UNDER THE PORTCULLIS AND INSIDE THE GOLDEN CASTLE: *AMERICAN PIPE & CONSTRUCTION CO. v. UTAH*

> [An] obvious advantage which accrues to every member of the class at commencement, whether he knows he's a member of the class or not, is tolling the statute of limitations . . . . Defense counsel will soon learn that this . . . aid extends to the jackals who hang back until the tiger has downed the stag ready for the kill. The miracle of an action under the new rule 23 [sic] is that it tolls the statute of limitations for the dull, the lazy, the timid, the sly, and if he is there among them, the unfortunate who has really been injured.[1]

A statute of limitations usually operates as a bar to the legal remedy on a plaintiff's cause of action[2] occasioned by a lapse of time since his cause of action arose.[3] The timely commencement of an action to enforce a right before the appropriate statute of limitations has run ordinarily suspends the running of the statute with regard to that particular action.[4] The establishment of statutes of limitations is considered a legislative prerogative.[5]

Among the actions that a plaintiff may initiate, and which will result in the tolling of the statute of limitations, insofar as the named plaintiff is affected, is the representative suit or class action.[6] A class action is a suit typically prosecuted by a member of

1. Donelan, *The Advantages and Disadvantages of a Class Suit Under New Rule 23, as Seen by the Treble Damage Plaintiff*, 32 A.B.A. ANTITRUST L.J. 264, 266 (1968).

2. Campbell v. Haverhill, 155 U.S. 610, 618 (1895); Michigan Ins. Bank v. Eldred, 130 U.S. 693, 696 (1889).

3. Christmas v. Russell, 72 U.S. (5 Wall.) 290, 300 (1866).

4. Linn & Lane Timber Co. v. United States, 236 U.S. 574, 578 (1915); Columbia Heights Realty Co. v. Randolph, 217 U.S. 547, 554 (1910).

5. Saranac Land and Timber Co. v. Comptroller, 177 U.S. 318, 324 (1900); Rand v. Bossen, 27 Cal. 2d 61, 65, 162 P.2d 457, 459 (1945).

6. Courts of Equity have long recognized that a representative or small group of representatives should have the right to sue on behalf of themselves and for others similarly situated and thereby represent an entire class or body of persons interested in the litigation where their number was so great that joinder was impossible or impracticable. Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); Hartford Life Ins. Co. v. Ibs, 237 U.S. 622 (1915).

a group on behalf of all other members of the group for the purpose of adjudicating in a single action disputes between the group and an adverse party where joinder of all the members of the group is either impracticable or impossible.[7] It can be inferred that the commencement of the class action will toll the statute of limitations for the named representative of the class. This comment will discuss to what extent the commencement of a class suit tolls the statute of limitations for the benefit of unnamed or absent members of the class who would have been barred by the statute of limitations from instituting their own individual suits. *American Pipe & Construction Co. v. Utah*[8] is a recent United States Supreme Court decision that recites and establishes a confluent rationale for tolling the statute of limitations, under purportedly limited and narrow circumstances, for the benefit of all asserted members of the class upon the commencement of the class suit.

THE LEGAL BACKDROP

A. Original Rule 23

The class action as set forth in the original Rule 23(a)[9] of the Federal Rules of Civil Procedure was regarded by the federal courts as defining three different species of class actions,[10] predicating the distinction upon "the jural relationship among the class members with regard to the right sued upon."[11] The "true" class action involved a class in which the right sought to be en-

7. FED. R. CIV. P. 23(a); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1759 at 572-73 (1972).

8. 414 U.S. 538 (1974).

