23(c)(1). The plaintiff might then attempt to join or file independent suits against absent class members. If the statute of limitations has expired, the absent defendants could plead the statute as barring any action against them, as occurred in *Bestline*. Second, if a defendant class action is certified under rule 23(b)(3), members of the defendant class may choose to "opt out" after receiving notice of the suit. FED. R. CIV. P. 23(c)(2). If the statute of limitations has run, defendants who opted out may then try to plead the statute as a bar to any effort by the plaintiff to file independent suits against them, as occurred in *Appleton*.

All class actions must be certified under one of three subclassifications of FED. R. CIV. P. 23(b). A class is certified under rule 23(b)(1) if separate actions would create a risk of inconsistent or varying results for different individual defendants, or if a plaintiff's successful suit against a single defendant would be given substantial weight in subsequent actions against other similarly situated defendants. A class is certified under rule 23(b)(2) when a plaintiff seeks primarily injunctive or declaratory relief against a class of defendants who have acted on generally similar grounds, or are engaged in similar practices. Finally, a class is certified under rule 23(b)(3) in cases where a common question of law or fact predominates over individual controversies and where the plaintiff can demonstrate the manageability and superiority of a class action over other methods of adjudication. *See generally* 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶¶ 23.31-23.45 (2d ed. 1982); 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1772-84 (1972).

Commentators have suggested that, since the opportunity to opt out of a defendant class could frustrate the purpose of a defendant class action by allowing the exclusion of a significant number of absent class members, defendant classes cannot appropriately be certified under rule 23(b)(3). See 1 H. NEWBERG, *supra* note 12, § 1148c, at 254; Note, *Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative*, 9 VAL. L. REV. 357, 389-90 (1975). In practice, however, courts have frequently certified defendant classes under 23(b)(3). *See, e.g.*, Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619 (D. Kan. 1968), *modified*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971) & 404 U.S. 1063 (1972); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714 (N.D. Ill. 1968).

Interestingly, one court has suggested that defendant classes perhaps should not be certified under 23(b)(1) or (2), since the language of those sections literally applies only to plaintiff classes. Schneider v. Margossian, 349 F. Supp. 741, 746 (D. Mass. 1972); *cf.* Thompson v. Board of Educ., 709 F.2d 1200, 1203-04 (6th Cir. 1983) (certification of defendant class under (b)(2) appropriate only "in very limited circumstances"). Other courts, however, have not hesitated to certify defendant classes under these sections. *See* 3B J. MOORE & J. KENNEDY, *supra*, ¶ 23.40[6], at 23-310 to -311 ("[S]ince actions for injunctions or declaratory relief against defendant class [sic] are useful devices, and because there seems to be no intent to assign them exclusively to the standards of (b)(1) suits, some courts have stretched the (b)(2) language to allow defendant classes." (footnote omitted)); Note, *supra* note 12, at 634 (1978) ("[G]iven the clear authorization of defendant class actions in rule 23(a), the provisions of rule 23(b) should be interpreted to encompass defendant classes where appropriate.").

class actions, and the manner in which these purposes were reconciled in *American Pipe*. It concludes that *American Pipe* requires the creation of a tolling doctrine that promotes both the fair notice policy that underlies statutes of limitations and the concern for litigative economy that underlies rule 23 class actions. Part II then demonstrates that courts thus far have been unsuccessful in adapting *American Pipe* to defendant class actions. Finally, Part III proposes a requirement of informal notice at the outset of a defendant class action as a means of harmonizing defendants' need for notice with plaintiffs' and courts' desire for efficiency.

I. Reconciling the Policies Underlying Statutes of Limitations and Class Actions — the *American Pipe* Rule

The Supreme Court has stated: "Statutes of limitations are primarily designed to assure fairness to defendants."[15] There are two complementary aspects to this purpose — notice and repose. Timely notice promotes fair adjudication of disputes by informing defendants of the need to preserve evidence and witnesses necessary to their defense.[16] Expiration of the limitations period signifies the point at which the defendant's expectation of repose begins to outweigh the plaintiff's right to assert a claim.[17] Because limitations statutes afford plaintiffs only a reasonable period in which to bring suit,[18] they encourage plaintiffs to pursue their claims diligently.[19] The courts as well as defendants benefit from these laws;[20] they are spared the bur-

15. Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). *See* Smith v. American President Lines, 571 F.2d 102, 109 n.12 (2d Cir. 1978); Kreiger v. United States, 539 F.2d 317, 322 (3d Cir. 1976); Hungerford v. United States, 192 F. Supp. 581, 585 (N.D. Cal. 1961), *revd. on other grounds*, 307 F.2d 99 (1962); *see generally* Note, *Statutes of Limitations and Opting Out of Class Actions*, 81 Mich. L. Rev. 399, 412-14 (1982).

16. *See, e.g.,* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944):

> Statutes of limitation . . . promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation . . . .

quoted in Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965).

17. *See, e.g.,* Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980); Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342, 349 (1944) ("[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them."), *quoted in* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965); Steele v. United States, 599 F.2d 823, 829 (7th Cir. 1979).

18. *See, e.g.,* United States v. Kubrick, 444 U.S. 111, 117 (1979); Ehlers v. City of Decatur, 614 F.2d 54, 56 (5th Cir. 1980).

19. *See, e.g.,* NLRB v. California School of Professional Psychology, 583 F.2d 1099, 1101 (9th Cir. 1978) ("The rationale for limitations periods is to encourage persons promptly to file legal claims . . . ."); Dedmon v. Falls Prods. Inc., 299 F.2d 173, 178 (5th Cir. 1962) (Wisdom, J.) ("Its purpose is to force a litigant to get moving, and to get moving fast . . . .").

