

was correct in characterizing its standard of culpability as one "repeatedly held to be sufficient in the context of enforcement proceedings seeking equitable or prophylactic relief,"⁷⁷ it may have been misleading in characterizing the standard as "negligence" since the concept of scienter has been expanded by the Second Circuit in previous decisions to include the "negligent" action of Schiffman in *Spectrum*.

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Antitrust Law—Class Actions—Tolling of Federal Statutes of Limitations—*American Pipe & Construction Co. v. Utah*.¹—On June 19, 1964, the United States District Court for the Central District of California found American Pipe & Construction Company and five other steel and concrete pipe companies² guilty of violating section 1 of the Sherman Act.³ Four days later, the United States filed civil complaints against the same six companies which, as amended, sought to recover damages and to restrain further violations of sections of the Sherman,⁴ Clayton⁵ and False Claims⁶ Acts.⁷ On May 24, 1968, a negotiated "final judgment" was entered against the companies.⁸

On May 13, 1969, the State of Utah instituted a civil antitrust suit against the same defendant pipe companies,⁹ seeking treble damages for violations of section 1 of the Sherman Act. The complaint, which was based on the same events as those involved in the government's suits, was brought in the United States District Court

reckless disregard of available information and probably culpable under the strictest scienter standard.

⁷⁷ 489 F.2d at 541.

¹ 414 U.S. 538 (1974).

² The other five companies indicted were United Concrete Pipe Corp., Kaiser Steel Corp., United States Steel Corp., United States Industries, and Smith-Scott, Inc. *Maricopa County v. American Pipe & Constr. Co.*, 303 F. Supp. 77, 79 (D. Ariz. 1969).

³ 15 U.S.C. § 1 (1970). The indictments alleged that the six companies had combined and conspired to restrain interstate trade by submitting collusive and rigged bids for the sale of pipe and had divided the business thus obtained among themselves. 414 U.S. at 540.

⁴ 15 U.S.C. § 4 (1970).

⁵ 15 U.S.C. § 15(a) (1970).

⁶ 31 U.S.C. § 231 (1970).

⁷ 303 F. Supp. at 80.

⁸ *Id.* In *Maricopa County*, the district court determined that although five of the defendant pipe companies settled their suits with the government on Dec. 8, 1967, and a "partial final judgment" was entered which was, for all practical purposes, a final judgment against all the defendants except American Pipe, the conspiracy linking the companies together required that the "final judgment" as to all of the defendants not be entered until the case of the last defendant, American Pipe, was terminated on May 24, 1968. *Id.* at 87.

⁹ *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17 (C.D. Cal. 1969). In addition to the six companies involved in the government's suits, Utah also named Utah Concrete Pipe Co. and W.R. White Co. as defendants in the case. *Id.*

for the District of Utah. Utah brought the action on its own behalf and as representative of a class of approximately 800 members consisting of other western states that had not filed similar actions and numerous public entities within the State of Utah.¹⁰ Since the final judgment in the government's civil suit had been entered on May 24, 1968,¹¹ the institution of Utah's action on May 13, 1969 was timely by eleven days, pursuant to section 5(b) of the Clayton Act,¹² which suspends the running of the four year antitrust statute of limitations (section 4B)¹³ during the pendency of a federal suit and for one year thereafter.¹⁴

The case was transferred to the United States District Court for the Central District of California for assignment to Judge Martin Pence, who had handled all of the previous litigation within the Ninth Circuit arising from the alleged pipe companies' conspiracy.¹⁵ There, the defendants moved, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure,¹⁶ for an order that the suit not be

¹⁰ Id. at 18-20.

¹¹ See note 8 supra.

¹² 15 U.S.C. § 16(b) (1970) provides in pertinent part:

Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action . . . is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

¹³ 15 U.S.C. § 15b (1970) provides in pertinent part: "Any action to enforce any cause of action . . . shall be forever barred unless commenced within four years after the cause of action accrued."

¹⁴ Cases construing § 5(b) of the Clayton Act since its amendment to current form in 1955 have interpreted it to mean that a plaintiff must commence a suit either (a) within four years from the date of the accrual of the cause of action, or (b) within the year following the termination of the government's suit, without regard to whether four years have passed since cause of action accrued. See, e.g., *Solinski v. General Elec. Co.*, 149 F. Supp. 784, 786 (D.N.J. 1957).

¹⁵ *In re Concrete Pipe*, 303 F. Supp. 507 (Jud. Pan. Mult. Lit. 1969).

¹⁶ Fed. R. Civ. P. 23 provides in pertinent part:

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirabil-

maintained in the form of a class action.¹⁷ On December 4, 1969, Judge Pence, relying on his experience with the previous pipe company cases, granted the motion. He predicated his decision on the failure of Utah's class to satisfy the Rule 23(a)(1) prerequisite of a sufficiently numerous class.¹⁸ The class action was terminated as of May 13, 1969, the date of the filing of the complaint.¹⁹

On December 12, 1969, eight days after Judge Pence's denial of class action status, approximately sixty of the public entities in Utah's purported class sought leave to intervene as plaintiffs in Utah's private action, either as of right under Federal Rule 24(a)(2)²⁰

ity or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. . . .

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (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, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time. . . .

¹⁷ Utah's action would appear to have been a Rule 23(b)(3) class suit and as such it would have had to satisfy the prerequisites in Rule 23(a) and the requirements enumerated in Rule 23(b)(3), quoted in note 16 supra.

¹⁸ 49 F.R.D. at 21.

¹⁹ *Utah v. American Pipe & Constr. Co.*, 473 F.2d 580, 582 (9th Cir. 1973).