9. FED. R. CIV. P. 23(a), prior to the 1966 amendment, provided in pertinent part:

> (a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
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> (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;
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> (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or
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> (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

10. Snyder v. Harris, 394 U.S. 332, 335 (1969), *reh. denied*, 394 U.S. 1025 (1969).

11. 3B J. MOORE'S FEDERAL PRACTICE ¶ 23.30 at 23.501 (2d ed. 1974).

forced by or against the class was joint, common, secondary, or derivative.[12] The "hybrid" class action "involved situations in which the rights sought to be enforced by or against the class were several, and the object of the action was the adjudication of claims affecting specific property."[13] The "spurious" class action under Rule 23(a)(3) involved the enforcement of rights whose character was several, and there existed "a common question of law or fact affecting the several rights and a common relief was sought."[14] The spurious class suit was viewed as a permissive joinder device in which the rights and liabilities of each individual plaintiff were distinct.[15] It was merely an invitation to all persons similarly situated to join the action and litigate the several claims, and had a binding effect only on those plaintiffs who became parties to the action.[16] An absent member of a spurious class became an actual member to the action by intervening under Federal Rule 24.[17] This in turn raised problems when an absentee member attempted to intervene at a time when an individual action initiated by him would have been barred by an applicable statute of limitations. In spurious class actions, court holdings conflicted as to the circumstances under which intervention was to be permitted and as to the appropriate time for intervention.[18]

The question of whether the statute of limitations was tolled upon the commencement of a spurious class action remained uncertain and never was resolved by the United States Supreme

12. *Id.*
13. *Id.* at 23.502.
14. *Id.*
15. Snyder v. Harris, 394 U.S. 332, 335 (1969); *Developments in the Law —Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 930 (1958).
16. Advisory Committee's Note, 39 F.R.D. 98, 99 (1966).
17. 3B J. MOORE'S FEDERAL PRACTICE ¶ 23.10[1] at 23-2606 (2d ed. 1974).
18. *See* Union Carbide v. Nisley, 300 F.2d 561, 588-89 (10th Cir. 1961) for a list of the various positions and supporting authorities on this subject. Note that the commencement of a suit tolled the statute of limitations in both the true and hybrid class actions as to all members of the class. Richmond v. Irons, 121 U.S. 27 (1887); Deckert v. Independence Shares Corp., 39 F. Supp. 592 (E.D. Pa. 1941), *remanded*, 123 F.2d 979 (3d Cir. 1941). The rationale for this concept appeared to be based on the fact that a judgment in a true class action bound all members of the class and the judgment in a hybrid class action bound all members of the class as to their rights in the specific property involved in the action. 3B J. MOORE'S FEDERAL PRACTICE ¶ 23.11[2] at 23-2821, *et. seq.* (2d. ed. 1974).

Court.[19] On the question of whether absent members of a spurious class could be permitted to join or intervene as parties after the running of a limitation period that barred their own claims, a majority of the courts concluded that such intervention was proper.[20]

> If we are to give full recognition to the representative character of the action we must hold that the statute of limitations is tolled for those in whose behalf the representative action is brought as well as for those who actually bring the action.[21]

Other courts concluded that each member attempting to intervene and participate in the action would be compelled to satisfy the timeliness requirement.[22] A spurious class "involves separate causes of action, and is a matter of efficiency to avoid multiplicity of action. Consequently, each plaintiff must be able to avoid the bar of the statute of limitations without reference to the other causes of action."[23]

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19. American Pipe & Construction Co. v. Utah, 414 U.S. at 550.

20. York v. Guaranty Trust Co., 143 F.2d 503, 528-29 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

> As to suits under (3), . . . the Rule unequivocally tells all persons having claims of the type therein described that one or more of them may begin such a class action 'on behalf of all' when the 'class' is 'so numerous as to make it impracticable to bring them all before the court.' Any non-accepting noteholders, relying on that assurance, were justified in believing that plaintiff's suit was begun on their behalf although they were not before the court. To hold that such noteholders cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule into a trap. Since, in a class under clause (3), a judgment will not intervene, we suggest that if, after trial, the court finds against the defendant, appropriate steps be taken to notify all such noteholders to intervene . . . judgment to be entered in favor only of those who do so within a reasonable time.

Id., at 529. *See also*, Escott v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); DePinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963); Union Carbide Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961); Mutation Mink Breeders Ass'n v. Lou Nierenberg Corp., 23 F.R.D. 155, 162 (S.D.N.Y. 1959).