20. This benefit has been described as the "institutional" justification for statutes of limita-

den of adjudicating stale claims,[21] and their credibility is enhanced by improving the accuracy of factfinding.[22]

Class actions, on the other hand, have as their primary purpose the promotion of litigative efficiency. They conserve judicial resources by preventing duplicative suits and motions stemming from a single dispute.[23]

In overseeing the operation of statutes of limitations, courts must devise tolling doctrines that are consistent with federal law.[24] This means that in class actions the tolling rule should preserve the efficiency goals of rule 23,[25] without interfering with defendants' interests in notice and repose.[26]

In *American Pipe and Construction Co. v. Utah*,[27] "the seminal case on the application of the tolling doctrine in class action suits,"[28]

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tions. Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1016-17 (1980).

21. *See, e.g.*, Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965) ("[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." (footnote omitted)); United States v. Western Pac. R.R., 352 U.S. 59, 72 (1956); Allen v. United States, 542 F.2d 176, 179 (3d Cir. 1976) ("Some statutes of limitations serve to protect the courts from the necessity for adjudicating stale claims."); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 550 (2d Cir. 1963) ("The purpose of statutes of limitations is 'to keep stale ligitation out of the courts.' " (citation omitted)); Sherwood v. Graco, Inc., 427 F. Supp. 155, 157 (D. Colo. 1977); Special Project, *supra* note 20, at 1016-17.

22. *See, e.g.*, Board of Regents v. Tomanio, 446 U.S. 478, 487 (1980) ("The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh."); United States v. Kubrick, 444 U.S. 111, 117 (1979); Special Project, *supra* note 20, at 1017.

23. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392, 2395 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 556 (1974); Satterwhite v. City of Greenville, 578 F.2d 987, 998 (5th Cir. 1978) (en banc), *vacated on other grounds*, 445 U.S. 940 (1980); Note, *supra* note 15, at 418.

24. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975) ("[C]onsiderations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." (citation omitted)), *quoted in* Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) *and* Robertson v. Wegmann, 436 U.S. 584, 590 (1978).

25. *See* Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392, 2395 (1983); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553-54 (1974); *cf.* Johnson v. Railway Express Agency, 421 U.S. 454, 466 (1975) ("[In *American Pipe*] there was a substantial body of relevant federal procedural law to guide the decision to toll the limitation period, and significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute.").

26. *Cf.* FED. R. CIV. P. 23 advisory committee note on 1966 amendments, *reprinted in* 39 F.R.D. 69, 102-03 (1966) ("Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, . . . without sacrificing procedural fairness . . . ."); notes 40-50 *infra* and accompanying text.

27. 414 U.S. 538 (1974).

28. Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 609 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981) (defendant and plaintiff class action); *see, e.g.*, Jefferson v. H.K. Porter Co., 485 F. Supp. 356, 360 (N.D. Ala. 1980) ("Any analysis of the application of a statute of limitations to members of a class in a class action lawsuit should begin with *American Pipe* . . . .") (plaintiff class action), *aff'd*, 648 F.2d 337 (5th Cir. Unit B 1981).

the Supreme Court announced a tolling rule for plaintiff class actions that harmonizes the purposes of rule 23 and statutes of limitations — filing a plaintiff class action tolls the statute for all members of the class. The Court reasoned that unless the filing of a class action tolled the statute of limitations for all potential class members, they "would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable."[29] This "needless duplication of motions"[30] "would deprive rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure."[31] Moreover, the Court observed, when the complaint initiating a class action notifies defendants "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs," defendants have the information essential to determine the scope of the prospective litigation within the limitations period, regardless of whether the actual trial is ultimately conducted as a class action or in some other form.[32] Hence, the rule of *American Pipe*, that the filing of a plaintiff class action tolls the statute for all members of the purported class, is consistent with the objectives of both rule 23 and statutes of limitations.[33]

II. Fitting *American Pipe* to Defendant Class Actions

This Part examines the three district and circuit court decisions that have applied *American Pipe* to defendant class actions. It argues that these opinions fail to recognize that *American Pipe* attributed equal importance to notice and litigative efficiency, rather than subordinating one policy to the other. Finally, in support of adapting *American Pipe's* balanced approach to defendant class actions, this Part illustrates the negative effects that result from such subordination.

A. *The Cases*

The *American Pipe* tolling doctrine was first applied to a defendant class action in *In re Bestline Products Securities and Antitrust Litigation*.[34] As in *American Pipe*, class certification had been denied in

29. 414 U.S. at 553.

30. 414 U.S. at 554.

31. 414 U.S. at 553; *see* note 23 *supra* and accompanying text.

32. 414 U.S. at 555; *see* note 49 *infra* and accompanying text.

33. 414 U.S. at 555.

34. [1974-1975 Transfer Binder] Fed Sec. L. Rep. (CCH) ¶ 95,070, at 97,750 (S.D. Fla. 1975).

Only four cases have dealt with the problems presented by the statute of limitations in defendant class actions. *See* note 13 *supra* . These cases may arise infrequently because most defendant class actions seek injunctive or declaratory relief. *See* 1 H. Newberg, *supra* note 12, § 1148, at 251; Note, *Personal Jurisdiction and Rule 23 Defendant Class Actions*, 53 Ind. L.J.

Bestline. In *American Pipe*, absent plaintiffs moved to intervene under rule 24;[35] in *Bestline*, plaintiffs sought to join absent defendants under rule 20.[36] Since both rules permit an additional party to be named in suits involving common questions of law or fact, the *Bestline* court analogized from the permissive intervention of individual plaintiffs from an unsuccessful plaintiff class to the permissive joinder of individual defendants from an uncertified defendant class.[37] Based on this procedural similarity, the court concluded that the holding and rationale of *American Pipe* applied to defendant class actions,[38] holding that the mere filing of a class action tolls the statute of limitations with respect to individual defendants who would have been members of the defendant class had the court certified it.[39]

In relying simply on procedural similarity, however, the *Bestline* court ignored the analysis by which the Supreme Court reached its holding in *American Pipe*. Specifically, *Bestline* failed to consider whether the tolling rule it applied furthered the goals of both rule 23 and limitations statutes in a defendant class context. As subsequent decisions have recognized, if the statute is tolled merely by filing a complaint in defendant class actions, absent members of the class may not receive notice of the action within the statutory period,[40] thus frustrating one of the major purposes of statutes of limitations.