²⁰ Fed. R. Civ. P. 24(a) provides in pertinent part:

Upon timely application anyone shall be permitted to intervene in an action: . . . (2)

or by permission under Rule 24(b)(2).²¹ On March 20, 1970, Judge Pence denied the motions, concluding that both of the Clayton Act's limitation periods²² had run against the petitioners, and barred intervention.²³ Judge Pence specifically rejected the contention that the commencement of the class action on May-13, 1969 retolled section 5(b) for the purported class members so as to permit them to relate their claims back to that date and thereby retain eleven days in which to intervene prior to the running of the statutory period. To permit intervention in this manner, Judge Pence declared, would abridge the defendants' substantive right to interpose the bar of limitations provided in section 5(b).²⁴

The United States Court of Appeals for the Ninth Circuit affirmed the denial of intervention as of right under Rule 24(a)(2), but, with one dissent, reversed the district court's denial of permissive intervention.²⁵ The court reasoned that the initiation of Utah's action did toll the limitation provision in section 5(b), with eleven days yet to run, for all of the members of the class, until that time when they were ejected from the suit by Judge Pence's denial of class action status.²⁶

The Supreme Court granted certiorari²⁷ to consider important questions concerning the proper interaction between federal statutes of limitations and Rule 23 class actions in the federal courts. In an opinion by Mr. Justice Stewart, the Court unanimously affirmed the judgment of the court of appeals²⁸ and HELD: the timely commencement of a suit denominated a class action tolls the applicable federal statute of limitations for every asserted member of the class,

when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest

²¹ Fed. R. Civ. P. 24(b) provides in pertinent part:

Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim . . . and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

²² See notes 12-14 *supra*.

²³ *Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99, 102-08 (C.D. Cal. 1970).

²⁴ *Id.*

²⁵ 473 F.2d at 582-84. After Judge Pence had denied intervention, the petitioners amended their complaint to remove allegations of conspiracy for the four years immediately preceding the suit's commencement in order to permit the order denying intervention to become final and thus appealable. *Id.* at 582 n.1. See also 50 F.R.D. at 110.

The Ninth Circuit handed down an opinion on Dec. 11, 1972 which reversed the order denying intervention. This opinion emphasized that the members of Utah's class had refrained from bringing individual suits because of their reliance on their membership in Utah's suit. Recognizing that the record did not substantiate the assumption of reliance, the court withdrew its first opinion and issued the decision which is discussed in the text of this note. Brief for Petitioners at 9-10, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) [hereinafter cited as Brief for Petitioners].

²⁶ 473 F.2d at 583-84.

²⁷ *American Pipe & Constr. Co. v. Utah*, 411 U.S. 963 (1973).

²⁸ Mr. Justice Blackmun wrote a concurring opinion, 414 U.S. at 561.

regardless of whether the suit is later denied class action status after the statutory period has elapsed.²⁹ Emphasizing the policy of efficiency and economy of litigation inherent in Rule 23, the Court declared that this standard applied even to those class members who were not aware of the suit's existence.³⁰ Finally, the Court specified that the running of the statutory period was suspended only until the class action was denied maintenance. Thus, since Utah had initiated its action with eleven days left to run, the motions by the putative class members for intervention, which were filed only eight days after Judge Pence's denial of class status, were found to be timely.³¹

American Pipe & Construction Co. v. Utah was a case of first impression for the Supreme Court. Prior to *American Pipe*, the Court had never addressed itself to the threshold issue of the impact of the commencement of a maintainable class action upon a federal statute of limitations,³² much less the effect of a suit which, after the limitation period had run, was "stripped of its character as a class action."³³ Hence *American Pipe* provided the Court with a vehicle by which to render a complete exposition of the principles and rules governing the interaction within the federal sphere of Rule 23 of the Federal Rules of Civil Procedure and congressionally enacted statutes of limitations.

At the outset, this note will survey certain of the policy considerations underlying class actions and federal statutes of limitations. With that background the Supreme Court's opinion in *American Pipe* will be examined—first as to the Court's ruling regarding the tolling of the statute of limitations by the initiation of a maintainable class action, and then as to its holding that the timely commencement of a class suit, which is denied class action status after the statutory period has run, tolls the limitation provision for all asserted members of the class. With reference to the latter, it will be submitted that the breadth of the Court's holding in *American Pipe* may be unwarranted in light of the inherent potential for purported class members to derive an unjust and unexpected windfall at the expense of the defendant's rights. Finally, an alternative and less expansive formula to govern the interaction of Rule 23 and federal statutes of limitations will be proposed and discussed.

The preliminary issue in determining the proper effect of the timely institution of a class action upon the Clayton Act's limitation period must be whether this federal statute of limitations may ever be tolled judicially. The Federal Rules of Civil Procedure were

²⁹ Id. at 552-53.

³⁰ Id. at 550-52.

³¹ Id. at 560-61.

³² Brief for Petitioners, *supra* note 25, at 22. See also Newberg, Orders in the Conduct of Class Actions: A Consideration of Subdivision (d), 10 B.C. Ind. & Com. L. Rev. 577, 584 (1969).

³³ Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 98, 104 (1966).

promulgated pursuant to the authority granted in enabling legislation³⁴ which included the caveat that "[s]uch rules shall not abridge, enlarge or modify any substantive rights"³⁵ Accordingly, class action proceedings under Federal Rule 23 may never result in a diminution of any of a litigant's substantive rights.³⁶ Thus, in *American Pipe*, Judge Pence premised his denial of leave to intervene on a belief that the tolling of section 5(b) by a Federal Rule 23 proceeding, which was determined not to be maintainable, would be an abridgement of the defendant pipe companies' substantive rights.³⁷ He reasoned that Congress had created innovative substantive rights for plaintiffs in the antitrust statutes, replete with treble damages, cost of suit including reasonable attorney's fees,³⁸ a prima facie evidentiary rule³⁹ and a suspension of the limitation provision.⁴⁰ Yet accompanying these plaintiffs' rights was a solitary obligation: the suit had to be brought within the prescribed limitation period. Moreover, an integral part of the congressional antitrust scheme was the right of the defendant "to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23"⁴¹ Consequently, Judge Pence concluded sections 4B and 5(b) provided the defendants with a substantive right of repose which could not be modified by a federal rule of procedure.⁴²

However, the persuasive reasoning of the Eighth Circuit Court of Appeals in an earlier case, *Kansas City, Missouri v. Federal Pacific Electric Co.*,⁴³ casts certain doubts over Judge Pence's conclusions. There, the court pointed out that section 4B, which was created solely for the avowed purpose of providing a uniform limitation period,⁴⁴ was not added until forty-one years after the Clayton Act was initially enacted; therefore it could not be part of an overall

³⁴ 28 U.S.C. § 2072 (1970).