21. Escott v. Barchris Construction Corp., 340 F.2d 731, 733 (2d Cir. 1965).

22. Pennsylvania Co. for Insurances v. Deckert, 123 F.2d 979 (3d Cir. 1941); Athas v. Day, 161 F. Supp. 916 (D. Colo. 1958).

> While tolling of the statute is of great benefit to members of the class, it should not be rationalized on the basis of the reliance of silent members on those who are bringing the action. 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 advantage of an unexpected windfall.

Comment, *Spurious Class Actions Based on Securities Frauds under the Revised Federal Rules of Civil Procedure*, 35 FORD. L. REV. 295, 308 (1966). *See also*, Slack v. Stiner, 358 F.2d 65, 69-70 (5th Cir. 1966).

23. Athas v. Day, 161 F. Supp. 916, 919 (D. Colo. 1958).

B. New Rule 23[24]

The 1966 revision of Rule 23 apparently eliminated[25] the former right-oriented categories.[26] The Rule now specifically provides that a judgment rendered in a class action is binding on all those the court may determine to be members of the class and who do not request exclusion.[27] Class actions are now permitted only under circumstances which are deemed to make such an action appropriate.[28] Class actions maintainable under subdivision (b) (3) require that common questions of law and fact predominate over questions affecting merely individuals and that the class action is superior to any other method of adjudicating the controversy.[29] The nature of a (b) (3) class, despite the apparent elimination of the "spurious" tag, is the same as the old suprious class action in that the rights of the class are several and there are predominate questions

24. 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 desirability 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.

25. FED. R. CIV. P. 23(c) (3).

26. 3B J. MOORE'S FEDERAL PRACTICE ¶ 23.08 - 23.10[7], 23-2505 - 23-2751 (2d ed. 1974).

27. Advisory Committee's Note, 39 F.R.D. 98, 105 (1966). The committee noted that the terms used as the basis of the classification had proved "obscure and uncertain." *Id.* at 98.

28. *Id.* at 99.

29. FED. R. CIV. P. 23(b) (3).

of law and fact which are common to the members of the class.[30]

The relatively slight relationship between class members in the (b)(3) class creates the possibility that a class member could be affected by the judgment of the suit without his knowledge or acquiescence.[31] The 1966 amendments assure that members will be identified before trial on the merits: [T]he action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated."[32] A determination of whether the action will be maintained as a class action is made "[a]s soon as practicable after the commencement of an action brought as a class action. . . ."[33] The Rule further requires that the "best notice practicable under the circumstances"[34] be afforded all members of the 23(b)(3) class, informing them that a suit has been initiated in their behalf and that they will be bound by the judgment of the court unless they request exclusion from the class.

Under present Rule 23, with the elimination of one-way intervention by extending the res judicata effect of a judgment to absentees, there should remain no conceptual or practical obstacles in the path of holding that statutes of limitations are tolled by the commencement of a class suit for all members of the class as subsequently determined.[35] If the statute was not tolled, the class members

30. Ford, *The History and Development of Old Rule 23 and the Development of Amended Rule 23*, 32 A.B.A. ANTITRUST L.J. 254, 261 (1966).

31. *Involuntary Dismissals of Class Actions*, 40 U. CHI. L. R. 783, 786 (1973). This problem had its roots in old rule 23 where there existed the potential for one-way intervention, a phenomenon whereby a member could join in the class after a favorable judgment and thereby reap the full benefits thereof, or, where there was an unfavorable judgment, remain outside of the class and not be bound. Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961); 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE, § 568 (rev. ed. Wright 1961); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 935 (1958).