By contrast, the court in *Chevalier v. Baird Savings Association*[41] focused on notice, holding that the statute continued to run as to unnamed members of the defendant class until each was named in an amended complaint or until the class was certified.[42] Although the *Chevalier* court ensured that defendant class members would receive notice within the limitations period, it overlooked rule 23's in-

841, 844 (1978); Comment, *Damages in Class Actions: Determination and Allocation*, 10 B.C. IND. & COM. L. REV. 615, 619 (1969); *see also* note 14 *supra*.

35. FED. R. CIV. P. 24(b) ("[A]nyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.").

36. FED. R. CIV. P. 20(a) ("All persons . . . may be joined in one action as defendants if there is asserted against them . . . any right to relief . . . arising out of the same transaction . . . and if any question of law or fact common to all defendants will arise in the action.")

37. [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,070, at 97,752.

38. *See also* Wolfson, *supra* note 12, at 471 ("Bringing a defendant class action undoubtedly satisfies the statute of limitations requirement of commencing an action with respect to all defendant class members, just as bringing a plaintiff class action tolls the statute with respect to all absent plaintiff class members." (footnote omitted)).

39. [1974-1975 Transfer Binder] FED SEC. L. REP. (CCH) ¶ 95,070, at 97,752 (S.D. Fla. 1975).

40. Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 609 (7th Cir. 1980), *cert denied*, 451 U.S. 976 (1981); Chevalier v. Baird Sav. Assn., 72 F.R.D. 140, 155 (E.D. Pa. 1976).

41. 72 F.R.D. 140 (E.D. Pa. 1976).

42. 72 F.R.D. at 155.

terest in litigative economy and efficiency, which was thwarted by its requirement of joinder.

In the only Court of Appeals case to deal with tolling in defendant class actions, *Appleton Electric Co. v. Graves Truck Lines*,[43] the court reached the same result as the *Bestline* court, for different reasons. The *Appleton* court believed that it was confronted by "a true conflict between the operation of the statute of limitations and Rule 23," and reasoned that "[t]his conflict can be resolved only by the promotion of one rule at the expense of the other."[44] Based on its reading of *American Pipe*, which the *Appleton* court concluded implicitly favored rule 23 litigative efficiency and economy over statutes of limitations notice and repose,[45] the court held that the statute of limitations in a defendant class action is tolled for all members of the purported class when the complaint is filed.[46]

The *Appleton* court's interpretation of *American Pipe*, however, is incorrect. In *American Pipe* the Supreme Court indicated no preference for either rule 23 or statutes of limitations. Instead, the court emphasized that the tolling doctrine it established was consistent with both the vitality of class actions and the proper function of limitations statutes.[47] Because the goals of the class action procedure and the functioning of the statute of limitations were compatible in *American Pipe*, the Court did not weigh their relative importance.[48] Contrary to the *Appleton* court's assertion, *American Pipe* and its progeny have maintained a constant emphasis on furnishing notice to the defendant in plaintiff class actions.[49] Thus, the court's discernment of

43. 635 F.2d 603 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981).

44. 635 F.2d at 609.

The court observed that due process is not offended by a tolling provision that does not afford notice to the defendant within the limitations period. Constitutional notions of "fairness" embodied in due process considerations do not require that any defendant, named or absent, receive notice of suit within some specified limitations period. *See generally Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1405 (1976). The length of the limitations period and the provisions for commencing and tolling the running of the statute are regarded as pragmatic expressions of public policy decisions, not "fundamental" or "natural" rights of the defendant. Chase Secs. Corp. v. Donaldson, 325 U.S. 304, 314 (1945)., Therefore, courts and legislatures may establish and alter limitations periods and tolling rules without trenching upon any constitutional due process requirements. *See* Campbell v. Holt, 115 U.S. 620 (1885); Chase Secs. Corp. v. Donaldson, 325 U.S. 304 (1945); *cf.* Kerney v. Fort Griffin Fandangle Assn., 624 F.2d 717, 721 (5th Cir. 1980) (Court rejected contention that defendant class action was unconstitutional, but suggested that failure of district court to ensure adequate notice to individual defendant might constitute a denial of due process such that the defendant "would be entitled to have an adverse judgment set aside or reversed on appeal.").

45. 635 F.2d at 609.

46. 635 F.2d at 609-10.

47. 414 U.S. at 555. ("Since the imposition of a time bar would not in this circumstance [where adequate information about the suit is given to defendants] promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute.")

48. 414 U.S. at 554.

49. In Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983), the Court held that

an "implicit" preference appears unfounded.

To summarize, the courts that have devised tolling rules for defendant class actions have engaged in a "trade off" between the policies underlying rule 23 and statutes of limitations.[50] As demonstrated below, however, subordination of either policy to the other has significant, negative costs.

B. *Subordination of Litigative Economy to Notice*

The *Chevalier* court held that a statute of limitations should continue to run in favor of each absent defendant until the class was certified and actual or constructive notice was received.[51] This approach does eliminate the risk that an unnamed defendant may not be aware of the suit during the limitations period. Such a tolling rule, however, would operate unpredictably.[52] Although the Federal

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American Pipe extended to parties filing individual suits as well as intervenors after denial of class certification. Justice Powell wrote a separate concurrence, believing it important to reiterate the views expressed by Justice Blackmun in his concurrence in *American Pipe*. 103 S. Ct. at 2397 (Powell, J., concurring). Significantly, Justice Blackmun was the author of the Court's opinion in *Crown*. In *American Pipe*, Justice Blackmun emphasized that the Court's tolling rule would not invariably be extended to intervenors. He cautioned that courts should exercise discretion in granting permissive intervention to "preserve a defendant whole against prejudice arising from claims for which he has received no prior notice." 414 U.S. at 562 (Blackmun, J., concurring).