³⁵ *Id.*

³⁶ *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1014 (2d Cir. 1973), vacated, but not rev'd, — U.S. —, 94 S. Ct. 2140 (1974).

³⁷ 50 F.R.D. at 108.

³⁸ 15 U.S.C. § 15 (1970).

³⁹ 15 U.S.C. § 16(a) (1970).

⁴⁰ 15 U.S.C. § 16(b) (1970). For the pertinent language of this section, see note 12 *supra*.

⁴¹ 50 F.R.D. at 108.

⁴² *Id.*

⁴³ 310 F.2d 271 (8th Cir.), cert. denied, 371 U.S. 912 (1962), 373 U.S. 914 (1963). The court in *Kansas City* was concerned with the problem of whether the four year limitation period in § 4B could be tolled in a manner other than that provided in § 5(b). Specifically the question before the court was whether § 4B could be tolled under the doctrine of fraudulent concealment. Judge Pence, in rejecting the Eighth Circuit's approach, noted that *Kansas City* involved tolling § 4B due to fraudulent concealment whereas *American Pipe* concerned tolling § 5(b) by virtue of Federal Rule 23. 50 F.R.D. at 107 n.22. Yet in his opinion, Judge Pence stated that both §§ 4B and 5(b) were integral parts of the legislative scheme. *Id.* at 108. See text at notes 41-42 *supra*. Moreover, it should be noted that both *Kansas City* and *American Pipe* raised the preliminary question of whether the federal statute of limitations provided in the Clayton Act can be judicially tolled.

⁴⁴ S. Rep. No. 619, 84th Cong., 1st Sess., reprinted in 1955 U.S. Code Cong. & Ad. News 2328, 2331.

legislative scheme providing the antitrust defendant with a substantive right.⁴⁵ The fact that section 5(b) was also amended in 1955 to bestow upon the plaintiff an additional year after the United States suit has terminated in which to bring his private suit would seem to substantiate the position taken in *Kansas City* that sections 4B and 5(b) do not combine to create a defendant's substantive right. The court in *Kansas City* further suggested that perhaps the substantive/procedural dichotomy was not the crucial determinant at all, but rather that congressional intent was the controlling factor in tolling the Clayton Act's limitation period.⁴⁶

The Supreme Court, in *American Pipe*, specifically rejected Judge Peñe's line of reasoning, and by implication adopted that of the court in *Kansas City*: "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme."⁴⁷ The Court noted that the substantive/procedural dichotomy is only determinative in those cases where the issue presented is whether to apply federal or state law in proceedings held in the federal courts by virtue of diversity or maritime jurisdiction.⁴⁸ The Court then distinguished the present case, which turned on the question of whether judicial power exists to toll a federal statute of limitations, from the conflict of laws cases. This same distinction had been drawn in *Burnett v. New York Central R.R.*,⁴⁹ where the question was whether the congressionally created three year statute of limitations in the Federal Employers' Liability Act (FELA)⁵⁰ could be judicially tolled. There the Supreme Court concluded:

Classification of such a provision as 'substantive' rather than 'procedural' does not determine whether or under what circumstances the limitation period may be extended. . . . [T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.⁵¹

Hence in *American Pipe*, the Supreme Court was following its own precedent when it rejected the substantive/procedural rationale underlying the district court's opinion. The Court attempted to settle the issue definitively:

⁴⁵ 310 F.2d at 282.

⁴⁶ Id. at 283.

⁴⁷ 414 U.S. at 557-58.

⁴⁸ Id. at 557. See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *The Harrisburg*, 119 U.S. 199 (1886).

⁴⁹ 380 U.S. 424 (1965).

⁵⁰ 45 U.S.C. §§ 51 et seq. (1970). Section 6 of the FELA provides in pertinent part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (1970).

⁵¹ 380 U.S. at 426-27.

CASE NOTES

[T]he mere fact that a federal statute providing for a substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.⁵²

Having clarified that the principal inquiry is whether federal statutes of limitations may be tolled "consonant with the legislative scheme,"⁵³ it is necessary to determine the congressional purpose in enacting limitation provisions. In a 1944 case,⁵⁴ the Supreme Court had discussed the purposes of limitation statutes in general:

Statutes of limitation . . . are designed to 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 and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.⁵⁵

In essence, then, limitation provisions seek to assist defendants by delineating time restrictions upon legal liability and by condemning all claims not raised within this prescribed period as stale and unenforceable.

Yet, as the Supreme Court noted in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*,⁵⁶ there would appear to be one further congressional purpose inherent in the antitrust limitation provisions. The Supreme Court there cautioned that the 1914 congressional proceedings revealed "an almost complete absence of any discussion on the tolling problem,"⁵⁷ but observed that "[w]hatever ambiguities may exist in the legislative history of these provisions . . . it is plain that in section 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions."⁵⁸ The inclusion in the Clayton Act, as originally passed, of a provision for tolling the applicable statute of limitations during the pendency of a suit brought by the government would seem to support this view of the legislative purpose in section 5(b). Moreover, the Senate report on

⁵² 414 U.S. at 559.

⁵³ Id. at 557-58.

⁵⁴ *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944).

⁵⁵ Id. at 348-49.

⁵⁶ 381 U.S. 311 (1965). In *Minnesota Mining* the Supreme Court decided that a Federal Trade Commission hearing was a "civil suit" within the meaning of § 5(b). Id. at 321-22.

⁵⁷ Id. at 320.

⁵⁸ Id. at 317.

the 1955 amendment to section 5(b), which provided antitrust plaintiffs with one additional year during which the statute of limitations would be tolled, indicated that a primary motivation for the additional tolling year was to ensure that plaintiffs would be able to enjoy the full benefit of the government's case in preparing their individual suits.⁵⁹ Thus it would appear that, while creating a right of repose for antitrust defendants, Congress, through section 5(b), indicated that under the proper circumstances a tolling of the limitation provision should transcend the policy of repose. Hence, it can be posited that judicial tolling of this federal statute of limitations is assuredly not inconsistent with the effectuation of congressional purpose.