32. Advisory Committee's Note, 39 F.R.D. 98, 106 (1966).

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

34. FED. R. CIV. P. 23(c)(2) and 23(c)(3).

35. Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968); Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968). Although the commencement of a class action does not give the defendant notice of the precise number of plaintiffs in the class, he is still adequately apprised of the need to prepare his case. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 575-76 (D. Minn. 1968). "There should be no problem with regard to the statute of limitations under the amended rule. Since the judgment is now binding in all class actions, commencement of the action should toll the statute of limitations for all members of the class." Wright, *Class Actions*, 47 F.R.D. 169, 184-85 (1969).

might be forced to intervene or file precautionary suits, a procedure that would be wasteful, expensive and time-consuming for both litigant and court, thereby frustrating a principal function of a class suit.[36]

> [T]he class action determination, whenever made, relates back to the date of filing [citation omitted]. Where the class action determination is affirmative, the court is merely declaring that the action may be 'maintained' as a class action, and it seems reasonably clear that this determination relates back to the date of filing the complaint.[37]

Thus, when the court determines that an action is maintainable as a class suit, such determination relates back to the commencement of the suit for all individuals who may subsequently be determined as members of the class.

The difficult problems arise where, after the commencement of a class suit, the court determines that the suit should not proceed in class form. On this subject the Advisory Committee Notes do not provide adequate guidance:

> [T]he question of whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.[38]

If the statute in such a situation is not tolled, then class litigants could assure their participation in the judgment by filing precautionary individual actions or motions to intervene as parties resulting in "precisely the multiplicity of activity which Rule 23 was designed to avoid. . . ."[39]

The only case prior to *American Pipe and Construction Co. v. Utah* that addressed itself to this problem was *Philadelphia Electric Co. v. Anaconda American Brass Co.*[40] Where the determina-

36. Advisory Committee's Note, 39 F.R.D. 98, 102-3 (1966).
37. Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460 (E.D. Pa. 1968).
38. Advisory Committee's Note, 39 F.R.D. 98, 104 (1966).
39. American Pipe & Construction Co. v. Utah, 414 U.S. at 551. "This result [tolling of the statute] should be reached even if the court, for reasons of judicial housekeeping, ultimately holds that it will not allow the suit to proceed as a class action, since otherwise members of the class would have to file . . . protective suit[s] pending that determination." Wright, *supra* note 35, at 184-85.
40. 43 F.R.D. 452, 461 (E.D. Pa. 1968).

tion of the maintainability of the action as a class is negative, ". . . it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members."[41]

> If the reason for the negative determination is failure to meet the pre-requisites of 23(a) or even if the reason is that the common questions do not predominate over individual questions under 23(b)(3) it would seem reasonable to conclude that such negative determination also relates back to the filing of the complaint. If there never really was a class to be represented, members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired. But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, it may well be that the decision should not relate back to the commencement of the action, and that, at the very least, an opportunity should be presented for proof of reliance upon pendency of the purported class action sufficient to toll the statute of limitations.[42]

Thus, according to Judge Fullam of the Eastern District of Pennsylvania, if a purported class action is dismissed because of failure to satisfy the essential requirements of a class suit, then the purported members should not receive any tolling benefits. Conversely, if the action meets all of the fundamental requirements of a class suit and yet is dismissed due to reasons of judicial housekeeping then the class members should receive the benefit of the tolling of the statute of limitations. Judge Fullam, however, did not suggest what the effect should be if all the prerequisites of a class suit but one exist and whether the absent members of this purported class should receive the benefit of the date of commencement of the class suit in calculating tolled time under a statute of limitations.

From under this backdrop emerges *American Pipe.*

American Pipe & Construction Co. v. Utah

A. *The Early Cases*

The genesis of *American Pipe* occurred in early 1964 when a federal grand jury indicted a group of individuals and companies for conspiracy in the restraint of trade in violation of the antitrust laws.[43] The defendants pleaded *nolo contendere* and judgments of guilty were entered. At about the same time the United States initiated civil suits in order to restrain future violations.[44] These

41. *Id.*
42. *Id.*
43. American Pipe & Construction Co. v. Utah, 414 U.S. at 540.
44. It should be noted that the injunctive relief was initially sought in the United States District Court for the Central District of California. It

suits culminated in the entering of a "final judgment" on May 24, 1968, whereby the defendant parties consented to a decree enjoining them from engaging in specified future violations of the antitrust laws.[45]