In *Crown*, Justice Powell, joined by Justices Rehnquist and O'Connor, returned to this language in *American Pipe*, extending its application to absent class members filing individual suits after denial of certification, as well as intervenors. 103 S. Ct. at 2398 (Powell, J., concurring). Noting that the tolling rule of *American Pipe* "is a generous one, inviting abuse," and quoting the language from that opinion that a class suit notifies defendants of the substantive claims against them and the number and generic identities of potential plaintiffs, Justice Powell concluded, "Claims as to which the defendant was not fairly placed on notice by the class suit are not protected under *American Pipe* and are barred by the statute of limitations." 103 S. Ct. at 2398 (Powell, J., concurring).

Other cases as well have emphasized notice as the key element in extending *American Pipe* to related fact situations. *See* notes 62-65 *supra* and accompanying text. *Cf.* FED. R. CIV. P. 23 advisory committee note on 1966 amendments, *reprinted in* 39 F.R.D. 69, 102-03 (1966) (quoted at note 26 *supra*); Note, *supra* note 15, at 419 ("Basic principles of fairness, however, constrain the pursuit of judicial efficiency.") & n.90 ("The Advisory Committee Notes are replete with references to 'measures which can be taken to assure the fair conduct of these actions.' ").

Interestingly, in prior litigation involving the claims at issue in *Appleton*, in upholding the trial judge's certification of a defendant class, the court emphasized that the defendants in fact *had notice* of the claims against them:

> In reaching this conclusion, he was justified in considering, as we presume he did, that the carriers were given adequate notice that refunds might ultimately be necessary, that consequently they should have kept and earmarked all necessary documents and records, and that difficulties and costs resulting from their failure to do so would be at their own risk and burden.

Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 139 (7th Cir. 1974) (footnote omitted).

50. Note, *The* American Pipe *Dream: Class Actions and Statutes of Limitations*, 67 IOWA L. REV. 743, 770-71 (1982).

51. 72 F.R.D. at 155.

52. Unpredictability undercuts all the justifications for statutes of limitations. *See* Special Project, *supra* note 20, at 1075-76.

Rules state that certification is to be determined "as soon as practicable" after a class action is filed,[53] "it may not be possible to decide even tentatively near the outset of the case whether it should continue as a class action."[54] Consequently, a diligent plaintiff could find a promptly filed claim ultimately barred by the statute of limitations as to unnamed members of the defendant class.[55]

This uncertainty would generate a strong incentive for plaintiffs to file separate protective actions against all members of the defendant class or to join all members individually in the suit, thus defeating the purpose of rule 23.[56] In fact, such superfluous, protective filings may be even more likely in defendant than in plaintiff class actions. In a defendant class action, plaintiffs, by filing a complaint, have already indicated their awareness of their legal rights and willingness to take some form of legal action. By contrast, not every absent member of a plaintiff class is aware of the suit and willing to file a separate action to protect his individual interest.[57] Moreover, commentators have observed that defendant classes, although sufficiently numerous to make joinder or separate suits inconvenient and difficult,[58] tend to be smaller and easier to identify than plaintiff classes.[59] Finally, protective suits may also be more attractive to

53. FED. R. CIV. P. 23(c)(1).

54. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 42 (1967). *See also Developments in the Law — Class Actions*, *supra* note 44, at 1475-79 (difficulties associated with determining identity of class and adequacy of representation before class certification); Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1141-43 (1974).

55. This result runs counter to the underlying purpose of the Federal Rules. They were designed to ensure that cases would be heard and decided on their merits, *see, e.g.*, Middle Atl. Utils. Co. v. S.M.W. Dev. Corp., 392 F.2d 380, 386 (2d Cir. 1968); Century Refining Co. v. Hall, 316 F.2d 15, 20 (10th Cir. 1963); SEC v. National Student Mktg. Corp., 73 F.R.D. 444, 447 (D.D.C. 1977); Scott v. Crescent Tool Co., 306 F. Supp. 884, 886 (N.D. Ga. 1969); Holtzoff, *Twelve Months Under the New Rules of Civil Procedure*, 26 A.B.A.J. 45, 45 (1940), and are liberally interpreted to avoid technical procedural problems, *see, e.g.*, Staren v. American Natl. Bank & Trust Co., 529 F.2d 1257, 1263 (7th Cir. 1976).

56. *See* Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 610 (1980), *cert. denied*, 451 U.S. 976 (1981).

57. Obviously, in some cases a plaintiff will not be willing to endure the inconvenience and expense of suing each defendant class member separately, but it is reasonable to assume that a plaintiff who has taken some legal action against a class is more likely to pursue his interests against individuals than a plaintiff who is oblivious to a suit brought in his behalf. *Cf.* Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 320-22 (1972) (even upon receipt of individual notice after certification of a (b)(3) class action, many plaintiffs demonstrate little understanding of or interest in recovering on their cause of action).

58. For example, in United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10 (D. Nev. 1975), the court observed that joinder of the 3,800 members of the defendant class would involve six to twelve months and considerable expense. 71 F.R.D. at 16. The class must be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1).

59. Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 ECOLOGY L.Q. 881, 895 (1975); Note, *supra* note 34, at 854, 858. The *Appleton* litigation is illustrative. It involved "a multi-million member plaintiff class and a thousand-plus defendant class." Appleton Elec. Co. v. Advance-United Expressways, 497 F.2d 126, 127 (7th Cir. 1974).

plaintiffs, since individual recoveries tend to be larger in defendant than in plaintiff class actions.[60]

Because the risk of duplicative actions is so great in defendant class actions, it is imperative that a tolling standard be established which reduces the need for protective suits. Unless a plaintiff can be assured before the end of the limitations period that the statute is tolled for all class members, he must either risk losing meritorious claims or file unnecessary, duplicative motions that, in the *Appleton* court's words, "would sound the death knell for suits brought against a defendant class, nullifying that part of rule 23 that specifically authorizes such suits."[61]

C. *Subordination of Notice to Litigative Economy*

The importance of ensuring defendants notice has been recognized in the context of plaintiff class actions by *American Pipe* and its progeny.[62] In *American Pipe* the Supreme Court scrutinized the complaint to ascertain whether or not the defendant was afforded adequate information within the limitations period regarding the size and subject matter of the suit.[63] In subsequent suits addressing the problem of statutes of limitations in plaintiff class actions, federal courts have emphasized the need to furnish sufficient information within the statutory period. Thus, for example, where named representatives' claims were not typical of all class members, tolling was permitted only to the extent that the complaint provided fair notice of the character and claims of the total plaintiff class.[64] In another instance, the named representative was not a member of the class that was finally certified. There the court held that a complaint brought by an improper plaintiff tolls the statute only if it furnishes the defendant essential information about the suit.[65]

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60. *See* Note, *supra* note 34, at 854.

61. Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 610 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981). The *Appleton* court went on to describe the impact such a result would have:

> This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations. In the present instance, this could have resulted in the filing of a staggering number of complaints. As we stated in our decision affirming the district court's certification of both the plaintiff and defendant classes in the case at bar, "[t]he unparalleled, obstructive and duplicative efforts by the carriers to avoid paying refunds that by their nature should have been more or less automatically returned to shippers . . . [in] 1971, underscores the basic wisdom of Rule 23." *Appleton Electric Co.*, *supra*, 494 F.2d at 133.

635 F.2d at 610.

62. *See* note 49 *supra* and accompanying text.

63. 414 U.S. at 554-55.

64. McCarthy v. Kleindienst, 562 F.2d 1269, 1274-75 (D.C. Cir. 1977).

65. Haas v. Pittsburgh Natl. Bank, 526 F.2d 1083 (3d Cir. 1975). Other cases emphasizing the importance of fair notice in applying the *American Pipe* doctrine include Rose v. Arkansas Valley Envtl. & Util. Auth., 562 F. Supp. 1180, 1191-93 (W.D. Mo. 1983); Stoddard v. Ling-

Despite the acknowledged importance of providing absent defendants in class actions with notice, the *Bestline* and *Appleton* courts adopted a tolling rule that does not ensure notice within the limitations period. Because process is served only on the named class representatives,[66] if the statute is tolled as to the entire class upon mere filing of a complaint, "[absent] defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run."[67] Two arguments, neither of which are persuasive, have been advanced to justify lack of notice to absent defendants.

The essence of the first argument is that rule 23 protects absent defendants' interests primarily through adequate representation,[68] rather than notice. The argument goes as follows. Notice in defendant class actions is principally discretionary. It is mandated only for defendants certified under rule 23(b)(3),[69] the least common defendant class.[70] In the more usual case, where the class is certified under rule 23(b)(1) or (2), the court may choose,[71] but is not required,[72] to

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Temco-Vought, Inc., 513 F. Supp. 314, 335 (C.D. Cal. 1980); Johnson v. Brace, 472 F. Supp. 1056, 1059 (E.D. Ark. 1979); Goldstein v. Regal Crest, Inc., 62 F.R.D. 571, 578-80 (E.D. Pa. 1974).

66. *See* Wolfson, *supra* note 12, at 469-70.

67. Chevalier v. Baird Sav. Assn., 72 F.R.D. 140, 155 (E.D. Pa. 1976), *quoted in* Appleton Elec. Co. v. Graves Truck Line, 635 F.2d 603, 609 (7th Cir. 1980), *cert. denied*, 451 U.S. 976 (1981). *Cf.* Arneil v. Ramsey, 500 F.2d 774, 782 n.10 (1977) (plaintiff class action) ("[N]othing in *American Pipe* suggests that the statute be suspended from running in favor of a person not named as a defendant in the class suit, and we decline so to extend the rule. A different conclusion would not comport with reason.").

68. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853) ("The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."); Northern Natural Gas Co. v. Grounds, 292 F. Supp. 619, 636 (D. Kan. 1968) ("[T]he essential requisite of due process as to absent members of the class is not notice, but adequacy of representation of their interests by named parties."), *modified*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971) & 404 U.S. 1063 (1972); Management Television Systems v. National Football League, 52 F.R.D. 162, 164-65 (E.D. Pa. 1971) (Although absent members did not receive notice, "where a class is adequately represented, and where there is no conflict of interest between members of a class, a judgment binding on all the members does not offend due process."); Parsons & Starr, *supra* note 59, at 890; Note, *supra* note 12, at 646. *But cf.* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) ("Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided."); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217, 1240 (1975) ("Notice should be viewed as a part of, or handmaiden to, adequate representation. The notice requirement reinforces the requirement of adequate representation.").

69. FED. R. CIV. P. 23(c)(2) ("In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable . . . .").

70. *See* notes 12 & 34 *supra*.

71. FED. R. CIV. P. 23(d)(2).

72. The Supreme Court suggested that notice might be more broadly required in Eisen v.

order notice to absent members. Rule 23(b)(1) and (2) defendants are protected not by notice, but by the requirement of adequate representation. In all class actions, absent parties are considered the passive beneficiaries of the named representatives' industry[73] and are bound by the decision. Consequently, adequate representation is critical to the fair disposition of a class action,[74] and is carefully scrutinized in all defendant class actions.[75] Adequate representation, the argument concludes,[76] thus protects all absent members.[77]

This reasoning, however, is convincing only when adequacy of representation has been approved, and a homogeneous class certified for all issues. Limitations problems may arise, though, in other situations. If the class is not certified, unnamed defendants cannot rely on the named representatives for protection, but require notice within the limitations period to preserve their defenses.[78] Similarly, absent defendants who choose to opt out of a (b)(3) class must mount individual defenses;[79] notice of the pendency of the suit

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Carlisle & Jacquelin, 417 U.S. 156, 176-77 (1974), but the next year confirmed that notice was necessary only in rule 23(b)(3) actions. Sosna v. Iowa, 419 U.S. 393, 397 n.4. (1975).