Of course, this concern for whether the judicial tolling of the limitation period would be consistent with the legislative intent must be applied to the particular circumstances presented in the individual case. In *Burnett*, the Supreme Court stated that the purpose and policies underlying the limitation provision and the remedial scheme utilized by the plaintiff were proper factors for examination.⁶⁰ There, after such an analysis, the Court found that the timely commencement of a suit in a state court, under the FELA, which was dismissed for improper venue after the limitation provision had run its course, tolled the federal statute of limitations so as to permit the plaintiff to refile his claim in the federal courts.⁶¹ The Court reasoned that the timely commencement of the action was proof that plaintiff had not slept on his rights and also had served to provide the defendant with notice of the suit against him, thus fulfilling two major purposes behind the statute of limitations.⁶²

Further, federal courts have held congressionally enacted statutes of limitations to be tolled where the defendant's misrepresentations induced the plaintiff not to commence his action in a timely fashion,⁶³ where participation in a war impeded the timely initiation of the suit,⁶⁴ and in cases of fraudulent concealment.⁶⁵

In moving to an examination of *American Pipe*, the focus must center on the particular circumstances presented in the case, principally the distinctive remedial scheme—a Rule 23 class action—utilized by the plaintiffs. Rule 23, as originally enacted, permitted what came to be called a “spurious” class action when there was “a common question affecting the several rights” of a class which was

⁵⁹ S. Rep. No. 619, *supra* note 44, at 2332.

⁶⁰ 380 U.S. at 427.

⁶¹ *Id.* at 435-36.

⁶² *Id.* at 429-30.

⁶³ See, e.g., *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Scarborough v. Atlantic Coast Line Ry.*, 178 F.2d 253 (4th Cir. 1949), cert. denied, 339 U.S. 919 (1950).

⁶⁴ See, e.g., *Osbourne v. United States*, 164 F.2d 767 (2d Cir. 1947).

⁶⁵ See, e.g., *Holmberg v. Ambrecht*, 327 U.S. 392 (1946); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874); *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306 (10th Cir.), cert. denied, 374 U.S. 809 (1963).

seeking a common relief.⁶⁶ The rule, however, was silent as to the means of ascertaining the composition of the class as well as to the binding quality of the judgment.⁶⁷ In practice the "spurious" suit served as nothing more than a permissive joinder device,⁶⁸ with the attendant potential for "one-way intervention."⁶⁹ The controversy that arose concerning this inherently unfair procedure led to the development of two discrepant views among the federal judiciary with regard to the proper effect of a timely institution of a bona fide class action, *i.e.*, one which is ultimately maintained, upon the right of potential class members to intervene after the applicable statute of limitations had run.⁷⁰ A majority of the federal courts, relying on the representative character of a class action, ruled that the filing of the suit tolled the limitation period and thus permitted joinder or intervention by the potential members of the class.⁷¹ But some courts, perceiving the "spurious" suit as essentially a joinder device, required each individual party seeking to intervene to satisfy the applicable statutory provision as of the time he sought to enter the class.⁷² The Supreme Court never addressed itself to this inconsistency in the federal courts' interpretation of Federal Rule 23.⁷³

The 1966 amendments to Rule 23, which were designed to solve the "one-way intervention" problem, deleted the "spurious" class suit provision and replaced it with Rule 23(b)(3).⁷⁴ Further, a mechanism was inserted by which determinations could be made as

⁶⁶ Rule 23(a)(3) of the Rules of Civil Procedure for the District Courts of the United States, 308 U.S. 645, 689 (1939).

⁶⁷ *American Pipe*, 414 U.S. at 545-46.

⁶⁸ 3B J. Moore, *Federal Practice* ¶ 23.10[1], at 23-2601 (2d ed. 1974); Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. Ind. & Com. L. Rev. 501, 503 (1969); Weithers, *Amended Rule 23: A Defendant's Point of View*, 10 B.C. Ind. & Com. L. Rev. 515, 516 (1969).

⁶⁹ *American Pipe*, 414 U.S. at 547. See also Advisory Committee's Note to Fed. R. Civ. P. 23, 39 F.R.D. 98, 105-06 (1966) [hereinafter cited as Adv. Comm. Note], and cases cited therein. "One-way intervention" refers to the practice of potential class members of a "spurious" class action to delay their decision on whether to intervene until the trial had progressed to the point where it could be decided with reasonable certainty whether intervention would best serve their individual interests; at times this delay was permitted to extend until after the verdict. This procedure enabled the class member to share in a favorable verdict, while also retaining the ability to avoid a binding unfavorable judgment. 414 U.S. at 547.

⁷⁰ It was uniformly agreed that if the party seeking to join the suit was already barred by the limitations provision at the time the class action was instituted, the suit would not serve to revive his claims. *Escott v. BarChris Constr. Corp.*, 340 F.2d 731, 733 n.3 (2d Cir.), cert. denied, 382 U.S. 816 (1965). See Comment, *Class Actions Under New Rule 23 and Federal Statutes of Limitation: A Study of Conflicting Rationale*, 13 Vill. L. Rev. 370, 373 (1968).

⁷¹ See, e.g., *Escott v. BarChris Constr. Co.*, 340 F.2d 731 (2d Cir. 1965); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), petition for cert. dismissed, 371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945).

⁷² See, e.g., *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Deckert*, 123 F.2d 979 (3d Cir. 1941); *P.W. Hussler, Inc. v. Newman*, 25 F.R.D. 264 (S.D.N.Y. 1960); *Athas v. Day*, 161 F. Supp. 916 (D. Colo. 1958).

⁷³ See 414 U.S. at 550.

⁷⁴ For the text of Rule 23(b)(3), see note 16 *supra*.

to the identity of the members of the class, who then would be bound by the judgment in the case.⁷⁵ These measures were thought by most commentators to resolve the issue dividing the courts with reference to the appropriate effect of the filing of a maintainable class suit in favor of a tolling of the statute of limitations for all of the potential members of the class.⁷⁶

Prior to the Supreme Court's decision in *American Pipe*, there were four federal cases which involved the issue of the proper impact of the timely filing of a class action, under amended Rule 23(b)(3), upon the applicable limitation provision as to the absent class members.⁷⁷ While each of the four declared that the timely commencement of a valid class action tolled the statutory period for all of the asserted members, in only one, *Minnesota v. United States Steel Corp.*,⁷⁸ did a court, in reaching its decision, balance the policy considerations inherent in Rule 23 and federal statutes of limitations.