On May 13, 1969, eleven days short of a year after the entering of the final judgment, the State of Utah commenced a class action suit against the parties named in the West Coast Pipe cases alleging a Sherman Act conspiracy to rig prices in the sale of concrete and steel pipe. Utah purported to represent all public bodies and agencies of state and local government in Utah and states in the western area who were ultimate consumers of pipe acquired from defendants. The applicable federal statute of limitations governing antitrust suits was satisfied and the action was therefore found to be timely.[46] The Judicial Panel on Multidistrict Litigation transferred the case to the Central District of California for assignment to Judge Martin Pence who had been actively involved as judge in more than 100 actions arising out of the same factual situation.[47]

On December 4, 1969, the court entered an order that the action should not be maintained as a class action.[48] Even though the

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was in this court that the various litigants encountered Judge Martin Pence.

45. American Pipe & Construction Co. v. Utah, 414 U.S. at 540-41 & n.1.

46. "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 . . . ." Clayton Act § 5(b), 15 U.S.C. § 16(b) (1970). The Clayton Act further provides that "[a]ny action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (1970). The Clayton statute of limitations was enacted in order to remedy the confusion and disparity that resulted from the absence of a federal statute of limitations and the consequent reliance by the federal courts on the varying limitations provisions applicable under state law. S. REP. No. 619, 84th Cong., 1st Sess. 5 (1955); H. REP. No. 422, 84th Cong., 1st Sess. 7 (1955). *See also* Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COL. L. REV. 1, 32-42 (1972).

47. In re West of the Rockies Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 508-9 (J.P.M.L. 1969).

48. Utah v. American Pipe and Construction Company, 49 F.R.D. 17, 20 (C.D. Cal. 1969). "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 condi-

prerequisites of a class action contained in Rule 23(a)(2) through (a)(4)[49] had apparently been satisfied,[50] Judge Pence found that the members of the class described in the complaint were not, as required under Rule 23(a)(1), so numerous that joinder of all such entities was impracticable.[51] Judge Pence relied on his earlier experience in the West Coast Pipe cases and apparently implied that a class action under these circumstances could be inferior to other available methods for the adjudication of the controversy.[52]

Eight days later, on December 12, 1969, sixty towns, cities, and water districts in Utah, all of whom had been claimed as members in the class of the original action, filed motions to intervene, as of right under Rule 24(a)(2)[53] or, in the alternative, by permission under Rule 24(b)(2).[54] It appears that the reason for the petitions to intervene was to circumvent the bar of the statute of limitations by the relation back of their complaints to May 13, 1969, the date of the commencement of the class action.

> [T]he tolling of the statute of limitations on the government's 'Western Pipe' conspiracy cases ceased on May 24, 1969. Since only the State of Utah, of all the parties now before this court, filed its suit prior to that date, unless by one means or another the present parties can somehow get under the now dropped portcullis and inside the golden castle of the Clayton Act, any Sherman [§]1 claim for any injuries prior to the four years preceding the filing of these motions are barred.[55]

Judge Pence thus denied the would-be intervenors' motion by concluding that the limitations period imposed by the Clayton Act[56] had run as to all intervenors and had not been tolled by the commencement of the class action in their behalf.[57]

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tional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1).

49. *Supra* note 24.

50. 49 F.R.D. 17, 20 (C.D. Cal. 1969).

51. *Id.* at 24. *See also* note 24, *supra.*

52. 49 F.R.D. 17, 21 (C.D. Cal. 1969).

53. FED. R. CIV. P. 24 provides in pertinent part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or 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, unless the applicant's interest is adequately represented by existing parties.
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> (b) Permissive Intervention. Upon timely application anyone 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. . . .

54. *Id.*

55. Utah v. American Pipe and Construction Co., 50 F.R.D. 99, 101 (C.D. Cal. 1970).

56. *Supra* note 24.

57. 50 F.R.D. at 108.