73. *See* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 551-52 (1974).

74. *See* Hansberry v. Lee, 311 U.S. 32 (1940).

75. *See* Smith v. Swormstedt, 57 U.S. (16 How.) 288, 303 (1853) ("In all cases where . . . a few are permitted to . . . defend on behalf of the many, by representation, care must be taken that persons are brought on record fairly representing the interest or right involved, so that it may be fully and honestly tried."); Thillens, Inc. v. Community Currency Exch. Assn., 97 F.R.D. 668, 679 (N.D. Ill. 1983) ("Because of the serious due process problems which attend the certification of a defendant class, the 23(a)(4) mandate for an adequate representative must be strictly observed."); Marston v. L.E. Gant, Ltd., 56 F.R.D. 60, 62 (E.D. Va. 1972) ("The adequacy of representation should be scrutinized with particular care where suit is brought against a purported class of defendants, the obvious reason being that they cannot be protected adequately if the interest of the defendants, or the members of the class, are in conflict.").

The problem of adequate representation is particularly serious in defendant class actions, since the plaintiff chooses the representative, who may have little incentive to incur the expense of defending the suit. *See* Z. CHAFEE, JR., SOME PROBLEMS OF EQUITY 237 (1950) ("It is a strange situation where one side picks out the generals for the enemy's army."); Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 696 n.39 (1941); *see generally* C. WRIGHT & A. MILLER, *supra* note 14, § 1770.

76. Many courts and commentators, though, have argued that unnamed defendants' interests can be fairly protected only if notice is provided. *See* Canadian St. Regis Band of Mohawk Indians v. New York, 97 F.R.D. 453, 459 (N.D.N.Y. 1983) ("The Court acknowledges that a decision adverse to and binding upon defendant class members would pose grave constitutional problems were it not accompanied by notice and opportunity to be heard."); Parsons & Starr, *supra* note 59, at 894-95; Comment, *supra* note 34, at 619; Note, *supra* note 34, at 858-59; Note, *supra* note 15, at 418-19. *But see* Note, *supra* note 12, at 646.

77. Adequate representation cannot, however, spare the defendant who expected repose after expiration of the limitations period the unwelcome suprise that he is still vulnerable to suit. *See* notes 17-18 *supra* and accompanying text. *Cf.* Anderson v. Air West, Inc., 542 F.2d 522, 525 (9th Cir. 1976) ("Once the statute has run, a potential defendant who has not been served is entitled to expect that he will no longer have to defend against the claim. If service can be delayed indefinitely once the complaint is filed within the statutory period, these expectations are defeated . . . .").

78. *See* note 16 *supra* and accompanying text.

79. Class members in (b)(3) class actions have an unconditional right to "opt out" and pursue their claims or present their defenses individually. In Eisen v. Carlisle & Jacquelin, 417

within the limitations period is essential to protect their interests.[80] Moreover, a court may certify a defendant class only with respect to certain common issues.[81] Once these issues are resolved with respect to the class, individual defenses must be presented,[82] which must be safeguarded by notice, not representation.

The second argument that attempts to justify tolling upon filing a complaint against a defendant class, despite lack of notice to absent members, is based on the failure of the Federal Rules to require service of process within the limitations period. The structure of this argument is as follows. Rule 3 tolls the statute upon filing a complaint,[83] but rule 4 does not mandate notice within the limitations period.[84] As a result, the normal tolling rule admits the possibility

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U.S. 156 (1974), the Supreme Court held that individual notice must be mailed to all members of a plaintiff class, so that the individual can "preserve his opportunity to press his claim separately," 417 U.S. at 176, even though in *Eisen* the class consisted of 2,250,000 identifiable members to whom notice would have cost $225,000, and the named representative's stake in the potential class recovery was only $70. 417 U.S. at 166-68.

The Court suggested in dictum that the *American Pipe* tolling rule preserved the right of absent class members to opt out and file separate suits. 417 U.S. at 176 n.13. Because, however, unlike intervention, opting out would lead to duplicative suits and undermine the goal of litigative efficiency emphasized in *American Pipe*, there was subsequent speculation that the *Eisen* dictum would not prevail should the question come before the Court. *See* Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 461 F. Supp. 999, 1012 (D.D.C. 1978), *revd. on other grounds*, 650 F.2d 342 (D.C. Cir. 1978), *cert. denied*, 452 U.S. 954 (1981); Note, *supra* note 15; *see also* Arneil v. Ramsey, 550 F.2d 774, 783 (2d Cir. 1977) (reaching same conclusion, but not referring to *Eisen* dictum); Gluck v. Amicor, Inc., 487 F. Supp. 608, 615 (S.D.N.Y. 1980) (same); Jefferson v. H.K. Porter Co., 485 F. Supp. 356, 361 (N.D. Ala. 1980) (same); *cf.* Pavlak v. Church, 681 F.2d 617 (9th Cir. 1982) (statute not tolled for separate suit filed after class certification was denied), *vacated and remanded*, 103 S.Ct. 3529 (1983); Stull v. Bayard, 561 F.2d 429, 433 (2d Cir. 1977) (same), *cert. denied*, 434 U.S. 1035 (1978).

This issue was laid to rest in Crown, Cork & Seal Co. v. Parker, 103 S. Ct. 2392 (1983). The Court unanimously agreed that the *American Pipe* tolling rule extended to purported class members filing separate suits as well as motions to intervene after denial of class certification, relying in part in their opinion on the *Eisen* dictum. 103 S. Ct. at 2396. (Although Justice Powell wrote a separate concurrence, *see* note 49 *supra*, he also joined the Court's opinion. 103 S. Ct. at 2397 (Powell, J., concurring)).