Minnesota was an antitrust case, and after finding the class action maintainable, District Judge Neville faced the question of whether the commencement of the class suit had tolled the Clayton Act statute of limitations for all of the class members.⁷⁹ Judge Neville reviewed the dearth of definitive legislative history on the question of tolling,⁸⁰ the elimination of the "one-way intervention" problems,⁸¹ as well as the fact that the institution of the suit ensured that the defendants were forewarned of the claims against them,⁸² and concluded that the commencement of the class action, which was maintained under Rule 23, tolled the Clayton Act statute of limitations for all of the asserted members of the class.⁸³

Thus, although the question of whether the timely filing of an

⁷⁵ Fed. R. Civ. P. 23(c)(1)-(3). See note 16 supra.

⁷⁶ See, e.g., 3B J. Moore, supra note 68, ¶ 23.90[3], at 23-1651 to -1653; C. Wright, Law of Federal Courts § 72, at 316 (2d ed. 1970); 2 W. Barron & A. Holtzoff, Federal Practice & Procedure § 568, at 112-13 (Supp. 1970); Frankel, Some Preliminary Observations Concerning Civil Rule 23, 43 F.R.D. 39, 40 (1967); Ford, The History and Development of Old Rule 23 and the Development of Amended Rule 23, 32 Antitrust L.J. 254, 262-63 (1966); Donelan, The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff, 32 Antitrust L.J. 264, 265-66 (1966). But see Comment, supra note 70, at 383-84.

⁷⁷ *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969); *Hellerstein v. Mather*, 360 F. Supp. 473 (D. Colo. 1973); *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Pa. 1968).

⁷⁸ 44 F.R.D. 559 (D. Minn. 1968).

⁷⁹ *Id.* at 573-74. The court in *Minnesota* was actually concerned with the propriety of tolling the four year provision set out in § 4B of the Clayton Act. For the language of § 4B, see note 13 supra. Judge Neville speaks of § 5(b) in obvious reference to the second paragraph of that section. For the language of § 5(b), see note 12 supra. The language in the second paragraph of § 5(b) is a reference, of course, to the provision in § 4B.

⁸⁰ *Id.* at 575. See text at note 57 supra.

⁸¹ *Id.* at 574-75. See note 69 supra and text at notes 74-75 supra.

⁸² *Id.* at 575-76.

⁸³ *Id.* at 565, 573.

authentic class action, under amended Rule 23, tolls a federal statutory period was one of first impression for the Supreme Court when it granted certiorari in *American Pipe*, the Court had the benefit of the views expressed in four lower court opinions, the near unanimous thoughts of the commentators and the earlier rulings in the "spurious" class cases.

The Supreme Court, following the approach it had outlined in *Burnett v. New York Central R.R.*,⁸⁴ examined the policy considerations behind Rule 23 and the statute of limitations. Mr. Justice Stewart, noting the consequences of the amendments to Rule 23, declared that a federal class action is no longer merely a joinder device, but is a representative suit designed to remove the necessity for each potential class member to file papers with the court to assure his participation in the suit, as would be necessary if the timely filing of a bona fide class action did not toll the limitation provision for the class members.⁸⁵ The Court found that the policies of "efficiency and economy of litigation,"⁸⁶ which underlie Rule 23, militate for a tolling of the statute of limitations on behalf of the entire class upon timely initiation of a class action.

The Supreme Court then considered whether the policies behind the formulation of statutes of limitations pressed for an opposite conclusion. The Court noted that the commencement of Utah's suit provided notice to the defendant companies, within the statutory period, of the complaints against which they would be compelled to defend as well as the "number and generic identities of the potential plaintiffs"⁸⁷ Moreover, as the suit was brought within the limitation period set out in section 5(b), Utah's claims, by definition, were not stale and time-barred. Hence the Court concluded that the tolling of the applicable federal statute of limitations by the commencement of a valid class action was "consistent both with the procedures of Rule 23 and with the proper function of the limitations statute."⁸⁸

It is submitted that there should be little dispute as to the wisdom of the Supreme Court's decision that the timely commencement of a maintainable class action tolls a federal statute of limitations for the entire membership of the class. Class actions are essentially a device by which legal controversies dominated by questions and claims held in common by a cumbersome number of parties may be most efficiently and fairly adjudicated.⁸⁹ The suit by its very nature is of a representative character; the litigation of a few renders binding judgments for the consenting many who comprise the class. Accordingly, logic dictates that when the suit is initiated

⁸⁴ 380 U.S. 424 (1965). See text at note 60 supra.

⁸⁵ 414 U.S. at 550.

⁸⁶ Id. at 553.

⁸⁷ Id. at 555.

⁸⁸ Id.

⁸⁹ For the language of Rule 23, see note 16 supra.

by the moving parties, it is also commenced for the absentee class, as subsequently determined.⁹⁰

Moreover, the purpose behind limitation provisions is not thwarted by such a result. The very fact that the complaint was filed in a timely fashion indicates that the plaintiffs have not slept on their rights within the meaning of repose. Statutes of limitations define the time at which claims become legally extinguished, and if a suit is brought within the prescribed period the statute's avowed purpose has been satisfied. Thus, on weighing the policy considerations, it appears only reasonable that the timely commencement of a bona fide class action tolls the applicable federal statute of limitations for each and every member of the class being represented.

Hence in *American Pipe* the Supreme Court definitively resolved the issue of the proper interaction within the federal sphere of a maintainable class action, under Rule 23 of the Federal Rules of Civil Procedure, and the applicable congressionally created statute of limitations. The rationales and rulings of the four federal courts who had previously dealt with this issue in light of the 1966 amendments,⁹¹ as well as the majority of those opinions pertaining to tolling in "spurious" class suits,⁹² were supported by the highest court of the land. However, the case in which the Supreme Court chose to enunciate the principles and rules governing the interaction of class actions and limitation provisions⁹³ presented one further

⁹⁰ See Fed. R. Civ. P. 23(c)(2), quoted in note 16 supra.