The Court of Appeals for the Ninth Circuit affirmed the denial of leave to intervene as of right under Rule 24(a) ". . . since, as a practical matter, they would not be affected by any potential recovery by Utah."[58] However, the appellate court reversed the District Court's denial of plaintiff's motions for permissive intervention. The Court held that commencement of a class action suit tolled the statute of limitations for all members of the class until they were ejected by force of the order denying class action.[59]

> If the order, through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed, and the rights they presently possessed. It cannot leave them temporarily stranded in the present.[60]

B. The Supreme Court Decision[61]

The Supreme Court upheld the appellate court in a unanimous decision. Justice Stewart writing for the Court mentioned in passing that the issue involved in the case was a "limited" one.[62] The Court held that unnamed members of the class stood as parties to the class suit until they received notice of the pendency of the action and chose not to continue as members.[63]

> [T]he commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs.[64]

The Court found that the absent class members who had not relied on or were even aware of the commencement of a class action suit stood as parties to the suit for statute of limitations purposes. Justice Stewart claimed that all potential class members are passive beneficiaries of a suit brought in their behalf until the court determines that the suit is maintainable as a class action.[65] "Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit . . . ."[66]

58. Utah v. American Pipe & Construction Co., 473 F.2d 580, 582 (9th Cir. 1973).
59. *Id.* at 584.
60. *Id.*
61. American Pipe & Construction Co. v. Utah, 414 U.S. 538.
62. *Id.* at 540.
63. *Id.* at 550-51.
64. *Id.* at 551.
65. *Id.* at 552.
66. *Id.*

A central argument of Judge Pence in denying intervention on the grounds that the statute of limitations had run as to the absent parties was that the right to interpose the statute of limitations to the attempted tolling of § 5(b) of the Clayton Act by Rule 23 is a substantive right and a "necessary segment of the total sphere of antitrust legislation."[67] An attempt to toll § 5(b) by the means of Rule 23 is an abridgement of a substantive right and in violation of 28 U.S.C. § 2072, a statute which enables the Supreme Court to formulate the Federal Rules of Civil Procedure. "Such rules shall not abridge, enlarge or modify any substantive right. . . ."[68]

> This court can but conclude that within the statutorily created antitrust universe §5(b) cannot be retolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of §5(b) has ended.[69]

The Supreme Court argued that the mere fact that Congress has specified a limitation period is not conclusive of the "substantive" nature of the statute and does not make the statute immune from an extension of the tolling period by "procedural" rules.[70] "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."[71]

This above statement of Justice Stewart alludes to another problem area—the conflicting rationale between statutes of limitations and class actions. In *Escott v. Barchris Construction Co.*,[72] a decision rendered prior to the promulgation of amended Rule 23, the Second Circuit Court of Appeals held that the commencement of a spurious class action tolls the statute of limitations for the benefit of the unnamed members of the class.[73] The holding was supported primarily by a policy consideration of subordinating the underlying rationale of the statute of limitations to that of the class action.[74] The class action is a "device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group,"[75] and its use should be

67. 50 F.R.D. at 108.
68. 28 U.S.C. § 2072.
69. 50 F.R.D. at 108.
70. 414 U.S. at 559.
71. *Id.* at 557-58 & n.29.
72. 340 F.2d 731 (2d Cir. 1965).
73. *Id.* at 734.
74. *Id.* at 733.
75. *Id.*

encouraged.[76] The Court in *American Pipe* has apparently ratified this position.[77]

The Supreme Court, by virtue of the holding in this case, has tolled the prerequisites of 23(a) rather than the statute of limitations. The Court has determined that numerousness is not required for statute of limitations purposes. Perhaps the Court has suggested that 23(a)(1) is not a required prerequisite—rather a dispensable or optional prerequisite not unlike the classification of classes contained in 23(b). If so, this ruling of the Court does not square with Rule 23.