80. Because classes certified under (b)(3) are generally less cohesive than (b)(1) or (2) classes, there is a greater concern that named representatives of the class may not adequately protect absent members. *See* 7A C. WRIGHT & A. MILLER, *supra* note 14, § 1786, at 143.

81. FED. R. CIV. P. 23(c)(4) ("When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . . ."); *see, e.g.,* Research Corp. v. Pfister Associated Growers, 301 F. Supp. 497, 502 (N.D. Ill. 1969); Technograph Printed Circuits, Ltd. v. Methode Elecs., Inc., 285 F. Supp. 714, 720 (N.D. Ill. 1968).

82. *See* Pennsylvania v. Local Union 542, International Union of Operating Engrs., 90 F.R.D. 589 (E.D. Pa. 1981) (defendant class decertified after determination of liability ("Stage I") for individual "mini-hearings" on damages ("Stage II")). Even if all claims are resolved in the class dispute, where monetary relief has been granted, judgment operates only as a "declaration of rights and duties concerning common issues" against absent defendants. Wolfson, *supra* note 12, at 466. Consequently, when plaintiffs seek to execute judgment, absentees are entitled to raise individual defenses in opposition. *Id.*

83. *See* note 3 *supra* and accompanying text.

84. Such a requirement was included in a preliminary draft of the Federal Rules, but the Advisory Committee rejected it, and courts have subsequently refused to infer it from rule 3. *See, e.g.,* Messenger v. United States, 231 F.2d 328, 329 (2d Cir. 1956); Badillo v. Central Steel & Wire Co., 495 F. Supp. 299, 302 (N.D. Ill. 1980); FED. R. CIV. P. 3 original committee note

that a defendant may not receive notice before the statute has run. According to this rationale, absent defendant class members are treated the same as individual defendants — neither are guaranteed service of process within the limitations period.[85]

This argument, however, fails to recognize that the risk to individual defendants is mitigated by the provision of rule 4[86] requiring that a summons be issued "forthwith" upon filing.[87] A defendant who is not served within a reasonable time may move to dismiss the suit for failure to prosecute.[88] Such a motion will be granted if the court finds a lack of due diligence by the plaintiff. This lack of diligence is determined in large part by the prejudice that the plaintiff's delay causes the defendant.[89] Where the defendant can show prejudice, the plaintiff is likely to be found insufficiently diligent.[90] If the delay is extremely long, prejudice may even be presumed.[91]

If absent class members were actually treated like named defendants under rule 3, they would therefore be entitled, not only to

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of 1937, *reprinted in* 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 3.01[2] (2d ed. 1983).

85. *See* Kerney v. Fort Griffin Fandangle Assn., 624 F.2d 717, 722 (5th Cir. 1980). The court in *Appleton* similarly pointed out that "literal compliance with Rule 3" ordinarily tolled the statute of limitations, 635 F.2d at 608, but reasoned that Rule 3 did not dispose of the problem in defendant class actions, 635 F.2d at 609.

86. FED. R. CIV. P. 4(a) ("Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for the prompt service of the summons and a copy of the complaint.").

87. *See* Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1188 (5th Cir. Unit B 1980); Note, *supra* note 50, at 769; note 84 *supra* and accompanying text.

88. FED. R. CIV. P. 41(b). *See, e.g.*, Jordan v. United States, 694 F.2d 833, 837 n.7 (D.C. Cir. 1982); Messenger v. United States, 231 F.2d 328, 329 (2d Cir. 1956); Campbell v. United States, 496 F. Supp. 36, 39 (E.D. Tenn. 1980); McCrea v. General Motors Corp., 53 F.R.D. 384, 385 (D. Mont. 1971); *see generally* 5 J. MOORE, J. LUCAS & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 41.11 (2d ed. 1982).

89. *See, e.g.*, Titus v. Mercedes Benz of N. Am., 695 F.2d 746, 750-51 & n.9 (3d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931 (1979); Messenger v. United States, 231 F.2d 328, 331 (2d Cir. 1956); Prudential Lines v. Marine Repair Servs., 94 F.R.D. 325, 326 (E.D.N.Y. 1982); Saylor v. Lindsley, 71 F.R.D. 380, 384 (S.D.N.Y. 1976), *affd.*, 623 F.2d 230 (2d Cir. 1980). The Fifth Circuit follows a different rule from other courts and will dismiss for failure to prosecute only in cases of intentional misconduct. *See* Caldwell v. Martin Marietta Corp., 632 F.2d 1184, 1189 (5th Cir. Unit B 1980).

Without prejudice, the plaintiff's conduct is likely to be excused. *See, e.g.,* Nealey v. Transportación Marítima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980); Arnesen v. Shawmut County Bank, N.A., 504 F. Supp. 1077 (D. Mass. 1979); Preston v. Mendlinger, 83 F.R.D. 198 (S.D.N.Y. 1979); Ahmad v. Independent Order of Foresters, 81 F.R.D. 722 (E.D. Pa. 1979), *affd.*, 703 F.2d 549 (3d Cir. 1983).

90. *See, e.g.,* Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976); Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976), *affd.*, 623 F.2d 230 (2d Cir. 1980).

91. *See, e.g.* Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 43 (2d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931 (1979); Arundar v. Staff Builders Temporary Personnel, Inc., 92 F.R.D. 770, 771 (N.D. Ga. 1982); Saylor v. Lindsley, 71 F.R.D. 380, 384 (S.D.N.Y. 1976), *affd.*, 623 F.2d 230 (2d Cir. 1980).

"forthwith" service of a summons, but to dismissal upon an individualized finding of prejudice from delay.[92] Because of the delays in the certification and notice procedure,[93] if such an approach were taken to tolling questions in defendant class actions,[94] plaintiffs once again could not be certain whether any claim would be barred by the statute of limitations and would be induced to file multiple suits, or risk losing claims against unnamed parties.