⁹¹ See note 77 supra and text at notes 77-83 supra.

⁹² See note 71 supra and accompanying text.

⁹³ An interesting ancillary question to the Supreme Court's ruling in *American Pipe*, especially in view of the significance of the decision in this case of first impression, is the propriety of the grant of certiorari. Court of Appeals Judge Kilkenny, in dissenting from the Ninth Circuit's holding in the case, declared his belief that Judge Pence had merely exercised judicial discretion in denying intervention. 473 F.2d at 584 (dissenting opinion). The rule has long been that "in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene when intervention is a permissive matter within the discretion of the court." *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 524 (1947). Accord, *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142 (1944); *Stadin v. Union Elec. Co.*, 309 F.2d 912, 920 (8th Cir. 1962). The Supreme Court stated that Judge Pence had not weighed the considerations of intervention, but had concluded as a matter of law that the petitioners were barred by the running of the statute of limitations. 414 U.S. at 560. Yet a reading of Judge Pence's order denying intervention shows he did at least consider the issue of prejudice, which is arguably a matter of discretion. Further, if the judge had denied permissive intervention solely because the limitation period had run, as the Supreme Court said he did, it is perplexing that he did not deny intervention as of right for the same reason. See 50 F.R.D. at 102 and notes 20-21 supra.

One possible solution to this enigma is that the Supreme Court found in *American Pipe* a unique opportunity to clarify the entire field of issues pertaining to the interaction of Rule 23 and federal statutory limitations. This one case presented questions as to the effect of the institution of a bona fide class action upon the applicable statute of limitations as well as the effect of a suit denied class action status. Further, the case posed the issue of the significance of the "substantive/procedural" dichotomy in this area of federal law. Finally, the case presented an occasion for the Court to express its views on the merits of reliance playing a dominant role in the determination of a purported class member's rights after a class action has been denied. In light of these considerations, the Court's grant of certiorari can be

question: did the timely filing of a class action toll the statutory period for all of the class members if, after the limitation had expired, the suit was found, under Rule 23, not to be maintainable as a class action? This appendant issue was also a question of first impression for the Court. The Advisory Committee on the 1966 amendments to Rule 23 recognized this problem but did not purport to propose a solution. The Committee's Notes indicate that after a class action has been denied, whether putative class members should "be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the laws governing . . . limitations as they apply in particular contexts."⁹⁴ Further, the question appears to have been infrequently litigated at all levels of the federal judiciary.⁹⁵

The Ninth Circuit's reversal of Judge Pence in *American Pipe* placed considerable emphasis on the particular facts of the case. The court interpreted the district court's ruling to be simply an expression of preference for the action to be litigated via joinder of the parties rather than by class treatment. Accordingly, the court of appeals found that the class members and their claims were safely before the court and protected against the bar of section 5(b).⁹⁶ Thus the Ninth Circuit ruled that under the particular facts presented the initiation of the class action, within the statutory period, tolled the statute of limitations as to all of the class members so that when the suit was later denied class status, the class members were not barred from intervening.⁹⁷

However, the Ninth Circuit's opinion, unlike that of any other federal court considering this issue, did not mention the possibility of requiring class members to prove their reliance on the class action as a prerequisite to gaining the benefit of a tolled statute.⁹⁸ District court opinions prior to *American Pipe* had declared that members of a group denied class status for the purpose of a purported class action would be entitled to intervene, or initiate their own suit, with the advantage of a tolled statutory period, only if they could show that they had refrained from bringing a timely individual action due

interpreted as the result of a desire to seize the immediate opportunity to clarify an entire area of federal practice with one case.

⁹⁴ Adv. Comm. Note, *supra* note 69, at 104.

⁹⁵ One of the few cases to confront the issue squarely seems to be *Hellerstein v. Mather*, 360 F. Supp. 473 (D. Colo. 1973), where a class member of an earlier abortive class action sought to file his own suit claiming that the institution of the earlier action had tolled the statutory period in his behalf. The court held that the applicable statute of limitations was tolled by the earlier suit as to every member of the putative class even though the suit was subsequently denied class action status. The ruling in *Hellerstein*, however, was based solely upon the authority of the Ninth Circuit's ruling in *American Pipe*. *Id.* at 475. As such it is of little value to this discussion.

⁹⁶ 473 F.2d at 583-84.

⁹⁷ *Id.* at 584.

⁹⁸ The Ninth Circuit's initial opinion in *American Pipe*, however, was almost solely premised on the rationale of reliance exhibited by the class members. See note 25 *supra*.

to their good faith reliance on the class action brought on their behalf.⁹⁹ This conclusion was premised on the rationale that only those parties who had actually and knowingly placed their confidence in the class action to protect their interests "should not be penalized for failing to file parallel individual actions or motions to intervene."¹⁰⁰

Moreover, in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,¹⁰¹ the district court, by way of dictum, had suggested yet a more stringent rule. There, the court stated that only in those cases where class action status had been denied for "considerations of judicial housekeeping" should the class members even be permitted to attempt to show that their reliance on the existence of the class action was sufficient to warrant the statute of limitations being tolled.¹⁰² It was this more stringent position which appears to have been the one most favored by the commentators.¹⁰³

Thus, when the Supreme Court confronted the question in *American Pipe*, it had the benefit of varying views from the lower federal courts. However, in determining the rule which would henceforth regulate the rights of class members of a suit denied class action status, the Court did not avail itself of any of these opinions. Instead, the Court chose merely to apply its own rule that the timely commencement of a class action tolls the federal limitation provision for all the members of the class. The Court noted that where the case concerns the initiation of a maintainable class action, the question is the right of the absentees to participate as members of the class, and where the suit has been denied class action status, the question is the right of the absentees to participate via intervention.¹⁰⁴ The Court perceived no substantial difference in the two situations, as in each the inquiry remained whether the institution of a suit denominated a class action tolled the applicable statute of limitations so as to permit participation by the purported class members. The previously discussed balancing of the policy considerations inherent in Rule 23 and statutory provisions¹⁰⁵ led the Court to but one conclusion: "[T]he commencement of the original class suit tolls the running of the statute for all purported members

⁹⁹ *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1252 (N.D. Ga. 1971). Accord, *Abercrombie v. Lum's, Inc.*, 345 F. Supp. 387, 394 n.13 (S.D. Fla. 1972); *Rogers v. Coburn Fin. Corp.*, 54 F.R.D. 417, 419 (N.D. Ga. 1972).