DROPPING THE PORTCULLIS

As already mentioned, Judge Fullam in the *American Anaconda* case distinguished between "fundamental requirements" and "judicial housekeeping" reasons for disallowing the maintenance of a class action.[78] The court implied that the fundamental requirements of a class action were contained in 23(a) and, for the purposes of a (b)(3) suit, may also include the requirement that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class.[79]

The new rule, as already noted, attempted to eliminate the jural classifications of the old rule and establish effect-oriented standards for maintenance of a class action.[80] These standards are contained in 23(a) and 23(b). The standards or prerequisites of a class action found in 23(a) are to be considered characteristic of all class actions initiated under the new rule. However, mere satisfaction of 23(a), even though "necessary,"[81] is not sufficient for the maintenance of the suit as a class. "Subdivision (b) describes the additional elements which in varying situations justify the use of a class action."[82] Rule 23(b) describes a new tripartite classification of class actions.

76. *Id.*
77. 414 U.S. at 552-56.
78. 43 F.R.D. 452, 461 (E.D. Pa. 1968).
79. *Id.*
80. FED. R. CIV. P. 23(c)(3).
81. Advisory Committee's Note, 39 F.R.D. 98, 100 (1966).
82. *Id.*

> [As] everyone knows, the revision has taken the poetry out of Rule 23; we are said no longer to have the romantic and slightly risque categories we used to have—the "true", "hybrid", and (most incongruous of all legal rubrics) the "spurious" class action. In reshuffled and sharply redefined forms, the first two of the new subdivisions, (b)(1) and (b)(2), embrace the old "true" and "hybrid" and a still open-ended range of other forms. New subdivision (b)(3) bears many resemblances to the old "spurious" category, but it effects vital changes, and to avoid giving offense to the Advisory Committee, the Supreme Court, or anyone else, I will try usually to refer antiseptically to "(b)(3)" actions rather than to the illicit, outlawed, and patently counterfeit "spurious" ones.[83]

Despite the attempt to wash our hands of "true", "hybrid", and "spurious", in order to strike those adjectives from our federal civil procedure vocabulary, their spirit has been reincarnated as the new classifications of 23(b). The basis of these new categories are in terms of the effects that class or nonclass treatment would have on the legal rights of all the parties. In order that a class action may be maintained, the prerequisites of 23(a) must be satisfied and one set of requirements designated as a subdivision under 23(b) must also be met. A court, through its infinite wisdom and the power conferred by Rule 23(c)(1), shall deem whether the suit may be maintained as a class action as soon as practicable after the commencement of the suit.[84] In authoring an order that denies the maintainability of a class action, a court may rely on the failure of the action to meet the requirements of 23(a), or, in the alternative, the requirements of 23(b). If the negative determination is based on failure to satisfy 23(a), the question of whether the action can be categorized in a 23(b) subdivision becomes irrelevant. If 23(a) is satisfied, then the action must be able to comply with the requirements of one of the categories delineated in 23(b) and then the class action may be maintained.

Under 23(b)(3) questions of law or fact common to those of the class must predominate over those of individual members and the class action must be the superior method of adjudicating these questions. The subdivisions includes four factors to be included when considering whether the requirements of 23(b)(3) have been met.[85]

It is the author's contention that the prerequisites of 23(a) are in the form of a definition. The emphasis of this paragraph is placed on the nature of the action and hinges on the common or jural relationship between the parties. The categories of 23(b), in

83. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1968).
84. FED. R. CIV. P. 23(c)(1).
85. FED. R. CIV. P. 23(b)(3)(A) through (b)(3)(D).

contrast, have assumed the contour of judicial guidelines for determining when a class suit should be maintained as such under the circumstances of each individual case. Rule 23(b) is concerned solely with insuring the full adjudication of the rights and liabilities of all the parties to the action. Though criticism will probably stem from the use of Judge Fullam's terms, the contents of 23(a) should be designated "fundamental requirements" of a class action, and the various elements of the categories delineated in 23(b) should be labeled as "judicial housekeeping".

The authority of the trial judge in controlling the nature and course of a class action has been greatly increased by Rule 23.[86] This factor prompted Justice Black to recommend rejection of the amended Rule.

> I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.[87]

Without discussing the merits of this increased power in the hands of trial judges, it must be noted that such power plays a leading role in the judicial determination of the maintainability of an action as a class suit. A negative determination of the 23(b)(3) action may be based on one of many grounds. Frequently, fundamental requirement or judicial housekeeping reasons for disallowing the maintenance of the class suit are interchangeable and the rationale utilized is dependent solely upon the discretion of the trial judge.