III. A Proposed Solution — Informal Notice to Absent Members at the Onset of Defendant Class Litigation

The previous Part demonstrated that no court thus far has successfully devised a tolling rule for defendant class actions that is consistent with the policies of both rule 23 and statutes of limitations. It argued further that there is no persuasive reason for subordinating one policy to the other, and that to do so would seriously undermine the goals of the subordinated rule.

This Note proposes that courts require plaintiffs to provide informal notice to absent class members at the outset of defendant class actions. Coupled with a rule that tolls the statute of limitations as to all class members upon filing of a complaint, this approach harmonizes the operation of both rule 23 and statutes of limitations in defendant class actions: Absent defendants would receive notice promptly, and plaintiffs would have no incentive to file protective suits.[95] Authority for such an informal notice requirement can be

92. *Cf.* Veazey v. Young's Yacht Sales & Serv., 644 F.2d 475, 478 (5th Cir. Unit A 1981) (intentional misconduct requirement, *see* note 89 *supra*, not applied to delay in serving process) ("We view a delay between filing and service as being more likely to result in prejudice than a delay occurring after service, for in the former situation the defendant is not put on formal notice and allowed a full opportunity to discover and preserve relevant evidence when the matter is still relatively fresh and the evidence is intact and available."); Richardson v. United White Shipping Co., 38 F.R.D. 494, 495-96 (N.D. Cal. 1965) (same).

93. *See* note 54 *supra* and accompanying text.

94. This seems to be the approach suggested in dictum in Kerney v. Fort Griffin Fandangle Assn., 624 F.2d 717 (5th Cir. 1980). In *Kerney*, a plaintiff bringing suit against an association sought to amend his complaint to bring a class action, making the defendants named in the original complaint class representatives. Because "no named defendants [would] find their defense of the class to be different from their defense as individuals," the court held that the running of the statute of limitations did not bar the imposition of the additional role as class representatives. 624 F.2d at 721. The court also suggested that, since absent defendants could show prejudice after judgment was entered, it was "premature for defendants to object to a lack of personal notice and service on the unnamed defendants." 624 F.2d at 721. *See* note 44 *supra*.

95. *Cf.* Note, *supra* note 50, at 771. The solution suggested by that Note was use of the *Chevalier* rule requiring actual notice, and early filing of suit to allow for certification decision to be completed and notice of certification to be dispatched before expiration of the statute. The Note suggests that if the certification process is nevertheless incomplete, eleventh hour notice could be sent to absentees to toll the statute. If, however, upon certification many defendants opted out, plaintiffs would have little time to take action against numerous parties before the limitations period expired. Hence, either notice would have to be dispatched nearer

found in rule 23(d)(2).[96]

While this approach in some instances might impose a greater burden on plaintiffs than would an individual suit or a plaintiff class action,[97] informal notice would be significantly less onerous than serving each member personally, as protective suits would require.[98] Plaintiffs receive substantial benefits from maintaining defendant class actions; it is not inappropriate to impose these unavoidable expenses upon them.[99]

CONCLUSION

The policies underlying class actions and statutes of limitations — litigative efficiency and notice — cannot be reconciled in defendant class actions by literal application or rejection of the tolling rule in *American Pipe*. Informal notice to absent class members at the outset of defendant class litigation can eliminate the trade off between these policies in which the courts have thus far engaged. Such informal notice is not required by rule 23, but the required procedures, as courts have discovered, do not otherwise offer any satisfactory point for tolling.[100] Consequently, informal notice should be

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to the outset of the litigation, or plaintiffs would be put to the choice of filing protective actions or risking lost claims. Moreover, since the size and complexity of class actions often entail extended periods to proceed, *see generally* Miller, *supra* note 12, it may be difficult to file suit at an early date. These factors, plus the *ad hoc* quality of the suggested solution, do not recommend it over the rule proposed in this Note.

96. FED. R. CIV. P. 23(d) ("In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action . . . ."). *Cf.* American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555 n.25 (1974) ("[I]n certain situations the intervenors may raise issues not presented in the class action complaint and to that extent the defendants will not have received notice of the nature of the claims against them. . . . [U]nder Rule 23(d)(3) 'the court may make appropriate orders . . . imposing conditions on . . . intervenors.'" (citation omitted)); Kerney v. Fort Griffin Fandangle Assn., 624 F.2d 717, 721 (5th Cir. 1980) ("[T]he court has the power and the duty to ensure that all defendants be given adequate notice of the action and an opportunity to present individual defenses if desired.").

97. Even if this proposal resulted in double notice being required in some cases, the burden of dispatching such notice would be minimized by two factors. First, under rule 23(d)(2), it is left to the court's discretion to order an appropriate form of notice. *See* United States v. Truckee-Carson Irrigation Dist., 71 F.R.D. 10, 17-18 (D. Nev. 1975). Second, defendant classes are generally smaller and members more readily identifiable than plaintiff classes. *See* note 59 *supra* and accompanying text.

98. One practitioner estimated that to serve several hundred defendants in the traditional manner would probably cost more than ten thousand dollars. In contrast, personal service on five named representatives and notification by mail of the rest would cost less than two hundred dollars. Wolfson, *supra* note 12, at 469-70.

99. *See* Note, *supra* note 34, at 858 & n.110.

100. Commentators have criticized rule 23's lack of provision for defendant class actions, suggesting that "the draftsmen of the present rule 23 did not rigorously analyze the functions and problems of defendants' class actions." 1 H. NEWBERG, *supra* note 12, § 1148, at 250; *cf.* Kalven & Rosenfield, *supra* note 75, at 696 n.39 (discussing original rule 23).

required for tolling purposes as a means of harmonizing the policies of Rule 23 and statutes of limitations in defendant class actions.