¹⁰⁰ *Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1252 (N.D. Ga. 1971).

¹⁰¹ 43 F.R.D. 452 (E.D. Pa. 1968). *Philadelphia Electric* was the first case after the 1966 amendments to Rule 23 to declare that the initiation of a valid class action tolls the applicable statute of limitations for all of the members of the class. *Id.* at 460.

¹⁰² *Id.* at 461.

¹⁰³ See, e.g., 3B J. Moore, *supra* note 68, ¶ 23.90[3], at 23-1653 to -1654; C. Wright, *supra* note 76, at 316; Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B.C. Ind. & Com. L. Rev. 577, 584-86 (1969).

¹⁰⁴ 414 U.S. at 552.

¹⁰⁵ See text at notes 84-88 *supra*.

of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status.¹⁰⁶

Thus the Supreme Court affirmed the Ninth Circuit's holding, but in so doing the Court adopted a far more expansive approach to the issue than that employed by the court of appeals or any of the district courts which had discussed the question. Viewing the problem as essentially identical to the issue presented by the timely institution of a bona fide class action, the Supreme Court considered the representative nature of class suits and determined that the same standards applied to those who did not rely on the proceedings as to those who did so rely.¹⁰⁷ The federal limitation provision was tolled, therefore, for each and every member of the class regardless of whether the beneficiary was even aware of the proceeding's existence. The reliance distinction drawn by the district courts prior to *American Pipe*¹⁰⁸ was apparently thought to be inconsistent with the policies underlying Federal Rule 23. The Supreme Court concluded:

We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.¹⁰⁹

The breadth of this ruling is striking. While logic dictates that the timely commencement of a bona fide class action should toll the applicable statute of limitations for every eligible class member, reason and a sense of fair play reject the conclusion that the timely filing of a suit which is denied class status should also suspend the statute for each and every asserted class member.

The principal rationales cited by the Supreme Court for tolling the limitation provision for the entire membership of a maintainable class suit are the unique representative nature of the form of action¹¹⁰ and the policy of "litigative efficiency and economy" inherent in the procedure.¹¹¹ But it is submitted that neither rationale retains its full persuasive force when a suit has been "stripped of its character as a class action."¹¹² A non-class action is by definition not a representative suit; the moving parties are appearing only for themselves and the rights they are protecting are solely their own. Similarly, the policies of efficiency and economy of litigation under-

¹⁰⁶ 414 U.S. at 553.

¹⁰⁷ *Id.* at 550-52.

¹⁰⁸ See text at notes 99-102 *supra*.

¹⁰⁹ 414 U.S. at 554.

¹¹⁰ *Id.* at 550. See text at notes 85, 90 *supra*.

¹¹¹ *Id.* at 556. See text at note 86 *supra*.

¹¹² Adv. Comm. Note, *supra* note 69, at 104.

lying class action proceedings would seem to be of less consequence when that very mode of proceedings has been specifically declared to be inappropriate for the case.

To the contrary, it is suggested that the only validly persuasive justification for permitting a purported class member of a suit filed before, but denied class action status after, the statutory period has elapsed to benefit from a tolled statute of limitations is to prevent converting Rule 23 into a trap for the unwary.¹¹³ It would be an assault upon the basic principles of fairness and justice to bar the party who was fully cognizant of his own cause of action but intentionally forbore from proceeding individually because of a belief that his inclusion as an asserted member of the class would adequately protect his rights. To deny this class member the right to intervene would be penalizing his faithful observance of the procedures prescribed in Rule 23. Moreover, this absentee's inactivity, which was based on his reliance on participation in the class action, had the ultimate effect upon the defendant of providing additional time in which to prepare a defense against the forthcoming suit.

However, this reasoning is inapplicable when the absentee class member was unaware of the class action proceedings. The class member who is unaware of the action being brought on his behalf cannot possibly have relied on the suit's existence to protect his rights, nor was his lack of individual action against the defendant even remotely related to an observance of class action procedures.¹¹⁴ Thus, the policies underlying Rule 23 should have little bearing on this situation, for, the nonrelying class member never perceived himself as being represented.

Moreover, if it were not for the class action, the nonrelying member's cause of action would have been legally extinguished by virtue of the running of the applicable statute of limitations. Hence, to toll the statutory provision for this class member would be to grant him an unexpected windfall. But beyond this unwarranted benefit to the absentee, the suspension of the limitation period would also directly injure the defendant, who has "the right to be free of stale claims,"¹¹⁵ and indeed would have been relieved of this absentee's claim if it were not for the fortuitous inclusion by the moving party of the absentee's name in his complaint. Yet, the Supreme Court's ruling in *American Pipe* included this unaware

¹¹³ See *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944).

¹¹⁴ As one commentator has pointed out:

One can only speculate on the percentage of each class who failed to bring an action because of their reliance on the original suit as compared to those who carelessly or otherwise let the statutory period expire and are taking the advantage of an unexpected windfall.

Comment, 35 *Fordham L. Rev.* 295, 308 (1966).

¹¹⁵ *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

class member as a beneficiary of the tolled statutory period resulting from the timely filing of a class action. It is contended that the tolling rules established in *American Pipe* will serve to revive numerous slumbering claims to the great detriment of defendants named in defective class action suits.