In *American Pipe*, the district court judge held as unreasonable the State of Utah's contention that over 800 state entities could be involved in the class litigation and therefore the suit failed to satisfy the numerousness requirement of 23(a)(1).[88] The court, how-

86. FED. R. CIV. P. 23(b)(3), 23(c), and 23(d).
87. *Mr. Justice Black's Statement* [on the Transmittal of the Amendments to the Federal Rules of Civil and Criminal Procedure], 39 F.R.D. 272, 274 (1966).
88. 49 F.R.D. 17, 20 (C.D. Cal. 1969).

ever, further stated that joinder would be a more appropriate procedure.[89] It is arguable, therefore, that the trial judge could have held that the class action was not superior to other available methods for the fair and efficient adjudication of the controversy under 23(b)(3), a judicial housekeeping reason.

In the light of the Supreme Court's rationale for its decision in *American Pipe,* it does not appear probable that this case will be relegated to the status of a case decided on narrow and limited grounds. Quite the contrary. Probably, a tolling of statutes of limitations will accrue to the benefit of absent members where the class as an action is defeated on other grounds, such as failure to comply with 23(a)(4) which calls for adequate representation. Perhaps only where the class suit is completely frivolous will the absent members of the purported class be barred by the statute of limitations.

Conclusion

Under the above extension of the holding in *American Pipe,* the fundamental requirements can apparently be broken down into two categories: The physical composition prerequisites of 23(a)(1) and 23(a)(4), and the substantive prerequisites of 23(a)(2) and 23(a)(3). The physical composition prerequisites are subordinated to the substantive when the court considers the tolling effects on a statute of limitations. The skeletal remnants of Rule 23 rest solely in prerequisites 23(a)(2) and 23(a)(3), whose presence is essential if a statute of limitations shall be tolled. These elements of a class action, viewed alone, are generally not unlike the requirements of Permissive Joinder of Parties[90] and Permissive Intervention.[91] The theme that underlines all three procedural concepts is the notion of common questions of law and fact.

Under Rules 20 and 24(b), however, the individual who is joined or who intervenes must independently satisfy the statute of limitations requirement. Under Rule 23 a non-party member receives the tolling benefit for as long as the suit is maintained as a class action or until he opts out under the provisions of 23(c)(2)(A). Thus the commencement of a class action suit becomes an attractive alternative to joinder without satisfying the numerousness requirement.

The class action was originally devised as a procedure by the Equity Courts whereby persons so numerous as to make joinder

89. *Id.*
90. Fed. R. Civ. P. 20.
91. Fed. R. Civ. P. 24.

impracticable may be bound by a judgment in a "representative" suit.[92] Evidently an individual had to be a member of a definitely ascertainable class, his interest had to be identical with the interest of members of the class, and all of those interests had to be adequately represented. It is difficult to argue, while standing in the glow of Rule 23(a), that this is not the essence of a class action under the present federal rules.

The above considerations are of critical importance to the issue of whether the statute of limitations is tolled by the commencement of a class action. As Judge Fullam has illustrated above, if all of the fundamental requirements are satisfied and the court determines that the suit should not be maintained as a class action because of judicial housekeeping reasons, it would only be fair to conclude that the statute of limitations was tolled between commencement of the suit and the negative determination. If the prerequisites were not satisfied, then "there never really was a class to be represented, [and] members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired."[93] A reliance element could temper the harshness of this result. Thus, where a class action is dismissed for want of one of the fundamental requirements, a member of the class would be allowed to intervene as a party plaintiff where he could demonstrate reliance on the class action for the full adjudication of his interest.

Rule 23 specifically delineates the fundamental requirements of a class action and included therein are the requirements of numerousness and adequate representation. If the statute of limita- is to be tolled for the benefit of unnamed members of a class, the suit must satisfy the fundamental requirements contained in 23(a).

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92. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853).
93. 43 F.R.D. at 461.