This concern is magnified upon the realization that the Court's holding in *American Pipe* would not seem to be limited to the issues presented by the precise facts of the case. The Court's constant utilization, while discussing the merits of tolling, of generic terminology with regard to limitation provisions, as opposed to specific references to section 5(b),¹¹⁶ might well indicate an intention that the rules enunciated in *American Pipe* be applicable to all federal statutes of limitations, and not merely to section 5(b). Further, the Court stated:

[A]t least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class

117

This language leads to speculation that suits denied class action status for failure to meet other of the prerequisites provided in Rule 23(a)¹¹⁸ may also be deemed to toll the applicable statutory period for all of the class members.¹¹⁹

Recognizing the possible detrimental impact on defendants which might result from this expansive ruling, Mr. Justice Blackmun, in his concurring opinion in *American Pipe*, commented that the Court's decision that the timely commencement of a class action tolls the applicable limitation provision for all of the purported class members does not remove or diminish the necessity for those class members to satisfy the requirements in Rule 24¹²⁰ in order to obtain leave to intervene.¹²¹ However, with the benefit of a tolled statute, it would seem the class member desiring to file a claim against the defendant would have the choice of seeking intervention under Rule

¹¹⁶ 414 U.S. at 545-60. See also *Eisen v. Carlisle & Jacquelin*, 94 S. Ct. 2140, 2152 n.13 (1974).

¹¹⁷ Id. at 552-53 (emphasis added), quoting Fed. R. Civ. P. 23(a)(1).

¹¹⁸ For the language of Rule 23(a), see note 16 supra.

¹¹⁹ This belief is only heightened by the Court's unqualified statement:

The rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class, who would have been parties had the suit been permitted to continue as a class action.

414 U.S. at 554.

¹²⁰ For the text of Rule 24, see notes 20-21 supra.

¹²¹ 414 U.S. at 561-62 (concurring opinion).

24, or, alternatively, of initiating his own action against the defendant in the allotted time, thereby by-passing the intervention requirements.¹²²

Thus, it is submitted that the breadth of the Supreme Court's decision in *American Pipe* is unwarranted in view of the inherent potentialities for many of the asserted class members to derive an unexpected and quite unjust windfall at the great expense of the defendant's rights. In view of the fact that a dominant concern inherent in class action procedure is *fairness*,¹²³ the courts' primary interest should be with protecting the individual rights of all of the parties to the suit, including the defendant. Class members who have refrained from individual action due to a good faith reliance on the class suit should not be penalized, but neither should a defendant be compelled to face claims which in reality were revitalized by an abortive class action proceeding. It is recommended that the proper treatment of this issue is provided by the reliance procedure suggested by a majority of lower federal courts under amended Rule 23 prior to the Supreme Court's opinion in *American Pipe*.¹²⁴ The only method which can serve this duality of interest, consistent with principles of fairness, is to permit those class members who in reliance on the class suit forbore individual action to proceed with the applicable limitation provision tolled as of the date the class suit was commenced, but to free the defendant from the claims of those who did not so rely, if the untolled statute of limitations would now bar their claims.

Further, the practicalities of such a scheme do not appear to be unmanageable. After a suit has been determined not to be maintainable as a class action, those purported class members who refrained from individual action in reliance on the suit would simply be required to present a showing of such reliance in order to be granted the benefit of a tolled statute. While this may entail slightly less economy of litigation, it is contended that where a suit is denied class status, the goal of litigative efficiency must defer to the principles of fairness.

Moreover, satisfactory proof of reliance could be assured by the mere filing of a notice certifying the party's awareness of and reliance on the class action. An affirmative action requirement similar to this proposed notice has been imposed by courts under Rule 23 with regard to intent to prove damages.¹²⁵ Such notice will ensure the class member's right to proceed under a tolled statutory period and will also serve better to inform the defendant of the scope of

¹²² See *Hellerstein v. Mather*, 360 F. Supp. 473 (D. Colo. 1973).

¹²³ Cf. Note, 14 B.C. Ind. & Com. L. Rev. 543, 552 (1973). See text at note 89 supra.

¹²⁴ See note 99 supra.

¹²⁵ E.g. *Minnesota v. United States Steel Corp.*, 44 F.R.D. 559, 577 (D. Minn. 1968); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968).

impending litigation confronting him if the class action is found to be defective and is not permitted to continue.¹²⁶

In conclusion, the Supreme Court's decision in *American Pipe & Construction Co. v. Utah* that the timely commencement of a bona fide class action, under Rule 23 of the Federal Rules of Civil Procedure, tolls the applicable federal statute of limitations as to every member of the represented class is endorsed as a wise and prudent resolution of a long unanswered and "important question affecting the administration of justice in the federal courts."¹²⁷ This ruling is consonant with the "effectuation of the purposes of litigative efficiency and economy"¹²⁸ which underlie Rule 23, the intrinsic representative nature of class actions, and the principles of basic fairness which should pervade every judicial proceeding. However, it is submitted that the Court's application of the aforementioned rule to cases where class action status is denied after the expiration of the applicable limitation period is encumbered with inherent injustice. The tolling of a federal statute of limitations for each and every asserted member of the class, under these circumstances, carries the attendant potential for purported class members to derive an unjust benefit to the severe and unwarranted detriment of the defendant. It is urged that the Supreme Court avail itself of the next opportunity to reconsider its ruling on this issue in *American Pipe*, for when a suit is stripped of its character as a class action the dominant concern should be always with the basic principles of fairness, thus ensuring that the individual rights of *all* the parties to the original suit are not diminished.

KENNETH S. PRINCE

Labor Law—Interaction of Title VII and the National Labor Relations Act—Union Exclusivity and Individual Rights—*Western Addition Community Organization v. NLRB*.¹—The Emporium (the Company), a large San Francisco department store, was both integrated and unionized. A collective bargaining agreement was in effect which vested exclusive bargaining power in the hands of the union. This agreement included an anti-discrimination clause, provided for referral of grievances to the adjustment board, and allowed either party to insist on binding arbitration if the adjustment board failed to reach a settlement within one week.²

¹²⁶ The authority for such a notice requirement may be found in Fed. R. Civ. P. 23(d)(5), and also, at least arguably, in Rule 23(d)(2), quoted in note 16 *supra*.

¹²⁷ 414 U.S. at 545.

¹²⁸ *Id.* at 556.

¹ 485 F.2d 917, 83 L.R.R.M. 2738 (D.C. Cir. 1973), cert. granted, 42 U.S.L.W. 3468 (U.S. Feb. 19, 1974) (No. 73-830).

² 485 F.2d at 919-20, 83 L.R.R.M. at 2739.